

**C L I F F O R D**  
**C H A N C E**



**SEXUAL AND GENDER-BASED  
VIOLENCE IN THE PACIFIC ISLANDS:  
HANDBOOK ON JUDICIAL SENTENCING PRACTICES**

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In this Handbook, we express our views and recommendations as to certain matters referred to herein. For the purposes hereof any reference to our believing, or words of similar import, means that our reasoned assessment of possible outcomes is based on our professional experience and the relevant legal sources (if any are available). It is not to be read as an assurance that these outcomes are certain, or that recommendations would be effective in all cases. We hereby accept no liability or responsibility for any loss suffered or incurred by any person as a result of any claim or litigation.

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## SECTION 1: INTRODUCTION AND OVERVIEW

### 1.1 Introduction

- 1.1.1 Sexual and gender-based violence (“**SGBV**”)<sup>1</sup> is a fundamental and widespread violation of human rights affecting approximately one in three women over their lifetime. It occurs in every country, irrespective of socio-economic status, cultural background or religion. Pacific Islands Countries (“**PICs**”) experience some of the highest rates of SGBV in the world, the physical, emotional and psychological consequences of which, for women living in the region, are far-reaching.<sup>2</sup>
- 1.1.2 The high rates of SGBV experienced in the PICs, and elsewhere, can in part be attributed to long-standing gender stereotypes, discrimination, inequality and gender bias. These same factors have also been found to influence the attitudes of the judiciary, leading in turn to discriminatory sentencing. These factors can therefore impede access to justice for victims/survivors of SGBV, rendering them victims twice over. It is important that gender inequality and power imbalances which form the root cause of SGBV are challenged, both within the community and in the court room. All institutions are accountable, and it is essential that the entire community is engaged in order to put an end to SGBV, such that individuals and groups are empowered with the knowledge, resources and skills required to effect changes that will eliminate gender biases ingrained in society.<sup>3</sup>
- 1.1.3 To this end, this Handbook seeks to provide an introductory analysis of the various societal and community-level factors that contribute to SGBV and how these can potentially impact judicial sentencing practices within PICs. It provides an introduction to the gender bias, stereotypes and discrimination that exist within the judiciary and wider society and which affect decision making, particularly in SGBV cases. The Handbook aims to provide readers with the tools needed to be able to identify gender bias within PIC case law decisions, and to examine sentencing patterns with a view to uncovering SGBV trends.
- 1.1.4 The Handbook is primarily aimed at assisting lawyers in analysing case law from PICs. This analysis, which will draw on the methodology outlined in section 5, will cover relevant cases compiled into a legal database by ICAAD. The Handbook will help lawyers to understand the value judgements, customs and traditions that affect sentencing in SGBV cases, and may also assist in further case law analysis undertaken in the future or for judges reviewing domestic violence and sexual offences cases. It provides general background into SGBV and gender bias, and acts as a tool to help lawyers practising in PICs to identify judicial bias in decisions being made before them, as well as being an educational aid for policy makers, legislators and those in charge of judicial training. The Handbook draws upon the preliminary data and observations from a pilot case law analysis conducted between 2014 and 2015, of which the final report was published in December 2015.<sup>4</sup> Section 5.6 sets out four sample case studies.

1 The international community uses both the terms “sexual and gender-based violence” and “gender-based violence” (GBV). SGBV was used in the earliest humanitarian programmes which primarily addressed violence against conflict-affected women and girls and focussed on exposure to sexual violence. The United Nations High Commissioner for Refugees consciously continues to use the term SGBV to emphasise the urgency of protection interventions that address the criminal character and disruptive consequences of sexual violence. More recently, humanitarian groups have been advocating the use of the term GBV to clarify that sexual violence is a component of GBV rather than a separate issue. In some instances, organisations will use the term GBV to refer to violence against men and boys and/or violence against LGBTQI populations. For the purposes of this Handbook, we use the term SGBV unless quoting from a source which uses GBV; however, we express no preference for either term.

2 UN Women, *Ending Violence Against Women and Girls: Evidence, Data and Knowledge in Pacific Island Countries* (July 2011), <http://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2011/ending%20violence%20against%20women%20and%20girls.pdf?la=en> accessed on 6 January 2018.

3 *Ibid.*

4 ICAAD and DLA Piper, *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region* (February 2016), <https://icaad.ngo/wp-content/uploads/2015/12/ICAAD-Analysis-of-Judicial-Sentencing-Practices3.pdf> accessed on 27 June 2017.

## 1.2 Executive Summary

1.2.1 Gender-based violence, as defined by the Inter-Agency Standing Committee, is an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed (gender) differences between males and females. SGBV, a type of GBV, poses a threat to both women and men on a global level. Although experienced by all genders, for the purposes of this Handbook, SGBV will be restricted to violence against persons who identify as women or female specifically, of any age, as further discussed in 2.3.1. The Declaration on the Elimination of Violence against Women promulgated by the UN General Assembly (1993) (the "**DEVAW**") and UN Women define "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."<sup>5</sup>

SGBV comes in many forms; it is not confined to physical violence but incorporates a wide range of harmful behaviours, including domestic violence, sexual violence, psychological abuse and denial of resources or access to services. SGBV in whatever form it manifests is rarely triggered by any single cause, but rather is the result of the interaction of many factors at different levels. Such factors, which include traditional practices and economic inequalities, are grounded in the broader context of gender inequality, gender stereotypes and discrimination.<sup>6</sup>

Whilst the methodology employed in this Handbook is focused on violence against women, this methodology can be used as a base for a broader analysis of GBV where the victims are of any gender. Note, however, that this would require further research and that there are certain types of gender bias, myths and discrimination that people may experience that are not addressed in this Handbook.

1.2.2 Gender bias and gender stereotyping are significant factors which play into judicial sentencing, particularly in PICs. Historically, men have been regarded as the patriarch or dominant figure in the family, with women perceived to take the subordinate role. Such attitudes and beliefs have been entrenched in social and cultural norms and can create an environment that tolerates or even perpetuates SGBV. Myths that stem from stereotypes surrounding SGBV that are entrenched in society can be used to reduce the severity of a perpetrator's sentence – for example, if a female victim/survivor has had previous sexual partners, stereotypes can lead to the assumption that she is of "loose morals" and therefore is less affected or injured by the sexual assault, resulting in a reduced sentence for the perpetrator (see paragraph 3.5 below). Customary practices, including those common in or particular to PICs, can also play a role in determining the nature and length of sentencing in SGBV cases, as outlined in paragraph 3.6 below.

5 UN Women, *Gender Equality Glossary* <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=V&sortkey=&sortorder=> accessed 23 April 2018.

6 UN Women, *What are the root causes of SGBV?* <http://www.endvawnow.org/en/articles/1768-what-are-the-root-causes-of-sgbv-.html> accessed 23 February 2018.

- 1.2.3 States have obligations under international human rights law to take adequate action to protect citizens from SGBV and discriminatory conduct, to combat harmful gender stereotypes, and to provide equal protection under the law. An awareness of these obligations serves as a useful backdrop for identifying globally recognised standards in this area and for understanding PICs' commitments under international law. There are many ways in which international human rights law may be translated at domestic level. This Handbook explores how it has been interpreted in PICs, and how SGBV has been dealt with by legislation. It provides an overview of SGBV criminal offences in PICs, broken down into three categories for ease of examination, namely i) domestic violence, which comprises a range of assaults that occur in a family, domestic or intimate partner context; ii) sexual offences, such as sexual assault, incest, rape and sexual abuse of a minor; and iii) murder or manslaughter offences.
- 1.2.4 This Handbook should serve as a useful training tool for lawyers conducting PIC case law analysis. It includes a step-by-step reference guide outlining where and how to identify cases, case classification, examples of contentious factors to look out for in sentencing decisions, how to interpret results and sample case studies.



## SECTION 2: ANALYSIS OF SEXUAL AND GENDER-BASED VIOLENCE

### 2.1 Introduction

2.1.1 This section highlights the prevalence of SGBV globally and in PICs, and examines the root causes of SGBV, which include structural factors such as patriarchy, state inaction and economic inequalities. As well as defining SGBV, different forms of violence against women including harmful traditional practices (such as female genital cutting/mutilation, honour killings and forced marriages) are analysed in the context of PICs.

### 2.2 SGBV in the Pacific Island Region

2.2.1 Globally, it is estimated that around one in three women will experience SGBV during their lifetime.<sup>7</sup> In PICs, the prevalence of SGBV is much higher; some studies estimate that between 60% and 80% of women in the region will experience some form of SGBV in their lifetime.<sup>8</sup>

2.2.2 A regional snapshot report published by the United Nations (“UN”) Population Fund (“UNFPA”) shows the proportion of women reporting experience of partner and non-partner violence in PICs, using data collected between 2000 and 2014.<sup>9</sup>

**Figure 1:** Intimate partner violence among ever-partnered women and non-partner violence among all women

	Intimate partner violence among ever-partnered women								Non-partner violence since age 15 among all women			
	Psychological violence		Physical violence		Sexual violence		Physical or sexual violence		Physical violence by non-partner		Sexual violence by non-partner	
	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months
<b>Fiji</b>	58.3	28.8	61.1	19.4	33.9	14.2	64.1	23.7	26.9	N/A	8.5	N/A
<b>Kiribati</b>	47.1	30.1	60.0	32.4	64.4	33.7	67.6	36.1	11.0	N/A	9.8	N/A
<b>Marshall Islands</b>	47.6	22.1	48.1	16.2	20.6	5.9	50.9	18.2	33.0	3.5	13.0	0.8
<b>Micronesia</b>	32.8	24.6	28.6	19.4	18.1	12.9	32.8	24.1	9.6	3.0	8.0	2.7
<b>Nauru</b>	N/A	N/A	46.6	20.6	20.6	9.9	48.1	22.1	N/A	N/A	47.3	12.2
<b>Palau</b>	23.0	9.1	23.0	6.5	10.3	3.5	25.2	8.4	13.9	2.5	15.1	3.4
<b>Papa New Guinea</b>	69.0	28.3	51.5	21.9	58.1	13.4	67.5	32.9	N/A	N/A	N/A	N/A
<b>Samoa</b>	19.6	12.3	40.5	17.9	19.5	11.5	46.1	22.4	62.0	N/A	10.6	N/A
<b>Solomon Islands</b>	56.1	42.6	45.5	N/A	54.7	N/A	63.5	41.8	18.2	N/A	18.0	N/A
<b>Tonga</b>	24.0	13.0	33.4	12.5	16.5	11.0	39.6	18.9	67.8	N/A	6.3	N/A
<b>Tuvalu</b>	28.1	23.1	33.3	23.8	10.0	5.1	36.8	25.0	N/A	N/A	N/A	N/A
<b>Vanuatu</b>	68.0	54.0	51.0	33.0	44.0	33.0	60.0	44.0	28.0	N/A	33.0	N/A

7 The World Bank, *Raising awareness of violence against women in the Pacific* (November 2011), <http://www.worldbank.org/en/news/feature/2012/11/25/raising-awareness-of-violence-against-women-in-the-pacific> accessed on 25 May 2017.

8 The World Bank, *op.cit.* at footnote 6, cited in UN Women, *op.cit.* at footnote 1; UNICEF, *Harmful Connections: Examining the relationship between violence against women and violence against children in the South Pacific* (January 2015), [https://www.unicef.org/pacificislands/Harmful\\_Connections\(1\).pdf](https://www.unicef.org/pacificislands/Harmful_Connections(1).pdf) accessed on 25 May 2017; Crook, T., Farran, S. and Röell, E., *ECOPAS Final Report: Understanding Gender Inequality Actions in the Pacific: Ethnographic Case-studies and Policy Options* (2016), [http://nrl.northumbria.ac.uk/27092/1/ECOPAS%20Gender%20Equity%20report%20MN0216385ENN\\_small.pdf](http://nrl.northumbria.ac.uk/27092/1/ECOPAS%20Gender%20Equity%20report%20MN0216385ENN_small.pdf) accessed on 25 May 2017.

9 UNFPA, 2016 Regional Snapshot: UNFPA Asia and the Pacific Region (August 2016), [http://asiapacific.unfpa.org/sites/default/files/pub-pdf/VAW%20Regional%20Snapshot\\_2.pdf](http://asiapacific.unfpa.org/sites/default/files/pub-pdf/VAW%20Regional%20Snapshot_2.pdf) accessed 2 October 2017.

### Summary of Key Points

- Age groups for the surveys range from 15 to 49 years and 15 to 64 years, and sample sizes range from 634 to 3,193.
- Years of reported data collection range from 2000 to 2014.
- **Psychological violence** seems to be nearly as prevalent as physical and sexual violence, and sometimes even more common. The highest figures for lifetime psychological violence were reported in Vanuatu and Papua New Guinea, at 68% and 69%. These figures were at least 9% higher than other regions, where percentages range from 23% to 58.3%.
- Reported figures of **physical violence** are higher than those of sexual violence in most of the reported regions (9 out of 13). The highest figures for reported physical violence are from Fiji and Kiribati, with 60% to 61.1% of women having experienced lifetime physical violence. This compares to figures reported from the other 11 regions, which range from around 23% to 51.5%.
- Kiribati also has the highest reported rate of lifetime **sexual violence** at 64.4%. The reported prevalence of lifetime sexual violence across all the regions ranges from 10% to 64.4%.

- 2.2.3 SGBV globally has been linked to various cultural, socio-economic and geographical factors, discussed in paragraph 2.4 below. These include both structural factors and risk factors that are associated with an increased presence of SGBV. The exact behaviours which we classify as SGBV are discussed in paragraph 2.3 below.
- 2.2.4 As discussed further in paragraph 2.3 below, GBV is considered to be any harmful act directed against individuals or groups of individuals on the basis of their gender. Sexual violence is a subset of GBV and can take multiple forms, encompassing any non-consensual sexual act, unwanted sexual comments or advances or acts otherwise directed against a person's sexuality using coercion.<sup>10</sup> It should be noted that not all GBV is sexual violence; GBV includes, among other things, domestic violence, sex trafficking, psychological violence, forced marriage and harmful traditional practices, as discussed in paragraph 2.3 below. On the other hand, most forms of sexual violence are also GBV. In the PICs, women are overwhelmingly the victims of GBV, and men are overwhelmingly the perpetrators,<sup>11</sup> which is due in part to the social and economic inequality experienced by women, particularly young women or women living with a disability.<sup>12</sup>
- 2.2.5 The occurrence of SGBV behaviours is not uniform throughout the PICs, and the diverse ways in which SGBV manifests, and its relative prevalence across jurisdictions, is shaped by a variety of factors such as differing cultural practices, gender stereotypes and perceived gender roles in the various societies. For example, statistical data from 2008 and 2010 reveals that, of those women who reported suffering physical violence in the Marshall Islands, 72% were victimised by a husband or partner, compared to 90% in the Solomon Islands,<sup>13</sup> and

<sup>10</sup> OHCHR, *Sexual and gender-based violence in the context of transitional justice* (October 2014), [http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagere/Sexual\\_and\\_gender-based\\_violence.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagere/Sexual_and_gender-based_violence.pdf) accessed on 1 August 2017.

<sup>11</sup> Cited in Biersack, A. and Macintyre, M., *Introduction: Gender Violence and Human Rights in the Western Pacific* in Biersack, A., Jolly, M. and Macintyre, M. (eds), *Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu* (2016), p.4.

<sup>12</sup> ICAAD and DLA Piper, *op.cit.* at footnote 4.

<sup>13</sup> Cited in UN Women, *op.cit.* at footnote 2.

almost 100% of men reportedly beat their wives in the Highlands of Papua New Guinea.<sup>14</sup> There could be any number of reasons behind these disparities, including a skew toward intimate partner violence in certain PICs, and/or a relative lack of stranger violence, and/or a reduced likelihood of women reporting intimate partner violence in certain jurisdictions.

- 2.2.6 Demographic and Health Surveys (“**DHSs**”) have documented a variety of attitudes towards violence against women in the PICs. For example, according to the 2007 Tuvalu DHS, 70% of women and 73% of men agreed with at least one “justification” for a husband beating his wife, which is of concern because “[it] indicate[s] that the subordinate status of women within the marital relationship is generally accepted”.<sup>15</sup> A 2013 Vanuatu DHS explored some of these “justifications” more specifically, finding the most popular justifications according to both men and women, to be the wife i) neglecting the children, ii) going out without telling her husband or iii) arguing with him.<sup>16</sup>
- 2.2.7 There are also differences in the frequency and types of violence experienced by women of different marital status, age, socio-economic status and geographical location within the same jurisdiction. For example, close to 100% of women in the Highlands of Papua New Guinea experience intimate partner abuse, yet the statistics for the nation as a whole are estimated at 67% of women.<sup>17</sup> In many Pacific Island societies, women who have disabilities, who are living with HIV, who are homeless, or who are sex-workers, will have an increased vulnerability to SGBV.<sup>18</sup> Where women experience marginalisation on a number of levels – that is, where different forms of discrimination and inequality intersect, such as being both homeless and living with HIV – that vulnerability is compounded, known as intersectionality. The number of women in these vulnerable populations will depend upon the broader trends and general characteristics of the society (for example, access to healthcare may be a determining factor in the rates of HIV transmission). The interaction of factors within a territory, such as economic wealth and urbanisation, may also give rise to high levels of certain forms of SGBV; for example, in the case of Papua New Guinea, the urban slums in this developing nation<sup>19</sup> have facilitated an epidemic of gang rapes carried out by slum gangs. A study conducted by the Australian Government Overseas Aid Program found that 60% of men in the country reported participating in a gang rape at least once.<sup>20</sup>

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14 *Ibid.*

15 Tuvalu DHS (2007), Chapter 13, [http://prism.spc.int/images/documents/DHS/2007\\_Tuvalu\\_DHS-Report.pdf](http://prism.spc.int/images/documents/DHS/2007_Tuvalu_DHS-Report.pdf) accessed on 6 January 2018.

16 Vanuatu DHS (2013), <https://vnso.gov.vu/index.php/component/advertising/?view=download&fileId=2975> accessed on 7 July 2017.

17 Cited in UN Women, *op.cit.* at footnote 2.

18 *Ibid.*

19 Papua New Guinea has the highest level of income inequality in the Asia-Pacific region and is ranked the lowest of all nations outside sub-Saharan Africa in the UN Human Development Index: see Oxfam Australia, *Our Work in Papua New Guinea*, <https://www.oxfam.org.au/country/papua-new-guinea/> accessed on 25 May 2017.

20 Jewkes R, Fulu E, Roselli T, Garcia-Moreno C, *Prevalence of and factors associated with non-partner rape perpetration: findings from the UN Multi-country Cross-sectional Study on Men and Violence in Asia and the Pacific* (Lancet Glob Health 2013), pages 208-218.

## 2.3 Forms of Violence and Abuse

### 2.3.1 Defining SGBV

Whilst SGBV can be experienced by people of all genders, SGBV and “violence against women” are often used interchangeably, since it has been widely acknowledged that most GBV is perpetrated by men against women.<sup>21</sup> Although “violence against women” is therefore just one type of GBV, for the purposes of this Handbook the scope of SGBV will be restricted to violence against people who identify as women or female. To this end, the definition of SGBV used in this Handbook corresponds to the description of “violence against women” promulgated in DEVAW namely:

*Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*<sup>22</sup>

This violence may take place in “all spaces and spheres of human interaction”, including the family, the community, public spaces, the workplace, leisure, politics, sport, health services, educational settings and their redefinition through technology-mediated environments.<sup>23</sup> It impairs or nullifies women’s enjoyment of their human rights and fundamental freedoms, and has therefore been recognised in international law as a violation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) (the “**CEDAW**”).<sup>24</sup>

We also draw on the definition adopted by the Committee on the Elimination of Discrimination against Women (the “**CEDAW Committee**”) in its General Recommendation No. 19 (“**General Recommendation No. 19**”, referred to in paragraph 1 of General Recommendation No. 35) on violence against women, which provides that GBV is:

*Violence directed against a woman because she is a woman or that affects women disproportionately.*<sup>25</sup>

This definition recognises that violence as it is experienced by women is inherently discriminatory against women, and posits it as a manifestation of historically unequal power relations between the genders.<sup>26</sup> Much of SGBV is considered to be rooted in traditional attitudes and stereotyping of gender roles (see section 3 below for more detail).<sup>27</sup>

In defining what is meant by “violence” as it is perpetrated against women, we adopt for the purposes of this Handbook the UN Women’s typology of violence against women. This categorises SGBV into six forms of violence: (a) domestic and intimate partner violence; (b) sexual violence by non-partners; (c) harmful traditional practices; (d) HIV/AIDS and violence; (e) violence against women in

21 Violence Against Women & Girls, *Resource Guide*, <http://www.vawgresourceguide.org/terminology> accessed 1 August 2017.

22 UN, Declaration on the Elimination of Violence against Women, A/RES/48/104 (1993), Article 1.

23 General Recommendation No. 35, paragraph 20.

24 CEDAW Committee, General Recommendation No. 19 (1992) on violence against women, paragraphs 1 and 6.

25 *Ibid.*, paragraph 6.

26 DEVAW, *op.cit.* at footnote 22, preamble.

27 CEDAW Committee, *op.cit.* at footnote 24, paragraph 11.

war and armed conflict; and (f) the trafficking of women.<sup>28</sup> These are discussed individually below.

The UN Women's typology is a useful tool for analysing patterns of SGBV, but these categories are not discrete and there is considerable overlap between them (for example, a husband physically beating his wife, generally discussed in the context of domestic violence, may also constitute a harmful traditional practice where this is recognised as a long-standing cultural behaviour). There is also significant co-morbidity of SGBV manifestations. For example, a study conducted in Tanzania found that HIV positive women were 2.5 times more likely than HIV negative women to have experienced domestic violence perpetrated by their current partner.<sup>29</sup> There is a growing recognition that women's risk of, and vulnerability to, HIV infection is shaped by deep-rooted and pervasive gender inequalities, and violence against them in particular.<sup>30</sup> HIV can be a form of SGBV where, for example, it is directly transmitted through sexual violence or indirectly transmitted through inability to negotiate condom use. In formulating measures to address specific and individual acts of SGBV, states should be aware that many such acts occur not in isolation, but within a wider framework of gender-related violence.<sup>31</sup>

### 2.3.2 Domestic and Intimate Partner Violence

The Council of Europe has defined domestic violence as follows:

*All acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.*<sup>32</sup>

And describes it further as:

*Structural violence – violence that is used to sustain male power and control.*<sup>33</sup>

Domestic violence includes a range of violent and abusive acts which are categorised by reference to the fact that they occur between people in an intimate, familial or co-habiting relationship.<sup>34</sup> Historically, the laws of most countries sanctioned the abuse of women within marriage as an aspect of the husband's perceived ownership of his wife, encompassing a right to control, rape, and chastise her.<sup>35</sup>

Domestic violence is widespread and endemic, with some national studies recording up to 70% of women experiencing physical and/or sexual intimate partner violence in their lifetime.<sup>36</sup> Evidence also shows high rates of

28 UN Women, *Fact Sheet: Violence Against Women*, <https://unwomen.org.au/wp-content/uploads/2015/11/VAW-Factsheet.pdf> accessed on 3 July 2017.

29 *Ibid.*

30 WHO, *Violence Against Women and HIV/AIDS: Critical Intersections* (2004), <http://www.who.int/hac/techguidance/pht/InfoBulletinIntimatePartnerViolenceFinal.pdf> accessed 2 October 2017.

31 DCAF, *Judicial Bench Book: Considerations for Domestic Violence Case Evaluation in Bosnia & Herzegovina* (2014) <http://www.dcaf.ch/judicial-benchbook-considerations-domestic-violence-case-evaluation-bosnia-and-herzegovina> accessed on 25 May 2017.

32 Council of Europe, *Convention on preventing and combating violence against women and domestic violence* (2011), Article 3.

33 Council of Europe, *About the Convention*, <http://www.coe.int/en/web/istanbul-convention/about-the-convention> accessed on 3 July 2017.

34 UN Women, *op.cit.* at footnote 28.

35 Cusack, S. *Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases* (submitted to the OHCHR 2014), p.37.

36 UN Women, *Facts and Figures: Ending Violence against Women*, <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes> accessed on 3 July 2017. For a more detailed analysis of the proportion of women reporting experience of intimate partner violence in the PICs, please see the table at paragraph 2.2.2.

psychological violence (although little data is available and the manner in which psychological violence is recorded differs widely across countries), with 48% of women in 28 European Union member states reporting having experienced some form of psychological violence by an intimate partner at some point in their life.<sup>37</sup> Domestic violence is also frequently severe – in 2012, nearly half of all female murder victims worldwide were killed by family members or intimate partners, compared to less than 6% of men killed in the same year.<sup>38</sup>

Domestic violence may manifest in a variety of ways and, whilst some common trends may be identified, it should be approached on a case-by-case basis. One suggested typology of domestic violence categorises violence which may occur in the home into three main patterns:<sup>39</sup>

- (a) **Situational couple violence** is the most common, and occurs where an argument escalates into violence. This may be frequent but the violence is likely to be less severe. This form of domestic violence is conducted by both genders at similar levels of frequency, and neither party intends to dominate and control the other.
- (b) **Domestic violence battering or intimate terrorism** occurs independently of disagreement, and occurs less frequently than situational couple violence. It is more likely to cause severe harm, and at its core involves one party trying to dominate and control the other. It is usually perpetrated by men against women, and will involve physical violence combined with other tactics such as coercion, threats, economic and psychological abuse and isolation.<sup>40</sup> It will rarely constitute an isolated incident and will instead form part of an ongoing and “systematically repeated” campaign of abuse.<sup>41</sup>
- (c) **Violent resistance by victims/survivors** occurs where a domestic violence victim/survivor physically challenges an abuser’s attempts to dominate.

The campaign of abuse which an “intimate terrorist” might perpetrate is designed to establish coercive control over the victim/survivor. Most control techniques are psychological in nature and, if a perpetrator is successful in making his victim/survivor feel imprisoned and unable to resist, there may only be sparing need for the use of physical violence.<sup>42</sup> The use of psychological abuse in a domestic context may involve: insults and criticism to undermine the victim/survivor’s self-confidence, rejection intended as a punishment and to create feelings of unworthiness, emotional blackmail to create guilt, insecurity and fear, possessive behaviours such as jealousy to restrict the victim/survivor’s ability to forge bonds with others outside of the abusive relationship, and denying the victim/survivor’s potential and capabilities in order to limit their opportunities to become self-sufficient and keep them dependent.<sup>43</sup> The psychological abuse may have an overtly sexual or gendered element, such as criticising or emotionally blackmailing a wife for failing to fulfil her “duties” as a

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M. (eds.), *Gender Bias and the Law: legal frameworks and practice from Bosnia & Herzegovina and beyond* (2017), p.61.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p.55.

<sup>42</sup> *Ibid.*, p.64.

<sup>43</sup> DCAF, *op.cit.* at footnote 31.

wife or mother (for example, by refusing sex), sexual insults, and threatening to cheat on or leave a partner if the partner refuses to give in to the abuser's demands.<sup>44</sup> The "Power and Control Wheel", depicted below, was developed by Domestic Abuse Intervention Programs to demonstrate the different methods by which an abuser may establish control.<sup>45</sup>

**Figure 2:** The Power and Control Wheel



While the Power and Control Wheel has provided direction for understanding domestic violence in general, it is important to note the cultural context in PICs. For example, a context-specific model like the Fonofale Model from Samoa, depicted below, highlights the impact of collectivism in Samoan culture and the intersectionality of status and relationships.<sup>46</sup> Models like this expose the gaps in individualistic approaches to understanding domestic violence and function as a reminder to focus on the needs of the specific community, which might not fit a traditional model.<sup>47</sup>

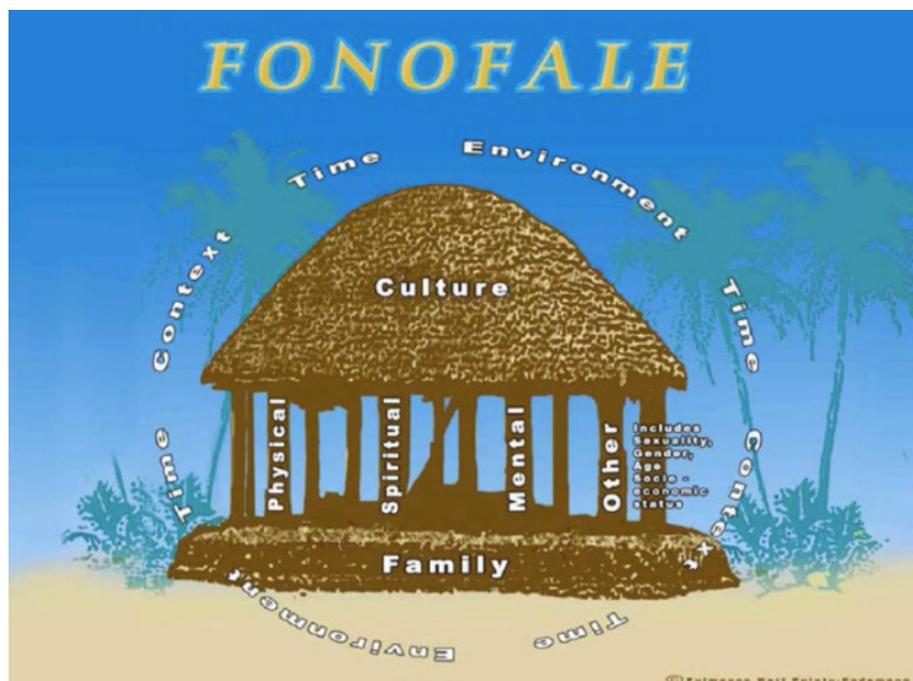
44 Australian Government, *National Domestic and Family Violence Bench Book* (June 2016), <http://www.dfvbenchbook.aiija.org.au/contents> accessed on 25 May 2017.

45 Domestic Abuse Intervention Programs, *Power and Control Wheel*, <https://www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf> accessed on 3 July 2017.

46 Pulotu-Endemann, Fuimaono Karl, *Fonofale Model of Health* (2001), <http://www.hauora.co.nz/resources/Fonofalemodelexplanation.pdf> accessed on 30 August 2017.

47 Rankine, Jenny, Teuila Percival, Eseta Finau, Linda-Teleo Hope, Pefi Kingi, Maiava Carmel Peteru, Elizabeth Powell, Robert Robati-Mani, and Elisala Selu, *Pacific Peoples, Violence, and the Power and Control Wheel*, (2017), [https://www.researchgate.net/publication/280997003\\_Pacific\\_Peoples\\_Violence\\_and\\_the\\_Power\\_and\\_Control\\_Wheel](https://www.researchgate.net/publication/280997003_Pacific_Peoples_Violence_and_the_Power_and_Control_Wheel) accessed 6 January 2018.

**Figure 3:** Fonofale



Domestic violence may involve sexual violence (as discussed at paragraph 2.3.3 below), and there are particular forms which may be more likely to occur in a domestic setting. These include acts harmful to women’s reproductive independence and health, such as a partner insisting on unprotected sex or intentionally attempting to impregnate the victim/survivor without her consent,<sup>48</sup> sabotaging her birth control measures or access to birth control services, using physical violence against her whilst she is pregnant, forcing her to abort a child, or threatening to abandon her if she fails to conceive.<sup>49</sup>

The Council of Europe includes economic abuse in their definition of domestic violence; this can involve the perpetrator controlling the victim/survivor’s access to money in order to limit their freedom of movement and self-sufficiency, accumulating debts in the victim/survivor’s name, or refusing them access to outside work or education.<sup>50</sup> The victim/survivor may also be forced to sign over any wealth upon the occasion of their marriage, and have any property they receive whilst married confiscated.<sup>51</sup> Preventing access to work may be part of a broader pattern of isolating the victim/survivor from friends, family and public media, spatially confining the victim/survivor in order to monopolise their skills and resources and to assert exclusive possession, and preventing them from seeking any external support, in order to create complete emotional and financial dependence.<sup>52</sup>

48 DCAF, *op.cit.* at footnote 31.

49 Australian Government, *op.cit.* at footnote 44.

50 DCAF, *op.cit.* at footnote 31; Australian Government, *op.cit.* at footnote 44.

51 DCAF, *op.cit.* at footnote 31.

52 Australian Government, *op.cit.* at footnote 44.

### 2.3.3 Sexual Violence

The Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) (the “**Istanbul Convention**”) came into force in August 2014 as the first legally binding instrument intended to prevent, protect against and prosecute various forms of violence against women. It defines sexual violence, including rape, as:

*Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; engaging in other non-consensual acts of a sexual nature with a person, or causing another person to engage in non-consensual acts of a sexual nature with a third person.*<sup>53</sup>

An estimated 35% of women globally have experienced physical and/or sexual violence from their intimate partner, or sexual violence by a non-partner, at some point in their lives.<sup>54</sup> Rates of sexual violence by non-partners suffered after the age of 15 years old reported in national surveys range from less than 1% in Ethiopia and Bangladesh, to between 10% and 12% in Peru, Samoa and the United Republic of Tanzania. In Switzerland, 22.3% of women report experiencing sexual violence by non-partners in their lifetime.<sup>55</sup> However, it should be noted that official statistics collected in relation to rates of rape and sexual assault may be unreliable due to significant underreporting,<sup>56</sup> particularly in societies where rape is considered shameful for the victim/survivor and their family.<sup>57</sup>

Most acts of sexual violence are committed by someone known to the victim/survivor, including family members or an intimate partner, boyfriend or husband, so the distinction between domestic violence and sexual violence is somewhat blurred; sexual violence can be, and often is, a form of domestic violence.

### 2.3.4 Harmful Traditional Practices

Harmful traditional practices are forms of violence that have been committed against women in certain communities and societies for so long that they are considered acceptable cultural practice.<sup>58</sup> These behaviours may be tolerated or even actively encouraged at the community level. Examples of practices which might constitute SGBV include: dietary restrictions for pregnant women, preference for male children (including sex-selective abortion or murder of female children), child marriage, female genital cutting/mutilation, dowry murder, honour killings and witchcraft and sorcery-related killings.<sup>59</sup>

**Female genital cutting/mutilation** includes several variations of traditional cutting operations performed on women, often as part of fertility or coming-of-age rituals. It is sometimes held out to be justified as a way to ensure chastity or purity.<sup>60</sup> At least 200 million women worldwide are currently living with the

53 Council of Europe, *op.cit.* at footnote 32, Article 36.

54 UN Women, *op.cit.* at footnote 36.

55 UN Secretary-General, *Violence against Women* (November 2011), <http://www.un.org/en/women/endviolence/situation.shtml> accessed on 12 January 2017.

56 UN Women, *op.cit.* at footnote 28.

57 UN Secretary-General, *op.cit.* at footnote 55.

58 UN Women, *op.cit.* at footnote 28.

59 CEDAW Committee, *op.cit.* at footnote 24, paragraph 20.

60 UN Women, *op.cit.* at footnote 28.

consequences of female genital cutting/mutilation,<sup>61</sup> and a further 30 million girls are thought to be at risk of being cut in the next decade.<sup>62</sup>

**Dowry murder** occurs where a woman is murdered by her husband or in-laws because her family is unable to meet their demands for a dowry. Historically it occurred predominantly in South Asia.<sup>63</sup>

**Honour killings** of rape victims/survivors and women suspected of engaging in adultery or premarital sex by their male relatives occur where the violation of a woman's chastity is viewed as a desecration of the family's honour.<sup>64</sup> UNFPA estimates that the annual number of women so killed each year may be as high as 5,000.<sup>65</sup>

**Killings of women suspected of witchcraft or sorcery** have been documented in the Central African Republic, Tanzania and Nigeria, with reports indicating that attacks are generally carried out by private citizens, where belief in witchcraft is more widespread.<sup>66</sup> A study undertaken in Zimbabwe found that the majority of the women in 42 examined cases of femicide (where the woman was over 50 years of age) had been previously accused of witchcraft by male relatives.<sup>67</sup> In PICs, such killings also occur in Papua New Guinea, where traditional beliefs about witchcraft combine with gender discrimination to encourage the lynching by communities of women accused of carrying out sorcery.<sup>68</sup> In the majority of cases young women are targeted, but older women may be vulnerable where they are deemed to constitute an "economic burden" on others or hold desirable property rights, in which case an accusation of sorcery may be perceived a means of dispelling them from society.<sup>69</sup>

**Polygyny** is the most common form of polygamy, where a husband takes multiple wives. Research has found that polygynous structures increase violence towards women and children by intensifying control over women (in all areas of life) which devolves into systematic practices of violence.<sup>70</sup> Where the husband does not use condoms with his wives, this may increase the risk of HIV transmission.<sup>71</sup> The practice of taking multiple wives is tied to historical conceptions of women as property of men, and women's value deriving from their sexual availability and ability to produce male offspring.<sup>72</sup>

61 UN Children's Fund, *Female genital mutilation/cutting: A global concern* (2016) [https://www.unicef.org/media/files/FGMC\\_2016\\_brochure\\_final\\_UNICEF\\_SPREAD.pdf](https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf) accessed 5 April 2018.

62 United Nations Children's Fund, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, UNICEF, New York, 2013.

63 UN Secretary-General, *op.cit.* at footnote 55.

64 UN Women, *op.cit.* at footnote 28.

65 UN Secretary-General, *op.cit.* at footnote 55.

66 OHCHR, *Handbook compiling observations and recommendations of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Chapter 8: Victim Groups*, at pp. 47-50. <http://eje.madeofpeople.org/application/media/Handbook%20Chapter%208%20-%20Victim%20Groups%20C%20Handbook.pdf> accessed 30 November 2017.

67 OHCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences: Rashida Manjoo* (23 May 2012) A/HRC/20/16, [http://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16\\_En.pdf](http://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16_En.pdf) accessed 30 November 2017.

68 Human Rights Watch, *Bashed Up: Family Violence in Papua New Guinea* (4 November 2015), <https://www.hrw.org/report/2015/11/04/bashed/family-violence-papua-new-guinea> accessed 6 November 2017.

69 OHCHR, *Women's Rights are Human Rights* (2014), <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> accessed 31 October 2017, p.76.

70 McDermott, R. and Cowden, J., *Polygyny and Violence Against Women* (2015), *Emory Law Journal* 64(6), 1767-1814.

71 UN Women, *Understand the linkages between HIV/AIDS and violence against women and girls*, <http://www.endvawnow.org/en/articles/677-understand-the-linkages-between-hiv-aids-and-violence-against-women-and-girls-.html> accessed on 3 July 2017.

72 McDermott, R. and Cowden, J., *op.cit.* at footnote 70.

**Child and forced marriage** affects primarily young women, with one in three girls in the developing world marrying before they are 18 years old and one in nine marrying before they are 15 years old.<sup>73</sup> Early marriage and early motherhood have significant health and economic consequences, with complications in pregnancy and childbirth representing the leading cause of death for girls aged 15 to 19 years old in developing countries, and studies showing that the educational and employment opportunities of young wives/mothers are severely curtailed.<sup>74</sup>

**Wife inheritance** is a practice where a widow is forced or expected to marry a male family member of her deceased husband. This usually involves unequal power relations, where the woman does not have any choice in the matter.<sup>75</sup> Women who do resist may be evicted from their homes under customary law or have financial support for their children removed, as often such women will belong to communities where their property rights and financial independence are curtailed, in fact if not in law.<sup>76</sup>

**Widow cleansing** describes a cultural practice of forcing newly widowed women to have sex with a member of their deceased husband's family or the wider community as a cleansing rite after the death.<sup>77</sup> The sex will traditionally be unprotected and therefore, as well as constituting a form of sexual violence where the woman is unwilling, it also increases her risk of exposure to HIV infection.<sup>78</sup>

### 2.3.5 HIV/AIDS and Violence

The percentage of HIV positive women has been growing and there are now more women than men living with HIV.<sup>79</sup> In some regions, young women and adolescent girls remain at an exceptionally higher risk of HIV infection than their male peers. For example, in 2015, 450,000 new infections occurred among adolescent girls and young women aged 15 to 24 years old in sub-Saharan Africa, which translates into approximately 8,600 new infections per week.<sup>80</sup> AIDS-related illnesses are the leading cause of death among women of reproductive age in Africa.<sup>81</sup> Inequalities between genders affect women's ability to negotiate safe sex (for example, in the context of an abusive intimate partner relationship or a child marriage) and to refuse unwanted sex (inside and outside the family home), and are closely linked to this "feminisation" of the HIV epidemic. Studies worldwide consistently show a statistical association between violence and HIV infection, particularly in respect of intimate partner violence

73 OHCHR, *Information Series on Sexual and Reproductive Health and Rights: Harmful Practices*, [http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_Harm\\_Pract\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Harm_Pract_WEB.pdf) accessed on 3 July 2017.

74 *Ibid.*

75 UN Women, *op.cit.* at footnote 71.

76 Immigration and Refugee Board of Canada, *Zimbabwe: The custom of wife "inheritance"; the government's attitude towards this custom; protection available to women who refuse to observe this custom (2004 - January 2006)* (2006), <http://www.refworld.org/docid/45f147cb23.html> accessed 3 July 2017.

77 Kouagheu, J. and Guilbert, K. (Reuters), From cleaning corpses to sex with strangers, widow rituals fuel disease in Africa, <https://www.reuters.com/article/us-africa-widows-rituals/from-cleaning-corporse-to-sex-with-strangers-widow-rituals-fuel-disease-in-africa-idUSKCN0Z80LE> accessed 7 November 2017.

78 UN Women, *op.cit.* at footnote 71.

79 *Ibid.*

80 UNAIDS, *HIV prevention among adolescent girls and young women* (2016), [http://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_HIV\\_prevention\\_among\\_adolescent\\_girls\\_and\\_young\\_women.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_HIV_prevention_among_adolescent_girls_and_young_women.pdf) accessed 2 August 2017.

81 UNAIDS, *Empower young women and adolescent girls: fast-tracking the end of the AIDS epidemic in Africa* (2015), [http://www.unaids.org/sites/default/files/media\\_asset/JC2746\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/JC2746_en.pdf) accessed 2 August 2017.

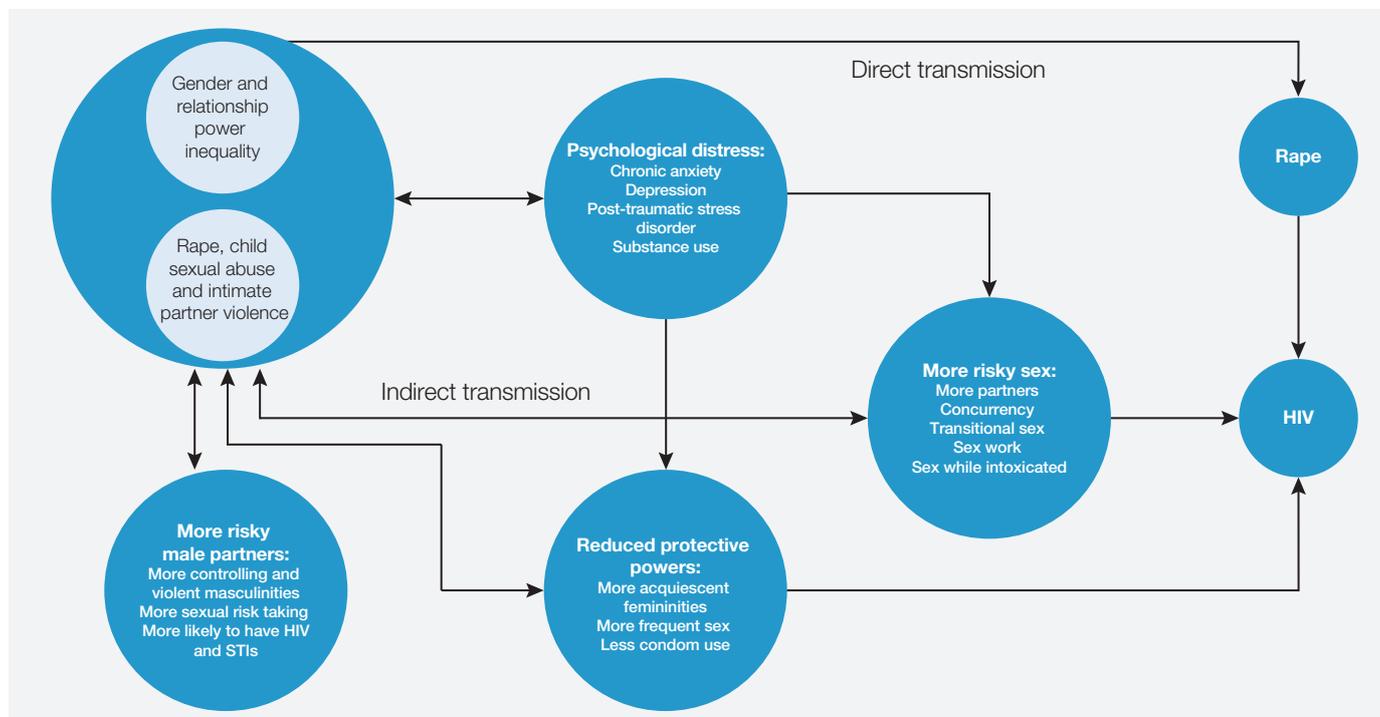
where women are repeatedly exposed to the same HIV-infected perpetrator.<sup>82</sup> One study using data from 96 countries demonstrated that women who had experienced intimate partner violence were more than twice as likely to contract HIV.<sup>83</sup>

Sexual assault is also a risk factor for HIV infection where physical trauma during forced or unwanted sex facilitates the uptake of HIV infection, or threat of assault dissuades women from negotiating condom use or refusing sex. The stigma attached to being sexually assaulted due to traditional attitudes that women should be “pure” or “chaste” may also discourage women from seeking medical treatment such as post-exposure prophylaxis.<sup>84</sup> Certain discriminatory traditional and cultural practices are also considered to contribute to HIV transmission in women, such as polygyny, wife inheritance and widow cleansing (discussed at paragraph 2.3.4 above).<sup>85</sup>

Not only is violence a risk factor for HIV transmission, but an increased risk of violence against women could also be linked to HIV infection. One study conducted in the Asia-Pacific region found that HIV positive women are significantly more likely than men to experience discrimination, violence and forcible eviction.<sup>86</sup>

The following World Health Organisation (“WHO”) diagram illustrates the links between HIV, violence and gender discrimination:<sup>87</sup>

**Figure 4:** The links between HIV, violence and gender discrimination



82 WHO, *Addressing violence against women and HIV/AIDS: What works?* (2010), <http://www.who.int/reproductivehealth/publications/violence/9789241599863/en/> accessed 31 October 2017, p.10.

83 UN Women, *op.cit.* at footnote 71.

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 WHO, *op.cit.* at footnote 82, p.10.

### 2.3.6 Violence against Women in War and Armed Conflict

This category encompasses the use of sexual and physical violence against women as tactics of war, taking place in a broader context of warfare conducted against civilian populations. Rape, abduction, sexual humiliation, forced pregnancy and slavery may be utilised against women in conflict as tactics to instil terror, perpetrate genocide,<sup>88</sup> or to break up and humiliate communities and families.<sup>89</sup> The Rome Statute of the International Criminal Court (1998) (the “**Rome Statute**”) provides broad statutory recognition of gender-based violence as a crime under international criminal law, classifying as crimes against humanity any “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity” committed “as part of a widespread or systematic attack directed against any civilian population”. Rape and other sexual violence have been declared as constitutive of genocide by the International Criminal Tribunal for Rwanda, inasmuch as such acts cause serious bodily and mental harm, impose conditions calculated to bring about physical destruction of communities or prevent births (for example through sexual mutilation, sterilisation and forced birth control), and can involve forcibly transferring children from one group to another (such as through forced pregnancy through rape).<sup>90</sup> When committed as part of international armed conflict, rape and comparable acts are designated as war crimes.<sup>91</sup>

Rape has historically been used as a tactic of war, and violence against women has been reported in every international and domestic warzone. During the 1994 genocide in Rwanda, between 250,000 and 500,000 women were raped, and in the Democratic Republic of Congo approximately 1,100 rapes were being reported each month (as of November 2011), with an average of 36 women being raped each day.<sup>92</sup>

### 2.3.7 Trafficking

The UN has defined “trafficking” as:

- (a) *the recruitment, transfer, harbouring or receipt of persons,*
- (b) *by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, or giving or receiving of payments or benefits*
- (c) *to achieve the consent of a person having control over another person, for the purpose of exploitation.*

Such exploitation includes the sexual exploitation of others, forced labour or services, slavery (or practices similar to slavery), servitude or the removal of organs.<sup>93</sup> Gender discrimination has been widely recognised as a root cause of trafficking. Not only are women and young children disproportionately affected,

88 *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T (Judgment, 2 September 1998), paragraph 731.

89 UN Women, *op.cit.* at footnote 28.

90 Genocide Watch, *Rape as an Act of Genocide* (20 April 2012), <http://www.genocidewatch.org/rapeasgenocide.html> accessed 22 November 2017.

91 Cited in UN, *Handbook for Legislation on Violence against Women* (2010), p.7.

92 UN Secretary-General, *op.cit.* at footnote 55.

93 UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (2000), Article 3(a).

but certain forms of trafficking involve gender-specific forms of harm, including forced abortion.<sup>94</sup> Where the trafficking is of children, no use of threat, force, coercion or deception is necessary to establish trafficking, given the vulnerable status of those involved.<sup>95</sup> It is difficult to accurately quantify the global scale of trafficking, but estimates provide that as many as 2.5 million people are trafficked annually, 80% of whom are women.<sup>96</sup>

### 2.3.8 The scope of SGBV

It is important to note that SGBV is not just perpetrated against women; it constitutes any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. Several reviews have demonstrated that gender minorities are more likely to be victims of physical and sexual violence than the general population.<sup>97</sup> Consequently the analysis in this Handbook is restricted to cases of violence against individuals that are female-identifying, gender non-binary or trans men. The analysis does not extend to SGBV against non-cis-gendered men.

## 2.4 The Causes of SGBV

Violence is not confined to a specific culture, region or country, or to particular groups within a society. The causes of SGBV are grounded in the broader context of systemic gender inequality, harmful gender stereotypes, and the neglect or denial of women's civil, political, economic, social and cultural rights.

A report of the UN Secretary-General distinguishes between:

- (a) structural causes, such as the use of violence in conflict resolution, doctrines of privacy used to justify a lack of state intervention when violence is committed against women in the family home, cultural and social practices and state inaction as a result of discriminatory laws and practices; and
- (b) individual or family behaviour patterns that create a higher risk of violence.<sup>98</sup>

Whilst these causes and factors are briefly explored below, it should be noted that, in reality, SGBV occurs as the result of various intersecting factors at various levels, which are linked to a general power imbalance between genders.<sup>99</sup>

### 2.4.1 Structural Causal/Contributory Factors of Violence

#### (a) Patriarchy and relations of dominance and subordination

Historically, the socially constructed roles of genders have been ordered hierarchically, with men exercising power and control over women and women taking a subordinate role. There are many definitions of "patriarchy". For the purposes of this Handbook, it is defined as: "a traditional form of organising society which often lies at the root of gender inequality. According to this kind of social system, men, or what is considered masculine, is accorded more

94 Gallagher, T., *The International Law of Human Trafficking* (30 September 2010), p.196.

95 UN, *op.cit.* at footnote 93, Article 3(c).

96 UN Secretary-General, *op.cit.* at footnote 55.

97 Katz-Wise SL, Hyde JS. Victimization experiences of lesbian, gay, and bisexual individuals: a meta-analysis. *J Sex Res.* 2012;49(2-3):142–67; Peterson ZD, Voller EK, Polusny MA, Murdoch M. Prevalence and consequences of adult sexual assault of men: review of empirical findings and state of the literature. *Clin Psychol Rev.* 2011 Feb;31(1):1–24; Rothman EF, Exner D, Baughman AL. The prevalence of sexual assault against people who identify as gay, lesbian, or bisexual in the United States: a systematic review. *Trauma Violence Abuse.* 2011 Apr;12(2):55–66 and; Stotzer RL. Violence against transgender people: a review of United States data. *Aggress Violent Behav.* 2009;14(3):170–9.

98 UN General Assembly, *In-depth study on all forms of violence against women: Report of the Secretary-General* (6 July 2006).

99 Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.55.

importance than women, or what is considered feminine. Traditionally, societies have been organized in such a way that property, residence, and descent, as well as decision-making regarding most areas of life, have been the domain of men. This is often based on appeals to biological reasoning (women are more naturally suited to be caregivers, for example) and continues to underlie many kinds of gender discrimination.”<sup>100</sup>

Patriarchy is usually entrenched in social and cultural norms, which privilege certain traditional concepts of masculinity, physical power and oppression; this creates an environment that accepts or condones violence and inequality.<sup>101</sup> Examples of the means through which male or masculine dominance is maintained include the exploitation of women’s productive and reproductive work without monetary compensation, control over women’s sexuality and reproductive capacity, the devaluing of women and lack of agency in the institution of marriage, such as in the practices of polygyny and dowries where women are effectively bought and sold, child marriages, exclusively taking on the male’s last name, the exclusion, exploitation or ‘othering’ of men who do not fit the traditional concepts of masculinity, and many more.

It is important to note that patriarchy is not something that is continuously imposed on women by men, rather these concepts have often become internalised by all members of society, of all genders.<sup>102</sup> A survey in Vanuatu from 2011 indicates that these unequal power relationships between the genders continue to be accepted as the norm: 53% of women believed that they become a man’s property if the dowry price is paid.<sup>103</sup> Such practices reinforce the subordination of women and toleration of male violence.

#### **(b) Use of violence in conflict resolution**

The use of violence against women can be seen at the individual, community and national levels and is itself a manifestation of patriarchy. At an individual level, the approach taken to conflict resolution is a factor in determining whether conflict escalates into violence. At the community level, there are social norms which govern how conflicts within the family or in the community should be handled and these can create an environment that either condones or discourages violence.

At national and international levels, access to arms and the use of force to resolve political and economic disputes can express itself in violence against women.<sup>104</sup> Rape as a tool of war, along with other atrocities targeting women, are the most systemic expressions of violence against women in armed conflict. Following the 2006 coup d’état in Fiji, women faced severe economic difficulties (including unemployment and reduced working hours), leaving them vulnerable to violence and exploitation.<sup>105</sup> Fiji’s current constitution entrenches

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100 UN Women Training Centre, *Gender Equality Glossary*, <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=P&sortkey=&sortorder> accessed 21 April 2018.

101 Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.55.

102 Hooks B, *Feminism is for Everybody* (South End Press, 2000).

103 Vanuatu Women’s Centre, *Vanuatu National Survey on Women’s Lives and Family Relationships* (May 2011), [https://mjcs.gov.vu/images/research\\_database/Vanuatu\\_National\\_Survey\\_on\\_Womens\\_Lives\\_and\\_Family\\_Relationships.pdf](https://mjcs.gov.vu/images/research_database/Vanuatu_National_Survey_on_Womens_Lives_and_Family_Relationships.pdf) accessed 3 August 2011.

104 Rehn, E. and Johnson Sirleaf, E., *Focus: Women, Gender and Armed Conflict* (October 2009), <https://www.oecd.org/dac/gender-development/44896284.pdf> accessed 3 August 2017.

105 UNFPA Pacific Sub Regional Office Suva, Fiji, *An Assessment of the State of Violence Against Women in Fiji* (2008), [http://www.un.org/womenwatch/ianwge/taskforces/vaw/Fiji\\_VAW\\_Assessment\\_2008.pdf](http://www.un.org/womenwatch/ianwge/taskforces/vaw/Fiji_VAW_Assessment_2008.pdf) accessed 4 October 2017.

immunities for any government action, including human rights abuses, between 2006 and 2014, and reaffirms immunities for events surrounding the previous coup in 2000.<sup>106</sup>

### **(c) Doctrines of privacy**

Legal doctrines of privacy have been widely used to justify the failure of state and society to intervene in matters of violence in the privacy of a family household.<sup>107</sup> Enforcement remains the main challenge, as social norms and legal culture often protect privacy and male dominance within the family. Doctrines of privacy can deter women from speaking out about SGBV experienced at home.

### **(d) State inaction**

State inaction commonly manifests itself in two forms. Firstly, allowing discriminatory laws and policies to remain in place undermines women's human rights and disempowers women. State-tolerated violence means that perpetrators are able to avoid punishment, as they are protected by laws and policies enacted by their own countries and legal systems. Such impunity can encourage further violence and shift responsibility away from the state. Secondly, some states have laws and policies in place to protect against SGBV, yet fail to effectively enforce these protections or prosecute those that violate them. There are a number of social, political and economic factors contributing to poor enforcement but, ultimately, it leaves women without protection or recourse to justice.<sup>108</sup>

### **(e) Cultural and traditional practices**

Many cultural norms and practices are often used to justify violence against women and emphasise the role of women in society as being subordinate to men. These practices are interwoven in the daily lives of communities and have led to restrictions in women's human rights in many, if not all, countries.

For example, more than 200 million women alive today have experienced female genital cutting/mutilation<sup>109</sup> and various manifestations of femicide – the murder of women – exist around the world. One example is “honour” crime, usually committed by a male family member to restrict and control women's choices where they feel her actions will injure the family, as discussed in paragraph 2.3.4. In other cultural contexts, preoccupation with women's sexuality has resulted in the commodification of women in the media, reducing them to sexual objects and influencing the ways in which women are viewed and treated in broader society. The role of tradition as a contributory factor of violence must therefore be considered within diverse and fluid cultural settings.

### **(f) Economic inequalities**

Women's economic inequalities and discrimination in areas such as employment, income, access to other economic resources and financial independence reduce women's capacity to act and take decisions, increase their dependence on men

106 Amnesty International, *Beating Justice: How Fiji's Security Forces Get Away with Torture* (December 2016), [https://uploads.guim.co.uk/2016/12/04/FIJI\\_REPORT\\_ASA\\_1851492016.pdf](https://uploads.guim.co.uk/2016/12/04/FIJI_REPORT_ASA_1851492016.pdf) accessed 4 October 2017.

107 UN Entity for Gender Equality and the Empowerment of Women (UN Women), *Ending violence against women: From words to action* (October 2006), [http://www.un.org/womenwatch/daw/public/VAW\\_Study/VAWstudyE.pdf](http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf) accessed 19 January 2018.

108 UN Entity for Gender Equality and the Empowerment of Women (UN Women), *Ending violence against women: From words to action* (October 2006), [http://www.un.org/womenwatch/daw/public/VAW\\_Study/VAWstudyE.pdf](http://www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf) accessed 19 January 2018.

109 WHO, *Female genital mutilation fact sheet* (February 2017), <http://www.who.int/mediacentre/factsheets/fs241/en/> accessed 3 August 2017.

and thus increase their vulnerability to violence. WHO has noted that the wider the gap between the rich and the poor in countries where there are already high levels of inequality, the higher the rate of interpersonal violence.

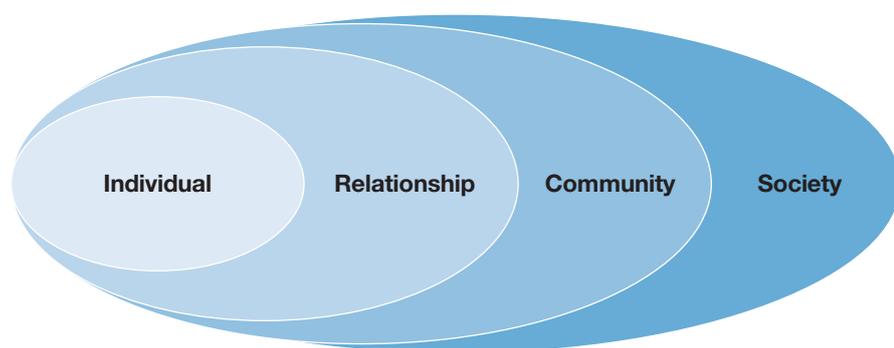
#### 2.4.2 Individual or family behaviour patterns that are risk factors for violence

The below represents a non-exhaustive list of risk factors related to violence. It should be noted that these are not, on their own, considered to be causes of violence, but rather factors which are associated with an increased risk of SGBV:

- drug and/or alcohol abuse or addiction;
- witnessing or experiencing abuse as a child;
- low levels of education;
- economic stress and poverty;
- membership in marginalised or excluded communities;
- male control of assets and decision-making;
- interpersonal disparities in economic, educational or employment status; and
- inadequate punishment of or responses to violence within the legislative and policy framework.<sup>110</sup>

The ecological model developed by Lori Heise (1998) distinguishes risk factors at four levels: **individual** (e.g. education, economic status and substance abuse), **relationship** (e.g. parental conflict, peer influence and marital satisfaction), **community** (e.g. population density, level of unemployment and the existence of a local drug or gun trade) and **society** (e.g. the availability of weapons, conflict resolution and social and cultural norms that support violence).<sup>111</sup> This serves as a useful framework for understanding the various factors behind SGBV and their interplay.

**Figure 5:** The ecological model<sup>112</sup>



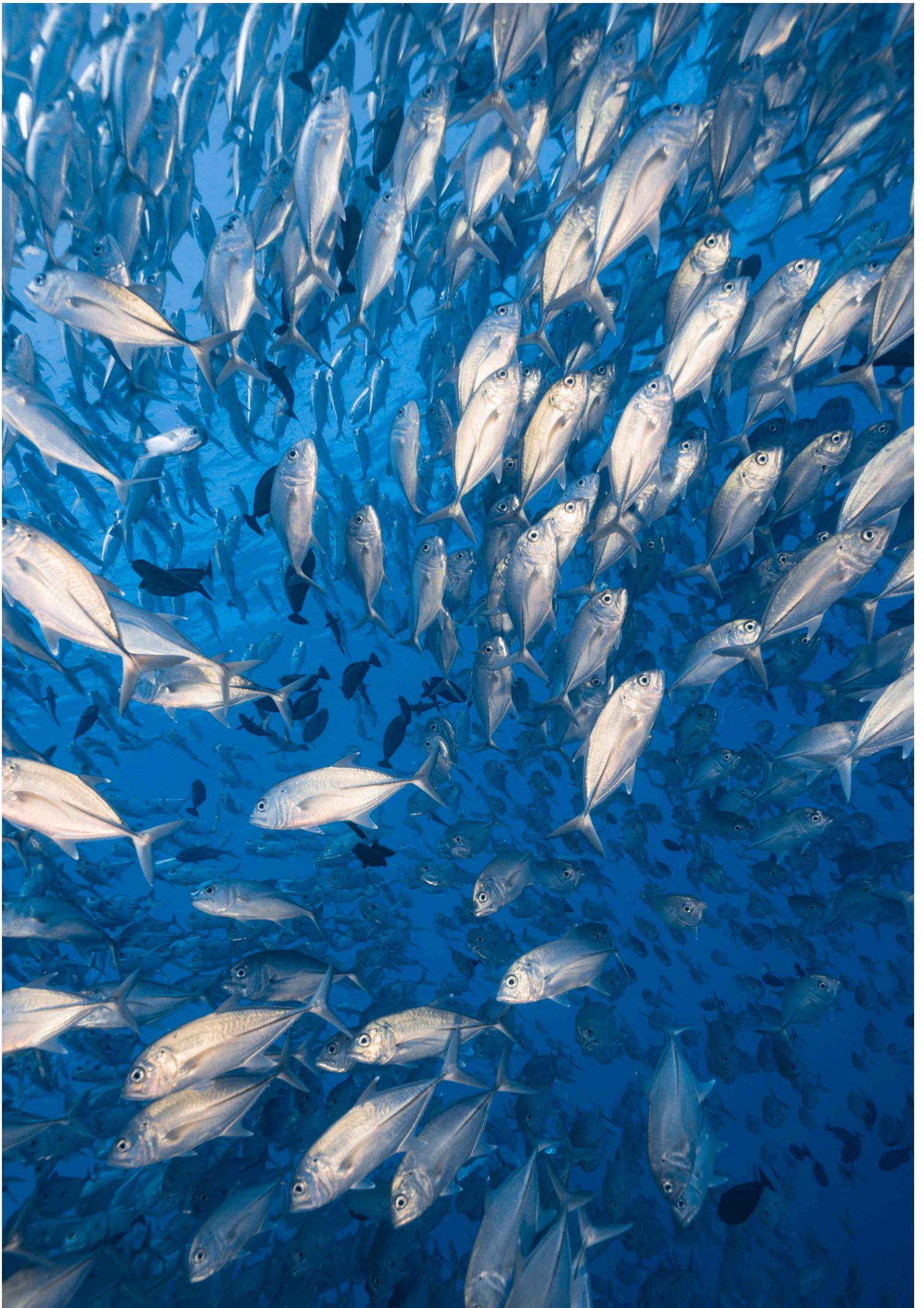
Source: Heise 1998

© UNFPA and WAVE 2014

<sup>110</sup> UN General Assembly, op.cit. at footnote 98; UN Women, *Virtual knowledge centre to end violence against women and girls: Causes, protective and risk factors*, <http://www.endvawnow.org/en/articles/300-causes-protective-and-risk-factors-.html> accessed 8 August 2017.

<sup>111</sup> Health-GenderViolence.org, *Strengthening Health System Responses to Gender-based Violence in Eastern Europe and Central Asia: A resource package, 1.3 Causes of gender-based violence* <http://www.health-genderviolence.org/guidance-for-health-care-professionals-in-strengthening-health-system-responses-to-gender-based-vi-0> accessed 21 November 2017; WHO, *The ecological framework*, <http://www.who.int/violenceprevention/approach/ecology/en/> accessed 18 August 2017; UN Women, *The Ecological Framework*, <http://www.endvawnow.org/en/articles/1509-the-ecological-framework.html> accessed 18 August 2017.

<sup>112</sup> UNFPA and WAVE, *Strengthening Health System Responses to Gender-based Violence in Eastern Europe and Central Asia: A Resource Package* (2014), <http://www.health-genderviolence.org/sites/default/files/download/WAVE-UNFPA%20English.pdf> accessed 18 August 2017.



## SECTION 3: GENDER BIAS IN SEXUAL AND GENDER-BASED VIOLENCE CASES

### 3.1 Introduction

This section examines the role of gender bias in judicial sentencing decisions and provides a non-exhaustive discussion of contentious factors that may be encountered by lawyers carrying out analysis of SGBV case law. Gender bias manifests itself in the stereotypes attached to women and the resulting myths that have developed in relation to SGBV. Such SGBV myths and stereotypes influence judges' views of the victim/survivor's credibility and are often factors used to attempt to diminish the culpability of the offender.

This section also looks at customary practices and the extent to which they put women at risk of violence and make it difficult for women to protect themselves against it. In the PICs, customary practices and, in particular, the acceptance of various forms of customary reconciliation as a mitigating factor in sentencing, diminish accountability for SGBV offences.

### 3.2 Gender Bias

Gender bias and gender stereotypes can affect the way we view, approach and respond to SGBV cases, both in society generally and within the judicial system. Gender bias, whether conscious, unconscious, explicit or implicit, can impact how SGBV cases are, and should be, classified (see paragraph 5.3 below). Gender bias can also affect the extent to which a victim/survivor's testimony is believed, whether the perpetrator is convicted and the sentence that the perpetrator receives.<sup>113</sup>

According to WHO, gender can be understood as:

*... socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. While most people are born either male or female, they are taught appropriate norms and behaviours – including how they should interact with others of the same or opposite sex within households, communities and work places. When individuals or groups do not “fit” established gender norms they often face stigma, discriminatory practices or social exclusion – all of which adversely affect health. It is important to be sensitive to different identities that do not necessarily fit into binary male or female sex categories.*<sup>114</sup>

Gender bias can be described as an inclination towards, or prejudice against, a person based upon their gender, and is perpetuated by gender stereotyping. Gender stereotyping occurs where there are generalised views or preconceptions about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, specific genders.<sup>115</sup> For example, a judge would exhibit gender bias if they were influenced by the clothes a victim/survivor of rape was wearing at the time of the offence. The notion that the length of a woman's skirt could be a mitigating factor in the sentencing of sexual assault is a clear illustration of gender bias.

<sup>113</sup> See Department of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* (15 December 2015), <https://www.justice.gov/crt/file/799316/download> accessed 6 November 2017.

<sup>114</sup> WHO, *Gender, equity and human rights*, <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> accessed 23 February 2018.

<sup>115</sup> See OHCHR Commissioned Report, *Gender Stereotyping as a Human Rights Violation* (October 2013), <http://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx> accessed 29 June 2016.

Gender bias connected to gender stereotypes can undermine justice for victims/survivors of SGBV in, among others, some of the following ways:<sup>116</sup>

- compromising the impartiality of judges' decisions by disregarding law and facts in favour of stereotypes;
- influencing judges' understanding of the nature of the criminal offence, (for example, the belief that a sex worker cannot be raped);
- affecting judges' views about witness credibility and legal capacity, often leading to negative views about the credibility of victims/survivors and positive views about the credibility of perpetrators;
- stopping judges from holding perpetrators legally accountable, especially where the victim/survivor does not fit the "ideal victim" archetype; and
- impeding access to legal rights and protections, such as denying women protection orders, which often allows SGBV to continue unchecked.

### 3.3 Gender Stereotypes

As noted above, gender stereotyping occurs where there are generalised views or preconceptions about attributes, characteristics, or roles that should be performed by specific genders. As a starting point, it is helpful to note the comments of Jivka Marinova of the UN Division for the Advancement of Women:

*Although in different cultures in the world the attitudes toward boys and girls show some nuances, girls are taught since the very early age that they have to obey, and boys – that they have to be strong and to be leaders.*<sup>117</sup>

The above statement provides a generalised understanding of global gender stereotypes, which can include ideas such as the male as the head of the household and/or breadwinner, or that women should be subservient or "exist to fulfil the desires of men".<sup>118</sup>

These stereotypes are held, and often internalised, by people of all genders. In the context of PICs, a report commissioned by Fiji Women's Crisis Centre National Research on Domestic Violence and Sexual Assault states:

*Women themselves appear to be culturally and socially conditioned to believe that violence inflicted upon them was justified under certain circumstances. While 80 per cent of respondents indicated that they would intervene in domestic violence conflicts, this appeared to contradict experiences of victims, where intervention was rare. The use of violence as a form of discipline in the home was still prevalent.*<sup>119</sup>

<sup>116</sup> OHCHR, *The harms of gender stereotyping*, <http://www.ohchr.org/EN/NewsEvents/Pages/GenderStereotyping.aspx> accessed on 6 November 2017.

<sup>117</sup> Jivka Marinova, *Gender Stereotypes and the Socialization Process* (October 2003), <http://www.un.org/womenwatch/daw/egm/men-boys2003/EP3-Marinova.pdf> accessed on 4 July 2017.

<sup>118</sup> ICAAD and DLA Piper, *op.cit.* at footnote 4.

<sup>119</sup> Chattier, Priya and Tararia, Almah, 'A Woman Should Be Beaten If She Deserves Punishment': *Conversations with Men and Women in Fiji and PNG*, In Brief (SSGM) no. 43, 2014.

In some PICs, the understanding of marriage roles prevents women from speaking about violence which has occurred inside the marital home. For example, “in some Vanuatu cultures, on the day of the wedding, women are told about their roles and that they cannot tell what happens at home outside the house. And they believe that is culture”.<sup>120</sup>

According to the OHCHR, such stereotypes are harmful because they *... frequently regard women as subordinate to men, or dictate that men should control women... These attitudes may be so widely and deeply held within the community that they are almost invisible – except in their effects. For they perpetuate discrimination, violence and humiliation.*<sup>121</sup>

Examples of how gender stereotyping can affect the partiality of the judiciary in PICs can be found below at paragraph 3.5.

## 3.4 SGBV Myths

### 3.4.1 Definition

SGBV myths are erroneous, stereotypical and prejudicial beliefs about rapists/assaulters, victims/survivors and the causes of SGBV. They are widely and persistently held, and serve to deny or justify male aggression against women. SGBV myths often originate from societal attitudes and cultural stereotypes such as traditional gender roles (see paragraphs 3.5.2 and 3.5.3 below) and the acceptance of interpersonal violence. They arise from a need to make sense of acts that are senseless, violent or disturbing, by reconciling them with preconceived ideas about society.<sup>122</sup>

### 3.4.2 Examples of SGBV Myths<sup>123</sup>

The table in Annex 1 provides some examples of myths surrounding SGBV, the underlying assumptions behind these, their implications and consequences, and the facts that debunk these myths. Such myths include that:

- rape occurs between strangers in dark alleys;
- women provoke rape by the way they dress or act;
- rape is a crime of passion; and
- if the victim/survivor didn't scream, fight or get injured, it wasn't rape.

<sup>120</sup> The World Bank, *op.cit.* at footnote 7.

<sup>121</sup> OHCHR, *The harms of gender stereotyping*, <http://www.ohchr.org/EN/NewsEvents/Pages/GenderStereotyping.aspx> accessed on 4 July 2017.

<sup>122</sup> ICAAD and DLA Piper, *op.cit.* at footnote 4.

<sup>123</sup> See the following sources for further detail:

- Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39.
- MacCorquodale, *Gender and sexual behaviour* (1989), McKinney and Sprecher (Eds.), *Human sexuality: the societal and interpersonal context*, 91–112, p.103.
- Abbey A., *Sex differences in attributions for friendly behavior: Do males misperceive females' friendliness?* *Journal of Personality and Social Psychology* 1982, Volume 42, 830–838, p.831.
- Petersen and Hyde, *A meta-analytic review of research on gender differences in sexuality, 1993-2007*, *Psychological Bulletin*, Volume 136, 21–38.
- Schmitt, *Sociosexuality from Argentina to Zimbabwe: A 48-nation study of sex, culture, and strategies of human mating* (2005), *Behavioral and Brain Sciences*, Volume 28, 247–311.

Please note that this list is non-exhaustive and primarily covers rape myths.

### 3.4.3 The Reality

SGBV myths encourage a culture of shame and victim-blaming. They endure, in part, because many crimes are not reported and those that are remain unpunished. For example, the myth that rape is always/only perpetrated by strangers is incorrect, as shown in the table below.

**Figure 6:** SGBV Statistics in PICs

Country	SGBV Statistics <sup>124</sup>
Fiji	64% of ever-partnered women experience physical and/or sexual violence by an intimate partner.
Kiribati	68% of ever-married women between the ages of 15-49 experience physical and/or sexual violence by an intimate partner. 33% of child sex abusers <sup>125</sup> are strangers.
Samoa	46% of ever-partnered women between the ages of 15-49 experience physical and/or sexual violence by an intimate partner.
Solomon Island	65% of ever-married women between the ages of 15-49 experience physical and/or sexual violence by an intimate partner. 24% of child sex abusers are strangers.
Tonga	40% of ever-married women between the ages of 15-49 experience physical and/or sexual violence by an intimate partner.
Vanuatu	60% of ever-married women between the ages of 15-49 experience physical and/or sexual violence by an intimate partner. 22% of sex abuse against adults <sup>126</sup> is committed by strangers. 30% of child sex abusers are strangers.

## 3.5 How Gender Bias and Stereotypes Affect Judicial Decisions and Sentencing

While gender bias can affect all stages of a criminal case, from reporting, investigation and prosecution, to conviction and sentencing, this Handbook focuses primarily on sentencing.

When it comes to the sentencing of perpetrators, SGBV myths resulting from gender stereotyping can be divided into two categories: (i) factors used to diminish the culpability of the offender, including victim blaming, underplaying the extent of physical/emotional harm inflicted and asserting that the victim/survivor is not vulnerable; and (ii) factors relating to the characteristics of the perpetrator and the impact that a lengthy sentence would have on his career, future (privileging the perpetrator's future and interests over the interests of the victim) and his family – for example, where weight in sentencing is given to the economic dependence that wives and children theoretically have on the male perpetrator.

<sup>124</sup> UNICEF, *Harmful Connections: Examining the relationship between violence against women and violence against children in the South Pacific* (2015), [https://www.unicef.org/pacificislands/Harmful\\_Connections\(1\).pdf](https://www.unicef.org/pacificislands/Harmful_Connections(1).pdf) accessed on 15 January 2017.

<sup>125</sup> Where the victim/survivor is under 15 years old.

<sup>126</sup> Where the victim/survivor is above 15 years old.

A judge who allows either (or both) of these factors to influence them is not impartial and will not be able to hand down a just sentence, as stated by the OHCHR:

*Judges may engage in stereotyping in one of two ways. Judges may apply, enforce and perpetuate stereotypes in their decision-making by substituting stereotypes for law and facts in evidence. Alternatively, they may facilitate the perpetuation of stereotypes by failing to challenge stereotyping, for example by lower courts or the parties to legal proceedings.*<sup>127</sup>

The consequences of such gender stereotyping can have the following impacts:

- distort judges' perceptions of what occurred in a particular situation of violence or the issues to be determined at trial;
- affect judges' vision of who is a victim/survivor of GBV;
- influence judges' perceptions of the culpability of persons accused of GBV;
- influence judges' views about the credibility of witnesses;
- lead judges to permit irrelevant or highly prejudicial evidence to be admitted to court and/or affect the weight judges attach to certain evidence;
- influence the directions that judges give to juries;
- cause judges to misinterpret or misapply laws; and
- shape the ultimate legal result.<sup>128</sup>

Gender stereotypes, bias and myths all play into the ways in which supposedly impartial members of the judiciary can implicitly or explicitly undermine SGBV cases. For example, in one study of sentencing for SGBV crimes in PICs, gender stereotypes were the sole contentious factor raised in 15% of the cases reviewed (and were present in combination with other factors in many more) and in 20.73% of cases where gender stereotypes were raised, the sentence was completely suspended.<sup>129</sup> This is examined in more detail below.

### 3.5.1 Stereotypes Affecting Credibility

Gender stereotypes affect not just considerations of how a woman should demonstrate her lack of consent, but also her credibility in presenting her case and in representing herself as a victim/survivor, as well as the extent of the harm she has suffered and any culpability she may have in the crime. Historically, there has been much focus on the (past or current) behaviour, actions and choices of the victim/survivor, which perpetuates the belief that victims/survivors of sexual assault are at least in part responsible for their own abuse.<sup>130</sup> Both legislation and court process are often biased by the prevalence of the "real rape" narrative, which constructs an ideal/"real" rape victim against whom all victims/survivors of sexual assault are measured. Women whose circumstances do not match those of such a victim may find their credibility in question.<sup>131</sup> In some cases, this can lead to inferences that the victim/survivor is deliberately presenting a misleading account of the facts to cover up sex that was actually consensual but that they regret or of which they are embarrassed.

<sup>127</sup> Cusack, S., *op.cit.* at footnote 35.

<sup>128</sup> *Ibid.*

<sup>129</sup> ICAAD and DLA Piper, *op.cit.* at footnote 4.

<sup>130</sup> Hallilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.75 and p.83; and Cusack, S. *op.cit.* at footnote 35, pp.18-19.

<sup>131</sup> Cusack, S. *op.cit.* at footnote 35, p.25.

In order to combat the harm which such discriminatory stereotyping can do, the UN strongly recommends that states:

- prohibit the admission of evidence pertaining to the victim/survivor's prior sexual history where irrelevant to the case at hand, since this plays into stereotypes that women who consent to some sex consent to all sex;<sup>132</sup> and
- remove any legislative requirements for corroboration of victim/survivor testimony or warnings to be given in respect of uncorroborated testimony (applying only to sexual crimes), since this is premised on the prejudicial assumption that women lie about rape.<sup>133</sup>

A set of legal requirements designed to prevent stereotyping in sexual assault cases and to address contentious issues around consent, corroboration and sexual history has been advanced in Rule 96 of The Rules of Procedure and Evidence of the International Tribunals for Rwanda and the former Yugoslavia. This addresses some forms of gender discrimination in courts by encouraging states to introduce laws which provide that: (i) the victim/survivor's testimony does not need to be corroborated; (ii) consent is not permitted as a defence if the victim/survivor was subjected to or threatened with, or has had reasons to fear, violence, duress, detention or psychological oppression, or reasonably believed that if they did not submit, another might be so subjected; (iii) the accused must satisfy the Trial Chamber "in camera" (in private) that any evidence of the victim/survivor's consent is credible before this can be submitted; and (iv) the victim/survivor's prior sexual conduct shall not be admitted in evidence or as a defence.<sup>134</sup>

### 3.5.2 How Perceptions of the "Masculine Role" Affect Sentencing

Common gender stereotypes regarding the "masculine role" include men as aggressive, sexually motivated, the breadwinner and head of the household.

The breadwinner argument, which focuses on the theoretical economic dependence of the wife and children upon the male perpetrator, is frequently used to **mitigate** the sentences of males responsible for SGBV. Indeed, sometimes the victims/survivors themselves plead for a non-custodial sentence for the perpetrator as the victims/survivors are financially reliant upon the perpetrator and would be destitute if he were to be sentenced to jail.<sup>135</sup> However, it is important to note that not all judicial officers accept the breadwinner argument; for example, in the case of *Rex v Vake* the Tonga Court of Appeal held:

*A sentence of full time custody will inevitably impose significant hardship on the other members of the offender's family, particularly his wheelchair bound mother and disabled bedridden son. Such hardship cannot be an overriding mitigating factor in cases where the objective gravity of the offences and the presence of aggravating factors call for a custodial sentence.*<sup>136</sup>

Judges have also been recorded as allowing gender bias to shape their judgment when it comes to the matter of provocation (namely, where the female allegedly provoked the male to act violently towards her; see paragraph 3.5.3 below for a more detailed discussion). Behind this is the assumption that the payment of bride-price (see paragraph 3.6.3 (b)) or the act of being married to or in a relationship with a woman gives the male partner rights over that woman.<sup>137</sup>

<sup>132</sup> UN, *op.cit.* at footnote 91, p.44.

<sup>133</sup> Cusack, S. *op.cit.* at footnote 35, p.40; UN, *op.cit.* at footnote 91, p.43.

<sup>134</sup> *Ibid.*

<sup>135</sup> *State v Mavuug* [2012] PGNC 255; N4898 (22 November 2012).

<sup>136</sup> *Rex v Vake* [2012] TOCA 7; AC 4 of 2012.

<sup>137</sup> *State v Lom* [2012] PGNC 63; N4725 (22 June 2012).

### 3.5.3 How Perceptions of the “Feminine Role” Affect Sentencing

Common gender stereotypes regarding the “feminine role” assume passivity, submission, dependence and emotionality in women, as well as a view that women are responsible for protecting their own purity. Where these gender stereotypes are defied, this can lead to the view that the woman has defied society, creating an unconscious bias against her. As a result, the following have all been used as **mitigating factors** put forward by the defence in SGBV cases in PICs:

- the victim/survivor had previous sexual partners and therefore was not as affected by the sexual assault<sup>138</sup> (this occurs even in cases where the victim/survivor is under 15 years old and the perpetrator much older);<sup>139</sup>
- the victim/survivor previously, or subsequently, had consensual sex with the perpetrator;<sup>140</sup>
- the victim/survivor had behaved in a way that led the perpetrator to think she may consent to additional advances, with evidence of belief in consent being behaviour such as having a drink with the perpetrator, being out at a nightclub, or getting into his car;<sup>141</sup>
- the victim/survivor tempted the perpetrator by wearing inappropriate clothing;<sup>142</sup>
- the victim/survivor was of “loose” morals;<sup>143</sup>
- the victim/survivor did not run away and so could have prevented the rape but did not;<sup>144</sup>
- the victim/survivor did not seem psychologically harmed by the incident (often drawn without conclusive medical evidence);<sup>145</sup> and
- the victim/survivor failed to report the rape earlier (even where she is between 9 and 13 years old).<sup>146</sup>

Further factors which were seen to **mitigate** the defendant’s sentence relate to alleged provocation on the woman’s part, implying that she is partly to blame for SGBV carried out against her due to her rejection of the feminine role (conversely, it is often seen as an **aggravating factor** where there was no provocation).<sup>147</sup> Such incidences include where the female partner has left the male partner;<sup>148</sup> where she has argued with the male partner;<sup>149</sup> and where she is having an affair or suspected of having an affair.<sup>150</sup> These factors also play into gender stereotypes surrounding “masculinity”: that men are passionate and/or unable to control their temper, or that men should discipline their wives. However, it should be noted that while this is a judicial trend in PICs, there are exceptions, such as in the case of *Rex v Fatani*, in which the court held:

138 *PP v Simeon* [2008] VUMC 3; *Police v Autagavaia* [2010] WSSC16.

139 *PP v Simeon* [2008] VUMC 3; *Regina v Haka* [2013] SBHC 15; HCSI-CRC 195 of 2012. In this case the child was 10 years, the perpetrator was 20 years, suspended sentence of 8 months.

140 *Regina v Waipage* [1997] SBHC 29; Criminal Case 46.1997; *State v Melly* (No 2) [2009] PGNC 138; N3779 (22 July 2009).

141 *Naidu v State* [2007] FJCA 4; *PP v Kalsaru* [2007] VUSC 84.

142 *Police v Korua* [2013] WSSC 52.

143 *PP v Simeon* [2008] VUMC 3.

144 *Regina v Tebounapa* [1999] SBHC 9; HC-CRC 033 of 1997; *The State-v- James Yali* (2006) PGNC 26; *PP v Marango* [2002] VUSC 7.

145 *State v Sipris* (No 2) [2003] PGNC 65; N2453 (1 August 2003).

146 *Regina v Kaboma* [1992] SBHC 69; HCSI-CRC 12 of 1992; *PP v Boesaleana* [2011] VUSC 321.

147 *State v Ali* [2014] FJMC 131.

148 *Regina v Gua* [2013] SBHC 2; Criminal Appeal Case 37 of 2012.

149 *State v Panta* (No.2) [2013] PGNC 111; N5287 (23 May 2013); *State v Autar* [2011] FJMC 163.

150 *State v Uraro* [2012] PGNC 298; N5164 (26 November 2012).

*It is significant that the accused said by way of defence at trial that they had a fight which she started. He seemed to think that it was all right for him to respond in this manner although he alleged it was only three or four slaps. The accused needs to be told in no uncertain terms that no man is entitled to strike his wife.*<sup>151</sup>

### 3.6 Customary Practices

Custom and collective practices are an important part of Pacific Island culture and a diverse range of traditions and customs exist throughout the region.<sup>152</sup> However, as with many cultures around the world, some customary practices and attitudes have been recognised as putting women at risk of violence and making it difficult for them to protect themselves against it.<sup>153</sup> To this end, the question of reconciling the human rights of people in PICs and the customary law, values and practices integral to their daily lives is key, and is rooted in the tension between cultural relativism and universalism.

There are at least two types of cultural beliefs and practices that may lead to gender bias in sentencing: i) those that include gender stereotypes and biases that the court may consider as mitigating circumstances (e.g. provocation or bride-price) and ii) those that, in the way they operate, are discriminatory towards women (e.g. reconciliation between the families of both parties or compensation to the chief of the village) and that, when taken into account by the court, undermine equal protection under the law for female victims/survivors.

#### 3.6.1 Customary Reconciliation

Customary reconciliation is a term used to describe the processes which have been adopted by some socio-cultural groups in order to restore relations between members of that group. For example, Don Paterson describes the purpose of a customary reconciliation ceremony in Vanuatu to be the restoration of “harmony and peace between the members of the community who have been affected by the wrongdoing ... held as soon after the event as possible”.<sup>154</sup>

The legislation in most PICs allows customary reconciliation and other customary laws to be taken into account during sentencing. Yet, “customary law” is rarely defined and it appears that some harmful practices against women are simply regarded as customary legal practices and consequently are not challengeable. Provided that the customary practices do not conflict with constitutional law and are consistent with principles of humanity, there is little recourse against gender discriminatory abuse within customary practice. Please see paragraph 4.3 for the legal status of customary law in PICs.

What constitutes “customary law” appears to be flexible. There is some indication that more recent interpretations of customary law may in fact be a

<sup>151</sup> *Rex v Fatani* [2004] TOSC 65; CR 300 2003.

<sup>152</sup> Civil Liberties Australia, *Balancing Human Rights and Customs in the Pacific Region: A Pacific Charter of Human Rights?* (20 August 2009), <http://www.cla.asn.au/Article/2009/Paper%20Kelly%20HS%200912.pdf> accessed 10 August 2017.

<sup>153</sup> Jalal, I., UN Division for the Advancement of Women, UN Economic Commission for Africa, *Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Laws* (3 June 2009), [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2009/Expert%20Paper%20EGMGPLHP%20\\_Imrana%20Jalal\\_.pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Imrana%20Jalal_.pdf) accessed 9 August 2017.

<sup>154</sup> Don Paterson, *Customary Reconciliation in Sentencing for Sexual Offences: A Review of Public Prosecutor v Ben and Others and Public Prosecutor v Tarilingi and Gamma* (2006) 10 (1) *Journal of South Pacific Law*, <http://www.paclii.org./journals/fJSPL/vol10/12.shtml> accessed 16 April 2008.

hostile response to the growing assertiveness of women, changing gender roles and rapid economic change.<sup>155</sup> For example, some Papua New Guinean communities which did not practise the bride-price tradition in the past have adopted the practice as a way of demanding money for the marriage of a daughter.<sup>156</sup> Papua New Guinean politician Dame Carol Kidu noted:

*I think it is important that it is clarified that what is cultural practice now is not traditional practice. It is an evolution from traditional practices and unfortunately often to the detriment of women and girls. Many new cultural practices have been much influenced by western (mis)interpretation of culture and by the huge impact of commercialization of culture by cash input.*<sup>157</sup>

### 3.6.2 Types of Customary Reconciliation

#### (a) Payment of Compensation, Formal Apology and Acceptance

Compensation is a common form of reconciliation in PICs. The payment of compensation is regarded as a tacit acknowledgement of wrongdoing. It is often paid to the family of the victim/survivor rather than the victim/survivor directly. This is demonstrative of the view that the overarching purpose of reconciliation is the re-establishment of harmony within the community, rather than simply the offender and their victim/survivor(s).<sup>158</sup> As stated by Nick Goodenough:

*The concept of reconciliation and compensation is very important in the Solomon Islands way of life. From the policy perspective it makes good sense that where a small population live in the finite reality of an island that a mechanism exists to enable continuous harmonious living.*<sup>159</sup>

Fifi'i, a Solomon Islander, has explained how he considers the payment of compensation to be an effective reconciliatory tool:

*Our customary laws work better than (the criminal court process) – at least for us, and our way of life and the things we value. When compensation is paid, in shell money or whatever, then the two sides are joined together again. Both sides are satisfied and nobody is angry afterwards.*<sup>160</sup>

He further explained that, following the payment of compensation, both sides are “joined together again” and “nobody is angry afterwards”, indicative of the symbolic and ritualistic importance of compensation as a means of achieving social cohesion. As such, seeking justice for the victim/survivor, punishment of the perpetrator and the deterrence of the crime do not appear to be priorities. In this instance, reconciliation can block cases from reaching court.

An apology is a mitigating factor in many of the PICs' sentencing processes. An apology is often made publicly, but does not always require the victim/survivor's acceptance. Notwithstanding that a sincere apology can and should be taken into account when sentencing an offender, the focus in many PICs is on the apology itself rather than the victim/survivor's response. For example, in one case

<sup>155</sup> Jalal, I., *op.cit.* at footnote 153.

<sup>156</sup> Ali, S., UN Division for the Advancement of Women in collaboration with UNICEF, *Violence against the girl child in the Pacific Islands region* (25 – 28 September 2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.14%20%20Ali.pdf> accessed 4 October 2017.

<sup>157</sup> UNESCAP, *Pacific Perspectives on the Commercial Sexual Exploitation and Sexual Abuse of Children and Youth*, (2009), 95.

<sup>158</sup> Secretariat of the Pacific Community, *Solomon Islands: Legal Analysis on Violence Against Women* (July 2013), p.59.

<sup>159</sup> Good, N., *Reconciliation and the Criminal Process in the Solomon Islands*, *Journal of South Pacific Law*, 2006.

<sup>160</sup> Fifi'i, J. (Roger Keesing, Editor and Translator), *From Pig Theft to Parliament: My Life between Two Worlds* (1989) 148.

in Nouwai, Vanuatu, a sentence was reduced by one third because of the defendant's "pleas of guilt, the fact that [he] had no previous convictions, [his] public apology and [his] willingness to undergo a custom ceremony".<sup>161</sup>

Some PICs have a more formal approach to reconciliation. Their legislation requires customary practices to be taken into account during sentencing. For example, the constitution of Samoa states that the law includes customary law and, consequently, the Village Fono has the power to impose punishments under custom. *Ifoga*<sup>162</sup> is a group activity where typically one group apologises for the conduct of one of its members to another offended group. *Ifoga* requires a public act of self-humiliation as well as a gift.<sup>163</sup> The self-humiliation involves contrition, submission and apology.<sup>164</sup> *Ifoga* is concerned with re-establishing male honour, not bringing justice to the victim/survivor. It places emphasis on maintaining peace between groups rather than women's well-being or wish for justice.<sup>165</sup>

Similarly *te kabara bure* (formal apology) in Kiribati acts as a deterrent by making crimes public and the consequences of criminal activity socially humiliating. Again, a male perpetrator can regain his social standing by formally apologising and the victim/survivor is often not part of the ceremony.<sup>166</sup>

In Fiji, the court may, in assault cases of a personal or private nature, promote reconciliation, and encourage and facilitate settlement. For example, *bulubulu* allows a perpetrator to seek forgiveness from the injured party, or the injured party's family, and reconciliation.<sup>167</sup> *Bulubulu* may constitute a mitigating factor in the sentencing process under the Criminal Procedure Decree (2009), although it should be noted that this only applies to the offences of common assault or assault occasioning actual bodily harm.<sup>168</sup>

In many PICs, legislation requires the courts to consider the payment of compensation when sentencing. For example, the Vanuatu Penal Code even allows for the postponing of the sentence until compensation is paid:

*When sentencing an offender, the court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone [the] sentence for such purpose.*<sup>169</sup>

While in many cases it is the act of the apology rather than its acceptance that is important, even in cases where the acceptance or non-acceptance is taken into account, the force of custom can have the effect of negating any real possibility of a complainant or survivor rejecting the apology and gift/compensation that comes with customary reconciliation. The external pressure to fix relations between the two families, communities or tribal groups, can be considerable.<sup>170</sup> Rejections of customary apologies by the victim/survivor

<sup>161</sup> Don Paterson and Anita Jowitt, *More on customary Reconciliation Ceremonies in Sentencing for Criminal Offences*, *Journal of South Pacific Law* (2008) 12(2).

<sup>162</sup> Jalal, I., *op.cit.* at footnote 153.

<sup>163</sup> Per Justice Fisher in *Iosu v AG* [2014] WSCA 5 para 40. In Samoa *ifoga* is taken into account by the court even in cases of rape of young girls (see *Police v PE* [2013] WSSC 10; *Police v Lauvae* [2011] WSSC 75; *Police v Moatoga* [2012] WSSC 61; *Police v Tuifao* [2012] WSSC 6).

<sup>164</sup> Cluny and La'avasa MacPherson, *The Ifoga: The Exchange Value of Social Honour in Samoa*, (2005) 114 *Journal of the Polynesian Society* 109.

<sup>165</sup> Jalal, I., *op.cit.* at footnote 153.

<sup>166</sup> ICAAD and DLA Piper, *op.cit.* at footnote 4.

<sup>167</sup> *State v Makutu* [2012] FJHC 1081; but compare *Apenisa Seruitata v The State* [2004] FJHC 20, where the judge refused to take it into account; and *Talevakarua v State* [2008] FJHC 322, para.14.

<sup>168</sup> Please see paragraph 4.3.3 for further information.

<sup>169</sup> Vanuatu Penal Code (Amendment) Act 2006.

have led to banishment and social exclusion from the village or community.<sup>171</sup> Social cohesion often takes precedence over retributive justice.<sup>172</sup>

### **(b) Banishment from the Village**

Banishment from the village is a traditional customary practice and its reconciliatory value is debated. The penalty of banishment remains a customary penalty, but in Samoa and other PICs banishment has moved from the “mandate” of the village council to that of the court. The Samoan constitution, for example, states that banishment decisions should be made by the court only, in order that:

*...the imposition of a banishment order is made fair and reasonable and according to law. An individual who is dissatisfied with a decision given at the first instance level of the Land and Titles Court also has further (formal) avenues for seeking redress as the Land and Titles Court can make a banishment order, so that court can cancel it.*<sup>173</sup>

### **(c) Payment of a Fine to the Village Chief**

The payment of a fine to a village chief is another example of how the maintenance of peace between groups and their leaders in SGBV cases takes precedence over women’s well-being. When women report a sexual assault to the chief of the village, in the absence of a formal police presence, the chief might order the family of the perpetrator to pay compensation to the complainant’s family. Such compensation may take the form of pigs, woven mats, kava, shell money, whale’s teeth or cash.<sup>174</sup> Some magistrates have even argued that cases of sexual assault should be dealt with by chiefs rather than courts, and that it would decrease the likelihood of retribution in the form of a separate sexual assault:

*I think the most that can be done is to call the parties involved, maybe the chief can do it in a chief’s hearing—he will take a walk over to the house of the man, and ask him to pay compensation to her or to the family (usually not her). The payment is to prevent a payback against him, maybe to rape his daughter (male magistrate, Solomon Islands).*<sup>175</sup>

An example of where the payment of a fine was considered a mitigating factor is in the case of *Public Prosecutor v Tabisal*, Vanuatu. The accused had pleaded guilty to rape of a nine year old girl. He paid the chiefs customary settlement of three pigs and six mats, which neither the rape victim/survivor nor her parents shared in. This was taken into account in reducing the charge from rape to unlawful sexual intercourse. The High Court considered the offence very serious because of the girl’s age, but because the accused was a first-time offender and had made a customary settlement, his sentence was reduced to only three years.<sup>176</sup>

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170 Jalal, I., *op.cit.* at footnote 153.

171 *Ibid.*

172 ICAAD and DLA Piper, *op.cit.* at footnote 4.

173 Mark Findlay, *Crime, community penalty and integration with legal formalism in the South Pacific*, the Journal of Pacific Studies, Volume 21, 1997, 145–160, p.154.

174 Jalal, I., *op.cit.* at footnote 153.

175 AusAid, *Violence Against Women in Melanesia and East Timor: Building on Global and Regional Promising Approaches* (2008), p.16.

176 Jalal, I., *op.cit.* at footnote 153.

### 3.6.3 Other Beliefs and Practices linked to SGBV in PICs

#### (a) Belief in sorcery and witchcraft

Sorcery and witchcraft are raised in a number of SGBV crimes across the PICs: sorcery-related killings (*sangumas*) of innocent women are most common (wherein the woman is accused of being a witch or sorceress) in parts of Papua New Guinea and Vanuatu.<sup>177</sup>

In some tribes, sorcery is blamed for sudden and unexplained deaths and mysterious illness. Women suffering from HIV/AIDS are also often thought to be victims of sorcery and blamed for spreading the disease into their community.<sup>178</sup>

Women accused of witchcraft or sorcery are usually economically dependent, elderly women who are perceived to be a 'financial burden' on their tribes. Those victims/survivors face inhumane treatment, such as being thrown over a cliff or into rivers/caves, being burned or buried alive, beheaded, choked to death, starved, axed, electrocuted, suffocated with smoke, forced to drink petrol or hot liquid, stoned or shot.<sup>179</sup>

Violence against women committed on the basis of suspected sorcery and/or witchcraft often goes unpunished as sorcery and witchcraft are seen as morally reprehensible and are illegal in many PICs. A few countries still have laws which criminalise witchcraft or sorcery, which effectively legitimises crimes against supposed witches. For example, in Nauru:

*Any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for one year.*<sup>180</sup>

Vanuatu prohibits the practice of sorcery in its Penal Code. Section 151 provides that "no person shall practise witchcraft or sorcery with intent to cause harm or detriment to any other person. The penalty is imprisonment for two years".<sup>181</sup>

In Fiji,<sup>182</sup> the recognition of witchcraft is also codified and witchcraft is made illegal.

In Papua New Guinea, *puripuri*, the traditional belief in sorcery, has been used as a pretext for brutal acts of violence,<sup>183</sup> the victims/survivors mostly being women.<sup>184</sup> In May 2013, Papua New Guinea repealed the Sorcery Act (1971), which had acknowledged acts to stop sorcery as a plausible defence in murder cases.<sup>185</sup>

177 *Ibid.*

178 Jalal, I., *op.cit.* at footnote 153.

179 Amnesty International, *Papua New Guinea: Violence Against Women: Not Inevitable, Never Acceptable!* (September 2006), <https://www.amnesty.org/en/documents/ASA34/002/2006/en/> accessed 10 August 2017.

180 Queensland Criminal Code 1899 (as in force from 3 December 2011), s.432, [http://ronlaw.gov.nr/nauru\\_ipms/files/acts/7a6152bda0c095cb3b94813330d84b80.pdf](http://ronlaw.gov.nr/nauru_ipms/files/acts/7a6152bda0c095cb3b94813330d84b80.pdf) accessed 6 January 2018.

181 Vanuatu Penal Code, s.151.

182 Fiji Crimes Decree (2009), s.263.

183 Amnesty International, *Papua New Guinea: Violence against women, sorcery-related killings and forced evictions* (May 2011), <https://www.amnesty.org/en/documents/ASA34/005/2010/en/> accessed 10 August 2017.

184 Human Rights Watch, *World Report 2017: Papua New Guinea*, <https://www.hrw.org/world-report/2017/country-chapters/papua-new-guinea> accessed 10 August 2017.

185 Amnesty International, *Papua New Guinea: Time for a Real Action to Protect Human Rights: UN Universia Periodic Review of Papua New Guinea* (May 2016), <https://www.amnesty.org/download/Documents/ASA3435402016ENGLISH.pdf> accessed 10 August 2017.

### (b) Bride-price

Bride-price is one of the most widespread customary practices putting women at risk in PICs (particularly in the Melanesian region and East Timor), where a groom pays a token amount of money to his bride's family.<sup>186</sup> The payment of bride-price is often used as a justification for violence and to reinforce notions of "ownership", which make it difficult for women to escape violent situations.<sup>187</sup> This links to earlier discussions of gender stereotyping surrounding the "feminine role". Furthermore, such practices serve not only to mitigate sentencing, but often result in customary reconciliation, which prevents cases from reaching the courts in the first place, as discussed below at paragraph 3.7.

In Papua New Guinea, according to the Law Reform Commission, "a certain amount of domestic violence is accepted as normal in most parts of the country, with bride-price seen as justifying a husband's right to beat his wife in many of Papua New Guinea's diverse societies."<sup>188</sup>

There are laws that specifically seek to ban defences based on bride-price. Vanuatu's Family Protection Act (2008) ("**VFPA**") creates a specific criminal offence of domestic violence and states clearly that the payment of bride-price has no bearing on guilt, and is not a defence to prosecution in domestic violence cases:<sup>189</sup>

*10. (1) A person who commits an act of domestic violence is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 5 years or a fine not exceeding 100,000 Vatu, or both. (2) It is not a defence to an offence under subsection (1) that the defendant has paid an amount of money or given other valuable consideration in relation to his or her custom marriage to the complainant.*<sup>190</sup>

## 3.7 How Customary Reconciliation Affects Judicial Decisions and Sentencing

In some PICs, customary practices and customary reconciliation are taken into account during sentencing, sometimes in the place of, and sometimes parallel to, the formal justice process. In the latter instances, even though such practices occur outside the framework of official laws, research indicates that the carrying out of such practices is often taken into account by the judiciary when deciding appropriate sentences for the perpetrator of SGBV. Indeed, research has shown

186 Jalal, I., *op. cit.* at footnote 153.

187 Kotoisuva, E., UN Department of Economic and Social Affairs, *Combating Violence against Indigenous Women and Girls: Article 22 of the UN Declaration on the Rights of Indigenous Peoples, Violence Against Women and Girls in the Pacific* (18-20 January 2012), [http://www.un.org/esa/socdev/unpfii/documents/EGM12\\_Kotoisuva.pdf](http://www.un.org/esa/socdev/unpfii/documents/EGM12_Kotoisuva.pdf) accessed 10 August 2017.

188 Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14 (1992), [http://beta.pacii.org/pg/LRC/REP\\_14.htm](http://beta.pacii.org/pg/LRC/REP_14.htm) accessed 10 August 2017.

189 Jalal, I., *op.cit.* at footnote 153.

190 VFPA, s.10.

that the courts in PICs took into account customary practices as mitigating factors when deciding the sentence of the perpetrator in 29% of cases relating to adult females and 22% of child cases,<sup>191</sup> in some cases resulting in a custodial sentence being reduced to a non-custodial sentence.<sup>192</sup> While it should be noted that in some cases of SGBV against young children, judges are not willing to accept customary reconciliation as a mitigating factor based on the argument that children are too young to understand the consequences of or to benefit from such reconciliation,<sup>193</sup> such reasoning is the exception to the rule.<sup>194</sup>

Customary practices can lead to gender bias where they are applied or interpreted in a way that results in discrimination against women. This is evidenced in cases where courts have reduced sentences for the perpetrator based on the perpetrator's participation in a reconciliation ceremony or formal apology.<sup>195</sup> Such a system is perpetuated and expounded by issues of gender – frequently, the apology will be accepted by the victim/survivor in order to adhere to expectations of compliance on their part based on society's beliefs surrounding the "feminine role", alongside the fear that defiance can lead to being banished from their household or community, with all economic ties cut.<sup>196</sup> Such acceptance is taken by the courts as a reason to reduce the sentence of the perpetrator, hampering the formal justice process. It should be noted that the judiciary do sometimes take into account factors surrounding the reconciliation which may reduce its mitigating effect or lead to it being ignored entirely, including:<sup>197</sup>

- (a) whether the apology was offered by the perpetrator or a spokesman for the perpetrator and whether the ceremony is outstanding or has already been carried out;<sup>198</sup>
- (b) whether the perpetrator pays compensation;<sup>199</sup> and
- (c) whether the apology is directed towards the victim/survivor herself rather than the family or village.<sup>200</sup>

191 ICAAD and DLA Piper, *op.cit.* at footnote 4.

192 *PP v Kevin Gideon* [2002] VUCA 7.

193 *State v Peter* [2002] PGNC 18; N2336 (11 April 2002).

194 *Police v Metu* [2013] WSSC 103.

195 See for example *Raisoqoni v State* [2011] FJHC 32, where the performance of *bulubulu* was a mitigating factor; and *Republic v Uaititi* [2010] KHC 35, where a formal apology was a mitigating factor.

196 Biersack et al., *op.cit.* footnote 11.

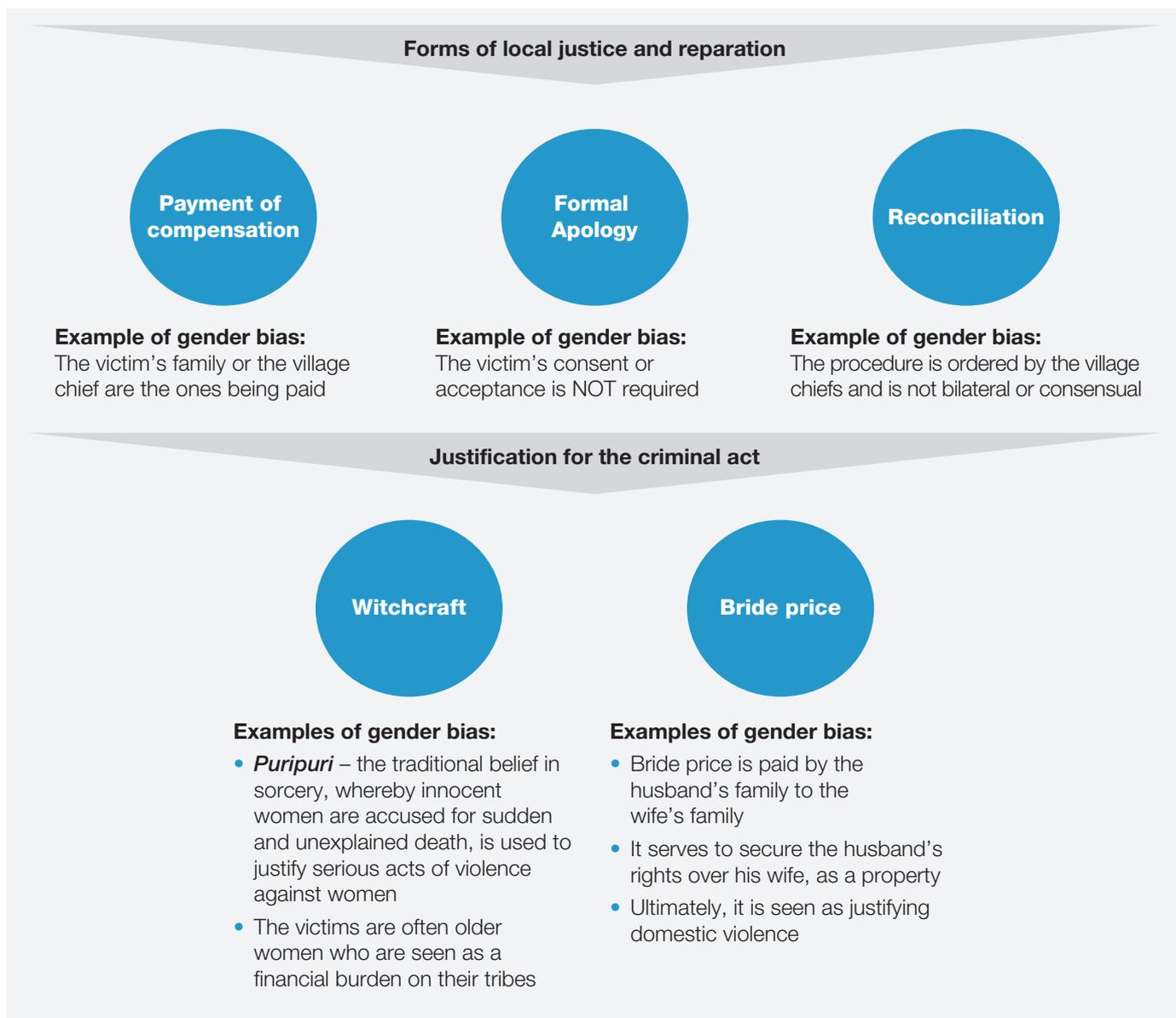
197 ICAAD and DLA, *op.cit.* at footnote 4.

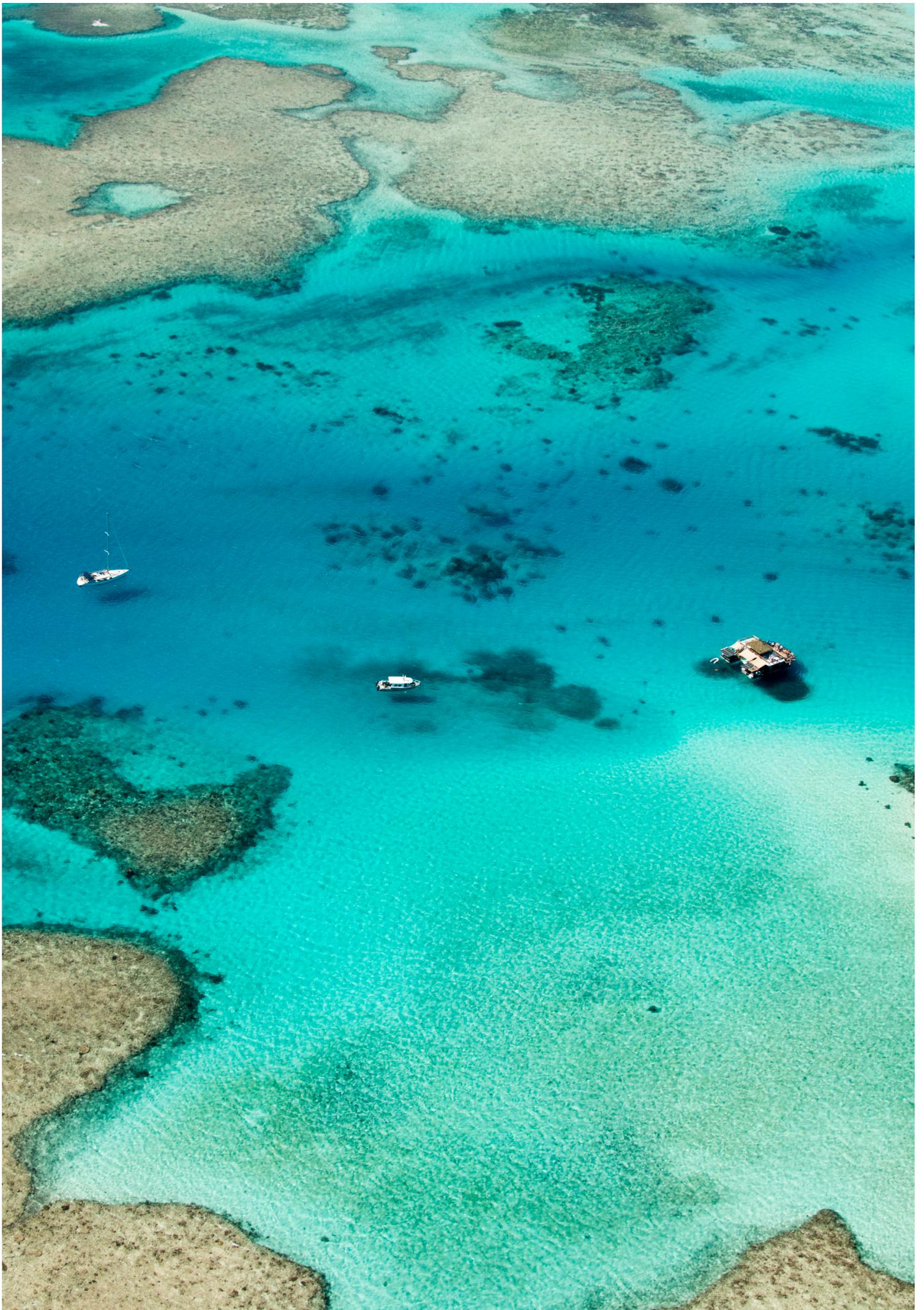
198 *Koilo v PP* [2010] VUCA 27.

199 *Giamur v State* [2007] PGSC 7; SC884 (23 February 2007).

200 *Koilo v PP*, *op.cit.* at footnote 198.

**Figure 7:** Forms of local justice and reparation, and justification for the criminal act, that may contain gender discrimination and bias





## SECTION 4: LEGAL CONSIDERATIONS

### 4.1 Introduction

This section analyses the obligations placed on states by international human rights law to protect women against SGBV, particularly under CEDAW. This section also examines the sentencing processes in PICs in relation to international standards which have been promulgated to guide criminalisation and sentencing for various forms of SGBV.

### 4.2 International Human Rights Law

#### 4.2.1 Introduction

Under international human rights law, states have an obligation to protect people against SGBV through the removal of harmful gender stereotypes and biases and by providing equal protection under the law through legislation, policies, structures and practices. International human rights law also imposes obligations on states to ensure that justice is dispensed equally without gender discrimination and provides guidance on the drafting and implementation of legislative protections. This section explores those obligations in further depth.

The first section sets out a summary of the general relationship between international law and domestic law in the PICs. This is important for understanding how international law influences and shapes domestic law. The second section provides a list of all the relevant human rights-oriented international legal and policy instruments signed and ratified, or acceded to, by each of the PICs. This gives a good picture of the extent to which each PIC has adopted international standards, and shines a light on regional trends. For example, it shows that some PICs may have concerns over adopting international treaties that have the potential to place a significant financial burden on the state. Finally, it explores state obligations under international law in respect of SGBV standards. This explains how international law should be translated into practical action, with a focus on the international law that most of the PICs are bound by.

#### 4.2.2 The Relationship between International Law and Domestic Law

The application of international law obligations at a state's domestic level will depend on the approach of the legal system of that particular state.

- (a) Under the dualist approach, international law obligations, such as those deriving from treaties that states sign, will only become applicable at the state's domestic level if there is domestic legislation that gives the treaty effect domestically. This tends to be the approach adopted by states whose legal systems are influenced by British jurisprudence.<sup>201</sup> Other than Palau and the Federated States of Micronesia, all PICs are dualist states.
- (b) Under the monist approach, international law obligations are considered to be directly applicable in the state's legal system without separate domestic legislation. This tends to be the approach adopted by states whose legal system is influenced by American jurisprudence.<sup>202</sup> Palau and the Federated States of Micronesia are monist states.

<sup>201</sup> Pacific Islands Legal Information Institute, *Pacific Island Treaty Series: How Treaties become Law*, <http://www.paclii.org/pits/en/domestication.shtml> accessed 1 May 2017. The case of *Chubb Ins. v Eleni, et al.*, SCT Civ 16-02 (June 6, 2017) subsequently confirmed that the Marshall Islands is a dualist state.

<sup>202</sup> *Ibid.*

### 4.2.3 International Legal and Policy Instruments

There are a number of international treaties relevant to the issue of SGBV, the most relevant of which include CEDAW and the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”).

CEDAW requires states to, among other things, incorporate the principle of equality of men and women into their legal system, act to remove stereotyped roles of men and women and the idea of the inferiority of one gender, abolish discriminatory laws and establish effective institutions to protect against gender discrimination. It also specifically addresses violence against women in its General Recommendation No. 35. ICESCR requires states to protect economic, social and cultural rights, including the right to non-discrimination, the right to work, the right to the highest attainable standards of health and cultural freedoms.

The table in Annex 2 provides further detail on which treaties the PICs have signed, ratified or acceded to, and is summarised below:

- (a) All PICs have signed, ratified or acceded to Convention on the Rights of the Child (the “**CRC**”) and all except Tonga and Palau have signed, ratified or acceded to CEDAW. Only two of the PICs have signed, ratified or acceded to the Optional Protocol to CEDAW (the “**CEDAW Optional Protocol**”). The CEDAW Optional Protocol provides a remedy for violations of women’s rights. The CEDAW Optional Protocol contains two procedures:
  - (i) A communications procedure, which allows individual women, or groups of women, to submit claims of violations of rights protected under CEDAW to the CEDAW Committee.
  - (ii) An inquiry procedure, which enables the CEDAW Committee to initiate inquiries into grave or systematic violations of women’s rights.

States must be parties to CEDAW and the CEDAW Optional Protocol to make use of these procedures. A state which ratifies the CEDAW Optional Protocol recognises the competence of the CEDAW Committee to receive and consider complaints from individuals and groups within its jurisdiction. It includes an opt-out clause, which allows states to declare that they do not accept the inquiry procedure.

- (b) Only three PICs have signed, ratified or acceded to the ICESCR, whereas most of the countries around the world (165 out of 197) have either signed, acceded or ratified it. A possible reason for this discrepancy was articulated in the Solomon Islands’ draft federal constitution explanatory notes, where it states that the rights in the ICESCR “have been so broadly interpreted or given extensive meaning to suit or accommodate certain western world ideals which are in direct conflict with the beliefs, norms and practices of Solomon Islands’ contemporary and traditional society”.<sup>203</sup> Another possible, and more generally applicable, explanation for the disproportionately high number of PICs which have not signed, ratified or acceded to the ICESCR in relation to the rest of the world, is that there may be a concern over excessively onerous obligations that would put pressure on the limited financial resources of the state.<sup>204</sup> This latter reason may also serve as an explanation for the low levels of PIC participation in other optional protocols more generally.

203 Awa, Ruby, *Why should Pacific Island Countries sign ICESCR?* Pacific Community Regional Rights Resource Team Human Rights Programme, <http://rrrt.spc.int/publications-media/featured-articles/item/690-why-should-pacific-island-countries-sign-icescr> accessed on 6 June 2017.

204 *Ibid.*

- (c) Only four PICs have signed, ratified or acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “**CAT**”), whereas most of the countries around the world (162 out of 197) have signed, acceded or ratified it. One possible reason for this discrepancy, as expressed at the regional workshop for PICs held in Fiji on the benefits of and challenges to ratifying and implementing the CAT, is the shortage of human and technical capacity, as well as perceived burdens from the reporting obligations under CAT.<sup>205</sup>
- (d) Another international legal instrument which is pertinent to SGBV (but has not been signed, ratified or acceded to by certain PICs) is the International Convention for the Suppression of the Traffic in Women and Children.<sup>206</sup>

#### 4.2.4 SGBV, International Law and State Responsibility

SGBV deprives women of enjoyment of their fundamental human rights under international law, and therefore constitutes a human rights violation.<sup>207</sup> SGBV has been found to violate individuals’ rights to privacy, non-discrimination, equality before the law, health, best interests of the child and freedom from torture. For example, the European Court of Human Rights has ruled that rape constitutes a form of torture and, as such, is a violation of Article 3 of the European Convention on Human Rights (1950) (the “**ECHR**”).<sup>208</sup>

States have a positive duty under international law, including under General Recommendation No. 19, to act with due diligence to prevent violations of women’s human rights, and to eliminate all forms of discrimination, including gender and sex-based discrimination, in judicial processes among others, and to eliminate harmful gender stereotypes.<sup>209</sup> To the extent that a state fails to act to prevent SGBV, or to adequately investigate, punish and redress acts of violence, such state may be held responsible, even for abuses incurred by private individuals.<sup>210</sup> CEDAW jurisprudence includes a number of cases (for example, *Fatma Yildirim (deceased) v Austria* (Communication No. 6/2005)) where states have been found to have violated the human rights of women by failing to take adequate steps to protect them from SGBV.<sup>211</sup> The due diligence requirement involves developing adequate penal, civil, labour and administrative sanctions in domestic legislation to punish and redress violence against women, providing women with just and effective remedies for the harm that they have suffered, and protecting them from SGBV.<sup>212</sup> The UN Handbook for Legislation on Violence against Women (the “**UN Handbook**”) recommends that domestic legislation addressing SGBV should provide for sentences that are commensurate with the gravity of the crime committed in order to achieve justice.<sup>213</sup>

205 Convention Against Torture Initiative, *A regional push for UNCAT ratification and implementation in the Pacific*, <http://www.cti2024.org/en/news/a-regional-push-for-ratification-and-better-implementation-of-uncat-in-the-pacific/> accessed on 6 June 2017.

206 International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 24 April 1950, as amended 12 November 1947) 53 UNTS 39, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VII-2&chapter=7&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-2&chapter=7&clang=en) accessed on 19 January 2018.

207 CEDAW Committee, *op.cit.* at footnote 24, paragraphs 1 and 6.

208 Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.78.

209 CEDAW Committee, *op.cit.* at footnote 24, paragraph 9; and CEDAW, preamble.

210 CEDAW Committee, *op.cit.* at footnote 24, paragraph 9.

211 OHCHR, *op.cit.* at footnote 69, p.77.

212 DEVAW, *op.cit.* at footnote 22, Article 4; CEDAW Committee, *op.cit.* at footnote 24, paragraph 24; CEDAW, Article 2.

213 UN, *Handbook for Legislation on Violence against Women* (2010), p.50.

States should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to the elimination of SGBV.<sup>214</sup> It should be recognised by states that certain cultural legal practices, such as ordering the offender to pay compensation to the victim/survivor's family or community, or the use of reconciliation proceedings, may not effect justice for the female victim/survivor, as they do not focus on her healing or need for redress.<sup>215</sup> Where cases are processed under customary and/or religious law, therefore, this should not preclude them from being brought also in formal proceedings, should that prove a better forum to ensure respect for the victim/survivor's human rights and equality.<sup>216</sup>

International law guidelines for best practice in addressing SGBV are crafted in light of an understanding of SGBV as a violation of human rights law, and as a manifestation of pervasive discriminatory attitudes held against women. In respect of the application of SGBV laws, states should take appropriate measures to reduce judicial stereotyping<sup>217</sup> (as discussed at paragraphs 3.2, 3.5 and 3.7 above). The UN Human Rights Committee advises that judges' decisions should not be influenced by personal bias or prejudice, and the tribunal must also appear to a reasonable observer to be impartial.<sup>218</sup> The importance of states addressing such stereotyping in the legal and justice systems has been recognised, as the prevalence of gender stereotypes and prejudices in those areas is a key cause of the high attrition rate in the prosecution of sexual offences, leading to a problem of impunity.<sup>219</sup>

With respect to the UN typology of violence against women identified in paragraph 2.3.1, the following international standards have been promulgated to guide criminalisation and sentencing:

#### **(a) Domestic and Intimate Partner Violence**

At least 119 countries now have laws on domestic violence; however, women in many states are still without legislative protection. In respect of those that do, these laws are not always compliant with international standards and many have tended to address physical violence only.<sup>220</sup> The UN Handbook recommends that legislation should be introduced where lacking, and that it should follow the Council of Europe definition, including within the remit of "domestic violence" physical, sexual, psychological and economic abuse.<sup>221</sup> The model legislative framework promulgated by the UN Special Rapporteur on violence against women in 1996 encourages states to adopt legislation with the broadest possible definitions of acts of domestic violence and relationships within which domestic violence occurs.<sup>222</sup> Domestic violence laws have tended to focus on married or co-habiting couples. However, the UN recommends that domestic violence legislation should apply more widely, at a minimum to individuals who are or have been in an intimate relationship (not limited to marriage) including same-sex and non-cohabiting relationships, individuals in family relationships, and members of the same household.<sup>223</sup>

<sup>214</sup> DEVAW, *op.cit.* at footnote 22, Article 4.

<sup>215</sup> UN, *op.cit.* at footnote 91, p.16.

<sup>216</sup> *Ibid.*

<sup>217</sup> Cusack, S., *op.cit.* at footnote 35, p.ii.

<sup>218</sup> UN Human Rights Committee, General Comment No. 32, Article 14.

<sup>219</sup> The UN Special Rapporteur on the independence of judges and lawyers, cited in Cusack, S., *op.cit.* at footnote 35, p.30.

<sup>220</sup> UN Women, *op.cit.* at footnote 36; and UN, *op.cit.* at footnote 91, p.24.

<sup>221</sup> *Ibid.*, p.24.

<sup>222</sup> *Ibid.*, p.10.

<sup>223</sup> *Ibid.*, p.25.

General Recommendation No.19 and the UN Special Rapporteur on violence against women recommend the availability of both criminal and civil penalties in cases of domestic violence.<sup>224</sup> In the case of repeated incidents, it is suggested that increasingly severe sanctions should be imposed, as this has proven effective in Europe and the United States.<sup>225</sup> With respect to mitigating factors, the following considerations are noted:

- (i) The defendant's **status as a father, husband, family man or head of the household** should not be considered a mitigating factor. Such a consideration is based on traditional and stereotypical assumptions that marital or parental status deserves higher social respect or is indicative of moral character, or that children are always better off if raised by both a mother and a father (even if a violent one), and that the rights of the man as head of the household in respect of their control over the woman and access to children should be privileged over the right to life and physical and mental integrity of the woman and children.<sup>226</sup> Judges should also resist the stereotypical attitude that a man has the right to chastise his wife, and that what happens within the family is a private matter to be resolved by the (male) head of household.<sup>227</sup>
- (ii) Any laws lessening the sentence or exculpating the perpetrator where he claims to be **defending his family's "honour"** in regard to the assault or murder of a female family member should be eliminated (see paragraph 2.3.4 above).<sup>228</sup>

Lenient sentences for domestic violence reinforce notions that this type of violence is less serious than stranger violence, and that men have a right to use violence to establish power and control in their own home or over an intimate partner.<sup>229</sup> For this reason, the UN Handbook advises that fines should not be imposed as a penalty in domestic violence cases as they are unlikely to constitute a sufficient form of punishment. They will be particularly inappropriate where the effect would be to burden the victim/survivor or her family as a result of the money being taken from the family's income.<sup>230</sup>

Other recommendations of the UN Special Rapporteur on violence against women include providing necessary training to justice system personnel in respect of upholding women's rights in court, and the introduction of protection and restraining orders (available to all victims/survivors of SGBV), violation of which should be made a criminal offence.<sup>231</sup> In addition, it is suggested that such orders should be made available without any requirement that the victim/survivor institutes other legal proceedings (such as divorce or criminal proceedings) against the offender, and that they should be issued in addition to, rather than in lieu of, any other relevant penalty.<sup>232</sup>

224 CEDAW Committee, *op.cit.* at footnote 24, paragraph 24, UN, *op.cit.* at footnote 91, p.10.

225 UN, *op.cit.* at footnote 91, p.52.

226 Cusack, S. *op.cit.* at footnote 35, p.28; and Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.49.

227 Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.53.

228 CEDAW Committee, *op.cit.* at footnote 24, paragraph 24.

229 Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.53; and Cusack, S. *op.cit.* at footnote 35, p.19.

230 UN, *op.cit.* at footnote 91, p.52.

231 UN, *op.cit.* at footnote 91, p.10 and p.50.

232 *Ibid.*, p.45.

## **(b) Sexual Violence**

### **(i) Broadening and Reframing the Definition of Sexual Violence in Law**

In most countries, rape has historically been the main type of sexual violence addressed by criminal law, with definitions focusing on proof of penetration.<sup>233</sup> This alone does not account for the full range of sexual violations which victims/survivors may experience, however, and the UN provides that legislation should cover a broad range of sexual assaults graded based on harm, as suggested by the definition contained in the Istanbul Convention.<sup>234</sup> States, including certain PICs, are recognising that changing domestic laws on sexual violence can help counter gender bias and sex discrimination.<sup>235</sup> In 2016, the Solomon Islands amended its sexual offences legislation to strengthen penalties for sexual offences and widen definitions to encompass a broader range of sexual offences.<sup>236</sup> Vanuatu has also increased penalties for sexual offences in its legislation,<sup>237</sup> citing deterrence and the need to ensure that courts administer “appropriate and fair penalties according to the seriousness of offences committed”.<sup>238</sup>

Historically, rape and sexual assault were legally framed as crimes against “moral customs and society”, a “violation of family honour”,<sup>239</sup> or as property crimes posited on the concept of the woman as property of her husband or father.<sup>240</sup> Modern sexual assault legislation should instead frame definitions in terms which recognise the individual agency of the woman, focusing on the assault as a violation of their bodily integrity and sexual autonomy, and emphasising the importance of their individual consent.<sup>241</sup>

### **(ii) Consent**

Many sexual crimes, including rape, are premised on a lack of consent – it is this absence of consent which renders otherwise lawful acts unlawful.<sup>242</sup> The laws on rape and sexual assault in many states have generally required evidence of physical resistance by the victim/survivor, or that the victim/survivor prove lack of consent. This is premised on the traditional and discriminatory view that unless a woman struggles and evidences opposition through her body language, she is consenting by default. It also ignores the reality that women may react in a myriad of ways, including freezing, and prescribes for women a certain way in which they are expected to react when faced with sexual violence. Failure to react in the expected manner may then cause her not to be seen as a “real victim” in the eyes of the legal and judicial authorities, or by her community.<sup>243</sup>

The UN and European Court of Human Rights therefore recommend eliminating any requirement that sexual assault be committed by force or violence, and

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<sup>233</sup> UN, *op.cit.* at footnote 91, p.26.

<sup>234</sup> *Ibid.*

<sup>235</sup> HC Deb 04 March 2004 vol 418 cc1080-139; UK Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para 0.2-1.1.3.

<sup>236</sup> *Penal Code (Amendment) (Sexual Offences) Act 2016*.

<sup>237</sup> *Penal Code (Amendment) Act No.15 of 2016*.

<sup>238</sup> Explanatory Note on the Bill for the Penal Code (Amendment) Act No.15 of 2016, Ministry of Justice and Community Affairs, [https://parliament.gov.vu/images/Bills/2nd\\_extra\\_2016/English/Bill\\_for\\_the\\_Penal\\_Code\\_Am\\_Act\\_No.\\_of\\_2016.pdf](https://parliament.gov.vu/images/Bills/2nd_extra_2016/English/Bill_for_the_Penal_Code_Am_Act_No._of_2016.pdf) accessed on 15 November 2017.

<sup>239</sup> Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.78.

<sup>240</sup> UN, *op.cit.* at footnote 91, p.26; and Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.75.

<sup>241</sup> UN, *op.cit.* at footnote 91, p.26.

<sup>242</sup> Hughes, G., *Consent in Sexual Offences* (1962) 25 MLR 672, 673.

<sup>243</sup> Randall, M., *Sexual Assault Law, Credibility and Ideal Victims: Consent, Resistance, and Victim Blaming* (2010) 22(2) CJWL 397.

instead the focus should be on proving the victim/survivor's lack of consent to the sexual act,<sup>244</sup> and many jurisdictions have made efforts to revise their national laws accordingly in order to try and reflect more broadly the experiences of women facing sexual violence.<sup>245</sup>

Even in jurisdictions where evidence of physical resistance is no longer a requirement at law, however, it is often still required in fact in order to prove cases of sexual assault. For example, in the Canadian case of *R. v Ewanchuk*, a victim/survivor of sexual assault verbally expressed her lack of consent but did not physically resist, leading to the original trial judge finding that she had given "implied consent". The Supreme Court of Canada overturned this decision as unsupported by Canadian law and being formed on the basis of gender stereotypes which denied female sexual agency and privileged aggressive male sexuality, and which ignored the real reason for the victim/survivor's lack of physical resistance: her fear of aggravated sexual assault.<sup>246</sup> States are expected under CEDAW to take steps to ensure that their national tribunals offer effective protection of women and do not engage in discrimination, in order to ensure that women are treated equally before the law.<sup>247</sup> The CEDAW Committee has stressed that "stereotyping affects women's right to a fair and just trial and the judiciary must take caution not to create inflexible standards of what women and girls should be or what they should have done when confronted with a situation of rape".<sup>248</sup>

### (iii) Marital Rape

Historically, rape within marriage has been exempted from criminalisation. A multitude of justifications for this exemption have been presented over time, including beliefs that the marriage contract includes the wife's irrevocable consent to sexual intercourse, perceptions that the wife's and husband's interests will always be fully aligned, elaborate legal regimes in previous centuries that continued to explicitly subordinate wives to husbands,<sup>249</sup> a reluctance to extend the criminal law into the private sphere, or interpretation of religious doctrines. In recognition that this is highly discriminatory and denies a woman her full rights as an autonomous human being, an increasing number of countries are now removing such exemptions. The UN recommends that, not only should any positive exemptions be eliminated, but sexual assault within the marital relationship should be explicitly criminalised at domestic law by means of legislative provisions stating either that sexual assault laws apply irrespective of the nature of the relationship between the perpetrator and the complainant, or that no marriage or other relationship shall constitute a defence to a charge under the legislation.<sup>250</sup> Additionally, any provision exculpating a perpetrator of violence if he subsequently marries the victim/survivor should be removed.<sup>251</sup> Only an estimated 52 countries currently have laws that specifically penalise marital rape, meaning that this remains under-criminalised worldwide.<sup>252</sup>

244 UN, *op.cit.* at footnote 91, p.26; and Halilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.78.

245 UK Home Office, *op.cit.* at footnote 235, para 0.6; and UK Crown Prosecution Service, *CPS Policy for Prosecuting Cases of Rape*, section 7: Helping victims and witnesses to give evidence, <https://www.cps.gov.uk/publications/prosecution/rape.html> accessed on 25 May 2017.

246 *R v Ewanchuk* [1999] 1 S.C.R. 330 cited in Cusack, S. *op.cit.* at footnote 35, p.27 and p.34.

247 CEDAW, Articles 2 and 15.

248 Cited in Cusack, S. *op.cit.* at footnote 35, p.13; *Karen Tayag Vertido v The Philippines* (18/08) [2010] CEDAW/C/46/D/18/2008.

249 Hasday, J., *Contest and Consent: A Legal History of Marital Rape* (2000), 88 Cal. L. Rev. 1373 (2000).

250 UN, *op.cit.* at footnote 91, p.26.

251 *Ibid.*, p.51.

252 UN Women, *op.cit.* at footnote 36.

#### (iv) Punishing Sexual Violence

International guidance suggests that states should establish sentencing policies which hold offenders accountable for acts of sexual violence and are comparable to those for other violent crimes,<sup>253</sup> with the prosecution authorities bearing primary responsibility for initiating prosecutions, not the victims/survivors.<sup>254</sup> The UN Office on Drugs and Crime (“**UNODC**”) encourages the prohibition and penalisation of all forms of violence against women in order to discourage less serious violence from escalating into gender-related killing of women.<sup>255</sup> The UN recommends that, in addition to criminal and civil remedies, there should be legislation allowing for the payment of compensation or reparation from the perpetrator to the victim/survivor, provided that this is not given in lieu of other punishment.<sup>256</sup> Mediation should be prohibited in all cases of violence against women, since it removes cases from judicial scrutiny, presumes both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability.<sup>257</sup> The UN further proposes that any process for prosecuting sexual violence should be structured so as to avoid secondary victimisation of the victim/survivor. This may necessitate changes to rules of evidence, legal procedure and explicit recognition of the rights of the victims/survivors.<sup>258</sup>

Laws should also make explicit provision for aggravating factors including (but not limited to) the age of the victim/survivor, the relationship of the perpetrator and victim/survivor, any use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences for the victim/survivor.<sup>259</sup> Laws should apply equally to all women irrespective of virginity or marital status, and so should be revised where necessary to remove all references to concepts such as “morality”, “chastity” and “honour”.<sup>260</sup>

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<sup>253</sup> *Ibid.*, pp.10-11.

<sup>254</sup> *Ibid.*, p.11.

<sup>255</sup> UNODC, *Recommendations for action against gender-related killing of women and girls*, [http://www.unodc.org/documents/justice-and-prison-reform/GRK\\_eBook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/GRK_eBook.pdf) accessed on 3 July 2017.

<sup>256</sup> UN, *op.cit.* at footnote 91, p.52.

<sup>257</sup> *Ibid.*, p.38.

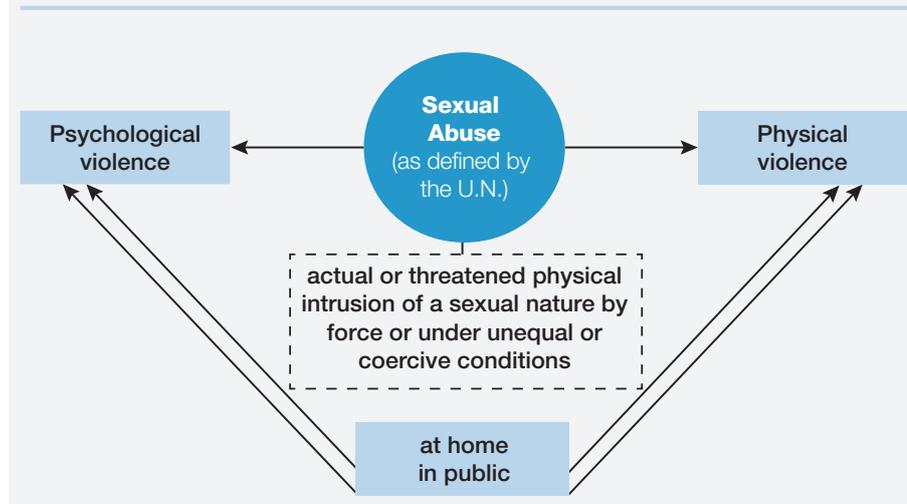
<sup>258</sup> *Ibid.*, p.2.

<sup>259</sup> *Ibid.*, p.26.

<sup>260</sup> UN, *op.cit.* at footnote 91, p.26.

**Figure 8:** Definitions of sexual abuse and assault in legislation**How should legislation define sexual abuse and assault?**

- sexual assault is a violation of bodily integrity and sexual autonomy
- a broad offence of sexual assault graded based on harm should be adopted
- aggravating circumstances should be provided for:
  - age of the survivor
  - the relationship or connection between the survivor and the perpetrator
  - use of threat of violence
  - presence of multiple perpetrators
  - grave physical or mental consequences the victim
- any requirement that sexual assault can only be proved if force or violence have been used should be removed
- any requirement to prove penetration should be removed
- the accused should be required to prove steps have been taken to ascertain the complainant's consent
- a board range of coercive circumstances should be covered
- sexual assaults within relationships should be specifically criminalizing
  - marriage or other relationships shall not constitute a defense to sexual assault

**(c) Harmful Traditional Practices**

The UN, CEDAW and other bodies of international law oppose harmful traditional practices such as female genital cutting/mutilation, dowry murder, honour killings, witchcraft and sorcery-related killings, polygyny, child or forced marriage, wife inheritance and widow cleansing (see the discussion of these at paragraph 2.3.4 above) as incompatible with women's rights under CEDAW and other human rights treaties. The CEDAW Committee's General Recommendation No. 21 on Equality in Marriage and Family Relations condemns polygyny as contravening women's right to equality with men, and urges states to prohibit polygynous marriage, particularly in light of the serious emotional and financial consequences it can have for women and their dependents.<sup>261</sup> Forced marriage and child marriage are generally condemned in international law, and states are directed to prohibit such practices.<sup>262</sup> The UN unequivocally opposes female genital cutting/mutilation, and in 2012 passed a unanimous resolution banning the

<sup>261</sup> CEDAW Committee, General Recommendation No. 21 on Equality in Marriage and Family Relations (1994), paragraph 14.

<sup>262</sup> Council of Europe, *op.cit.* at footnote 32, Article 37; and OHCHR, *op.cit.* at footnote 73.

practice as a form of violence against women and urging countries to enforce legislation criminalising such practice.<sup>263</sup>

UNODC recommends that national legislation be updated to eliminate provisions which can lead to discrimination in the treatment of gender-related killings of women, such as defences invoking “family honour”, and defences of provocation, which allow perpetrators to escape full responsibility by claiming that the victim was partially at fault for her death if she caused them to experience “passion” or “violent emotion”.<sup>264</sup> By positing the “difficult” or “argumentative” behaviour of a victim as a provoking circumstance mitigating abuse,<sup>265</sup> such defences imply that the violence perpetrated against the victim was somehow justified, and that acting against stereotype by being demanding or provocative (rather than passive and submissive) voids a woman’s victimisation and makes her less worthy of protection under the law.<sup>266</sup>

#### (d) HIV/AIDS and Violence

The UN urges countries to introduce legislation to protect all women from discrimination on the basis of HIV or AIDS status, and include targeted measures for women whose experience of violence has been shaped by their HIV or AIDS status, where appropriate.<sup>267</sup> In addition to programmes designed to educate women about the risks of sexually transmitted infections and the provision of health and social support services to those infected, WHO advises that violence and gender inequality should be addressed at all levels of society in order to reduce the level of infection and prevent violence against women.<sup>268</sup>

#### (e) Violence against Women in War and Armed Conflict

Violence against women, including sexual violence that is widespread or systematic, in armed conflict has been recognised as a crime against humanity under international law.<sup>269</sup> Under international law, states have responsibility for investigating, trying and punishing those responsible for genocide, crimes against humanity and war crimes. This requires ensuring that domestic legislation defines the crimes in accordance with international law, and that these laws are effectively enforced.<sup>270</sup>

#### (f) Trafficking

According to the Recommended Principles on Human Rights and Human Trafficking (2002) promulgated by the OHCHR (the “**Recommended Principles on Human Trafficking**”), states have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers, and to assist and protect trafficked persons.<sup>271</sup> This includes adopting appropriate legislation and other measures necessary to establish trafficking, its component acts and related conduct as criminal

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263 UN Women, *UN bans female genital mutilation*, <http://www.unwomen.org/en/news/stories/2012/12/united-nations-bans-female-genital-mutilation> accessed on 6 January 2018.

264 UNODC, *op.cit.* at footnote 255.

265 See, for example, the *State v Ali* [2014] FJMC 131 case referred to in paragraph [3.4.2] below.

266 Hallilović, M., Watson, C., Huhtanen, H. and Socquet-Juglard, M., *op.cit.* at footnote 39, p.51.

267 UN, *op.cit.* at footnote 91, p.14.

268 WHO, *op.cit.* at footnote 82, p.26.

269 See, for example, Article 4 of Additional Protocol II of the Geneva Convention.

270 UN, *op.cit.* at footnote 91, p.7.

271 OHCHR, Recommended Principles on Human Trafficking, Article 2.

offences,<sup>272</sup> and effectively investigating, prosecuting and adjudicating trafficking offences<sup>273</sup> in respect of both legal and natural persons.<sup>274</sup> Any legislation should systematically address the issue of gender-based discrimination, to ensure that measures are not applied in a discriminatory manner.<sup>275</sup> Trafficked persons should also receive legal protection from summary deportation where there are reasonable grounds to conclude that this would represent a significant security risk to that person or their family,<sup>276</sup> and should have an enforceable right to fair and adequate criminal, civil and/or administrative remedies.<sup>277</sup> Should trafficked women experience violence, they should not suffer punitive actions related to their immigration status if they report such violence to the police or other authorities, and should be allowed to apply confidentially for legal immigration status independently of their trafficker or abuser.<sup>278</sup>

#### 4.2.5 International Case Law Principles

In certain circumstances, the state's failure to take adequate action to protect women from domestic violence, sexual abuses, and discriminatory conduct has been found to be a breach of a number of fundamental human rights. Such rights include, amongst others: the right to life;<sup>279</sup> the right to freedom from torture, cruel, inhuman or degrading treatment or punishment;<sup>280</sup> the right to equal protection under the law;<sup>281</sup> the right to respect for private and family life;<sup>282</sup> and the right to equality in the family.<sup>283</sup>

A failure to put in place systems to protect from abuse and, in particular, a failure to impose an adequate sentence on the perpetrator, has been found to amount to cruel, inhuman and degrading treatment and punishment. In *Opuz v Turkey*, the court found that the Turkish authorities' failure to protect the victim/survivor and her mother from domestic violence, which resulted in injuries to her and the death of her mother, amounted to a breach of Articles 2 (Right to Life), 3 (Prohibition of Torture) and 14 (Prohibition of Discrimination) of the ECHR.<sup>284</sup>

Examples of general principles which have been upheld in international jurisprudence in relation to gender bias include:

- (a) In *Maria Da Penha Maia Fernandes v Brazil*, the husband of the victim/survivor inflicted physical violence upon the victim/survivor, including

<sup>272</sup> *Ibid.*, Article 12.

<sup>273</sup> *Ibid.*, Article 13.

<sup>274</sup> *Ibid.*, Guideline 4, paragraph 2.

<sup>275</sup> *Ibid.*, Guideline 1, paragraph 4.

<sup>276</sup> *Ibid.*, Guideline 4, paragraph 6.

<sup>277</sup> *Ibid.*, Guideline 9, paragraph 1.

<sup>278</sup> UN, *op.cit.* at footnote 91, p.34.

<sup>279</sup> *Gonzalez, Monreal and Monarrez v Mexico* (Inter-American Court of Human Rights 2009) (Series C No. 205), *Fatma Yildirim v Austria* (UN Committee on the Elimination of Discrimination against Women, August 2007), and Judgment on the merits and just satisfaction delivered by a Chamber, *Osman v United Kingdom and E and Others v United Kingdom*, no. 23452/94, ECHR 1998

<sup>280</sup> Judgment on the merits and just satisfaction delivered by a Chamber, *Opuz v Turkey, Talpis v Italy, E.S. and Others v. Slovakia, and E.M. v. Romania*, no. 33401/02, ECHR 2009

<sup>281</sup> Inter-American Commission on Human Rights petition, *Maria Da Penha Maia Fernandes v Brazil and Jessica Lenahan (Gonzales) v United States*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II/111 Doc. 20 rev. at 704 (2000)

<sup>282</sup> Judgment on the merits and just satisfaction, *A. v Croatia, and Hajduová v Slovakia*, no. 2660/03, ECHR 2011

<sup>283</sup> Judgment on the merits and just satisfaction delivered by a Chamber, T.P and A.T. v. *Hungary*, nos. 37871/14 and 73986/14, ECHR 2017

<sup>284</sup> McQuigg, R. Human Rights Law and Domestic Violence (September 2011) <http://rightsni.org/2011/09/human-rights-law-and-domestic-violence/> accessed on 20 July 2017.

attempting to murder her. The Inter-American Commission on Human Rights found that Brazil had failed to exercise its due diligence obligation to investigate the domestic violence complaint. Furthermore, it was held that the state had failed to guarantee the victim/survivor access to judicial remedies and have her case heard by a competent authority, and that the failure in this case was symbolic of the widespread ineffectiveness of the court system. The state was required to put in place procedures to enable the state to respond to domestic violence in a timely manner.<sup>285</sup>

- (b) In *Hajduová v Slovakia*, it was held that the lack of sufficient measures taken by the state to respond to the applicant's ex-husband's behaviour (including the failure to order that he be detained for psychiatric treatment following his criminal conviction for abusing and threatening her) breached the state's positive obligations to protect the right to privacy and family life under Article 8 of the ECHR.<sup>286</sup>

## 4.3 Pacific Islands Law

### 4.3.1 Introduction

PICs are obliged under international law to implement legislation to protect against SGBV, to address customary practices that discriminate against women or prevent equal access to justice, and to ensure women have access to remedy in the courts. It is therefore important to examine:

- (a) the current status of custom in the law of PICs;
- (b) how the courts of PICs treat and interpret custom;
- (c) whether legislative obligations with respect to SGBV have been met; and
- (d) judicial bias in the courts.

These factors determine whether the PICs are upholding their international obligations. This is especially helpful for monist PICs, as international law can be directly applied to override any conflicting domestic law or legal practice. It also helps dualist PICs to identify where they might be in breach of their international obligations and how they might best address those breaches. Encouragingly, many PICs and their courts have recognised that custom should not be allowed as an excuse to diminish women's rights and for perpetrators to escape punishment. Some PICs, such as the Solomon Islands, the Marshall Islands, Nauru and Vanuatu, have also recently introduced reforms to better protect against domestic and sexual violence.

### 4.3.2 The Status of Custom in Domestic Legislation

The table in Annex 3 summarises the constitutional and/or legislative requirements that pertain to customary practice and local culture in certain PICs. Customary law is generally recognised or considered to some degree in sentencing across the PICs; however, the approach ranges from complete recognition and requirement that the court take it into consideration (e.g. in Palau, where statute and customary law are equally authoritative) to being an option that a court may, but is not required to, consider (e.g. in Fiji, where a

<sup>285</sup> London School of Economics, *Tackling Violence Against Women* <http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/gonzalez-et-al-v-mexico/> accessed on 12 July 2017; Columbia Law School, *Human Rights & Domestic Violence: An Advocacy Manual* (February 2010), <http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv%20advocacy%20manual.pdf> accessed on 20 July 2017.

<sup>286</sup> European Court of Human Rights, *op.cit.* at footnote 282.

court may promote customary reconciliation but, ultimately, the safety and well-being of the victim must be the paramount weighing factor). Other PICs, such as Papua New Guinea and Vanuatu, consider customary practices/laws to the extent that they do not conflict with statute.

### 4.3.3 Pacific Island Legal Principles

There is limited access to the decisions of village and other courts operating at the lower subordinate level in PICs. This makes it difficult to draw principles from national cases settled in the customary sphere, in particular because in many instances the judgments of such courts are not transcribed unless requested by one of the parties, and decisions of village courts are unlikely to be recorded at all.<sup>287</sup>

Nevertheless, the following principles have been deduced from certain Pacific Island cases by various academics:

- (a) Court officials are often unsympathetic to survivors of domestic violence and do not encourage legal solutions.<sup>288</sup>
- (b) Judges sometimes fail to apply an appropriate level of reasoning in cases involving sexual assault and some display evidence of gender bias in their reasoning.<sup>289</sup>
- (c) In some jurisdictions, the lower subordinate courts are empowered, or even obliged, to take customary law and practice into account when dealing with criminal cases. This includes countries such as Vanuatu and the Solomon Islands.
- (d) Victims/survivors and offenders sometimes perceive customary settlement as the final resolution, with the court case considered unnecessary. For example, in the Tongan case of *Hala v R*,<sup>290</sup> the Court of Appeal judges referred to the appellant's submission that the trial judge had given insufficient weight to the offender's financial assistance to the victim's family and that there was reason to believe that the family did not wish the case to go to a hearing. The appeal against the sentence was allowed.<sup>291</sup>
- (e) The courts have acted inconsistently regarding the significance afforded to customary reconciliation and/or compensation. Although the severity of the offence is often a pivotal factor – for example, comments made by the Supreme Court of Vanuatu suggested a disinclination to accept customary settlement as a significant mitigating factor in cases of serious violence, in particular where the violence results in death – there is a wide variance both within and between jurisdictions. Consistent sentencing is necessary to ensure a fair, equitable and effective judicial system.<sup>292</sup>

287 Cain, T. *Convergence or Clash? The Recognition of Customary law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region* (2001), 2 Melb. J. Int'l L. 48.

288 Secretariat of the Pacific Community for Ministry of Women, Youth & Children's Affairs, *Solomon Islands Family Health and Safety Study: A study on Violence Against Women and Children* (2009), <http://pacific.unfpa.org/sites/default/files/pub-pdf/SolomonIslandsFamilyHealthandSafetyStudy.pdf> accessed on 6 January 2018.

289 Bere, M. A., *Women and justice in Timor-Leste* (2005), Development Bulletin, no. 68. pp 55-57, quoted in Development Studies Network, *Women, Gender and Development in the Pacific: Key Issues*, [https://socialpolicy.crawford.anu.edu.au/rmap/devnet/devnet/gen/gen\\_legal.pdf](https://socialpolicy.crawford.anu.edu.au/rmap/devnet/devnet/gen/gen_legal.pdf) accessed on 20 July 2017.

290 *Hala v R* [1992] Tonga Law Reports 7.

291 Cain, T., *op.cit.* at footnote 287.

292 ICAAD and DLA Piper, *op.cit.* at footnote 4.

- (f) In some cases, the courts have excluded issues of custom altogether. For example, in *Public Prosecutor v Iata Tangaitom*,<sup>293</sup> it was held that a customary practice that considered age irrelevant to whether sexual relationships with female members of the family were acceptable should be rejected and that the criminal law must prevail. Also, in the Vanuatu case of *Public Prosecutor v Wayane*,<sup>294</sup> which involved charges against six defendants for rape and aiding rape, the judge dismissed the custom settlement of apologies, shaking hands, and payments of ten mats, VT10,000, two pigs, kava and other island food. The judge stated:

*I will impose a custodial sentence as opposed to other form of sentencing. This may not go down well with the relatives of both parties and even the defendants as the matter had been settled by custom and they may ask why punish the offenders again when they had paid the price of what they did in the custom. A defendant who commits an offence must pay the price for the penalty described by such offence and customary settlement cannot exchange such punishment but can only be used to ease the ill feelings between the parties and their relatives.*<sup>295</sup>

Overall, the case law suggests that judges appear to be ambivalent or reluctant to be creative in bringing about an integrated jurisprudence between law and custom.<sup>296</sup>

- (g) The customs of *bulubulu* in Fiji and *ifoga* in Samoa allow the defendant to seek forgiveness and reconciliation, which can be taken into account by the court when considering the mitigation of a sentence.<sup>297</sup> For example, this was raised as a defence in a case concerning the rape of a young child,<sup>298</sup> and in *Public Prosecutor v Tariodo*, the settlement paid as part of a customary reconciliation played a major role in the defendant's acquittal for rape.<sup>299</sup> Furthermore, in *Public Prosecutor v Gideon*,<sup>300</sup> the defendant pleaded guilty to a charge of unlawful sexual intercourse with a 13 year old girl, but paid a VT30,000 fine to the victim/survivor's relatives and gave a pig to the village chief. The judge imposed a sentence of eighteen months' imprisonment, stating that both the guilty plea and "customary settlement" had been factored into his decision.<sup>301</sup> Also, the judiciary noted in each of *Public Prosecutor v Rarip*, *Public Prosecutor v Nouwai – Sentence*, *Public Prosecutor v Damasing*, *Public Prosecutor v Mogeror*, and *Public Prosecutor v Kamiti* that customary reconciliation was a factor that mitigated the defendant's sentence.<sup>302</sup>

However, the practice of customary compensation payments has also been criticised in some courts for diminishing the severity of assaults on women<sup>303</sup> and for creating a perception that rape and other sexual attacks are tolerated and possibly condoned.<sup>304</sup> Certain case law indicates that the judiciary are

<sup>293</sup> *Public Prosecutor v Iata Tangaitom* [1998] (Unreported, Supreme Court of Vanuatu).

<sup>294</sup> [2000] VUSC 57

<sup>295</sup> Rousseau, B., "This is a Court of law, not a Court of Morality": *Kastom and Custom in Vanuatu State Courts* (2008) *Journal of South Pacific Law*, Volume 12(2).

<sup>296</sup> Cain, T., *op.cit.* at footnote 287.

<sup>297</sup> Farran, S., *Gender, Equality and Pacific Island Countries with Particular Focus on Domestic Violence* (2015) *Journal of South Pacific Law*, Volume 2015(2);

Taylor, C. *Domestic Violence and its Prevalence in Small Island Developing States- South Pacific Region* (2016) *Pacific Journal of Reproductive Health*, Volume 1(3).

<sup>298</sup> *State v Vesukula* [2014] FJHC 28.

<sup>299</sup> Rousseau, B., *op.cit.* at footnote 295.

<sup>300</sup> [2001] VUSC 118

<sup>301</sup> Rousseau, B., *op.cit.*

<sup>302</sup> Paterson, D. and Jowitt, A., *More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences* (2008) *Journal of South Pacific Law*, Volume 12(2).

<sup>303</sup> Farran, S., *op.cit.* at footnote 297.

<sup>304</sup> Cain, T., *op.cit.* at footnote 287.

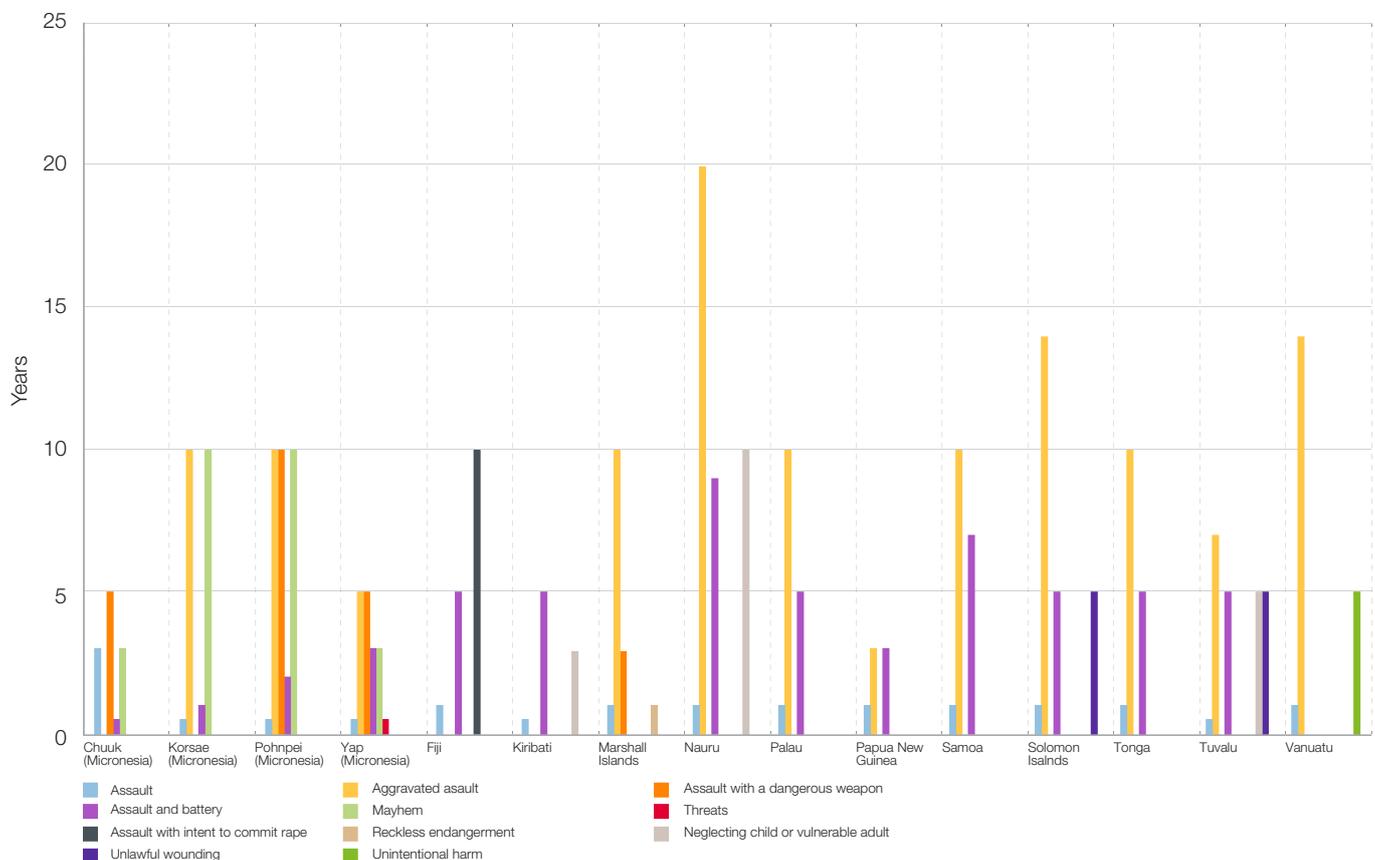
reluctant to explicitly or implicitly accept the payment of compensation to mitigate their sentencing decision and have indicated that it may not be appropriate.<sup>305</sup> For example, the court recognised in *R v Asuana*<sup>306</sup> that it must not attach such weight to customary compensation, otherwise it would appear “to be a means of subsequently buying yourself out of trouble”.<sup>307</sup>

#### 4.3.4 Sexual and Gender-Based Violence Statutory Offences

The graphs below provide an overview of SGBV crimes in each PIC, categorised into domestic violence, sexual offences and murder/manslaughter, including the varying penalties for these offences. In general, non-domestic violence offences carry greater sentences than specific domestic violence offences. For example, the average maximum imprisonment in the Marshall Islands, Palau and Tonga for aggravated assault/assault in the first degree is nine years, whereas the average maximum sentence for a third-offence specific domestic violent offence is only three years. The highest maximum imprisonment among PICs for non-domestic crimes of violence was between 15-20 years, whereas the highest maximum imprisonment was only five years for specific domestic violence offences.

In addition, the age at which sexual abuse of a minor is an offence differs greatly between PICs. This varies from less than 13 years old in Chuuk, Kosrae and Yap to less than 16 years in Papua New Guinea and Pohnpei, as is demonstrated in the graphs below.

**Figure 9:** Maximum imprisonment for crimes of violence excluding specific domestic violence offences

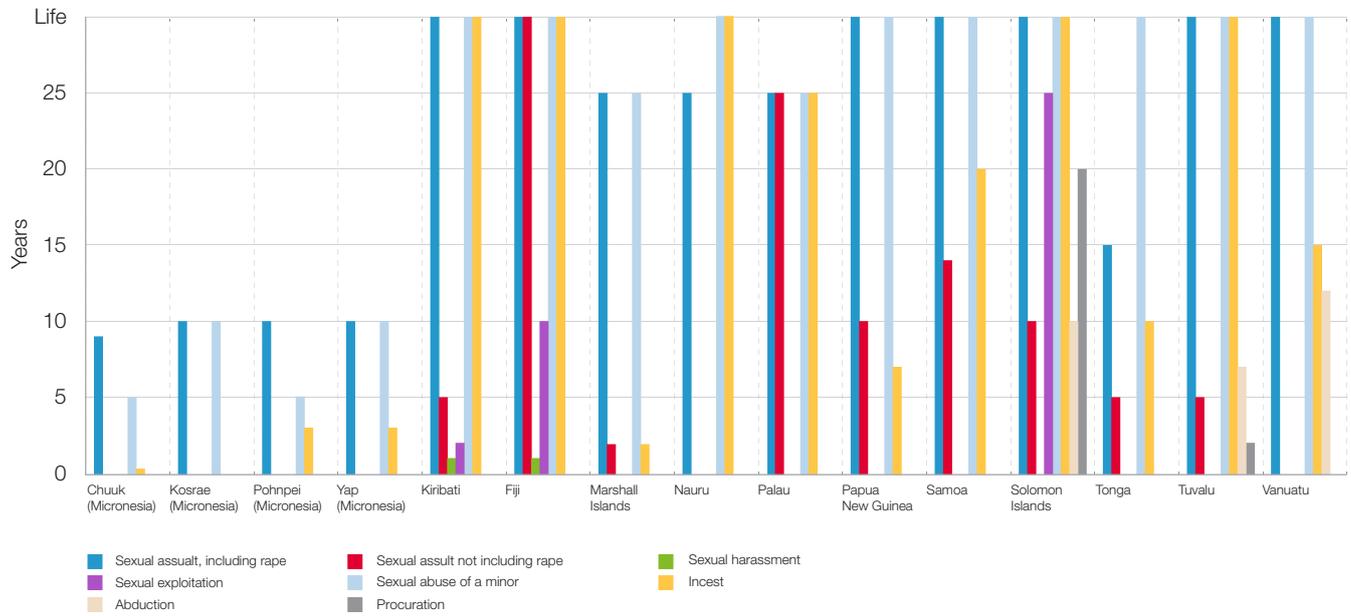


305 Cain, T., *op.cit.* at footnote 287.

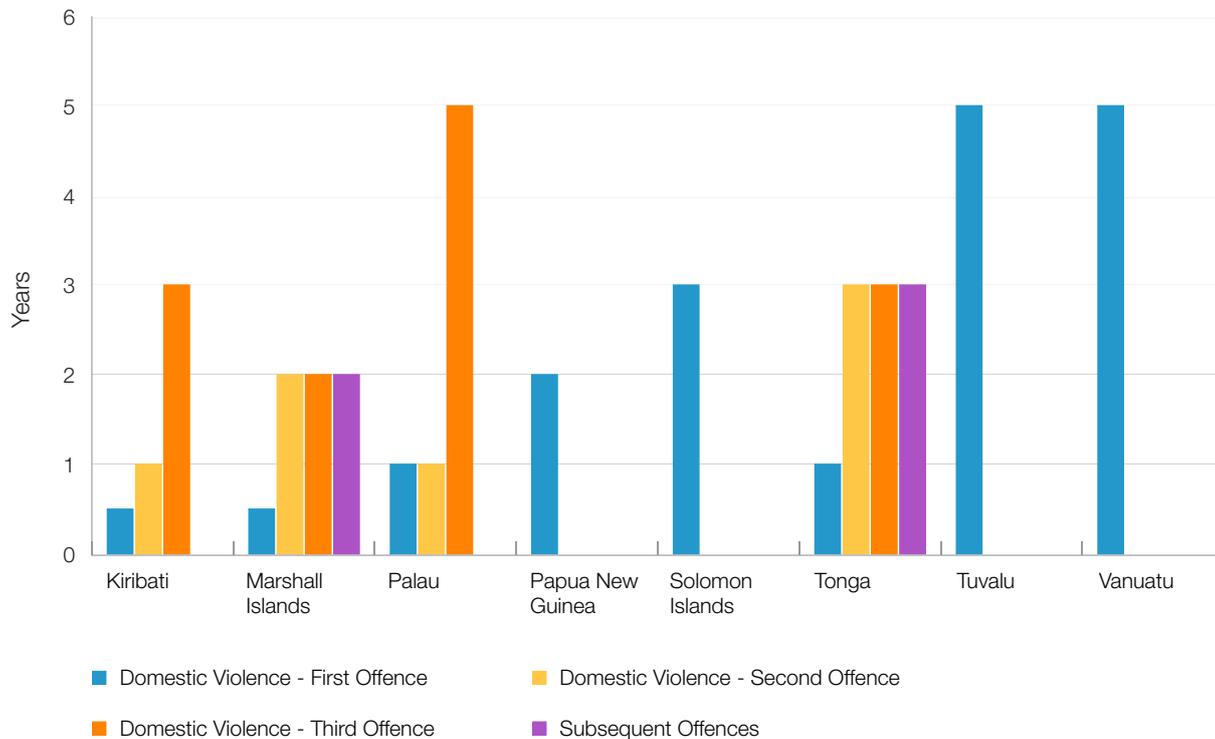
306 Unreported, High Court of the Solomon Islands, Criminal Case No 34 of 1990, 12 October 1990

307 Goodenough, N., *Reconciliation and the Criminal Process in the Solomon Islands* (2006) *Journal of South Pacific Law*, Volume 10(1).

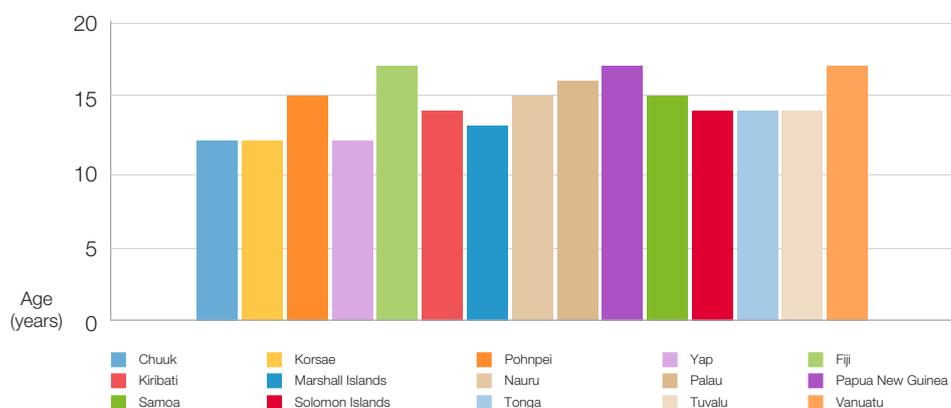
**Figure 10:** Maximum imprisonment for sexual offences<sup>308</sup>



**Figure 11:** Maximum imprisonment for specific domestic violence offences



308 In addition to the custodial sentences shown in Figure 10, the death penalty may still be imposed for the crime of rape in Papua New Guinea, notwithstanding that the last execution took place in 1954.

**Figure 12:** Age under and at which sexual abuse of a minor is an offence across the PICs<sup>309</sup>

## 4.4 Sentencing Process

The sentencing process used in a criminal justice system can be an important indicator of the relevant country's approach to human rights. International human rights norms require the observation of due process in any state trial and that sentences are appropriate to the severity of the particular crime. Legislation on sentencing can have a significant impact on the ability of a judge to ensure that sentences are determined in accordance with these norms. For instance, legislation on sentencing may allow or exclude certain factors from being considered, such as the sexual history of the victim, which enables the use of gender bias and stereotypes in the courtroom. In England and Wales, section 41 of the Youth Justice and Criminal Evidence Act 1999 restricts the admissibility of a victim's sexual history with the intention of avoiding rape myths and stereotypes.<sup>310</sup> Such rape myths are used to discredit the victim by suggesting, for example, that if a female victim has had previous sexual partners, she is less affected by the sexual assault.

Annex 5 compares the legislated sentencing framework in each of the PICs. Paragraphs 4.4.1 to 4.4.3 provide further detail on some of the important concepts and terms used in sentencing decisions.

### 4.4.1 Sentence – Mitigating and Aggravating Circumstances

The judiciary is entitled to take into account certain factors concerning the circumstances of the crime when determining the sentence for a convicted defendant. Mitigating factors will lead to a reduction in sentence, whereas aggravating factors will increase the severity of the sentence. Gender bias can influence a sentencing decision because it may influence judges' understanding of the nature of the criminal offence. For example, gender bias may cause a judge to mistakenly conclude that the fact that a victim/survivor of a sexual offence was a sex worker, or was wearing a short dress, is a mitigating factor because it in some way "induced" the perpetrator into the offence.

<sup>309</sup> This graph does not take into account some defences where, for example, the perpetrator is married to the child.

<sup>310</sup> Ministry of Justice. "Limiting the use of complainants' sexual history in sex cases" 14 Dec. 2017, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/667675/limiting-the-use-of-sexual-history-evidence-in-sex-cases.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/667675/limiting-the-use-of-sexual-history-evidence-in-sex-cases.pdf)

#### 4.4.2 Suspended Sentence

A suspended sentence is a prison term that is suspended subject to the offender being on good behaviour for a set period. The term of imprisonment can be fully or partly suspended, meaning that the offender either spends no time in prison, or spends only part of the sentence in prison. If the offender breaches the conditions of the suspended sentence, or commits another crime during the period for which the sentence is suspended, the prison term will take effect in full. In some cases, legislation may specify factors that can be taken into account when deciding between a custodial or non-custodial sentence. For example, in the Marshall Islands a judge may take into account the fact that the victim/survivor was compensated when deciding whether to order a suspended sentence.<sup>311</sup>

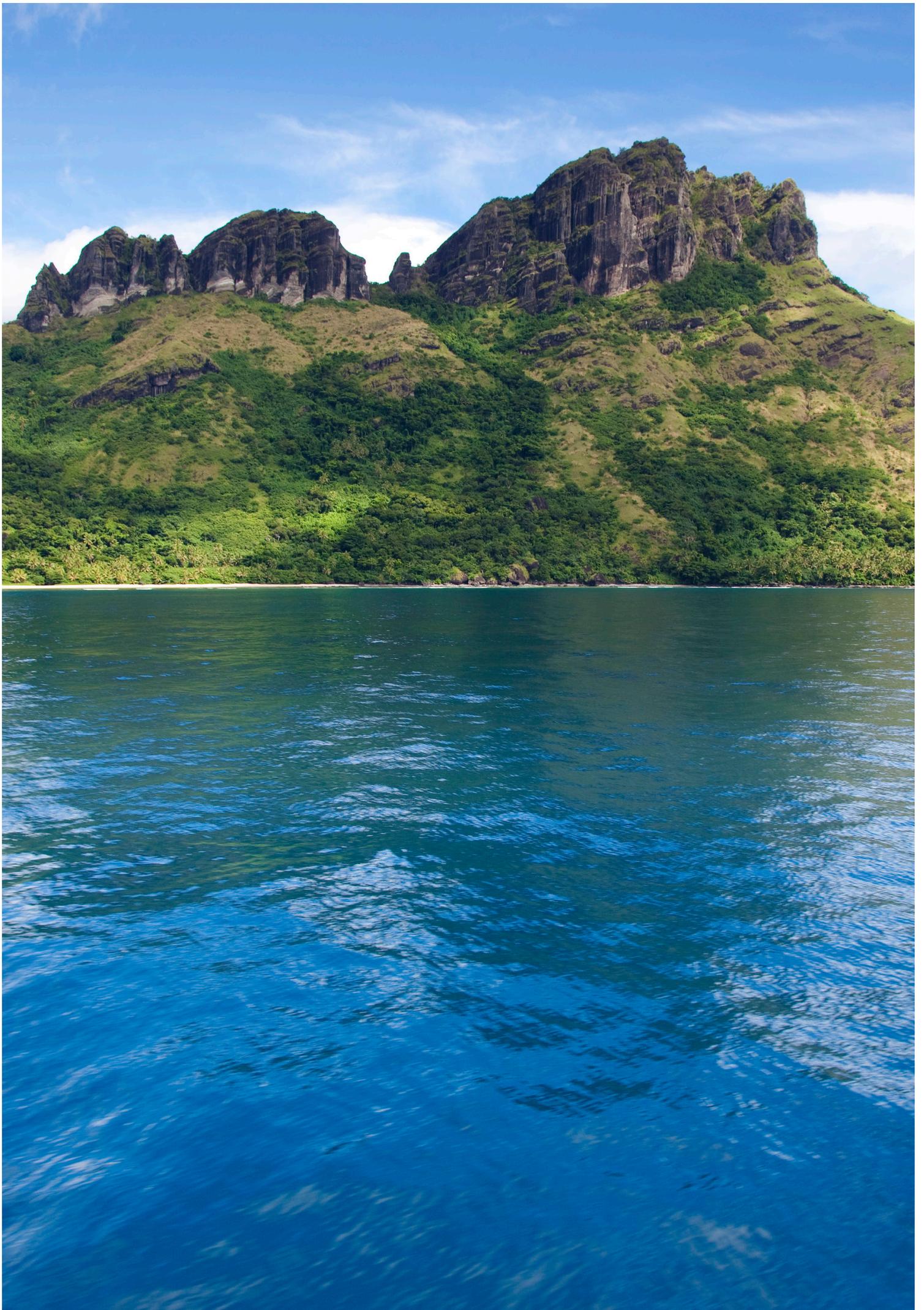
#### 4.4.3 Protection Order

A protection order is an order used by a court to protect a person in a situation involving alleged domestic violence, harassment or sexual assault. The person subject to the order will be restricted from certain actions, for example contacting the complainant.

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<sup>311</sup> Criminal Code (2011), Article 7, s.7.01, available at: [http://www.paclii.org/cgi-bin/sinodisp/mh/legis/num\\_act/cc201194/cc201194.html?stem=&synonyms=&query=Criminal%20Code%202011](http://www.paclii.org/cgi-bin/sinodisp/mh/legis/num_act/cc201194/cc201194.html?stem=&synonyms=&query=Criminal%20Code%202011) accessed on 1 March 2018.





## SECTION 5: ANALYSING SGBV SENTENCING DECISIONS: METHODOLOGY

### 5.1 Introduction

This section provides a methodology for conducting case law analysis of SGBV sentencing practices. It should be noted that ICAAD has already compiled a legal database of relevant cases on the basis of the scope set out below; however, this scope may also be followed in future studies. Similarly, the methodology below should be followed by lawyers carrying out the large-scale analysis over the database compiled by ICAAD, yet it remains useful as a guide for any further analysis in the future. The table at paragraph 5.6.5 provides specimen analysis in relation to four cases.

### 5.2 Identification of Cases

- 5.2.1 The first step is to identify cases involving SGBV and sentencing decisions. In order to identify cases involving sexual and gender-based offences, it is currently necessary to use publicly available databases such as <http://www.paclii.org>. Very few cases are on private databases.
- 5.2.2 The following criteria should be used to identify cases within the scope of the analysis:
- the relevant actions of the accused include elements of SGBV, as defined in paragraph 1.2.1 above;
  - the victim/survivor is female. Note, this methodology and the examples used address only violence against women. As discussed in paragraph 2.3.8, SGBV can be perpetrated against victims/survivors of any gender; however, this goes beyond the scope of this Handbook and, although this methodology may provide a basis for broader analysis of SGBV, further research would be required before incorporating victims/survivors of other genders into the case law analysis;
  - the perpetrator could be of any gender; and
  - the case involved sentencing of the perpetrator.
- 5.2.3 It is important to consider how search terms can help identify relevant cases. When searching a database for cases, it is useful to adopt modifiers to produce more relevant results. The following are some examples of modifiers and their respective meanings:
- the use of the AND modifier between two words connects terms that are far apart from one another within the text (for example, “murder” AND “family member”);
  - the use of the OR modifier between two words broadens the search seeking text with either of the terms provided (for example, “rape” OR “domestic violence”);
  - the use of the asterisk (\*) modifier broadens the search by finding words that start with the same letters (for example “vulner\*” finds “vulnerable”, “vulnerability” and “vulnerabilities”); and
  - the use of the NOT modifier excludes searches which include specific terms (for example, “rape” NOT “adult”)

- the use of the “w/n” modifier finds terms that appear within “n” words of each other (for example “gender w/3 violence”). Other variations of the w/ modifier include:
  - “w/s” – this finds terms which appear within the same sentence; and
  - “w/p” – this finds terms which appear within the same paragraph.

5.2.4 The following are some examples of suggested search terms to identify sexual and gender-based violence cases:

- “domestic violence”;
- “manslaughter” AND “father” OR “brother”;
- “murder” AND “family member”;
- “rape”;
- “sexual offence”;
- wife OR girlfriend OR daughter OR niece OR granddaughter OR transwoman OR transgender;
- (hit OR slap OR abuse OR yell) w/s (wife OR girlfriend OR daughter OR niece OR granddaughter)

You may find you need to use a number of different searches to ensure all relevant cases are identified.

### 5.3 Case Classification

5.3.1 Cases should be classified in accordance with the following categories:

- Domestic Violence, as described in paragraph 2.3.2 and Annex 4;
- Sexual Violence, as described in paragraph 2.3.3 and Annex 4; and/or
- Murder/Manslaughter, as described in Annex 4.

### 5.4 Identifying Contentious Factors

5.4.1 The key element in this exercise is analysing whether or not the final sentence received by a perpetrator was influenced by gender discrimination. In the pilot case law analysis conducted by ICAAD and DLA Piper in December 2015, factors that were considered in sentencing that constituted gender discrimination were called “contentious factors”. These are factors which, when used in the mitigation stage by the court, discriminate against the victim/survivor because of gender.

5.4.2 **Contentious factors should be categorised in accordance with the following categories:**

- gender stereotyping (including gender bias, SGBV myths and the breadwinner argument), as described in paragraphs 3.2-3.4;
- customary practices (including formal and informal reconciliation, forgiveness, payment of compensation), as described in paragraph 3.6; or
- any other factors which unjustly privilege the interests of the perpetrator over the interests of the victims/survivors (e.g. the perpetrator attends church).<sup>312</sup>

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312 ICAAD and DLA Piper, op.cit. at footnote 4.

- 5.4.3 Section 3 of this Handbook provides a detailed overview of the main types of contentious factors that may be raised in court, which serves as a useful reference for identifying contentious factors in court cases. However, please note that this Handbook does not provide an exhaustive list of the possible contentious factors and lawyers carrying out case analysis are likely to encounter additional factors that are not considered below.
- 5.4.4 Contentious factors may be raised by the defence but not necessarily accepted or used by the judicial officer. It should be noted both whether the defence raised them and whether the judicial officer used them to reduce the sentence. The language judicial officers use when referring to contentious factors, whether in the positive or in the negative, is important to note. Please see below some examples of such language:
- *“The Court will allow a further reduction because the victim did not report the offendings in August 2011 when it happened on the first occasion. She waited until she became pregnant and gave birth. She made a statement only on 6th July 2012. She could have done so in August, 2011 and prevented further offendings but she did not. That omission and/or failure by the victim must be taken as a mitigating factor.”*<sup>313</sup>
  - *“We consider some small reduction in sentence is justified for this ceremony. We acknowledge, as the Judge observed, that the ceremony did not involve either the Appellant or the victim. However serious crimes such as these can easily give rise to strong feelings of grievance on behalf of the victim, her family and her village. This can, if left unresolved, itself cause unwise attempts at retribution. Custom ceremony therefore can help to avoid further violence between the family of the victim and the perpetrator. Such a successful ceremony therefore should be reflected in a modest sentence reduction as an incentive to resolve such potential conflict by custom. We consider it appropriate to deduct three months from the Appellant’s sentence to reflect the ceremony.”*<sup>314</sup>
  - *“The victim/survivors and their mother are seeking further compensation of K3,000.00 and he is willing and able to afford that too, and wants to arrange a formal reconciliation ceremony. The victims and their mother rely on the offender for financial support and a place to live. They have expressed their desire not to see the offender imprisoned.”*<sup>315</sup>
  - *“A sentence of full time custody will inevitably impose significant hardship on the other members of the offender’s family, particularly his wheelchair bound mother and disabled bedridden son. Such hardship cannot be an overriding mitigating factor in cases where the objective gravity of the offences and the presence of aggravating factors call for a custodial sentence.”*<sup>316</sup>
- 5.4.5 There can be considerable overlap between those contentious factors which qualify as gender stereotyping and those which qualify as customary practice. The distinction lies in the fact that customary reconciliation includes beliefs that do not appear on their face to be gender specific.<sup>317</sup> Indeed, many cultural norms and traditions may not be harmful or illegitimate sentencing considerations unless they are rooted in or borne of gender

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313 *Public Prosecutor v Yacinth* [2012] VUCA 30.

314 *Koilo v PP* [2010] VUCA 27.

315 *State v Mavuug* [2012] PGNC 255.

316 *Rex v Vake* [2012] TOCA 7; AC 4 of 2012.

317 ICAAD and DLA Piper, *op.cit.* at footnote 4.

discrimination. Customary reconciliation, where it discriminates against women, is based on gender stereotyping. For the purposes of the case law analysis, contentious factors are disaggregated so as to identify those cases that include customary reconciliation.

- 5.4.6 It is also crucial to identify factors which may constitute legitimate aggravating factors but become contentious when used in mitigation. For example, while the use of a weapon may be an acceptable aggravating factor, treating the absence of weapons as a mitigating factor and rewarding the perpetrator for not causing additional harm may be unacceptable as this implies that SGBV is not “real” or as condemnable if no physical violence or force is used.<sup>318</sup>
- 5.4.7 One mitigating factor that requires particular discussion is the “breadwinner argument”. This describes the notion that the perpetrator’s sentence warrants reduction on the grounds of his family’s economic dependence upon him as the sole or main source of income for the family.
- 5.4.8 The breadwinner argument is a particularly powerful mitigating factor, though it presents something of a moral conundrum. The breadwinner’s emotional and physical abuse towards women within his own family, or the wider community, is weighed against the economic damage of depriving the perpetrator’s family of its main source of income. The breadwinner argument is problematic because a woman’s bodily integrity is a fundamental right which is absolute and cannot be outweighed by consideration of the perpetrator’s economic dominance. The relative economic power of the male breadwinner, combined with female economic disempowerment and resulting economic dependence on a partner or father is also an underlying cause of SGBV and allows its perpetuation.
- 5.4.9 While it may be the case that the family does rely on the perpetrator for income, the court ought not to presuppose that the family’s economic dependence on one individual is more important than a vulnerable person’s safety and likelihood of further abuse. To do so upholds and rewards the root causes of SGBV. The prevalence of the breadwinner argument warrants attention, and demonstrates the need for broader solutions to be considered, such as economic empowerment of women, property ownership and inheritance equality and alternative economic support or training to victims/survivors to equip them with employable skills.<sup>319</sup>
- 5.4.10 Another factor which may require discussion is whether the perpetrator is a first time offender. This can be contentious due to the perpetrator’s historic behaviour and how the court perceives and identifies past offences. For example, an individual may have exhibited a history of violent conduct, including prior domestic violence, but without being subject to a previous criminal conviction. Without a prior conviction, a court might have considered the perpetrator to be a first time offender notwithstanding that such behaviour is evidenced by doctors’ reports or witness evidence. Similarly, where the facts indicate that the perpetrator has committed serious criminal acts in the past of a different type (i.e. not SGBV in nature), the perpetrator should not benefit from first time offender status.

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<sup>318</sup> *Ibid.*

<sup>319</sup> ICAAD and DLA Piper, *op.cit.* at footnote 4.

5.4.11 As discussed in paragraph 3.6.2, apologies, reconciliation and acts of contrition are often taken into account as mitigating factors in sentencing. This in itself is not contentious as sincere apologies can and should be taken into account by judges. However, the level to which the apology mitigates the offender's conduct can be contentious and it may be that a judge has given acts of reconciliation undue weight as mitigation. Often customary practices in PICs favour social cohesion over retributive justice which can divert focus away from the victim/survivor and their response to the perpetrator's apology. It is important to consider whether the judge has given appropriate treatment to an offender's apology or whether it had too much influence in the offender's sentencing.

## 5.5 Interpreting Results

5.5.1 In addition to the contentious factors described above, the following variables are important when interpreting SGBV case law and drawing statistical conclusions:

- (a) perpetrator's age;
- (b) perpetrator's sex;
- (c) victim/survivor's age;
- (d) victim/survivor's sex, gender identity and sexuality (see (i) below);
- (e) whether the victim/survivor knew the perpetrator before the abuse? If yes, what was the relationship between the victim/survivor and the perpetrator?
- (f) whether or not the perpetrator is a first time offender;
- (g) a guilty plea or finding of guilt;
- (h) cumulative/concurrent offences;
- (i) whether the victim/survivor was targeted because they identify or were perceived as belonging to the LGBTQI community (for example, corrective rape cases);
- (j) whether the victim/survivor has, or has had, a disability;
- (k) whether a pathology report was referred to at the hearing;
- (l) whether a medical report was referred to at the hearing;
- (m) whether a protection order was imposed on either of the parties at any time;
- (n) the starting sentence/tariff;
- (o) if the starting sentence is unclear or not explicitly stated, the total time where aggravating and starting sentences are treated as one;
- (p) all aggravating factors and the additional time added to the sentence;
- (q) all mitigating factors (not just contentious factors) and the time reduced from the sentence (excluding time taken off because it was served on remand);
- (r) final sentence;
- (s) whether the perpetrator was sentenced to life imprisonment or the death penalty;
- (t) customary practices, including reconciliation (informal or formal process), that were raised, either by the defence or the judicial officer;

- (u) gender stereotypes, including gender bias and SGBV myths (e.g. the perpetrator was the sole breadwinner, son of a widowed mother, dependent sisters, is the only son) that were raised, either by the defence or the judicial officer;
- (v) if gender stereotypes were raised, did these result in a judicial officer reducing the sentence;
- (w) if contentious factors (e.g. the victim/survivor did not appear distressed, the perpetrator was married or attended church) that were raised, either by the defence or the judicial officer;
- (x) if there was a sentence reduction, was it based at least partly on customary practice(s);
- (y) if there was a sentence reduction based on cultural practice(s), gender stereotype(s), other contentious factors, or a combination of these factors, what was the specific amount of reduction resulting from these attitudes?
- (z) whether the sentence was partially or fully suspended;
- (aa) if sentence was partially or fully suspended, how much of the sentence was suspended;
- (bb) whether a custodial (prison) sentence was given;
- (cc) the final length of the sentence depending on whether the judicial officer suspended the sentence or not; and
- (dd) whether a fine or bond was given.

## 5.6 Sample Case Studies

The following cases have been chosen as sample case studies:

- *State v Mavuug*<sup>320</sup>
- *State v Lom*<sup>321</sup>
- *Police v Metu*<sup>322</sup>
- *Aisea Cabebula v State*<sup>323</sup>

A sample table showing the analysis for these cases is set out in paragraph 5.6.5 below.

### 5.6.1 *State v Mavuug*<sup>324</sup>

**Facts:** the claimants were aged 10 and 11 respectively, when their step-father, the defendant, raped them over a period of two years and three months. Compensation was paid and, allegedly, the victims and their mother expressed a desire not to see the defendant imprisoned. Given the age of the girls, it is questionable to what extent these considerations can be taken at face value.

<sup>320</sup> *State v Mavuug*, [2012] PGNC 255

<sup>321</sup> *State v Lom* [2012] PGNC 63

<sup>322</sup> *Police v Metu* [2013] WSSC 103

<sup>323</sup> *Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)*.

<sup>324</sup> *State v Mavuug*, [2012] PGNC 255

**Contentious factors:**

Factors that the trial judge took into consideration that may be considered contentious include the following:

- gender bias in recognising contrition – it was noted that “the offender must be given credit for his early guilty plea and the payment of compensation, which are signs of genuine remorse and acceptance of responsibility for his actions”;<sup>325</sup>
- compensation paid to the victims/their mother;
- victims/their mother expressed a desire not to see the defendant imprisoned;
- perpetrator has two brothers and three sisters and family relationships are strong and stable;
- perpetrator has stable employment;
- desire to arrange a formal reconciliation ceremony; and
- perpetrator is the sole breadwinner.

**Mitigating factors:**

The judge stated that the strength of the following mitigating factors was strong justification for sentencing below the starting point of 20 years:

- the offender acted alone;
- he used no weapon or aggravated violence;
- he has caused no further trouble to the victim;
- he is a first-time offender;
- he has paid substantial compensation;
- he has pleaded guilty;
- it is an early guilty plea (he was committed for trial on 13 August 2012 and the plea was entered on 22 October 2012); and
- the victim and her mother want him shown leniency.

**5.6.2 State v Lom<sup>326</sup>**

**Facts:** the defendant caught his wife having an affair with another man, he proceeded to chop her head, arm and leg with a bush knife. She died instantly.

The defendant argued provocation on the part of the deceased as she was having an affair and exclaimed that he had “*paid bride price for her*”.

**Contentious factors:**

Factors that the trial judge took into consideration that may be considered contentious include the following:

- shown remorse;
- married with three wives and three children;

<sup>325</sup> *State v Mavuug*, [2012] PGNC 255

<sup>326</sup> *State v Lom* [2012] PGNC 63

- attends church;
- bride price paid; and
- infidelity as provocation.

**Mitigating factors:**

The following mitigating factors were cited:

- the prisoner belongs to the Baptist Catholic Church;
- he is married with three wives and he had three children prior to the incident;
- he is a villager and had no formal employment;
- he was only educated up to grade 5;
- he pleaded guilty to the charged;
- he has no prior conviction prior to this incident;
- his plea of guilty saved much time and costs to the Court, the State and himself;
- he has shown remorse.

**5.6.3 Police v Metu<sup>327</sup>**

**Facts:** The victim, a 7 year old girl, alleged that the defendant took her to a secluded area of his plantation where he indecently assaulted her. The defendant undressed the victim, exposed himself and sexually assaulted her. The defendant also threatened the girl's brother with a machete and prevented him from stopping the assault.

**Contentious factors:**

Factors that the trial judge had taken into consideration that may be considered contentious include the defendant's:

- background of service to the community;
- attendance at church;
- penalty imposed by the village;
- *ifoga* by the defendant's family, which was accepted by the victim's family;
- being the last in a family of 2 brothers and 3 sisters; and
- immaturity at the time of the offence (the defendant was 19 years old).

**Mitigating factors:**

The court considered all of the above factors to mitigate the defendant's crime, reducing the sentence by two and a half years.

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<sup>327</sup> *Police v Metu* [2013] WSSC 103

#### 5.6.4 Aisea Cabebula v State<sup>328</sup>

**Facts:** the claimant, an 18 year old girl, alleged that her 42 year old father had raped her continuously in October 2010 at a time when the claimant's mother had gone to Lomaloma with her older sister to give birth. The defendant used a coconut knife to coerce her against her will, threatening to kill her if she told anybody.

**Contentious factors:**

Factors that the trial judge took into consideration that may be considered contentious include the following:

- the defendant is the sole breadwinner of the family;
- is 42 years old;
- is married; and
- has 5 siblings.

**Mitigating factors:**

The following mitigating circumstances were considered by the court:

- the accused pleaded guilty before the commencement of the trial;
- by pleading guilty he has saved the victim from having to re-live her ordeal all over again whilst giving evidence;
- the accused is 44 years old married with 5 siblings;
- he co-operated with the police and made a confession in his record of caution interview statement;
- he is the sole breadwinner of the family;
- he is remorseful;
- period in remand; and
- the accused has no previous conviction.

Considering all aggravating and mitigating circumstances, the court deducted three years for the mitigating factors to reach a sentence of four years imprisonment.

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<sup>328</sup> *Aisea Cabebula v State* (Criminal Case No.: HAC 172/2011).

## 5.6.5 Methodology Table

Figure 13: Methodology Table

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Case Summary	Text	<p><b>Facts:</b> the claimants were aged 10 and 11 respectively, when their step-father, the defendant, raped them over a period of two years and three months. Compensation was paid and allegedly, the victims and their mother expressed a desire not to see the defendant imprisoned. Given the age of the girls, it is questionable to what extent these considerations can be taken at face value.</p> <p><b>Contentious factors:</b> Factors that the trial judge took into consideration that may be considered contentious include the following:</p> <ul style="list-style-type: none"> <li>• gender bias in recognising contrition;</li> <li>• compensation paid to the victims/their mother;</li> <li>• victims/their mother expressed a desire not to see the defendant imprisoned;</li> </ul>	<p><b>Facts:</b> the defendant caught his wife having an affair with another man, he proceeded to chop her head, arm and leg with a bush knife. She died instantly.</p> <p>The defendant argued provocation on the part of the deceased as she was having an affair and exclaimed that he had “paid bride price for her”.</p> <p><b>Contentious factors:</b> Factors that the trial judge took into consideration that may be considered contentious include the following:</p> <ul style="list-style-type: none"> <li>• shown remorse;</li> <li>• married with three wives and three children;</li> <li>• following of the Catholic Church;</li> <li>• bride price paid; and</li> <li>• infidelity as provocation.</li> </ul>	<p><b>Facts:</b> The victim, a 7 year old girl, alleged that the defendant took her to a secluded area of his plantation where he indecently assaulted her. The defendant undressed the victim, exposed himself and sexually assaulted her. The defendant also threatened the girl’s brother with a machete and prevented him from stopping the assault.</p> <p><b>Contentious factors:</b> Factors that the trial judge had taken into consideration that may be considered contentious include the defendant’s:</p> <ul style="list-style-type: none"> <li>• background of service to the community;</li> <li>• attendance at church;</li> <li>• penalty imposed by the village;</li> <li>• ifoga by the defendant’s family, which was accepted by the victim’s family;</li> </ul>	<p><b>Facts:</b> the claimant, an 18 year old girl, alleged that her 42 year old father had raped her continuously in October 2010 at a time when the claimant’s mother had gone to Lomaloma with her older sister to give birth. The defendant used a coconut knife to coerce her against her will, threatening to kill her if she told anybody.</p> <p><b>Contentious factors:</b> Factors that the trial judge took into consideration that may be considered contentious include the following:</p> <ul style="list-style-type: none"> <li>• the defendant is the sole breadwinner of the family;</li> <li>• is 44 years old;</li> <li>• is married; and</li> <li>• has 5 siblings.</li> </ul>

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
		<ul style="list-style-type: none"> <li>being in a family of 2 brothers and 3 sisters;</li> <li>stable employment;</li> <li>desire to arrange a formal reconciliation ceremony; and</li> <li>he is the sole breadwinner.</li> </ul>		<ul style="list-style-type: none"> <li>being the last in a family of 2 brothers and 3 sisters; and</li> <li>immaturity at the time of the offence (the defendant was 19 years old).</li> </ul>	
Date	Text	22/11/2012	22/06/2012	22/08/2013	03/05/2012
Country	Text	Papua New Guinea	Papua New Guinea	Samoa	Fiji
City/District – Location of the hearing	Text	Madang	Wabag	Mulinuu	Suva
Court's jurisdiction	<ul style="list-style-type: none"> <li>Court of First Instance</li> <li>Appellate Court</li> <li>Supreme Court</li> </ul>	Court of First Instance	Court of First Instance	Court of First Instance	Court of First Instance
Appellate Case? (ex: Though the High Court in Fiji may function as an appellate court, the High Court is also a Court of First Instance in rape cases)	<ul style="list-style-type: none"> <li>Yes</li> <li>No</li> <li>Unknown</li> </ul>	No	No	No	No
Type of case	[Check all that apply] <ul style="list-style-type: none"> <li>Sexual violence</li> <li>Domestic violence</li> <li>Manslaughter/murder</li> </ul>	<ul style="list-style-type: none"> <li>Sexual violence</li> <li>Domestic violence</li> </ul>	Manslaughter/murder	Sexual violence	<ul style="list-style-type: none"> <li>Sexual violence</li> <li>Domestic violence</li> </ul>
Charge(s) – Specific Act, Code, Decree etc.	Text	Persistent Sexual Abuse of a child contrary to Section 229D(1) and (6) Criminal Code Act 1974	Murder contrary to section 300 (1)(a) of the Criminal Code Act	Sexual conduct with a child under 12 contrary to section 58 Crimes Act 2013.	Incest by any relative contrary to Section 223(1) Crimes Decree No. 44 of 2009

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Charge category – rape, indecent assault, domestic violence etc.	Text	Rape	Murder	Indecent assault	Incest
Judicial Officer's Name(s)	Text	Judge Cannings	Judge Gauli	Justice Nelson	Judge P. Kumararatnam
Anonymity (Victim)	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> <li>• Unknown</li> </ul>	Yes	No	Yes	No
Victim Information					
Gender (Victim)	<ul style="list-style-type: none"> <li>• Male</li> <li>• Female</li> <li>• Other</li> </ul>	Female	Female	Female	Female
Age (Victim) at time of offence	Text	10 and 11	N/A	7	18
Adult or child (defined as < 18) at time of offence	<ul style="list-style-type: none"> <li>• Adult</li> <li>• Child</li> <li>• Unknown</li> </ul>	Child	Unknown	Child	Adult
Identify as LGBTQI? – There should be specific reference in the text on whether they identify themselves as LGBTQI, otherwise, mark No. Ensure you can select more than one.	<ul style="list-style-type: none"> <li>• No</li> <li>• Lesbian</li> <li>• Gay</li> <li>• Bisexual</li> <li>• Transgender</li> <li>• Queer or Questioning</li> <li>• Intersex</li> </ul>	No	No	No	No

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Disability? There should be specific reference to their disability in the text, otherwise, mark No. Ensure you can select both medical and physical if necessary.	<ul style="list-style-type: none"> <li>• Mental</li> <li>• Physical</li> <li>• No</li> </ul>	No	No	No	No
Perpetrator Information					
Gender (Perpetrator)	<ul style="list-style-type: none"> <li>• Male</li> <li>• Female</li> <li>• Other</li> </ul>	Male	Male	Male	Male
Age (Perpetrator)	<ul style="list-style-type: none"> <li>• Text</li> </ul>	50	30	19	42
Perpetrator Known to Victim?	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> </ul>	Yes	Yes	No	No
Relationship with the Victim: if IPV, what was the relationship between the victim and the perpetrator? (e.g. spouse, boyfriend, girlfriend, ex-partner etc.)	Text	Stepfather	Spouse	N/A	N/A
First Time Offender? Not a first time offender if there are previous conviction(s) (even if it's a different type of crime) or if facts of the case show a history or pattern of violent acts/ abuse?	[Check all that apply] <ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> <li>• Disagree (w/ court's interpretation)</li> <li>• Unknown</li> </ul>	Yes	Yes	Unknown	Yes
Guilt	<ul style="list-style-type: none"> <li>• Pleaded guilty</li> <li>• Found guilty</li> </ul>	Pleaded guilty	Pleaded guilty	Found guilty	Pleaded guilty

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
<b>At the Hearing</b>					
Pathology Report – was a pathology report referred to in court proceedings as evidence?	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> <li>• Unknown</li> </ul>	No	No	Unknown	No
Medical Report – was a medical report referred to in court proceedings as evidence?	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> <li>• Unknown</li> </ul>	No	No	Unknown	Yes
<b>Sentencing Information</b>					
Protection Order? Does the court indicate that a protection order for either party was issued at any time, including in the sentencing decision?	<ul style="list-style-type: none"> <li>• Yes – Victim</li> <li>• Yes – Perpetrator</li> <li>• No</li> <li>• Not applicable (e.g. victim as died)</li> <li>• Unknown</li> </ul>	No	No	No	No
Starting Sentence (SS) – This is often not straightforward. You may have to work backward from the Final Sentence and add Aggravating and Mitigating Factors together to figure out the SS. Or identify the guideline, prior precedent, or tariff the judge is using to provide a starting point for sentencing. If this doesn't prove successful, see if you can identify an Alternative Starting Sentence.	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	20	20	4	4

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Alternative Starting Sentence (SS/AF) – If starting sentence is unclear, the judge once concluded with the analysis on Aggravating Factors, may identify a # prior to going into the analysis on Mitigating Factors.	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	N/A	N/A	N/A	N/A
Aggravating factors (AF) – add all aggravating factors (additional time added to the sentence)	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	N/A	N/A	N/A	3
Mitigating Factors (MF) – add all Mitigating Factors (time reduced from the sentence; do not include time served on remand in this figure)	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	16	N/A	2.5	3
Final Sentence (FS): SS + AF – MF = FS, or when starting sentence is unclear SS/AF – MF = FS	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	14	18	1.5	4
If FS is life imprisonment or death penalty, leave above section blank and choose following option:	<ul style="list-style-type: none"> <li>• Life Imprisonment</li> <li>• Death Penalty</li> <li>• Not applicable</li> </ul>	N/A	N/A	N/A	N/A

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Customary Practices: does the sentencing decision indicate that customary practices were raised (e.g. a formal apology, compensation, banishment from the village, bride-price), either by the defence or the judicial officer?	<ul style="list-style-type: none"> <li>• Yes – Defence</li> <li>• Yes – Judicial Officer</li> <li>• Yes – Both</li> <li>• No</li> <li>• Unknown</li> </ul>	Yes – both	Yes	Yes – both	No
Gender Stereotypes: does the sentencing decision indicate that gender stereotypes were raised (e.g. the notion that men are the head of the household, or that women exist to fulfill the desires of men), either by the defence or the judicial officer?	<ul style="list-style-type: none"> <li>• Yes – Defence</li> <li>• Yes – Judicial Officer</li> <li>• Yes – Both</li> <li>• No</li> <li>• Unknown</li> </ul>	Yes – both	Yes – both	No	Yes – Judicial Officer
Sole Breadwinner – if yes, did the gender stereotype raised result in a judicial officer reducing the sentence due to the perpetrator being a sole breadwinner/head of household?	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> </ul>	Yes	Yes	No	Yes

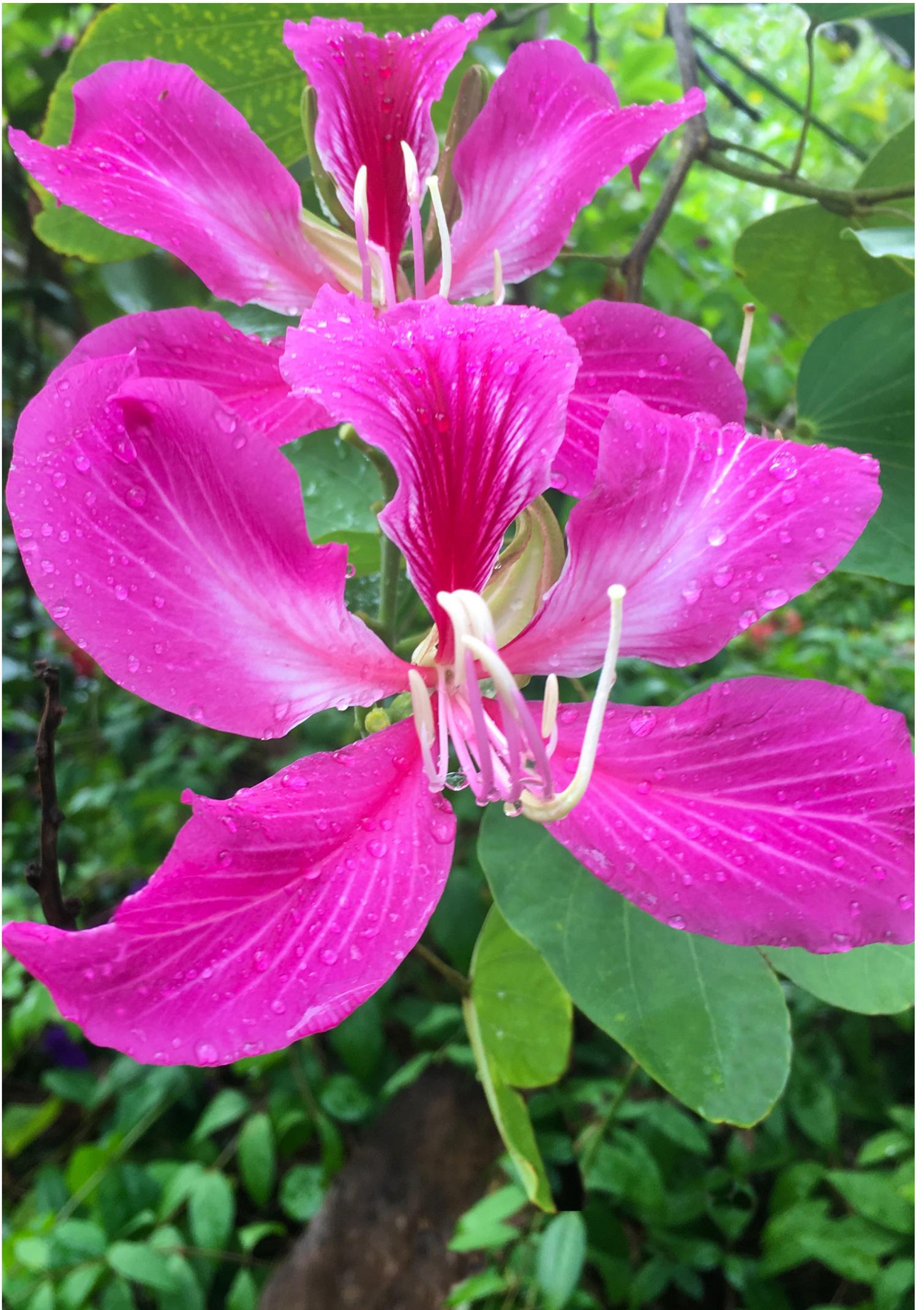
Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Other Contentious Factor(s) – does the sentencing decision indicate other contentious factors (unjustly privileges the interests of the perpetrator over the victim e.g. the perpetrator attends church); were raised, either by the defence or the judicial officer?	<ul style="list-style-type: none"> <li>• Yes – Defence</li> <li>• Yes – Judicial Officer</li> <li>• Yes – Both</li> <li>• No</li> <li>• Unknown</li> </ul>	Yes – both	Yes – both	Yes – both	Yes – Judicial Officer
Type of Gender Discrimination – if there was a sentence reduction, was it based at least partly on customary practice(s) e.g. formal and informal reconciliation/forgiveness/apology practices; gender stereotype(s); other contentious factor(s), none of these factors, or unknown?	<p>[Check all that apply]</p> <ul style="list-style-type: none"> <li>• Yes – Reconciliation/ Customary Practice</li> <li>• Yes – Gender Stereotypes</li> <li>• Yes – Other Contentious Factor(s)</li> <li>• No</li> <li>• Unknown</li> </ul>	<ul style="list-style-type: none"> <li>• Yes – Reconciliation/ cultural practice</li> <li>• Yes – Gender Stereotypes</li> <li>• Yes – Other contentious factor(s)</li> </ul>	<ul style="list-style-type: none"> <li>• Yes – Gender Stereotypes</li> <li>• Yes – Other contentious factor(s)</li> </ul>	<ul style="list-style-type: none"> <li>• Yes – Reconciliation/ cultural practice</li> <li>• Yes – Other contentious factor(s)</li> </ul>	<ul style="list-style-type: none"> <li>• Yes – Gender Stereotypes</li> <li>• Yes – Other contentious factor(s)</li> </ul>
Sentence Reduction 1 – If there was a sentence reduction based on cultural practice(s), gender stereotype(s), other contentious factors, or a combination of these factors, what was the specific amount of reduction resulting from these attitudes?	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	16	N/A	2.5	3

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Positive Judicial Statements (women's rights) – Language by the judicial officer making positive statements on how SGBV cases will be handled in order to uphold the human rights of women and girls	Text	<p><i>"..these are extremely serious crimes and the court must be conscious of the message it will send to the community if it allows suspended sentences for such crimes. Perhaps people will think that those who commit such wicked crimes will be able to fix the problems that they have created by buying their way out of jail: 'Pay enough compensation and you can avoid prison'. That would clearly not be the message that we want conveyed. It would not provide much deterrence to this sort of behaviour which the entire PNG community is gravely concerned about."</i></p> <p><i>"The other thing the court must be conscious of is how genuine the sentiments of the victims are. They are still only young girls. Are they really able to comprehend what has happened to them? Do they appreciate the gravity of the crimes their father has committed against them? Or are these things that they will only fully comprehend in their later teenage years or early adulthood?"</i></p>		<p><i>"The courts have often spoken of the need to protect young children from such acts by older males especially by those who know them. And use that knowledge and relationship for their own self gratifying purposes."</i></p> <p><i>"A deterrent sentence of imprisonment is required to be imposed to deter the defendant from doing this again and to deter other males and send a message to them as to what will happen if they behave like this in respect of a young girl. It is also required as a mark of societys disapproval of such behaviour and to denounce the defendants actions."</i></p>	<p><i>"The action of the accused clearly demonstrates a complete disregard of the defined social, religious and traditional rules that prohibit sexual relationship between family members".</i></p>

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Negative Judicial Statements (women's rights) – Language by the judicial officer indicating their views on customary reconciliation, gender stereotypes or other contentious factors that do not uphold the human rights of women and girls	Text	<p><i>“The offender has already paid substantial compensation and he is prepared to pay more and the victims and their mother are prepared to accept it.”</i></p> <p><i>“Payment of the K10,000.00 compensation to his wife took place in December 2011. He was able to afford this substantial sum by virtue of contributions by members of his family including a daughter, son and nephew. The victims and their mother are seeking further compensation of K3,000.00 and he is willing and able to afford that too, and wants to arrange a formal reconciliation ceremony. The victims and their mother rely on the offender for financial support and a place to live. They have expressed their desire not to see the offender imprisoned.”</i></p>	<p><i>“The prisoner is 30 years old and he comes from Yoalimanda village, Kompiam District, Enga Province. He belongs to the Baptist Catholic Church. He is married with three wives and he had three children prior to the incident. He is a villager and had no formal employment. He was only educated up to grade 5. He pleaded guilty to the charged. He has no prior conviction prior to this incident. His plea of guilty saved much time and costs to the Court, the State and himself. He has shown remorse.”</i></p> <p><i>“There are no special circumstances of the prisoner, other than having three wives and three children, provided for the Court to consider any partial suspension of the sentence.”</i></p>	<p><i>“What you are entitled to as noted by your counsel is a deduction for your background of service to your family to the community and to your Ekalesia. That is a background that is fully referred to in the probation office report and include references from your faifeau and others. For those matters I will deduct one year from the start point of sentence leaving a balance of 3 years. Probation office also confirmed you have been the subject of a village penalty. For that I will make a deduction of 6 months from the balance. Probation office also confirmed the ifoga by your family to the victims family accepted by them and they through the victims father have sought the courts leniency on you. For those matters I will deduct a further 6 months. That leaves a balance of 2 years on your sentence. I note that at the time of this offending you were around 19 years of age. In recognition of your young age and your probable immaturity I will deduct a further 6 months from that balance.”</i></p>	<p><i>“Accused is 44 years old married with 5 siblings... He is the sole breadwinner of the family... I deduct three years for the mitigating factors”.</i></p>
Was the sentence partially or fully suspended?	<ul style="list-style-type: none"> <li>• Yes – Fully</li> <li>• Yes – Partially</li> <li>• No</li> </ul>	No	No	No	No

Main structure		Cases			
Case information	Type of information	Examples			
Case citation/ File number	Text	State v Mavuug, [2012] PGNC 255	State v Lom [2012] PGNC 63	Police v Metu [2013] WSSC 103	Aisea Cabebula v State (Criminal Case No.: HAC 172/2011)
Sentence Reduction 2 – If sentence was partially or fully suspended, how much of the sentence was suspended?	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	N/A	N/A	N/A	3
Was a custodial (prison) sentence given?	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> </ul>	Yes	Yes	Yes	Yes
Final Sentence (including suspended sentence) – What was the final length of the sentence	Numerical value expressed in decimals (e.g. six and half months = 6.5; six years and eight months = 6.67)	14	18	1.5	4
Cumulative/Concurrent Sentence?	<ul style="list-style-type: none"> <li>• Yes – Cumulative</li> <li>• Yes – Concurrent</li> <li>• No</li> <li>• Unknown</li> </ul>	Yes – Cumulative	No	Yes	No
Was there a fine or bond given?	<ul style="list-style-type: none"> <li>• Yes</li> <li>• No</li> <li>• Unknown</li> </ul>	Yes	No	No	No
What other form of punishment was given? If none, leave blank.	Text				





## SECTION 6: GLOSSARY OF KEY TERMS

<b>Bride-price</b>	Money, property, or services given by a bridegroom to the kinsmen of his bride.
<b>Bulubulu</b>	A Fijian custom to settle disputes by offering a <i>tabua</i> (whale's tooth), a gift or compensation, and asking for forgiveness.
<b>Customary law</b>	Localised laws such as village or tribal laws. These are separate from and not codified by national laws.
<b>Customary practice</b>	Common practices or procedures carried out at a localised level, such as at a village or tribal level, separate from, and not codified by, national law.
<b>Customary reconciliation</b>	Localised practices, for example at a village or tribal level, designed to address grievances between parties and to right perceived wrongs, separate from the implementation of codified laws or the official addressing of grievances, such as through a nation's courts.
<b>Femicide</b>	The killing of a woman, often by a man where her gender is a factor in the murder.
<b>Fono (Village Fono)</b>	In relation to any Samoan village, means the assembly of the <i>Alii</i> (high chief – usually a hereditary noble) and <i>Faipule</i> (councillor – usually a leader of a political subunit of the village) of that village, meeting in accordance with the custom and usage of such village, and includes the plural.
<b>Gender</b>	Gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. While most people are born either male or female, they are taught appropriate norms and behaviours – including how they should interact with others of the same or opposite sex within households, communities and work places. When individuals or groups do not “fit” established gender norms they often face stigma, discriminatory practices or social exclusion – all of which adversely affect health. It is important to be sensitive to different identities that do not necessarily fit into binary male or female sex categories. <sup>329</sup>
<b>Gender bias</b>	Inclination towards or prejudice against a person based upon his/her gender and the stereotypes, roles and norms attached thereto.
<b>Gender myths</b>	Socially constructed assumptions that are widely held but false, relating to the different roles and behaviours that people of a certain gender ought to assume in society. <sup>330</sup>
<b>Gender stereotyping</b>	A gender stereotype is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, a certain gender. <sup>331</sup>
<b>Ifoga</b>	A Samoan custom where typically one group apologises for the conduct of one of its members to another offended group. It requires a public act of self-humiliation as well as a gift. The self-humiliation involves contrition, submission and apology.
<b>Kastom</b>	The traditional culture, including religion, economics, art, and magic, of Melanesia.
<b>LGBTQI</b>	Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex
<b>Nitijela</b>	The Legislature of the Marshall Islands.
<b>Pacific Island Countries</b>	Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

329 WHO, *op.cit.* at footnote 114

330 OHCHR Commissioned Report, *op.cit.* at footnote 115.

331 *Ibid.*

<b>Patriarchy</b>	A traditional form of organizing society which often lies at the root of gender inequality. According to this kind of social system, men, or what is considered masculine, is accorded more importance than women, or what is considered feminine <sup>332</sup> (see paragraph 2.4.1).
<b>Puripuri</b>	The practice of sorcery in Papua New Guinea.
<b>Sanguma</b>	The act of killing a person with sorcery in Papua New Guinea.
<b>Sexual and gender-based violence (SGBV)</b>	<p>Sexual violence comprises not only rape and attempted rape, but also sexual abuse, sexual exploitation, forced early marriage, domestic violence, marital rape, trafficking and female genital cutting/mutilation, amongst others.<sup>333</sup></p> <p>Gender-based violence is an umbrella term for violence directed toward or disproportionately affecting someone because of their actual or perceived gender identity. The term “gender-based violence” is primarily used to underscore the fact that structural, gender-based power differentials around the world place women at risk for multiple forms of violence.<sup>334</sup></p> <p>“Sexual and gender-based violence (SGBV)” refers to all of the above.</p>
<b>Sorcery</b>	Although this has differing and confused legal definitions throughout the Pacific Island region, this can broadly be taken to mean the alleged practice of magic, witchcraft or enchantment which may or may not be related to the supernatural. <sup>335</sup> This can sometimes encompass the practices of traditional medicine men (see paragraph 3.6.3(a)).
<b>Stereotyping</b>	A generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular social group. <sup>336</sup>
<b>Te kabara bure</b>	A concept in Kiribati whereby a public, formal apology takes place between families. The family of the perpetrator does this to compensate the family of the victim/survivor.

332 UN Women Training Centre, *Gender Equality Glossary*, <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=P&sortkey=&sortorder=> accessed 21 April 2018.

333 WHO, *Sexual and other forms of gender-based violence in crises*, <http://www.who.int/hac/techguidance/pht/SGBV/en/> accessed on 27 June 2017.

334 UN Task Team on the SEA Glossary for the Special Coordinator on improving the UN' response to sexual exploitation and abuse, *Glossary on Sexual Exploitation and Abuse* (Second Edition, 24 July 2017), [https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English\\_0.pdf](https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English_0.pdf) accessed on 6 January 2018.

335 Eves, R., *Sorcery and Witchcraft in Papua New Guinea: Problems in Definition*, the Australian National University (2013), [http://bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/SSGM\\_IB\\_2013\\_12\\_0.pdf](http://bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/SSGM_IB_2013_12_0.pdf) accessed 28 June 2017.

336 OHCHR Commissioned Report, *op.cit.* footnote 115.

## ANNEX 1 – RAPE MYTHS AND GENDER STEREOTYPES

### Rape myths

Figure 14: Rape Myths

Myth	Assumptions	Implications/Consequences	Fact
Rape occurs between strangers in dark alleys	<ul style="list-style-type: none"> <li>Assumes a particular victim, perpetrator and scenario: that rapists are not known by victims, that victims can avoid rape scenarios and rapists lurk in known places. That 'real rape' looks a certain way.</li> </ul>	<ul style="list-style-type: none"> <li>Perception that the home is safe</li> <li>Beliefs that rape can be prevented by avoiding certain places and therefore the victim is to blame</li> <li>Entrenches racial and class prejudices</li> <li>Perception that victims aren't raped by people known to them or close to them.</li> <li>Cases where rape doesn't fit the scenario are less likely to be believed or are seen as less serious.</li> </ul>	<ul style="list-style-type: none"> <li>The majority of rapes are committed by persons known to the victim</li> <li>Date or acquaintance rape is very common</li> <li>Victims are often raped in their homes</li> </ul>
Women provoke rape by the way they dress or act/only certain types of women are raped	<ul style="list-style-type: none"> <li>Assumes that predominantly young attractive women are raped</li> <li>Assumes that a woman who draws attention is looking for sex and has somehow already consented, or "deserves what she gets"</li> <li>Assumes that women who want sex at one point in time will not change their minds at a later point in time</li> </ul>	<ul style="list-style-type: none"> <li>Attempts to excuse rape and blame the victim</li> <li>Re-victimises and stigmatises the victim</li> <li>Brings the woman's sexual history into consideration, including that, if any, involving the perpetrator</li> <li>Brings the woman's behaviour/morals into consideration</li> <li>Women are seen as somehow in control of whether they are raped or not</li> </ul>	<ul style="list-style-type: none"> <li>People may dress attractively and flirt for many reasons. However a person's attitude or intent can never be inferred simply from this and it can never be seen as implied or explicit consent to sex</li> <li>Assuming that a woman's behaviour/communication, such as drinking or dancing with a man, wearing certain clothing, is providing sexual consent stems from certain gender stereotypes about how women do and should behave. Incorrectly assuming consent does not justify or excuse rape.</li> <li>Only the rapist is responsible for rape</li> </ul>

Myth	Assumptions	Implications/Consequences	Fact
Rape is a crime of passion	<ul style="list-style-type: none"> <li>Assumes that rape is impulsive and unplanned</li> <li>Assumes men to be incapable of delaying gratification or controlling sexual urges</li> <li>Assumes that rape is about uncontrollable lust or passion or love or attraction</li> </ul>	<ul style="list-style-type: none"> <li>Attempts to excuse, minimise and romanticise rape as being an emotional outburst</li> <li>Disregards elements of power, aggression, violence and humiliation in rape</li> <li>Attempts to remove the responsibility for the rape from the rapist</li> <li>In cases of 'provocation', shifts the blame onto the victim, claiming she provoked the attack either through 'leading him on' or through having an affair</li> </ul>	<ul style="list-style-type: none"> <li>Research and evidence from rapists themselves suggests that most rapes are premeditated and planned. A rapist often rapes repeatedly, usually in the same area and in the same way</li> <li>Many rapists fail to get an erection or ejaculate</li> <li>Interviews with rapists reveal they rape to feel powerful and in control, not for sexual pleasure</li> <li>There is no typical victim of rape. Girls and boys and women and men of all ages can be victims</li> <li>Many rapists are involved in sexually satisfying relationships with their partners at the time of rape</li> </ul>

Myth	Assumptions	Implications/Consequences	Fact
If she didn't scream, fight or get injured, it wasn't rape	<ul style="list-style-type: none"> <li>Assumes that all rape victims react in the same way and will fight back or try to escape</li> <li>Assumes that a victim who does not fight or scream is consenting</li> <li>Assumes that there has to be an element of physical force for the attack to be considered a rape</li> </ul>	<ul style="list-style-type: none"> <li>Disbelieves and re-traumatizes the victim</li> <li>Invalidates the experience of the victim</li> <li>Discourages him/her from seeking help</li> </ul>	<ul style="list-style-type: none"> <li>Victims in rape situations are often legitimately afraid of being killed or seriously injured and so co-operate with the rapist with a view to protecting their lives</li> <li>The victim's perception of threat influences their behaviour</li> <li>Rapists use many manipulative techniques to intimidate and coerce their victims</li> <li>Victims in a rape situation can become physically paralysed with terror or shock and are therefore unable to move or fight</li> <li>Non-consensual intercourse does not always leave visible signs on the body</li> <li>Failure to prevent does not equal victim responsibility</li> <li>Victims may show little physical resistance to the attack</li> <li>Whatever the victim does to survive the assault is appropriate action</li> </ul>
You can tell if she has 'really' been raped by how she acts/ there is a 'right way' to respond to a rape situation	<ul style="list-style-type: none"> <li>Assumes that a victim will try to escape the situation as soon as possible</li> <li>Assumes a raped woman will always be outwardly emotional about her experience</li> <li>Assumes a victim will always report the crime immediately</li> <li>Assumes a victim will remember all the details of the crime</li> </ul>	<ul style="list-style-type: none"> <li>Disbelieves and re-traumatizes the victim</li> <li>Invalidates the victim's experience and individuality</li> <li>Discourages her from seeking help</li> </ul>	<ul style="list-style-type: none"> <li>Reactions to rape are highly varied and individual</li> <li>Many women experience a form of shock after a rape that leaves them emotionally numb or flat – and apparently calm</li> <li>Each rapist has his own pattern, the victim will respond to any cues given by the rapist and follow her instinct in the situation</li> <li>Rape is a form of trauma and that trauma can have a significant effect on the memory of a victim, including inability to recall events clearly</li> </ul>

Myth	Assumptions	Implications/Consequences	Fact
Women cry rape when they regret having sex or want revenge	<ul style="list-style-type: none"> <li>Assumes that women are vindictive</li> <li>Assumes that women lie</li> <li>Assumes that women are or should be embarrassed by sex</li> </ul>	<ul style="list-style-type: none"> <li>Women are not believed in court and courts often ask for corroborating evidence from other witnesses which is not always available in SGBV cases</li> <li>Re-victimises and stigmatises the victim</li> <li>Undermines her ability to seek justice as she is disbelieved by police and courts</li> </ul>	<ul style="list-style-type: none"> <li>Instances of false accusations are low</li> </ul>
If the victim didn't complain immediately it wasn't rape	<ul style="list-style-type: none"> <li>Assumes women act in a certain predictable way when raped</li> </ul>	<ul style="list-style-type: none"> <li>Disbelieves and re-traumatises the victim</li> <li>Invalidates the experience of the victim</li> <li>Discourages her from seeking help</li> </ul>	<ul style="list-style-type: none"> <li>The trauma of rape can cause feelings of shame and guilt which might inhibit a victim from making a complaint</li> <li>The victim may not feel safe to report the rape straight away</li> <li>The victim may not want their loved ones or community to know about the rape</li> <li>Child victims may not understand that their ordeal is a reportable offence</li> <li>The victim may not have faith in the justice system and so may not report the rape</li> </ul>
A woman's value is in her virginity	<ul style="list-style-type: none"> <li>Assumes that if a female virgin is raped, she is 'ruined' and unmarriageable</li> <li>Assumes that if a woman is not a virgin then the harm of the rape is not as bad</li> </ul>	<ul style="list-style-type: none"> <li>The value of women's choice is diminished</li> <li>Women are objectified and worth placed on their physical state</li> <li>The perpetrator offers to marry the victim to mitigate the rape</li> </ul>	<ul style="list-style-type: none"> <li>Events/actions which take place after the rape do not mitigate the instances of rape<sup>337</sup></li> </ul>

<sup>337</sup> For example, in many parts of the PICs, a woman or girl who has been raped might be subject to the harmful practice of being made to marry her rapist to 'normalise' or 'settle' relations between the perpetrator's and victim's families: Jalal, I., *op.cit.* at footnote 153.

Myth	Assumptions	Implications/Consequences	Fact
Rape is sex and not really a violent crime	<ul style="list-style-type: none"> <li>Assumes that having sex is a unilateral, male decision and does not require female consent</li> <li>Assumes that forcing a woman to have sex will have no effect on the woman</li> <li>Assumes that violent crimes must all lead to extreme physical injuries, and that rape does not</li> </ul>	<ul style="list-style-type: none"> <li>Belittles the gravity of rape as a violent attack, the risk involved to the woman and the psychological effect on the woman</li> <li>Courts see rape that does not involve physical violence or force as somehow less serious</li> </ul>	<ul style="list-style-type: none"> <li>Rape is experienced by the victims as an act of violence and can be a life-threatening experience</li> <li>Power, control and anger, rather than sexual attraction, are often the primary motives</li> <li>Many rapists carry a weapon and threaten the victim with violence or death</li> </ul>
Women fantasise about being raped/women secretly enjoy being raped	<ul style="list-style-type: none"> <li>Assumes that all women think about sex in the same way</li> <li>Assumes that because a woman fantasises about rape that she actually wants to be raped</li> </ul>	<ul style="list-style-type: none"> <li>Leads to unilateral decisions by the male perpetrator based on “she wanted it” idea</li> <li>Belittles the gravity of the offence as it was perceived as invited</li> <li>Removes women’s sexual agency and control over their bodies by acting on assumptions as to what a woman wants</li> </ul>	<ul style="list-style-type: none"> <li>Fantasies about rape may be controlled and turned off if they become threatening. In actual cases of rape, the victim is unable to control the violence and stop it</li> <li>Fantasies about rape are never a substitute for actual consent.</li> <li>Women who fantasise about rape do not wish to be raped in real life</li> </ul>
A man cannot rape his wife	<ul style="list-style-type: none"> <li>Assumes that once a woman is married, she has no right to decide whether and when her husband has sex with her</li> <li>Assumes that marriage equates to a woman’s permanent consent</li> <li>Assumes that women are men’s property</li> </ul>	<ul style="list-style-type: none"> <li>No legal offence has taken place</li> <li>Married women do not have the same right to safety as unmarried women</li> <li>Women are unable to report marital rape to the police and may be frequently raped by their husbands</li> <li>Men can rape their wives with impunity and use it as a form of control</li> </ul>	<ul style="list-style-type: none"> <li>All sex without consent constitutes rape</li> <li>Marital rape can have the same psychological and physical effects as rape outside of marriage</li> <li>Marriage does not constitute consent</li> <li>Women retain bodily integrity and human rights throughout marriage</li> </ul>

Myth	Assumptions	Implications/Consequences	Fact
Only sick or insane men are rapists	<ul style="list-style-type: none"> <li>Assumes that “good” men or “normal” men or “sane” men do not rape women</li> <li>Assumes that rape is rare</li> <li>Assumes that society can easily recognise a rapist</li> </ul>	<ul style="list-style-type: none"> <li>Creates excuses to rationalise or excuse the rapist</li> <li>Judges may disbelieve victims as they “should have known” that the man was a rapist</li> <li>Perpetuates rape culture</li> </ul>	<ul style="list-style-type: none"> <li>Few perpetrators are diagnosed as mentally or emotionally ill. Most are found to be well-adjusted, but have a greater tendency to express their anger through violence and rage</li> <li>There is no way of knowing whether someone is a rapist. A person who commits rape generally looks and acts the same as everyone else</li> </ul>
A man cannot rape someone with whom he has previously had consensual sex.	<ul style="list-style-type: none"> <li>Assumes that if a woman wants to have sex with a man at one point in time, she will always want to have sex with him.</li> <li>Once consent is given once, it is likely to be given again.</li> </ul>	<ul style="list-style-type: none"> <li>Women who have previously had consensual intercourse with the perpetrator find it more difficult to show that they have been raped.</li> <li>Discourages rape victims who are in ongoing sexual relationships with the perpetrator from seeking help.</li> </ul>	<ul style="list-style-type: none"> <li>Prior consensual intercourse with the perpetrator does not permit all future sexual interaction.</li> <li>Whether a woman wants to have sex with a man is specific to each time they have sex. Consent must be present each time and cannot be assumed simply because it has been present in the past.</li> </ul>

## Gender Stereotypes

Figure 15: Gender Stereotypes

Stereotypes	Assumptions	Implications/Consequences	Fact
Men are naturally more violent or likely to engage in criminal behaviour	<ul style="list-style-type: none"> <li>Assumes that men should be given some leeway for their behaviour as it is in their nature and cannot be helped</li> <li>Assumes that there is a natural or normal way for men to behave, that this form of masculinity is innate and not culturally determined</li> <li>Assumes that women have a role as a civilising force and have some responsibility in protecting themselves from rape or violent outbursts.</li> </ul>	<ul style="list-style-type: none"> <li>Sentences for perpetrators of SGBV are less harsh than they should be compared to when the correct interpretation of the law within the factual context is adhered to</li> <li>Women are blamed for not reporting incidences sooner and thus not preventing later cases of rape, or for provoking their partner.</li> </ul>	<ul style="list-style-type: none"> <li>While male hormones can cause men to act more aggressively, there are many men who do not rape or engage in criminal behaviour, so physiology cannot be blamed. For example, cross-cultural studies have found that the magnitude and direction of sex difference in partner violence is highly correlated with national-level variations in gender empowerment and individualism-collectivism<sup>338</sup></li> </ul>

338 Archer, J., *Cross-Cultural Differences in Physical Aggression Between Partners: A Social-Role Analysis* (1 May 2006), Volume 10, Issue 2.

Stereotypes	Assumptions	Implications/Consequences	Fact
Men are the head of the house and have the right to discipline female dependents	<ul style="list-style-type: none"> <li>Assumes that women are the property of men</li> <li>Assumes that women must obey men</li> <li>Assumes that it is a man's role to lead the household and that leadership includes control and physical discipline</li> </ul>	<ul style="list-style-type: none"> <li>If a woman does not obey a man, he has the right to act violently against her to "discipline" her</li> </ul>	<ul style="list-style-type: none"> <li>Women and men are entitled to the same human rights and equality in both the public and private sphere</li> <li>Violence against another person is a crime unless it is self-defence or consensual</li> </ul>
Women should not be outspoken	<ul style="list-style-type: none"> <li>Assumes that an outspoken woman needs to be "put in her place"</li> <li>Assumes that women should be quiet, unopinionated and submissive</li> </ul>	<ul style="list-style-type: none"> <li>Outspoken women are subdued with violence if necessary</li> <li>Women may find it difficult to report instances of SGBV</li> </ul>	<ul style="list-style-type: none"> <li>Women and men are entitled to the same human rights, including freedom of expression</li> <li>There is no 'right way' for a woman to act; women have a right to express themselves on an equal basis with men</li> <li>Violence against another person is a crime unless it is self-defence or consensual</li> </ul>
Women are overly emotional and have difficulty getting facts right	<ul style="list-style-type: none"> <li>Assumes that women are not reliable witnesses, that they are more emotional than men, that emotion makes a person less reliable as a witness and that women's cognitive functions are different to men</li> </ul>	<ul style="list-style-type: none"> <li>Female victims of SGBV appearing in court may be perceived as less credible than male witnesses</li> </ul>	<ul style="list-style-type: none"> <li>There is no evidence that women are less reliable as witnesses than men, or that there are any differences in emotional or cognitive function between the genders</li> </ul>

## ANNEX 2 – INTERNATIONAL CONVENTIONS

Figure 16: International Conventions

International Instrument	Signed	Effective	Description	PIC Accession (a), Ratification (r) or Signature (s) <sup>339</sup>	Overall No. Of Acceding or Ratifying (PICs and global)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”)	10 December 1984	26 June 1987	This Convention requires states to take effective measures to prevent torture and cruel, inhuman or degrading treatment in their jurisdiction. Failure to prevent SGBV has been found in some cases to amount to cruel, inhuman and degrading treatment. <sup>340</sup>	Fiji (r), Nauru (r), Palau (s), Vanuatu (a).	PICs: 3/12  Global: 162/197
CEDAW (Convention on the Elimination of all Forms of Discrimination against Women)	18 December 1979	3 September 1981	This Convention requires states to, among other things, incorporate the principle of equality of men and women into their legal system, act to remove stereotyped roles of men and women and the idea of the inferiority of one gender, abolish discriminatory laws and establish effective institutions to protect women against discrimination. Violence against women is seen as a form of gender discrimination and a breach of CEDAW. CEDAW also states that the age of marriage should be 18.	Federated States of Micronesia (a), Fiji (a), Kiribati (a), Marshall Islands (a), Nauru (a), Palau (s), Papua New Guinea (a), Samoa (a), Solomon Islands (a), Tuvalu (a), Vanuatu (a).	PICs: 11/12  Global: 189/197
Convention on the Rights of the Child	20 November 1989	2 September 1990	This Convention requires states to, amongst other things, in a non-discriminatory way, protect all children, without discrimination, from exploitation (sexual and non-sexual), violence and abuse, including sexual abuse, injury or neglect or negligent treatment and dangerous work. In all dealings with a child the best interests of the child shall be paramount. State parties must also abolish traditional practices prejudicial to the health of children, including child marriage.	Federated States of Micronesia (a), Fiji (r), Kiribati (a), Marshall Islands (r), Nauru (a), Palau (a), Papua New Guinea (r), Samoa (r), Solomon Islands (a), Tonga (a), Tuvalu (a), Vanuatu (r).	PICs: 12/12  Global: 196/197

339 UN Treaty Collection, [https://treaties.un.org/Pages/UNTSONline.aspx?id=2&clang=\\_en](https://treaties.un.org/Pages/UNTSONline.aspx?id=2&clang=_en) accessed 1 May 2017.

340 OHCHR, *Gender-based crimes through the lens of torture International Women’s Day* (3 March 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17152&> accessed 10 August 2017.

International Instrument	Signed	Effective	Description	PIC Accession (a), Ratification (r) or Signature (s) <sup>339</sup>	Overall No. Of Acceding or Ratifying (PICs and global)
International Covenant on Civil and Political Rights	16 December 1996	23 March 1976	This Covenant requires states, amongst other things, to respect the civil and political rights of individuals, the right to life, privacy and autonomy and to guarantee equal protection under the law without discrimination.	Nauru (s), Palau (s), Papua New Guinea (a), Samoa (a), Vanuatu (a).	PICs: 3/12  Global: 169/197
ICESCR	16 December 1996	3 January 1976	This Covenant requires states to, among other things, protect economic, social and cultural rights, including the right to non-discrimination, the right to work, the right to the highest attainable standards of health and the right to cultural freedoms. The General Reporting Guidelines in relation to the Covenant include state requirements to report on specific aspects of gender-based violence, such as “what steps have been taken to eliminate direct and indirect discrimination based on sex in relation to each of the rights recognised in the Covenant” and indicate how the state party guarantees the right of men and, particularly, women to enter into marriage with their full and free consent and to establish a family”. <sup>341</sup>	Palau (s), Papua New Guinea (a), Solomon Islands (a).	PICs: 2/12  Global: 165/197

<sup>341</sup> Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the ICESCR*, HRI/GEN/2/Rev.6 (3 June 2009), Articles 12 and 34.

International Instrument	Signed	Effective	Description	PIC Accession (a), Ratification (r) or Signature (s) <sup>339</sup>	Overall No. Of Acceding or Ratifying (PICs and global)
International Convention on the Elimination of All Forms of Racial Discrimination	7 March 1966	4 January 1969	This Covenant requires states to, among other things, eliminate all forms of racial discrimination, promote understanding among all races, and to not sponsor or defend racism. The Committee has urged countries to ensure women of all races and ethnicities are equally protected from violence against women and all cases are adequately investigated and prosecuted.	Fiji (a), Nauru (s), Palau (s), Papua New Guinea (a), Solomon Islands (a), Tonga (a).	PICs: 4/12  Global: 178/197
Optional Protocol to the ICESCR	10 December 2008	6 May 2013	This Optional Protocol establishes a complaints mechanism for the Covenant on Economic, Social and Cultural Rights for individuals and/or groups who claim that their rights under that Covenant have been violated.	Solomon Islands (s).	PICs: 0/12  Global: 22/197
CEDAW Optional Protocol (Convention on the Elimination of All Forms of Discrimination against Women)	6 October 1999	22 December 2000	This Optional Protocol established a complaints mechanism for complaints by individuals and/or groups who claim that their rights under the Convention on the Elimination of All Forms of Discrimination against Women have been violated.	Solomon Islands (a), Vanuatu (a).	PICs: 2/12  Global: 109/197

International Instrument	Signed	Effective	Description	PIC Accession (a), Ratification (r) or Signature (s) <sup>339</sup>	Overall No. Of Acceding or Ratifying (PICs and global)
Optional Protocol to the CRC on the sale of children, child prostitution and child pornography	25 May 2000	18 January 2002	This Optional Protocol requires states to, among other things, protect the rights and interests of child victims/survivors of trafficking, prostitution, pornography and labour.	Federated States of Micronesia (r), Fiji (s), Kiribati (a), Nauru (s), Samoa (a), Solomon Islands (s), Vanuatu (r).	PICs: 4/12 Global: 173/197
Optional Protocol to CAT (Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment)	18 December 2002	22 June 2006	This Optional Protocol requires states to, among other things, allow inspections of its places of detention by the UN Subcommittee on the Prevention of Torture as well as set up its own domestic mechanism that inspects domestic places of detention.	Nauru (a).	PICs: 1/12 Global: 84/197

These treaty actions can be defined as follows:

- (a) Signature ad Referendum: A representative may sign a treaty “ad referendum”, i.e., under the condition that the signature is confirmed by his state. In this case, the signature becomes definitive once it is confirmed by the responsible organ.<sup>342</sup>
- (b) Signature Subject to Ratification, Acceptance or Approval: the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.<sup>343</sup>
- (c) Ratification: the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.<sup>344</sup>
- (d) Accession: the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the UN, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question.<sup>345</sup>

<sup>342</sup> Vienna Convention on the Law of Treaties 1969, Art.12(2)(b)

<sup>343</sup> Vienna Convention on the Law of Treaties 1969, Arts.10 and 18.

<sup>344</sup> Vienna Convention on the Law of Treaties 1969, Arts.2(1)(b), 14(1) and 16.

<sup>345</sup> Vienna Convention on the Law of Treaties 1969, Arts.2(1)(b) and 15.

## ANNEX 3 – LEGISLATION INFLUENCING INCLUSION OF CUSTOM AND CULTURE IN SENTENCING DECISIONS

**Figure 17:** Legislation Requiring Custom and Culture to be Considered During Sentencing

Country	Legislation requiring custom and culture to be considered during sentencing
<b>Federated States of Micronesia</b>	The Constitution of the Federated States of Micronesia provides, at s.11 of Article XI, that courts' decisions shall be consistent with the Constitution, with Micronesian customs and traditions, and with the social and geographical configuration of Micronesia. In rendering a decision, a court shall "consult and apply sources of the Federated States of Micronesia" (this statement and "sources" are not defined or clarified). Moreover, s.1203 of Title 11 of the Code of the Federated States of Micronesia (2014) <sup>346</sup> provides that, when determining the sentence to be imposed on an offender, the court must give due recognition to the generally accepted customs prevailing in the Federated States of Micronesia.
<b>Fiji</b>	Pursuant to s.154 of the Criminal Procedure Decree (2009), a court may promote customary reconciliation and encourage and facilitate settlement (outside of the formal court settlement process). The Decree came into force in February 2010 and the reconciliation provisions do not apply to domestic violence cases, in contrast to the Code which preceded it. Under the Domestic Violence Act (2009), the safety and well-being of the victim/survivor must be of the utmost and paramount importance in weighing factors that need to be taken into account.
<b>Kiribati</b>	Schedule 1 of the Laws of Kiribati Act (1989) defines the laws of Kiribati as including customary law and notes that customary law may be taken into account for the purposes of "deciding the reasonableness of an act, or an excuse...and determining the penalty to be imposed on a guilty party, or where the court believes that by not taking the customary law into account, an injustice may be done to a person". Under s.35 of the Magistrates Court Ordinance (1978), the Magistrates may promote reconciliation in common assault cases.
<b>Marshall Islands</b>	<p>The Constitution of the Marshall Islands recognises customary law as a source of law. According to the Constitution, "customary law" means any custom having the force of law in the Marshall Islands and includes any act declaring customary law.</p> <p>It is the responsibility of parliament (<i>Nitijela</i>) to declare by act customary laws. Customary laws may include provisions which, in the opinion of parliament, are necessary or desirable to supplement established rules of customary law or to take into account any traditional practice.</p> <p>The Constitution of the Marshall Islands recognises a Traditional Rights Court with jurisdiction over questions relating to titles, land rights or other legal interests depending wholly or partly on customary law and traditional practice.</p>
<b>Nauru</b>	The Custom and Adopted Laws Act (1971) provides that "institutions, customs and usages" of the Nauruan people as they existed immediately before the commencement of the Act will be recognised by the Nauruan courts. However, application of customary law is limited to issues involving solely Nauruan people and only those cases that deal with property. There is no evidence to suggest its use in cases of SGBV. The practice of public apologies to the victim/survivor, while referenced in cases, has not been expressly taken into account as a mitigating factor when sentencing.
<b>Palau</b>	The Palauan Constitution recognises the importance of traditional Palauan custom. Section 1 of Article V provides that the government will not curtail the roles of traditional leaders as recognised by custom and tradition, which are not inconsistent with the Constitution. Section 2 of Article V provides that statutes and customary law are equally authoritative. Where there is a conflict between the two, the statute will prevail only to the extent that it is not in conflict with the underlying principles of the traditional law. The Palau National Code (1986) also recognises traditional Palauan customs.

<sup>346</sup> The Federated States of Micronesia, as an independent sovereign nation made up of four states, is governed by an overarching constitution, and a code that draws together all the public laws as passed by the Congress of the Federated States of Micronesia. However, each state has its own legislative branch and may pass state-specific laws.

Country	Legislation requiring custom and culture to be considered during sentencing
<b>Papua New Guinea</b>	The Constitution of Papua New Guinea requires customary practice to be applied as part of the underlying law, to the extent that it is consistent with constitutional law and statute and is not repugnant to the general principles of humanity. Section 4 of the Customs Recognition Act (1963) states that in criminal cases custom can be taken into account in determining the penalty to be imposed upon a guilty party. The Criminal Law Compensation Act (1991) allows perpetrators to be ordered to pay compensation to victims/survivors in addition to criminal prosecution. Such compensation is generally capped at K5000, albeit sometimes a greater amount is ordered by the judge as a condition for a reduced sentence.
<b>Samoa</b>	The Samoan Constitution states that laws include customary laws. Under the Village Fono Act (1990), the Village Fono has the power to impose punishments in accordance with custom. Any punishments imposed shall be taken into account when considering whether to mitigate a sentence. While the Alternative Dispute Resolution Act (2007) encourages customary reconciliation, a court can only encourage this if they can ensure the victim/survivor in a domestic violence case is not submitting to it due to pressure.
<b>Solomon Islands</b>	Schedule 3 of the Constitution of the Solomon Islands states that customary law shall have effect as part of the law of the Solomon Islands. Under s.35 of the Magistrates Court Act (1996), in criminal cases the court may promote customary reconciliation.
<b>Tonga</b>	The Tongan Constitution does not expressly provide for the application of customary law. Section 28 of the Family Protection Act (2013) notes that it is not a defence to a domestic violence offence that the respondent has paid compensation or reparation to the complainant or to the complainant's family. The legislation covers domestic abuse amounting to sexual, physical and mental abuse; however, for first time offenders the cap on custodial sentences is 12 months.
<b>Tuvalu</b>	Section 2 of the Laws of Tuvalu Act (2008) provides that customary law "shall be recognized and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest". Section 32 of the Magistrates Court Act (2008) provides that a Magistrates Court may promote customary reconciliation and encourage and facilitate amicable settlement of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such court, and may thereupon order the proceedings to be stayed or terminated.
<b>Vanuatu</b>	The Constitution of Vanuatu states that customary law shall continue to have effect as part of the law of the republic. Section 10 of the Island Courts Act (1983) states that an Island Court shall administer customary law in so far as it is not in conflict with written law and not contrary to justice, morality and good order. The Penal Code (Amendment) Act (2006) provides that a court may promote customary reconciliation in criminal proceedings and facilitate settlement according to custom. In sentencing, account must be taken of any compensation or reparation made or due under custom. The Family Protection Act (2008) also allows compensation paid under custom to be taken into account in sentencing. In relation to sentencing, the Vanuatu Criminal Procedure Code (1981), s.118, promotes customary reconciliation and the encouragement and facilitation of settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal and private nature. Section 118 also imposes a duty on courts to take into account, in assessing the quantum of the penalty to be imposed, any compensation or reparation made or due by the offender under custom. Similarly, s.119 specifies that "an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order".

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## 1. Domestic Violence

Figure 18: Domestic violence

Domestic Violence					
	Type of Offence	Source	Definition	Proof	Penalties
International	Family violence and intimate partner violence	<a href="#">Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW)</a> and <a href="#">CEDAW Committee, General Recommendation No. 19</a>	<p><b>General Recommendation No. 19 (Referred to in paragraph 1 of General Recommendation No. 35):</b> Discrimination includes gender-based violence, which is “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence”. Please see paragraph 2.3.1.</p> <p><b>General Recommendation No. 19, Paragraph 23:</b> Family violence takes place within family relationships against women of all ages and may consist of violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence.</p>	N/A	N/A
		<a href="#">Universal Declaration of Human Rights (1948)</a>	<p><b>Article 5:</b> Domestic violence is a violation of Article 5 of the Universal Declaration of Human Rights (the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment and the right to life, equality and non-discrimination).</p>		
		<a href="#">UN Declaration on the Elimination of Violence Against Women (1993)</a>	<p><b>Articles 1 and 2:</b> Violence against women consists of “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life”, including “physical, sexual and psychological violence occurring in the family”.</p>		

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<a href="#">UN Resolution 58/147 Elimination of Domestic Violence against Women (2003)</a>	<p><b>Paragraph 1:</b> Domestic violence is violence “that occurs within the private sphere, generally between individuals who are related through blood or intimacy”, which “can take many different forms, including physical, psychological and sexual violence” and it “can include economic deprivation and isolation and that such conduct may cause imminent harm to the safety, health or well-being of women”.</p> <p><b>Paragraph 7:</b> Exhorts states to take measures to ensure the protection of women subjected to violence, and access to just and effective remedies, inter alia, through compensation and indemnification, and the healing of victims and the rehabilitation of perpetrators. However, states must not invoke any custom, tradition or religious consideration to avoid their obligations to eliminate violence against women.</p>	N/A	<p><b>Paragraph 6:</b> States have a commitment to establish legislation and/or strengthen appropriate mechanisms to handle criminal matters relating to all forms of domestic violence, including marital rape and sexual abuse of women and girls, and to ensure that such cases are brought to justice swiftly.</p> <p><b>Paragraph 7:</b> States should adopt, strengthen and implement legislation that prohibits domestic violence, prescribes punitive measures and establishes adequate legal protection against domestic violence, makes domestic sexual violence a criminal offence and ensures greater protection for women, <i>inter alia</i>, by means of, where appropriate, orders restraining violent spouses from entering the family home, or by banning violent spouses from contacting the victim.</p>
<b>Federated States of Micronesia</b>	There are no specific offences covering family violence or intimate partner violence in the Federated States of Micronesia.				
	Family violence and intimate partner violence	<p><a href="#">Code of the Federated States of Micronesia (2014), Title 11, ss.608 and 1201</a></p> <p><a href="#">Code of the Federated States of Micronesia (2014), Title 11, ss.609 and 1201</a></p>	<p><b>Aggravated Assault:</b> Causing serious bodily injury to another intentionally, knowingly, or recklessly, under circumstances showing extreme indifference to the value of human life.</p> <p><b>Assault:</b> Unlawfully and intentionally offering or attempting, with force or violence, to strike, beat, wound or do bodily harm to another.</p>	<p><b>Standard:</b> Beyond reasonable doubt (due process) (<a href="#">Constitution of the Federated States of Micronesia, Article IV, s.3</a>, as interpreted in <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a>).</p> <p><b>Evidential Issues:</b> Burden of proof lies with the prosecution (<a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a>).</p>	<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$100,000</p> <p>Both penalties may be imposed.</p> <p><b>Maximum Imprisonment:</b> 1 year</p> <p><b>Maximum Fine:</b> \$5,000</p> <p>Both penalties may be imposed.</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Federated States of Micronesia</b>	Family violence and intimate partner violence	<a href="#">Chuuk State Code (2001), Title 12, Part 1, Chapter 4, s.2057</a>	<b>Assault with a Dangerous Weapon:</b> Attempting to cause or purposely causing bodily injury to another person with a dangerous weapon.	<b>Standard:</b> Beyond reasonable doubt (due process) ( <a href="#">Constitution of the Federated States of Micronesia, Article IV, s.3</a> , as interpreted in <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a> ).  <b>Evidential Issues:</b> Burden of proof lies with the prosecution ( <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a> ).	<b>Maximum Imprisonment:</b> 5 years  <b>Maximum Fine:</b> \$5,000  Both penalties may be imposed.
		<a href="#">Chuuk State Code (2001), Title 12, Part 1, Chapter 4, s.2058</a>	<b>Assault:</b> Unlawfully offering or attempting, with force or violence, to strike, beat, wound or do bodily harm to another.		<b>Maximum Imprisonment:</b> 3 years  <b>Maximum Fine:</b> \$100  Both penalties may be imposed.
		<a href="#">Chuuk State Code (2001), Title 12, Part 1, Chapter 4, s.2059</a>	<b>Assault and Battery:</b> Unlawfully striking, beating, wounding or doing bodily harm to another.		<b>Maximum Imprisonment:</b> 6 months  <b>Maximum Fine:</b> \$250  Both penalties may be imposed.
		<a href="#">Chuuk State Code (2001), Title 12, Part 1, Chapter 4, s.2060</a>	<b>Mayhem:</b> Cutting, biting, slitting the nose, ear, or lip, or cutting off or disabling the tongue, or putting out or destroying an eye, or cutting off or disabling a limb or any member of another person, with intent to maim or disfigure.		<b>Maximum Imprisonment:</b> 3 years  <b>Maximum Fine:</b> \$1,000  Both penalties may be imposed.
<b>Federated States of Micronesia</b>	Family violence and intimate partner violence	<a href="#">Kosrae State Code (1997), Title 13, Part I, Chapter 3, s.13.301</a> and <a href="#">Kosrae State Code (1997), Title 13, Part II, Chapter 12, s.13.1201</a>	<b>Aggravated Assault:</b> Assaulting, striking, beating, or wounding another with a dangerous weapon, with intent to kill, rape, rob, inflict grievous bodily harm, or to commit another felony.	<b>Standard</b> Beyond reasonable doubt (due process) ( <a href="#">Constitution of the Federated States of Micronesia, Article IV, s.3</a> , as interpreted in <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a> ).  <b>Evidential Issues</b> Burden of proof lies with the prosecution ( <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a> ).	<b>Maximum Imprisonment:</b> 10 years  <b>Maximum Fine:</b> \$20,000  Both penalties may be imposed.
		<a href="#">Kosrae State Code (1997), Title 13, Part I, Chapter 3, s.13.302</a> and <a href="#">Kosrae State Code (1997), Title 13, Part II, Chapter 13, s.13.1303</a>	<b>Assault:</b> Offering or attempting with force or violence to strike, beat, wound or do bodily harm to another.		<b>Maximum Imprisonment:</b> 6 months  <b>Maximum Fine:</b> \$500  Both penalties may be imposed.

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Kosrae State Code (1997), Title 13, Part I, Chapter 3, s.13.303</u></p> <p>and</p> <p><u>Kosrae State Code (1997), Title 13, Part II, Chapter 13, s.13.1301</u></p>	<p><b>Assault and Battery:</b> Striking, beating, wounding or otherwise doing bodily harm to another.</p>		<p><b>Maximum Imprisonment:</b> 1 year</p> <p><b>Maximum Fine:</b> \$1,000</p> <p>Both penalties may be imposed.</p>
		<p><u>Kosrae State Code (1997), Title 13, Part I, Chapter 3, s.13.307</u></p> <p>and</p> <p><u>Kosrae State Code (1997), Title 13, Part II, Chapter 12, s.13.1201</u></p>	<p><b>Mayhem:</b> Cutting, biting, slitting the nose, ear, or lip, or cutting off or disabling the tongue, or putting out or destroying an eye, or cutting off or disabling a limb or any member of another person, with intent to maim or disfigure.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$20,000</p> <p>Both penalties may be imposed.</p>
<b>Federated States of Micronesia</b>	Family violence and intimate partner violence	<p><u>Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, s.5.131</u></p>	<p><b>Mayhem:</b> Cutting, biting, slitting the nose, ear, or lip, or cutting off or disabling the tongue, or putting out or destroying an eye, or cutting off or disabling a limb or any member of another person, with intent to maim or disfigure.</p>	<p><b>Standard</b> Beyond reasonable doubt (due process) (<u>Constitution of the Federated States of Micronesia, Article IV, s.3</u>, as interpreted in <u>Alaphonso v Federated States of Micronesia</u> [1982] 1 FSM Intrm. 209).</p> <p><b>Evidential Issues</b> Burden of proof lies with the prosecution (<u>Alaphonso v Federated States of Micronesia</u> [1982] 1 FSM Intrm. 209).</p>	<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed.</p>
		<p><u>Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, s.5.132</u></p>	<p><b>Assault or Assault and Battery with a Dangerous Weapon:</b> Unlawfully committing any assault or assault and battery upon another by means of a dangerous weapon.</p>		<p><b>Maximum Imprisonment:</b> 10 years (if bodily injury occurs) or 5 years (if no bodily injury occurs)</p> <p><b>Maximum Fine:</b> \$10,000 (if bodily injury occurs) or \$5,000 (if no bodily injury occurs)</p> <p>Both penalties may be imposed.</p>
		<p><u>Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, s.5.133</u></p>	<p><b>Felonious Assault and Battery:</b> Unlawfully and intentionally striking, beating, wounding or otherwise doing serious bodily harm.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed.</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<a href="#">Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, s.5.134</a>	<b>Assault and Battery:</b> Unlawfully and intentionally striking, beating, wounding or otherwise doing serious bodily harm.		<b>Maximum Imprisonment:</b> 2 years <b>Maximum Fine:</b> \$500 Both penalties may be imposed.
		<a href="#">Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, s.5.135</a>	<b>Assault:</b> Unlawfully and intentionally offering or attempting to strike, beat, wound or do bodily harm to another.		<b>Maximum Imprisonment:</b> 6 months <b>Maximum Fine:</b> \$100 Both penalties may be imposed.
<b>Federated States of Micronesia</b>	YAP  Family violence and intimate partner violence	<a href="#">Yap State Code (2000), Title 11, Chapter 2, s.207</a>	<b>Aggravated Assault:</b> Attempting to cause serious bodily injury to another or causing serious bodily injury intentionally, knowingly or recklessly under circumstances showing extreme indifference to the value of human life.	<b>Standard</b> Beyond reasonable doubt (due process) ( <a href="#">Constitution of the Federated States of Micronesia, Article IV, s.3</a> , as interpreted in <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a> ).  <b>Evidential Issues</b> Burden of proof lies with the prosecution ( <a href="#">Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</a> ).	<b>Maximum Imprisonment:</b> 5 years <b>Maximum Fine:</b> \$5,000 Both penalties may be imposed.
		<a href="#">Yap State Code (2000), Title 11, Chapter 2, s.208</a>	<b>Assault with a Dangerous Weapon:</b> Attempting to cause or purposely causing bodily injury to another person with a dangerous weapon.		<b>Maximum Imprisonment:</b> 5 years <b>Maximum Fine:</b> \$5,000 Both penalties may be imposed.
		<a href="#">Yap State Code (2000), Title 11, Chapter 2, s.209</a>	<b>Assault:</b> Unlawfully offering or attempting, with force or violence, to strike, beat, wound or doing bodily harm to another.		<b>Maximum Imprisonment:</b> 6 months <b>Maximum Fine:</b> \$100 Both penalties may be imposed.
		<a href="#">Yap State Code (2000), Title 11, Chapter 2, s.210</a>	<b>Assault and Battery:</b> Unlawfully striking, beating, wounding or otherwise doing bodily harm to another.		<b>Maximum Imprisonment:</b> 3 years <b>Maximum Fine:</b> \$100 Both penalties may be imposed.
		<a href="#">Yap State Code (2000), Title 11, Chapter 2, s.211</a>	<b>Mayhem:</b> Cutting, biting, slitting the nose, ear, or lip, or cutting off or disabling the tongue, or putting out or destroying an eye, or cutting off or disabling a limb or any member of another person, with intent to maim or disfigure.		<b>Maximum Imprisonment:</b> 3 years <b>Maximum Fine:</b> \$1,000 Both penalties may be imposed.
		<a href="#">Yap State Code (2000), Title 11, Chapter 2, s.213</a>	<b>Threats:</b> Threatening to commit any crime of violence with purpose to terrorise another person.		<b>Maximum Imprisonment:</b> 6 months <b>Maximum Fine:</b> \$100 Both penalties may be imposed.

## Domestic Violence

	Type of Offence	Source	Definition	Proof	Penalties
Fiji	The Domestic Violence Act (2009) <sup>347</sup> does not distinguish between family violence and intimate partner violence, applying instead to any “family or domestic relationship”.				
	Family violence and intimate partner violence	<u>Domestic Violence Act (2009), Part 1, s.3</u>	<p><b>Domestic Violence:</b> “Domestic violence” is defined as violence against a person committed, directed or undertaken by a person with whom the victim is, or has been, in a family or domestic relationship. This violence includes physical, sexual and psychological violence, stalking and property damage, and threats of such violence. Domestic violence may be a single act or a number of acts that form part of a pattern of behaviour, even if the acts seem minor when viewed in isolation.</p> <p>A process for obtaining restraining orders in cases of domestic violence, and an offence of breaching such a restraining order, are created under the Domestic Violence Act (2009), Part 3 and Part 9 respectively.</p>	N/A	N/A
		<u>Crimes Act (2009), Part 15, Division 5, s.274</u>	<b>Common Assault:</b> Unlawfully assaulting another person.	<p><b>Standard:</b> Beyond reasonable doubt (due process) (<i>AG v Gopal</i> [1967] 13 FLR 65).</p>	<b>Maximum Imprisonment:</b> 1 year
		<u>Crimes Act (2009), Part 15, Division 5, s.275</u>	<b>Assault Causing Actual Bodily Harm:</b> Committing an assault occasioning actual bodily harm.	<p><b>Evidential Issues:</b> The burden of proof lies with the prosecution (<u>Crimes Act (2009), Part 5, s.14, Criminal Procedure Code (1978), Part IV, s.144</u>). Every person charged with an offence has the right to be presumed innocent until proven guilty (<u>Constitution of the Republic of Fiji, Chapter 2, s.14(2)(a)</u>).</p> <p>Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the act creating such offence, and whether or not specified or negated in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution (<u>Criminal Procedure Code (1978), s.144</u>).</p>	<b>Maximum Imprisonment:</b> 5 years
	<u>Crimes Act (2009), Part 12, s.209</u>	<b>Assault with Intent to Commit Rape:</b> Assaulting another with intent to commit rape.			<b>Maximum Imprisonment:</b> 10 years

<sup>347</sup> The Revised Edition of the Laws (Consequential Amendments) Act 2016 (Act No. 31 of 2016) in Fiji amended individual legislative acts to change the naming convention from “Decree” to “Act”. However, neither the Crimes Decree (2009) nor the Domestic Violence Decree (2009) is mentioned among those revised to change the name of the legislation from “Decree” to “Act”. Despite this, it appears to be the case that within other pieces of legislation, the references have been amended to “Crimes Act (2009)” and “Domestic Violence Act (2009)”. For the purposes of this Handbook, we will therefore refer to the “Crimes Act (2009)” and the “Domestic Violence Act (2009)”.

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Kiribati</b>	The Family Peace Act does not distinguish between family violence and intimate partner violence, applying instead to any "domestic relationship".				
	Family violence and intimate partner violence	<u>Te Rau N Te Mwenga Act (2014) (No. 1 of 2014) (the "Family Peace Act")</u> , Part 1, ss.4-5 and Part 6, s.33	<p><b>Domestic Violence:</b> Any act, omission, conduct, or threats to the complainant or any person related to the complainant by the respondent in a domestic relationship, which:</p> <ul style="list-style-type: none"> <li>(a) harms, injures or endangers the health, safety, life, limb or well-being of the complainant, including physical, sexual, verbal, emotional and economic abuse;</li> <li>(b) harasses, harms, injures or endangers the complainant with a view to coercing the complainant or any related person to the complainant to meet any lawful demand for any property;</li> <li>(c) otherwise injures or causes harm to the complainant by any conduct in paragraphs (a) and (b); or</li> <li>(d) otherwise injures or causes harm to the complainant.</li> </ul> <p>A domestic relationship includes marriage, cohabitation, parent/child relationship, legal or customary adoption, engagement, courtship, customary or sexual relationship, sharing the same residence or dependency upon ongoing care in the same household.</p>	N/A	<p><b>First Offence</b></p> <p><b>Maximum Imprisonment:</b> 6 months</p> <p><b>Maximum Fine:</b> \$250</p> <p><b>Second Offence</b></p> <p><b>Maximum Imprisonment:</b> 12 months</p> <p><b>Maximum Fine:</b> \$500</p> <p>Both penalties may be imposed.</p> <p><b>Third Offence</b></p> <p><b>Maximum Imprisonment:</b> 3 years</p> <p><b>Maximum Fine:</b> \$1,000</p> <p>Both penalties may be imposed.</p>
		<u>Kiribati Penal Code (1965, as amended 1977) (the "Kiribati Penal Code")</u> , Part XXV, s.237	<b>Common Assault:</b> Unlawfully assaulting another.	<b>Standard:</b> Beyond reasonable doubt ( <u>Kiribati Magistrates' Bench Book (2004), Chapter 6, ss.2.2-2.3</u> ).	<b>Maximum Imprisonment:</b> 6 months
		<u>Kiribati Penal Code, Part XXV, s.238</u>	<b>Assaults Causing Actual Bodily Harm:</b> Committing an assault occasioning actual bodily harm.	<b>Evidential Issues:</b> Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty ( <u>The Constitution of Kiribati (1979), Chapter II, s.10(2)(a)</u> ).	<b>Maximum Imprisonment:</b> 5 years

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Criminal Code (2011), Article 230, s.230.3, Article 6, s.6.06(2)(c)</u></p> <p>and</p> <p><u>Child Abuse and Neglect Act (1991), Chapter 5, s.502(2)</u></p>	<p><b>Child Abuse and Neglect:</b> Commission of child abuse or neglect by a parent, guardian, or other person supervising the welfare of a child under the age of 18 years old. "Child abuse or neglect" is defined as acts or omissions of any person that have resulted in the physical or psychological health or welfare of a child to be harmed, or to be subject to any reasonably foreseeable, substantial risk of being harmed.</p> <p>Circumstances include but are not limited to the following:</p> <ul style="list-style-type: none"> <li>(a) when the child exhibits evidence of: substantial or multiple skin bruising or any other internal bleeding; any injury to skin causing substantial bleeding; malnutrition; failure to thrive; burn or burns; poisoning; fracture of any bone; sub-dural hematoma; soft tissue swelling; extreme pain; extreme mental distress; gross degradation; and death;</li> <li>(b) when the child has been the victim of sexual contact or conduct, including but not limited to sex crimes or other forms of sexual exploitation;</li> <li>(c) where there exists injury to the psychological capacity of the child as evidenced by an observable and substantial impairment of the child's ability to function;</li> <li>(d) when the child is not provided in a timely manner with adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision; or</li> </ul>		<p><b>Maximum Imprisonment:</b> 35 months</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Marshall Islands</b>	The Domestic Violence Prevention and Protection Act (2011) does not distinguish between family violence and intimate partner violence, applying instead to any violence perpetrated upon a “family member” (which term includes “partner”).				
	Family violence and intimate partner violence	<u>Domestic Violence Prevention and Protection Act, (2011) Part I §904 and §905</u>	<p><b>Domestic Violence:</b></p> <p>(1) Any person who:</p> <ul style="list-style-type: none"> <li>(a) assaults a family member;</li> <li>(b) psychologically abuses or intimidates a family member;</li> <li>(c) sexually assaults a family member;</li> <li>(d) economically abuses a family member;</li> <li>(e) continuously and unlawfully restrains the freedom of movement of a family member;</li> <li>(f) stalks a family member;</li> <li>(g) unlawfully behaves in an indecent manner to a family member;</li> <li>(h) unlawfully damages or causes damage to a family member’s property, commits an act of domestic violence.</li> </ul> <p>(2) Any person who counsels or procures another to commit any of the acts under subsection (1) commits an act of domestic violence.</p> <p>(3) Any person who threatens to commit any of the acts under subsection (1) commits an act of domestic violence.</p> <p>“Family member” means a partner, or a member of a person’s family including spouse, child, parent, grandparent, sibling, uncle, aunt, brother-in-law or sister-in-law, or uncle-in-law or nephew, niece or cousin; any other person who is treated by the person as a family member or a member of a same household including by customary adoption.</p>	<p><b>Standard:</b> Beyond reasonable doubt (<u>Criminal Code (2011), Article 1, s.1.12(1)</u>).</p> <p><b>Evidential Issues:</b> In the absence of proof of an offence, the defendant is assumed innocent (<u>Criminal Code (2011), Article 1, s.1.12(1)</u>).</p>	<p><b>First Offence</b></p> <p><b>Maximum Imprisonment:</b> 6 months</p> <p><b>Maximum Fine:</b> \$1,000</p> <p><b>Second or any Subsequent Offences</b></p> <p><b>Maximum Imprisonment:</b> 2 years</p> <p><b>Maximum Fine:</b> \$2,000</p> <p><b>Procuring or counselling the offence:</b></p> <p><b>Maximum Imprisonment:</b> 6 months</p> <p><b>Maximum Fine:</b> \$1,000</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<u>Criminal Code (2011), ss.211.1, 6.03 and 6.08</u>	<p><b>Assault:</b> Attempting to cause or intentionally, knowingly or recklessly causing bodily injury to another; or negligently causing bodily injury to another with a deadly weapon.</p> <p>Assault is a misdemeanour unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanour.</p>		<p><b>Maximum Imprisonment:</b> 1 year (in the case of a misdemeanour) or 6 months (in the case of a petty misdemeanour)</p> <p><b>Maximum Fine:</b> \$1,000 (in the case of a misdemeanour) or \$400 (in the case of a petty misdemeanour)</p>
		<u>Criminal Code (2011), ss.211.2, 6.03 and 6.06</u>	<p><b>Assault with a Deadly Weapon:</b> Attempting to cause or intentionally or knowingly causing bodily injury to another with a deadly weapon.</p>		<p><b>Maximum Imprisonment:</b> 35 months</p> <p><b>Maximum Fine:</b> \$5,000</p> <p>Both penalties may be imposed.</p>
		<u>Criminal Code (2011), ss.211.3, 6.03 and 6.06</u>	<p><b>Aggravated Assault:</b> Attempting to cause serious bodily injury to another, or causing such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$20,000</p>
		<u>Criminal Code (2011), ss.211.4, 6.03 and 6.08</u>	<p><b>Reckless Endangerment:</b> Recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.</p>		<p><b>Maximum Imprisonment:</b> 1 year</p> <p><b>Maximum Fine:</b> \$1,000</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Nauru</b>	The Domestic Violence and Family Protection Act (2017) does not distinguish between family violence and intimate partner violence, applying instead to any "domestic relationship". It also does not create a stand-alone offence of domestic violence.				
	Family violence and intimate partner violence	<u>Domestic Violence and Family Protection Act (2017), ss.5 and 6</u>	<p><b>Domestic Violence:</b></p> <p>(1) A person commits domestic violence if he or she threatens to or commits the following against a person with whom he or she is, or has been, in a domestic relationship:</p> <ul style="list-style-type: none"> <li>(a) assault;</li> <li>(b) coercive control;</li> <li>(c) economic and financial abuse;</li> <li>(d) sexual violence;</li> <li>(e) stalking;</li> <li>(f) persistently behaving in an abusive, cruel, inhumane, degrading, provocative or offensive manner; and</li> <li>(g) damage to property;</li> </ul> <p>(2) A person commits domestic violence if he or she engages or incites another person to commit any conduct in subsection (1).</p> <p>(3) Domestic violence may consist of a single act or a number of acts that form a pattern of behaviour, despite some of those acts when viewed in isolation appearing to be minor or trivial.</p> <p>A "domestic relationship" with another person includes marriage, partnership, cohabitation, family members, dependency on the other person for regular support because of disability, illness, or impairment, and close personal relationships.</p>	N/A.	<p><b>Maximum Imprisonment:</b></p> <p>Currently there is no stand-alone "crime" of domestic violence. Only the breach of a protection or safety order; failure to attend court-mandated counselling; or the obstruction of a service provider (including a counsellor) merit imprisonment in the context of domestic violence.</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Crimes Act (2016), Part 6, s.71-73, Part 2, s.8</u></p>	<p><b>Assault Causing Serious Harm:</b></p> <p><i>“serious harm” means harm (including the cumulative effect of any harm) whether or not treatment is, or could have been, available: (a) that endangers, or is likely to endanger, a person’s life; or (b) that is or is likely to be significant and longstanding.</i></p> <p>A person intentionally engages in conduct, the conduct does cause serious harm to another person, and the person:</p> <ul style="list-style-type: none"> <li>(a) intends to cause serious harm to that or any other person by the conduct, or</li> <li>(b) is reckless about causing serious harm to that or any person by the conduct, or</li> <li>(c) is negligent about causing serious harm to that or any other person by the conduct.</li> </ul>	<p><b>Standard:</b> Beyond reasonable doubt (<u>Republic of Nauru v Toromon [2016] NRDC 47</u>).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<u>The Constitution of Nauru, Part II, s.10(3)(a)</u>).</p>	<p><b>Maximum Imprisonment:</b> 20 years (aggravating circumstances), 15 years (any other case)</p> <p><b>Maximum Imprisonment:</b> 15 years (aggravating circumstances), 12 years (any other case)</p> <p><b>Maximum Imprisonment:</b> 13 years (aggravating circumstances), 10 years (any other case)</p>
		<p><u>Crimes Act (2016), Part 6, s.74-75, Part 2, s.8</u></p>	<p><b>Assault Causing Harm:</b></p> <p><i>“harm” means physical harm and mental harm.</i></p> <p>A person intentionally engages in conduct, the conduct does cause harm to another person without that person’s consent, and the person:</p> <ul style="list-style-type: none"> <li>(a) intends to cause harm to that or any other person by the conduct, or</li> <li>(b) is reckless about causing harm to that or any person by the conduct.</li> </ul>		<p><b>Maximum Imprisonment:</b> 9 years (aggravating circumstances), 7 years (any other case)</p> <p><b>Maximum Imprisonment:</b> 7 years (aggravating circumstances), 5 years (any other case)</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Crimes Act (2016), Part 6, s.78</u></p>	<p><b>Common Assault:</b></p> <p>(1) A person (the “defendant”) commits an offence if:</p> <p>(a) the defendant intentionally:</p> <ul style="list-style-type: none"> <li>(i) engages in conduct that results in a direct or indirect application of force to another person; or</li> <li>(ii) makes physical contact (directly or indirectly) with another person knowing that the person might reasonably object to the contact in the circumstances (whether or not the person was aware of the contact at the time); or</li> <li>(iii) makes a threat to another person of a direct or indirect application of force that:                             <ul style="list-style-type: none"> <li>(A) the defendant intends the other person to apprehend; and</li> <li>(B) the other person believes on reasonable grounds is able to be carried out by the defendant; and</li> </ul> </li> </ul> <p>(b) the other person does not consent, or consents because of a dishonest representation by the defendant, to the conduct, contact or threat.</p> <p>(2) However, conduct that is within the limits of what would be acceptable to a reasonable person as incidental to social interaction or community life cannot amount to an offence under this section.</p>		<p><b>Maximum Imprisonment:</b></p> <p>2 years (aggravating circumstances), 1 year (any other case)</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<u>Crimes Act (2016), Part 6, s.79</u>	<p><b>Aggravating Circumstances for Assault Offences:</b></p> <p>(1) If an offence under this Division provides for a penalty if aggravating circumstances apply, then that penalty may be imposed if the conduct constituting the offence occurs in any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(a) the defendant is, or pretends to be, armed with an offensive weapon;</li> <li>(b) the defendant is in company with one or more other people;</li> <li>(c) the defendant intends to commit another offence; or</li> <li>(d) the defendant intends to avoid the lawful arrest or detention of any person.</li> </ul> <p>(2) For subsection (1)(c), it is not necessary to prove that the defendant intends to commit a particular offence.</p>		
		<u>Crimes Act (2016), Part 6, s.94</u>	<p><b>Neglecting Child or Vulnerable Adult:</b></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> <li>(a) the person is a responsible carer for a child or vulnerable adult; and</li> <li>(b) the person intentionally engages in any of the following conduct in relation to the child or vulnerable adult: <ul style="list-style-type: none"> <li>(i) fails to provide the child or vulnerable adult with adequate food, clothing, accommodation or care when it is available to the person from the person's own resources;</li> <li>(ii) fails to take all steps necessary to obtain adequate food, clothing, accommodation or care for the child or vulnerable adult when it is not available to the person from the person's own resources;</li> <li>(iii) deserts the child or vulnerable adult;</li> <li>(iv) leaves the child or vulnerable adult without means of support; and</li> </ul> </li> <li>(c) the conduct causes a significant temporary or permanent detrimental effect to the child's or vulnerable adult's physical, psychological or emotional wellbeing; and</li> <li>(d) the person is reckless about causing the effect to the child's or vulnerable adult's wellbeing.</li> </ul>		<b>Maximum Imprisonment:</b> 10 years

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Palau</b>	The Family Protection Act (2012) does not distinguish between family violence and intimate partner violence, applying to “family or household member[s]”.				
	Family violence and intimate partner violence	<p><u>Title 21 of the Palau National Code (1986) (the “PNC”)</u></p> <p>amended by the <u>Palau Family Protection Act (2012) (the “Family Protection Act”)</u>, <u>which adds a new Chapter 8, s.806</u></p> <p>and <u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 14, s.1400 and Chapter 6, ss.650(4) and 663</u></p>	<p><b>Abuse of Family or Household Members:</b></p> <p>physically abusing a family or household member, or refusing compliance with a police officer who makes reasonable inquiry or orders a person to leave the premises based on reasonable grounds of belief that there is physical abuse or harm inflicted by that person upon a family or household member and/or a danger of further physical abuse or harm.</p> <p>A family or household member means spouses, former spouses, persons in a dating relationship, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.</p>	<p><b>Standard:</b></p> <p>Beyond reasonable doubt (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 1, s.109(a)</u>).</p> <p><b>Evidential Issues:</b></p> <p>In the absence of proof, the innocence of the defendant is assumed (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 1, s.109(b)</u>).</p>	<p><b>First Offence</b></p> <p><b>Minimum Imprisonment:</b> 48 hours</p> <p><b>Second Offence</b> (within 1 year of the first conviction)</p> <p><b>Minimum Imprisonment:</b> 30 days</p> <p>For both of the above:</p> <p><b>Maximum Imprisonment:</b> 1 year</p> <p><b>Maximum Fine:</b> \$1,000</p> <p>Both penalties may be imposed. The offender is also required to undergo any available domestic violence intervention programs ordered by the court.</p> <p><b>Third or Subsequent Offence</b> (within two years of a second or subsequent conviction)</p> <p><b>Maximum Imprisonment:</b> 5 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed. Where the physical abuse consists of intentionally or knowingly impeding the normal breathing or circulation of the blood of the family or household member by applying pressure on the throat or the neck:</p> <p><b>Maximum Imprisonment:</b> 5 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed.</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 14, s.1400 and Chapter 6, ss.650(2) and 662(a)</u></p>	<p><b>Assault in the First Degree:</b> Intentionally or knowingly causing serious bodily injury to another person.</p>		<p><b>Maximum Imprisonment:</b> Indefinite term, 10 years</p> <p><b>Maximum Fine:</b> \$25,000</p> <p>Both penalties may be imposed.</p>
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 14, s.1401 and Chapter 6, ss.650(3) and 662(b)</u></p>	<p><b>Assault in the Second Degree:</b> Intentionally or knowingly causing substantial bodily injury to another, recklessly causing serious or substantial bodily injury to another, intentionally or knowing causing bodily injury to a correctional worker engaged in the performance of duty, or intentionally or knowingly causing bodily injury to another with a dangerous instrument.</p>		<p><b>Maximum Imprisonment:</b> Indefinite term, 5 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed.</p>
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 14, s.1402 and Chapter 6, ss.650(4)-(5) and 663</u></p>	<p><b>Assault in the Third Degree:</b> Intentionally, knowingly or recklessly causing bodily injury to another person, or negligently causing bodily injury to another person or negligently causing bodily injury to another person with a dangerous instrument.</p> <p>Assault in the third degree is a misdemeanour unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanour.</p>		<p><b>Maximum Imprisonment:</b> Definite term, 1 year for misdemeanour, 30 days for petty misdemeanour</p> <p><b>Maximum Fine:</b> \$1000 for misdemeanour, or \$500 for petty misdemeanour</p> <p>Both penalties may be imposed.</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Papua New Guinea</b>	The Family Protection Act (2013) only applies to family violence. There are no specific offences covering intimate partner violence in Papua New Guinea.				
	Family violence and intimate partner violence	<u>Family Protection Act (2013), Part II ss.5-6</u>	<p><b>Domestic Violence:</b> Committing any of the following acts against a family member:</p> <ul style="list-style-type: none"> <li>(a) assaulting the family member (whether or not there is evidence of a physical injury);</li> <li>(b) psychologically abusing, harassing or intimidating the family member;</li> <li>(c) sexually abusing the family member;</li> <li>(d) stalking the family member so as to cause him or her apprehension or fear;</li> <li>(e) behaving in an indecent or offensive manner to the family member;</li> <li>(f) damaging or causing damage to the family member's property; or</li> <li>(g) threatening to do any of the acts in paragraphs (a), (c) or (f).</li> </ul> <p>Domestic violence may be a single act or a number of acts forming a pattern, even though some acts when viewed in isolation may appear minor or trivial. It is not a defence to this offence that the defendant has paid an amount of money or given other valuable consideration, in accordance with his or her custom, to the complainant.</p>	<p><b>Standard:</b> Beyond a reasonable doubt (<u>Magistrates' Manual of Papua New Guinea, Part 2, s.5.4</u>).</p> <p><b>Evidential issues:</b> A person is presumed innocent until proven guilty (<u>Constitution of the Independent State of Papua New Guinea, s.37(4)(a)</u>).</p>	<p><b>Maximum Imprisonment:</b> 2 years</p> <p><b>Maximum Fine:</b> K5,000</p> <p>Both penalties may be imposed.</p>
		<u>Criminal Code Act (1974), Part V, Division 1, ss.243-244</u>	<p><b>Definition of Assault:</b> Directly or indirectly striking, touching or moving, or otherwise applying force to the person of another without his consent or with consent obtained by fraud, or threatening to apply force where the person making the threat has actually or apparently a present ability to effect this purpose. An assault is unlawful unless it is authorised, justified or excused by law, and it may be unlawful even where the other person has consented.</p>		
<u>Criminal Code Act (1974), Part V, Division 5, s.335</u>	<p><b>Common Assault:</b> Unlawfully assaulting another person.</p>	<p><b>Maximum Imprisonment:</b> 1 year (if no greater punishment is provided)</p>			

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<u>Criminal Code Act (1974), Part V, Division 5, s.340</u>	<b>Assaults Occasioning Bodily Harm:</b> Unlawfully assaulting another and by doing so doing him bodily harm.		<b>Maximum Imprisonment:</b> 3 years
		<u>Criminal Code Act (1974), Part V, Division 5, s.341</u>	<b>Serious Assaults:</b> (a) assaulting another with intent to commit a crime or to resist or prevent the lawful arrest or detention of himself or of any other person; (b) assaulting, resisting or wilfully obstructing a member of the Police Force while acting in the execution of his duty or any person acting in aid of a member of the Police Force while so acting; (c) unlawfully assaulting, resisting or obstructing a person who is engaged in the lawful execution of any process against any property, or in making a lawful distress; (d) assaulting, resisting or obstructing a person engaged in such a lawful execution of process, or in making a lawful distress, with intent to rescue any property lawfully taken under the process or distress; (e) assaulting a person on account of an act done by him in the execution of a duty imposed on him by law; or (f) assaulting a person in pursuance of an unlawful conspiracy respecting a manufacture, trade, business or occupation, any person or persons concerned or employed in a manufacture, trade, business or occupation, or the wages of any such person or persons.		<b>Maximum Imprisonment:</b> 3 years

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Samoa</b>	There are no specific offences covering family violence or intimate partner violence in Samoa.				
	Family violence and intimate partner violence	<u>Crimes Act (2013), Part 10, s.118</u>	<b>Causing Serious Bodily Injury with intent:</b> (1) Wounding, maiming, disfiguring, or causing grievous bodily harm to another person with intent to cause grievous bodily harm to that person.	<b>Standard:</b> Beyond reasonable doubt ( <i>Police v Toeoana</i> [2016] WSFC 1, see also <i>Police v Tutogi</i> [1998] WSSC 20).  <b>Evidential issues:</b> Presumed innocent until proved guilty ( <i>Constitution of the Independent State of Samoa</i> (1960), Part II, s.9(3)).	<b>Maximum Imprisonment:</b> 10 years  <b>Maximum Imprisonment:</b> 7 years
			(2) Assaulting another person or acting with reckless disregard for the safety of any other person and causing grievous bodily harm.		<b>Maximum Imprisonment:</b> 7 years
		<u>Crimes Act (2013), Part 10, s.119</u>	<b>Causing Injury:</b> (1) Causing bodily harm to another person with intent to cause actual bodily harm.		<b>Maximum Imprisonment:</b> 5 years
			(2) Causing actual bodily harm to another person by assaulting that other person, or acting with reckless disregard for the safety of any other person.		
<u>Crimes Act (2013), Part 10, s.123 and Part 1, s.2</u>		<b>Common Assault:</b> Assaulting any other person.  Assault is defined as the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his purpose.		<b>Maximum Imprisonment:</b> 1 year	

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Solomon Islands</b>	The Family Protection Act (2014) does not distinguish between family violence and intimate partner violence, applying instead to any “domestic relationship”.				
	Family violence and intimate partner violence	<u>Family Protection Act (2014), Part 1, ss.4-6 and Part 6, s.58</u>	<p><b>Domestic Violence:</b> Conduct committed by an offender against another person with whom the offender is in a domestic relationship, or the threat of such conduct, including physical, sexual, psychological and economic abuse. Domestic violence may consist of a single act or a number of acts that form part of a pattern of behaviour, even though some or all of those acts when viewed in isolation appear to be minor or trivial.</p> <p>The Act does not distinguish between family violence and intimate partner violence, applying instead to any “domestic relationship”. This means that they are or have been family members or they are the parents of a child or are persons who have or have had parental responsibility together for a child, or are or were in an engagement, courtship or customary relationship, or domestic workers in another person’s household.</p> <p>“Family members” are members of the person’s family, whether related by blood, adoption, marriage or custom.</p> <p>It is not a defence to an offence that the defendant paid an amount of money as customary compensation for committing the act of domestic violence.</p>	<p><b>Standard:</b> Beyond reasonable doubt (Solomon Islands Magistrates’ Bench Book, Section 2.2).</p> <p><b>Evidential issues:</b> Presumed innocent until proved or pleaded guilty (Constitution of Solomon Islands Statutory Instruments (1978) NO. 783), Chapter 2, s.10(2)(a)).</p>	<p><b>Maximum Imprisonment:</b> 3 years</p> <p><b>Maximum Fine:</b> 30,000 penalty units</p> <p>Both penalties may be imposed.</p>
		<u>Solomon Islands Penal Code of (1963), Chapter 26, Part XXV, s.244 (“Solomon Islands Penal Code”)</u>	<b>Common Assault:</b> Unlawfully assaulting another.		<b>Maximum Imprisonment:</b> 1 year (if the assault is not committed in circumstances for which a greater punishment is provided in the Solomon Islands Penal Code)

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<a href="#">Solomon Islands Penal Code, s.245 and Part II, s.4</a>	<p><b>Assault Causing Actual Bodily Harm:</b> Committing an assault occasion actual bodily harm.</p> <p>“Harm” means any bodily hurt, disease or disorder whether permanent or temporary.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>
		<a href="#">Solomon Islands Penal Code, Chapter 26, Part XXIII, s.226 and Part II, s.4</a>	<p><b>Grievous Harm:</b> unlawfully doing grievous harm to another.</p> <p>“Grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.</p>		<p><b>Maximum Imprisonment:</b> 14 years</p>
		<a href="#">Solomon Islands Penal Code, Chapter 26, Part XXIII, s.229 and Part II, s.4</a>	<p><b>Unlawful Wounding:</b> Unlawfully wounding another.</p> <p>“Wound” means any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing any other membrane.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Tonga</b>	There are no specific offences covering family violence or intimate partner violence in Tonga.				
	Family violence and intimate partner violence	<u>Family Protection Act (2013), Part 1, ss.4-5</u>	<p><b>Domestic Violence:</b> Domestic violence is where the perpetrator and victim are in a domestic relationship and, beyond the reasonable expectations and acceptances of family and domestic life, an act or omission thereof by the perpetrator (i) causes physical abuse, sexual abuse, or mental abuse to the victim or other person at risk; or (ii) otherwise harms or endangers the health, safety or well-being of the victim or other person at risk.</p> <p>A domestic relationship includes:</p> <ul style="list-style-type: none"> <li>(a) people who are or were married to each other;</li> <li>(b) people who live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;</li> <li>(c) people who are the parents of a child or are persons who have or had parental responsibility for that child;</li> <li>(d) people who are family members living in the same household and including those related by legal or customary adoption;</li> <li>(e) people who are or were in an engagement, courtship, including an actual or perceived intimate or sexual relationship;</li> <li>(f) people who share or recently shared the same residence;</li> <li>(g) where one person is wholly or partially dependent upon on-going care by the other person residing in the same household; or</li> <li>(h) where one person is a housekeeper in the same household.</li> </ul>	<p><b>Standard:</b> Beyond a reasonable doubt (<u>The Tonga Magistrates' Bench Book (2004), E8.2</u>).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<u>Evidence Act (1988), Ch.15, Part VIII, ss.104-105</u>).</p>	N/A

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Family Protection Act (2013), Part 6, s.28</u></p>	<p><b>Domestic Violence Offence:</b> a domestic violence offence is committed when a person:</p> <ul style="list-style-type: none"> <li>(a) commits domestic violence;</li> <li>(b) breaches a protection order;</li> <li>(c) fails to comply with a Police Safety Order;</li> <li>(d) threatens, intimidates or assaults a health practitioner or social service provider who is acting in pursuance of a duty of care under s.27; or</li> <li>(e) instigates, counsels or procures any of the above.</li> </ul> <p>Aggravating factors include domestic violence:</p> <ul style="list-style-type: none"> <li>(a) committed against a child or in the presence of a child;</li> <li>(b) committed against a person with special needs, a pregnant woman or a woman who cannot resist for whatever reason;</li> <li>(c) where the violence is severe or life-threatening;</li> <li>(d) where a weapon is used; or</li> <li>(e) where the respondent has committed repeated incidents of domestic violence.</li> </ul> <p>It is not a defence that the respondent paid compensation or reparation to the complainant or their family.</p>		<p><b>First Offence</b></p> <p><b>Maximum Imprisonment:</b> 1 year</p> <p><b>Maximum Fine:</b> \$2000</p> <p>Both penalties may be imposed.</p> <p><b>Subsequent Offence</b></p> <p><b>Maximum Imprisonment:</b> 3 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed.</p> <p>The court may order the respondent to pay reasonable and fair compensation where the victim/survivor suffered personal injury, damage to property or financial loss.</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Criminal Offences Act (1988), Part IX, s.112</u></p>	<p><b>Common Assault:</b> Wilfully and without lawful justification:</p> <ul style="list-style-type: none"> <li>(a) strikes at or actually hits another person with his hand or with anything held therein;</li> <li>(b) seizes or tears the clothes of another person;</li> <li>(c) pushes, kicks or butts another person;</li> <li>(d) spits or throws liquid or any substance on or at another person; or</li> <li>(e) sets a dog on another person.</li> </ul>		<p><b>Maximum Imprisonment:</b> 1 year (in default of payment of fine)</p> <p><b>Maximum Fine:</b> \$500</p>
		<p><u>Criminal Offences Act (1988), Part IX, s.107</u></p>	<p><b>Bodily Harm:</b> Wilfully and without lawful justification causing harm to any person in any manner or by any means whatsoever.</p> <p>Harm for the purpose of this offence means any injury which seriously or permanently injures health or is likely to injure health; injury involving serious damage to any external or internal organ, member or sense short of permanent disablement; any wound which is not severe; or any permanent disfigurement which is not a serious nature.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>
		<p>Criminal Offences Act (1988), Part IX, s.106</p>	<p><b>Grievous Bodily Harm:</b> Wilfully and without lawful justification causing grievous harm to any person in any manner or by any means whatsoever.</p> <p>Grievous harm means any harm endangering life; the destruction or permanent disabling of any external or internal organ, member or sense; any severe wound; or any grave permanent disfigurement.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Tuvalu</b>	The Family Protection and Domestic Violence Act (2014) does not distinguish between family violence and intimate partner violence, applying instead to any “domestic relationship”.				
	Family violence and intimate partner violence	<u>Family Protection and Domestic Violence Act (2014), Part 1, s.3 and Part 6, s.38-39 and Part 7, s.51</u>	<p><b>Domestic Violence:</b> Committing physical, sexual, verbal, psychological or economic abuse against another person in a domestic relationship, or instigating, counselling or procuring another person to commit such acts, where such abuse would constitute a misdemeanour under the Penal Code (i.e. it cannot be aggravated or attract a punishment of more than five years imprisonment). It is not a defence to such charges to say that the defendant has paid compensation or reparation to the complainant or to the complainant’s family.</p> <p>Domestic violence means violence within an existing or previous domestic relationship.</p> <p>Domestic relationship means relationship of persons:                      (a) who are, or were, married to each other; or                      (b) who are or were living together in a de facto relationship; or (c) who normally or regularly resides in the same household; or (d) who are regarded as a family member under Tuvaluan tradition and social practices; or (e) who is a child who resides or previously resided in the same household; or (f) who is wholly or partially dependent upon ongoing care in the same household; or (g) who is a household helper in the same household.</p> <p>Economic abuse (a) means a behaviour that constitutes deprivation of economic or financial resources; and (b) includes the following: (i) the disposition, retention or subtraction of moveable or immovable property in which a victim of domestic violence has a material interest and that results in hiding or hindering the use of property; (ii) the damaging or destroying of personal property in which the victim of domestic violence has an interest.</p>	<p><b>Standard:</b>                      Beyond reasonable doubt (<u>Tuvalu Island Courts Bench Book, Section A, para. 6</u>).</p> <p><b>Evidential Issues:</b>                      The burden of proof is on the prosecution (<u>Tuvalu Island Courts Bench Book, Section A, para. 6</u>).</p>	<p><b>Maximum Imprisonment:</b>                      5 years</p> <p><b>Maximum Fine:</b> \$1000</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>Psychological abuse includes intimidation, harassment, or threats of physical, sexual, or economic abuse.</p> <p>Sexual abuse means (a) a sexual act or conduct that abuses, humiliates, degrades or violates the sexual integrity and autonomy of the complainant without the claimant's consent, irrespective of the nature of the relationship between the complainant and the perpetrator in a domestic relationship; or (b) a conduct that forces, coerces, blackmails, bribes or intimidates a person in a domestic relationship to engage in prostitution or sexual acts with another person in the domestic relationship.</p> <p>Violence means a specific act or threat likely to result in any one or more of the following (a) physical abuse; (b) sexual abuse; (c) verbal abuse; (d) economic abuse; or (e) psychological abuse.</p>		
		<u>Penal Code (2008), Part XXV, s.237</u>	<b>Common Assault:</b> Unlawfully assaulting another.		<b>Maximum Imprisonment:</b> 6 months
		<u>Penal Code (2008), Part XXV, s.238</u>	<b>Assaults Causing Actual Bodily Harm:</b> Committing an assault occasioning actual bodily harm.		<b>Maximum Imprisonment:</b> 5 years
		<u>Penal Code (2008), Part XXIII, s.220</u>	<b>Grievous Harm:</b> Unlawfully doing grievous harm to another.		<b>Maximum Imprisonment:</b> 7 years
		<u>Penal Code (2008), Part XXIII, s.223</u>	<b>Unlawful wounding:</b> Unlawfully wounding another.		<b>Maximum Imprisonment:</b> 5 years

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Penal Code (2008), Part XXIII, s.226</u></p>	<p><b>Cruelty to Children:</b></p> <p>(1) A person 15 years and older who has the custody, charge or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight or hearing, or limb or organ of the body, and any mental derangement)</p> <p>(2) For the purposes of this section:</p> <p>(a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him;</p> <p>(b) where it is proved that the death of an infant under 3 years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of 15 years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the infant in a manner likely to cause injury to its health.</p> <p>(3) A person may be convicted of an offence under this section:</p> <p>(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;</p> <p>(b) notwithstanding the death of the child or young person in question.</p> <p>(4) Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person, having the lawful control of a child or young person to administer reasonable punishment to him.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Vanuatu</b>	The VFPA applies to "family members", thereby not distinguishing between family violence and intimate partner violence.				
	Family violence and intimate partner violence	<u>VFPA Part 1, s.4</u>	<p><b>Domestic Violence:</b></p> <p>(1) A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:</p> <p>(a) assaults the family member (whether or not there is evidence of a physical injury);</p> <p>(b) psychologically abuses, harasses or intimidates the family member;</p> <p>(c) sexually abuses the family member;</p> <p>(d) stalks the family member so as to cause him or her apprehension or fear;</p> <p>(e) behaves in an indecent or offensive manner to the family member;</p> <p>(f) damages or causes damage to the family member's property;</p> <p>(g) threatens to do any of the acts in (a) to (f).</p> <p>(2) Without limiting paragraph (1)(d), a person may stalk another person by:</p> <p>(a) following the person; or</p> <p>(b) watching the person; or</p> <p>(c) loitering outside premises where the person lives, works or frequents for the purposes of any social or leisure activity; or</p> <p>(d) making persistent telephone calls to the person or to premises where the person lives or works.</p> <p>(3) For the purposes of this Act, if a person (in this subsection called "the instigator") counsels or procures another person to commit an act that, if done by the instigator, would be an act of domestic violence, then the instigator is taken to have committed the act.</p>	<p><b>Standard:</b> Beyond reasonable doubt (<u>Penal Code of Vanuatu (2006), s.8</u>).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<u>Penal Code of Vanuatu (2006), s.8</u>).</p>	<p><b>Maximum Imprisonment:</b> 5 years or a fine not exceeding 100,000 Vatu (or both)</p>

**Domestic Violence**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>(4) To avoid doubt:</p> <p>(a) a single act may amount to an act of domestic violence; and</p> <p>(b) a number of acts that form part of a pattern of behaviour may amount to domestic violence even though some or all of those acts when viewed in isolation may appear to be minor or trivial.</p> <p>A “family member” is defined at VFPA s.3 as:</p> <p>(a) the spouse of the person;</p> <p>(b) a child of the person and/or the person’s spouse;</p> <p>(c) a parent of the person or the person’s spouse;</p> <p>(d) a brother or sister of the person or the person’s spouse; and</p> <p>(e) any other person who is treated by the person as a family member.</p> <p>“Spouse” is further defined at VFPA s.5 as including individuals who live together in a “marriage-like relationship” or an individual who is the biological parent of another individual’s child.</p>		
		<p><u>Penal Code of Vanuatu (2006), Part 2, s.107</u></p>	<p><b>Intentional Assault:</b> Committing intentional assault on the body of another person.</p>		<p><b>Maximum Imprisonment:</b></p> <p>14 years (unintentional death)</p> <p>10 years (permanent damage)</p> <p>5 years (temporary damage)</p> <p>1 year (no physical damage)</p>
		<p><u>Penal Code of Vanuatu (2006), Part 2, s.108</u></p>	<p><b>Unintentional Harm:</b> Unintentionally causing damage to the body of another person, through recklessness or negligence, or failure to observe any law.</p>		<p><b>Maximum Imprisonment:</b></p> <p>5 years (death)</p> <p>2 years (permanent damage)</p> <p>3 months (temporary damage)</p>

## 2. Sexual Offences

Figure 19: Sexual Offences

Sexual Offences					
	Type of Offence	Source	Definition	Proof	Penalties
International	Rape	<a href="#">UN Office on Drugs and Crime, International Classification of Crime for Statistical Purposes (March 2015), Part 2, Section 03</a>	<p><b>Rape:</b> Sexual penetration without valid consent or with consent as a result of intimidation, force, fraud, coercion, threat deception, use of drugs or alcohol, abuse of power or of a position of vulnerability, or the giving or receiving of benefits.</p> <p>Sexual penetration, at minimum, is the penetration of the vulva, anus or mouth with any body part or object.</p> <p><b>Rape with Force:</b> Sexual penetration without valid consent inflicted upon a person with force.</p> <p><b>Rape without Force:</b> Sexual penetration without valid consent inflicted upon a person without force.</p>	N/A	N/A
	Sexual assault	<a href="#">UN Office on Drugs and Crime, International Classification of Crime for Statistical Purposes (March 2015), Part 2, Section 03</a>	<p><b>Sexual Violence:</b> Unwanted sexual act, attempt to obtain a sexual act, or contact or communication with unwanted sexual attention without valid consent or with consent as a result of intimidation, force, fraud, coercion, threat, deception, use of drugs or alcohol, or abuse of power or of a position of vulnerability.</p> <p><b>Sexual Assault:</b> Unwanted sexual act, attempt to obtain a sexual act, or contact or communication with unwanted sexual attention not amounting to rape (both physical and non-physical).</p>		

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Incest	UN Office on Drugs and Crime, <u>International Classification of Crime for Statistical Purposes (March 2015), Part 2, Section 08</u>	<b>Other Acts Against Public Order Sexual Standards:</b> (includes) incest or familial sexual offences not amounting to rape or sexual assault.		
	Sexual abuse of a minor	UN Office on Drugs and Crime, <u>International Classification of Crime for Statistical Purposes (March 2015), Part 2, Section 03</u>	<p><b>Statutory Rape:</b> Sexual penetration with or without consent with a person below the age of consent, or with a person incapable of consent by reason of law.</p> <p><b>Sexual Exploitation:</b> Acts of abuse of a position of vulnerability, power or trust, or use of force or threat of force, for profiting financially, physically, socially or politically from the prostitution of sexual acts of a person (both against adults and children).</p>		

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Federated States of Micronesia</b>	<b>CHUUK</b>				
	Sexual assault, including rape	<u>Chuuk State Code 2001, Title 12, Part 1, Chapter 4, ss.2053-2055</u>	<b>Sexual Assault:</b> Subjecting another person to sexual penetration, against the other person's will, or under conditions in which the defendant knows or should know that the other person is mentally or physically incapable of resisting or understanding the nature of his conduct	<p><b>Standard</b> Beyond reasonable doubt (due process) (<u>Constitution of the Federated States of Micronesia. Article IV, s.3,</u> as interpreted in <u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p> <p><b>Evidential Issues</b> Burden of proof lies with the prosecution (<u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p> <p>In respect of the offence of incest, the burden of proof of relationship or affinity also lies with the prosecution.</p>	<p><b>Maximum Imprisonment:</b> 5 years (9 years if there is serious bodily or psychological injury or if a dangerous weapon is used)</p> <p><b>Maximum Fine:</b> \$5,000 (\$10,000 if a dangerous weapon was used)</p> <p>Both penalties may be imposed.</p>
	Sexual abuse of a minor		<b>Sexual Abuse:</b> Intentionally having sexual contact with another person who is less than 13 years old or causing a person less than 13 years old to have sexual contact with oneself.		<p><b>Maximum Imprisonment:</b> 5 years</p> <p>Maximum Fine: \$5,000</p> <p>Both penalties may be imposed.</p>
Incest		<b>Incest:</b> Unlawful sexual intercourse with another of such a close blood relationship or affinity that marriage between the two is prohibited by law or custom.		<b>Maximum Imprisonment:</b> 3 months	

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Federated States of Micronesia</b>	<b>KOSRAE</b>				
	Sexual assault, including rape	<u>Kosrae State Code (1997), Title 13, Chapter 3, ss.13.311-13.312 and Chapter 12, ss.13.201-13.202</u>	<p><b>Sexual Assault:</b> Subjecting another person to sexual penetration, or forcing another person to make a sexual penetration on himself or another or on an animal against the other person’s will, or under conditions in which the defendant knows or should know that the other person is mentally or physically incapable of resisting or understanding the nature of his conduct.</p> <p>Sexual penetration is sexual intercourse, cunnilingus, fellatio, anal or oral intercourse, or the causing of penetration of the genital, anal, or oral opening of another to any extent and with any object whether or not there is an emission.</p>	<p><b>Standard</b> Beyond reasonable doubt (due process) (<u>Constitution of the Federated States of Micronesia, Article IV, s.3</u>, as interpreted in <u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p> <p><b>Evidential Issues</b> Burden of proof lies with the prosecution (<u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>, see also <u>Kosrae v. Jonah, 10 FSM Intrm. 270, 272 (Kos. S. Ct. Tr. 2001)</u>).</p>	<p><b>Maximum Imprisonment:</b> 5 years (10 years if there is serious bodily or psychological injury or if a dangerous weapon is used)</p> <p><b>Maximum Fine:</b> \$10,000 (\$20,000 if there is serious bodily or psychological injury)</p> <p>Both penalties may be imposed.</p>
	Sexual abuse of a minor		<p><b>Sexual Abuse:</b> Intentionally having sexual contact with a person less than 13 years old or causing that person to have contact with oneself.</p> <p>Sexual contact means any touching of the sexual or other intimate parts of another done with the intent of gratifying the sexual desire of either party.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$20,000</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Federated States of Micronesia</b>	<b>POHNPEI</b>				
	Sexual assault, including Rape	<u>Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, Part E 61 PC 5-141</u>	<p><b>Sexual Assault:</b> Intentionally subjecting another person to sexual contact or penetration, or forcing another person to make a sexual penetration on himself or another or on an animal, without the other person’s consent, or under conditions in which the offender knows or should know that the other person is mentally or physically incapable of resisting or understanding the nature of his conduct.</p> <p>In respect of the offence of sexual assault, the defendant may not be convicted if defendant and complainant were cohabitating in an ongoing voluntary sexual relationship at the time of the alleged offence, or if the complainant is the defendant’s spouse, unless the defendant was an accomplice or accessory to the sexual assault by a third person, or at the time the married couple were either living apart and one of them had filed an action for separate maintenance or divorce or were no longer husband and wife under custom and tradition.</p>	<p><b>Standard</b> Beyond reasonable doubt (due process) (<u>Constitution of the Federated States of Micronesia, Article IV, s.3</u>, as interpreted in <u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p> <p><b>Evidential Issues</b> Burden of proof lies with the prosecution (<u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p> <p>In respect of the offence of incest, the burden of proof of relationship or affinity also lies with the prosecution.</p>	<p><b>Maximum Imprisonment:</b> 5 years (or 10 years if serious bodily or psychological injury to the victim/survivor; defendant acts with others; or a dangerous weapon is used to cause the victim/survivor to submit)</p> <p><b>Maximum Fine:</b> \$5,000 (or \$10,000 if serious bodily or psychological injury to the victim/survivor; defendant acts with others; or a dangerous weapon is used to cause the victim/survivor to submit)</p> <p>Both penalties may be imposed.</p>
	Sexual abuse of a minor	<u>Pohnpei State Code (2006), Division IX, Title 61, Chapter 5, Part E 61 PC 5-142</u>	<p><b>Sexual Abuse:</b> Intentionally having sexual contact with or sexually penetrating a person 15 years old or under or causing such a person to sexually penetrate or to have sexual contact with oneself.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p> <p><b>Maximum Fine:</b> \$5,000</p> <p>Both penalties may be imposed.</p>
Incest	<u>Pohnpei State Code (2006), Division IX, Title 61, Chapter 7, 61 PC 7-102</u>	<p><b>Incest:</b> Knowingly engaging in sexual intercourse, contact or penetration with grandparent, parent, brother, sister, children or their children.</p>		<p><b>Maximum Imprisonment:</b> 3 years</p> <p><b>Maximum Fine:</b> \$3,000</p> <p>Both penalties may be imposed.</p>	

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Federated States of Micronesia</b>	<b>YAP</b>				
	Sexual assault, including rape	<u>Yap State Code, Title 11, Division 1, Chapter 2, s.205</u>	<p><b>Sexual Assault:</b> Intentionally subjecting another person to sexual penetration by force, or forces another person to make a sexual penetration on himself or on a beast against the other person's will or engaging in sexual penetration with another person who the perpetrator knows is mentally or physically incapable of resisting or understanding the nature of his conduct, or who is an accomplice or accessory to the sexual assault by a third person.</p> <p>"Sexual penetration" means sexual intercourse, cunnilingus, fellatio, or anal intercourse, or the causing of penetration to any extent and with any object of the genital or anal opening of another whether or not there is any emission.</p>	<p><b>Standard</b> Beyond reasonable doubt (due process) (<u>Constitution of the Federated States of Micronesia, Article IV, s.3</u>, as interpreted in <u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p> <p><b>Evidential Issues</b> Burden of proof lies with the prosecution (<u>Alaphonso v Federated States of Micronesia [1982] 1 FSM Intrm. 209</u>).</p>	<p><b>Maximum Imprisonment:</b> 5 years (10 years if there is serious bodily or psychological injury or if a dangerous weapon is used)</p> <p><b>Maximum Fine:</b> \$10,000 (10 years if there is serious bodily or psychological injury or if a dangerous weapon is used)</p> <p>Both penalties may be imposed.</p>
	Sexual abuse of a minor	<u>Yap State Code, Title 11, Division 1, Chapter 2, s.206</u>	<p><b>Sexual Abuse:</b> Intentionally having sexual contact with a person less than 13 years old or causing such a person to have sexual contact with oneself.</p> <p>It is a defence that the defender reasonably believed the child to be older than 13 years old.</p>	In respect of the offence of Incest, the burden of proof of relationship or affinity also lies with the prosecution.	<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Maximum Fine:</b> \$10,000</p> <p>Both penalties may be imposed.</p>
Incest	<u>Yap State Code (2000), Title 11, Chapter 6, s.602</u>	<b>Incest:</b> Unlawful sexual intercourse with another of such a close blood relationship or affinity that marriage between the two is prohibited by law or custom.		<b>Maximum Imprisonment:</b> 3 years	

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Fiji</b>	Rape	<u>Crimes Act (2009), Part 12, s. 206-209</u>	<p><b>Rape:</b> A person rapes another person if:</p> <p>(a) the person has carnal knowledge with or of the other person without that person's consent; or</p> <p>(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or</p> <p>(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.</p> <p>"Consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Non-exhaustively, consent is not freely and voluntarily given where it is obtained:</p> <p>(a) by force; or (b) by threat or intimidation; or (c) by fear of bodily harm; or (d) by exercise of authority; or (e) by false and fraudulent representations about the nature or purpose of the act; or (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.</p> <p>A child under 13 years old is incapable of giving consent.</p>	<p><b>Standard</b> Beyond reasonable doubt (due process) (<u>AG v Gopal [1967] 13 FLR 65</u>).</p> <p><b>Evidential Issues</b> The burden of proof lies with the prosecution (<u>Crimes Act (2009), Part 5, s.14, Criminal Procedure Code (1978), Part IV, s.144</u>). Every person charged with an offence has the right to be presumed innocent until proven guilty (<u>Constitution of the Republic of Fiji, Chapter 2, s.14(2)(a)</u>).</p> <p>Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the act creating such offence, and whether or not specified or negated in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution (<u>Criminal Procedure Code (1978), s.144</u>). No corroboration of the complainant's evidence is necessary in trials for sexual offences, and no warning is required to be given to the assessors relating to the absence of corroboration (Criminal Procedure Decree (2009), Part XI, s.129).</p>	<p><b>Rape</b></p> <p><b>Maximum Imprisonment:</b> Life; 10 years (attempted)</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
				<p>No evidence given or questions relating to the sexual history of the complainant or the sexual reputation of the complainant except by leave of the court. The court is only to give leave if of direct relevant to the facts in issue or the issue of the appropriate sentence and to exclude it would be contrary to the interests of justice (Criminal Procedure Decree (2009), Part XI, s.130).</p> <p>For Indecent Assault under the Crimes Decree (2009) s.212, the accused has a persuasive burden to prove its defence under the section to the court on the balance of probabilities (as the section requires him to “prove” the defence). By contrast, to establish its defence for Defilement of young person between 13 and 16 years old (s.215), the accused has only an evidential burden to raise a reasonable doubt, and is not required to establish the defence on the balance of probabilities (as the section requires him to “make it appear to the court”) (Sat Deo Shiri Wasto s/o Chandar Deo v R [1977] 23 FLR).</p>	

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual assault	Crimes Act (2009), Part 12, s. 210	<p><b>Sexual Assaults:</b>                      (1): Unlawfully and indecently assaulting another person or procuring another person without their consent to commit or witness an act of gross indecency;</p>		<p><b>Maximum Imprisonment:</b>                      10 years</p>
<p>(2): bringing any part of the genitalia or the anus of a person with any part of the mouth of a person as part of an offence defined in subsection (1); or</p>			<p><b>Maximum Imprisonment:</b>                      14 years</p>		
<p>(3) being or pretending to be armed with a dangerous or offensive weapon immediately before, after or during the offence, or being in the company of another person, or the indecent assault includes the person who is assaulted penetrating the vagina, vulva or anus of the offender to any extent with a thing or a part of the person's body that is not a penis, or the procurement of an act of gross indecency includes the person who is procured penetrating the vagina, vulva or anus of the person who is procured or another person to any extent with a thing or a part of the person's body that is not a penis.</p>			<p><b>Maximum Imprisonment:</b>                      Life imprisonment</p>		
Crimes Act (2009), Part 12, s. 212		<p><b>Indecent Assault:</b> Unlawfully and indecently assaulting any other person.                      If the girl or boy is under 16 years old, there is no defence of consent unless there is both consent and the person charged had reasonable cause to believe and did in fact believe that he or she was of or over 16 years old, or the offender was of a similar age to the boy or girl and the consent was given in the context of a continuing friendship. No person in a relationship of control or trust over the boy or girl may rely on such a defence.</p>	<p><b>Maximum Imprisonment:</b>                      5 years</p>		

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual harassment	<u>Crimes Act (2009), Part 12, s. 213</u>	<p><b>Indecently Insulting or Annoying any Person:</b> While intending to insult the modesty of any person:</p> <p>(a) uttering any word, making any sound or gesture, or exhibiting any object, intending that such action be observed by the other person, or</p> <p>(b) intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty</p>		<b>Maximum Imprisonment:</b> 1 year
	Incest	<u>Crimes Act (2009), Part 12, s. 223</u>	<p><b>Incest by any Relative:</b> Carnal knowledge of another person who to his or her knowledge is in a relationship to him or her of parent, grandparent, child or sibling.</p> <p>There is no defence of consent.</p>		<b>Maximum Imprisonment:</b> 20 years or if the incest is with a child under the age of 13 years old, life imprisonment.
	Sexual abuse of a minor	<u>Crimes Act (2009), Part 12, s. 211</u>	<p><b>Abduction of Minor with intent to have Carnal Knowledge:</b> Taking or causing to be taken, any unmarried person under 18 years with intent to unlawfully and carnally know that person, out of the possession and against the will of his or her father or mother, guardian or any other person have the lawful care or charge of the person.</p>		<b>Maximum Imprisonment:</b> 5 years
		<u>Crimes Act (2009), Part 12, s. 214</u>	<p><b>Defilement of Children Under 13 Years of Age:</b> Unlawful and carnal knowledge of any child under 13 years old.</p>		<b>Maximum Imprisonment:</b> Life imprisonment; 13 years (attempted)

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Crimes Act (2009), Part 12, s. 215</u></p>	<p><b>Defilement of Young Person Between 13 and 16 Years of Age:</b> Unlawful and carnal knowledge (or attempt to have such knowledge) of any person being of or above 13 years old and under 16 years old.</p> <p>It is a sufficient defence that the person charged had reasonable cause to believe and did in fact believe that the person charged was of or above the age of 16 years old. It is no defence that the person consented.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p>
	Sexual exploitation	<p><u>Crimes Act (2009), Part 12, s. 217</u></p>	<p><b>Procurement for Unlawful Purposes:</b></p> <p>(a) Procuring or attempting to procure any person under 21 years, not being a common prostitute or of known immoral character, to have unlawful [carnal] connection, either in Fiji or elsewhere, with any other person or persons; or</p> <p>(b) procuring or attempting to procure any person to become, either in Fiji or elsewhere, a common prostitute; or</p> <p>(c) procuring or attempting to procure any person to leave Fiji, with intent that he or she may become an inmate of or frequent a brothel elsewhere, or procuring or attempting to procure any person to leave his or her usual place of abode in Fiji (such place not being a brothel), with intent that he or she may for the purposes of prostitution become an inmate of or frequent a brothel either in Fiji or elsewhere.</p>		<p><b>Maximum Imprisonment:</b> 2 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Crimes Act (2009), Part 12, s. 218</u></p>	<p><b>Procuring Defilement by Threats or Fraud or Administering Drugs:</b></p> <p>(a) By threats or intimidation procuring or attempting to procure any person to have any unlawful carnal connection either in Fiji or elsewhere; or</p> <p>(b) by false pretences or false representations procuring any person, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either in Fiji or elsewhere; or</p> <p>(c) applying, administering to, or causing to be taken by any person any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such person.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>
		<p><u>Crimes Act (2009), Part 12, s. 221</u></p>	<p><b>Conspiracy to Defile:</b> Conspiring with another to induce any person, by means of any false pretence or other fraudulent means, to permit any other person to have unlawful carnal knowledge of him or her.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p>

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
<b>Kiribati</b>	Rape	<u>Kiribati Penal Code, Part XVI, ss.128-130 and s.161</u>	<b>Rape:</b> Having unlawful sexual intercourse with a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband.	<b>Standard:</b> Beyond reasonable doubt ( <u>Kiribati Magistrates' Bench Book (2004), Part 6, 2.2-2.3</u> ).  <b>Evidential Issues:</b> Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty ( <u>The Constitution of Kiribati (1979), Chapter II, s.10(2)(a)</u> ).  To prove sexual intercourse, it shall not be necessary to prove the completion of the intercourse by the actual emission of seed but the intercourse shall be deemed complete upon proof of penetration only.	<b>Maximum Imprisonment:</b> Life imprisonment; 7 years (attempted)
	Sexual assault	<u>Kiribati Penal Code, Part XVI, s.133</u>	<b>Indecent Assault on Females:</b> Any person who unlawfully and indecently assaults any woman or girl.  It is no defence to a charge for an indecent assault on a girl under the age of 15 years old to prove that she consented to the act of indecency.		<b>Maximum Imprisonment:</b> 5 years
	Sexual harassment	<u>Kiribati Penal Code, Part XVI, s.133(3)</u>	<b>Intending to Insult Modesty:</b> With intent to insult the modesty of any woman or girl, uttering any word, making any sound or gesture, or exhibiting any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or girl, or intruding upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty.		<b>Maximum Imprisonment:</b> 1 year
	Incest	<u>Kiribati Penal Code, Part XVI, s.156</u>	<b>Incest:</b> Any male person who has sexual intercourse with a female person who is in his knowledge his granddaughter, daughter, sister or mother.  It is immaterial that the sexual intercourse was with the consent of the female person.		<b>Maximum Imprisonment:</b> 7 years; life imprisonment (victim/survivor under 13 years)

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual abuse of a minor	Kiribati Penal Code, Part XVI, s.134	<p><b>Defilement of a Girl Under 13 Years of Age:</b> Unlawful sexual intercourse with any girl under the age of 13 years old.</p> <p>It is no defence to prove that the girl consented to the act.</p>		<b>Maximum Imprisonment:</b> Life imprisonment
		Kiribati Penal Code, Part XVI, s.135	<p><b>Defilement of a Girl Between 13 and 15 Years of Age, or Idiot or Imbecile:</b> Unlawful sexual intercourse (or attempt to have unlawful sexual intercourse) with any girl of or above the age of 13 years old and under the age of 15 years old, or any female idiot or imbecile woman or girl under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile.</p> <p>It is no defence to a charge of defilement of a girl between 13 and 15 years old to prove that the girl consented to the act, though it is a defence if it shall be made to appear to the court that the person charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of 15 years old.</p>		<b>Maximum Imprisonment:</b> 5 years
		Kiribati Penal Code, Part XVI, s.141	<p><b>Disposing of Minors Under the Age of 15 Years for Immoral Purposes:</b> Any parent or any other person having the custody, charge or care of a minor under the age of 15 years who lets for hire or otherwise disposes of such minor with intent that such minor shall at any age be employed or used for the purpose prostitution or unlawful sexual intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such minor at any age will be employed or used for any such purpose.</p>		<b>Maximum Imprisonment:</b> 2 years

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
		<u>Kiribati Penal Code, Part XVI, s.142</u>	<p><b>Obtaining Minors Under the Age of 15 Years for Immoral Purposes:</b></p> <p>Any person who hires or otherwise obtains possession of any minor under the age of 15 years with intent that such minor shall at any age be employed or used for the purpose of prostitution or unlawful sexual intercourse with any person or for any unlawful and immoral purpose or knowing it to be likely that such minor at any age will be employed or used for any such purpose.</p>	Any common prostitute or other person of known immoral character who hires or otherwise obtains possession of a minor under the age of 15 years shall, until the contrary is proved, be deemed to have obtained possession of such minor with the intent mentioned in this section.	<b>Maximum Imprisonment:</b> 2 years
	Sexual exploitation	<u>Kiribati Penal Code, Part XVI, s.136</u>	<p><b>Procuration:</b></p> <p>(a) Procuring or attempting to procure any girl or woman under 18 years, to have unlawful sexual intercourse, either in [Kiribati] or elsewhere, with any other person or persons; or</p> <p>(b) procuring or attempting to procure any woman or girl to become, either in [Kiribati] or elsewhere, a common prostitute; or</p> <p>(c) procuring or attempting to procure any woman or girl to leave [Kiribati] with intent that she may become an inmate of or frequent a brothel elsewhere; or</p> <p>(d) procuring or attempting to procure a woman or girl to leave her usual place of abode in [Kiribati] (such place not being a brothel), with intent that she may for the purposes of prostitution become an inmate of or frequent a brothel either in [Kiribati] or elsewhere.</p>	For procuration offences, no person shall be convicted of an offence upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.	<b>Maximum Imprisonment:</b> 2 years

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Kiribati Penal Code, Part XVI, s.137</u></p>	<p><b>Procuring Defilement of Woman by Threats or Fraud or Administering Drugs:</b></p> <p>a) By threats or intimidation procures or attempts to procure any woman or girl to have sexual intercourse either in the Gilbert Islands or elsewhere; or</p> <p>(b) by false pretences or false representations procures any woman or girl to have sexual intercourse, either in the Islands or elsewhere; or</p> <p>(c) applies, administers to, or causes to be taken by any woman or girl any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have sexual intercourse with such woman or girl.</p>		<p><b>Maximum Imprisonment:</b> 2 years</p>
		<p><u>Kiribati Penal Code, Part XVI, s.140</u></p>	<p><b>Detention with intent or in a Brothel:</b></p> <p>Detaining any woman or girl against her will: (a) in or upon any premises with intent that she may have unlawful sexual intercourse with any man, whether any particular man or generally; or (b) in a brothel.</p> <p>(2) When a woman or girl is in or upon any premises for the purpose of having unlawful sexual intercourse, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the directions of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.</p>		<p><b>Maximum Imprisonment:</b> 2 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			(3) No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel, as was necessary to enable her to leave such premises or brothel.		
<b>Marshall Islands</b>	Sexual assault, including rape	<u>Criminal Code (2011), Article 213, ss.213.0 and 213.1, Article 6, s.6.06(2)(a)</u>	<p><b>Sexual Assault in the First Degree:</b></p> <p>(a) Knowingly subjecting another person to an act of sexual penetration (being vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body and which occurs upon any penetration and does not require emission) through strong compulsion (being the use of or attempt to use one or more of the following to overcome a person: a threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped; a dangerous or physical force; or</p> <p>(b) knowingly engaging in sexual penetration with another person who is younger than 14 years old; or</p> <p>(c) knowingly engaging in sexual penetration with a person who is at least 14 years old but less than 16 years old provided that the person is not less than 3 years older than the minor and the person is not legally married to the minor; or</p> <p>(d) knowingly subjecting to sexual penetration another person who is mentally defective; or</p> <p>(e) knowingly subjecting to sexual penetration another person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without their consent.</p>	<p><b>Standard:</b> Beyond reasonable doubt (<u>Criminal Code (2011), Article 1, s.1.12(1)</u>).</p> <p><b>Evidential Issues:</b> In the absence of proof of an offence, the defendant is assumed innocent (<u>Criminal Code (2011), Article 1, s.1.12(1)</u>).</p>	<b>Maximum Imprisonment:</b> 25 years

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Criminal Code (2011), Article 213, ss.213.0 and 213.2, Article 6, s.6.06(2)(b)</u></p>	<p><b>Sexual Assault in the Second Degree:</b></p> <p>(a) Knowingly subjecting another person to an act of sexual penetration by compulsion (being absence of consent, or a threat, express or implied that places a person in fear and public humiliation, property damage or financial loss); or</p> <p>(b) knowingly subjecting to sexual penetration another person who is mentally defective, mentally incapacitated or physically helpless; or</p> <p>(c) sexual penetration committed in the course of certain employments relating to criminal justice against persons under their control.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual assault, including non-penetrative offences	<u>Criminal Code (2011), Article 213, ss.213.0 and 213.3, Article 6, s.6.06(2)(c)</u>	<p><b>Sexual Assault in the Third Degree:</b></p> <p>(a) Recklessly subjecting another person to an act of sexual penetration by compulsion (where “recklessly” refers to a situation where a person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to the actor involves a gross deviation from the standard and care that a reasonable person would observe in the actor’s situation); or</p> <p>(b) recklessly subjecting to sexual contact another person who is younger than 14 years old or causing such a person to have sexual contact with the person; or</p> <p>(c) recklessly engaging in sexual contact with a person who is at least 14 years old but less than 16 years old or causing the minor to have sexual contact with the person, provided that the person is not less than 3 years older than the minor and is not legally married to the minor; or</p> <p>(d) recklessly subjecting to sexual contact another person who is mentally defective, mentally incapacitated or physically helpless, or causing such a person to have sexual contact with the actor; or</p> <p>(e) sexual penetration committed in the course of certain employments relating to criminal justice against persons under their control; or</p> <p>(f) recklessly, by strong compulsion, engaging in sexual contact with another person or causing another person to have sexual contact with the actor.</p>		<b>Maximum Imprisonment:</b> 35 months

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<u>Criminal Code (2011), Article 213, ss.213.0 and 213.4, Article 6, s.6.08</u>	<b>Sexual Assault in the Fourth Degree:</b> Recklessly subjecting another person to sexual contact by compulsion or causing another person to have sexual contact with the actor by compulsion.		<b>Maximum Imprisonment:</b> 1 year
	Incest	<u>Criminal Code (2011), Article 230, s.230.2, Article 6, s.6.06(2)(c)</u>	<b>Incest:</b> Knowingly marrying, cohabiting or having sexual intercourse with another of such a close blood relationship or affinity that marriage between the two who so engage is prohibited by custom.		<b>Maximum Imprisonment:</b> 35 months
	Sexual abuse of a minor	<u>Criminal Code (2011), Article 213, s.213.5, Article 6, s.6.06(2)(a)</u>	<b>Continuous Sexual Assault of a Minor Under the Age of 14 Years:</b> Residing in the same home with a minor under the age of 14 years old or having recurring access to the minor; and engaging in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under 14 years old.		<b>Maximum Imprisonment:</b> 25 years

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
Nauru	Rape	<p><u>Crimes Act (2016), Part 7, Division 7.2, s.105(1)</u></p> <p>and</p> <p><u>Criminal Procedure Act (1972), Part II, s.7A, as amended by the Criminal Procedure Amendment Act (2015), s.3</u></p>	<p><b>Rape:</b> Intentionally engaging in sexual intercourse with another person knowing the other person has not consented or is recklessly indifferent to the consent of the other person.</p>	<p><b>Standard:</b> The prosecution must prove beyond reasonable doubt either that the accused was aware that the woman was not consenting, or else that he realised she might not be but decided to have intercourse with her whether she was consenting or not (<i>Republic of Nauru v Notte [2017] NRSC 51</i>, see also <i>Republic v Olsson [2011] NRSC 18</i> and <i>R v Flannery &amp; Prendergast [1969] VicRp 5</i>).</p>	<p><b>Maximum Imprisonment:</b> 20 years, 25 years if aggravating circumstances apply</p> <p><b>Third (or more) Sexual Offence</b></p> <p><b>Maximum Imprisonment:</b> Life imprisonment without the possibility of parole</p>
	Incest	<p><u>Crimes Act (2016), Part 7, Division 7.2, s.114(1)</u></p> <p>and</p> <p><u>Criminal Procedure Act (1972), Part II, s.7A, as amended by the Criminal Procedure Amendment Act (2015), s.3</u></p>	<p><b>Incest:</b> A person aged at least 16 years old, intentionally have sexual intercourse with another person aged at least 16 years old, knowing that other person to be his great grandfather or grandmother, grandfather or grandmother, parent, uncle or aunt, sibling, niece or nephew, child, grandson or granddaughter, great grandson or granddaughter.</p> <p>Consent of the other person is not a defence.</p> <p>The offence of incest is not committed if the person did not consent to the sexual intercourse.</p>	<p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<i>The Constitution of Nauru, Part II, s.10(3)(a)</i>)  see also <i>Republic of Nauru v Notte [2017] NRSC 51</i>.</p>	<p><b>Maximum Imprisonment:</b> 10 years</p> <p><b>Third (or subsequent) Sexual Offence</b></p> <p><b>Maximum Imprisonment:</b> Life imprisonment without the possibility of parole</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual abuse of a minor	<u>Crimes Act (2016), Part 7, Divisions 7.2 and 7.3, ss.115, 116 and 127</u>	<p><b>Rape of Child Under 16 Years Old:</b> Intentionally engaging in sexual intercourse with a person under 16 years old. The offence is also committed if a person intentionally causes a person under 16 years old to:</p> <ul style="list-style-type: none"> <li>(a) engage in sexual intercourse with a third person; or</li> <li>(b) do an act of sexual self-penetration; or</li> <li>(c) engage in sexual intercourse with an animal;</li> <li>(d) engage in masturbation of an animal; or</li> <li>(e) engage in any activity with an animal that involves physical contact by the person with the animal for sexual gratification or sexual arousal of the person.</li> </ul> <p>If the child was at least 13 years old and no aggravating circumstances apply, it is a defence that the defendant took reasonable steps to determine the age of the child, honestly believed on reasonable grounds that the child was at last 16 years old and the child wished to consent to the physical act.</p> <p>It is also a defence if the defendant was within 2 years of age of the child and the child wished to consent to the physical act.</p>		<p><b>Maximum Imprisonment:</b> 25 years, if the child is under 13 years or aggravating circumstances apply, life imprisonment</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Crimes Act (2016), Part 7, Division 7.3, s.117 and 127</u> and <u>Criminal Procedure Act (1972), Part II, s.7A, as amended by the Criminal Procedure Amendment Act (2015), s.3</u></p>	<p><b>Indecent Acts in Relation to Child Under 16 Years Old:</b> When a person:</p> <p>(a) intentionally touches another person under 16 years old in an indecent way, being reckless to that fact; or</p> <p>(b) a person intentionally causes another person under 16 years old, to touch him, or the other person themselves, or a third person, or an animal, in an indecent way, being reckless to that fact; or</p> <p>(c) a person intentionally does an indecent act towards another person aged under 16 years old, being reckless to that fact.</p> <p>Absolute liability applies.</p> <p>Whether the act or touching is indecent is a question of fact applying the standard of an ordinary person.</p> <p>If the child was at least 13 years old and no aggravating circumstances apply, it is a defence that the defendant took reasonable steps to determine the age of the child, honestly believed on reasonable grounds that the child was at last 16 years old and the child wished to consent to the physical act.</p> <p>It is also a defence if the defendant was within 2 years of age of the child and the child wished to consent to the physical act.</p>		<p><b>Maximum Imprisonment:</b> 12 years, if the child is under 13 years or aggravating circumstances apply, 15 years</p> <p><b>Third (or more) Sexual Offence</b></p> <p><b>Maximum Imprisonment:</b> Life imprisonment without the possibility of parole</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Crimes Act (2016), Division 7.3, Part 7, s.118 and 127</u> and <u>Criminal Procedure Act (1972), Part II, s.7A, as amended by the Criminal Procedure Amendment Act (2015), s.3</u></p>	<p><b>Causing ETC Child Under 16 Years Old to Engage in Sexual Activity:</b> Intentionally engaging in conduct with a person under 16 years old, intending to cause or procure or making it easier to cause or procure the child to:</p> <ul style="list-style-type: none"> <li>(a) engage in sexual intercourse; or</li> <li>(b) engage in masturbation or sexual self-penetration; or</li> <li>(c) engage in any activity involving physical contact by the child with the person or a third person (including a dead person) for sexual gratification or sexual arousal of any person; or</li> <li>(d) engage in activity that involves physical contact by the child with an animal for sexual gratification or sexual arousal of any person; or</li> <li>(e) engage in an act for sexual gratification or sexual arousal of any person involving undressing so that the child is only clothed in underwear; or</li> <li>(f) engage in an act involving nudity or exposure or partial exposure of a person's private parts for sexual gratification or sexual arousal of any person; or</li> <li>(g) engage in any other act with, or towards, the child that is indecent, but that is not covered by subparagraphs (a) to (f)</li> </ul> <p>Absolute liability applies.</p> <p>Whether the act is indecent is a question of fact applying the standard of an ordinary person.</p>		<p><b>Maximum Imprisonment:</b> 12 years, if the child is under 13 years or aggravating circumstances apply, 15 years</p> <p><b>Third (or more) Sexual Offence</b></p> <p><b>Maximum Imprisonment:</b> Life imprisonment without the possibility of parole</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>If the child was at least 13 years old and no aggravating circumstances apply, it is a defence that the defendant took reasonable steps to determine the age of the child, honestly believed on reasonable grounds that the child was at last 16 years old and the child wished to consent to the physical act.</p> <p>It is also a defence if the defendant was within 2 years of age of the child and the child wished to consent to the physical act.</p>		
<b>Palau</b>	Sexual Assault	<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1602</u>	<p><b>Sexual Assault in the First Degree:</b> Knowingly subjecting another person to an act of sexual penetration:</p> <p>(a) by strong compulsion (being the use of express or implied threats placing a person in fear of bodily injury or kidnap in respect of any person, the use of a dangerous instrument or physical force);</p> <p>(b) where the other person is less than 15 years old;</p> <p>(c) where the other person is at least 15 years old but less than 17 years old, provided that the person is not less than 5 years older than the minor and not legally married to the minor;</p> <p>(d) where the other person is mentally defective; or</p>	<p><b>Standard:</b> Beyond reasonable doubt (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 1, s.109(a)).</p> <p><b>Evidential Issues:</b> In the absence of proof, the innocence of the defendant is assumed (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 1, s.109(b)).</p>	<p><b>Maximum Imprisonment:</b> 25 years without the possibility of suspension of sentence (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.661)</p> <p><b>Maximum Fine:</b> \$50,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1))</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>(e) where the other person is mentally incapacitated or physically helpless as a result of a substance that the actor knowingly caused to be administered without the other person's consent.</p> <p>"Sexual penetration" includes vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required.</p>		
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1603</u></p>	<p><b>Sexual Assault in the Second Degree:</b> Knowingly subjecting another person to an act of sexual penetration:</p> <p>(a) by compulsion</p> <p>(b) another person who is mentally incapacitated or physically helpless; or</p> <p>(c) another person who is under the actor's care whilst the actor is engaged in certain employment/professional capacities.</p>		<p><b>Maximum Imprisonment:</b> 10 years (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.662(a)</u>)</p> <p><b>Maximum Fine:</b> \$25,000 (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(2)</u>)</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1604</u></p>	<p><b>Sexual Assault in the Third Degree:</b></p> <p>(a) Recklessly subjecting another person to an act of sexual penetration by compulsion;</p> <p>(b) knowingly subjecting to sexual contact another person who is less than 15 years old or causing such a person to have sexual contact with the actor;</p> <p>(c) knowingly engaging in sexual contact with a person who is at least 15 years old but less than 17 years old, or causing the minor to have sexual contact with the actor, provided that the actor is not less than 5 years older than the minor and not legally married to the minor;</p> <p>(d) knowingly subjecting to sexual contact another person who is mentally defective, mentally incapacitated or physically helpless, or causing such person to have sexual contact with the actor;</p> <p>(e) knowingly subjecting a person to sexual contact who is under the actor's care whilst the actor is engaged in certain employment/professional capacities; or</p> <p>(f) knowingly, by strong compulsion, having sexual contact with another person or causing another person to have sexual contact with the actor.</p>		<p><b>Maximum Imprisonment:</b> 5 years (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.662(b))</p> <p><b>Maximum Fine:</b> \$10,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(3))</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1605</u></p>	<p><b>Sexual Assault in the Fourth Degree:</b></p> <p>(a) Knowingly subjecting another person to sexual contact by compulsion or causing another person to have sexual contact with the actor by compulsion;</p> <p>(b) knowingly exposing the person’s genitals to another person under circumstances in which the actor’s conduct is likely to alarm the other person or put them in fear of bodily injury; or</p> <p>(c) knowingly trespassing on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor.</p> <p>“Sexual penetration” includes vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person’s body or of any object into the genital or anal opening of another person’s body; it occurs upon any penetration, however slight, but emission is not required.</p>		<p><b>Maximum Imprisonment:</b>  1 year (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.663</u>)</p> <p><b>Maximum Fine:</b> \$1,000 (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(4)</u>)</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Incest	<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1601</u></p>	<p><b>Incest:</b> An act of sexual penetration with another who is within the degrees of consanguinity or affinity within which marriage is prohibited by law or custom. The offence is one of strict liability.</p>		<p><b>Maximum Imprisonment:</b> 25 years (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.661</u>)</p> <p><b>Maximum Fine:</b> \$50,000 (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1)</u>)</p> <p>Both penalties may be imposed.</p>
	Sexual abuse of a minor	<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1602</u></p>	<p><b>Sexual Assault in the First Degree:</b> Knowingly engaging in sexual penetration with another person who is less than 15 years, or knowingly engaging in sexual penetration with a person who is at least 15 years but less than 17 years, provided that the person is not less than 5 years older than the minor or legally married to the minor.</p>		<p><b>Maximum Imprisonment:</b> 25 years (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.661</u>)</p> <p><b>Maximum Fine:</b> \$50,000 (<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1)</u>)</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1604</u></p>	<p><b>Sexual Assault in the Third Degree:</b> Knowingly engaging in sexual contact with a person who is at least 15 years but less than 17 years or causing the minor to have sexual contact with the person, provided that the person is not less than 5 years older than the minor or legally married to the minor.</p>		<p><b>Maximum Imprisonment:</b> 5 years (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.662(b))</p> <p><b>Maximum Fine:</b> \$10,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(3))</p> <p>Both penalties may be imposed.</p>
		<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 16, ss.1600 and 1606</u></p>	<p><b>Continuous Sexual Assault of a Minor Under the Age of 15 Years:</b> Engaging in three or more acts of sexual penetration or sexual contact with a minor under the age of 15 years residing in the same home, or to whom the perpetrator has returning access, over a period of time.</p>		<p><b>Maximum Imprisonment:</b> 25 years (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.661)</p> <p><b>Maximum Fine:</b> \$50,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1))</p> <p>Both penalties may be imposed.</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Papua New Guinea</b>	Rape	<u>Criminal Code Act (1974), Part V, Division 7, ss.347 and 347A</u>	<p><b>Rape:</b> Sexual penetration of a person without his consent.</p> <p>“Consent” means free and voluntary agreement. Circumstances in which a person does not consent to act include but are not limited to, the following:</p> <ul style="list-style-type: none"> <li>(a) the use of violence or force on that person or someone else;</li> <li>(b) threats or intimidation against that person or someone else;</li> <li>(c) fear of harm to that person or someone else;</li> <li>(d) the person is unlawfully detained;</li> <li>(e) the person is asleep, unconscious or affected by alcohol/drugs so as to be incapable of freely consenting;</li> <li>(f) the person is incapable of understanding the essential nature of the act or communicating willingness due to physical/ mental disability;</li> <li>(g) the person is mistaken about the sexual nature of the act or the identity of the person;</li> <li>(h) the person mistakenly believes the act is for medical/hygienic purposes;</li> <li>(i) the person is induced by the accused by abuse of a position of trust, power or authority;</li> <li>(j) the person initially consents but then expresses by words or conduct a lack of agreement to continue; or</li> <li>(k) agreement is expressed by a person other than the complainant.</li> </ul>	<p><b>Standard:</b> The prosecution must prove beyond a reasonable doubt (<u>Magistrates’ Manual of Papua New Guinea, Part 2, s.5.4</u>).</p> <p><b>Evidential issues:</b> A person is presumed innocent until proven guilty (<u>Constitution of the Independent State of Papua New Guinea, s.37(4)(a)</u>).</p> <p>The spouse of the accused is a competent and compellable witness.</p> <p>A person may be found guilty on the uncorroborated testimony of one witness and a judge shall not instruct himself that it is unsafe to find the accused guilty in the absence of corroboration.</p>	<p><b>Maximum Imprisonment:</b> 15 years; but if there are aggravating circumstances for life</p> <p><b>Attempted Rape Maximum Imprisonment:</b> 14 years (<u>Criminal Code Act (1974), Part V, Division 7, ss.348</u>)</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>Lack of positive consent is normally enough to show lack of consent; a person is not to be regarded as having consented just because she did not physically resist or sustain physical injury, or just because she had previously freely agreed to engage in a sexual act with that or some other person.</p> <p>Belief in consent is not a defence where this belief was caused by self-induced intoxication or reckless blindness, or the accused did not take reasonable steps to ascertain consent.</p> <p>Aggravating circumstances include but are not limited to where:</p> <ul style="list-style-type: none"> <li>(a) the accused is in the company of another person or persons;</li> <li>(b) at the time of or immediately before/after the offence the accused uses or threatens to use a weapon;</li> <li>(c) at the time of or immediately before/after the offence the accused tortures or causes grievous bodily harm to the complainant;</li> <li>(d) the accused confines or restrains the complainant before or after the offence;</li> <li>(e) the accused abuses a position of trust, authority or dependency;</li> <li>(f) the accused is a member of the same family/clan;</li> <li>(g) the complainant has a serious physical/mental disability;</li> <li>(h) the complainant was pregnant at the time; or</li> <li>(i) the accused was knowingly infected with HIV or knowingly had AIDS.</li> </ul>		

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Criminal Code Act (1974), Part V, Division 7, s.347C inserted by Criminal Code (Amendment) Act no.6 of (2013), S.2</u></p>	<p><b>Aggravated Rape:</b> Sexual penetration of the vagina or anus or such other body part of another person with any body part, object or implement, without consent:</p> <ul style="list-style-type: none"> <li>(a) whilst armed with a dangerous or offensive weapon;</li> <li>(b) in the company of one or more other persons;</li> <li>(c) causing grievous bodily harm to a person before, after or in the course of the offence; or</li> <li>(d) where the victim is a child under the age of 10 years.</li> </ul>		<p><b>Maximum Penalty:</b> Death</p>
	Sexual assault	<p><u>Criminal Code Act (1974), Part V, Division 7, ss.349 and 349A</u></p>	<p><b>Sexual Assault:</b> Touching, without a person's consent, with any part of his body the sexual parts of that other person, or compelling the person to touch with any parts of that person's body the sexual parts of his body. This includes touching with any object manipulated by the person.</p> <p>Aggravating circumstances include but are not limited to where:</p> <ul style="list-style-type: none"> <li>(a) the accused is in the company of another person or persons;</li> <li>(b) at the time of or immediately before/after the offence the accused uses or threatens to use a weapon;</li> <li>(c) at the time of or immediately before/after the offence the accused tortures or causes grievous bodily harm to the complainant;</li> <li>(d) the accused confines or restrains the complainant before or after the offence;</li> </ul>		<p><b>Maximum Imprisonment:</b> 5 years; if aggravated, 10 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			(e) the accused abuses a position of trust, authority or dependency; (f) the accused is a member of the same family/clan; (g) the complainant has a serious physical/mental disability; (h) the complainant was pregnant at the time; or (i) the accused was knowingly infected with HIV or knowingly had AIDS.		
	Incest	<u>Criminal Code Act (1974), Part IV, Division 2, s.223</u>	<b>Incest:</b> An act of sexual penetration with a close blood relative, including parents, children, siblings (and half-siblings), grandparents, grandchildren, aunts and uncles, nieces and nephews and first cousins who are blood relatives. There is a defence if the person was under restraint, duress or fear of the other at the time of sexual penetration.		<b>Maximum Imprisonment:</b> 7 years
	Sexual abuse of a minor	<u>Criminal Code Act (1974), Part IV, Division 2A, ss.229A, 229F, s.229G, 229H and 229I.</u>	<b>Sexual Penetration of a Child:</b> Act of sexual penetration with a child under the age of 16 years.  Consent is only a defence if the accused believed on reasonable grounds that the child was aged 16 years or older; or the child was aged 12 years or older and the accused was no more than two years older than the child.  A person is not criminally responsible if the child was over 14 years old and married to the accused.		<b>Maximum Imprisonment:</b> 25 years; if under 12 years old, life; if a relationship of trust, authority or dependency at the time of the offence, life

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Criminal Code Act (1974), Part IV, Division 2A, ss.229B, 229F, 229G, 229H and 229I</u></p>	<p><b>Sexual Touching:</b> Touching for sexual purposes with any part of his or her body the sexual parts of a child under the age of 16 years old, or compelling a child under the age of 16 years old to touch with any part of his or her body, the sexual parts of the accused's body. This includes touching with any object manipulated by the person.</p> <p>Consent is only a defence if the accused believed on reasonable grounds that the child was aged 16 years old or older; or the child was aged 12 years old or older and the accused was no more than two years older than the child.</p> <p>A person is not criminally responsible if the child was over 14 years old and married to the accused.</p>		<p><b>Maximum Imprisonment:</b> 7 years; 12 years; if a relationship of trust, authority or dependency at the time of the offence, 12 years</p>
		<p><u>Criminal Code Act (1974), Part IV, Division 2A, ss.229C, 229F, 229G, 229H and 229I</u></p>	<p><b>Indecent Act Directed at a Child:</b> Committing an indecent act directed at a child under the age of 16 years old.</p> <p>Consent is only a defence if the accused believed on reasonable grounds that the child was aged 16 years old or older; or the child was aged 12 years old or older and the accused was no more than two years older than the child.</p> <p>A person is not criminally responsible if the child was over 14 years old and married to the accused.</p>		<p><b>Maximum Imprisonment:</b> 5 years; if under 12 years, 7 years; if a relationship of trust, authority or dependency at the time of the offence, 7 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Criminal Code Act (1974), Part IV, Division 2A, ss.229D, 229F, 229G, 229H and 229I</u></p>	<p><b>Persistent Sexual Abuse of a Child:</b> On two or more occasions engaging in conduct in relation to a particular child that constitutes an offence under Division 2A of the Criminal Code Act (1974).</p> <p>Consent is only a defence if the accused believed on reasonable grounds that the child was aged 16 years old or older; or the child was aged 12 years old or older and the accused was no more than two years older than the child.</p> <p>A person is not criminally responsible if the child was over 14 years old and married to the accused.</p>		<p><b>Maximum Imprisonment:</b> 15 years; if one or more acts included penetration, life</p>
		<p><u>Criminal Code Act (1974), Part IV, Division 2A, ss.229E, 229G, 229H and 229I</u></p>	<p><b>Abuse of Trust, Authority or Dependency:</b> Engaging in an act of sexual penetration or sexual touching of a child between the ages of 16 and 18 years old with whom the person has an existing relationship of trust, authority or dependency.</p> <p>Consent is only a defence if the accused believed on reasonable grounds that the child was aged 18 years old or older.</p> <p>A person is not criminally responsible if the child was over 14 years old and married to the accused.</p>		<p><b>Maximum Imprisonment:</b> 15 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
Samoa	Rape	<u>Crimes Act (2013), Part 7, ss.48, 49(a), 50, and 52</u>	<b>Sexual Violation: Rape:</b> Where a male has sexual intercourse (penetration of the female’s genitalia by the male penis) with a female without her consent freely and voluntarily given. There is no presumption of law that any person is by reason of his or her age incapable of the sexual intercourse. Marriage to the victim is not a defence.	<b>Standard:</b> Beyond reasonable doubt ( <i>Police v K [2017] WSSC 73</i> ).  <b>Evidential Issues:</b> Presumed innocent until proved guilty ( <i>Constitution of the Independent State of Samoa (1960), Part II, s.9(3)</i> ).	<b>Maximum Imprisonment:</b> Life imprisonment
	Sexual assault	<u>Crimes Act (2013), Part 7, ss.49(b), 50 and 52</u>	<b>Sexual Violation: Unlawful Sexual Connection:</b> Sexual connection with another person without the consent of that other person freely and voluntarily given. Sexual connection is connection occasioned by:  (a) the penetration of the genitalia or the anus of any person by any part of the body of any other person; or any object held or manipulated by any other person; or  (b) connection between the mouth or tongue or any part of the body of any person and any part of the genitalia or anus of any other person; or  (c) the continuation of sexual connection, as described in either paragraph (a) or (b).		<b>Maximum Imprisonment:</b> 14 years
		<u>Crimes Act (2013), Part 7, s.60</u>	<b>Indecent Assault:</b> Indecently assaulting another person.		<b>Maximum Imprisonment:</b> 5 years

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Incest	<u>Crimes Act (2013), Part 7, ss.50 and 55</u>	<p><b>Incest:</b> Sexual connection between 2 persons whose relationship is that of parent and child, siblings, half-siblings, or grandparent and grandchild; and the person charged is at least 16 and knows of the relationship. “Child” includes an illegitimate child or an adopted child; and “grandchild” has a corresponding meaning. Sexual connection is defined as connection occasioned by:</p> <ul style="list-style-type: none"> <li>a) the penetration of the genitalia or the anus of any person by any part of the body of any other person, or any object held or manipulated by any other person; or</li> <li>(b) connection between the mouth or tongue or any part of the body of any person and any part of the genitalia or anus of any other person; or</li> <li>(c) the continuation of sexual connection, as described in either paragraph (a) or (b).</li> </ul>		<p><b>Maximum Imprisonment:</b> 20 years</p>
		<u>Crimes Act (2013), Part 7, ss.50, 56 and 57</u>	<p><b>Sexual Conduct with a Family Member:</b> Sexual connection with a dependent family member under the age of 21 years old is an offence. Consent is not a defence. One person is a defendant family member of another person if the other person has power or authority over him or her and is one of a number of specified categories of relationship, including but not limited to parent, step-parent, foster parent, guardian, uncle and aunt, or if outside such a category but has a responsibility for, or significant role in the care of upbringing of the person.</p>		<p><b>Maximum Imprisonment:</b> 14 years</p> <p><b>Attempted Sexual Connection with a Family Member Maximum Imprisonment:</b> 14 years</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual abuse of a minor	<u>Crimes Act (2013), Part 7, s.58(1)</u>	<p><b>Sexual Conduct with a Child Under 12:</b> Sexual connection with a child (a person under the age of 12 years old). Sexual connection is defined as connection occasioned by:</p> <p>(a) the penetration of the genitalia or the anus of any person by any part of the body of any other person, or any object held or manipulated by any other person; or</p> <p>(b) connection between the mouth or tongue or any part of the body of any person and any part of the genitalia or anus of any other person; or</p> <p>(c) the continuation of sexual connection, as described in either paragraph (a) or (b).</p> <p>It is not a defence that the child consented or that the person believed the child to be of or over the age of 12 years old.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment</p> <p><b>Attempted Sexual Conduct with a Child Under 12:</b> 14 years</p>
<u>Crimes Act (2013), Part 7, s.58(3)</u>		<p><b>Indecent Act with a Child:</b> Doing an indecent act with a child, including indecently assaulting the child. Indecent assault is not defined in the Crimes Act (2013).</p>	<p><b>Maximum Imprisonment:</b> 14 years</p>		
<u>Crimes Act (2013), Part 7, ss.59 and 61</u>		<p><b>Sexual Connection with a Young Person Under 16:</b> Doing an indecent act with or on a young person (12 years old or over and under the age of 16 years old).</p> <p>Marriage to the young person is a defence, as is a situation in which the accused is under 21 at the time of the act, the person took reasonable steps to find out whether the young person concerned was of or over the age of 16 years old, the person believed on reasonable grounds that the young person was of or over the age of 16 years old and the young person consented.</p>	<p><b>Maximum Imprisonment:</b> 7 years</p> <p><b>Attempted Sexual Connection with a Young Person Under 16:</b> 10 years</p>		

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
<b>Solomon Islands</b>	Rape	<u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.136F, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u>	<p><b>Rape:</b> A person commits an offence if the person has sexual intercourse with another person:</p> <p>(a) without the other person’s consent; and</p> <p>(b) knowing about or being reckless as to the lack of consent.</p> <p>Marriage or “a marriage-like relationship” is no defence.</p> <p>“Sexual intercourse” is defined as any of the following:</p> <p>(a) the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law;</p> <p>(b) the penetration, to any extent, of the genitalia (including alter or surgically constructed genitalia) or anus of a person by an object (including an animal) manipulated by another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law;</p> <p>(c) the introduction of any part of the penis of a person into the mouth of another person;</p> <p>(d) fellatio;</p> <p>(e) cunnilingus; or</p> <p>(f) the continuation of sexual intercourse as defined in paragraph (a), (b), (c), (d) or (e).</p>	<p><b>Standard:</b> Prosecution must prove beyond reasonable doubt (<u>Solomon Islands Magistrates’ Bench Book, Section 2.2</u>).</p> <p><b>Evidential issues:</b> Presumed innocent until proved or pleaded guilty (<u>Constitution of Solomon Islands Statutory Instruments (1978) NO. 783, Chapter 2</u>).</p>	<p><b>Maximum Imprisonment:</b> Life imprisonment</p> <p><b>Attempted Maximum Imprisonment:</b> 30 years (attempted with grievous harm done to the victim/survivor); 25 years (attempted with harm done to the victim/survivor); 20 years (if the offender over the age of 18 years and the victim/survivor is under the age of 15 years); 15 years (in all other cases)</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			Recklessness as to another person's lack of consent includes if: (a) the person is aware of a risk that the other person does not consent and it is unreasonable to take the risk; or (b) the person does not give any thought as to whether the person is consenting.		
		<u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.136G, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u>	<b>Compelled Sexual Intercourse:</b> A person commits an offence if the person compels a person to engage in sexual intercourse with another person: (a) without the person's consent; and (b) knowing about or being reckless as to the lack of consent.		<b>Maximum Imprisonment:</b> Life imprisonment
	Abduction with intention of rape or sexual assault	<u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.137, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u>	<b>Abduction or Detention with intent:</b> A person commits an offence if the person takes, entices away or detains another person with the intention: (a) of having sexual intercourse with the person; or (b) of committing an indecent act on or in the presence of the person; or (c) that a third person will have sexual intercourse with the person.		<b>Maximum Imprisonment:</b> 10 years

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Sexual assault	<p><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.138, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></p>	<p><b>Indecent Act without Consent:</b> A person commits an offence if the person commits an indecent act on or in the presence of another person:</p> <p>(a) without the other person’s consent; and</p> <p>(b) knowing about or being reckless as to the lack of consent.</p> <p>An “indecent act” is an act of a sexual nature, not being sexual intercourse, and which a “reasonable person would consider to be contrary to community standards of decency.”</p> <p>“Position of trust” as to a child includes: the child’s parents (including adoptive or step-parents), grandparents, cousins, siblings (including half or step-siblings), uncle/aunts, custodian/guardian/carer, doctor/healer/medical practitioner, teacher, counsellor, employer, legal practitioner, religious or community leader, a police officer, or if the child is in a correctional centre, a correctional services officer in the centre.</p>		<p><b>Maximum Imprisonment:</b></p> <p>10 years (child victim/survivor and offender in position of trust or victim/survivor under 13 years of age); 7 years (victim/survivor between 13 and 15 years of age); 5 years in all other cases</p>
<p><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.138A, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></p>		<p><b>Rape or Indecent Act – Person with Significant Disability:</b> A person has sexual intercourse with/commits an indecent act on or in the presence of a person with a significant disability, knowing that the person has a significant disability and that the person is submitting because of their significant disability.</p>	<p><b>Maximum Imprisonment – sexual intercourse:</b></p> <p>Life imprisonment</p> <p><b>Maximum Imprisonment – indecent act:</b> 10 years (if the child is under 13 years); 10 years (if the victim/survivor is a child and the offender is in a position of trust to the child); 7 years (if the victim/survivor is between 13 and 15 years of age); and 5 years (any other case)</p>		

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
			<p>Marriage or “a marriage-like relationship” is no defence.</p> <p>“Significant disability” is defined as means an intellectual, mental or physical condition or impairment (or a combination of more than one of these types of condition or impairment) that affects a person to such an extent that it significantly impairs a person’s capacity to:</p> <p>(a) understand the nature of sexual conduct; or</p> <p>(b) understand the nature of a decision about sexual conduct; or</p> <p>(c) communicate decisions about sexual conduct.</p>		
	Sexual abuse of a minor	<p><a href="#"><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.139, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></a></p>	<p><b>Sexual Intercourse or Indecent Act:</b> A person commits an offence if the person (1) has sexual intercourse with or (2) commits an indecent act on or in the presence of a child who is under 15 years of age.</p> <p>It is not a defence that the child consented.</p> <p>A “child” is a person under 18 years of age.</p>		<p><b>Maximum Imprisonment – sexual intercourse:</b> Life (if the child is under 13 years or the person is in a position of trust to the child); 15 years (if the child is between 13 and 15 years of age)</p> <p><b>Maximum Imprisonment – indecent act:</b> 7 years (if the child is under 13 years); 15 years (if the child is between 13 and 15 years of age or the person is in a position of trust to the child); 5 years (any other case)</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.140, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></p>	<p><b>Sexual Intercourse or Indecent Act:</b> A person commits an offence if:</p> <p>(a) the person has sexual intercourse with/ commits an indecent act on or in the presence of a child who is at least 15 years of age but under 18 years of age; and</p> <p>(b) the person is in a position of trust in relation to the child.</p> <p>It is not a defence that the child consented.</p>		<p><b>Maximum Imprisonment:</b> 15 years (sexual intercourse); 5 years (indecent act)</p>
		<p><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.142, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></p>	<p><b>Persistent Sexual Abuse of a Child:</b> A person commits an offence if the person engages in an act in relation to a particular child that constitutes a sexual offence on 3 or more separate occasions occurring on separate days during any period.</p> <p>It is immaterial whether or not the act is of the same nature, or constitutes the same offence, on each occasion.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment</p>
		<p><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.143, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></p>	<p><b>Child Commercial Sexual Exploitation:</b> A person commits an offence if the person obtains commercial sexual services from a child.</p> <p>“Commercial sexual services” means sexual services provided in return for financial or other reward, whether or not the reward is actually received by the person providing the sexual services or by another person.</p>		<p><b>Maximum Imprisonment:</b> 20 years (if the child is under 15 years of age); 15 years (in all other cases)</p>

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Procuration	<u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.141, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u>	<p><b>Procuration:</b> A person commits an offence if the person procures or attempts to procure:</p> <ul style="list-style-type: none"> <li>(1) a child to perform an indecent act or to have sexual intercourse with another person; or</li> <li>(2) a person to provide commercial sexual services, either in Solomon Islands or elsewhere.</li> <li>(3) A person commits an offence if, in order to commit an offence under subsection (1) or (2), the person does any of the following: <ul style="list-style-type: none"> <li>(a) threatens or intimidates the victim;</li> <li>(b) makes false representations; or</li> <li>(c) administers or provides an intoxicating drug to the victim.</li> </ul> </li> </ul>		<p><b>Maximum Imprisonment:</b></p> <ul style="list-style-type: none"> <li>(1) 20 years (if the child is under 15 years of age); 15 years (if the child is between 15 and 18 years of age)</li> <li>(2) 20 years (if the victim/survivor is under 15 years of age); 15 years (in all other cases)</li> <li>(3) 7 years (if the victim/survivor is under 15 years of age); 5 years (in all other cases)</li> </ul>
	Internal people trafficking	<u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.145, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u>	<p><b>Internal People Trafficking:</b> A person commits an offence if the person engages in internal people trafficking by one or more of the following means:</p> <ul style="list-style-type: none"> <li>(a) threats;</li> <li>(b) use of force or other coercion;</li> <li>(c) abduction;</li> <li>(d) fraud;</li> <li>(e) deception;</li> <li>(f) abuse of power or of a position of trust; or</li> <li>(g) giving or receiving payments or benefits to obtain the consent of a person who has control over another person.</li> </ul>		<p><b>Maximum Imprisonment:</b> 25 years (if the victim/survivor is a child); 20 years (in all other cases)</p> <p><b>Maximum Imprisonment for engaging in or profiting from exploitation of a trafficked person:</b> 15 years</p>

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	Type of Offence	Source	Definition	Proof	Penalties
			<p>“Exploitation” includes all forms of sexual exploitation (including sexual servitude), forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs.</p> <p>“Internal people trafficking”: a person engages in internal people trafficking if the person recruits, transports, harbours or receives another person within Solomon Islands for the purpose of exploitation.</p>		
	Incest	<p><u>Solomon Islands Penal Code, Chapter 26, Part XVI, s.163, as amended by the Penal Code (Amendment) (Sexual Offences) Act (2016)</u></p>	<p><b>Incest:</b> A person commits an offence if the person has sexual intercourse with another person who is a close family member of the person.</p> <p>“Close family member”, of a person, means any of the following persons:</p> <p>(a) a parent or grandparent;</p> <p>(b) a child or other lineal descendant; or</p> <p>(c) a brother, sister, half-brother or half-sister.</p>		<p><b>Maximum Imprisonment:</b> Life if the close family member is under the age of 13 years; 10 years in all other cases</p> <p><b>Attempted Maximum Imprisonment:</b> 7 years if the close family member is under the age of 13 years; 5 years in all other cases</p>
<b>Tonga</b>	Rape	<p><u>Criminal Offences Act (1988), Part IX, s.118</u> as amended by <u>Criminal Offences (Amendment) Act No.17 of (1999), s.5</u></p>	<p><b>Rape:</b> Carnal knowledge of a female:</p> <p>(a) against her will; or</p> <p>(b) being aware that she is in a state of insensibility; or</p> <p>(c) being aware that she is feeble minded, insane or is an idiot or imbecile as to be incapable of giving or refusing consent; or</p> <p>(d) by personating her husband; or</p> <p>(e) by reason of her consent being given under fear of death or serious injury, and the accused knows that the woman does not consent or is reckless as to her consent.</p>	<p><b>Standard:</b> Beyond a reasonable doubt (<u>The Tonga Magistrates’ Bench Book (2004), E8.2, see also <i>Rex v RVL [2015] TOSC 20; CR92 of 2014</i></u>).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<u>Evidence Act (1988), Ch.15, Part VIII, ss.104-105</u>).</p> <p>In all criminal proceedings for rape or other sexual offences, in order to corroborate the</p>	<p><b>Maximum Imprisonment:</b> 15 years</p>

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	Type of Offence	Source	Definition	Proof	Penalties
			<p>The Criminal Offences (Amendment) Act No.17 of (1999) removed the carve-out for spousal rape.</p>	<p>testimony of the injured party, evidence may be given that such person voluntarily made a statement relating to the commission of the crime at or shortly after the crime was committed. Such statement shall not be considered as constituting additional or independent evidence of the crime, but only shows that the person's conduct is consistent with the evidence given at trial (<u>Evidence Act (1988), Ch.15, Part I, s.11</u>).</p> <p>For rape (s.118), it is not necessary to prove actual emission of seed but the offence is deemed complete on proof of penetration only.</p> <p>For rape and indecent assault, no evidence or question in cross-examination may be adduced at trial by the defendant about the sexual experience of a female complainant with any person other than the defendant, except with the leave of the judge who must believe it would be unfair to the defendant not to adduce such evidence and do so in the absence of a jury (<u>Evidence Act (1988), Ch.15, Part I, s.33</u>).</p>	

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	Type of Offence	Source	Definition	Proof	Penalties
	Indecent assault	<p><u>Criminal Offences Act (1988), Part IX, s.124</u></p> <p>as repealed and replaced by</p> <p><u>Criminal Offences (Amendment) Act (2012), s.14</u></p>	<p><b>Indecent Assault:</b> Committing an indecent assault on any person, being serious indecent assault or simple indecent assault.</p> <p>Consent is not a defence where the person is under 15 years old, or where that person is feeble-minded, insane or an idiot or imbecile and so incapable of consent and the person knew or had reason to suspect her to be such.</p>		<p><b>Maximum Imprisonment:</b> 5 years (Serious); 3 years (Simple)<sup>348</sup></p>
	Incest	<p><u>Criminal Offences Act (1988), Part IX, ss.132</u></p>	<p><b>Incest by Male Person:</b> Male person having carnal knowledge of a female person who is to his knowledge his granddaughter, daughter, sister, mother, aunt, mother's sister's daughter, father's sister's daughter, father's brother's daughter, or niece.</p> <p>Consent is not a defence.</p>		<p><b>Maximum Imprisonment:</b> 10 years</p>
		<p><u>Criminal Offences Act (1988), Part IX, s.133</u></p>	<p><b>Incest by Female Person:</b> Female person of or above the age of 18 years old who consents to her grandfather, father, brother, son, uncle, father's mother's son, mother's brother's son, mother's sister's son, or nephew having carnal knowledge of her (knowing him to be such).</p>		<p><b>Maximum Imprisonment:</b> 10 years</p>
	Sexual abuse of a minor	<p><u>Criminal Offences Act (1988), Part IX, ss.121</u></p> <p>as repealed and replaced by</p> <p><u>Criminal Offences (Amendment) Act (2012), s.14</u></p>	<p><b>Carnal Knowledge of Child or Young Person:</b> Carnal knowledge of a child under the age of 12 or 15 years old.</p> <p>Consent is not a defence, nor is it a defence to a charge of carnal knowledge of a child under 12 that the person reasonably believed the child was of or above the age of 12 years old.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment (victim/survivor under 12 years); 5 years (victim/survivor under 15 years)</p>

<sup>348</sup> The distinction between “serious” and “simple” indecent assault, and therefore the varying sentences, appears to be at the discretion of the judge based on the evidence presented.

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Tuvalu</b>	Rape	<u>Penal Code (2008), ss.128 and 129</u>	<p><b>Rape:</b> Having unlawful sexual intercourse with a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.</p> <p>Penal Code (2008) s.161 states that sexual intercourse will be deemed complete upon proof of penetration.</p>	<p><b>Standard:</b> Beyond reasonable doubt (<u>Tuvalu Island Courts Bench Book, Section A, para. 6</u>).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<u>Tuvalu Island Courts Bench Book, Section A, para. 6</u>).</p>	<p><b>Maximum Imprisonment:</b> Life imprisonment; 7 years for attempted rape</p>
	Sexual assault	<u>Penal Code (2008), s.133</u>	<p><b>Indecent Assaults on Females:</b> Unlawfully and indecently assaulting any woman or girl.</p> <p>The consent of a girl under 15 years old is no defence.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>
	Procuration	<u>Penal Code (2008) s.137</u>	<p><b>Procuring Defilement of Woman by Threats or Fraud or Administering Drugs:</b> Enabling a person to have sexual intercourse with a woman by threatening/ intimidating the woman, or making false pretences or representations to the woman, or by causing the woman to take a drug with the intention of stupefying or overpowering her.</p> <p>Requires the evidence of more than one person or corroborating evidence.</p>		<p><b>Maximum Imprisonment:</b> 2 years</p>

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
	Procuration	<u>Penal Code (2008) s.137</u>	<p><b>Procuring Defilement of Woman by Threats or Fraud or Administering Drugs:</b> Enabling a person to have sexual intercourse with a woman by threatening/ intimidating the woman, or making false pretences or representations to the woman, or by causing the woman to take a drug with the intention of stupefying or overpowering her.</p> <p>Requires the evidence of more than one person or corroborating evidence.</p>		<b>Maximum Imprisonment:</b> 2 years
		<u>Penal Code (2008) s.136</u>	<p><b>Procuration:</b> Procuring or attempting to procure any woman under 18 years of age to have unlawful sexual intercourse; any woman or girl to become a prostitute; any woman or girl to leave her home/Tuvalu so that she can become an inmate or frequent a brothel elsewhere.</p> <p>Requires the evidence of more than one person or corroborating evidence.</p>		<b>Maximum Imprisonment:</b> 2 years
	Conspiracy to defile	<u>Penal Code (2008) s.149</u>	<p><b>Conspiracy to Defile:</b> Conspiring with another to have sexual intercourse with a woman or girl through false pretence or fraudulent means.</p>		<b>Maximum Imprisonment:</b> 2 years
	Incest	<u>Penal Code (2008), ss.156-157</u>	<p><b>Incest:</b> Where a male has sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister, half-sister or mother.</p> <p>Consent of the female is not a defence.</p>		<b>Maximum Imprisonment:</b> Life (victim/survivor under 13 years); 7 years; 2 years for attempted incest

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>Where a female person of or above the age of 15 years old permits her grandfather, father, brother or son to have sexual intercourse with her (knowing him to be her grandfather, father, brother, half-brother or son, as the case may be).</p>		<p><b>Maximum Imprisonment:</b> 7 years</p>
		<p><u>Penal Code (2008), s.158</u></p>	<p><b>Sexual Intercourse with Certain Collaterals:</b> Any native having sexual intercourse with any collateral either by blood or adoption up to and including the second degree of cousinship.  Lawful marriage is a defence.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>
	<p>Sexual abuse of a minor</p>	<p><u>Penal Code (2008), s.134</u></p>	<p><b>Defilement of a Girl Under 13 Years of Age:</b> Having unlawful sexual intercourse with any girl under the age of 13 years old.  Consent is not a defence.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment; 2 years (attempted)</p>
		<p><u>Penal Code (2008) s.135</u></p>	<p><b>Defilement of a Girl Between 13 and 15 Years of Age, or an Idiot or Imbecile:</b> Having unlawful sexual intercourse with (a) any girl being of or above the age of 13 years old and under the age of 15 years old, or (b) with a female idiot or imbecile under circumstances which do not amount to rape but prove that the person charged knew that the woman or girl was an idiot or imbecile.  Consent is not a defence.  It is a defence that the person charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of 15 years.  Prosecution must commence within 12 months of the offence.</p>		<p><b>Maximum Imprisonment:</b> 5 years</p>

## Sexual Offences

	Type of Offence	Source	Definition	Proof	Penalties
	Abduction	Penal Code (2008) s.131	<b>Abduction:</b> Abduction with the intent to have sexual intercourse or to marry a woman of any age, or cause her to be married or carnally known by any other person or detains her against her will.		<b>Maximum Imprisonment:</b> 7 years
		Penal Code (2008) s.132 (read in conjunction with s.42 ( <i>General punishment for misdemeanours</i> ))	<b>Abduction of a Girl Under 18 Years with intent to have Sexual Intercourse:</b> Any person who with intent that any unmarried girl under the age of 18 years shall have unlawful sexual intercourse with any man, whether such sexual intercourse is intended to be with any particular man, or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother, guardian or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.  It is a defence that the person charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of 18 years.		<b>Maximum Imprisonment:</b> 2 years and a fine
<b>Vanuatu</b>	Rape	Penal Code of Vanuatu (2006), ss.90-91	<b>Rape:</b> Having sexual intercourse with another person: (a) without that person's consent; or (b) with that person's consent if the consent is obtained (i) by force; or (ii) by means of threats of intimidation of any kind; or (iii) by fear of bodily harm; or (iv) by means of false representation as to the nature of the act; or (v) in the case of a married person, by impersonating that person's husband or wife; commits the offence of rape.  The offence is complete upon penetration.	<b>Standard:</b> Beyond reasonable doubt (Penal Code of Vanuatu (2006), s.8)  <b>Evidential Issues:</b> The burden of proof is on the prosecution (Penal Code of Vanuatu (2006), s.8)	<b>Maximum Imprisonment:</b> Life imprisonment

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
	Incest	<u>Penal Code of Vanuatu (2006), s. 95</u> (as amended by the <u>Penal Code (Amendment) Act 2016</u> )	<b>Incest:</b> Sexual intercourse between – (a) parent and child (including an adopted child); (b) brother and sister, whether of the whole blood or of the half blood, and whether the relationship is traced through lawful wedlock or not; or (c) grandparent and grandchild, where the person charged knows of the relationship between the parties. No person of or over the age of 16 years old shall commit incest.		<b>Maximum Imprisonment:</b> 15 years
	Sexual abuse of a minor	<u>Penal Code of Vanuatu (2006), s. 98(1), (2)</u>	<b>Indecent Assault:</b> Indecently and forcibly assaulting any other person under the age of 13 years old.		<b>Maximum Imprisonment:</b> 10 years (victim/survivor under 13 years); 7 years
		Penal Code of Vanuatu (2006), s. 96	<b>Sexual Intercourse with Child Under Care or Protection:</b> Having or attempting to have sexual intercourse with any child, not being the person’s spouse, who is under the age of 18 years old and who – (a) being the person’s stepchild or foster child, is at the time of the intercourse or attempted intercourse living with the person as a member of the person’s family; or (b) not being the person’s stepchild or foster child, and not being a person living with him as the person’s spouse, is at the time of the intercourse or attempted intercourse living with the person as a member of the person’s family and is under the person’s care or protection.  Consent is not a defence.		<b>Maximum Imprisonment:</b> 10 years

**Sexual Offences**

	Type of Offence	Source	Definition	Proof	Penalties
		<p><u>Penal Code of Vanuatu (2006), s.97 (as amended by the Penal Code (Amendment) Act (2016)</u></p>	<p><b>Unlawful Sexual Intercourse:</b> Having sexual intercourse with any child under the age of 13 years old. No person shall have sexual intercourse with any child under the age of 15 years old but of or over the age of 13 years old.</p> <p>Consent is not a defence.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment (victim/survivor under 13 years); 15 years (victim/survivor under 15 years)</p>
		<p><u>Penal Code of Vanuatu (2006), ss. 97A (as amended by the Penal Code (Amendment) Act (2016)</u></p>	<p><b>Aggravated Sexual Assault with a Child:</b> Having sexual intercourse with a child under the age of 15 years old in circumstances of aggravation. "Circumstances of aggravation" means circumstances in which – (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or (c) the alleged offender is in the company of another person or persons; or (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or (e) the alleged victim has a serious physical disability; or (f) the alleged victim has a serious intellectual disability.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment</p>

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	Type of Offence	Source	Definition	Proof	Penalties
	Abduction	<p><u>Penal Code of Vanuatu (2006) s.92 (as amended by the Penal Code (Amendment) Act (2016)</u></p>	<p><b>Abduction:</b> Of any female of any age with the intent to marry or have sexual intercourse with her, or cause her to be married or have sexual intercourse with another person against her will.</p>		<p><b>Maximum Imprisonment:</b> 12 years</p>
<p><u>Penal Code of Vanuatu (2006), s. 92A (as amended by the Penal Code (Amendment) Act (2016)</u></p>		<p><b>Abduction of a Person Under the Age of 18 Years of Age:</b> Taking or causing to be taken an unmarried person under the age of 18 years out of the possession and against the will of her father or mother or guardian or any other person having the lawful care or charge of her with the intention:</p> <p>(a) of having sexual intercourse with the person; or</p> <p>(b) to cause the person to have sexual intercourse with any other person.</p>	<p><b>Maximum Imprisonment:</b> 7 years</p>		

### 3. Murder/Manslaughter

Figure 20: Murder/Manslaughter

Murder/Manslaughter					
	Type of Offence	Source	Definition	Proof	Penalties
International	Murder				
	Manslaughter				
Federated States of Micronesia	Murder	<u>Code of the Federated States of Micronesia (2014), Title 11, s.606</u>	<b>Murder:</b> Unlawfully causing the death of another human being intentionally or knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.	<b>Standard:</b> Beyond reasonable doubt (due process) ( <u>Constitution of the Federated States of Micronesia. Article IV, s.3, as interpreted in <i>Alaphonso v Federated States of Micronesia</i> [1982] 1 FSM Intrm. 209).</u>	<b>Minimum Imprisonment:</b> 10 years <b>Maximum Imprisonment:</b> Life imprisonment
	Manslaughter	<u>Code of the Federated States of Micronesia (2014), Title 11, ss.607 and 1201</u>	<b>Manslaughter:</b> Causes the death of another human being when acting recklessly, or a homicide which would otherwise be murder committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be.	<b>Evidential Issues:</b> Burden of proof lies with the prosecution ( <u><i>Alaphonso v Federated States of Micronesia</i> [1982] 1 FSM Intrm. 209).</u>	<b>Maximum Imprisonment:</b> 10 years <b>Maximum Fine:</b> \$100,000 Both may be imposed ( <u>Code of the Federated States of Micronesia (2014), Title 11, Chapter 12, ss.1201 and 1202).</u>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Fiji</b>	Murder	<u>Crimes Act (2009), Part 15, Division 1, s.237</u>	<b>Murder:</b> Conduct causing the death of another person while intending to cause, or being reckless as to causing, the death of the other.	<b>Standard:</b> Beyond reasonable doubt <i>(State v Arthur James Kamoe Moore [2012])</i>	<b>Maximum Imprisonment:</b> Life imprisonment
	Manslaughter	<u>Crimes Act (2009), Part 15, Division 1, s.239</u>	<b>Manslaughter:</b> Conduct causing the death of another person while intending to cause, or being reckless as to causing, serious harm to the other.	<b>Evidential Issues:</b> The burden of proof lies with the prosecution ( <u>Crimes Decree (2009), Part 8, s.57</u> ). Every person charged with an offence has the right to be presumed innocent until proven guilty ( <u>Constitution of the Republic of Fiji, Chapter 2, s.14(2)(a)</u> ).  Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the act creating such offence, and whether or not specified or negated in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution ( <u>Criminal Procedure Code (1978), s.144</u> ).	<b>Maximum Imprisonment:</b> 25 years

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
		<u>Crimes Act (2009), Part 15, Division 1, s.242</u>	<p><b>Killing with Provocation:</b> It is manslaughter where a person unlawfully kills another under circumstances which would otherwise constitute murder, and where the act which causes death is done in the heat of passion caused by sudden provocation, and before there is time for passion to cool.</p> <p>Provocation means any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.</p>		<b>Maximum Imprisonment:</b> 25 years
<b>Kiribati</b>	Murder	<u>Kiribati Penal Code, Part XX, s.193</u>	Any person who of malice afterthought causes the death of another person by an unlawful act or omission.	<p><b>Standard:</b> Prosecution must prove beyond reasonable doubt (<u>Kiribati Magistrates' Bench Book (2004), Part 6, 2.2-2.3</u>).</p> <p><b>Evidential Issues:</b> Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty (<u>The Constitution of Kiribati (1979), Chapter II, s.10(2)(a)</u>).</p>	<b>Maximum Imprisonment:</b> Life imprisonment
	Manslaughter	<u>Kiribati Penal Code, Part XX, s.192</u>	Any person who by unlawful act or omission (i.e. an omission amounting to culpable negligence or to discharge a duty tending to the preservation of life or health) causes the death of another person.		<b>Maximum Imprisonment:</b> Life imprisonment

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Marshall Islands</b>	Murder	<u>Criminal Code (2011), Article 210, ss.210.1 and 210.2; Article 6, s.6.06</u>	<b>Murder:</b> Causing the death of another human being either intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or sexual intercourse by force or threat of force, arson, burglary, or kidnapping. Murder is a felony of the first degree.	<p><b>Standard:</b> Beyond reasonable doubt (<u>Criminal Code (2011), Article 1, s.1.12(1)</u>).</p> <p><b>Evidential Issues:</b> In the absence of proof of an offence, the defendant is assumed innocent (<u>Criminal Code (2011), Article 1, s.1.12(1)</u>).</p>	<b>Maximum Imprisonment:</b> Life imprisonment
	Manslaughter	<u>Criminal Code (2011), Article 210, s. 210.3</u>	<b>Manslaughter:</b> When the death of another human being is caused recklessly or in circumstances that would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be. An emotional disturbance may be excusable if it is occasioned by any provocation, event, or situation for which the offender was not culpably responsible. Manslaughter is a felony of the second degree.		<b>Maximum Imprisonment:</b> 10 years
<b>Nauru</b>	Murder	<u>Crimes Act (2016), Part 4, Division 4.2, ss.25 and 55</u>	<b>Murder:</b> Intentionally engaging in conduct that causes the death of another person, with the intention of causing or being reckless about causing the death of that or any other person by the conduct.	<p><b>Standard:</b> Beyond reasonable doubt (<u>Republic v Agege [1989] NRSC 1</u>).</p> <p><b>Evidential Issues:</b> Presumed innocent until proven guilty (<u>The Constitution of Nauru, Part II, s.10(3)(a)</u>), see also <u>Republic v Agege [1989] NRSC 1</u>).</p>	<b>Maximum Penalty:</b> Life imprisonment
	Manslaughter	<u>Crimes Act (2016), Part 4, Division 4.2, ss 25 and 56</u>	<b>Manslaughter:</b> Intentionally engaging in conduct which causes the death of another person with the intention of causing or being reckless about causing, serious harm to that or any other person by the conduct.		<b>Maximum Imprisonment:</b> 25 years

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Palau</b>	Murder	<u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 13, s.1300</u>	<b>Murder in the First Degree:</b> Intentionally or knowingly causing the death of more than one person in the same or separate incident, a law enforcement officer, judge, or prosecutor arising out of the performance of official duties, a person known by the defendant to be a witness in a criminal prosecution and the killing is related to that status, a person by a hired killer, or a person while the defendant was imprisoned.	<p><b>Standard:</b> Beyond reasonable doubt (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 1, s.109(a)).</p> <p><b>Evidential Issues:</b> In the absence of proof, the innocence of the defendant is assumed (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 1, s.109(b)).</p>	<p><b>Murder (or Attempted) in the First Degree</b></p> <p><b>Minimum Imprisonment:</b> Life imprisonment, without possibility of parole (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.660(a))</p> <p><b>Maximum Fine:</b> \$50,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1))</p> <p>Both penalties may be imposed.</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
		<p>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 13, s.1301)</p>	<p><b>Murder in the Second Degree:</b> Intentionally or knowingly causing the death of another person.</p>		<p><b>Murder (or Attempted) in the Second Degree</b></p> <p><b>Minimum Imprisonment:</b> Life imprisonment, with possibility of parole (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.660(b))</p> <p><b>Maximum Fine:</b> \$50,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1))</p> <p>Both penalties may be imposed.</p>
	<p>Manslaughter</p>	<p>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 13, s.1302)</p>	<p><b>Manslaughter:</b> Recklessly causing the death of another person or intentionally causing another person to commit suicide.</p>		<p><b>Maximum Imprisonment:</b> 25 years, without possibility of parole (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.661).</p> <p><b>Maximum Fine:</b> \$50,000 (Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), Chapter 6, s.650(1))</p> <p>Both penalties may be imposed.</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
Papua New Guinea	Murder	<a href="#">Criminal Code Act (1974), Chap. 262, s.299</a>	<b>Wilful Murder:</b> Unlawfully killing another person, intending to cause his death or that of some other person.	<p><b>Standard:</b> Beyond a reasonable doubt (<a href="#">Magistrates' Manual of Papua New Guinea, Part 2, s.5.4</a>).</p> <p><b>Evidential issues:</b> A person is presumed innocent until proven guilty (<a href="#">Constitution of the Independent State of Papua New Guinea, s.37(4)(a)</a>).</p>	<b>Maximum Penalty:</b> Death
		<a href="#">Criminal Code Act (1974), s.299A inserted by Criminal Code (Amendment) Act (2013), No. 6 of 2013, s.1</a>	<b>Wilful Murder of a Person on Account of Accusation of Sorcery:</b> Intentionally killing another person on account of accusation that the person is practicing sorcery.		<b>Maximum Penalty:</b> Death
		<a href="#">Criminal Code Act (1974), s.300</a>	<p><b>Murder:</b> Killing another person in any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(a) if the offender intended to do grievous bodily harm to the person killed or to some other person;</li> <li>(b) if death was caused by means of an act done in the prosecution of an unlawful purpose and of such a nature as to be likely to endanger human life;</li> <li>(c) if the offender intended to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime other than a crime specified by a law to be a crime for which a person may only be arrested by virtue of a warrant; or the flight of an offender who has committed or attempted to commit such an offence;</li> <li>(d) if death was caused by administering any stupefying or overpowering thing for a purpose specified in paragraph (c); or</li> <li>(e) if death was caused by wilfully stopping the breath of a person for a purpose specified in paragraph (c).</li> </ul> <p>For (a), it is immaterial that the offender did not intend to hurt the particular person killed; for (b), it is immaterial that the offender did not intend to hurt any person; and for (c) through (e) it is immaterial that the offender did not intend to cause death or know it was likely to result.</p>		<b>Maximum Imprisonment:</b> Life imprisonment

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
	Manslaughter	<u>Criminal Code Act (1974), s.302</u>	<b>Manslaughter:</b> Unlawfully killing another under such circumstances as not to constitute wilful murder, murder or infanticide.		<b>Maximum Imprisonment:</b> Life imprisonment
<u>Criminal Code Act (1974), s.303 and s.266</u>		<p><b>Killing on Provocation:</b> Unlawfully killing another under circumstances that would otherwise constitute wilful murder or murder, but where the act that causes death is done in the heat of passion caused by sudden provocation, before there is time for his passion to cool.</p> <p>Provocation means a wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relationship or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered. A lawful act is not provocation.</p>	<b>Maximum Imprisonment:</b> Life imprisonment		

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Samoa</b>	Murder	<u>Crimes Act (2013), Division 1, ss.92, 99, 100, 103 and 104</u>	<p><b>Culpable Homicide:</b> The killing of any person by (a) an unlawful act; or (b) an omission without lawful excuse to perform or observe any legal duty; or (c) both (a) and (b) combined; or (d) causing that person by threats or fear of violence, or by deception, to do an act which causes that person's death; or (e) wilfully frightening a child under the age of 16 years old or a sick person. Except as provided in section 110, culpable homicide is either murder or manslaughter. Homicide that is not culpable is not an offence.</p> <p><b>Murder:</b> Culpable homicide is murder (a) if the offender means to cause the death of the person killed; (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not; (c) if the offender — (i) means to cause death; or (ii) means to cause bodily injury known to the offender to be likely to cause death, and is reckless whether death ensues or not, to one person, and by accident, mistake or otherwise kills another person, though offender does not mean to hurt the person killed; or (d) if the offender for any unlawful object does an act that the offender knows to be likely to cause death, and thereby kills any person, though the offender may have desired that the offender's object should be effected without hurting any person.</p>	<p><b>Standard:</b> Beyond reasonable doubt (<u><i>Nepa v Attorney General [2010] WSCA 1</i></u>).</p> <p><b>Evidential Issues:</b> Presumed innocent until proved guilty (<u>Constitution of the Independent State of Samoa (1960), Part II, s.9(3)</u>).</p>	<p><b>Mandatory Imprisonment:</b> Life imprisonment</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue (a) if the offender means to cause grievous bodily injury for the purpose of facilitating the commission of certain offences (namely treason or communicating secrets; sabotage; piracy; piratical acts; escape or rescue from prison or lawful custody or detention; sexual violation; murder; abduction; kidnapping; burglary; robbery; arson.), or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission of the offences, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from grievous bodily injury; or (b) if the offender administers any stupefying or overpowering thing for any of the purposes in paragraph (a), and death ensues from the effects thereof; (c) if the offender by any means wilfully stops the breath of any person for any of the purposes in paragraph (a), and death ensues from such stopping of breath.</p>		

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
	Manslaughter	<u>Crimes Act (2013), Division 1, ss.101, 102 and 108</u>	<p><b>Manslaughter:</b> Culpable homicide not amounting to murder is manslaughter.</p> <p><b>Provocation:</b> Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.</p> <p>Anything done by the deceased to the person who caused death may be provocation:</p> <p>(a) if the act was sufficient to cause a person having the power of self-control of a reasonable person to be deprived of the power of self-control; and (b) it did in fact deprive the defendant of the power of self-control and cause him or her to kill the deceased; and (c) the retaliation was reasonably proportionate to the act of provocation.</p> <p>Despite (a) nothing done will be provocation unless the defendant: (1) feared serious violence from the person killed against the defendant or another identifiable person; or (2) the thing done constituted circumstances of a grave nature.</p> <p>The fact alone of a statement from any person as to the sexual infidelity of the person killed despite the provisions (a) is not to be evidence of provocation, but otherwise whether there is any evidence of provocation is a matter of law. Any statement or word alone is not provocation that can reduce murder to manslaughter.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Solomon Islands</b>	Murder	<u>Solomon Islands Penal Code, Chapter 26, Part XX, ss.200 and 202</u>	<p><b>Murder:</b> Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.</p> <p>Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated: – (a) an intention to cause the death of or grievous bodily harm to any person, whether such person is the person actually killed or not; or (b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.</p>	<p><b>Standard:</b> Beyond reasonable doubt (Solomon Islands Magistrates' Bench Book, Section 2.2).</p> <p><b>Evidential issues:</b> Presumed innocent until proved or pleaded guilty (Constitution of Solomon Islands Statutory Instruments (1978) NO. 783), Chapter 2, s.10(2)(a).</p>	<p><b>Maximum Imprisonment:</b> Life imprisonment</p>
	Manslaughter	<u>Solomon Islands Penal Code, Chapter 26, Part XX, S.199</u>	<p><b>Manslaughter:</b> Any person who by an unlawful act or omission causes the death of another person is guilty of the felony known as manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.</p>		<p><b>Maximum Imprisonment:</b> Life imprisonment</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
Tonga	Homicide	<u>Criminal Offences Act (1988), Chap. 18, Part IX, s.85</u>	<b>Definition of Homicide:</b> The killing of a human being by any means whatsoever and is either culpable or not culpable	<p><b>Standard:</b> Beyond a reasonable doubt (The Tonga Magistrates' Bench Book (2004), E8.2, see also <i>Rex v Masalu [2015] TOSC 30; CR143 &amp; 144 of 2013</i>).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (<u>Evidence Act (1988), Ch.15, Part VIII, ss.104-105</u>).</p>	N/A
		<u>Criminal Offences Act (1988), Chap. 18, Part IX, s.86</u>	<p><b>Definition of Culpable Homicide:</b> The killing of any person either by an unlawful act or by omission without lawful excuse to perform or observe towards such person any legal duty, or by the commission of an unlawful act combined with the omission of a legal duty, or by causing a person through threat, fear of violence or deception to do an act that causes that person's death, or by wilfully frightening a child or sick person.</p> <p>Culpable homicide is either murder or manslaughter.</p>		N/A
	Murder	<u>Criminal Offences Act (1988), Chap. 18, Part IX, ss.87 and 91</u>	<p><b>When Culpable Homicide Amounts to Murder:</b> Culpable homicide amounts to murder where:</p> <p>(a) the offender intended to cause the death of the person killed; or</p> <p>(b) the offender intended to cause to the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensued or not; or</p>		<b>Maximum Penalty:</b> Death or life imprisonment

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>(c) the offender intending to cause the death of one person or intending to inflict on one person bodily injury likely to cause death and being reckless whether death ensues or not kills a different person by accident or mistake although he does not mean to hurt the person killed; or</p> <p>(d) the offender for the purpose of accomplishing any unlawful object does an act which he knows or ought to have known to be likely to cause death and thereby kills any person even though he may not have desired to hurt any person in order to effect his object; or</p> <p>(e) to inflict grievous bodily injury for the purpose of facilitating the commission of any offence of treason, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, abduction, robbery, housebreaking or arson, or for the purpose of facilitating the flight of any person who has committed or attempted to commit any of such offences and death ensues from such injury; or</p> <p>(f) the offender administers any stupefying or overpowering thing for either of the purposes mentioned in paragraph (e) above and death ensues from the effects thereof; or</p> <p>(g) the offender by any means wilfully stops the breath of any person for either of the purposes mentioned in paragraph (e) above and death ensues from such stoppage of the breath.</p> <p>For (e) to (g) above, the offender does not need to know that death is likely to ensue.</p>		

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
	Manslaughter	<u>Criminal Offences Act (1988), Chap. 18, Part IX, ss.88 and 93</u>	<p><b>When Culpable Homicide is Manslaughter Only:</b> Culpable homicide amounts to manslaughter only where:</p> <p>(a) the offender was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in s.89; or</p> <p>(b) the offender was justified in causing some harm to the other person, and that in causing harm in excess of the harm he would have been justified in causing, he acted from such terror of death or grievous hurt as in fact deprived him for the time being of the power of self-control; or</p> <p>(c) in causing the death the offender acted in the belief in good faith and on reasonable grounds that he was under a legal duty to cause the death or to do the act which he did.</p>		<b>Maximum Imprisonment:</b> 15 years
		<u>Criminal Offences Act (1988), ss.89 and 90</u>	<p><b>What Matters Amount to Extreme Provocation:</b> The following matters may amount to extreme provocation:</p> <p>(a) an unlawful assault committed upon the accused person by the other person which was of such a kind either by reason of its violence or of accompanying words, gestures or other circumstances of aggravation as to be likely to deprive any person of ordinary character being in the circumstances in which the accused person was, of the power of self-control; or</p>		N/A

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>(b) the taking up by the other person at the beginning of an unlawful fight of an attitude manifesting an intention of manifesting instantly attacking the accused person with deadly or dangerous means or in a deadly manner; or</p> <p>(c) an act of adultery committed in the view of the accused person with or by his wife or her husband or the crime of unnatural carnal knowledge committed in the view of the accused person upon his wife or his or her child; or</p> <p>(d) a violent assault committed in the view or presence of the accused person upon his or her wife, husband, child or parent or upon any other person in the presence of and in the care or charge of the accused person.</p> <p>Extreme provocation is not available if it appears from the evidence that:</p> <p>(a) the offender was not in fact deprived of the power of self-control by the provocation; or</p> <p>(b) the offender acted wholly or partly from a previous purpose to cause death or harm or to engage in an unlawful fight whether or not he would have acted on that purpose at the time or in the manner in which he did act had it not been for the provocation; or</p>		

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
			<p>(c) after the provocation was given and before he did the act which caused the harm, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control; or</p> <p>(d) his act was in respect either of the instrument or means used or of the brutal manner in which it was used, greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstances to be deprived of his self-control by the provocation; or</p> <p>(e) the offender prepared deadly means against an adversary for use in a fight, even if a blow was received in the fight as might amount to extreme provocation, if the means was readied prior to such blow and the adversary had not used or manifested any intention of using any such means against him.</p>		
		<p><u>Criminal Offences Act (1988), ss.92 and 93</u></p>	<p><b>Manslaughter:</b> Culpable homicide caused by negligence amounts to manslaughter by negligence.</p>		<p><b>Maximum Imprisonment:</b> 15 years; if by negligence, 10 years</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
<b>Tuvalu</b>	Murder	Penal Code (2008), Part XX, ss.193 and 195	<p><b>Murder:</b> Causing the death of another person by an unlawful act or omission with malice aforethought.</p> <p>Malice aforethought may be expressed or implied and expressed as malice shall be deemed to be established by evidence proving either of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated:</p> <p>(a) an intention to cause the death of or grievous bodily harm to any person, whether such person is the person actually killed or not; or</p> <p>(b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.</p>	<p><b>Standard:</b> Beyond reasonable doubt (Tuvalu Island Courts Bench Book, Section A, para. 6).</p> <p><b>Evidential Issues:</b> The burden of proof is on the prosecution (Tuvalu Island Courts Bench Book, Section A, para. 6).</p>	<p><b>Mandatory Imprisonment:</b> Life imprisonment</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
	Manslaughter	<p>Penal Code (2008), Part XX, ss.192, 197 and 198</p>	<p><b>Manslaughter:</b> Causing the death of another person by an unlawful act or omission. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.</p> <p>A murder charge can be reduced to manslaughter on the grounds:</p> <ul style="list-style-type: none"> <li>(a) that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section; or</li> <li>(b) that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control; or</li> <li>(c) that, in causing the death, he acted in the belief, in good faith and on reasonable grounds, that he was under a legal duty to cause the death or to do the act which he did; or</li> <li>(d) if provocation where evidence is on that the person was provoked (whether by things done or by things said or by both together) to lose his self-control, and the provocation was enough to make a reasonable man do as he did.</li> </ul>		<p><b>Maximum Imprisonment:</b> Life imprisonment</p>

**Murder/Manslaughter**

	Type of Offence	Source	Definition	Proof	Penalties
Vanuatu	Murder	<u>Penal Code of Vanuatu (2006), s.106</u>	<b>Intentional Homicide:</b> Intentionally causing the death of another person by any unlawful act or omission. Premeditation in relation to this offence consists of a decision made before the act to make a homicidal attack on a particular person or on any person who may be found or encountered.	<b>Standard:</b> Beyond reasonable doubt ( <u>Penal Code of Vanuatu (2006) s.8</u> ).  <b>Evidential Issues:</b> The burden of proof is on the prosecution ( <u>Penal Code of Vanuatu (2006), s.8</u> ).	<b>Premeditated:</b>  <b>Maximum Imprisonment:</b> Life imprisonment  <b>Not Premeditated:</b>  <b>Maximum Imprisonment:</b> 20 years
	Manslaughter	<u>Penal Code of Vanuatu (2006), s.107</u>	<b>Intentional Assault:</b> Intentional assault on the body of another person not amounting to intentional homicide.		<b>Death</b>  <b>Maximum Imprisonment:</b> 10 years  <b>Damage of a Permanent Nature</b>  <b>Maximum Imprisonment:</b> 5 years  <b>Damage of a Temporary Nature</b>  <b>Maximum Imprisonment:</b> 1 year
		<u>Penal Code of Vanuatu (2006), s.108</u>	<b>Unintentional Harm:</b> Unintentionally causing damage to the body of another person, through recklessness or negligence, or failure to observe any law.		<b>Death</b>  <b>Maximum Imprisonment:</b> 5 years  <b>Damage of a Permanent Nature</b>  <b>Maximum Imprisonment:</b> 2 years  <b>Damage of a Temporary Nature</b>  <b>Maximum Imprisonment:</b> 3 months



## ANNEX 5 – LEGISLATIVE FRAMEWORK GOVERNING THE SENTENCING PROCESS IN PICS

**Figure 21:** Legislative framework governing the sentencing process in PICS

The table below compares the legislative framework governing the sentencing process in the relevant PIC jurisdictions:

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<b>Federated States Of Micronesia</b>			
<p>A court may consider a reduction of sentence pursuant to the <u>Code of the Federated States of Micronesia (2014)</u>.</p> <p>In <i>FSM v. Tammed</i> (Yap 1990), 5 FSM R. 426, 428, mitigation was given without regard to custom because of the beatings received by the defendants. In this case, the court could not reflect the customary nature of the beatings as it could not find from the evidence presented that the beatings were customary.</p> <p>Mitigating evidence cannot be used to depart from the mandatory minimum penalty required by statute. A court may only consider that evidence in deciding whether the minimum sentence should be enhanced. <i>FSM v. Cheng Chia-W</i> (II (Pon. 1995)), 7 FSM R. 205, 220.</p>	<p>If the court determines that a defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, and the court shall commit the defendant, for a reasonable period of time, to an appropriate institution for the purpose of restoring fitness to proceed.</p> <p>If the court is satisfied that the defendant may be released on conditions without danger to himself or herself or to the person or property of another, the court shall order his or her release, which shall continue at the discretion of the court, on such conditions as the court determines necessary.</p>	<p>The <u>Code of the Federated States of Micronesia (2014)</u> does not appear to deal expressly with protection orders.</p>	<p>Sexual assault, including rape, is a punishable crime.</p> <p>There is no specific law against spousal rape.</p> <p>Sexual assault involving a dangerous weapon or serious physical or psychological harm to the victim/survivor is punishable by up to nine years' imprisonment in Chuuk and 10 years' imprisonment in the other three states, and a fine of up to \$20,000 in Kosrae and \$10,000 in the other states.</p> <p>If neither a dangerous weapon nor serious physical harm is involved, the assault is punishable in all states by up to five years' imprisonment or a fine.<sup>349</sup></p>

349 United States Department of State, *Country Reports on Human Rights Practices* (2011), <https://www.state.gov/documents/organization/186500.pdf> accessed on 21 July 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<b>Fiji</b>			
<p>According to the <u>Sentencing and Penalties Decree (2009) Part 2, s.4 (3)</u>, mitigating factors for an offence involving domestic violence are:</p> <ul style="list-style-type: none"> <li>any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including – <ul style="list-style-type: none"> <li>the age of the victim;</li> <li>whether the victim was pregnant; and</li> <li>whether the victim suffered any disability;</li> </ul> </li> <li>whether a child or children were present when the offence was committed, or were otherwise affected by it;</li> <li>the effect of the violence on the emotional, psychological and physical well-being of a victim;</li> <li>the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim;</li> <li>the conduct of the offender towards the victim since the offence, and any matter which indicates whether the offender – <ul style="list-style-type: none"> <li>accepts responsibility for the offence and its consequences;</li> <li>has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim; and</li> </ul> </li> </ul>	<p>According to the <u>Fiji Sentencing and Penalties Decree (2009), Part 4, s.26 (3)</u>, a court proposing to make an order suspending a sentence of imprisonment must explain or cause to be explained (before making the order), to the offender in a language likely to be readily understood by the offender, the following:</p> <ul style="list-style-type: none"> <li>the purpose and effect of the proposed order; and</li> <li>the consequences that may follow if the offender commits another offence punishable by imprisonment during the operational period of the sentence.</li> </ul> <p>According to <u>Fiji Sentencing and Penalties Decree (2009), s.26(1)</u>, on sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.</p> <p>The above is only permitted if the period of imprisonment imposed, or the aggregate period of imprisonment, where the offender is sentenced in the proceeding for more than one offence:</p> <ul style="list-style-type: none"> <li>does not exceed three years in the case of the High Court; or</li> <li>does not exceed two years in the case of the Magistrates' Court.</li> </ul>	<p>Applications for protection orders under the <u>Family Law Act (2003), s. 202</u> may be made independently of other legal proceedings.<sup>350</sup></p> <p>In proceedings between the parties to a marriage, the court may order an injunction in circumstances arising out of the marital relationship (<u>Fiji Family Law Act (2003), ss.202(1) and s.2(1)(f)</u>).</p> <p>The following orders may be made:</p> <ul style="list-style-type: none"> <li>relieving a party to a marriage from any obligation to perform marital services or render conjugal rights;</li> <li>an injunction for the personal protection of a party to the marriage;</li> <li>an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides;</li> <li>an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;</li> <li>an injunction for the protection of the marital relationship;</li> </ul>	<p>Fiji's <u>Crimes Act (2009)</u> created the following penalties, amongst others, for SGBV:</p> <ul style="list-style-type: none"> <li>life imprisonment for rape;</li> <li>25 years' imprisonment for sexual slavery (described as "the condition of a person who provides sexual services and who, because of the use of force or threats, is not free to cease providing sexual services or is not free to leave the place or area where the person provides sexual services");</li> <li>25 years' imprisonment for sexual violence committed as part of a widespread or systematic attack directed against a civilian population;</li> <li>life imprisonment for a person who "unlawfully and carnally knows any child under the age of 13 years" old;</li> <li>10 years' imprisonment for carnal knowledge or attempting to have carnal knowledge of a person between the ages of 13 and 16 years old;</li> <li>12 years' imprisonment for a householder "permitting defilement of a child on the premises" (a "child" being a person under 16 years old);</li> <li>20 years' imprisonment for committing incest or, if the incest is with a child under the age of 13 years old, life imprisonment; and</li> </ul>

350 UN, *op.cit.* at footnote 91.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<ul style="list-style-type: none"> <li>– may pose any further threat to a victim;</li> <li>• evidence revealing the offender’s– <ul style="list-style-type: none"> <li>– attitude to the offence;</li> <li>– intention to address the offending behaviour; and</li> <li>– likelihood of continuing to pose a threat to a victim; and</li> </ul> </li> <li>• whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance.</li> </ul>		<ul style="list-style-type: none"> <li>• an injunction in relation to the property of a party to the marriage; or</li> <li>• an injunction relating to the use or occupancy of the matrimonial home.</li> </ul>	<ul style="list-style-type: none"> <li>• 10 years’ imprisonment for the defiling of a person “suffering from a mental sub-normality”.</li> </ul>

Kiribati			
<p>Mitigation factors are not directly listed in the <u>Kiribati Penal Code</u>.</p> <p>However, <u>Kiribati Penal Code, Part VI, s.25</u> provides that a person liable to certain imprisonment may be sentenced to a shorter term other than for any sentence of imprisonment for life required to be imposed for the offences of treason, instigating invasion, piracy and murder.</p>	<p><u>Kiribati Penal Code, Part VI, s.32</u>, permits the suspension of the execution of a sentence of imprisonment in default of a fine.</p> <p><u>Kiribati Penal Code, Part VI, s.44(2)</u> permits a court to not deal with an offender by means of a suspended sentence, unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence, and a court which passes a suspended sentence shall explain to the offender his liability to be imprisoned if during the relevant suspended period he commits an offence punishable with imprisonment.</p>	<p><u>The Family Peace Act, Part II</u>,<sup>351</sup> deals with protection orders.</p> <p>An application for a protection order may be made to the court nearest to where the complainant lives either temporarily or permanently, where the complainant works or where the act of domestic violence occurred or is occurring.</p> <p>An application for a protection order may be made <i>ex parte</i>, unless the court otherwise orders it to be on notice. Temporary or emergency orders may be made. A court must give priority to the hearing of applications for protection orders.</p> <p>No civil or criminal liability is incurred in relation to an application made in good faith for a protection order.</p>	<p>The <u>Kiribati Penal Code</u> states, amongst others, the following offences for SGBV:</p> <ul style="list-style-type: none"> <li>• life imprisonment for rape;</li> <li>• seven years’ imprisonment for attempted rape;</li> <li>• five years’ imprisonment for indecent assault;</li> <li>• life imprisonment for a male who commits incest with a female below 13 years old, or seven years for a male who commits incest with a female over the age of 13 years old; and</li> <li>• two years’ imprisonment for “procuring defilement of woman by threats or fraud or administering drugs”.</li> </ul>

<sup>351</sup> Regional Rights Resource Team, Human Rights Programme, *Implementing domestic violence legislation: Early days in Kiribati*, <http://rrrt.spc.int/publications-media/featured-articles/item/629-implementing-domestic-violence-legislation-early-days-in-kiribati> accessed on 30 May 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
	<p>Kiribati Penal Code, Part VI, s.44(1) is subject to <u>Kiribati Penal Code, Part VI, s. 44(2)</u> and states that: a court which passes a sentence of imprisonment for a term of not more than two years may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than two years from the date of the order, the offender commits another offence punishable with imprisonment and thereafter a court having power to do so orders that the original sentence shall take effect.</p>	<p>The court takes into account the following, prior to making a protection order:</p> <ul style="list-style-type: none"> <li>• the respondent is using, or has used, domestic violence against the complainant, or a child or any other member of the family living in the same household; and</li> <li>• the making of an order is necessary for the protection of the complainant, or a child or any other member of the family living in the same household.</li> </ul> <p>In deciding whether to make a protection order, the court must take into account the following:</p> <ul style="list-style-type: none"> <li>• the need to ensure that the complainant is protected from domestic violence;</li> <li>• the well-being and the accommodation needs of the complainant, the complainant's children and any other family member living in the same household;</li> <li>• the principles mentioned in s.3of the Family Peace Act; and</li> <li>• any other matter that the court considers relevant.</li> </ul>	

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<b>Marshall Islands</b>			
<p>The main laws relating to SGBV sentencing in the Marshall Islands are the following:</p> <ul style="list-style-type: none"> <li>• <u>Domestic Violence Prevention and Protection Act (2011)</u>; and</li> <li>• <u>Criminal Code (2011)</u>.</li> </ul> <p>The MICC permits the court to consider (when imposing a sentence of imprisonment) as aggravating or mitigating circumstances, any factor which the court deems appropriate to the ends of justice, including the custom of the Marshall Islands.</p>	<p>The <u>Criminal Code (2011), Article 7, s.7.01</u> permits the court to suspend the imposition of a sentence or the execution of the whole or part of a sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, suspension is inadvisable, or when imprisonment is necessary for public protection.</p> <p>Several other factors may also be considered, such as:</p> <ul style="list-style-type: none"> <li>• conduct, whereby the defendant neither caused nor threatened serious harm;</li> <li>• whether the defendant acted under a strong provocation;</li> <li>• whether the victim induced criminal conduct;</li> <li>• whether the victim was compensated for injury; and</li> <li>• where imprisonment would entail excessive hardship.</li> </ul>	<p><u>Domestic Violence Prevention and Protection Act (2011), Part 3, division 1, s.6</u> governs protection orders.</p> <p>The court must be satisfied on the balance of probabilities that:</p> <ul style="list-style-type: none"> <li>• the respondent has committed an act of domestic violence against the applicant for the order; or</li> <li>• the respondent is likely to commit an act of domestic violence against the applicant for the order.</li> </ul> <p>In deciding whether to grant a protection order, the court shall take into account the following:</p> <ul style="list-style-type: none"> <li>• all measures necessary to ensure that the complainant and any children are protected from future domestic violence;</li> <li>• that the well-being and accommodation needs of the complainant and children, as well as other family members are secured; and</li> <li>• any other matter that the court consider relevant and significant.</li> </ul> <p>General and specific conditions may also be included as part of a protection order.</p> <p>Temporary protection orders are also recognised by legislation – separate from further involvement of the court, if necessary.</p>	<p>The <u>Criminal Code (2011)</u> lists the following penalties, amongst others, for SGBV-related crimes:</p> <p><b>Felonies</b></p> <ul style="list-style-type: none"> <li>• A first degree felony is committed where a person: <ul style="list-style-type: none"> <li>(a) either, resides in the same home with a minor under the age of 14 years old, or has recurring access to the minor; and</li> <li>(b) engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under the age of 14 years old.</li> </ul> </li> </ul> <p>The penalty is a maximum of 25 years imprisonment.</p> <ul style="list-style-type: none"> <li>• Sexual assault in the first degree, whereby a person knowingly subjects another to an act of sexual penetration by strong compulsion or whereby a person engages in sexual intercourse with another person who is under 14 years old, is punishable to a maximum of 25 years imprisonment.</li> <li>• Sexual assault in the second degree, whereby a person knowingly subjects another to an act of sexual penetration by strong compulsion or whereby a person engages in sexual intercourse with another person who is “mentally defective, mentally incapacitated or physically helpless”, is punishable to a maximum of 10 years imprisonment.</li> </ul>

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
			<ul style="list-style-type: none"> <li>Sexual assault in the third degree, whereby a person recklessly subjects another to an act of sexual penetration by strong compulsion or whereby a person engages in sexual intercourse with another person who is under 14 years old, is punishable to a maximum of 35 months imprisonment.</li> </ul> <p><b>Misdemeanours</b></p> <ul style="list-style-type: none"> <li>Where a person recklessly subjects another person to sexual contact by compulsion or causes another to have sexual contact with the actor by compulsion, the crime is sexual assault in the fourth degree and the penalty is punishable by no more than one year in jail.</li> </ul>
Nauru			
<p>The main laws relating to SGBV sentencing in Nauru are the following:</p> <ul style="list-style-type: none"> <li><u>Criminal Procedure Act (1972)</u>; and</li> <li><u>Criminal Justice Act (1999)</u>.</li> </ul> <p>Where a court has found that an accused is guilty of the offence charged, it shall also hear evidence of any mitigating circumstances. Such mitigating circumstances may result in the court reducing the offender's sentence.</p> <p><u>Criminal Procedure Act (1972), Part 15, s.282</u> also gives the court wide discretion to reduce penalties.</p>	<p><u>Criminal Procedure Act (1972), Part 15, s.280</u> contains sentencing considerations that the court must satisfy itself of before handing down a custodial sentence.</p> <p><u>Criminal Procedure Act (1972), s.8</u>, permits the Supreme Court and the District Court to combine any two or more sentences which the court is authorised by law to pass, subject to the Act itself and any other written law.</p> <p>Specific legislation under which an offender has been charged may also permit the suspension of a sentence.</p>	<p>Protection orders appear to be recognised only under certain specific legislation such as the <u>Child Protection and Welfare Act (2016), s.24</u>, which permits an application for a protection order for a child (see for example <u>Republic of Nauru v MU [2016]</u>, NRDC 61).</p>	<p>The types of punishment under the <u>Crimes Act (2016)</u> and the <u>Criminal Procedure Act (1972), as amended by the Criminal Procedure Amendment Act (2015)</u> include:</p> <ul style="list-style-type: none"> <li>20 years imprisonment for rape, 25 years if aggravating circumstances apply;</li> <li>10 years for incest;</li> <li>25 years for rape of a child under 16 years old, or if the child is under 13 years or aggravating circumstances apply, life imprisonment;</li> </ul>

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
	<p><u>Criminal Justice Act (1999)</u> provides new methods of dealing with offenders liable to imprisonment by a system of probation, community service and parole. The legislation permits the substitution of a sentence.</p>		<ul style="list-style-type: none"> <li>• 12 years for indecent acts in relation to a child under 16 years old, or if the child is under 13 years or aggravating circumstances apply, 15 years; and</li> <li>• 12 years for causing a child under 16 years old to engage in sexual activity, or if the child is under 13 years or aggravating circumstances apply, 15 years.</li> </ul>
<b>Palau</b>			
<p>The main laws relating to SGBV sentencing in Palau are the following:</p> <ul style="list-style-type: none"> <li>• the <u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014)</u>; and</li> <li>• the <u>Palau Family Protection Act (2012)</u>.</li> </ul> <p>The Palau National Code stated that a sentence can be reduced by the courts if they take into account customary practices carried out by the offender as a mitigating factor to his crime.</p> <p>However, the Palau Family Protection Act (2012) has a “no drop” policy, meaning that once a victim has brought a case, the offender will be prosecuted to the full extent of the law.</p>	<p><u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014), s.44(1)</u> states:</p> <p>The court which imposes a sentence upon a person convicted of a criminal offense may direct that the execution of the whole or any part of a sentence of imprisonment imposed by it shall be suspended on such terms as to good behaviour and on such conditions as the court may think proper to impose.</p> <p>A subsequent conviction by a court for any offense shall have the effect of revoking the suspension of the execution of the previous sentence unless the court otherwise directs.</p> <p>However, the penalty of 25 years’ imprisonment for sexual assault is without the possibility of a suspended sentence.</p>	<p>Apart from a temporary restraining order, the <u>Palau Family Protection Act (2012), s. 822</u>, permits a petition to be filed for an order for protection in cases of domestic abuse. The following may be noted with respect to protection orders:</p> <p>Such petitions may be filed by any:</p> <ul style="list-style-type: none"> <li>• family or household member on behalf of the member or on behalf of a family or household member who is a minor or who is an incapacitated person or who is physically unable to go to the appropriate place to complete or file the petition; or</li> <li>• agency of Palau on behalf of a person who is a minor or who is an incapacitated person or a person who is physically unable to go to the appropriate place to complete or file the petition on behalf of that person.</li> </ul>	<p>According to the <u>Palau National Code (1986), Title 17 (as amended and replaced by an Act to update criminal offences contained in Title 17 of the Palau National Code dated 24 February 2014)</u>, types of penalty include:</p> <ul style="list-style-type: none"> <li>• the imposition of fines and procedure upon non-payment of fines;</li> <li>• orders requiring specified residence;</li> <li>• orders for restitution, compensation or forfeiture;</li> <li>• labour without imprisonment;</li> <li>• designation of place of confinement;</li> <li>• probation; and</li> <li>• imprisonment.</li> </ul> <p>For rape, the sentence is not more than 25 years.</p> <p>For “carnal knowledge” of a person under 15 years old who is not the perpetrator’s wife, the sentence is not more than 10 years.</p>

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
		<p>The petition seeking relief must be in writing and is required to allege (under penalty of perjury), that:</p> <ul style="list-style-type: none"> <li>• a past act or acts of abuse may have occurred;</li> <li>• threats of abuse make it probable that acts of abuse may be imminent;</li> <li>• extreme psychological abuse or malicious property damage is imminent; and</li> <li>• be accompanied by an affidavit, stating the specific facts and circumstances from which relief is sought.</li> </ul> <p>The court is required to designate an employee (or non-judicial agency) to assist the person in completing the petition.</p> <p>The clerk of the court must accept a petition for an order for protection without assessment of a filing fee.</p>	<p>Indecent assault of a child under than age of 14 years old will result in a sentence of not more than five years.</p>

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<b>Papua New Guinea</b>			
<p><b>Legislation</b></p> <p>The <u>Criminal Code Act (1974) s.19</u> of Papua New Guinea clarifies that the court has discretion to impose a reduced sentence on a convicted offender. However, it does not outline specific mitigating factors.</p> <p><b>Case law</b></p> <p>The <u>State v James Yali [2006] PGNC 26</u> sets out principles to take into consideration for mitigation, including:</p> <ul style="list-style-type: none"> <li>• whether the victim provoked or aggravated the offence;</li> <li>• if the offender treated the victim “with dignity” immediately after;</li> <li>• level of emotional impact on the victim;</li> <li>• whether the offender did anything tangible towards repairing his wrongs, for example offering compensation, engaging in reconciliation, organising counselling and support for the complainant or personally or publicly apologising for what he did; and</li> </ul>	<p>A Magistrate may defer an offender’s sentence and release him on probation for a specified period, between 6 months and five years (<u>Probation Act (1979), s.16</u>).</p> <p>The District Court has the power to suspend an offender’s sentence on the condition of “good behaviour” and that he will appear for conviction and sentence when called on at any time during such period, not exceeding three years, as specified in the order.</p> <p>In the District Court, the Magistrate has wide powers of disposal of simple offences and indictable offences triable summarily where the charge is proved but the Magistrate is of the opinion that, having regard to certain factors, it is “inexpedient” to impose punishment.</p> <p>A conviction need not be entered, and the Magistrate may dismiss the charge or discharge the offender conditionally on a bond after considering carefully the provisions of the <u>District Courts Act (1963), s.132</u>.</p>	<p>Under the Papua New Guinea <u>Family Protection Act (2013)</u>, an applicant may apply for a full or interim protection order to protect someone threatened by physical or sexual violence or whose property is threatened with damage. (See also the Papua New Guinea District Court Practice Directions for Family and Sexual Violence, Protection Order Rules, (2009) (“PDs”).)</p> <p>An interim order can be made without the knowledge of the defendant whereas the defendant usually is permitted to make representations prior to the issuing of a full protection order.</p> <p>Protection orders provide the following:</p> <ul style="list-style-type: none"> <li>• protection for complainant and other family members against domestic violence;</li> <li>• conditions that restrain, restrict and prohibit the behaviour of the defendant in order to prevent further violence;</li> <li>• no lawyer required;</li> <li>• no fee; and</li> <li>• an interim order lasts up to 30 days (with a possible 30 day extension) and a full order lasts up to two years.</li> </ul>	<p>Under Papua New Guinea’s laws, the following penalties may be imposed for SGBV:</p> <ul style="list-style-type: none"> <li>• payment of compensation (money or compensation in kind) as part of a customary reconciliation (see <b>Customs Recognition Act (1963)</b><sup>352</sup>);</li> <li>• obligation to “keep the peace or be of good behaviour”;</li> <li>• restriction of movement;</li> <li>• custodial sentence (average final sentence of between 0.98 and 5.19 years) – with or without hard labour;<sup>353</sup> or</li> <li>• death.</li> </ul> <p>(See also <u>Criminal Code Act (1974)</u>).</p>

352 Customs Recognition Act (1963) , [http://www.paclii.org/pg/legis/consol\\_act/cra1963242.rtf](http://www.paclii.org/pg/legis/consol_act/cra1963242.rtf).

353 ICAAD and DLA Piper, *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region* (February 2016), <https://icaad.ngo/wp-content/uploads/2015/12/ICAAD-Analysis-of-Judicial-Sentencing-Practices3.pdf> accessed on 27 June 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<ul style="list-style-type: none"> <li>whether the offender has caused further trouble to the complainant or the complainant's family.</li> </ul> <p>Other case law indicates that the following factors have also been used to justify a reduced sentence:</p> <ul style="list-style-type: none"> <li>community work (<u>State v Sasoropa (No 1) [2004] PGNC 203; N2565 (27 April 2004)</u>)</li> <li>peace ceremony conducted by the Village Court (<u>State v Sembengo [2006] PGNC 198; N3029 (16 February 2006)</u>) and</li> <li>sole perpetrator and lack of transmission of sexually transmitted diseases (<u>State v Tachik (No. 2) [2013] PGNC 78</u>).</li> </ul>		<p>Interim orders can be obtained at the Village Court and/or District Court. Full orders can only be issued by a District Court or Magistrate).</p>	
<b>Samoa</b>			
<p><b>Legislation</b></p> <p><u>Sentencing Act (2016), Part 2, Division 1, s.7</u>, mitigating factors:</p> <ul style="list-style-type: none"> <li>the age of the defendant;</li> <li>whether and when the defendant pleaded guilty;</li> <li>that there was a limited involvement in the offence on the defendant's part;</li> <li>that the defendant has, or had at the time the offence was committed, diminished intellectual capacity or understanding (not including voluntary consumption of alcohol or drugs other than for a <i>bona fide</i> medical purpose); and</li> </ul>	<p><u>Sentencing Act (2016), Part 3, Division 3, Subdivision C, s.73</u> clarifies that a court can, instead of imposing a sentence, order the defendant to “appear for sentence if called on to do so” within a specified period.</p> <p>This period cannot exceed more than one year. The defendant can be called to come up for sentence if he is convicted of a subsequent offence punishable by a custodial term of more than three months or if he fails to comply with any order of the court to pay compensation to the victim.</p>	<p><u>Family Safety Act (2013)</u>:</p> <p>The court can issue interim protection orders which prohibit specified conduct (this generally includes contact with the victim but the court has discretion to prohibit any acts).</p> <p>Interim protection orders can be replaced by permanent protection orders where further evidence is presented.</p> <p>Custodial sentences can be imposed where the protection order is breached.</p> <p>A person may act on behalf of a complainant in applying for a protection order. Such persons include legal counsel, a village representative, a child welfare officer, a counsellor, a health service provider or a teacher, or any other person approved by court.</p>	<p>A court may impose the following sentences or orders:</p> <ul style="list-style-type: none"> <li>discharge or order to come up for sentence if called on;</li> <li>sentences of a fine and reparation;</li> <li>community-based sentences of community work and supervision; and/or</li> <li>sentence of imprisonment.</li> </ul> <p>The death penalty was abolished in 2004 (see <u>The Crimes (Abolition of Death Penalty) Amendment (2004)</u>).</p>

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<ul style="list-style-type: none"> <li>any remorse shown by the defendant, or action as described in s.9 of the SA (see below).</li> </ul> <p>Under <u>Sentencing Act (2016), Part 2, Division 3, s.9</u> a court may take into account “offers, agreement, response or measure to make amends” in sentencing the defendant.</p> <p>The sentence may also be reduced if the defendant or his family have made compensation to the victim’s family, apologised to the victim’s family or taken any other remedial action.</p> <p>The <u>Village Fono Act (1990), s8</u> allows a judge to take into consideration any penalty already imposed on the defendant by the village elders (<i>fono</i>).</p> <p><b>Case law</b></p> <p>Case law indicates that sentences are routinely reduced where the defendant has:</p> <ul style="list-style-type: none"> <li>paid compensation to the victim or the victim’s family;</li> <li>made a public apology (<i>ifoga</i>); or</li> <li>already been penalised by the village elders (<i>fono</i>).</li> </ul> <p>One example of a case where a sentence was reduced due to <i>ifoga</i> is the case of <u><i>Police v Metu</i> [2013] WSSC 103</u>, where the perpetrator indecently assaulted a seven year old girl. The family of the perpetrator had performed <i>ifoga</i> to the family of the victim and neither the perpetrator nor the victim were involved. The judicial officer deducted six months from a three year sentence on account of the ceremony.</p>			

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<b>Solomon Islands</b>			
<p>Research shows that courts have accepted the following as mitigating factors usually leading to a decrease in the sentence:<sup>354</sup></p> <ul style="list-style-type: none"> <li>• family obligations;</li> <li>• first time offender;</li> <li>• previous good character;</li> <li>• guilty plea;</li> <li>• court process of trial, conviction and sentence is viewed as punishment;</li> <li>• co-operation with police;</li> <li>• payment of compensation;</li> <li>• demonstrated remorse;</li> <li>• delay;</li> <li>• good prospects of rehabilitation;</li> <li>• the perpetrator's level of education and employment;</li> <li>• good work history;</li> <li>• family support of the offender; or</li> <li>• absence of violence, weapon or serious injury.</li> </ul> <p><b>Case law</b></p> <p>In <i>Regina v Olofia</i> [2008] SBHC 106 the court considered the offender's exemplary character, old age and the delay in proceedings of over three years to be significant mitigating factors that warranted a suspended sentence.</p>	<p>Under the <u>Solomon Islands Penal Code (1978), s.44(1)</u>, a court can suspend an offender's sentence for up to two years on the condition that the offender does not commit another offence punishable with imprisonment during this time.</p>	<p>Under Solomon Islands' <u>Family Protection Act (2014), Part 3</u>, the Magistrates' Court can make a protection order or an interim protection order to prevent violence where a domestic relationship exists.</p> <p>The court will issue an interim protection order (through an expedited process where the respondent is not required to be present) where:</p> <ul style="list-style-type: none"> <li>• the respondent is likely to commit domestic violence against the affected person; or</li> <li>• the affected person may be prevented or deterred from pursuing the application for the final protection order.</li> </ul> <p>The interim order will stay in place until either a final order is issued, the interim order is provoked or the affected person withdraws the application for a final order.</p> <p>A final order will be issued if, on the balance of probabilities, the respondent is likely to commit domestic violence against the affected person or has committed violence against the affected person. The respondent will be entitled to make representations.</p>	<p>Under the <u>Solomon Islands Penal Code (1978), Part 14</u>, the penalty for "Offences against morality" include:</p> <ul style="list-style-type: none"> <li>• life imprisonment for rape;</li> <li>• seven years' imprisonment for attempted rape;</li> <li>• five years' imprisonment for sexual assault;</li> <li>• life imprisonment for a male who commits incest with a female below 13 years old, or seven years for a male who commits incest with a female over the age of 13 years old; and</li> <li>• two years' imprisonment for "procuring defilement of woman by threats or fraud or administering drugs".</li> </ul>

354 Solomon Islands Law Commission, *Review of the penal code and criminal procedure code: Sexual Offences Sentencing Research Paper* (2011), [www.paclii.org/sb/lawreform/SBLawRComm/2011/1.pdf](http://www.paclii.org/sb/lawreform/SBLawRComm/2011/1.pdf) accessed on 30 May 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<p>In <i>Regina v Oge</i> [2004] SBHC 71 the court considered the offender's good character since offending and the five-year delay in proceedings. These warranted a suspended sentence.</p> <p>In <i>Pasikale v The Queen</i> [2003] SBHC 36 the mitigating factors, including that the offender was the breadwinner for his family and payment of compensation, were given significant weight.</p> <p>In <i>Regina v Qinity</i> [2010] SBHC 26 the offender had premeditated non-consensual sexual intercourse with his 15 year old daughter and destroyed the sanctity of the family home. The court regarded the reconciliation that took place, financial obligations to his family and the delay of five years as warranting a two year sentence.</p>		<p>Under the Family Protection Act (2014), s. 35, it is a condition of every protection order that the respondent</p> <ul style="list-style-type: none"> <li>• must not commit domestic violence: <ul style="list-style-type: none"> <li>(i) against the affected person; or</li> <li>(ii) if an affected person is a vulnerable person – in the presence of the vulnerable person; and</li> </ul> </li> <li>• must not possess a firearm.</li> </ul> <p>The court may also impose additional conditions including prohibiting the respondent from the following:</p> <ul style="list-style-type: none"> <li>• entering or remaining at a specified place, or approaching within a specified distance of the place;</li> <li>• approaching within a specified distance of the affected person;</li> <li>• contacting the affected person;</li> <li>• attempting to do anything mentioned in the first three bullets above;</li> <li>• engaging in stated behaviour that is likely to lead to domestic violence against the affected person;</li> <li>• possessing a weapon other than a firearm; or</li> <li>• encouraging another person to engage in behaviour in relation to the affected person that, if engaged in by the respondent, would be prohibited under the order.</li> </ul>	

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<b>Tonga</b>			
<p>The Magistrates' Court sees offences where the maximum prison term is not greater than three years. Mitigating factors in the Magistrates' Court include:</p> <ul style="list-style-type: none"> <li>• guilty plea (but note that the court cannot penalise an offender for exercising his or her right not to plead guilty);</li> <li>• genuine remorse;</li> <li>• reparation;</li> <li>• reconciliation;</li> <li>• young offender;</li> <li>• first offender;</li> <li>• provocation; and</li> <li>• no harm or minimal harm to person or property.</li> </ul> <p>The Magistrates are also advised to consider reasonable reductions for:</p> <ul style="list-style-type: none"> <li>• time spent in custody;</li> <li>• punishment meted out by other tribunals;</li> <li>• traditional or customary penalties; and</li> <li>• guilty plea.<sup>355</sup></li> </ul>	<p>The court may suspend a sentence of imprisonment for up to three years (<u>Criminal Offences Act (1988) s. 24(3)</u> and <u>Tonga Magistrates' Bench Book (2004)</u>).</p> <p>This is conditional on the offender not being convicted of an offence punishable by imprisonment during the period of suspension.</p> <p>In <u>Mo'unga v The Crown (case no. CR 467, 409/97) Cr. App. 15/97</u>, the Court of Appeal adopted as appropriate to Tonga the approach suggested in <b>R v Petersen [1994] 2 NZLR 533</b>, which stated that suspension of sentence may be appropriate in the following situations:</p> <ul style="list-style-type: none"> <li>• Where the offender is young, has a previous good record, or has had a long period free of criminal activity.</li> <li>• Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.</li> <li>• Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.</li> <li>• Where the offender has co-operated with authorities.</li> </ul>	<p>The Tonga <u>Family Protection Act (2013)</u> gives Tongan courts the power to issue protection orders and police safety orders.</p> <p>There is a "no-drop" policy, whereby the police and prosecutors are obliged to continue in full any investigation into domestic violence regardless of whether the complainant has withdrawn their complaint.</p> <p><b>Standard conditions</b></p> <p>Protection orders automatically include the following provisions, namely that the respondent will not:</p> <ul style="list-style-type: none"> <li>• commit domestic violence or physically or sexually abuse the complainant, or other person at risk;</li> <li>• encourage any other person to engage in behaviour against a complainant or other person at risk where the behaviour, if engaged in by the respondent, would be prohibited by the order;</li> <li>• approach the complainant while under the influence of alcohol or non-prescription drugs, and likewise neither shall the complainant so approach the respondent; and</li> </ul>	<p>Under Tongan law, the following penalties may be imposed:</p> <ul style="list-style-type: none"> <li>• payment of compensation;</li> <li>• community service order;</li> <li>• fine;</li> <li>• whipping (men only);</li> <li>• imprisonment; and</li> <li>• death.</li> </ul> <p>(See <u>Criminal Offences Act (1988) s 24.(1)</u>).</p>

355 Pacific Judicial Education Programme and Tonga National Judicial Education Committee, *The Tonga Magistrates' Bench Book* (2004), <http://www.paclii.org/to/other/tonga-magistrates-court-bench-book-2004.pdf> accessed on 21 July 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<p>According to the 2014 ICAAD white paper on Tonga,<sup>356</sup> domestic violence is traditionally viewed as a private matter that should be dealt with by and within the family. Therefore, judges often give lighter sentences or even just a lecture to offenders.<sup>357</sup> The lack of sufficient sentencing guidelines gives judges an opportunity to rely on a perpetrator being a breadwinner or head of household to conclude that the perpetrator should receive a lesser sentence.<sup>358</sup></p>		<ul style="list-style-type: none"> <li>• be in possession of any firearm, and the respondent shall surrender any weapon to the nearest police station or dispose of any weapon that has been used or threatened to be used to commit domestic violence.</li> </ul> <p>The Tonga <u>Family Protection Act (2013)</u>, s16, states that where the respondent and the complainant live in the same dwelling house, it is an automatic provision of any protection order that the respondent will not:</p> <ul style="list-style-type: none"> <li>• watch, loiter near, or prevent or hinder access to or from, the complainant's place of residence, business, employment, educational institution, or any other place that the complainant visits often;</li> <li>• follow the complainant about or stop or accost the complainant in any place;</li> <li>• where the complainant is known to be present on any land or building, enter or remain on that land or building without the complainant's express consent; and</li> <li>• make any other contact with the complainant (whether by telephone, electronic message, correspondence, or otherwise), except such contact: <ul style="list-style-type: none"> <li>(i) as is reasonably necessary in any emergency; or</li> </ul> </li> </ul>	

356 ICAAD, *Tonga: Violence Against Women – Identifying and Combating Structural Discrimination that Furthers Sexual and Gender Based Violence* (2014).

357 Kingi, Venezia and Roguski, Michael, *Pacific Prevention of Domestic Violence Programme: Update of Baseline In-County Review Tonga Report*, 37 (January 2011), <https://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Tonga-PPDVP-Baseline-Update-25-February-2011.pdf> accessed on 20 July 2017.

358 *Ibid.*

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
		<p>(ii) as is permitted under any order or written agreement relating to the role of providing day-to-day care for, or contact with, or custody of access to any children.</p> <p>The order may also outline conditions relating to property/accommodation, custody of dependents and maintenance (Family Protection Act (2013), ss.17-19).</p> <p><b>When the court will make an order</b></p> <p>The court may make a protection order if it is satisfied that:</p> <ul style="list-style-type: none"> <li>• the respondent and the complainant are in a domestic relationship;</li> <li>• the respondent has committed, or in the opinion of the court is a risk to commit, domestic violence against the complainant, or other person at risk, or the respondent uses or has used economic abuse against the complainant or other person at risk; and</li> <li>• the making of an order is necessary or desirable for the protection of the complainant or other person at risk.</li> </ul> <p><b>Who can apply for an order</b></p> <p>If a complainant is unable to make an application personally, an application can be made on their behalf by:</p> <ul style="list-style-type: none"> <li>• a family member, guardian or friend;</li> <li>• a registered counsellor;</li> </ul>	

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
		<ul style="list-style-type: none"> <li>• a law practitioner;</li> <li>• a health practitioner;</li> <li>• a head of school; or</li> <li>• a police officer.</li> </ul> <p>A court may make an emergency protection order which lasts up to 28 days or a temporary protection order which lasts up to 90 days (<u>Family Protection Act (2013), ss.13-14</u>).</p> <p><b>Police safety orders</b></p> <p>A police officer may issue a police safety order if he suspects on reasonable grounds that a person who is or has been in a domestic relationship with a person at risk:</p> <ul style="list-style-type: none"> <li>• has committed or is about to commit a domestic violence offence relating to that person at risk; or</li> <li>• has breached a protection order.</li> </ul> <p>A person served with a police safety order must vacate any building or land occupied by a person at risk and is prohibited from making contact with such a person.</p>	
<b>Tuvalu</b>			
<p>The <u>Tuvalu Island Courts Bench Book, Section B, para. 9.2</u> lists factors to be considered when deciding what sentence to pass. These can be either aggravating or mitigating factors.</p> <p>Such factors might include:</p> <ul style="list-style-type: none"> <li>• the offender’s age;</li> <li>• the offender’s character;</li> </ul>	<p>Under the <u>Penal Code (2008), s.28A</u>, a court can suspend a prison sentence that is no more than two years. This is conditional on the offender not committing another offence punishable with imprisonment during the time of the suspension.</p>	<p>Under the <u>Family Protection and Domestic Violence Act (2014), Part 4, s.13</u>, a court can issue the following protection orders:</p> <ul style="list-style-type: none"> <li>• emergency protection order (lasts 72 hours);</li> <li>• temporary protection order (lasts 30 days);</li> </ul>	<p>The <u>Penal Code (2008), s.158</u> specifies five years’ imprisonment for sexual intercourse with “certain collaterals” such as those related by blood or adoption “including the second degree of cousinship”.</p>

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<ul style="list-style-type: none"> <li>the offender’s community involvement;</li> <li>the offender’s previous criminal record;</li> <li>the offender’s employment;</li> <li>steps taken to make changes and repair the damage caused by the offending;</li> <li>guilty plea;</li> <li>other relevant personal information;</li> <li>the seriousness of the offence;</li> <li>the impact on the victim(s) or the community; and</li> <li>the seriousness with which the community views the offence.</li> </ul> <p>Where the court thinks that the charge against the accused person has been proven but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is not expedient to inflict any punishment, the court may make an order dismissing the charge, either absolutely or conditionally.<sup>359</sup></p>		<ul style="list-style-type: none"> <li>consent protection order (for any specified length of time);</li> <li>interim protection order (lasts no longer than two years); or</li> <li>final protection order (for any specified length of time).</li> </ul> <p>The protection order may include any of the following conditions which prohibits the defendant from:</p> <ul style="list-style-type: none"> <li>physically assaulting or threatening to assault the complainant or anyone in a domestic relationship with the applicant;</li> <li>forcibly confining or detaining the applicant or anyone in a domestic relationship with the complainant;</li> <li>depriving the complainant of adequate food, water, clothing, shelter and rest;</li> <li>forcing the complainant to engage in sexual conduct which violates the complainant’s sexual integrity and autonomy;</li> <li>depriving or threatening to deprive the complainant of (i) financial resources or (ii) medical and personal necessities required for the health and well-being of the complainant;</li> <li>contacting the complainant by any form of communication at work or other places;</li> </ul>	<p>The <u>Penal Code (2008)</u>, Part 16 gives the following sentences for certain “offences against morality” (among others):</p> <ul style="list-style-type: none"> <li>life imprisonment for rape;</li> <li>seven years’ imprisonment for attempted rape;</li> <li>five years’ imprisonment for an indecent assault on a female;</li> <li>life imprisonment for a male who commits incest with a female below 13 years old, or seven years for a male who commits incest with a female over the age of 13 years old; and</li> <li>two years’ imprisonment for “procuring defilement of woman by threats or fraud or administering drugs”.</li> </ul>

<sup>359</sup> Pacific Judicial Education Programme and Tuvalu National Judicial Education Committee, *Tuvalu Island Courts Bench Book* (2004), <http://www.paclii.org/tv/other/tuvalu-courts-bench-book-2004-eng.pdf> accessed on 21 July 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
		<ul style="list-style-type: none"> <li>• destroying, hiding, hindering, disposing or threatening to dispose of property in which the complainant has a material interest;</li> <li>• harassing and stalking the complainant;</li> <li>• entering the complainant's residence without consent, where the parties do not share the same residence;</li> <li>• emotionally, verbally or psychologically abusing the complainant;</li> <li>• coming within 30 meters of the complainant; or</li> <li>• doing any act which the court considers is not in the best interests of the complainant or any other person in a domestic relationship with the complainant.</li> </ul>	
<b>Vanuatu</b>			
<p>The Vanuatu bench book lists the following factors that may be considered in mitigation:<sup>360</sup></p> <ul style="list-style-type: none"> <li>(a) a guilty plea (but note that the court cannot penalise an offender for exercising his or her right to plead not guilty);</li> <li>(b) genuine remorse;</li> <li>(c) reparation;</li> <li>(d) reconciliation;</li> <li>(e) young offender;</li> </ul>	<p>The court can suspend a sentence on the condition that the offender commits no further offences during the period of suspension. A sentence of more than three years cannot be suspended (<u>Vanuatu Penal Code (Amendment) Act (2006) s.57</u>).</p> <p>A suspended sentence is commonly issued with a supervision order containing conditions.</p>	<p>Under <u>VFPA, ss.11-17</u> the court may make a full or temporary protection order.</p> <p>The protection orders can contain conditions relating to protection of the individual (e.g. prohibiting contact), weapons, property or counselling/ mediation (<u>VFPA ss.13-16</u>).</p> <p>Each order automatically includes the provision that a defendant must be of good behaviour towards the complainant and must not commit acts of domestic violence (<u>VFPA s.12</u>).</p>	<p>The <u>Penal Code of Vanuatu (2006)</u> specifies, amongst others, the following penalties for SGBV:</p> <ul style="list-style-type: none"> <li>• life imprisonment for rape;</li> <li>• life imprisonment for aggravated sexual assault of a child;</li> <li>• 10 years' imprisonment for the indecent assault of a child under 13 years old;</li> <li>• 10 years' imprisonment for any person over 16 years old who commits incest; and</li> </ul>

<sup>360</sup> Pacific Judicial Education Programme and Tuvalu National Judicial Education Committee, *Vanuatu Magistrates' Bench Book* (2004), <http://www.paclii.org/vu/other/vanuatu-magistrates-court-bench-book-2004.pdf> accessed on 21 July 2017.

Sentence Reduction	Conditional/ Suspended Sentences	Protection Orders	Types Of Penalty
<p>(f) first-time offender;</p> <p>(g) provocation;</p> <p>(h) no harm or minimal harm to person or property;</p> <p>(i) previous good character;</p> <p>(j) victim acquiescence;</p> <p>(k) family ties;</p> <p>(l) custom ties;</p> <p>(m) political instability; and</p> <p>(n) responsible position.</p> <p>The <b>VFPA ss.10(5)-(6)</b> provides that, if a person is convicted of an offence of domestic violence, the court may take into account any compensation or reparation made or due by the person under <i>kastom</i> i.e. customary reconciliation.</p> <p>If under <i>kastom</i> such compensation or reparation has not been determined and a court is satisfied that a determination is likely to be made without undue delay, the court may postpone sentencing pending the determination.</p>		<p>Temporary protection orders remain in force for 30 days and can be made in the absence of the defendant. Following a hearing, the court may confirm, vary or revoke the temporary order.</p> <p>Breach of a temporary order is punishable by a fine and/or imprisonment of up to two years.</p>	<ul style="list-style-type: none"> <li>• 10 years' imprisonment for sexual intercourse with a child (i.e. a person under 18 years old) under one's care.</li> </ul>

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