

REPUBLIC OF KIRIBATI
(No. of 2017)

I assent.

Beretitenti

23/2/18

AN ACT
entitled

**AN ACT TO AMEND THE PENAL CODE IN RELATION TO SEXUAL OFFENCES
WHICH ALSO INCORPORATE CONSEQUENTIAL AMENDMENTS TO THE
CRIMINAL PROCEDURE CODE.**

Commencement:

23/2/2018

MADE by the Maneaba ni Maungatabu and assented to by the Beretitenti

1. Short title

This Act may be cited as the Penal Code (Amendment) and the Criminal Procedure Code (amendment) Act 2017.

2. Definition of 'principal Act'

In this Act 'principal Act' means the Penal Code (Cap 67).

3. Repeal of sections 128 to 130; new sections 127A, 128, 129 and 130

Sections 128, 129 and 130 of the principal Act are repealed and replaced by the following new sections -

"Interpretation of Part XVI

127A. In this Part -

"building" includes a tent or temporary structure;

"engaged in a private act" in relation to a person means -

(a) the person is in a state of undress, using the toilet, showering, bathing, engaged in a sexual act of a kind not ordinarily done in a public place, or engaged in any other like activity; and

(b) the circumstances are such that a reasonable person would expect to be afforded privacy;

"filming" by a person of another person means that the first person causes one or more images (whether still or moving) of the other person to be recorded or transmitted for the purpose of enabling the first person or someone else to observe the images (whether during the filming or later);

"genitals" includes surgically constructed or altered genitals;

"sexual intercourse" means any of the following -

- (a) the penetration, to any extent, of any part of a person's genitals by any part of the body of another person;
- (b) the penetration, to any extent, of the anus of a person by any part of the body of another person;
- (c) the penetration, to any extent, of any part of a person's genitals by an object, carried out by another person;
- (d) the penetration, to any extent, by any part of a person's genitals of an object, carried out by another person;
- (e) the penetration, to any extent, of the anus of a person by an object, carried out by another person;
- (f) a person's mouth or tongue touching another person's genitalia or anus; or
- (g) the continuation of an activity mentioned in any of paragraphs (a) to (f);

"sexual self-penetration" means the penetration, to any extent, by a person of that person's genitals or anus by any part of the body of that person or by any object;

"unlawful", in relation to an activity, means without the consent, or an honest and reasonable belief in the consent, of a person involved in the activity, other than for a genuine medical or law enforcement purpose.

Meaning of consent in offences against this Part

128. (1) For the purposes of this Part, a person consents to an activity only if the person freely and voluntarily agrees to the activity.

(2) A person does not consent in the following circumstances -

- (a) merely because the person does not protest or physically resist the activity;

(b) if the person consents because the person-

(i) is subjected to force or the threat of force or an act of terror, whether the force is applied or the threat is made or the terrorisation carried out toward that person or someone else;

(ii) is fearful of any force that may be applied to the person or someone else;

(iii) is subjected to a non-violent threat;

(iv) is unlawfully detained;

(v) is substantially affected by alcohol or any other drug;

(vi) is unconscious or asleep;

(vii) is under a mistaken belief about the identity of the person with whom the activity happens; or

(viii) is under a mistaken belief about the nature or purpose of the activity;

(c) if the person-

(i) is under the age of 15 years old; or

(ii) has a cognitive incapacity to consent (including any mental or physical impairment that affects the person's ability to consent, or refuse to consent, to the activity).

(3) Subsection (2) does not limit the circumstances in which a person may be taken not to consent to the activity.

(4) In this section -

"non-violent threat" includes an express or implied representation by a person that he or she, or someone else, may do any of the following-

(a) commit an offence that -

(i) is punishable by imprisonment; but

(ii) does not involve the application of force;

(b) make an accusation or disclosure that may or may not be true about any living or dead person which could seriously damage the reputation of that person;

(c) make improper use of a power or authority arising from-

- (i) an occupation or vocation held by the person; or
- (ii) a commercial relationship involving the person.

Unlawful sexual intercourse

129. (1) Any person who engages in unlawful sexual intercourse is guilty of a felony and is liable to imprisonment for life.

(2) Any person who causes another person to engage in-

- (a) unlawful sexual intercourse with a third person; or
- (b) sexual self-penetration,

is guilty of a felony and is liable to imprisonment for life.

(3) Any person who assaults another person with the intention to engage in unlawful sexual intercourse with the other person is guilty of a felony and is liable to imprisonment for 7 years.

Attempt

130. Any person who attempts to commit unlawful sexual intercourse is guilty of a felony and is liable to imprisonment for 7 years. "

4. Repeal of sections 133 to 135; new sections 133, 133A, 134, 135, 135A, 135B, 135C and 135D

Sections 133, 134 and 135 of the principal Act are repealed and replaced by the following new sections -

"Indecent assault

133. Any person who unlawfully and indecently assaults another person is guilty of a felony and is liable to imprisonment for 7 years.

Indecent behaviour

133A. Any person who engages in indecent behaviour -

- (a) at a place accessible to the public, whether or not on payment of a charge; or

(b) at a place other than a place accessible to the public, if the person intends to insult or offend another person,

is guilty of a misdemeanour and is liable to imprisonment for 1 year.

Sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 13

134. (1) Any person who engages in sexual intercourse with a person under the age of 13 is guilty of a felony and is liable to imprisonment for life.

(2) Any person who attempts to engage in sexual intercourse with a person under the age of 13 is guilty of a felony and is liable to imprisonment for 12 years.

(3) Any person who indecently assaults a person under the age of 13 is guilty of a felony and is liable to imprisonment for 12 years.

(4) Any person who engages in indecent behaviour on, or in the presence of, a person under the age of 13 is guilty of a felony and is liable to imprisonment for 7 years.

(5) It is not a defence to a prosecution for an offence against this section that-

(a) the other person consented; or

(b) the accused believed that the other person was 13 years old or older.

Sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 15

135. (1) Any person who engages in sexual intercourse with a person under the age of 15 is guilty of a felony and is liable to imprisonment for life.

(2) Any person who attempts to engage in sexual intercourse with a person under the age of 15 is guilty of a felony and is liable to imprisonment for 10 years.

(3) Any person who indecently assaults a person under the age of 15 is guilty of a felony and is liable to imprisonment for 10 years.

(4) Any person who engages in indecent behaviour on, or in the presence of, a person under the age of 15 is guilty of a felony and is liable to imprisonment for 5 years.

(5) Subject to subsections (6) and (7), it is not a defence to a prosecution for an offence against this section that the other person consented.

(6) It is a defence to a prosecution for an offence against this section that at the time of the alleged offence -

(a) the accused was not more than 2 years older than the other person; and

(b) the other person wished to consent to the sexual intercourse, indecent assault or act of indecency.

(7) It is also a defence to a prosecution for an offence against this section that -

(a) the accused -

(i) took reasonable steps to determine the age of the other person; and

(ii) honestly believed on reasonable grounds that the other person was 15 years old or older; and

(b) the other person wished to consent to the sexual intercourse, indecent assault or act of indecency.

(8) Subsections (6) and (7) do not apply if the accused was a person in a position of trust towards the other person as defined by section 155A.

Peeping

135A. Any person who intentionally observes another person engaged in a private act without the other person's consent to being so observed is guilty of a felony and is liable to imprisonment for 3 years.

Filming person engaged in private act

135B. Any person who intentionally films another person engaged in a private act without the other person's consent to such filming is guilty of a felony and is liable to imprisonment for 3 years.

Filming genitalia, anal area or breasts of another person

135C. Any person who intentionally films another person's genitalia or anal area or, if the other person is female, breasts -

(a) without the other person's consent to such filming; and

(b) in circumstances in which a reasonable person would expect that the other person's genitalia, anal area or breasts would not be filmed,

is guilty of a felony and is liable to imprisonment for 3 years.

Installing device to allow peeping

135D. Any person who -

- (a) installs or operates a device; or
- (b) constructs or adapts a building, vehicle, or vessel,

for the purpose of observing or filming, or assisting the observation or filming of another person, with intent to engage in, or enable someone else to engage in, conduct that would be an offence against any of sections 135A, 135B or 135C, is guilty of a felony and is liable to imprisonment for 3 years."

5. Repeal of sections 156 to 159; new sections 155A, 156 and 156A

Sections 156, 157, 158 and 159 of the principal Act are repealed and replaced by the following new sections -

"Sexual intercourse, indecent assault or indecent behaviour by person in a position of trust

155A. (1) Any person who -

- (a) is in a position of trust in relation to another person under the age of 18; and
- (b) engages in sexual intercourse with the other person,

is guilty of a felony and is liable to imprisonment for life.

(2) Any person who -

- (a) is in a position of trust in relation to another person under the age of 18; and
- (b) attempts to engage in sexual intercourse with the other person,

is guilty of a felony and is liable to imprisonment for 10 years.

(3) Any person who -

- (a) is in a position of trust in relation to another person under the age of 18; and
- (b) indecently assaults the other person,

is guilty of a felony and is liable to imprisonment for 10 years.

(4) Any person who -

- (a) is in a position of trust in relation to another person under the age of 18; and
- (b) engages in indecent behaviour on, or in the presence of, the other person,

is guilty of a felony and is liable to imprisonment for 5 years.

(5) It is not a defence to a prosecution for an offence against this section that the other person consented.

(6) For the purpose of this section, a person is in a position of trust in relation to another person if the first person holds a position of trust or authority in relation to the other person, or the other person is dependent in any way on the first person.

(7) Without limiting subsection (6), a person is in a position of trust in relation to another person if the first person is any of the following in relation to the other person -

- (a) a parent, grandparent, great grandparent, foster parent, step-parent or adoptive parent;
- (b) a sibling, half-sibling or step-sibling;
- (c) an uncle or aunt;
- (d) a cousin;
- (e) a current or former custodian, guardian or carer;
- (f) a custom doctor or healer, or medical practitioner;
- (g) a teacher;
- (h) a sporting coach;
- (i) a counsellor;
- (j) a leader of religion or community;
- (k) a legal practitioner;
- (l) an employer;
- (m) if the other person is in the care, custody or control of the police - a police officer;

(n) if the other person is in a prison - a prison officer in the prison.

(8) A person is also in a position of trust in relation to another person if the person -

(a) has responsibility for, or a significant role in, the other person's upbringing and is part of his or her extended family; or

(b) has care, custody or control of the other person and allows him or her to live with the person's family as a member of the family.

(9) In subsection (7), in relation to a person -

"aunt" includes a half-sister or step-sister of one of the person's parents, step-parents, foster parents or guardians;

"foster parent" includes a former foster parent;

"step-parent" includes a former step-parent;

"uncle" includes a half-brother or step-brother of one of the person's parents, step-parents, foster parents or guardians.

Consensual sexual intercourse with family member

156. (1) Any person who -

(a) is aged 18 years or older; and

(b) engages in sexual intercourse with a family member of the person,

is guilty of a felony and is liable to imprisonment for 7 years.

(2) It is not a defence to a prosecution for an offence against this section that the other person consented.

(3) A person does not commit an offence under this section if the person did not consent to the sexual intercourse.

(4) In this section, the term "family member" of a person means any of the following -

(a) a sister or half-sister;

(b) a brother or half-brother;

(c) a parent or adoptive parent;

- (d) a grandparent or great grandparent;
- (e) a child or adopted child;
- (f) a grandchild or great grandchild;
- (g) an uncle or aunt;
- (h) a niece or nephew.

Removal from guardianship

156A. (1) If a person is convicted of an offence under this Part against a person over whom the offender has guardianship, the court may-

- (a) order the removal of the victim from the guardianship of the offender; and
- (b) appoint as guardian any other person the court considers appropriate.

(2) The court may at any time vary an order made under this section."

6. Amendment of section 160

Section 160 of the principal Act is amended –

- (a) by repealing the words "woman or girl" wherever they appear and substituting "person";
- (b) by repealing the word "she" and substituting "the person";
- (c) in the section heading, by replacing the word "female" by the word "person".

7. Repeal of section 161

Section 161 of the principal Act is repealed.

8. Amendment of section 287(3)

Section 287(3) of the principal Act is amended by repealing the word "rape" wherever it appears and substituting "unlawful sexual intercourse".

9. Consequential amendments to the Criminal Procedure Code

Sections 164, 165, 166 and 167 of the Criminal Procedure Code are repealed and replaced by the following sections -

"Person charged with unlawful sexual intercourse may be convicted of another offence

164. If a person is charged with unlawful sexual intercourse and the court is of opinion that the person is not guilty of that offence, but is guilty of an offence under any of sections 133, 133A, 134, 135, 137 or 156 of the Penal Code, the person may be convicted of that other offence although the person was not charged with it.

Person charged with consensual sexual intercourse with family member may be convicted of another offence

165. If a person is charged with an offence under section 156 of the Penal Code and the court is of opinion that the person is not guilty of that offence but is guilty of an offence under any of sections 134, 135 and 155A of the Penal Code, the person may be convicted of that other offence although the person was not charged with it.

Person charged with sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 15 may be convicted of another offence

166. If a person is charged with sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 15 and the court is of opinion that the person is not guilty of that offence but is guilty of an offence under any of sections 133, 133A, 134 or 137 of the Penal Code, the person may be convicted of that other offence although the person was not charged with it.

Person charged with sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 13 may be convicted of another offence

167. If a person is charged with sexual intercourse, indecent assault or indecent behaviour involving a person under the age of 13 and the court is of opinion that the person is not guilty of that offence but is guilty of an offence under any of sections 133, 133A, 135 or 137 of the Penal Code, the person may be convicted of that offence although the person was not charged with it. "

10. Application of this Act and repealed sections of the principal Act

- (1) This Act applies to conduct that takes place on or after the commencement of this Act.
- (2) Despite the repeal of sections of the principal Act by this Act, the repealed sections continue to apply –
 - (a) to conduct that took place before the commencement of this Act and that could be prosecuted under those sections; and
 - (b) to any proceedings or action taken, or any requirement or procedure imposed in relation to such conduct before or after that commencement.

PENAL CODE (AMENDMENT) ACT 2016

EXPLANATORY MEMORANDUM

1. The purpose of this Act is to amend the principal Act to modernise the rape offences, incest offences and related provisions.
2. Changes to the principal Act are required to ensure that the rape offences, incest offences and related provisions comprehensively criminalise conduct using a clear and fair approach. The provisions in this Act have been developed in accordance with best practice legislation in comparable Pacific jurisdictions, and take into account evolving legal jurisprudence.
3. The provisions in this Act will also complement the operation of the *Te Rau N Te Mweenga Act 2014*, which includes a broad definition of 'sexual assault' in section 4, that forms part of the domestic violence offence in section 33.
4. Sections 1 and 2 provide a short title for the Act, and define 'principal Act' to mean the Penal Code (Cap 67).
5. Section 3 repeals sections 128 (Definition of rape), 129 (Punishment of rape) and 130 (Attempt), and replaces them with the following new sections:
 - 127A (Interpretation of Part XVI)
 - 128 (Meaning of consent in offences against this Part)
 - 129 (Unlawful sexual intercourse), and
 - 130 (Attempt).
6. New section 127A (Interpretation of Part XVI) of the principal Act defines a range of terms relevant to the new and amended offences in the principal Act, including 'building', 'engaged in a private act', 'filming', 'genitals', 'sexual self-penetration' and 'unlawful'. Of particular note is the definition of 'sexual intercourse', which provides a modern and broad definition of the term that is gender-neutral, and broadens the traditional concept of penile penetration of the vagina to include penetration of other body parts and objects, as well as penetration by other body parts and objects. This ensures that a wider range of conduct will now be covered by the sexual offences.
7. New section 128 (Meaning of consent in offences against this Part) of the principal Act provides clarity as to the meaning of consent for the purpose of sexual offences in the principal Act. This section introduces the concept that a person consents to conduct only if the person freely and voluntarily agrees. The section also provides a range of situations in which a person is not taken to have consented to conduct, including if the person is subjected to force, substantially affected by alcohol, unconscious, under 15 years old, or affected by a cognitive incapacity to consent (such as a mental or physical impairment). This section also provides that a person does not consent merely because they do not protest or physically resist the activity. This section will assist prosecutors to more easily demonstrate where consent has not taken place.

8. New sections 129 (Unlawful sexual intercourse) and 130 (Attempt) of the principal Act replace the existing offences of rape and attempted rape. The offence of 'unlawful sexual intercourse' is much broader than the existing rape offence. Firstly, as 'sexual intercourse' has been defined more broadly (see discussion under paragraph 6), a wider range of conduct is covered by the offence. Secondly, the offence is now gender-neutral and could, for example, be committed by a woman against a man. Thirdly, the offence now specifies clearly that rape within marriage is an offence, as consistent with modern legal jurisprudence. To reflect the broader range of conduct that is covered by the new offence, the phrase 'unlawful sexual intercourse' has been used in place of the existing term of 'rape'.

9. Section 4 repeals sections 133 (Indecent assaults on females), 134 (Defilement of a girl under 13 years of age) and 135 (Defilement of a girl between 13 and 15 years of age, or of idiot or imbecile), and replaces them with the following new sections:

- 133 (Indecent assault)
- 133A (Indecent behaviour)
- 134 (Sexual intercourse, indecent assault or indecent behaviour involving a person under 13)
- 135 (Sexual intercourse, indecent assault or indecent behaviour involving a person under 15)
- 135A (Peeping)
- 135B (Filming person engaged in private act)
- 135C (Filming genitalia, anal area or breasts of another person), and
- 135D (Installing device to allow peeping).

10. New sections 133 (Indecent assault) and 133A (Indecent behaviour) of the principal Act replace existing section 133 (Indecent assaults on females). The language of these provisions has been modernised, and made gender-neutral, which means that these offences could now, for example, be committed by women against men. The provisions are also complemented by new specific provisions to cover 'peeping' conduct (see paragraph 12).

11. New sections 134 (Sexual intercourse, indecent assault or indecent behaviour involving a person under 13) and 135 (Sexual intercourse, indecent assault or indecent behaviour involving a person under 15) of the principal Act replace the existing defilement offences. These offences have also been made gender-neutral to protect boys as well as girls, and have been amended for consistency with the other new sexual offences.

12. New sections 135A (Peeping), 135B (Filming person engaged in private act), 135C (Filming genitalia, anal area or breasts of another person) and 135D (Installing device to allow peeping) of the principal Act criminalise conduct that observes other people's private acts or private parts without their consent. This conduct was previously criminalised under section 133 (Indecent assaults on females). However, the new offences apply to a broader range of conduct.

13. Section 5 repeals sections 156 (Incest), 157 (Test of relationship) and 158 (Sexual intercourse with certain collaterals), and replaces them with the following new sections:

- 155A (Sexual intercourse, indecent assault or indecent behaviour by person in a position of trust)
- 156 (Consensual sexual intercourse with family member), and
- 156A (Removal from guardianship).

14. New section 155A (Sexual intercourse, indecent assault or indecent behaviour by person in a position of trust) is a new offence designed to protect vulnerable young people from abuse by those in positions of authority. As such, where a person is aged between 15 and 18 years old, they are now deemed unable to consent to sexual conduct with a person who is in a position of trust over them. This is because any consent they do give will be negated by the position of trust the offender is in. As such, a person who engages in sexual conduct with a person over whom they are in a position of trust will be guilty of an offence under this section. Examples of people in positions of trust are listed in the provision and include a young person's parents, uncles, aunts and other relatives with a significant role in their upbringing, or a young person's teacher, religious leader, employer or sporting coach.

15. New section 156 (Consensual sexual intercourse with family member) replaces the existing sections 156 (Incest), 157 (Test of relationship) and 158 (Sexual intercourse with certain collaterals). Incest in Kiribati culture includes a wide range of family relationships. Conduct that may broadly be considered incest in Kiribati culture is covered under several different sections of the criminal law, including the child sex offences. The 'Consensual sexual intercourse with family member' offence will only cover consensual sexual intercourse by a person aged 18 years or older with a family member, and as such the word 'incest' has been removed from the name of the offence to avoid confusion with the customary meaning of the word. The existing separate offences for men and women have been combined into a single offence, and in order to reflect the broad view of incest in Kiribati culture, the 'consensual sexual intercourse with family member' offence now covers sexual intercourse with an adoptive parent, cousin, uncle, aunt, niece or nephew; relationships that are not covered by the existing incest offence.

16. New section 156A (Removal from guardianship) maintains the existing power of the court, which is currently given in subsection 156(4), to remove a young person from the guardianship of a person who has committed a sexual offence against them.

17. Section 6 provides as follows:-

By repealing the words "woman or girl" wherever they appear and substituting "person";

(b) by repealing the "she" and substituting "the person";

(c) in the section heading, by repealing the word "female" by the word "person"

18. Section 7 repeals section 161 (Definition of sexual intercourse), which is now covered in section 127A (Interpretation).

19. Sections 8 and 9 provide for necessary consequential amendments to the principal Act and the Criminal Procedure Code, namely, replacing references to terms that have now been replaced in the sexual offences provisions in the principal Act (such as 'rape') with the new terminology.

20. Section 10 states that this Act will apply to conduct that takes place on or after the commencement day. It preserves any offences committed before that day, and any proceedings arising out of such offences.

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Hon. Natan Teewe (MP)
Minister for Justice
19/07/17

**CERTIFICATE OF THE CLERK OF THE MANEABA NI
MAUNGATABU**

This printed impression of the Employment and Industrial Relations Code (amendment) Act 2017 has been carefully examined by me with the Bill which passed the Maneaba ni Maungatabu on the 5th December 2017 and is found by me to be a true and correctly printed copy of the said Bill.

Eni Tekanene
Clerk of the Maneaba ni Maungatabu

Published by exhibition at the Maneaba ni Maungatabu this 23 day of
February 2018.

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Eni Tekanene
Clerk of the Maneaba ni Maungatabu