

**SOLOMON ISLANDS
LAW REFORM COMMISSION**



**REVIEW OF THE PENAL CODE AND CRIMINAL
PROCEDURE CODE
SEXUAL OFFENCES - SENTENCING
RESEARCH PAPER
2011**



**THE SOLOMON ISLANDS LAW REFORM COMMISSION
HONIARA, SOLOMON ISLANDS**

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Solomon Islands Law Reform Commission

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

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The Commissioners are:

Mr Gabriel Suri

Mr Waeta Ben Tabusasi C.S.I., S.I.M.

Mrs Sarah Dyer

Rt Reverend Philemon Riti O.B.E.

The Research Manager is Kate Halliday

The Legal Officers are:

Philip Kanairara

Kathleen Kohata

Daniel A. Suluia

Lauren Banning

The Office Manager is Matilda Dani Diake

The Administration Assistant is Solomon Lincoln Saemala

The project team for this paper was Lauren Banning and Kate Halliday

The LRC is located at Kalala Haus, Honiara, behind the High Court.

PO Box 1534 Honiara

Phone: +677 38773

Fax: + 677 38760

Email: lawreform@lrc.gov.sb

Website: www.lawreform.gov.sb.

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1. Overview

This report examines prosecutions for the sexual offences of rape, defilement, indecent assault, incest, unnatural offences and indecent practices to determine sentence range, and the factors that affect the type and severity of sentences given for these offences. The report examines cases prosecuted between 2003 and 2010.

Major findings:

- The highest sentence for one count of rape was 8 years by the High Court in 2010. The lowest sentence for one count of rape was 1 year, 8 months by the High Court in 2009.
- The highest sentence for one count of attempted rape was 5 years by the Court of Appeal in 2010. The lowest sentence for one count of attempted rape was 2 years, 6 months by the High Court in 2008.
- The highest sentence for one count of defilement of a girl aged less than 13 years was 5 years by the High Court in 2008. The lowest sentence for one count of defilement of a girl aged less than 13 years was 9 months, in 2006.
- The highest sentence for one count of defilement of a girl aged 13 to 15 years was 12 months by the Magistrates' Court in 2010. The lowest sentence for one count of defilement of a girl aged 13 to 15 years was 3 months by the High Court in 2005.
- The highest sentence for one count of incest was 3 years, 6 months by the High Court in 2008. The lowest sentence for one count of incest was 2 years by the High Court in 2005 and 2010.
- The highest sentence for one count of indecent assault was 3 years by the Court of Appeal in 2010. The lowest sentence for one count of indecent assault was 1 month by the High Court in 2005.
- The highest sentence for one count of unnatural offences was 6 years by the High Court in 2004. The lowest sentence for one count of unnatural offences was 2 years by the Magistrates' Court in 2010.
- The highest sentence for one count of indecent practices was 12 months by the High Court in 2004. The lowest sentence for one count of indecent practices was 6 months in the Magistrates' Court in 2010.

Mitigating factors personal to the offender were given significant weight despite the presence of serious aggravating factors, such as use of violence and threats, the offender being in a position of trust, or the victim was a child (under 18 years).

Although the Court of Appeal has endorsed sentencing guidelines that set a 5 year starting point for sentencing of rape, there is a tendency for sentences to be influenced by the actual sentences in similar cases, rather than using the principles set out in the guidelines.

Sentencing guidelines and starting points are limited or non-existent for sexual offences other than rape. Instead the courts follow sentencing trends in similar cases.

Compared with the other Melanesian countries of Papua New Guinea, Fiji and Vanuatu, the sentencing for sexual offences in the Solomon Islands is low.

Consideration needs to be given to courts sentencing for sexual offences having better information about the social, physical and psychological harm caused to the victim by the offence.

Also, given the high prevalence of sexual abuse recorded by the Solomon Islands Family Health and Safety Survey in 2009 more consideration could be given to the purpose of general deterrence in sentencing for sexual offences.

2. Introduction

- 2.2 The Solomon Islands Law Reform Commission (LRC) is currently undertaking a review of the Penal Code. This research paper was produced to support the review of sexual offences: rape, defilement, indecent assault and incest. The paper examines records of convictions and sentencing outcomes to identify:
- what sentences are given;
 - the aggravating and mitigating factors that are taken into account by courts; and
 - any additional factors considered relevant by the court for the purpose of sentence.
- 2.3 This paper will assist the LRC to develop recommendations for reforms that will provide better protection to victims and society, ensure fairness to people convicted of offences, and make the Solomon Islands judicial system more robust.
- 2.4 Reform of sexual offences will also help the Solomon Islands to meet its international obligations under the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW). Furthermore, the Solomon Islands government has expressly supported ending violence against women and improving gender equality as demonstrated with the recent national policies: Eliminating Violence Against Women (EVAW), Gender Equality and Women's Development (GEWD), National Children's Policy (NCP) and the National Youth Policy 2010-2015 (NYP). These policies indicate an ongoing commitment to gender mainstreaming and enacting legislation to improve protection for women and children against violence.

Purpose of Sentencing

- 2.5 The purposes of sentencing are retribution, deterrence (general and specific to the perpetrator), rehabilitation and protection of the community. The purposes of sentencing give guidance to courts when determining what sentence to give an offender.

Methodology

- 2.6 The sexual offences under review are:
- rape;
 - attempted rape;
 - defilement;
 - indecent assault;
 - incest; and
 - unnatural offences.

- 2.7 Judgments and case information were identified through online resources, primarily PacLII, and Solomon Islands daily newspapers. Additional information was provided by the Office of the Director of Public Prosecutions and the High Court. The following information was extracted from each case (when that was possible):
- offence;
 - sentence imposed;
 - age of victim, age of offender;
 - aggravating factors in sentencing; and
 - mitigating factors in sentencing.
- 2.8 Specific aggravating and mitigating factors were reviewed in greater detail due to their significance in sentencing. The age of the victim and relationships of trust, care and authority are significant aggravating factors. The mitigating factors of family obligations, delay, the victim's behaviour and prior sexual activity, sexual inexperience of the offender, compensation and lack of aggravating factors were identified as focus areas.
- 2.9 The relevant information was compiled in an electronic (Excel) workbook. Additional resources were used to provide social, cultural, policy and legal context including country reports (domestic and international), government policies, international research and LRC consultation notes.
- 2.10 A comparative analysis of sentences in neighbouring Melanesian states, Fiji, Papua New Guinea (PNG) and Vanuatu was conducted.
- 2.11 Some challenges in collecting reliable data emerged. They included:
- problems with access to written decisions by the Magistrates' Court; and
 - essential information was missing in written judgements from the High Court and Court of Appeal.
- 2.12 The paper will commence with a review of the existing offences and then present the research about sentencing for the offences. It will then address factors identified by courts that affect the type and severity of sentences given. It then presents a short comparison with sentencing for sexual offences in Fiji, PNG and Vanuatu. It concludes with a discussion about the research findings.

3. Offences and maximum penalties

- 3.1 This section reports on the maximum sentences for each offence and the elements of each offence.
- 3.2 Figure 1 lists the maximum sentences for all sexual offences and any differences in maximum penalties due to the age or mental capacity of the victim. All penalties are for imprisonment.

Figure 1: Maximum sentences for sexual offences in the Penal Code

Offence	Maximum Sentence (victim 18 years or older)	Maximum Sentence (victim is less than 13 years)	Maximum Sentence (victim is 13-15 years/ imbecile or idiot)
Rape	Life	Life	Life
Attempted Rape	7 years	7 years	7 years
Defilement	N/A	Life	5 years
Attempted Defilement	N/A	2 years	5 years
Indecent Assault	5 years	5 years	5 years
Incest	7 years	Life	7 years
Unnatural Offences	14 years	14 years	14 years
Attempted Unnatural Offences	7 years	7 years	7 years
Indecent Practices	5 years	5 years	5 years
Attempted Indecent Practices	5 years	5 years	5 years

Sexual Intercourse

- 3.3 Sexual intercourse is an element of the offences of rape, defilement and incest. The Penal Code defines sexual intercourse to be penile penetration of the vagina.

s. 168: Definition of Sexual Intercourse

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove sexual intercourse, it shall not be necessary to prove the completion of the intercourse by the actual emission of seed but the intercourse shall be deemed complete upon proof of penetration only.

- 3.4 For a conviction for rape, defilement or incest the prosecution must prove that sexual intercourse took place. This definition restricts these offences to penile penetration of the vagina only. This definition means only women and girls can be victims of penetrative sexual assault with the exception of buggery. Penetration by other objects or body parts is excluded.

Rape

- 3.5 Rape is regarded as the most serious sexual offence in the Solomon Islands. It is a violent crime that demonstrates an offender has no regard to the rights and emotions of women and girls.¹

s. 136: Any person who has unlawful sexual intercourse with a woman or girl without her consent or with her consent, if the consent is obtained by force, or by means of threats, or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act or in the case of a married woman, by personating her husband.

s.137: Any person who commits the offence of rape shall be liable to imprisonment for life.

- 3.6 Rape has a maximum penalty of life imprisonment. Currently it can only be committed by a man against a female victim.
- 3.7 There is no separation between adult and child victims. Rape relies on proving no consent to sexual intercourse. Currently the Penal Code does not provide any guidance to the meaning of consent other than section 136.

“The law is that the slightest penetration is enough, even if it is not deep enough to damage the hymen. If that happens it is sufficient to constitute rape.”²

Attempted Rape

s.138: Any person who attempts to commit rape is guilty of a felony and shall be liable to imprisonment for seven years.

- 3.8 Proof of penile penetration is needed for rape, defilement and incest. Our research suggests that where an accused failed to achieve full penetration because the victim was extremely young and her vagina was too small he was charged with either attempted rape or indecent assault.
- 3.9 Section 138 is unclear as to what physically constitutes an ‘attempt’ however under section 378 of the Penal Code if a offender has an intention to commit an offence and starts to execute this intention he is regarded as committing the offence, even if he or she is unable to fulfil this intention. It is irrelevant under section 378 that the offender desisted on his or her own volition.

¹ *Regina v Waiapuru* [2008] SBHC 40; *Regina v Nickson* [2008] SBHC 21

² *Regina v Alualu* [2005] SBHC 106

- 3.10 A 2010 judgment found an offender guilty of attempted rape without genital to genital contact.³ This suggests that intention to commit the act of rape is sufficient to prove an attempt even if partial penetration does not take place.

Case Study⁴

A 66 year old grandfather pleaded guilty to 2 Counts of Attempted Rape of his 6 year old granddaughter. The Magistrate's Court sentenced the offender to 4 years imprisonment per count, consecutively. On appeal, the High Court altered the sentence to concurrent on the grounds that it was a crushing punishment for someone that old.

Defilement

s.142: Defilement of a girl under thirteen years of age:

- (1) Any person who has unlawful sexual intercourse with any girl under the age of thirteen years is guilty of a felony and shall be liable to imprisonment for life
- (2) Any person who attempts to have unlawful sexual intercourse with any girl under the age of thirteen years is guilty of a misdemeanour, and shall be liable to imprisonment for two years

It is no defence to charge for an offence under this section to prove that the girl consented to the act

s.143: Defilement of a girl between thirteen and fifteen years of age or of idiot or imbecile

- (1) Any person who-

has or attempts to have unlawful sexual intercourse with any girl being of or above the age of thirteen years and girl under the age of fifteen years; or

³ *Regina v Kipusia* [2010] SBHC 84 cf *Regina v Nono'oa* SBMC (Unreported, Maina CM, 25 November 2010): in this case a man attempted to rape a woman while she was asleep, but was unable to achieve an erection. The CM stated had he been physically able to penetrate the victim he would have been charged with rape. From the available information it is unclear why he was charged with indecent assault and not attempted rape. Under s.378 his intention was clear he was just unable to fulfil the action. He was sentenced to 18 months imprisonment.

⁴ *Paskale Togovi v Regina* High Court of Solomon Islands, Criminal Case No 50 of 2009 (unreported Naqiolevu J 30 October 2009).

has or attempts to have unlawful sexual intercourse with any female idiot or imbecile woman or girl under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile,

shall be guilty of a misdemeanour, and shall be liable to imprisonment for five years:

Provided that it shall be a sufficient defence to any charge under paragraph (a) of this subsection if it shall be made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of fifteen years.

(2) No prosecution shall be commenced for an offence under paragraph (a) of subsection (1) of this section more than twelve months after the commission of the offence.

(3) It is no defence to any charge under paragraph (a) of subsection (1) of this section to prove that the girl consented to the act.

- 3.11 Men who have sexual intercourse with a girl under 15 years can be guilty of defilement. Consent of the victim is not a defence. The victim is regarded under the law as a child and not able to consent to sexual intercourse.
- 3.12 Defilement is often used as an alternative charge to rape. Under section 166 of the Criminal Procedure Code, a person charged with rape may be convicted under section 142 or section 143 if lack of consent cannot be proved beyond reasonable doubt and the victim is less than 15 years.
- 3.13 There is significant difference between the maximum penalties for the two categories of defilement. The maximum penalty for defilement of a girl under 13 is life imprisonment compared to a maximum penalty of 5 years for a girl aged 13 to 15 years. Section 143 has the same penalty of 5 years for both defilement and its attempt, whereas an attempted defilement of a girl under 13 years is only liable to 2 years imprisonment. The policy reason for the large difference between both offences of defilement and the attempts is unclear.
- 3.14 The terms of section 143(3) are offensive and archaic, and the offence does not provide adequate protection for men or women with a disability who may be vulnerable to sexual abuse.

*Case Study*⁵

A step father aged 49 years pleaded guilty to 1 count of defilement of his 12 year old step daughter. He took her to an isolated location, committed the offence and told the victim not to tell anyone or he would kill her. He was sentenced to 2 years imprisonment.

Indecent Assault**s.141: Indecent Assault**

(1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and shall be liable to imprisonment for five years.

(2) It is no defence to a charge for an indecent assault or on a girl under the age of fifteen years to prove that she consented to the act of indecency.

(3) Whoever, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such a word or sound shall be heard, that such a gesture or object shall be seen, by such woman or girl, or whoever intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty, shall be guilty of a misdemeanor and shall be liable to imprisonment for one year.

3.15 Indecent assault covers a range of conduct including sexual touching, forced removal of clothes, digital penetration and oral sex. The offence is used for all conduct except for sexual intercourse and for this reason the maximum penalty of five years does not always reflect the seriousness of the conduct.

3.16 As with rape, there is no separation between children and adult victims.

*Case Study*⁶

In a recent case in the Magistrates' Court a man was convicted of 3 counts indecent assault. The victim was his 12 year old daughter. The court identified the repeated nature of offending, the use of violence and threats, and significant breach of trust as aggravating factors. The offender was sentenced to 2 years for each offence, to be served concurrently.

⁵ *Regina v Alwin Danny Desmond* High Court of Solomon Islands, Criminal Case No 21 of 2007 (unreported Faulkona J, 5 March 2009).

⁶ *Regina v X SBMC* (Unreported, Wilson M, 25 March 2010)

Incest**s.163: Incest by males**

(1) Any male person who has sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony and shall be liable to imprisonment for seven years:

Provided that if it is alleged in the information, or charge and proved that the female person is under the age of thirteen years, the offender shall be liable to imprisonment for life

(2) It is immaterial that the sexual intercourse was had with the consent of the female person.

(3) If any male person attempts to commit any such offence as aforesaid, he shall be guilty of a misdemeanour

(4) On the conviction before any court of any male person of an offence under this section, or of an attempt to commit the same, against any female under the age of eighteen years, it shall be in the power of the court to divest the offender of such female, to remove the offender from such guardianship and in any such case to appoint any person or persons willing to take charge of such female, to be the guardian or guardians of such female during her minority or any less period, and the court may at any time vary or rescind the order by the appointment of any other person as such guardian or in any other respect.

s.164: Incest by females

Any female person of or above the age of fifteen years who with consent permits her grandfather, father, brother or son to have sexual intercourse with her (knowing him to be her grandfather, father, brother or son, as the case may be) shall be guilty of a felony, and shall be liable to imprisonment for seven years.

3.17 The offence of incest covers sexual intercourse between closely related adults, with a specific provision for victims under 13 years of age. Consent of the victim or offender is not relevant to the offence of incest by a male, except when the offence is committed by a female over the age of 15 years. Family members that fall beyond the scope of this offence cannot be charged with incest, such as uncles, half-siblings, cousins and adopted siblings. Customary family relationships are

not included although in many cases a breach of these relationships is regarded as taboo as those included.

- 3.18 Non penetrative sexual offences that are perpetrated by male family members within this definition are excluded from this charge. This suggests that the purpose of an incest offence is to prevent the birth of incestuous children. There are several cases involving uncles or cousins sexually assaulting a victim however they fall beyond the scope of s.163. These offenders are charged under rape or defilement.

Unnatural Offences

s.160: Any person who:

- (a) commits buggery with another person or with an animal ; or
- (b) permits a male person to commit buggery with him or her,

Shall be guilty of a felony, and shall be liable to imprisonment for fourteen years.

- 3.19 This crime applies to males and females who are engaging in anal sex, and includes adult consenting acts and non consenting adult to child and adult to adult acts. We could only identify two cases since 2003 where the offence has been used. Both cases involved adults sexually assaulting children under 18 years without consent. One case involved male victims.

*Case Study*⁷

The Magistrates' Court recently found a 19 year old boy guilty of committing buggery against his 10 year old half-sister. The medical report confirmed there had been forced anal penetration. The offender pleaded guilty and as a first time offender was only sentenced to 2 years.

Indecent Practices

s.162: Indecent practices between persons of the same sex

Any person who, whether in public or private-

- (a) Commits any act of gross indecency with another of the same sex;
- (b) Procures another of the same sex to commit any act of gross indecency; or

⁷ Solomon Star, Wednesday 23 June 2011, 5.

(c) Attempts to procure the commission of any act of gross indecency by persons of the same sex,

Shall be guilty of a felony and liable to imprisonment for five years.

- 3.20 This crime applies to persons of the same sex and includes both consensual and non-consensual acts. As with unnatural offences, there is no separation of adults and children and it has been used to charge adult offenders who have committed acts of gross indecency with children.
- 3.21 Both the act and its attempt have the same maximum penalty of 5 years.
- 3.22 The act does not define 'gross indecency' however from the research it includes touching another person's genitals with hands, oral sex and masturbation. This offence has only been charged in two cases and involved adult male perpetrators and male children.
- 3.23 Indecent practices and unnatural offences are the only sexual offence crimes that protect male victims. Both crimes also criminalise consenting homosexual relations.

4. Range of sentences given for sexual offences

- 4.1 In this section we present information about the range of sentences given for each of the offences.
- 4.2 The sentences that are considered are from both the Magistrates' and High Court. The Magistrates' Court can hear offences with maximum penalties of 14 years. The offences of defilement of a girl aged 13 to 15 years, attempted defilement, attempted rape, incest where the victim is older than 13, indecent assault, indecent practices, unnatural offences and attempted unnatural offences can be finalised in either the Magistrates' or High Court. However if finalised in the Magistrates' Court this affects the maximum penalty that might be given because Magistrates only have the power to sentence up to 5 years for each offence.⁸ Where an offender is found guilty of multiple charges the Magistrates' Court only has the power to impose a total sentence up to 10 years (they cannot exceed twice the amount of punishment, 5 years, allowed).⁹
- 4.3 Under the Criminal Procedure Code¹⁰, the Magistrates Court can commit a guilty offender to the High Court for sentencing. This is suitable for any offence where the Magistrate believes on the facts of the case a greater punishment should be imposed. The offender must be over 18 years.
- 4.4 We looked at the highest and lowest penalties given for a single count of each sexual offence. We decided to record suspended sentences separately. If we identified several suspended sentences for an offence we recorded the highest suspended sentences given.¹¹
- 4.5 Figure 2 shows the highest and lowest sentences given for one count of all sexual offences. In cases where suspended sentences were given, we have included the highest suspended sentences. These sentences are for the 2003-2010 period only.

⁸ Applies to Principle Magistrates, s. 7(1)(a) Criminal Procedure Code

⁹ s.9(2) Criminal Procedure Code

¹⁰ Criminal Procedure Code s 208.

¹¹ A suspended sentence is a prison term that is suspended subject to the offender being of good behaviour for a set period (not commit any further offences in that set period). The term of imprisonment can be full or partly suspended, meaning that the offender either spends no time in prison, or spends part of the sentence in prison.

Figure 2: The highest and lowest sentences and highest suspended sentences recorded for one count of a sexual offence between 2003-2010

Offence	Highest Sentence	Lowest Sentence	Suspended Sentence
Rape	8 years ¹²	1 year, 8 months ¹³	2 years (wholly suspended) ¹⁴
Attempted Rape	5 years ¹⁵	2 years, 6 months ¹⁶	N/A
Defilement (s.142) Victim under 13 years	5 years ¹⁷	9 months ¹⁸	4 months (wholly suspended for 12 months) ¹⁹
Defilement (s.143) Victim aged 13 to 15 years	12 months ²⁰	3 months ²¹	12 months (wholly suspended for 2 years) ²²
Incest	3 years, 6 months ²³	2 years ²⁴	16 months (at 8 months sentence suspended) ²⁵
Indecent Assault	3 years ²⁶	1 month ²⁷	N/A
Unnatural Offences	6 years ²⁸	2 years ²⁹	N/A
Indecent Practices	12 months ³⁰	6 months ³¹	N/A

N/A = Not Applicable because the offence has not reached court or the offence has not received a suspended sentence. With the exception of attempted rape, no cases were identified of attempts of other sexual offences.

¹² *Regina v Sisiolo* [2010] SBHC 35

¹³ *Regina v Paul* [2009] SBHC 48

¹⁴ *Regina v Olofia* [2008] SBHC 106; *Regina v Oge* [2004] SBHC 71

¹⁵ *Regina v Foa* [2010] SBCA 1

¹⁶ *Regina v Luimalefo* [2008] SBHC 71

¹⁷ *Regina v Lotau* [2008] SBHC 58

¹⁸ *Pasikale v The Queen* [2003] SBHC 36; *Oscar v Regina* [2006] SBHC 148

¹⁹ *Regina v Rubekolo* [2006] SBHC 122

²⁰ *Regina v Titi* SBMC (Unreported, Maina CM, 29 January 2010); *Regina v Ferris* HCSI-CRC 308-03 (Unreported, Palmer CJ, 22 December 2004)

²¹ *Zale v Regina* [2005] SBHC 54

²² *Regina v Usa* HCSI-CRC 180-2007 (Unreported, Naqiolevu J, 26 March 2009)

²³ *Regina v Bwa'ala* [2008] SBHC 37; *Fuilorentino v Regina* [2008] SBHC 47

²⁴ *Regina v Qinity* [2010] SBHC 26; *Nanai v Regina* [2005] SBHC 74

²⁵ *Regina v X* SBMC (Unreported, Wilson M, 23 April 2010)

²⁶ *Regina v Okisi* [2008] SBHC 92; *Regina v Foa* [2010] SBCA 1

²⁷ *Tala v Regina* [2005] SBHC 89

²⁸ *Farsy v Reginam* [2004] SBHC 120

²⁹ *Regina v Y* SBMC (Unreported, Wilson M, 22 June 2010)

³⁰ *Farsy v Reginam* [2004] SBHC 120

³¹ *Regina v Lauvisu* SBMC (Unreported, Wilson M, 4 March 2010)

Rape

- 4.6 The highest sentence given by the High Court for rape is 8 years. In *Sisiolo* the offender pleaded guilty to 4 counts rape, and sentenced to 8 years per count to be served concurrently.³² The offender was a repeat sexual offender, raped two victims, was significantly older than either girl and was in a position of trust as a custom doctor.
- 4.7 The lowest sentence given for rape by the High Court is 1 year, 8 months. The offender and victim were close in age and the Judge stated there were no aggravating factors. There had been a delay in proceedings of 3 years and 8 months which was given significant weight.
- 4.8 In two cases of rape, a 2 year sentence was wholly suspended due to delays in proceedings. In *Olofia* the court considered the offender's exemplary character, old age and the delay in proceedings of over 3 years to be significant mitigating factors that warranted a suspended sentence.³³ In *Oge* the court considered the offender's good character since offending, and the 5 year delay in proceedings warranted a suspended sentence.³⁴
- 4.9 The research shows that most sentences for rape by a first time offender are between 3 and 6 years.³⁵ The sentences at the high end of the scale (6 years) involved aggravating factors such as the use of violence, further acts of sexual indignities and severe injury to the victim. The majority of cases rest at the lower end of the scale (3 years).

Attempted Rape

- 4.10 In *Foa* the Court of Appeal increased the High Court sentence of 3 years, to 5 years resulting in the highest sentence for attempted rape.³⁶ The victim had been 9 years old at the time of offending and the offender was a serving Police Officer. He was also found guilty of indecent assault against the same victim.
- 4.11 The lowest sentence for attempted rape is 2 years, 6 months and involved a step father and his 13 year old step-daughter. The offender was significantly older than her, threatened her with a knife and used his position of trust to commit the offence.
- 4.12 Given the small size of this category (only four cases have been tried between 2003 and 2010 and all the victims, except one, were children) it is difficult to draw any conclusions on the sentencing range for attempted rape.

³² *Regina v Sisiolo* [2010] SBHC 35

³³ *Regina v Olofia* [2008] SBHC 106

³⁴ *Regina v Oge* [2004] SBHC 71

³⁵ *Regina v Nickson* [2008] SBHC 21

³⁶ *Regina v Foa* [2010] SBCA 1 – This is the highest sentence for attempted rape between 2003 -2010. In *Ligiau & Dori*, a 5 year sentence was given for the attempted rape offence.

4.13 No cases of suspended sentences for attempted rape were identified.

Defilement of a girl aged less than 13 years

- 4.14 The highest sentence for defilement of a girl under 13 years, a crime that carries a maximum sentence of life imprisonment, is 5 years. In *Lotau* the victim was 12 years old and the offender was her step father.³⁷ The age disparity, breach of a significant trust relationship, use of money by the offender (a corrupting influence), that he was drunk and threatened her prevent reporting were all aggravating factors.
- 4.15 The lowest sentence for defilement of a girl under 13 years was 9 months and was given in two cases. In *Pasikale* the mitigating factors, including that the offender was the breadwinner for his family, and payment of compensation were given significant weight.³⁸ In *Oscar* there were 9 offenders, all of whom had had unlawful sexual intercourse (some more than once) with the 12 year old victim.³⁹ They ranged in age from juveniles (approximately 17 years) to 23 years old.
- 4.16 In *Rubekolo* the offender was sentenced to 4 months, but fully suspended for 12 months.⁴⁰ In this case the victim was 12 years old and the offender was 23 years old. The mitigating factors of this case (first time offender, absence of aggravating factors, not in a position of trust) were regarded as significant and resulted in the suspension.
- 4.17 This category is small, with only 6 cases between 2003 and 2010 identified.

Defilement of a girl aged 13 to 15 years

- 4.18 The maximum sentence for the offence of defilement of a girl 13-15 years was 12 months and has been given in two cases. In an unnamed case in the Magistrates' Court, the conduct of the 13 year old victim and her alleged previous sexual experience were regarded as relevant mitigating factors.⁴¹ In *Ferris* the victim was also aged 13 years, and the offender was a significantly older, family friend.⁴² The payment of compensation and his status as a first time offender resulted in his initial two year sentence being reduced to 12 months.
- 4.19 The lowest sentence for defilement of a girl aged 13-15 years was 3 months per count for a total consecutive sentence of 9 months. In *Zale* the victim was also aged 13 years old and the offender pleaded guilty to 3 counts of defilement.⁴³

³⁷ *Regina v Lotau* [2008] SBHC 58

³⁸ *Pasikale v The Queen* [2003] SBHC 36

³⁹ *Oscar v Regina* [2006] SBHC 148

⁴⁰ *Regina v Rubekolo* [2006] SBHC 122

⁴¹ *Regina v Titi* SBMC (Unreported, Maina CM, 29 January 2010)

⁴² *Regina v Ferris* HCSI-CRC 308-03 (Unreported, Palmer CJ, 22 December 2004)

⁴³ *Zale v Regina* [2005] SBHC 54

- 4.20 A sentence of 12 months, fully suspended for 2 years was given in *Usa* for defilement of a girl aged 13 to 15 years.⁴⁴ The offender was 21 years and the victim was 14 years old. The Judge regarded the mitigating factors, in particular giving compensation, responsibilities to his wife and child, rehabilitation prospects and that he “made a mistake” to be significant.

Incest

- 4.21 The highest sentence for incest by a male was 3 years and 6 months per count. This has been given in two cases, both involving father and daughter sexual abuse. In *Bwa'ala* the offender was found guilty of 6 counts of incest committed against his two daughters (aged 14 and 21 years at the start of offending) and resulted in the elder daughter bearing his child.⁴⁵ In *Fuiloentino* the offender was found guilty of 14 counts of incest committed against his daughter aged 19 at the start of offending and resulted in the birth of four children.⁴⁶
- 4.22 The lowest sentence for incest by a male was 2 years and has been given in 2 cases. In *Qinity* and *Nanai* the perpetrators in both cases pleaded guilty to a single count of incest.⁴⁷ In *Nanai* the victim was made pregnant as a result of the sexual offending, however on appeal to the High Court the offender received a reduction due to the lengthy delay (almost 10 years) and his current medical condition.⁴⁸ In *Qinity* the offender had premeditated non-consensual sexual intercourse with his 15 year old daughter and destroyed the sanctity of the family home.⁴⁹ The court regarded the reconciliation that took place, financial obligations to his family and the delay of 5 years as warranting a 2 year sentence.
- 4.23 In an unnamed case decided in the Magistrates Court, the offender was given 16 months imprisonment with 8 months of the sentence suspended.⁵⁰ In this case the victim was aged 14 years and her father, the perpetrator, was aged 40 years. Despite serious aggravating factors such as large age disparity, the significant breach of trust, that the offence was non-consensual and the victim suffered physical and emotional pain, the court appears to have significant weight on the mitigating factors personal to the accused (his age, family obligations and shame) to warrant a partially suspended sentence.

Indecent Assault

- 4.24 The highest sentence for indecent assault was 3 years in two cases. Both of these cases were serious because the victims were children, the perpetrators were adults,

⁴⁴ *Regina v Usa* HCSI-CRC 180-2007 (Unreported, Naqiolevu J, 26 March 2009)

⁴⁵ *Regina v Bwa'ala* [2008] SBHC 37

⁴⁶ *Fuiloentino v Regina* [2008] SBHC 47

⁴⁷ *Regina v Qinity* [2010] SBHC 26; *Nanai v Regina* [2005] SBHC 74

⁴⁸ *Nanai v Regina* [2005] SBHC 74

⁴⁹ *Regina v Qinity* [2010] SBHC 26

⁵⁰ *Regina v X* SBMC (Unreported, Wilson M, 23 April 2010)

the offender used force and there was an existing relationship of trust between the offender and victim. In *Okisi* the offender was found guilty of 5 counts of indecent assault, which included rubbing his penis on the vagina of the victim until he ejaculated.⁵¹ In *Foa* the offender pleaded guilty to attempted rape and indecent assault, which was digital penetration and licking the victim's vagina.⁵²

- 4.25 The lowest sentence given for indecent assault was 1 month. In *Tala* the offender also pleaded guilty to defilement of the victim, aged 13 years, and was given a total sentence of 10 months.⁵³ This sentence was made concurrent to an existing 22 month sentence for previous unknown offences. The indecent assault was unwanted sexual touching and kissing.
- 4.26 No suspended sentence has been given for indecent assault.

Unnatural Offences

- 4.27 The highest sentence given for unnatural offences was 6 years for non-consensual anal sex by an adult man of a teenage boy.⁵⁴ The court regarded the age disparity, that it was non-consenting and that the offender could have infected the victim with HIV or AIDS as significant aggravating factors.
- 4.28 The lowest sentence for unnatural offences was 2 years in a recent unnamed case dealt with in the Magistrates Court.⁵⁵ The offender was 19 year old, and had forced, non-consensual anal sex with his 10 year old half sister. He was a first time offender and had pleaded guilty to the charges.
- 4.29 No suspended sentence has been given for this offence.

Indecent Practices

- 4.30 The highest sentence for a single count of indecent practice was 12 months. The offender was charged with 1 count of unnatural offences and 3 counts of indecent practices.⁵⁶ There were 2 victims, both boys aged between 14 and 18 years. The offender performed oral sex on one victim and masturbated the other boy. The court sentenced him to 12 months for each of these offences. One count was made consecutive to the sentence given for an offence of unnatural offences, and the other 2 counts of indecent practices were concurrent with the other sentences.
- 4.31 The lowest sentence for indecent practices was 6 months per count and has been given in 2 cases. In *Farsy*, the offender received a 6 month penalty for one count of indecent practice.⁵⁷ The offender procured the victim to masturbate him. In

⁵¹ *Regina v Okisi* [2008] SBHC 92

⁵² *Regina v Foa* [2010] SBCA 1

⁵³ *Tala v Regina* [2005] SBHC 89

⁵⁴ *Farsy v Reginam* [2004] SBHC 120

⁵⁵ *Regina v Y* SBMC (Unreported, Wilson M, 22 June 2010)

⁵⁶ *Farsy v Reginam* [2004] SBHC 120

⁵⁷ *Farsy v Reginam* [2004] SBHC 120

Lauvisu the offender was sentenced to 6 months for procuring the victim to hold his genitals. Both cases involved male victims under 18 years.⁵⁸

4.32 No suspended sentence has been given for this offence.

⁵⁸ *Regina v Lauvisu* SBMC (Unreported, Wilson M, 4 March 2010)

5. How courts determine the sentence

- 5.1 Judges use a combination of legislative provisions, guidelines, precedent, and information about sentences in comparative cases as well as judicial discretion to determine an appropriate sentence.

Rape

“[Rape] is an offence based on a selfish disregard for the rights and feelings of girls and women in country. It is likely to cause serious and long lasting harm to victim”.⁵⁹

- 5.2 The courts in Solomon Islands have adopted sentencing guidelines for rape. In *Ligiau and Dori*⁶⁰ (*Ligiau*) the High Court adopted the sentencing guidelines established in the English case of *Billam*.⁶¹ The guidelines have been used in subsequent cases, and approved by the Court of Appeal.⁶² The guidelines are not binding on courts, and have the status of persuasive authority.
- 5.3 The guidelines set a starting point for sentences for rape. From the starting point, aggravating factors, such as use of violence or threats, might increase the sentence and mitigating factors, such as pleading guilty or delay, might decrease the sentence. In the case of *Ligiau* the Chief Justice also said that personal mitigating factors, such as being the family breadwinner or loss of employment, should not be given the same weight when sentencing for rape compared to other kinds of crime. The outcome in *Ligiau* was 6 years for rape and 5 years for attempted rape. The victims were aged 12 and 10 years old.⁶³
- 5.4 In *Su’umania*⁶⁴ the Court of Appeal confirmed that the guidelines in *Billam* are applicable for determining the starting point for rape and attempted rape cases⁶⁵, and recognised that these principles “must always be applied with sufficient flexibility to reflect both the present facts and changing nature of society”.⁶⁶ In 2009 the Court of Appeal reiterated this view in *Nickson*⁶⁷ stating the “guidelines remain relevant” but it was difficult to reconcile the sentencing trends with the guidelines.

⁵⁹ *Regina v Waiapuru* [2008] SBHC 40

⁶⁰ *R v Ligiau and Dori* [1986] SBHC 15 – the starting point set in *R v Billam* (1986) WLR 349

⁶¹ *R v Billam* (1986) WLR 349

⁶² *Regina v Arurumae* [2007] SBHC 14; *Regina v Waiapuru* [2008] SBHC 40; *Regina v Nickson* [2008] SBHC 21
Regina v Sisiolo [2010] SBHC 35

⁶³ *R v Ligiau and Dori* [1986] SBHC 15

⁶⁴ *R v Su’umania* [2005] SBCA 3

⁶⁵ Supported by *R v Niulifia* [2005] SBCA 4; *Regina v Foa* [2010] SBCA 1

⁶⁶ *R v Su’umania* [2005] SBCA 3

⁶⁷ *Nickson v Regina*, Criminal Appeal Case No.11 of 2008 (Unreported, Goldsborough P, Williams JA and Hansen JA, 26 March 2009)

Sentencing Guidelines for Rape⁶⁸

For contested rape cases committed by an adult without any aggravating or mitigating factors, a starting point of 5 years is appropriate.

A starting point of 8 years is appropriate when one of the following features is included:

- The rape is committed by 2 or more men;
- The offender has broken into or gained access to the home of the victim;
- The offender is in a position of responsibility towards the victim; or
- The offender abducts the victim and holds her captive.

A starting point of 15 years is appropriate for offenders who have committed rape against a number of different women or girls. He represents a greater danger to society.

If an offender has perverted or psychopathic tendencies or gross personality disorder and will continue to be a danger to women for an indefinite time a life sentence would be appropriate.

The following factors are aggravating:

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

Where **any one or more** of these aggravating features are present the sentence should be **substantially higher** than the figure suggested as the starting point. The starting point for attempted rape should normally be less than for the completed offence, especially if

⁶⁸ Established by *R v Billam* (1986) WLR 349

it is desisted at a comparatively early stage. But attempted rape may be made by aggravating features into an offence even more serious than some examples of the full offence.

“The starting point for the sanction of rape in this jurisdiction, where no aggravating features are present, is five years imprisonment”⁶⁹

Attempted Rape

- 5.5 The Chief Justice in *Ligiau* stated that although attempted rape will in most cases have a lower starting point than rape, if serious aggravating factors are present, it might be considered more serious than some cases of rape.⁷⁰ The Court of Appeal in *Koraua and Kaitira* determined that it was not possible to keep direct proportion between sentences for attempts and the complete offence because circumstances will often vary greatly.⁷¹
- 5.6 The Court of Appeal recently decided in the case of *Foa*, to increase the sentence for attempted rape from 3 years to 5 years because it was manifestly inadequate.⁷² Following the rape guidelines, the Court applied the same assessment to attempted rape as it would rape when considering factors such as injury to the victim, the age disparity, and the offender’s position of trust as a police officer.

Defilement

- 5.7 The research shows that although there are no guidelines that set a starting point for either offence of defilement, some sentencing guidelines have been provided by the Court of Appeal. In *Mulele and Poini (Mulele)* it was determined that although each case must be considered on its own facts, some matters must be considered by the courts.⁷³ These factors are: age disparity, abuse of a position of trust, subsequent pregnancy and the character of the girl. The Court of Appeal also indicated that other factors could be included depending on the situation.
- 5.8 In *Poloso* the Chief Justice stated the starting point of 5 years is suitable for defilement of a girl less than 13 years.⁷⁴ He clarified that where aggravating factors, such as those listed in *Ligiau*, are present the starting point for defilement should be higher.⁷⁵ The facts of the case in *Poloso* were a 9 year old victim who was sexually assaulted by her uncle aged 19 or 20 years. The aggravating factors

⁶⁹ *Regina v Waiapururu* [2008] SBHC 40

⁷⁰ *R v Ligiau and Dori* [1986] SBHC 15

⁷¹ *Koraua and Kaitira v Regina* [SBCA] 1988 2

⁷² *Regina v Foa* [2010] SBCA 1

⁷³ *Muele v DPP; Poini v DPP* [1986] SBCA 5

⁷⁴ *Regina v Poloso* [2006] SBHC 33

⁷⁵ *R v Ligiau and Dori* [1986] SBHC 15

included age disparity, abuse of a trust relationship, loss of self-esteem and innocence and that the circumstances of the case were “tantamount to rape”.⁷⁶

- 5.9 Both offences of defilement are dealt with in the Magistrates’ and High Court however there is no discernible difference in sentencing between them.

Incest

- 5.10 The research shows that although there is no starting point for incest some sentencing guidelines do exist. The aggravating factors from the *Attorney-General Reference (No. 1 1989)* in the UK are applied. These include, the incest continued over time, the victim was threatened or treated violently by her father, and the girl has become pregnant.⁷⁷ However judges predominantly act with discretion and follow the sentences set in previous cases through comparison of case merits and facts.⁷⁸
- 5.11 In the appeal decision of *Roko*⁷⁹, The Chief Justice regarded incest to be a more serious offence the Solomon Islands then it is considered in England and “sentences considerably higher than those suggested [in A-G Reference]... are appropriate here” because of the stigma that will attach to the victim and the child.⁸⁰ This case involved four separate counts of incest committed by a father against his 16 year old daughter (who gave birth to his child). The High Court reduced the 6 year sentence to 5 years.
- 5.12 All the cases of incest identified between 2003 - 2010 were given sentences lower than *Roko*.⁸¹
- 5.13 Incest cases always involve a relationship of trust and authority and the research shows that victims were in the age range of 14 to 21 years. Judges often remark in sentencing comments that incest is contrary to law, custom, and religion and strong penalties are needed both for personal and general deterrence.⁸² However, when the victim is over the age of 13 years, sentences are restricted to a seven year maximum.

Indecent Assault

- 5.14 The research could not identify any clear sentencing guidelines or starting point for the offence of indecent assault. Indecent assault incorporates a broad range of conduct and circumstances, so judges use case comparison to determine penalties.

⁷⁶ *Regina v Poloso* [2006] SBHC 33

⁷⁷ *Kyio v Regina* [2004] SBHC 90

⁷⁸ *Regina v Qinity* [2010] SBHC 26

⁷⁹ *Roko v Reginam* [1990] SBHC 99

⁸⁰ *Roko v Reginam* [1990] SBHC 99

⁸¹ *Roko v Reginam* [1990] SBHC 99

⁸² *Fuiloentino v Regina* [2008] SBHC 47; *Regina v Melake* [2010] SBHC 34

- 5.15 The High Court indicated in 2010 that the indecent assault of a nine year old child which involved digital penetration and licking her vagina warranted a minimum three year sentence.⁸³ The Court of Appeal accepted this approach, confirming the sentence.⁸⁴

Unnatural Offences

- 5.16 This offence has been used very rarely since 2003 and little case law has developed. However in *Farsy*⁸⁵ the Chief Justice identified that buggery committed against children should warrant a five year starting point and where aggravating factors are present the sentence should increase.

“The starting point for such offences in this jurisdiction nevertheless against children is five years imprisonment. Where aggravating features are present longer sentences must be imposed.”⁸⁶

Indecent Practices

- 5.17 The research could only identify two cases since 2003 where this offence has been used, so no starting point or sentencing guidelines appear to be applicable. In *Farsy*⁸⁷ the High Court reduced the sentence from 2 years to 12 months imprisonment for 1 Count of Indecent Practice. This count concerned oral sex committed by the offender against the victim. In *Lauvisu*⁸⁸ the Magistrates’ Court sentenced the offender to 6 months imprisonment for holding the genitals of his victim.

⁸³ *Regina v Foa* [2010] SBHC unreported 5

⁸⁴ *Foa v Regina* [2010] SBCA 1

⁸⁵ *Farsy v Regina* [2004] SBHC 120

⁸⁶ *Farsy v Regina* [2004] SBHC 120

⁸⁷ *Farsy v Regina* [2004] SBHC 120

⁸⁸ *Regina v Lauvisu* SBMC (unreported Wilson M, 4 March 2010).

6. Factors that affect sentencing

“In sexual offences as a whole, and rape and attempted rape in particular, matters of mitigation personal to the offender must have less effect than in most other serious crimes.”⁸⁹

“In sentencing for rape, mitigation personal to the contrite offender must have less effect than in most other serious crimes because of the serious and long lasting harm to the victim”⁹⁰

- 6.1 Identifying the aggravating and mitigating factors of an offence assists a court to determine the appropriate sentence. The maximum penalty for an offence sets the upper limit and is an indicator of the seriousness of the offence. The judge or magistrate must use his or her discretion to balance the all of the factors that attach to the offence and those that attach to the offender.
- 6.2 Aggravating factors are considerations that increase the seriousness of the offence and/or the moral culpability of the offender.⁹¹ The presence of these factors will affect the nature and level of punishment of the offender.
- 6.3 Mitigating factors are the considerations that are raised to mitigate or minimise the culpability of an offender and the severity of the punishment. The court takes into account particular factors relevant to the offender that help explain the criminal behaviour or why sentence reduction is needed.⁹²

Aggravating factors

- 6.4 Consideration of cases show the following factors are regarded as aggravating:⁹³
 - age disparity between the complainant and the offender;
 - abuse of a trust position;
 - victim sustained injuries from the offence;
 - use of extreme force at time of the offence;
 - use of weapon at time of the offence;
 - pre-planning of the offence;
 - threats of violence during offence or to prevent reporting of the crime;

⁸⁹ *Regina v Ligiau and Dori* [1986] SBHC 15

⁹⁰ *Regina v Ligiau and Dori* [1986] SBHC 15

⁹¹ Richard Edney and Mirko Bagaric *Australian Sentencing: Principles and Practice*, (2007) 114

⁹² Richard Edney and Mirko Bagaic, *Australian Sentencing: Principles and Practice* (2007) 149

⁹³ This compiled list is based entirely on Solomon Islands case law. Some are included in *R v Billam* however many are factors judges have accepted as aggravating and should therefore raise the tariff.

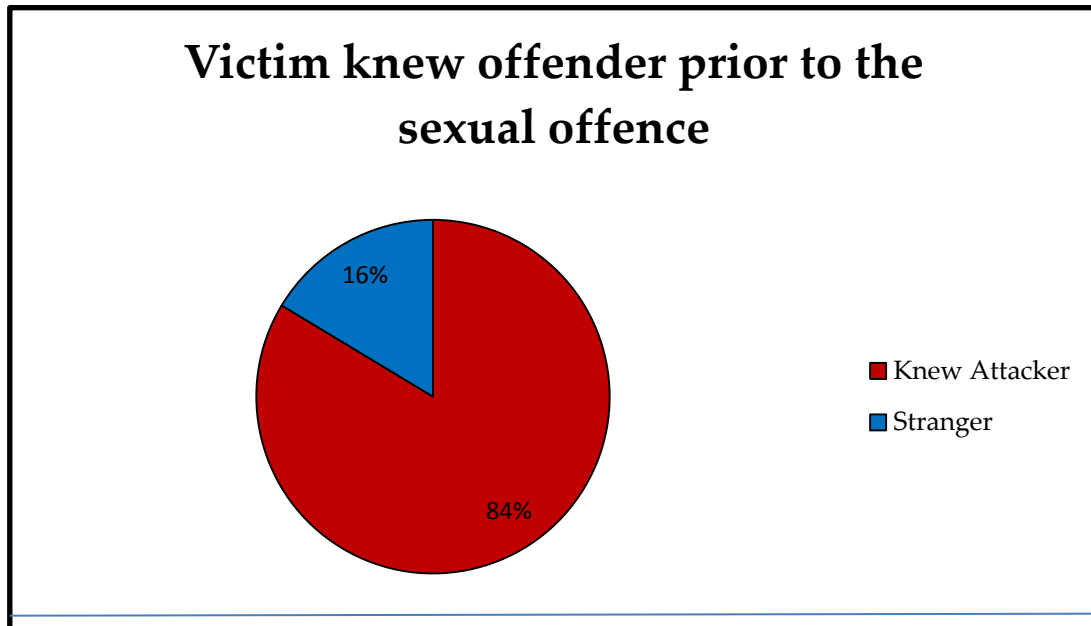
- pregnancy resulting from the offence;
 - offender was drunk during offence;
 - causing embarrassment and shame in cultural context;
 - ignoring the cries and/or pain of the victim;
 - previous convictions for sexual offences ;
 - extreme youth or age of the victim;
 - offences committed during bail for other criminal offences;
 - offence involved two or more perpetrators (in company);
 - the offence was repeated;
 - the offender forced further sexual indignities upon the victim;
 - offences were committed by a family member or close family acquaintance, thereby destroying the safety and sanctity of the victim's home;
 - the victim experienced heightened fear from abduction; and
 - the victim played no part in the commission of the offence of incest or defilement.
- 6.5 From the research abuse of a relationship of trust, and age of the victim are considered highly aggravating and are common. These factors will be considered in more detail.
- 6.6 It is not common for courts to consider the following as aggravating factors:⁹⁴
- individual impact on the victim including the psychological, social and health impacts;
 - the victim contracted a STD or HIV/AIDs from the offender;
 - loss of education due to the sexual assault or from a resulting pregnancy;
 - preparing or "grooming" the victim before the sexual offending (particularly relevant for child victims);
 - the victim was forced to leave family home due to the presence of the offender; and
 - impact on the victim in intra family abuse and the difficulty of bringing the case to light.

Relationship of Trust

⁹⁴ These are factors that other jurisdictions have found aggravating and warrant an increase in sentence.

“Persons in positions of trust dependency relationships or positions of authority must realise it is wrong to take advantage of such positions and betray our young children and will be incarcerated for lengthy periods of time.”⁹⁵

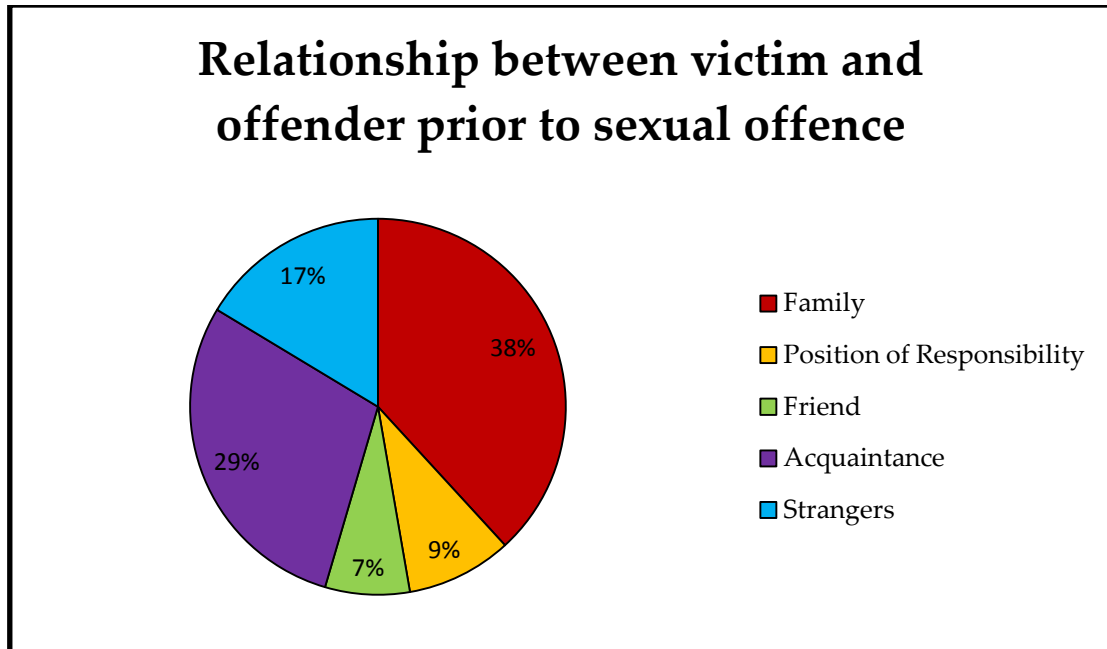
- 6.7 In 84% of cases we considered, the victim knew her attacker. Of these cases in 52% there was a relationship of trust, authority or responsibility between the offender and victim.



- 6.8 In only 16% of cases was the offender a stranger to the victim. This means there was some kind of existing relationship between the victim and the offender prior to the offence or offences being perpetrated. These findings are consistent with sexual offences research around the world.⁹⁶

⁹⁵ *Regina v Poloso* [2006] SBHC

⁹⁶ Sexual Offences: Law and Procedure Final Report, Victoria Law Reform Commission, p. 82; ACSSA Wrap 1, November 2005 'Adult victim/survivors of childhood sexual assault', 1



6.9 In the cases we considered where there was an existing relationship 38% of perpetrators were family, 7% were friends (including family friends), 9% were in a position of responsibility and 29% were acquaintances. No existing relationship meant the offender was either a stranger or the relationship was not explained. 'Position of Responsibility' in this table meant the offender was in a position of trust by their profession (for example, custom doctor or police officer) or as the victim's employer.

6.10 Of those cases where the offender was a family member in the majority of cases, offenders were the father, step-father or uncle of the victim.

What is a 'Relationship of Trust'?

6.11 From our case research the following relationships have been accepted as a 'trust relationship' by the court:

- family relation (blood or marriage);
- custom doctor;
- police officer; and
- employer.

6.12 In *A'aron*⁹⁷, Justice Kabui included teachers, priests, doctors, lawyers and guardians as persons in trust positions. The research found no offenders since 2003 in these positions, nor have any others been added to the list. In *Ferris*, Chief

⁹⁷ *Regina v A'aron* [1999] SBHC 128

Justice Palmer held that the offender was in a position of trust to the victim because he was a “much older person”, and as a guest was in the care of his family.⁹⁸ Her parents trusted him and there was responsibility both “in custom and in law” expected.

- 6.13 In all sexual offences, offenders in a position of trust to the victim are considered a serious aggravating factor. In cases of rape where the offender is in a position of responsibility to the victim the starting point should be 8 years.⁹⁹

“As a father you have a duty not only to provide and care for your child but to protect her. Instead you have not only failed in your duty but gone further to violate her sexually, leaving a scar and stigma in her life.”¹⁰⁰

“You were in a position of trust as her step-father...the victim would have been 5 years old when [you married her mother] and you have been responsible for her growth, development and well being since. You took advantage of that position of trust and abused it for your personal gratification.”¹⁰¹

“Through lust and selfishness this defendant has not only violated that trust and betrayed his own niece, who in custom can be regarded as his own daughter, but has also violated what our customs would regard as tribal taboos.”¹⁰²

“The defendant at time of commission of the offence was a police officer and had actually reached the rank of Police Sergeant. The defendant was in a position of responsibility to the victim, she was their house-girl and was responsible for looking after their baby/child and to that extent he was obliged to look after her as well.”¹⁰³

“He presented to the complainants that sexual intercourse was part of the custom healing process and the only answer to their needs... This was a significant breach of trust with the victims placing themselves in a vulnerable position to the accused who took advantage of that desire to be healed and abused that trust.”¹⁰⁴

The Age of the Victim

“The violation of a child is as wrong in any “customary law” of any society in Solomon Islands”¹⁰⁵

⁹⁸ *Regina v Ferris* HCSI-CRC 308-03 (Unreported, Palmer CJ, 22 December 2004)

⁹⁹ *R v Billam* (1986) WLR 349

¹⁰⁰ *Regina v Dausina* [2007] SBHC

¹⁰¹ *Regina v Okisi* [2008] SBHC 92

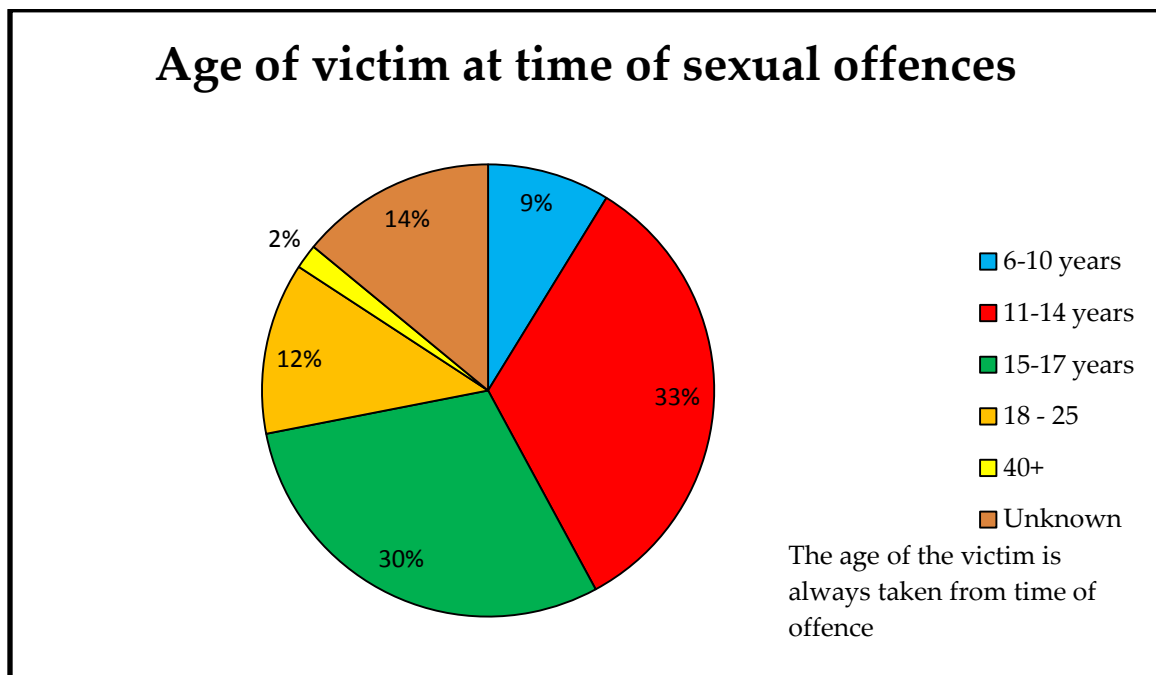
¹⁰² *Regina v Poloso* [2006] SBHC 33

¹⁰³ *Regina v Raha* [2004] SBHC 70

¹⁰⁴ *Regina v Sisiolo* [2010] 3

¹⁰⁵ *Regina v Poloso* [2006] SBHC 33

- 6.14 According to the guidelines in *Billam*, an offence should be treated as aggravated when the victim is either very old or very young.¹⁰⁶ In *Ligiau* the Chief Justice regarded the extreme young age of the victims at 12 and 10 years, to be serious aggravating factors.¹⁰⁷
- 6.15 In the cases we considered almost three quarters of sexual offence victims were less than 18 years. Of this, about 38% are girls aged 14 years and younger.
- 6.16 Girls aged 11 to 14 years were the most common victim (33%), closely followed at 30% by girls aged 15 to 17 years. Only 14% of victims were aged 18 to 25 at the time of offence, 2% aged over 40 years and in 14% of cases age was unknown.¹⁰⁸



- 6.17 The research suggests that it is unclear at what age a victim is regarded as still being a child, and when being a child or a youth is considered an aggravating factor. For example girls aged 15-17 years are inconsistently regarded as children. This means in some rape cases a 16 year old girl will be regarded as a child, and “must be protected by the court”¹⁰⁹ constituting an aggravating factor. But in other

¹⁰⁶ *R v Billam* (1986) WLR 349

¹⁰⁷ *R v Ligiau and Dori* [1986] SBHC 15

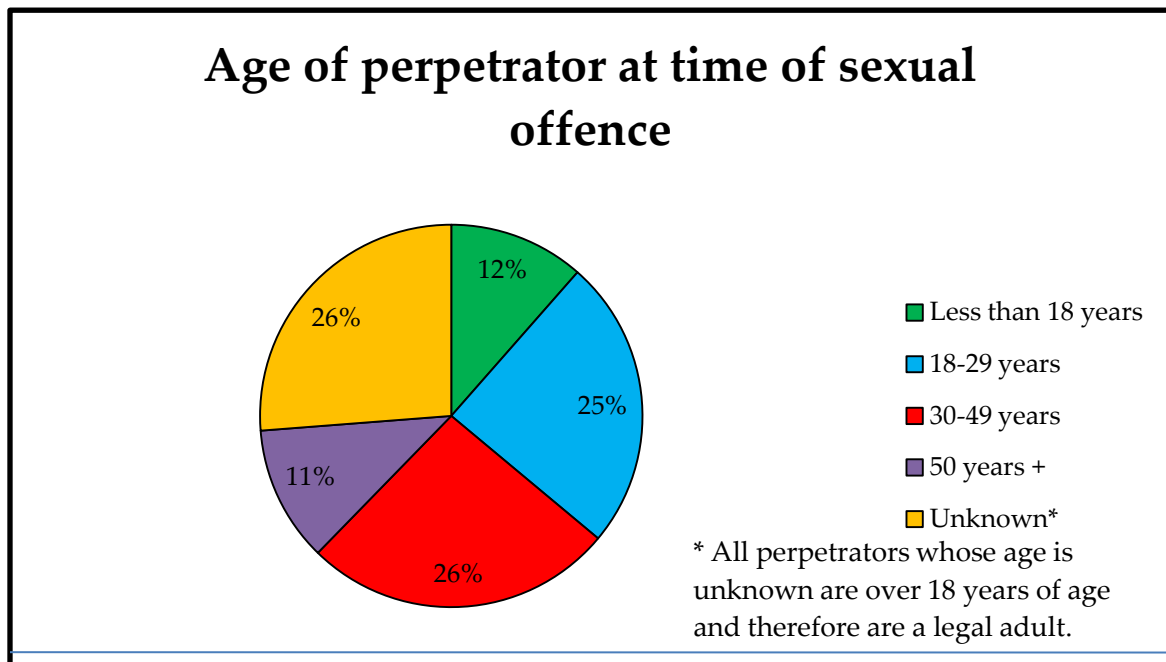
¹⁰⁸ The judgement or sentence does not state the age of the victim, however based on the offences it is likely the victims were all over 15 years. In cases where the victim is called a ‘young adult’ LRC has interpreted this as 18 years and older. Any victims over 18 years are still under 29 years. This means all victims are considered youths.

¹⁰⁹ *Regina v Dausina* [2007] SBHC 79 in which the victim’s age of 16 was an aggravating factor “At 16, she is a young girl of tender age” and “children must be protected by the courts”.

cases of rape a 16 year old girl will receive no additional aggravating consideration.¹¹⁰

The Age of the Perpetrator

6.18 In the cases we considered over one-third of offenders were men over 30 years old. Only 12% of perpetrators are under 18 years of age. This means 88% of offenders were adult men, compared to almost two-thirds of female victims being children (under 18 years of age).



6.19 A large age disparity between the offender and the victim should constitute an aggravating factor. Where there is a small age disparity between the victim and perpetrator, the courts are generally much more lenient. Mature men are expected to act more responsibly and have increased control of their sexual drive.¹¹¹

6.20 The results suggest that age disparity is regarded as a more serious aggravating factor than the victim being a child or young person.

¹¹⁰ In *Regina v Waiapuru* [2008] SBHC 40 the victim was 16 years but this was not regarded as an aggravating factor by the court.

¹¹¹ *Regina v Poloso* [2006] SBHC 33

“Your age difference is also very great; she was only 13 years old at the commission of the offence and you were already a big and mature man, 35 years and ought to have known better.”¹¹²

“The age of the victim is also aggravating in this case. The sentence imposed must reflect the seriousness and revulsion with which the public hold against this type of offence and the need to protect young children. The victim was only 9 years old and the accused 19-20 years old.”¹¹³

“You were 41 years old at time of commission of those offences. The age difference is huge. This is an aggravating feature. As an older man, it is presumed that you will be more mature and responsible in your actions towards this child. Your actions did not reflect your age and maturity.”¹¹⁴

Mitigating factors

6.21 The research shows that courts have accepted the following as mitigating factors usually leading to a decrease in the sentence:¹¹⁵

- family obligations;
- first time offender;
- previous good character;
- guilty plea;
- court process of trial, conviction and sentence is viewed as punishment;
- cooperation with police;
- payment of compensation;
- demonstrated remorse;
- delay;
- good prospects of rehabilitation;
- the perpetrator’s level of education and employment;
- good work history;
- family support of the offender;
- absence of violence, weapon or serious injury;

¹¹² *Regina v Luimalefo* [2008] SBHC 71

¹¹³ *Regina v Poloso* [2006] SBHC 33

¹¹⁴ *Regina v Okisi* [2008] SBHC 92

¹¹⁵ This is not an exhaustive list, however from the research these factors most frequently appear in sentencing

- no direct evidence of trauma;
- sexual inexperience (applies to young offenders);
- victim's appearance;
- victim's prior sexual experience;
- offender's young age;
- extreme age of offender – "crushing" sentence
- the victim did not become pregnant; and
- the tribal and community stigmas that may remain with the offender.

6.22 Mitigating factors that are not considered by the courts, but perhaps should be:

- medically proven psychological illness at time of offence; and
- a mental or intellectual impairment.

Guilty Plea

6.23 A plea of guilty from the first opportunity is generally recognised by reducing the punishment. An early guilty plea demonstrates the offender is remorseful for his or her actions, saves the police time and cost in investigation, saves the victim from reliving the trauma of the offences in giving evidence (especially important in sexual offences) and saves the court time and costs. This means a late plea should be given less of a reduction.

6.24 The discount awarded for a guilty plea is unclear in the judgements, as it is rarely explicitly stated. There is precedent for a discount of one quarter (1/4) or one third (1/3) for a plea at the first opportunity, however the discount is not fixed to allow for judicial discretion.¹¹⁶ There appears to be little consistency between judgements as to what discount a guilty plea will be awarded, nor what exactly constitutes an 'early plea'. The Court of Appeal has confirmed that a late plea is only entitled to a small concession.¹¹⁷

Family Obligations

6.25 Family obligations usually mean the offender is married with children and/or has financial responsibilities to immediate and extended family. The 'breadwinner' factor (that the offender is financially responsible for his immediate family) is a common mitigating factor that is raised by an offender. The research noted that the courts do try to balance this factor with the need to punish.¹¹⁸

¹¹⁶ *Gerea v Regina* [2005] SBCA 34 via *Regina v Melake* [2010] SBHC 34

¹¹⁷ *Regina v Foa* [2010] SBCA 1

¹¹⁸ *Regina v Melake* [2010] SBHC 34

- 6.26 When determining a sentence, courts place considerable weight on the 'breadwinner' factor and award high credit for the burden that families will experience if the offender goes to prison.¹¹⁹ The offender is always regarded as the sole provider, and contributions by women to the family income are often poorly recognised. Many women contribute to their families through paid and unpaid work, food production and clothing.
- 6.27 It is difficult to reconcile the weight given to this factor with the harm caused by the offender, particularly in those cases where the victim is a member of the offender's family.

Delay

"It must be justified or explained as it is vital to the process of sentencing. Unless the details are before the court it cannot make an informed decision one or the other as to what weight to attach to the element of delay".¹²⁰

"Delay is a well established mitigating factor to be taken into account and must have strong effect of reducing custodial sentence considerably".¹²¹

"Delay does not eliminate or annul the penalty. The most that can be given to it is to recognise that it must result in a substantial reduction of the sentence that would have been imposed."¹²²

- 6.28 After a guilty plea, delay is most likely to result in a serious reduction in a sentence.
- 6.29 However research suggests that where delay is raised as a mitigating factor that the reasons for the delay are often unclear. Despite this, in most cases the offender is given a discount for delay.
- 6.30 Reasons for delay in the judicial system include:
- delay between offence and reporting to police;
 - investigation takes a long time;
 - courts are overburdened and frequently reschedule – all matters for the High Court must first go through committal proceedings in the Magistrates' Court;
 - one or both parties is trying to locate a witness or piece of evidence;
 - inter-provincial travel for both parties, especially witnesses is unreliable ;

¹¹⁹ *Regina v Olofia* [2008] SBHC 106

¹²⁰ *Kyio v Reginam* [2004] SBHC 90

¹²¹ *Regina v Maewanusi* [2010] SBHC 53

¹²² *Kyio v Reginam* [2004] SBHC 90

- the tensions between 1998-2003 and the subsequent disruption to government have resulted in delays in the investigation and prosecution of offences that occurred during this time.
- 6.31 The research suggests that delay is accepted entirely as a mitigating factor and no consideration is given to the victim and the impact of delay on her. The stigma experienced by an offender whilst waiting for the resolution of his case is taken into consideration and in comparison little to no consideration is given to the victim.
- 6.32 In the rape case of *Olofia*¹²³ delay caused by the offender during the course of the trial appears to have been given significant weight by the sentencing judge, along with his previous good character. The sentencing outcome was 2 years, fully suspended, despite the aggravating factors of age disparity and the victim's young age (exact unknown, sentencing remarks merely call her young at the time of the offence). He could not get any credit for a guilty plea because he was found guilty after trial in which the victim gave evidence. According to *Billam* in a contested case the starting point for the sentence should be 5 years.

Compensation and Reconciliation

"Payment of custom compensation is significant to restore the relationship in a peaceful and harmonious manner. This reflects the accused's degree of contrition and affords him some mitigation. However this must not be viewed as the accused buying his way out. The offence was committed against the state which the accused is liable to be punished for that... payment should be paid to very close relatives and brothers or sisters, in particular those who directly are affected or humiliated by such a perverted act".¹²⁴

- 6.33 Compensation is commonly part of customary reconciliation in the Solomon Islands.¹²⁵ When compensation is paid (at an acceptable level, determined by the community), reconciliation has also taken place. In the sexual offences cases reviewed, the results show that compensation most often took place in intra-family sexual abuse. Sexual offences are regarded as bringing shame on not only the victim, but her family, and compensation is expected to other family members, particularly the male relatives of the girl.¹²⁶ With the exception of two cases from rural Malaita, one in Makira, and one in Honiara the payment of money or giving of items (pigs, food or shell money) are recorded only in incest or family rape cases.¹²⁷

¹²³ *Regina v Olofia* [2008] SBHC 106

¹²⁴ *Regina v Melake* [2010] SBHC 34

¹²⁵ *Regina v Usa* [2009] SBHC 8; *R v Paul* (unreported) HCSI CRC No. 24, 95.

¹²⁶ *Kyio v Reginam* [2004] SBHC 90

¹²⁷ *Regina v Arurumae* [2008] SBHC 14; *Regina v Alualu & Bakeloa* [2005] SBHC 108; *Regina v Kipusia* [2010] SBHC 84; *Regina v Usa* [2009] SBHC 8

- 6.34 It is difficult to determine the extent to which the court assesses and includes compensation as a mitigating factor. However, when compensation and reconciliation has occurred and appears to be accepted by the victim party the court does reduce the sentence. The court regards compensation as a demonstration by the offender of remorse and contrition.
- 6.35 The research shows that in cases where the victim's mother has continued to live with the offender and/or there has been reconciliation in the family, the court accepts this as a mitigating factor.¹²⁸ This situation is common in intra-family sexual abuse.
- 6.36 For example, in *Okisi*¹²⁹ the Court accepted in mitigation that:
- there had been some form of reconciliation with the wife and the victim (his step daughter) and some form of compensation paid (to whom exactly is unknown);
 - the offender had continued to reside with his wife after the offence;
 - the victim is no longer living in the family home; and
 - the offender intended to return to his wife after release from prison.
- 6.37 As a result of these factors and being a first time offender, he was given a sentence of 3 years per count for five counts of indecent assault. All sentences were to be served concurrently.
- 6.38 It is also common that in cases involving sexual abuse by fathers and step fathers, the victim is sent away from the household and the mother continues to live with the offender and their other children.¹³⁰ In one case the Judge accepted reconciliation between the offender and the victim's mother as proof that the offence was a 'one-off'.¹³¹

Lack of aggravating factors

- 6.39 In a number of cases considered by the research, the absence of an aggravating factor was presented by the defence as a mitigating factor. For example, mitigation is claimed on the basis that only force necessary to commit rape was used, no weapon was used or no physical injuries were suffered by the victim. In some cases it has been put forward that the victim not falling pregnant is mitigation.¹³² In one case the court gave credit to the offender for not being in a position of trust to the victim.¹³³

¹²⁸ *Regina v Qinity* [2010] SBHC 26; *Regina v Desmond* [2009] SBHC 3; *Regina v Okisi* [2008] SBHC 79; *Kyio v Reginam* [2004] SBHC 90

¹²⁹ *Regina v Okisi* [2008] SBHC 79

¹³⁰ *Regina v Qinity* [2010] SBHC 26; *Regina v Desmond* [2009] SBHC 3; *Regina v Okisi* [2008] SBHC 79; *Kyio v Reginam* [2004] SBHC 90

¹³¹ *Regina v Desmond* [2009] SBHC 3

¹³² *Regina v Melake* [2010] SBHC 34

¹³³ *Regina v Rubekolo* [2006] SBHC 122

- 6.40 In *Niulifia* the Court of Appeal confirmed that it was correct not to give any credit for the absence of weapons or lack of injuries sustained by the victim.¹³⁴ The Court clarified that as stated in *Billam* and applied in *Ligiau*, the use of violence or a weapon would normally be viewed as aggravating features only.¹³⁵ Their absence cannot be used to justify a mitigation of the sentence.
- 6.41 Despite this decision by the Court of Appeal in 2005, the research indicates that credit is given to some offenders for the lack of aggravating factors.

“I note in your favour that no violence was actually involved in the commission of the offences.”¹³⁶

“I take into account that there was no violence other than the act of forced sexual intercourse, and no suggestion of any pre-planning by the defendant...there is no evidence of any specific injury or ongoing concerns about her ability to adjust to what has occurred.” [The 15 year old victim was raped by her uncle] ¹³⁷

“The rape you committed had no aggravating features. That point goes in your favour when considering an appropriate custodial sentence to be imposed on you for the offence...you did not use any weapon to cause fear or threat to the victim, although you were in possession of a bush knife before the rape occurred, you merely used force necessary to effect penetration...”¹³⁸

“I noted that the minimal level of threat used was without violence or weapon. No further acts of perversion beyond the offence of sexual intercourse. The accused has no history of violence and sex crimes. The victim was not very old or very young. There is no pregnancy as the result of the act of incest.”¹³⁹ [father, aged 55 years, repeatedly sexually assaulted his daughter, aged 16 years]

Victim's Behaviour and Prior Sexual Activity

- 6.42 The research indicates the victims' appearance, behaviour and sexual experience is accepted as a mitigating factor for the purpose of sentencing. It has predominantly been raised in defilement cases and is used to shift blame from the offender to the victim.
- 6.43 In *Fasua* the victim was 10 years old when the offending began and it was put to the court and accepted that she was a willing participant.¹⁴⁰ The offender was a 36

¹³⁴ *Regina v Niulifia* [2005] SBCA 4

¹³⁵ *R v Billam* (1986) WLR; *R v Ligiau and Dori* [1986] SBHC 15

¹³⁶ *Regina v Okisi* [2008] SBHC 79

¹³⁷ *Regina v Muma* [2007] SBHC 142

¹³⁸ *Regina v Paul* [2009] SBHC 49

¹³⁹ *Regina v Melake* [2010] SBHC 34

¹⁴⁰ *Regina v Fasua* [2009] SBHC 54

year old family friend and pleaded guilty to 6 counts of defilement of a girl less than 13 years. The Judge acknowledged her consent was not a defence, however all offences were “committed with the cooperation of the victim” and this was accepted as a mitigating factor.

- 6.44 Under the Evidence Act 2009 the sexual experience of a complainant cannot directly or indirectly be put to the court through evidence or witness testimony.¹⁴¹ However, this only applies to trial evidence and not to any sentencing submissions made by the defence. In *Rubekolo* defence counsel submitted that the victim looked “big for her age and that she was not inexperienced in sexual matters”.¹⁴² The Court regarded this as relevant to her character and the circumstances of the offence. The offender was sentenced to 4 months for one count of defilement, wholly suspended.
- 6.45 Determining the age of a victim can be challenging because of poor birth registration and many people are unsure how old they are.¹⁴³ This can directly impact on the offences charged and the sentence given.

“You also rely on the fact that the girl took the lead most of the time and that she was a willing participant throughout. While it is not a defence, it is relevant to her character and the circumstances in which the offence was committed. I note that your Counsel has submitted on your behalf that the girl looked big for her age and that she was not inexperienced in sexual matters”.¹⁴⁴ [The offender was 23 years and the victim 12 years.]

Sexual Inexperience of the Perpetrator

- 6.46 A juvenile offender (less than 18 years) is subject to the Juvenile Offenders Act which requires a different approach than the one used for sentencing adults.
- 6.47 The research shows that in cases involving young offenders the courts have accepted sexual inexperience on the part of the offender as a mitigating factor. This is not confined to juvenile offenders, as the courts appear to give offenders in their twenties some credit for sexual inexperience. The research indicates mature aged men (approximately 30 years and older) are expected by the court to be more responsible.¹⁴⁵

¹⁴¹ section 58 *Evidence Act* 2009.

¹⁴² *Regina v Rubekolo* [2006] SBHC 122: It is unclear how this evidence was presented nor how it could be verified by the court.

¹⁴³ For example in *Regina v Iroi* [2004] SBHC 30, the victim believed she was 12 years old, her aunty believed she was 15 years and the medical doctor said she could be 19 years old.

¹⁴⁴ *Regina v Rubekolo* [2006] SBHC 122

¹⁴⁵ *Regina v Maewanusi* [2010] SBHC 53

“The age of the defendant being 19-20 years. He is still very young, has no previous convictions, a first offender and sexually inexperienced it seems. This is to be distinguished from the commission of a similar offence say by a more mature and sexually experienced man, in his forties or fifties.”¹⁴⁶

¹⁴⁶ *Regina v Poloso* [2006] SBHC 33

7. Comparison with Fiji, Papua New Guinea and Vanuatu

- 7.1 These countries were selected for comparison because they are Melanesian, sharing common cultural practices and had similar, if not identical law to the Solomon Islands prior to their legal reforms.
- 7.2 Fiji, PNG and Vanuatu have all undergone recent criminal law reform, particularly for sexual offences. Both the courts and respective governments have identified that sexual offences are an increasing problem and stronger punishments are needed to deter and help reduce future offending.¹⁴⁷ The courts emphasize the need for high custodial sentences, and sentences in Fiji, PNG and Vanuatu have been steadily increasing. In Fiji the courts were increasing sentences well before the reforms¹⁴⁸, whereas it appears that in PNG and Vanuatu, the reforms are partially responsible for the higher sentences.

Fiji

- 7.3 Fiji only recently released sexual offence reforms in the Crimes Decree 2009 which came into effect in January 2010. Reform included:
- widening the definition of consent for the offence of rape to include “freely and voluntarily given”;
 - widening sexual penetration to include penetration of the vagina, vulva, anus, and mouth with a penis, another body part or a thing;
 - all sexual offences became gender neutral (so they apply to male and female victims);
 - increased the maximum penalties for some offences, such as attempted rape from 7 years to 10 years; and
- 7.4 Until 1994 courts in Fiji followed the guidelines established in *Billam* for sentencing of rape, however in *Kasim*¹⁴⁹ the Court of Appeal decided the starting point for rape of an adult should be 7 years. The court emphasized “that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more clearly reflect the understandable public outrage”.¹⁵⁰ In cases involving child victims the starting point is between 10 to 13 years and in cases where the offender is the father or step father of the victim, 10 years.¹⁵¹ Overall sentences now given for sexual offences in Fiji are much higher than those the Solomon Islands.

¹⁴⁷ *Public Prosecutor v Isaac* [2010] VUSC 49; *The State v Peter* [2010] PGNC 48; *The State v AV* [2009] FJHC 24

¹⁴⁸ *Kasim v The State* [1994] FJCA 25

¹⁴⁹ *Kasim v The State* [1994] FJCA 25

¹⁵⁰ *Kasim v The State* [1994] FJCA 25

¹⁵¹ *Drotini v The State* [2006] FJCA 26

Papua New Guinea

7.5 PNG launched its Criminal Code (Sexual Offences and Crimes Against Children) Act in 2002. Reform included:

- widening the definition of sexual penetration to now include penetration (to any extent) of the vagina, anus and mouth by penis, other body part or foreign object;
- significantly widening the definition of consent for rape to be a free and voluntary agreement;
- offences specific to children (defined as under 16 years) including persistent child abuse, sexual penetration of a child or a child in care, child pornography and child prostitution;
- a specific provision for a relationship of trust, authority or dependency that increases the maximum sentence for some offences. For example, for sexual penetration of a child (under 16 years) if the offender had an existing relationship of trust as a parent, this increases the maximum sentence to life imprisonment; and
- circumstances of aggravation that increase the maximum sentence for rape, and include acting in company, use of a weapon, confining or restraining the victim, the offender is related to the victim or the offender has knowingly infected the victim with HIV or AIDs.

7.6 Prior to the reforms the PNG courts, like the Solomon Islands followed the sentencing guidelines of *Billam*, and used the 5 year starting point for sentencing of rape.¹⁵² After the reforms the courts in PNG have increased their starting points and correspondingly their sentences significantly. For offences against section 229 (sexual penetration of a child under 16 years), the court considers that in cases of victims less than 12 years, the starting point is 20 years¹⁵³ and for cases where a victim is aged less than 16, but more than 12, the starting point is 10 years.¹⁵⁴ In some cases the actual sentence is higher than the starting point, depending on the presence of aggravating factors.

7.7 In cases of aggravated rape (a maximum sentence of life imprisonment), the starting point is 15 years and can increase with aggravating factors, as was the case in *Kombo*.¹⁵⁵ In this case, the rape was aggravated because the offender was the step-father of the victim.¹⁵⁶ When determining the sentence the Judge regarded the offender's treatment of his stepdaughter and her physical, mental and psychological suffering to warrant a final sentence of 18 years.

¹⁵² *R v Billam* (1986) WLR 349

¹⁵³ *The State v Jonathon* [2009] PGNC 210

¹⁵⁴ *The State v Okupa* [2009] PGNC 117

¹⁵⁵ *The State v Kombo* [2009] PGNC 180

¹⁵⁶ s.349A (f) Criminal Code (Sexual Offences and Crimes Against Children) Act 2002

Vanuatu

- 7.8 Vanuatu passed the Penal Code (Amendment Act) in 2006, which significantly developed sexual offences laws. Reform included:
- the term “rape” was replaced with “sexual intercourse without consent”;
 - sexual intercourse was widened and includes penetration of the vagina, anus and mouth with penis, other body part or object, the licking, sucking or kissing to any extent of the vulva, vagina, penis or anus of a person and the causing or permitting of these things to the body of another person;
 - all sexual offences became gender neutral (so they apply to male and female victims); and
 - separate offences for children (under 15 years), including aggravated sexual assault of a child which has a maximum penalty of life imprisonment. “Circumstances of aggravation” include malicious bodily harm committed against the victim, threatened bodily harm, offences committed in company, or where the victim has a mental or physical impairment or the victim is under the authority of the offender.
- 7.9 Vanuatu courts follow the guidelines in *Billam* and use a starting point of 5 years.¹⁵⁷ In *Scott Tula*¹⁵⁸ it was confirmed that in a contested case with no aggravating or mitigating factors a 5 year starting point was appropriate. Courts also have the power to order compensation payments instead of, or in conjunction with, imprisonment.

¹⁵⁷ *R v Billam* (1986) WLR 349

¹⁵⁸ *Public Prosecutor v Scott Tula* [2002] VUCA 29

8. Discussion

Rape

- 8.1 In *Nickson*, when the Court of Appeal was considering an appeal of a sentencing decision given for rape, it was identified that many sentences for sexual offences were difficult to reconcile with the sentencing guidelines given in *Ligiau* and *Niulifia*.¹⁵⁹
- 8.2 The research indicates that despite the presence of aggravating factors such as where the offender is in a position of trust, or the victim is a child, emphasis is placed on mitigating factors such as delay, prior good character and family obligations. In addition, in some cases it appears that the offender is also given credit for lack of aggravating factors such as no force or violence being used, lack of injuries suffered by the victim or no weapon used. This has also included the victim not becoming pregnant despite no evidence of any contraceptive measures taken by the offender.¹⁶⁰
- 8.3 The sentencing guidelines for rape set a starting point of 8 years when the offender is in a position of trust and responsibility to the victim. The research shows no case where this has taken place. In *Sisiolo*¹⁶¹ the Judge identified a starting point of 6 years due to the offender's prior 6 year sentence for rape, and the aggravating factors (age disparity, offences were repeated, significant breach of trust). He arrived at a sentence of 8 years on the basis of the offender's risk to the community.

Case Study of 'JD'¹⁶² - rape – breach of a significant relationship of trust - Billam guidelines not applied – more weight given to personal mitigating factors

The offender pleaded guilty to raping his 16 year old daughter. The court regarded the abuse of trust and violation of a relationship “recognized by custom, religion and law”, the age disparity of 33 years, the offender's persistence in perpetrating the offence and his drunken state as aggravating factors. However, his guilty plea, responsibility as the family breadwinner, being a first time offender, being a crime of opportunity rather than pre-planned, not using a weapon or causing serious injury and already spending a year in jail to “reflect on behaviour and reform ways” were taken into account by the court. The court reviewed comparative case sentences however the starting point of 8 years

¹⁵⁹ *Nickson v Regina*, Criminal Appeal Case No.11 of 2008 (Unreported, Goldsborough P, Williams JA and Hansen JA, 26 March 2009)

¹⁶⁰ *Regina v Melake* [2010] SBHC 34

¹⁶¹ *Regina v Sisiolo* [2010] SBHC 35

¹⁶² *Regina v Dausina* [2007] SBHC

was not considered. The court sentenced him to 3 years and 6 months jail, minus time in custody.¹⁶³

Case Study 'GR'- rape, indecent assault, assault occasioning bodily harm - serious aggravating factors – warranted a starting point of 8 years – emphasis on personal mitigating factors¹⁶⁴

The offender, a Police Sergeant, pleaded not guilty to rape, indecent assault and assault occasioning bodily harm. He was found guilty in trial. His use of extreme violence, forcing the victim to perform sexually perverse acts (forced oral sex), his rank as an active Police Sergeant and his position of responsibility as her employer were considered highly aggravating (the victim was employed as domestic staff at his home). In fact the Judge stated that based on *Ligiaw*, 8 years would have been an appropriate starting point. However a 4 year delay (no explanation was included in the judgment), the embarrassment of losing his police pay since indictment, his first time offender status, the loss of custody of his 2 children and that his marriage problems combined with alcohol had caused “one thing to lead to another” were all taken into account as mitigation. The offender was sentenced to 3 years, 6 months for rape, 12 months for indecent assault and 12 months for assault occasioning bodily harm, all to be served concurrently.

This case went to trial, and no remorse or contrition was expressed by the offender at any point.

Case Study of 'SR' – rape – victim suffering mental impairment – Billam guidelines not applied - 8 year starting point warranted – offender abducted victim and held captive - personal mitigating factors given significant weight¹⁶⁵

The offender was charged with 1 Count Rape of a 17 year old girl with a mental disability. The offender pleaded not guilty, and the victim was required to give evidence at trial. The Judge determined she was able to give sworn evidence and the offender was found guilty. The offender was known to the victim as a friend of her sister's. On the pretence of locating her sister, the offender took the victim away from her family home in his taxi and back to his house. This was the first time she had been outside her home without her family. The offender held her captive in his house all night and had sexual intercourse with her twice. The Judge indicated there were no aggravating factors in this case. However mitigating factors accepted by the court included, being a first time

¹⁶³ This is the only case where a father has been charged with rape of his daughter. In all other cases of father/daughter sexual assault between 2003-2010 the accused has been charged with the lesser offence of incest.

¹⁶⁴ *Regina v Raha* [2004] SBHC 70

¹⁶⁵ *Regina v Romane* [2005] SBHC 29

offender, family circumstances, that no force used or threats were made against the complainant nor did she suffer any injuries. The offender was sentenced to 2 years.

As a contested case of rape a starting point of 5 years should have been applied. According to the guidelines in circumstances where the victim is abducted and held captive (a factor undisputed in this case) an 8 year starting point is appropriate. The presence of aggravating factors such as, the girl's mental disability and young age, would justify a further increase in sentence.

Case Study of 'EP' –rape - Billam guidelines not applied – offender gained access to victim's house – warranted 8 year starting point – aggravating factors excluded – significant weight given to personal mitigation of offender¹⁶⁶

The perpetrator, 21 years, pleaded not guilty to one count rape. The victim, approximately 20 years, was raped in her home after the offender broke in. The offender had made sexual advances prior to the rape, and threatened the victim. When the victim returned to her house, the offender was waiting outside with his bush knife. The victim locked the door, but he broke in, blocking the exit and raped her. The Judge stated there no aggravating factors and regarded the perpetrator's admission of sex (he disputed lack of consent) to warrant a starting point of 4 years. Mitigating factors included no previous convictions, partial admission to police, no weapon used (a knife was present), only force used to effect penetration, stopping the act before completion, the small age disparity, victim suffered minor injuries, the delay of 3 years, 8 months (partly his fault) and that offender now had a family. No consideration was given to the victim, nor was there any evidence of her experiences since the crime. He was sentenced 1 year, 8 months.

As a contested case of rape the 5 year starting point should have been applied. According to the guidelines breaking into or gaining access to the victim's home warrants an 8 year starting point.

Defilement

8.4 The sentencing guidelines formulated by the Court of Appeal in *Muele* are applied to both types of defilement, despite the significant difference in maximum sentences.¹⁶⁷ The guidelines stipulate that the courts must consider each case on its own facts, as well as age disparity, abuse of a trust position, subsequent pregnancy and the character of the girl when determining sentence. Defilement of a girl aged less than 13 years shares the same maximum sentence as rape; life imprisonment,

¹⁶⁶ *Regina v Paul* [2009] SBHC 48

¹⁶⁷ *Muele v DPP; Poini v DPP* [1986] SBCA 5

however the guidelines make no separation between this offence and that of section 143. The Chief Justice in *Poloso* stated a 5 year starting point, like rape, should be applied to section 142 defilement cases, in particular when the offender is in a position of responsibility to the victim.¹⁶⁸ There has been no further development of guidelines by the Court of Appeal since 1986.

- 8.5 In *Muele* the Court of Appeal included the character of the girl as a factor to be considered by the court when determining a sentence for defilement.¹⁶⁹ In cases where the victim actively resisted the offender, and did not willingly consent to sexual intercourse, the courts regard this as an aggravating factor. In most defilement cases the victim is much younger than the offender and has an existing relationship, making her highly vulnerable to exploitation. The research suggests that if the victim does not fight back, try to escape or suffer demonstrated physical injury she will be regarded as cooperating with the offender.

*Case Study of 'LF'- defilement - maximum penalty of life imprisonment – significant emphasis on mitigating factors*¹⁷⁰

The offender was a 36 year old married man who was a family friend to the victim. She was aged 10 and 11 during the period of offending. He pleaded guilty to 6 counts of defilement, but argued that all sexual intercourse was committed willingly by the child and on three occasions he paid her afterwards (these facts were accepted by the court). The large age disparity, that the offences were repeated and his decision to ejaculate on her thigh (“conduct [that] would be humiliating to the victim”) were viewed as aggravating. In mitigation the court accepted the previous good character of the offender, his financial responsibilities to his family, cooperation with police, early guilty plea, a delay of 27 months (no reasons included in judgment), the offences had the victim’s cooperation (although “consent is not a defense”) and the criminal process was already “substantial punishment”. He was sentenced to 10 months imprisonment per count, all to be served concurrently. The offender only had to serve 5 months of the sentence, the remainder was suspended for 1 year.

Incest

- 8.6 The offence of incest where the victim is over the age of 13 years has a maximum sentence of 7 years. Use of this offence, rather than rape does not reflect the objective seriousness of many of the cases considered.

*Case Study of 'MM' – incest – repeated offences – no guidelines – emphasis on personal mitigating factors*¹⁷¹

¹⁶⁸ *Regina v Poloso* [2006] SBHC 33; *R v Ligiau and Dori* [1986] SBHC 15

¹⁶⁹ *Muele v DPP; Poini v DPP* [1986] SBCA 5

¹⁷⁰ *Regina v Fasua* [2009] SBHC 54

The offender was charged with 3 counts of incest against his 16 year old daughter. He pleaded guilty to all counts. The court recognised the breach of trust as aggravation. His previous good character, remorse, payment of compensation, the crushing nature of a sentence (he was 65 at time of sentencing), the lack of aggravating factors (no weapon used, no history of violence or sex crimes, victim did not become pregnant and that she was neither very young or very old) and the significant delay were accepted as mitigating factors. He was sentenced to 2 years per count to run concurrently, however 1 year was fully suspended.

Age of Victim

- 8.7 The social structure of Melanesian culture accords high respect to elders and little to children and youths heightening their vulnerability to sexual abuse and exploitation.¹⁷² Children generally have low status in society and the girl child is most often at the very bottom of the social hierarchy.¹⁷³
- 8.8 The research suggests that courts regard age disparity as a more significant aggravating factor than the victim being a child. The Case Study 'LF' (above) indicates that a child of 10 can be regarded as capable of having consensual sex with a man almost four times her age.
- 8.9 The Family Health and Safety Study (FHS) reported that 42% of women who had their first sexual experience before the age of 15 reported it as forced or coerced and the younger the girl was the more likely the sex was forced.¹⁷⁴ A further 37% of women interviewed (aged 15-49) reported that they had been sexually abused when they were under the age of 15. This meant someone had touched them sexually or made them do something sexual they did not want to.¹⁷⁵

Relationship of Trust

- 8.10 Women sexually abused before 15 years of age in the FHS reported that these offences were mostly committed by a boyfriend (36%), a family member (19%), a male family friend (16%) or an acquaintance (15%). Over 50% of women interviewed aged 15-49 had experienced sexual partner violence.¹⁷⁶

¹⁷¹ *Regina v Melake* [2010] SBHC 34

¹⁷² *Child Sexual Abuse and Commercial Exploitation of Children in the Pacific: A Regional Report*, 2006, p. 22. Pacific Perspectives Report p.26

¹⁷³ 'Violence against the girl child in the Pacific Islands region', Shamima Ali, Expert Group Meeting on Elimination of all forms of discrimination and violence against the girl child, 25-28 September 2006, 6

¹⁷⁴ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009), 91

¹⁷⁵ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009), 87-88

¹⁷⁶ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009), 62

Case Study of 'HS'- rape – offender impersonated police officer – regarded as relationship of trust¹⁷⁷

The offender pleaded not guilty to rape. The victim was aged 18 years and the offender was aged over thirty years. He impersonated a police officer and told the victim she would be arrested for trespass of the Botanical Gardens. The Court regarded his conduct as sufficient to create a situation of trust and was a serious aggravating factor. His status as a first time offender, being married with two children and no using force or causing physical injuries to the victim were accepted as mitigating factors. The court found him guilty of rape and sentenced him to 5 years.

The impact of the offence on the victim

- 8.11 A feature of the available judgments is a lack of detailed information about the harm experienced by the victim, in particular the social, emotional and psychological harm suffered. In the recent case of *Qinity*, the Prosecution submitted a statement from the victim that detailed the impact of the offence on her life.¹⁷⁸ As a result the Judge had some insight into the personal impact of the crime and took this into account when determining the sentence. However the victim was also cross examined on her impact statement, resulting in further trauma and pain. In this case the offender was her father, and there had been reconciliation and compensation between the parties.
- 8.12 Courts sentencing for sexual offences would benefit from having better information about the impact of the offence on the victim. Sometimes this might require expert evidence, however this is not always necessary. It can simply mean providing information so that the judge or magistrate can understand how the offending has affected the victim's life. This might include having to leave school early and stop studies, having an unwanted baby, being afraid to go anywhere alone, being distrustful of men, needing to move to a new community or having difficulty finding a husband. It can also include how the offence has affected the ability of the girl or woman to carry out her role as housewife, mother, family breadwinner and backbone of the kin group. All of this information assists the judge or magistrate to determine a sentence that correctly reflects the harm caused by the offence to the victim and society.
- 8.13 Rules for victim impact statements, particularly on cross-examination and protecting the witness are necessary and need to be considered. Currently the risks of using a statement from the victim about the harm caused by the offence is that the victim may be cross-examined about the content of the statement. By contrast, the personal mitigating factors of the offender are regularly provided to

¹⁷⁷ *R v Su'umania* [2005] SBCA 3

¹⁷⁸ *Regina v Qinity* [2010] SBHC 26

the judge or magistrate for the purpose of sentencing, but the offender is not always required to give evidence about these matters, and usually the information is given by the offender's lawyer.

Purpose of sentencing – deterrence

- 8.14 The FHS reported that childhood sexual abuse was relatively common, and 37% of interviewed women said they were sexually abused before the age of 15. The FHS also reported that one in two ever-partnered women, aged 15 to 49, were raped by their partner.¹⁷⁹ These findings suggest a need to give greater attention when sentencing for sexual offences to the objective of deterrence.
- 8.15 There are two forms of deterrence – specific and general. Specific deterrence aims to reduce crime by punishing actual offenders for their crimes, to convince them that crime does not pay. General deterrence tries to educate potential offenders, by the threat of anticipated punishment. General deterrence reinforces the abhorrent nature of the offence and encourages people to not commit offences.

¹⁷⁹ Ministry of Women, Youth and Children Affairs, *Solomon Islands Family Health and Safety Study* (2009), 4, 63.

9. Appendices

Rape

Charge	Age of Victim(s)	Age of Offender(s)	Relationship	Sentence - Total
1 Count Rape	16 years	33 years	Custom Doctor/same village	4 years, 6 months
4 Counts Rape	16 and 22 years	55 years	Custom Doctor/Patient	8 years
1 Count Rape	20 years	21 years	Acquaintances	1 year 8 months
1 Count Rape	16 years	35 years	Strangers	2 years, 6 months
1 Count Rape	13-14 years	17 years	Second cousins	6 years, 6 months
1 Count Rape	Adult (age unknown)	59 years	Strangers	2 years (wholly suspended)
1 Count Rape	15 years	41 years	Uncle/niece	3 years
1 Count Rape	18 years	23 years	Strangers	5 years
1 Count Rape; 1 Count Incest (dropped on arraignment)	16 years	49 years	Father/daughter	3 years, 6 months (only rape)
1 Count Rape	15 years	24 years	Acquaintances	6 years
1 Count Rape; 1 Count Indecent Assault; 1 Count Assault Occasioning Bodily Harm	Adult (age unknown)	Adult (age unknown)	Employer (police officer)/house girl	3 years, 6 months
1 Count Rape;	Adult (age unknown)	Adult (age unknown)	Custom doctor/Patient	3 years
Alualu: 2 Counts Rape - 2 victims; Bakeloa: 1 Count Rape	14 years	Both 15 years	Acquaintances	3 years each
1 Count Rape	17 years	Adult (age unknown)	Acquaintances	2 years
1 Count Rape	18 years	30+ years	Strangers	5 years
1 Count Rape	Adult (age unknown)	Adult (age unknown)	Strangers	2 years (wholly suspended)
1 Count Rape	15-17 years	Adult (age unknown)	Strangers	4 years
1 Count Rape	Adult (age	24 years	Strangers	6 years

each	unknown)			
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Attempted Rape

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence -Total
1 Count Attempted Rape	46 years	19 years	Strangers	3 years, 6 months
1 Count Attempted Rape	9 years	27 years	Police officer/ Met Same Day	5 years
2 Counts Attempted Rape	6 years	66 years	Grandfather/Grand-daughter	4 years per charge (concurrent)
3 Counts Attempted Rape	13 years	35 years	Step father/Step-daughter	2 years, 6 months for one count only

Defilement of a girl under 13 years

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence -Total
6 Counts Defilement	10 years	36 years	Family friends	10 months per charge (concurrent) suspended at 5 months
1 Count Defilement; 1 Count Assault	12 years	49 years	Step-father/Step-daughter	3 years
1 Count Defilement	12 years	41 years	Step-father/ Step-daughter	5 years
1 Count Defilement	9 years	19-20 years	Uncle/Niece	3 years, 6 months
1 Count Defilement Each (9 offenders)	12 years	4 aged less than 18, 4 aged 20 years and 1 aged 23 years	Acquaintances/ Same village	9 months per offender
1 Count Defilement	12 years	23 years	Acquaintances	4 months (wholly suspended for 12 months)
1 Count Defilement (alternative to 1	12 years	Adult (age unknown)	Family friends	9 months (guilty of defilement)

Count Rape)				
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Defilement of a girl aged 13 – 15 years

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence
1 Count Defilement	13 years	Adult (age unknown)	Acquaintance/ Lived in same village	12 months
1 Count Defilement	14 years	21 years	Acquaintances	12 months (2 year suspended sentence)
1 Count Defilement	13 years	Adult (age unknown)	Family Friends	12 months
1 Count Defilement; 1 Count Indecent Assault	13 years	Adult (age unknown)	Acquaintances	9 months for Defilement; 1 month for Indecent Assault – concurrent with existing 22 month sentence
3 Counts Defilement	13 years	Adult (age unknown)	Family friends	3 months per charge - consecutive

Incest

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence
3 Counts Incest	16 years	55 years	Father/Daughter	2 years per count (concurrently) 1 year suspended
1 Count Incest	15 years	35 years	Father/Daughter	2 years
1 Count Incest	14 years	40 years	Father/Daughter	8 months (+ 8 months suspended sentence)
14 Counts Incest	19 years	50 years	Father/Daughter	3 years, 6 months (HC reduced from 5 years)
6 Counts of Incest	14 and 21 years	Adult(age unknown)	Father/Daughters	5 years, 6 months
1 Count Incest	Under 20 years	35-50 years	Father/Daughter	2 years
3 Counts Incest	17 years	Adult(age	Father/Daughter	4 years 8 months

		unknown)		
1 Count Incest	Adult(age unknown)	43 years	Father/Daughter	2 years (after 12 months, 1 year suspended sentence)
1 Count Incest	12 years old	56 years old	Grandfather/Grand-daughter	3 years

Indecent Assault

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence
1 Count Indecent Assault	Adult (age unknown)	Adult (age unknown)	Neighbours/Same village	1 year, 6 months
3 Counts Indecent Assault	12 years	40 years	Father/Daughter	2 years
2 Counts Indecent Assault (1 Count Attempted Rape; 1 Count Intimidation and Molestation; 7 Counts Defilement)	11 years	41 years	Step-Father/Step-Daughter	3 years per count. Found guilty of 5 Counts of Indecent Assault – all concurrent (acquitted of other charges)
1 Count Indecent Assault; 1 Count Defilement	13 years	Adult (age unknown)	Acquaintances	9 months for Defilement; 1 month for Indecent Assault – concurrent to existing 22 month sentence
1 Count Indecent Assault; 1 Count Rape; 1 Count Assault Occasioning Bodily Harm	Adult (age unknown)	Adult (age unknown)	Employer (police officer)/house girl	3 years, 6 months (12 months for indecent assault, concurrent)

Unnatural Offences

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence
1 Count	10 years	19 years	Half-	2 years

Unnatural Offence (Buggery)			Brother/Half-Sister	
3 Counts Indecent Practice; 1 Count Unnatural Offence	14-18 years (2 victims)*	48 years	Met Same Day	7 years

*Victims in this case were boys

Indecent Practices

Charge	Age of Victim(s)	Age of Offender	Relationship	Sentence
1 Count Indecent Practice	14 years*	56 years	Distant Relative	6 months
3 Counts Indecent Practice; 1 Count Unnatural Offence	14-18 years (2 victims)*	48 years	Met Same Day	7 years

*Victims in both cases were boys