

A close-up photograph of a hand painting a face on a textured, reddish-brown surface. The hand is holding a paintbrush and applying black paint to the eyes. The background is dark and textured.

Next Steps Towards Reform:

Assessing good practice
and gaps in Commonwealth
sexual offences legislation

The Pacific

Acknowledgements

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Design and editing: Elle Greet and Leisha Lister.

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About the Equality & Justice Alliance

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression.

The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, Sisters For Change and The Royal Commonwealth Society.

The Alliance was formed following the Commonwealth Heads of Government Meeting in London in April 2018 during which the then UK Prime Minister Theresa May announced that as Chair-in-Office of the Commonwealth the UK would support Commonwealth governments that want to reform their laws that discriminate against women and girls and lesbian, gay, bisexual and transgender (LGBT) people, many of which are a colonial legacy.

The Equality & Justice Alliance was formed to provide this support during the period April 2018 to March 2020, with funding from the UK Foreign and Commonwealth Office in support of the commitments made during CHOGM 2018.

About the Human Dignity Trust

The Human Dignity Trust is an organisation of international lawyers supporting local partners to uphold international and constitutional human rights law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. Over 70 jurisdictions globally criminalise consensual same-sex intimacy, putting LGBT people beyond the protection of the law and fostering a climate of fear, stigma, discrimination and violence. Many of these laws sit alongside other sexual offences laws that discriminate against or fail to protect women, children and other marginalised groups. The Trust provides technical legal assistance upon request to local human rights defenders, lawyers and governments seeking to eradicate discriminatory laws and improve protection against violence and hate crimes.

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Next Steps

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About the Research

This research was commissioned by the Human Dignity Trust (the **Trust**) on behalf of the Equality & Justice Alliance,¹ as part of a 2-year programme announced by the UK Government at the April 2018 Commonwealth Heads of Government Meeting (CHOGM) in London² by the then UK Prime Minister, Theresa May.³ A core focus of the 2-year programme is support for reform of colonial-era sexual offences laws that discriminate against women and girls and LGBT+ people, among others. As part of that support, the Trust—with the assistance of experts from around the Commonwealth—is producing research and information designed to inform, inspire and assist Commonwealth governments that are considering embarking on reform of these laws. The research is Commonwealth-focused, enabling member states to learn from other countries in the Commonwealth that have already successfully undertaken reforms. This research complements other independent research that the Trust is undertaking, including a series of practical in-depth case studies on the process of sexual offences law reform in different Commonwealth countries, which will be available on the Trust’s website as they are completed.⁴

This report and the information it contains is provided for general informational purposes only. It has been prepared as a work of comparative legal research only and does not represent legal advice in respect of the laws of the jurisdictions of the member countries of the Commonwealth. It does not purport to be complete or to apply to any particular factual or legal circumstances. It does not constitute, and must not be relied or acted upon as, legal advice.

Every effort has been made to reflect accurately each country’s laws based on legislation that was publicly available online or provided to the authors at the time of writing (January 2020) and, wherever possible, advice from legal experts in the countries covered in this report.

Please report any errors to the Human Dignity Trust at:
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PART A:
About this Report

OVERVIEW

This report builds on previous research commissioned by the Human Dignity Trust on good practice, human rights compliant sexual offences laws in the Commonwealth. It assesses this legislation in all fifty-three members of the Commonwealth against a series of criteria in the following areas of law:

- **Sexual assault**, including penetrative and non-penetrative sexual assaults;
- **Child sexual assault**, including certain problematic defences;
- **Disability and sexual offences**, including sexual assault laws that criminalise sexual activity with people with disability regardless of their capacity to consent to such activity; and
- **Consensual same-sex sexual activity**, including sodomy, buggery and gross indecency laws and discriminatory age of consent laws.

The report provides a snapshot view of some elements of national legislation in the four areas listed above. It is intended to highlight where a country is meeting or failing to meet good practice, human rights compliant standards for key aspects of its criminal law. It is not intended as a comprehensive survey of all criminal law on sexual offences in the Commonwealth.

The report focuses only on the criminal law as provided in **legislation** and does not evaluate the common law or judge-made law (with limited exceptions) or non-legislative instruments, such as subordinate legislation (e.g. regulations), policies and procedures, sentencing guidelines or judges' bench books which may be part of a sexual offences legal framework. Nor does it evaluate the implementation and enforcement of the legislation, which are as critical to good practice sexual offences laws as the legislation itself.

Earlier research commissioned by the Human Dignity Trust focused on defining good practice criteria for sexual offences legislation. These criteria, which are applied in modified form in this report, are based on international human rights law and states' obligations to implement that law at the national level, including through enacting domestic legislation to respect, protect and fulfil human rights. In the earlier research, these good practice criteria were applied to a small sample of Commonwealth countries from each region that demonstrated good practice in one or more areas of sexual offences laws within the scope of the research. The findings are reported in *Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth* (2019) (the *Good Practice Sexual Offences Report*). That report is intended to be used as a companion to this report. It is available online at <https://www.humandignitytrust.org>.

Importantly, the *Good Practice Sexual Offences Report* contains a detailed description of the good practice criteria and their sources in international human rights law, which is not repeated here. It also evaluates sexual offences laws against a wider range of good practice criteria than are applied in this report, and includes an assessment of how those laws are implemented in a small sample of case studies from across the Commonwealth regions. This more-in-depth approach was taken because the focus was on identifying examples of good practice sexual offences laws and included only a small sample of countries. However, in this report, the focus is on mapping the sexual offences laws of all members of the Commonwealth. In order to facilitate this, the criteria have been streamlined and only address certain key aspects of good practice sexual offences laws.

Each of the criteria applied in the *Good Practice Sexual Offences Report* are critical to an effective, human rights compliant sexual offences legal regime and readers are referred to that report for information on the more inclusive list of good practice criteria.

Good practice criteria for sexual assault laws that were assessed in the *Good Practice Sexual Offences Report* but are not included in this report address penalties, the defence of reasonable and honest but mistaken belief as to consent, special rules of procedure to protect complainants and witnesses, prohibiting marriage between the complainant and accused or compensation payments in lieu of criminal prosecution, and the need for independent and ongoing monitoring of the implementation of sexual assault legislation and to collect and publish sex-disaggregated data on sexual assault from all parts of the justice sector. Also excluded from assessment in this report are some aspects related to sexual offences laws and children and people with disability, as well as in relation to consensual same-sex sexual activity.

Some categories of sexual offences laws were outside the scope of the original research and are not included here. For example, laws criminalising sex work (prostitution), including same-sex sex work, and trafficking are not covered. Legislation criminalising incest, adultery, domestic and family violence, and female genital mutilation (FGM) are not covered. Laws criminalising LGBT+ public advocacy or cultural expression, and affectional, sexual or gender identity expression in public (for example, under public decency laws) are also outside the scope of this study. Each of these areas is an important area of study in its own right.

Age of consent laws of individual Commonwealth countries are not evaluated for good practice in this report. However, we describe key elements for good practice age of consent laws in Part B below because these laws are integral to child sexual offences and are used in some countries to criminalise consensual same-sex sexual activity between people of certain ages, areas of law which this report does address.

How to use this Report

This report is intended primarily for use by government officials interested in reforming their country's sexual offences laws, law reform commissioners and experts, and advocates seeking reform in their country or region. Those working on sexual offences law reform in their country can use this report as a starting point in the law reform process.

The authors acknowledge that there is more than one way to draft good practice sexual offences legislation. This is demonstrated in the research in this and the other regional reports mapping these laws in the Commonwealth. This report is not intended to promote one approach over another, but rather to identify the fundamental, base-line criteria for good practice that any sexual offences law should meet.

However, the report does favour sexual offences legislation that sets out the law in detail to ensure that it is correctly applied by justice sector actors, including police and judges. For example, the report applies good practice criteria requiring that legislation define in detail non-consensual sexual acts, such as sexual or indecent assault, rather than relying on the courts to interpret the scope of the crime. In some jurisdictions, the case law interpreting such provisions and prosecutorial practice may be well-developed, nonetheless some national law reform bodies in these jurisdictions are recommending greater detail be included in the legislation.

The report is divided into three parts. Part A provides the overview and background to the research. Part B describes and briefly explains the good practice criteria used in the study. The criteria address key aspects of sexual offences laws and differ slightly in places from the criteria used in the *Good Practice Sexual Offences Report*.

Part C contains brief country reports and a checklist chart for every Commonwealth country in this region. It also contains a comparative chart for the region as a whole.

The country checklists show at a glance which aspects of a country's sexual offences laws that are addressed in this report meet the good practice standards and which ones fall short of those standards. Where necessary for clarification, short explanations are included. The checklists use the following designations:

-  **Green** – the law meets the criteria. An explanation may be provided.
-  **Orange** – the law partly meets the criteria. An explanation is provided.
-  **Red** – the law does not meet the criteria. An explanation may be provided.
-  **Blue** – Unknown. There was insufficient information available to assess the law against the criteria.

TERMINOLOGY

The report uses a number of terms with the following meanings.

- **Accused** refers to the defendant in a criminal trial for sexual offences.
- **Complainant** refers to the victim/survivor of a sexual assault in a criminal trial.
- **Good practice** not 'best practice' is used in this report. Laws assessed as meeting the good practice criteria in this report meet fundamental international human rights standards. Good practice requires, at a minimum, that laws be compliant with these standards. As reform is an ongoing process and standards evolve over time, and there may be different models of legislation that are nonetheless all human rights compliant, we refer to 'good practice' laws rather than 'best-practice' laws.
- **LGBT+** refers to lesbian, gay, bisexual, transgender and other gender non-conforming people and includes people who do not identify with any gender.
- **Person with disability** includes any person, adult or child, with a permanent or temporary impairment that affects their cognitive, intellectual, hearing, vision, mobility or other capacities.
- **Sexual assault** includes all non-consensual penetrative sexual assaults, such as rape, unlawful 'sexual intercourse' or 'carnal knowledge', or however described in law, as well as non-penetrative sexual assaults such as touching or groping.
- **Same-sex sexual activity** refers to any and all sexual acts between people of the same sex or gender.
- **Victim/survivor** refers to any person who experiences sexual assault, including persons killed as a result of or as part of the sexual assault. The term recognises some victims/survivors prefer one term over the other to describe themselves.

SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND THE NEED FOR REFORM

In each region of the Commonwealth there are some countries that have reformed their sexual offences laws. The extent of these reforms varies. Some have made significant changes, bringing their law into line with good practice standards and international human rights law. Others have only reformed elements of their law, leaving in place some outdated or discriminatory provisions. Several Commonwealth countries were developing reforms at the time of writing.

In many cases, expert local non-government organisations are the drivers of law reform. Drawing on their expertise, often as providers of essential services including as first responders to people who have been sexually assaulted or subject to discriminatory criminal prosecution, they have in many cases led decades-long campaigns for reform and provided essential expert advice on the development of good practice sexual offences laws. Legal development programmes funded by donor countries and agencies have bolstered these efforts and played a critical support role for reform of sexual offences laws in the Commonwealth.

However, as is clear from the findings in this report, the sexual offences laws of most members of the Commonwealth need urgent reform to remove discriminatory provisions and address outdated and prejudicial myths about sexual offences, perpetrators and victim/survivors.



Photo credit: Elyssa Fahndrich

Examples of some common sexual offences laws in the Commonwealth that do not meet good practice

- **Sexual assault** laws that:
 - limit penetrative sexual assault (e.g. rape) to penile penetration of a vagina;
 - exempt rape in marriage, only criminalise it in certain circumstances (e.g. when a husband uses force or threats of force to coerce his wife to have sex, or when the parties are separated or divorced), or set a lower penalty for marital rape compared with rape outside marriage; or
 - require corroboration of a complainant’s evidence;
- Laws that criminalise **consensual sexual activity with people with disability**, regardless of the capacity of the individual to freely consent;
- **Child sexual assault** laws that:
 - apply only to girls and fail to criminalise a wide range of acts;
 - permit the defence of consent to child sexual assault;
 - do not provide close-in-age exceptions or defences; and
 - set different ages of consent for girls and boys or for same and opposite-sex sexual activity;
- Laws that criminalise **consensual same-sex sexual activity** (however described in law);
- Laws that use **derogatory language** to describe people with disability (e.g. ‘imbecile’, ‘idiot’, ‘mental defective’) or same-sex sexual activity (e.g. ‘buggery’, ‘sodomy’, ‘unnatural acts’), or **moralistic language** for sexual assault (e.g. ‘defilement’, ‘indecent assault’, ‘carnal knowledge’).

A country’s sexual offences laws, if they are non-discriminatory, properly implemented and enforced consistently and fairly, can play a vital role in protecting people, deterring the commission of offences and providing redress for those affected by violations. Good practice laws also:

- **Support the rule of law in general;**
- **Build confidence in the formal justice system;**
- **Protect and guarantee fundamental human and constitutional rights;**
- **Eliminate stigma and abuse of vulnerable or marginalised groups; and**
- **Encourage positive shifts in attitude and behaviour at a societal and cultural level.**

On the other hand, sexual offences laws that are discriminatory or unfair, either on paper or in practice, are ineffective and harm people who are often already the most vulnerable in society, affecting all aspects of their lives. Such laws are:

- Inconsistent with national constitutional guarantees of equality, non-discrimination, dignity and privacy and with international and regional human rights norms; and
- Undermine the rule of law and the authority of the justice system.

They also perpetuate the commission of sexual offences and other violence, stigma and discrimination. For example, a discriminatory rape law will deter victim/survivors from coming forward and reporting the crime. Discriminatory rules of evidence can re-traumatise victim/survivors and can have the effect of denying them access to justice while the perpetrator is not held to account. Differential treatment of different victims of sexual abuse deny people equal protection of the law. Criminalisation of same-sex sexual activity exposes people to a range of very serious harms in violation of their fundamental rights.

Good practice laws are, therefore, essential for the well-being of individuals, their families, communities, broader society and the rule of law.

GOOD PRACTICE LEGISLATION MUST BE IMPLEMENTED AND ENFORCED

Many factors, in addition to good legislation, determine whether a country's sexual offences laws represent good practice. In fact, the best legislation in the world will be ineffective at best and, at worst harmful if it is not well implemented. Good practice legislation requires consistent and non-discriminatory implementation and enforcement to be effective. It also requires the cooperation of other sectors, such as health, child protection, expert non-governmental organisations and service providers. The effective implementation of sexual offences laws therefore also rests on a cooperative multi-sectoral approach. Examples of some positive implementation efforts by Commonwealth countries can be found in the *Good Practice Sexual Offences Report*.

Analysis of implementation of sexual offences laws is outside the scope of this report which focuses on the legislation. Nonetheless, states are strongly encouraged to:

- **Review their legal framework as a whole**, to ensure it meets good practice, including aspects of sexual offences laws not addressed in this report and non-legislative instruments that provide important guidance to justice sector actors on the correct application of the law (e.g. bench books, sentencing guidelines, policies, police standard operating procedures);
- **Ensure that criminal law and procedure do not further victimise** sexual offences complainants or act as a deterrent for reporting such offences to police. Laws and rules may appear neutral, but they may have an unintended negative impact on the reporting and prosecution of sexual assault. For example, laws criminalising false reporting of crimes including rape, will deter victims

from coming forward and expose them to criminal prosecution and further victimisation. Laws criminalising adultery and consensual same-sex sexual activity have the same effect. A number of countries in the Commonwealth do not have procedural or evidential laws and court practices that provide for safe and protective circumstances for victim /complainants, including children, to be able to give evidence. These and other laws need to be reviewed as part of a sexual offences law reform process to ensure they are consistent with good practice standards and cannot be applied in a punitive or discriminatory manner;

- **Adopt a range of measures for the effective implementation of the law**, including providing adequate resourcing, targeted training of all justice sector actors (e.g. in the law, human rights, gender sensitivity, non-discrimination principles), consistent and complementary policies, laws, procedures and practices in corrections, health and education, access to justice programming, public education about legal rights, including human rights, and periodic, independent evaluation of the sexual offences legal framework; and
- **Consult and coordinate routinely** with a range of public agencies, experts and service providers, including from the non-government sector, that routinely interact with law enforcement and the justice sectors in the context of sexual offences (e.g. child protection, health, forensic pathology, corrections, legal aid and women's, children's, disability and LGBT+ non-governmental organisations, service providers and advocates).

INTERNATIONAL & REGIONAL HUMAN RIGHTS LAW AND SEXUAL OFFENCES LEGISLATION

International human rights law requires states to take a range of measures, including enacting effective and non-discriminatory laws, to respect, protect and fulfil human rights. Discriminatory sexual offences laws are inconsistent with the foundational human rights principles of substantive equality and the respect for the inherent dignity of every person. They may also violate a range of other specific human rights norms including:

- equality before the law and equal protection of the law;
- freedom from discrimination in the enjoyment of all fundamental rights;
- respect for human dignity;
- right to privacy;
- protection of bodily integrity, including freedom from torture and cruel, inhuman or degrading treatment or punishment;
- protection of children from abuse and exploitation; and
- the rights of people with disability to autonomy, including sexual autonomy.

The specific legal obligations of states under international human rights law underlie the good practice criteria used in this report, which are derived from international and regional human rights treaties. For more information on applicable international legal norms, see the *Good Practice Sexual Offences Report*.

United Nations human rights treaties⁵

- *International Covenant on Civil and Political Rights (ICCPR)*,
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*,
- *Convention on the Rights of the Child (CRC)*,
- *Convention on the Rights of Persons with Disabilities (CRPD)*,
- *Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.

Regional human rights treaties and declarations

- *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*,⁶
- *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*,⁷
- *Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*,⁸
- *Declarations on the Elimination of Violence against Women in the ASEAN Region*,⁹ and
- *Pacific Leaders Gender Equality Declaration 2012*.¹⁰

Other international instruments

- *Yogyakarta Principles +10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*.¹¹

Human rights treaty bodies and others have given general and country-specific commentary and guidance on how states can meet their treaty obligations, including by reforming their sexual offences laws, through general comments and recommendations and observations on individual countries as part of the periodic review process (e.g. the 'UPR'). For example, the CEDAW Committee has issued two General Recommendations (GR) on violence against women, GR 19 in 1992 and GR 35 in 2017,¹² and made numerous observations over many years on states' implementation of CEDAW at the national level.

Some agencies have further distilled the advice from the treaty bodies into practical guidance for states. For example, UN Women have published the guide, *Handbook for Legislation on Violence against Women (2012) (UN Handbook)* and its *Supplement on Harmful Practices*.¹³ These explain in detail how to make national laws on violence

against women, including sexual violence, that would meet states' international human rights legal obligations. Although both Handbooks focus on violence against women, they are relevant to making laws on sexual assault against any person. It is therefore recommended that those interested in sexual offences law reform refer to the Handbooks.¹⁴

The Handbooks have informed several regional guidelines, such as the *Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines)*,¹⁵ adopted by the African Commission on Human and Peoples' Rights, and the *Pacific Island Forum Sexual Offences Model Provisions 2010*. The UN Handbooks have also informed the development of the good practice criteria used in this report.

What is clear from the treaties, commentary and guidance is that good practice sexual offences laws must be non-discriminatory, protect an individual from harm, and respect their personal agency and bodily integrity. Where laws create criminal offences, they must also appropriately balance the competing interests of the rights of an accused person to a fair trial with the rights of a complainant. Laws that do not meet these fundamental standards will harm individuals affected by sexual offences and undermine the rule of law and the criminal justice system.

PART B:

About the Good Practice Criteria

1. Sexual Assault

Universal Criteria

This Part briefly explains the criteria used in the country checklists in Part C below to assess whether a country's legislation on sexual assault and consensual same-sex sexual activity meet good practice. A 'traffic light' system is applied to the relevant law of each Commonwealth country to illustrate whether that law meets the good practice criteria explained in this Part.¹⁶

- ✔ **'Green light'** – the law fully meets the criteria. An explanation may be provided.
- **'Orange light'** – the law partly meets the criteria. An explanation is provided.
- ✘ **'Red light'** – the law does not meet the criteria. An explanation may be provided.
- ? **'Blue light'** – insufficient information to assess the law against the criteria.

The criteria are derived from international human rights law, including key international and regional human rights treaties, and their interpretation by expert bodies.

While the past half century has seen significant reforms to national rape and sexual assault laws, including in the Commonwealth, many countries retain archaic laws that are based on and perpetuate false, discriminatory and damaging myths about sexual assault and about victim/survivors and perpetrators.¹⁷ These include exceptions for rape in marriage (women are the property of their husbands), requiring corroboration of a sexual assault complaint (women and girls lie about rape and sexual assault), defining rape only as penile penetration of a vagina (men and boys are not raped or sexually assaulted), allowing evidence of prior sexual conduct or reputation (only chaste women can be raped and sexually assaulted, the victim is to blame), assuming that young children can consent to sexual activity (willingness is the same as consent) and criminalising consensual sex with people with a disability (they don't understand the nature of the act, can never give free consent or should not be sexually active).

These and many other myths, and the legal rules that maintain them, cause harm and undermine the criminal justice system. They prevent or deter people from reporting sexual assault, expose survivors to re-traumatisation, shield perpetrators from justice and restrict or prevent access to justice for victim/survivors.¹⁸ They blame the victim/survivor for what has happened and give excuses to the perpetrator for their actions and behaviour.



credit: Kyle Post

SEXUAL ASSAULT: THE CRITERIA EXPLAINED

Definition and scope of the crimes

- a. **Sexual assault crimes are gender-neutral:** Definitions of sexual assault offences must not exclude any potential victim/survivor or perpetrator, regardless of sex, gender, sexual orientation, gender identity, age, disability status, marital status or any other status. All victim/survivors should have equal protection of the law.

In some Commonwealth countries penetrative sexual offences, such as rape and child rape, are conceived in law (and in common understanding) as a crime that can only be committed by a male against a female. Accordingly, in many countries rape is limited to sexual intercourse and the penetration of a vagina by a penis. Excluding the rape of males is discriminatory and not good practice. Some countries that maintain 'buggery' and 'sodomy' laws may criminalise non-consensual anal sex under such provisions. However, good practice requires the repeal of these crimes and for anal 'rape' to be included in the general sexual assault provisions, for example as 'rape' and 'sexual assault', and in child sexual offences. All of these crimes should be gender-neutral.

Meeting this good practice criteria does not preclude including additional specific offences of violence against women and girls, for example in acknowledgement that they are overwhelmingly the target of many forms of violence, including sexual assault and domestic violence. This is an approach a small number of countries have taken.

- b. **Marital rape and sexual assault are crimes:** The legislation should expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

'Marital rape immunity' remains in the law of some Commonwealth jurisdictions either as a blanket exemption or as a defence in limited circumstances, such as if force is used or the parties are judicially separated or divorced. Many countries simply do not address marital rape in their legislation at all.

Marital rape immunity is based on the outdated belief that wives cannot be raped because at marriage they consented to all sexual acts with their husband. This view is discriminatory on the grounds of sex and marital status and denies women their fundamental right to autonomy and bodily integrity and to be free from torture and cruel, inhuman or degrading treatment. It treats wives as male property.

The UK House of Lords overturned an old common law rule exempting husbands from criminal liability for raping their wives (*R v R*).¹⁹ Many countries around the world, including in the Commonwealth, have abolished this exemption legislatively or by jurisprudence. The common law and national case law are not assessed in this report and to meet the good practice standards applied here, legislation should state that marital rape and sexual assault, including of married children, are crimes and that there is no exception for, or defence of marriage to these offences.

- c. **Free and voluntary consent is required:** The legislation should expressly define consent to require free and voluntary agreement to sexual activity. The law should also explicitly recognise that there are circumstances in which genuine consent cannot be given. These circumstances should be listed in the legislation in a non-exhaustive list.

Most sexual assault laws in the Commonwealth do not define ‘consent’ at all, merely stating that rape is sexual intercourse without consent or with the use or threat of force, or when a person was deceived into sexual intercourse (the perpetrator impersonates the victim/survivor’s husband), or when the victim/survivor was incapable of understanding the nature of the act due to their age or impairment. Some countries include a longer list of circumstances where there can be no consent including for example:

- where the perpetrator took advantage of, or created a coercive situation, such as use or threat of force or the exercise of coercive control in cases of domestic violence or unlawful detention;
- where the victim/survivor cannot give free and voluntary consent because they were a child, asleep, unconscious, physically immobilised or restrained, incapacitated by alcohol or drugs, or by a temporary or permanent illness, disability or impairment that prevents them from giving free and voluntary consent or with limited or no capacity to communicate their consent or non-consent;
- where the perpetrator was in a position of trust or authority in relation to the victim/survivor, or the victim/survivor was under the care and/or control of the perpetrator.

Where such lists exist in the law, they are not evaluated.

This report does not address the defence of reasonable or honest but mistaken belief as to consent. This defence is an important safeguard of the rights of an accused person. However, good practice requires the rights of the accused to be balanced with the rights of a complainant. For this reason, where this defence is available, sexual offences laws should expressly require a defendant to show they took reasonable steps to confirm that the person was consenting to the sexual activity. This defence should not be available in circumstances in which the law presumes consent cannot be given, such as those outlined above.

- d. **Evidence of resistance is not required:** The legislation should make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It should also make clear that consent cannot be inferred from a complainant’s silence or submission during the assault.

Requiring proof of resistance as evidence that there was no consent is based on discriminatory and erroneous myths, including that ‘real rape’ always involves force, victim/survivors always try to fight off their attacker and that women lie about rape and other sexual assaults. There are many circumstances in which genuine consent cannot be given and there are many reasons why a victim/survivor may not physically resist their attacker or might appear to submit to sexual assault even in the absence of the use or threat of force.

Some Commonwealth countries have made clear in their law that evidence of resistance by the victim/survivor is not required and that submission or silence is not consent. This approach fully meets this criterion. Defining consent as free and voluntary agreement, with a list of situations in which there can be no consent, does not, on its own, meet this criterion because evidence of resistance to prove that there was no such agreement may still be required by a court. In several Commonwealth countries, there is an express requirement for evidence of force or violence to prove there was no consent. This is not good practice.

- e. **All non-consensual sexual acts involving penetration are offences:** Good practice sexual assault laws must be broadly defined and cover non-consensual sexual penetration of any orifice (mouth, vagina, anus) by any body part (not limited to a penis) or object.

Laws on rape and other penetrative sexual offences in many Commonwealth countries continue to define the crime as the penile penetration of a vagina. This is not good practice as it excludes rape of males and other ways in which non-consensual penetrative sexual conduct occurs, as well as same-sex penetrative sexual assaults. This approach also treats vaginal rape as more serious than other forms of penetrative sexual assaults, which does not reflect the harm caused to the victim/survivor.

Some jurisdictions criminalise rape as the non-consensual penile penetration of a vagina and cover other forms of non-consensual sexual penetration, including of males, as part of other sexual offences, such as indecent or sexual assault. These jurisdictions may satisfy this criterion if they criminalise all such conduct equally, including prescribing the same penalty. However, if these offences are not treated as seriously with appropriate penalties, they may not meet the good practice criteria. Better practice would be to make all crimes of penetrative sexual assault gender-neutral and object and orifice inclusive. Laws criminalising non-consensual anal sex as ‘buggery’ or ‘sodomy’ are not good practice either. These crimes should be repealed and anal rape of any person (male or female) should be covered under gender-neutral sexual assault provisions and child sexual offences.

- f. **All non-penetrative, non-consensual physical sexual acts are criminal offences:** Good practice sexual assault laws must be defined broadly to include all kinds of non-penetrative assaults of a sexual nature.

Contrary to good practice, many sexual offences laws in the Commonwealth do not define these offences, which are commonly called ‘indecent’ acts or assaults. Such laws may be interpreted by local courts to cover the acts in question, but this is not transparent or clear and may be more likely to lead to a narrow interpretation, excluding a range of assaults of a sexual nature from the criminal law. These offences should be clearly and broadly defined in legislation to include, at least, non-consensual touching, groping or physical contact of a sexual nature, whether over or under clothes, for example of genitals, breasts or anus using any body part (including semen) or object, as well as using genitals to touch any part of the body. They should also include any act of sexual stimulation and forcing a person to perform sexual acts on themselves or others, or to watch such acts.

The use of the term ‘indecent’ act or assault, while a common feature of sexual offences laws in Commonwealth jurisdictions, is not good practice because it treats the crime as a moral attack rather than as a violent assault. These crimes should be re-named and characterised as assaults of a sexual nature.

Rules of evidence and procedure

- g. **No corroboration required:** Legislation setting out rules of evidence in criminal proceedings for sexual assault should state that no corroboration by a third party of the complainant’s testimony is required.

The rule on corroboration is a common law exception to the hearsay rule imported into many Commonwealth countries by the British colonists. The rule requires a third party to corroborate a complaint of sexual assault. The rule is clearly discriminatory. It is often not applicable to other criminal offences, including those that occur in private, and it is based on the damaging and false myth that women and girls lie about rape and other sexual assault.

In a case on appeal from Grenada, the Privy Council held that there is no requirement at common law for corroboration in sexual assault cases and that it was up to the judge to determine if it was necessary to warn the jury about the reliability of any uncorroborated evidence (*R v Gilbert* (2002) 61 WIR 174). A number of courts around the Commonwealth have made similar findings and some Commonwealth countries have expressly abolished the rule in their legislation.

Common law rules of evidence, including on corroboration of sexual offences, are not assessed in this report. Where legislation does not expressly exclude corroboration in relation to sexual offences, regardless of the common law position in that country, the law does not meet this good practice criterion. Good practice sexual offences laws for the purpose of this report require its express abolition by legislation.

The harmful impact of the corroboration rule

[The corroboration rule's] effect has been to place victims of sexual offences in a special category of suspect witnesses ... It has given accused ... a protection which does not exist in other cases of serious criminality, and it almost certainly has had the effect, in many instances, of deterring rape victims from reporting offences committed against them, or from co-operating in the prosecution of offenders.

Attempts have been made, from time to time, to justify the rule by reference to a wide range of reasons, including a supposed tendency in women to engage in fantasy, to be fickle or spiteful in sexual relationships, to be prone to sexual neurosis, or to be unwilling to admit to consent out of shame.

However forcefully these reasons are propounded, along with the associated rape myths ... we consider that they have reflected a flawed understanding of the world, they have been unfairly demeaning of women, and they have been discredited by law makers, in more recent times.

— *Fiji Court of Appeal – Balelala v State [2004] FJCA 49*

- h. **Prior sexual conduct is inadmissible and irrelevant:** Legislation should provide a presumption that evidence of the prior sexual conduct of the complainant with the accused or another person, as well as their 'sexual reputation', is inadmissible or only admissible with prior leave of the court and with strict safeguards.

Good practice on this point requires balancing the rights of an accused person to a fair trial with the rights of a complainant to equal protection of the law, privacy and dignity. Evidence of a complainant's prior sexual history is generally irrelevant, yet it has been and is often allowed to discredit the complainant herself, as well as her evidence that she did not consent to the sexual activity that is the subject of the criminal complaint. Providing that such evidence is inadmissible protects complainants from irrelevant questioning that is often traumatising and which violates their privacy. Allowing evidence of a complainant's prior sexual conduct or sexual reputation is not good practice as it allows an inference of consent to be drawn from irrelevant factors.

A small number of Commonwealth countries have excluded such evidence altogether, while others may allow it with the leave of the court in limited circumstances, such as when it relates directly to the sexual activity that is the subject of the charges and has a very high probative value that outweighs any potential prejudice to the proper administration of justice or the complainant's personal dignity and right to privacy. Depending on the extent to which such evidence is allowed and which safeguards are put in place in the law, this approach may meet good practice standards.

Crimes of power and violence not morality

- i. **Terminology in sexual assault laws is legal and not moralistic:** Sexual offences provisions should use neutral and precise legal terminology that is not moralistic and does not perpetuate discriminatory stereotypes.

Use of terms such as ‘defilement’, ‘insulting modesty’, ‘offences against morality’ or ‘honour’ and ‘indecent assault’ are used to describe sexual offences in the criminal laws of many Commonwealth countries. For example, the crime of ‘defilement’ is an archaic concept meaning ‘to pollute’ or ‘to sully’ and, in the context of sexual offences, usually refers to the sexual assault of girls. It is a discriminatory term as it indicates that girls are ‘spoilt’ or ‘damaged’ through the loss of their virginity. Properly viewed, the rape and sexual assault of any person are attacks against their physical and mental integrity and sexual autonomy. They are unrelated to the ‘modesty’ or ‘honour’ of the victim/survivor or their family.



Sexual violence has often been addressed in the problematic framework of morality, public decency and honour, and as a crime against the family or society, rather than a violation of an individual’s bodily integrity.

— *United Nations Handbook on Legislation for Violence Against Women 2012, p24*

2. Sexual Assault

Additional Criteria in Relation to Children

The general criteria outlined above apply equally in relation to children. The following are additional criteria with specific application to the particular situation of children.

All Commonwealth countries have specific child sexual assault offences. However, the laws of many are inadequate and discriminatory and do not meet good practice standards. For example, many countries do not criminalise a wide range of child sexual assault, limiting protection only to unlawful sexual intercourse with children and not expressly including offences such as grooming. Some countries only criminalise sexual activity with girls, which is discriminatory on the grounds of sex and not good practice. Even where countries have child sexual assault offences in their legislation, they are often undermined by allowing the defence of consent and not providing appropriate close-in-age defences.

Children under the age of consent should be presumed in law not to be able to consent to sexual activity (except in close-in-age situations), including in marriage. Good practice child sexual assault laws should allow 'close-in-age' defences to protect children and young people under the age of consent from criminal prosecution for engaging in consensual sexual activity with their peers.

Many Commonwealth countries provide for a defence of reasonable and honest but mistaken belief as to the age of a child. This defence is not assessed in this report. While this defence is an important safeguard of the rights of an accused person, good practice requires a balance between the rights of the accused and the rights of a complainant. For this reason, where this defence is available, sexual offences legislation should expressly require a defendant to show they took reasonable steps to confirm that the person was over the age of consent. In order to protect children, it must include an objective test to determine if the accused person's belief as to the age of the complainant was reasonable in the circumstances.

Age of consent laws and close-in-age defences

Laws governing the age at which a person can consent to sexual activity underlie all child sexual offences and are also relevant to laws on minimum age for marriage. This report does not assess the age of consent laws of individual Commonwealth countries or their minimum marriage age. It does, however, note the age of consent (where one exists) in each country and evaluates whether that law is discriminatory on the basis of sex, gender, sexual orientation or gender identity.

Practice on age of consent to sexual activity varies around the world, including in the Commonwealth. Most Commonwealth countries set the age of consent for opposite-sex sexual activity at 16 years with some opting for a higher age of 18 (e.g. Rwanda) and some a lower age, for example 14 years (e.g. Namibia). Some countries provide for a lower age of consent for girls than for boys (e.g. Bangladesh). Some countries also discriminate in their age of consent law on the basis of the kind of sexual activity or whether it is same-sex or opposite-sex sexual activity (e.g. Bahamas). All such distinctions are discriminatory and do not meet good practice standards.

Under international law, children and adolescents have rights as well as evolving capacities to make decisions that affect themselves. Good practice age of consent laws, therefore, strike the right balance between protecting the rights of children and young people to be free from exploitation and other harms, including sexual abuse, and protecting their other fundamental rights, including to privacy and healthy sexual development. This is the approach also recommended by the UN Committee on the Rights of the Child.²⁰

It follows that good practice age of consent laws must be non-discriminatory, clearly set out in the law and not allow exceptions for child marriage or on the basis of culture or religion. They must be set neither too low nor too high. A low age of consent exposes children, and especially girls, to sexual abuse and child marriage and undermines the child sexual offences legal framework. Setting the age of consent too high can have the effect of stigmatising and criminalising adolescents who engage in consensual sexual activity with each other and may drive child marriage.



In some societies, parents’ desire to preserve their daughters’ “sexual purity” prior to marriage may drive early marriage. In many societies, adolescents may feel the only way they can have sex—and access sexual and reproductive health information and services—is by being married, which again, may drive early marriage. It also increases barriers to accessing sexual and reproductive health services, further endangering young people.²¹

Providing for close-in-age defences in the legislation is also essential to prevent the criminalisation and stigmatisation of genuinely consensual sexual activity between peers, where there is a small gap in age between them (e.g. 2-5 years) and where one or both are under the age of consent.

However, there should be no close-in-age defence if there is a relationship of trust, authority, supervision or dependence between the parties (e.g. teacher, care-giver, employer, employee in an institution where the young person lives or studies, sports coach, religious leader). The law should also make clear that there is no such defence even if the older party is also a child but uses threats, coercion or pressure.²² Excluding close-in-age defences in these situations addresses potential power imbalances between the parties and helps to protect children from exploitation or abuse by another child or young person.

This report does not evaluate the close-in-age laws of individual Commonwealth countries, but it does consider the availability of this defence in the assessment of child sexual assault provisions against the good practice criteria.

International human rights law does not specify a minimum age of consent to sexual activity. However, based on the principles under the *Convention on the Rights of the Child* and other human rights standards, it is recommended that the age of consent be set at between 16-18 years of age, provided that appropriate close-in-age defences are also in place.

THE CRITERIA EXPLAINED

Definition and scope of sexual offences against children

- a. **There are specific child sexual assault offences:** Sexual offences legislation should include specific child sexual assault offences, including penetrative and non-penetrative sexual offences.

Children and young people face particular vulnerabilities to sexual abuse and exploitation due to their age, their social status and their dependency on adults. Good practice laws must criminalise specific penetrative and non-penetrative sexual offences against all children and young people, including for example, rape, sexual assault, including touching and groping or other contact of a sexual nature, as well as grooming and sexual communication with a child. Other specific child offences that are not addressed in this report should also be explicitly provided for, including child sexual exploitation, trafficking, persistent child sexual abuse, FGM and voyeurism.

The legislation must provide appropriate close-in-age defences or exceptions for consensual sexual activity between young people when one or both of them is under the age of consent and they are close-in-age. However, this defence should be excluded if there is a relationship of trust, authority or dependency between the child and the other person, or any other coercion, exploitation or pressure of the child.

- b. **Child sexual assault offences are gender-neutral:** Child sexual assault offences should be gender-neutral. Any child, regardless of sex or gender, sexual orientation or gender identity, or any other characteristic, can be raped or otherwise sexually assaulted. The definitions of crimes should not exclude any potential victim/survivor.

Some countries still explicitly limit child sexual assaults to girls, for example in 'defilement'-type offences. This approach is discriminatory on the basis of sex. It is based on, and perpetuates the false myth that only females can be raped or subjected to other sexual assaults. It denies male children protection from abuse while protecting abusers. Child sexual assault laws that are not gender-neutral also violate fundamental rights under many human rights treaties, including the *Convention on the Rights of the Child*, to which every Commonwealth country is a party.

- c. **There is no defence of consent to child sexual assault offences (other than close-in-age defences):** The defence of consent should be expressly excluded from child sexual assault laws (e.g. 'statutory rape').

Children under the age of consent should be presumed in law not to be able to consent to sexual activity except when close-in-age.



Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood...

— United Nations Standard Rules for the Equalization of Opportunities for Persons with Disabilities, Rule 9

3. Sexual Assault

Additional Criteria in Relation to People with Disability

The general criteria and the criteria relating to child sexual offences outlined above apply equally in relation to all persons (including children) with disability. The following are additional criteria developed to have specific application to persons with disability.

Sexual assault laws in many countries across the world, including in the Commonwealth, reflect outdated and prejudiced attitudes towards people with disability. This is evident in the common use of derogatory language in sexual offences laws to describe people with disability, for example, 'idiot', 'imbecile', 'defective' or 'subnormal'. It is also evident in the underlying assumptions reflected in the law that people with disability:²³

- never have any autonomy and so cannot consent to sexual activity,
- always are incapable of understanding the nature of sex,
- should not be sexually active, and
- are inherently vulnerable to violence and abuse, rather than made vulnerable by the social and structural systems that constrain and control their lives and fail to support them to exercise their legal capacity.

A common response in sexual offences laws to these assumptions is to criminalise all sexual activity with a person with a disability (usually limited to cognitive or intellectual disability or mental illness), in an effort to protect them from sexual exploitation and abuse.

These assumptions are based on negative and ill-informed stereotypes about people with these types of disability. They are inconsistent with human rights law to the extent that they undermine or deny people with disability their rights to equality and non-discrimination, to personal autonomy, and to equality before the law, including the right to make decisions about issues that affect them. In other words, to exercise their 'legal capacity'.

At the same time, the international human rights framework requires that countries protect the right of people with disability, like everyone else, to be free from violence. Global data consistently show that people with disability face greater risk of all forms of violence than people without disability.²⁴ The data also show that the risk is particularly acute for women and girls with disability, and people with disability whose day-to-day lives are managed or constrained by others, such as in institutional or congregate care settings, or in heavily

controlled family settings. These risks are exacerbated by the invisibility experienced by many people with disability, both through attitudes that seek to hide disability or those that seek to be overly protective.

Good practice sexual offences laws should be disability-neutral. They should provide the same regime for determining whether a person has freely and voluntarily consented to sexual activity for people with disability and people without disability. Similarly, situations that should be recognised in the law when genuine consent cannot be given, such as incapacity or abuse of trust or authority, should apply to all people. Any person, whether they are a person with disability or not can be affected by such factors temporarily, permanently or intermittently.

THE CRITERIA EXPLAINED

Sexual offences laws treat people with disability equally

- a. **Consensual sexual activity with a person who has a disability is not an offence:** Consensual sexual activity should not be criminalised solely on the basis that one or more of the participants is a person with disability. Sexual assault laws should not assume that all or any persons with disability are incapable of freely and voluntarily agreeing to sexual activity or understanding the nature of it.

The test for consensual sexual activity with a person with a disability should be the same as for a person without disability – the giving of free and voluntary agreement. Similarly, situations recognised in the law in which genuine consent cannot be given, such as actual incapacity or abuse of trust or authority, such as in a care facility, should apply to all people. Any person, whether they are a person with disability or not, can lack capacity to consent freely and voluntarily either temporarily or permanently. The legislation should not impose additional protective measures merely on the basis of a person's disability and regardless of whether they have the capacity to give, and have given, free and voluntary consent to the sexual activity. However, it may be consistent with good practice to provide for higher penalties for sexual offences against people with disability where there is no genuine consent or to provide that abuse of a trust or care relationship is an aggravating factor to be considered in sentencing. Criminalising all sexual activity with people with disability, however, is paternalistic and violates a person's fundamental rights to legal capacity, equality and non-discrimination.

- b. **No discriminatory, derogatory or stigmatising language is used:** Discriminatory, derogatory or stigmatising language must not be used in sexual offences laws to refer to people with disability. These include terms such as 'idiots', 'imbeciles', 'mentally subnormal', 'mental defective' and 'handicapped'. Good practice laws should refer to 'people', 'persons' or 'person' with disability, in accordance with the language of the *UN Convention on the Rights of Persons with Disabilities*.

4. Consensual Same-Sex Sexual Activity

Criteria

Every human population includes members who are same-sex attracted and who find happiness and fulfilment in an intimate, emotional and sexual relationship with another person of the same sex. It is widely understood and accepted in the international legal and scientific communities that this is a normal variant of human sexuality. However, there is a long history, particularly across the Commonwealth, and in certain other countries in the world, of criminalising consensual same-sex sexual activity. States use a range of terms for these offences, such as buggery, sodomy, unnatural acts, gross indecency, same-sex sexual relations, homosexual sex, lesbianism and acts against the order of nature. Often these acts are dealt with in the same provision as the crime of bestiality, which exacerbates the stigmatising impact of the crimes. In addition to criminalising consensual same-sex sexual activity or activity that is more associated with same-sex attracted people, some countries also criminalise any public display of same-sex relationships directly or indirectly (e.g. Nigeria).

In the Commonwealth, the numbers are well known: as of October 2019, 35 of the 53 member states (including associated jurisdictions) still criminalise consensual sexual activity between people of the same sex.²⁶ While these figures are stark and highlight the need for urgent action on legislative reform across the Commonwealth, some progress has been made with national courts finding criminalisation to be unconstitutional and striking down the offending provisions in the criminal law, for example, in South Africa and Fiji and more recently in Belize, Botswana, India and Trinidad and Tobago. Legislatures in a number of Commonwealth countries have also taken steps recently to repeal these laws, including in Mozambique, Nauru and Seychelles.

There is extensive literature and an ever-growing body of empirical research showing that criminalising consensual same-sex activity causes a wide range of serious, identifiable harms, including murder, sexual violence, discrimination in all spheres of life, social exclusion, harassment and unlawful detention, removal of children from and denial of custody of children to their parents, poor health, such as depression, suicide and self-harm and HIV/AIDS, and limited access to basic services, including health, education, housing and legal services.

A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization...

[Criminalising] laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity.

— *UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016*

Criminalisation of consensual same-sex sexual activity is also contrary to international human rights law and the fundamental principles of equality, non-discrimination and the right to privacy and leads to violations of many other fundamental human rights. This has been confirmed, for example, by the European Court of Human Rights, which has found that laws criminalising same-sex sexual activity violate the right to privacy under the *European Convention on Human Rights*.²⁶ The UN Human Rights Committee has also been very clear that human rights law prohibits criminalisation of consensual same-sex sexual activity. For example, in its landmark 1994 decision in *Toonen v Australia*,²⁷ the Committee said that a state law in Australia (Tasmania) criminalising consensual sexual activity between men violated the right to privacy and non-discrimination on ground of sex under the *ICCPR*. It said that the law violated human rights even though it was not enforced.

Since *Toonen*, other UN treaty bodies have repeatedly urged states to reform their laws criminalising consensual same-sex conduct because they violate fundamental human rights norms.²⁸

States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination.

— *UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016*

Reinforcing the impact of these decisions have been a number of important declarations, including:

- the African Commission on Human and Peoples' Rights *Resolution 275 on protection against violence on the grounds of sexual orientation and gender identity*, which condemns human rights violations, including arbitrary imprisonment and other forms of persecution based on sexual orientation or gender identity;²⁹

- the 2016 report of the former UN Special Rapporteur on Torture, Juan Mendez, linking the criminalisation of same-sex activity to increased violence against LGBT+ people; and
- the *Yogyakarta Principles plus 10* that make an unequivocal case for decriminalisation.³⁰

In some countries in the Commonwealth, these crimes are expressed in gender-neutral terms and apply both to consensual and non-consensual acts. This is not good practice. These offences should be repealed and all non-consensual sexual acts, including anal 'rape' of any person, should be criminalised as part of gender-neutral sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences.

Some countries that have repealed their offences on same-sex sexual activity maintain or create a different age of consent for same-sex sexual activity or sexual activity that is more associated with same-sex attracted people, such as anal sex. Not only is this discriminatory, it means the country has not fully decriminalised. It also exposes people engaging in such conduct to the same harms listed above. Therefore, it is not human rights compliant nor good practice.

THE CRITERIA EXPLAINED

Same-sex sexual activity is not a crime

- a. **Consensual same-sex sexual activity is not a crime:** Consensual same-sex sexual activity between people who are above the age of consent should not be criminalised. The following offences, or any with similar effect, should be abolished: indecency (or gross indecency) between people of the same sex, unnatural acts, carnal knowledge/intercourse against the order of nature, buggery, sodomy, homosexuality, lesbianism, same-sex sexual relations, fellatio, and cunnilingus.

Some Commonwealth countries have repealed these offences through legislation. In others, local courts have found these offences to be unconstitutional, striking down the offending provisions in the criminal law. Both approaches are assessed in the country reports in Part C.

- b. **No discriminatory, derogatory or stigmatising language is used:** Sexual offences laws should not use language that is discriminatory, derogatory or stigmatising of LGBT+ people, including terms such as: buggery, sodomy, intercourse against the order of nature, indecency between male/female persons, abominable crime, or the equating of same-sex sexual activity with bestiality.
- c. **No discriminatory age of consent laws where consensual same-sex sexual activity is not a crime:** The age at which a person can legally consent to sexual activity should be the same for everyone regardless of the kind of sexual activity and whether it involves same-sex or opposite-sex participants.

Maintaining a higher age of consent for same-sex sexual activity after repeal of the associated criminal offences is discriminatory, does not achieve full decriminalisation and is not good practice.

Close-in-age defences and exceptions should be available to prevent criminalising children and young people who engage in genuinely consensual same-sex sexual activity with their peers when one or both of them is under the age of consent.

PART C:
Country Checklists

THE PACIFIC



The Pacific region of the Commonwealth comprises 11 countries. Approximately half of the countries in the Pacific have overhauled their sexual offences laws, introducing new legal regimes that meet many of the good practice standards applied in this report. Five countries in the region have decriminalised consensual same-sex sexual activity (Australia, Fiji, Nauru, New Zealand and Vanuatu). Some countries retain sexual offences laws that do not meet good practice and are outdated and discriminatory in a number of respects.

Countries in this region have parallel legal systems, including customary law, which may cover, or be relevant to sexual offences. Applicable common law and case law may also be relevant. For the most part, these laws have not been assessed in this report as they are outside its scope. One of the reasons for excluding these sources of law from the analysis was their limited accessibility. Also, it was decided to focus on statutory sexual offences law in the first instance, in order to prompt and assist legal reform processes. The report is not a comprehensive survey of all sexual offences laws in force in the Commonwealth countries of the region. It is intended to provide a snapshot view of whether certain key elements of sexual offences law in national legislation meet good practice standards that are human rights compliant. It is hoped that the report will be a helpful *starting point* for the thorough analysis of all sexual offences laws that states will need to undertake as part of any law reform process. This would necessarily include analysis of any parallel or complementary legal frameworks on sexual offences, including the common law, as well as customary law where this applies.

In relation to sexual assault, a number of countries have updated their laws to expressly prohibit marital rape and sexual assault (e.g. Nauru), to criminalise all penetrative sexual activity that is non-consensual (e.g. New Zealand), to define consent as free and voluntary agreement (e.g. Solomon Islands), to state in the law that evidence of resistance to sexual assault is not necessary to prove non-consent (e.g. Nauru) and to criminalise a wide range of specific child sexual offences (e.g. Nauru).

However, in six countries, consensual same-sex sexual activity is still criminalised (Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu).

Other deficiencies in some Pacific countries include that the definition of rape is limited to penile penetration of a vagina, restricting the crime to an act committed by a man against a woman (e.g. Kiribati), not expressly criminalising rape and sexual assault or allowing a defence of marriage to a charge of rape (e.g. Vanuatu), child sexual offences that are not gender-neutral, covering only female victim/survivors (e.g. Tuvalu) and criminalising consensual sexual activity with a person with disability (e.g. Tonga). Sexual offences laws in this region still use moralistic and stigmatising terminology, including referring to people with disability as ‘idiots’ and ‘imbeciles’ (e.g. Tuvalu), characterising sexual violence against children as a moral attack, ‘defilement’, rather than a crime of violence (e.g. Fiji) and equating consensual same-sex sexual activity with bestiality (e.g. Tuvalu).

Although the penalties regime for sexual offences is not assessed in this report, all penalties need to be reviewed, along with any sentencing guidelines to judges, as part of any sexual offences law reform process. Good practice requires penalties to match the gravity of the crimes, provide for aggravating factors to be taken into account in sentencing, not be discriminatory, and exclude the death penalty and corporal punishment.

Implementation of sexual offences laws is also not assessed in this report. It is noted, however, that in many countries in the region, including some with reformed, good practice sexual offences laws, effective implementation of the law is a significant challenge due to a number of factors, including:

- lack of financial and human resources;
- geographical challenges;
- lack of training, including in gender sensitivity, among justice sector actors; and
- entrenched cultural and religious beliefs.

Every country in the Pacific region has ratified at least some UN human rights treaties of most relevance to the subject matter of this report, namely the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, and the *Convention on the Rights of Persons with Disabilities*. However, not every country has ratified the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* or the *International Covenant on Civil and Political Rights*. There is no Pacific regional human rights treaty.

Every effort has been made to reflect accurately each country's laws based on legislation that was publicly available online or provided to the authors at the time of writing and, wherever possible, advice from legal experts in the countries covered in this report.



Photo credit: Shane Rouse

AUSTRALIA



Australia is a federal country with six states and two territories. Each state and territory has its own criminal law jurisdiction, which includes legislation on sexual offences. While there are many similarities in the law across the jurisdictions, they are not identical. For this reason, each jurisdiction is reported on separately here. In addition, there are some federal criminal laws that include sexual offences. These apply in each state and territory as well, but are not assessed in this report.

In many respects, the sexual offences laws assessed in this report meet the good practice standards: consensual same-sex sexual activity is not a crime in any jurisdiction; marital rape is a crime and no defence of marriage applies; and all non-consensual acts of sexual penetration are criminalised.

Most jurisdictions criminalise a wide range of specific child sexual offences, including grooming, and do not allow a defence of consent to these crimes. However, in some jurisdictions, the law requires further reform, including for example: providing that evidence of resistance to a sexual assault is not necessary to prove that sexual activity took place without consent; that consent cannot be inferred from a complainant's silence or submission during the assault; and ensuring that the consent regime applies without discrimination to people with disability.

Australia is a state party to relevant international and regional human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *International Covenant on Civil and Political Rights* and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

AUSTRALIAN CAPITAL TERRITORY



In the Australian Capital Territory, sexual offences laws are found in the *Crimes Act 1900 (CA)*, as amended. The *Evidence (Miscellaneous Provisions) Act 1991 (EMPA)* and the *Evidence Act 2011 (EA)* contain applicable rules of evidence.

Many of the provisions assessed in this report meet good practice standards. For example, sexual assault covers all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. Consensual same-sex sexual activity is not a crime. The *EA* prohibits a requirement for corroboration and the *EMPA* explicitly states that evidence of prior sexual conduct of the complainant is inadmissible, with limited exceptions.

The age of consent is 16 years for every person.

Other aspects of the legislation do not meet good practice standards and require reform. For example, non-penetrative sexual offences are partly contained within the moralistically termed offence of ‘act of indecency’, which are differentiated on the basis of whether force was used or not, and are not defined to include all forms of non-consensual sexual touching. The child sexual assault provisions in the *CA* are limited and do not expressly include, for example, sexual communication with a child or causing a child to watch sexual acts. These acts may be covered by the crime of ‘act of indecency’ or other offences, such as grooming, but this is not specified in the law. Sexual communication through electronic media is covered in federal legislation which applies in the Australian Capital Territory but is not assessed here. Close-in-age defences are limited and are not expressly excluded if there is a relationship of trust, authority, supervision or dependence between the parties (e.g. teacher, care-giver, employer, employee in an institution where the young person lives or studies, sports coach, religious leader).

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
Comment: The legislation specifies that marriage is not a bar to prosecution for 'sexual intercourse without consent' (s 60 CA).
- c **Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given. There is a limited list of circumstances in which there is a presumption of no consent (e.g. unconscious or asleep, drugs or alcohol, detained, violence and threat of violence, mistaken belief about the other person) (s 67 CA).
- d **Evidence of resistance is not required** 
Comment: The legislation states a 'person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to it' (s 67(2)). The legislation should also state that consent cannot be inferred from submission to, or silence during the sexual act.
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not specify that all of these acts are crimes and does not define 'act of indecency' or other sexual offences to include them (e.g. groping) (ss 57-59 CA). Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation states 'it is not necessary that evidence on which a party relies be corroborated' or that a judge warn a jury about convicting on uncorroborated evidence (s 64 EA). A judge retains the discretion to warn a jury of convicting without corroboration.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: The legislation states that evidence of 'sexual reputation' is inadmissible (s 75 EMPA). Evidence of 'sexual activities' of the complainant with another person are inadmissible except with the leave of the court and only if it has 'substantial relevance to the facts' (ss 76, 78 EMPA). Sexual activities with the accused that are the subject of the proceedings are admissible (s 76 EMPA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. test for prejudice to, or impact on the complainant).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'act of indecency' (ss 57-59 CA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment: There are child sexual assault offences (e.g. ss 55-56, 55A, 61, 61A, 66 CA), including 'maintaining a sexual relationship with a child 16-18', 'grooming' and 'sexual activity with a person in special care' (by a teacher, employer, service provider etc). Other offences e.g. sexual activity in front of a child and electronic sexual communication with a child, are not listed in the legislation. Such acts may be covered under existing child sex offences but it is not explicit. They may also be covered under Federal criminal law which is not assessed here.

Note that 'maintaining a sexual relationship with a child 16-18' or 'under special care' is inappropriately described as 'sexual relations' with a child and should be described as sexual assault (s 56 CA).

There are close-in-age defences.

b Child sexual assault offences are gender-neutral 

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

b No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

b No discriminatory, derogatory or stigmatising language is used 

c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

NEW SOUTH WALES



In NSW, sexual offences laws are found in the *Crimes Act 1900 (NSW) as amended (CA)*. The *Evidence Act 1995 (NSW) (EA)* and the *Criminal Procedure Act 1986 (CPA)* contains the rules of evidence which apply to sexual assault offences.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, the offence of 'sexual assault' covers all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. Non-penetrative offences are broadly defined to include all forms of sexual assault. There is an extensive array of child sexual assault provisions, no

moralistic terminology is used, and there are close-in-age defences to child sexual assault offences preventing criminalising consensual sexual activity between young people.

The age of consent is 16 years for everyone. Consensual same-sex sexual activity is not a crime.

However, although the *EA* explicitly states that corroboration of a sexual assault complaint is not required, the judge's discretion to warn the fact finder of convicting on uncorroborated evidence is retained. The *CPA* states that evidence relating to the prior sexual conduct of the complainant is inadmissible, with some limited exceptions.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
Comment: The legislation expressly states that marriage is not a defence to any sexual offence (s 61KA CA).
- c **Free and voluntary consent is required** 
Comment: All offences require that the complainant did not consent and that the other person knows there was no consent (ss 61I, 61HA, 61HB CC). Consent is defined in the legislation to mean 'the person freely and voluntarily agrees to the sexual activity.' There is also an inclusive list of circumstances in which there is a presumption of no consent (e.g. lack of capacity, unconsciousness or sleep, unlawful detention, threat of violence, mistaken belief about the identity of the accused (s 61HE CC)).
- d **Evidence of resistance is not required** 
Comment: The legislation states, 'A person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity' (s 61HE (9) CC). The legislation should also state that consent cannot be inferred from silence during, or submission to the sexual activity.
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation expressly states that 'it is not necessary that evidence on which a party relies be corroborated'. Although it is not necessary for the judge to 'warn the jury that it is dangerous to act on uncorroborated evidence', it preserves their discretion to do so (s 164 EA).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: The legislation states that 'Evidence relating to the sexual reputation of the complainant is inadmissible.' There are statutory exceptions for evidence of prior sexual activity if it links directly to the sexual offence and has a very high probative value that outweighs any distress, humiliation or embarrassment to the complainant (s 293 CPA).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment: There are multiple child sexual assault offences (e.g. ss 66A-66D, 66DA-66DB, 66DC-66DF), including targeted offences, such as grooming and persistent sexual abuse of a child. There are close-in-age defences.
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

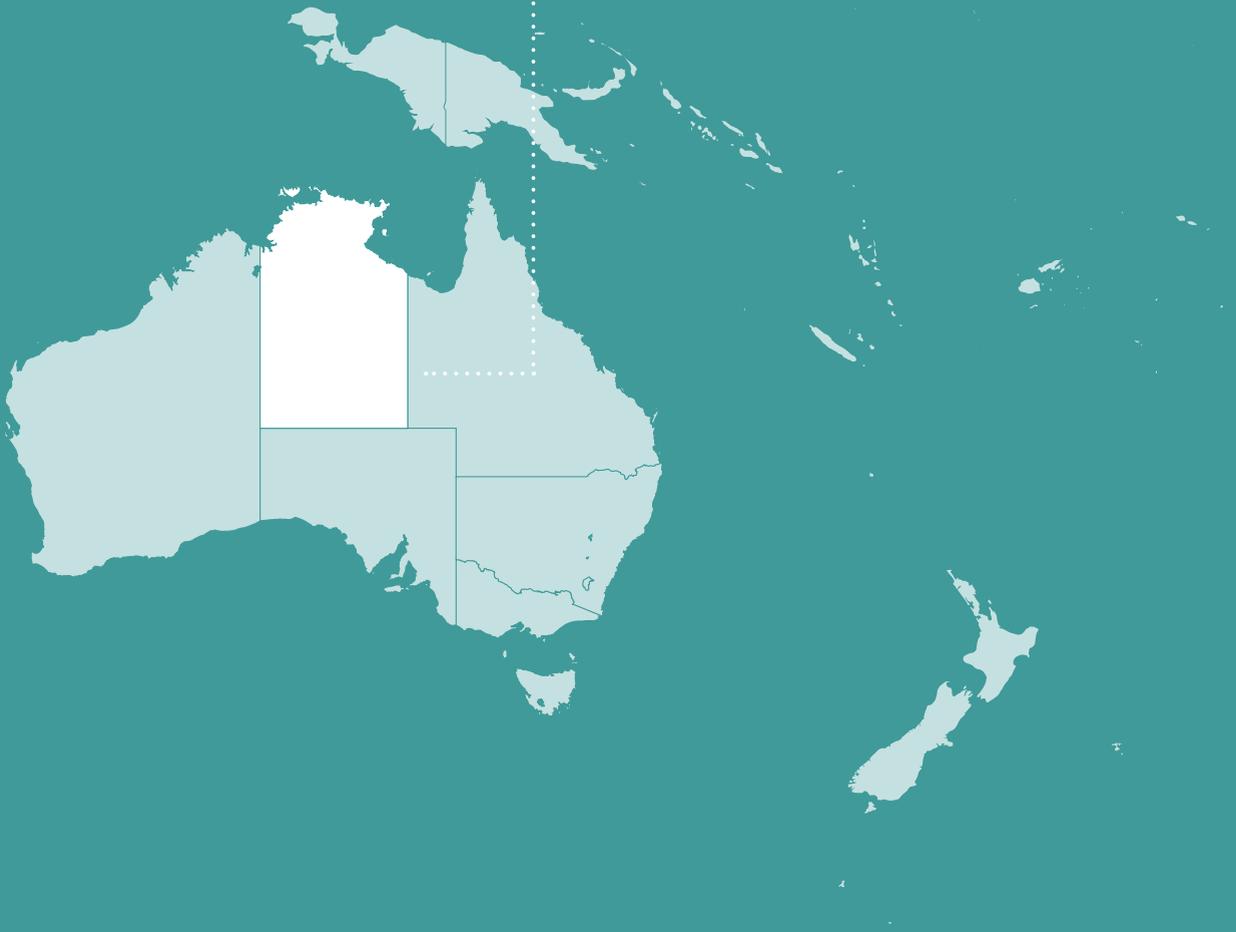
- a **Consensual sexual activity with a person who has a disability is not an offence** 
Comment: A person 'responsible for care' of a person with 'cognitive impairment' who has sexual intercourse, sexually touches or commits a sexual act with that person commits an offence regardless of consent' (66F CA). Good practice legislation is disability-neutral, applying the same consent regime for all. This can include presumptions of no consent and aggravated penalties in cases of abuse of authority of any person.
- b **No discriminatory, derogatory or stigmatising language is used** 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
- b **No discriminatory, derogatory or stigmatising language is used** 
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 

NORTHERN TERRITORY



In the Northern Territory, sexual offences laws are found in the *Criminal Code Act 1983 (CCA)*, as amended. The *Sexual Offences (Evidence and Procedure) Act 1983 (SOEP)* contains the rules of evidence applicable to sexual offences.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, sexual assault covers all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. Consensual same-sex sexual activity is not a crime.

The age of consent is 16 years for everyone.

However, some other aspects of the legislation do not meet good practice standards. For example, under the CCA, non-penetrative offences are partly contained within the moralistically termed offence of ‘gross indecency’, which is not defined and does not expressly include all forms of non-penetrative sexual touching. Child sexual assault provisions are limited, for example, sexual communication with a child, sexual acts in the presence of a child, or grooming are not specifically captured by the law. There are no close-in-age defences to child sexual assault, which are essential to prevent criminalising consensual sexual activity between young people where one or both are under the age of consent.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
Comment: Consent is defined as 'free and voluntary agreement'. There is also an inclusive list of circumstances in which there is a presumption of no consent (e.g. lack of capacity, unconsciousness or sleep, drugs or alcohol affected, unlawful detention, use or threat of violence, inability to understand because of disability, mistaken belief about the identity of the accused, s 192 CCA).
- d **Evidence of resistance is not required** 
Comment: The legislation states 'the judge shall direct the jury that a person is not to be regarded as having consented to an act of sexual intercourse or to an act of gross indecency only because the person: did not protest or physically resist' (s 192A CA).
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not specify that all of these acts are crimes and does not define 'indecent assault' (s 192 CCA) or other sexual offences to include them. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation states the judge must not 'warn or suggest in any way to the jury that it is unsafe to convict on the uncorroborated evidence of the complainant' (s 3 SOEP).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: The legislation states that no evidence of 'general reputation as to chastity' or 'the sexual activities' of the complainant with any other person are admissible unless of 'substantial relevance to the facts at hand' (s 4 SOEP). Evidence relating to prior sexual conduct with the accused is not expressly excluded in the legislation. There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant). Use of 'chastity' is not good practice.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'indecent dealing', 'gross indecency' and 'chastity' (ss 127, 132, 192 CCA; s 4 SOEP).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment: There are limited child sexual assault offences (e.g. ss 127, 128, 131, 132 CCA) (e.g. no specific offences for grooming sexual activity in the presence of a child). These may be covered under existing offences, but it is not explicit. Federal criminal law is not assessed. There are no close-in-age defences. Note inappropriate terminology in offence of 'unlawful sexual relationship with a child', (s 131 CCA). This conduct is sexual abuse and should not be termed a 'relationship'.

b Child sexual assault offences are gender-neutral 

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

Comment: Sexual intercourse and gross indecency by a 'person who provides a disability support service, whether for remuneration or on a voluntary basis, to a mentally ill or handicapped person' is an offence regardless of consent (s 130 CCA). The legislation does not apply the consent definition in s 192 to determine presence or absence of consent and discriminates on the basis of marital status, as well as disability. Good practice legislation is disability-neutral, applying the same consent regime for all. This can include presumptions of no consent and aggravated penalties in cases of abuse of authority of any person.

b No discriminatory, derogatory or stigmatising language is used 

Comment: The CC uses the term 'handicapped person' (s 130 CCA).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

b No discriminatory, derogatory or stigmatising language is used 

c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

QUEENSLAND



In Queensland, sexual offences laws are found in the *Criminal Code 1989 (CC)*, as amended. The *Criminal Law (Sexual Offences) Act 1978 (CLSO)* contains the relevant rules of evidence.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, offences of sexual assault cover all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. The consent provisions require an accused to actively seek to confirm consent.

The age of consent is 16 years for everyone. Consensual same-sex sexual activity is not a crime.

Other aspects of the provisions assessed here do not meet good practice standards and require reform. For example, non-penetrative offences are contained within the undefined offence of ‘indecent assault’. The moralistic terms ‘carnal knowledge’, ‘indecent assault’ and ‘indecent treatment’ are used. Corroboration is not strictly prohibited. The *CLSO* states that evidence of prior sexual conduct of the complainant is inadmissible, but there are limited exceptions without adequate safeguards. Although child sexual assault provisions are comprehensive, there are no close-in-age defences to child sexual offences preventing the criminalising of consensual sexual activity between young people when one or both are under the age of consent.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
Comment: The legislation defines consent as 'freely and voluntarily given'. There is also a limited list of circumstances in which there is a presumption of no consent (e.g. force, threat of force, person is in a position of authority, fraud or mistake) (s 348 CC).
- d **Evidence of resistance is not required** 
Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not specify that consent cannot be inferred from a complainant's silence or submission during the assault.
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The offence of sexual assault is defined as the 'unlawful and indecent assault of another person'. It is not expressly defined to include all acts of sexual touching (e.g. groping) of any part of the body (s 352 CC). Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation states, 'A person may be convicted of an offence on the uncorroborated testimony of one witness' and 'a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of one witness' (s 632 CC). This does not prohibit the judge from warning the jury it is unsafe to convict.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: The legislation provides that evidence related to the 'chastity' of the complainant is inadmissible. Evidence related to the 'sexual activities' of the complainant with any person are inadmissible unless of 'substantial relevance to the facts in issue' (s 4 CLSO). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant). Use of 'chastity' is outmoded and not good practice.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'indecent assault', 'indecent act', 'carnal knowledge' (ss 216, 227, 349 CC) and 'chastity' (e.g. s 4 CLSO).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment: There are multiple specific child sexual assault offences, including grooming and sexual contact with a child through the internet (e.g. ss 210, 215, 218A, 218B, 349, CC). However, the offence of maintaining a 'sexual relationship' with a child under 16 is inappropriately termed as this is sexual abuse and not a 'relationship' (s 229B CC).
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
Comment: Unlawful carnal knowledge with a person with an 'impairment of the mind' is an offence regardless of consent. There is a defence if the unlawful carnal knowledge 'did not in the circumstances constitute sexual exploitation of the person with an impairment of the mind' (s 216 CC). Good practice legislation is disability-neutral, applying the same consent regime for all. This can include presumptions of no consent and aggravated penalties in cases of abuse of authority of any person.
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The legislation uses the term 'impairment of the mind' (s 216 CC).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
- b **No discriminatory, derogatory or stigmatising language is used** 
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 

SOUTH AUSTRALIA



In South Australia, sexual offences laws are found in the *Criminal Law Consolidation Act 1935 (CLC)* as amended. The *Evidence Act 1929 (EA)* (as amended) contains the rules of evidence applicable to sexual offences, including in relation to the rule on corroboration and admissibility of prior sexual conduct in sexual assault cases.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, sexual assault covers all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices.

The age of consent is 17 years for all. Consensual same-sex sexual activity is not a crime.

Other aspects of the provisions assessed in this report do not meet good practice standards and require reform. For example, non-penetrative

sexual offences are partly contained within the undefined and moralistically termed offence of ‘indecent assault’. The offence of ‘compelled sexual manipulation’ is too narrowly construed. These offences do not expressly include all forms of sexual touching. Child sexual assault provisions are also limited, with no offences for example of sexual communication with a child, sexual acts in the presence of a child, or sexual abuse by a person in power or authority. These may be covered under Federal criminal laws, which are not assessed in this report.

They are further weakened by the absence of close-in-age exceptions. Close-in-age defences or exceptions are necessary to avoid criminalising young people and children who engage in consensual sexual activity with their peers. A requirement for corroboration in sexual assault cases is not expressly prohibited.

1 Sexual Assault

Universal Criteria

Meets Criteria: Yes Partly No Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral**
- b **Marital rape and sexual assault are crimes**
- c **Free and voluntary consent is required**
Comment: Consent is defined as free and voluntary agreement to sexual activity. The legislation also has an inclusive list of circumstances in which there is a presumption of no consent (e.g. lack of capacity, unconsciousness or sleep, drug or alcohol affected, unlawful detention, use or threat of violence, inability to understand the nature of the sexual act because of disability, mistaken belief about the identity of the accused, s 46 CLC).
- d **Evidence of resistance is not required**
Comment: The legislation provides the judge must direct the jury that the person is not to be regarded as having consented to the sexual activity merely 'because the person did not protest to or physically resist the sexual activity' (s 43N EA).
- e **All non-consensual sexual acts involving penetration are offences**
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences**
Comment: The legislation has two non-penetrative sexual offences: 'compelled sexual manipulation' is defined as the manipulation by a person of another person's genitals or anus; and 'indecent assault', which is not defined to include all other acts of sexual touching (e.g. groping) of any part of the body (ss 48A, 56 CLC). Such acts may be covered, but it is not explicit in the legislation

Rules of evidence and procedure

- g **No corroboration required**
Comment: The legislation states: 'the judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence' (s 34L EA). This does not prohibit the judge from warning the jury it is unsafe to convict.
- h **Prior sexual conduct is inadmissible and irrelevant**
Comment: The legislation provides that no evidence of 'sexual reputation' or 'the sexual activities' of the victim before and after the alleged offence is admissible unless of 'substantial probative value' or likely to 'impair confidence in the reliability' of the victim's evidence and in the 'interests of justice'. Recent sexual activities with the accused are admissible (s 34L EA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic**
Comment: The legislation uses the terms 'indecent assault' and 'gross indecency' (ss 56, 58 CLA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment: There are limited child sexual assault offences (e.g. ss 49, 50, 56, 58 CLC). There are no other targeted offences, such as grooming or sexual activity in the presence of a child. These may be covered but it is not explicit. Federal criminal law is not assessed. There are no close-in-age defences.

Note that persistent sexual abuse of a child is inappropriately referred to as maintaining an unlawful sexual 'relationship' with a young person under 17, s 50 CLC). This conduct is sexual abuse, not a 'relationship'.

b Child sexual assault offences are gender-neutral 

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

b No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

b No discriminatory, derogatory or stigmatising language is used 

c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

TASMANIA



In Tasmania, sexual offences laws are found in the *Criminal Code 1924 (CC)* as amended. The *Evidence Act 2001 (EA)* is applicable to sexual offences, containing for example the rules of evidence in relation to prior sexual conduct of a complainant in a sexual assault case.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices are crimes. The consent provisions presume an absence of consent unless there is evidence of communicated free agreement. There are close-in-age defences to child sexual assault offences preventing criminalising consensual sexual activity between young people and their peers when one or both are under the age of consent.

The age of consent is 17 years for all. Consensual same-sex sexual activity is not a crime.

The CC explicitly states that corroboration of a rape or other sexual assault complaint is not required. The EA expressly states that evidence of sexual reputation is inadmissible and prior sexual conduct of the complainant is generally inadmissible, with limited exceptions.

Other aspects of the provisions are, however, not in accord with good practice. For example, non-penetrative offences are contained within the moralistically termed offence of 'indecent assault', which is not expressly defined in the CC to include all forms of sexual touching. Child sexual assault provisions are limited and do not cover offences such as sexual communication with a child, causing a child to watch sexual acts, or sexual abuse by a person in power or authority. These may be covered under Federal criminal law which is not assessed in this report. The offence of 'maintaining a relationship with a child' is problematic as sexual intercourse with a child is sexual assault, not a 'relationship'. It would be better characterised as persistent child sexual abuse.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required** 
Comment: The CC provides there cannot be consent if the person 'does not do or say anything to indicate consent'. It states that submitting to sexual activity because of the use of force, abuse of authority or other circumstance is an absence of consent (s 2A). The law also states that evidence of serious physical injury, 'grievous bodily harm', is evidence of lack of consent.
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (s 127 CC).

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation states 'No rule of law or practice shall require a judge to give a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of a person'. The legislation enables a judge to give a warning if 'justified' in the circumstances. (s 136 CC).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of 'sexual reputation' is inadmissible. Previous 'sexual experience' is generally inadmissible. However, there is an exception if the evidence has 'direct and substantial relevance to a fact or matter in issue' and 'the probative value of that evidence outweighs any distress, humiliation or embarrassment' (s 194M EA).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'indecent assault' and 'indecent act' (ss 125B, 127).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment: There are limited child sexual assault offences (e.g. 124, 125A, 125B). There are some gaps in these offences, which do not cover for example, sexual activity in the presence of a child. 'Maintaining a relationship with a young person under 17' (s 125B) is sexual abuse and should be re-characterised as persistent sexual abuse of a child. Federal criminal law is not assessed. There are close-in-age defences.

b Child sexual assault offences are gender-neutral 

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

b No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

b No discriminatory, derogatory or stigmatising language is used 

c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

VICTORIA



In Victoria, sexual offences laws are found in the *Crimes Act 1958* amended by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (CA)*. The *Evidence Act 2008 (EA)* and the *Criminal Procedure Act 2009 (CPA)* contain the rules of evidence which apply to sexual assault offences.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, consensual same-sex sexual activity is not a crime, sexual assault under the CA covers all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. Non-penetrative offences are broadly defined to include all forms of sexual assault and carry serious penalties. There is an extensive range of child sexual assault provisions, no moralistic, discriminatory or derogatory terminology is used, and there are close-in-age defences to child sexual assault offences. These are a critical part of good practice child sexual offences law as they prevent the criminalising of genuinely consensual sexual activity between young people when one or both are under the age of consent. The age of consent is 16 years for everyone.

The EA explicitly states that corroboration of a sexual assault complaint is not required, which conforms to good practice and the CPA explicitly states that evidence of ‘the general reputation of the complainant with respect to chastity’ and the prior sexual conduct of the complainant is inadmissible. While this meets the good practice criteria, ‘chastity’ is an outmoded and moralistic term that should be removed from the legislation.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
Comment: Consent is defined as 'free agreement'. There is also an inclusive list of circumstances in which there is a presumption of no consent (e.g. lack of capacity, unconscious or asleep, drugs or alcohol, detained, violence and threat of violence, mistaken belief about the other person (s 36 CA).
- d **Evidence of resistance is not required** 
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: Sexual assault is comprehensively defined to include any sexual touching. 'Sexual' is defined to include any act a reasonable person would consider sexual (s 40 CA). 'Touching' is comprehensively defined (s 35B CA).

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The EA states: 'It is not necessary that evidence on which a party relies be corroborated' and that the judge must not 'warn the jury that it is dangerous to act on uncorroborated evidence' and must not 'direct the jury regarding the absence of corroboration'(s 164 EA).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: The CPA provides that no evidence of 'the general reputation of the complainant with respect to chastity' is admissible (s 341 CPA). Evidence of the prior 'sexual history of the complainant 'is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates' (s 343 CPA).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The term 'chastity' is used in the CPA (e.g. s 341).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment: There are multiple child sexual assault offences (e.g. ss 49A-49N) including targeted offences, such as sexual activity in the presence of a child, grooming and persistent sexual abuse of a child. There are close-in-age defences.
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
- b **No discriminatory, derogatory or stigmatising language is used** 
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 

WESTERN AUSTRALIA



In Western Australia, sexual offences laws are found in the *Criminal Code Act 1913 (CCA)*, as amended. The *Evidence Act 1906 (EA)* contains the rules of evidence in relation to corroboration and prior sexual conduct.

Many of the provisions covered by this review and the criteria below meet good practice standards. For example, sexual assault covers all forms of non-consensual sexual penetration – by penis, objects and other body parts – of all orifices. There are comprehensive child sexual assault offences.

The age of consent is 16 years for everyone. Consensual same-sex sexual activity is not a crime.

Other aspects of the legislation evaluated in this report do not meet good practice standards. For example, non-penetrative sexual offences are partly contained within the moralistically termed offence of ‘acts of indecent assault’ which are differentiated on whether force was used and do not expressly include all forms of sexual touching. Child sexual assault offences are weakened by a lack of close-in-age exceptions that are necessary to avoid criminalising young people and children who engage in consensual sexual activity with their peers.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
Comment: The legislation defines consent as 'freely and voluntarily given'. There is a limited list of circumstances in which there is a presumption of no consent (e.g. force, threat, intimidation, deceit, or any fraudulent means) (s 319 CCA).
- d **Evidence of resistance is not required** 
Comment: The legislation states 'where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act' (s 319(2)(b)). It does not specify that consent cannot be inferred from a complainant's silence or submission during the assault.
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not define 'indecent assault' and 'aggravated indecent assault' to include all acts of sexual touching (e.g. groping) of any part of the body (ss 323, 324 CCA). Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation states a 'judge shall not give a corroboration warning to the jury unless the judge is satisfied that such a warning is justified in the circumstances' (s 50 EA).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: The legislation states that evidence of 'sexual reputation' and 'disposition of complainant in sexual matters is inadmissible (ss 36B, 36BA EA). Evidence of the 'sexual activities' of the complainant with any person is inadmissible unless of 'substantial relevance to the facts' and the 'probative value outweighs the distress, humiliation and embarrassment of the complainant (s 36BC EA).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the term 'indecent' (ss 321, 323, 324 CCA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment: There are multiple specific child sexual assault offences (e.g. ss 204B, 320, 321, 321A, 322 CCA) with targeted offences, such as sexual electronic communication with a child, persistent sexual conduct with a child, and sexual offences by a person in authority. There are no close-in-age defences.
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
- b **No discriminatory, derogatory or stigmatising language is used** 
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 



[M]uch work remains to be done to ensure that rape and sexual offences legislation around the world is inclusive of people with disabilities, recognizes people with disabilities as sexual agents and provides appropriate protection from sexual violence for people with and without disabilities.

— A. Artstein-Kerslake & E. Flynn, *Legislating Consent: Creating an Empowering Definition of Consent to Sex that Is Inclusive of People with Cognitive Disabilities*, *Social and Legal Studies* 2016, Vol. 25(2), 225-248, 244.



Photo credit: Matt Ariz

FIJI



Fiji's sexual offences laws are found in the *Crimes Act 2009*. The *Criminal Procedure Act 2009* contains the rules of evidence which apply to sexual assault offences. Note that these acts were originally issued as government decrees, but obtained the status of acts in 2016 (*Revised Edition of the Laws (Consequential Amendments) Act 2016*).

Some of the provisions covered by this review and assessed against the criteria below meet good practice standards. For example, the CA explicitly criminalises all forms of non-consensual sexual penetration and provides that consent must be freely and voluntarily given by a person with the necessary mental capacity to give the consent. Sexual offences against both adults and children are gender-neutral and consensual same-sex sexual activity is not a crime.

The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance. However, in 2016 the Fiji Court of Appeal held that marital rape and sexual assault are crimes in Fiji (*Ismail v State [2016] FJCA 136*). Better practice would be to amend the *Crimes Act* to explicitly exclude a marital rape exception.

Other areas of the law partly meet good practice. For example, the legislation does not state that non-penetrative sexual assault includes all acts of sexual touching (e.g. groping) of any part of the body, there are limited child sexual assault provisions and they are not aligned with

the general rape and sexual assault provisions. There are limited close-in-age defences for child sexual assaults to prevent criminalising consensual sexual activity between young people where one or both are under the age of consent.

Other areas of the law would need to be reformed to meet good practice fully, including for example: replacing moralistic terminology used to describe sexual assault, such as 'gross indecency', 'indecent assault', 'insult[ing] the modesty' and 'defilement'; providing that there is no need for evidence of resistance to the assault to prove that sexual activity took place without consent and that consent cannot be inferred from a complainant's silence or submission during the assault; defining non-penetrative sexual offences more broadly; and not criminalising sex with people with disability regardless of their consent.

The age of consent is 13, which is too low.

The CA uses the term 'mental sub-normality' to refer to people with intellectual disability, which is derogatory and stigmatising and not good practice.

Fiji is a state party to relevant international human rights treaties, including the *UN Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *International Covenant on Civil and Political Rights*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
Comment: Not expressly stated as a crime under the legislation. The Court of Appeal has confirmed that marriage is not an exception to rape under Fijian law (Ismail v State [2016] FJCA 136.) Better practice would require the legislation to specify that marital rape and sexual assault are crimes without exception.
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required** 
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (s 212 CA). Although the common law is not assessed it is noted that in Fiji, indecent assault covers all such acts (e.g. State v Laca, [2012] FJHC 1414, 14 November 2012). For clarity and transparency and to fully meet this criterion, the offence should be defined expressly and broadly in the CA.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation expressly states that corroboration is not required in cases of sexual assaults, but preserves the judge's discretion to warn the assessors (jury) about the absence of corroboration (s 129 CPA).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Prior sexual conduct with the accused is only admissible in limited circumstances. Prior sexual conduct with persons other than the accused is expressly excluded (s 130 CPA). The reputation of the complainant in sexual matters is admissible with leave of the court in specified circumstances (s 130 (2)(b) CPA). The safeguards that apply if the court gives leave for prior sexual conduct evidence to be led are inadequate to protect the complainant.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'gross indecency', 'indecent assault', 'insult the modesty' and 'defilement' (e.g. ss 210, 212-214 CA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment: There are limited specific child sexual assault provisions (e.g. defilement of children ss 214-215 CA). They are not comprehensive as there are no offences of grooming or sexual communication with a child. There is only a close-in-age defence for indecent assault (s 212(2) CA).

b Child sexual assault offences are gender-neutral 

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

Comment: There is no defence of consent to rape of a boy or girl under the age of 13 (s 207(3) CA). There is no defence of consent to indecent assault for a child under the age of consent (16 years) (s 212(2) CA). There is no defence of consent to defilement of a young person between 13-16 (s 215(3) CA). The legislation does not specify that this defence is unavailable for rape of a child 13-16 years.

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

Comment: 'Unlawful carnal knowledge' of any intellectually impaired person under circumstances which do not amount to rape is a crime (s 216 CA).

b No discriminatory, derogatory or stigmatising language is used 

Comment: The legislation uses the term 'mental sub-normality' (s 216 CA).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

b No discriminatory, derogatory or stigmatising language is used 

c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

KIRIBATI



The Kiribati sexual offences laws are found in the *Penal Code 1977 (PC)*. The *Evidence Act 2003 (No. 5 of 2003) (EA)* contains the rules of evidence which apply to sexual assault offences.

The *PC* has not been amended since its introduction and the provisions assessed in this report need to be reformed to meet good practice standards. However, in 2003, after ratifying *CEDAW*, Kiribati amended the *EA* to exclude the corroboration rule for rape, which does conform to good practice standards for sexual offences law.

The law does not meet the good practice criteria applied below in a number of ways, including for example: sexual assault crimes that are not gender-neutral; definition of 'rape' that is too narrow and does not cover all acts of non-consensual sexual penetration of all orifices by any body part or object; and no definition of 'consent' requiring free and voluntary choice to engage in sexual activity. Most of the specific child sexual offences apply only to girls and there are no close-in-age defences for child sexual assaults to prevent criminalising consensual sexual activity between young people when one or both are under the age of consent. Consensual sexual activity with a person who has a disability is an offence and the *PC* uses the derogatory terms 'idiot' and 'imbecile'. Importantly, marital rape and sexual assault are not explicitly prohibited under the *PC*. All non-consensual sexual acts should be expressly criminalised in the legislation in every circumstance without exception. Allowing a defence of

marriage to a rape accusation violates human rights and is discriminatory. It also perpetuates sexual assault. Good practice requires that marital rape be explicitly prohibited.

The *PC* criminalises consensual same-sex sexual activity between men and uses derogatory terms such as 'buggery', 'gross indecency', 'unnatural offences' and 'indecent practices'. Under the *PC*, 'buggery' is equated with bestiality. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Kiribati is a state party to the *UN Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities* and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Kiribati is not a party to the *International Covenant on Civil and Political Rights*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral** 
Comment: 'Rape' is limited to 'unlawful sexual intercourse with a woman or girl' (s 128 PC). 'Indecent assault' can only be committed against females (s 133 PC).
- b Marital rape and sexual assault are crimes** 
Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.
- c Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given and for the accused to take steps to confirm consent.
- d Evidence of resistance is not required** 
Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not specify that consent cannot be inferred from a complainant's silence or submission during the assault.
- e All non-consensual sexual acts involving penetration are offences** 
Comment: The legislation does not specify that all acts of penetration, including all orifices and body parts or objects, are crimes. Such acts may be covered by other offences, but this is not explicit in the legislation and they may be treated less seriously.
- f All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation is limited to assault on females and does not define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body of any person. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g No corroboration required** 
Comment: The EA expressly states that corroboration is not required. However, a judge has the discretion to warn the fact finder (jury) about convicting on uncorroborated evidence, but is not required to do so (s 11 EA).
- h Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of the sexual reputation of the complainant is inadmissible. Prior sexual conduct with the accused or another person is admissible only with the prior leave of the court. Leave can only be given if the court is 'satisfied that the evidence has substantial relevance to facts in issue' and other conditions are met (s 14 EA). There are inadequate safeguards to protect a complainant if the court gives leave for prior sexual conduct evidence to be led.

Crimes of power and violence not morality

- i Terminology in sexual assault laws is legal and not moralistic** 
Comment: The Penal Code uses the terms 'offences against morality', 'indecent assault', 'defilement', and 'immoral purposes' (e.g. ss 133-135, 141 PC).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment. There are specific child sexual assault offences (e.g. ss 132, 134-136 PC), but these are not comprehensive and appropriate (e.g. do not cover sexual grooming, sexual communication with a child and causing a child to watch sexual activity). There are no close-in-age defences. Note that 'defilement' of a girl 13-15 years' is a misdemeanour with a significantly lower penalty (5 years) than the equivalent offence for a girl under 13, and of rape (a felony) of an adult woman (life imprisonment).

b Child sexual assault offences are gender-neutral 

Comment: Child sexual assault offences apply only to girls (e.g. 'defilement of a girl under 13', s 134). Only two offences are gender-neutral, 'disposing' and 'obtaining' minors under the age of 15 years for immoral purposes', (ss 141-142).

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

Comment: This defence is available for all child sex offences with the exception of 'defilement of a girl under 13', 'defilement of a girl between 13-15' and 'procuration' of a girl (ss 134-136 PC). It is a defence to 'defilement of a girl' with a disability (s 135).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

Comment: 'Defilement of a woman or girl idiot or imbecile' is an offence (s 135). 'Defilement' of a woman with a disability is a misdemeanour with a significantly lower penalty (5 years) than the equivalent felony offence of rape for a woman without disability (life imprisonment). This is discriminatory.

b No discriminatory, derogatory or stigmatising language is used 

Comment: The legislation uses the terms 'idiot' and 'imbecile' (s 135 PC).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

Comment: 'Indecent practices between men' is criminalised as 'gross indecency'. 'Buggery' is also considered an unnatural offence and is criminalised (ss 153-155).

b No discriminatory, derogatory or stigmatising language is used 

Comment: PC uses the terms 'buggery', 'gross indecency', 'unnatural offences' and 'indecent practices'. Buggery is equated with bestiality (ss 153-155).

c No discriminatory age of consent laws where same-sex sexual activity is not a crime N/A

NAURU



In Nauru, sexual offences are found in the *Crimes Act 2016*.

Most of the provisions of the *Crimes Act* assessed in this report meet good practice and human rights standards. For example, consensual same-sex sexual activity is not criminalised, all sexual assaults are criminalised, the law is explicit that corroboration is not required and that marital rape is a crime, consent is defined as the free and voluntary agreement to sexual activity and sexual assault crimes are gender-neutral. Consensual sexual activity with persons with disability is not a crime and the legislation does not use discriminatory or derogatory language to describe a person with disability. There are close-in-age defences, which are necessary to protect young people from criminalisation when they engage in consensual sexual activity with their peers where one or both people are under the age of consent.

However, there are insufficient safeguards in the legislation to protect a complainant's privacy and other rights when a court allows evidence of their prior sexual activity.

Nauru is a state party to relevant international and regional human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *International Covenant on Civil and Political Rights*, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
Comment: The legislation states 'to remove any doubt, this Division ('unlawful sexual acts') applies even if the person alleged to have committed the offence is married or a de facto partner of the person in relation to whom the offence is committed' (s 104 PC).
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required** 
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 

Rules of evidence and procedure

- g **No corroboration required** 
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence about a complainant's sexual reputation is 'not allowed' (s 130 CA). Evidence of prior sexual activity with any person, other than those to which the charge relates, is only allowed with the leave of the court (s 131 CA). Sexual history evidence is defined (s 129 CA). The safeguards are inadequate to protect the complainant if the court gives leave for such evidence to be led (e.g. no tests for prejudice to the complainant).

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: Legislation uses the term 'indecent act' (s 106 CA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences 
- b Child sexual assault offences are gender-neutral 
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 
Comment: The defence of consent is expressly excluded for all child sexual offences (s 126 CA).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence 
- b No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a Consensual same-sex sexual activity is not a crime 
Comment: Same-sex sexual activity was decriminalised for males and females in 2016.
- b No discriminatory, derogatory or stigmatising language is used 
- c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

In many states, legislation addressing gender-based violence against women remains non-existent, inadequate and/or poorly implemented.

— CEDAW Committee, General Recommendation No 35 2017, para 7, (CEDAW/C/GC/35)



NEW ZEALAND



The New Zealand sexual offences laws are found in the *Crimes Act 1961 (as amended) (CA)* and the *Evidence Act 2006 (EA)* contains the rules of evidence which apply to sexual assault offences.

Many of the provisions of the CA meet good practice. For example, consensual same-sex sexual activity is not a crime, all non-consensual sexual acts involving penetration are offences, corroboration is explicitly not required, there is no defence of marriage to rape, free and voluntary consent is required and sexual assault crimes are gender-neutral. There are specific child sexual assault offences, including 'grooming', and they are also gender-neutral. A close-in-age defence to child sexual offences is available to protect children and young people from being prosecuted for consensual sexual activity with their peers when one or both is under the age of consent. Further, consensual sexual activity with persons with disability is not a crime and the language used to describe a person with disability is discriminatory or derogatory.

There are some parts of the law that only partly meet the good practice criteria. For example, not all non-penetrative, non-consensual sexual acts such as groping or touching are expressly criminalised in the legislation. Cross examination of the complainant about prior sexual activity (consensual or non-consensual) is allowed with the 'leave of the court'.

The legislation does not explicitly provide for a close-in-age defence to child sexual offences to prevent criminalising consensual sexual activity between young people where one or both are under 16.

New Zealand is a state party to relevant international and regional human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *International Covenant on Civil and Political Rights*, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required** 
Comment: The legislation expressly states that 'a person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity' or submits or acquiesces to it (s 128 CA).
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not specify that all of these acts (e.g. sexual touching, groping) are crimes and does not define 'indecent assault' or other sexual offences to include them. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence about a complainant's 'sexual experience' is not allowed. Evidence of prior sexual activity with a person other than the accused is only allowed with the permission of the judge if it's relevant to the proceedings and in the interests of justice (s 44 EA). There are inadequate safeguards for the privacy and other rights of a complainant.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The CA uses the term 'indecent assault' (s 135 CA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a There are specific child sexual assault offences 
- b Child sexual assault offences are gender-neutral 
- c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a Consensual sexual activity with a person who has a disability is not an offence 
- b No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a Consensual same-sex sexual activity is not a crime 
- b No discriminatory, derogatory or stigmatising language is used 
- c No discriminatory age of consent laws where same-sex sexual activity is not a crime 

PAPUA NEW GUINEA



Papua New Guinea's sexual offences laws are in the *Criminal Code Act 1974 (as amended) (CCA)*. The *Evidence Act 1974 (EA)* contains the evidentiary rules for all criminal offences, including sexual offences.

In 2003, Papua New Guinea made major reforms to the CCA with the passing of the *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002*. These reforms resulted in a number of positive changes that conform to the good practice standards applied in this report. These include for example, the introduction of a series of new offences extending 'rape' to cover penetration of all orifices by the penis or any other object. The requirement for corroboration of a complaint of sexual assault was removed and a good practice definition of 'consent' was introduced into the legislation.

However, Papua New Guinea retains a marital immunity that protects a person from prosecution for child sexual assault if their spouse is over 14 at the time of the act. This does not meet good practice because it only criminalises rape in marriage in limited circumstances. Non-consensual sexual intercourse should be expressly criminalised in the legislation in every circumstance without exception. Allowing a defence or exception of marriage to rape violates human rights and is discriminatory. Good practice requires that marital rape be explicitly prohibited in legislation.

Papua New Guinea also still criminalises consensual same-sex sexual activity between men, with a maximum prison

sentence of 14 years. The CCA also uses discriminatory, derogatory and stigmatising language such as 'unnatural offences', 'against the order of nature', and 'gross indecency' and equates consensual same-sex activities with the offence of bestiality. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

There are child sexual assault offences, however, they are not comprehensive and are weakened by a defence of consent for sexual offences against children. The age of consent for opposite-sex sexual activity in Papua New Guinea is 16 for unmarried girls and 14 for boys, which is discriminatory and too low in the case of boys.

Papua New Guinea is state party to relevant international human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities* and *International Covenant on Civil and Political Rights*. Papua New Guinea has not joined the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
Comment: Rape and sexual assault are gender-neutral (ss 347, 349 CCA). A separate offence of indecent assault on males is a misdemeanour (s 337 CCA).
- b **Marital rape and sexual assault are crimes** 
Comment: Marriage is a defence if the complainant is over 14 years and is married to the accused (s 229G CCA).
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required** 
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 

Rules of evidence and procedure

- g **No corroboration required** 
- h **Prior sexual conduct is inadmissible and irrelevant** 

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses the terms 'carnal knowledge', 'defilement' and 'indecent assault' (e.g. ss 214, 220, 337, CCA).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

a There are specific child sexual assault offences 

Comment: There are specific child sexual assault offences (e.g. ss 220, 229A–229D CCA) but they are not comprehensive, (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). There is a close-in-age defence. Consistent with good practice standards, this defence does not apply in cases of abuse of trust (s 229F(b) CCA).

b Child sexual assault offences are gender-neutral 

Comment: Most child sexual assault offences are gender-neutral except 'abduction of girls under 18' and 'abduction of a girl under 16' (ss 220, 351 CCA).

c There is no defence of consent to child sexual assault offences (other than close-in-age defences) 

Comment: There is a defence of consent for sexual offences against children (s 229F(a) CCA).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

a Consensual sexual activity with a person who has a disability is not an offence 

b No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

a Consensual same-sex sexual activity is not a crime 

Comment: Crimes include 'sexual penetration against the order of nature', 'indecent practices between males', 'gross indecency with another male' regardless of consent (ss 210, 212 CCA).

b No discriminatory, derogatory or stigmatising language is used 

Comment: The legislation uses the terms 'unnatural offences', 'against the order of nature', and 'gross indecency' and equates these with bestiality (ss 210, 212 CCA).

c No discriminatory age of consent laws where same-sex sexual activity is not a crime N/A

SAMOA



Samoa's sexual offences laws are in the *Crimes Act 2013 (CA)*. The *Evidence Act 2015 (EA)* contains the evidentiary rules for all criminal offences, including sexual offences.

In 2013, Samoa enacted the CA which replaced and modernised the *Crimes Ordinance 1961*. The Act made significant changes to sexual assault offences in Samoa, some of which meet the good practice standards applied in this report. For example, under the offence of 'sexual violation', a range of sexual penetration acts are criminalised as 'unlawful sexual connection with another person' without consent. The circumstances in which consent cannot be given are expressly set out. Further, the Act specifically recognises marital rape as an offence. Some outdated and discriminatory offences, such as cross-dressing (a male dressing as a female) were repealed.

Additionally, the EA removed the requirement for corroborated evidence in cases of sexual assault as a general rule, and excluded evidence about a complainant's sexual reputation. However, it allows evidence of prior sexual experience with a person other than the defendant with the leave of the judge with insufficient safeguards for the privacy and other rights of a complainant. Also, the legislation does not expressly cover non-penetrative, non-consensual sexual acts such as groping or touching. Samoa criminalises consensual anal sex. Although the law applies to anal sex between people of the same or opposite sex, this activity

is most associated with male same-sex sexual activity. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assaults provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

There are specific child sexual assault offences, but they are not comprehensive. For example, they do not cover sexual grooming. The CA provides an exception to the offence of 'sexual conduct with a young person under 16' if the accused was married to the child at the time of the act concerned. Finally, there are no appropriate close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers.

Samoa is a state party to the relevant international human rights treaties: *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities* and *International Covenant on Civil and Political Rights*. Samoa has not joined the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral 
- b Marital rape and sexual assault are crimes 
- c Free and voluntary consent is required 
- d Evidence of resistance is not required 
- e All non-consensual sexual acts involving penetration are offences 
- f All non-penetrative, non-consensual physical sexual acts are criminal offences 

Rules of evidence and procedure

- g No corroboration required 
- h Prior sexual conduct is inadmissible and irrelevant 
Comment: Evidence about a complainant's sexual experience is not allowed. Evidence of their prior sexual experience with any person other than the defendant is only allowed with the permission of the judge (s 34 EA). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).

Crimes of power and violence not morality

- i Terminology in sexual assault laws is legal and not moralistic 
Comment: The CA uses the term 'indecent assault' (s 60).

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a** There are specific child sexual assault offences 
Comment. Child sexual assault offences are limited (e.g. ss 58-59 CA) (e.g. do not include, sexual grooming, sexual communication with a child, sexual activity in front of a child).
There are no appropriate close-in-age defences.
- b** Child sexual assault offences are gender-neutral 
- c** There is no defence of consent to child sexual assault offences (other than close-in-age defences) 
Comment: There is no defence of consent to 'sexual conduct with a child under 12' (s 58 CA). The defence is available in limited circumstances for 'sexual conduct with young person under 16' (s 59 COA). The legislation also provides an exception to this offence if the accused was married to the child concerned at the time of the act (s 59 CA).

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a** Consensual sexual activity with a person who has a disability is not an offence 
Comment: The CA criminalises sexual activity, whether consensual or not, with a person with 'severe intellectual disability'. The definition of 'severe intellectual disability' does not take into account an individual's capacity to understand the nature of a sexual act and to give free and voluntary consent to it (s 63 CA).
- b** No discriminatory, derogatory or stigmatising language is used 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a** Consensual same-sex sexual activity is not a crime 
Comment: 'Sodomy' either consensual or non-consensual, whether committed against a male or female, is an offence (s 67 CA).
- b** No discriminatory, derogatory or stigmatising language is used 
Comment: CA uses the term 'sodomy' (67 CA).
- c** No discriminatory age of consent laws where same-sex sexual activity is not a crime N/A

SOLOMON ISLANDS



The Solomon Islands sexual offences laws are found in the *Penal Code as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016 (PCASO)*. The *Evidence Act 2009 (EA)* contains the rules of evidence which apply to sexual assault offences.

The provisions of the *Penal Code (Amendment) (Sexual Offences) Act 2016* in some respects meet the good practice standards assessed in this report, including gender-neutral offences for adults and children, the use of terminology that is legal and not moralistic and a comprehensive definition of sexual assault covering penetration of all orifices by any body part or object. Marital rape is expressly a crime under the *PC* and extends to those persons in 'a marriage-like relationship'. Consensual sexual activity with a person who has a disability is not an offence and the Act does not use discriminatory, derogatory or stigmatising language to describe a person with a disability.

Other areas of the law only partly meet the good practice criteria. For example, the legislation criminalising non-penetrative sexual assault is limited and does not define 'indecent act' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body. Evidence of a complainant's prior sexual history with the accused or other persons is admissible with permission of the court without adequate safeguards for their privacy and other rights. The legislation does not specify that consent cannot be inferred from a complainant's silence

or submission during the assault. There are no close-in-age defences for child sexual assaults to prevent criminalising consensual sexual activity between young people when one or both is under the age of consent.

The Solomon Islands continues to criminalise consensual same-sex sexual activity and the legislation uses derogatory and stigmatising language for these offences, such as 'buggery', 'gross indecency', 'unnatural offences' and 'indecent practices'. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

The Solomon Islands is a state party to only two relevant international human rights treaties, the *Convention on the Elimination of All Forms of Discrimination against Women* and *Convention on the Rights of the Child*. It has signed but not ratified the *Convention on the Rights of Persons with Disabilities*. The Solomon Islands has not joined the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or the *International Covenant on Civil and Political Rights*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
Comment: Marital rape is expressly a crime under the legislation, which states, 'To avoid doubt, subsection (1) applies even if the persons are married or in a marriage-like relationship' (s 136F(2) PCASO).
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required** 
Comment: The Act states that lack of evidence of 'actual physical resistance' is not evidence of consent, but does not specify that consent cannot be inferred from a complainant's silence or submission during the assault (s 136A (3) PCASO).
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation is limited and does not define 'indecent act' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body (s 138 PCASO). Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The EA excludes corroboration in general, unless the law otherwise requires it. (ss 7, 18 EA). The PCASO should also expressly state that corroboration is not required in sexual violence cases.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Evidence of prior sexual experience with persons other than the accused is only admissible with permission of the court. Evidence of a complainant's prior sexual history with the accused is admissible in limited circumstances (s 58 EA). There are inadequate safeguards for the privacy and other rights of a complainant.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment. Child sexual assault offences are very limited (e.g. ss 139-144 PCASO) (e.g. does not include sexual grooming, sexual communication with a child, sexual activity in front of a child). There is no close-in-age defence.
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
Comment: Consensual and non-consensual same-sex sexual activity is criminalised for male and females (ss 160-162 PC).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The PCASO uses the terms 'buggery', 'gross indecency', 'unnatural offences' and 'indecent practices' (ss 160-162).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

TONGA



Tonga's sexual offences laws are in the *Criminal Offences Act (COA)*. The *Evidence Act (as amended) (EA)* contains the evidentiary rules for all criminal offences, including sexual offences.

Tonga does not have comprehensive laws to address sexual violence. The most recent reforms were in 1988, when section 118 of the COA was amended by repealing the marital rape exemption, making rape within marriage a criminal offence.

Most of the sexual assault provisions assessed in this report do not meet good practice. For example, the definition of rape is very narrow and gender specific as it is committed by men against women. It does not take into account the full range of sexual violations experienced by victim/survivors, both male and female. Corroboration is required and prior sexual conduct of the complainant is admissible with leave of the court with insufficient safeguards for the privacy and other rights of a complainant.

The law does not define consent to sexual activity as free and voluntary agreement by a person, does not specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. The COA also deems any person with an intellectual disability to be incapable of giving free and voluntary consent to sexual activity and uses derogatory terms such as 'feeble minded, insane, idiot or imbecile' to refer to such persons. There are

no close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers.

The age of consent for opposite-sex sexual activity in Tonga is 16 years for both boys and unmarried girls.

Consensual same-sex sexual activity is criminalised under the COA, with a maximum penalty of 10 years' imprisonment and whipping of any male found guilty of having anal sex, whether consensual or not. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Tonga is a state party to only two of the relevant international human rights treaties, the *Convention on the Rights of Persons with Disabilities* and the *Convention on the Rights of the Child*. Tonga is not a party to other relevant human rights treaties including the *Convention on All Forms of Elimination against Women*, *International Covenant on Civil and Political Rights* and *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
Comment: The crime of 'rape' relates only to females - 'any person who carnally knows any female' (s 118 COA).
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given.
- d **Evidence of resistance is not required** 
Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not stipulate that consent cannot be inferred from a complainant's silence or submission during the assault.
- e **All non-consensual sexual acts involving penetration are offences** 
Comment: The legislation does not specify that all acts of penetration, including of all orifices by any body part or object, are crimes. Such acts may be covered by other offences, but this is not explicit in the legislation and they may be treated less seriously.
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not specify that all of these acts are crimes and does not define 'indecent assault' or other sexual offences to include them. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: The legislation specifies that corroboration of a sexual assault complaint is required (s 11 EA).
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Sexual experience of a complainant with a person other than the defendant is allowed only with the leave of the court (s 33 EA). Character evidence, which may include reputation in relation to sexual activity, must be 'confined to general reputation only and shall not relate to particular acts of good or bad conduct' is allowed (s 34 EA). There are insufficient safeguards in the legislation to prevent the admissibility of irrelevant evidence of a complainant's prior sexual conduct.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses terms including 'carnal knowledge' and 'indecent assault'.

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment: Child sexual assault offences are very limited (e.g. ss 122-122, 124-127, 129 COA) (e.g. they do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). There is no close-in-age defence.
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
Comment: The legislation states that, as a matter of law, a person with a cognitive or intellectual disability cannot consent to sexual activity (s 126 COA).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: COA refers to people with intellectual or cognitive disability as being 'feeble minded, insane, idiot or imbecile' (s 118(1)(c)).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
Comment: It is an offence to engage in consensual or non-consensual anal sex ('sodomy'). The maximum penalty for this offence is 10 years imprisonment (s 136 COA). The legislation also expressly allows for whipping of any male found guilty of 'sodomy' (s 142 COA).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: Uses the term 'sodomy' and the crime is equated with bestiality.
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

TUVALU



Tuvalu's sexual offences laws are found in the *Penal Code 2008 (as amended) (PC)*. Tuvalu does not have an evidence act. The Constitution of Tuvalu provides that United Kingdom laws of evidence and common law are applicable as part of the existing common law of Tuvalu. The common law is not assessed in this report, which focuses on legislation.

Tuvalu does not have comprehensive legislation to address sexual violence. The most recent reforms were made in 2008, when article 134 of the *PC* was amended to include the criminalisation of rape of girls under 13 years of age and article 129 which increased the penalty for rape to imprisonment for life.

Most of the sexual assault provisions assessed in this report do not meet good practice. For example, the definition of rape is very narrow and gender specific as it can only be committed by men against women and does not take into account the full range of sexual violations experienced by victim/survivors, both female and male. The legislation does not define consent to sexual activity as free and voluntary agreement by a person or specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent.

Corroboration of a sexual assault complaint is required and prior sexual conduct of the complainant is admissible without adequate safeguards for the privacy and other rights of a complainant. This is inconsistent with the

approach taken in the *Family Protection and Domestic Violence Act 2014*. Under that Act, corroboration is not necessary, evidence of a complainant's sexual reputation or previous sexual experience with any person other than the accused is inadmissible, and a complainant does not need to prove they resisted the attack to show they did not consent.

Child sexual offences under the *PC* are not comprehensive and apply only to girls. There is a short statute of limitations of 12 months within which to bring a complaint of unlawful sexual intercourse with a girl between 13-15 years. Tuvalu does not provide close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers when one or both is under the age of consent. The age of consent for opposite-sex sexual activity in Tuvalu is 15 years for both boys and unmarried girls. This is too low.

Tuvalu criminalises consensual same-sex sexual activity between males and the *PC* uses discriminatory and stigmatising language such as 'unnatural offences', 'buggery' and 'indecent practices'. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed and all non-consensual sexual acts, including 'anal rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Tuvalu is a state party to some relevant international human rights treaties, including the *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *Convention on the Elimination of All Forms of Discrimination against Women*, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Tuvalu is not a party to the *International Covenant on Civil and Political Rights*.



Photo credit: Kyle Post

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral** 
Comment: The crime of 'rape' relates only to females - 'any person who has unlawful sexual intercourse with a woman or girl' (s 128 PC).
- b Marital rape and sexual assault are crimes** 
Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.
- c Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given and for the accused to take steps to confirm consent.
- d Evidence of resistance is not required** 
Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not make clear that consent cannot be inferred from a complainant's silence or submission during the assault.
- e All non-consensual sexual acts involving penetration are offences** 
Comment: The legislation does not specify that all acts of penetration, including of all orifices by any body part or object, are crimes. Such acts may be covered by other offences, but this is not explicit in the legislation and they may be treated less seriously.
- f All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not define 'indecent assault' or specify that it includes all acts of sexual touching (e.g. groping) of any part of the body. Such acts may be covered by other offences, but this is not explicit.

Rules of evidence and procedure

- g No corroboration required** 
Comment: Corroboration is generally required.
- h Prior sexual conduct is inadmissible and irrelevant** 
Comment Not expressly excluded in legislation. Common law rules are not assessed.

Crimes of power and violence not morality

- i Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses terms, including 'indecent assault', 'immoral purposes', 'defilement'.

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment: There are very limited child sexual assault offences (e.g. ss 132-135, ss 138-142 PC) (e.g. they do not include sexual grooming, sexual communication with a child or sexual activity in front of a child). There are no close-in-age defences.
- b **Child sexual assault offences are gender-neutral** 
Comment: Child sexual assault offences relate only to girls (e.g. 'defilement of a girl', s 134 PC).
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The PC refers to people with intellectual or cognitive disability as an 'idiot' or 'imbecile' (s 135).

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
Comment: 'Buggery is an offence, whether consensual or non-consensual and whether between people of the same or opposite sex. The maximum penalty for this offence is 14 years imprisonment (s 153 PC). 'Gross indecency' between males whether in public or private is also an offence (s 155). The maximum penalty is 5 years.
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The PC uses the terms 'unnatural offences', 'buggery', 'gross indecency' and 'indecent acts'. Anal sex is equated with bestiality (s 153).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

VANUATU



Vanuatu's sexual offences laws are in the *Penal Code Act 1981 (PCA)*, as amended (*Penal Code (Amendment) Act No 17 of 2003* and *Act No 25 of 2006*). Vanuatu does not have an evidence act and applies common law evidentiary rules. The common law and Vanuatu case law are not assessed in this report.

Vanuatu has a hybrid justice system comprising the formal legal system and *kastom*, both of which are recognised under the Constitution. *Kastom* is administered by local chiefs. The jurisdiction of *kastom* 'courts' is officially narrow, limited to cases involving theft, land and family disputes. However, in practice chiefs also hear complaints of sexual assault. They do not necessarily apply the law as set out in the *PC*. *Kastom* is not assessed in this report.

Some sexual offences provisions assessed in this report meet good practice and human rights standards. For example, sexual assault offences are gender-neutral, there is no defence of consent to child sexual assault and consensual sexual activity with a person with disability is not a crime. 'Sexual intercourse without consent' has a good practice definition that criminalises non-consensual penetration by objects or any body part of vagina or anus as well as non-consensual cunnilingus and fellatio.

Although consensual same-sex sexual activity is not a crime in Vanuatu, it maintains discriminatory age of consent laws – 15 years for opposite-sex sexual activity and 18 years for same-sex sexual activity. Some other areas of the law evaluated below that do not meet the good practice criteria include for example, child sexual offences that are not comprehensive, no close-in-age defences to protect young people from being prosecuted for consensual sexual activity with their peers, and no definition of 'consent' as free and voluntary agreement. In addition, the legislation does not state that there is no exception for, or defence of marriage to a charge of sexual intercourse without consent or other sexual offence in any circumstance.

Vanuatu is a state party to the following relevant international human rights treaties: *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *International Covenant on Civil and Political Rights* and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1 Sexual Assault

Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.
- c **Free and voluntary consent is required** 
Comment: There is no express definition of consent requiring free and voluntary consent to be given.
- d **Evidence of resistance is not required** 
Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not make clear that consent cannot be inferred from a complainant's silence or submission during the assault.
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 
Comment: The legislation does not specify that all such acts are crimes and does not define 'act of indecency' (s 98) or other sexual offences to include them. Such acts may be covered, but it is not explicit in the legislation.

Rules of evidence and procedure

- g **No corroboration required** 
Comment: Not expressly excluded in legislation. Common law rules are not assessed.
- h **Prior sexual conduct is inadmissible and irrelevant** 
Comment: Not expressly excluded in legislation. Although the common law is not assessed in this report, it is noted that under the common law applied by Vanuatu courts, corroboration is not required for conviction in sexual offences cases, but that the judge must warn the assessor (jury or other trier of fact) about convicting without corroboration.

Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic** 
Comment: The legislation uses terms including 'indecent matter', 'indecent act' and 'indecent assault'.

2 Sexual Assault

Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown

Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences** 
Comment. Child sexual assault offences are limited (e.g. ss 96, 97A, 99 PCA) and do not include, for example sexual grooming, sexual communication with a child, or sexual activity in front of a child.
There are no close-in-age defences.
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

3 Sexual Assault

Additional Criteria in Relation to People with Disability

Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

4 Consensual Same-Sex Sexual Activity

Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
Comment: Consensual 'homosexual acts' is only an offence between people under 18 years (s 99 PCA).
- b **No discriminatory, derogatory or stigmatising language is used** 
Comment: The PCA uses the term 'gross indecency' (s 100).
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 
Comment: Age of consent is 15 for opposite-sex sexual activity and 18 for same-sex sexual activity (s 99 PCA).

Endnotes

- 1 The other organisations of the Alliance are the Kaleidoscope Trust, *The Royal Commonwealth Society and Sisters for Change*.
- 2 The Human Dignity Trust (2019) <<http://www.humandignitytrust.org/pages/NEWS/News?NewsArticleID=578>> (last accessed January 2020).
- 3 The Hon Theresa May, UK Prime Minister, 'Speech' (Speech delivered to the Commonwealth Joint Forum Plenary, UK, 17 April 2018) <<https://www.gov.uk/government/speeches/pm-speaks-at-the-commonwealth-joint-forum-plenary-17-april-2018>> (last accessed January 2020).
- 4 Resources (2019) The Human Dignity Trust <<https://www.humandignitytrust.org/hdt-resources/>> (last accessed January 2020).
- 5 UN human rights treaties available at <www.ohchr.org>.
- 6 African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, (Maputo Protocol) 11 July 2003 <<https://icj-kenya.org/downloads/Publications/Maputo%20Protocol%20-%20A5.pdf> |> (accessed January 2020).
- 7 *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)* <<http://oas.org/en/mesecvi/convention.asp>> (accessed January 2020).
- 8 Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*, <<https://www.coe.int/en/web/istanbul-convention/basic-texts>> (accessed January 2020).
- 9 For example, *Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in the ASEAN Region 2012*, <https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4 (accessed January 2020).
- 10 *Pacific Leaders Gender Equality Declaration 2012*, <<https://www.forumsec.org/pacific-leaders-gender-equality-declaration/>>. See also <http://www.pilonsec.org/images/stories/PLGED_intros.pdf>.
- 11 Yogyakarta Principles plus 10 (2016) <<https://yogyakartaprinciples.org/principles-en/yp10/>> (accessed January 2020).
- 12 Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19: Violence against women*, 11th sess, contained in UN Doc A/47/38 (1992) <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.asp>> (accessed January 2020).
- 13 UN Women, *Handbook for Legislation on Violence against Women* (2012) (*UN Handbook*) and *Supplement to the Handbook for Legislation on Violence against Women, 'Harmful Practices'* (2012) <<http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>> (accessed January 2020).
- 14 See also for example, UN Office on Drugs and Crime (UNODC), *Model Strategies and Practical Measures for the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice* (1999) <http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_CP_and_CJ.pdf> (accessed January 2020); Southern Africa Development Community (SADC) Parliamentary Forum, *Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage* (2016).

- 15 Africa Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa (Naimey Guidelines)* (2017) <<https://www.achpr.org/legalinstruments/detail?id=4>> (accessed January 2020). Authoritative guidance on state implementation of regional treaties of relevance is provided by the expert bodies responsible for monitoring implementation. For example, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) in relation to the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, <<http://oas.org/en/mesecvi/about.asp>> (accessed January 2020).
- 16 The criteria used to assess rape and sexual assault laws in this report reflect the fact that the vast majority of Commonwealth states distinguish between sexual and other assaults and between penetrative (e.g. rape) and non-penetrative (e.g. indecent assault) sexual offences with the penalty usually varying according to the *nature of the assault*. One Commonwealth country, Canada, takes a different approach. It includes sexual assault as part of its general assault offences and grades the offences and penalties according to the perceived *degree of harm* to the complainant rather than on the nature of the assault (see Canada checklist in Part C in the Caribbean and Americas Regional Report). This approach can also meet good practice standards applied in this report.
- 17 See, for example, *The Global Rape Epidemic* (2017) Equality Now [Gaps in protecting women and girls from sexual violence] <https://www.equalitynow.org/the_global_rape_epidemic_campaign> (accessed January 2020).
- 18 P. Imrana Jalal, *Handbook on Law for Pacific Women, A Legal Rights Handbook* Fiji Women's Rights Movement, (1998) (*Handbook on Law for Pacific Women*) 74 <http://www.fwrn.org.fj/images/fwrn2017/PDFs/resources/Law_for_Pacific_Women.pdf> (accessed January 2020).
- 19 *R v R* [1992] 1 A.C. 599.
- 20 For example, see Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [40].
- 21 Petroni, S., Das M, Sawyer S. (2018). The Lancet Child & Adolescent Health. *Protection versus rights: age of marriage versus age of sexual consent*, December 3, 2018. Quoted in *Marriage vs Age of Sexual Consent*, Girls Not Brides, <https://www.girlsnotbrides.org/wp-content/uploads/2019/01/Age-of-Marriage-brief.pdf> (accessed January 2020).
- 22 Committee on the Rights of the Child, *General comment No. 13 (2011) on The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [25].
- 23 See, for example, the observations about assumptions or myths made about women and girls with disability by the Committee on the Rights of Persons with Disabilities, *General Comment No 3 (2016) on women and girls with disabilities*, 16th sess, UN Doc CRPD/C/GC/3 (25 November 2016) [30] & [38] <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en> (accessed January 2020).
- 24 See, for example, D Stubbs & S Tawake (2009) *Pacific Sisters with Disabilities: At the intersection of discrimination* (UNDP Pacific Centre, Suva, Fiji, 2009) < <https://pacificwomen.org/research/pacific-sisters-with-disabilities/>> (accessed January 2020).

- 25 For detailed information on countries that criminalise consensual same-sex sexual activity please see www.humandignitytrust.org.
- 26 For example, in 1981, in the case of *Dudgeon*, the European Court held that laws in Northern Ireland that criminalised same-sex sexual activity violated the right to privacy under article 8 of the European Convention on Human Rights, even when they were not enforced. It ruled that no state in its jurisdiction had the right to criminalise all same-sex sexual activity. *Dudgeon v United Kingdom*, Appl No 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981 (*Dudgeon*) <<https://www.refworld.org/cases,ECHR,47dfaf7d.html>> (accessed January 2020). Also, *Norris v Ireland*, 13 Eur. H.R. Rep. 186 (1988) <https://www.humandignitytrust.org/wp-content/uploads/resources/Norris_v_Ireland.pdf> (accessed January 2020); *Modinos v Cyprus*, 7/1992/352/426, Council of Europe: European Court of Human Rights, 23 March 1993 <<https://www.refworld.org/cases,ECHR,402a21a04.html>> (accessed January 2020).
- 27 *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994 <<https://www.refworld.org/cases,HRC,48298b8d2.html>> (accessed January 2020).
- 28 See, for example, UN Commission on Human Rights, *Promotion and Protection of Human Rights: 2003/... Human rights and sexual orientation*, 59th sess, Agenda Item 17, UN Doc E/CN.4/2003/L.92 (17 April 2003) <<https://undocs.org/en/E/CN.4/2003/L.92>>; H E Wegger Christian Strømme, *2006 Joint State: 3rd session of the Human Rights Council* (1 December 2006) ARC International <<http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/>> (accessed January 2020); *Report of the Human Rights Council: 17/19 Human rights, sexual orientation and gender identity*, 17th sess, UN Doc A/66/53 (17 June 2011) 172 <<https://www.right-docs.org/doc/a-hrc-res-17-19/>> (accessed January 2020).
- 29 African Commission on Human and Peoples' Rights, *275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (2014) <<https://www.achpr.org/sessions/resolutions?id=322>> (accessed January 2020).
- 30 *Yogyakarta Principles plus 10* (2016) <<https://yogyakartaprinciples.org/principles-en/yp10/>> (accessed January 2020).

