Legislative Review

Sexual Offences and Customary Reconciliation- Penal Code 05/14

STRETEM ROD BLONG JASTIS
VANUATU LAW AND JUSTICE PARTNERSHIP
Australian AID

VANUATU LAW COMMISSION

Penal Code:

Sexual Offences & Customary Reconciliation

LEGISLATIVE REVIEW

No. 05/14

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Foreword

The office of the Secretary undertook the review of the *Penal Code* [Cap 135] specifically the provisions that dealt or looked at sexual offences and the customary reconciliation. Vanuatu is one of the most culturally diverse countries in the world. Custom and tradition is one of the most important aspects of life as a Ni-Vanuatu. The importance of custom is recognized in Vanuatu's Constitution. Section 51 provides that parliament may pass laws to help identify rules of custom and allow people who are knowledgeable in custom to sit with judges in court. Additionally, Section 95 (3) states that custom law continues to have effect as part of the law of Vanuatu, and finally, Section 5 provides for the fundamental right of protection under the law meaning that no one may be convicted of an offence that was not known to custom or written law at the time it was committed.

Amongst the 83 islands of Vanuatu, there is a very well established custom for a wrongdoer to perform a formal reconciliation with the victim. The term reconciliation in its simplest custom sense means restoring harmony and peace between the members of the community who have been affected by the wrongdoing or dispute. Usually the restoration of peace and harmony requires a victim to accept words of remorse and regret, with valuable custom items such as mats, food, kava, pigs and money.

This practice is widespread and applies to all kinds of wrongdoings. Custom reconciliation ceremonies are usually performed as soon after the offence or wrong have been committed. Often, custom reconciliation ceremonies are ordered by chiefs to ensure the maintenance of law and order within the community.

Thus brings us to the most important part of the review, where we the review looked as certain aspects of the Penal Code and sought views from various islands in the different provinces within Vanuatu that were statistically affected by these offences. The questions that were asked were "*how should custom reconciliation be recognised by courts when judging criminal actions- especially sexual offences"* or the issue of *"equal and consistent sentencing", "protection of sex offenders" etc…*there were several more other

questions asked, but these were some of the fundamental ones that required general feedback from the general public in terms of what they thought should be changed in the Penal code to cater for these changing times.

The *Penal Code* has under gone a considerable change of some of its laws through amendments that were made in 2006, and these changes saw that custom had been given recognition to all forms of sexual assault as well as incest and other criminal behaviour where advantage is taken of young or disabled persons. So by carrying out this review to see if custom reconciliation should be given recognition in all sexual offence cases or should there only be certain cases that customary reconciliation be considered or allowed by the courts.

The other important matter that was raised during the consultations as to whether protection of defendants or accused of a sexual offence the protection accorded them is it sufficient or does the government body responsible need to provide more emphasis on this area to ensure the accused or defendants protection is secured.

The other important part of the review raised the question of the age of the victims, under Section 97A it is an offence of aggravated sexual intercourse with a child under the age of 15 years, this raises the question of whether this is being discriminatory against those persons who are over the age of 15 years. According to the Convention on the Rights of the Child (CRC) and the law of Vanuatu a child is every human being below the age of 18 years old. Article 2 of the Convention provides an international obligation for state parties of the convention to take all appropriate measures to protect every child against all forms of discrimination. Therefore this review looks at the age component within the *Penal Code* and questions as to whether this is in line with the CRC.

Moreover, you will find this review of the *Penal Code* regarding Sexual offences and Customary reconciliation will provide for an interesting read especially the findings from the consultations as these findings contain the views and opinions of the people of the Republic of Vanuatu and what they would like to see changed in the law to suit the current situation for Vanuatu.

It is with great pleasure that we present this report on the review of the *Penal Code* [Cap135], mainly on the provisions of sexual offences and custom reconciliations. The findings and recommendations are all contained in this report.

I would like to take this opportunity to thank the Ministry of Justice and Community Services and Stretem Rod Blong Jastis (AusAid) project without your support this would not have been possible as well as to the Government of Vanuatu for giving us this opportunity, and to all stakeholders and the people out in the communities.

Bertha Pakoasongi

Secretary of the Law Commission

Abbreviations

CAT	Convention Against Torture
CA-NSW	*Crime Act* of 1900, New South Wales
CA-NZ	*Crimes Act* of 1961, New Zealand
CAA-NZ	*Crimes Amendment Act* of 2005, New Zealand
CCA	*Criminal Code Act* of 1974, Papua New Guinea
CCA-NT	Criminal Court of Appeal, Northern Territory
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CLA	*Criminal Law (Compensation) Act* of 1991, Papua New Guinea
CLAA-SA	*Criminal Law Amendment Act* of 2007, South Africa
CRC	Convention on the Rights of a Child
FPA	*Family Protection Act* of 2008, Vanuatu
HIV	Human Immuno-deficiency Virus
LKA	*Laws of Kiribati Act* of 1989
PAA	Priority Action Agenda 2012-2016, Vanuatu
PC	*Penal Code* [Cap 135], Vanuatu
PCAA	*Penal Code Amendment Act* of 2006, Vanuatu
SOA	*Sexual Offence Act* of 2006, Kenya
STI	Sexual Transmitted Infections
VNGWEP	Vanuatu's National Gender and Women's Empowering Policy 2013-2023

Executive Summary

One of the functions of the Vanuatu Law Commission (VLC) is to study and keep under review the laws of Vanuatu. In 2013, the Law Commission decided upon its own initiative to review the *Penal Code* [Cap 135] specifically the provisions on the sexual offences and customary reconciliation. This was followed by a number of Human Rights workshops conducted in 2013 that was run by the Regional Rights Resource Team (RRRT). After consultation in the provinces, including community consultations on Efate, Aniwa, Tanna, Epi, Ambrym, Maewo, Ambae, Santo, Vanualava and Loh Island, the main message given to the VLC is that in sexual offence cases, the courts should not take into account customary compensation or reparation that is not freely and voluntarily accepted by the victim.

The VLC has taken into consideration Vanuatu's international obligations (as a member of the UN), having ratified the Convention on Elimination of all Forms of Discrimination against Women, Convention on the Rights of the Child and Convention against Torture.

The review found wide support for Section 38 and 39 of the Act to be amended so that in sexual offence cases the courts should only recognise and take into account custom reconciliation in any form of compensation or reparation if the victim voluntarily accepts the reconciliation. The VLC recommends that in sexual offences where victims do not freely and voluntarily accept the customary reconciliation, the courts must not promote customary reconciliation, and encourage, facilitate the settlement according to custom. It was also recommended that in sexual offence cases committed against a young victim under the age of 12 or a person with a physical or mental incapacity, the courts must also not recognise customary reconciliation.

Consultations also showed the people wanted the current Act to be changed so that the courts must exercise their discretion fairly when taking into account customary reconciliation in all sexual offence cases where the victim has agreed to a reconciliation ceremony. The VLC recommends that the *Penal Code* must provide a guideline as to how the courts should exercise their discretion in recognising customary reconciliation in all sexual offence cases where the victim accepts the reconciliation.

People across Vanuatu spoke of the need for the current Act to provide temporary protective measures to protect defendants. There have been cases of sexual offences where the defendants have been assaulted by the police or the relative of the victims. The VLC recommends that the current Act must provide protective measures to be given to defendants prior to them appearing in courts. A further recommendation was for the current Act to cater for a juvenile center for persons under 18 years of age, who are not to be sentenced to imprisonment unless no other method of punishment is appropriate.

Many people spoke of the need that the current Act needs to be improved so that in sexual offences, every victim must be treated equally, irrespective of gender and marital status. The VLC recommends that the current Act must be amended to incorporate a general provision to cater for the issue of impersonating or tricking someone (husband, wife, de-facto husband, de-facto wife, boyfriend or girlfriend) into sexual intercourse. It was further recommended that the age of 18 years should be made a standard age for a 'child' in all offences in the *Penal Code* as provided for under the Convention on the Rights of a Child and that serious penalty should be awarded to every offences where a victim is a child.

As a result the VLC has completed this review regarding the provisions of sexual offences and customary reconciliation of the Act. Other legislations also related to these provisions have also been identified in the report as outdated and needing much improvement and the general recommendation is that these outdated laws should be improved.

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Introduction

The *Penal Code Act* [Cap 135] 1981 was enacted within twelve months of the country becoming independent from the joint administrations of Britain and France. It commenced on 7 August 1981 and has been effective in Vanuatu for over 13 years now. It was an important piece of legislation marking as it did for the first time an attempt to provide a *Penal Code* which would apply to all the people of Vanuatu. Like many other Penal Codes in the South Pacific, the *Penal Code* of Vanuatu is divided into two Parts. Part I deals with general principles of criminal law and liability, and Part 2 sets out the definition of the individual offences and the punishments thereof, criminal responsibility and matters connected therewith.

Since 1981 there have been several amendments with regards to the Act. The first ever amendment was made in 1982 to provide an additional offence, adultery, that amendment was the result of a private member's bill. Another amendment was made in 1966 followed by another in 1988. In 1989, there were two amendments made to the Act, one of which was the Amendment Act No 14 of 1989 and another was the Amendment Act No 27 of 1989.

In 2003 several minor changes were made to the Act, particularly changes under the section dealing with terrorist, the section dealing with rape as an offence, the section dealing with aggravated sexual intercourse, as well as the section dealing with prostitution. Another minor amendment to the Act occurred in 2005 followed by another in 2006 which took into account the sections dealing with customary reconciliation, the courts and its sentencing. The latest amendment to the Act was made in 2007.

After almost six years since the latest amendment, it is timely to review this important piece of legislation, and this is the purpose of this paper. Attention will be drawn to the issues surrounding Sex and Customary Reconciliation in Vanuatu and the Courts and its Sentencing. The report will identify the limitations in the current law in this regard and further provide recommendations for possible and practical changes.

The issues and limitations in the current law are:

- The issue of customary reconciliation, the courts and sentencing. How custom reconciliation should be recognized by the courts when judging criminal actions;
- The issue of equal and consistent sentencing;
- The issue of whether or not the laws in the *Penal Code* give enough protection to women, girls and young children in our communities;
- The issue of whether the law provides enough protection to defendants who are charged with sexual offences;
- The issue of whether or not the *Penal Code* provides sufficient protection to defendants in regards to imprisonment and sentencing; and
- The issue of whether or not Vanuatu's criminal laws be improved to treat every victim equally, irrespective of gender and marital status.

In addressing these issues, the Vanuatu Law Commission undertook consultation of this review on ten islands. These islands are Tanna, Aniwa, Epi, Ambrym, Santo, Loh (Torres), Vanualava, Ambae, Maewo and Efate. Seven communities were visited. This report considers Vanuatu's obligations internationally, nationally and traditionally and recommendations made are based on findings made in the communities, provinces and with stakeholders in Luganville and Port Vila.

Custom reconciliation should be recognised by courts when judging criminal actions, especially sexual offences

Chapter One

Background

Vanuatu is one of the most culturally diverse countries in the world, where Custom and tradition are the two of the most important aspects of life[1]. Custom holds such an important position in Vanuatu that it has been incorporated into the laws of the country[2]. Customary reconciliation is an aspect which has been incorporated into the domestic laws and the courts are applying these laws in all criminal cases. The basic purpose of custom reconciliation is to restore harmony and peace between the members of the community who have been affected by the wrongdoing. Reconciliation ceremonies usually occur right after an incident has occurred and is usually facilitated by a chief to ensure the maintenance of law and order within the community[3].

The *Penal Code (Amendment) Act 2006* provides that in criminal proceedings the courts may promote reconciliation, encourage and facilitate the settlement according to custom. The Act also provides that the courts must take into account any compensation or reparation in custom when assessing the appropriate sentencing and penalty to be imposed on the offender[4]. Whilst the Act provides considerable

[1] Miranda Forsyth, 'Beyond Case Law: Kastom and Courts in Vanuatu' (2004) 15 *Victoria University of Wellington Law Review* http://www.austlii.edu.au/nz/journals/VUWLRev/2004/15.html (Accessed 16 April 2014).

[2] Above n1

[3] Don Paterson, 'Customary Reconciliation in Sentencing for Sexual Offences: A Review of Public Prosecutor v Ben and Others and Public Prosecutor v Tarilingi and Gamma (2006) 10 (1) Journal of South Pacific Law http://www.paclii.org./journals/fJSPL/vol10/12.shtml (Accessed 16 April 2014)

[4] *Penal Code (Amendment)Act 2006* which provides:

38 PROMOTION OF RECONCILIATION

guidelines for the court in ordering compensation, it does not give any guidance to the court as to how and when customary reconciliations are to be taken into consideration and this is left to the courts to develop according to its discretion. This often results in discrepancy by the courts in exercising their discretion in regards to Section 38 and 39 of the Act which leads to inconsistent sentencing.

In the South Pacific regional countries, the Constitutions of Niue, Tuvalu and Solomon Islands provide constitutional statements in relation to the significance of customary law in fairly broad terms. These provisions and the constitutional documents do not make specific reference to the role that customary law plays in relation to sentencing decisions made by the criminal courts. The *Laws of Kiribati Act 1989* gives a clear guideline as to the applicability of custom and customary law within the criminal sphere, including the specific issue of sentencing decisions[5].

Furthermore, the New Zealand Law Commission did not follow the Forum model draft suggestion that reconciliation should never be taken into account for sexual offences, preferring to recommend that the sentencing court 'closely consider the settlement. Where there has been genuine consent by the victim and the settlement has been for the benefit of the

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(1) Notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court.

(2) Nothing in this section limits the court's power to impose a penalty it deems appropriate for the relevant offence.

39 ACCOUNT TO BE TAKEN OFCOMPENSATION PAYMENT

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

[5] *Law of Kiribati Act 1989* (Kiribati)

Criminal cases

3. Subject to this Act and to any other enactments, customary law may be taken into account in a criminal case only for the purpose of-

(a) ascertaining the existence or otherwise of a state of mind of a person; or

(b) deciding the reasonableness or otherwise of an act, default or omission by a person; or

(c) deciding the reasonableness or otherwise of an excuse;

(d) deciding, in accordance with any other enactment, whether to proceed to the conviction of a guilty party; or

(e) determining the penalty (if any) to be imposed on a guilty party.

Or where the court thinks that by not taking the customary law into account injustice will or may be done to a person

victim, it may be quite appropriate to take that settlement into account in mitigation of sentence'[6].

However, 'genuine consent' is often very difficult for a court to decide, because victims and their families may come under all kinds of pressure to accept reconciliation. Also in Vanuatu in most custom reconciliation ceremonies there are no legal people or independent witnesses to confirm that reconciliation was properly carried out and that both victim and offender freely took part in it.

WHAT PEOPLE SAID

Recognition of Customary Reconciliation

- *During the consultation, there was general support from the villages and communities that in criminal sexual offences, custom reconciliation should only be exercised as a means of restoring harmony and peace between the members of the community who have been affected by the wrongdoing.*

- *There was wide support from the people that the courts should only recognise the custom reconciliation in any form of compensation or reparation if the victim voluntarily accepts the reconciliation.*

- *The communities and villages agreed that the court may only recognise and take into account customary reconciliation for the first time the sexual offence is committed by the offender.*

Court should not recognise customary reconciliation

- *The chief should only order and facilitate the custom reconciliation ceremony but not influence or force the victim to accept the reconciliation. If the chief is found to have influenced or forced the victim, then the courts must not take into consideration that customary reconciliation.*

[6] New Zealand Law Commission- Converging Currents – Custom and Human Rights in the Pacific Study Paper 17, 2006 – quoting from pp96, 111, 182

- *There was general consensus from the villages and communities that the courts should not take into account customary reconciliation that has been rejected by the victim.*

- *The customary reconciliation that was accepted by the victim's families or chief, without the victim's permission or knowledge should not be considered by the courts.*

- *The people support that the courts should not take into account customary reconciliation in sexual offence committed against a young victim under the age of 12 or a person with physical or mental incapacity.*

- *There was general support from the people that the courts must not take into account customary reconciliation in relation to a repeat or second sexual offence committed by the same offender.*

RECOMMENDATION

THEREFORE, the Vanuatu Law Commission recommends the following:

1. That the Act must clearly provide that customary reconciliation must only be exercised as a means of restoring harmony and peace between the members of the community who have been affected by the wrongdoing.

2. That the Act must be amended to specifically provide that in sexual offences the courts may only take into account any form of customary reconciliation if the victim has freely and voluntarily accepted that customary compensation.

3. That the Act must provide that the courts must not exercise their discretion to consider any customary reconciliation that was accepted by the victim's family or chief on behalf of the victim.

4. That the Act must limit the courts discretion in regards to customary reconciliation for victims below 12 years and a person with mental incapacity and repeat offenders.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission have been looking at the laws of other South Pacific regional countries as an example and make these following drafting instructions to take in the above recommendations:

- Amend Sections 38 and 39 of the Act to provide guidance to the court in considering customary reconciliation ceremonies in sexual offences. Add these new sections;

38 PROMOTION OF RECONCILIATION

(1) Subject to Subsection (2), notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation, encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court.

(2) In sexual offences where victims do not freely and voluntarily accept the customary reconciliation, the courts must not promote customary reconciliation, encourage and facilitate the settlement according to custom, in circumstances that include but are not limited to, where the:-

(a) families of the victims and the victims reject the customary compensation or reparation;

(b) chief or families of the victims accepts the reconciliation and customary compensation on behalf of the victim;

(c) offence committed is against a young victim under the age of 12 or a person with physical or mental incapacity as set out under the 'Offences Against Morality' Part of this Act;

(d) a repeat or second offence committed by the offender; and

(e) any other circumstances deemed relevant by the court.

39 ACCOUNT TO BE TAKEN OF COMPENSATION PAYMENT

(1) Subject to Subsection (2) and (3), when sentencing an offender, the court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone sentence for such purpose.

(2) Nothing in this section binds a court in relation to a person with mental incapacity or second offence committed by an offender against the '**Offences Against Morality'** Part of this Act;

(3) In relation to any sexual offence committed by an offender the court must only act under Subsection (1) if it is satisfied that any such compensation or reparation has been freely and voluntarily agreed to by the victim of the offence and that such compensation or reparation is for the benefit of the victim of the offence.

Equal and consistent sentencing

Chapter Two

Background

In Vanuatu, everyone is entitled to the fundamental rights and freedoms which are stipulated under Article 5 (1) of the Constitution. Two of these fundamental rights and freedoms are protection of the law and equal treatment under the law[7]. Sentencing in sexual offences by the courts is one area where both these fundamental rights are very important, especially where customary reconciliation is involved. The results in recent researches and analysis in some sexual offence cases[8] shows that there was discrepancy by the courts in exercising their discretions in relation to whether customary reconciliation must be considered when imposing the appropriate sentencing. This violates the fundamental rights of all persons to be protected under the law and to achieve fair and equal treatment.

The *Penal Code*, specifically under Sections 38 and 39 makes it clear that customary settlements must be taken into account by courts when considering the quantum of the punishment. In a 2004 case[9] involving a sexual offender the Court of Appeal of Vanuatu ruled that:

"It is a fundamental aspect of the rule of law that like cases are treated and responded to in a consistent and uniform way. There should be transparency in process and consistency in the treatment of all who have offended against the criminal law. Courts are required to articulate the factors which have been weighed and what issues have been considered including mitigating and aggravating factors in reaching a decision.[10]"

[7] *Constitution* (Vanuatu)
[8] Don Patterson and Anta Jowitt, '*more on customary reconciliation ceremonies in sentencing in criminal offences'* Journal of the South Pacific law (2008) 12(2)
[9] *Public Prosecutor v Atis Willie* [2004] VUCA 4; Criminal Appeal Case 02 of 2004 (9 June 2004)
[10] Ibid

However statistics have shown that in the two year period 2006-2007, out of the 57 sentencing judgments recorded by PacLII, in the majority of cases (60%) there is no mention of customary reconciliation at all. This leaves a balance of 23 sentencing judgments (40%) in which customary reconciliation is mentioned in the judgments as having been made or promised by the defendant. Sentences in the period 2011 – 2013 recorded on PacLII also show discrepancies, especially in relation to sexual offences. Almost 90% of judges' reasons for sentencing sex offenders refer to custom reconciliation in some way, even if the custom reconciliation was an offer by the offender's family or community, which had been refused or not yet accepted by the victim[11].

This shows that Section 38 and 39 of the Act has been interpreted as exclusionary or complementary by the courts in exercising their discretion.

In addition, two other issues which the current Act does not cater for but which has been left to the courts to develop according to their discretion in regards to recognising customary reconciliation are; the interpretation of Section 39 regarding the assessment of the penalty to be imposed on the offender; and the divergence of the weight or credibility to be given to customary reconciliation.

Whilst the 2006 Amendments Act provides considerable guidance for the court in ordering compensation, it does not provide any guidance as to how customary reconciliation should be assessed and how much weight or credit should be given to any form of customary compensation or reparation. The Act must limit the courts' discretion by providing guiding procedures and conditions in assessing the weights or creditability when taking into account customary reconciliation.

In other South Pacific countries, the *Criminal Law (Compensation) Act 1991* of Papua New Guinea provides that, where the courts are deciding to make order for compensation, one of the factors they must take into account is any relevant custom regarding compensations. The relevant customs includes; any custom regarding the nature, the amount, the method of payment and the appropriate person or persons to be paid the compensation; and custom which relates to the amount of compensation

[11] See n2 above

pertaining to the age or life expectancy of the person suffering injury or loss[12].

WHAT PEOPLE SAID

Equal sentencing

- *During the consultation, there was general consensus from the villages and communities that the courts must exercise their discretion fairly when taking into account customary reconciliation in all sexual offences where the victim has agreed to a reconciliation ceremony.*

Assessing and weighing customary reconciliation

- *Currently the courts exercise their discretion according to the various circumstances and seriousness of the sexual offences. The people in the communities support that due to the differences in circumstances in each sexual offence cases, the courts should not give any weights or credit to customary compensation or reparation.*

- *There was general support from the people that because of the big divergence of custom and culture in Vanuatu, it is difficult to legislate a standardised customary compensation or reparation to be recognised in all sexual offences.*

Customary reconciliation as mitigating factor

- *There was general consensus from the villages and communities that the paramount purpose of customary reconciliation is to restore peace and harmony between the victim and the offender and their families.*

- *If the victim does not freely consent to the custom, the courts must not take into account that customary reconciliation as a mitigating factor.*

[12] *Criminal Law (Compensation) Act 1991* (Papua New Guinea)

- *The people support that if the victims freely consent for the courts to take into account the customary compensation, it may only influence the length of sentence of imprisonment or the amount of fine but not to alter the fundamental nature of the punishment. For example, the sentence may be lessened but the offender should not be given a lighter sentence like a suspended sentence.*

RECOMMENDATION

THEREFORE, the Vanuatu Law Commission recommends the following:

1. That the *Penal Code Act* must provide guiding procedures as to how the courts should exercise their discretion in recognising customary reconciliation in sexual offences.

2. That the Act must specify that the courts must not give any weight or credit to the customary reconciliation if the Victim rejects the custom.

3. That the Act must clearly provide that in customary reconciliation where the victim has accepted, that customary reconciliation should only influence the length of sentence of imprisonment or the amount of fine but not to alter its fundamental nature of the punishment.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission have been looking at the laws of other south pacific regional countries as an example and make these following drafting instructions to take in the above recommendations:

- Amend Section 39 of the Act to provide guidance to the court to ensure equal and consistent sentencing. Add these new sections;

39 ACCOUNT TO BE TAKEN OF COMPENSATION PAYMENT

(1) Subject to Subsection (2) (3) and (4),when sentencing an offender, the court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone sentence for such purpose.

(2) Nothing in this section binds a court in relation to a repeat or second offence committed by an offender against the '**Offences Against Morality'** Part of this Act;

(3) In relation to any sexual offence committed by an offender the court must only act under Subsection (1) if it is satisfied that any such compensation or reparation has been freely and voluntarily agreed to by the victim of the offence and further that such compensation or reparation is for the benefit of the victim of the offence.

(4) Without limiting the meaning of Subsection (1),and not inconsistent with the provision of this Act or any other laws, in exercising their discretion in regards to Subsection (1), the courts must limit their discretion, including but not limited to:-

(a) customary reconciliation must be considered as a means of restoring peace and harmony between the families;

(b) where the victims freely and voluntarily consent for the courts to take into account the customary reconciliation, that custom may only influence the length of sentence

of imprisonment or the amount of fine but not to alter to a suspended sentence or non-custodial sentence; and

(c) no weight or credibility should be given to any form of customary compensation or reparation which was rejected by the victims.

Does the law give enough protection to women, girls and young children in Vanuatu?

Chapter Three

Background

Violence against women, girls and children is a growing social and economic issue in Vanuatu. The national prevalence study of 2010 concluded that at least 60 percent of the women interviewed had experienced physical or sexual violence from their partners and 30 percent had experienced childhood sexual abuse while under the age of 15 years.[13] Women are easily intimidated in a male dominated society like that in Vanuatu. There is a clear power imbalance between the parties.[14]

The Vanuatu Women's Centre reported 3600 cases of family violence from 1993-2000 and around half of the Community Legal Centre's cases, located at the University of the South Pacific, were related to domestic violence (UNIFEM 2010). There are also reports of girls being sold by their fathers into early and transactional sex around bars in Port Vila (Laqeretabua, Naidu, & Bhagwan Rolls, 2009).[15]

In 2010 gender equality were featured in the Vanuatu's national plan, the Priority Action Agenda 2012–2016. This agenda was aimed at accelerating development and coordinating efforts in two specific areas namely a quota of 30per cent women in parliament and mainstreaming of gender perspective into all government policy processes. These priorities were critical in achieving gender equality and addressing violence against women and girls who face

[13] Republic of Vanuatu *"Elimination and Prevention of Violence Against Women and Girls"* 57th Commission on the Status of Women, 2013.

[14] A kind of Mending: Restorative Justice in the Pacific Islands, by Sinclair Dinnen with Anita Jowitt and Tess Newton edition - 2010 ANU E Press.

[15] Gender domestic violence ant its big bite on small island states – Fiji, Solomon Islands and Vanuatu http://www.gdn.int/admin/uploads/editor/files/2013Conf_Papers/CharlotteTaylor_paper.pdf

and are subject to systemic discrimination in our society.[16]

Elimination of gender based violence is a main pillar of the mandate of the national women's machinery. Vanuatu's National Gender and Women's Empowering Policy 2013–2023 aims to provide direction and guidance on strategic interventions in addressing gender inequalities. It also acts as a coordinating document for government ministries to integrate and mainstream gender perspective in all policies.[17]

However, the question of whether the domestic laws give enough protection to the venerable group mentioned - women, girls and children still remain.

The Constitution of the Republic of Vanuatu under Article 5 sets out a number of fundamental rights and freedoms of all individuals or persons. These includes the freedom of and rights to life, liberty, security of the person, protection of the law, freedom from inhuman treatment and forced labour as well as equal treatment under the law '… insofar as it makes provision for the special benefits, welfare, protection or advancement of females, children, and young persons'.[18]

Building on its Constitution, Vanuatu has taken steps to ratify certain International Conventions to help address these aspects. In doing so, Vanuatu is now a state party to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) as it ratified it on the 8th of September 1995. The Convention seeks to protect and promote women from elimination of all forms of violence against women.[19] Vanuatu then became a state party to the Convention on the Rights of the Child (CRC) which seeks to protect and promote the rights of individual children and all member countries are bound by its terms.[20] The two Conventions provide for member countries to undertake all appropriate measures for the implementation of the protection and rights of women and children as recognized in the Conventions.

The *Family Protection Act* 2008 and the *Penal Code* [Cap 135] of Vanuatu provides some means of protection to women, girls and young children in the community. The *Family Protection Act* enables victims of domestic

[16] Above n1
[17] Above n1
[18] Constitution of the Republic of Vanuatu.
[19] Convention on the Elimination of all Forms of Discrimination against Women.
[20] Convention on the Rights of the Child.

violence to seek protection orders. The Act states that the custom pride is not an acceptable excuse for violence in the home.[21] As part of implementing the sections of this Act, the Police Department established and strengthened the internal Family Protection Unit (FPU) within its department to address the high levels of domestic violence and other related matters.

The *Penal Code* [Cap 135] provides a range of offences to protect women, girls and children including unlawful sexual intercourse by male with girls aged under 20 who is under protection; unlawful sexual intercourse under the age of 13; unlawful sexual intercourse with a girl aged 13-15 years; and indecent assault of a girl under 13.[22]

However there is limited protection of a person's right to choose whether or not to have sexual intercourse, especially when this is seen under the Constitution as a fundamental right to liberty, security of a person and equal treatment under the law. In Papua New Guinea, the law states that an adult person must give free voluntary agreement to sexual intercourse. The free and voluntary agreement cannot be presumed just because the person did not protest or resist, was not injured, or had on other occasions agreed to sexual intercourse.

The *Penal Code* and other related laws which deals with health, education and family do not provide any provisions to guarantee access to sexual reproductive health services. However, it is an offence under section 117 of the Penal Code for a woman to procure her own abortion or a person to procure an abortion for a woman unless for good medical reasons.[23] A woman who became pregnant after unlawful intercourse, incest or rape is not allowed to have an abortion except on medical grounds. There is currently no legislative provision to cater for the quality of contraceptives such as condoms and treatment for sexual and reproductive health conditions.

In addition, there are no provisions in the *Penal Code* and other related laws requiring children to be provided with information regarding Human Immuno-deficiency Virus (HIV) and Sexual Transmitted Infections (STI's) or to be provided with condoms or other means of prevention. There are also no provisions in the laws specifically addressing children and young

[21] *Family Protection Act* No. 28 of 2008, Vanuatu.
[22] *Penal Code* [Cap 135], Vanuatu.
[23] Above n10.

people's rights of informed consent and access to confidential sexual and reproductive health services.

Further, there are no provisions prohibiting coercion of adults or children into sex work or prohibiting trafficking or sex tourism although section 101 of the principle Act and the amendment Act of 2003 deals with issues surrounding prostitution. In countries like Kenya, the punishment of sex tourism and benefiting from disable or child prostitution is 10 years imprisonment. They also punish any person who intentionally transmit to another the virus of HIV or any other life threatening STI's.[24]

With regards to the issue of sexual intercourse without consent, Section 90 of the *Penal Code* fails to make specific reference to sexual intercourse without the consent of a disable woman, girl or children and the penalty to which to be awarded for such an act. Section 91 regarding the penalty of committing the act of sexual intercourse without consent should also be specified to cater for having intercourse with able women, girl or children, those with mental problems but yet physically normal and raping a disable women, girl or children. Since the enactment of the Act, the life imprisonment penalty has not been exercised.

Moreover, while the issue of Abortion has been dealt with in the current Act it fails to specifically prohibit sexual intercourse without consent and incest as good medical reasons to carry out miscarriage of a woman or a girl. It also fails to address that upon the advice of a doctor, proceeding with a termination of pregnancy is of good medical reason.

WHAT PEOPLE SAID

Rights

- *Everyone including women and children have the freedom and right to life, liberty, movement, equal treatment and a peaceful living.*

- *Women and children should be treated with utmost respect.*

Rape and proof of consent

- *The provisions on sexual intercourse without consent should also incorporate raping disabled women, girls and children.*

[24] *Sexual Offences Act* No.3 of 2006, Kenya.

- *Consent should also be defined to protect disabled people and children.*

- *Disabled people and children cannot give free and voluntary consent.*

- *Free and Voluntary consent to sex should not be presumed just because the person did not resist, was not injured or had on other occasions agreed to sexual intercourse.*

Prostitution

- *More strict provisions should be incorporated to regulate the issue of prostitution.*

- *Coercing children into prostitution should be made a serious offence.*

Abortion

- *The Constitution of Vanuatu upholds Christian principles, therefore Rape or incest shouldn't be a good medical reason for a woman or a girl to carry out abortion.*

- *Abortion should only be performed on good medical grounds.*

Transmission of HIV/AIDS Virus

- *Transmitting AIDS, STIs or HIV through sex or needles should be serious offence like murder if deliberate.*

- *Unless the partner agrees or knows then reckless transmission should be an offence like intentional assault.*

- *Intentional passing HIV/AIDS is or should be made a serious offence*

- *Vanuatu should have a standalone legislation to deal with the issue of HIV/AIDS.*

Education for children

- *12 years is an age for a child to be given appropriate educational information on sex issues without going to the extent of detailing the use of contraceptives or family planning.*

- *Education information and awareness should be given to children from 12 years.*

RECOMMENDATIONS

THEREFORE, the Vanuatu Law Commission makes the following recommendations:

1. That a new Section 91 be inserted to incorporate a special provision protecting disabled women, girls and children or any other person with disability when it comes to the issue of sexual intercourse without consent.

2. That a new Section 93 be inserted to cater for the penalties of rape. A more serious penalty for offence of rape against a victim with disability or a child.

3. That Section 117 should extend to incorporate an advice of a doctor to justify for good medical reason to proceed with carrying out Abortion.

4. That Section 101 should be amended to prohibit coercion of adults or children into sex work or prohibiting trafficking or sex tourism.

5. That a new section be inserted under the heading 'Offences against the Person' of the *Penal Code* to regulate for HIV/AIDS and its transmission.

6. That the provisions will address the control over the spreading of the virus as well as to protect and safe guard the victims of HIV/AIDS.

7. That the provisions will be a temporary provision awaiting a full new HIV/AIDS legislation.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission have been looking at the laws of other South Pacific regional countries as an example and make these following drafting instructions to take in the above recommendations:

New Section 92 to read;

92. Sexual Intercourse without Consent under the age of 18 years

Any person who has sexual intercourse with a child under the age of 18 is guilty of an offence of sexual intercourse without consent. The offence is complete upon penetration.

New Section 93 to read;

93. Punishment of sexual intercourse without consent

(a) No person shall commit sexual intercourse without consent.

Penalty; 20 years imprisonment.

(b) No person shall commit sexual intercourse without consent on a disable person or child.

Penalty; Imprisonment for life.

(c) No person shall commit sexual intercourse without consent on a child under the age of 18.

Penalty; Imprisonment for life.

New Section 117. Abortion

New Sub-section 3 to read;

(3) It shall be a defence to any charge under Subsections (1) and (2) if the person charged shall show that, upon the advice of the doctor, the abortion procured was for good medical reasons.

(5) No prosecution shall be commenced under Subsection (1) (2) or (3) without the consent in writing of the Public Prosecutor.

New Section 101. Prostitution

Add a new Section 101B to read;

(1) A person must not –
   (a) by any means, cause or induce a child to participate in an act of child prostitution;
   (b) by any means, coercing a child to participate in an act of child prostitution; or
   (c) participate as a client with a child in an act of child prostitution.

Penalty; Imprisonment for 10 years or, if the child is under the age of 14 years, to imprisonment for 15 years.

(2) The consent of a child is not a defence to a charge relating to an offence under this section.

New Section 107. HIV/AIDS transmission

Add a new Section 107 to read;

(1) Any person who recklessly transmit a HIV/AIDS virus to another person through;
   (a) needle or syringe; or
   (b) any other means of transmission
   Shall be guilty of an offence and is liable to 10 years imprisonment.

(2) Any person who wilfully transmits HIV/AIDS to another person through;
   (a) needle or syringe; or
   (b) any other means of transmission
   shall be guilty of an offence and be liable to a term of 20 years imprisonment.

Add a new Section 108 to read;

(1) Any person or persons infected with or suspected of being infected with HIV/AIDS is entitled as of right to affordable, appropriate, quality counselling, care and treatment services, including appropriate Anti-Retroviral Therapy.

(2) Any person, company, business, trade or undertaking which discriminates against any person, or any family member of a person, suspected of or infected with HIV/AIDS in education or employment is guilty of an offence under this Act punishable by a fine of up to 1 million vatu.

Add new Section 109 with heading '**Confidentiality'** to read;

(1) Every medical practitioner, nurse or health worker who takes any action under this Act, or fails to act in breach of this Act, must preserve and keep confidential all matters which have come to their knowledge except in the performance of their professional duties.

(2) Any person in breach of Subsection (1) may, in the case of a medical practitioner or nurse, be referred to the Minister by any person and such a referral shall constitute a complaint against the medical practitioner or nurse under s10 of the Health Practitioners' Act.

(3) Any other person in breach of Subsection (1) may be referred to the health committee which employs or engages them and shall be subject to the processes for investigating complaints of misconduct against workers, employees or contractors engaged by the health committee.

Chapter Four: PROTECTION OF DEFENDANTS

Background

Vanuatu is a member country of the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. As a member of this Convention, Vanuatu has an obligation to take effective legislative, administrative and judicial measures to prevent the act of torture. Torture in the Convention includes "punishing a person for an act he or a third party person has committed or is suspected of having committed..."

In Vanuatu, there have been cases of sexual offences where the defendants have been assaulted either by police, prison guards, the relatives of the victims and even their own relatives. This often happens before the case reaches court. Defendants are often assaulted by police and prison guards as a way to get a confession from him or her while the victim's relatives often act out due to their anger at the defendant over the crime that he or she committed. With regards to the defendant's own relatives assaulting him, this was clearly illustrated in the case of *Public Prosecutor v Bob* [2007] VUSC 13[25]. The defendant was cross-examined about a customary reconciliation that he had performed to the victim's family, and the defendant agreed that he had remained silent in the meeting because he was afraid of being assaulted by his relatives if he did not follow their orders.[26]

In Australia, with the indigenous Aboriginal communities, there is a legislative framework for the sentencing of the indigenous offenders, with recognition given to the Aboriginal customary law. This recognition differs in the different states, with some states giving it wide recognition while some are not so permissive. In many instances, where a crime has been committed, a system of ritualised physical punishment is used by the community group as part of their customary law. An example of such a punishment

[25] Don Paterson and Anita Jowitt, '*More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences*' Journal of the South Pacific Law (2008) 12(2)
[26] Above n1

was the spearing of the offender's leg. This tribal payback punishment, similarly to the custom reconciliations performed in Vanuatu, can occur either before, during or after the case has been taken to court.[27]

The Criminal Court of Appeal of the Northern Territory held that while an assault is unlawful, it is not unlawful if authorised by the 'victim' unless the person committing the assault intends to kill or to cause grievous harm to the defendant. It went on further to say that while it is one thing for a court to take into account the likelihood of future retribution to be visited upon the accused, whether lawful or unlawful; it is yet another for a court to actually facilitate the imposition of an unlawful punishment.[28]

In Vanuatu, the courts or the law itself have yet to address the issue of the unlawfulness of the assault of defendants even if it is deemed lawful by customary law. Furthermore, the *Penal Code* does not provide temporary protecting measures to protect the accused until they are arrested and tried by a court of law.

WHAT PEOPLE SAID

There should be temporary protective measures given to the defendants

- *There was a general consensus among the stakeholders in both rural and urban areas that there should be temporary protective measures given to the defendants.*

- *There should be protective measures given to avoid any further incidents, especially where the defendant's family may retaliate or even worse, the defendant will get seriously injured.*

- *The defendant has rights and is presumed innocent until proven guilty in a court of law. As such, it will not do well to assault a person who turns out to be innocent.*

- *The police should be the responsible authority to provide protective measures to the defendants.*

[27] Above n1
[28] Above n1

RECOMMENDATIONS

THEREFORE, the Vanuatu Law Commission makes the following recommendations:

1. That a provision be inserted in the *Penal Code* to provide for protective measures to be given to defendants prior to them appearing in court.

2. That the body responsible for carrying out these protective measures should be the police, where practical.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission have been looking at the laws of other South Pacific regional countries as an example and make these following drafting instructions to take in the above recommendations:

1. Insert after Section 101D, under the part of *Offences against the Person*, provision providing protection for defendants:

   102. Protection of Defendants

   (1) No person shall attempt or participate to commit intentional assault on the body of a person who was;

   (a) Suspected of committing a crime; or

   (b) accused of committing a crime;

   (c) and who has yet to be convicted or acquitted for the offence that he or she is charged with

   (2) The accused should be put under the surveillance and protection of an authority figure and this authority figure depends on whether it is an urban or rural area.

2. Insert under the Interpretation section of the Act, a definition for 'authority figure':

   Authority figure means a person who exercises control over others and has social standing within the community.

PROTECTION TO DEFENDANTS IN REGARDS TO IMPRISONMENT AND SENTENCING

chapter five

Background

Imprisonment or incarceration within the criminal justice system serves a number of purposes, including deterrence, rehabilitation, incapacitation and retribution.[29] Counterbalancing this are the human rights provisions which limits arbitrary and excessive punishment and detention.

Under Vanuatu's *Penal* Code[CAP 135], Section 37 provides that all offenders convicted of an offence punishable by imprisonment must have alternative sentences considered by the court. So far that is practicable and consistent with the safety of the community but imposes community sentencing or suspended sentencing. Courts do suspend sentences for sexual offences but imposes community sentencing or suspended sentencing. However, they do not normally suspend sentences for rape or sexual intercourse without consent. The courts also take into account the protection of the community and public as a factor in determining the length of sentencing.

The maximum sentence for sexual offences ranges from 2 years to life imprisonment. In sentencing sexual offenders the courts usually exercises its discretion taking into account customary reparation and reconciliation and other mitigating factors to impose a lower sentence.

With regards to young sexual offenders, Section 54 of the *Penal Code* gives protection for young offenders under the age of 16 by requiring that those under 16 years of age not be imprisoned 'unless no other method of punishment is appropriate. This provision supports Article 37 of the CRC, where Vanuatu must ensure that imprisonment of children

[29] Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) *Buffalo Criminal Law Review* 307

under 18 is only a last resort and for the shortest appropriate period of time. In the past, the Courts have been criticised for not complying with this provision, as is evidenced in *Public Prosecutor v Ben and others*[30] where three boys who were 15 years old were sentenced to 5 years imprisonment by the Supreme Court for rape. However, recently, the Courts have given more weight to the offender's age and the case of *Public Prosecutor v Aruel*[31] illustrates this, where custom reconciliation was offered and accepted.

In the Solomon Islands, there is a detailed procedure regarding protection of offenders under the age of 16. It provides that in the opinion of the court the defendant is of need of behavioural control, protection and care then the court may make an order for the defendant to be in care or protection of any fit person. The Act defines "fit person" as including any local authority, religious institution, welfare association or other organisation that is able and willing to undertake the care, protection or control of persons under the age of 18 years.

A similar approach is also practised in New Zealand where they carry out "community based programs" to protect adolescent sexual offenders where offenders receive treatment, counselling, special programs for adolescents with intellectual disabilities and development delay, and social work services.

WHAT PEOPLE SAID

Alternative sentences

- *There was wide support from all the stakeholders that there should be alternate imprisonment for young offenders.*

- *Instead of 16 years of age, it should be raised to 18 years so as to be consistent with the UN Conventions.*

- *There was also wide support for there to be a juvenile corrections centre, so as to be able to separate the adult offenders from the young offenders.*

[30] *Public Prosecutor v Ben and others* [2005] VUSC 18
[31] *Public Prosecutor v Aruel* [2012] VUSC 158

- *The majority of the stakeholders in the rural areas were in agreement with the community based programs as an alternative sentence. However, they expressly stated that the offenders should be sent directly back to their home village and island and go under the supervision of an authority figure, who will then report directly back to the Corrections services.*

Types of Offences Appropriate for Alternative Sentencing

- *Many felt that while alternative sentencing was better suited for young offenders, an offender should only be given 3 chances before he or she has to serve some prison time.*

- *A lot of people also felt that while alternative sentencing is the best option for young offenders, it all depends on the nature of their crime. If it's a serious crime, such as murder, then the offender should not be given alternative sentencing. It should only apply to those who have committed minor crimes such as theft and so forth.*

- *A juvenile centre or prison should be set up to provide a place for young offenders who get sent to prison.*

RECOMMENDATIONS

THEREFORE, the Vanuatu Law Commission makes the following recommendations:

1. That the age limit of young offenders should be put up to 18 years of age instead of the current 16 years of age.

2. There should be an exclusionary clause in this provision that provides for alternative sentencing to only apply to minor offences and not major offences such as murder.

3. That there should be strong emphasis on the setting up of a juvenile prison or detention centre to cater for the young offenders.

4. That when young offenders are sent on community based programs, they should be sent directly back to their home village and island and be under the supervision of an authoritative figure who will then be reporting directly back to the Corrections office.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission have been looking at the laws of other South Pacific regional countries as an example and make these following drafting instructions to take in the above recommendations:

1. Change and insert new age of 18 years of age as cut off age for young offenders:

   54. Imprisonment of Minors

   (1) A person under 18 years of age is not to be sentence to imprisonment unless no other method of punishment is appropriate.

   (2) If a person under the age of 18 years of age is sentence to imprisonment the Court must give its reason for doing so.

   (3) The above provisions are excluded under circumstances:

      (a) Where the nature of the crime is serious

      (b) And the penalty for such an offence exceeds 10 years imprisonment

Chapter six

Should the law or laws be improved so that they treat every victim equally, irrespective of gender and marital status?

Background

Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex. However this is subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health- … (k) equal treatment under the law or administrative action. Furthermore, no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.[32]

Contrary to the fundamental rights and freedoms set out in the Constitution, there are some provisions in the *Penal Code* [Cap 135] that are currently discriminatory which needs to be improved so that everyone is treated equally under the law.

The *Penal Code* [Cap 135] under Section 90 (b)(v), deals with the issue of sexual intercourse without consent in the case of impersonation. The provision provides that any person who has sexual intercourse with another person with that person's consent, if the consent is obtained by pretending to be that person's husband or wife, commits the offence of sexual intercourse without consent.[33] Taking into account the context

[32] Art 5 (1), Constitution of the Republic of Vanuatu.
[33] *Penal Code* [Cap 135], Vanuatu

of Vanuatu in terms of de-facto relationships, this provision is to some extent discriminatory. The provision fails to protect victims with de-facto relationships where the offender impersonates the de facto partner and tricks the de-facto partner (victim) into sexual intercourse, because the victim was not married. Only the married victims are protected under the current provision. Similarly, under Section 98 (b)(v) states that 'a person must not commit an act of indecency on, or in the presence of another person, without that person's consent if the consent is obtained in the case of a married person, by impersonating that person's husband or wife. Again only the married victims are protected under the current provision therefore is discriminatory.

Considering other laws in the region, the *Crimes Act* of New Zealand has provided a general provision that encompasses all cases, where the offender tricks the victim. Section 128A (7) of the *Crimes Act* provides that a person does not consent to sexual activity if he or she submit to or allows the sexual activity because he or she is mistaken about who the other person is.[34]

Furthermore, according to the Convention on the Rights of the Child (CRC) and the law of Vanuatu a child is every human being below the age of 18 years old. Article 2 of the Convention provides an international obligation for state parties of the convention to take all appropriate measures to protect every child against all form of discrimination.[35] The current *Penal Code* has three different age groupings for any offences committed against children, namely 13 years, 15 years and 18 years. To a certain extent, this can be taken as discriminatory.

For instance, Sections 97 and 97A of the *Penal Code* [CAP 135] which provides for the criminal offence of unlawful intercourse with a child under the age of 13 and the offence of aggravated sexual intercourse with a child under the age of 15 are discriminatory as they only protect children or victims under the age of 15.[36] Young people of age 15 and over but below 18 years are not protected by these provisions, yet suffer the similar effects from the offences like all the other children. Thus, they are all considered as child in accordance to CRC and under the other laws of Vanuatu.

[34] *Crimes Act* of 1961, New Zealand.
[35] Convention on the Rights of a Child.
[36] Above n2.

Similar situations are found through-out the region. The *Penal Codes* and *Crimes Acts* of other Pacific Island countries and New Zealand have similar provision to Section 97 of the *Penal Code* [CAP 135] of Vanuatu. Under Section 132 of the *Crimes Act* 2005 of New Zealand it provides that it is a criminal offence to have sexual intercourse with a child under 12 and further provides the definition of 'child' under that section, meaning a person under the age of 12 years.[37] That is to provide a clear and specific meaning of the child as those above 12 but below 18 years cannot be a victim of the offence.

Moreover, Section 98A of the *Penal Code* [CAP 135] provides for the criminal offence of act of indecency with a young person is also considered discriminatory. It states that a person must not commit an act of indecency upon, or in the presence of another person under the age of 15.[38] This section only provides for children less than 15 years of age but there is a gap for children between the ages of 15 and 18 years old as there is no provision in the Penal Code that provides for this age group.

WHAT PEOPLE SAID

Equality under the law

- *Everyone should be treated equally under the law.*

- *The law should not discriminate against another whether or not a he or a she is an offender of a victim of the act.*

The term 'child' and the appropriate age

- *The laws of the country with regards to the age of a child should reflect the standard age of 18 years spelled out in the Convention of the Rights of the Child (CRC).*

- *A child should be defined or referred to as any human being under the age of 18 years.*
- *Children under 18 years should be protected under the law against unlawful or aggravated sexual intercourse and rape.*

[37] *Crimes Amendment Act* of 2005, New Zealand.
[38] Above n2.

Penalties

- *Both women and men should be awarded the same penalty for any sexual offence such as incest, trickery or rape.*

- *Very serious penalties must be awarded to any person committing any sexual offence with a child under the age of 18.*

RECOMMENDATIONS

THEREFORE, the Vanuatu Law Commission makes the following recommendations:

1. That the current Section 90 of the *Penal Code* [Cap 135] be amended to incorporate a general provision to cater for the issue of impersonating or tricking someone (husband, wife, de-facto husband, de-facto wife, boyfriend or girlfriend) into sexual intercourse and that sub-section (b)(v) of Section 90 of the act be permanently deleted.

2. That the age of 18 years should be made a standard age for a 'child' in all offences in the *Penal Code* as provided for under the Convention on the Rights of a Child and that serious penalty should be awarded to every offences where victim is of child by age.

3. That Section 97 and 97A be amended to incorporate the standard age of a child and that Section 97 Sub-section (2) shall be permanently deleted.

4. That Section 98A should be amended to incorporate the age of 18 years and that the penalty awarded must be serious.

5. That Section 98B (v) be deleted and a new general provision be inserted to cater for should be amended to cater for the issue of impersonating someone (husband, wife, de-facto husband, de-facto wife, boyfriend or girlfriend) into an act of indecency without consent.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission have been looking at the laws of other South Pacific regional countries as an example and make these following drafting instructions to take in the above recommendations:

New Section 90. Sexual intercourse without consent

Amend Section 90 to read;

(1) Any person who has sexual intercourse with another person;

(a) without that person's consent; or

(b) with that person's consent if the consent is obtained-

(i) by force; or
(ii) by means of threats of intimidation of any kind; or
(iii) by fear of bodily harm; or
(iv) by means of false representation as to the nature of the act;
(v) by the effects of alcohol or drugs; or
(vi) because of the physical or mental incapacity of that person.

commits the offence of rape. The offence is complete upon penetration.

(2) A person does not consent to an act of sexual activity if he or she submits to or allows the act because he or she is mistaken about its nature and quality.

New Section 97. Unlawful Sexual Intercourse

Amend Section 97 to read;

(1) No person shall have sexual intercourse with any child under the age of 18 years.

Penalty: Imprisonment for life.

(2) It is no defence to a charge under this section that the child consented or that the person charged believed that the child was of or over the age in question.

(3) The child shall not be charged as a party to an offence under this section.

Section 97A. Aggravated Sexual Intercourse with a Child

Amend Section 97A to read;

(1) A person must not have sexual intercourse with a child under the age of 18 years in circumstances of aggravation.

Penalty: Imprisonment for life.

(2) In this section, "circumstances of aggravation" means circumstances in which;

(a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or

(b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or

(c) the alleged offender is in the company of another person or persons; or

(d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or

(e) the alleged victim has a serious physical disability; or

(f) the alleged victim has a serious intellectual disability.

New Section 98A. Act of Indecency with a Young Person

A person must not commit an act of indecency upon, or in the presence of another person under the age of 18.

Penalty: Imprisonment for 20 years."

New Section 98B. Act of indecency without Consent

(1) A person must not commit an act of indecency on, or in the presence of another person:

(a) without that person's consent; or

(b) with that person's consent if the consent is obtained:

(i) by force; or

(ii) by means of threats of intimidation of any kind; or

(iii) by fear of bodily harm; or

(iv) by means of false representations as to the nature of the act; or

(v) by the effects of alcohol or drugs; or

(vi) because of the physical or mental incapacity of that person.

(2) A person does not consent to an act of indecency if he or she submits to or allows the act because he or she is mistaken about its nature and quality.

Chapter Seven

OTHER LAWS AND ISSUES

Background

During the consultation, it became apparent that there are other laws and regulations that also deal with sexual offences and customary reconciliation. These other legislation include laws covering health, especially with regards to sexual reproductive matters and sexual awareness, along with education and family matters. These laws need to be consistent with the *Penal Code* and any amendments that are made to it as a result of this report, for the better implementation of the legislation.

Generally, the *Penal Code* and other related laws which deals with health, education and family do not provide any provisions to guarantee access to sexual reproductive health services. Furthermore, there is currently no legislative provision to cater for the quality of contraceptives such as condoms and treatment for sexual and reproductive health conditions.

More specifically, there are no provisions in the *Penal Code* and other related laws requiring children to be provided with information regarding Human Immuno-deficiency Virus (HIV) and Sexual Transmitted Infections (STI's) or to be provided with condoms or other means of prevention. There are also no provisions in the laws specifically addressing children and young people's rights of informed consent and access to confidential sexual and reproductive health services.

The *Education Act* states that one of the requirements for the registration of a school is to offer the minimum curriculum approved by the National Education Commission for a school of its kind and also to provide educational texts, equipment and other materials that are adequate for the courses of study offered at the school and that satisfied the prescribed requirements. As mentioned earlier, there is no specific mention in the Act or the curriculum about children having access to any sexual productive matters, apart from the science lessons that teach students about the reproductive system in the secondary level.

The *Public Health Act* is also silent with regards to free confidential sexual and reproductive health services. In addition, even though it is a serious issue and disease, HIV is only classified under a broad general category of a number of diseases, called 'notifiable diseases'. As such, HIV/AIDs has not received the attention or the much needed awareness that it requires for people to be fully aware of its effects. It is recommended that HIV/AIDs should have its own standalone legislation but until that is accomplished, this HIV/AIDs issue will be dealt with accordingly with the other laws.

WHAT PEOPLE SAID

Other legislation dealing with sexual offences and customary reconciliation

- *There are laws that touch on the provisions of the Penal Code but which are very general and do not really work alongside each other.*

- *There was general support from the stakeholders that apart from inserting provisions in the Penal Code to cater for some of the offences that have been discussed and that have led to some recommendations being made with regard to them, this issues need to be addressed properly in order to make the different laws work consistently. One such example is that of HIV/AIDs, where it is recommended that it should have its own standalone legislation to better deal with the issues that are being brought about by it. However, this should be consistent with the Penal Code itself.*

RECOMMENDATIONS

THEREFORE, the Vanuatu Law Commission makes the following recommendations:

1. That there needs to be a temporary provision inserted under the *Penal Code* to regulate for HIV/AIDS and its transmission, until such time when a full new HIV/AIDS legislation.

DRAFTING INSTRUCTIONS

THE Vanuatu Law Commission, after looking at the laws of the other South Pacific regional countries as an example, make the following drafting instructions to cater for the above recommendation.

New Section 107. HIV/AIDS transmission

Add a new Section 107 to read;

(1) Any person who recklessly transmit a HIV/AIDS virus to another person through;
   (a) needle or syringe; or
   (b) any other means of transmission

   Shall be guilty of an offence and is liable to 10 years imprisonment.

(2) Any person who wilfully transmits HIV/AIDS to another person through;
   (a) needle or syringe; or
   (b) any other means of transmission
   shall be guilty of an offence and be liable to a term of 20 years imprisonment.

Add a new Section 108 to read;

(1) Any person or persons infected with or suspected of being infected with HIV/AIDS is entitled as of right to affordable, appropriate, quality counselling, care and treatment services, including appropriate Anti-Retroviral Therapy.

(2) Any person, company, business, trade or undertaking which discriminates against any person, or any family member of a person, suspected of or infected with HIV/AIDS in education or employment is guilty of an offence under this Act punishable by a fine of up to 1 million vatu.

Add new Section 109 with heading '**Confidentiality'** to read;

(1) Every medical practitioner, nurse or health worker who takes any action under this Act, or fails to act in breach of this Act, must

preserve and keep confidential all matters which have come to their knowledge except in the performance of their professional duties.

(2) Any person in breach of Subsection (1) may, in the case of a medical practitioner or nurse, be referred to the Minister by any person and such a referral shall constitute a complaint against the medical practitioner or nurse under s10 of the *Health Practitioners' Act.*

(3) Any other person in breach of Subsection (1) may be referred to the health committee which employs or engages them and shall be subject to the processes for investigating complaints of misconduct against workers, employees or contractors engaged by the health committees.

Conclusion

This review was done to assist the law enforcement agencies that work with the *Penal Code*. From the review it is clear that some of the provisions specifically the customary reconciliation and sexual offences laws in the *Penal Code* are discriminatory and needs to be revised. As a member of the UN and with the number of international conventions and treaties that Vanuatu has ratified, there is still some work that needs to be done to implement these conventions into the domestic laws. It is clear that the *Penal Code* is one of the laws that need to be revised to reflect these international conventions and treaties.

The Convention of the Right of Child, the Convention on Elimination of all Forms of Discrimination against Women, and Convention against Torture provides international obligations for all member countries to take effective legislative and administrative measures to provide welfare protection for all human beings and eliminate discrimination. For instance, in regards to the convention against torture, the *Penal Code* does not provide a protection provision for protecting defendants from being tortured by the police or by the victims' families. The CRC defines "child" as all human beings under the age of 18 years. However the provisions of sexual offences in the *Penal Code* makes it only an offences to unlawfully have sexual intercourse or commit the act of indecency with a child under the age of 16 years while those between 16 and 18 years who are also recognised as child according to CRC are not protected.

This review has highlighted some of the areas that need to be amended in order to reflect the international obligations. Other laws that connect to the *Penal Code* will also be affected should the current law be amended. These laws have also been taken into consideration in the course of the review.

The recommendations made in this review shows that changes need to be done in the *Penal Code* to recognize customary reconciliation and to protect young children under

the age of 18 years, de facto relationship, victims of sexual offences, women and every human being from sexual abuses and tortures. The Law Commission hopes this review has covered all aspects that need to be addressed and will assist the Vanuatu's law enforcement agencies and authorities.

Appendix 1

Name/Community		Office
1.	Albert Taufa	Senior Legal Officer, ALAC Vanuatu
2.	Alicta Vuti	Acting CEO, Malvatumauri National Council of Chiefs
3.	Amos Talu	Island Coordinator, Save the Children Ambae
4.	Andy Luke	Nurse Practitioner, Vaimali Health Centre Epi
5.	Annie Shem Samuel	Gender Base Violence Officer, Women's Affairs Department
6.	Brenda Mutumba Nabirye	Project Officer- Child Protection, UNICEF
7.	Chris King	Technical Advisor, Correctional Services Department
8.	Christion Tukunamoli	Island Coordinator-STARS Program Santo, Save the Children
9.	Davis Saravanu	Senior Sargent, Officer In Charge – Family Protection
10.	Diana Dick	Youth Supervisor, NCYC
11.	Elizabeth Tarizine	Legal Officer, ALAC Vanuatu
12.	Ekaokao Community	Aniwa Island
13.	Fanafo Hydro Community	Santo Island
14.	Fredington Aru	Island Court Clerk, Torba Province
15.	Georgewin Garae	Secretary General, Penama Provincial Government
16.	Georgino Neveservette	Police Constable, Santo Family Protection Unit
17.	Gideon Ronolea	Customary Lands Officer, Torba Province

18.	Graham Patas	Doctor, Torba Provincial Health Services
19.	Graig Cove Community	Ambrym Island
20.	Haines Dini	Youth Club Officer, Save the Children
21.	Irene Alick	Police Constable, Morality Section-CID Santo
22.	Jean Paul Toure	Senior Sargent, Saratamata Police Station
23.	Jean Pierre Tom	Senior Customary Lands Officer, Malvatumauri Lands Tribunal Office
24.	John Mark Roro	State Prosecutor, Penama State Prosecution
25.	John Tari	Vanuatu Mobile Force Officer, Torba Province
26.	Judith Iakavai	Project Manager, NCYC
27.	Judah Silas	Inspector, Torba Police
28.	Kalkot Mataskelekele	Ombudsman, Office of the Ombudsman
29.	Kelly Alastair	Principle Correctional Officer, Luganville Corrections
30.	Lendy Joel	Area Secretary, Torba Province, Loh Islands
31.	Linda Vutilolo	Probation Officer, Luganville Corrections
32.	Lo Community	Torres Island
33.	Lowin Taga	Penama Probation Officer, Correctional Services
34.	Marylyn Tahi	Director, VNCW
35.	Mathew Walter	Probation Officer, Luganville Corrections
36.	Manthow Collon	Nurse, Vaimali Health Center, Epi
37.	Michiel Adams	Malvatumauri Representative, Torres Island

38.	Mina Popovi	Legal Officer, ALAC Vanuatu
39.	Nasawa Community	Maewo Island
40.	Precilla Wells	Probation Officer, Luganville Corrections
41.	Reginald Tarilaka	Banks Island Coordinator- STARS Health Program, Save the Children
42.	Richard Bani	Acting Centre Manager, Luganville Corrections
43.	Rolland Ture	Corporate Officer, Luganville Corrections
44.	Roger Quarani	Corporal, Torba Police
45.	Sandra Nothemaro	Community Engagement Officer, Save the Children
46.	Selwyn Bage	Penama Chief Medical Officer, Lolowai Hospital
47.	Trevor Cullwick	Surgical Consultant, Vila Central Hospital
48.	Tony Harry	O+G Consultant, Vila Central Hospital
49.	Vanuatu Disabilities Representatives	Wan Smol Bag
50.	Velma W Karabani	Director, General Complaints/Investigation, Office of the Ombudsman
51.	Waenia Community	Epi Island
52.	Wan Smol Bag Youths	Port Vila
53.	Youth and Justice Representatives	Wan Smol Bag

Appendix 2

The following are the list of sources used when writing up the Sex and Customary Reconciliation Report	
	Sources
1.	A kind of Mending: *Restorative Justice in the Pacific Islands, by Sinclair Dinnen with Anita Jowitt and Tess Newton edition* - 2010 ANU E Press.
2.	*Crimes Act of 1900,* New South Wales.
3.	*Crimes Act of 1961*, New Zealand.
4.	*Crimes Amendment Act of 2005*, New Zealand.
5.	*Criminal Law (Compensation) Act 1991*, Papua New Guinea.
6.	*Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007,* Republic of South Africa.
7.	Convention on the Elimination of all Forms of Discrimination against Women.
8.	Convention on the Rights of the Child.
9.	Constitution of the Republic of Vanuatu.
10.	Don Paterson and Anita Jowitt, '*More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences*' Journal of the South Pacific Law (2008) 12(2).
11.	Evans Amelia, *Critique of the Criminalization of Sexual Transmission* [2007] 38(3) Victoria University of Wellington Law Review 517.
12.	*Family Protection Act* No. 28 of 2008, Vanuatu.
13.	Forster Christine, "*Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards*" (2009) 33(3) Melbourne University Law Review 833.
14.	http://www.austlii.edu.au/nz/journals/VUWLRev/2004/15.html
15.	http://www.gdn.int/admin/uploads/editor/files/2013Conf_Papers/CharlotteTaylor_paper.pdf

16. http://www.paclii.org./journals/fJSPL/vol10/12.shtml

17. Kirby Michael, *HIV /AIDS Criminalization - Deserved Retribution or Capricious Sideshow?* [2007] Alternative Law Journal 29.

18. *Neal v The Queen* [2011] VSCA 172 (15 June 2011)

19. New Zealand Law Commission- *Converging Currents – Custom and Human Rights in the Pacific* Study Paper 17, 2006 – quoting from pp96, 111, 182.

20. NSW Parliamentary Library Research Service - *Crimes Amendment (Sexual Offences) Bill 2003* by Talina Drabsch Briefing Paper No 10/03.

21. Paterson, D and Jowitt A – *More on Customary reconciliation Ceremonies in Sentencing for Criminal Offences* , Journal of South Pacific Law 2008 Vol 8 p 39.

22. *Penal Code (Amendment) Act 2006,* Vanuatu.

23. *Penal Code* [Cap 135], Vanuatu.

24. *Public Prosecutor v Aruel* [2012] VUSC 158.

25. *Public Prosecutor v Ben and others* [2005] VUSC 18.

26. *Republic of Vanuatu "Elimination and Prevention of Violence Against Women and Girls" 57th Commission on the Status of Women, 2013.*

27. *R v Reid* [2006] QCA 202 (9 June 2006).

28. *R v Parenzee* 2008 SASC 245 (27 April 2007).

29. *Sexual Offences Act* No.3 of 2006, Kenya.

30. Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) *Buffalo Criminal Law Review* 307.

31. Swamy, Arthi Bandhana – *Customary Reconciliation in Sentencing for Sexual Offences in Vanuatu*, Journal of South Pacific Law Vol 12 p 94.

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