

SOLOMON ISLANDS
LAW REFORM COMMISSION



Review of the Penal Code and Criminal Procedure Code

SECOND INTERIM REPORT

SEXUAL OFFENCES

JUNE 2013



SOLOMON ISLANDS LAW REFORM COMMISSION
REVIEW OF THE PENAL CODE AND CRIMINAL
PROCEDURE CODE
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2013



SOLOMON ISLANDS LAW REFORM COMMISSION

30 April 2013

Honourable Commins Mewa
Minister for Justice and Legal Affairs
Kalala Haus
Honiara

Dear Hon Minister,

Review of the Penal Code and Criminal Procedure Code

On 1st May 1995 your predecessor gave terms of reference to the Law Reform Commission (LRC) to enquire and report to you on the review of the Penal Code and Criminal Procedure Code.

In accordance with the Law Reform Commission Act the LRC is pleased to present to you the second interim report on this Review. The second interim report contains recommendations for reform of sexual offences contained in Part XVI of the Penal Code.

Yours Sincerely,

Commissioner Gabriel Suri

Commissioner Waeta Ben Tabusasi

Commissioner Philemon Riti

Commissioner Emmanuella Kauhue

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Solomon Islands Law Reform Commission

The Solomon Islands Law Reform Commission (LRC) is a statutory body established under the Law Reform Commission Act 1994. The LRC is headed by the Chairman and four part-time Commissioners who are appointed by the Minister for Justice and Legal Affairs.

The post of Chairman is vacant. The Commissioners are Mr Gabriel Suri, Mr Waeta Ben Tabusasi C.S.I., S.I.M, Mrs Emmanuella Kauhue and Rt Reverend Philemon Riti O.B.E. Mrs Sarah Dyer was a Commissioner until her resignation in March 2012. She was replaced by Mrs Emmanuella Kauhue who was appointed in June 2012.

The staff of the LRC are:

Mr Philip Kanairara – Principal Legal Officer

Mr Derek Gwali Futaiasi – Senior Legal Officer (moved to Prime Minister's Office in June 2013)

Ms Kathleen Kohata Senior Legal Officer (transferred to the Public Solicitor's Office in February 2013)

Mr Daniel A. Suluia – Senior Legal Officer

Mrs Matilda Dani Diake – Office Manager

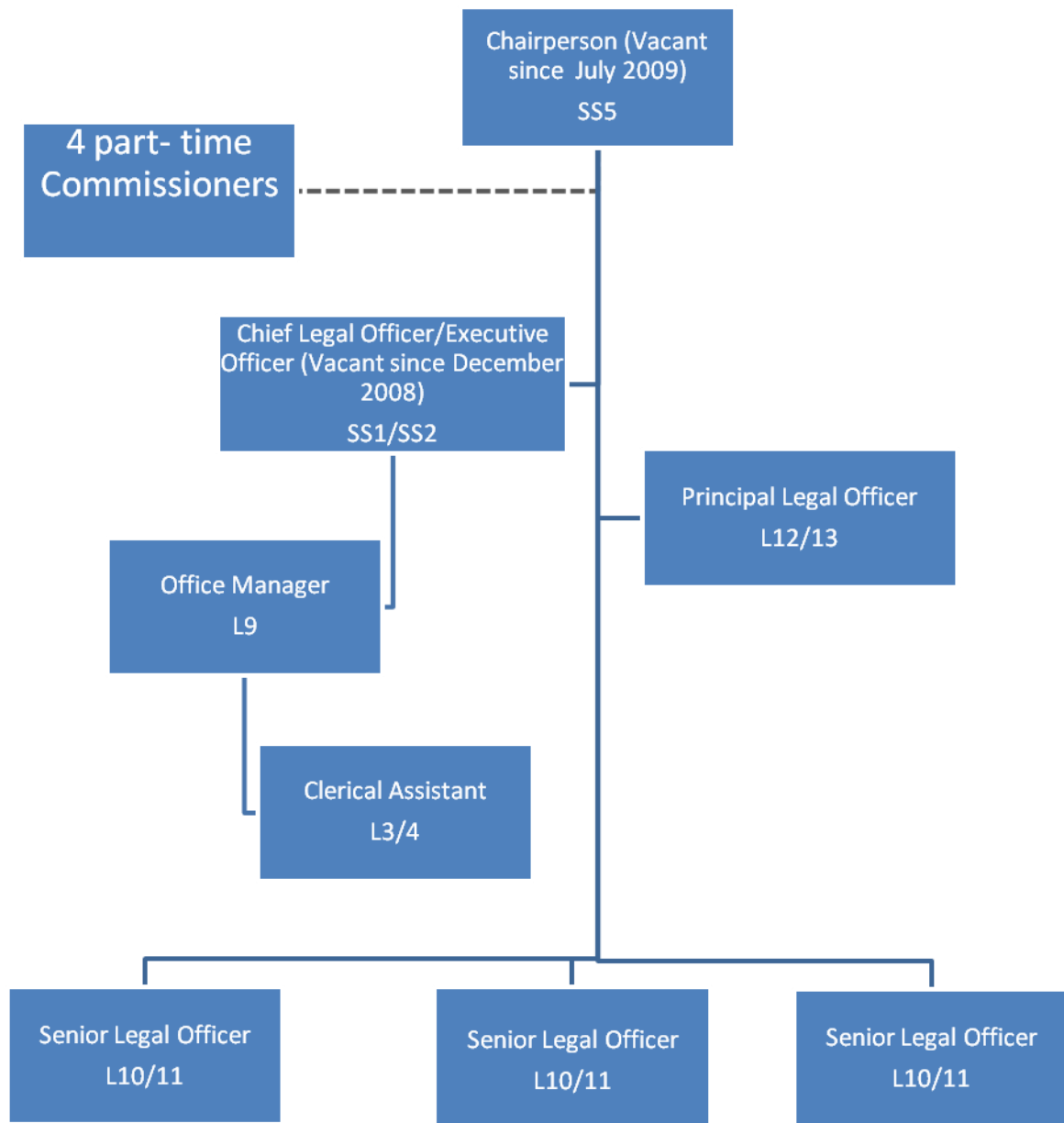
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Solomon Islands Law Reform Commission (SILRC)
Organisational Structure



Commissioners



Commissioner Gabriel Suri



Commissioner Waeta Ben Tabusasi



Commissioner Rt Rev. Philemon Riti



Commissioner Emmanuella Kauhue

Law Reform Commission Staff



Left to Right: Mr. Derek Futaiasi, Ms Kathleen Kohata, Mrs. Matilda Dani Diake, Ms. Kate Halliday, Mr. Philip Kanairara and Mr. Daniel A. Suluia. Missing: Mr. Solomon-Lincoln Saemala

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Terms of reference

WHEREAS the Penal Code and the Criminal Procedure Code are in need of reform after many years of operation in Solomon Islands.

NOW THEREFORE in exercise of the powers conferred by section 5(1) of the Law Reform Commission Act 1994, I OLIVER ZAPO, Minister of Justice and Legal Affairs hereby refer to the Law Reform Commission the following –

To enquire and report to me on –

The Review of the Penal Code and Criminal Procedure Code;

Reforms necessary to reflect the current needs of the people of Solomon Islands.

Dated at Honiara this 1st day of May 1995.

NB: Explanation: The criminal law system in Solomon Islands has now been in operation for many years. Developments in new crimes, their nature and complexity have made it necessary to overhaul criminal law in general to keep it abreast with the modern needs of Solomon Islands.

Abbreviations and Terminology

CEDAW – United Nations Convention on the Elimination of all Forms of Discrimination Against Women

CCSE – Child commercial sexual exploitation

CSEM -Child sexual exploitation material

CRC – United Nations Convention on the Rights of the Child

CRC Optional Protocol – Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

NSW – New South Wales Australia

PIF – Pacific Islands Forum

PNG – Papua New Guinea

Qld – Queensland Australia

RSIPF – Royal Solomon Islands Police Force

SA – South Australia

Tas – Tasmania Australia

UNIFEM – United Nations Development Fund for Women

UNICEF-United Nations Children's Fund

UNCRPD – United Nations Convention on the Rights of Persons with Disabilities

Van – Vanuatu

Vic – Victoria Australia

WA – Western Australia

List of recommendations

Rape

Recommendation 1

Sexual intercourse should be defined as -

‘the introduction to any extent of the penis in the vagina, anus or mouth; or the introduction to any extent of the penis, other body part or object in the vagina or anus; or the acts of licking, sucking or kissing the genitals of a person.’

Recommendation 2

Consent should be defined as a ‘free and voluntary agreement where the person has the freedom and capacity to make the choice.’

Recommendation 3

The following circumstances should be identified in the legislation for where consent cannot be validly given. However this list is not exhaustive, and the courts should be able to consider other circumstances when determining whether the alleged victim consented or not.

- The victim submits because of the use of violence, or threats of violence, to the victim or someone else.
- The victim submits out of respect or fear due to the accused’s position of authority, trust or responsibility.
- The victim submits because of threats to shame, degrade or humiliate the victim or another person.
- The victim does not have the capacity to give consent because of age, cognitive ability, mental or physical impairment preventing communication, being asleep, being unconscious or being incapable due to the consumption of drugs or alcohol.
- The victim or another person is unlawfully detained (held captive or unable to escape due to location or external threats).
- The victim mistakenly believes that the act is for medical or hygienic purposes, or the act will be beneficial to his or her physical, psychological, social or spiritual wellbeing.

- The victim is mistaken about the identity of the person.
- Consent was expressed by words or conduct of another person (not the victim).
- The victim consented to some sexual activity but then withdrew consent through words or conduct.

Recommendation 4

The legislation should provide that a person does not consent to sexual intercourse just because he or she did not say anything to indicate non-consent; did not protest, struggle or sustain a physical injury, or freely consented to sexual intercourse with the accused or another on an earlier occasion.

Recommendation 5

The new offence of rape should be drafted so that it is clear that it applies to all people, even where there is a marriage relationship between the victim and the accused.

Recommendation 6

The term rape should be retained.

Recommendation 7

The maximum penalty for attempted rape should be increased to 10 years imprisonment.

Sexual abuse of a person with a significant disability

Recommendation 8

The LRC recommends the introduction of an offence of sexual intercourse with a person who has a significant disability to replace the existing defilement offence that applies in relation to a “female idiot or imbecile.”

The offence is committed when a person has, or attempts, sexual intercourse with a person who has a significant disability, knowing that the person has a significant disability, and has obtained the person’s

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acquiescence in, submission to, participation in, or undertaking of the act by taking advantage of the disability.

The LRC recommends a separate offence of indecent act on a person with a significant disability.

Significant disability should be defined as an intellectual, mental or physical condition or impairment (or a combination of two or more of these types of condition or impairment) that affects a person to such an extent that it significantly impairs the person's capacity to understand the nature of the sexual conduct, or to understand the nature of the decision about sexual conduct, or to communicate decisions about sexual conduct.

The LRC recommends that for the offence involving sexual intercourse the maximum penalty should be 10 years imprisonment, but if the victim is under the age of 13 years or the offence is committed by a person in a position of trust, authority or dependency to the victim who is aged 13 to 15 years the maximum penalty should be life imprisonment.

For the offence involving indecent conduct the maximum penalty should be five years imprisonment, but if the victim is under the age of 13 years or the offence is committed by a person in a position of trust, authority or dependency to the victim who is aged 13 to 15 years the maximum penalty should be seven years imprisonment.

Indecent assault

Recommendation 9

The offence of indecent assault should be replaced with an offence of indecent touching without consent, that adopts the same definition of consent as recommended for rape. The offence should apply to both genders.

The term indecent should be defined as meaning indecent according to the standards of ordinary or right minded people, or prevailing community standards. To determine whether conduct is offensive all of the circumstances surrounding the conduct can be considered, including the motive of the accused.

The offence should include touching where a person is forced to indecently touch him or herself, the accused or another person.

The maximum penalty should be five years imprisonment.

Recommendation 10

The offence of insulting the modesty should be replaced with an offence of indecent conduct in the presence of another person without the consent of that person. Conduct includes words, gestures and other actions that do not amount to touching. The term indecent should have the same meaning as for the recommended offence of indecent touching.

The maximum penalty should be three years imprisonment.

Incest

Recommendation 11

The Penal Code should have one general offence of incest drafted in gender neutral terminology.

Incest should apply to the following close blood relatives – lineal (parent, child, grandparent, grandchildren), brother and sister (including half brother and half sister), uncle, aunt, nephew, niece and first cousin.

A defence of restraint, duress or fear should apply to incest. The defence would be available to an accused person who at the time of the offence was under restraint, duress, or fear of the other person or another person.

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Custom marriage according to well established practices should be available as a defence.

Lack of knowledge of the relationship should be available as a defence. This defence should be available if the accused did not know, or could not reasonably have been expected to know, that the other person was a close blood relative.

The maximum penalty for incest should be 10 years imprisonment, but if the offence is committed against a child under the age of 13 years the maximum penalty should remain as life imprisonment. The penalty for attempted incest should be five years imprisonment. If the attempt is against a child under the age of 13 years the maximum penalty should be seven years imprisonment.

Sexual intercourse with a child

Recommendation 12

The offence of defilement of a girl under the age of 15 years should be replaced with a new offence of sexual intercourse with a child under the age of 15 years.

The act of sexual intercourse can be made by the perpetrator or the child.

Where the child is under the age of 13 years, or if the offence is committed by a person in a position of trust, authority or dependency with the child, the maximum penalty should be life imprisonment.

If the child is aged 13 to 15 years, and the offence is not committed by a person in a position of trust, authority or dependency the maximum penalty should be 15 years imprisonment.

Minimum age for marriage

Recommendation 13 (a)

The minimum age for customary marriage should be in line with the minimum age for marriage under the state law (Islanders' Marriage Act). There should be provision in the Islanders' Marriage Act for marriage under the age of 15 years in exceptional circumstances. Exceptional circumstances would include pregnancy, and where marriage is in the best interests of the unborn child. Marriage under the Act when someone is under the age of 15 years should be a defence to sexual intercourse with a child under the age of 15 years.

Recommendation 13 (b)

A stricter requirement should be placed on an accused who relies on the defence of reasonable belief that the child was 15 years or older. For the belief to be reasonable the accused must demonstrate that he or she took reasonable steps to ascertain the age of the child.

Indecent touching of a child

Recommendation 14

The LRC recommends the introduction of the offences of-

- indecent touching of a child who is under the age of 15 years;
- compelling a child who is under the age of 15 years to indecently touch him or herself, the accused or another person;
- indecent conduct in the presence of a child who is under the age of 15 years; and
- compelling a child who is under the age of 15 years to engage in indecent conduct in the presence of the accused.

The maximum penalty for the offences should be seven years imprisonment if the child is under 13 years of age, or the offender is in a position of trust, authority or dependency in relation to the child; otherwise the maximum penalty should be five years imprisonment.

Sexual abuse of a child aged 15 to 18 years

Recommendation 15

The LRC recommends the introduction of an offence of sexual abuse of a child over the age of 15 years but under the age of 18 years by a person in a position of trust, authority or dependency in relation to the child.

The offence should cover acts of sexual intercourse and sexual touching but with different maximum penalties. For acts of sexual intercourse the maximum penalty should be seven years, and for acts of sexual touching the maximum penalty should be five years.

Persons in a position of trust, authority or dependency in relation to a child should include (but not be limited to) the following persons-

- parent, step-parent and adoptive parent;
- sister, brother or cousin;
- grandfather or grandmother;
- uncle or aunt;
- custodian, guardian or carer;
- custom doctor or healer;
- religious or community leader;
- teacher;
- counsellor ;
- medical practitioner;
- employer; and
- police or correctional officer.

The courts should be free to determine that other types of relationship between the accused and the young person was one of trust, authority or dependency.

There should be a defence of reasonable belief that the young person was 18 years or older, where the accused took reasonable steps to ascertain the age of the young person prior to the sexual act. There should be a defence of marriage, which includes marriage under written law and custom.

Persistent sexual abuse of a child

Recommendation 16

The LRC recommends the introduction of a new offence of persistent sexual abuse of a child. The offence should protect children under the age of 18 years.

The offence should be constituted by the commission of at least two sexual offences (either child specific, or a general sexual offence such as rape) on separate occasions.

The maximum penalty for the offence should be 15 years, unless one of the offences constituting the offence includes the element of sexual intercourse, then the maximum penalty should be life imprisonment.

Commercial sexual exploitation of children

Recommendation 17

For offences addressing the commercial sexual exploitation of children (which includes child prostitution) a child should be defined as a person under the age of 18 years.

Recommendation 18

The definition of child commercial sexual exploitation (CCSE) should be the provision of sexual services by a child (whether or not this includes an indecent act) for financial or other reward, favour, compensation, financial or material thing or gain.

There should be no requirement that a benefit was actually received by the child or any other person in exchange for sexual services.

Recommendation 19

The LRC recommends the introduction of offences of-

- obtaining or using commercial sexual services from a child;
- inducing, inviting, persuading, arranging or facilitating a child to engage in CCSE, or otherwise acting as an agent or 'middleman' for CCSE;
- trafficking of children for CCSE;
- parent, guardian or carer permitting a child to be used for CCSE; and
- receiving a benefit from CCSE.

The maximum penalty for the offences should be ten years.

Recommendation 20

The LRC recommends the introduction of an offence of knowingly allow premises to be used for CCSE. The offence should target persons who control or manage premises or who control or manage entry of people into premises.

The offence should also address situations when a person becomes aware that CCSE has or is occurring on premises under his or her control or management and who fails to take steps to report or address the matter.

The following defences should be available-

- the accused had no knowledge that CCSE was occurring on the premises;
- the accused had no knowledge that the child was participating in CCSE; or
- the accused used all due diligence to prevent CCSE the premises.

The term premises should include land, buildings, marine vessels and vehicles.

Recommendation 21

A defence of reasonable belief that the child was over the age of 18 years should apply to CCSE offences. An accused who relies on this defence must show that he or she took reasonable steps to ascertain the age of the child.

Recommendation 22

The LRC recommends that a child who is a victim of CCSE should not be liable to prosecution for CCSE offences where the child is providing the sexual service.

In relation to other children who are liable to prosecution for CCSE offences the LRC recommends that the Director of Public Prosecutions should use the discretion to grant immunity to the child in the public interest to encourage children to come forward and report CCSE offences.

Child sexual exploitation material

Recommendation 23

The LRC recommends the introduction of offences to address child sexual exploitation material (CSEM). Material should include visual, audio and print mediums as well as data capable of conveying, transmitting or storing the material.

Recommendation 24

A child for the purpose of CSEM offences should be defined as a person under the age of 18 years or who appears to be under the age of 18 years.

Recommendation 25

The definition of CSEM should include -

- (a) material that depicts-
 - the sexual parts of a child;
 - sexual activity with a child;

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- a child in a sexual context or context intended to satisfy a sexual or sadistic gratification;
- a child being subjected to torture or harm;
- a child in a demeaning context; or
- (b) material intended, or apparently intended, to encourage or advocate people to engage in sexual activity with children.

The material must also be indecent or offensive to a reasonable person. The test for indecency should be the same as the one proposed in Recommendation 9.

Recommendation 26

The LRC recommends the introduction of offences to prohibit procuring, offering or using a child to make CSEM, or for a pornographic performance.

Pornographic performance should be defined as a performance by a child-

- engaged in sexual activity; or
- in a sexual, abusive, exploitative or demeaning context, including where someone else is engaged in sexual activity in the presence of the child, that is intended for the sexual or sadistic gratification of a viewer or a person taking part in the performance.

Recommendation 27

The LRC recommends introduction of the following offences-

- knowingly possess CSEM;
- distribute, trade (offer, sell, exchange) advertise, import, export or disseminate CSEM; and
- possess CSEM for the purpose of distribution, trade or dissemination.

The penalty for the offences should be 10 years imprisonment.

It should not be an offence for a police officer or other law enforcement official to possess CSEM when carrying out official functions or duties.

The following defences should be available-

Penal Code Sexual Offences Recommendations

- the material is being used for authorised medical, scientific or educational purposes; or
- the material has cultural or artistic merit.

Chapter 1 Introduction

1.1 The LRC commenced the review of the Penal Code and Criminal Procedure Code in 2008. An Issues Paper on the Penal Code was released in November 2008 which provided information, asked questions about reform and called for submissions. In 2009 and 2010 the LRC conducted consultation in the provinces and Honiara (see Appendix 1 for a list of consultations and submissions).

1.2 Due to the size and complexity of the reference it has been broken down into different areas. This approach allows the LRC to deliver interim reports to the Minister for Justice and Legal Affairs on particular areas when the work on that area is completed. In 2011 a report was delivered to the Minister for Justice and Legal Affairs on reform of corruption offences in Parts X and XXXVIII of the Penal Code.

1.3 This report contains recommendations for reform of sexual offences contained in Part XVI of the Penal Code. It also makes recommendations for the introduction of some new offences.

The approach of the LRC

1.4 The terms of reference for the review of the Penal Code require the LRC to make recommendations to address developments in new crimes and make the Penal Code more responsive to the modern needs of the Solomon Islands.

1.5 In addition the Law Reform Commission Act requires the LRC to make recommendations that will ‘modernise and simplify the law, eliminate defects in the law, introduce new and more effective methods for the administration of justice.’

1.6 In order to fulfill its mandate the LRC used a process that started with an analysis of the current law and contextual research. This included a consideration of the Constitution, as well as the international obligations of Solomon Islands, in particular the

Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW).

1.7 Following this the LRC undertook consultation across Solomon Islands and called for submissions. Consultation meetings were held in all provinces, with leaders, village people and key stakeholders such as the RSIPF and women's groups.

1.8 In the final stage of the process the LRC analysed information collected from the consultation and research to develop recommendations for reform of the law. Key research used by the LRC included the Solomon Islands Family Health and Safety Survey as well as research on sentencing for sexual offences conducted by the LRC. During this process consideration was also given to government policy, such as the National Children's Policy and the National Policy on Eliminating Violence Against Women.

Focus of reform and content of this report

1.9 The underlying principles used to formulate the recommendations for reform of sexual offences are the elimination of gender bias and discrimination, strengthening of laws in relation to violence against women and the protection of children from all forms of sexual abuse and exploitation. These principles are based on Solomon Islands' national policies and international commitments particularly those contained in the CRC and CEDAW.

1.10 The next chapter of this report considers evidence about the nature and prevalence of sexual offences, attitudes towards sexual offences relevant policies such as the National Policy on Eliminating Violence Against Women and the National Children's Policy and the international obligations of Solomon Islands.

1.11 The report then considers reform of the offence of rape. This is a key part of the report as it contains recommendations for the

definition of sexual intercourse, and when consent to sexual activity is valid, that are also incorporated into later recommendations.

1.12 Recommendation 1 in relation to sexual intercourse provides that offences which include the element of sexual intercourse will cover a broad range of sexual conduct, including penetration of the vagina or anus with objects. As a result the offences will protect men and women, boys and girls from sexual abuse; and include conduct that under the current law can only be prosecuted with the offence of indecent assault (for example, vaginal penetration with an object).

1.13 Recommendation 2 in relation to consent emphasises that consent alone is not sufficient, and that the victim must have also had the freedom and capacity to make a choice. Recommendation 3 gives greater guidance about the situations where consent to sexual activity is not validly given and takes into account cultural norms that constrain people, particularly women and children, from saying no to a person who is in a position of authority. Recommendation 4 provides that a person is not taken to have consented to sexual activity just because he or she did not struggle, protest or sustain a physical injury.

1.14 Chapter 4 contains recommendations for the introduction of a new offence to protect people with a significant disability that affects the person's ability to understand the nature of sexual conduct, or to understand decisions about sexual conduct or to communicate decisions about sexual conduct. The existing defilement offence that applies to girls and women who are imbeciles and idiots is discriminatory and offensive. It is intended that the new offence will reflect the need to protect people who have a significant disability from sexual abuse while recognising the human rights of people living with a disability. The recommendations in relation to reform of rape have also been designed to meet the needs of people with a disability who cannot give free consent to sexual activity because of the disability.

1.15 Chapters 7 to 12 consider offences against children. As well as making recommendations for reform of existing offences the LRC also recommends the introduction of new offences to protect children.

1.16 The Penal Code contains a number of specific offences that cover sexual abuse of children including defilement of a girl under the age of 15 years, defilement of a girl under the age of 13 years, abduction of girl under the age of 18 years with intent to have sexual intercourse, procuring a girl under the age of 18 years to have unlawful sexual intercourse, householder permitting defilement of a girl under 13 years, householder permitting defilement of a girl under the age of 18 years, detaining a girl in a brothel, disposing of minors under the age of 15 years for prostitution or unlawful sexual intercourse and obtaining minors under the age of 15 years for immoral purposes. Most of these offences only apply to girls. Under the current law sexual abuse of boys must be prosecuted with the offence of buggery.

1.17 The report makes a number of recommendations for reform of defilement (including a change in the name of the offence). The offence that is recommended to replace defilement incorporates the broad definition of sexual intercourse that is recommended in relation to the offence of rape.

1.18 New offences that are recommended for the protection of children include-

- an offence of sexual abuse of a young person over 15 years and under 18 years by a person in a position of trust or authority;
- an offence of persistent sexual abuse; and
- offences of indecent touching of child, and indecent conduct in the presence of a child.

1.19 Chapter 11 on Child Commercial Sexual Exploitation recommends the introduction of a number of new offences to expand the coverage of existing offences. The proposed new offences will protect boys as well as girls and will apply to people who use or obtain

commercial sexual services from children. The offences will protect children up to the age of 18 years.

1.20 The final Chapter contains a number of recommendations in relation to new offences to address child sexual exploitation material. Currently the Penal Code does not make specific provision for offences of this nature, and only contains some general and outdated offences regarding obscene publications, video tapes and photographs.

Chapter 2 Policy Context

2.1 This Chapter considers information about the nature and prevalence of sexual violence in Solomon Islands, attitudes to sexual violence and the policy responses to sexual violence. It also considers the international obligations of Solomon Islands in relation to sexual violence against adults and children.

Nature and prevalence

2.2 The Family Health and Safety Study provides valuable information about the nature and incidence of sexual violence experienced by women. The study surveyed 2615 women aged 15 to 49 years.

2.3 It indicates an alarming level of sexual violence. 55% of women interviewed had experienced sexual violence from their partner and the most common form was forced sexual intercourse (53%). A high proportion (43%) reported having sexual intercourse because they were afraid, and 28% reported being forced to do something sexually degrading or humiliating.¹

2.4 The study also asked questions about violence by perpetrators other than an intimate partner. 18% of women interviewed reported experiencing non-partner sexual violence.²

2.5 The study also collected information about child sexual abuse. 37% of women reported that they had been sexually abused when they were under the age of 15 years. About half of the women who reported child sexual abuse reported that the abuse has occurred three or more

¹ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 63.

² Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 80.

times (53%).³ The perpetrators of child sexual abuse were boyfriends (36%), strangers (24%) family member (19%), male friend of family (16%) and acquaintances (15%).⁴

2.6 The study found that for the majority of women their first sexual experience was consensual (62%) however for 17% of women their first sexual experience was somewhat coerced, and for 20% their first sexual experience was forced.⁵

2.7 The Study recommends the development and implementation of a legal framework to effectively address violence against women.⁶

2.8 There is some evidence that the rate of sexual violence during the tension period was high. Amnesty International reported that women and girls experienced high rates of sexual violence in Guadalcanal and Malaita.⁷ The Family Health and Safety Study collected quantitative and qualitative information about sexual violence during the tension period. The qualitative research indicated that sexual violence was high during the period, but the quantitative data did not give any strong results.⁸ It was also suggested that there have been no prosecutions of any sexual crimes that occurred during the tension period because women are too afraid to press charges, or were discouraged from pressing charges by relatives.⁹

³ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 88.

⁴ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 89.

⁵ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 91.

⁶ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 169

⁷ Amnesty International, *Solomon Islands Women Confronting Violence* (2004), 22

⁸ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 86.

⁹ Amnesty International, *Solomon Islands Women Confronting Violence* (2004),

2.9 A study on mental health issues for young people in the Solomon Islands reported that stories of 'longlaen' were common in Honaira. 'Longlaen' is the gang rape of young women and almost always involves drugs or alcohol. The study said victims are often scared and ashamed to report anything to medical professionals or police and many become depressed, even suicidal.¹⁰ Young women who participated in the survey reported they were fearful of being raped.¹¹

Prosecution of sexual offences

2.10 Most sexual offences committed against women are not reported and therefore not investigated by police, or prosecuted in courts.¹² The LRC conducted research into sexual offences that were prosecuted between 2003 and 2010 to identify sentence ranges and the factors that affect the type and severity of sentence that was imposed on those convicted of an offence.

2.11 In 38% of the cases that were considered the victim was in a family relationship with the perpetrator. In 84% of cases the victim knew the perpetrator prior to the offence. Girls aged 11 to 14 years were the most common victim (33%) closely followed by girls aged 15 to 17 years (30%). One third of perpetrators were men over the age of 30 years, and only 12% of perpetrators were under the age of 18 years.

2.12 Despite the presence of factors that should aggravate the seriousness of the offence, such as the perpetrator being in a relationship of trust with the victim, or the victim being very young,

¹⁰ Dr. Christine Jourdan, *Youth and Mental Health in Solomon Islands: A Situational Analysis*, (2008) 25

¹¹ Dr. Christine Jourdan, *Youth and Mental Health in Solomon Islands: A Situational Analysis*, (2008) 25

¹² 70% of women who experienced physical and/or sexual partner violence did not tell anyone about the violence: Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 123.

mitigating factors (factors that are favourable to the perpetrator, and that mitigate the severity of the sentence) were given significant weight in the determination of the sentence. Mitigating factors that were given some prominence include delay in the prosecution of the case, prior good character and family obligations.

2.13 The sentencing range for rape between 2003 and 2010 was eight years imprisonment (the highest) and one year and 8 months imprisonment (lowest). The sentence of eight years was imposed in one case on an offender with prior convictions for sexual offences. Most sentences were in the range of three to six years. The sentences at the high end of the scale involved aggravating factors such as the use of violence, further acts of sexual indignities and severe injury to the victim. The majority of cases were at the bottom end of the scale (three years).¹³

2.14 In some cases involving very young victims the court took the character or conduct of the girl victim into account as a mitigating factor. For example, in a recent case of defilement the court accepted that the victim (aged 10 years and 8 months at the time of the offence) was a willing participant, and that this was one of the strong mitigating factors taken into account by the court. The offender (aged about 20 years at the time of the offence) was sentenced to 8 months imprisonment (for each of the two counts of defilement), and the sentence was suspended.¹⁴

2.15 Compared to other countries in the region such as Vanuatu, Papua New Guinea and Fiji sentences for sexual offences in Solomon

¹³ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code, Sexual Offences –Sentencing Research Paper 2011*, 17.

¹⁴ *Regina v Haka* [2013] SBHC 15 paclii.org.

Islands are low. All of these countries have undergone recent reform of sexual offences.¹⁵

2.16 A number of decisions by the Court of Appeal, including some recent significant decisions, have highlighted that in some cases the courts have failed to properly apply the guidelines that apply to sentencing for the offence rape.

2.17 In one of the most recent cases the Court of Appeal considered an appeal by the Director of Public Prosecutions from the sentence imposed by the trial judge for the offence of rape.¹⁶ This case is also significant because the trial judge held that a husband could be convicted of rape of his wife. The trial judge imposed a sentence of four years imprisonment and took into account as a mitigating factor the conduct of the victim in terminating her marriage with the offender.

2.18 The Court of Appeal disagreed with the approach of the trial judge and concluded that the appropriate sentence should be seven years imprisonment. More significantly the Court said that it did not find that any of the mitigation put forward by the offender, including the conduct of the victim, should have the effect of reducing the sentence from seven years imprisonment.

2.19 In another recent case the Court of Appeal confirmed that a starting point of five years imprisonment is appropriate for rape; and that a starting point of eight years is appropriate where the offence is committed by two or more men acting together, or by a man who has broken into or gained access to the place where the victim if living, by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive.

¹⁵ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code Sexual Offences Sentencing Research Paper* 2011.

¹⁶ *Regina v Macberth Gua* Criminal Appeal Case No 37 of 2012 (unreported, Goldsbrough P, Sir Gordon Ward JA and Mwanasalua JA, 26 April 2013).

2.20 The Court of Appeal also confirmed that the offence of rape is aggravated by the presence of any of the following factors, and that the sentence should be increased from the starting point to take account of the presence of any of any of the factors-

- Violence is used over and above the force necessary to commit the rape.
- A weapon is used to frighten or wound the victim.
- The rape is repeated.
- The rape has been carefully planned.
- The defendant has previous convictions for rape or other serious offences of a violent or sexual kind.
- The victim is subjected to further sexual indignities or perversions.
- The victim is either very old or very young.
- The effect on the victim, whether physical or mental, is of special seriousness.

2.21 The Court did not identify relevant mitigating factors, or how they should be assessed, other than what effect a guilty plea should have on a sentence. The Court indicated that a maximum discount of up to one third “may well be considered appropriate in some circumstances”. The Court’s discussion on this issue suggests that to justify the maximum discount the effect of the guilty plea must be that the victim is not required to give evidence.¹⁷

Community attitudes to sexual violence and reform of sexual offences

2.22 This section presents information gathered from the consultations conducted by the LRC and submissions received by the LRC on reform of sexual offences. Information collected from consultations and submissions is also used throughout the report to

¹⁷ *Soni, Supa and Chachia v Reginam* Criminal Appeal Cases No 27, 28, 35 of 2012 (unreported Goldsbrough P, Sir Gordon Ward JA, Mwanasalua JA 26 April 2013). The Court upheld all three appeals, and substituted sentences of 7 years imprisonment for Soni, seven years imprisonment for Supa and nine years imprisonment for Chachia.

identify support or opposition to options for reform. The purpose of this section is to give a snapshot of community attitudes to sexual violence. Information from other sources (such as the Family Health and Safety Survey) is also presented.

2.23 Sexual offences and sexual abuse of children were often identified as areas of concern by participants at consultation meetings held by the LRC.

2.24 At a consultation meeting with women at Kirakira rape, creeping, sexual abuse, use of girls as prostitutes by poor families, incest, fathers using daughters for sex, unwanted pregnancy, child abuse, rape by big men, pornography, sexual touching of children and taking photographs of young children were identified as areas of concern by the participants.¹⁸

2.25 The consultations indicated a level of awareness about the inadequacies in the existing sexual offences. For example, at a consultation meeting with police at Kirakira concern was expressed about having to use the offence of indecent assault to prosecute a man who had sexually penetrated a woman with an object.¹⁹

2.26 The consultation also indicated concern for sexual abuse associated with resource development and foreign workers in remote places. At a number of consultations participants raised concerns about children being sent to work as house girls in logging camps resulting in sexual abuse or exploitation. These arrangements are sometimes called marriage. Money is paid to the girl, or the family. In some cases if she falls pregnant the arrangement stops and she goes back to the family.

¹⁸ *Consultation*, Kirakira Women's Resource Centre, 11 March 2010.

¹⁹RSIPF, *Consultation* Kira Kira Makira Province 11 March 2010.

Prosecution of these cases can be difficult because parents are not willing to cooperate with police, or the worker leaves the country.²⁰

2.27 The available data and the consultation by the LRC suggest that sexual violence, even against very young children, is sometimes justified by the perceived character or behaviour of the women or girl, particularly if the woman or girl fails to meet gender role expectations.

2.28 Some participants in the consultation suggested that children should be held responsible for sexual offences committed against them (for example defilement) if the child initiates or consents to the sexual activity, or is working as a prostitute.²¹ At another consultation participants considered that in cases of incest both the father and daughter should be prosecuted.²²

2.29 Other participants pointed out that children can be stigmatized by sexual abuse.²³ This would make children more vulnerable to repeat sexual abuse.

2.30 The Family Health and Safety Survey gathered information from male perpetrators of violence. The study identified strong patriarchal attitudes amongst perpetrators. One third of the perpetrators thought that a woman is obliged to have sex with her husband even if she does not feel like it.²⁴

²⁰ Provincial Executive Isabel Province, *Consultation* Buala Isabel Province 26 May 2009; *Consultation*, Makira Province 11 March 2010; *Consultation*, Gizo Western Province 21 April 2009.

²¹ RSIPF and staff from the Office of the Public Solicitor, *Consultation*, Auki Malaita 29 April 2009; Provincial government representatives, *Consultation* Taro Choiseul 13 October 2009; RSIPF, *Consultation* Kira Kira Makira 2010.

²² RSIPF, *Consultation* Tulagi Central Province 3 November 2009.

²³ *Consultation*, Auki Malaita 30 April 2009.

²⁴ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 158-159.

2.31 The LRC consultations also revealed patriarchal attitudes towards domestic violence and child abuse. At one LRC consultation, during a discussion about domestic violence, participants said that husbands regard their wives as property, or consider themselves the boss of the wife and the children.²⁵ At another consultation women said they if they voice out their concerns in relation to domestic violence they will suffer.²⁶

2.32 Some participants in the consultation identified reform of sexual offences as an opportunity to implement international agreements such as CEDAW. They also recognized the need to complement any law reform with changing attitudes in the home and the family towards violence against women.²⁷

2.33 During some consultation meetings there was discussion about the relationship between the practice of bride price and sexual violence against women. Some participants suggested that some people have the expectation that they get married in order to have sex, and that this gives rise to an expectation by men that the wife should be available for sex on demand.²⁸

Solomon Islands Government policy

2.34 The National Policy on Eliminating Violence Against Women (EVAW) was launched in conjunction with the Gender Equality and Women's Development 2010 – 2015 policy to specifically address the issue of violence against women. In the policy violence against women is recognised as-

²⁵ RSIPF, *Consultation* Gizo Western Province, 20 April 2009.

²⁶ Women's group, *Consultation* Gizo Western Province 21 April 2009.

²⁷ Women's group, *Consultation* Gizo Western Province 21 April 2009.

²⁸ Office of the Public Solicitor, *Consultation* 17 July 2009.

“any form of violence...that does or is likely to, result in physical, sexual or psychological harm or suffering, including threats of violence and arbitrary deprivation of liberty, whether occurring in public or private life.”²⁹

2.35 Under the key strategic area of “strengthen legal frameworks, law enforcement and the justice system” the policy identifies the following action-

Reform the criminal law, protective law and marriage and divorce (family) law in accordance with the needs of women experiencing violence, in ways that reflect and update kastom law while fulfilling Constitutional mandates and international commitments of Solomon Islands.

2.36 In 2010 the Government released the National Children’s Policy and Action Plan. The objective of the policy is to protect and develop the interests and rights of children in Solomon Islands regardless of age, gender, religion, ethnicity or cultural background; and to ensure that these rights are acknowledged and promoted, and that children grow into responsible citizens. For the purpose of the policy a child is a person under the age of 18 years. One of the goals of the policy is to develop and implement laws for children’s development and safety from all forms of abuse.³⁰

International commitments

2.37 Solomon Islands ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on the 6 May 2002. CEDAW goes beyond merely guaranteeing non-discrimination of women and requires states to make positive steps on “the advancement

²⁹ UN Declaration on Violence Against Women, 1993 cited in Ministry of Women, Youth, Children and Family Affairs, *National Policy on Eliminating Violence Against Women Policy* (2010) 8.

³⁰ Solomon Islands Government, Ministry of Women, Youth and Children’s Affairs, *National Children’s Policy with National Plan of Action 2010*.

of women”.³¹ As a ratifying state, Solomon Islands should “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”.³²

2.38 CEDAW requires state parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”, and to “repeal all national penal provisions which constitute discrimination against women”.³³ This means eliminating practices, conduct and legislation that are based on the idea of “the inferiority or the superiority of the sexes or on the stereotyped roles for men and women”.³⁴

2.39 CEDAW defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing, nullifying the recognition, enjoyment or exercise of women, **irrespective of their marriage status**, on a basis of equality between men and women, of human rights and fundamental freedoms”.³⁵

2.40 CEDAW does not refer to violence against women, however the CEDAW Committee has published a general comment which clarifies that discrimination includes gender based violence.³⁶

2.41 UNIFEM has developed indicators to measure legislative compliance with CEDAW, and in relation to Solomon Islands the following reforms have been identified to bring the law into compliance-

³¹ *Convention on the Elimination of All forms of Discrimination against Women* art 3.

³² *Convention on the Elimination of All forms of Discrimination against Women* art 2(e).

³³ *Convention on the Elimination of All forms of Discrimination against Women* art 2.

³⁴ *Convention on the Elimination of All forms of Discrimination against Women* art 2 (f).

³⁵ *Convention on the Elimination of All forms of Discrimination against Women* art 1 (emphasis added).

³⁶ United Nations Committee on the Elimination of Violence Against Women, General Comment 19 (11th Session 1992).

- Redefining penetration to include penetration of the vagina, anus and mouth with non-penile objects and other body parts.
- Including a non-exhaustive list of circumstances that do not amount to consent for rape and other non-consensual offences.
- Removing the common law immunity for husbands from being prosecuted for marital rape.
- Removing terms such as defilement, insulting the modesty, because they are discriminatory, and suggest that girls and women are spoilt or damaged by sexual offences.³⁷

2.42 Solomon Islands ratified the Convention on the Rights of the Child (CRC) on 10 April 1995. The CRC requires state parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while the in the care of parents, legal guardians or any other person who has the care of the child.”³⁸

2.43 State parties to the CRC must protect children from all forms of sexual exploitation and sexual abuse; and should ensure that children are not subject to torture, other cruel, inhuman or degrading treatment or punishment.³⁹

2.44 In 2003 Solomon Islands made its initial report to the Committee on the Rights of the Child regarding implementation of the CRC. The Committee suggested that Solomon Islands should take action to address child sexual abuse, including effective systems for prosecuting cases in a child sensitive manner, and to prevent child prostitution and other forms of sexual exploitation of children, while avoiding criminalising child victims of prostitution.⁴⁰

³⁷Vedna Jivan and Christine Wallace, UNDP UNIFEM, *Translating CEDAW into Law: CEDAW Legislative Compliance in nine Pacific countries* (2006).

³⁸ *Convention on the Rights of the Child* art 19.

³⁹ *Convention on the Rights of the Child* art 34 and 37.

⁴⁰ Committee on the Rights of the Child CRC/C/15/Add.208 6 June 2003.

2.45 During the Periodic Review of Solomon Islands before the UN Human Rights Council in 2011 a number of recommendations in relation to legislation to address violence against women were supported by the Solomon Islands delegation. Those recommendations included specific recommendations to make spousal rape a crime.⁴¹

Conclusion

2.46 The available evidence indicates a high level of sexual violence against women and girls, including a high level of repeated violence. The LRC consultations and submissions indicate support for changes to the law to more effectively address sexual violence. Solomon Islands has entered into international conventions, such as CEDAW and the CRC, that require it to ensure that its criminal law address provide protection to woman and children who are vulnerable to sexual violence.

2.47 CEDAW also requires the elimination of practices, conduct and legislation that are based on discrimination and stereotyped roles for men and women. The available evidence suggests that there are some strong patriarchal attitudes towards women and children that have an impact on the way sexual abuse is understood and addressed in the community and in the legal system.

2.48 At a national level the Government has adopted policies that specifically require reform of the criminal law to protect women and children from violence and exploitation that is consistent with international obligations.

⁴¹ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review Solomon Islands*, A/HRC/18/8.

Chapter 3 Rape

Current law

3.1 The offence of rape is committed when a man or boy has ‘unlawful’ sexual intercourse with a woman or girl without consent. Section 168 of the Penal Code defines sexual intercourse as penile penetration of the vagina.⁴² Furthermore the Code states that “intercourse shall be deemed complete upon proof of penetration only”.

3.2 Consent is not validly given if obtained by-

- force;
- threats;
- intimidation;
- fear of bodily harm;
- fraudulent misrepresentation about the nature of the act; or
- (in the case of a married woman) impersonating her husband.⁴³

Otherwise the Penal Code does not define consent.

3.3 The maximum penalty for rape is life imprisonment; and the maximum penalty for attempted rape is seven years.

3.4 The Penal Code presumes that a male person under the age of 12 years is incapable of having sexual intercourse.⁴⁴

3.5 Until a recent decision of the High Court there was an understanding, based on an earlier High Court decision, that under the current law a man could not be convicted of rape of his wife.⁴⁵

3.6 The current definition of sexual intercourse only recognises sexual penetration by the penis of the vagina. The definition does not

⁴² Penal Code s 168.

⁴³ Penal Code s 136.

⁴⁴ Penal Code s14.

⁴⁵ *Regina v Gaa* [2012] SBHC 118 www.pacii.org.

cover penetration of other parts of the body, such as the anus and the mouth by the penis, or penetration of the anus or vagina by things other than a penis.

3.7 Under the current law penetration of the anus is prosecuted as as the offence of buggery⁴⁶, and penetration of the vagina or anus with things other than a penis are prosecuted as indecent assault. The offence of buggery has a maximum penalty of 14 years, and the offence of indecent assault carries a maximum penalty of five years, which does not give sentencing courts adequate discretion to impose sentences that reflect the seriousness of the offending.

3.8 There is no requirement in the law that a victim of rape must struggle, or put up some physical resistance. However, at least one case suggests that evidence of struggle or injuries is important where consent is in issue.⁴⁷

Consultations and submissions

3.9 In relation to the offence of rape, the Issues Paper asked the following questions-

Should the definition of consent be changed?

Should the Penal Code provide a list of circumstances where consent is considered invalid?

Should a person be guilty of rape if the victim is not capable of giving consent (a young child, a person with a severe disability)?

Should the Penal Code provide equal protection from rape and sexual abuse for boys and men?

Should the Penal Code expand the definition of rape so that it includes all forms of penetration?

Should the term 'rape' in the Penal Code be replaced with some other terminology?

Should rape in marriage be an offence under the Penal Code?

Should the penalty for attempted rape be increased?

⁴⁶ Penal Code s 160.

⁴⁷ *R v Misiata* [1999] SBHC 23 www.pacilii.org.

Consent

3.10 Many groups supported changing the definition of consent to be a “free and voluntary agreement” recognising that a person has the right to sexual autonomy.⁴⁸ Some participants suggested that as well as defining consent as “free and voluntary agreement”, the Penal Code should also include a list of circumstances where consent is not validly given.

3.11 Examples from consultations of these circumstances include-

- the victim is a child and under the age of consent;
- the perpetrator used indirect force;
- the perpetrator used influence or duress;
- the victim lacked the capacity to make a decision (from age, disability both mental or physical, incapacitated by drugs or alcohol);
- the victim withdrew consent;
- the victim was asleep or unconscious;
- the perpetrator abused their position of authority, trust or responsibility;
- the perpetrator used money to induce sexual intercourse;
- the perpetrator compelled the victim by threatening harm to another person (e.g. a family member); and
- the perpetrator pressured the victim to consent in return for something.⁴⁹

⁴⁸ A Radclyffe, *Submission* undated; RSIPF, *Consultation* Honiara 18-19 May 2009; ICP Workshop, *Consultation*, Lengalau Village, Tasiboko area, East Guadalcanal 12 May 2009; NACC Workshop, *Consultation* Honiara 9 July 2009; Mother’s Union Conference *Consultation* Honiara 16 June 2009; C Sandakabuta, *Submission* 3 September 2009; Public Solicitor’s Office, *Consultation* Honiara 17 July 2009; Women, Youth and Church Representatives, *Consultation* Taro Choisel 14 October 2009.

⁴⁹ This is a list taken from the following consultations: RSIPF, *Consultation* Honiara 18-19 May 2009; *Consultation*, Women’s Resource Centre Temotu 5 May 2009; NACC Workshop, *Consultation* Honiara 9 July 2009; C Sandakabatu, *Submission* 3 September 2009; Provincial Government, *Consultation* Malaita 28 April 2009; Public Solicitor’s Office, *Consultation* Honiara, 17 July 2009.

3.12 Several consultations and submissions recommended introducing a minimum age under which a victim is deemed incapable of giving consent. Some stakeholders thought that children under 12 years should be considered too young to make a free agreement to sexual activity.⁵⁰

3.13 One group indicated there is a perception there must be evidence of a struggle or violence for it to be rape.⁵¹

3.14 One consultation suggested reversing the onus of proof for consent to the accused.⁵² This would mean the accused person would need to actively demonstrate how he or she obtained consent from the victim.

Definition of sexual intercourse

3.15 Many stakeholders supported the elimination of gender bias in sexual offences. There was also broad recognition of the need to include anal and vaginal penetration with objects in the scope of the offence of rape.⁵³

⁵⁰ NACC Workshop, *Consultation* Honiara 9 July 2009; Public Solicitor's Office, *Consultation* Honiara 17 July 2009; A Radclyffe, *Submission* undated.

⁵¹ Women's Group, *Consultation* Gizo Western Province 21 April 2009.

⁵² Public Solicitor's Office *Consultation* Honiara 17 July 2009.

⁵³ Provincial Executive, *Consultation* Auki Malaita 24 April 2009; RSIPF and officers from the Office of the Public Solicitor, *Consultation* Auki Malaita 29 April 2009; *Consultation*, Auki 30 April 2009; Connelly Sandakabatu, *Submission* 29 August 2009; *Consultation*, Women's Resource Centre Kira Kira Makira 11 March 2010; NACC workshop, *Consultation* 9 July 2009; Mothers Union Conference, *Consultation* Honiara 16 June 2009; RSIPF, *Consultation* Honiara 18-19 May 2009; A Radclyffe, *Submission* undated; ICP Workshop, *Consultation* Lengilau village Tasiboko East Guadalcanal 12 May 2009; ICP Workshop, *Consultation* Savo Central Province 23 June 2009; Workshop on law reform to address violence against women, *Consultation* 20-23 July 2009; *Consultation*, Women's Resource Centre Lata Temotu 5 May 2009; RSIPF, *Consultation* Buala Isabel 15 September 2009; RSIPF, *Consultation* Tulagi Central Province 3 November 2009; Women, youth and church representatives *Consultation* Taro Choisuel 14 October 2009.

Rape in marriage

3.16 The LRC consultation was held prior to the High Court decision in *Gua*⁵⁴ and was conducted on the basis that a husband could not be convicted of rape of his wife. However in *Gua* the Court decided that the common law principles that were the basis for a husband's immunity to a prosecution for rape are no longer part of the common law of Solomon Islands.

3.17 Many individuals and groups consulted by the LRC said that rape in marriage should be an offence.⁵⁵ Participants recognized that-

- women have autonomy from men;
- women have the right to say no to sex when they are tired, sick or menstruating;
- bride price does not equate to consent or ownership;
- women have universal rights to respect and personal integrity; and
- significant health issues such as physical and mental illness accompany sexual violence.

3.18 Rape in marriage is often accompanied by physical abuse, and in many cases the husband is drunk and becomes violent.⁵⁶ One group

⁵⁴ *Regina v Gua* [2012] SBHC 118 www.pacii.org.

⁵⁵ A Radclyffe, *Submission* undated; RSIPF, *Consultation* Honiara 18-19 May 2009; *Consultation*, Temotu 6 May 2009; Violence Against Women Workshop, *Consultation* Honiara 20-23 July 2009; ICP Workshop, *Consultation* Lengalau Village Tasiboko area, East Guadalcanal 12 May 2009; Women's Group, *Consultation* Gizo 21 April 2009; Mother's Union Conference, *Consultation* Honiara 16 June 2009; C Sandakabatu, *Submission* 3 September 2009; *Consultation*, Auki, Malaita 30 April 2009; Public Solicitor's Office Honiara, *Consultation* 17 July 2009; Family Support Group Gizo Western Province, *Submission* 28 August 2009; Women, Youth and Church Representatives, *Consultation* Taro, Choisel 14 October 2009; *Consultation*, Women's Resource Centre Kirakira Makira 11 March 2010.

⁵⁶ Women and Youth Representatives, *Consultation* Tulagi, Central Province 4 November 2009.

identified that refusal to have sex causes domestic violence.⁵⁷ Women may be compelled to consent either from fear of physical harm or that the husband will go to another woman.⁵⁸

3.19 Some participants were concerned about making marital rape a crime, over fears of misuse, financial issues or whether it should be limited to certain situations. One group of participants thought it should only apply in extremely violent situations.⁵⁹ One participant suggested it should be grounds for divorce instead of a criminal offence.⁶⁰

3.20 At one consultation it was suggested that it should be an offence except in certain situations, such as repeated refusal to have sex by the wife.⁶¹ One participant disagreed with making marital rape an offence.⁶² One group believed women are the property of their husbands and once married are sexually available to their husbands.⁶³ Another group discussed bride price obligations and cultural and social expectations that husbands have regarding sex with their wives in marriage.⁶⁴

3.21 At one consultation there was concern that this provision could be misused by women wanting to get a divorce.⁶⁵ At another consultation participants raised a concern about what would happen to the wife and children if the husband if the financial provider goes to

⁵⁷ *Consultation*, Women's Resource Centre Kirakira Makira 11 March 2010.

⁵⁸ *Consultation*, Women's Resource Centre, Kirakira Makira 11 March 2010.

⁵⁹ Provincial Council of Women, *Consultation* Buala Isabel 27 May 2009.

⁶⁰ RSIPIF, *Consultation* Auki Malaita 29 April 2009.

⁶¹ ICP Workshop, *Consultation* Savo 23 June 2009;.

⁶² J. Mepluna, *Submission* 6 May 2009.

⁶³ ICP Workshop, *Consultation* Lengalau Village, Tasiboko area, East Guadalcanal 12 May 2009.

⁶⁴ Public Solicitor's Office Honiara, *Consultation* 17 July 2009.

⁶⁵ Public Solicitor's Office Honiara, *Consultation* 17 July 2009.

prison.⁶⁶ Participants thought these concerns might stop women bringing cases to police or be pressured to drop a charge. Some participants believed introducing this offence might weaken the institution of marriage.⁶⁷

Name of the offence

3.22 The results from the consultations on this issue were mixed. Some participants strongly recommended keeping the name of the offence as ‘rape’. They felt it was understood and familiar for most people. However, some consultations indicated rape was misunderstood, with one group of participants suggesting it did not necessarily need penetration to be rape, whilst other groups said a high level of force or violence is needed to be rape.⁶⁸

3.23 One group of participants suggested changing the name to ‘sexual penetration without consent’, which is used in Western Australia criminal legislation.⁶⁹ This would align with the proposed new offence of ‘sexual penetration of children’ to replace defilement.

3.24 One group recommended using a different name for the offence of rape in marriage.⁷⁰

Increasing penalty for attempted rape

3.25 Increasing the maximum penalty for attempted rape was supported by a number of consultations and submissions.⁷¹ A few

⁶⁶ Women and Youth Representatives, *Consultation* Tulagi Central Province 4 November 2009.

⁶⁷ Public Solicitor’s Office Honiara, *Consultation* 17 July 2009; RSIPF, *Consultation* Auki, Malaita 29 April 2009.

⁶⁸ Women’s Group, *Consultation* Gizo 21 April 2009; RSIPF, *Consultation*, Kirakira Makira 11 March 2010.

⁶⁹ Criminal Code Act 1913 (WA) ss 325-326, read with s319.

⁷⁰ ICP Workshop, *Consultation* Lengalau Village, Tasiboko area, East Guadalcanal 12 May 2009.

consultations recommended an increase to 10 years for attempted rape.⁷² One submission suggested 14 years would be an appropriate maximum sentence.⁷³ Another group suggested increasing the penalty to 20 years.⁷⁴

Conclusions and recommendations

Sexual intercourse

3.26 In 2011 a magistrate sentencing a man for indecent assault for sexual penetration of a woman with an object and a dog called for a change to the definition of sexual intercourse.⁷⁵

3.27 The current definition of sexual intercourse is restrictive and discriminatory. Rape of a man or a boy cannot be prosecuted under the current offence of rape. Under the existing law other forms of sexual penetration without consent must be prosecuted with the offence of indecent assault which has a maximum penalty of five years, or in the case of male rape, the offence of buggery in section 160 of the Penal Code which has a maximum penalty of 14 years.

3.28 The CEDAW compliance indicators require a broader definition of penetration that includes penetration of the vagina and anus with non-penile objects and other body parts.⁷⁶

⁷¹ A. Radclyffe, *Submission* undated; RSIPF, *Consultation* Honiara 18-19 May 2009; *Consultation*, Women's Resource Centre Temotu 5 May 2009; ICP Workshop, *Consultation* Lengalau village, Tasiboko Area, East Guadalcanal 12 May 2009; Mother's Union Conference, *Consultation* Honiara 16 June 2009.

⁷² Women and Youth Representatives, *Consultation* Taro Choisel 14 October 2009; ICP Workshop, *Consultation* Lengalau Village Tasiboko area, East Guadalcanal 12 May 2009.

⁷³ A. Radclyffe, *Submission* undated.

⁷⁴ Mother's Union Conference, *Consultation* Honiara 16 June 2009.

⁷⁵ Magistrate: Definition of rape should be considered, *Solomon Star*, 16 June 2011.

⁷⁶ Vedna Jivan and Christine Wallace, UNDP, UNIFEM, *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Countries* (2006).

3.29 It is intended that the definition of sexual intercourse in recommendation 1 will apply to all sexual offences that include the element of sexual intercourse (for example, the LRC's proposed offence of sexual intercourse with a child under the age of 15 years).

Recommendation 1

Sexual intercourse should be defined as –

'the introduction to any extent of the penis in the vagina, anus or mouth;

the introduction to any extent of the penis, other body part or object in the vagina or anus; or

the acts of licking, sucking or kissing the genitals of a person.'

Definition of consent

3.30 As well as the information collected during consultation the LRC considered examples of definitions of consent that have been introduced in other countries.

Figure 1: Table of definitions from comparable jurisdictions

Jurisdiction	Definition
United Kingdom <i>Sexual Offences Act 2003</i>	"a person consents if he agrees by choice, and has the freedom and capacity to make that choice"
Australia <i>Model Criminal Code 1999</i>	"consent means free and voluntary agreement"
Victoria, Australia <i>Victoria Crimes Act 1958</i>	"consent means free agreement"
New South Wales, Australia <i>NSW Crimes Act 1900</i>	"a person consents to sexual intercourse if the person freely and voluntarily agrees to the

	sexual intercourse"
Northern Territory, Australia <i>NT Criminal Code Act 2008</i>	"consent means free and voluntary agreement"
Papua New Guinea <i>PNG Criminal Code</i>	"consent means free and voluntary agreement"
Fiji <i>Crimes Decree 2009</i>	"consent freely and voluntarily given by a person with the necessary mental capacity to give consent"
Pacific Islands Forum <i>Sexual Offences Model Provisions</i>	"consent means free and voluntary agreement if he or she agrees by choice and has the freedom and capacity to make that choice"
South Africa <i>Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007</i>	"consent means voluntary or uncoerced agreement"

3.31 The definition for consent in Fiji, the UK and the Pacific Islands Forum Model Provisions also includes the additional requirement that the victim had the freedom and capacity at the time to make a free and voluntary choice to engage in sexual activity.⁷⁷

3.32 The capacity to make a free choice regarding sexual intercourse can be impaired for several reasons, including being intoxicated or asleep, having a mental and/or physical impairment, and age (youth or elderly). The ability to make a free choice is also impaired by

⁷⁷ Crimes Decree 2009 (Fiji) s 206(1); Sexual Offences Model Provisions (Pacific Islands Forum) s 11(1); Sexual Offences Act (UK) s 74.

circumstances such as where the victim is being detained, or there is a significant imbalance of power between two people. In the context of Solomon Islands imbalances of power arise due to gender, as well as social position.

3.33 Persons living with disabilities, both mental and physical, may be unable to effectively communicate lack of consent, or may not have the mental capacity to make a free choice. For example, persons who are mute (unable to speak) or deaf have restricted capacity to demonstrate they are not consenting.

3.34 Currently the Penal Code has a separate offence of defilement of a woman or girl who is an idiot or imbecile which carries a maximum penalty of five years. The offence is archaic and offensive, suggesting that people with disabilities do not merit the same protection under the law as people who do not have a disability. It is intended that the LRC's recommendations for reform of the offence of rape will cover situations where a person has a disability which impairs his or her capacity to freely consent to sexual intercourse.

Recommendation 2

<p>Consent should be defined as a 'free and voluntary agreement where the person has the freedom and capacity to make the choice.'</p>

Circumstances where consent is not valid

3.35 The consultation indicated support for a broader set of circumstances for where consent is not validly given than currently provided by the Penal Code.

3.36 Figure 2 sets out the circumstances where consent may not be freely given based on suggestions made during the LRC consultation, compared to circumstances where consent is not valid that are set out in the legislation of other countries.

Figure 2: Circumstances where consent is not valid

Theme	Consultation Suggestions	Legislation from other countries
Force	The perpetrator used extreme violence or force against the victim	The victim submits because of the use of violence or force to the victim or someone present or nearby ⁷⁸
Threats	The perpetrator compelled the victim by threatening harm to another person (e.g. a family member)	The victim submits because of : <ul style="list-style-type: none"> • Express or implied threats of violence or force against the victim or someone present or nearby • Express or implied threats to inflict violence or force or use extortion against another person • Express or implied threats of public humiliation, disgrace, physical or mental harassment against the victim or someone else⁷⁹
Fear/Intimidation	The perpetrator used indirect force to obtain consent. This might include: <ul style="list-style-type: none"> • Using influence or duress over to the victim 	Fear of force, or fear of harm of any type to complainant or someone else ⁸⁰
Circumstances affecting capacity to consent	The victim lacked the mental or physical capacity to consent to sexual intercourse due to: <ul style="list-style-type: none"> • Being very young or very old • Being incapacitated by alcohol or drugs at the time⁸¹ 	A person does not consent to sexual intercourse: <ul style="list-style-type: none"> • If the person does not have the capacity to consent to the sexual intercourse, including because of

⁷⁸ Sexual Offences Model Provisions (PIF) s 11 (2) (1) .

⁷⁹ Criminal Act 1900 (ACT) s 67 (1) (b)(c)(d); Criminal Law Consolidation Act 1935 (SA) s46 (3)(a)(i)(ii); Crimes Act (NZ) s128A (2)(a)(b)(c).

⁸⁰ Criminal Code (NT) s 192 (2)(a).

⁸¹ The issue of longlaen was raised in consultations with youth in a mental health and youth study. Longlaen is the gang rape of girls, and usually happens when the victim is drugged or taken to a party and given alcohol. Dr. Christine Jourdan, *Youth and Mental Health in Solomon Islands: A Situational Analysis* (2008) 25.

Rape

	<ul style="list-style-type: none"> • Being asleep or unconscious at the time • Being mentally or physically impaired 	<ul style="list-style-type: none"> • age⁸² or cognitive ability; or • If the person does not have the opportunity to consent because the person is unconscious or asleep;⁸³ or • Due to the victim's physical helplessness⁸⁴ • The victim is asleep, unconscious, or so affected by alcohol or another drug so as to be incapable of freely consenting⁸⁵
Fraud and deceit (generally)		Any fraudulent misrepresentation of any fact, made by the perpetrator or by a third person to the knowledge of the perpetrator ⁸⁶
Fraud or mistake about the nature or purpose of the act		False and fraudulent misrepresentation about the nature or purpose of the act. ⁸⁷
Fraud or misrepresentation about medical or hygienic purposes		<p>The victim mistakenly believes that the act is for medical or hygienic purposes⁸⁸</p> <p>The victim is under the mistaken belief that the act of sexual penetration will be beneficial to his or her physical, psychological or spiritual health⁸⁹</p>

⁸² Criminal Code 1899 (Qld) s 349(3) A child under 12 years is incapable of giving consent.

⁸³ Crimes Act (NSW) s 61H(4)(a)(b).

⁸⁴ Criminal Act 1900 (ACT) s 67(1)(i).

⁸⁵ Criminal Code (PNG) s 347A(2)(e).

⁸⁶ Criminal Act 1900 (ACT) s 67(1)(g).

⁸⁷ Criminal Code Act 1899 (Qld) s 348(2)(e).

⁸⁸ Crimes Act (NSW) s 61H(4)(c).

⁸⁹ South African Law Reform Commission, *Project 107 Sexual Offences Report* (2002) 30.

Penal Code Sexual Offences Recommendations

Fraud or misrepresentation about the identity of the person proposing intercourse		The victim is mistaken about the identity of the person ⁹⁰
Unlawful detention		The victim submits because he or she or someone else was unlawfully detained ⁹¹
Abuse of authority or trust	The perpetrator used their position of authority, trust or responsibility to compel the victim.	The victim is overborne by the nature or position of another person ⁹² The perpetrator abuses his or her authority over, or profession or trust in relation to the victim ⁹³
Consent withdrawn	The victim consented to sexual activity but withdrew that consent and the perpetrator continued regardless	The victim, having consented to engage in the sexual activity, expresses by words or conduct, a lack of agreement to continue to engage in the activity ⁹⁴
Third Party		The agreement is expressed by the words or conduct of a person other than the victim. ⁹⁵

3.37 The LRC is aware of the need for the law to provide for circumstances where a person who claims to be a custom doctor or healer gains consent to sexual activity on the pretext that it is part of the

⁹⁰ Crimes Act (NZ) s128A(6).

⁹¹ Crimes Act (Vic), Criminal Code (PNG), Crimes Act (NT), Crimes Act (NSW)s61H(4)(d), Sexual Offences Act (UK) s74(2)(c).

⁹² Criminal Code Act 1924 (Tas) 2A(2)(e).

⁹³ Criminal Act (ACT) s.67(1)(f).

⁹⁴ Criminal Code (PNG) s347A (2)(j).

⁹⁵ Criminal Code (PNG) s347A (2)(k).

treatment or a ritual. A number of cases have been prosecuted in Solomon Islands where the offender gained the consent of the victim to sexual intercourse on the basis of claims that it was part of a treatment or ritual.⁹⁶

3.38 A recent prosecution illustrates the problem. A man was prosecuted for and convicted of the offence of defilement (lack of consent is not an element of the offence of defilement, and cannot be raised as a defence by an accused). The victim was aged 13 at the time of the offence, and the offender (who was her uncle) told her that he would give her a custom blessing. The prosecution stated that the victim then willingly had sexual intercourse with the offender. The sentencing Judge expressed concern about the use of the offence of defilement (which has a maximum penalty of five years imprisonment), rather than the offence of rape, because it severely limited the sentencing discretion of the Court. He stated that an adult male who prevails on a very young girl to have sex with him because of a promise to deliver a spell for a happy marriage may well be committing the offence of rape. The offender had also been convicted of defilement on a previous occasion in similar circumstances.⁹⁷

3.39 The LRC intends that reform of rape as suggested will clarify that consent is not validly given where the victim mistakenly believes that the act is for medical or hygienic purposes, or the act will be beneficial to his or her physical, psychological, social or spiritual wellbeing.

3.40 The LRC is also concerned that the law should take account of cultural norms or expectations that prevail in Solomon Islands, including norms that constrain people from saying no to a person in a

⁹⁶ For example, *R v Sisiolo* [2010] SBHC 35 www.pacii.org, conviction for 4 counts of rape.

⁹⁷ *Regina v Phobro* [2013] SBHC 8 www.pacii.org.

position of authority. Women and girls in particular may be reluctant to assert themselves in a way that may be seen as culturally inappropriate. This may be construed as willingness to participate in sexual activity. The LRC considers that it is important that the criminal law should make provision for reluctance to say no to sexual activity, or to resist sexual activity, that arises because of fear or respect for a person in a position of authority.

Recommendation 3

The following circumstances should be identified in the legislation for where consent cannot be validly given. However this list is not exhaustive, and the courts should be able to consider other circumstances when determining whether the alleged victim consented or not.

The victim submits because of the use of violence, or threats of violence, to the victim or someone else.

The accused submits out of respect or fear due to the accused's position of authority, trust or responsibility.

The victim submits because of threats to shame, degrade or humiliate the victim or another person.

The victim does not have the capacity to give consent because of age, cognitive ability, mental or physical impairment preventing communication, being asleep, being unconscious or being incapable due to the consumption of drugs or alcohol.

The victim or another person is unlawfully detained (held captive or unable to escape due to location or external threats).

The victim mistakenly believes that the act is for medical or hygienic purposes, or the act will be beneficial to his or her physical, psychological, social or spiritual wellbeing.

The victim is mistaken about the identity of the person.

Consent was expressed by words or conduct of another person (not the victim).

The victim consented to some sexual activity but then withdrew consent through words or conduct.

The use of force

3.41 Research shows that victims respond in different ways to attack, including freezing or not resisting, in order to minimise injury.⁹⁸ A victim may not offer physical resistance to rape because of fear of injury (to oneself or another person), previous violence from the offender or cultural obligations of respect for a person in a position of trust or authority. The Family Health and Safety Survey found that many women reported that they have submitted to sex because they were afraid of what their partner might do if they refused.⁹⁹

3.42 In 1999 the Fiji Law Reform Commission said that the so called ‘resistance requirement’ in the law fails to take account of cultural and social conditions of victims particularly in the Pacific. They argued that it is easy for an accused to overpower a child or a woman. The Commission recommended that consent should be defined in the legislation, and that it should specifically say that submission without physical resistance shall not alone constitute consent. This was based on the (then) provision in Victoria Australia.¹⁰⁰

3.43 Many jurisdictions that have reformed their rape law have included a provision that expressly states that a victim is not to be regarded as consenting merely because he or she did not physically resist or experience injury from the rape. For example, a person does not consent merely because-

⁹⁸ Anxiety and intense fear are the primary responses following rape. Being paralysed by fear and unable to move, or “deciding” it is safest to not physically resist in the situation, does not mean she consented. C. Boyd, ‘The Impacts of Sexual Assault on Women’ (April 2011) *Australian Centre for the Study of Sexual Assault Resource Sheet*

⁹⁹ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009) 63.

¹⁰⁰ Fiji Law Reform Commission, *Reform of the Criminal Procedure Code and Penal Code, The Sexual Offences Report* (November 1999) 22.

- they did not say or do anything to indicate non-consent;
- they did not protest, physically resist or sustain physical injury;
or
- that on an earlier occasion they freely consented to engage in another sexual act with that person (accused) or another.¹⁰¹

3.44 The LRC considers that greater legislative guidance in this area is appropriate because in the cultural context of Solomon Islands silence does not necessarily indicate agreement, and some cultural norms constrain people from expressing disagreement with people who hold a position of authority.

3.45 The recommendation does not remove the requirement that the prosecution must prove beyond reasonable doubt that the victim did not consent to the act of sexual intercourse.

Recommendation 4

The legislation should provide that a person does not consent to sexual intercourse just because he or she did not say or do anything to indicate non-consent; did not protest, struggle or sustain a physical injury, or freely consented to sexual intercourse with the accused or another on an earlier occasion.

Rape in marriage

3.46 Up until late 2012 there was a perception that in Solomon Islands a man could not be convicted of rape of his wife. This perception was based on an understanding of English common law that was adopted in a High Court decision in 1991.¹⁰²

3.47 The common law doctrine of the immunity of a husband to conviction for rape of his wife was discredited and abolished by the House of Lords in 1992¹⁰³, and abolished by statute in Australia by the

¹⁰¹ Based on a summary of the laws of PNG, Victoria, ACT, SA and the Model Sexual Offences Provisions (PIF).

¹⁰² *Regina v Gwanwango & Tawdola* [1991] SBHC 59 [www. pacii.org](http://www.pacii.org).

¹⁰³ *R v R* [1992] 1 AC 599.

late 1980's. In Fiji in 2006 the Court of Appeal did not interfere with a conviction of a man who was convicted of rape of his wife in the magistrates' court.¹⁰⁴

3.48 In the 2012 High Court decision of *Gua*, the Court decided that the doctrine was no longer part of the common law of Solomon Islands because -

- in 1992 the House of Lords held that the doctrine was a common law fiction, and had never been part of the common law¹⁰⁵; and
- the doctrine was not applicable or appropriate to the circumstances of Solomon Islands. Under the Constitution English common law does not have effect in Solomon Islands if it is inconsistent with the Constitution, or is inapplicable to the circumstances of Solomon Islands.

In addition the judgment cited the equality provisions in CEDAW, as well as the Constitution, in support of the decision-

*"All these instances show the changing attitude in Solomon Islands towards the status of women and the recognition that women are equal partners with men in nearly all things, including marriage."*¹⁰⁶

3.49 It is suggested that the new legislation should clearly state that a husband can be convicted of rape of his wife. This would be consistent with other jurisdictions and the CEDAW indicators. The LRC also notes that in the cases that have been successfully prosecuted under the current law the parties were separated but not divorced.

Recommendation 5

The new offence of rape should be drafted so it is clear that it applies to all people, even where there is a marriage relationship between the victim and accused.

¹⁰⁴ *Dutt v the State* [2006] FJCA 59 www.pacii.org.

¹⁰⁵ *R v R* [1992] 1 AC 399 at 623.

¹⁰⁶ *Regina v Gua* 2012 SBHC 118.

Name of the offence

3.50 Figure 3 sets out examples of names for the offence of rape from other jurisdictions.

Figure 3: Name of the offence in other jurisdictions

Jurisdiction	Name of the offence
Australia <i>Model Criminal Code 1999</i>	"unlawful sexual penetration"
Victoria, Australia <i>Victoria Crimes Act 1958</i>	"rape"
New South Wales, Australia <i>NSW Crimes Act 1900</i>	"sexual assault"
Queensland, Australia <i>Qld Criminal Code Act 1899</i>	"rape"
Northern Territory, Australia <i>NT Criminal Code Act 2008</i>	"sexual intercourse without consent"
Western Australia, Australia <i>WA Criminal Code Act 1913</i>	"sexual penetration without consent"
New Zealand <i>Crimes Act 1961</i>	"sexual violation"
Papua New Guinea <i>PNG Criminal Code</i>	"rape"
Fiji <i>Crimes Decree 2009</i>	"rape"
Vanuatu <i>Penal Code (Amendment Act) 2006</i>	"sexual intercourse without consent"

Pacific Forum Model Legislation	"sexual violation"
<i>Sexual Offences Model Provisions</i>	
United Kingdom	"rape"
<i>Sexual Offences Act 2003</i>	

3.51 Other law reform agencies have recommended that using broader terminology assists the public and the courts in moving away from old definitions of, and preoccupations with, penile penetration of the vagina. However the LRC considers that the term rape is well understood in Solomon Islands and should be retained.

Recommendation 6

The term rape should be retained.

Maximum penalty for attempted rape

3.52 The Penal Code includes general provisions for attempted offences, as well as some specific attempt offence. The general provision states that an attempt is when a person has an intention to commit an offence but is unable to fulfill this intention to the extent of committing the whole offence.¹⁰⁷ This provision provides a penalty of 7 years imprisonment for persons who attempt to commit a felony, unless otherwise stipulated. Separate provision is made for the offence of attempted rape, and it has a maximum sentence of 7 years.¹⁰⁸

3.53 Rape has a maximum penalty of life imprisonment.¹⁰⁹ This is the highest sentence available in the Penal Code, and also applies to attempted murder, manslaughter, and several offences endangering life and health, including acts intended to cause grievous harm. An

¹⁰⁷ Penal Code s 378.

¹⁰⁸ Penal Code s 138.

¹⁰⁹ Penal Code s 136.

attempt of any of these offences shares the same maximum penalty of life imprisonment.¹¹⁰

3.54 When attempted rape was discussed in consultation or in a submission there was support for increasing the penalty for the offence.

3.55 In Queensland and Papua New Guinea the maximum sentence for attempted rape is 14 years, in Fiji and New Zealand the penalty is 10 years.¹¹¹

Recommendation 7

The maximum penalty for the attempted rape should be increased to 10 years imprisonment.

¹¹⁰ Penal Code s 215 attempted murder; s 222 disabling in order to commit felony or misdemeanour; s 223 stupefying in order to commit felony or misdemeanour; s 224 acts intended to cause grievous harm or prevent arrest.

¹¹¹ Criminal Code 1899 (Qld) s 350; Criminal Code Act (PNG) s 348; Crimes Decree 2009 (Fiji)s 208; Crimes Act 1961 (NZ) s 129.

Chapter 4 Sexual Abuse of a Person with a Significant Disability

Current law

4.1 The defilement offence in section 143 of the Penal Code (defilement of a girl between the age of 13 and 15 years) includes an offence that applies where a person has or attempts to have sexual intercourse, in circumstances that do not amount to rape, with any ‘female idiot or imbecile’ knowing that she is an idiot or imbecile. The Penal Code categorizes this offence as a misdemeanor (minor offence) and it carries a maximum penalty of 5 years imprisonment.¹¹²

4.2 The underlying policy reason for such an offence is to protect people with a disability (in the case of the existing offence only girls and women are protected) who are vulnerable to coercive sex that does not amount to rape. The prosecution does not have to prove lack of consent for a conviction.

4.3 However, the current provision is inadequate and discriminatory because of the use of the terms “idiot and imbecile” and it only protects girls and women. It also has a comparatively low penalty and only applies to sexual intercourse.

4.4 The use of the terms “idiot and imbecile” to describe people living with disabilities is discriminatory, and is insulting to this group of persons. The terms are old-fashioned, inappropriate and should be replaced with suitable terminology.

4.5 One of the underlying aims of laws creating sexual offences is to protect freedom of choice in sexual relations.¹¹³ The law must balance

¹¹² Penal Code s 143(1).

¹¹³ Model Criminal Code Officers Committee, *Model Criminal Code Sexual Offences Against the Person* Discussion Paper (1999) 175.

two competing interests. Firstly, that of protecting people with impaired mental functioning from sexual exploitation, and secondly giving maximum recognition to their sexual rights.¹¹⁴

4.6 People living with disability are vulnerable to sexual exploitation because they depend on other people for care and support. In Solomon Islands many people with disabilities are cared for by family members in their home.

Rape or defilement?

4.7 A recent case illustrates the problem with the existing offence. A man pleaded guilty in Auki Magistrates' Court to an offence of defilement that was committed on a 13 year old girl who was disabled and could not speak or talk. The maximum penalty for this offence is five years. She was severely injured by the offence. Police charged the offender with defilement, rather than rape. The offender was sentenced to three years imprisonment.¹¹⁵

4.8 By comparison, if the offender had been charged with and convicted of rape the starting point for sentencing, with the aggravating features that were present in the case, would have been eight years.

4.9 The existing offence in section 143 of the Penal Code suggests that disabled women and girls can only be defiled, and not raped. This is reinforced by the potentially limited definition of rape in section 136 of the Penal Code, which is addressed by the LRC's recommendations in relation to rape. The LRC's recommendations make it clear that the offence of rape should be used where the evidence shows that the victim does not have the capacity to give free and voluntary agreement

¹¹⁴ Model Criminal Code Officers Committee, *Model Criminal Code Sexual Offences Against the Person* Discussion Paper (1999) 177.

¹¹⁵ *R v Sixton Haiku* Auki Magistrates' Court (unreported, 15 February 2013).

to sexual intercourse because of a cognitive ability or a mental or physical impairment preventing communication.

Consultation and submissions

4.10 No feedback was received by the LRC from the consultations on sexual offences against people with physical disabilities and mental impairment.

International commitments

4.11 The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) contains some relevant provisions for this project. Solomon Islands signed this Convention on 23 September 2008 and signed the Optional Protocol to the Convention on 24 September 2009. While Solomon Islands has not yet ratified the Convention, and is not bound by it, signing the Convention and Optional Protocol creates an obligation to refrain from acts that would defeat the object and purpose of the treaty.¹¹⁶

4.12 The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.¹¹⁷ State Parties to the Convention must ensure that people with disabilities have -

- access to justice on an equal basis with others;¹¹⁸
- equal recognition before the law;¹¹⁹ and
- the right to liberty and security of person on an equal basis with others.¹²⁰

¹¹⁶ United Nations, *Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities* <http://www.un.org/disabilities/default.asp?navid=23&pid=151#bp1> (Accessed 29/11/10).

¹¹⁷ *Convention on the Rights of the Persons with Disabilities* art 1.

¹¹⁸ *Convention on the Rights of the Persons with Disabilities* art 13.

¹¹⁹ *Convention on the Rights of the Persons with Disabilities* art 12.

¹²⁰ *Convention on the Rights of Persons with Disabilities* art 14(1)(a).

4.13 Three of the general principles of the UNCPRD are –

- respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- non-discrimination; and
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.¹²¹

4.14 State Parties are obligated to ‘undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, State Parties undertake –

- to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention; and
- to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise.¹²²

Conclusions and recommendations

4.15 The LRC considered the laws in Fiji and New Zealand for comparative purposes.

¹²¹ *Convention on the Rights of Persons with Disabilities* art 3(a)(b)(d).

¹²² *Convention on the Rights of Persons with Disabilities* art 4(a - e).

4.16 The Fiji Crimes Decree 2009 terms the offence ‘defilement of intellectually impaired persons’. It is a summary offence and is committed where a person unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any intellectually impaired person under circumstances not amounting to rape, but where it is proved that the offender knew at the time of the commission of the offence that the person was suffering from a mental sub-normality. The offence carries a maximum term of imprisonment of 10 years.¹²³

4.17 ‘Mental sub-normality’ is defined as to ‘a state of arrested or incomplete development of mind, which includes sub normality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or guarding against sources of exploitation, or will be so incapable when of an age to do so...’¹²⁴

4.18 In New Zealand the offence is ‘sexual exploitation of person with significant impairment’.¹²⁵ The offence is committed when a person has, or attempts to have, exploitative sexual connection with a person with a significant impairment, and carries a maximum penalty of 10 years imprisonment.¹²⁶

4.19 There are two elements to the offence –

- the accused has sexual connection with the impaired person knowing that the impaired person is a person with a significant impairment; and
- obtained the impaired person’s acquiescence in, submission to, participation in, or undertaking of the connection by taking advantage of the impairment.

4.20 ‘Significant impairment’ means an ‘intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects

¹²³ Crimes Decree 2009 (Fiji) s216.

¹²⁴ Crimes Decrees 2009 (Fiji) s4.

¹²⁵ Crimes Amendment Act 2005 (NZ) s7.

¹²⁶ Crimes Amendment Act 2005 (NZ) s 7.

a person to such an extent that it significantly impairs the person's capacity –

- to understand the nature of sexual conduct;
- to understand the nature of decisions about sexual conduct;
- to foresee the consequences of decisions about sexual conduct;
- or
- to communicate decisions about sexual conduct.¹²⁷

4.21 The definition of 'sexual connection' is similar to the LRC's proposed definition for sexual intercourse.

4.22 The New Zealand Act also contains an offence of 'indecent act' to protect persons with a significant impairment. This offence carries a maximum penalty of 5 years imprisonment. A person commits the offence on a person with a significant impairment (impaired person) if he or she –

- does an indecent act on the impaired person knowing that the impaired person is a person with a significant impairment; and
- has obtained the impaired person's acquiescence in, submission to, participation in, or undertaking of the doing of the act by taking advantage of the impairment.¹²⁸

4.23 The LRC supports the introduction of an offence based on the New Zealand approach because it offers protection to both genders and covers a broad range of disabilities including physical and mental impairment, and allows for people with disabilities who do have the capacity to understand and make decisions about sexual conduct to make those decisions.

Recommendation 8

The LRC recommends the introduction of an offence of sexual intercourse with a person who has a significant disability to replace the existing defilement offence that applies in relation to a 'female idiot or imbecile.'

¹²⁷ Crimes Amendment Act 2005 (NZ) s 7.

¹²⁸ Crimes Amendment Act 2005 (NZ) s 7.

The offence is committed when a person has, or attempts, sexual intercourse with a person who has a significant disability, knowing that the person has a significant disability; and has obtained the impaired person's acquiescence in, submission to, participation in, or undertaking of the act by taking advantage of the disability.

The LRC also recommends a separate offence of indecent act on a person with a significant disability.

Significant disability should be defined as an intellectual, mental or physical condition or impairment (or a combination of 2 or more of these types of conditions or impairments) that affects a person to such an extent that it significantly impairs the person's capacity to understand the nature of the sexual conduct, or to understand the nature of decisions about sexual conduct or to communicate decisions about sexual conduct.

The LRC recommends that for the offence involving sexual intercourse with a person with a significant mental disability that the maximum penalty should be 10 years imprisonment, but if the victim is under the age of 13 years or the offence is committed by a person in an position of trust, authority or dependency to the victim who is aged 13 to 15 years, the maximum penalty should be life imprisonment.

For the offence involving indecent act the maximum penalty should be five years imprisonment, but if the victim is under the age of 13 years, or the offence is committed by a person in an position of trust, authority or dependency to the victim who is aged 13 to 15 years, the maximum penalty should be seven years imprisonment.

Chapter 5 Indecent Assault

Current law

5.1 Section 141 of the Penal Code consists of two separate offences.

- The first offence of indecent assault is where a man or boy unlawfully and indecently assaults a woman or girl. The maximum penalty for this offence is five years imprisonment.
- The second offence is the offence of intending to “insult the modesty” of any woman or girl through words, sounds or gestures. This is a lesser offence which does not involve any contact or threatened contact, and the maximum penalty is one year imprisonment.

The Penal Code does not provide any definitions for indecent or assault.

5.2 Lack of consent is an element of the offence of indecent assault, however if the victim is a girl aged less than 15 years consent is not a defence.

5.3 Due to the narrow definition of sexual intercourse in the Penal Code the offence of indecent assault is used to prosecute a broad range of conduct that does not involve sexual intercourse, ranging from touching of breasts to vaginal penetration with an object.¹²⁹

5.4 The LRC’s recommendations for expansion of the concept of sexual intercourse will, if implemented, result in some of the conduct that is currently prosecuted with the offence of indecent assault being covered by the offence of rape (or other offences that include the element of sexual intercourse).

5.5 There is little in the case law of Solomon Islands case law about the meaning of indecent. A review of the cases suggests there is usually explicit contact of the sexual parts such as genital to genital contact or genital to mouth contact. This suggests that prosecutors, or courts, may

¹²⁹ Sexual intercourse is defined as penile penetration of the vagina, Penal Code s 168.

hold the view that the current offence requires proof of explicit contact with sexual parts.

5.6 Under the common law that has been adopted in Solomon Islands an assault occurs where a person intentionally or recklessly causes another person to fear immediate and unlawful personal violence.¹³⁰

5.7 One problem is that this definition does not cover indecent or sexual actions without consent that involve touching or bodily contact that do not involve personal violence. For example, kissing without consent, touching of breasts or buttocks without consent or forcing the victim to remove clothing or touch the body of the accused. This kind of conduct would have to be prosecuted with the lesser offence of insulting the modesty.

5.8 Other jurisdictions that have codified their criminal law have included a definition of assault in the legislation that includes direct and indirect touching, attempts to apply force, and threats by actions or gestures to apply force if the person making the threat appears to be able to carry out the threat.¹³¹ Assault in these jurisdictions does not need to be violent and can be as slight as a mere touch.¹³²

Consultations and submissions

5.9 In relation to the offence of indecent assault the Issues Paper asked the following questions-

Are the penalties for indecent assault, and insulting the modesty of women and girls adequate?

¹³⁰ *Regina v Fataga, Kiusi and Niudenga* [2003] SBHC 108 www.paclii.org citing with approval *Fagan v Metropolitan Police Commissioner* (1968) 3 All E.R. at 445.

¹³¹ Criminal Code (Qld) s 245; Criminal Code (NT) s 187; Criminal Code (WA) s 222; Criminal Code (PNG) s 243.

¹³² *Collins v Wilcock* [1984] 1 WLR 1172.

Should there be different penalties for indecent assault of children and adults?

Should the offences apply to boys and men as well as girls and women?

Should there be different penalties for indecent assault where there is a relationship of trust or dependency between the victim and the accused?

Should the concept of ‘insulting modesty’ be replaced by a more modern concept, such as offensive words or conduct?

5.10 At one consultation there was discussion about the issue of a person “flashing” his or her genitals at victims, particularly children, and where this kind of offence would fit.¹³³ Participants suggested improving the law to make sure it had a strong penalty to deter this kind of behaviour.

5.11 Consultation with provincial leaders in Malaita Province raised concerns that nonconsensual kissing was happening in villages and reports indicated this was an increasing problem.¹³⁴

5.12 One consultation suggested public perception confuses rape with indecent assault, stating rape happens when a man holds or struggles with a girl and that often sentences fail to satisfy expectations for seriousness.¹³⁵

5.13 During one consultation there was discussion about the term “assault” and how that implies that the victim must suffer some physical injury.¹³⁶

5.14 Participants at two consultations suggested creating a new offence of aggravated indecent assault.¹³⁷ This would apply to

¹³³ NACC Workshop, *Consultation* Honiara 9 July 2009.

¹³⁴ Provincial Government, *Consultation* Auki, Malaita 29 April 2009.

¹³⁵ RSIPF *Consultation* Kirakira Makira 11 March 2010.

¹³⁶ RSIPF *Consultation* Kirakira Makira 11 March 2010.

¹³⁷ RSIPF, *Consultation* Honiara 18-19 May 2009; Public Solicitor’s Office, *Consultation* Honiara 17 July 2009.

circumstances offences where the victim suffers serious injury from assault with an accompanying indecent act.

5.15 Some of the consultations and submissions recommended an increase in the penalty for indecent assault.¹³⁸ A number of submissions and consultations supported a separate offence (and penalty) for child victims, and that sexual touching of children should receive a significant penalty increase.¹³⁹

5.16 There was some support for the argument that like offences against children, harsher penalties are needed for offenders who are in trust positions.¹⁴⁰ On the other hand, a submission argued this should not be done through legislation and that the courts should be able to take it into account as an aggravating factor for the purpose of sentencing.¹⁴¹

5.17 There was support for the separation of the two offences, and for modernising the language of the insulting modesty offence.¹⁴² One consultation recommended replacing this offence with a more general offence, such as offensive words and conduct. Participants recommended that the language in a reformed offence should be clear about the nature of the offence, and be gender neutral.¹⁴³

¹³⁸A Radclyffe *Submission* undated; RSIPF *Consultation* Honiara 18-19 May 2009; NACC Workshop *Consultation* Honiara 9 July 2009; Provincial Executive, *Consultation* Buala, Isabel 26 May 2009.

¹³⁹ A Radclyffe, *Submission* undated; RSIPF, *Consultation* Honiara 18-19 May 2009; NACC Workshop, *Consultation* Honiara 9 July 2009.

¹⁴⁰ RSIPF, *Consultation* Honiara 18-19 May 2009.

¹⁴¹ A Radclyffe, *Submission* undated.

¹⁴² A Radclyffe, *Submission*, undated; RSIPF, *Consultation* Honiara 18-19 May 2009.

¹⁴³ RSIPF *Consultation* Honiara 18-19 May 2009.

Conclusions and recommendations

Indecent assault

5.18 The LRC concludes that reform is needed to address the limitations imposed by use of the element of assault, and the term indecent. The offence should also protect men and women.

5.19 Looking at other jurisdictions there appears to be two possible approaches. One, adopted in the PIF Sexual Offences Model Provisions and the PNG Criminal Code is that the offence is defined as touching, without consent, of the sexual parts of another person; or compelling the victim to touch his or her sexual parts (with his or her body or an object). ‘Sexual parts’ includes genital area, groin, buttocks or breasts.¹⁴⁴

5.20 However, one problem with limiting the scope of the offence to touching of specific sexual parts is that it excludes other kinds of touching accompanied by indecent circumstances. For example, touching of the thigh accompanied by words or other actions that are sexual.

5.21 A second approach is to use indecent touching as the physical element for the offence, together with a definition for indecent. The Model Criminal Code Committee recommended an offence of indecent touching without consent, including a statutory definition where indecent means indecent according to the standards of ordinary people.¹⁴⁵ In the UK the offence (called sexual assault) is committed when a person intentionally touches another, the touching is sexual and there is no consent.¹⁴⁶

5.22 The LRC has decided that the second approach is preferred because it uses plain English and covers a broader range of conduct.

¹⁴⁴ Sexual Offences Model Provisions (PIF) s 6; Criminal Code Act (PNG) s 349.

¹⁴⁵ Model Criminal Code Officers Committee, *Sexual Offences Against the Person Report* (1999), 102.

¹⁴⁶ Sexual Offences Act (UK) s 3.

The definition of consent that has been adopted in the recommendations for reform of rape can also be adopted for the offence of indecent touching without consent. This would also ensure that there is consistency between the offence of rape and indecent touching.

5.23 The offence should also cover situations where an offender compels or forces the victim to indecently/sexually touch themselves, or another person (including the accused). In South Africa and the UK this offence is dealt with separately from their indecent assault offence, and is regarded as forced sexual activity.¹⁴⁷ In other jurisdictions this kind of activity is part of the main offence. For example in Queensland the offence of sexual assault includes where a person procures (forces) another without their consent to commit an act of gross indecency, or witness an act of gross indecency.¹⁴⁸

5.24 The LRC considered that it was important that the definition of indecent be flexible enough to cover different contexts in Solomon Islands and allow courts to take community standards into account when deciding whether touching is indecent.

Recommendation 9

The offence of indecent assault be replaced with an offence of indecent touching without consent, that adopts the same definition of consent as recommended for rape. The offence should apply to both genders.

The term indecent should be defined as meaning indecent according the standards of ordinary or right minded people, or prevailing community standards. To determine whether conduct is offensive all of the circumstances surrounding the conduct can be considered, including the motive of the accused.

¹⁴⁷ Causing a person to engage in sexual activity without consent, Sexual Offences Act 2003 (UK) s 4; compelled self-sexual assault, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 2007 (South Africa) s 7.

¹⁴⁸ Criminal Code (Qld) s 352.

The offence should include touching where a person is forced to indecently touch him or herself, the accused or another person.

The maximum penalty should be five years imprisonment.

Insulting the modesty

5.25 The second offence - insulting the modesty of a woman or girl- consists of uttering words, making sounds or gestures or showing objects that are intended to offend, or intruding on the privacy of a woman or girl by doing something likely to offend her.¹⁴⁹

5.26 The 2009 Fiji Crimes Decree updated the offence so that it applies where a person, intending to insult the modesty of any person:

- utters a word, makes a sound or gesture or exhibits an object intending that the word or noise will be heard or the gesture or object will be seen by the other person or
- intrudes on the privacy of another person by doing an act likely to offend the modesty of the other person.¹⁵⁰

5.27 In the PIF Sexual Offences Model Provisions the equivalent offence is committing an act of indecency.

5.28 In the ACT Australia there is an offence of act of indecency on or in the presence of another person without consent.¹⁵¹

5.29 In New Zealand it is an offence to do any indecent act (in any place) with the intention to insult or offend.¹⁵²

5.30 The Model Criminal Code Committee recommended an offence of indecent act directed at another person without consent.¹⁵³

¹⁴⁹ Penal Code s 141(3).

¹⁵⁰ Crimes Decree 2009 (Fiji) s 213.

¹⁵¹ Crimes Act (ACT) s 60.

¹⁵² Crimes Act (NZ) s 126.

¹⁵³ Model Criminal Code Officers Committee, *Sexual Offences Against the Person Report*, (1999) 112.

Recommendation 10

The offence of insulting the modesty should be replaced with an offence of indecent conduct in the presence of another person without the consent of that person. Conduct includes words, gestures and other actions that do not amount to touching. The term indecent should have the same meaning as given in Recommendation 9.

The maximum penalty should be three years imprisonment.

Chapter 6 Incest

Current law

6.1 The Penal Code contains two offences addressing incest – incest by male and incest by a female.¹⁵⁴ Incest prohibits sexual intercourse between people who are related to each other through lineal or blood relationships, and knowledge of the relationship is an element of the offences. Both offences have a maximum penalty of 7 years imprisonment. In the case of incest by a male where the victim is under the age of 13 years, the maximum penalty is life imprisonment. An attempt by a male to commit the offence is a misdemeanor.

6.2 The relationships covered by the two offences are lineal relationships (father, mother, grandmother, grandfather, son, daughter) and brother and sister, including half -brother and half- sister.

6.3 There are some differences between the two offences. For incest committed by a male it is immaterial whether the female victim consented to the sexual intercourse. For the offence of incest committed by a female the offender must consent to the sexual intercourse. That is, a female cannot be convicted of incest if she does not consent to the sexual intercourse. The female must also be of or above the age of 15 years to be convicted of incest.

Consultation and submissions

6.4 The Issues Paper asked the following questions about reform of the offences of incest.

Should the definition of relative be broadened for incest offences to include adopted siblings, parents and grandparents?

¹⁵⁴ Penal Code ss 163 and 164.

Should the Penal Code be changed so a child under the age of 18 years cannot be charged with incest, or so a person in a position of dependency cannot be charged with incest?

6.5 A number of stakeholders considered that the law on incest should cover adopted siblings or step children.¹⁵⁵ Some participants emphasised that adopted children are a part of the family regardless of what family they are adopted into.¹⁵⁶ At one consultation it was suggested that the law should also cover a stepfather or a stepmother who engages in the offence with his or her step-child.¹⁵⁷

6.6 The inclusion of the relationships of cousin sister and cousin brother in the offence of incest was raised at a number of consultations.¹⁵⁸ At Makira it was suggested that under custom it was prohibited to have sexual intercourse (or a marriage relationship) with an uncle, and with a first cousin.¹⁵⁹

6.7 Participants at one consultation recommended that a child under the age of 18 years should not be charged with the offence.¹⁶⁰ Others at another consultation recommended that a child under the age of 18 should not be charged if the other person taking part in the

¹⁵⁵ *Consultation*, Temotu Province, 4 – 6 May 2009; *Workshop on law reform to address violence against women*, *Consultation* Honiara 20 -23 July 2009; NACC workshop, *Consultation* 9 July 2009; Mothers Union Conference, *Consultation* 16 June 2009; *Consultation* Isabel Province Buala, 26 – 30 May 2009; *Consultation* Tulagi Central Province 2 -5 November 2009.

¹⁵⁶ *Consultation*, Temotu Province, 4 -6 May 2009.

¹⁵⁷ ICP Workshop, *Consultation* Savo Central Province 23 June 2009.

¹⁵⁸ *Consultation*, Buala Isabel Province 26 May 2009; *Consultation*, Taro Choiseul 14 October 2010.

¹⁵⁹ RSIPF, *Consultation* Kirakira Makira Province 11 March 2010.

¹⁶⁰ RSIPF, *Consultation* workshop 18 – 19 May 2009.

offence is an adult and was over the age of 18 years at the time the offence was committed.¹⁶¹

6.8 One submission said that the offences on incest should not cover adopted siblings, parents and grandparents, and should not be changed so that a child under the age of 18 years cannot be charged with the offence.¹⁶²

6.9 Some participants said that often males are seen as the perpetrators of the offence. They suggested that both parties should be punished for the offence where both parties consented. These participants also suggested that mandatory reporting of certain crimes, such as incest, is necessary, and stated that there is need to do something to get communities to report crimes, especially where such crimes are repeatedly committed. The participants said that their community has failed to report a man who repeatedly abused his daughter, and recommended that community policing and the headman system should be established in the community.¹⁶³

Conclusions and recommendations

6.10 The main question for reform is the type of relationships that should be covered by the offence of incest. The consultation suggests that other relationships such as first cousin and uncle or aunt should be included, and the LRC considers that these relationships should be included in the offence. The LRC is also aware that in some cases marriage between close family members such as first cousins may be permitted under custom for specific reasons, such as securing land under custom. The LRC suggests that some further targeted

¹⁶¹ Workshop on law reform to address violence against women, *Consultation* Honiara 20 – 23 July 2009.

¹⁶² A Radclyffe, *Submission* undated.

¹⁶³ *Consultation*, Gizo Western Province 20 -22 April 2009.

consultation on the issue should be done before any legislation is finalised.

Recommendation 11

The Penal Code should have one general offence of incest drafted in gender neutral terminology.

Incest should apply to the following close blood relatives – lineal (parent, child, grandparent, grandchildren) brother, sister (including half-brother and half sister), uncle, aunt, nephew, niece and first cousin.

A defence or restraint, duress or fear should apply to incest. The defence would be available to an accused person who at the time of the offence was under restraint, duress or fear of the other person, or another person.

Custom marriage according to well established practices should be available as a defence.

Lack of knowledge of the relationship should be available as a defence. This defence should be available if the accused did not know, or could not reasonable have been expected to know, that the other person was a close blood relative.

The maximum penalty for incest should be 10 years imprisonment, but if the offence is committed against a child under the age of 13 years the maximum penalty should remain as life imprisonment. The penalty for attempted incest should be five years imprisonment. If the attempt is against a child under the age of 13 years the maximum penalty should be seven years imprisonment.

Chapter 7 Defilement

Current law

7.1 Under the current law defilement is committed when a man or boy has sexual intercourse with a girl under the age of 15 years. The Code distinguishes between defilement of a girl under the age of 13 years, and defilement of a girl aged 13 to 15 years.

7.2 In the case of defilement of a girl aged under 13 years the maximum penalty is life imprisonment. However attempted defilement of a girl under 13 years of age has a maximum penalty of two years imprisonment.¹⁶⁴

7.3 Defilement of a girl aged 13 to 15 years has a maximum penalty of five years imprisonment. Attempt to commit the offence also has a maximum penalty of five years imprisonment. Prosecution of the offence must commence within 12 months of the time it was committed. It is a defence where the perpetrator reasonably believed that the girl is more than 15 years at the time of the offence.¹⁶⁵

7.4 For both offences consent on the part of the victim is immaterial, and lack of consent is not an element of the offence.

Submissions and consultation

7.5 The Issues Paper asked the following questions in relation to reform of the offence of defilement:

Should the distinction in maximum penalties for the offences of defilement of girls under 13 years, and defilement of girls aged 13 to 15 years be retained?

Should there be any changes to the penalties?

¹⁶⁴ Penal Code s142.

¹⁶⁵ Penal Code s143.

Should the defence of reasonable belief that the girl was over the age of 15 be retained?

Is there a need to retain the term 'defilement'?

Should the requirement that the prosecution of the offence (for girls aged 13 to 15 years) commence within 12 months be retained?

7.6 Some participants considered that 15 years is too young for marriage because children at that age are still dependent on parents, and are not strong enough to support a family of their own.¹⁶⁶

7.7 At another consultation participants considered that the church and parents need to address the issue of customary marriage of girls under the age of 15 years. The parents' decision and the consent of the girl are important considerations.¹⁶⁷

7.8 Some participants supported the removal of the time limit for the prosecution of defilement of a girl aged 13 to 15 years, and the two tier structure of the offence of defilement. One reason for removing the time restriction for prosecution is that the victim may have to continue living with the perpetrator for some time after the offence is committed, or may live a long way from police.¹⁶⁸

7.9 At a consultation workshop with Police representatives in Honiara participants said that the limitation period causes problems for the effective investigation and prosecution of the offence. Participants at this workshop also supported retaining two tiers of punishment for defilement, with some support for an increase to the maximum penalty for defilement of a 13 to 15 year old. Participants also considered that

¹⁶⁶ Provincial Executive, *Consultation Buala Isabel Province* 26 May 2009.

¹⁶⁷ Mothers' Union Conference, *Consultation Honiara* 16 June 2009.

¹⁶⁸ RSIPF, *Consultation Buala Isabel Province* 26 May 2009; RSIPF, *Consultation Tulagi Central Province* 3 November 2009; Workshop on law reform to address violence against women, *Consultation Honiara*, July 2009.

customary marriage should not be a defence to defilement, but that there should be some provision so that boys and girls under the age of 15 years can lawfully enter into a customary marriage.¹⁶⁹

7.10 A submission supported retention of the two tiers, and supported an increase in the offence committed against a child between the age of 13 and 15 to seven years. The submission also supported removal of the limitation period for the prosecution for the offence.¹⁷⁰

Conclusions and recommendations

7.11 The UNIFEM report on implementation of CEDAW suggests that the term defilement is discriminatory as it indicates that girls are spoilt and damaged.¹⁷¹

7.12 The UNIFEM report also suggests that the availability of a defence based on belief about the girl's age is discriminatory because it places a burden on the girl to reveal her age, whereas the offender should be responsible for determining her age. Proof that the girl was under the age of 15 years may be difficult to obtain as most births are not registered in Solomon Islands.

7.13 The LRC recommends that the offence should be reframed as sexual intercourse with a child under the age of 15 years, and that the definition of sexual intercourse proposed in connection with rape also apply to this offence. This will also ensure that the offence can be used to protect boys and girls.

¹⁶⁹ RSIPF, *Consultation* Honiara 18 and 19 May 2009.

¹⁷⁰ A Radclyffe, *Submission* undated.

¹⁷¹ Vedna Jivan and Christine Wallace, UNIFEM, UNDP, *Translating CEDAW into Law: Legislative Compliance in Nine Pacific Countries* (2006).

Recommendation 12

The offence of defilement of a girl under the age of 15 years should be replaced with a new offence of sexual intercourse with a child under the age of 15 years.

The act of sexual intercourse can be made by the perpetrator, or the child.

Where the child is under the age of 13 years, or if the offence is committed by a person in a position of trust, authority or dependency with the child, the maximum penalty should be life imprisonment.

If the child is aged 13 to 15 years, and the offence is not committed by a person in a position of trust or authority, the maximum penalty should be 15 years imprisonment.

7.14 It is the view of the LRC that the minimum age for customary marriage should be in line with the minimum age for marriage under the written law. The LRC is also aware that government policy indicates a goal of raising the minimum age for marriage to 18 years. The LRC also has a reference to review the law of marriage and divorce and believes that it is important to consult widely on the minimum age for marriage. The LRC also has concerns that there are exceptional situations where marriage under the age of 15 years can be the best outcome when a girl is pregnant.

7.15 The LRC suggests that there should be provision in the Islanders' Marriage Act to allow for marriage of a person under 15 years in exceptional circumstances.

7.16 The defence of honest and reasonable mistake of fact is available to all offences in the Penal Code.¹⁷² This would allow for a defence based on an honest and reasonable belief held by the accused that the child was over the age of 15 years at the time of the offence.

7.17 The LRC considers that this defence should be available to a person accused of the new offence, but that a stricter approach should

¹⁷² Penal Code s 10.

be taken so that the accused should be required to demonstrate that he or she took reasonable steps to ascertain the age of the child.

7.18 The LRC considered whether a new defence, based on the accused being close in age to the victim, should be introduced. Courts in Solomon Islands have acknowledged that an offender whose age is close to the age of the victim should be treated leniently. In some other jurisdictions a full defence is available if the victim is more than 12 years old, and the offender is not more than two years older than the victim.

7.19 The LRC has decided not to recommend such a defence because it conflicts with culture and religious principles which treat sex outside of marriage as unacceptable behavior. The LRC is also concerned that the defence may be abused if it is made available.

Recommendation 13(a)

The minimum age for customary marriage should be in line with the minimum age for marriage under the state law (Islanders' Marriage Act). There should be provision in the Islanders' Marriage Act for marriage under the age of 15 in exceptional circumstances. Exceptional circumstances would include pregnancy, and where marriage is in the best interests of the unborn child. Marriage under the Act when someone is under the age of 15 years should be a defence to sexual intercourse with a child under the age of 15 years.

Recommendation 13(b)

A stricter requirement should be placed on an accused who relies on the defence of reasonable belief that the child was 15 years or older. For the belief to be reasonable the accused must demonstrate that he or she took reasonable steps to ascertain the age of the child.

Chapter 8 Indecent Touching of a Child

Current law

8.1 The Penal Code contains one offence of indecent assault that applies to women and girls. Consent is not a defence to an indecent assault on a girl under the age of 15.

Conclusions and recommendations

8.2 Recommendations 9 and 10 addressed the offence of indecent assault. However the LRC considers that there should be a separate offence of indecent touching that would apply to children up to the age of 15 years that will have a higher penalty than the offence recommended for adults. This is consistent with feedback received during the consultation and other standards such as the Convention on the Rights of the Child.

8.3 The proposed new offences mirror the proposed offences of indecent touching and indecent conduct contained in Recommendations 9 and 10 except that lack of consent is not an element of the offences.

Recommendation 14

The LRC recommends the introduction of the offences of-

indecent touching of a child who is under the age 15 years;

compelling a child who is under the age 15 years to indecently touch him or herself, the accused or another person;

indecent conduct in the presence of a child who is under the age of 15 years; and

compelling a child who is under the age of 15 years to engage in indecent conduct in the presence of the accused.

The maximum penalty for the offences should be seven years imprisonment if the child is under 13 years of age, or the offender is

**in a position of trust, authority or dependency in relation to the child;
otherwise the penalty should be five years imprisonment.**

Chapter 9 Sexual Abuse of a Child Aged 15 to 18 Years

Current law

9.1 The Penal Code does not contain any specific offence to protect children over the age of 15 years and under the age of 18 years from sexual abuse. The offences of rape, attempted rape and indecent touching may be used to prosecute sexual abuse of children in this age group, however there are no offences that take into account the fact that this group can lawfully consent to sexual activity, but are at the same time vulnerable to sexual abuse, particularly from people who are in a position of trust, authority or dependency in relation to a child. For the offences of rape, attempted rape and indecent assault the prosecution has to prove beyond reasonable doubt that the victim did not consent to the sexual activity.

Submissions and consultations

9.2 The introduction of an offence to protect young people aged 15 to 18 years from exploitative sexual activity with a person in a position of trust, authority or dependency was supported by a number of stakeholders.¹⁷³

9.3 At one consultation participants supported the introduction of the offence because the conduct can have negative psychological impact on the young person.¹⁷⁴ At another consultation concerns were raised about teachers having sexual relationships with students.¹⁷⁵

¹⁷³Office of the Public Solicitor, *Consultation* Honiara 24 July 2009; RSIPF *Consultation* Honiara 18 and 19 May 2009, A Radclyffe, *Submission* undated; *Consultation*, Gizo 21 April 2009; NACC workshop, *Consultation* 9 July 2009; Mothers' Union Conference, *Consultation* 16 June 2009; Women and youths, *Consultation* Tulagi Central Province 4 November 2009.

¹⁷⁴ Office of the Public Solicitor, *Consultation* Honiara 24 July 2009.

¹⁷⁵ *Consultation*, Gizo 21 April 2009.

The law in other jurisdictions

9.4 Other jurisdictions in the region have introduced this type of offence into their criminal laws including Papua New Guinea and Vanuatu. Consent of the child to sexual activity is not a defence to the offences.

9.5 In Papua New Guinea an offence was introduced in 2002 to protect children between the ages of 16 to 18 years who are in a relationship of trust, authority or dependency with the accused. Persons in the relationship of trust, authority or dependency include (but are not limited to) parents, step-parents, adoptive parents, guardians, persons having the care or custody of children, grandparents, aunt, uncle, sibling including step-sibling, first cousin, teacher, religious instructor, counsellor, youth worker, health care professional, police or prison officer. The offence covers unlawful sexual intercourse and sexual touching and has a maximum penalty of 15 years imprisonment.¹⁷⁶

9.6 In Vanuatu the offence is termed 'sexual intercourse with a child under care or protection' and is aimed at protecting children under the age of 18 years from sexual abuse by a person who is in a 'social relationship' with the child. A social relationship is a relationship between a person and his or her step-child or foster child, a child living with the person as a member of the person's family and who is under the person's care and protection. The maximum penalty for the offence is 10 years imprisonment.¹⁷⁷

9.7 In Victoria Australia there is an offence of sexual penetration of a 16 or 17 year old child, and a separate offence of sexual touching of a 16 or 17 year old child. The offences apply to people who in a relationship of care, supervision or authority in relation to a child.

¹⁷⁶ Criminal Code (PNG) s 229E.

¹⁷⁷ Penal Code (Van) s 96.

Persons in this position include the child's teacher, foster parent, legal guardian, a minister of religion with pastoral responsibility for the child, the child's employer, the child's youth worker, sport coach, counsellor, health professional a police officer acting in his or her duty in respect of the child, and a person employed in a youth correctional centre. The maximum penalty for the offence is 10 years imprisonment for sexual penetration, and five years imprisonment for sexual touching.¹⁷⁸

Conclusions and recommendations

9.8 The LRC has concluded that specific offences should be introduced to protect this group of young people to cover the conduct of sexual intercourse and sexual touching. The rationale for introduction of the offence is that it targets persons in charge of children who have a duty and responsibility for the welfare of those children in their care.¹⁷⁹ It is intended to cover situations that fall short of rape (where lack of consent must be proved beyond reasonable doubt) where a person such as a teacher, sport coach or pastor takes advantage of a young person.

9.9 The legislation should include a non-exhaustive list of categories of people who are in a position of trust, authority or dependency in relation to a child.

Recommendation 15

The LRC recommends the introduction of an offence of sexual abuse of a child over the age of 15 years but under the age of 18 years committed by a person in a position of trust, authority or dependency in relation to the child.

¹⁷⁸ Crimes Act 1958 (Vic) ss 48, 49.

¹⁷⁹ J. Y. Luluaki 'Sexual Crimes Against and Exploitation of Children and the Law in Papua New Guinea' (2003) 3 *Melanesian Law Journal* 15.

The offence should cover acts of sexual intercourse and sexual touching but with different maximum penalties. For acts of sexual intercourse the maximum penalty should be seven years imprisonment, and for acts of sexual touching the maximum penalty should be five years imprisonment.

Persons in a position of trust, or authority or dependency in relation to a child should include (but not be limited to) the following persons-

parent, step-parent and adoptive parent;

sister, brother or cousin;

grandfather or grandmother;

uncle or aunt;

custodian, guardian or carer;

custom doctor or healer;

religious or community leader;

teacher;

counsellor;

medical practitioner;

employer; and

police or correctional officer.

The courts should be free to determine that other types of relationship between the accused and young person was one of trust, authority or dependency.

There should be a defence of reasonable belief that the young person was 18 years or older, where the accused took reasonable steps to ascertain the age of the young person prior to the sexual act.

There should be a defence of marriage, which includes marriage under written law and custom.

Chapter 10 Persistent Sexual Abuse of a Child

Current law

10.1 The Penal Code does not contain an offence of persistent sexual abuse of a child.

10.2 The evidence suggests that children are vulnerable to repeated acts of sexual abuse by the same perpetrator. The Family Health and Safety Study found that about half of women who reported being sexually abused as a child had experienced the abuse on three or more occasions.¹⁸⁰ Research by the LRC into prosecutions for sexual offences revealed a number of cases where the victim had been subjected to sexual abuse over a period of time by the same perpetrator. This research also suggests that when an offender is convicted of multiple offences on a victim that the sentences given for each offence are often ordered to be served concurrently which may not reflect the seriousness of the conduct of the offender.¹⁸¹

¹⁸⁰ Ministry of Women, Youth and Children's Affairs, *Solomon Islands Family Health and Safety Study* (2009) 88.

¹⁸¹ Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code Sexual Offences Sentencing Research Paper* (2011); in particular the cases of *Regina v Fasau* [2009] SBHC 54 (6 counts of defilement), *Regina v Maenisoa* [2011] SBHC 25 (4 counts of rape), *Regina v Melake* [2010] SBHC 34 (3 counts of incest), *Fuiloirentino v Regina* [2008] SBHC 47 (6 counts of incest on the offenders' two daughters).

Consultations and submissions

10.3 The Issues Paper asked the question-

Should the Penal Code include an offence of persistent sexual abuse of a child?

10.4 A number of stakeholders supported the introduction of an offence of persistent sexual abuse of a child.¹⁸²

The law in other jurisdictions

10.5 In Papua New Guinea the offence of persistent sexual abuse of a child is committed by an accused if, on at least 2 or more separate occasions happening on separate days during a relevant period, the accused person engages in conduct in relation to a particular child that constitutes a sexual offence specific to children.¹⁸³ These offences include-

- sexual penetration or sexual intercourse of a child;
- sexual touching;
- indecent act directed at child; and
- sexual abuse by a person in a position of trust, authority or dependency.¹⁸⁴

10.6 The maximum penalty for the offence is 15 years, but if sexual penetration takes place on any one or more of the occasions, the maximum penalty is life imprisonment.¹⁸⁵

10.7 All States in Australia have introduced this offence into their respective laws.¹⁸⁶ Australian jurisdictions extend the scope of the

¹⁸² NACC workshop, *Consultation* 9 July 2009; Mothers Union Conference, *Consultation* 16 June 2009; RSIPE; *Consultation* Honiara 18-19 May 2009; A Radclyffe, *Submission* undated, Office of the Public Solicitor, *Consultation* 24 July 2009.

¹⁸³ Criminal Code Act 1974 (PNG) s 229D(6).

¹⁸⁴ See Criminal Code Act 1974 (PNG) Division 2A – Sexual offences against children; Sexual Offences Model Provisions (PIF) Part 3 – Sexual offences against Children.

¹⁸⁵ Criminal Code Act 1974 (PNG) s 229D(6).

offence to cover specific child sexual offences, as well as other sexual offences such as rape, indecent assault and incest. For example in Victoria, the offence of persistent sexual abuse of a child is committed if on 3 or more occasions during a particular period the accused committed a sexual offence in relation to a child. The maximum penalty for the offence is 25 years imprisonment.¹⁸⁷

Sexual offences are-

- rape;
- indecent assault;
- assault with intent to rape
- incest;
- sexual penetration of child under the age of 16;
- indecent act with child under 16;
- sexual penetration of 16 or 17 year old child;
- indecent act with 16 or 17 year old child; and
- facilitating sexual offences against children.¹⁸⁸

Conclusions and recommendations

10.8 An offence of persistent sexual abuse of a child recognises a course of conduct over a period of time rather than a single event. It seeks to address situations where the sexual conduct with a child occurs repeatedly, and over a period of time. It aims to address the repeated nature of the offending where young children are involved, and the difficulties in prosecuting such cases.

10.9 One reason for introducing the offence is to deter offending behaviour which can go on over a long period of time. Introducing the

¹⁸⁶ See Crimes Act 1900(NSW) s 66EA; Crimes Act 1958 (Vic) s 47A; Criminal Code (WA) s 321A, Criminal Code (Qld) s 229B; Criminal Code (Tas) s 125A; Crimes Act 1900 (ACT) s 56; Criminal Code (NT) s131A & Criminal Law Consolidation Act 1935 (SA) s 50.

¹⁸⁷ Crimes Act 1958 (Vic) s 47A(4).

¹⁸⁸ See Crimes Act 1958 (Vic) ss 38 – 49A.

offence will give a message to the community that such persistent offending behaviour against children is very serious and cannot be tolerated in society.

10.10 Introducing the offence may also eliminate the difficulties experienced by victims and prosecutors in establishing the particulars of a charge in the prosecution of child sexual offences. Procedural rules require charges to be drafted with sufficient particulars about an alleged offence (time, place) so that the accused can have a fair trial. The problem is that in some cases of child sexual abuse the victim cannot identify dates or other circumstances of repeated offences that have been committed over a period of several months or years.

10.11 The LRC recommends that an offence of persistent sexual abuse of child should be introduced as a new offence into the Penal Code. While the offence does not have to be used to prosecute all cases where a perpetrator commits multiple offences against a child it will provide prosecutors with an alternative for such cases. The LRC also recommends that the offence should include all sexual offences including rape, incest and the child specific sexual offences.

Recommendation 16

The LRC recommends the introduction of a new offence of persistent sexual abuse of a child. The offence should protect children under the age of 18 years.

The offence should be constituted by the commission of at least two sexual offences (either child specific, or a general sexual offence such as rape) on separate occasions.

The maximum penalty for the offence should be 15 years, unless one of the offences constituting the offence includes the element of sexual intercourse, then the maximum penalty should be life imprisonment.

Chapter 11 Commercial Sexual Exploitation of Children

11.1 A baseline report on children that was conducted by UNICEF in 2008 documented that 91% of parents and caregivers who took part in the survey knew stories of children being involved in prostitution, mainly as a result of poverty.¹⁸⁹

11.2 In 2007, a report by the Christian Care Center on Arosi, a remote region in Makira documented that child prostitution was a common type of exploitation.¹⁹⁰ Some girls became pregnant and many were under the age of 17.

11.3 The extent to which child prostitution occurs in the country is not properly documented. Prosecution is rare but the available evidence suggests that it occurs in major town centers and in rural areas where logging, mining, fisheries, large scale resource exploitation and tourism activities are present.¹⁹¹

11.4 Children do not enter into prostitution by choice but rather as a result of coercion or desperate circumstances. This fact is shared by other countries around the region.¹⁹²

¹⁸⁹ UNICEF, *Protect Me with Love and Care, A Baseline Report for creating a future free from violence, abuse and exploitation of girls and boys in Solomon Islands* (2008) 3.

¹⁹⁰ T Herbert, Christian Care Center, Church of Melanesia, Solomon Islands, *Commercial Sexual Exploitation of Children in the Solomon Islands : A report focusing on the presence of the logging industry in a remote region* (2007).

¹⁹¹ T Herbert, Christian Care Center, Church of Melanesia, Solomon Islands, *Commercial Sexual Exploitation of Children in the Solomon Islands : A report focusing on the presence of the logging industry in a remote region* (2007); UNICEF, *Protect Me with Love and Care, A Baseline Report for creating a future free from violence, abuse and exploitation of girls and boys in Solomon Islands*, (2009) 72-73; Rory Callinan, *Generation Exploited*, Time, Sunday March 19 (2009) <http://www.time.com/time> accessed 5/26/2011.

¹⁹² Ministry of Justice New Zealand *Child Prostitution in New Zealand*, <http://www.justice.gov.nz/publications> , accessed 9/13/2011.

11.5 The Family Health and Safety Study in 2009 found 37% of women aged 15 – 49 reported that they had experienced sexual abuse during their childhood (under the age 15).¹⁹³ A high level of sexual violence against women and girls also makes children more vulnerable to commercial sexual exploitation.

11.6 In Solomon Islands, a child prostitute maybe referred to by a number of terms including 'jiuri', 'dukong', and 'sol fish'. The term 'jiuri' describes a promiscuous person, of loose moral values, lacking inhibition, and known as having many partners. 'Jiuri' may also be used to refer to a prostitute, male or female, young or adult.

11.7 A "dukong" is a female who works as a prostitute. The term is more commonly used with adult prostitutes or older girls but has evolved to include references to very young girls as well.

11.8 A 'Solfish' is a female who trades sex for cash or fish. The term originated from the practice of young girls being taken to fishing boats anchored off the Point Cruz harbor in Honiara to exchange goods for fish. It is believed sex was sometimes part of the transaction.

11.9 Solomon Islands has not ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. At the Periodic Review of Solomon Islands at the United Nations Human Rights Council in May 2011 the government's delegation advised the Council that ratification of the protocols to the CRC was a priority task in the Government's work plan for 2011.¹⁹⁴

¹⁹³ Ministry of Women Youth & Children's Affairs, *Solomon Islands Family Health and Safety Study*, (2009)87.

¹⁹⁴ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review Solomon Islands 11 July 2011, A/HRC/18/8.

Current law

11.10 The term 'child prostitution' is not used in the Penal Code. However several existing offences do address when a girl or child is being used or obtained for prostitution, unlawful sexual intercourse or unlawful and immoral purposes. The offences are-

- procuring a girl under the age of 18 to have unlawful sexual intercourse;¹⁹⁵
- procuring a girl or woman to become a common prostitute in Solomon Islands or elsewhere;¹⁹⁶
- procuring a girl to leave Solomon Islands to become a prostitute, or to become an inmate of a brothel elsewhere;¹⁹⁷
- procuring defilement of a woman by threats or fraud or administering drugs¹⁹⁸
- disposing of minors under the age of 15 years for prostitution or unlawful sexual intercourse;¹⁹⁹
- obtaining minors under the ages of 15 for prostitution or unlawful sexual intercourse;²⁰⁰
- householder permitting defilement of a girl on their premises;²⁰¹
- living on the earnings of prostitution or aiding prostitution²⁰²
- detaining a girl in a brothel; and²⁰³
- conspiracy to defile.²⁰⁴

11.11 The above offences are classified as morality offences in the Penal Cod,²⁰⁵ and consistent with values at the time when it was implemented in Solomon Islands, the policy was to protect the chastity

¹⁹⁵Penal Code s 144(1)a.

¹⁹⁶ Penal Code s 144(1)b.

¹⁹⁷ Penal Code s 144(1)d.

¹⁹⁸Penal Code s 145.

¹⁹⁹ Penal Code s 149.

²⁰⁰ Penal Code s 150.

²⁰¹ Penal Code ss 146, 147.

²⁰² Penal Code s 153.

²⁰³ Penal Code s 148.

²⁰⁴ Penal Code s 156.

²⁰⁵ Penal Code Part XVI.

of a girl for marriage, uphold moral values and guard against public indecency.

Procuring

11.12 Procuring offences apply where a woman or girl is obtained or recruited for the purposes of-

- unlawful sexual intercourse²⁰⁶
- to become a common prostitute; or
- to be an inmate or a member of a brothel.²⁰⁷

The term 'procure' is not defined in the Penal Code. The ordinary meaning of the term is 'to find prostitutes for clients.'²⁰⁸ In Queensland it is defined and includes 'knowingly entice or recruit a person or persons for the purposes of sexual exploitation'.²⁰⁹

11.13 A woman or girl is not procured if she acts on her own initiative. In addition, a person considered as a prostitute cannot be capable of being procured for prostitution.²¹⁰ Procurement offences are misdemeanors with maximum penalty of two years imprisonment.

Disposing and obtaining minors under 15 for immoral purposes

11.14 These offences apply to parents or custodians of children who let for hire or dispose of a child, or to those who obtain a child, for the purpose of-

- prostitution;

²⁰⁶ Halsbury's Laws of England (4th edition) 11(1) para 524. An offence constituted by procuring a woman to have unlawful sexual intercourse is committed only if unlawful sexual intercourse occurs *R v Mackenzie and Higginson* (1910)6 Cr App 64 CCA; *R v Johnson* [1964] 2 QB 404; 48 Cr App Rep 25 CCA.

²⁰⁷ Penal Code s144.

²⁰⁸ *Oxford Advanced Learner's Dictionary of Current English* (5th edition) (2002) Oxford University Press.

²⁰⁹ Criminal Code(Qld) s 217; Solomon Islands Law Reform Commission, *Review of Penal Code and Criminal Procedure Code, Issues Paper 1*, (2008) para 6.80.

²¹⁰ Halsbury's Laws of England (4th edition)11(1) para 524.

- unlawful sexual intercourse; or
- any unlawful and immoral purpose.²¹¹

If the child is disposed to a common prostitute or a person of immoral character, it is presumed the child was disposed for the above purposes. The offence is a misdemeanor with a maximum penalty of 2 years imprisonment.

Living of the earnings of prostitution

11.15 Prostitution itself is not a crime, but soliciting, living of the earnings of prostitution or controlling, directing or influencing the movements of a prostitute for gain, is an offence.²¹² A person who lives with or is 'habitually' in the company of a prostitute may be considered as 'knowingly living of the earnings of prostitution'.²¹³

Offences relating to use of premises

11.16 These offences prohibit a householder from allowing his or her premises to be used for defilement of a girl on the premises, or detaining a girl, and detaining a woman or girl in premises for unlawful sexual intercourse or in a brothel.²¹⁴

Problems with existing offences

11.17 Based on the consultation, and analysis of comparative laws the following problems have been identified in relation to the existing offences-

- Most of the offences only apply only to girls.
- Many of the offences only apply to girls under the age of 15 years.
- The offences apply to a narrow range of conduct for example sexual intercourse, or to activities that are vaguely defined, for example 'immoral purpose.'

²¹¹ Penal Code ss 149, 150.

²¹² Penal Code s 153.

²¹³ Penal Code s 153(2).

²¹⁴ Penal Code ss 146, 147 and 148.

- Procurement offences do not address many aspects of child prostitution, and some situations whereby children are exploited by those who have care and custody over them.
- Most offences are misdemeanours, the penalties are low and do not act as a deterrent.
- Procedural requirements that apply to some offences require more than one witness (corroboration) and are inconsistent with the CRC.
- The current offences do not criminalise people who use or engage child prostitutes.

Consultations and submissions

11.18 The Issues Paper asked the question-

Should the child prostitution offences be reconsidered? If so, how?

11.19 The NACC recommended the definition of a “child” should be consistent with the CRC and that there should be a uniform approach to the definition of ‘child abuse’.²¹⁵

11.20 A number of participants at consultations raised the issue of early marriage, and the exploitation of children (usually girls) in logging camps. At one consultation the arrangements were described as parents sending children to logging camps to work as house girls where the services provided by the girls include sex. Once the girl gets pregnant the arrangement usually terminates and she has to go back to her family for support.²¹⁶

11.21 Some other participants identified the use of girls as prostitutes by families who are poor.²¹⁷

11.22 At one consultation the problem of distinguishing CCSE from genuine customary marriage (where bride price is paid) was raised. It

²¹⁵ NACC workshop, *Consultation* 9 July 2009.

²¹⁶ Provincial Executive, *Consultation* Buala Isabel Province 26 May 2009.

²¹⁷ *Consultation* Women’s Resource Centre Kirakira 11 March 2010; Provincial Executive *Consultation* Lata Temotu Province 4 June 2009.

was suggested that that nature of the consideration for the girl could be an indicator and that arrangements under custom would be accompanied by the payment of shell money.²¹⁸

11.23 Another submission said “so called customary marriages involving young people under 15 should not be recognized. In most cases these will be arranged marriages to which the child has not consented or can’t give informed consent.”²¹⁹

11.24 Police supported removal of the requirement for corroboration before a person can be convicted of the procuring offences in the Penal Code.²²⁰

Conclusions and recommendations

11.25 The LRC is proposing a complete shift in policy. Whereas the current law aimed to protect the chastity of girls for marriage, maintain morals and public decency, the core aim for the proposed offences is the protection of children from harm.

11.26 This shift recognizes the right and freedoms of all children enshrined in the Constitution, the international commitments of Solomon Islands, the results of the Family Health and Safety Study, and government policies which call for better protection for children.

11.27 Contrary to popular belief most prostitution in is not only driven by the desire for fast cash or fun, but rather of poverty, hungry children to feed or a desire for a better life, lack of formal employment, missing education, and lack of opportunities for women.²²¹

11.28 The CRC defines a ‘child’ as a person below the age of 18 years unless under the law applicable to the child, majority age is attained

²¹⁸ Office of the Public Solicitor, *Consultation* 17 July 2009.

²¹⁹ A Radclyffe, *Submission* undated.

²²⁰ RSIPF, *Consultation* Honiara 18 and 19 May 2009.

²²¹ UNIFEM *Protecting Women’s Human Rights in Solomon Islands Law* (2010) 51.

earlier.²²² The national children's policy has adopted the definition of a child as 'a person under the age of 18'.²²³ PNG and Vanuatu have adopted this definition for provisions prohibiting commercial sexual exploitation of children.²²⁴ The PIF Sexual Offences Model Provisions also contains this definition for similar provisions.²²⁵

11.29 In some jurisdiction "the age for protection of a child in circumstances of sexual exploitation is determined by the age of consent." ²²⁶ However the age of consent is irrelevant for child prostitution or any crime of commercial sexual exploitation of a child because there can be no issue of choice, freewill or self determination in such circumstances.²²⁷

11.30 In Solomon Islands the age of consent is 15 years. However protecting children under 18 from commercial sexual exploitation recognizes the requirements under the CRC, the abhorrent nature of the offence and the need to protect children under this age from such practices.

11.31 In addition, using the word 'person' also ensures the definition is gender neutral. Many stakeholders agreed that the crimes should protect both boys and girls. ²²⁸

²²² *Convention on the Rights of the Child*, art 1.

²²³ Ministry of Women, Youth and Children's Affairs, *National Children's Policy with National Plan of Action*(April 2010) 2.

²²⁴ Criminal Code 1974 (PNG) s229J , Penal Code(Amendment)Act 2003(Van) s101A.

²²⁵ Sexual Offences Model Provisions (PIF) s3.

²²⁶ R Shackel *The Commercial Sexual Exploitation of Children A Review of International Legal Responses*, Australian International Law Journal (1999) 91.

²²⁷ R Shackel *The Commercial Sexual Exploitation of Children A Review of International Legal Responses*, Australian International Law Journal (1999) 91.

²²⁸ Women and Youth, *Consultation* Taro Choiseul Province 14 October 2009; Provincial Executive, *Consultation* Renbel Province 15 September 2009; RSIPF, *Consultation* Tulagi Central Province 3 November 2009; Women and Youth, *Consultation* Tulagi Central Province 4 November 2009; *Consultation*, Kirakira Women's Centre Makira Province 10

Recommendation 17

For offences addressing the commercial sexual exploitation of children (CCSE) (which includes child prostitution), a child should be defined as a person under 18 years of age.

Definition of child commercial sexual exploitation

11.32 The definition of CCSE in other countries and the CRC Optional Protocol on the sale of children, child prostitution and child pornography (CRC Optional Protocol) focuses on three elements-

- use of a child under the age of 18 years;
- for sexual services;
- in return for benefit, remuneration, financial or other reward, favour or compensation.

11.33 The Criminal Code 1974 (PNG) defines child prostitution as ‘the provision of any sexual services by a person under the age of 18 years for financial or other reward, favor or compensation, whether paid to the child or some other person’.²²⁹

11.34 The Vanuatu Penal Code Amendment Act defines an act of child prostitution as an “any sexual service, whether or not involving an indecent act-

- that is provided by a child for the payment of money or the provision of any other material thing (whether or not it is in fact paid or provided to the child or to any other person);
- that can reasonably be considered to be aimed at the sexual arousal or sexual gratification of a person or persons other than the child, and

March 2010; RSIPIF, *Consultation* Temotu Province, 4 June 2009; *Consultation*, Temotu Province 6 June 2009; Provincial Executive, *Consultation* Malaita Province 29 April 2009; RSIPIF, *Consultation* Malaita Province 30 April 2009; *Consultation*, Auki Malaita Province 30 April 2009; RSIPIF, *Consultation* Buala Isabel Province 27 May 2009; Director of Public Prosecutions and Staff, *Consultation* Honiara 6 June 2008; Mothers Union Conference, *Consultation* Honiara 16 June 2009; ICP Workshop, *Consultation* Lengalau Village, Guadalcanal Province 12 May 2009.

²²⁹ Criminal Code (PNG) s229J.

- includes (but is not limited to) sexual activity between person or different sexes or the same sex, comprising sexual intercourse for payment or masturbation committed by one person on another for payment, engaged in by a child.”²³⁰

11.35 The definition of ‘child prostitution’ in Vanuatu does not require proof of payment of money or the provision of any other benefit. It is sufficient to prove that this was the basis on which sexual services were provided.

11.36 The reference to ‘benefit, remuneration, financial or other reward, favor or compensation or material gained from the use of the child’ in the definition expands the application of the offence to situations where other forms of benefit are promised or given in return for sexual services.

Recommendation 18

The definition of child CCSE should be the provision of sexual services by a child (whether or not this involves an indecent act) for financial or other reward, favor, compensation, financial or material thing or gain.

There should be no requirement that a benefit was actually received by the child or any other person in exchange for sexual services.

What activities should be prohibited?

11.37 The Optional Protocol to the CRC requires that the activities of ‘offering, obtaining, procuring and providing a child for child prostitution, should be criminalised.’²³¹

11.38 In Papua New Guinea and the PIF Sexual Offences Model Provisions the following activities are prohibited-

- obtaining services of a child prostitute;²³²
- offering or engaging a child for prostitution;²³³

²³⁰ Penal Code (Van) s 101A.

²³¹ Optional Protocol to the CRC art 3(1)b.

²³² Model Sexual Offences Provisions (PIF) s 29; Criminal Code 1974 (PNG) s 229K.

- facilitating or allowing child prostitution;²³⁴
- receiving a benefit from child prostitution; and²³⁵
- permitting premises to be used for child prostitution.²³⁶

The offence of obtaining in PNG extends to clients who use a child as a prostitute, as well as other people involved in persuading or inducing a child to engage in prostitution.

11.39 In Vanuatu the legislation prohibits-

- promoting and engaging in acts of child prostitution and
- obtaining a benefit from child prostitution.

11.40 Fiji's Crimes Decree 2009 retains offences similar to the current Penal Code provisions, except the offences have higher penalties.

11.41 The only child specific offence in the Queensland Criminal Code is one of obtaining prostitution from person who is not an adult.²³⁷

11.42 Currently it is not an offence in Solomon Islands to obtain sexual services from a prostitute so clients cannot be prosecuted.

11.43 The LRC is of the view that a person who uses a child for CCSE services, as well as those who are involved in offering or arranging children for CCSE, should be liable to prosecution.

Recommendation 19

The LRC recommends the introduction of offences of-

obtaining or using commercial sexual services from a child;

inducing, inviting, persuading, arranging or facilitating a child to engage in CCSE, or otherwise acting as an agent or 'middleman' for CCSE;

²³³ Sexual Offences Model Provisions (PIF) s 30; Criminal Code 1974(PNG) s 229L.

²³⁴ Sexual Offences Model Provisions (PIF) s 31; Criminal Code 1974(PNG) s 225 M.

²³⁵ Sexual Offences Model Provisions (PIF) s 32; Criminal Code 1974(PNG) s 229 N.

²³⁶ Sexual Offences Model Provisions (PIF) s 33; Criminal Code 1974(PNG) s 229O.

²³⁷ Criminal Code (Qld) 1899 s 229FA.

trafficking of children for CCSE;

receiving a benefit from CCSE; and

parent, guardian or carer permitting a child to be used for CCSE.

The maximum penalty for the offences should be ten years imprisonment.

Using or allowing premises to be used for child prostitution

11.44 The current offences in the Penal Code in relation to premises (householder permitting defilement) do not apply to all places where CCSE is taking place such as nightclubs, hotels and taxis.

11.45 The PIF Sexual Offences Model Provisions and the PNG Criminal Code have an offence of “permitting premises to be used for child prostitution”. It applies to an owner, lessor, manager, tenant or occupier of property who knowingly allows child prostitution to take place on the property; or who fails to report that child prostitution has occurred on the property to the police.²³⁸

11.46 The provisions places a responsibility on a person who owns, leases, manages, occupies, or rents a property to prevent child prostitution from taking place on the property. It also requires people to report an incidence of child prostitution if it takes place on that property.

11.47 Vanuatu does not have an offence which prohibits a person from allowing premises to being used for child prostitution.

11.48 The LRC is also concerned about the lack of enforcement on the age limit for entering nightclubs. The LRC suggests that people who control or manages premises (including nightclubs, bars) should be held responsible when they fail to report or take action to remove or prevent underage children on their premises.

²³⁸ Criminal Code 1974(PNG) s 229O.

Recommendation 20

The LRC recommends the introduction of an offence of knowingly allow premises to be used for CCSE. The offence should target persons who control or manage premises, or who control or manage the entry of persons into that premises.

The offence should also address situations when a person becomes aware that CCSE was or has occurred on premises under his or her control or management and who fails to take steps to report or address the matter.

The following defences should be available-

the accused had no knowledge of that CCSE was occurring on the premises;

**the accused had no knowledge that the child was participating CCSE;
or**

the accused used all due diligence to prevent CCSE on the premises.

The term premises should include places other than buildings, and include marine vessels and vehicles.

Mistake as to age

11.49 Children can look younger or older than their actual age. At times it is difficult to ascertain the exact age of a child because many parents (especially in rural and remote areas) do not register the birth of their children.²³⁹ This causes difficulties for prosecution.

11.50 Culturally the maturity of a person is not determined by the number of years as in Western culture. Rather, maturity is determined by physical attributes, the ability to perform certain tasks and bear certain responsibilities or undertake tribal initiation rites.

11.51 'Mistake as to age' is a defence commonly available for sexual offences committed on children. The defence applies where an accused has a reasonable belief that a child is older than their actual age. In

²³⁹ UNICEF, *Protect Me with Love and Care, A Baseline Report for creating a future free from violence, abuse and exploitation of girls and boys in Solomon Islands* (2008) 105.

PNG the ‘mistake of age’ defence only applies to offences of ‘obtaining the services of a child prostitute’ and ‘facilitating or allowing child prostitution’.²⁴⁰ The PIF Sexual Offences Model Provisions suggests that the defence should apply to all CCSE offences.²⁴¹

Recommendation 21

A defence of reasonable belief that the child was over the age of 18 years should apply to CCSE offences. An accused who relies on this defence must show that he or she took reasonable steps to ascertain the age of the child.

Liability of children

11.52 In most jurisdictions, children cannot be prosecuted if the child provides the ‘sexual service’.²⁴² The intention is to protect the child engaged in CCSE.

11.53 Some stakeholders proposed during consultation that children who knowingly solicit and entice others to have sex with them should also bear some of the blame and be liable to prosecution.²⁴³ Others argue children under the age of 15 years are capable of consenting to sexual relations and therefore should also be liable to prosecution.²⁴⁴

11.54 Under the current law a child is liable to conviction for a criminal offence if the child is over the age of 12 years, or over the age of 8 years and the child has the capacity to understand that he or she should not do the act or omission that constitutes the offence.

11.55 If a child can be prosecuted it does not acknowledge the true nature of the crime. It also shifts the burden of responsibility from an

²⁴⁰ Criminal Code 1974 s 229P.

²⁴¹ Sexual Offences Model Provisions (PIF) s 34.

²⁴² Criminal Code 1974(PNG) s 229Q; Model Sexual Offences Provisions (PIF) s 35.

²⁴³ RSIPF, *Consultation* Kirakira Makira 11 March 2010.

²⁴⁴ RSIPF, *Consultation* Taro Choiseul 12 October 2009; Provincial Government, *Consultation* Taro Choiseul 13 October 2009.

adult, deemed as mature and able to exercise better moral judgment, to a child who is vulnerable and immature both in age and conscience. Prosecuting a child would not be consistent with the obligations of Solomon Islands under the CRC, in particular the obligation to act in the best interests of the child.

Recommendation 22

The LRC recommends that a child who is a victim of CCSE should not be liable to prosecution for CCSE offences where the child is providing the sexual service.

In relation to other children who are liable to prosecution for CCSE offences the LRC recommends that the Director of Public Prosecutions should use the discretion to grant immunity to the child in the public interest so as to encourage children to come forward and report CCSE offences.

Chapter 12 Child Sexual Exploitation Material

Current law

12.1 The Penal Code contains some general offences that prohibit trade in, or distribution of, obscene publications, exhibition of indecent shows or performances, dealing with obscene and indecent publications and possession of imported obscene video tapes and photographs.²⁴⁵ The offences are misdemeanors and attract a maximum penalty of 2 years imprisonment or a fine of two hundred dollars.

12.2 Apart from the Penal Code, there is other legislation dealing with obscene photographs or materials such as the Telecommunications Act, Solomon Islands Postal Corporation Act 1996 and the Customs Act.

12.3 Under the Telecommunications Act, it is an offence to send any message by telecommunication which is grossly offensive, or of an indecent, obscene or menacing character.²⁴⁶ The penalty for this offence is a fine of two hundred dollars or 6 months imprisonment or both fine and imprisonment.

12.4 The Solomon Islands Postal Corporation Act 1996 prohibits the sending of any obscene or immoral article. The penalty for this is a fine of ten thousand dollars (\$10000) or imprisonment for 6 years, or both.²⁴⁷

12.5 The Customs Act refers to prohibited and restricted imports. Indecent articles include indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles.²⁴⁸

²⁴⁵ Penal Code ss 173, 174.

²⁴⁶ Telecommunications Act (Cap 33) s 33.

²⁴⁷ Solomon Islands Postal Corporation Act 1996 s 40.

²⁴⁸ Customs Act (Cap 121) s 3 2nd schedule.

12.6 The current offences in the penal code are classified as *Nuisance and other miscellaneous offences*.²⁴⁹ They do not recognise the degrading treatment, violence and trauma that children experience when sexually exploited and the dynamics of the offending behavior.

Consultation and submissions

12.7 The Issues Paper asked the following question-

Should the child prostitution offences be reconsidered? If so, how?

12.8 One submission supported generally an update of the offences.²⁵⁰ At one consultation it was suggested that there is a community perception of a relationship between violence, pornography and sexual offences.²⁵¹

Conclusions and recommendations

12.9 The distribution of child sexual exploitation material (CSEM) is now supported by the internet and advancement in digital technologies that have revolutionized mediums and methods of storing, transmitting and modifying data.

12.10 The use of media and technology such as the internet, mobile phones, computers and devices that store electronic and digital information (compact discs, flash drives and MP3 players) to deal in or disseminate obscene or indecent publications is not addressed by the Penal Code.

12.11 CSEM is a crime of violence and exploitation against children and images often show sexual abuse and sexual violence committed on or involving children. Some jurisdictions have extended the definition of child pornography to address depictions of torture, cruelty or abuse or children, or of them in a demeaning context. The Penal Code

²⁴⁹ Penal Code Part XVII .

²⁵⁰ A Radclyffe, *Submission* undated.

²⁵¹ *Consultation*, Kirakira Women's Resource Centre 5 May 2009.

offences do not adequately address these issues because they are limited to distribution and trade in obscene publications, indecent performances and possession of imported obscene video tapes and photographs. The current law does not address production or making of CSEM, possession of CSEM and the dissemination of CSEM by the internet, mobile telephone and other methods of sharing data.

12.12 Some jurisdictions have introduced child specific offences in recognition of this and the proliferation of CSEM on the internet.

12.13 Some jurisdictions use terms other than child pornography to describe the material to emphasise the link between child pornography and exploitation of children. The following are terms used in other jurisdictions to refer to the subject-

- Child pornography;²⁵²
- Child abuse material; and²⁵³
- Child exploitation material.²⁵⁴

12.14 In NSW and NT the definition of child abuse material, and in WA, QLD and Tasmania the definition of child exploitation material, is not restricted to material with sexual content but also includes other forms of abuse and exploitation.

Recommendation 23

The LRC recommends the introduction of offences to address child sexual exploitation material. Material should be defined to include visual, audio and print mediums, as well as data capable of conveying, transmitting or storing the material.

²⁵² Penal Code (Van); Sexual Offences against Children and Exploitation Act (PNG) s 62 Criminal Law Consolidation Act 1935(SA).

²⁵³ Crimes Act 1900 (NSW) s 91 FB; Criminal Code (NT) s125 (1).

²⁵⁴ Criminal Code 1899(QLD) s 207A ; Criminal Code (Tas) s1A.

Age of child

12.15 The age of consent for participation in sexual activities varies according to the type of sexual conduct. Some jurisdictions align the age of protection with the legal age of consent, recognising the need to protect children while also respecting their right to personal autonomy.²⁵⁵ Others have aligned their age of protection to reflect the CRC which defines a child as a person under the age of 18.²⁵⁶

12.16 The age of consent in Solomon Islands is 15 years. However the LRC recommends that the CSEM offences should protect children under the age of 18 years in order to be consistent with CRC's definition of a child.

12.17 It may be difficult to ascertain the age (and identity) of a child depicted in CSEM due to the transnational nature of the material. To overcome this difficulty the definition of child for CSEM offences should include a person who *appears* to be a child.²⁵⁷ This means that the prosecution would not have to prove that the actual child depicted in the material was a child under the age of 18 years at the relevant time, but must prove that the person in the image appears to be a child under the age of 18 years. In some cases the prosecution may need to use an expert witness (usually a medical doctor) to provide evidence that the person depicted appears to be a child under the age of 18 years. In cases where the child is prepubescent it would probably not be necessary to provide any expert evidence. Ultimately it will be a question of fact to be determined by the court.

²⁵⁵ PNG(18 years); Vanuatu (16 years); Queensland (16 years); Victoria (18 years); Northern Territory (18 years).

²⁵⁶ Jurisdictions with child defined as person under the age of 18 include NT, PNG.

²⁵⁷ Crimes Act (NSW) 1900 s 91FB; Criminal Code (NT) s 125A(1).

Recommendation 24

A child for the purposes of CSEM offences should be defined as a person under the age of 18, or who appears to be under the age of 18 years.

Definition of CSEM

12.18 The definition of CSEM can include children engaged in sexual activity or in a sexual context, whether by themselves or with some other person as well as children being subjected to cruelty, torture or harm.

12.19 In some jurisdictions the definition of prohibited material includes material describing or showing –

- children engaged in sexual activity , in a sexual context or sexual pose;²⁵⁸
 - sexual or private parts of the body ²⁵⁹ (including breasts, genitalia) or anal regions of a child;²⁶⁰
 - images of a child for some sexual or sadistic gratification;²⁶¹
 - a child being subject to torture, cruelty and harm;²⁶²
- or material that is, or appears to be, intended to -
- excite or gratify a sadistic or other perverted interest in violence or cruelty;²⁶³ or
 - encourage or advocate persons to engage in sexual activity with children.²⁶⁴

12.20 An additional requirement in some Australian jurisdictions is that the material must be offensive.²⁶⁵ The test is whether the material is in all circumstances offensive to a reasonable adult. The requirement

²⁵⁸ Crimes Act 1900 (NSW) s 91FB.

²⁵⁹ Crimes Act 1900 (NSW) s 91FB.

²⁶⁰ Sexual Offences against Children and Exploitation Act 2003 (PNG) s 229(a)(ii).

²⁶¹ Crimes Act 1900 (ACT); S64(1); Criminal Law and Consolidation Act (SA) s62 .

²⁶² Criminal Code (NT) s 125A(1); Crimes Act 1900(NSW) s 91FB(a).

²⁶³ Criminal Law Consolidation Act 1935 (SA) s 62.

²⁶⁴ Sexual Offences against Children and Exploitation Act 2003 (PNG) s 229(c).

²⁶⁵ Crimes Act 1900 (NSW) s 91; Criminal Code (WA) s 217A.

that the matter be offensive in all of the circumstances ensures that innocent material such as nude family photographs of babies for example will not be captured by the definition.

Recommendation 25

The definition of CSEM should include-

(a) material that depicts-

the sexual parts of a child

sexual activity with a child;

a child in a sexual context, or context intended to satisfy a sexual or sadistic gratification;

a child being subject to torture or harm;

a child in a demeaning context; or

(b) material intended, or apparently intended, to encourage or advocate for persons to engage in sexual activity with children.

The material must also be indecent or offensive in all the circumstances to a reasonable person. The test used for indecency should be the same as the one proposed in Recommendation 9.

What conduct should be criminalised?

12.21 Under the CRC Optional Protocol the following activities in relation to child pornography should be criminalised -

- producing;
- distributing;
- disseminating;
- importing;
- exporting;
- offering;
- selling; and
- possession for any of these purposes.²⁶⁶

²⁶⁶ CRC Optional Protocol art 3(1).

12.22 The CRC says that state parties should take measures to prevent the exploitative use of children in pornographic performances and materials.²⁶⁷

12.23 Many jurisdictions that have introduced CSEM offences to prohibit the following -

- the use of a child for the production of child pornography or a pornographic performance;
- causing, offering or procuring a child for the production of CSEM or a pornographic performance; and
- production, dissemination or possession of CSEM.

12.24 Under the Northern Territory legislation it is an offence to use a child in a pornographic or abusive performance which is defined as any performance by a person -

- engaging in sexual activity,
- in a sexual or offensive or demeaning context; or
- being subject to torture, cruelty or abuse that is likely to cause offence to a reasonable adult.²⁶⁸

12.25 The Australian Capital Territory *Crimes Act* defines a pornographic performance as-

- a performance by a child engaged in an activity of a sexual nature; or
- a performance by someone else engaged in an activity of a sexual nature in the presence of a child;

that is substantially for the sexual arousal or sexual gratification of someone other than the child.²⁶⁹

12.26 A new offence should target persons who use, procure, allow or consent to children being used make CSEM. Secondly the proposed offence should also cover when a child is being used, procured or allowed for the purposes of pornographic performance.

²⁶⁷ CRC Optional Protocol art 34.

²⁶⁸ Criminal Code (NT) s 125A.

²⁶⁹ Crimes Act 1900 (ACT) s 64(5).

Recommendation 26

The LRC recommends the introduction of an offences to prohibit the use of procuring, offering or using a child to make CSEM, or for a pornographic performance.

Pornographic performance should be defined as a performance by a child-

engaged in sexual activity; or

in a sexual, abusive, exploitative or demeaning context, including when someone else is engaged in sexual activity in the presence of a child, that is intended for the sexual or sadistic gratification whether of a viewer or of a person taking part in the performance.

Possession of CSEM

12.27 The CRC Optional Protocol does not require the introduction of an offence of possession of CSEM. Many jurisdictions have introduced an offence of possession, and it is the most commonly used offence.

12.28 In Queensland and Victoria, the offence of possession requires that the accused knowingly possessed the prohibited material.²⁷⁰ In other jurisdictions this is not an element of the offence.²⁷¹ There are therefore two options with regards to the offence of possession. One is to introduce an offence where the requirement is to 'knowingly possess', the other is to introduce an offence of simply 'possess'. The LRC is concerned that the defence of reasonable mistake in the Penal Code may not give sufficient protection to people who did not know that they had child exploitation material in their possession.

12.29 A defence that the material has cultural and artistic merit is not available in all jurisdictions. However it is recommended for Solomon Islands taking into account the traditional and customary practices of art and cultural expression.

²⁷⁰ Crimes Act 1958 (Vic) s70(1); Criminal Code (Qld) s 228D.

²⁷¹ Criminal Code (NT) s125B.

Recommendation 27

The LRC recommends introducing offences of -

knowingly possess CSEM;

distribute, trade (offer, sell, exchange), advertise, import, export or disseminate CSEM; and

possess CSEM for the purpose of distribution, trade or dissemination.

The penalty for these offences should be 10 years imprisonment.

It should not be offence for a police officer or other law enforcement agency to possess CSEM when carrying out official functions or duties.

The following defences should be available-

the material is being used for authorised medical, scientific, or educational purposes, or

the material has cultural or artistic merit.

Appendix 1

Consultations on the Penal Code

Consultation	Location and Date
RSIPF workshop	Honiara May 2009
National Advisory Committee for Children	Honiara July 2009
Mothers Union Conference	Honiara July 2009
Legal Staff at the Office of the Public Solicitor	Honiara July 2009
Workshop on law reform to address violence against women (jointly presented by Ministry for Women, Children, Youth and Family Affairs, Regional Rights Resource Team, LRC and UNIFEM)	Honiara 20-23 July 2009
Temotu Province Premier and members of provincial government Provincial government officers RSIPF meeting Public meeting	May 2009
Central Province ICP Workshop Chiefs from Gela Provincial Executive RSIPF Women and youth Provincial officers and non government organisations	Savo June 2009 Bungana Island June 2009 Buala November 2009
Guadalcanal People of Lengilau village Community meeting at Tetere RSIPF and Correctional Officers at Tetere	Tasiboko area May 2009 June 2010 May 2010
Western Province RSIPF and lawyers Western Province Council of Women Public forum Deputy Premier and Provincial Secretary	Gizo April 2009
Malaita Province	Auki April 2009

Meetings with Deputy Premier and Provincial Secretary Legal Adviser Provincial Ministers RSIPF and staff of Office of the Public Solicitor Non government organisations and provincial government representatives	
Isabel RSIPF Isabel Provincial Executive Council of Women Diocese of Isabel Mothers Union	May 2009
Renbel Province Provincial Secretary Church leaders RSIPF Community leaders Community meetings at Tengano and Nuipani villages East Rennell	October 2009
Choiseul Province RSIPF Provincial Executive Lauru Land Conference Non government organisations and government officers Women and youth	October 2009
Makira Province Premier and provincial government executive Provincial government officers RSIPF Community meeting	March 2010

Submissions

Andrew Radclyffe

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Appendix 1

Chief John Harai

Bernice Tebitara, Chairperson Family Support Group Gizo

Kenneth Wong

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