SEXUAL OFFENCES LAW REFORM IN PACIFIC ISLAND COUNTRIES: REPLACING COLONIAL NORMS WITH INTERNATIONAL GOOD PRACTICE STANDARDS

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[Sexual assault, primarily perpetrated against women and girls, is widespread throughout Pacific Island communities, as in other parts of the world, cutting across boundaries of culture, class, education, income and ethnicity. This article examines sexual offences provisions in 15 Pacific Island countries and illustrates that, apart from the introduction of a contemporary sexual offences framework in Papua New Guinea in 2003, all retain outdated models, adopted from the main colonising countries of the region, that are based on notions of morality rather than the protection of women and children. The introduction of a good practice model in PNG coupled with a recent region-wide focus on violence against women provides, however, an ideal platform for law reform initiatives in Pacific Island countries. Whilst criminal law reform cannot itself prevent sexual assault, this article argues that the presence of a strong legal framework has an important role in a prevention strategy by designating acceptable standards of sexual conduct, countering stereotypes about sexual assault and providing more effective means of prosecuting offenders.]

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I INTRODUCTION

Sexual assault, primarily perpetrated against women and girls, is widespread throughout Pacific Island communities, as in other parts of the world, cutting across boundaries of culture, class, education, income and ethnicity.[1] Ratification of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*'),[2] the United Nations *Convention on the Rights of the Child* ('*CRC*')[3] and other international conventions obligates Pacific Island countries ('PICs') to take legal and policy measures to prevent sexual assault, to protect victims and to ensure the prosecution of offenders.[4] Whilst all three components are critical aspects of an effective response to sexual assault, this article focuses on the latter: the prosecution of perpetrators and in particular the establishment of a 'good practice' model of sexual offences in the criminal law frameworks across the Pacific Islands. This article identifies the good practice components of sexual offences provisions based on an analysis of expert commentary, namely, the inclusion of a comprehensive and graded set of offences (including both designated child sexual offences and aggravating circumstances (such as a breach of trust) with serious penalties), a statutory definition of the element of consent (including a free agreement provision), a non-exhaustive list of situations in which consent cannot be established and explicit statutory limits on the defence of honest mistaken belief of consent.

This article examines sexual offences provisions in 15 PICs and argues that, despite sporadic examples of good practice, most do not meet the standards set by international conventions and advocated by expert commentators. Instead, most PICs have outdated sexual offences frameworks, adopted from the main colonising powers of the region and based on outdated notions of decency and morality rather than on the protection of women and children. Whilst criminal law reform cannot itself prevent sexual assault, this article suggests that it is an important aspect of a comprehensive state response to sexual assault in Pacific

[1] See, eg, Office of Development Effectiveness, Australian Government Agency for International Development, *Violence against Women in Melanesia and East Timor: A Review of International Lessons* (2007) 5–8; Commonwealth Secretariat, *Integrated Approaches to Eliminating Gender-Based Violence* (2003) 87; Amnesty International, *Solomon Islands: Women Confronting Violence* (2004) 1 <http://www.amnesty.org/en/library/info/ASA43/001/2004>; 'Level of Violence against Women in Pacific among Highest in the World', *Solomon Times* (online), 8 March 2010; United Nations Children's Fund ('UNICEF'), *Protecting Children from Violence, Abuse and Exploitation in the Pacific: A Regional Programme Strategy for Building a Protective Environment for Children in the Pacific* (2008) 2 <http://www.unicef.org/pacificislands/regional_program_strategy_report.pdf>; United Nations Development Fund for Women ('UNIFEM'), *Violence against Women — Facts and Figures* (2007) <http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php>.

[2] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). See generally Vedna Jivan and Christine Forster, 'Challenging Conventions: In Pursuit of Greater Legislative Compliance with *CEDAW* in the Pacific' (2009) 10 *Melbourne Journal of International Law* 655.

[3] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[4] See *Intensification of Efforts to Eliminate All Forms of Violence against Women*, GA Res 61/143, UN GAOR, 61st sess, 81st plen mtg, Supp No 49, UN Doc A/RES/61/143 (2007). Ratification or accession obligates states parties 'to prevent, investigate and punish the perpetrators of violence against women and girls': art 7.

Island communities. Such reform can play an important and valuable role in designating acceptable and contemporary standards in relation to the sexual autonomy and physical integrity of women and can contribute to countering stereotypes about sexual assault which hinder and frustrate the criminal process. The recent placement on the public agenda of gender-based violence and its impact on Pacific Island communities[5] coupled with the example of Papua New Guinea, which introduced a contemporary sexual offences framework in 2003,[6] provide a platform from which to advocate for regional reform. An examination of the criminal law frameworks in the region therefore is timely.

Part II identifies the key components of good practice sexual offences as identified by expert commentators. Part III examines the sexual offences provisions of 15 PICs in the light of the good practices identified in Part II. Part IV highlights the incidence and impact of sexual assault in the Pacific region, emphasises the importance of a state response to sexual assault and analyses the benefits of reforming sexual offences provisions. Part V, the conclusion, suggests that sexual offences law reform is an important objective for PICs as part of a comprehensive strategy to reduce sexual violations against women and children across the Pacific region.

II GOOD PRACTICE IN SEXUAL OFFENCES PROVISIONS

A *Comprehensive Range of Graded Offences Criminalised*

Sexual assault frameworks in common law countries are still dominated by a three-tier approach to sexual offences provisions, consisting of penile rape, indecent assault and a series of 'defilement' provisions for offences against girls.[7] Such a model does not represent good practice as identified by expert commentators for a range of reasons. The first tier consists of the offence of rape,

[5] See Amnesty International, *Papua New Guinea — Violence against Women: Not Inevitable, Never Acceptable!* (2006) <http://www.amnesty.org/en/library/info/ASA34/002/2006>. Anote Tong, President of Kiribati, stated that 'men must take the lead in stopping violence against women': Secretariat of the Pacific Community, 'Pacific Leader Tells Men to Take Action to End Violence against Women' (Press Release, 21 November 2008) <http://lists.spc.int/pipermail/press-releases_lists.spc.int/2008-November/000176.html>. See also Fortieth Pacific Islands Forum, *Forum Communiqué* (5–6 August 2009) [64] <http://www.forumsec.org.fj/pages.cfm/newsroom/press-statements/2009/final-communique-of-40th-pacific-islands-forum-cairns.html>, where the forum leaders at the 2009 Pacific Islands Forum in Cairns

> reaffirmed support for ongoing action by the Secretariat and Forum members at the highest level, in collaboration with relevant stakeholders, to raise awareness of the seriousness of sexual and gender based violence (SGBV) and its impact on the Pacific [and] … committed to eradicate SGBV and to ensure all individuals have equal protection of the law and equal access to justice.

[6] *Criminal Code (Sexual Offences and Crimes against Children) Act 2002* (PNG), amending *Criminal Code Act 1974* (PNG).

[7] 'Defilement' refers to sexual intercourse with a girl under the age of consent. No defence of consent is available to the offender. It is an outdated term typically found in legislation that has originated from England: see P Imrana Jalal, *Law for Pacific Women: A Legal Rights Handbook* (1998) 94.

traditionally defined as non-consensual penile–vaginal penetration.[8] Rape is a serious violation which, as well as the potentially serious impact on victims common to all sexual assaults, also carries the substantial dangers of sexual disease and pregnancy. However, centralising rape as the primary offence in sexual offences provisions and framing it to exclude other, equally harmful, sexual violations does not represent good practice. Indeed, the focus on (forced) penile–vaginal penetration in sexual offences provisions reflects a historic conceptualisation of rape as 'a theft of male property in female sexuality' whereby rape provisions were constructed and intended to protect a father from the loss of a virgin daughter's value as a transferable asset,[9] or to protect a husband from his loss of exclusive conjugal rights, rather than to protect the physical and sexual integrity of the victim.[10] As a result, rape provisions formulated in this way bear little relationship to the range of forced and coerced sexual acts which women find 'frightening, humiliating, invasive and injurious'.[11]

The second tier is an indecent assault provision which operates in these frameworks as the only category for sexual violations that do not involve penile penetration. It is often undefined and in many instances is given a narrow scope by the judiciary, which typically requires evidence of 'any intentional application of force' to satisfy the assault component of the offence.[12] Since many sexual violations involve coercion, often perpetrated by persons known to the victims, the requirement of force excludes many forms of violations.[13] Additionally, the indecent assault category is typically categorised as a misdemeanour, carrying a minimal penalty.[14] The combination of these two categories, therefore, provides an unsatisfactory coverage of the range of sexual violations that women experience and does not designate serious penalties to serious (non-penile-penetrative) violations. The third tier is offences against girls, usually termed 'defilement' and typically consisting of the same restrictive framework as described above — namely, a restrictive rape provision and an indecent assault provision. These offences do not have consent as an element of the offence (discussed more fully below in Part II(B)), are often gender-specific — excluding sexual offences against boys — and typically incorporate different

[8] Cf Damian Warburton, 'The Rape of a Label: Why It Would Be Wrong to Follow Canada in Having a Single Offence of Unlawful Sexual Assault' (2004) 68 *Journal of Criminal Law* 533, 534.

[9] Mary Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 16.

[10] Susan McCoin, 'Law and Sex Status: Implementing the Concept of Sexual Property' (1998) 19 *Women's Rights Law Reporter* 237, 243.

[11] Heath, above n 9, 19.

[12] See, eg, *R v Mafua* [2003] TOSC 15 (Unreported, Supreme Court of Tonga, CR 122 of 2002, Ford J, 26 March 2003).

[13] J C Sierra et al, 'Male Sexual Coercion: Analysis of a Few Associated Factors' (2009) 105 *Psychological Reports* 69.

[14] See below nn 89–90 and accompanying text.

penalties for offences against girls of different ages decreasing in seriousness as the age of the girl increases.

Criticism of this three-tier model on the basis that it does not incorporate or appropriately grade the range of violations that women and children typically experience and excludes both boys and many of the harmful contexts in which sexual assault occurs has led to the development of new models of sexual offences provisions in many countries worldwide, including the former colonisers of PICs. In particular, there have been three significant waves of reform (strongly influenced by feminist perspectives): first, radical reform in the 1970s in many US states;[15] secondly, in the 1980s in some Australian states,[16] Canada[17] and New Zealand;[18] and finally and most recently, in the 2000s in England,[19] Scotland,[20] South Africa[21] and the Australian states of Victoria,[22] New South Wales[23] and South Australia.[24] In New Zealand reforms have been recommended but not yet implemented.[25] Whilst a range of models can and have been adopted, all forms of sexual assault should be perceived as serious offences within the criminal law framework. The majority of jurisdictions that have reformed their sexual offences provisions have opted for a division between penetrative and non-penetrative offences, generally affording a higher degree of seriousness to penetrative offences.[26] Such a separation may be justified by research that indicates penetrative violations are more harmful than non-penetrative offences because of their invasive nature.[27] Some jurisdictions have further distinguished penile penetration from non-penile penetration.[28] This

15 See Richard Klein, 'An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness' (2008) 41 *Akron Law Review* 981, 984–5.

16 See, eg, *Crimes (Amendment) Ordinance (No 5) 1985* (ACT); *Crimes (Sexual Assault) Amendment Act 1981* (NSW); *Crimes (Amendment) Act 1989* (NSW). The law of rape was 'substantially revised in 1985' in the Australian Capital Territory: ACT Law Reform Commission, *Report on the Laws Relating to Sexual Assault*, Report No 18 (2001) 17; see also at 27.

17 See Ronald Hinch, 'Canada's New Sexual Assault Laws: A Step Forward for Women' (1985) 9 *Contemporary Crises* 33.

18 *Crimes Amendment Act (No 3) 1985* (NZ) s 2, inserting *Crimes Act 1961* (NZ) s 128A, which sets out some of the circumstances where a person does not consent, and s 128, which introduced the notion of reasonable belief in consent. These sections have now been repealed and substituted by *Crimes Amendment Act 2005* (NZ) s 7.

19 *Sexual Offences Act 2003* (UK) c 42.

20 *Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005* (Scot) asp 9.

21 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (RSA).

22 *Crimes (Sexual Offences) Act 2006* (Vic).

23 *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* (NSW).

24 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA).

25 For an overview of these proposed changes, see Ministry of Justice (NZ), *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* (2008).

26 For example in South Africa, where *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (RSA) ss 3–6 divide offences into 'sexual penetration' of any orifice by any object (rape) and 'sexual violation' which covers all forms of non-penetrative sexual contact (sexual assault).

27 Paul E Mullen and Jillian Fleming, 'Long-Term Effects of Child Sexual Abuse' (Child Abuse Prevention Issues No 9, Australian Institute of Family Studies, 1998) <http://www.aifs.gov.au/nch/pubs/issues/issues9/issues9.html>.

28 See, eg, *Sexual Offences Act 2003* (UK) c 42, ss 1–2, which create separate offences for the penile penetration of the vagina, anus or mouth of another person and for the penetration of 'the

article suggests that the preferred model is not to separate different forms of penetration, so as to avoid perpetuating the historic focus on penile penetration and instead encourage a focus on the violation to victims, which may be equally or more harmful if the victim is penetrated by a bottle, a weapon or some other object. In models that separate penetrative and non-penetrative offences, the residual non-penetrative category should enable appropriate penalties for both minor forms of sexual touching that may not have serious consequences and also sexual violations that, whilst not penetrative, nevertheless are serious and harmful, particularly if associated with additional contextual factors.[29] Research suggests that particular contextual (or aggravating) factors are very relevant to both the level of harm suffered by the victim and the culpability of the offender.[30] It is important therefore to recognise, either with separate offences or by the addition of more serious penalties, the harmful impact of particular situational contexts in which sexual assault often occurs. For example, research has indicated that sexual violations that are perpetrated by persons in a position of trust and authority (such as fathers or other senior relatives, priests, doctors, teachers, counsellors and police officers) are likely to result in a greater impact upon the victim than assaults by persons unknown or unconnected to the victim.[31] Sexual assaults of all types (penetrative and non-penetrative) that are perpetrated by persons in a position of trust and authority vis-à-vis the victim should therefore be specifically recognised and categorised as very serious offences to reflect not only the invasion of personal integrity common to all sexual assaults but also the devastating effects of the breach of trust implicit in the assault. Other relevant aggravating contextual circumstances that should be incorporated into the sexual offences framework include offences accompanied

vagina or anus of another person … with a part of his body or anything else.' Both offences are, however, regarded as equally serious with a maximum penalty of life imprisonment: ss 1(4), 2(4). See also *Sexual Offences Act 2006* (Kenya) ss 3(3), 5(2) (2007 rev ed), which separate penile penetration from other forms of penetration and impose a life imprisonment penalty for both.

29 See, eg, *Crimes Act 1900* (ACT) ss 51–62, which provide for penalties ranging from 12 to 20 years for penetrative offences and 5 to 15 years for non-penetrative offences. This model recognises that non-penetrative offences may be (almost) as serious as penetrative offences, although the penalties are not as serious as in other jurisdictions. By contrast, *Sexual Offences Act 2003* (UK) c 42, ss 1(4), 2(4), 3(4)(b) impose a maximum penalty of life imprisonment for penetrative offences and a maximum penalty of 10 years' imprisonment for non-penetrative offences. The sharp differentiation in penalty does not give scope for any recognition that non-penetrative offences can be as serious as penetrative offences, for example in situations where there is a breach of trust or where the offences are multiple and perpetrated over a period of time.

30 See, eg, Alan Clarke, Jo Moran-Ellis and Judith Sleney, 'Attitudes to Date Rape and Relationship Rape: A Qualitative Study' (Research Report No 2, Sentencing Advisory Panel, May 2002) 61.

31 See generally Ana Bernarda Ludermir et al, 'Violence against Women by Their Intimate Partner and Common Mental Disorders' (2008) 66 *Social Science and Medicine* 1008; Beverly A McPhail et al, 'An Integrative Feminist Model: The Evolving Feminist Perspective on Intimate Partner Violence' (2007) 13 *Violence against Women* 817; Stephanie J Woods et al, 'Physical Health and Posttraumatic Stress Disorder Symptoms in Women Experiencing Intimate Partner Violence' (2008) 53 *Journal of Midwifery and Women's Health* 538; Lena Dominelli, 'Betrayal of Trust: A Feminist Analysis of Power Relationships in Incest Abuse and Its Relevance for Social Work Practice' (1989) 19 *British Journal of Social Work* 291; Trisha Leahy, Grace Pretty and Gershon Tenenbaum, 'Perpetrator Methodology as a Predictor of Traumatic Symptomatology in Adult Survivors of Childhood Sexual Abuse' (2004) 19 *Journal of Interpersonal Violence* 521.

by physical violence, offences perpetrated by multiple offenders (such as gang rape) and multiple offences perpetrated over a period of time resulting in extensive cumulative harm.

An alternative model adopted in some jurisdictions is a single sexual assault offence that includes both penetrative and non-penetrative offences.[32] Such an approach may leave a considerable amount of discretion to the judiciary to fix the appropriate penalty, an approach which could be problematic unless adequate guidelines are included.[33] Whichever approach is chosen, however, the critical issue is that all forms of sexual violations experienced by women and children are included in the scope of the legislation, with serious penalties for the most harmful categories of sexual offences. The range of offences should have significant penalties, graded according to their criminal seriousness, which should be determined primarily on the basis of the severity of impact on the victim as identified in a significant body of literature and not — as they have been historically conceptualised and differentiated — on the basis of norms of morality, decency and as a crime against men and/or the (nuclear) family.[34] Commentators generally agree that criminal seriousness can be determined by a combination of the potential harm risked by the behaviour in question and the level of culpability.[35]

B *Contemporary Consent Provisions*

1 *Free Agreement*

Lack of consent, both as the actus reus (the acts which constitute the crime) and the mens rea (the state of mind of the perpetrator), is typically a key element of the offence of rape and other sexual offences (other than in child sexual offences provisions discussed below in Part II(C)).[36] In the sexual offences provisions introduced in common law countries during the early to mid-20th century the consent element was often not accompanied by any detailed definition susceptible to direct judicial interpretation.[37] In the absence of explicit legislative guidance, the following interpretations were developed in common law countries. The actus reus of the offence required the prosecution to establish

32 For example, the Canadian sexual offences do not differentiate between penetrative and non-penetrative offences: *Criminal Code*, RSC 1985, c C-46, ss 271–3. See also Warburton, above n 8.

33 The Canadian model of sexual offences guides the judiciary with three levels of penalties based on whether weapons were used and whether the victim sustained bodily injury or other harm: *Criminal Code*, RSC 1985, c C-46, ss 271(1), 272(2), 273(2).

34 See P Imrana Jalal, *Good Practices in Legislation on Violence against Women: A Pacific Islands Regional Perspective*, 5, UN Doc EGM/GPLVAW/2008/EP.07 (2008).

35 See, eg, R A Duff, *Punishment, Communication, and Community* (2001) 135; C T Sistare, *Responsibility and Criminal Liability* (1989) 29.

36 Bernadette McSherry, 'Constructing Lack of Consent' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 26, 26.

37 See, eg, *Crimes Ordinance 1971* (HK) cap 200, s 118 (3)(a) (emphasis added), which states that a man commits rape if 'he has *unlawful sexual intercourse* with a *woman* who at the time of the intercourse does not consent to it'. This provision is based on English legislation subsequently modified in England but remains in its original form in Hong Kong.

that sexual penetration occurred without consent. This typically had two elements: first that sexual penetration occurred and secondly that it occurred without consent.[38] Whilst the second element (the absence of consent) has been generally considered to be subjective and therefore from the point of view of the victim, credibility was often based on a range of external factors, including whether 'force, fear or fraud' was used and whether the complainant physically resisted sexual relations.[39] Feminist scholars have critiqued this approach, arguing that using force and physical resistance as the markers of lack of consent (and conversely physical inactivity as the signal of consent) does not recognise the inherent power imbalance between men and women and the non-violent ways in which women are coerced into sexual relations.[40]

Instead, feminist scholars have argued that a good practice approach to the actus reus element (already adopted by some jurisdictions)[41] is to articulate explicitly in the legislation a positive 'communicative' standard of consent, typically defined as 'positive consent' or a requirement to obtain 'free agreement'.[42] Such a model is premised on the view that the fundamental underlying principle in sexual offences provisions should be respect for a person's autonomy, which requires 'placing emphasis on a person freely choosing [whether or not] to engage in sexual activity.'[43] The basic principle underlying this model of consent therefore requires that both participants are equally active in reaching agreement on sexual relations, with a focus on what the parties did to reach agreement. In particular, this approach requires the defendant to establish that he had obtained agreement before the sexual relations occurred, in effect creating a presumption of lack of consent. Thus, no indication from the complainant of either consent or lack of consent would result in a finding that free agreement had *not* been obtained, which is a stark departure from the physical resistance approach described above.

2 *Non-Exhaustive List of Lack of Consent Circumstances*

Additionally, expert commentators have welcomed the legislation designating a 'strict liability' non-exhaustive list of circumstances in which free agreement cannot be present.[44] These should include situations such as where the person is asleep or is affected by drugs and/or alcohol, where the person agreed to sexual

38 McSherry, above n 36, 27–8.

39 See *DPP (UK) v Morgan* [1976] AC 182, 210 (Lord Hailsham), citing T R Fitzwalter Butler and Stephen Mitchell, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (38th ed, 1973) [2871]. See also ibid 30.

40 Allison Moore and Paul Reynolds, 'Feminist Approaches to Sexual Consent: A Critical Assessment' in Mark Cowling and Paul Reynolds (eds), *Making Sense of Sexual Consent* (2004) 29, 31; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (1989) 172–5. See also *R v Park* [1995] 2 SCR 836, 869–71 (L'Heureux-Dubé J).

41 The Canadian consent provisions, considered to be the most progressive in the world, define consent as 'the voluntary agreement of the complainant to engage in the sexual activity in question': *Criminal Code*, RSC 1985, c C-46, s 273.1(1).

42 McSherry, above n 36, 32. See also Simon Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' (1994) 18 *Criminal Law Journal* 249.

43 Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Report No 209 (2007) 8.

44 See, eg, McSherry, above n 36, 31.

relations due to threats, coercion or intimidation including threats of harm to a third party (such as a child, sibling or mother), where the person was deceived about the nature or purpose of the activity, where the accused impersonated someone known to the person or where agreement to the act was made by a third party.[45] If proof of one of the statutory situations is present, there is no consent and the actus reus of the offence is presumed established. Some jurisdictions have included situations which are 'negative indicators' rather than specific factual situations which of themselves constitute lack of agreement. Included in *Crimes Act 1958* (Vic) s 37AAA, for example, are the following directions:

> (e) a person [is not to be regarded] as having freely agreed to a sexual act just because
>
> (i) she or he did not protest or physically resist; or
>
> (ii) she or he did not sustain physical injury; or
>
> (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.

Additionally, the legislation provides that 'the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement'.[46] Some commentators argue that, since there is a vast range of possible indicators that could be included, these indicators should not appear in the statutory provisions but should be left instead to the discretion of the judge to determine on a case-by-case basis. Further, the stereotypes that these indicators represent should be broken down through education and public awareness campaigns.[47] However, these particular indicators adopted by the Victorian jurisdiction are targeted not just at prevalent stereotypes but at actual common law presumptions that have been and continue to be actively applied by the judiciary in many countries.[48] Accordingly, this article suggests that the inclusion of such 'negative' indicators is indicative of good practice.

3 *Mens Rea and the Defence of Honest Mistaken Belief*

The mens rea of the lack of consent requirement goes further than the actus reus element by requiring that the accused is aware of the lack of consent or is reckless or wilfully blind to its absence.[49] The absence of any explicit legislative definition of this standard in many common law jurisdictions has led to two judicial interpretations of what is required: one subjective and one objective. The subjective approach (and the one most beneficial to the defendant) requires the prosecution to establish that the accused had actual knowledge that the complainant did not consent or (in some jurisdictions) was reckless as to the

45 Ibid, citing *Crimes Act 1958* (Vic) s 36.
46 *Crimes Act 1958* (Vic) s 37AAA(d).
47 See Scottish Law Commission, above n 43, 28.
48 See, eg, McSherry above n 36, 31 fn 24; Michelle J Anderson, 'All-American Rape' (2005) 79 *St John's Law Review* 625, 628.
49 See, eg, *Crimes Act 1958* (Vic) s 38(2)(a).

issue of consent. In some jurisdictions it is sufficient for the accused to establish that he held an honest belief that the complainant was consenting even if that belief was not reasonable.[50] Critics of this approach to the interpretation of the mens rea of the consent element argue that it perpetuates masculine notions of sexual behaviour by enabling the male accused to formulate a belief of consent based on his own (arguably unreasonable) notions of female sexuality.[51] As such, this mens rea standard often creates an unobtainable benchmark whereby, even in instances where it is established that there was no consent, no conviction ensues.[52] The objective approach, by contrast, requires the prosecution to establish that a reasonable person in the position of the accused would believe the complainant was consenting. In this approach (clearly more favourable to the complainant), the subjective belief of the defendant is irrelevant. This position has been critiqued, however, by proponents of the first (subjective) approach on the basis that an objective approach is incongruent with the general subjective approach adopted in relation to the mens rea element in other criminal law offences.[53] In turn, the objective approach is also critiqued by some feminist commentators who argue that it does not go far enough to protect victims of rape. They advocate that to accord with good practice, where the accused cannot establish that he took reasonable steps to ascertain consent, no argument of honest but mistaken belief in consent should be available.[54] This approach, adopted in Canada,[55] shifts the onus to the accused to establish that he actively took steps to ensure free agreement before any defence of honest mistake is available.

C *Inclusion of Child Sexual Offences Provisions*

A range of law reform approaches can and have been adopted in relation to sexual violations against children and those with mental or physical incapacity. Uniform contemporary reforms have introduced gender-neutral provisions to include sexual offences against boys as well as girls.[56] Some jurisdictions have

[50] See, eg, Michael T Molan, Duncan J Bloy and Denis Lanser, *Modern Criminal Law* (5th ed, 2003) 244 in relation to England. Increasingly, however, contemporary frameworks are moving towards a requirement of reasonableness, for example in New South Wales, which has recently amended the *Crimes Act 1900* (NSW) to incorporate a requirement that the belief in consent must be reasonable: s 61HA, inserted by *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* (NSW) sch 1 item 1.

[51] Kate Warner, 'Sentencing for Rape' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 174, 177.

[52] Pamela Ferguson, 'Reforming Rape and Other Sexual Offences' (2008) 12 *Edinburgh Law Review* 302, 303–4.

[53] Klein, above n 15, 1015.

[54] Ilene Seidman and Susan Vickers, 'The Second Wave: An Agenda for the Next Thirty Years of Law Reform' (2005) 38 *Suffolk University Law Review* 467, 489; Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 *Akron Law Review* 865, 868.

[55] The defence of mistaken belief in consent, whilst still existing, cannot be invoked if 'the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting': *Criminal Code*, RSC 1985, c C-46, s 273.2(b).

[56] *Crimes Act 1961* (NZ) s 132.

included age and mental incapacity among the circumstances in which free agreement or consent cannot be obtained.[57] Whilst this is a simpler alternative to including separate offences, some commentators have argued that the law has a role in explicitly stating that sexual activity with children or persons with mental incapacity is wrong and, therefore, that separate provisions should be included rather than allowing such cases to be subsumed within the consent rules.[58] If a model of separate provisions is chosen as the preferred option, it should incorporate the full range of penetrative and non-penetrative sexual violations experienced by children. As with the general provisions, it should also incorporate situational or aggravating factors. In particular, since the vast majority of child sexual assaults are perpetrated over a period of time by persons known and trusted by the child, often with the use of 'grooming' techniques (which are used to gain the trust of the child or their carer to both facilitate the abuse and prevent its discovery),[59] the devastating impact of the breach of trust in such circumstances[60] must be recognised with serious penalties. The forms of relationships that might give rise to a breach of trust and authority should be specifically included in the legislation. The list should be non-exhaustive and include relatives, parents, teachers, religious leaders and instructors, carers, professionals, counsellors, and police and prison officers.

Contemporary reforms, whilst removing outdated terms such as 'defilement' and 'carnal knowledge', have tended to justify and continue distinctions between violations against children of different ages, retaining models whereby the penalty decreases as the child's age increases, typically coupled with the retention of a defence of mistaken belief of age in cases involving older children.[61] This approach is justified by some commentators on the basis that the aims of the law are normative along a continuum ranging between an 'absolutely wrong' age and an age where it may be 'wrong' for children to have sex.[62] Although contemporary models have uniformly introduced serious penalties for

57 For an example of this approach, see *Combating of Rape Act 2000* (Namibia) ss 2(2)(d), (f)(i).

58 See Scottish Law Commission, above n 43, 59.

59 Anne-Marie McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* (2007) 85.

60 For a medical study of the impact of intra-familial abuse, see Teresa Magalhães et al, 'Sexual Abuse of Children: A Comparative Study of Intra and Extra-Familial Cases' (2009) 16 *Journal of Forensic and Legal Medicine* 455.

61 See, eg, *Crimes Act 1958* (Vic) s 45, which imposes maximum penalties of 25 years' imprisonment for the sexual penetration of a child of under 10 years and 10 years' imprisonment for the sexual penetration of a child aged between 10 and 16 (unless the child is under the care and supervision of the accused, in which case the penalty is raised to 15 years' imprisonment). A defence of honest and mistaken belief of age is available in relation to children over the age of 10: s 45(4). See also *Sexual Offences Act 2003* (UK) c 42, ss 5, 9, which impose a maximum penalty of life imprisonment for the sexual penetration of a child under 13 years and a maximum 14 years' imprisonment for the sexual penetration of a child under 16 years. See also *Sexual Offences Act 2006* (Kenya) s 8 (2007 rev ed), which has introduced three age categories: first, under 11 years of age, with a mandatory penalty of life imprisonment; second, between 12 and 15 years of age, with a minimum penalty of 20 years' imprisonment; and third, between 16 and 18 years of age, with a minimum penalty of 15 years' imprisonment. This is a positive frame-work in that the penalties are all serious and protection is provided for children up until the age of 18; however, the differentiation on the basis of age is unjustified.

62 See Scottish Law Commission, above n 43, 63–4.

all child sexual offences once it is determined that sexual relations have occurred between a designated child and an adult,[63] this article contends that it is unjustifiable to treat one case more seriously than another on the basis of age either in terms of likely impact or culpability. Additionally, the provision of a defence of mistake of age, which has been retained in many contemporary reforms,[64] does not resonate with a model of free agreement, where a requirement to actively ascertain the age of a sexual partner seems as reasonable as a requirement to actively seek consent to sexual relations. Therefore this article recommends that such differences should not be included in contemporary child sexual offence provisions.[65]

The age below which child sexual assault offences should apply and whether any exception should be made to accommodate sexual exploration between young people (and if so in what circumstances) remain controversial. Many argue that the increase of sexual activity amongst teenagers in some societies, and the important and growing recognition of the sexual rights of young people, necessitate an exception for sexual relations between consenting young persons.[66] Indeed, the *CRC* provides that children should be involved in the decision-making process in matters affecting their lives,[67] which lends support to providing them with some autonomy and choice in relation to their sexual selves provided they have the requisite physical and emotional maturity.[68] However, the *CRC* also states that children need protection from sexual abuse[69] and defines 'child' as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'[70] The Committee on the Elimination of Discrimination against Women ('CEDAW Committee') in *General Recommendation No 21* has nominated 18 years as the age of majority for marriage[71] but is silent in relation to the age of consent for sexual relations. The former United Nations Special Rapporteur on Violence against Women has stated that '[t]he need to ensure that laws protect children from abuse requires

63 Sexual penetration of children is a strict liability regime in most jurisdictions: see, eg, *Crimes Act 1958* (Vic) s 45(1); *Sexual Offences Act 2003* (UK) c 42, ss 5(1), 9(1); *Sexual Offences Act 2006* (Kenya) s 8(1) (2007 rev ed).

64 See, eg, *Crimes Act 1958* (Vic) s 45(4)(a); *Sexual Offences Act 2003* (UK) c 42, s 9(1)(c)(i); *Sexual Offences Act 2006* (Kenya) s 8(5) (2007 rev ed).

65 But see *Crimes Act 1961* (NZ) s 134A(1)(a), which provides a defence where the accused proves that 'before the time of the act concerned, he or she had taken reasonable steps to find out' whether the young person was aged 16 or over.

66 Arfan Khan, '*Sexual Offences Act 2003*' (2004) 68 *Journal of Criminal Law* 220, 220–3. See also Carolyn Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* (2004) 9–10.

67 *CRC* art 12.

68 See *CRC* art 12(1).

69 *CRC* art 19(1).

70 *CRC* art 1.

71 *Report of the Committee on the Elimination of Discrimination against Women: Thirteenth Session*, UN GAOR, 49th sess, Agenda Item 97, vii, xiv, UN Doc A/49/38 (1994) ('*General Recommendation No 21: Equality in Marriage and Family Relations*').

that the age for statutory rape be put at below the age of 18.'[72] There is therefore some support for setting the statutory rape age at below 18.

Clearly, therefore, the most difficult legal issue is to strike an appropriate balance between protecting children from sexual abuse and exploitation, on the one hand, and permitting the sexual expression of young persons as they proceed through adolescence into young adulthood, on the other. Because different individuals will reach physical and psychological maturity at different times, setting an age under which individuals cannot validly consent to sexual activity is an exercise that will be arbitrary to some extent. A number of approaches have been adopted in contemporary reforms. In Canada, if the complainant is between 12 and 14 and the defendant is not more than 2 years older or if the complainant is between 14 and 16 and the defendant is not more than 5 years older, and the relationship in either case is not one of trust or dependency, then the defence of consent is available.[73] Some jurisdictions provide no formal exceptions, but nevertheless such an exception can be accommodated within a flexible sentencing regime which makes possible a lenient approach if the situation warrants it.[74]

III SEXUAL OFFENCES PROVISIONS IN PACIFIC ISLAND COUNTRIES

All 15 PICs reviewed in this article *have* legislated against sexual assault in their criminal law legislation.[75] With the exceptions of PNG, which remodelled its sexual offences provisions in 2003,[76] and the Marshall Islands, which reformed some aspects of its law in 2004,[77] the legislation of the PICs has remained in force in its original form. The particular features of the models in place in the PICs reviewed here are strongly reflective of the approaches taken by the Imperial powers which administered them during the colonisation period. Countries in this review colonised by the US include the Federated States of Micronesia ('FSM')[78] and the Marshall Islands, which both entered into

72 See Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN ESCOR, 53rd sess, Agenda Item 9(a), 11, UN Doc E/CN.4/1997/47 (1997).

73 *Criminal Code*, RSC 1985, c C-46, ss 150.1(2)–(2.1).

74 See, eg, *Police v Fagalele* [2008] WSSC 45 (Unreported, Supreme Court of Samoa, Sapolu CJ, 15 July 2008) [29], where a non-custodial sentence was imposed on the 16-year-old accused in relation to a consensual sexual relationship with a 15-year-old girl, although no formal exception is provided by the law.

75 The first set of sexual offences provisions was introduced in Nauru in 1922 (*Criminal Code Act 1899* (Qld) sch 1 ss 347–8 ('*Queensland Criminal Code*'), adopted by *Laws Repeal and Adopting Ordinance 1922* (Nauru) s 13) and the most recent in Vanuatu in 1981 (*Penal Code 1981* (Vanuatu) cap 135, s 90 (1988 rev ed)). Note that this article does not examine the French colonies, where the civil laws of France prevail: Michael A Ntumy, 'New Caledonia' in Michael A Ntumy (ed), *South Pacific Islands Legal System* (1993) 595, 603.

76 Note that no substantive changes were made to the PNG provisions (*Criminal Code Act 1974* (PNG)) from when they were adopted from the *Queensland Criminal Code* in 1975 until the reforms of 2003 (*Criminal Code (Sexual Offences and Crimes against Children) Act 2002* (PNG)): see John Y Luluaki, 'Sexual Crimes against and Exploitation of Children and the Law in Papua New Guinea' (2003) 17 *International Journal of Law, Policy and the Family* 275, 276.

77 *Criminal Code*, 31 Marshall Islands Revised Code ch 1 (2004).

78 The FSM comprises the states of Chuuk, Kosrae, Pohnpei and Yap.

'compacts of free-association' with the US in 1986 and continue to receive extensive US federal funding and support.[79] The third US-colonised country examined in this article is American Samoa, which, unlike the two preceding independent countries, has continued as a US territory since its annexation in 1899.[80] As will be described and discussed below, all three countries have sexual offences frameworks reflective of models introduced throughout the US during the 1970s.

Countries in this review colonised and administered by Britain include Fiji (independent since 1970), the Cook Islands (in a compact of 'free association' with New Zealand since 1965), Tokelau (a territory of New Zealand since 1948), Kiribati (previously Gilbert Island, independent since 1979), Tuvalu (previously Ellice Island, independent since 1978), Niue (independent since 1974), the Solomon Islands (independent since 1978), Samoa (independent since 1962), Vanuatu (administered jointly with France, previously the New Hebrides, independent since 1980), PNG (independent since 1975) and Nauru (independent since 1968).[81] The final PIC to be reviewed is Tonga, which was never formally colonised although it was under British protection until 1970; hence its laws exhibit a strong British influence.[82] As will be described and discussed below, all of the former British colonies and Tonga adopted their sexual offences provisions from Britain, Australia or New Zealand and all reflect the same common law principles that dominated the colonisers' own sexual offences frameworks until they instigated reforms in the latter half of the 20th century. The following sections overview the key features of sexual offences provisions in the PICs reviewed and consider them in the light of the good practice standards identified in Part II.

A *Range of Sexual Violations Criminalised*

All the formerly British-administered countries with the exception of PNG have models of sexual offences that are largely framed around the three categories of offences described previously as typical of sexual offences frameworks in common law countries enacted in the mid-20th century: a rape provision, indecent assault offences and defilement offences against girls (described below in Part III(C)). The first category, namely, a restrictive rape provision, is limited to penile–vaginal penetration in 10 of these 11 countries.[83]

[79] E Robert Statham Jr, *Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations* (2002) 125.

[80] Ibid 85–7.

[81] For a discussion of how each PIC gained independence, see Jennifer Corrin Care, 'Colonial Legacies? A Study of Received and Adopted Legislation Applying in the University of the South Pacific Region' (1997) 21 *Journal of Pacific Studies* 33, 35–43.

[82] Secretary of State for Foreign and Commonwealth Affairs (UK), *Exchange of Letters: Termination of United Kingdom Responsibility for the External Relations of Tonga*, November 1970; *Tonga Act 1970* (UK) c 22.

[83] *Crimes Act 1969* (Cook Islands) s 140; *Penal Code 1944* (Fiji) cap 17, s 183; *Penal Code 1965* (Kiribati) cap 67, s 161 (1977 rev ed); *Niue Act 1966* (Niue) s 161, applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2; *Queensland Criminal Code* s 347, adopted by *Laws Repeal and Adopting Ordinance 1922* (Nauru) s 13; *Crimes Ordinance 1961* (Samoa) s 46;

In all 11 countries rape is the most serious offence, with maximum penalties ranging from life imprisonment in the Solomon Islands, Vanuatu, Samoa, Fiji, Tuvalu and Kiribati[84] to 14 years in Niue and Tokelau.[85] However, the narrow definition of rape in most countries means that serious and harmful sexual violations such as penetration by a bottle or weapon or anal penetration of any kind can be prosecuted only as an indecent assault. The category of indecent assault and/or (in some jurisdictions) 'intending to insult the modesty of any woman or girl'[86] is included in 9 of the 11 jurisdictions.[87] It is not statutorily defined in any country but has been judicially interpreted in some Pacific jurisdictions as requiring the 'deliberate (intentional) application of force' as well as 'circumstances of indecency'.[88] The requirement for force excludes the numerous sexual violations that occur through coercion and other non-forcible means. Additionally, in all 11 countries indecent assault is a misdemeanour and hence not regarded seriously, with light sentences ranging from two years' imprisonment with hard labour in Nauru[89] to seven years' imprisonment in the Cook Islands.[90] Case law throughout the region illustrates the limitations of this (outdated) approach to sexual offences, providing many examples in which penile penetration was not established and, despite serious breaches of trust, multiple violations and significant and serious impact on the victim, prosecutions have resulted only in indecent assault convictions with minimal sentences.[91]

Penal Code 1963 (Solomon Islands) cap 26, s 168 (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 161 (1978 rev ed); *Penal Code 1981* (Vanuatu) cap 135, s 90 (1988 rev ed). Cf *Criminal Offences Act 1924* (Tonga) cap 18, s 118 (1988 rev ed).

84 *Penal Code 1944* (Fiji) cap 17, s 150; *Penal Code 1965* (Kiribati) cap 67, s 129 (1977 rev ed); *Crimes Ordinance 1961* (Samoa) s 47(2); *Penal Code 1963* (Solomon Islands) cap 26, s 137 (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 129 (1978 rev ed); *Penal Code 1981* (Vanuatu) cap 135, s 91 (1988 rev ed).

85 *Niue Act 1966* (Niue) s 162(2), applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2.

86 *Penal Code 1944* (Fiji) cap 17, s 154(4); *Penal Code 1965* (Kiribati) cap 67, s 133(3) (1977 rev ed); *Penal Code 1963* (Solomon Islands) cap 26, s 141(3) (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, ss 133(3), 141(3) (1978 rev ed).

87 *Crimes Act 1969* (Cook Islands) s 148; *Penal Code 1944* (Fiji) cap 17, s 154; *Penal Code 1965* (Kiribati) cap 67, s 133 (1977 rev ed); *Queensland Criminal Code* s 350, adopted by *Laws Repeal and Adopting Ordinance 1922* (Nauru) s 13; *Crimes Ordinance 1961* (Samoa) s 54; *Penal Code 1963* (Solomon Islands) cap 26, s 141 (1997 rev ed); *Criminal Offences Act 1924* (Tonga) cap 18, s 124(1) (1988 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 133 (1978 rev ed); *Penal Code 1981* (Vanuatu) cap 135, s 98 (1988 rev ed).

88 See *Police v Pu'a* [2008] WSSC 46 (Unreported, Supreme Court of Samoa, Vaai J, 16 July 2008) 3.

89 *Queensland Criminal Code* s 350, adopted by *Laws Repeal and Adopting Ordinance 1922* (Nauru) s 13.

90 *Crimes Act 1969* (Cook Islands) s 148. The penalty for indecent assault is five years' imprisonment in Fiji, Kiribati, Niue, Samoa, the Solomon Islands and Tuvalu: *Penal Code 1944* (Fiji) cap 17, s 154(1); *Penal Code 1965* (Kiribati) cap 67, s 133(1) (1977 rev ed); *Niue Act 1966* (Niue) s 156, applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2; *Crimes Ordinance 1961* (Samoa) s 54(a); *Penal Code 1963* (Solomon Islands) cap 26, s 141(1) (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 133(1) (1978 rev ed). Four countries have an additional offence of insulting the modesty of a girl or woman, which carries a penalty of one year imprisonment: see above n 86.

91 See, eg, *R v Okisi* [2008] SBHC 79 (Unreported, High Court of Solomon Islands, HCSI-CRC 72 of 2007, Palmer CJ, 12 December 2008) [14]. In this case, the victim was sexually violated by her stepfather over a long period of time but the Court did not find that penile penetration was

Additionally, Nauru, Tuvalu, Tonga, the Solomon Islands, Tokelau, Niue, Fiji, Kiribati and the Cook Islands do not include any contextual or aggravating factors in their sexual offences provisions. Samoa and Vanuatu recognise a breach of trust between a parent and a girl under 21 and 20 respectively[92] (discussed more fully below in Part III(C)) but do not include any aggravating factors for violations against adult women. All 11 PICs therefore fall well short of international good practice standards. Instead, they reflect the (outdated) norms of the colonising powers whereby penile–vaginal rape is the primary sexual offence representing (immoral) sexual relations outside of marriage rather than a crime against the person or a violation of a person's right to physical integrity.[93]

The Marshall Islands, American Samoa and the FSM all contain an expansive definition of sexual penetration in accord with good practice as described above in Part II. The Marshall Islands and American Samoa divide offences against persons over 16 into penetrative and non-penetrative violations, but with a sharp (and arguably unjustified) division in penalties between the two categories.[94] The result, particularly in the Marshall Islands, is that serious non-penetrative violations cannot attract serious penalties. Both grade sexual violations in substantial part on the basis of whether force or a dangerous weapon was used and upon the level of (physical) impact upon the victim, which automatically classifies the offence as more serious. Although the use of force or a weapon may increase the harm suffered by a victim, a requirement for force in order to classify the offence as most serious is out of step with research which, as discussed previously,[95] illustrates that there are a range of non-violent situations in which serious sexual violations can occur. The Marshall Islands statute also includes a range of limited offences for sexual violations perpetrated by persons in positions of authority in either correctional or residential facilities.[96] Whilst

proven and convicted the accused only on indecent assault charges, each with maximum sentences of five years: see *R v Okisi* [2008] SBHC 92 (Unreported, High Court of Solomon Islands, HCSI-CRC 72 of 2007, Palmer CJ, 27 November 2008) [31]–[32]. Despite the multiple offences and the significant breach of trust, the perpetrator was sentenced to only three years' imprisonment: *R v Okisi* [2008] SBHC 79 (Unreported, High Court of Solomon Islands, HCSI-CRC 72 of 2007, Palmer CJ, 12 December 2008) [14].

92 *Crimes Ordinance 1961* (Samoa) s 50; *Penal Code 1981* (Vanuatu) cap 135, s 96 (1988 rev ed).

93 See Coomaraswamy, above n 72, 10.

94 In the Marshall Islands penetrative offences attract penalties of 25 years', 10 years' and 5 years' imprisonment depending on the mental state of the offender and the force used, whilst there is a one year penalty for non-penetrative offences: *Criminal Code*, 31 Marshall Islands Revised Code §§ 152(A)(3), (B)(2), (C)(3), (D)(2) (2004). In American Samoa the first offence is penile–vaginal penetration, which attracts a penalty of 5 to 15 years' imprisonment unless there is serious physical injury or a deadly weapon, which increases the penalty range to between 10 and 30 years' imprisonment: American Samoa Code Annotated §§ 46.2301, 46.3604(b) (2007). The second offence is any penetrative sexual contact of the genitals (but not objects) upon the genitals, anus, mouth or hand of the other person, which attracts a maximum penalty of 7 years' imprisonment unless there is a serious physical injury or use of a deadly weapon, which increases the penalty range to between 5 and 15 years' imprisonment: §§ 46.2301, 46.3601, 46.3610. Thirdly, any other (non-penetrative) sexual contact attracts a maximum penalty of 5 years' imprisonment unless there is serious physical harm or a deadly weapon is used, in which case the maximum penalty is 7 years' imprisonment: §§ 46.2301, 46.3615.

95 See above n 40 and accompanying text.

96 *Criminal Code*, 31 Marshall Islands Revised Code §§ 152(B)(1)(c), (C)(1)(d) (2004).

this is a positive inclusion it is narrow in its scope. There are no offences, for example, for violations by other actors in positions of trust and authority such as parents and relatives, teachers, partners and religious leaders. The FSM have only a single category for penetrative violations and no category for non-penetrative offences (with the exception of Pohnpei, which includes an offence of sexual contact defined as any touching of the sexual or other intimate parts),[97] leaving no recourse for victims of non-penetrative sexual violations.[98] This is clearly an unsatisfactory framework that falls short of good practice.

PNG provides a good practice example for the region (and indeed the world). The recently enacted sexual offences provisions are divided into penetrative and non-penetrative offences. Rape is broadly defined to include 'sexual penetration'[99] with a serious maximum penalty of 15 years' imprisonment, which can be increased to life imprisonment in 'circumstances of aggravation'.[100] A residual category of sexual assault is included for non-penetrative sexual violations, explicitly defined to encompass any sexual touching without consent and therefore not requiring use of force.[101] Whilst attracting a penalty of only 5 years, if the offence includes any 'circumstances of aggravation' the penalty can be increased to 10 years.[102] Although there is still a marked disparity in penalty between penetrative and non-penetrative offences, the model does provide a substantial improvement on the former PNG framework[103] and on other models operating in the region. Indeed, PNG jurisprudence suggests that the new framework has led to some increases in the range of violations prosecuted, which has subsequently led to successful convictions and serious penalties.[104]

97 61 Pohnpei State Code §§ 5-141, 5-142(3) (2006).

98 In the FSM, a single penetration offence attracts a maximum penalty of either 9 or 10 years' imprisonment if serious injury results or a dangerous weapon was used and 5 years' imprisonment otherwise: 12 Chuuk State Code §§ 2051, 2053 (2001 draft); Kosrae State Code §§ 13.311, 13.1201–13.1202 (1997); 61 Pohnpei State Code § 5-141(1) (2006); 11 Yap State Code §§ 201(f), 205 (2000).

99 *Criminal Code Act 1974* (PNG) sch 1 s 6 provides that 'sexual penetration' occurs where there is:

> (a) the introduction, to any extent, by a person of his penis into the vagina, anus or mouth of another person; or
>
> (b) the introduction, to any extent, by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.

100 *Criminal Code Act 1974* (PNG) sch 1 s 347. The circumstances include (but are not limited to) where there are other persons present, where the accused uses or threatens to use a weapon, where the assault is accompanied by grievous bodily harm, where the accused confines or restrains the complainant, where the accused breaches a position of trust, authority or dependency, where the accused is a member of the family or clan of the victim, where the victim has a serious mental or physical disability, where the victim is pregnant and where the accused knowingly has HIV: sch 1 ss 349A(a)–(i).

101 *Criminal Code Act 1974* (PNG) sch 1 s 349.

102 *Criminal Code Act 1974* (PNG) sch 1 s 349(4).

103 The former PNG framework replicated the three-tier approach described previously, with a restrictive rape provision, an indecent assault category and a series of defilement provisions for offences against girls.

104 See, eg, *State v Kepas* [2007] PGNC 77 (Unreported, National Court of Justice of Papua New Guinea, CR No 69 of 2007, Cannings J, 21 March 2007) [2]–[3], [24] (where the defendant was convicted and sentenced to 12 years' imprisonment under *Criminal Code Act 1974* (PNG)

Additionally, the jurisprudence to date indicates that the use of a model where the presence of aggravating circumstances operates to raise the penalty, whilst also enabling the court to award lighter sentences when the offence is minor, has provided the courts with an ability to more accurately gauge and assess appropriate sentences for different offences.[105]

B *Incorporating Contemporary Consent Provisions: Free Agreement and a Limited Defence of Honest Mistaken Belief*

1 *Free Agreement*

All the PICs examined, with the exception of PNG, construe the requirement to establish lack of consent narrowly. In relation to the actus reus element, which requires the prosecution to establish that penetration occurred without consent,

sch 1 s 229D for the new offence of persistent abuse of a child in a situation with five instances of sexual touching and one instance of sexual penetration); *State v Haupas* [2007] PGNC 81 (Unreported, National Court of Justice of Papua New Guinea, CR No 779 of 2004, Cannings J, 21 March 2007) [2], [26] (where a sentence of three years was imposed after the offender touched the 'sexual parts' of a pregnant woman; he was unknown to the victim and under the previous law this would have been a misdemeanour with a maximum penalty of one year); *State v Warifa* [2008] PGNC 32 (Unreported, National Court of Justice of Papua New Guinea, CR No 84 of 2008, Kandakasi J, 11 March 2008) [2], [5], [22] (where the 24-year-old offender, who had rubbed his penis against a 6-year-old girl's vagina but had not penetrated her, was sentenced to seven years' imprisonment, although it was an isolated event). Kandakasi J noted that the new laws required much higher penalties for non-penetrative offences in recognition of their potential seriousness: at [18].

105 See, eg, *State v Makata* [2006] PGNC 59 (Unreported, National Court of Justice of Papua New Guinea, CR No 662 of 2005, Jalina J, 23 May 2006) [3]–[4], [18] (where five 19-year-old offenders were each sentenced to 20 years' imprisonment for sexually penetrating a 15-year-old girl known to them; Jalina J held that it was a breach of trust, although they were not related to the victim, because they led her to believe they were going to get betel nuts: at [16]); *State v Lare* [2004] PGNC 218 (Unreported, National Court of Justice of Papua New Guinea, CR No 384 of 2004, Kandakasi J, 20 May 2004) 2, 6–7, 9 (where a 40-year-old who sexually penetrated his 12-year-old adopted daughter a number of times over a two-year period was sentenced to 20 years' imprisonment); *State v Solomon [No 2]* [2007] PGNC 147 (Unreported, National Court of Justice of Papua New Guinea, CR No 855 of 2005, Davani J, 19 April 2007) [3], [37] (where the perpetrator was sentenced to 45 years' imprisonment for three counts of rape; Davani J placed great weight on the aggravating circumstances, which included that the perpetrator was the victim's guardian (at [25]), that he used physical violence (at [24]) and that the offences occurred over a period of four years (at [22])). Cf *State v Samson* [2005] PGNC 160 (Unreported, National Court of Justice of Papua New Guinea, CR No 1197 of 2004, Cannings J, 25 February 2005) 9, 11 (where the 17-year-old offender was sentenced to five years' imprisonment for sexually penetrating a 13-year-old where there were no weapons used and no breach of trust); *State v Nara [No 2]* [2007] PGNC 86 (Unreported, National Court of Justice of Papua New Guinea, CR No 1236 of 2004, Davani J, 17 April 2007) [2]–[3], [19] (where the offender was sentenced to five years' imprisonment for touching a nine-year-old girl's genitals with his hand); *State v Patangala* [2006] PGNC 43 (Unreported, National Court of Justice of Papua New Guinea, CR No 800 of 2004, Lenalia J, 22 February 2006) 2, 6 (where the accused was sentenced to four years' imprisonment for touching the victim's breasts). In both *State v Nara [No 2]* and *State v Patangala* there was a relationship of trust between the victim and the accused which raised the sentence despite the minor nature of the violation: *State v Nara [No 2]* [2007] PGNC 86 (Unreported, National Court of Justice of Papua New Guinea, CR No 1236 of 2004, Davani J, 17 April 2007) [4]; *State v Patangala* [2006] PGNC 43 (Unreported, National Court of Justice of Papua New Guinea, CR No 800 of 2004, Lenalia J, 22 February 2006) 2. However, in *State v Patangala*, Lenalia J decided that 'the case of the accused should fall on the low range of sentencing', holding that a sentence of four years of which three were suspended would be sufficient: at 5–6. The new regime therefore appears to be giving the judiciary the ability to award sentences that accord more closely with the seriousness of the offence.

only PNG contains a good practice, positive free agreement provision. PNG defines consent as 'free and voluntary agreement',[106] and the legislation states that the fact that a person did not say or do anything to indicate consent is normally enough to show that the act took place without the person's consent.[107] Furthermore, a person is not to be regarded as having consented just because they did not physically resist, did not sustain physical injury or agreed on some earlier occasion to a sexual act with that person or some other person.[108] These indicators suggest that the absence of active steps by the defendant and verbal agreement between the two parties will result in a finding that there was no consent. In all the other British-colonised PICs, the discriminatory external factors that have been utilised historically in common law jurisdictions, such as a failure to physically resist or going willingly with the accused, can be identified in the case law. Many PICs have followed the statement that 'as a matter of common sense and reasonable inference if no force was used then it follows that there was no resistance, and if there was no resistance then that there was consent.'[109] For example, in a recent rape trial in Tonga, the Supreme Court held that there was little evidence of any resistance and since the victim accepted a ride home with the accused she 'encouraged him by refusing to go home with her husband and then going with the accused in an encounter involving familiarity and no doubt a sexually charged atmosphere.'[110] However, in Vanuatu, indicating some recent progress in this regard, the judge in a rape trial noted that '[t]he fact that a woman does not physically resist or ceases to resist does not mean that she has consented.'[111] However, a legislative free agreement provision such as that adopted in PNG is required to ensure that this approach is taken consistently throughout the region.

Whilst the British-colonised countries (other than PNG) have read in a requirement for force in order to establish a lack of consent, the state of Yap (in the FSM), the Marshall Islands and American Samoa explicitly require force (or the use of a dangerous weapon) for the most serious — penetrative — offences to satisfy the actus reus element; only the lesser offences can be satisfied without the presence of force. The focus on force in the Marshall Islands, American Samoa and Yap is consistent with the reforms in the US in the 1970s.[112] Many US states replaced the consent requirement with a requirement for force or coercion, with the aim of shifting the investigation focus from the victim to the actions of the perpetrator[113] and to reflect a feminist perspective that non-

106 *Criminal Code Act 1974* (PNG) sch 1 s 347A(1).

107 *Criminal Code Act 1974* (PNG) sch 1 s 347A(3)(a)

108 *Criminal Code Act 1974* (PNG) sch 1 s 347A(3)(b).

109 *State v Birch* [1978] PNGLR 79, 89 (Greville Smith J) (National Court of Justice), explaining *R v Bourke* [1915] VLR 289, 296 (Hood J).

110 *R v Tu'ivailala* [2007] TOSC 24 (Unreported, Supreme Court of Tonga, CR 66 of 2007, Andrew J, 29 October 2007) 3.

111 *Public Prosecutor v Olul* [2008] VUSC 53 (Unreported, Supreme Court of Vanuatu, CC 4 of 2008, Tuohy J, 11 July 2008) [6].

112 See generally Merry Morash, *Understanding Gender, Crime, and Justice* (2006) 36.

113 The so-called 'Michigan model' (*Criminal Sexual Conduct Act 1974*, Mich Comp Laws §§ 750.520a–750.520l (1974)) was introduced into a number of US states in the 1970s and aimed

consensual sexual relations are a form of violence of themselves. However, these reforms, now reflected in the US-colonised PICs, have the effect of further entrenching the view that 'real rape' is when a stranger jumps from behind a bush in the dark to forcibly attack his victim[114] rather than acknowledging the statistical worldwide reality that most sexual violations occur in situations of coercion and other non-violent contexts.[115]

2 *Non-Exhaustive List of Lack of Consent Circumstances*

All PICs reviewed have included situations in which lack of consent is presumed. Whilst the inclusion of such a statutory list is in accord with good practice, in the British-colonised countries — the Cook Islands, Fiji, Kiribati, Nauru, Niue, Samoa, the Solomon Islands, Tokelau, Tuvalu and Vanuatu — the list is narrow, exhaustive and predicated on the (outdated and insufficient) English common law maxim of 'force, fear or fraud'.[116] All accordingly include the following situations in which consent cannot be present, namely: if there is force or threats or intimidation of any kind; if the victim is in fear of bodily harm; or if the perpetrator uses false representations as to the nature of the act or impersonates a married woman's husband.[117] The Cook Islands and Samoa additionally include the situation where consent is extorted by fear, on reasonable grounds, that refusal would result in death or grievous bodily harm to a third person.[118] Tonga, following the British-colonised countries, has included the same components described above along with two additional circumstances, namely, awareness that the victim is in a state of insensibility due to sleep, intoxication or any other cause and awareness that the victim is mentally unable to give consent.[119] These are positive additions, although in both instances the prosecution must establish that the perpetrator was aware of the circumstances;[120] the provisions do not impose a strict liability standard and place an obligation on the perpetrator to ascertain that the circumstances are not present. In the US territory of American Samoa, for offences where consent is an element, no situations are listed,[121] whilst in the Marshall Islands for those

to reduce focus on the circumstances in which sexual penetration took place and to minimise the significance of the role of consent in rape trials on the basis that rape is primarily a crime of violence: see ibid 36–7; Catherine McNamee, 'Rape' in Rita J Simon (ed), *A Comparative Perspective on Major Social Problems* (2001) 1, 7–8.

114 Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (2001) 24.

115 See above n 40 and accompanying text.

116 See *DPP (UK) v Morgan* [1976] AC 182, 210 (Lord Hailsham), citing T R Fitzwalter Butler and Stephen Mitchell, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (38th ed, 1973) [2871].

117 *Crimes Act 1969* (Cook Islands) s 141; *Penal Code 1944* (Fiji) cap 17, s 149; *Penal Code 1965* (Kiribati) cap 67, s 128 (1977 rev ed); *Queensland Criminal Code* s 347, adopted by *Laws Repeal and Adopting Ordinance 1922* (Nauru) s 13; *Niue Act 1966* (Niue) s 162, applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2; *Crimes Ordinance 1961* (Samoa) s 47(1); *Penal Code 1963* (Solomon Islands) cap 26, s 136 (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 128 (1978 rev ed); *Penal Code 1981* (Vanuatu) cap 135, s 90 (1988 rev ed).

118 *Crimes Act 1969* (Cook Islands) s 141(c); *Crimes Ordinance 1961* (Samoa) s 47(1)(c).

119 *Criminal Offences Act 1924* (Tonga) cap 18, ss 118(1)(b), (c) (1988 rev ed).

120 *Criminal Offences Act 1924* (Tonga) cap 18, s 118(4) (1988 rev ed).

121 See, eg, American Samoa Code Annotated § 46.3604 (2007).

offences where consent is an element only in situations where there is a 'threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss' is lack of consent established.[122] In the FSM, the only situation included in the legislation is where the offender knows or should know that the other person is mentally or physically incapable of resisting or understanding the nature of the offender's conduct.[123] In contrast to all the other PICs reviewed, PNG contains a strict liability, non-exhaustive, good practice list of circumstances where consent cannot be found.[124] PNG is therefore the only PIC of the 15 reviewed that meets the good practice standards identified in Part II in relation to the actus reus requirement.

3 *Mens Rea and the Defence of Honest Mistaken Belief*

The content of the mens rea component of the consent element, which requires that the defendant is either aware of the lack of consent or is wilfully blind to its absence, and whether it is to be determined objectively (on the basis of the reasonable person) or subjectively (requiring proof of actual awareness on the part of the defendant), is not explicitly articulated in any of the British-colonised PICs or in American Samoa. However, all have adopted a subjective approach in practice. In Tonga, the requirements articulated in the legislation impose a subjective standard, requiring the prosecution to establish that the accused either knows the victim does not consent to sexual relations or is reckless as to consent.[125] In the US-colonised countries of the FSM and the Marshall Islands the standard is explicitly subjective. The FSM requires actual knowledge[126] whilst the Marshall Islands requires the prosecution to establish that the accused knowingly used force (for a first-degree offence)[127] or knowingly proceeded without consent (for second-, third- or fourth-degree offences).[128] Only for a third-degree offence is a standard of recklessness sufficient to establish mens rea.[129] Tonga is the only PIC to explicitly provide a defendant with a defence of mistaken belief of consent; however, the legislation requires the jury to consider

122 *Criminal Code*, 31 Marshall Islands Revised Code § 151(2) (2004).

123 12 Chuuk State Code § 2053(1) (2001 draft); Kosrae State Code § 13.311 (1997); 61 Pohnpei State Code § 5-141(1) (2006); 11 Yap State Code § 205 (2000).

124 The circumstances include where the person submits because of force administered to them or another person, because of threats, because of the fear of harm to themselves or another person and because the person is unlawfully detained, where the person is asleep, unconscious or affected by drugs or alcohol, where the person is incapable of understanding the nature of the act, where the person is mistaken about the sexual nature of the act or identity of the perpetrator or mistakenly believes the act is for medical or hygienic reasons, where the accused abuses a position of trust, power or authority, where the person having consented to the sexual activity expresses by words or conduct a lack of agreement to continue or where the agreement is expressed by the words or conduct of another person: *Criminal Code Act 1974* (PNG) sch 1 s 347A(2), as amended by *Criminal Code (Sexual Offences and Crimes against Children) Act 2002* (PNG) s 1.

125 *Criminal Offences Act 1924* (Tonga) cap 18, s 118(3) (1988 rev ed).

126 12 Chuuk State Code § 2053(1) (2001 draft); Kosrae State Code § 13.311 (1997); 61 Pohnpei State Code § 5-141(1) (2006); 11 Yap State Code § 205 (2000).

127 *Criminal Code*, 31 Marshall Islands Revised Code § 152(A)(1)(a) (2004); see also § 151(14).

128 *Criminal Code*, 31 Marshall Islands Revised Code §§ 152(B)(1)(a), (C)(1)(a), (D)(1)(a) (2004); see also § 151(2).

129 *Criminal Code*, 31 Marshall Islands Revised Code § 152(C)(1)(a) (2004).

the presence or absence of reasonable grounds for this belief, introducing in part an objective standard of reasonableness.[130] Although Tonga is the only country of the 15 PICs to legislatively provide a defence of mistaken belief, regional case law suggests that the defence of honest but mistaken belief of consent *is* available to defendants.[131] In PNG, in yet another good practice example for the region, the mens rea element is clearly and explicitly articulated. The defence of honest and reasonable belief is not available if the defendant's belief arose from self-induced intoxication, recklessness or wilful blindness, or where 'the accused did not take reasonable steps, in the circumstances known to him at that time, to ascertain whether the person was consenting.'[132]

C *Inclusion of Designated Child Sexual Offences*

Sexual offences against children where consent is not an element of the offence (often termed 'statutory rape') provide important protection for children. However, PNG is the only PIC to meet the good practice standards described above in Part II. All the PICs in this article, except Nauru, have separate provisions for sexual offences against girls and, in the cases of the US-colonised countries and PNG, boys. All the British-colonised countries, with the exception of PNG, mirror the adult offences and their limitations described above. Sexual offences against girls in these countries, therefore, are generally divided into a restrictive rape provision and an indecent assault provision.[133] Additionally, all differentiate on the basis of age with more serious penalties for offences against younger girls than older girls.[134] Although many contemporary sexual offences

130 *Criminal Offences Act 1924* (Tonga) cap 18, s 118(4) (1988 rev ed).

131 See, eg, *Public Prosecutor v Olul* [2008] VUSC 53 (Unreported, Supreme Court of Vanuatu, CC 4 of 2008, Tuohy J, 11 July 2008) [7].

132 *Criminal Code Act 1974* (PNG) sch 1 s 347B.

133 Fiji has a single indecent assault category for girls under 16 with a maximum penalty of five years' imprisonment: *Penal Code 1944* (Fiji) cap 17, ss 154(1)–(2). Kiribati, the Solomon Islands and Tuvalu have a single indecent assault category for girls under 15 with a maximum penalty of five years' imprisonment: *Penal Code 1965* (Kiribati) cap 67, ss 133(1)–(2) (1977 rev ed); *Penal Code 1963* (Solomon Islands) cap 26, ss 141(1)–(2) (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, ss 133(1)–(2) (1978 rev ed). Vanuatu has a single indecent assault category for girls under 13 with a penalty of 10 years' imprisonment (*Penal Code 1981* (Vanuatu) cap 135, s 98(1) (1988 rev ed)), while Niue and Tokelau have a single indecent assault category for girls under 12 years with a maximum penalty of 10 years' imprisonment (*Niue Act 1966* (Niue) s 163, applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2). The Cook Islands has an indecent assault offence for girls under 12 years with a maximum penalty of 10 years' imprisonment and another for girls between 12 and 16 years with a maximum penalty of 7 years' imprisonment: *Crimes Act 1969* (Cook Islands) ss 146–7. Samoa, although having separate offences for girls under 12 years and girls between 12 and 16 years, has the same maximum penalty of 7 years' imprisonment for both: *Crimes Ordinance 1961* (Samoa) ss 52–3. Tonga has an indecent assault offence for girls under 16 with a maximum penalty of 2 years' imprisonment and another for girls under 12 with a maximum penalty of 5 years' imprisonment: *Criminal Offences Act 1924* (Tonga) cap 18, ss 124(1)–(2), 125(1) (1988 rev ed).

134 The maximum penalties for penile–vaginal penetration (termed 'defilement' and 'carnal knowledge' in most jurisdictions) of a girl under 13 (under 12 in Niue, Tokelau, Tonga and Samoa) range from life imprisonment in Fiji, Kiribati, the Solomon Islands, Tonga and Tuvalu (*Penal Code 1944* (Fiji) cap 17, s 155(1); *Penal Code 1965* (Kiribati) cap 67, s 134(1) (1977 rev ed); *Penal Code 1963* (Solomon Islands) cap 26, s 142(1) (1997 rev ed); *Criminal Offences Act 1924* (Tonga) cap 18, s 121 (1988 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 134(1) (1978

provisions do differentiate on the basis of age, the PICs described here present a series of inconsistent regimes where penalties, in some instances, do not differ between the penetrative and non-penetrative offences and in other instances provide protection for particular age groups for penetrative offences but not non-penetrative offences or vice versa. Additionally, with three very limited exceptions, none of the PICs recognise aggravating or situational factors. The Cook Islands, Samoa and Vanuatu criminalise having or attempting to have sexual intercourse with a girl under 21 (under 20 years in Vanuatu) who is living with him as a member of his family and is under his care or protection. Whilst consent is not a defence and the penalties are reasonably serious,[135] the breadth of the provisions is narrow. There is no recognition of other potential breaches of trust by persons such as teachers, priests, caregivers or other family relatives who have no distinct caregiving role but nevertheless are trusted by the child. In Fiji, Kiribati, the Solomon Islands and Tuvalu the accused is additionally provided with a defence of honest belief that the girl was aged 15 or above (16 or above in Fiji).[136] Although these four countries adopt an objective standard of reasonableness, such a defence is out of step with contemporary requirements for participants in sexual relations to actively ascertain consent, and indeed three countries — the Cook Islands, Samoa and Vanuatu — expressly prohibit the defence of a reasonable honest belief of age.[137] Additionally, in Fiji, Kiribati, Samoa, the Solomon Islands and Tuvalu, prosecution of offences against older girls is restricted to being within 12 months after the commission of the offence.[138] The inclusion of a statutory 'recent complaint' provision implies that sexual assault victims are unreliable and untrustworthy and has been roundly discredited in the literature.[139] Finally, only Samoa provides an exception on the

rev ed)) to 10 years' imprisonment in Niue, Tokelau and Samoa (*Niue Act 1966* (Niue) s 163(1), applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2; *Crimes Ordinance 1961* (Samoa) s 51(1)). The penile penetration of a girl aged between 13 and 16 in Fiji attracts a maximum penalty of five years' imprisonment (*Penal Code 1944* (Fiji) cap 17, s 156(1)), while that of a girl aged between 13 and 15 in Vanuatu also attracts a maximum penalty of five years' imprisonment (*Penal Code 1981* (Vanuatu) cap 135, s 97(2) (1988 rev ed)). The penile penetration of a girl aged between 12 and 16 in the Cook Islands and Samoa attracts a maximum penalty of seven years' imprisonment: *Crimes Act 1969* (Cook Islands) s 147(1); *Crimes Ordinance 1961* (Samoa) s 53(1). In Niue and Tokelau, the penile penetration of a girl aged between 12 and 15 attracts a maximum penalty of only three years' imprisonment: *Niue Act 1966* (Niue) s 164(1), applying also to Tokelau through *Crimes Regulations 1975* (Tokelau) reg 2.

135 The maximum penalty is 7 years' imprisonment in the Cook Islands and Samoa and 10 years' imprisonment in Vanuatu: *Crimes Act 1969* (Cook Islands) s 144; *Crimes Ordinance 1961* (Samoa) s 50; *Penal Code 1981* (Vanuatu) cap 135, s 96 (1988 rev ed).

136 *Penal Code 1944* (Fiji) cap 17, s 156(1); *Penal Code 1965* (Kiribati) cap 67, s 135(1) (1977 rev ed); *Penal Code 1963* (Solomon Islands) cap 26, s 143(1) (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 135(1) (1978 rev ed).

137 *Crimes Act 1969* (Cook Islands) s 147(5); *Crimes Ordinance 1961* (Samoa) s 53(5); *Penal Code 1981* (Vanuatu) cap 135, s 97(3) (1988 rev ed).

138 *Penal Code 1944* (Fiji) cap 17, s 156(2); *Penal Code 1965* (Kiribati) cap 67, s 135(2) (1977 rev ed); *Crimes Ordinance 1961* (Samoa) s 53(7); *Penal Code 1963* (Solomon Islands) cap 26, s 143(2) (1997 rev ed); *Penal Code 1965* (Tuvalu) cap 8, s 135(2) (1978 rev ed).

139 See Simon Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 41, 43. For an overview of the reasons why victims may delay

basis of consenting minors. In relation to a girl between 12 and 16, it is a defence if the accused was younger than the girl and the girl consented.[140] This is an arbitrary and limited exception since the male minor must be younger than the girl and it applies only to sexual intercourse (not to any other form of sexual contact); it is not, therefore, grounded in any of the good practice principles described previously.

The three US-colonised countries have a number of similar features. The states of the FSM each have a single child sexual offence criminalising sexual contact with a child (boy or girl) aged under 13 (under 15 in Pohnpei).[141] The weaknesses of the framework can be identified as follows. First, whilst it extends to both girls and boys, only children under 13 are protected, whereas this article recommends protection for children until the age of 18. Secondly, there are no situational or aggravating factors included or acknowledged. Thirdly, the model does not separate penetrative and non-penetrative offences and, whilst this is an acceptable good practice approach provided that the penalties are sufficient to incorporate both serious and less serious sexual violations against children, the penalties in this model are not severe. Fourthly, the failure to provide any guiding principles in relation to sentencing heightens the likelihood of low penalties. Finally, the use of a fine is an inappropriate penalty for sexual violations against children.

The Marshall Islands has three sexual offences in relation to children under 16, including a penetrative offence, a non-penetrative offence[142] and a third offence for the persistent sexual assault of a minor under 16, which requires either that the victim lives in the home of the offender or that the offender has recurring access to the victim — persistence requires three or more acts of any offence, whether penetrative or non-penetrative.[143] American Samoa has two penetrative and two non-penetrative offences in relation to children under 16[144] and a fifth

disclosure, see Anne Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence' (2002) 9 *Psychiatry, Psychology and the Law* 163, 169.

140 *Crimes Ordinance 1961* (Samoa) s 53(3).

141 12 Chuuk State Code § 2054(1) (2001 draft); Kosrae State Code § 13.312 (1997); 61 Pohnpei State Code § 5-142(1) (2006); 11 Yap State Code § 206(a) (2000). The maximum penalty ranges from 5 years' imprisonment and/or a US$5000 fine in Chuuk to 10 years' imprisonment and/or a US$20 000 fine in Kosrae: 12 Chuuk State Code § 2054(3) (2001 draft); Kosrae State Code §§ 13.312, 13.1201 (1997).

142 In the Marshall Islands, sexual penetration attracts a maximum penalty of 25 years' imprisonment whilst sexual contact attracts a maximum penalty of 5 years' imprisonment: *Criminal Code*, 31 Marshall Islands Revised Code §§ 152(A)(1)(b), (A)(3), (C)(1)(b), (C)(3) (2004).

143 The penalty is a maximum of 25 years' imprisonment: *Criminal Code*, 31 Marshall Islands Revised Code §§ 152(E)(1), (3) (2004).

144 The first penetrative offence is rape, which attracts a penalty of 5 to 15 years' imprisonment unless there is serious physical injury or a deadly weapon, which increases the penalty to between 10 and 30 years' imprisonment: American Samoa Code Annotated §§ 46.2301, 46.3604 (2007). The second penetrative offence is sexual assault, which attracts a penalty of up to 7 years' imprisonment unless there is serious physical injury or a deadly weapon, which increases the penalty to between 5 and 15 years' imprisonment: §§ 46.2301, 46.3610. The first non-penetrative offence is deviate sexual assault, which means any sexual contact of the genitals (but not objects) upon the genitals, anus, mouth or hand of the other person, attracting a penalty of up to 7 years' imprisonment unless there is a serious physical injury or use of a deadly weapon, which increases the penalty to between 5 and 15 years' imprisonment: §§ 46.2301, 46.3601,

offence which applies to children under 12 and includes penile–vaginal penetration or any form of sexual act which involves the genitals of one person and the anus, mouth, tongue or hand of another.[145] The legislation explicitly provides that, where the 'criminality of conduct depends upon a child's being under the age of 14, it is no defense that the defendant believed the child to be 14 years old or older',[146] which does not preclude an accused relying on a defence that he believed the child to be 16, if the child is in fact 15. The weaknesses and strengths of the two frameworks can be identified as follows. First, they protect children until the age of 16, which, although below the *CRC*-recommended age of 18, still provides much stronger protection than in the British-colonised PICs. Secondly, as discussed in relation to the general provisions of these two countries, situational or aggravating factors are limited to serious physical injury and the use of deadly weapons and in the Marshall Islands to a single, somewhat restricted offence of persistent sexual abuse. This does not resonate with the context of most child sexual abuse, which often involves coercion or 'grooming' rather than physical force.[147] Finally, in the Marshall Islands the difference in penalty between the penetrative and non-penetrative offence is stark and unjustified; American Samoa, however, has adopted a much more integrated approach to penalties.

PNG has followed the approach adopted in many contemporary reforms to child sexual offences (as described above in Part II). Offences, which apply equally to girls and boys, are differentiated on the basis of the age of the child. The sexual (penile and non-penile) penetration of a child under 12[148] is differentiated from the sexual penetration of child under 16.[149] Although this article does not advocate for a differentiation of penalty based on the age of the child, the penalties for both offences are very serious. Additionally, all offences against children under 16 attract the increased maximum penalty of life imprisonment if there is an existing relationship of trust or dependency,[150] which is an important recognition of relevant aggravating factors. Moreover, the addition of two other contextual offences results in a comprehensive package of child sexual offences. First, there is an offence for the sexual penetration or

46.3612. The second non-penetrative offence is sexual abuse, which attracts a penalty of up to 5 years' imprisonment unless there is serious physical harm or a deadly weapon is used, which increases the penalty to up to 7 years' imprisonment: §§ 46.2301, 46.3615. There is an additional offence of sodomy, which is defined as 'deviate sexual intercourse' and involves the same act as deviate sexual assault (and also does not require penetration); it attracts a penalty of 5 to 15 years' imprisonment unless there is serious physical injury or a deadly weapon, which increases the penalty to between 10 and 30 years' imprisonment: §§ 46.2301, 46.3601(a), 46.3611. This offence provides the prosecution with an alternative, more serious offence for the same act against a person under 16.

145 The offence attracts a penalty of 10 to 30 years' imprisonment: American Samoa Code Annotated §§ 46.2301, 46.3601, 46.3618 (2007).

146 American Samoa Code Annotated § 46.3603 (2007).

147 See above n 59 and accompanying text.

148 This offence attracts a maximum penalty of life imprisonment: *Criminal Code Act 1974* (PNG) sch 1 s 229A(2).

149 This offence attracts a maximum penalty of 25 years' imprisonment: *Criminal Code Act 1974* (PNG) sch 1 s 229A(1).

150 *Criminal Code Act 1974* (PNG) sch 1 s 229A(3).

sexual touching of a child between the ages of 16 and 18 where there is an existing relationship of trust, authority or dependence[151] and, secondly, there is an offence for the persistent abuse of a child, defined as two or more offences on different days.[152] An accused can, however, rely on a defence of an honest and reasonable belief that the child was 18 years or older for the first offence without any requirement to take active steps to ascertain the age of the child.[153]

IV REFORMING PACIFIC FRAMEWORKS: THE WAY FORWARD

A *Importance of a State Response to Sexual Assault in the Pacific Region*

Despite a dearth of recent research into the incidence of sexual assault in PICs, it is generally acknowledged in the region that sexual violations against women and children are widespread and pervasive.[154] Government reports to the various treaty body reporting committees have also acknowledged the extent of sexual violations[155] and Pacific leaders at the recent Fortieth Pacific Islands Forum acknowledged the prevalence of sexual assault in the Pacific and 'the risk that it poses to human security and as a potential de-stabilising factor for communities and societies alike'.[156] Available statistics and reports uniformly support the prevalence of sexual assault in the region. In Samoa, a World Health Organization survey found 46 per cent of women aged between 15 and 49 had experienced physical or sexual assault perpetrated by their partners, whilst 35 per cent of women who first had sex under the age of 15 said it was forced.[157] The same study also indicated that the majority of Samoan women believed a woman did not have the right to refuse sex with her husband if she did not want it.[158] In Fiji, research has indicated that 47.9 per cent of married women are forced to

151 This offence attracts a maximum penalty of 15 years' imprisonment: *Criminal Code Act 1974* (PNG) sch 1 s 229E(1).

152 This offence attracts a maximum penalty of 15 years' imprisonment; however, if one or more occasions involved penetration, then the maximum penalty is life imprisonment: *Criminal Code Act 1974* (PNG) sch 1 s 229D(1); see also sub-s (5)(a).

153 *Criminal Code Act 1974* (PNG) sch 1 s 229E(2); but see s 229F.

154 See above n 1.

155 See CEDAW Committee, *Consideration of Reports Submitted by States Parties under Article 18 of the* Convention on the Elimination of All Forms of Discrimination against Women*: Combined Initial, Second and Third Periodic Reports of States Parties — Vanuatu*, 27–9, UN Doc CEDAW/C/VUT/1-3 (2005). See also PNG's initial report to the United Nations Committee on the Rights of the Child in 2003, which states that '[r]ape, sexual assault and harassment, indecent assault, rape [sic], carnal knowledge, incest and sodomy where children are the victims are common occurrences in contemporary Papua New Guinean society': Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the* Convention*: Initial Reports of States Parties Due in 2000 — Papua New Guinea*, 99, UN Doc CRC/C/28/Add.20 (2003).

156 Fortieth Pacific Islands Forum, *Forum Communiqué* (5–6 August 2009) [64] <http://www.forumsec.org.fj/pages.cfm/newsroom/press-statements/2009/final-communique-of-40th-pacific-islands-forum-cairns.html>.

157 Claudia Garcia-Moreno et al, *WHO Multi-Country Study on Women's Health and Domestic Violence against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses* (2005) 19, 28, 52.

158 Ibid 40.

have sex with their husbands.[159] In a March 2004 study of the civil conflict that occurred in the Solomon Islands between 1998 and 2003, 75 per cent of women interviewed stated that they had 'suffered direct personal trauma', including rape.[160] Gang rapes have been reported as common in the Solomon Islands[161] and PNG.[162]

Sexual assault violates the autonomy, physical integrity and dignity of the victim and denies her control over an important area of life. It also has devastating and extensive effects on victims, families and communities. Adult victims typically experience psychological and emotional effects,[163] such as anxiety, low self-esteem,[164] self-blame, guilt, shock, self-harm, suicidal ideation,[165] depression,[166] substance abuse disorders and post-traumatic stress disorders.[167] Physical effects include chronic diseases, headaches, eating disorders and gynaecological symptoms.[168] As well as the psychological and physical effects on the victim, there is often significant social impact. This can include an inability to relate to intimate partners, friends and family and the disruption of a victim's leisure activities and community life.[169] The fear of rape, for example, may restrict women's participation and presence in the public sphere, binding them more closely to the home despite the statistical reality that

159 Fiji Women's Crisis Centre, 'International Womens Day' (Press Release, 2002), cited in UNIFEM, *Actions to End Violence against Women — A Regional Scan of the Pacific* (2003) <http://pacific.unifem.org/index.php?cat=10>.

160 Pacific Islands Forum Secretariat, *Social Impact Assessment of Peace Restoration Initiatives in Solomon Islands* (2004) 35.

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

162 Research indicates that gang rape, known as 'line-up sex', is a common practice in PNG: see Amnesty International, above n 5, 16 fn 40.

163 See generally Zoë Morrison, Antonia Quadara and Cameron Boyd, '"Ripple Effects" of Sexual Assault' (Issues No 7, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, June 2007) 2; Joseph H Beitchman et al, 'A Review of the Long-Term Effects of Child Sexual Abuse' (1992) 16 *Child Abuse and Neglect* 101.

164 See Sarah E Romans, Judith L Martin and Paul E Mullen, 'Women's Self-Esteem: A Community Study of Women Who Report and Do Not Report Childhood Sexual Abuse' (1996) 169 *British Journal of Psychiatry* 696.

165 Sarah E Ullman and Cynthia J Najdowski, 'Correlates of Serious Suicidal Ideation and Attempts in Female Adult Sexual Assault Survivors' (2009) 39 *Suicide and Life-Threatening Behavior* 47.

166 Bizu Gelaye et al, 'Depressive Symptoms among Female College Students Experiencing Gender-Based Violence in Awassa, Ethiopia' (2009) 24 *Journal of Interpersonal Violence* 464.

167 Morrison, Quadara and Boyd, above n 163, 1; Rebecca Campbell, 'The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems' (2008) 63 *American Psychologist* 702, 703. See also David M Fergusson, Michael T Lynskey and L John Horwood, 'Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood: Prevalence of Sexual Abuse and Factors Associated with Sexual Abuse' (Pt I) (1996) 35 *Journal of the American Academy of Child and Adolescent Psychiatry* 1355.

168 Morrison, Quadara and Boyd, above n 163, 2; Jenifer E Allsworth et al, 'Physical and Sexual Violence and Incident Sexually Transmitted Infections' (2009) 18 *Journal of Women's Health* 529.

169 Morrison, Quadara and Boyd, above n 163, 2; Andy Myhill and Jonathan Allen, 'Rape and Sexual Assault of Women: The Extent and Nature of the Problem — Findings from the British Crime Survey' (Research Study No 237, Home Office Research, Development and Statistics Directorate, March 2002) 42. See generally Kimberly A Tyler, 'Social and Emotional Outcomes of Childhood Sexual Abuse: A Review of Recent Research' (2002) 7 *Aggression and Violent Behavior* 567.

this location is in fact more dangerous.[170] As well as having physical, psychological and social impact on victims, sexual assault may result in significant financial costs, including loss of earnings, medical expenses and counselling costs.[171]

Child victims of sexual assault may suffer additional effects. These can include difficulties at school, namely, poor academic performance and disruptive behaviour due to a lack of concentration, truancy, fatigue and anxiety, along with a host of other abuse-related responses.[172] Consequently, child victims are more likely to go on to have work histories as adults that place them in the lowest socioeconomic status categories and likely to be unemployed.[173] Research also suggests that child sexual abuse is associated with poor sexual adjustment in adult life and that, as adults, child victims are more likely to experience general instability in their close relationships[174] and be at an increased risk of rape and domestic violence victimisation.[175] As well as the profound effects of sexual assault on the victims themselves, there are also negative effects on family and community life, including the strain on and financial costs to health services, police, courts, prisons, welfare services and mental health services.[176] The incidence and impact of sexual violations against women and children in the Pacific region cannot therefore be underestimated and comprehensive strategies to respond to its incidence are critical.

B *Relevance of Criminal Law Reform in the Pacific*

There are three internationally recognised components to an effective state response to sexual assault. First, preventative measures such as education initiatives in a variety of contexts including schools and media[177] and the establishment of mechanisms to collect sex-disaggregated data in relation to the 'extent, causes and effects of violence, and on the effectiveness of measures to

170 See Morrison, Quadara and Boyd, above n 163, 22.

171 Ibid 2, 23.

172 See Isabelle V Daignault and Martine Hébert, 'Profiles of School Adaptation: Social, Behavioral and Academic Functioning in Sexually Abused Girls' (2009) 33 *Child Abuse and Neglect* 102.

173 See Elizabeth A Schilling, Robert H Aseltine Jr and Susan Gore, 'Young Women's Social and Occupational Development and Mental Health in the Aftermath of Child Sexual Abuse' (2007) 40 *American Journal of Community Psychology* 109, 118–20.

174 Natacha Godbout, Stéphane Sabourin and Yvan Lussier, 'Child Sexual Abuse and Adult Romantic Adjustment: Comparison of Single- and Multiple-Indicator Measures' (2009) 24 *Journal of Interpersonal Violence* 693, 701.

175 Jillian Fleming et al, 'The Long-Term Impact of Childhood Sexual Abuse in Australian Women' (1999) 23 *Child Abuse and Neglect* 145, 154; Heather Y Swanston et al, 'Nine Years after Child Sexual Abuse' (2003) 27 *Child Abuse and Neglect* 967, 978.

176 See Morrison, Quadara and Boyd, above n 163, 6, 23–6.

177 *Report of the Fourth World Conference on Women: Beijing, 4–15 September 1995*, 51–3, UN Doc A/CONF.177/20/Rev.1 (1995), endorsed in *Follow-Up to the Fourth World Conference on Women and Full Implementation of the Beijing Declaration and the Platform for Action*, GA Res 50/203, UN GAOR, 50th sess, 99th plen mtg, Agenda Item 165, Supp No 49, paras 1–3, UN Doc A/RES/50/203 (1996). For a discussion of the use of education to prevent child sexual abuse see, David Finkelhor, 'The Prevention of Childhood Sexual Abuse' (2009) 19 *Future of Children* 169.

prevent and deal with violence';[178] secondly, protective measures for victims, such as the establishment of counselling services, crisis centres and legal aid services, and compensation for victims;[179] and finally, appropriate legal mechanisms to facilitate the prosecution and punishment of perpetrators.[180] All three components are critical aspects of an effective state response to sexual assault; however, it is the establishment of a good practice model of sexual offences in criminal law frameworks that is the focus of this article. Other important aspects of the prosecution process include non-discriminatory evidentiary procedures, sympathetic courtroom procedures (such as the availability of video facilities for the giving of evidence), and the training of police and court personnel. Although these are important aspects of ensuring the effective prosecution of offenders, they are beyond the scope of this article.

The limitations of criminal law to engender the successful prosecution and conviction of offenders are well documented in the literature. In jurisdictions where good practice models have been introduced, there have not been appreciable decreases in the incidence of sexual assault or even significant increases in prosecution and conviction rates.[181] Expert commentators have argued that prevalent stereotypes about rape, which involve derogatory beliefs about rape victims and their credibility, dominate each stage of the criminal process, hindering prosecution and conviction even in the presence of a good practice sexual offences framework.[182] The purchase of such stereotypes is evident in the criminal processes in the Pacific, where research has indicated that women and children are reluctant to report offences to the police for fear that they will not be believed and that their communities will not support their complaint,[183] that there are high dismissal rates of complaints by police and prosecutors[184] and that there is widespread use of reconciliation proceedings between the perpetrator and the victim to replace criminal proceedings in many Pacific Island communities.[185] Many commentators argue, however, that the

178 *Report of the Committee on the Elimination of Discrimination against Women: Eleventh Session*, UN GAOR, 47th sess, Supp No 38, 1, 4, UN Doc A/47/38 (1992) ('*General Recommendation No 19: Violence against Women*'). See also *Report of the Committee on the Elimination of Discrimination against Women: Eighth Session*, UN GAOR, 44th sess, Supp No 38, 75, UN Doc A/44/38 (1989) ('*General Recommendation No 12: Violence against Women*').

179 *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN GAOR, 61st sess, 76–7, UN Doc A/61/122/Add.1 (2006).

180 See Coomaraswamy, above n 72, 10.

181 See also Barbara Sullivan, 'Rape, Prostitution and Consent' (2007) 40 *Australian and New Zealand Journal of Criminology* 127, 132; Rebecca Campbell et al, 'Predicting Sexual Assault Prosecution Outcomes: The Role of Medical Forensic Evidence Collected by Sexual Assault Nurse Examiners' (2009) 36 *Criminal Justice and Behaviour* 712, 713.

182 See Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) 10.

183 See Penny Schoeffel Meleisea and Ellie Meleisea, *The Elimination of All Forms of Discrimination and Violence against the Girl Child: Situation Paper for the Pacific Islands Region* (2006) 11.

184 Ibid.

185 *Good Practices in Legislation on Violence against Women: Report of the Expert Group Meeting* (2008) 7; Economic and Social Commission for Asia and the Pacific, *Pacific Perspectives on the Commercial Sexual Exploitation and Sexual Abuse of Children and Youth* (2009) 14, 79.

introduction of good practice models of sexual offences provisions plays an important role in dismantling those stereotypes by establishing appropriate normative standards for the community and legal actors.[186] In the Pacific Islands, the introduction of good practice sexual offences provisions would mark the 'seriousness' of sexual assault and at the same time articulate the contemporary value system that should govern sexual relations and the autonomy of women and girls in the region.[187]

C *Where to from Here?*

Most Pacific criminal legislation reflects the early to mid-20th century values and norms of the colonising powers and do not reflect the basic human rights principles that uphold the autonomy, dignity and physical integrity of girls and women. Moreover, they do not provide an effective framework to facilitate the prosecution of perpetrators of sexual violations against women and children. The history of colonisation in the Pacific region, which saw the widespread introduction of systemised legal frameworks based on the written legal systems of the major colonising powers (France, Britain and the US),[188] provides a partial explanation for the outdated and inadequate sexual offences frameworks in the Pacific region. The Imperial powers, although recognising local laws in many instances, introduced legislation into their colonies, territories and protectorates based on their own domestic legal frameworks. Although colonial expansion came to an end with the enactment of the United Nations *Declaration on the Granting of Independence to Colonial Countries and Peoples* in 1960,[189] which placed pressure on the colonial powers to establish independent Pacific Island states, most PICs opted to 'save' the law in force before independence.[190] This preserved pre-independence statute law, which could be repealed or amended only by the newly independent PIC and would not be altered by subsequent amendments in the original legislation of the colonising country.[191] Subsequently, recognition of the negative impact of gender-based violence coupled with an acknowledgement that outdated sexual offences provisions were not effectively facilitating the prosecution of offenders led to extensive law reform in many countries worldwide, including the former Imperial powers.

There have been unsuccessful attempts to introduce sexual offences law reform in the Pacific region in recent years, with the rejection of three draft bills

186 See Temkin and Krahé, above n 182, 161.

187 See generally Robyn Holder, 'Domestic and Family Violence: Criminal Justice Interventions' (Issues Paper 3, Australian Domestic and Family Violence Clearinghouse, 2001) 2; Debra Patterson, Megan Greeson and Rebecca Campbell, 'Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems' (2009) 34 *Health and Social Work* 127, 133.

188 See generally Michael A Ntumy, Jean G Zorn and C Guy Powles, 'Introduction', in Michael A Ntumy (ed), *South Pacific Islands Legal System* (1993) xvii, xviii.

189 GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Supp No 16, UN Doc A/4684 (1960).

190 Care, above n 81, 34.

191 Ibid 33–4.

(in the Fiji Islands,[192] in the Cook Islands[193] and a regional 'good practice model').[194] The Fiji draft Sexual Offences Bill was rejected on the basis that it was 'too "western", feminist, radical and clashed with so-called Pacific culture.'[195] However, the success of the PNG reforms and the rationale advanced by Dame Kidu when the Bill was presented to Parliament provide a strong basis for similar reform in the region. She argued: first, that the reforms created the opportunity to remove and replace the colonial origins of the previous law, which was not reflective of local culture and tradition; secondly, that the reforms enabled PNG to meet some of the international obligations created by ratification of *CEDAW* and the *CRC* and at the same time provided the opportunity to introduce a contemporary human rights approach to sexual violations against women and children; thirdly, that such an approach had already been integrated into the criminal legislation of Commonwealth countries, including the former colonisers, and that the reforms would provide PNG with an opportunity to join Commonwealth countries on an equal footing; and finally, that the reforms would acknowledge and reinforce the important role of Parliament in 'shaping the changing values of PNG' and 're-defining the limits of acceptable behaviour'.[196] Such arguments have broad applicability in the wider regional Pacific context. Coupled with a renewed emphasis in the region on the impact of, and the need to prevent, gender-based violence[197] and public commitment by some governments to reform sexual offences provisions,[198] they suggest that it may be timely to again emphasise the benefits of a comprehensive good practice model of sexual offences throughout the region.

V CONCLUSION

This article has examined the sexual offences provisions in 15 PICs and concluded that, whilst there are some notable examples of good practice, with the exception of PNG and to a lesser extent the Marshall Islands none meet the good practice standards set by international conventions and advocated by expert commentators. Importantly, this article has identified a range of benefits to the

192 Ratna Kapur, 'Draft Sexual Offenses Legislation' (Report, Fiji Women's Rights Movement, 25 May 1996) (on file with author). See Jalal, *Good Practices in Legislation on Violence against Women*, above n 34, 3 fn 7.

193 See *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cook Islands*, 39th sess, 5–6, UN Doc CEDAW/C/COK/CO/1 (2007). But see Gender and Development Division, Cook Islands Government, 'Response to the United Nations Questionnaire on the Implementation of the *Beijing Platform for Action* and the Outcome of the Twenty-Third Special Session of the General Assembly', Submission to United Nations Economic and Social Commission for Asia and the Pacific, *Questionnaire to Governments on Implementation of the* Beijing Declaration and Platform for Action *(1995) and the Outcome of the Twenty-Third Special Session of the General Assembly (2000)*, April 2009, 4.

194 Pacific Islands Forum Secretariat, *Sex Offences Model Provisions* (2005).

195 See Jalal, *Good Practices in Legislation on Violence against Women*, above n 34, 3.

196 PNG, *Hansard*, National Parliament, 11 October 2001, 30–2 (Dame Lady Kidu).

197 See above n 5.

198 Pacific Centre, United Nations Development Programme, 'Cook Islands Announces CEDAW Law Reform' (Media Release, 27 May 2008) <http://www.undppc.org.fj/pages.cfm/newsroom/press-releases/2008/cook-islands-announces-cedaw-law-reform.html>.

region in the establishment of good practice sexual offences provisions. These would include: first, the removal of the colonial origins of the current law, which is not reflective of local culture and tradition; secondly, enabling PICs to meet their international obligations created by ratification of *CEDAW* and the *CRC* and, at the same time, provide the opportunity to introduce a contemporary human rights approach to sexual violations against women and children; thirdly, clarifying confusion about the law, particularly in relation to the concept of consent; and fourthly, providing a strong public statement of the value system that should govern sexual relations and of the autonomy of women and girls. Additionally, the establishment of good practice sexual offences provisions would send a clear message that sexual intercourse must be by free agreement and that the person seeking consent has the responsibility to take steps to ascertain consent exists. Finally and importantly, the reforms in PNG provide a platform from which to argue for similar reform in the region. An active agenda of law reform is, however, necessary as it is unlikely that the judicial development of the common law will be sufficient to guide PICs to the good practice standards set in contemporary models of sexual offences and identified in this article. In the light of an increased emphasis in the region of the negative and far-reaching impact on gender-based violence on women and children and the greater community, it is timely to advocate for extensive reform of sexual offences throughout the region.