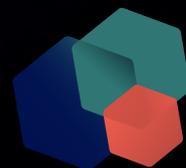


# TrackGBV: Pacific Islands Country Reports 2000-2021

SYSTEMATIC ANALYSIS OF GENDER DISCRIMINATION IN GENDER-BASED  
VIOLENCE SENTENCING DECISIONS IN FIJI, KIRIBATI, PAPUA NEW GUINEA,  
SAMOA, SOLOMON ISLANDS, TONGA, AND VANUATU



**ICAAD**  
Human Rights Innovation

## **Acknowledgements**

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To our civil society partners and colleagues in the Pacific, we owe a great debt of gratitude to those who welcomed us into the region almost a decade ago and have continued to support our work, collaborate on projects to advance gender equity, and help build each other's capacity and technical knowledge. Special thanks to the Fiji Women's Rights Movement, Vanuatu Women's Centre, SPC Regional Rights Resource Team, Pacific Women's Watch, Family Support Centre Solomon Islands, Solomon Islands Safenet Partners, Pacific Island Law Officer's Network, UN Women Pacific, Samoa's National Human Rights Institution (Ombudsman), Tuvalu Family Health Association, Banaban Women's Organization, Pacific Justice Sector Programme, Women United Together Marshall Islands, Makefu Women's Village Council (Niue), Munro Leys, University of the South Pacific, and our first friend and colleague in the region, Roshika Deo.

Moreover, we appreciate the guidance provided by several judges who took the time to meet with us, evaluate our work, jointly craft judicial directives, and provide case law to improve judicial transparency. Special thanks to the Honourable: Chief Justice Carl B. Ingram (Marshall Islands), fmr. Chief Justice Owen Paulsen (Tonga), fmr. Chief Justice Anthony Gates (Fiji), fmr. Chief Justice Patu Falefatu Sapolu (Samoa), and Chief Magistrate Usaia Ratuville (Fiji).

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## EXECUTIVE SUMMARY

Society has become accustomed to seeing headlines reporting on cases of gender-based violence (GBV) that have made it to the courts where justice has not been served. Suspended sentences based on arguments grounded in rape myths and sentence reductions based on character references irrelevant to a perpetrator's violent offending are all too common. For victims/ survivors who seek justice in the courts, less than half receive an outcome unhindered by gender discrimination.

It's one thing to have an isolated example of a case with its own unique circumstances, and it's another to build an evidence base of over 20 years of case law that tracks the patterns and impacts of biased judicial decision-making, regionally and by country. TrackGBV does just that, using data and technology to support judicial policy reform with the goal of removing gender discrimination from judicial decision-making.

The TrackGBV data tracks key variables related to access to justice for women and girls and allows us to quantify the impact of contentious factors on sentencing. In many Pacific Island Countries and in countries around the world, perpetrators of domestic violence and sexual offences often receive disproportionately low sentences or no custodial sentences at all. TrackGBV aims to tell the story of how that happens in each jurisdiction.

TrackGBV began in 2013 in the Pacific Islands region. Since then, ICAAD and its law firm partners have reviewed over 5,000 cases and analysed 2,492 sentencing decisions from 2000 to 2021. To ensure timeliness and relevance, ICAAD will continue to review and add to the [TrackGBV Data Dashboard](#), accessible on the ICAAD website. Sentencing decisions allow for the identification of the presence of contentious factors (see page 6) and numerous other variables, providing a baseline to measure the quantitative impact of gender discrimination within the judiciary.

The TrackGBV data has illuminated a number of patterns in the region. Victims/ survivors who come before the courts tend to fall between the ages of 6 and 17. When it comes to access to justice, the impact of contentious factors is clear. Contentious factors were raised in 77.3% of cases regionally with a quantifiable impact on sentencing in 51.9% of cases. While the frequency and types of contentious factors raised and applied in cases vary across jurisdictions, in cases with charges similar to rape, sentences were, on average,  $\frac{1}{3}$  shorter when contentious factors were raised. The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the lack of medical reports, the misapplication of first time offender status, and the lack of victim anonymity. Despite progress in some jurisdictions on reducing judicial bias and improving access to justice for women and girls, TrackGBV reveals notable gaps for judiciaries across the region.

## Methodology

ICAAD reviewed 5,000 cases, analysed 2,492 applicable cases, and conducted a secondary review of 1,860 cases (75% of applicable cases). Our methodology involves training reviewers who manually analyse cases and tag corresponding variables relevant to gender-based violence (GBV) cases. Reviewers are primarily lawyers at our partner law firms including Clifford Chance; Manatt, Phelps, and Phillips; and Linklaters. Our CSO partners also review cases; Fiji Women’s Rights Movement publishes an annual report on Fiji cases focused on sexual offence sentencing decisions. And finally, our tech partner, Conduent, played a vital role in developing the platform (Viewpoint) where the case law analysis was completed, and outputs from this analysis were hosted on Tableau’s data visualisation platform.

Applicable cases for review are sentencing decisions in which the actions of the perpetrator include elements of **domestic violence** and/ or **sexual violence** and the victim was identified as female.

### Gender-based violence (GBV)

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.  
**For the purposes of this report, we reviewed only cases involving GBV against people who identify as girls/ women or female specifically, of any age.**

### Domestic violence

“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>1</sup>

### Sexual violence

“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>2</sup>

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<sup>1</sup> Council of Europe, Convention on preventing and combating violence against women and domestic violence (2011), Article 3.

<sup>2</sup> Council of Europe, Convention on preventing and combating violence against women and domestic violence (2011), Article 36.

Applicable cases are reviewed against **51 variables** including the use of contentious factors by the judicial officer and defence, and whether they were raised and/ or used to justify a reduction in the sentence. The three categories of contentious factors are:

<b>Gender Stereotypes</b>	Stereotypical attitudes and beliefs regarding gender and the way in which men and women should interact within society. Gender stereotypes also include rape myths: prejudicial, stereotypical or false beliefs regarding rape, and characteristics of rape victims and rapists.
<b>Customary Practices</b>	<p>This includes forms of out-of-court justice and reparation including payment of compensation, formal apology, and reconciliation. It also includes where customary practices are used as justification for criminal acts which undermine equal protection under the law for female victims/survivors (eg: accusations of witchcraft, or bride price).</p> <p>It is important to note that customary practices are not the same as customary values. Customary values that may <i>underpin</i> customary law and practices can include reciprocity, harmony, respect, and more. Customary practices can change while still upholding customary values.</p>
<b>Other Contentious Factors</b>	This includes any other factors which unjustly privilege the interests of the perpetrator over the interests of the victims/ survivors. For example, considering the fact that the perpetrator participated in church or community activities as a mitigating factor.

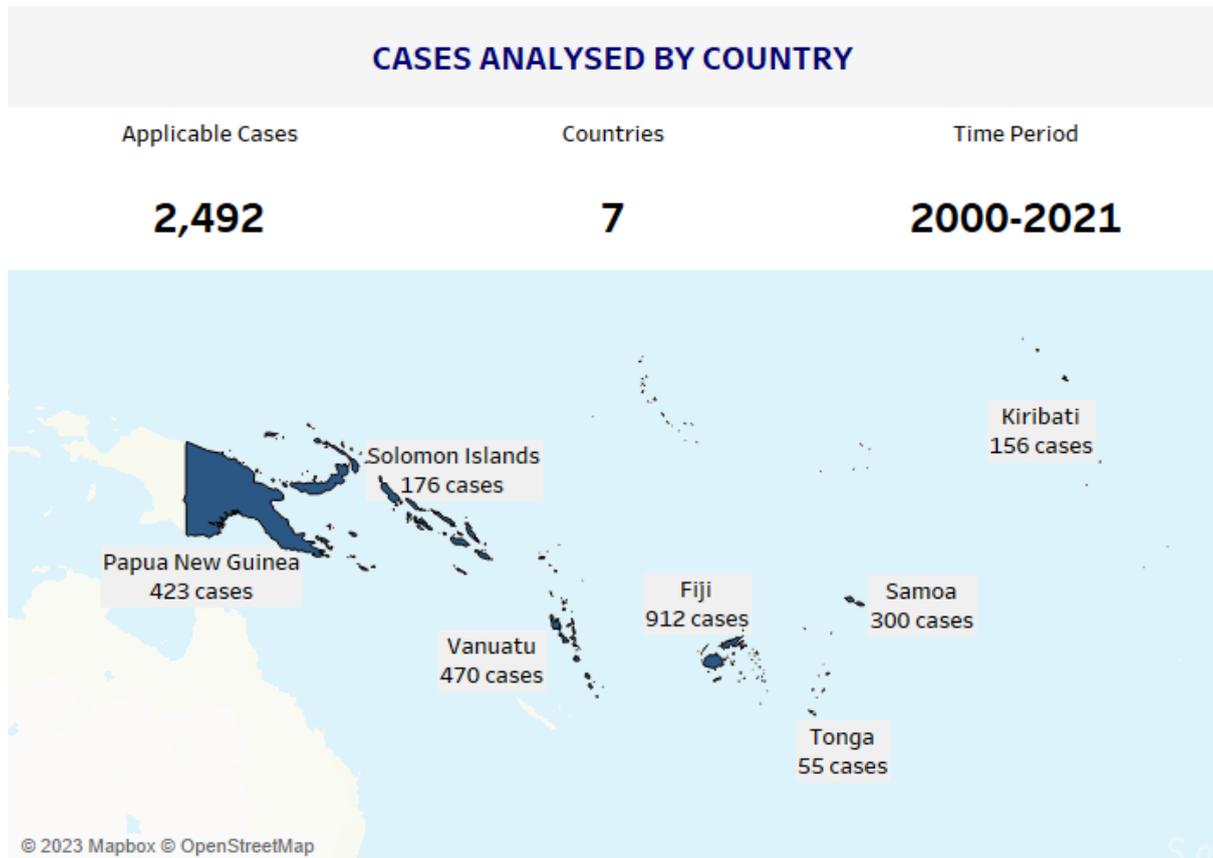
For more detailed information on the TrackGBV methodology, please refer to our handbook.<sup>3</sup> The up-to-date TrackGBV Dashboard can be explored at this link: <https://icaad.ngo/trackgbv-dashboard/>. The following report provides a narrative and in-depth analysis of the Pacific region and the specific patterns in seven Pacific jurisdictions from 2000-2021.

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<sup>3</sup> *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance, 2018.

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## TRACKGBV: PACIFIC ISLANDS



### Regional Summary

Across the Pacific Islands region, contentious factors were raised in 77.6% of GBV cases with those contentious factors impacting the final sentence in 51.4% of decisions. The TrackGBV data tracks key variables related to access to justice for women and girls and allows us to quantify the impact of contentious factors on sentencing. While the frequency and types of contentious factors raised and applied in cases vary across jurisdictions, the impact of contentious factors when applied is clear. On average, in cases with charges similar to rape, sentences were  $\frac{1}{3}$  shorter when contentious factors were raised. This section provides an overview of TrackGBV data from 2000-2021 with recommendations for training, institutionalising best practices, and promoting accountability in Pacific judiciaries.

## Contentious Factors

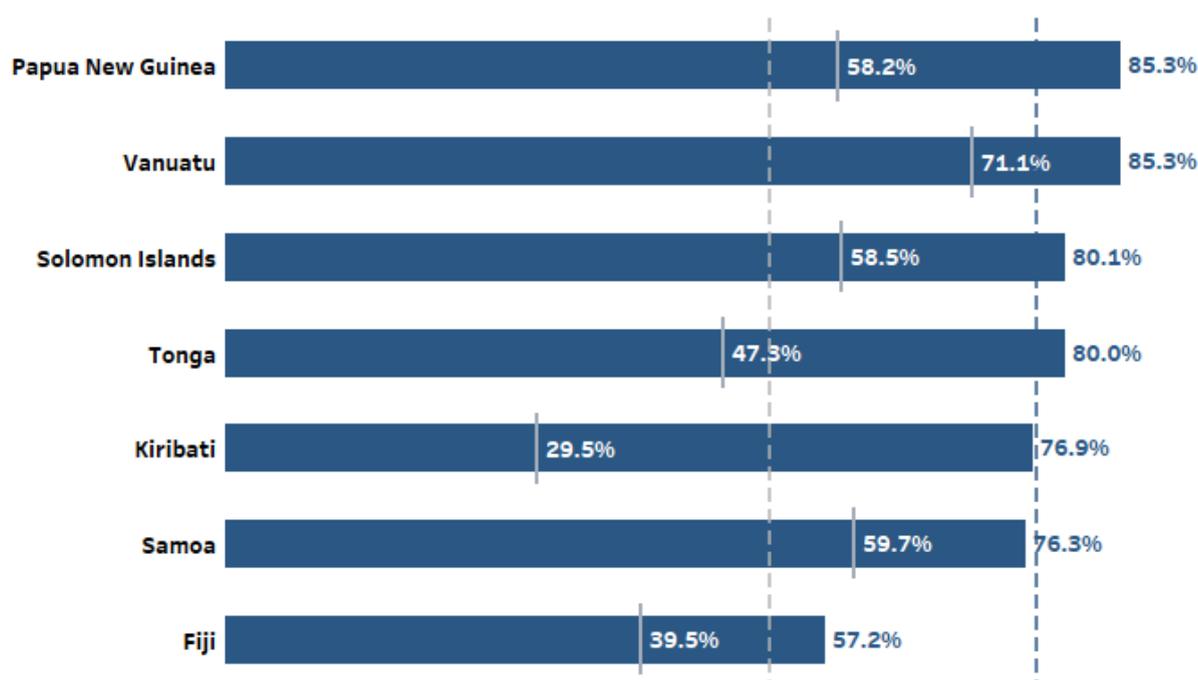
Across the region, contentious factors were raised in 77.6% of cases, with those contentious factors impacting the final sentence in 51.4% of decisions. **For victims/ survivors who seek justice in the courts, less than 1 in 2 receive an outcome unhindered by gender discrimination.**

The frequency and types of contentious factors vary across jurisdictions. Vanuatu has the highest rate of both contentious factors raised and those impacting final sentences. While Papua New Guinea has the same frequency of contentious factors raised, it has a lower rate at which those factors impact decisions. Kiribati has the lowest rates of these jurisdictions; however, 29.5% of decisions still feature gender discrimination in the form of contentious factors.

### Contentious Factors Raised vs. How Frequently they Impact Decisions

Contentious Factors Raised (Regional Average) ----

Decision Impacting Contentious Factors (Regional Average ---)



In terms of change over time, four of the seven jurisdictions have seen a decrease in both impacting contentious factors and contentious factors raised: Fiji, Kiribati, Solomon Islands, and Tonga. Fiji witnessed the greatest change over time, going from 55.6% of cases with impacting contentious factors in 2010-2014 to 31.3% in 2015-2021. The time period from 2015 to 2021 marked ICAAD's engagement with the Fiji judiciary, which involved co-designed directives with the former Chief Justice and Chief Magistrate, as well as the training of key stakeholders with the TrackGBV Dashboard. Additionally, ICAAD presented to all the offices of the attorney general from the Pacific region at the Pacific Island Law Officers' Network



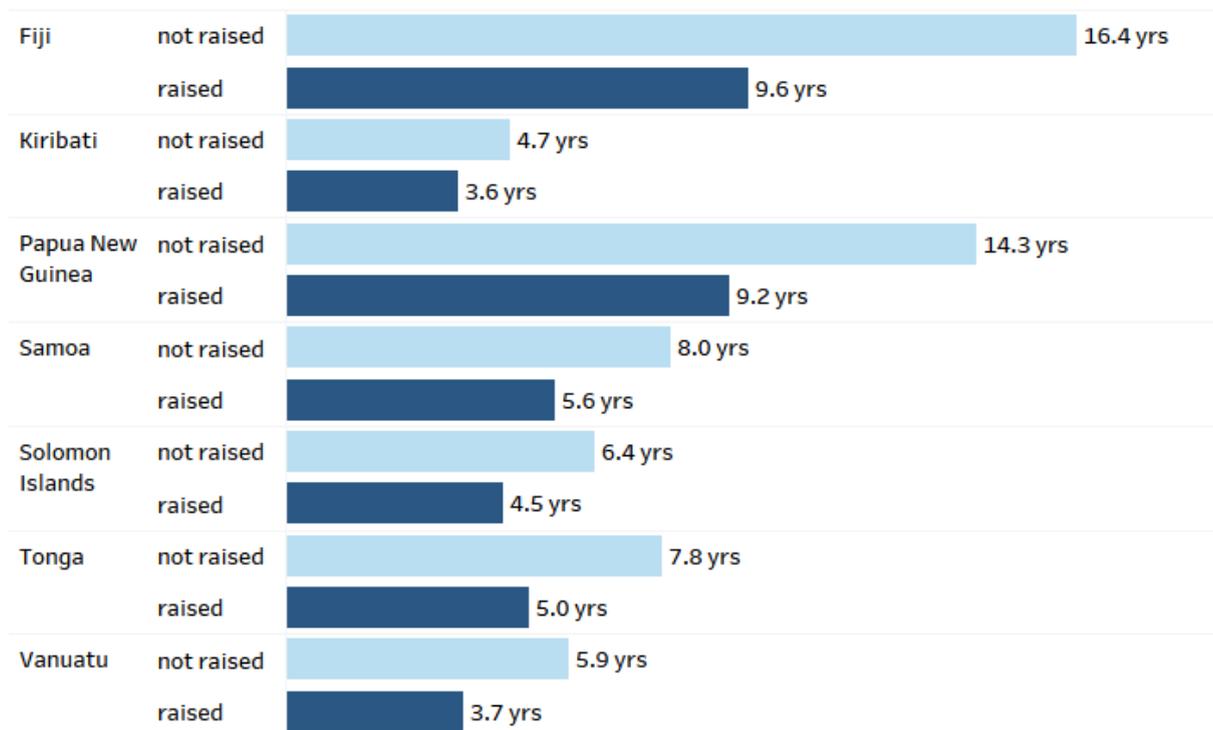
## Sentencing Outcomes

TrackGBV allows us to quantify the impact of contentious factors on sentencing. While the frequency and types of contentious factors raised and applied in cases vary across jurisdictions, the impact of contentious factors when applied is clear. **In the average final sentences for charges similar to rape, sentences in which contentious factors were raised are lower in every jurisdiction than sentences without contentious factors.** In Fiji where there is the widest gap between sentences with and without contentious factors raised, the difference is 7.1 years. **On average, in cases with charges similar to rape, sentences were 1/3 shorter when contentious factors were raised.**

In addition to reduced sentences, contentious factors can also lead to no custodial sentence or partially or fully suspended sentences. This is most common in Tonga where 63.6% of sentences were either partially or fully suspended, and 18.2% of perpetrators were not given a custodial sentence.

### Average Final Sentence for Charges Similar to Rape

contentious factors raised vs. contentious factors not raised



The TrackGBV data also points to additional procedural barriers to consistency and accountability, **namely the lack of medical reports, the misapplication of first time offender status, and the lack of victim anonymity.** The use of medical reports has decreased over time, with the highest proportion of medical reports not being cited in sentencing decisions in

Kiribati, Vanuatu, and Tonga. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. There has been a slight increase in the use of medical reports in sentencing decisions in Samoa and a more significant increase in Tonga. Still, there is seemingly a regional gap in terms of integrating medical evidence into the decision-making process.

Given how many existing barriers there are for victims/ survivors seeking justice through the legal system, the frequency of the misapplication of first time offender status is notable. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction. In Papua New Guinea, Solomon Islands, and Tonga, first time offender status was misapplied in over 20% of cases.

### Judicial Statistics

Indicators are **High**, **Medium** or **Low** based on regional averages

	Custodial Sentences not given	Suspended Sentences partially/fully	Victim Anonymity not maintained	Medical Reports not cited	First-Time Offender misapplication	Sole Breadwinner argument used
Fiji	10.1%	16.1%	41.6%	62.8%	6.7%	19.7%
Kiribati	17.9%	19.2%	46.8%	91.0%	12.0%	4.5%
Papua New Guinea	13.9%	34.0%	70.2%	68.3%	22.3%	3.3%
Samoa	9.7%	2.3%	33.7%	69.0%	16.7%	7.7%
Solomon Islands	4.0%	9.1%	65.9%	71.6%	25.9%	12.5%
Tonga	18.2%	63.6%	52.7%	78.2%	21.4%	7.3%
Vanuatu	23.2%	21.9%	57.9%	82.1%	15.2%	10.2%

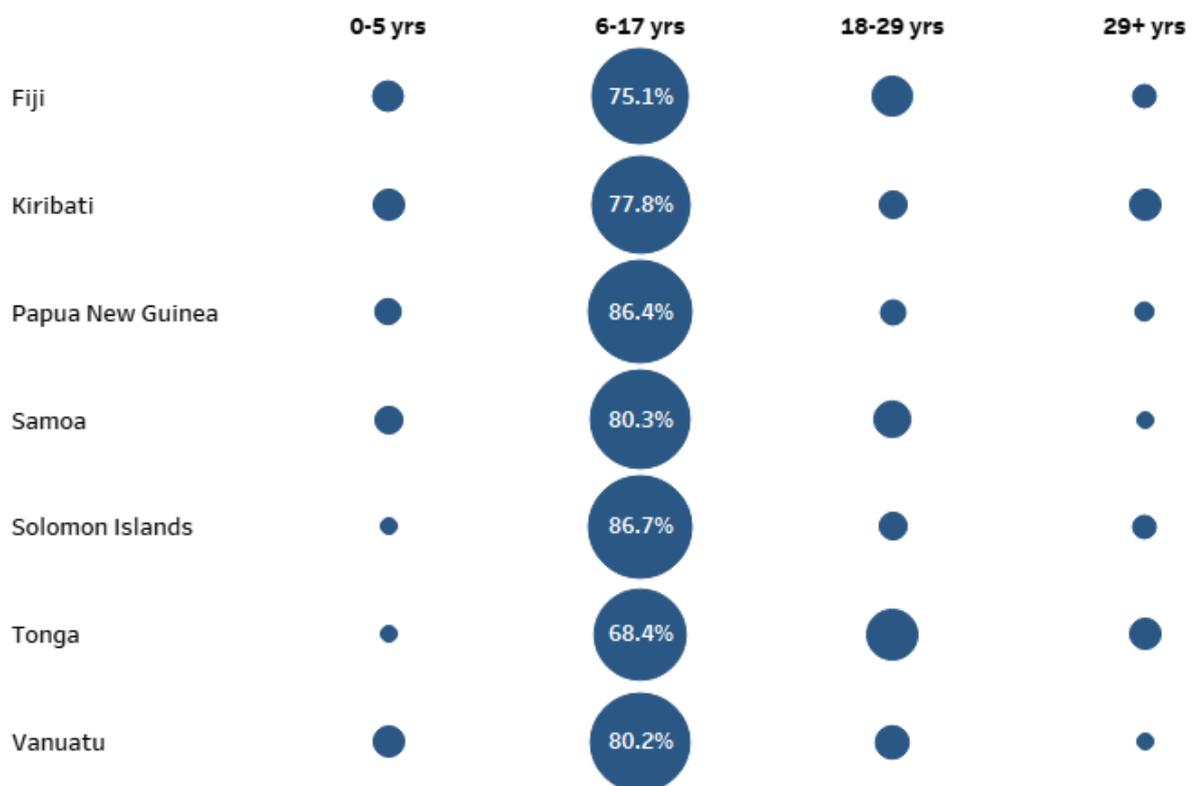
Across the region, there is also a significant proportion of cases in which victim anonymity is not protected in GBV cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim/ survivor and trust in the system.

While TrackGBV is focused specifically on sentencing decisions, these insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/ survivors.

## Survivor Stats

Across the region, we see a high frequency of sentencing decisions involving child survivors between the ages of 6 and 17. While there may be several contributing factors<sup>5</sup> that do not necessarily indicate that this age group has the highest prevalence of GBV, it is important to identify – for the development of Pacific judiciaries – the demographics of victims/ survivors coming before the courts, and that the volume of cases involving sexual violence and children is incredibly worrisome.

### Percentage of Cases involving Sexual Violence based on Victim/Survivor Age



<sup>5</sup> More cases concerning girls coming before the court does not necessarily mean that the greatest prevalence of GBV involves girls under the age of 18. There are several factors that influence this number including: greater reporting of violence against children, prosecutors taking violence against children more seriously, less societal pressure for children to reconcile with the perpetrator of the violence, and significant underreporting of violence against women.

## Regional Recommendations

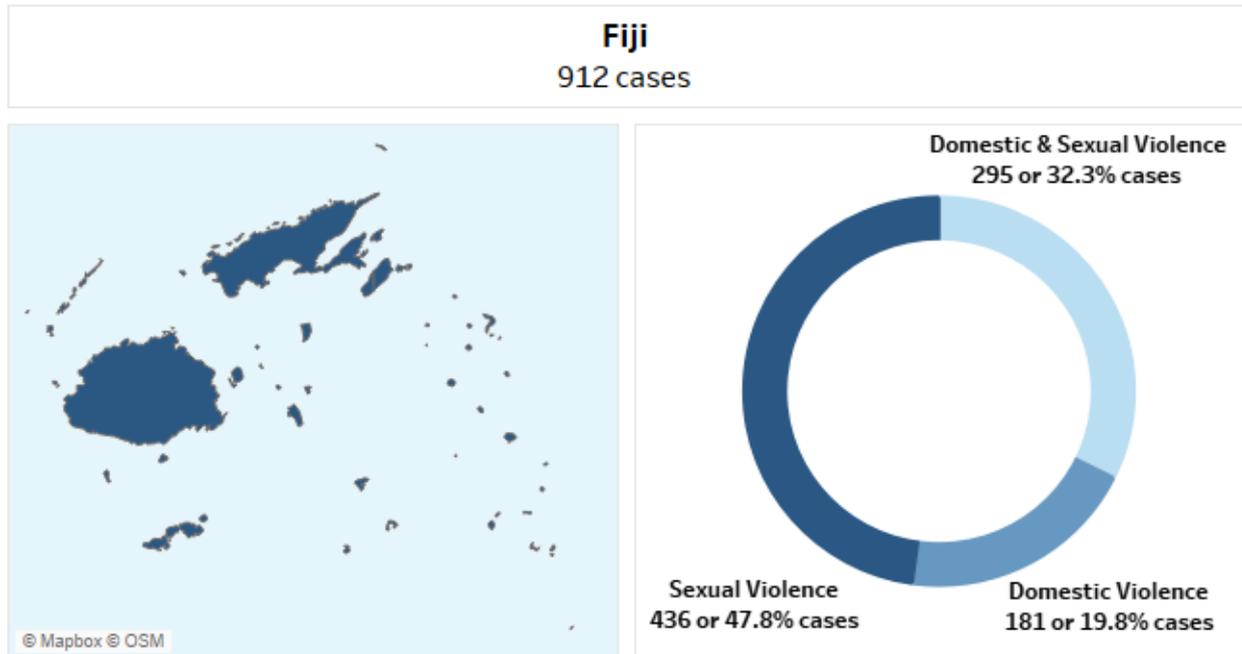
Despite progress in some jurisdictions on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for each jurisdiction and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, survivors, police, survivors, and healthcare professionals.

- **Review jurisdiction-specific TrackGBV data in the [TrackGBV Dashboard](#).** As explored in this report, each jurisdiction has unique challenges as it relates to gender discrimination.
- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Issue judicial directives.** Based on training outcomes, judicial administrators can show leadership in issuing judicial directives to institutionalise best practices for all judges.
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

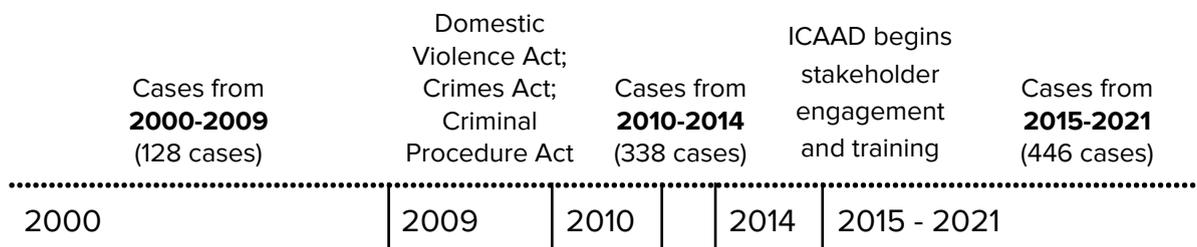
In Fiji, we were able to track the impact of our substantive engagement with the judiciary and its impact on case outcomes by breaking out a time period from 2015-2021, marking that engagement. Going forward, other jurisdictions can similarly track their progress towards access to justice as a result of training and engagement with the TrackGBV data.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. For example, in jurisdictions with a high proportion of partially or fully suspended sentences, like Tonga and Papua New Guinea, additional research should be done by judiciaries to track perpetrators who breach the terms of their suspended sentence (i.e. tracking recidivism rates) and evaluate judicial decision-making on those grounds. ICAAD's CSO partners have also raised important concerns about the process for protection orders, which is an important area of inquiry as it relates to victims/survivors' direct safety. Furthermore, the TrackGBV data disaggregates case analysis by disability and sexual orientation. While there are not enough cases for an in-depth quantitative analysis for these categories, qualitative case review can point to additional gaps in protection for vulnerable groups.

## TrackGBV: Fiji



Regionally, Fiji has the lowest rate of contentious factors raised in sentencing decisions, demonstrating notable progress building on the knowledge derived from the TrackGBV data, collaboration with ICAAD, and the advocacy of groups like Fiji Women’s Rights Movement. Between 2000 and 2021, contentious factors were used to justify a reduction in sentences in 39.5% of the applicable 912 cases. The data for Fiji is broken into three time periods – beginning with 2000-2009, marking the time period before the passing of the Domestic Violence Act, Crimes Act, and Criminal Procedure Act, followed by 2010-2014, marking the time period prior to ICAAD’s engagement in training stakeholders on the TrackGBV data and methodology. The most recent time period, 2015-2021, indicates notable progress with a 24.3% reduction in impacting contentious factors compared to the time period prior.



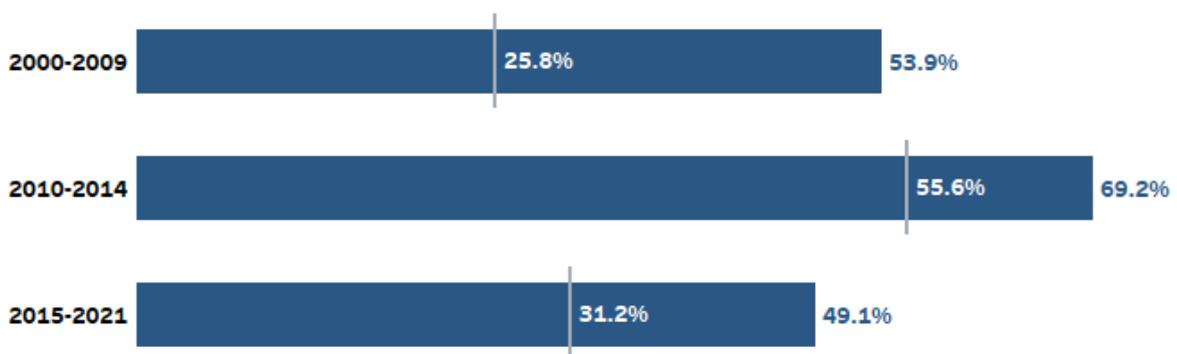
While Fiji demonstrates the impact of institutionalising TrackGBV, gaps still remain as revealed in recent case law. Fiji has the highest rate of the application of the Sole Breadwinner

Argument<sup>6</sup> at 19.8%, and as with other jurisdictions, still faces a medico-legal gap with the most recent time period, 2015-2021, featuring the lowest rate of cases with medical reports cited of the three time periods, at 46.1%.

## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

### Contentious Factors Raised vs. How Frequently they Impact Decisions



In Fiji, the prevalence and use of contentious factors increased significantly from the first time period, 2000-2009, to the second time period, 2010-2014. Between 2010 and 2014, contentious factors were raised in 69.2% of cases and used to justify sentence reductions in 55.6% of cases. In the most recent time period, these rates decreased significantly, with rates near those of the 2000-2009 time period. Between 2015 and 2021, contentious factors were raised in 49.1% of cases and used to justify sentence reductions in 31.2% of cases.

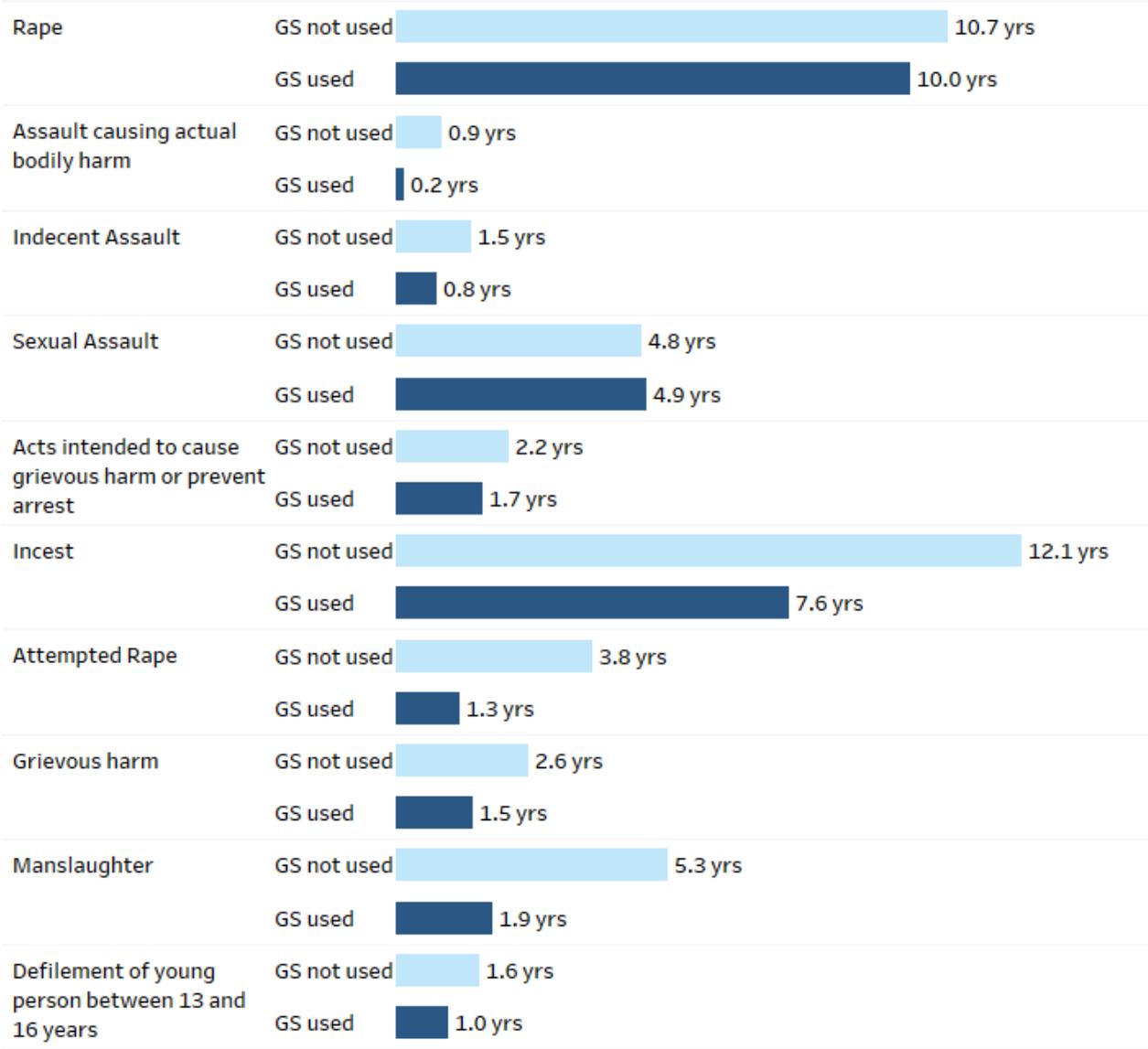
The most common contentious factors relied upon fell under the Gender Stereotypes category, with judges relying on Gender Stereotypes alone in 36.3% of impacted cases. Over time, the application of Customary Practices has decreased, and the use of Gender Stereotypes has increased. Between 2015 and 2021, Gender Stereotypes used in isolation accounted for 43.6% of impacted cases in Fiji.

The decrease in the use of contentious factors is accompanied with a decrease in the impact on resulting sentences. The average sentence reduction in rape cases with contentious factors was 2.6 years between 2010 and 2014 and 1.9 years between 2015 and 2021.

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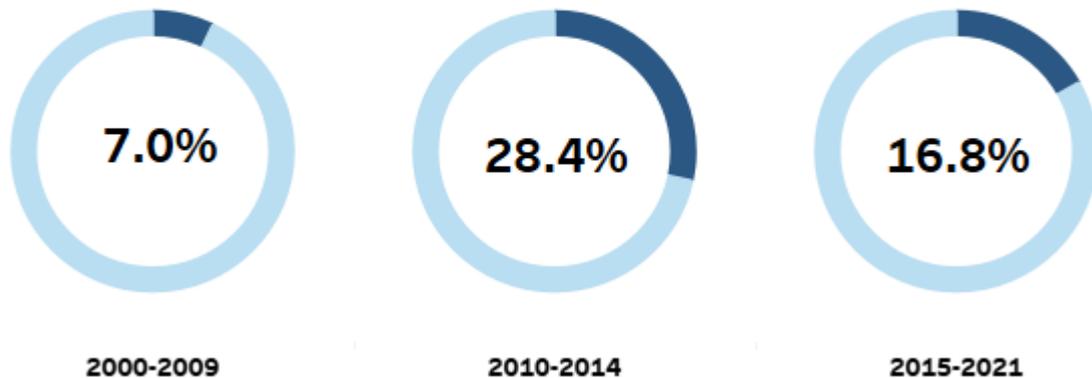
<sup>6</sup> The Sole Breadwinner Argument is the notion that the perpetrator's sentence warrants reduction on the ground of his family's economic dependence on him as the sole or main source of income for the family.

Average Final Sentence for cases where Gender Stereotypes were used in Mitigation in Fiji



The most common Gender Stereotype is the Sole Breadwinner Argument: the notion that the perpetrator’s sentence warrants reduction on the ground of his family’s economic dependence on him as the sole or main source of income for the family. Fiji has the highest rate of the Sole Breadwinner Argument, which features in 19.7% of cases. While there was a slight decrease between 2010-2014 and 2015-2018 from 28.4% to 17.0%, these rates are significantly higher than the 2000-2009 time period at a rate of 7.0%. The wellbeing of perpetrators’ families is an important policy concern; however, a systems approach to GBV allows us to distinguish the role of the courts from the role of other government institutions which are better positioned to offer social services and welfare to both victims/ survivors and offenders.

### Use of Sole Breadwinner Argument in Fiji



The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the lack of victim/ survivor anonymity and the lack of medical reports cited in sentencing. The lack of victim anonymity persists in Fiji courts. Between 2015 and 2021, victim anonymity was not maintained for child victims in 27.3% of cases and for adult victims in 59.6% of cases, an increase from 2010-2014 which had rates of 18.3% and 56.4%, respectively. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

The lack of medical reports in sentencing decisions is also notable, demonstrating a medico-legal gap in the judiciary in Fiji. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. Across the two most recent time periods, there was a decrease in the percentage of cases featuring medical reports from 57.3% to 46.1%, representing a significant access to justice gap.

While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/ survivors.

### Case Examples

Recent case law analysis illustrates both progress resulting from ICAAD’s collaboration with the Fiji judiciary as well as some persistent gaps in access to justice. In *State v Koroivalu* [2020]<sup>7</sup>, a male landlord was charged with one count of sexual assault against his 15 year old tenant. The judge chose 11 years as a starting point, which was increased by two years for

<sup>7</sup> *State v Koroivalu - Sentence* [2020] FJHC 666, <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2020/666.html?stem=&synonyms=&query=koroivalu>.

aggravating factors, including the physical harm noted in the medical report. The judge allowed for a one year sentence reduction for a number of mitigating factors including the offender being 49 years old with eight children, his active engagement in social and community service, his one previous conviction not being of a sexual nature, and his seeking mercy of the court.

The contentious factors raised in this case include Gender Stereotypes, specifically the Sole Breadwinner Argument, and Other Contentious Factors, which include the offender's age and engagement in social and community service.<sup>8</sup> He is also given credit for not having had a prior conviction of a sexual nature which is a neutral factor at best, not a mitigating factor.<sup>9</sup>

A medical report was cited in this case which added to the aggravating factors; however, there was still a flawed interpretation of the medical evidence, albeit in favour of establishing the severity of the crime. The judge notes that the "doctor who medically examined the victim found her hymen not to be intact" which contributed to evidence supporting the severity of the rape.<sup>10</sup> However, it is a myth that vaginal examination of the hymen can determine whether sexual assault (specifically, non-consensual penetration) has occurred. Changes to the appearance of the hymen are not specific and cannot indicate any medical or legal conclusions. This case demonstrates that even where medical evidence is cited in sentencing, it can be misinterpreted across disciplines.

*State v Tagi* [2019]<sup>11</sup> is a domestic violence case involving a husband and wife at the Magistrates Court at Nausori. The offence was one count of assault with actual bodily harm. The judge selected nine months as a starting point. In aggravation, he added six months for the use of a weapon. The mitigating factors raised included the perpetrator's age of 32, the fact that he is married with four children, and that he is a farmer. For these factors, the judge deducted six months. He deducted an additional three months for the offender's guilty plea bringing the final sentence to six months.

The offender was not a first time offender and had a number of previous convictions where the courts treated him leniently. He was given suspended sentences starting in 2012. The judge also rejected the letter from the victim confirming that reconciliation had taken place and stated that "reconciliation has no role to play in domestic violence offences in the court and it has a little value as a mitigating factor. Hence I disregard the supposed reconciliation between the parties."<sup>12</sup>

This language rejecting the use of reconciliation in the mitigation of domestic violence cases resonates with one of the Directives ICAAD co-designed with the Fijian judiciary in 2018. The Directives were passed down to all judges and magistrates in Fiji, and the case law since has

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<sup>8</sup> *Ibid.*, para. 3.

<sup>9</sup> *Ibid.*, para. 10.

<sup>10</sup> *Ibid.*, para. 3.

<sup>11</sup> *State v Tagi - Sentence* [2019] FJMC 71,

[http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJMC/2019/71.html?stem=&synonyms=&query=title\(state%20and%20tagi%20\)](http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJMC/2019/71.html?stem=&synonyms=&query=title(state%20and%20tagi%20)).

<sup>12</sup> *Ibid.*, para. 16.

demonstrated progress in terms of reconciliation being used less frequently in domestic violence cases and a number of cases rejecting first time offender status when there is an established pattern of offending.

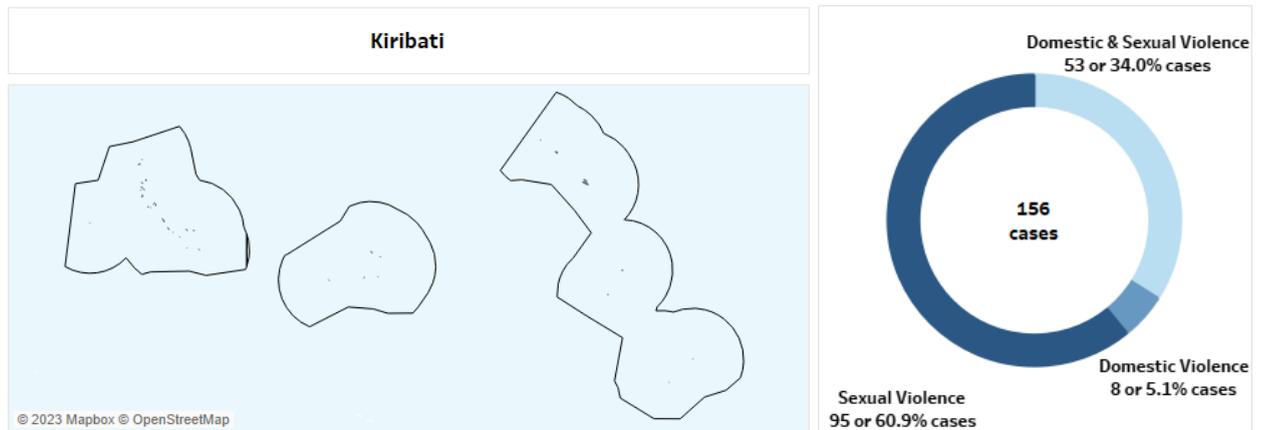
## Recommendations

Despite progress in Fiji on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for Fiji and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for key stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Issue new judicial directives.** Building on the prior set of directives, key judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - The use of the Sole Breadwinner Argument
  - Protocols for interpreting medical evidence in GBV cases
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. In Fiji, there is work to be done to assess the impact of past judicial directives and efforts to streamline the Domestic Violence Restraining Order process. The Fiji Women's Rights Movement continues to lead the way in terms of operationalizing TrackGBV in its advocacy, and the analysis will continue to support this work and the progress of the judiciary toward better access to justice for victims/ survivors.

## TrackGBV: Kiribati



Regionally, Kiribati has the lowest rate of contentious factors used to justify sentence reductions, at 29.5% of the 156 cases reviewed. Still, contentious factors were raised in 76.9% of cases. Kiribati also hands down comparatively low sentences for GBV related offences to other jurisdictions in the region.

The TrackGBV methodology reveals several important patterns in the case law including the prevalence of non-custodial sentences and the use of medical reports in sentencing decisions. Kiribati stands out regionally with 17.9% of GBV offenders receiving a non-custodial sentence. The use of medical reports in the courts also remains a challenge, with only 9.0% of cases citing a medical report.

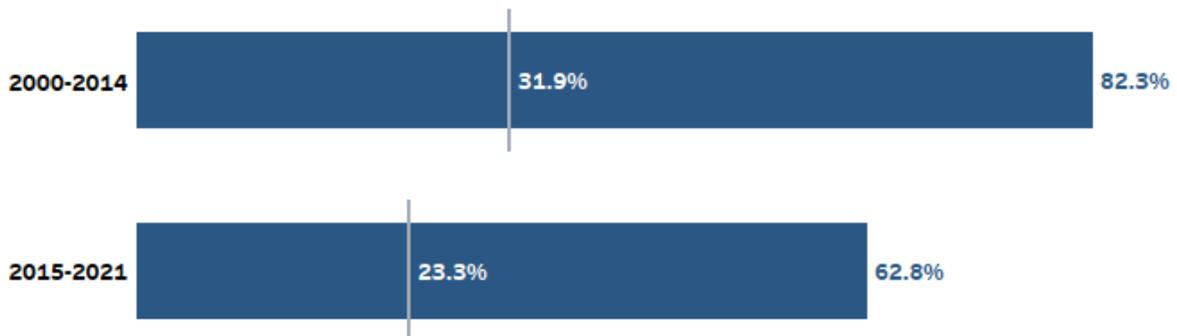


<sup>13</sup> Noting the large proportion of cases in the 2000-2014 time period in comparison to that of the 2015-2021 time period, further analysis with a more granular breakdown could provide additional insights for stakeholders. This will be pursued in the next phase alongside stakeholder partners.

## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

### Contentious Factors Raised vs. How Frequently they Impact Decisions



In Kiribati, the prevalence and use of contentious factors have decreased significantly across the two time periods. Of the 156 cases reviewed, contentious factors were raised in 82.3% of cases between 2000 and 2014 compared to 62.8% between 2015 and 2021. The use of contentious factors to justify sentence reductions decreased from 31.9% to 23.3% over the same two time periods. The most common contentious factors relied upon were Other Contentious Factors, used alone in 32.6% of cases, and Gender Stereotypes, used alone in 23.9% of cases. The application of Customary Practices in any combination with other contentious factors increased over the two time periods from 36.1% to 40.0%.

The impact of these contentious factors on sentencing is significant. The average sentence reduction in rape cases with contentious factors in Kiribati is 2.5 years, which is significant given the comparatively low tariffs for GBV related offenses to start with. In domestic violence cases, custodial sentences were not given at all in 25% of cases. The frequency of contentious factors and impact on sentencing reduces faith in the legal system and access to justice for victims/ survivors.

In the time period from 2015 to 2021, 20.9% of cases featured a partially or fully suspended sentence. In addition to contentious factors applied in mitigation, suspended sentences resulted in large sentence reductions and sometimes no custodial sentence at all. Customary Practices are the primary category of contentious factors involved when sentences were suspended, accounting for 75.0% of suspended sentences between 2015 and 2021.

The TrackGBV data also points to additional procedural barriers to consistency and accountability including the lack of medical reports cited in sentencing. This demonstrates a medico-legal gap in the judiciary in Kiribati. Medical reports serve as compelling evidence

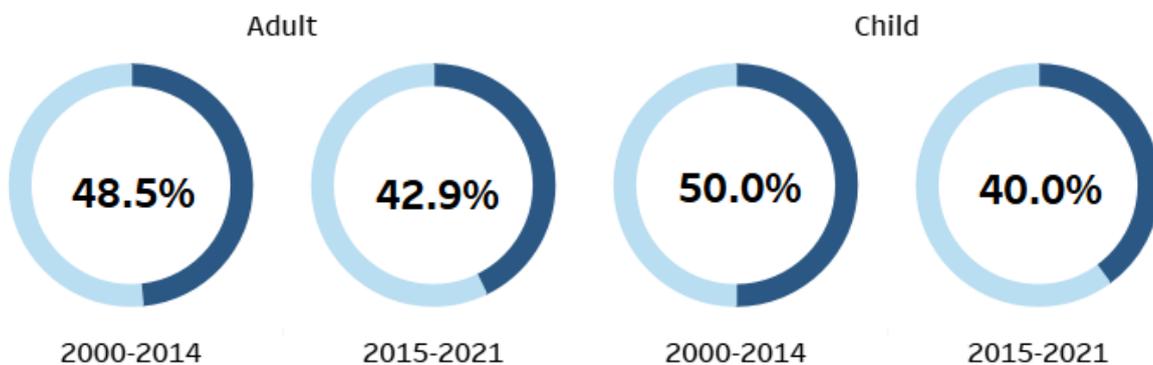
pointing to the severity of a crime and often have a strong influence on sentencing. There was a decrease in medical reports cited, from 9.7% to 7.0%, across the two time periods, representing a major access to justice gap.

### Medical Reports not cited in Kiribati



The lack of victim anonymity persists in Kiribati courts. Victim anonymity was not maintained for child victims in 47.4% of cases and for adult victims in 46.8% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

### Anonymity not maintained in Kiribati



While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/ survivors.

## Case Examples

Two recent cases help illustrate trends in sentencing in Kiribati. In *Republic v Tawere* [2018]<sup>14</sup>, the offender was charged with the rape of a girl who passed out under the influence of alcohol. In mitigation, the judge considered the offender's apology to the victim/ survivor and her family. The judge noted the precedent in *Republic v Arawaia* [2013]<sup>15</sup> which suggested that an apology should have little effect as mitigation in sentencing in cases of defilement of girls under 13 years, and disregards it in this instance, minimizing the rape simply because the girl had been drinking. Victim blaming constitutes Gender Stereotypes and also contributed to giving credit to the offender's apology, constituting Customary Practices as well.<sup>16</sup> The judge delivered a final sentence of two years and six months.

In *Republic v Tenamorua* [2021]<sup>17</sup>, the offender was charged with two charges of rape and one of indecent assault against his stepdaughter. The judge found a starting sentence of nine years and took a number of factors into account in mitigation including the delay in prosecution and the offender's guilty plea. The judge also accepted the impact of the offender's imprisonment on his family. He stated, "[y]ou are the only one providing food to them currently, and you subsist largely on copra and fish", which resulted in a five percent discount.<sup>18</sup> This factor is a Gender Stereotype, specifically the Sole Breadwinner Argument.

The Sole Breadwinner Argument is the notion that the perpetrator's sentence warrants reduction on the ground of his family's economic dependence on him as the sole or main source of income for the family. A systems approach to GBV allows us to distinguish the role of the courts from the role of other government institutions which are better positioned to offer social services and welfare to both victims/ survivors and offenders. For example, in *Republic v Tenamorua* [2021], other government institutions would need to ensure the offender's wife and mother have food supplies and other social welfare support as opposed to allowing this factor to affect his criminal accountability.

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<sup>14</sup> *Republic v Tawere* [2018] KIH C 2, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KIHC/2018/2.html?stem=&synonyms=&query=Tawere>.

<sup>15</sup> *Republic v Arawaia* [2013] KICA 11, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KICA/2013/11.html?stem=&synonyms=&query=Arawaia>.

<sup>16</sup> *Republic v Tawere* [2018] KIH C 2, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KIHC/2018/2.html?stem=&synonyms=&query=Tawere>.

<sup>17</sup> *Republic v Tenamorua* [2021] KIH C 4, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KIHC/2021/4.html?stem=&synonyms=&query=Tenamorua>.

<sup>18</sup> *Ibid.*, para. 14.

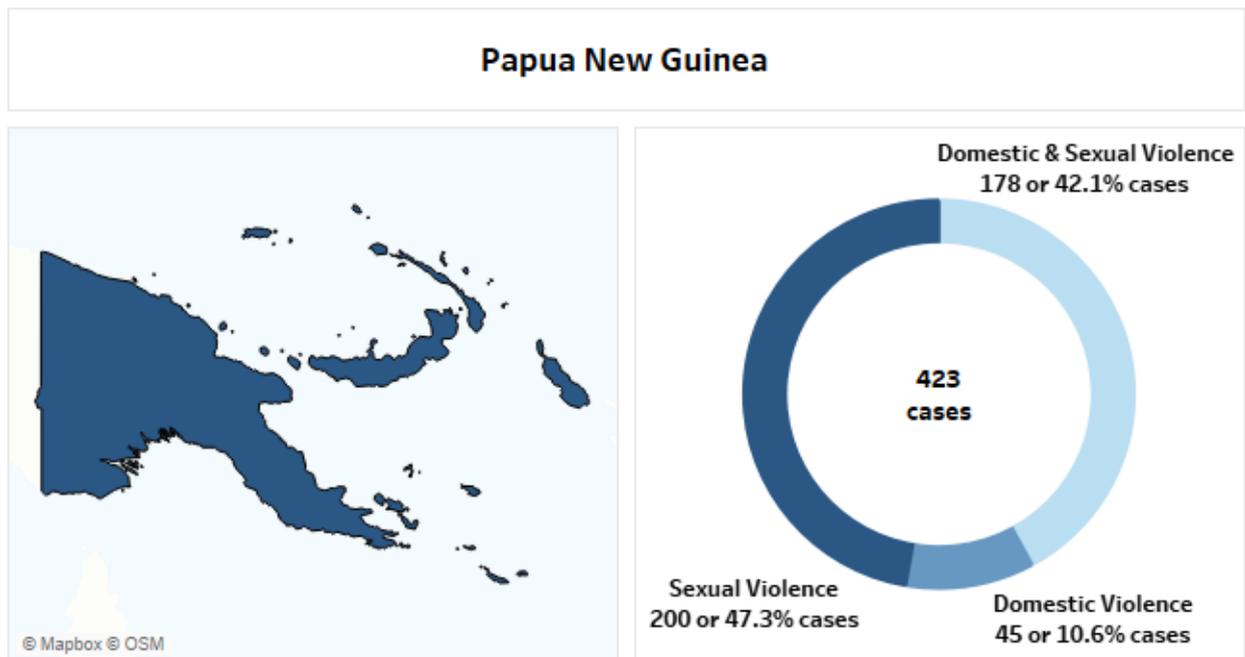
## Recommendations

Despite progress in Kiribati on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for Kiribati and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Conduct a sentencing review.** Given the comparatively low sentences, the judiciary would benefit from a review of final sentence lengths for GBV related offences to potentially inform new sentencing guidelines.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - Clarify and ban Gender Stereotypes, particularly rape myths and victim blaming arguments, in mitigation
  - Ensure that the lack of aggravating factors are not accounted for as mitigating factors in sentencing decisions
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

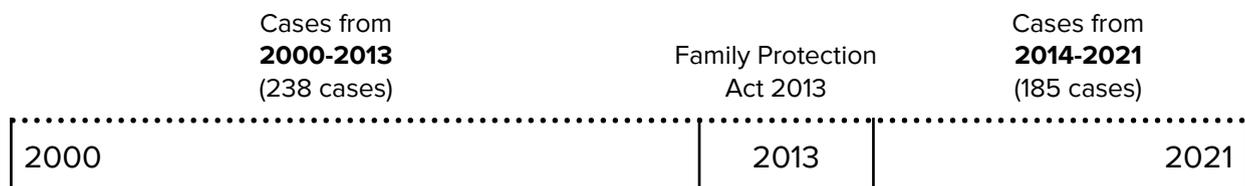
There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. In Kiribati, the cases that have made it to the sentencing level overrepresent non-partner violence in relation to the most recent prevalence survey data. Non-partner violence accounted for 54.5% of cases, while the latest prevalence survey data has a rate of only 11.0%, compared to 67.6% of women over the age of 15 who have experienced physical and/ or sexual intimate partner violence. This may indicate a general underreporting of domestic violence cases in the courts, which is an area for further exploration with key stakeholders in Kiribati.

## TrackGBV: Papua New Guinea



Papua New Guinea (PNG) and Vanuatu share the highest rate of contentious factors raised in sentencing decisions in the TrackGBV data, both at 85.3% of cases. From the 423 applicable GBV cases reviewed in PNG from 2000-2021, contentious factors were used to justify a reduction in sentences in 58.2% of cases.

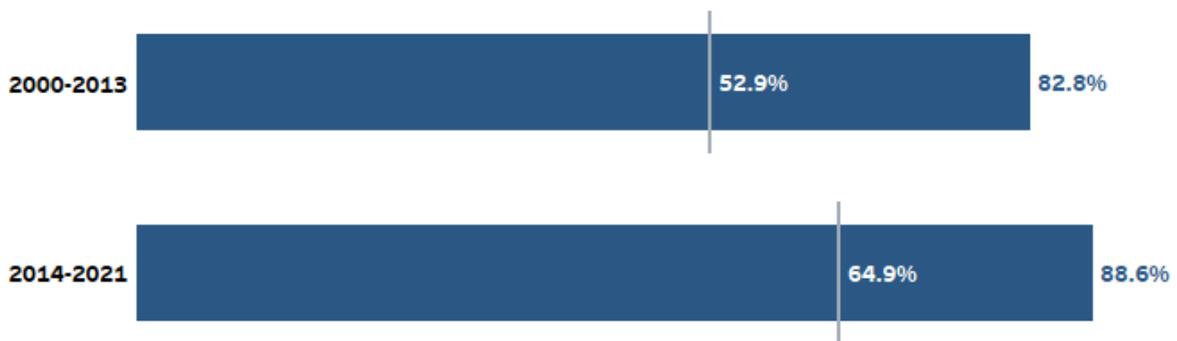
The TrackGBV methodology reveals several important patterns in the case law, including the proportion of cases involving child victims/ survivors and the frequency of partially or fully suspended sentences. In PNG, 70.1% of cases involved child victims/ survivors, and 34% of cases featured partially or fully suspended sentences.



## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

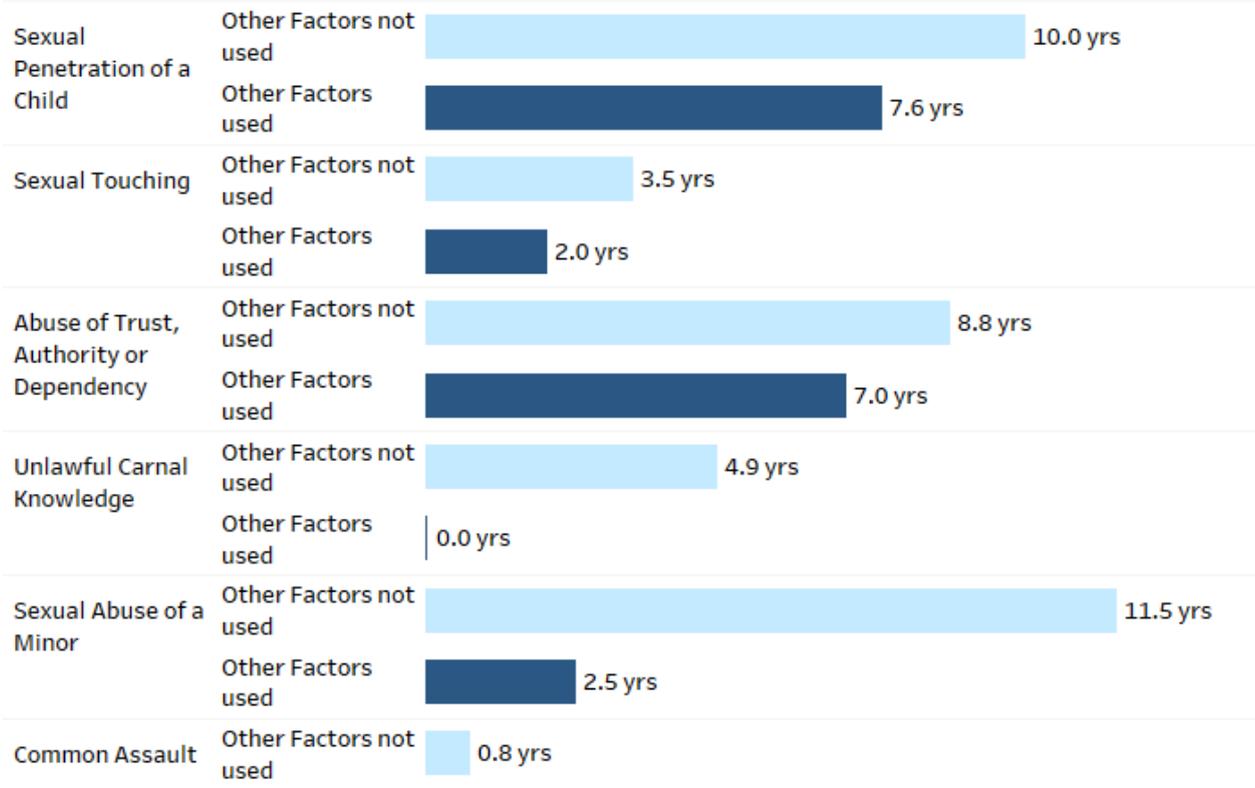
### Contentious Factors Raised vs. How Frequently they Impact Decisions



In PNG, the prevalence and use of contentious factors has increased across the two time periods. Between 2000 and 2013, contentious factors were raised in 82.8% of cases and used to justify sentence reductions in 52.9% of cases. Between 2014 and 2021, contentious factors were raised in 88.6% of cases and used to justify sentence reductions in 64.9% of cases. The most common contentious factors relied upon fell under the Other Contentious Factors category, with judges relying on Other Contentious Factors alone in 30.1% of cases. The use of Gender Stereotypes increased from 38.2% to 41.1% across the two time periods, as did Customary Practices from 40.8% to 54.6%.

The impact of these contentious factors on sentencing is significant. The average sentence reduction in rape cases with contentious factors increased from three years to four years across the two time periods, and decreased from 2.5 years to 1.5 years for domestic violence cases. The high frequency of contentious factors and significant impact on sentencing severely reduces faith in the legal system and access to justice for victims/ survivors.

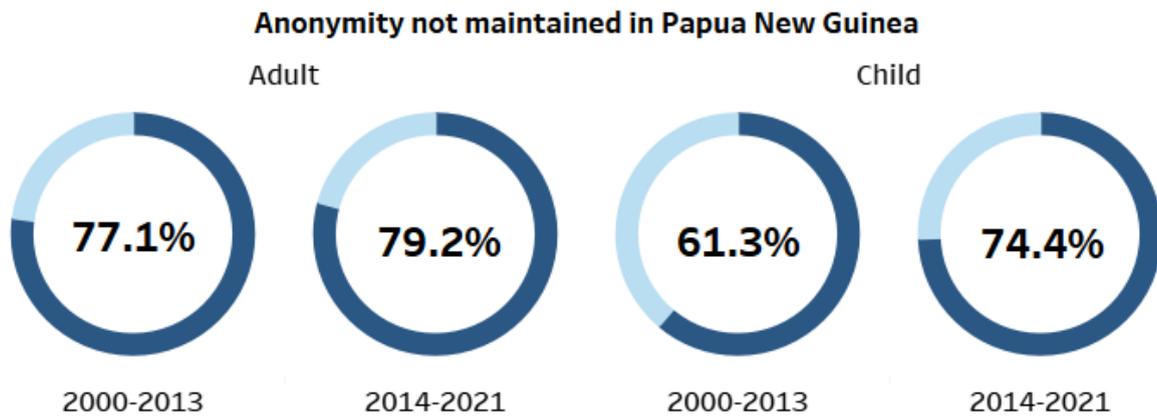
Average Final Sentence for cases where **Other Contentious Factors** were used in Mitigation



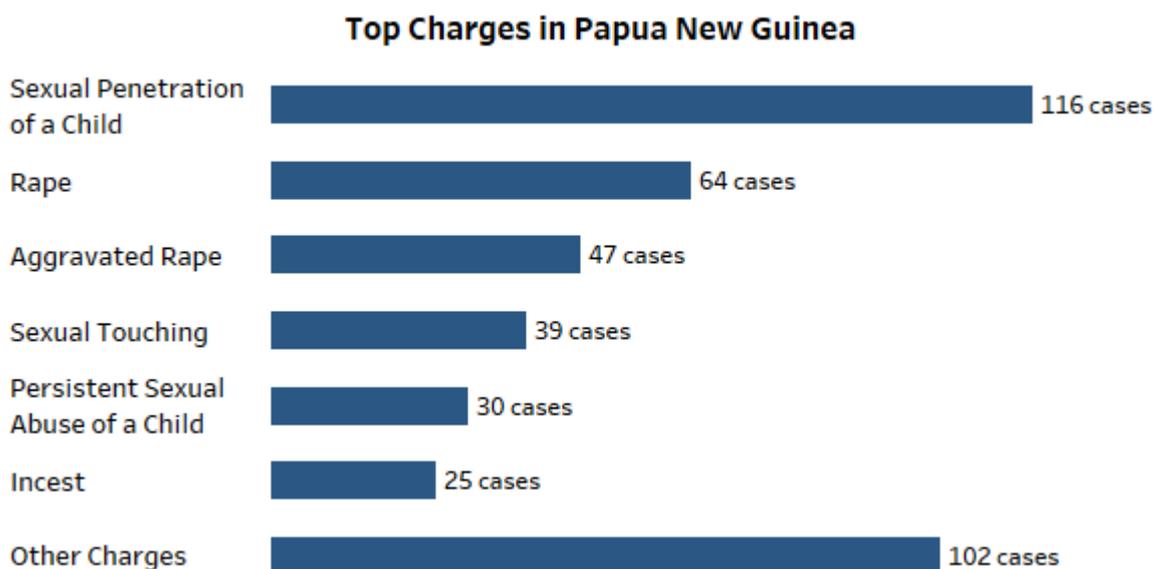
The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the lack of medical reports and the misapplication of first time offender status. The use of medical reports in sentencing decisions has decreased across the two time periods. Medical reports were only cited in 29.3% of cases between 2014 and 2021. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. The lack of reliance on medical reports in PNG demonstrates a medico-legal gap.

Noting how many existing barriers there are for victims/ survivors seeking justice through the legal system, the frequency of the misapplication of first time offender status is notable. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction. The misapplication of first time offender status came up in almost a quarter of cases (22.3%) in PNG.

The lack of victim anonymity is also notable. Victim anonymity was not maintained for child victims in 67.1% of cases and for adult victims in 78% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.



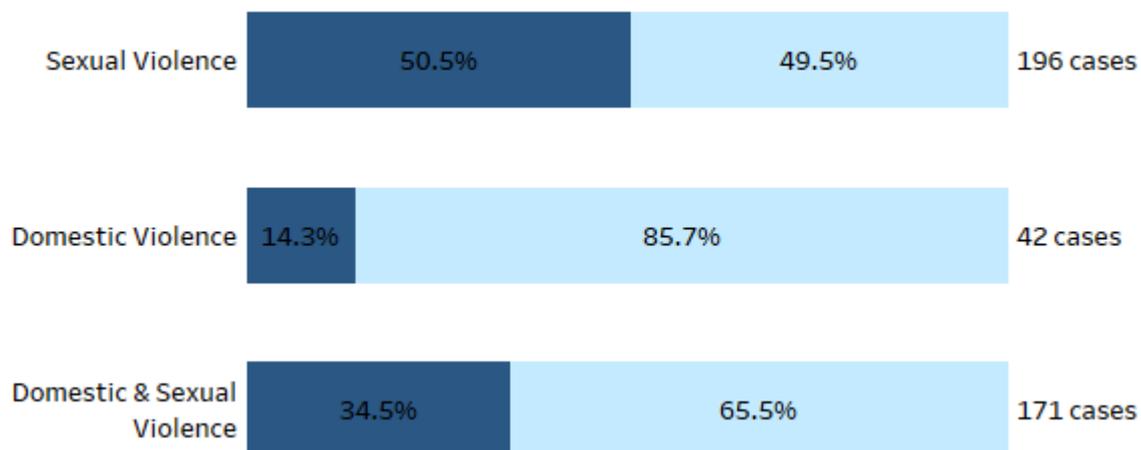
While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms more broadly. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/survivors.



## Case Examples

The prevalence of Other Contentious Factors can be explained by the reliance on a number of precedents that were reinforced with the appellate case *Sabiu v State* [2007]<sup>19</sup> in the Supreme Court. The case involved sexual penetration of a child under 12 years old, and the judge upheld a set of considerations for sentencing of child sexual penetration cases. While many of the questions are not contentious in nature, they have since been applied in a number of cases to use a lack of aggravating factors as mitigation. For example, judges are mitigating sentences after asking the question “[d]id the offender use a threatening weapon and not use aggravated physical violence?” or “[d]id the offender cause physical injury and pass on a sexually transmitted disease to the victim?”<sup>20</sup> Broadly, these are important considerations, but they are being impermissibly used as mitigating factors when aggravating factors are not present.

### Use Other Factors compared to other types contentious factors in Mitigation



In *State v Awi* [2016]<sup>21</sup>, the perpetrator pled guilty to raping his six year old neighbor who had been home alone. The case was reported to the authorities when the victim/ survivor had developed a vaginal infection and was questioned by her mother and medical staff. The judge relied on the set of considerations from *Sabiu v State* [2007] and mitigated the sentence for not using force or violence and not exacting serious permanent physical injuries. If present, these features would be aggravating factors, but giving credit for them not being present is categorised here as Other Contentious Factors. The judge also relied on two common rape myths noting that “[t]he victim did not scream and there was no evidence of force” and that

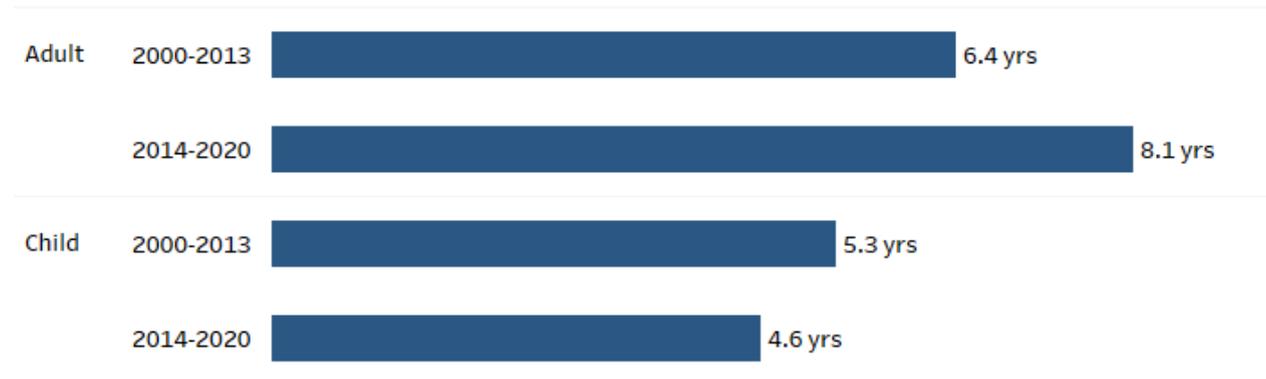
<sup>19</sup> *Sabiu v State* [2007] PGSC 24, [http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGSC/2007/24.html?stem=&synonyms=&query=title\(sabiu%20and%20state%20\)](http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGSC/2007/24.html?stem=&synonyms=&query=title(sabiu%20and%20state%20)).

<sup>20</sup> *Ibid.*, para. 11.

<sup>21</sup> *State v Awi* [2016] PGNC 338, [http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2016/338.html?stem=&synonyms=&query=title\(State%20and%20Awi%20\)](http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2016/338.html?stem=&synonyms=&query=title(State%20and%20Awi%20)).

“[t]he incident was not reported until 2 years later.”<sup>22</sup> The judge went on to support the defence’s argument that the six year old victim/ survivor had actually consented.<sup>23</sup> This is another consideration from the *Sabiu* decision that actually contradicts the spirit of Section 229F of the Criminal Code which asserts that consent is not a defense for cases involving sexual violence against children. The judge handed down a sentence of ten years and partially suspended it, resulting in a final sentence of six years and five months.

### Average Final Sentence for cases involving Sexual Violence



In a more recent case involving sexual penetration of a minor, *State v Kumangkena* [2018]<sup>24</sup>, the perpetrator was the victim/ survivor’s guardian and uncle. He repeatedly raped her, and in relation to his heinous conduct, the judge noted that “[t]he girl never protested.”<sup>25</sup> The judge granted mitigating credit for the perpetrator acting alone, not using weapons, threat or force, not causing further trouble while on bail, and for the acts not resulting in physical injury, STIs, or pregnancy which all constitute Other Contentious Factors.<sup>26</sup> Similar to *State v Awi* [2016], the judge in this case also used the argument of consent in mitigation. The perpetrator in this case had established a pattern of offending in this case, as well as a previous conviction for a very similar offence 19 years prior, and the judge still granted first time offender status. The starting sentence was six years which was reduced to four years for the aforementioned mitigating factors and then fully suspended on the condition that the perpetrator compensate his wife for the adultery committed, restrain from alcohol, and not reoffend.

<sup>22</sup> *Ibid.*, para. 13.

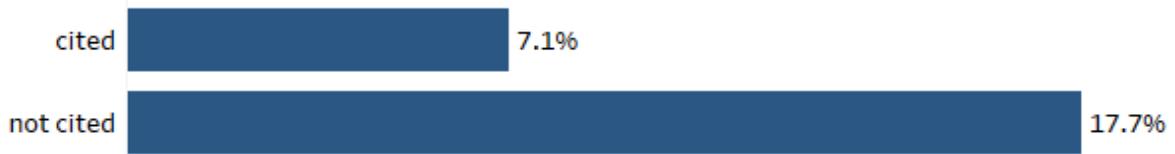
<sup>23</sup> *Ibid.*, para. 14.

<sup>24</sup> *State v Kumangkena* [2018] PGNC 336, <http://www.paclii.org/cqi-bin/sinodisp/pg/cases/PGNC/2018/336.html?stem=&synonyms=&query=Kumangkena>.

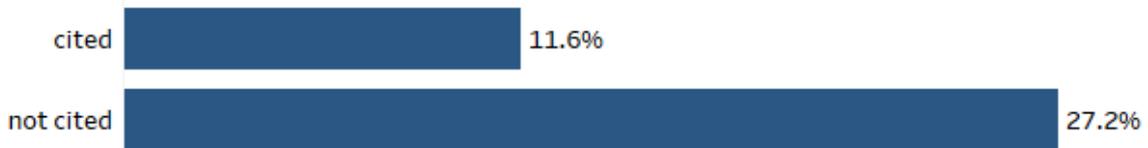
<sup>25</sup> *Ibid.*, para. 8.

<sup>26</sup> *Ibid.*, para. 18.

Medical Reports were not cited in 17% of the cases where Gender Sterotypes were used in mitigation



Medical Reports were not cited in 17% of the cases where Other Contentious Factors were used in mitigation



As an example of both Gender Stereotypes and the lack of medico-legal capacity, *State v Sefere* [2016]<sup>27</sup> demonstrates how rapes myths can result in gender discrimination in the courts. In this case of sexual penetration of a child, the perpetrator attacked the victim while she was walking home along the coast. He punched her and pushed her head under water until she nearly drowned. He then dragged her to a nearby swamp and raped her. The judge misinterpreted the medical evidence in the following quote:

“There are some inconsistencies in the victim’s evidence for instances she said this was her first time to have sex with a male person. This is contrary to the medical report tendered into evidence by consent. The medical report states that hymen was absent and this shows that she was not a virgin at the date of the offence. But such is probable particularly from a young girl giving evidence trying to protect her reputation and dignity in the community as she is ridiculed in school by other students over the incident.”<sup>28</sup>

Importantly, it is a myth that vaginal examination of the hymen can determine whether someone has previously had sexual intercourse. Alteration of the hymen’s appearance are non-specific and do not point to any medical or legal conclusions. This is an important indication of a gap in medico-legal capacity in the judiciary that has critical ramifications for access to justice for victims/ survivors of GBV.

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<sup>27</sup> *State v Sefere* [2016] PGNC 367, <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2016/367.html?stem=&synonyms=&query=Sefere>.

<sup>28</sup> *Ibid.*, para. 5.

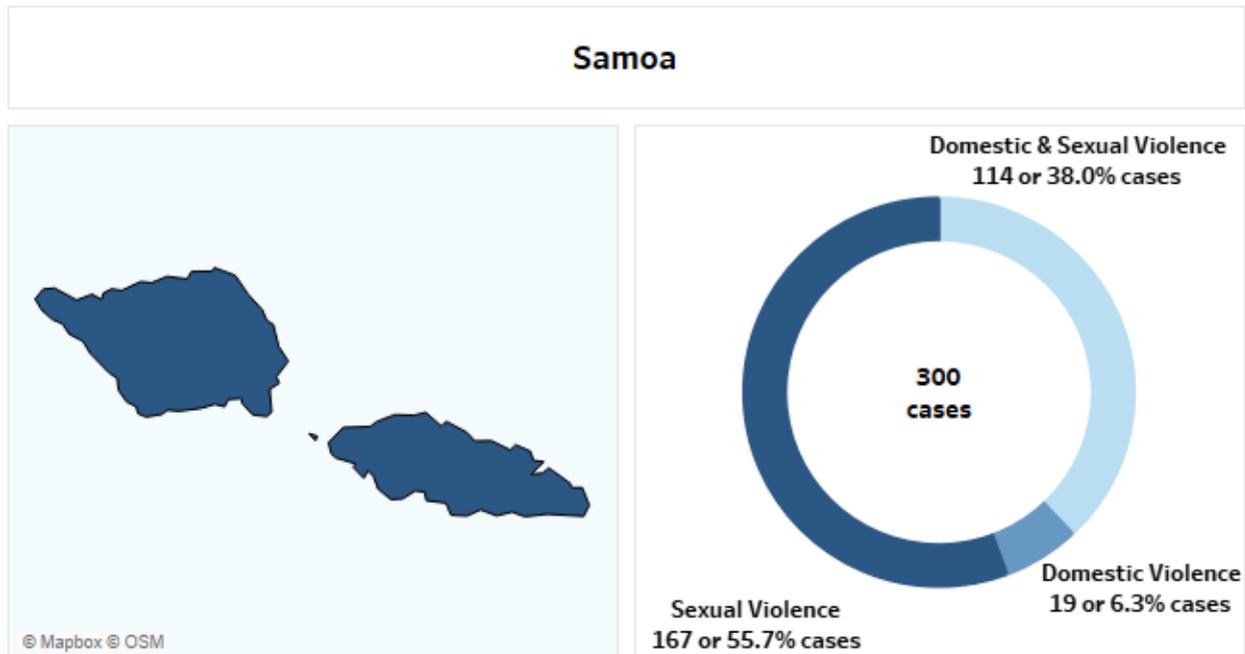
## Recommendations

There is a critical need for progress in Papua New Guinea to reduce judicial bias and improve access to justice for women and girls. Based on ICAAD's research and training, the following steps are recommended for Papua New Guinea and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - Clarify and ban Gender Stereotypes, particularly rape myths and victim blaming arguments, in mitigation
  - Ensure that the lack of aggravating factors are not accounted for as mitigating factors in sentencing decisions
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

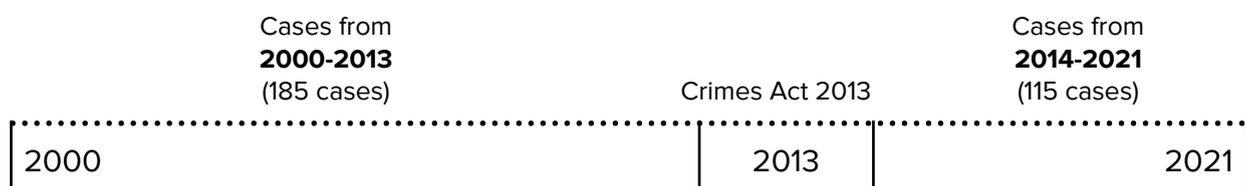
There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. In PNG, the high rate of Gender Stereotypes and Other Contentious Factors warrant a detailed analysis on the trends in specific examples in order to curate training specific to the repeated challenges raised by judicial officers. These can also be disaggregated by cases involving child victims as opposed to adult victims, having seen the impact of Other Contentious Factors on the reduction of average final sentences for Sexual Abuse of a Minor cases from 19.0 years to 2.5 years when Other Contentious Factors were applied.

## TrackGBV: Samoa



Across the two time periods of 2000-2013 and 2014-2021, Samoa saw the largest increase in contentious factors raised and applied in cases. From the 300 applicable GBV cases reviewed in Samoa from 2000-2021, contentious factors were used to justify a reduction in sentences in 59.7% of cases. Samoa also has one of the highest rates of Customary Practices as a contentious factor in GBV cases.

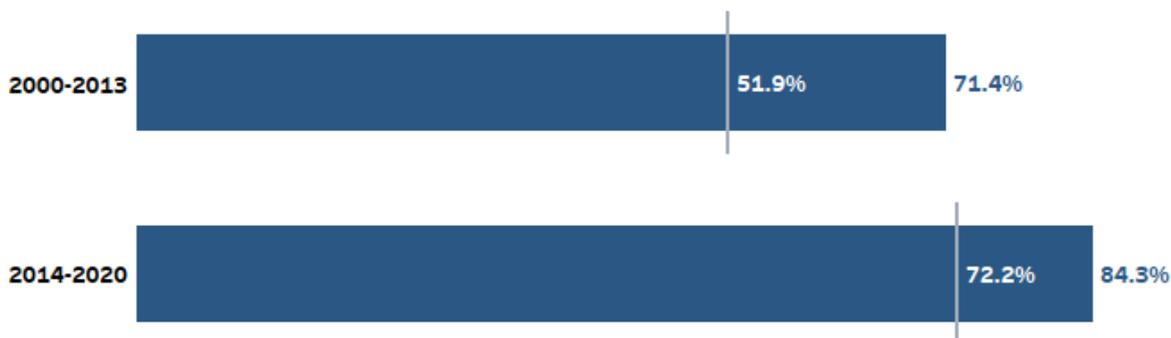
The TrackGBV methodology reveals several important patterns in the case law including the proportion of cases involving child victims/ survivors and the misapplication of first time offender status. In Samoa, 76.8% of cases involved child victims/ survivors, and 16.7% of cases featured a misapplication of first time offender status.



## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

### Contentious Factors Raised vs. How Frequently they Impact Decisions



In Samoa, the prevalence and use of contentious factors has increased across the two time periods. Between 2000 and 2013, contentious factors were raised in 71.4% of cases and used to justify sentence reductions in 51.9% of cases. Between 2014 and 2021, contentious factors were raised in 84.3% of cases and used to justify sentence reductions in 72.2% of cases, which showed the largest increase over the two time periods in the region. The most common contentious factors relied upon fell under the Customary Practices category, with judges relying on Customary Practices alone in 42.7% of impacted cases. The use of Customary Practices as a proportion of cases impacted by contentious factors increased from 41.1% to 44.6% across the two time periods, while Gender Stereotypes in any combination of contentious factors decreased from 31.58% to 24.10%.

The impact of these contentious factors on sentencing is significant. The average sentence reduction in rape cases with contentious factors is 1.6 years and 1.5 years for domestic violence cases. The high frequency of contentious factors and significant impact on sentencing severely reduces faith in the legal system and access to justice for victims/survivors.

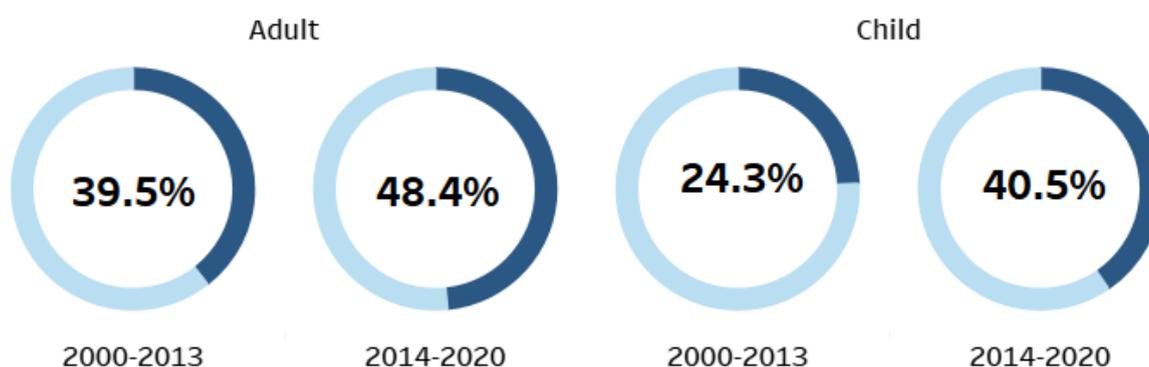
The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the lack of medical reports and the misapplication of first time offender status. The use of medical reports in sentencing decisions increased slightly over the two time periods. Medical reports were cited in 33.9% of cases between 2014 and 2021. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. The lack of reliance on medical reports in Samoa demonstrates a medico-legal gap.

### Average Final Sentence with/without Contentious Factors (CF) in Samoa

Rape	CF not raised	9.1 yrs
	CF raised	8.3 yrs
Attempted Rape	CF not raised	5.7 yrs
	CF raised	2.8 yrs
Indecent Assault	CF not raised	3.3 yrs
	CF raised	1.5 yrs
Sexual conduct with child under 12	CF not raised	4.4 yrs
	CF raised	1.0 yrs
Sexual conduct with young person under 16	CF not raised	1.9 yrs
	CF raised	1.1 yrs

Noting how many existing barriers there are for victims/ survivors seeking justice through the legal system, the frequency of the misapplication of first time offender status is notable. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction. The misapplication of first time offender status came up in almost 16.7% in Samoa, with a slight increase over the two time periods.

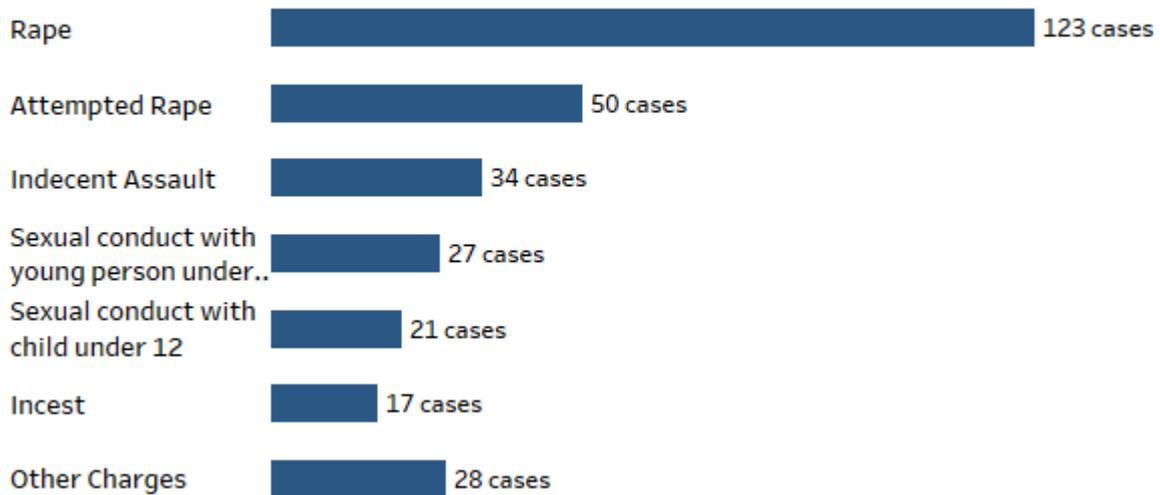
### Anonymity not maintained in Samoa



The lack of victim anonymity is also significant. Victim anonymity was not maintained for child victims in 30.3% of cases and for adult victims in 43.5% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms more broadly. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/survivors.

### Top Charges in Samoa



### Case Examples

In Samoa, customary law is a source of law per the Constitution, which explains the prevalence of Customary Practices. There are two areas of legislation specifically relevant to GBV cases. The first is the treatment of customary reconciliation, which can be promoted in the courts under the Alternative Dispute Resolution Act 2007, section 17. The second is the Village Fono Act of 1990 which requires Samoan courts to take into account punishments already imposed by village council (*fono*) in mitigation.

The way this plays out in the courts can be illustrated in *Police v Laki* [2018]<sup>29</sup> from the Supreme Court. The case involved the rape of two girls by an older male relative. For one of the victims/ survivors, the rape was repeated in their home over two months, and the other victim/ survivor was raped by the same man walking from their home on an inland road. The defendant initially pleaded not guilty and had a warrant issued for his non-appearance at early court matters.

In sentencing, the judge reduced the 14 year maximum penalty to seven years and reduced a further six months accounting for the defendant's record of service rendered to his family

<sup>29</sup> *Police v Laki* [2018] WSSC 65, [http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSSC/2018/65.html?stem=&synonyms=&query=title\(Police%20and%20Laki%20\)](http://www.paclii.org/cgi-bin/sinodisp/ws/cases/WSSC/2018/65.html?stem=&synonyms=&query=title(Police%20and%20Laki%20)).

supported by his references from his pastor and a *matai* (chief).<sup>30</sup> These factors are categorised as Other Contentious Factors, given they are irrelevant to the offending against his own family members and unjustly privilege his interests over those of the victims/survivors.

The judge went on to deduct an additional six months for his reconciliation with the family, which constitutes Customary Practices as a contentious factor. While Customary Practices are crucial to ensuring relationships in the family and community are restored where possible, they should not distract from court proceedings focused on accountability. Further, they should centre the interests of the victims/ survivors. In this case, according to the Victim Impact Report, “[b]oth girls expressed disappointment that no personal apology was made to either of them by the defendant only the family to family reconciliation.”<sup>31</sup>

The judge deducted a further one year for penalties imposed on the defendant by the *fono*, an additional example of Customary Practices.<sup>32</sup> In the 2018 National Inquiry into Family Violence in Samoa, *fono* most commonly impose fines as penalties on the perpetrator and his family and often plays an intermediary role in what incidents get reported to the police.<sup>33</sup> The final sentence in this case was three years, which is particularly egregious for rape cases even where contentious factors have been raised. Of rape cases with contentious factors raised, the average sentence was 5.6 years, compared to eight years without contentious factors.

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<sup>30</sup> *Ibid.*, para. 13.

<sup>31</sup> *Ibid.*, para. 10.

<sup>32</sup> *Ibid.*, para. 15.

<sup>33</sup> Samoa Office of the Ombudsman National Human Rights Institution, *National Public Inquiry into Family Violence in Samoa*, 2018, Inquiry Finding 34, p. 29: [https://www.ombudsman.gov.ws/wp-content/uploads/2022/09/SHRR-2018-National-Public-Inquiry-into-Family-Violence\\_-English.pdf](https://www.ombudsman.gov.ws/wp-content/uploads/2022/09/SHRR-2018-National-Public-Inquiry-into-Family-Violence_-English.pdf).

## Recommendations

There is a critical need for progress in Samoa to reduce judicial bias and improve access to justice for women and girls given the sharp increase in contentious factors over the two time periods. Based on ICAAD's research and training, the following steps are recommended for Samoa and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has offered one virtual Train-the-Trainers program with a small cohort in 2021 which should be offered to more stakeholders. The training goes in-depth on the TrackGBV data that instills a deep understanding of gender justice for stakeholders.
  - This training should involve critical conversations about Customary Practices in GBV cases with appropriate stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - Ban the use of Other Contentious Factors, including character references, in mitigation
  - Clarify and ban the use of contentious factors in suspending sentencing
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. Samoa has experimented with Specialist Courts including the Family Violence Court and Alcohol and Drugs Court, which require additional research to understand outcomes.

## TrackGBV: Solomon Islands



The Solomon Islands has a high rate of contentious factors raised in sentencing decisions, with contentious factors being used to justify a reduction in sentences in 58.5% of the 176 applicable cases. Across the two time periods of 2000-2014 and 2015-2021, marking the Family Protection Act in 2014, the Solomon Islands saw a notable decrease in contentious factors raised and applied in cases. Between 2015 and 2021, contentious factors impacted sentencing outcomes in 45.1% of cases, representing a 22.5% decrease. While progress has been made, contentious factors impacting sentencing constituting gender discrimination affected nearly half of GBV cases in the Solomon Islands.

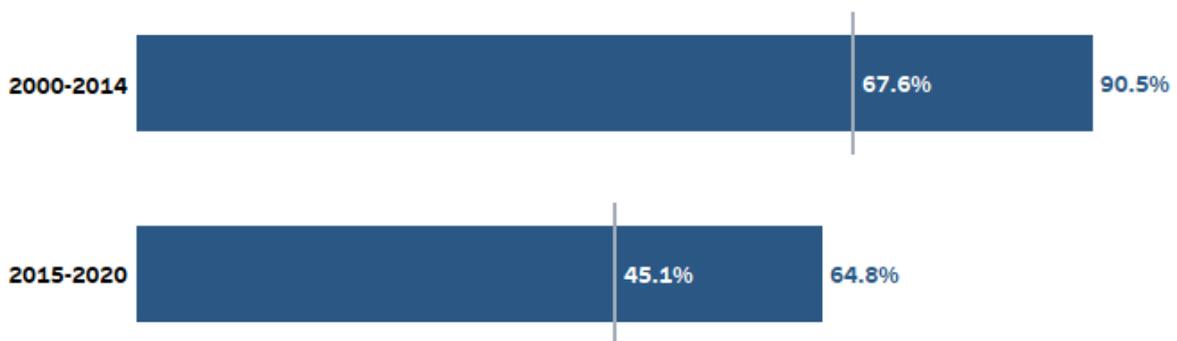


The TrackGBV methodology reveals several important patterns in the case law including the misapplication of first time offender status, the use of the Sole Breadwinner Argument (a specific Gender Stereotype), and the protection of victim/ survivor anonymity. The Solomon Islands has the highest rate of misapplication of first time offender status in the region, at 25.9% of cases, and a high rate of the application of the sole breadwinner argument, at 12.5% of cases. The TrackGBV data also reveals a gap in the safety of victims/ survivors when accessing the courts, with only 34.1% of cases protecting victim/ survivor anonymity.

## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system’s capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

### Contentious Factors Raised vs. How Frequently they Impact Decisions



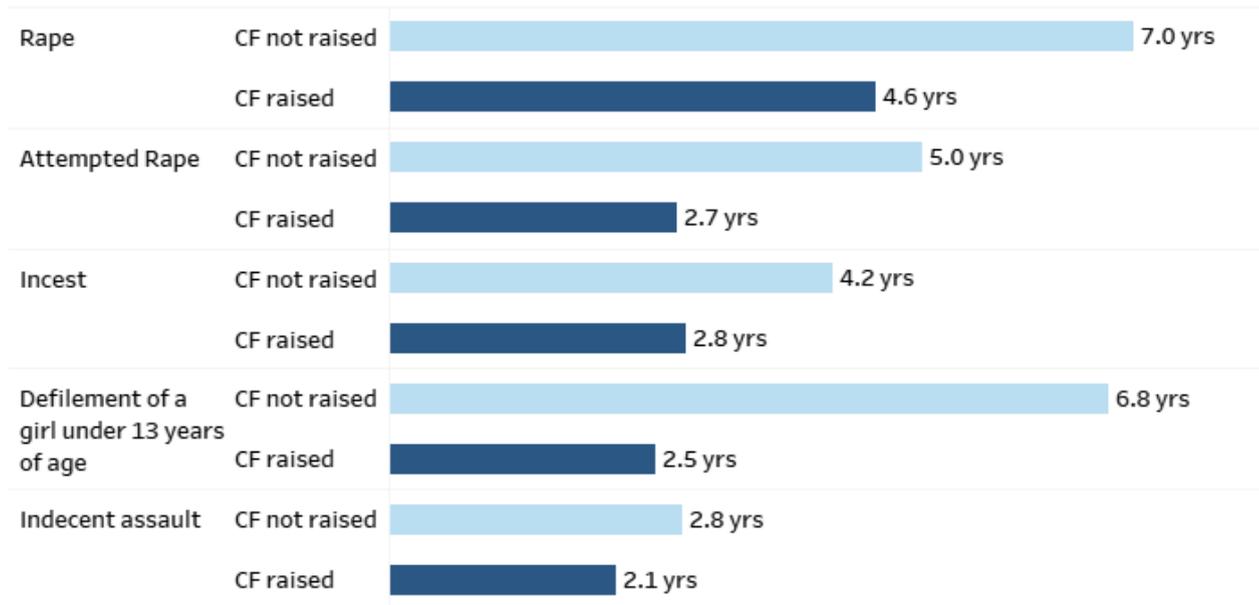
In the Solomon Islands, the prevalence and use of contentious factors decreased across the two time periods. Between 2000 and 2014, contentious factors were raised in nearly every case at a rate of 90.5% and used to justify sentence reductions in 67.6% of cases. Between 2015 and 2021, contentious factors were raised in 64.8% of cases and used to justify sentence reductions in 45.1% of cases, which showed a significant decrease over the two time periods, although the use of contentious factors still prevented just outcomes in nearly half of cases.

The most common contentious factors relied upon fell under the Other Contentious Factors category, with judges relying on Other Contentious Factors in some combination of contentious factors in 70.87% of impacted cases. Secondly, Gender Stereotypes featured in some combination with contentious factors in 45.51% of impacted cases with minimal change in the types of contentious factors over the two time periods.

While the use of contentious factors has decreased over the two time periods generally, the quantitative impact of contentious factors on sentencing outcomes increased. The average sentence reduction in rape cases with contentious factors was two years between 2000 and

2014 and three years between 2015 and 2021. The high frequency of contentious factors and significant impact on sentencing severely reduces faith in the legal system and access to justice for victims/ survivors.

### Average Final Sentence with/without Contentious Factors (CF) in Solomon Islands



The most common Gender Stereotype is the Sole Breadwinner Argument, the notion that the perpetrator’s sentence warrants reduction on the ground of his family’s economic dependence on him as the sole or main source of income for the family. The Solomon Islands has one of the highest rates of the Sole Breadwinner Argument, which features in 12.5% of cases, often in combination with Other Contentious Factors that privilege the interests of the perpetrator over those of the victim/ survivor. The wellbeing of perpetrators’ families is an important policy concern; however, a systems approach to GBV allows us to distinguish the role of the courts from the role of other government institutions which are better positioned to offer social services and welfare to both victims/ survivors and offenders.

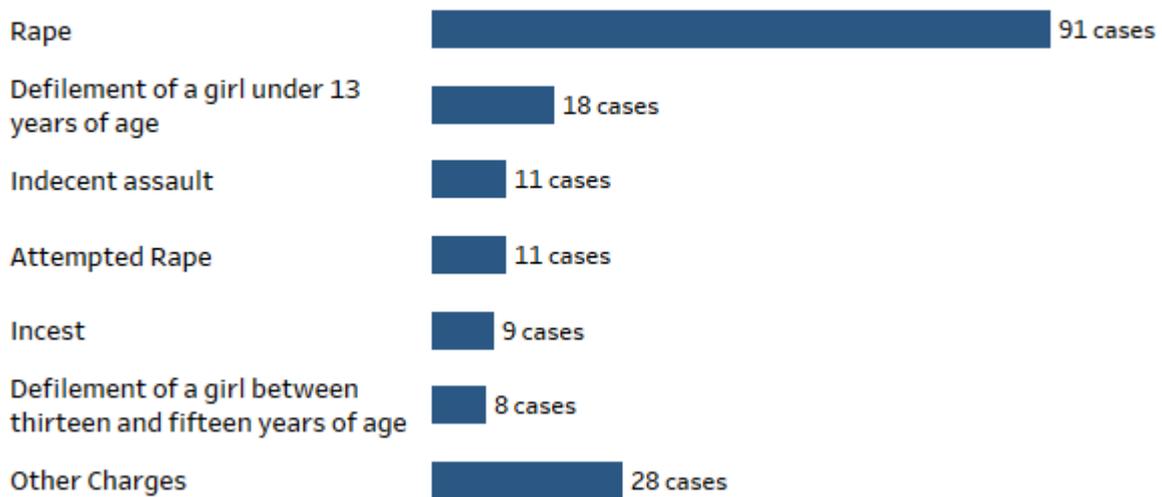
The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the misapplication of first time offender status, the lack of victim/ survivor anonymity, and the lack of medical reports cited in sentencing. Noting how many existing barriers there are for victims/ survivors seeking justice through the legal system, the frequency of the misapplication of first time offender status is notable. The Solomon Islands has the highest rate of misapplication of first time offender status in the region, at 25.9% of cases. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction.

The lack of victim anonymity persists in the Solomon Islands courts. Between 2015 and 2021, victim anonymity was not maintained for child victims in 72.5% of cases and for adult victims in

77.3% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

The lack of medical reports in sentencing decisions is also notable, demonstrating a medico-legal gap in the judiciary in the Solomon Islands. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. Across the two time periods, there was a decrease in the percentage of cases featuring medical reports from 30.5% to 25.4%, representing a persistent access to justice gap.

### Top Charges in Solomon Islands



While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms more broadly. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/survivors.

## Case Examples

Recent case law illustrates the application of the Solebreadwinner Argument and the misapplication of first time offender status, as well as trends in reducing charges to lesser offenses even when they involve sexual violence. In *Regina v Zonga* [2019], the accused threatened, beat, and raped his 17 year old daughter over the course of five months and was charged with one count of incest and one count of common assault.<sup>34</sup> This Magistrate's Court decision failed to account for the relevant provisions of the Family Protection Act 2014.

The judge found a starting sentence of six years concurrent with a three year starting sentence for common assault. In mitigation, the judge granted a 30% discount for the accused's guilty plea and remorse and additional allowance for his first time offender status and Sole Breadwinner status.<sup>35</sup> This is a misapplication of first time offender status because even though he had no prior convictions, the case established a pattern of offending over several months. The accused, the victim's father, is also given credit for being married with five children, which shows to the judge that he has "huge family responsibilities on his hand [sic]."<sup>36</sup> The final sentence was four years imprisonment.

Recent cases also depict the impact of the medico-legal gap in sexual violence cases in particular. In *R v Sasapio* [2017], the accused was acquitted of the initial rape charge and was convicted on one count of defilement of his niece.<sup>37</sup> The judge relied on precedents from 1985 and 1986 pointing generally to the case-by-case nature of sentencing sexual violence cases.<sup>38</sup> In sentencing, the main data point relied upon was medical evidence from the trial indicating that the victim had not started her period and that she lacked a hymen. The judge interpreted that "the accused was unlikely to be the first person to have sexual intercourse with the complainant."<sup>39</sup> Without clearly mapping the weight given to the aggravating and mitigating factors mentioned, the judge imposed a sentence of two years.

Importantly, it is a myth that vaginal examination of the hymen can determine whether sexual assault (specifically, non consensual penetration) has occurred. Changes to the appearance of the hymen are not specific and cannot indicate any medical or legal conclusions. This case demonstrates that even where medical evidence is cited in sentencing, it can be misinterpreted across disciplines, leading to gender discrimination against victims/ survivors.

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<sup>34</sup> *R v Zonga* [2019] SBMC 12, <http://www.paclii.org/cgi-bin/sinodisp/sb/cases/SBMC/2019/12.html?stem=&synonyms=&query=zonga>.

<sup>35</sup> *Ibid.*, para. 27.

<sup>36</sup> *Ibid.*, para. 27.

<sup>37</sup> *R v Sasapio* [2017] SBHC 153, <http://www.paclii.org/cgi-bin/sinodisp/sb/cases/SBHC/2017/153.html?stem=&synonyms=&query=sasapio>

<sup>38</sup> *Mulete v DPP* [1985]; *Poini v DPP* [1986] SILR 145.

<sup>39</sup> *R v Sasapio* [2017] SBHC 153, para. 4.

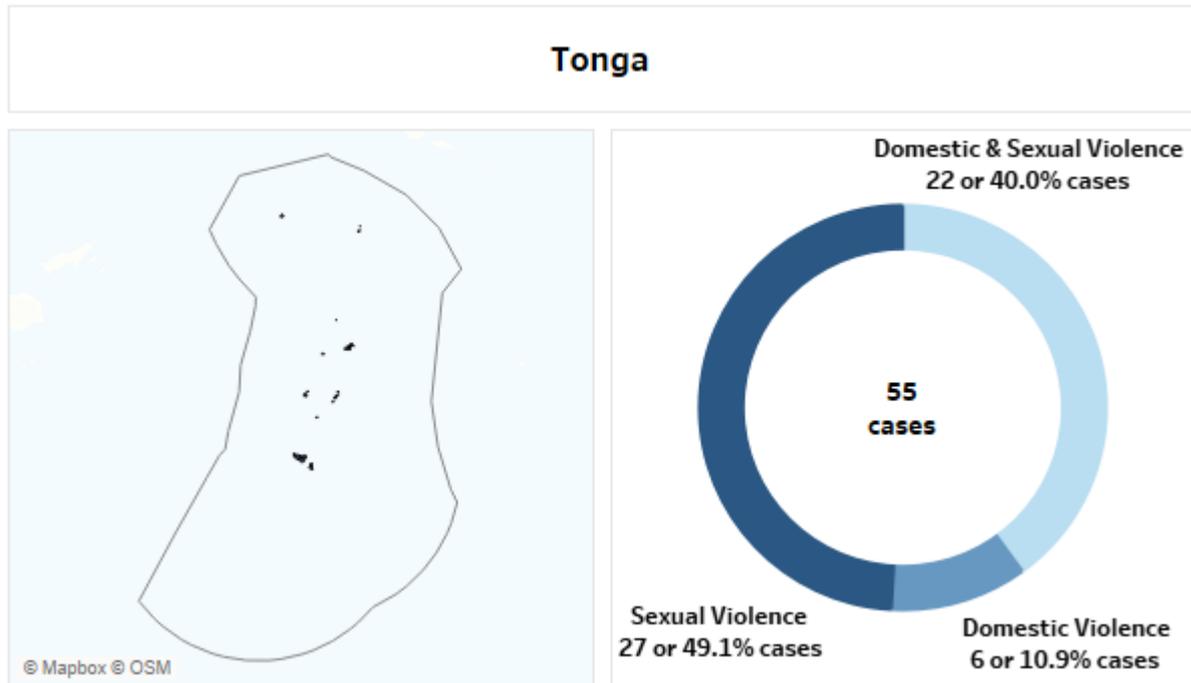
## Recommendations

Despite progress in the Solomon Islands on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for the Solomon Islands and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Conduct a sentencing review.** Given the comparatively low sentences and conversations with the judiciary, the judiciary would benefit from a review of final sentence lengths for GBV related offences to potentially inform new sentencing guidelines.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - Clarify and banning Gender Stereotypes, including the Sole Breadwinner Argument, in mitigation
  - Ensure that the lack of aggravating factors are not accounted for as mitigating factors in sentencing decisions
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

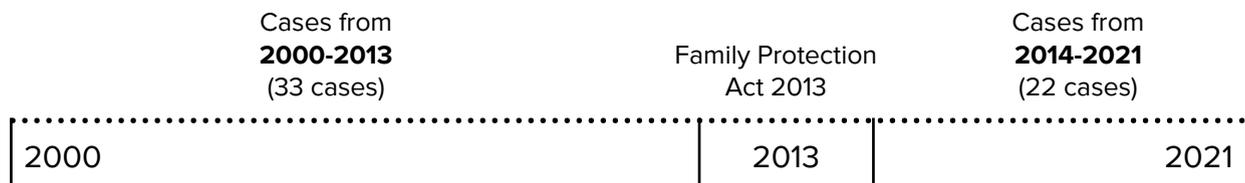
There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. In the Solomon Islands, the cases that have made it to the sentencing level overrepresent non-partner violence in relation to the most recent prevalence survey data. Non-partner violence accounted for 53.0% of cases, while the latest prevalence survey data has a rate of only 18.2%, compared to 66.9% of women over the age of 15 who have experienced physical and/ or sexual intimate partner violence. This may indicate a general underreporting of domestic violence cases in the courts, which is an area for further exploration with key stakeholders in the Solomon Islands.

## TrackGBV: Tonga



Tonga has the third highest rate of contentious factors raised in sentencing decisions in the TrackGBV data at 81.8% of cases, falling close behind Papua New Guinea (PNG) and Vanuatu. From the 55 applicable GBV cases reviewed in Tonga from 2000-2021, contentious factors were used to justify a reduction in sentences in 43.6% of cases.

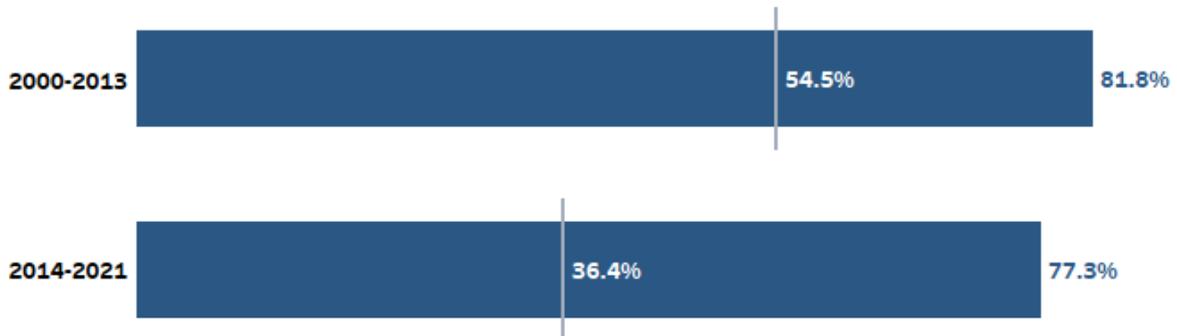
The TrackGBV methodology reveals several important patterns in the case law, including the frequency of partially and fully suspended sentences for perpetrators of GBV as well as the misapplication of first time offender status. Tonga stands out regionally with respect to partially and fully suspended sentences in GBV cases, which were issued in 63.6% of cases, and perpetrators who were unjustifiably granted first time offender status, in 24.1% of cases.



## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

### Contentious Factors Raised vs. How Frequently they Impact Decisions



In Tonga, the prevalence and use of contentious factors has decreased across the two time periods. While Tonga does feature a smaller data set with only 55 cases, contentious factors were raised in 84.8% of cases between 2000 and 2013 compared with 77.3% of cases between 2014 and 2021. The use of contentious factors to justify sentence reductions decreased from 48.5% to 36.4% across the same two time periods. The most common contentious factors relied upon were Other Contentious Factors, used alone in 22.2% of cases, and Gender Stereotypes, used alone in 18.5% of cases. The application of Customary Practices in any combination with other contentious factors increased significantly over the two time periods, from 31.58% to 50.0%.

The impact of these contentious factors on sentencing is significant. The average sentence reduction in rape cases with contentious factors increased from half a year to a year across the two time periods. In domestic violence cases, custodial sentences were not given in half of cases. The high frequency of contentious factors and significant impact on sentencing severely reduces faith in the legal system and access to justice for victims/ survivors.

In the time period from 2014 to 2021, 72.7% of cases featured a partially or fully suspended sentence. In addition to contentious factors applied in mitigation, suspended sentences result in large sentence reductions and sometimes no custodial sentence at all. Other Contentious Factors is the primary category of contentious factors involved when sentences were suspended, being used in some combination of contentious factors in 71.43% of cases between 2014 and 2021.

The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the misapplication of first time offender status and the lack of medical

reports cited in sentencing. Noting how many existing barriers there are for victims/ survivors seeking justice through the legal system, the frequency of the misapplication of first time offender status is notable. Tonga has one of the highest rates of misapplication of first time offender status in the region, at 21.4% of cases. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction.

The lack of medical reports in sentencing decisions is also notable, demonstrating a medico-legal gap in the judiciary in Tonga. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. While there was an increase in the percentage of cases relying on medical reports from 15.2% to 31.8%, this percentage is still low and represents a major access to justice gap.

The lack of victim anonymity persists in Tongan courts. Victim anonymity was not maintained for child victims in 47.1% of cases and for adult victims in 62.5% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms more broadly. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/ survivors.

## Case Examples

There are three recent cases that help illustrate some of these trends. In *Rex v Mo'unga* [2017], the perpetrator was charged with 14 counts of sexual violence related offenses including rape, incest, and serious indecent assault involving six victims over the course of six years.<sup>40</sup> In sentencing, the judge found a starting point of 15 years as a concurrent sentence and deducted four years in mitigation to account for the guilty plea, lack of previous convictions, and remorsefulness noting that in the witness box, the perpetrator quoted scripture and “said he had found god.”<sup>41</sup> Credit for quoting scripture and displaying religiosity constitutes Other Contentious Factors. The judge then partially suspended the final sentence relying on the same mitigating factors by two years, so long as he did not commit any offenses, reside with women or girls, and undergo an appropriate course and counselling for sexual abuse.

The case also includes details of personal circumstances for the perpetrator which were not explicitly taken into account in sentencing but feature commonly in Tongan case law. For example, we know that the perpetrator “left school at a young age and helped his family with fishing and on a plantation.”<sup>42</sup> In some cases, these personal circumstances are explicitly applied as mitigation, representing Other Contentious Factors.

**Average Final Sentence for cases involving Sexual Violence**



In *Rex v Mo'unga* [2017], we also have a clear example of the misapplication of first time offender status. The case details the repeated offending with six different victims over six years, including the challenges faced by victims/survivors in attempting to report before charges were finally brought in 2016. The judge gave undue credit to the perpetrator’s previous character given that limited access to justice is the reason he did not have prior convictions for the repeated offending over six years.

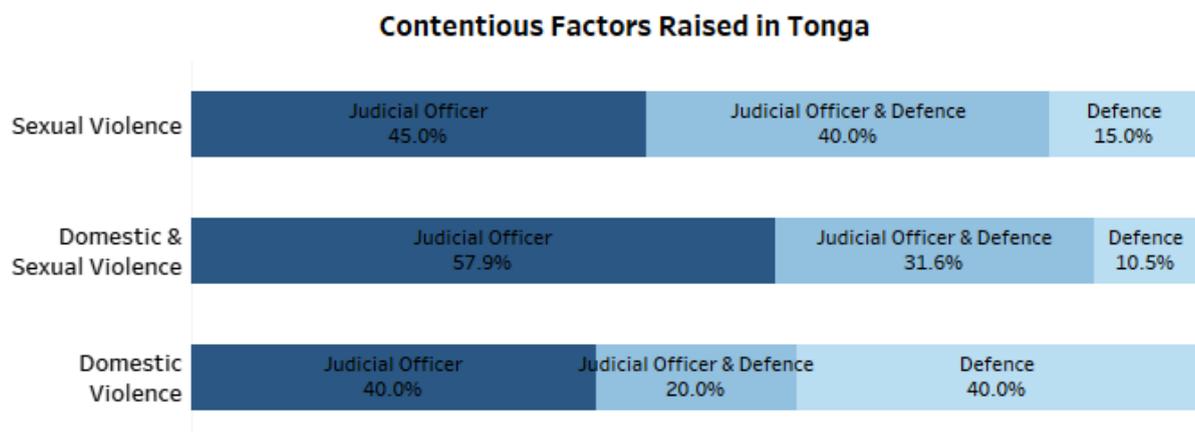
<sup>40</sup> *Rex v Mo'unga* [2017] TOSC 13, <http://www.paclii.org/cqi-bin/sinodisp/to/cases/TOSC/2017/13.html?stem=&synonyms=&query=mo%20unga>.

<sup>41</sup> *Ibid.*, para. 12.

<sup>42</sup> *Ibid.*, para. 2.

*R v Luka* [2021] illustrates the impact of Other Contentious Factors in a domestic violence case.<sup>43</sup> The defendant pled guilty to causing serious bodily harm against his de facto partner. The de facto partner found the defendant having an affair at their neighbour’s house and yelled at the defendant and ran out of the room. The defendant “chased after her, grabbed her and hit and punched her repeatedly.” The defendant only stopped after “his mother tackled him to the ground.”<sup>44</sup>

The judge found a starting point of two years and six months. In mitigation, the judge explored the provocation argument made by the defendant, that the “rude comments at him about his mother and sisters” were “too hurtful and that he felt intense anger and could not control himself.”<sup>45</sup> The judge rejected the blatant provocation argument given that the victim’s language was a direct response to the situation the defendant initiated by having sex with another woman.



Still, the judge implied that the defendant’s anger and alcohol abuse played a significant role in the offence representing a misunderstanding of GBV and its root causes. The judge reduced the starting sentence to 20 months for the defendant’s lack of previous convictions, early guilty plea, and remorse – despite the fact that he claimed he was provoked by the victim. The judge then suspended the final eight months of the sentence requiring that the defendant complete anger management and alcohol awareness courses.

In another case, *R v Tu’ifua* [2018], the judge critically examined Customary Practices and applied a number of Other Contentious Factors.<sup>46</sup> In the case, the offender raped his friend’s

<sup>43</sup> *R v Luka* [2021] TOSC 46, [http://www.paclii.org/cgi-bin/sinodisp/to/cases/TOSC/2021/46.html?stem=&synonyms=&query=title\(R%20and%20Luka%20\)](http://www.paclii.org/cgi-bin/sinodisp/to/cases/TOSC/2021/46.html?stem=&synonyms=&query=title(R%20and%20Luka%20)).

<sup>44</sup> *Ibid.*, para. 2.

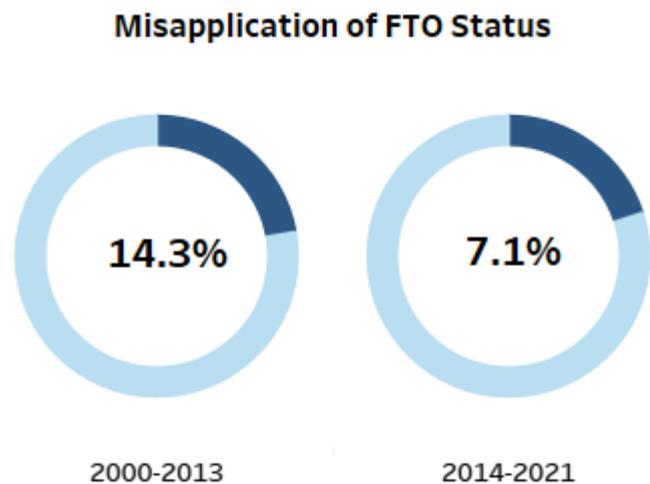
<sup>45</sup> *Ibid.*, para. 21.

<sup>46</sup> *Rex v Tu’ifua* [2018] TOSC 73, <http://www.paclii.org/cgi-bin/sinodisp/to/cases/TOSC/2018/73.html?stem=&synonyms=&query=tu-ifua>.

girlfriend while she was unconscious from intoxication. The judge found a starting point of five years and six months and allowed a discount of one year for the offenders' lack of previous convictions for any serious or similar offending, previous good character and support to his family, and the community references which demonstrated that he was a useful member of the community.<sup>47</sup> This constitutes a misapplication of first time offender status, given that the offender did have a prior conviction involving alcohol abuse and presented alcohol "as a cause of the offending," signifying a lack of previous good character or willingness to reform.<sup>48</sup> Additionally, undue credit was given for reference letters from the Town Officer and a retired pastor from the offender's Church.

The offender claimed to be apologetic, yet also rejected his role in the offending and that it happened at all. The judge still found good prospects for his rehabilitation and partially suspended the final 18 months of his sentence, requiring courses on alcohol and drug abuse and sexual abuse against women.

While there has been progress in some ways around judging applications of Contentious Factors, there is still significant room for improvement underpinned by a need for judicial officers to understand the root causes of GBV.



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<sup>47</sup> *Ibid.*, para. 10.

<sup>48</sup> *Ibid.*, para 5, 8, and 9.

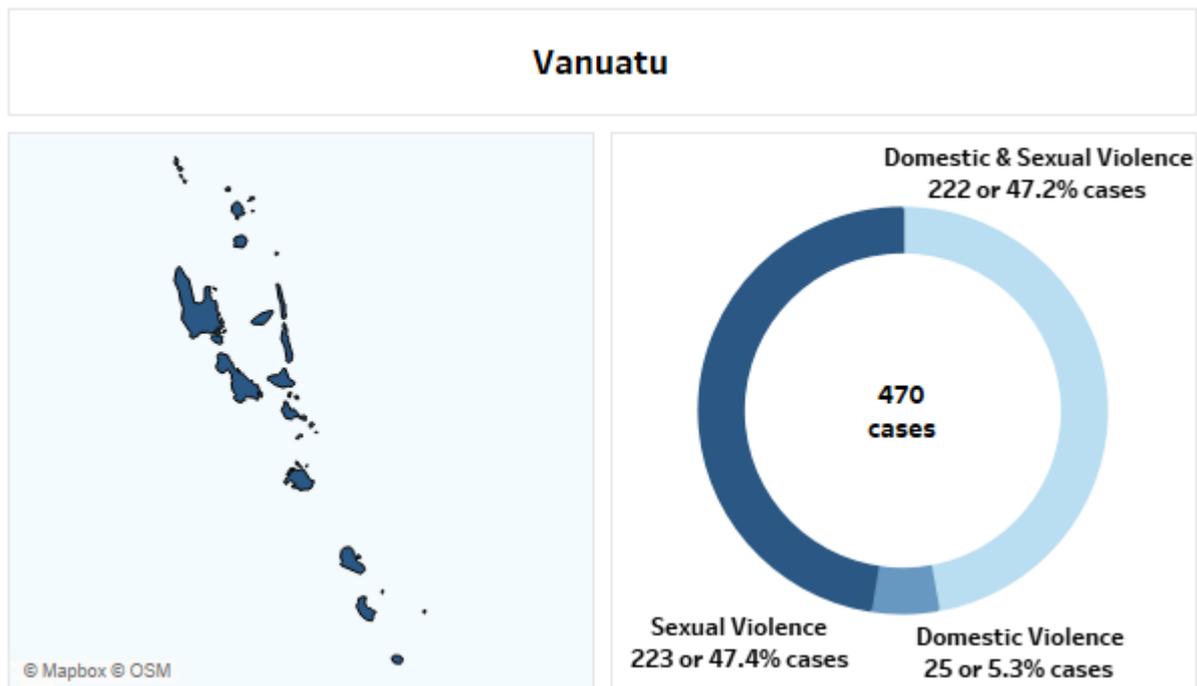
## Recommendations

Despite progress in Tonga on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for Tonga and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - Ban the use of Other Contentious Factors, including character references, in mitigation
  - Clarify and ban the use of contentious factors in suspending sentencing
  - Clarify the meaning of first time offender to exclude those who have an established pattern of offending
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. Given the high rate of suspended and non-custodial sentences in Tonga, rates of reoffending would be particularly valuable to assess the impact of probation periods and rehabilitation programs.

## TrackGBV: Vanuatu



Vanuatu has the highest rate of contentious factors raised and applied in sentencing decisions in the TrackGBV data, and across the two time periods of 2000-2008 and 2009-2021, there has been a slight increase. From the 470 applicable GBV cases reviewed in Vanuatu from 2009-2021, contentious factors were used to justify a reduction in sentences in 72.2% of cases, nearly three-fourths of cases that reach sentencing.

The TrackGBV methodology reveals several important patterns in the case law, including the frequency of partially and fully suspended sentences and non-custodial sentences for perpetrators of GBV. Vanuatu stands out regionally with respect to non-custodial sentences, which were handed down in 23.2% of cases. Partially and fully suspended sentences in GBV cases which were issued in 21.9% of cases.



<sup>49</sup> Noting the large proportion of cases in the 2009-2021 time period in comparison to that of the 2000-2008 time period, further analysis with a more granular breakdown could provide additional insights for stakeholders. This will be pursued in the next phase alongside stakeholder partners.

## Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

### Contentious Factors Raised vs. How Frequently they Impact Decisions



In Vanuatu, the prevalence and use of contentious factors has increased across the two time periods. Between 2000 and 2008, contentious factors were raised in 82.2% of cases and used to justify sentence reductions in 68.1% of cases. Between 2009 and 2021, contentious factors were raised in 86.6% of cases and used to justify sentence reductions in 72.2% of cases, which shows a slight increase over the two time periods.

The most common contentious factors relied upon fell under the Customary Practices category, with judges relying on Customary Practices alone in 45.5% of impacted cases, and in any combination with other categories of contentious factors in 81.44% of impacted cases. The use of Customary Practices as a proportion of cases impacted has largely remained consistent over the two time periods, and there was an increase in the use of Other Contentious Factors in any combination from 41.30% to 48.35% across the two time periods.

The impact of these contentious factors on sentencing is significant. The average sentence reduction in rape cases due to contentious factors is 1.3 years and 0.9 years for domestic violence cases. The high frequency of contentious factors and significant impact on sentencing severely reduces faith in the legal system and access to justice for victims/survivors.

In the time period from 2009 to 2021, 47.8% of domestic violence cases and 30.1% of sexual violence cases were given non-custodial sentences. Of cases featuring fully suspended sentences in this time period, 80.8% involved Customary Practices either alone or in combination with other contentious factors. The high rates of Customary Practices and the significant impacts on sentencing can be attributed to the role of customary law in Vanuatu.

In Vanuatu, the Constitution recognizes customary law as a source of law but does not explicitly indicate what matters or what persons it applies to. The customary legal system, (*kastom*), is commonly practised in GBV cases through some form of reconciliation which is explicitly promoted in the Penal Code Amendment Act No. 25 of 2006 and Family Protection Act of 2008. These provisions extend to permitting judges to take account of customary compensation in sentencing as well.

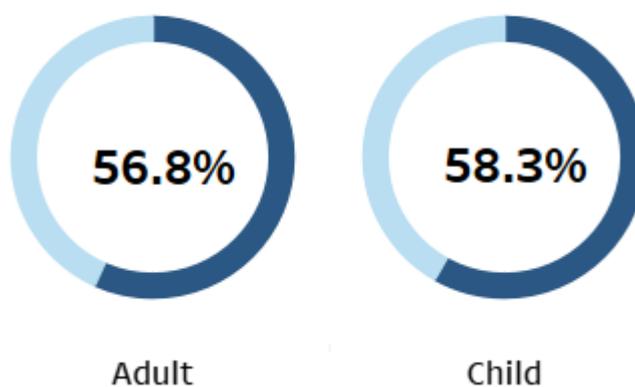
### Average Final Sentence with/without Contentious Factors (CF) in Vanuatu

Rape	CF not raised	6.5 yrs
	CF raised	4.6 yrs
Unlawful sexual intercourse with girls under 13 years	CF not raised	4.8 yrs
	CF raised	2.7 yrs
Indecent assault on child	CF not raised	1.9 yrs
	CF raised	1.6 yrs
Indecent Assault	CF not raised	2.2 yrs
	CF raised	1.1 yrs
Unlawful sexual intercourse with girls between 13 and 15 years	CF not raised	0.9 yrs
	CF raised	0.9 yrs

The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the lack of medical reports and the misapplication of first time offender status. The use of medical reports in sentencing decisions has decreased over the two time periods from 20.7% of cases citing medical reports between 2000 and 2008 and 16.7% between 2009 and 2021. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. The lack of medical reports in Vanuatu demonstrates a medico-legal gap in the judiciary.

Noting how many existing barriers there are for victims/ survivors seeking justice through the legal

### Anonymity not maintained in Vanuatu



system, the frequency of the misapplication of first time offender status is notable. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction. The misapplication of first time offender status came up in 16.3% of cases between 2009 and 2021, up from 12.2% between 2000 and 2008 in Vanuatu.

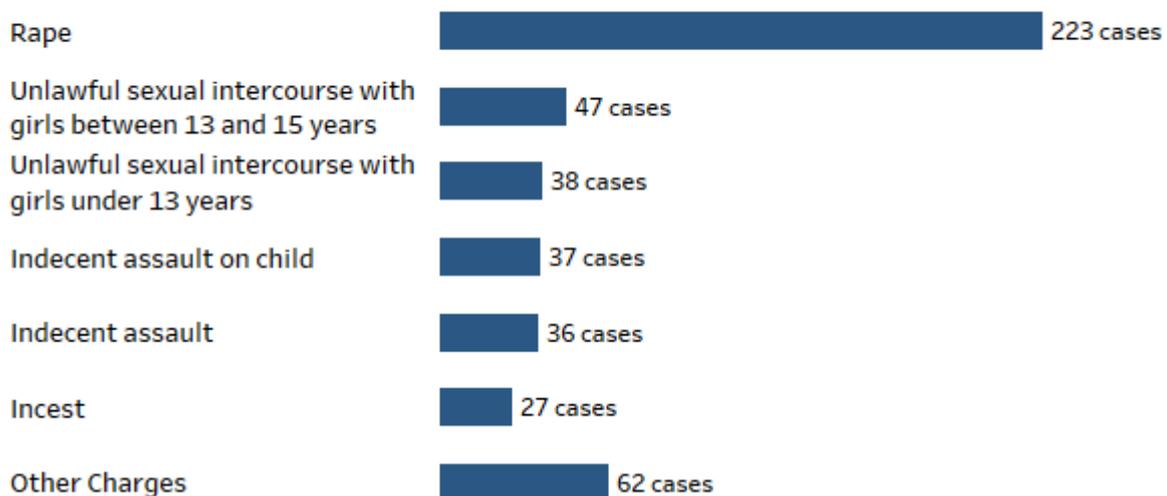
The lack of victim anonymity is also notable. Victim anonymity was not maintained for child victims in 58.3% of cases and for adult victims in 56.8% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms more broadly. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/survivors.

## Case Examples

*Public Prosecutor v Tahin* [2019] involved the sexual assault of a foreign visitor and illustrates the use of Customary Practices and Other Contentious Factors.<sup>50</sup> The judge adopted a starting sentence of three years which he reduced by one year accounting for the “traditional fine imposed and paid by the defendant a rural subsistence farmer” and an additional reduction of eight months for the defendant’s early guilty plea.<sup>51</sup>

### Top Charges in Vanuatu



<sup>50</sup> *Public Prosecutor v Tahin* [2019] VUSC 72, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2019/72.html?stem=&synonyms=&query=tahin>.

<sup>51</sup> *Ibid.*, para. 9.

The judge then turned to the question of whether or not to suspend the sentence and described the offending as “one-off” and “opportunistic” with no “attempt by the defendant to force the victim” despite the facts laid out that the defendant entered the victim/ survivor’s home and she repeatedly rejected his advances.<sup>52</sup> There is language from the judge that appears to minimize the impacts of sexual assault on victims/ survivors. For example, “[t]here is no suggestion in this case, of any injury being caused to the victim a grown woman of 23 years of age, by the defendant’s indecent touching or of the defendant forcing his intentions when the victim rejected his advances” (emphasis original).<sup>53</sup> Leaning on the traditional fine of VT25,000 already paid by the defendant, the judge decided to fully suspend the sentence.

In a similar case later that year, *Public Prosecutor v Tabi* [2019], the offender was charged with one count of incest for raping his 17 year old granddaughter.<sup>54</sup> The judge found a starting sentence of seven years considering aggravating factors and added up mitigating factors including the offender’s old age, customary reconciliation and fine paid, and contributions to the community, resulting in a total reduction of two years. These constitute Customary Practices and Other Contentious Factors. The judge further reduced the sentence to three years and four months accounting for the offender’s guilty plea. The judge then fully suspended the sentence for the offender’s old age and customary fines paid, described as “exceptional circumstances.”<sup>55</sup>

Curiously, the judge relied on the precedent in *PP v Bae* [2003] to justify the fully suspended sentence, in which the judge stated that it is “almost impossible to imagine circumstances in which that [imprisonment] will not be the necessary response.”<sup>56</sup> Similar to the *Tabi* case, the judges have failed to identify the clear patterns in offending and high rates of sexual violence in these cases which are far from exceptional even when considering offenders’ circumstances. Hardly exceptional, between 2009 and 2021, there were 54 sentencing decisions involving sexual violence that resulted in partially or fully suspended sentences.

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<sup>52</sup> *Ibid.*, para. 10.

<sup>53</sup> *Ibid.*, para. 6.

<sup>54</sup> *Public Prosecutor v Tabi* [2019] VUSC 183, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2019/183.html?stem=&synonyms=&query=Tabi>.

<sup>55</sup> *Ibid.*, para. 11.

<sup>56</sup> *Public Prosecutor v Bae* [2003] VUCA 14, <http://www.paclii.org/vu/cases/VUCA/2003/14.html>.

## Recommendations

There is a critical need for progress in Vanuatu to reduce judicial bias and improve access to justice for women and girls, given the sharp increase in contentious factors over the two time periods. Based on ICAAD's research and training, the following steps are recommended for Vanuatu and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instills a deep understanding of gender justice for stakeholders.
  - This training should involve critical conversations about Customary Practices in GBV cases with appropriate stakeholders.
  - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Conduct a sentencing review.** Given the comparatively low sentences, the judiciary would benefit from a review of final sentence lengths for GBV related offences to potentially inform new sentencing guidelines.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
  - Clarify and ban Gender Stereotypes, particularly rape myths and victim blaming arguments, in mitigation
  - Ensure that the lack of aggravating factors are not accounted for as mitigating factors in sentencing decisions
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. Customary Practices play a large role in sentencing outcomes in Vanuatu, but there is minimal research focused on the impact of victims/ survivors and their satisfaction with customary fines and reconciliations. This research, as well as reoffending rates, would provide useful information for discussions with key stakeholders.

## Next Steps

This analysis offers a deeper dive into some of the trends over time and examples from what is available on the [TrackGBV Dashboard](#). The regional analysis allows for comparison across jurisdictions and some trends over time, and the country reports look at each of the seven jurisdictions. However, stakeholders may have additional questions to support their work towards improving access to justice for women and girls.

For more information, navigating the [TrackGBV Dashboard](#) and its many features may help you to uncover the insights you are looking for. Stakeholders can highlight specific data and download PDF reports on the Dashboard. The ICAAD team is also available to collaborate in disaggregating the raw data for additional insights and to work with stakeholders to make use of this data within judiciaries and advocacy efforts.

Additionally, ICAAD is prepared and experienced in helping jurisdictions approach some of the recommendations outlined in this report including training and developing judicial directives. ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.

To collaborate, please contact Erin Thomas ([erin@icaad.ngo](mailto:erin@icaad.ngo)).



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