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An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region

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Consistency.
Transparency.
Accountability.



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Glossary of Terms

Adult	A person aged 18 or over
Bulu Bulu	Customary Reconciliation among the Fijian I-Taukei population
Child	A person under the age of 18
CEDAW	UN Convention on the Elimination of all forms of Discrimination against Women
Customary Reconciliation	Refers to forms of reconciliation, apology, and forgiveness practiced in a number of cultures in the Pacific Island Countries (PICs). In the context of sexual and gender-based violence (SGBV) cases, these practices may be formal (ritualised) or informal
DV	Domestic Violence includes Family Violence against both adults and children, and Intimate Partner Violence. For purposes of this study, it does not include cases which contain sexual violence; these are included under Sexual Assault (SA)
Gender Stereotypes	Stereotypical attitudes and beliefs regarding gender and the way in which men and women should interact within society. In this Report 'Gender stereotypes' also includes rape myths: prejudicial, stereotypical or false beliefs regarding rape, and characteristics of rape victims and rapists
Ifoga	Samoa practice of seeking forgiveness and providing a formal apology for one's wrongdoing
Contentious Factors	Those factors which, when used in mitigation by the court, discriminate against the victim/survivor on the basis of her gender. This may be through gender stereotyping and rape myths, the consideration of customary practices which may be imbued with gender discrimination (such as forgiveness ceremonies) or other factors which unjustly privilege the interests of the perpetrator over the interests of the victim/survivor. The problematic factors have been separated into three categories: Gender Stereotypes, Customary Practices and Other Factors. A more detailed explanation of each can be found in sections 8-10
Intervention Order	Orders made by the court which restrict a person's behaviour in relation to another person, for example by forbidding them from seeing the other person, or being within a certain distance from each other. Intervention orders are also known as Apprehended Violence Orders, Domestic Violence Orders, Family Violence Intervention Orders, Restraining Orders, or Protective Orders.
Judicial Officer	Refers to the presiding Judge or Magistrate in the relevant case
M	Cases involving murder, manslaughter or attempted murder
Other Factors	Factors raised or considered in mitigation that are unacceptable but do not fit into the category of 'customary practices' or 'gender stereotypes'
PICs	Pacific Island Countries
SA	Sexual Assault includes all sexual crimes, rape, indecent assault, defilement, statutory rape, and incest. Crimes that also include elements of DV are categorised as SA
SGBV	Sexual and Gender-Based Violence
STI	Sexually Transmitted Infection
Starting Sentence	The criminal sentence that the court states it would have imposed upon the perpetrator were there no mitigating factors. The starting sentence includes any increases in sentence due to aggravating factors. This differs from the common court usage of the phrase 'starting sentence' in order to capture the full extent of any sentence reduction
WHO	World Health Organization

Symptoms of judicial bias are a lack of: consistency, transparency, and accountability.



Section A: Introduction and Methodology

1. Introduction

1.1 In April 2012 Neiman, a 36-year-old man, attacked his wife Margaret with a bush knife, inflicting two severe wounds. Margaret's left arm was left dangling, attached by skin alone and had to be amputated. In addition, her right arm was seriously injured, resulting in a permanent disability. The attack was premeditated.



A bushknife is a common instrument found throughout PNG. A form of machete, the blade can be anywhere between 18 to 32 inches long and a few inches wide.

1.2 In Margaret's country the maximum sentence for a crime of this nature is seven years. Neiman received a suspended sentence of 4 years and 9 months. He spent a total of 3 months in prison prior to being sentenced and was released immediately upon sentencing. He was ordered to live with his wife.

1.3 The reasons that the judge gave for such an arrangement were that Neiman, at the time of the attack, possessed a genuine belief that Margaret had committed adultery, a fact which constituted provocation and was thus considered by the court to be a mitigating factor. In addition, Margaret had requested his release: she feared for the welfare of her two children, because she could no longer look after their two children on her own due to her disability. Neiman was also ordered to pay Margaret compensation.¹

1.4 The case of Neiman is typical of the way in which sexual and gender-based violence (SGBV) cases are addressed, not only in the Pacific, but also in many countries around the world. Economic dependence, gender stereotypes about provocation and justified violence, presuming women are the property of their fathers and husbands, and customary reconciliation are consistently used to mitigate sentences for perpetrators of SGBV. Perpetrators are often left with a greatly reduced custodial sentence, or no sentence at all.

1.5 According to the World Health Organization (WHO), more than 35% of women globally will experience inter-personal violence in their lifetime. The vast majority of this violence will be perpetrated by men who are

intimate partners or male family members.²

1.6 In the Pacific Island Countries (PICs), it is estimated that 60 - 80% of women are victim/survivors of violence committed by men.³ It should be noted that emotional and economic abuse (for example humiliation and intimidation), which constitute forms of intimate partner violence, are unaccounted for in published prevalence studies because of the lack of standards for measuring them.⁴

1.7 Combatting SGBV requires that the entire community be involved in efforts to change attitudes and behaviours. This begins with changing the relationships between men and women from being male dominated to one of shared respect, rather than a power imbalance that serves to subjugate women.

1.8 Ensuring access to justice for victim/survivors of SGBV is a crucial part of combatting SGBV. PICs have begun amending their laws and government policies and practices to address domestic violence and other forms of SGBV. More is required, however, to remove the barriers to legal redress and safety for women who have been victim/survivors of SGBV. These barriers are based on biases against women in the form of community tolerance of violence against women, and protection of male privilege. Compounding these biases are preferences in favour of customary forms of reconciliation in lieu of legal penalties for crimes of SGBV.

1.9 Unfortunately, victim/survivors face numerous hurdles at every step of the criminal and judicial process. The gender power imbalances that lead to SGBV are also barriers to equal access to justice for women. Community attitudes to violence and to women's roles, lack of education, lack of resources, customary and non-customary forms of reconciliation, and judicial and police attitudes about rape all create barriers for women attempting to access the judicial systems for redress. This manifests in a lack of reporting of a crime, failure to investigate or prosecute, barriers to achieving a conviction and, as we will see in this report, the short and frequent non-custodial sentences that perpetrators receive in DV cases.

2 World Health Organization, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, 2013, <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/> (The WHO methodology surveyed women and girls between 15-49 accessed 14 October 2015)

3 UN Women, *Ending Violence against Women and Girls: Evidence, Data and Knowledge in Pacific Island Countries*, July 2011 <http://www.pacificwomen.org/resources/research/evidence-data-and-knowledge-in-pacific-island-countries/> accessed on 20 November 2015

4 World Health Organization, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, 2013, <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/> accessed 14 October 2015

1 *State v Dua* [2013] PGNC 8

Purpose of this report

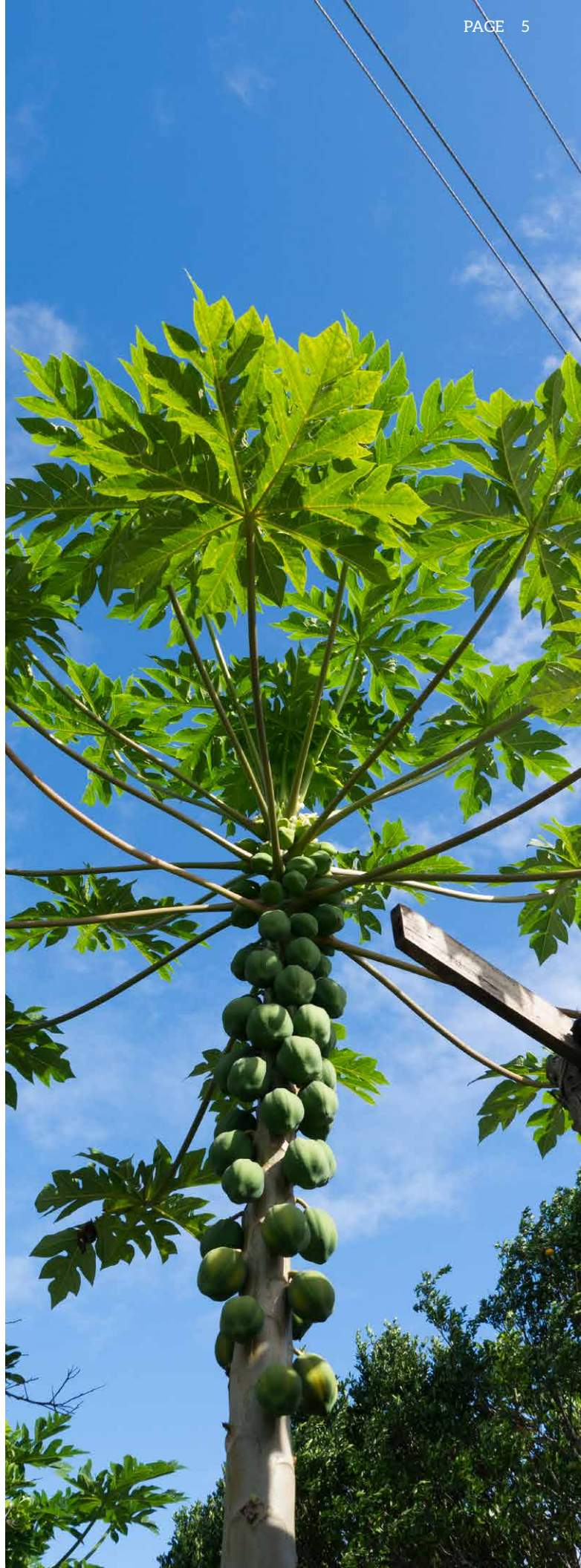
1.10 Patriarchal norms, gender stereotypes, and rape myths have embedded gender discrimination within the structures of society that should be providing avenues for justice, redress, and protection for victim/survivors of SGBV. These structural barriers allow perpetrators to escape accountability for their crimes and women are left disempowered, vulnerable, and with little faith in a justice system that should be protecting them.

1.11 It is rare that the values and cultural norms which lead to this inequality are expressed in writing. One place in which these values and cultural norms are captured in written form is in the judgements and sentencing remarks of magistrates and judges in SGBV criminal cases. Where these deliberations are recorded, we have a rich resource of information regarding the views and values of the magistrates or judges, and also the defendants, their legal representatives, the prosecutors and, in some cases, the victim/survivors and other witnesses.

1.12 By analysing sentencing decisions from the region, we can understand the value judgements, customs, and traditions that affect sentencing in SGBV cases. We can determine the number of cases in which gender stereotypes, rape myths, and other contentious factors led to a reduced sentence. We can assess whether there is a difference between lower and appellate courts in their handling of SGBV cases, and whether there has been change over time.

1.13 This Report is restricted to looking at the factors raised and considered during the sentencing phase only, including arguments in mitigation of sentence. Thus, in each case reviewed for this Report, the perpetrator has either pleaded guilty or been found guilty by the trier of fact. Factors raised as evidence in defence against the charges are excluded.

1.14 By collating qualitative data from these cases, in the form of judicial commentary, we gain an insight into the language used to describe the perpetrators and victim/survivors. Correspondingly, by collating quantitative data, insight is gained into whether courts are consistent in their sentencing decisions and what factors may create variance. Our research indicates this is the first report of its kind in the region.



2. Executive Summary

2.1 We identified and analysed 908 sentencing records involving SGBV in seven PICs: Fiji, Samoa, Solomon Islands, Tonga, PNG, Kiribati and Vanuatu. We analysed each case to determine whether gender stereotypes, customary reconciliation (e.g. apology, forgiveness) or other contentious factors ('Contentious Factors') were considered during sentencing.

2.2 Contentious factors are those factors which, when used in mitigation by the court, discriminate against the victim on the basis of her gender. This may be through gender stereotyping and rape myths, the consideration of customary practices which may be imbued with gender discrimination (such as forgiveness ceremonies) or other factors which unjustly privilege the interests of the perpetrator over the interests of the victim. We have separated the contentious factors into three categories: Gender Stereotypes, Customary Reconciliation Practices and Other Factors.

2.3 We then looked at whether the contentious factors had had any effect on sentence length and, if so, by how much. Comments and language by the judge or magistrate that indicated their views regarding gender stereotypes, rape myths, or customary forms of reconciliation were also captured.

2.4 Our random selection of 908 cases included 111 domestic violence (DV) cases and 787 sexual assault (SA) cases. Of these, 31 DV and 8 SA cases resulted in murder/ manslaughter or attempted murder (M) along with another 11 cases of gender violence that did not have a DV or SA element. 79% (715 cases) of sentences were handed down between 2005 and 2014.

2.5 In terms of age of the victims, 58% of the victim/survivors were under the age of 18 and 40% were under the age of 15. In 55 cases the age of the victim was unknown.

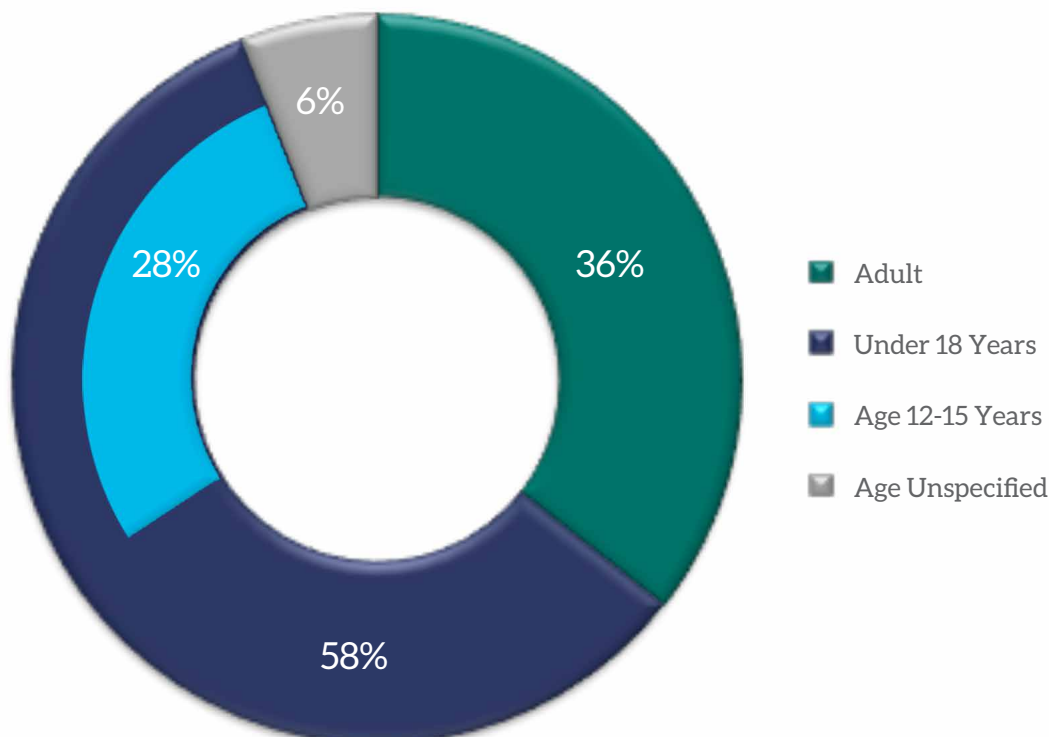
2.6 The average final sentences for DV and SA cases were 0.98 years and 5.19 years respectively. The starting sentences, that is, the total sentence including aggravating factors before mitigation, for each were 2.43 and 8.71 years respectively, demonstrating a reduction in sentence of 60% and 40% for DV and SA cases. A total of 775 out of the 908 cases analysed resulted in a custodial sentence. We found that DV cases were four times more likely to result in a non-custodial sentence than SA cases, with 47% of DV cases resulting in a non-custodial sentence compared to 11% of SA cases.

2.7 In 75% of cases analysed, contentious factors were raised in court and led to an actual reduction in sentence in 52% of cases. Contentious factors were raised in 90% of DV cases and in 66% of DV cases it led to a reduction in sentence. For SA cases, contentious factors were considered in 73% of cases and led to a sentence reduction in 50% of cases. We found that average final sentences were substantially lower in cases where contentious factors were considered.

2.8 Where a judicial officer took into account a combination of contentious factors, the perpetrator was **four times** more likely to receive a non-custodial sentence than in cases where no contentious factors were considered.

2.9 The corollary of this is that in cases where no contentious factors were considered a perpetrator was significantly more likely to receive a custodial sentence, than in cases where a combination of factors were

Age of Victim/ Survivors



Average Starting and Final Sentences After Consideration of Contentious Factors



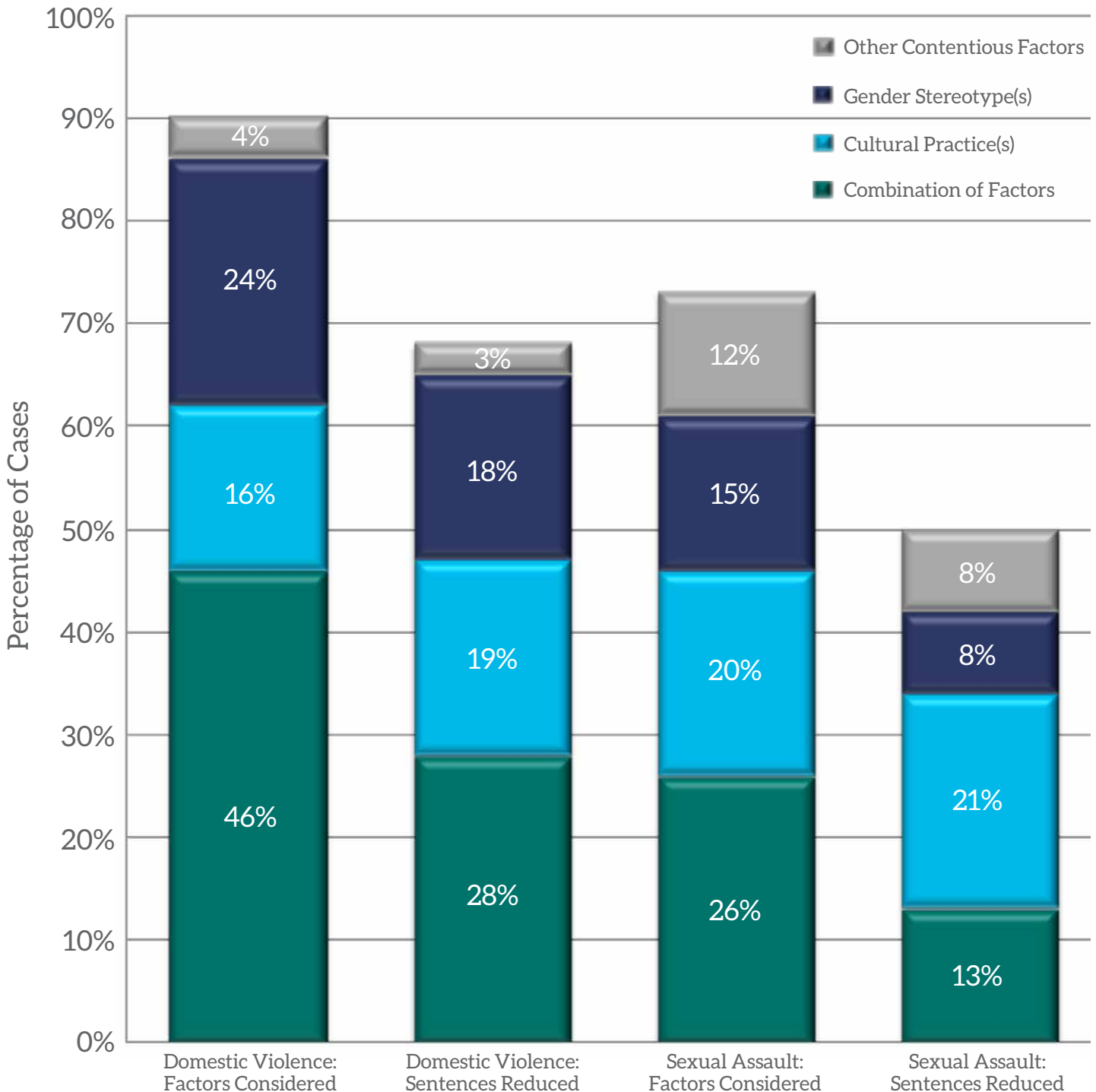
considered. This may be because contentious factors were not raised, or because the judicial officer refused to take them into account. It is obvious from the research that, at least in some cases, judicial officers rejected certain factors as being appropriate for mitigation: in around 21% of both SA and DV cases contentious factors were raised by the defence but were rejected, either implicitly or explicitly, by the judicial officer as a valid mitigating factor.

2.10 A range of contentious factors were taken into account by judicial officers. Common forms of gender stereotyping included considerations that the perpetrator was the bread-winner and, therefore, needed to be home to provide for his family; that the victim/survivor

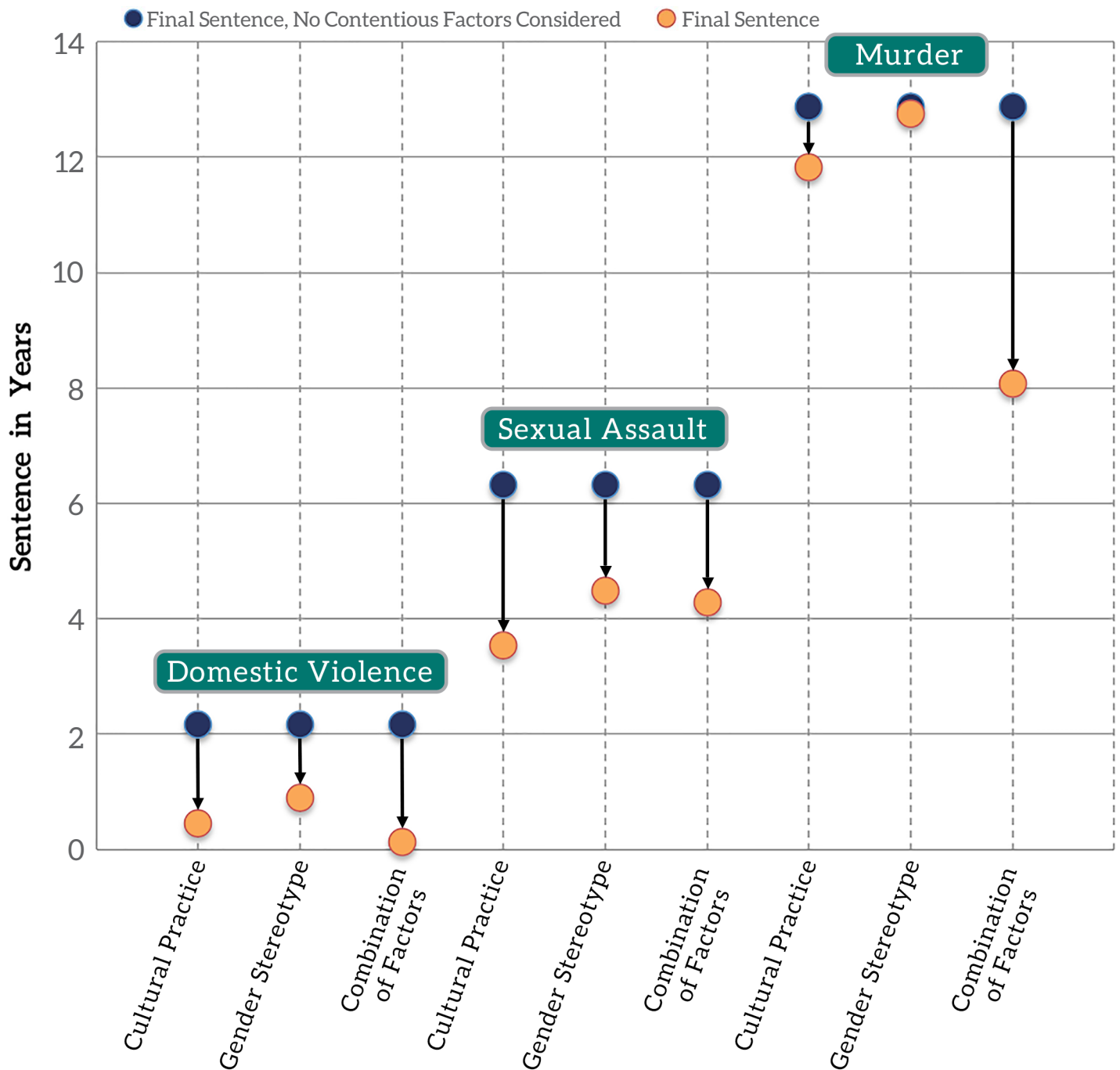
had provoked the perpetrator; taking into account the sexual history of the victim/survivor, for example to draw conclusions as to the level of emotional trauma experienced by her, and whether it may have appeared from her sexual history that she was consenting; the fact that the victim/survivor did not seem upset; that the victim/survivor behaved at the time in a way that led the perpetrator to believe she would be a willing participant (such as having a drink with him); and that the victim/survivor was of 'loose' morals.

2.11 Under specific customary practices we found various informal and formal manifestations of customary reconciliation including ceremony, compensation,

Contentious Factors Considered and Sentences Reduced



Specific Impact of Contentious Factors on Sentences



forgiveness or a combination of the above. Where compensation is paid, it is often to a village chief, or to the father or brother of the victim/survivor, or in some cases to the victim/survivor herself. Cases also include retribution, such as spearing or destruction of property of the offender.

2.12 In reviewing the language of the court opinions and the factors considered by the judicial officers, it was evident that the approach to sentencing, gender stereotyping and the use of customary reconciliation is far from consistent. Judicial officers differed widely in how and under what circumstances issues such as provocation, victim's sexual history or customary reconciliation should be taken into account in sentencing decisions.

2.13 Looking at both the quantitative and qualitative

data, it is clear from our research that gender stereotypes and customary reconciliation play a significant role in determining the nature and length of sentencing in SGBV cases in the PICs. The discriminatory nature of gender stereotypes and customary reconciliation has meant that victim/survivors of SGBV are denied equal protection under the law. This Report also shows that judicial officers, when equipped with the proper tools and information, can and do identify and reject contentious factors raised by the defence. Legislative and policy reform, as well as education and training, is needed to ensure that the victim/survivors are placed at the centre of the judicial process and that discriminatory sentencing practices which breach the obligations of PICs under the Convention on the Elimination of All Forms of Discrimination (CEDAW), are eliminated.

3. Methodology

3.1 The research conducted in the creation of this Report included a review of 928 sentencing records in cases of SGBV in 12 PICs. However, as is seen below in Section B, five countries returned less than 20 results: Marshall Islands, Palau, Nauru, Tuvalu and Micronesia. We therefore excluded these countries from the rest of the analysis. Thus, this report is based on the study of 908 cases in total.

3.2 The research focuses on the use of certain mitigating factors in sentencing decisions for SGBV cases. This Report evaluates whether particular factors were raised in mitigation by the defence, considered by the judicial officer, and whether those factors had any effect on final sentences.

3.3 In addition, this Report provides useful insight into the types of SGBV cases considered by the courts, the age ranges of victim/survivors, and the use of intervention orders in domestic violence cases.

Identification of cases

3.4 This study utilised publically available cases from the PaCLII database available at <http://www.paclii.org>.⁵

3.5 Using this database, researchers undertook a randomised search for sentencing decisions in cases of SGBV against women. The search terms used to identify relevant cases was a Boolean search of: sentence AND (rape OR defil* OR sexual OR indecent OR “domestic violence” OR ((girlfriend OR wife) w/5 (abuse OR hit OR strike OR punch))).

3.6 The cases then analysed were those that fit the following criteria:

3.6.1 The case involved violence against a woman or girl.⁶

⁵ Accessed 5 November 2015

⁶ Our search was not restricted to cis-gendered women. The search was broad enough to include Transwomen. However none of the cases analysed explicitly identified the victim or perpetrator as being a Transwoman.

3.6.2 The perpetrator could be male or female.

3.6.3 The case involved sentencing of the perpetrator.

3.6.4 For appeals cases, only those cases which reviewed the lower court’s sentence in some detail and upheld it, or overturned the sentence and made a new one were considered.

3.7 For countries where the search resulted in more than 150 cases, we analysed a minimum of 5 cases per court level per year from 2000 onwards analysing additional cases if time allowed. If there were less than 5 cases for that particular year, we only reviewed those cases which were relevant based upon the criteria described above.

Data collected

3.8 Cases were classified as Sexual Assault (SA), Murder/ Manslaughter (M) or Domestic Violence (DV). Where non-murder cases had elements of both SA and DV they were classified as SA.⁷

3.9 Basic information that was collected included:

3.9.1 Case citation, Year, Presiding Judge or Magistrate, Court, Country;

3.9.2 Type of case (SA, M or DV);

3.9.3 The particular crime committed;

3.9.4 Whether the courts had imposed an intervention order upon the perpetrator at any time;⁸

3.9.5 The age of the victim/survivors (where there was more than one victim/survivor, the younger age was noted. Where the crimes continued over a number of years, the age of the victim/survivor at the first offence was noted);

3.9.6 Initial length of sentence, taking into account aggravating factors (starting point);

3.9.7 Resulting reduction in sentence due to all

⁷ Three cases were also identified that included violence against women but were not sexual or domestic in nature, nor did they involve murder or attempted murder. Given there were only three cases in this category they were excluded from the analysis on the basis of small sample size.

⁸ Intervention orders refer to orders made by the court which restrict a person’s behaviour in relation to another person, for example by forbidding them from seeing the other person, or being within a certain distance. Intervention orders are also known as Apprehended Violence Orders, Domestic Violence Orders, Family Violence Intervention Order, Restraining Order, Protective Orders etc.



Nukualofa Supreme Court, Tonga

mitigating factors considered;⁹

3.9.8 Whether customary forms of reconciliation,¹⁰ gender stereotypes, or other contentious factors were raised, either by the defence or the judicial officer, and whether they led to mitigation;

3.9.9 If available, what portion of the sentence reduction was based upon contentious factors;¹¹

3.9.10 Full or partial suspension of sentence;

3.9.11 Final custodial sentence imposed or, if not, any bond/fine. This may be different to the sentence actually served as perpetrator may be released earlier;

3.9.12 Language by the Judicial Officer indicating their views on customary reconciliation, gender stereotypes or other factors;

3.9.13 Whether the Judicial Officer believes gender stereotypes or customary reconciliation warrants a reduction in sentence;

3.9.14 Any other relevant information.

3.10 The main focus of the research was to review whether customary forms of reconciliation, gender stereotypes, rape myths, or other contentious factors were considered in sentence mitigation. Each case was therefore reviewed to identify:

3.10.1 Whether anyone in the court, be it defendant, prosecutor, victim/survivors, or judicial officer raised a contentious factor;

3.10.2 Whether the contentious factor raised led to a reduction in sentence; and

3.10.3 The number of years by which the sentence was reduced and the proportion of that reduction attributable to contentious factors, where specified.

3.11 Contentious factors are those factors which, when used in mitigation by the court, discriminate against the

⁹ In some cases a judge considered both aggravating and mitigating factors at the same time. In these cases no 'starting sentence including aggravating factors' was provided, nor was it possible to know the length of the sentence reduction. For these cases we noted 'starting sentence' and 'amount of mitigation' as 'unknown'.

¹⁰ To be clear, the use of customary forms of reconciliation (apology, forgiveness, *bulubulu*, *ifoga*, etc.) in some PICs is mandated by legislation and/or the Constitution. However, for reasons we will discuss shortly, we are advocating against the use of cultural forms of reconciliation as a factor in mitigation because they function in a discriminatory manner, in the specific context of SGBV cases and in contravention of CEDAW.

¹¹ The specific amount of sentence reduction attributable to contentious factors was only indicated in 79 cases.

victim on the basis of her gender. This may be through gender stereotyping and rape myths, the consideration of customary practices which may themselves be imbued with gender discrimination (such as forgiveness ceremonies) or other factors which unjustly privilege the interests of the perpetrator over the interests of the victim. We have separated the problem factors into three categories: Gender Stereotypes, Customary Reconciliation Practices and Other Factors. A more detailed explanation of each can be found in sections 8-10.

3.12 Guidance was provided to researchers as to what constituted customary reconciliation, gender stereotypes, and other factors, outlined below. Many of the factors considered would qualify as both gender stereotypes and customary reconciliation, with gender stereotypes and rape myths being a basis for certain cultural norms and beliefs. However, gender stereotypes included those cultural factors which related specifically to gender and/or rape myths, while customary reconciliation includes beliefs that do not appear, *prima facie*, to be gender specific. Any other factor that we believed should not have been considered as mitigating but nonetheless was considered, such as the fact that the perpetrator may not have possessed a weapon or that the perpetrator had not given the victim/survivor a Sexually Transmitted Infection (STI), was classified as 'other'.¹²

Some of the examples of contentious factors provided to the researchers were:

3.12.1 Customary reconciliation: reconciliation (such as *bulubulu* and *ifoga*), apology and forgiveness;

3.12.2 Gender stereotyping examples, such as the perpetrator being the breadwinner of the family, or that the victim/survivor:

3.12.2.1 was out late at night drunk;

3.12.2.2 had previously had sex with the perpetrator;

3.12.2.3 was wearing revealing clothing;

3.12.2.4 did not struggle or cry out;

3.12.2.5 appeared calm and collected, not distressed;

3.12.2.6 initiated or consented to sex (in situations where the victim was under the age of consent with a substantial difference in age);¹³

¹² While the presence of a weapon or the transmission of an STI may be legitimate aggravating factors, it is problematic to consider their absence as a mitigating factor as it rewards the perpetrator for not using a weapon or causing additional harm: this goes towards the traditional view that rape is not 'real rape' without the use of force or the infliction of additional harm over and above the harm caused by rape.

¹³ For example where the victim/survivor is 14 and the perpe-

3.12.2.7 failed to report the incident in a timely manner;¹⁴

3.12.2.8 was nagging the perpetrator or had been unfaithful, or was suspected of being unfaithful (in DV cases).

3.13 Examples of 'other' factors provided to researchers were where the absence of additional force in a rape case¹⁵ led to a mitigation of sentence,¹⁶ or the fact that the perpetrator was married, or had started attending church. A list of individual contentious factors found in the cases analysed is provided in Section C below.

3.14 Depending on the jurisdiction, the judicial officer may be required by law to consider these contentious factors (see Section C). Thus, it is important to note that the results of this study should not necessarily be interpreted as reflecting a failure on the part of judicial officers to implement sentencing legislation or guidelines. This is explored further in Section C below.

3.15 Given the different approaches to sentencing demonstrated by judicial officers, and the different legislative requirements in each country, there were a number of issues encountered during our research. This is explored in further detail in the final section.

trator is 23 (in the case of *Police v Autagavaia* [2010] WSSC 16) or 28 (in the case of *PP v Simeon* [2008] VUMC 3)

14 There is no definition of what constitutes a 'timely manner', rather we looked at whether the defence or judicial officer considered any delay in reporting the crime to be a reason for mitigation.

15 *State v Johannes* [2014] PGNC 105; N5644 (26 June 2014); *State v Tugumar* [2013] PGNC 219; N5377 (16 August 2013); *State v Dabo* [2006] PGNC 97

16 Note that historically the phrase 'extraneous force' was used in rape cases where an element of the crime was the use of force to subdue and penetrate the victim/survivor. The lack of evidence of extraneous force was therefore a defence to a charge of rape. This is in contrast to the way in which 'additional force' is considered in sentencing here. In the cases analysed, additional force refers to the use of force that is additional to that used to restrain and penetrate the victim, such as being hit, punched, cut, or otherwise suffering from injuries other than those that would be inflicted to subdue and rape her. In a number of cases the judicial officer considered the lack of additional force as a mitigating factor, in effect rewarding the perpetrator for not attacking the victim any more than was necessary to rape her. While additional violence and injury may justifiably be a relevant aggravating factor in a sentence, we have viewed the consideration of these as mitigating factors as contentious.

Interpretation of results

3.16 Those interpreting these results should proceed with caution. The number of cases per country and the number of cases per year should not be seen as a reflection of either the prevalence of SGBV in each country, or the change in prevalence over time. While a basic review of cases on PacLII will show an increase in cases in more recent years, differences in the numbers of cases reviewed may be due to a number of reasons, including the availability of published data, the focus by us on post-2000 decisions, the increase in use of PacLII, increased reporting of sentences and so forth. Given the research was not intended to be comparative across jurisdictions, the inclusion of more than the required number of cases was not seen to detract from the analysis.

3.17 Cases were only identified based upon:

3.17.1 the presence of SGBV.

3.17.2 that it was a sentencing decision.

3.17.3 the country, court level and year.

All other data obtained from the analysis is therefore random and so conclusions as to prevalence, spread and relationships between the data points can be drawn. Randomised data includes:

3.17.4 The age of the victim/survivor.

3.17.5 Whether contentious factors were raised, considered, and utilised in sentencing.

3.17.6 The attitudes of the judicial officer.

3.17.7 In DV cases, whether there was an intervention order.

3.17.8 The starting and final sentence, reduction in sentence, and whether or not it was suspended.



Section B: Courts, Cases & Victim/ Survivors

4. Courts and Cases

4.1 We identified 928 cases in total from eleven countries. They included 81 DV cases, 49 Murder or Manslaughter (including attempted) cases and 798 SA cases. Where the case included both sexual and non-sexual elements, it was classified as SA.¹⁷

STATE	DOMESTIC VIOLENCE	SEXUAL ASSAULT	MURDER	NO. OF CASES
Fiji	54	87	4	145
Kiribati	2	119	4	125
Marshall Islands		2		2
Micronesia				0
Nauru	1	13		14
Papua New Guinea	13	103	28	144
Samoa	5	216	4	225
Solomon Islands	1	113	2	116
Tonga	3	36	2	41
Tuvalu		4		4
Vanuatu	2	105	5	112
Palau				0
Grand Total	81	798	49	928

4.2 Given the smaller number of cases in Tuvalu, Nauru, Micronesia, Palau, and Marshall Islands, we have not included them in the final analysis below. The total number of cases included in our analysis is thus 908, being 80 DV, 779 SA and 49 M cases.

4.3 While most cases were drawn from 2000 - 2014, we did analyse 110 pre-2000 cases.

4.4 In many cases the defendant was sentenced for more than one crime. It is therefore difficult to quantitatively analyse the number and types of crimes reviewed. However, we categorised each case according to whether they were SA, DV or M and then prioritised them by the crime which attracted the highest penalty. It should be known that this is a fairly rudimentary form of categorisation that does not take into account the particular characteristics of each crime, nor is it intended to be a comment on whether one crime is 'worse' than another. Where the case included more than one charge/crime, a '+' was added to the category. Crimes were ranked in the following order:

¹⁷ We did not identify any cases of DV or gender-based violence that featured non-physical abuse only (such as psychological or financial abuse). This may be due to the particular Boolean search we used. However there may be other reasons why such cases are not being heard in courts, including the failure by victims or police to see such treatment as a form of crime, or even for the criminal laws to legislate against such behaviour.

- 4.4.1 Murder / Homicide
- 4.4.2 Manslaughter
- 4.4.3 Attempted Murder
- 4.4.4 Rape
- 4.4.5 Defilement / Statutory Rape / Incest / Sexual intercourse with a girl under care and protection
- 4.4.6 Attempted Rape
- 4.4.7 Indecent Assault
- 4.4.8 Assault
- 4.4.9 Abduction

The full categorisation and incidence of each crime can be found in **Appendix 1**.

- 4.5 Our sample of analysed cases included:
 - 4.5.1 26 cases of murder and 3 of attempted murder
 - 4.5.2 20 cases of manslaughter
 - 4.5.3 333 cases of rape. 101 of these were accompanied by additional charges.
 - 4.5.4 49 cases of attempted rape
 - 4.5.5 44 cases of incest
 - 4.5.6 80 cases of assault, including assault causing bodily harm
 - 4.5.7 198 of the cases involved sexual intercourse or assault of a minor where consent was not a factor
 - 4.5.8 One case of breaching an intervention order

5. Courts

5.1 The courts from which judicial opinions were reviewed included both trial and appellate courts. Very few cases came from the lower courts, such as Magistrates or District courts except for those originating in Fiji. We believe the main reason for this is that in many cases Magistrate and District Court cases are not published on PacLII as all jurisdictions studied have Magistrates courts with criminal jurisdiction. In many cases, the sentencing hearing for domestic violence cases would occur in a lower court.

5.2 Cases by Court:¹⁸

COURT'S JURISDICTION	TOTAL
Court of Appeal	105
District Court	7
High Court	283
Magistrates Court	52
National Court of Justice	121
Supreme Court	338
Youth Court	2
Grand Total	908

¹⁸ Depending on the jurisdiction and country, a Supreme Court or High Court may hear both original jurisdiction and appeal cases.



High Court, Honiara, Solomon Islands

5.3 Combining various levels of court systems and dividing according to jurisdiction:

STATE	COURT OF APPEAL	HIGH / SUPREME COURT	DISTRICT/ MAGISTRATES / YOUTH COURT	NATIONAL COURT OF JUSTICE	NO. OF CASES
Fiji	30	65	50		145
Kiribati	10	115			125
PNG		16	7	121	144
Samoa	10	213	2		225
Solomon Is	12	104			116
Tonga	15	26			41
Vanuatu	28	82	2		112
Grand Total	105	621	61	121	908

6. Characteristics of Victim/ Survivors

6.1 Sexual abuse of girls under the age of 18 is known to be a considerable problem within the Pacific Island region. Although prevalence studies have been conducted in many PICs, the WHO methodology used only surveys girls from 15-18 years old. Other studies have found that in Fiji, 30% of all female rape victims/survivors were between 11 and 15 years of age. In Kiribati, 20% of women reported being sexually abused before the age of 15 and in the Solomon Islands 37% of women reported that they had been sexually abused before the age of 15. In all cases, the most common perpetrator was a male in their immediate or extended family, or a boyfriend.¹⁹

6.2 The proportion of child victim/survivors in the cases we identified is substantially higher than in the studies cited above. Of the cases we researched, **40% of the cases involved a child under the age of 15**. Of course, the difference in figures between this and the above research may be due to a number of factors, for example there may be a higher probability of prosecution and conviction for violence against girls under the age of 18.

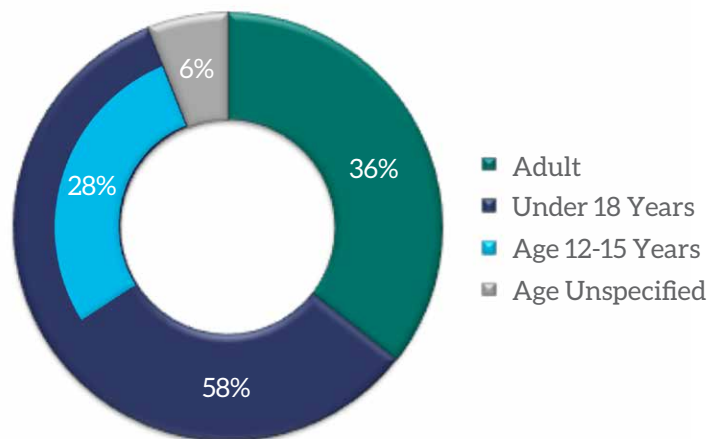
6.3 Overall, 323 of the victims/survivors in the cases reviewed were adults (35.58%) and 530 were under 18 years old (58.37%). The remaining 55 cases did not specify

¹⁹ UN Women, *Ending Violence against Women and Girls: Evidence, Data and Knowledge in Pacific Island Countries* July 2011 <http://www.pacificwomen.org/resources/research/evidence-data-and-knowledge-in-pacific-island-countries/> accessed on 20 November 2015.

whether the victim/survivors were adults or children.

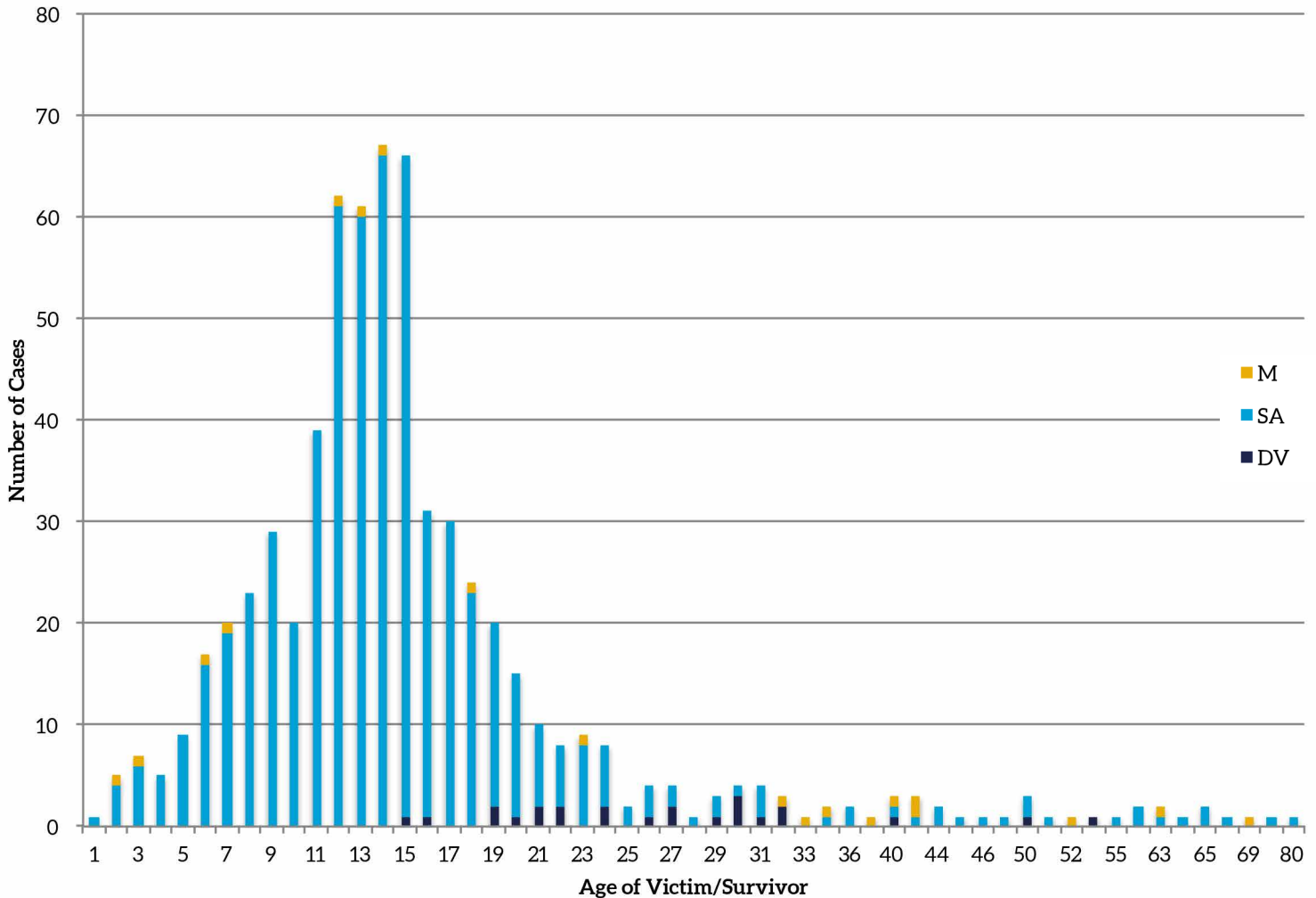
6.4 A total of 256 cases, being 28.2% of all cases, involved victims/survivors aged between the ages of 12 and 15.

Age of Victim/ Survivors



6.5 For the cases where the victim/survivor was under the age of 16, the primary charge was rape or attempted rape in 154 of the 469 cases. 188 of the cases involved sexual intercourse or indecent acts where the issue of consent was not an element of the crime, such as statutory rape. The issue of plea-bargaining, or prosecution for a lesser offence is not within the scope of the research conducted in preparing this report, however the qualitative evidence collated does indicate that prosecution for statutory rape

Number of Cases by Age of Victim



²⁰ or incest is often used in cases where rape, which often attracts a higher sentence, was clearly present.²¹ As the element of consent does not need to be established in statutory rape or incest cases, police and prosecutors have been known to charge the perpetrator with these lesser offences rather than that of rape. The perpetrator therefore obtains the benefit of a lesser charge and a lower starting sentence. Such a practice has been criticised by judicial officers.²²

6.6 The relatively young age of the majority of victim/survivors is also of concern where the judicial officer has taken into account customary reconciliation or gender

²⁰ Statutory Rape refers to cases of sexual intercourse with a person under the legal age of consent. Consent is not a factor in statutory rape cases as a person under the legal age of consent cannot consent to sexual intercourse. The element of consent in these cases does not need to be established.

²¹ See for example *Regina v Phobro* [2013] SBHC 8; *PP v Hinge* [2008] VUMC 2; *Attorney-General v Fereti* [1994] WSCA 13; *PP v Utut* [2006] VUSC 92; *PP v Tula* [2001] VUSC 63

²² *Regina v Phobro* [2013] SBHC 8

stereotypes. This is discussed further below.

6.7 In terms of other vulnerable populations, in a number of cases the victim/survivor was identified as having a disability, primarily an intellectual disability. A number of victim/survivors were vulnerable by reason of age, with 8 victim/survivors over the age of 60. None of the cases made reference to the sexual orientation or gender identity of the victim/survivors. None of the cases referred to the victim/survivor as working in the sex industry.



Section C: Mitigation and Sentence Lengths

7. Average Starting Sentence, Mitigation, and Final Sentence

7.1 We reviewed the starting sentence (which includes aggravating factors), reduction in sentence due to mitigation, and final custodial sentence for each case. The starting sentence is the sentence that would have been imposed were there no mitigating factors. Our research also looked at whether a sentence was partially or fully suspended. Not all judicial officers clearly stated a starting sentence, often weighing aggravating and mitigating factors simultaneously to come to a final decision; therefore this could not be captured in each case. Where no starting sentence was provided, this was noted as 'unknown' and not included below.

7.2 The average final sentence for DV and SA cases were 0.98 years and 5.19 years respectively. The starting sentences for each were 2.43 and 8.71 years respectively, demonstrating a reduction from the starting sentence of 60% and 40% for DV and SA cases. 775 cases resulted in a custodial sentence. SA cases were significantly more likely to result in a custodial sentence than DV cases, with close to half of the DV cases reviewed resulting in a suspended sentence, fine, or other non-custodial result. The final sentence is the sentence that was imposed by the court; the actual sentence served may be much shorter, for example, because the perpetrator was released on parole.

7.3 Contentious factors were considered and led to a reduction in the majority of cases. We found that contentious factors were considered in 90% of DV cases and in 66% of DV cases it led to a sentence reduction. For SA cases, contentious factors were considered in 73% of cases and led to a reduction in sentence in 50% of cases. We also found that final sentences were substantially lower in cases where contentious factors were considered.

7.4 This means that in 24% of DV cases and 23% of SA cases, contentious factors were raised by the defence but did not lead to a reduction in sentence. This indicates that the judicial officer rejected the contentious factors raised by the defence. It is not clear from the data whether they were rejected on the basis of submissions by the prosecution or whether the judicial officer themselves considered and then rejected the contentious factors.

7.5 There was a strong correlation between consideration of contentious factors and non-custodial sentences. For example, where a judicial officer took

into account a combination of contentious factors, **the perpetrator was four times more likely to receive a non-custodial sentence than in cases where no contentious factors were considered.**

Starting sentences

7.6 In our research the starting sentence refers to the sentence that would be imposed upon the perpetrator were there no mitigating factors. For example, a judicial officer may decide that the starting point for the sentence should be five years given the type and gravity of the crime. S/he may then add an additional two years to the sentence for aggravating factors, such as the use of a weapon or additional physical harm. In our analysis then, the 'starting sentence' would be seven years.

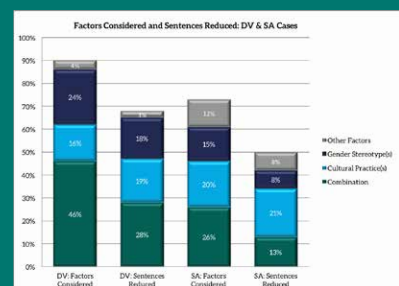
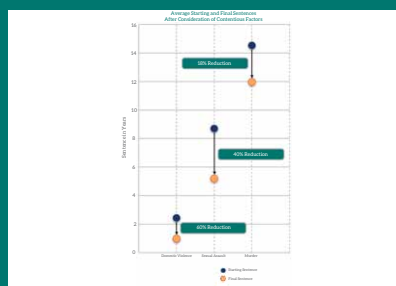
7.7 One limitation is that in 412 cases, the courts did not indicate a starting sentence. In some cases, the courts would indicate the maximum legislated sentence, or the theoretical default sentence for that category of crime; these were not recorded, noting only 'unknown'. In others, no initial sentencing framework was provided at all, with the final sentence being the only information provided. In many of these cases, the mitigating and aggravating factors were still taken into consideration by the judicial officer.

7.8 Just over half the cases (496) provided a starting sentence. Of these, the average starting sentence (not including life/death sentences) was:

STARTING SENTENCE*	AVERAGE (YEARS)	MEDIAN (YEARS)
DV	2.43	1.125
M	14.54	12.5
SA	8.71	7

*In addition, there were 8 cases in which the initial sentencing exposure faced by the perpetrator was a life sentence and 4 cases in which the initial sentence proposed was the death penalty.

Please see the summary charts on pp. 6-9.



Final sentences

7.9 Final sentences varied widely, from a good behaviour bond or fine to life imprisonment or the death penalty. In 133 cases (14.65%) a non-custodial sentence was imposed. In these cases, the sentence was either fully suspended, the perpetrator was put on probation or a good behaviour bond, or a fine was imposed. There were 775 cases where there was some form of custodial sentence. Ten of these resulted in a life sentence; there was one case in which the perpetrator was sentenced to death and one case resulted in evening detention for five nights.

7.10 Removing the small sample of life sentences and death penalty, the remaining 896 cases resulted in sentences as follows: domestic violence cases received on average less than a 1 year sentence and sexual assault cases received on average 5 years and 2 months sentence.

Sentence reduction

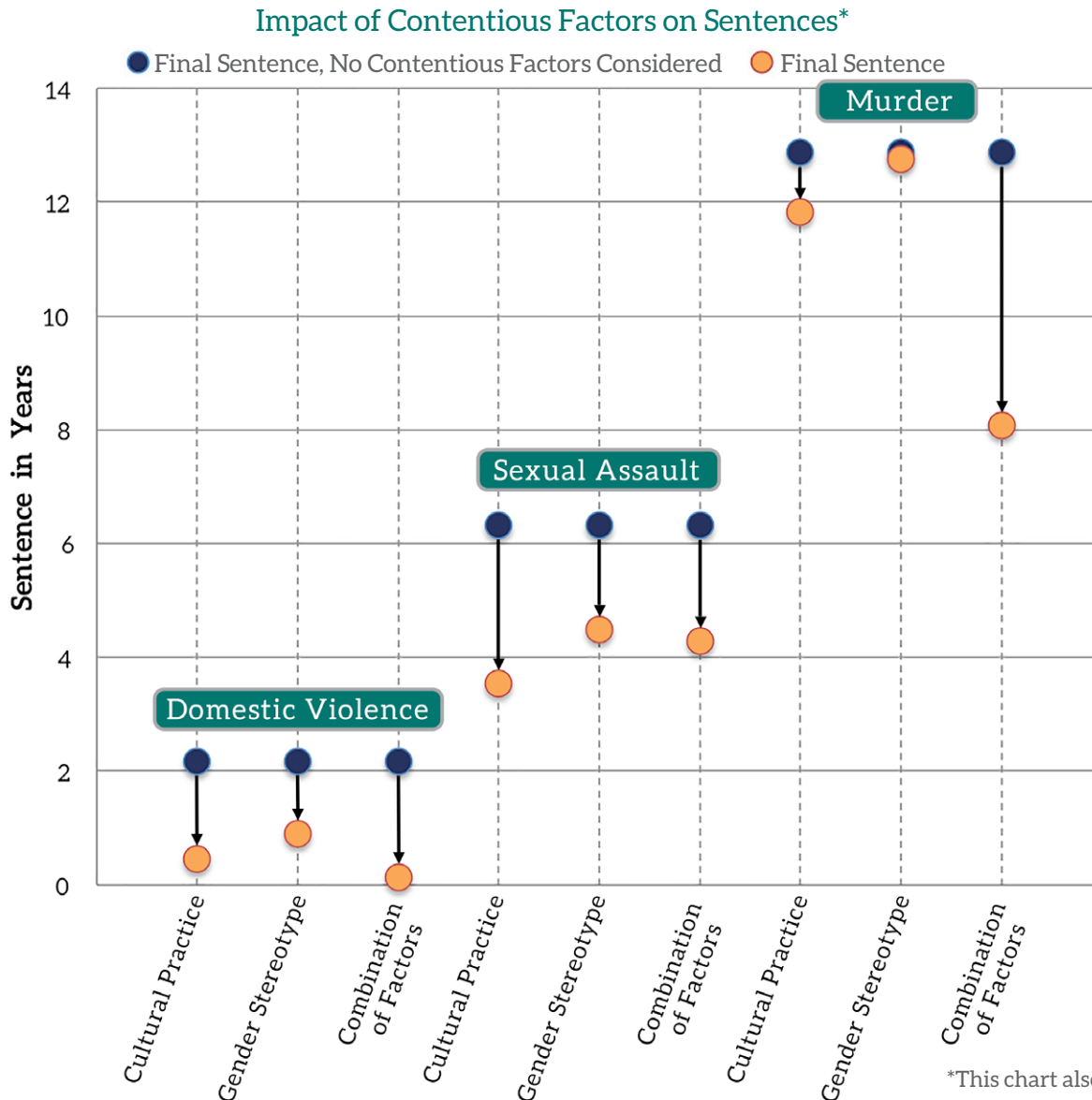
7.11 Of particular interest is that the fact that the final sentence for DV cases and SA cases reflect 40% and 60% decrease from the starting sentences. In murder and manslaughter cases, sentences were reduced by 18%.

AVERAGE OF FINAL CUSTODIAL SENTENCE LENGTH*	AVERAGE (YEARS)	MEDIAN (YEARS)
DV	0.98	0.00
SA	5.19	4.00
M	11.97	9.50

*Not including sentences of life or death.

Comparing starting and final sentences we can see that DV, M and SA cases on average were reduced by 1.45, 2.57 and 3.52 years respectively

7.12 In many cases a reduction in a sentence is warranted and certain factors are legitimate reasons for mitigating a sentence. The ability to reduce a sentence allows a judicial officer to take into account the particular facts of each case and arrive at a sentence appropriate to the circumstances. The above data simply provides an overview of the average sentences and reductions in



sentence we are currently seeing across all cases. The focus of this report is on how contentious factors affect sentence length and sentence reduction, comparing sentences in cases where no contentious factors were considered to those where they were. This is explored further down.

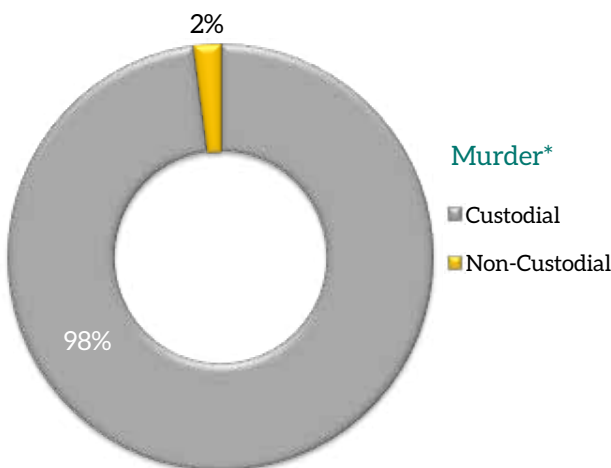
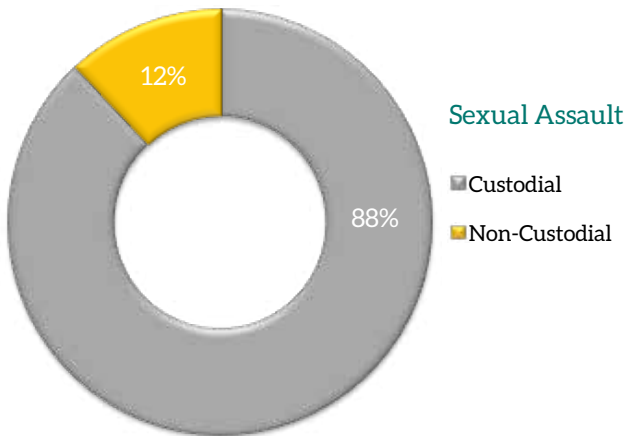
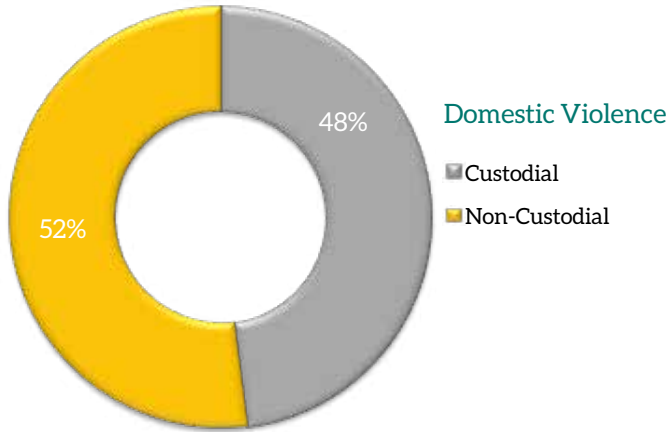
Sentence suspension and non-custodial sentencing

7.13 We found that DV cases were much more likely to be suspended than other cases. In total, 107 of the 911 DV and SA cases were suspended, which is just under 12%. The majority of these suspensions were in DV cases, where 46%

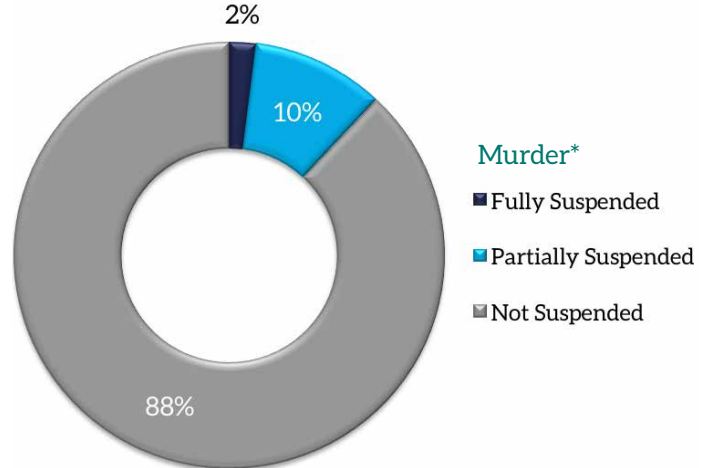
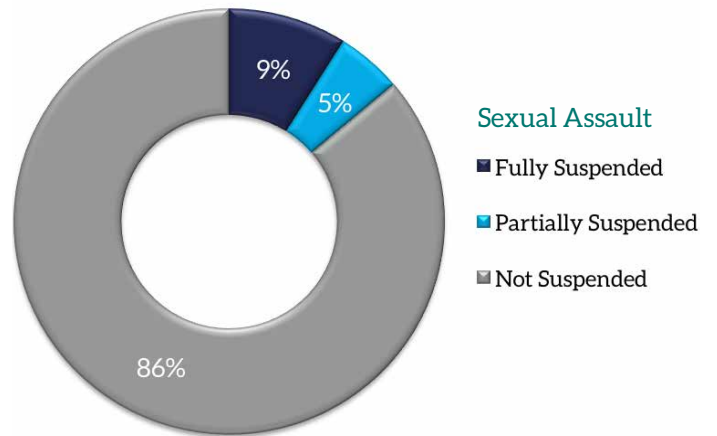
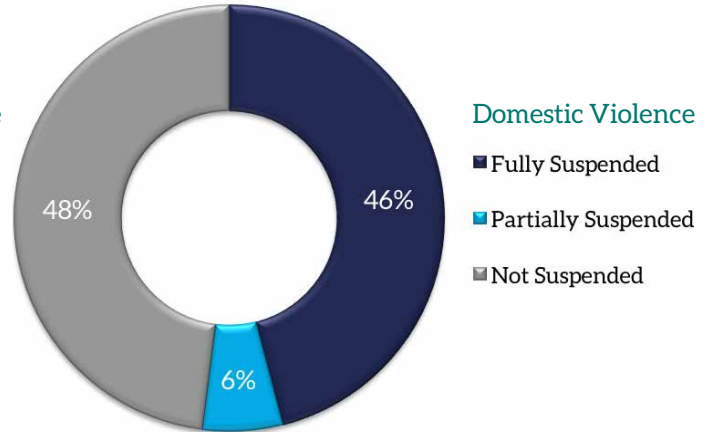
of sentences were completely suspended.

7.14 The charts on the left below look solely at whether a custodial sentence was imposed at all. The evidence indicates that over half of the DV cases and 12% of SA cases resulted in a non-custodial sentence. The difference between DV cases and SA cases is quite notable. The figures in the charts on the right below only represent cases where a custodial sentence was imposed and then suspended. They do not capture cases in which the judicial officer considered all mitigating and aggravating factors and chose a non-custodial sentence, either through a fine, good behaviour bond, probation, or other form of non-custodial sentence.

Was a Custodial Sentence Given?



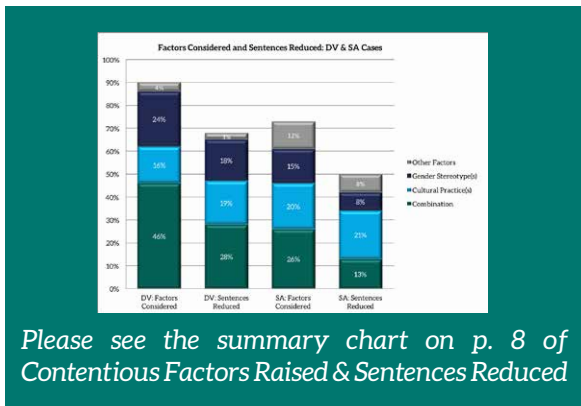
Was the Sentence Suspended?*



*P < 0.00001 Chi-square test
 *Note, the sample size contained 49 murder cases.

Mitigating factors

7.15 As discussed above in the methodology, each case was reviewed to determine whether customary reconciliation (including but not limited to forgiveness, apology, and their indigenous equivalents), gender stereotypes (e.g. prior relationship, victim/survivor was out late and drunk) and other contentious factors, were raised in regards to mitigation in each case. Whether or not the mitigating factors led to a reduction in sentence and, if available, the amount of that reduction, was also analysed. For the purposes of this Report, irrespective of whether customary reconciliation practices are permissible mitigating factors and codified in law, they have been classified as contentious factors in recognition of the gender discrimination that results from customary reconciliation, which inherently creates a power imbalance that leaves the victim/survivor vulnerable. A list of factors that were considered to be contentious, and a more in depth discussion regarding the types of gender discrimination inherent in these factors, can be found in sections 8, 9 and 10.



Please see the summary chart on p. 8 of Contentious Factors Raised & Sentences Reduced

7.16 Our analysis revealed that contentious factors were raised in an overwhelming number of cases: 90% of all DV cases, 76% of murder cases and 73% of all SA cases.

7.17 Of course, simply because a factor was raised in mitigation does not indicate it led to a reduction in sentence. While it was not always possible to tell whether a factor led to a reduction in sentence, there were many cases in which it was expressly stated that that was indeed what was occurring. In 469 cases, just over half of those cases reviewed, it was clear from the judgement that contentious factors were considered mitigating and led to a reduction in sentence. The number of cases wherein contentious factors led to a reduction in sentence is less than the number of cases where such factors were merely raised, indicating that the judicial officers would not always accept contentious factors as being a legitimate basis for mitigation. Indeed, in 21% of both DV and SA cases contentious factors were

raised by the defence but did not lead to a reduction in sentence, indicating the judicial officer rejected the contentious factors. The data also reveals that of the 29% of cases where a combination of factors were raised, the judicial officer rejected one or all of the factors in 47% of cases.

7.18 However, the number of cases where contentious factors did lead to a reduction is still over 50%: 66% in DV cases, 45% in murder cases and 51% in SA cases. Of those cases where contentious factors did lead to a reduction in sentence, around 65% were due to customary reconciliation.

7.19 There is a strong correlation between the acceptance of contentious factors and sentence suspension. For cases where no contentious factors were accepted, 5.37% of cases were fully suspended and 4.4% were partially suspended. Compare this to cases where a combination of contentious factors led to a sentence reduction and we find that 25.38% were fully suspended, while 21% of cases where gender stereotypes were accepted were fully suspended. The percentage of cases leading to a partial sentence reduction was similar across all categories of mitigating factors examined, except in cases where a combination of contentious factors was accepted by the judicial officer: here there was a greater likelihood of a partial suspension than in other cases. Overall, of the cases in which a contentious factor led to a sentence reduction, 17% of these resulted in a suspended sentence.²³

CONTENTIOUS FACTOR LED TO REDUCTION?	NO	FULL SUSPENSION	PARTIAL SUSPENSION
None	90.28%	5.37%	4.35%
Unknown	85.42%	10.42%	4.17%
Combination	66.15%	25.38%	8.46%
Customary Practice(s)	82.35%	13.37%	4.28%
Gender Stereotype(s)	74.39%	20.73%	4.88%
Other Factor (s)	87.14%	7.14%	5.71%
Grand Total	83.26%	11.67%	5.07%

7.20 Looking at whether a non-custodial sentence was imposed, we find that in cases where no contentious factors are considered, 93% of cases led to a custodial sentence. This figure drops drastically to 68% when a combination of contentious factors were considered in determining the length of the sentence. In fact, where a combination of contentious factors led to a reduction,

²³ For full suspension P<0.05 when comparing combination, cultural and gender factors individually against 'none', The differences are not significant (P>0.05) on a two-tailed test for the Partial Suspension of sentence. Combining all cases where a contentious factor led to a reduction, on a chi-square test the results are significant, that is, P<0.05, that there is a relationship between consideration of contentious factors and the suspension in sentence.

the perpetrator was over four times more likely to receive a non-custodial sentence than where no contentious factors are considered.²⁴ Of course where contentious factors did not lead to a reduction, the perpetrator was much more likely to receive a custodial sentence.

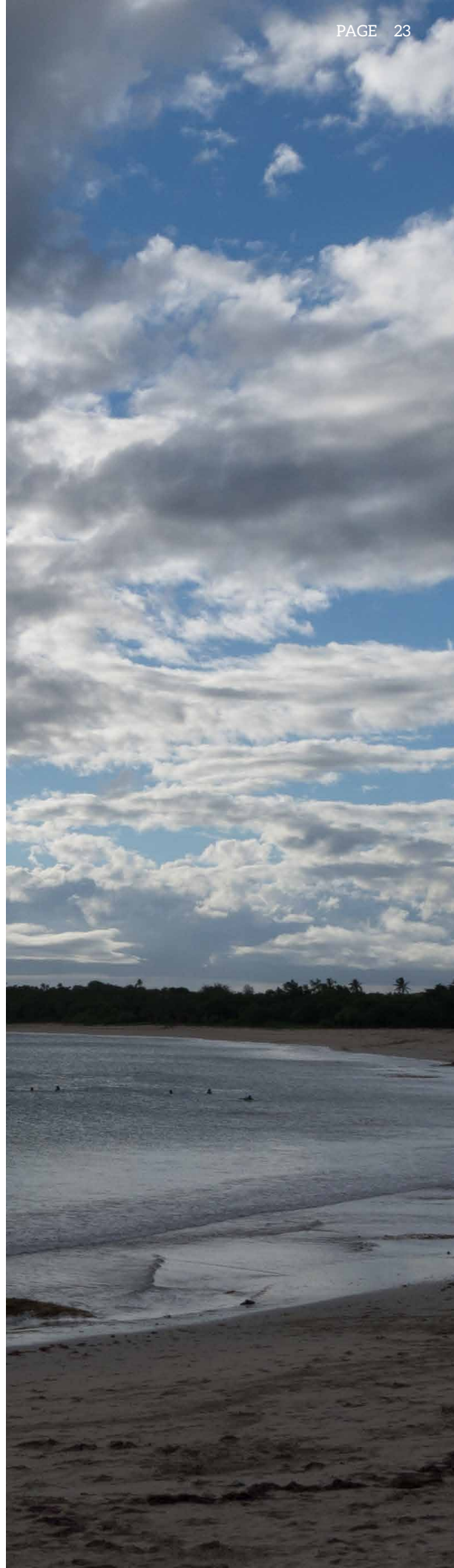
CONTENTIOUS FACTOR LED TO REDUCTION?*	NON-CUSTODIAL SENTENCE	CUSTODIAL SENTENCE	NUMBER OF CASES
None	6.91%	93.09%	383
Unknown	12.50%	87.50%	48
Combination	32.31%	67.69%	129
Customary Practice(s)	17.65%	82.35%	186
Gender Stereotype(s)	23.17%	76.83%	80
Other Factor (s)	8.57%	91.43%	70
Grand Total	14.65%	85.35%	896

*P < 0.00001 Chi-square test

7.21 Predictably, where a contentious factor led to a reduction in sentence, the average final sentences were substantially lower than where it did not.

CONTENTIOUS FACTOR LED TO REDUCTION?	AVERAGE FINAL SENTENCE (YEARS)	MEDIAN FINAL SENTENCE (YEARS)	NUMBER OF CASES
No	6.34	5	383
Unknown	4.10	3	48
Combination	3.76	2.42	129
Customary Practice(s)	3.56	2.67	186
Gender Stereotype(s)	4.22	3	80
Other Factor (s)	6.61	4	70
Grand Total	5.09	3.75	896

²⁴ The difference in number of cases which ended in a non-custodial sentence for combination, cultural and gender stereotypes is significant (P<0.05) (Two-tailed Z-test comparing each factor to 'none'). It is not significant for 'Other' Factors.



7.22 In 79 of the cases the presiding judicial officer indicated the portion of the sentence to be reduced on account of the contentious factors the judicial officer considered. In those cases, the sentence reduction attributed to contentious factors was on average one year.²⁵

7.23 The chart below compares the lengths of sentences based on the contentious factors accepted. For cases in which contentious factors resulted in a reduction, sentences are generally of a shorter length.

7.24 The above analyses indicates not only that the consideration of contentious factors has a substantial effect on custodial sentences and sentence length but also that:

7.24.1 Judges have, in over 21% of DV and SA cases, heard and rejected arguments based on contentious factors;

7.24.2 Where contentious factors are not raised in, or not accepted by, the court, the final sentence

²⁵ The approach to attributing specific reductions to specific mitigating factors was inconsistent between judicial officers. For example, a judicial officer may reduce a sentence by three months for customary reconciliation but then reduce the sentence by another year for a combination of mitigating factors, including some contentious factors. It is thus not possible to draw any further conclusions from this particular set of data.

is higher than in cases where they are accepted by the court; and

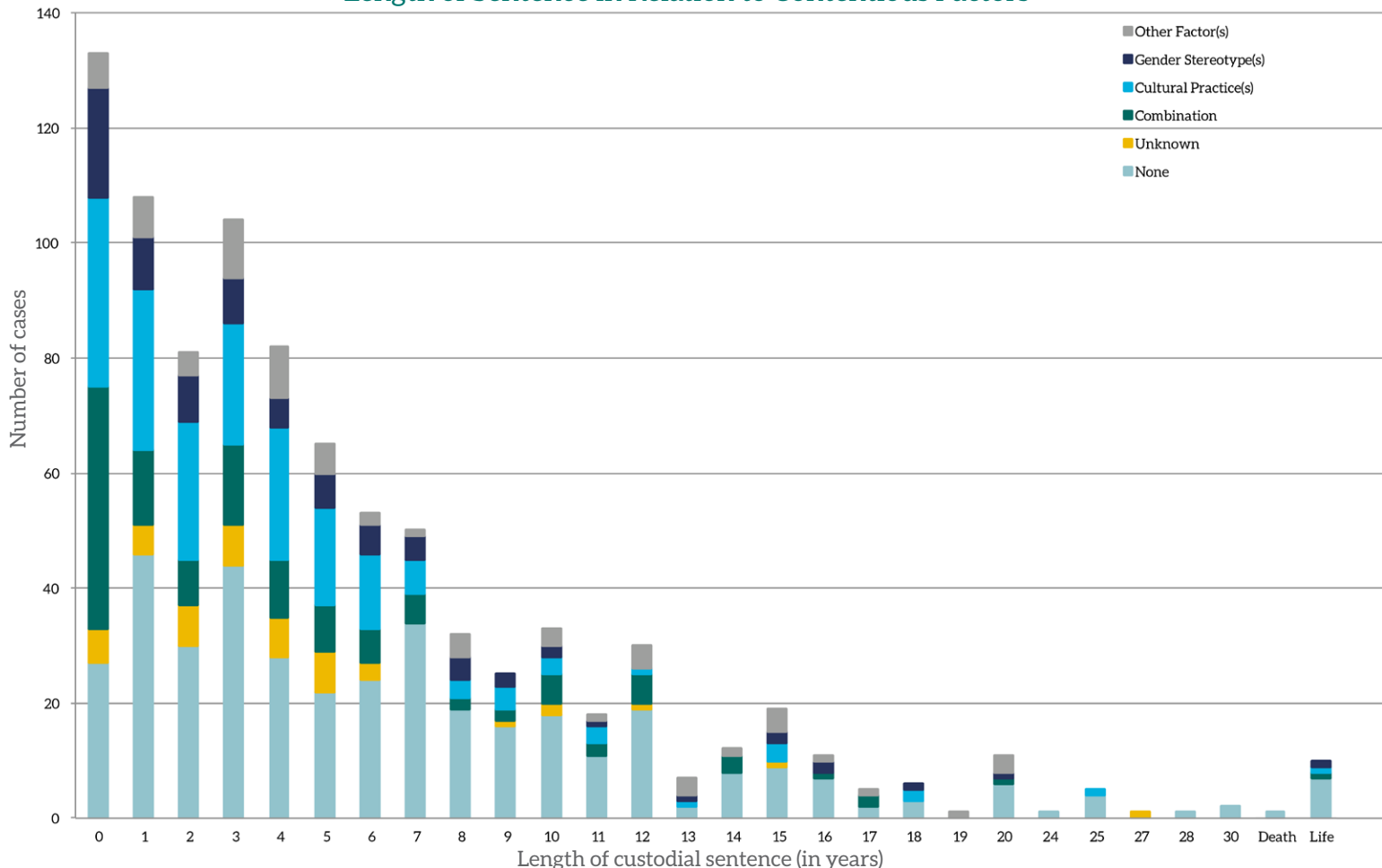
7.24.3 Where contentious factors are not raised in, or not accepted by, the court, the perpetrator is significantly more likely to receive a custodial sentence.

8. Customary Reconciliation

8.1 In all countries reviewed, cases of violence against women continue to be addressed through customary law procedures and practices, such as customary reconciliation practices, compensation, and retribution. While these practices generally occur outside the formal justice system, they can affect the operation of the formal justice system, either by preventing cases from reaching the courts, or when used in mitigation of a sentence, as we reviewed below. According to UN Women, these practices are often problematic as “they do not focus on the healing of, and providing redress to, the survivor.”²⁶ This practice of employing traditional legal customs can be seen as a form of discrimination against women. In many cases, the victim/survivor is not involved in the customary

²⁶ UN Women, *Handbook for Legislation on Violence Against Women*, at 16 (2008), available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

Length of Sentence in Relation to Contentious Factors



reconciliation process or is prevented from seeking redress in the formal court system. Women may also feel pressured to accept the apology or compensation.²⁷ The evolution of customary reconciliation practices appears to further restrict the rights of victim/survivors. For example, customary reconciliation practices have changed over time and currently they often take place without the victim/survivor's express permission or participation.²⁸ Where such practices are common, UN Women recommends that the relationship between customary and religious law be clarified and that the right of the victim/survivor to be treated in accordance with human rights treaty obligations must be protected by codifying gender equality in the law.²⁹

8.2 A study in Kiribati noted that the customary practice of *te kabara bure* (formal apology) serves the purpose of making the crime public and therefore is a disincentive for committing the crime. However, as a male perpetrator can easily regain his standing by practicing *te kabara bure*, he has little to lose. The victim/survivor, however, who is often not part of the ceremony, will live with the shame, stigma, and trauma of the sexual assault forever,³⁰ something that is remarked upon by judicial officers in a number of the cases we reviewed.³¹

8.3 Where female victim/survivors are involved in the customary forgiveness or reconciliation ceremony they theoretically have the opportunity to reject the apology and compensation. In reality, the social pressure on the victim/survivor to accept the apology, in order to heal the rift between the two families or communities, is immense. To reject an apology may even lead to banishment or social exclusion.³² The social cohesion of the community is given a greater priority than an individual victim/survivor's rights.

8.4 Reducing the sentence of a perpetrator when they have provided compensation or performed a ceremony can therefore deny women access to justice on an equal

27 Vedna Jivan and Christine Forster, *Challenging Conventions: In Pursuit of Greater Legislative Compliance with CEDAW in the Pacific*, MELBOURNE JOURNAL OF INTERNATIONAL LAW Vol 10 (2009)

28 Imrana Jalal, *Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Laws' Expert Paper for the Expert Group Meeting on good practices in legislation to address harmful practices against women* (May 2009) http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Imrana%20Jalal_.pdf

29 UN Women, *Handbook for Legislation on Violence Against Women*, at 16 (2008), available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

30 *Id.*

31 *PP v Ken* [2003] VUSC 52; *Police v Elia* [2014] WSSC

32 Imrana Jalal, *Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Laws' Expert Paper for the Expert Group Meeting on good practices in legislation to address harmful practices against women* (May 2009) http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Imrana%20Jalal_.pdf

footing with men, by taking into consideration a practice which reinforces structural discrimination against and disempowerment of women. Under CEDAW, states have an obligation to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.³³

8.5 Our findings below show that customary reconciliation practices continue to be considered in sentencing. However, the way in which they are considered is inconsistent within and between jurisdictions. While the quantitative data collated provides an idea of the extent to which customary reconciliation is utilised and considered, the qualitative data indicates the range of approaches that judicial officers have taken in considering customary reconciliation practices.

33 Convention on the Elimination of all forms of Discrimination against Women Article 2(f)



Legislative requirements to consider custom and culture

8.6 In a number of countries studied, legislation requires customary practices to be taken into account during sentencing.

COUNTRY	LEGISLATION REGARDING SENTENCING AND CUSTOMARY LAW.
Fiji	The court may, in assault cases of a personal or private nature, promote reconciliation and encourage and facilitate settlement (<i>Criminal Procedure Decree s154</i>). The Decree mentions reconciliation in general, not specifically <i>bulubulu</i> . The Decree came into force in February 2010 and the reconciliation provisions do not apply to domestic violence cases, in contrast to the Code which preceded it. Under the <i>Domestic Violence Decree of 2009</i> , the safety and wellbeing of the victim/survivor must be of the utmost and paramount importance in weighing factors that need to be taken into account.
Kiribati	The <i>Laws of Kiribati Act (1989)</i> defines the laws of Kiribati as including customary law. Schedule 1 notes that customary law may be taken into account for the purposes of deciding the reasonableness of an act, or an excuse...and determining the penalty to be imposed on a guilty party, or where the court believes that by not taking the customary law into account, an injustice may be done to a person. Under the <i>Magistrates Court Ordinance, s35</i> the Magistrates may promote reconciliation in common assault cases.
PNG	The PNG Constitution requires custom to be applied as part of the underlying law, to the extent that it is consistent with Constitutional Law, a statute and is not repugnant to the general principles of humanity. The <i>Customs Recognition Act (PNG)</i> states that in criminal cases custom can be taken into account in determining the penalty to be imposed upon a guilty party (s4).
Samoa	The Constitution of Samoa states that laws include customary laws. The Village Fono has the power to impose punishments in accordance with custom. Any punishments imposed shall be taken into account in mitigation of a sentence (<i>Village Fono Act 1990</i>). While the <i>Alternative Dispute Resolution Act 2007</i> encourages reconciliation, a court can only encourage this if they can ensure the victim/survivor in a domestic violence case is not submitting to it due to pressure.
Solomon Islands	Schedule 3 of the Constitution of the Solomon Islands states that customary law shall have effect as part of the law of the Solomon Islands. Under the <i>Magistrates Court Act</i> in criminal cases the court may promote reconciliation.
Vanuatu	The Constitution of Vanuatu states that customary law shall continue to have effect as part of the law of the republic. The <i>Island Courts Act s10</i> states that an Island Court shall administer customary law in so far as it is not in conflict with written law and not contrary to justice, morality and good order. The <i>Penal Code (Amendment) Act 2006</i> provides that a court may promote reconciliation in criminal proceedings and facilitate settlement according to custom. In sentencing, account must be taken of any compensation or reparation made or due under custom. The <i>Family Protection Act 2008</i> also allows compensation paid under custom to be taken into account in sentencing.

The effect of customary reconciliation on sentencing

8.7 Customary reconciliation was raised as the sole contentious factor in 20% of cases reviewed, while a combination of factors (which may or may not include customary reconciliation) was raised in 29% of cases. In 21% of cases customary reconciliation on their own led to a reduction in sentence, while in 14% of cases a combination of factors led to a reduction in sentence. For children the statistics were slightly higher, with customary factors being raised in 22%³⁴ of child cases and leading to a reduction in 23% of cases.³⁵

8.8 Where customary factors led to a reduction in sentence, the average final sentence was approximately 3.56 years, compared to the total average of 5.1 years and compared to a final sentence of 6.34 years in cases where no contentious factors led to a reduction.

8.9 Cases where customary reconciliation led to a reduction in sentence were more than twice as likely to result in a non-custodial sentence, than cases where no contentious factors were considered.

8.10 The customary factors we encountered through this review included the following:

8.10.1 Reconciliation (both formal -- including *ifoga* (Samoa), *bulubulu* (Fiji), *te kabara bure* (Kiribati) -- and informal)

8.10.2 Payment of compensation

8.10.3 Formal apology and acceptance

8.10.4 Belief in sorcery

8.10.5 Banishment from the village

8.10.6 Payment of a fine to the village chief

8.10.7 Physical punishment by village chief or victim/survivor's family, such as maiming or spearing the perpetrator

8.10.8 Retribution, including destruction of property or physical violence towards perpetrator's family members³⁶

8.10.9 Arguments over bride-price³⁷

8.11 With respect to payment of compensation and customary reconciliation, the research reflected the use of both formal and informal forms of reconciliation in

³⁴ P = 0.052 Two-tailed Z test.

³⁵ P < 0.05 Two-tailed Z test.

³⁶ *Giamur v State* [2007] PGSC 7; SC884 (23 February 2007)

³⁷ *State v Misek* [2011] PGNC 244; N4561 (23 January 2011)

certain cases. For example, in Samoa, *ifoga*³⁸ is a ceremony of apology for a wrong committed and involves the formal payment of compensation to the family or community of the family of the survivor. In Fiji the custom of *bulubulu*³⁹ is a formal method, outside the formal justice system, of settling differences between families or between villages. In some cases a formal customary hearing will occur, which may result a request for a particular payment and ceremony to be undertaken. In other cases, informal reconciliation may occur between the two families involved, for example, the uncle of the perpetrator may make an apology to the parents of the victim/survivor, accompanied by an offering of food or mats. In cases in which customary reconciliation practices are employed, there is no requirement that the victim/survivor or the perpetrator be involved in the reconciliation process. In some cases the reconciliation arrangements were determined by village chiefs, in others cases the fathers or the uncles from the families were involved in paying and receiving compensation and/or an apology.⁴⁰ In countries where there were formal methods of reconciliation and compensation, there are also informal forms of apology and reconciliation as well, particularly where the formal reconciliation practices are restricted to a particular culture or ethnic group. Both formal and informal practices were included in the analysis.

Judicial approach to customary law

8.12 The approach to customary law varied according to judicial officer and jurisdiction. The following are examples of the variety of factors that affect how a judicial officer addressed reconciliation and compensation in the cases reviewed. The cases listed in the footnotes are examples only.

8.12.1 Whether the reconciliation is undertaken by the perpetrator, his family or the village.⁴¹ In some cases, but not all, only if the perpetrator pays compensation will reconciliation be taken into account in sentencing;⁴²

8.12.2 Whether the reconciliation is directed

³⁸ Secretariat of the Pacific Community - Pacific Regional Rights Resource Team, *Legal Analysis on Violence Against Women*, July 2013; Law Commission of New Zealand, *Converging Currents: Custom and Human Rights in the Pacific*, September 2006, Study Paper 17, Wellington, NZ.

³⁹ Sally Engle Merry, *Tensions Between Global Law and Local Social Justice: CEDAW and the Problem of Rape in Fiji*, at 9 (2004); For examples of cases where *bulubulu* was considered see *State v. Qalia* [2009] FJHC 150; HAA017.2009 (24 July 2009); *State v. Makutu* [2012] FJHC 1081; HAC141.2011 (15 May 2012)

⁴⁰ Cases in which the perpetrator provided the victim/survivor with a simple apology in court, or communicated it privately to the victim/survivor, as an expression of remorse were not included in the research for this report, absent the presence a broader formal or cultural process of reconciliation.

⁴¹ *Koilo v PP* [2010] VUCA 27

⁴² *Giamur v State* [2007] PGSC 7; SC884 (23 February 2007)

towards the victim/survivor herself or her family or village;⁴³

8.12.3 Whether the reconciliation is accepted by the victim/survivor and her family;⁴⁴

8.12.4 Whether the reconciliation was accompanied by true remorse or not;⁴⁵

8.12.5 Whether the reconciliation and compensation was considered satisfactory;

8.12.6 Whether the reconciliation has in fact occurred or not. In some cases, the promise of reconciliation is not sufficient, it must be shown to have occurred in fact;⁴⁶

8.12.7 Whether customary reconciliation can result in a custodial sentence being reduced to a non-custodial sentence.⁴⁷

8.13 The above factors may lead a judicial officer to ignore reconciliation entirely or to reduce the effect it has on mitigation. A number of courts have also held that reconciliation cannot convert a custodial sentence into a non-custodial sentence. However, the approach taken is inconsistent.

Children and customary reconciliation

8.14 Customary reconciliation and ceremony takes place in sexual assault cases regardless of the age of the victim/survivor. As noted above, quite often the customary law and ceremonies will only involve the families or village of the victim/survivor. In situations where the victim/survivor is quite young, they may not understand the nature of the reconciliation or the import attached to accepting apologies. While in many cases the age of the victim/survivor does not appear to change the judicial approach, at least in one case customary reconciliation was not accepted in mitigation of sentencing because the court found that children do not have the capacity to know what it means to accept compensation and reconciliation.⁴⁸ Given the large number of cases involving children, and the possibility that the perpetrator is a member of the family, this is an issue that needs to be considered further when thinking about sentencing reform.

8.15 The case where the court held that children do not have the capacity to know what it means to accept compensation and reconciliation involved a 13-year-old girl who was raped by a 19-year-old man. The judicial officer remarked that

⁴³ *Koilo v PP* [2010] VUCA 27

⁴⁴ *Police v Elia* [2014] WSSC 23; *Wotu v Public Prosecutor* [2011] VUCA 36; *PP v James* [2010] VUSC 179; *PP v Utut* [2006] VUSC 92

⁴⁵ *Regina v Belo* [2012] SBHC 88; HCSI CRC 09 of 2009

⁴⁶ *Regina v Voka* [2011] SBHC 26; HCSI-CRC 48 of 2011

⁴⁷ *PP v Kevin Gideon* [2002] VUCA 7

⁴⁸ *State v Peter* [2002] PGNC 18; N2336 (11 April 2002)

"I have always maintained a strong view that compensation, customary or otherwise, is not appropriate in a criminal case where the victim/survivor of crime, particularly sex related offences, are young children... This is because children are incapable of making their own decision regarding compensation and if compensation is paid, they're incapable of appreciating its value and benefiting from it. Adult relatives and parents always tend to benefit from those payments when they are not themselves victim/survivor of the crime."⁴⁹

8.16 The approach taken by this particular judicial officer appears to be more the exception than the rule. Among the cases reviewed that involved child victim/survivors, customary reconciliation led to a sentence reduction in least 23% of cases. For example, in the case of *Police v Metu*,⁵⁰ the perpetrator indecently assaulted a 7 year-old girl. The family of the perpetrator had performed *ifoga* to the family of the victim/survivor, and neither the perpetrator nor the victim/survivor was involved. The judicial officer deducted 6 months from a 3-year sentence as a result of the customary ceremony.

Lack of compensation taken into consideration in sentencing

8.17 Where compensation is not paid, this fact is often noted by judicial officers and in some cases viewed as an indication of a lack of remorse on the part of the perpetrator.⁵¹ Judicial officers have also been known to order a suspended sentence on the proviso that the perpetrator perform a custom reconciliation ceremony.⁵²

8.18 The large variety of approaches to customary reconciliation and practices is problematic. The administration of justice must be as consistent as possible if it is to provide a trustworthy system for victims/survivors and if it is to mete out sentences that are proportionate to the gravity of the crime. Compensation may well be an element in the punishment of perpetrators, but should be directed towards the victim/survivor herself, and should be in addition to, rather than a substitute for, other penalties, such as imprisonment of the perpetrator.⁵³

8.19 In addition, a human rights based and gender equal approach to sentencing practices should be adopted, one that places the concerns of the victim/survivor at the centre of the system. Customary practices that involve only the relatives of the victim/survivor and perpetrator or chiefs of a village, particularly where male relatives only are involved, fail to provide the victim/survivor with any meaningful voice or agency with which to effectively engage in the judicial process.

⁴⁹ *Id.*

⁵⁰ *Police v Metu* [2013] WSSC 103

⁵¹ *State v Meki* [2006] PGNC 169; N3391 (15 November 2006)

⁵² *Public Prosecutor v Aru* [2014] VUSC 141

⁵³ UN Women, *Handbook for Legislation on Violence Against Women*, at 16 (2008), available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

9. Gender Stereotypes & Rape Myths

9.1 Under CEDAW, governments are required to eliminate harmful cultural practices and stereotypes based on the inferiority of women in all areas of life, including criminal law and legislation.⁵⁴ The presence of gender stereotypes in the criminal justice system and sentencing practices can have a significant negative effect on the ability of victim/survivors to access justice and can lead to inequitable sentencing based on a contentious mitigating factor.

9.2 Gender stereotyping in judicial processes is often a reflection of broadly held attitudes regarding women and families. The Demographic Health Surveys undertaken in a number of PICs demonstrate that a high proportion of both men and women believe that husbands are justified in beating their wives in certain circumstances. In Tuvalu, Solomon Islands and Samoa, 70% of women believed their husband would be justified in beating them in certain circumstances.⁵⁵ In Kiribati, the majority of women believe that a husband is justified in beating his wife in certain circumstances. A key reason why women do not seek assistance is because they believe domestic violence is normal and not serious.⁵⁶

9.3 Women are also likely to blame themselves for domestic violence. In Tuvalu, when asked, the women interviewed stated that domestic violence was provoked by 'women who will not take advice, who are high spirited, who tell lies and who show off.'⁵⁷ In Samoa, it was generally accepted that 'a good woman obeys her husband'. Survey respondents attributed violence to the victim/survivor's behaviour, economic problems, sexual jealousy, and gender role expectations.⁵⁸

9.4 With respect to marital rape, in Tuvalu the study

54 Convention on the Elimination of all forms of Discrimination against Women Article 5

55 Secretariat of the Pacific Community and Macro Inc, *Tuvalu Democratic and Health Survey* (2007), Chapter 13, http://www.pacificdisaster.net/pdnadmin/data/original/TUV_2007_DHS_report.pdf; Secretariat of Pacific Island Countries Community (SPC), *The Samoa Family Health and Safety Study Noumea, New Caledonia* (2007); Secretariat of Pacific Island Countries Community (SPC), *Solomon Islands Family Health and Safety Study: A Study on Violence against Women and Children Noumea, New Caledonia* (2009)

56 Secretariat of Pacific Island Countries Community (SPC), *Kiribati Family Health and Support Study* Govt of Kiribati and SPC (2010) http://www.spc.int/hdp/index.php?option=com_docman&task=cat_view&gid=89&Itemid=44 accessed 23 November 2015

57 Secretariat of the Pacific Community and Macro Inc, *Tuvalu Democratic and Health Survey*, Chapter 13, (2007), http://www.pacificdisaster.net/pdnadmin/data/original/TUV_2007_DHS_report.pdf

58 Secretariat of Pacific Island Countries Community (SPC), *The Samoa Family Health and Safety Study Noumea, New Caledonia* (2007) <http://www.pacificwomen.org/resources/research/samoa-health-and-safety-study/> accessed 23 November 2015

indicated that approximately 14% of men believe it is acceptable to use force to have sex with one's wife and over 50% believed that it was permissible to get angry at one's wife if she refused to have sex.⁵⁹ In Samoa, around 70% of women think not wanting sex is an insufficient reason for refusing sex with one's husband.⁶⁰

9.5 Gender stereotyping when found within the judiciary causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry.⁶¹ The presence of gender stereotyping undermines justice for women in cases of SGBV in five distinct ways:

9.5.1 By compromising a judicial officer's impartiality;

9.5.2 By influencing a judicial officer's understanding of criminal offences and their perception as to whether violence has actually occurred, especially in cases such as marital rape, rape of sex workers, and DV;

9.5.3 By biasing judicial officers' views about witness credibility and legal capacity;

9.5.4 By causing judicial officers to blame the victim/survivor rather than hold the perpetrators accountable;

9.5.5 By impeding access to legal rights and protections for female victims/survivors of violence.⁶²

9.6 Gender stereotypes affect all stages of the judicial process, from the initial reporting of the crime, to the investigation, prosecution, and sentencing of the perpetrator. Being unable to access justice can also leave victim/survivors at risk of further acts of violence.

The effect of gender stereotypes on sentencing

9.7 Gender stereotypes were the sole contentious factor raised in 15% of the cases reviewed. However, this number is higher when you factor in that in 29% of cases a combination of gender stereotypes, customary reconciliation, and other factors were raised. In 9% of the cases reviewed, gender stereotypes alone led to a reduction in sentence, while in 14% of cases a combination of factors led to a reduction. Gender stereotypes were slightly more likely to be raised and lead to a reduction in adult cases compared to child victim/survivor cases.⁶³

59 Secretariat of the Pacific Community and Macro Inc, *Tuvalu Democratic and Health Survey*, Chapter 13, (2007), http://www.pacificdisaster.net/pdnadmin/data/original/TUV_2007_DHS_report.pdf

60 Secretariat of Pacific Island Countries Community (SPC), *The Samoa Family Health and Safety Study Noumea, New Caledonia* (2007) <http://www.pacificwomen.org/resources/research/samoa-health-and-safety-study/> accessed 23 November 2015

61 Simone Cusack, *Eliminating Judicial Stereotyping: Equal access to justice for women in gender-based violence cases* (June 2014)

62 Simone Cusack, *OHCHR Commissioned Report: Gender Stereotyping as a Human Rights Violation*, October 2013; OHCHR High Commissioner, *The Harms of Gender Stereotyping* (June 2014)

63 The result was not significant with P=0.05 for consideration

Regarding sentence suspensions, in 20.73% of cases where gender stereotypes were raised in court, the sentence was completely suspended, as compared with a suspension rate of 5.37% where no contentious factors were considered. **This means that in those cases in which gender stereotypes were used as a means to reduce the sentence, the perpetrators were almost four times as likely to have their sentence suspended.⁶⁴ A case was also three times more likely to result in a non-custodial sentence where gender stereotypes led to the sentence reduction.**

9.8 Where gender stereotypes were the only contentious factor that led to a sentence reduction, the final sentence was substantially lower than in cases where no contentious factors were considered. Acceptance of gender stereotypes alone had a negligible influence on final sentences in murder cases.

Average final sentence (in years)

CONTENTIOUS FACTOR LED TO REDUCTION	DV	SA	M
None	2.17	6.32	12.88
Gender Stereotypes	0.9	4.49	12.75

Median final sentence (in years)

CONTENTIOUS FACTOR	DV	SA	M
None	0.75	5.00	11.00
Gender Stereotypes	0.00	3.00	15.00*

*Note that there were only 3 cases in this sample size.

Qualitative data: forms of gender stereotypes

9.9 The gender stereotypes and rape myths evident in the cases researched can be divided into two categories. The first category of stereotypes and myths include factors which are used to diminish the culpability of the offender. These include victim blaming, minimising the extent of the physical or emotional harm inflicted on the victim/survivor, or asserting that the victim/survivor is not vulnerable.

9.10 The second category focuses on the characteristics

of gender stereotypes, and $P = 0.07$ for leading to a reduction in sentence

64 $P < 0.05$ Two-tailed Z Test.

of the perpetrator and the effect that a lengthy sentence would have on his family. For the purposes of this Report, this second category of stereotyping is termed the 'bread-winner' argument. In instances in which the bread-winner argument is employed, the judicial officer gives weight to the economic dependence that wives and children theoretically have on the male head of household. Ironically, the wives and children of the perpetrator are often the victim/survivors of the crimes charged. However, the bread-winner argument in many cases was considered a mitigating factor and thus justified a reduction in the perpetrator's sentence in order to prevent his family from becoming destitute. While it may be the case that the family does rely upon the perpetrator for income, there was often no acknowledgement by the court of the danger into which the family may be placed; often the perpetrator would return to live with the family, and in Margaret's case, outlined at the beginning of this report, the perpetrator was actually ordered to live with the victim/survivor. Alternative solutions such as night time detention was only ordered in one case.⁶⁵ The issue of the breadwinner also demonstrates the need for broader solutions to be considered, such as economic empowerment of women, property ownership and inheritance equality, alternative economic support for victim/survivors, compensation or training victims to provide them with employable skills, to enable judges to impose custodial sentences where warranted.

9.11 The gender stereotypes encountered in the cases reviewed included:

Characteristics and actions of the victim survivor

9.11.1 That the victim/survivor had previous sexual partners and therefore was not as affected by the sexual assault;⁶⁶ this occurs even in cases where the victim/survivor is under 15 years old and the perpetrator much older;⁶⁷

9.11.2 That the victim/survivor previously, or subsequently, had consensual sex with the perpetrator;⁶⁸

9.11.3 That the victim/survivor had behaved in a way that led the perpetrator to think she may consent to additional advances, with evidence of belief in consent being behaviour such as having a drink with the perpetrator, being out at a nightclub, or getting into his car;⁶⁹ or that she

65 *State v Atmeyok* [2009] PGDC 1; DC693

66 *PP v Simeon* [2008] VUMC 3; *Police v Autagavaia*; [2010] WSSC 16

67 *PP v Simeon* [2008] VUMC 3; *Regina v Haka* [2013] SBHC 15; HCSI-CRC 195 of 2012 - in this case the child was 10, the perpetrator was 20 years old, suspended sentence of 8 months.

68 *Regina v Waipage* [1997] SBHC 29; Criminal Case 46.1997; *State v Melly* (No 2) [2009] PGNC 138; N3779 (22 July 2009)

69 *Naidu v State* [2007] FJCA 4; *PP v Kalsaru* [2007] VUSC 84

tempted him by wearing inappropriate clothing⁷⁰

9.11.4 In cases of statutory rape, the fact that the victim/survivor consented, where the age gap between the two parties was large;⁷¹

9.11.5 That the victim/survivor was of 'loose' morals;⁷²

9.11.6 The complainant did not resist or run away, and therefore was partly to blame for what occurred. Note this is separate to the concept of whether the victim/survivor consented. Rather, in certain cases, the judicial officer considered that the failure to run away meant that the victim/survivor could have prevented the assault or rape but did not. The judicial officer then concluded that the victim/survivor is partially to blame for the assault due to their failure to prevent it. This line of reasoning has been used even when the perpetrator was in a position of trust and authority over the victim/survivor or when the victim/survivor is as young as 9 years old;⁷³

9.11.7 That the victim/survivor does not seem upset or psychologically harmed by the incident. Often this conclusion is drawn without any supporting medical or psychological evidence. In some cases a victim impact statement was provided to the court, but not always, while medical reports often focused on the physical, rather than psychological impact of the crime;⁷⁴

9.11.8 That the victim/survivor failed to report it earlier, meaning she could have prevented, and therefore was complicit in, any later offences that may have occurred. This factual finding led to mitigation even in cases where the victim/survivor was between the ages of 9 and 13.⁷⁵

Nature of the offence

9.11.9 The fact that the hymen⁷⁶ was still intact

meant that there was not 'full' penetration and therefore did not constitute rape.⁷⁷

9.11.10 The fact that the hymen was not ripped, meaning the victim/survivor had not technically lost her virginity (in one particular case being called 'partial penetration') was a finding that weighted in the defendant's favour.⁷⁸ In another case the defendant claimed in mitigation the hymen was already ripped and used this fact to claim she was not a virgin.⁷⁹

Characteristics and actions of the perpetrator

9.11.11 That the perpetrator is the bread-winner for his family and therefore a custodial sentence would unfairly affect his family. Courts have accepted this argument without requiring proof of the fact.⁸⁰

9.11.12 The concept that women exist to fulfill the desires of men. For example, the fact that the perpetrator wanted the victim/survivor to be his girlfriend was weighed in the perpetrator's favor.⁸¹ Another defence raised was that a defendant's wife was not fulfilling his sexual needs so he was driven to go elsewhere, in some cases to his daughter.⁸²

9.11.13 The offender promises to marry the rape victim/survivor.⁸³

full penetration. (Hegazy AA, Al-Rukban MO, 'Hyman; facts and conceptions' in theHealth 2012, Issue 3, Vol 4, p109. The concern as to whether a hymen is unruptured also reinforces gender stereotypes regarding the need for an unmarried woman to remain pure and its connection woman's value in patriarchal cultures, rather than focusing on the actual psychological and physical trauma the victim may have experienced during the assault. The reliance upon medical evidence of the state of the hymen in determining whether there was 'full penetration' not only indicates a misunderstanding of the biology of the hymen but also reflects a traditional sexist view that 'real rape' can only occur with full penetration.

77 *Koraua & Kaitira v Reginam* [1988] SBHC 6; [1988-1989] SILR 4

78 *Regina v Tebitanga - Sentence* [2013] SBHC 24; HCSI-CRC 75 of 2009; *Koraua & Kaitira v Reginam* [1988] SBHC 6; [1988-1989] SILR 4

79 *Rex v Vaiangina* [2011] TOSC 19; CR 116 of 2011

80 *State v Naidu* [2004] FJHC 492; *R v Patare* [2014] SBHC 79; HCSI CRC 49 of 2013

81 *Vudiniabola v The State* [2004] FJHC 494

82 *State v Naidu* [2004] FJHC 492; *R v Motulalo* [2000] TongaLaRp 51; [2000] LR 311

83 *State v Nandiro* (No. 2) [2004] PNGLR 5

70 *Police v Korua* [2013] WSSC 52

71 *Police v Lolesio* [2012] WSSC 127; *Regina v Haka* [2013] SBHC 15; HCSI-CRC 195 of 2012 - in this case the child was 10, the perpetrator was 20 years old, suspended sentence of 8 months.

72 *PP v Simeon* [2008] VUMC 3

73 *Regina v Tebounapa* [1999] SBHC 9; HC-CRC 033 of 1997; *The State-v- James Yali* (2006) PGNC 26; *PP v Marango* [2002] VUSC 7

74 *State v Sipris* (No 2) [2003] PGNC 65; N2453 (1 August 2003)

75 *Regina v Kaboma* [1992] SBHC 69; HCSI-CRC 12 of 1992; *PP v Boesaleana* [2011] VUSC 321

76 The reference in evidence to the state of the hymen of the victim/survivor brings into play a number of rape myths and stereotypes. From a biological perspective, the hymen is not an accurate indication of virginity; tears and ruptures can occur without sexual penetration, while a hymen may remain intact with



Domestic violence cases

9.12 Some of the above myths are also used in domestic violence cases, such as the failure to report earlier and the bread-winner argument. In addition, the following were also evident in domestic violence cases:

9.12.1 In cases of domestic violence, the fact that the husband and wife have reconciled and the wife has asked for the charges to be dropped often affected the sentencing outcome. Often in these cases there was no assessment of whether the wife was under duress at the time of reconciliation, or whether she has any other form of income.

9.12.2 The following assertions were viewed as forms of provocation:

9.12.2.1 The wife or girlfriend has left her husband;⁸⁴

9.12.2.2 The wife or girlfriend was arguing with the husband, or parents-in-law;⁸⁵

9.12.2.3 The wife or girlfriend was having an affair, or just suspected of having an affair, regardless of the reasonableness of the suspicion.⁸⁶

9.12.2.4 The wife was a second wife and was causing disruption in the family.⁸⁷

9.12.3 That the perpetrator is not a danger to the community, despite repeatedly abusing his wife.⁸⁸

9.13 While not every argument listed above was accepted by the judicial officers reviewing a given case, in many instances, the arguments listed above were taken under consideration. As with the customary practices, the approach to gender stereotypes was found to be inconsistent between judicial officers and jurisdictions.

Bread-winner argument

9.14 One of the most common forms of stereotyping found was the use of the 'bread-winner' argument. In many cases, the defence would indicate that the perpetrator was married with children and that the wife and children were economically dependent upon the perpetrator. In some cases, the judicial officer accepted this argument and reduced the sentence, or imposed a non-custodial sentence. In other cases, the argument was dismissed. The argument was often raised even when the family

⁸⁴ *Regina v Gua* [2013] SBCA 2; Criminal Appeal Case 37 of 2012

⁸⁵ *State v Panta* (No.2) [2013] PGNC 111; N5287 (23 May 2013); *State v Autar* [2011] FJMC 163

⁸⁶ *State v Uraro* [2012] PGNC 298; N5164 (26 November 2012)

⁸⁷ *State v Atmeyok* [2009] PGDC 1; DC693

⁸⁸ *State v Carol* [2009] PGNC 143; N3762 (23 September 2009)

members themselves were the victim/survivors of the particular crimes. There were also cases where the lower courts reduced the sentence due to 'family circumstances' and the appellate courts have expressed disapproval.⁸⁹ In one case the opposite effect resulted from the use of the bread-winner argument, wherein the judicial officer held that the fact that the husband, by his own actions, would be depriving his children of a bread-winner and depriving the wife of his support, was actually considered aggravating rather than mitigating factor in a domestic violence case.⁹⁰ However, this was an isolated case.

9.15 In many cases, the wife or partner (who may also be the victim/survivor) pleads with the court for a non-custodial sentence in order that the perpetrator be able to continue to provide financial support for their children.⁹¹ Such a situation is indicative of the barriers that economic disempowerment creates for women who wish to leave an abusive relationship. Within the cases reviewed, there were cases in which the perpetrator raped his own daughters, and the wife and daughters subsequently asked the court for a non-custodial sentence on the perpetrator's behalf. In the case of *State v Mavuug*:

"The victim/survivors and their mother are seeking further compensation of K3,000.00 and he is willing and able to afford that too, and wants to arrange a formal reconciliation ceremony. The victims and their mother rely on the offender for financial support and a place to live. They have expressed their desire not to see the offender imprisoned."⁹²

9.16 It is important to note that not all judicial officers accept the bread-winner argument, as seen in the case above. Indeed, it has been overturned on appeal in some cases. In the case of *Rex v Vake*⁹³ the Appellate Court held:

"A sentence of full time custody will inevitably impose significant hardship on the other members of the offender's family, particularly his wheelchair bound mother and disabled bedridden son. Such hardship cannot be an overriding mitigating factor in cases where the objective gravity of the offences and the presence of aggravating factors call for a custodial sentence."⁹⁴

9.17 Throughout the PICs, women are still overwhelmingly economically dependent upon their male partners. For example, around 60% of Fiji Women's Crisis Centre clients are not engaged in formal employment. This absence of economic independence can negatively impact

⁸⁹ *Raj v State* [2014] FJCA 18; *Botaki v State* [2012] FJHC 1250

⁹⁰ *State v Lastervicker* [2012] FJHC 1237

⁹¹ *Police v Taivale* [2000] WSSC 46; *Bijay v State* [1997] FJMC 2

⁹² *State v Mavuug* [2012] PGNC 255; N4898 (22 November 2012)

⁹³ [2012] TOCA 7; AC 4 of 2012

⁹⁴ [2012] TOCA 7; AC 4 of 2012

a woman's ability to leave a violent relationship.⁹⁵ Further, in Kiribati and Papua New Guinea, lack of both land rights and rights to the husband's home or land, render women even more economically dependent upon their husband. In Vanuatu, women are not legally permitted to accumulate personal wealth.⁹⁶ This economic dependence can be further exacerbated by the presence of a bride price, paid by the husband to the bride's family. Women in abusive relationships who cannot repay the bride price often feel unable to leave.⁹⁷

Provocation

9.18 The concept of provocation was raised in a number of the cases reviewed. While on its face it can appear gender neutral, in practice it reflects an inappropriate consideration of gender stereotypes and illustrates the power imbalances within society. The provocation argument was used in the following factual situations:

9.18.1 Where the perpetrator experienced feelings of jealousy over seeing an ex-girlfriend or ex-wife⁹⁸ with another man;

9.18.2 Where the perpetrator allegedly acted in response to nagging, or to a refusal to have sex, or in an argument with the wife,⁹⁹ or that the wife asked for money to be returned to her that the husband had borrowed the day before.¹⁰⁰

9.19 In each case, the concept of provocation relies upon acceptance of the gender stereotypes that promote the belief that women are the 'property' of men and that men are justified in certain circumstances in disciplining their wives and girlfriends through force.

9.20 The defence of provocation was raised explicitly in 47 of the cases reviewed. The defence of provocation was used overwhelmingly in DV cases (42 out of the 111 cases). Of those, 13 were murder and manslaughter cases, which constitute 65% of the total murder and manslaughter cases reviewed.

⁹⁵ UNFPA, *An Assessment of the State of Violence against Women in Fiji Suva: Fiji* (2008) http://www.un.org/womenwatch/ianwge/taskforces/vaw/Fiji_VAW_Assessment_2008.pdf

⁹⁶ UN Women, *Ending Violence against Women and Girls 'Evidence, Data and Knowledge in the Pacific Island Countries'* 2011 <http://www.pacificwomen.org/resources/research/evidence-data-and-knowledge-in-pacific-island-countries/> accessed on 20 November 2015.

⁹⁷ *Id.*

⁹⁸ *State v Tuisawau* [2014] FJHC 121. In this case the ex-husband actually went to the house of his ex-wife to assault her. *Yavala v State* [2012] FJCA 73; *Police v Ausage*, [2007] WSSC 28

⁹⁹ *State v Panta* (No.2) [2013] PGNC 111; N5287 (23 May 2013); *State v Dubun* [2010] PGNC 118; N4109 (22 April 2010)

¹⁰⁰ *Police v Gabby* [2009] PGDC 63; DC928

9.21 There were a number of ways provocation was used:

9.21.1 Lack of provocation was considered an aggravating factor.¹⁰¹

9.21.2 Defendant may have raised provocation as a mitigating factor but it was not accepted by the court.¹⁰²

9.21.3 Provocation was raised as a defense or mitigating factor and accepted as such by the court.¹⁰³

9.22 Provocation as a mitigating factor, in SGBV cases, has troubling consequences. Problematically, the acceptance of provocation as a defense or a mitigating factor necessarily requires a belief that in some circumstances a perpetrator may be justified in assaulting his wife, girlfriend, partner, relation, or family member. Most frequently, the provocation argument was used in assault cases of violence against a wife or girlfriend.

9.23 Situations in which the provocation argument was raised included:

9.23.1 Where a wife had quarrelled with her husband (the perpetrator), this fact was used in mitigation for a manslaughter charge and considered to be de-facto provocation.¹⁰⁴

9.23.2 In a sexual assault case, the fact that the victim/survivor had a chance to escape but didn't was considered an act of provocation.¹⁰⁵

9.23.3 In a case in which a step-son was accused of assaulting his new step-mother, it was argued that her arrival had led to the breakdown of the family. The victim/survivor was a second-wife brought into the family by the husband. The court held "the courts as arbitrators of facts must not ignore presented facts that often indicate that many a times women or victims tend to put themselves at the receiving end. In other words you cannot jump into a fire and not get burnt." The perpetrator was sentenced in that case to five nights of evening detention.¹⁰⁶

9.23.4 A case in which the wife had refused to give the husband money for cigarettes, which resulted in grievous bodily harm to the wife.¹⁰⁷

9.23.5 A case in which the victim/survivor insisted in seeing the perpetrator's wife, her sister on New Year's Day.¹⁰⁸

9.23.6 A case where the victim/survivor, being attacked by the perpetrator, bit down on the perpetrator's hand in self-defence. The biting of the hand was considered provocation.¹⁰⁹

9.24 The above cases reflect various examples of gender stereotyping and gender roles including:

9.24.1 That wives and girlfriends are the property of their partners.

9.24.2 The challenging of the perpetrator's masculinity.

9.24.3 The view that husbands are justified in hitting their partners in certain circumstances, such as where she is arguing or has done something wrong.

9.25 In one case, the defendant stated "I would not have killed her if she did not have sexual intercourse with that man. That is the whole reason. I paid bride price for her." The judicial officer responded: "I also consider that this offence could not have been committed but for the provocation on the part of the deceased."¹¹⁰

9.26 Provocation was not accepted as a mitigating factor in all cases. In the case of *Rex v Fatani*¹¹¹ the court held: "It is significant that the accused said by way of defence at trial that they had a fight which she started. He seemed to think that was all right for him to respond in this manner although he alleged it was only three or four slaps. The accused needs to be told in no uncertain terms that no man is entitled to strike his wife."¹¹²

Gender stereotypes as aggravating factors

9.27 While not the focus of this Report, there were a number of cases in which gender stereotypes were considered as aggravating factors. While not necessarily problematic in and of itself, the view that such factors are relevant provides additional insight into how gender stereotyping affects judicial decisions. Such factors have included that:

9.27.1 There was no provocation.

9.27.2 The victim/survivor was married, and

101 *State v Ali* [2014] FJMC 131

102 *State v Johannes* [2014] PGNC 105; N5644 (26 June 2014)

103 *State v Tuisawau* [2014] FJHC 121

104 *State v Rende* [2013] PGNC 44; N5220 (14 May 2013)

105 *The State-v- James Yali* (2006) PGNC 26;

106 *State v Atmeyok* [2009] PGDC 1; DC693

107 *State v Lastervicker* [2012] FJHC 1237

108 *Police v Bira* [2010] PGDC 14; DC941 (23 April 2010)

109 *Police v Ausage*, [2007] WSSC 28

110 *State v Lom* [2012] PGNC 63; N4725 (22 June 2012)

111 (2004) TOSC 65

112 *Rex v Fatani* [2004] TOSC 65; CR 300 2003

thus the crime was also an insult to the husband.¹¹³

9.27.3 That the perpetrator was married, and therefore did not have an excuse to wander, indicating a belief that one of the duties of a wife is to satisfy the sexual desires of the husband, or that there is somehow a right to have sexual desires met. In one case the judicial officer noted that “Being married means he has a **wife** who can satisfy his **sexual** desires within the perimeters of love and a loving relationship. He did not need to **rape** this young girl to satisfy his **sexual** desires.”¹¹⁴

10. Other Factors

10.1 A number of factors were raised and considered in mitigation that, while not strictly the result of gender stereotypes, cultural norms, or customary reconciliation practices, were nevertheless inappropriate considerations in sentence mitigation.

10.2 These other considerations included:

10.2.1 Excessive consideration of the educational and career prospects of the individual;

10.2.2 The fact that the perpetrator attended church regularly, or that he was becoming baptised;¹¹⁵

10.2.3 The fact that the perpetrator did not infect the victim/survivor with an STD;¹¹⁶

10.2.4 That the perpetrator did not inflict further injury on the victim/survivor, cause physical harm or torture the victim/survivor;¹¹⁷

10.2.5 The fact that the perpetrator was drunk¹¹⁸ although this argument was frequently rejected by the reviewing judicial officer;

10.2.6 The fact that the victim/survivor did not become pregnant;¹¹⁹

10.2.7 Blaming the parents of the victim/survivor for not looking after their children and

¹¹³ *State v Johnny* [2008] PGNC 268; N3861 (25 September 2008); *Regina v Pautangata* [2011] SBHC 39; Criminal Case 166.2011; *Obed v PP* [2004] VUCA 24 - note that an appeals court objected to this approach.

¹¹⁴ *State v Madi* [2004] PGNC 160; N2625 (23 June 2004)

¹¹⁵ *State v Tugumar* [2013] PGNC 219; N5377 (16 August 2013)

¹¹⁶ *State v Johannes* [2014] PGNC 105; N5644 (26 June 2014)

¹¹⁷ *State v Johannes* [2014] PGNC 105; N5644 (26 June 2014); *State v Tugumar* [2013] PGNC 219; N5377 (16 August 2013); *State v Dabo* [2006] PGNC 97

¹¹⁸ *Republic v Tairo* [2014] KHC 25; Criminal Case 58.2012

¹¹⁹ *State v Sigege* [2014] PGNC 12; N5521 (18 February 2014)

failing to stop a particular situation.¹²⁰

10.3 These factors were the sole contentious factors raised in 11% of the cases reviewed and led to a reduction in sentence in 8% of the cases reviewed. However, there seems to be no real correlation between consideration of these factors and whether the individual received a custodial sentence: where no contentious factors were considered, 93.09% of cases led to a custodial sentence; where other contentious factors were considered, 91.43% of cases led to a custodial sentence.

10.4 The focus on attending church and being involved in church activities is a recurring theme among the cases reviewed. Not only is the fact that an individual attends church taken into account as a mitigating factor, but in a number of cases attending church was a condition of receiving a suspended sentence.¹²¹

10.5 The above considerations again highlight the inconsistent approach to sentencing found in the cases reviewed. As mentioned above, consistent sentencing is necessary to ensure a fair, equitable and effective judicial system, and to ensure that any penalty is commensurate with the gravity of the crime. Clear and detailed guidelines as to what is an appropriate and inappropriate mitigating factor are required to ensure the above listed factors are not given undue weight in court.

11. Domestic Violence Intervention Orders

11.1 Also reviewed was whether or not the courts had imposed an intervention order, or apprehended violence order (‘intervention order’) in domestic violence cases. Out of 80 DV cases, judicial officers imposed intervention orders on perpetrators in 44 cases. Not one murder or manslaughter case had an intervention order in effect at the time of the victim’s death. Of the cases where an intervention order was made, forty are from Fiji, with three in PNG and one in Samoa. All intervention orders were made from 2009 onwards with 41 out of the 44 orders made between 2012 and 2014.

11.2 In Fiji, where the majority of intervention orders were made, there were 54 DV cases in total. Intervention orders were made in 40 of these cases and in seven cases it was unclear whether an intervention order had been made.

11.3 Where an intervention order was made, the court was less likely to impose a custodial sentence.¹²² However, given the large number of other variables in this area, including the fact that most cases where an order was not imposed pre-dated 2009, it is inadvisable to draw any conclusions from these data.

¹²⁰ *State v Tigi* (No.2) [2013] PGNC 116; N5310 (24 July 2013)

¹²¹ *State v Kaore* [2014] PGNC 43; N5572 (10 April 2014); *State v Anton* [2012] PGNC 120; N4828 (22 October 2012)

¹²² $P < 0.05$ Chi-square test.

Domestic Violence Cases¹²³

INTERVENTION ORDER IMPOSED?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
No	10	18	28
Yes	28	16	44
Grand Total	38	34	72

11.4 Fiji was the only country studied where legislation requires courts to make an intervention order if a person is charged with, or is found guilty of, a domestic violence offence.¹²⁴ The fact that the vast majority of intervention orders are in Fiji shows the positive effect this legislation is having.

12. Appellate Court Decisions

12.1 Our analysis included 105 cases from various Courts of Appeal. Only 2 domestic violence cases were heard in the Court of Appeal, 7 murder/ manslaughter cases and 96 Sexual Assault cases. Of these cases, 41% involved an adult victim/survivor. Supreme Courts and High Courts may have heard appellate cases as well as original jurisdiction cases, but these lower court appeal cases are not captured in the data below.

12.2 Given the low number of DV and Murder cases, we have only looked at the SA cases in the Court of Appeal. In the Court of Appeal only one SA case led to a non-custodial sentence, compared to 89 in the lower court (1% versus 15% respectively). The average sentence was slightly higher in the Court of Appeal, at 6 years and 2 months versus just over 5 years in the lower courts. The reduction in sentence only differed by a few months.

12.3 The Court of Appeal was much less likely to reduce the sentence on the basis of contentious factors compared to the lower courts. In the Court of Appeal the consideration of contentious factors led to a reduction in sentence in 35% of cases, in comparison with 52.7% of cases in the lower courts.¹²⁵

Qualitative Analysis

12.4 As with the trial courts, the approach to sentencing varied among judges. In some cases the appellate courts upheld the use of contentious factors by the trial courts, in others the use of those contentious factors was overturned.

¹²³ Note that cases where it was unclear whether an intervention order had been made were not included in the calculations.

¹²⁴ Domestic Violence Decree (2009) Fiji s24

¹²⁵ $P < 0.05$ Two-Tailed Z Test.

12.5 For example, in the cases of *Public Prosecutor v Yacinth*¹²⁶ the trial judge had reduced the sentence of the perpetrator on the basis that the victim/survivor had not reported the case earlier. The case concerned the repeated rape of a young woman by a father figure. The victim/survivor did not report the rape until she became pregnant. The trial judge held that:

“The Court will allow a further reduction because the victim did not report the offendings in August 2011 when it happened on the first occasion. She waited until she became pregnant and gave birth. She made a statement only on 6th July 2012. She could have done so in August, 2011 and prevented further offendings but she did not. That omission and/or failure by the victim must be taken as a mitigating factor.”

On appeal the Court held that such a decision was in error:

“In our view, the position of this victim in this case meant it was almost inevitable that she would not immediately initiate a complaint. She was fragile and vulnerable. The offending was by a person who should have been caring for her. She should have been safe in a home which needed to support her...There is nothing which mitigates the respondent's culpability in the victim's initial omission to disclose as described by the sentencing Judge. It is a matter with no relevance to the exercise to be undertaken.”

12.6 Indeed, in one particular case the appellate court specifically noted that judges must avoid stereotypes and victim blaming:

“In assessing the gravity of offending judges must, of course, do this in a fact-specific way focusing on the culpability of the offender and the effect on the victim and, as a corollary, they must not reason by stereotype or seek to turn responsibility for the offending back on the victim, in terms of “she asked for it” or other excuses based on rape myths.”¹²⁷

12.7 In cases of domestic violence, an Appeals Court has also rejected the bread-winner argument noting that “Legitimate aspects of mitigation will include a clear record, proven remorse, mental disorder but not family circumstances because the perpetrator has by his conviction for the crime done everything within his power to destroy the fabric of the family unit.”¹²⁸ In other cases, the appellate courts have taken family circumstances into account, albeit noting that they should have less weight in sexual assault cases than in other serious crimes.¹²⁹

¹²⁶ [2012] VUCA 30

¹²⁷ *Malefo v Regina* [2013] SBCA 7; Criminal Case No.34 of 2012

¹²⁸ *Raj v State* [2014] FJCA 18

¹²⁹ *Natei v Regina* [2013] SBCA 14; Criminal Case No.1 of 2013

12.8 In cases where customary ceremonies and reconciliation have taken place, appellate courts have again differed in some cases from the lower courts. In the case of *Nickson v Regina*,¹³⁰ the court held that any customary ceremony must be accompanied by remorse and contrition for it to be considered a mitigating factor:

“Given that the appellant was not present at the custom payment, and that he subsequently subjected the pre-pubescent victim who had suffered serious injury to a trial based on the defence of consent, the sentencing judge was clearly entitled to conclude the appellant had exhibited no remorse, no contrition. In those circumstances the custom payment did not evidence any significant mitigating factor. The rejection of the document tendered did not ultimately lead to any error in the exercise of the sentencing discretion.”

12.9 However the trend is by no means consistent, with contentious factors, such as customary reconciliation,¹³¹ gender stereotypes,¹³² and provocation,¹³³ still leading to a reduced sentence at the appellate level, whether it be by affirming the lower court sentencing decision, or overturning it and providing a new sentence. In one case, the appellate court overturned the trial court’s decision not to take into account a customary ceremony. The trial judge

130 *Nickson v Regina* [2009] SBCA 17; Criminal Case No.11 of 2008

131 *Tangiat v Public Prosecutor* [2014] VUCA 15

132 *Naidu v State* [2007] FJCA 4

133 *Yavala v State* [2012] FJCA 73

declined to reduce the sentence as neither the appellant nor the victim/survivor participated in the customary reconciliation. The Court of Appeal held:

“We consider some small reduction in sentence is justified for this ceremony. We acknowledge, as the Judge observed, that the ceremony did not involve either the Appellant or the victim. However serious crimes such as these can easily give rise to strong feelings of grievance on behalf of the victim, her family and her village. This can, if left unresolved, itself cause unwise attempts at retribution. Custom ceremony therefore can help to avoid further violence between the family of the victim and the perpetrator. Such a successful ceremony therefore should be reflected in a modest sentence reduction as an incentive to resolve such potential conflict by custom. We consider it appropriate to deduct three months from the Appellant’s sentence to reflect the ceremony.”¹³⁴

The perpetrator in this case received a sentence of 8 years and 5 months.

12.10 The varied approaches by appellate courts to customary ceremonies, family responsibilities, and gender stereotypes clearly indicate that the lower courts cannot simply rely upon the appellate courts to provide clear guidance on sentencing practices. Legislation and judicial guidelines are required to ensure an approach to sentencing that is consistent, both internally and with respect to the requirements under CEDAW.

134 *Koilo v PP* [2010] VUCA 27



Section D: Recommendations & Conclusion

13. ISSUES & CONSIDERATIONS FOR FUTURE STUDIES

Limitations of the study

13.1 As with any study involving the extraction of quantitative information from qualitative data, there are often issues around the collection and categorisation of the data.

13.2 The very nature of law and judicial systems is that the judicial officer must respond to the particular facts of each case. Judicial officers will also have different ways of coming to their conclusions and expressing their views. As noted above, not all judicial officers provided a starting sentence or indicated the amount of sentence reduction attributable to each factor. Judicial officers would also mention mitigating factors that had been raised without clearly stating whether the factors did lead to a reduction. Categorisation, therefore, is not an exact science.

13.3 The classification of mitigating factors also requires an element of judgement, given the qualitative nature of the data. What facts and scenarios amount to reconciliation or a gender stereotype is not always clear and each researcher may analyse and apply each of these categories in a slightly different way.

13.4 Attempts were made to minimise any inconsistencies by providing guidance and examples of what should be considered a cultural reconciliation practice versus a gender stereotype and examples were given for each category. A final review by one researcher of all the data collected and synthesised provided some homogeneity to the approach taken. Researchers undertaking similar projects may benefit from providing teams with a drop-down list of factors considered in mitigation, with a section for 'other' allowing unanticipated factors to be included.

13.5 As the primary purpose of the study was to review the extent to which customary reconciliation practices, gender stereotypes, and other factors influence sentencing, there are a number of other pieces of information not collected that may be useful in future studies and should be kept in mind when reviewing this study:

13.5.1 Whether there was a plea of guilty, or a plea-bargain;

13.5.2 Whether this was a first offence;

13.5.3 Whether the sentences were cumulative or concurrent in cases where there was more than one offence charged;

13.5.4 Age of the perpetrator;

13.5.5 The relationship between the victim/survivor and perpetrator.

Avenues for further study

13.6 Sentencing records provide a rich source of data for researchers looking at SGBV within a community. In addition to the data collated by this study, through the course of the research, it became clear that such data could provide insight into a number of issues such as:

13.6.1 The effect of rape on the victim/survivors: victim/survivor impact statements provide rich source of information as to how victim/survivors feel and how their community responds to them. For example, in one case of a sexual assault, the court recorded that:

“As a result of this offending, she sat some class 6 examination but did not pass. That was somewhat due to the effect of what had happened caused by you Mr. Kaltu Ken. The effect of your actions as far as you other two are concerned also must have had some influence. In 2002, she stayed in the village doing gardening. She does not have any plans for the future, but wants to live a normal life. She said that she was ashamed and embarrassed when you assaulted her by having sexual intercourse. She was afraid to tell anybody about it because her parents would get angry and hurt her. The victim/survivor knew that the people in the village were talking about her and this make her afraid to walk around.”¹³⁵

In another case, a 19 year old girl was raped by a 40-year-old man. The victim impact report notes that:

“because of what has happened to the victim, she has been shunned by the people of her village. She is saddened and ashamed by what has happened to her that she has avoided village gatherings...she can no longer receive Holy Communion or take full part in certain rituals and activities of her church...The victim also said this was the first time she had sexual intercourse with a male and she finds her 'loss of dignity' as a woman deeply unsettling. Her parents have also suffered because the reputation of their family has been tarnished.”¹³⁶

As these examples illustrate, the relationship between the victim/survivor and her community is often negatively impacted; a study of the victim impact statements would be a good resource to further research the residual effects that a crime has had on a victim/survivor.

¹³⁵ *PP v Ken* [2003] VUSC 52

¹³⁶ *Police v Elia* [2014] WSSC

13.6.2 The use and quality of medical and expert evidence in court. This is particularly in relation to the psychological and physical effects of the crime on the victim. While victim impact statements are useful, they do not always include within them medical evidence or psychological reports. When and how reports are used, whether they are of sufficient quality or themselves affected by gender stereotypes and bias are all important factors affecting judicial decision-making.

13.6.3 Whether police and/or prosecutors have a tendency to pursue a lesser charge against the alleged perpetrator, such as statutory rape rather than rape, on the basis that lesser charges do not require lack of consent to be proven. In a number of cases of statutory rape reviewed, the judicial officer remarked that the defendant was lucky not to have been charged with rape. Often, the lack of consent on the part of the victim/survivor was quite clear, yet the police or prosecutor still chose to charge the perpetrator with the lesser offence; meaning that in order to obtain a conviction, the prosecutor would not need to prove lack of consent on the part of the victim/survivor.¹³⁷

13.6.4 Whether police and/or prosecutors have a tendency to pursue charges of domestic violence or sexual assault against alleged perpetrators when the victim/survivor is a child. The Findings from the data show that 58% of SGBV cases analysed were of girls under the age of 18 and 40% of SGBV cases were of girls under the age of 15. This point becomes more significant when one considers that the prevalence studies conducted in the Pacific using the WHO methodology only surveyed women and girls from the ages of 15-49.¹³⁸ The question therefore becomes, is the prevalence of SGBV even greater than the existing measurements when we account for the potential impact on girls less than 15, or are police and/ or prosecutors less likely to pursue charges of domestic violence or sexual assault against alleged perpetrators when the victim/survivor is a woman?

¹³⁷ *State v Mau* [2003] PNGLR 22; *PP v Boita* [2002] VUCA 38; *Republic v Toani* [2002] KIHIC 69; Criminal Case 34 of 2001

¹³⁸ World Health Organization, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, 2013, <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/> (The WHO methodology surveyed women and girls between 15-49 accessed 14 October 2015)

14. Survey of Programs & Recommendations Seeking to Combat SGBV

14.1 Numerous programs have been implemented to improve access to justice and strengthen accountability in the context of SGBV. Many of these have been the subject of in depth analysis and review. Drawing upon social science data, expert reports and reviews, we have outlined below a selection of both promising and unsuccessful programs.

14.2 Building a Culture of Judicial Accountability

Consistency in Sentencing

14.3 As this Report illustrates, there is a wide variety of approaches to sentencing. The range of approaches in the cases reviewed, even at the appellate level, indicate that the judicial system alone cannot be relied upon to ameliorate this issue. To ensure the impartial and consistent adjudication of SA and DV cases, UN Women has presented the following recommendations:

14.3.1 Ensuring that unbiased decision making and resources that are provided to adjudicate non-SGBV cases are similarly present in SGBV cases;

14.3.2 Continuous monitoring of judicial decisions to ensure compliance;

14.3.3 Accessible data on SGBV prosecutions;

14.3.4 Amplifying successful prosecutions of SGBV cases in the media;

14.3.5 Global consultations of judges and lawyers sharing best practices from their respective countries.¹³⁹

¹³⁹ UN Women, *Virtual Knowledge Centre to End Violence Against Women*, available at <http://www.endvawnow.org/en/articles/1005-overview.html>



Court House Mulinuu, Upolu, Samoa

14.4 The approach outlined by UN Women identifies ways in which non-judicial entities can be part of the process to push for greater consistency, transparency, and accountability within the judiciary. The recommendations provide a broad, but important, framework that can be tailored to specific country contexts.

Sentence Monitoring System

14.5 The findings of the Report show low and varied averages for sentencing in domestic violence (0.98 years) and sexual assault cases (5.19 years). Due to the inconsistency with which sentences are imposed, it follows from the above recommendation made by UN Women that the creation of a Sentence Monitoring System could be effective.

14.6 The United Kingdom has successfully implemented a system where any person has the right to file a complaint to the Attorney or Secretary General within 28 days of a sentence being imposed. The Attorney or Secretary General may then request the Court of Appeal to review the contested sentence. Unfortunately, in this instance, the types of cases reviewed do not include domestic violence cases, but they do include rape, child sex crimes, and child cruelty cases.

14.7 Once a person puts through a complaint, the Attorney or Solicitor General have 28 days to review a sentence and make a decision on whether to send the case to the Court of Appeal.¹⁴⁰ The standard is whether the sentence is deemed to be unreasonably low or “unduly lenient.”¹⁴¹ Even with a recommendation made by the Attorney or Solicitor General, the Court may refuse to hear the case. In evaluating the efficacy of this process, data from 2014 suggest that cases, including rape cases, which have been recommended to the Court of Appeal overwhelmingly receive increased sentences.¹⁴² We

140 UK Government, *Complaint about a Low Crown Sentence*, <https://www.gov.uk/complain-about-low-crown-court-sentence>

141 *Id.*

142 UK Government, *Unduly Lenient Sentence Statistics 2014* (June 11, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434311/ULS_Stats_Details_Grid_-_2014.csv/preview. It would be important to track data on how many complaints were made originally.

would suggest a similar Sentence Monitoring System be put in place for both domestic violence and sexual assault cases in all PICs.¹⁴³

14.8 It is important to note, a Sentence Monitoring System certainly does not preclude the trial court prosecutor who best knows the facts from making an appeal, however, the Sentence Monitoring System provides a much needed fail safe mechanism and allows parties outside of the judicial process to file a complaint. Ideally, such a system would be supplemented by an independent Working Group comprised of a key Ministry (e.g. Ministry of Women) and civil society.

The Role of Customary Reconciliation in Sentencing

14.9 The consideration of customary reconciliation, in the context of violence against women, has been held by CEDAW to amount to a form of discrimination against women.¹⁴⁴ The lack of participation by victims in the reconciliation process, the social pressure on victims to accept the apology, and the payment of compensation to male relatives all serve to disempower and alienate women from the justice system. This is compounded when the victim is too young to benefit from restitution or cash, or to understand the nature of the customary reconciliation process and the effect of accepting such an apology.¹⁴⁵

14.10 How, and under what circumstances, practices such as *bulubulu*, *ifoga*, and other customary (formal and informal) reconciliation practices should be incorporated into sentencing decisions needs to be assessed through a legal reform process and by reviewing the evidence (data) of the impact of customary reconciliation.¹⁴⁶ As

143 UK Government, *About Us*, <https://www.gov.uk/government/organisations/attorney-generals-office/about>

144 CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Fiji*, CEDAW/C/FJI/CO/4, ¶ 20 (July 30, 2010), <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-FJI-CO-4.pdf>;

145 Nick Goodenough, *Reconciliation and the Criminal Process in the Solomon Islands*, 10 JOURNAL OF THE SOUTH PACIFIC LAW 3 (2006)

146 We are discussing legal reform process as a means of evaluating existing laws and advocating for changes to enhance justice.



discussed previously, judicial officers differ radically in their approaches to administering sentences, for instance, whether or not the perpetrator and victim/survivor are involved in the customary ceremony may be crucial to one judicial officer but irrelevant to another.

14.11 Any inclusion of customary reconciliation in sentencing decisions for cases involving SGBV must be in compliance with CEDAW. This requires ensuring women and girls have agency in any decision involving their person, that they have equal access to justice, and that any customs or practices which would result in discrimination against women, should be excluded from sentencing hearings.

14.12 Types of Sentencing

Restitution

14.13 The victim/survivor should be entitled to restitution in both civil and criminal proceedings from the perpetrator. Restitution can include reimbursement for:

- 14.13.1 legal fees;
- 14.13.2 medical bills;
- 14.13.3 physical therapy expenses;
- 14.13.4 mental health treatment expenses;
- 14.13.5 lost wages while recovering from DV physical injuries and psychological trauma;
- 14.13.6 lost business opportunities and income, while recovering from DV physical injuries and psychological trauma;
- 14.13.7 merchandise, business vehicles, machines, and equipment damaged or stolen;
- 14.13.8 farm animals damaged or stolen;
- 14.13.9 farm buildings, machinery, vehicles, and equipment damaged or stolen;
- 14.13.10 personal property damaged or stolen, e.g. clothing, jewellery, decorative objects and artworks, motor vehicles and bicycles;
- 14.13.11 furniture and household items broken, damaged or stolen, kitchen equipment and food damaged or stolen, and bedding, linens, and towels damaged or stolen;
- 14.13.12 broken windows, doors, and door locks;
- 14.13.13 personal property stolen from survivor; and
- 14.13.14 real property and building damage.

Intrusive Sentencing

14.14 A study by the U.S. Department of Justice found that a more intrusive sentence (e.g. jail, work release, or electronic monitoring/ probation) resulted in a significant decrease in the rates of rearrest for domestic violence cases.¹⁴⁷ This was compared to sentencing scenarios considered to be less intrusive (e.g. fines or suspended sentences without probation). The recidivism rate was 23.3% when an intrusive sentence was given in a domestic violence case, versus the recidivism rate of 66% in cases with less intrusive sentencing.¹⁴⁸

14.15 Our Report indicates that in almost half of the cases reviewed, the perpetrator of domestic violence was awarded a suspended sentence. By reviewing the study conducted by the U.S. Department of Justice discussed above, it is reasonable to assume that, based on the practice of administering less intrusive sentences in these cases, there is high recidivism rate of domestic violence perpetrators in the Pacific, or at least a higher recidivism rate than there would otherwise be were more intrusive sentences imposed. Even if accurate arrest records exist in the PICs, low prosecution rates of in SGBV cases would likely mask the true recidivism rate. Nonetheless, this research would be an important first step in an investigation into a possible causal link between sentencing length and recidivism rates.

Mandatory Minimum Sentencing

14.16 Mandatory minimum sentences have generally been found to be counterproductive. UN Women reported that in the context of SGBV, such sentences have been met with mixed results.¹⁴⁹ Furthermore, they may be avoided by prosecutors undercharging,¹⁵⁰ and judges making findings to lesser included offenses. Finally, there is a plethora of social science data that indicates that mandatory minimum sentencing tends to punish poor and minority defendants disproportionately, without regard to the nature of the actual offenses.¹⁵¹

¹⁴⁷ U.S. Department of Justice, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges*, at 47 (June 2009), <https://www.ncjrs.gov/pdffiles1/nij/195079.pdf>

¹⁴⁸ *Id.*

¹⁴⁹ UN Women, *Handbook for Legislation on Violence Against Women*, at 51 (2008), available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

¹⁵⁰ Charging a crime that would constitute a lesser offense than could actually be pursued at trial given the facts.

¹⁵¹ The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (August 2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf

Permissible and Impermissible Justifications for Sentence Increases or Reductions

14.17 There are instances in which sentence reductions or increases occur because the victim/survivor is categorised as a particular “type” of woman (e.g. a sex worker, a non-virgin, a non-married woman or girl, or a girl who looks older for her age). It is highly problematic for a greater sentence to be imposed on a perpetrator of sexual assault if the victim/survivor is a married woman versus a victim/survivor who is a non-married woman.¹⁵² It is also highly problematic for a lesser sentence to be imposed on a perpetrator of sexual assault if the victim/survivor is a sex worker or non-virgin.

14.18 Whereas the above examples provide insight into contentious factors when increasing or decreasing a sentence, violation of intervention orders and repeat incidents of domestic violence should trigger enhanced sentencing.¹⁵³

14.19 Alternate Forms of Accountability/Rehabilitation

Fines

14.20 Fines should not be imposed for domestic violence or sexual assault cases.¹⁵⁴ There are two key reasons: 1) imposition of a fine on the perpetrator, specifically in domestic violence cases, potentially harms the survivor since the money is going to the State, and is unavailable to the wife and children or for restitution to the victim; 2) studies have shown that fines do not lead to behaviour change by perpetrators.¹⁵⁵

Batterer Intervention Program (BIP)

14.21 The popularity of Batterer Intervention Programs (BIP) has led to their proliferation as a form of rehabilitation. However, rigorous scientific controlled studies on such programs have shown that they provide “no significant difference . . . between control groups on reoffense rates or attitudes toward domestic violence.”¹⁵⁶ Moreover, studies that show efficacy of such programs have numerous limitations, including:

14.21.1 That those studies relied upon self-evaluations done by the programs to publicise

¹⁵² UN Women, *Handbook for Legislation on Violence Against Women*, at 51 (2008), available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

¹⁵³ *Id.* at 51-52.

¹⁵⁴ *Id.* at 52-53.

¹⁵⁵ *Id.* at 52.

¹⁵⁶ U.S. Department of Justice, *Batter Intervention Programs*, at 10 (June 2003), <https://www.ncjrs.gov/pdffiles1/nij/195079.pdf>

their successes;

14.21.2 That there were no control groups;

14.21.3 That the samples were limited to the men who completed the programs, excluding those who failed to complete the program;

14.21.4 That there was limited follow up assessment.¹⁵⁷ The assessments were based on the time during attendance in the programs and immediately on completion of the programs. There was no contact with the DV perpetrator’s partners, or information whether the men had partners during the period considered in the assessments.

Substance Abuse

14.22 Alcohol treatment alone does not stop SGBV. Alcohol treatment must be combined with individual therapy addressing the underlying issues of violence against women and girls. Ending alcohol abuse does not stop violence. Alcohol is not a cause, but a facilitator of violence.¹⁵⁸

14.23 Training of Legal & Judicial Officers

14.24 This Report indicates that judicial officers in the Pacific, when made aware of stereotypes and bias, can and do recognise and reject stereotyping and discriminatory factors in sentencing decisions. As discussed above, in 21% of DV and SA cases contentious factors were raised but did not lead to a reduction in sentence, while extracts from judicial decisions provided above indicate that in some cases judicial officers explicitly rejected factors raised in mitigation on the basis that they discriminated on the basis of gender.

14.25 Ensuring that judicial officers have the tools and knowledge to identify and reject these contentious factors can therefore play an important role in eliminating such considerations from sentencing decisions.

Removal of culturally driven bias in SGBV cases

14.26 Continuing legal and judicial training is the responsibility of every practitioner and key to meeting the evolving demands of society. Understanding discriminatory factors that compromise women and girls’ access to justice has been recognised as a priority for many PICs. Former High Court Judge of Fiji, Nazhat Shameem, discusses how culturally driven bias, especially in SGBV cases, affects how women are perceived and treated in

¹⁵⁷ Cornell Journal of Law and Public Policy [Vol.3:221], 235-241

¹⁵⁸ Sarah DeGue, *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, at 353 (June 2014) (substance abuse program not effective for sexual violence behavioral outcomes in a rigorous evaluation).

the courtroom.¹⁵⁹ Training of legal¹⁶⁰ and judicial officers using data (or evidence) provides a clear entry point into identifying potential bias and working toward greater objectivity.

Removal of gender-stereotyping and rape myths in judicial decision-making.

14.27 As this Report shows, gender stereotyping continues to play a large role in the sentencing of perpetrators in SGBV cases. The judicial system can, if properly resourced and supported, play a role in combating those same myths and stereotypes by replacing myth with fact, empirical evidence and research on sexual assault and domestic violence.¹⁶¹

14.28 Simone Cusack, in her report to the Office of the High Commissioner for Human Rights, identifies six key strategies for addressing judicial stereotyping:

14.28.1 Highlight the harms of judicial stereotyping through evidence based research;

14.28.2 Advocate legal and policy reforms that prohibit judicial stereotyping;

14.28.3 Monitor and analyse judicial reasoning for evidence of stereotyping;

14.28.4 Challenge judicial stereotyping through petitions and expert evidence;

14.28.5 Highlight good practice examples of judges challenging stereotyping; and

14.28.6 Improve judicial capacity to address stereotypes.¹⁶²

Three of the strategies in particular warrant further examination.

Advocate for legal and policy reforms that prohibit judicial stereotyping

14.29 Legislation can provide protection against stereotyping by judges and other state actors and in some cases provide an avenue for redress. Protections may be general in nature, such as in the *Bangalore Principles of Judicial Conduct* which prohibit judges from manifesting

¹⁵⁹ See generally Nazhat Shameem, *Gender, Justice, and Judges: Fiji Judiciary Criminal Workshop for Judges and Magistrates* (June 14, 2012)

¹⁶⁰ ICAAD and DLA have conducted legal trainings at the Regional Gender and the Law Consultation (Fiji, 2014) hosted by RRRT and the South Pacific Lawyers Conference (Brisbane, 2015) hosted by the Australian Law Council.

¹⁶¹ Simone Cusack, *Eliminating Judicial Stereotyping: Equal access to justice for women in gender-based violence cases*, June 2014

¹⁶² *Id.*

bias or prejudice towards any person or group.¹⁶³ They may also be very specific in nature, such as rules of procedure and evidence which forbid the court from considering past sexual experience of the victim/survivor.

Challenge judicial stereotyping through petitions and expert evidence

14.30 In relation to the fourth suggestion, prosecutors must be trained to identify and combat the use and consideration of gender stereotypes and rape myths by the defence or by a judicial officer. The use of expert evidence to combat such myths by, for example, providing evidence as to the range of psychological responses that a victim/survivor may exhibit, should be encouraged. Human Rights advocates may also be able to join as amicus on an appeal of a case to provide evidence regarding judicial stereotyping in the lower courts.

14.31 Health professionals and experts play an important role in ensuring stereotypes are identified and refuted. How victims respond to assault and situations of violence, the long term effects of an assault on an individual, as well as evidence as to the nature of the assault itself are crucial to establishing both guilt and an appropriate sentence. While our research did not capture the number of cases where medical evidence was provided, the above discussion on gender stereotypes indicates that the court would often draw conclusions as to the state of mind and mental health of the victim/survivor without recourse to medical opinion, a practice which leaves the court open to stereotyping and the use of rape myths.

14.32 Outside the courtroom, petitions and communications to regional and international human rights bodies, such as CEDAW can also serve to bring attention to the use of stereotyping in court.

¹⁶³ *Id.*



High Court, Suva, Fiji

Improve judicial capacity to address stereotypes

14.33 Judicial officers are not immune to the societal biases surrounding them. Unless they have been trained or informed regarding particular gender stereotypes and rape myths, there is no particular reason why they would be aware that their judicial reasoning is affected by such stereotypes. Education and training are crucial to building capacity and raising awareness within the judiciary of the harm of gender stereotypes. Educational materials and training must be focused on ensuring judicial officers:

14.33.1 reach decisions based on law and fact;

14.33.2 can identify gender stereotyping and rape myths;

14.33.3 understand the harms caused by stereotyping; and

14.33.4 can debunk stereotypes related to SGBV.¹⁶⁴

14.34 To this we would also add a recommendation to increase the number of female judicial officers in the Pacific Islands. A recent survey by the South Pacific Lawyers Association revealed that in eleven jurisdictions there are only 26 female judges and magistrates. Seven out of the eleven jurisdictions have only one or no female judicial officers.¹⁶⁵ Of course, gender parity within the judiciary should be pursued for its own sake. However a number of studies have indicated that the presence of female judicial officers can increase the gender sensitivity of the law in practice.¹⁶⁶ An analysis of cases relating to sexual harassment or discrimination in the U.S. found that a case was twice as likely to succeed when a female judge was present on the three-judge appellate panel, and that the presence of a female judge also 'increased male judges' propensity to support the plaintiff in cases of sexual harassment and sex discrimination.¹⁶⁷

¹⁶⁴ *Id.*

¹⁶⁵ South Pacific Lawyers Association *Women in the Law in the South Pacific: Survey Report February 2014* available at <http://www.southpacificlawyers.org/files/uploads/2014%2002%2006%20-%20Women%20in%20Law%20Report%20Final2.pdf> accessed 15 October 2015

¹⁶⁶ J. Doherty, *Women's Representation in Judiciaries Worldwide: Arguments in Favor of Increasing the Gender Diversity on the Bench* (Inst. for Global and Intl Stud. 2012) cited in Hassane Cisse et al, *The World Bank Legal Review, Volume 5: Fostering Development through Opportunity, Inclusion and Equity*, at 520 (2014)

¹⁶⁷ J.L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 Yale L.J. (2005). Cited in Hassane Cisse et al *The World Bank Legal Review, Volume 5: Fostering Development through Opportunity, Inclusion and Equity*, at 520 (2014)

14.36 Beyond Justice and Accountability

14.37 The focus of this Report is on equal access to justice and ways in which gender discrimination leads to inequality before the law in the criminal justice system. The report does not comprehensively address broader community interventions to respond to or prevent SGBV.

14.38 In a comprehensive study done on prevention of sexual violence, only three programs were found to be scientifically proven to be effective: 1) program focusing on addressing gender stereotyping and consequence of dating violence; 2) poster campaign raising awareness of dating violence; and 3) funding to improve criminal enforcement and victim advocacy.¹⁶⁸ Much has been written on how to assist victims, prevent recidivism and reduce the prevalence of SGBV. At this point in time, evidence as to the efficacy of interventions is primarily focused on high-income countries and looks mainly at intimate partner violence.¹⁶⁹ In high-income countries, interventions which focus on assisting survivors of violence have been shown to improve survivors' mental health and use of services, but there is little evidence that they reduce revictimisation. Intervention programmes in low and middle-income programmes have, in some cases, been successful. Successful programmes are those that:

14.38.1 Address underlying risk factors for violence including social norms that condone violence and inequality;

14.38.2 Support the development of non-violent behaviours;

14.38.3 Engage multiple stakeholders.¹⁷⁰

14.39 Research on correlations between SGBV and other forms of gender inequality have also revealed moderate correlations between violence against women and an unmet need for family planning, maternal mortality, education levels for women, legal protection and gender equality in professional and technical jobs.¹⁷¹

¹⁶⁸ See generally, *id.* (Substance abuse program not effective for sexual violence behavioral outcomes in a rigorous evaluation.)

¹⁶⁹ Mary Ellsberg, Diana Arango et al, *Prevention of Violence Against Women and Girls: What does the Evidence Say?*, Vol 385 *Lancet*, at 1555 (2015)

¹⁷⁰ *Id.*

¹⁷¹ McKinsey Global Institute, *The power of parity: how advancing women's equality can add \$12 trillion to global growth*, September 2015

15. Conclusion

15.1 CEDAW has found that male violence against women is, in and of itself, a form of discrimination against women.¹⁷² According to the UN Secretary General, violence against women is a global epidemic.¹⁷³ In the Pacific, more than two thirds of women and girls experience violence, twice that of the currently reported global average.¹⁷⁴

15.2 The same gender-discrimination that is inherent in male violence against women, also acts to prevent women from accessing justice on an equal basis with men. Our research revealed that gender-discrimination affects sentence outcomes in more than 50% of SGBV cases in PICs. The consideration of contentious factors led to sentence reductions in over 60% of DV cases and 50% of SA cases. Almost half of the DV cases led to a non-custodial sentence and where a combination of contentious factors were considered, perpetrators were four times more likely to receive a non-custodial sentence than in cases where no contentious factors were considered. Even more alarming is the fact that 40% of the victims were under 15 years of

172 CEDAW General Recommendation 19: Violence against Women, 1992 A/47/38 <http://www.refworld.org/docid/453882a422.html> accessed 14 October 2015

173 UN Secretary-General's remarks at High-level event on Women in Power and Decision-Making, Santiago, Chile 27 February 2015, available at <http://www.un.org/sg/statements/index.asp?nid=8421>

174 World Health Organization, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, 2013, <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/> (The WHO methodology surveyed women and girls between 15-49 accessed 14 October 2015); UN Women, *Ending Violence against Women and Girls: Evidence, Data and Knowledge in Pacific Island Countries*, July 2011 <http://www.pacificwomen.org/wp-content/uploads/UN-Women-Ending-VAW-Literature-Review-2nd-Edition1.pdf>

age and 58% of the victim/survivors were under 18 years of age.

15.3 Margaret, whose story began this report, had a right to protection against domestic violence. Once a victim, she also has a right to a remedy and justice, being the investigation and prosecution of the perpetrator in a process free from gender discrimination and stereotyping. Had her rights been protected, the husband's belief in her infidelity would not have been seen as a legitimate mitigating factor, nor would a court force her to live with the man who brutally attacked her, leaving her with permanent disabilities. An awareness of the nature of intimate partner violence may also lead a court to reconsider taking into account reconciliation between parties in sentencing. Finally, protection from violence and violent situations would also mean ensuring Margaret had alternative means to support her family without needing to rely upon her abusive husband.

15.4 For women to be afforded equal access to justice, a victim/survivor centred approach to prosecution must be implemented. Sentences must be imposed that are free from structural discrimination and gender bias. This can be achieved by eliminating inappropriate judicial consideration of gender stereotypes and myths. In 43% of cases the sentence was not explicitly affected by contentious factors, providing a good base to build upon. In addition, equal access to justice for women necessarily requires that judicial officers be precluded from employing or considering customary reconciliation practices that breach CEDAW obligations.

15.5 Providing equal access to justice for victim/survivors is just one aspect of a multi-faceted approach that must be taken in order to reduce the alarming rate of violence against women and girls in the Pacific. It is necessary to address and eradicate gender discrimination in order to provide women and girls with access to justice, and more importantly, establish the principle that their well-being and safety are recognised as human rights that are fundamental to the wellbeing of a nation.



Appendix 1: Crime Categories and Incidence

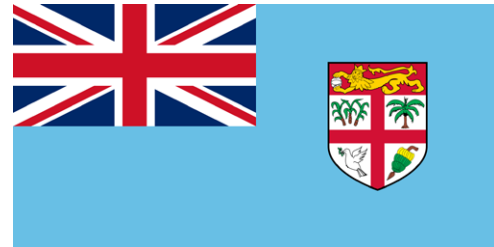
CHARGE CATEGORY	TOTAL
Abduction	1
Armed Robbery	1
Assault	10
Assault +	1
Assault causing bodily harm	62
Assault causing bodily harm +	7
Attempted Indecent Assault	1
Attempted Murder	3
Attempted Rape	31
Attempted Rape +	18
Attempted sexual intercourse with a girl under 12	3
Attempted sexual intercourse with a girl under 16 +	1
Breach of Restraining Order	1
Incest	37
Incest +	7
Indecent assault on young person +	1
Indecent Assault	103
Indecent Assault +	20
Indecent assault of a girl aged between 12/13 and 16	9
Indecent assault of girl under the age of 12/13	44
Indecent assault on a girl under the age of 12 +	2
Indecent Exposure +	1
Indecently annoying a female	1
Manslaughter	20
Murder	24
Murder +	2
Rape	232
Rape +	101
Sexual Intercourse in a situation of trust	7
Sexual intercourse with a Child under care	1
Sexual intercourse with a girl aged between 12 and 15/16	97
Sexual intercourse with a girl aged between 12 and 15/16 +	3
Sexual intercourse with a girl under 21 living as a member of the family	7
Sexual intercourse with a girl under the age of 12/13	36
Sexual intercourse with a girl under the age of 12/13 +	6
Sexual intercourse with a person between 16 and 18 with trust	2
Sexual intercourse with a person with a severe disability	1
Sodomy	3
Sodomy +	1
Grand Total	908



Appendix 2: Data by Country - Fiji

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	54
Sexual Assault (SA)	87
Murder (M)	4
Grand Total	145



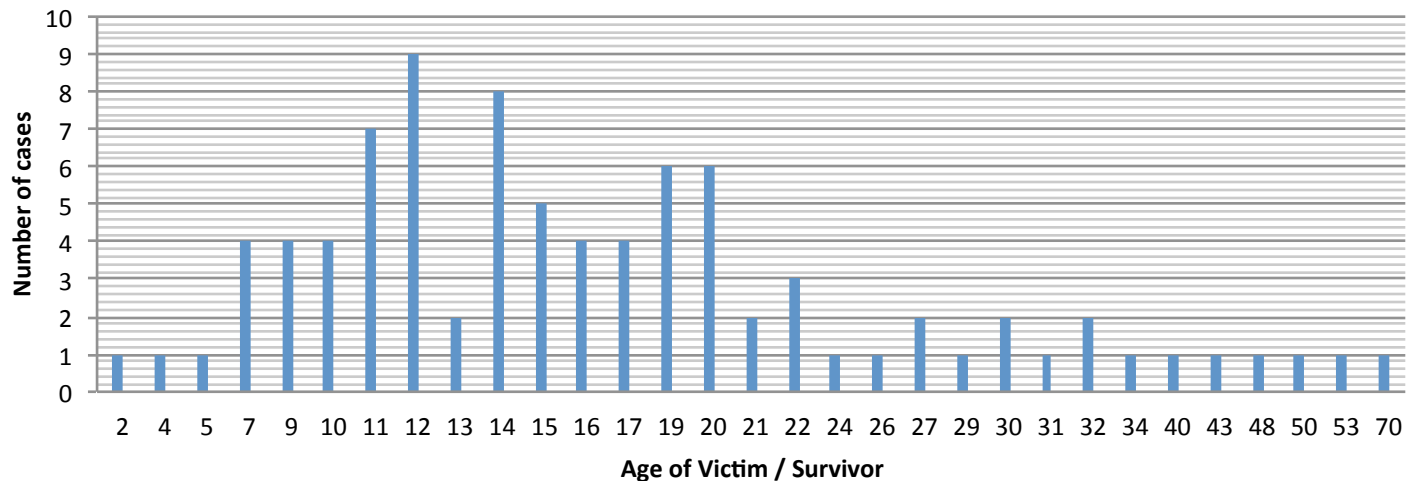
Courts

TYPES	NUMBER OF CASES
Court of Appeal	30
High Court	64
Supreme Court	1
Magistrates	50
Grand Total	145

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	52	26	3	81
Child	2	55	1	58
Unknown		6		6
Grand Total	54	87	4	145

Age of Victim/ Survivors in Cases



Imposition of Custodial Sentencing

	NON-CUSTODIAL	CUSTODIAL	TOTAL
DV	29	25	54
M		4	4
SA	9	78	87
Total	38	107	145

Average Starting & Final Sentences

	AVG STARTING SENTENCE (YRS)	AVG FINAL SENTENCE (YRS)
DV	2.03	0.82
M	10	6.13
SA	9.77	7.00
Total	6.76	4.66

Contentious Factors Considered?

	DV	SA	M	ALL CASES
None	9.26%	20.69%	50.00%	17.24%
Unknown	0.00%	10.34%	0.00%	6.21%
Combination	51.85%	16.09%	0.00%	28.97%
Customary Practice(s)	18.52%	6.90%	0.00%	11.03%
Gender Stereotype(s)	16.67%	29.89%	50.00%	25.52%
Other Factor(s)	3.70%	16.09%	0.00%	11.03%
Grand Total	100.00%	100.00%	100.00%	100.00%

Contentious Factor Led to Sentence Reduction?

	DV	M	SA	ALL CASES
None	33.33%	75.00%	55.17%	47.59%
Unknown	1.85%	0.00%	8.05%	5.52%
Combination	29.63%	0.00%	4.60%	13.79%
Customary Practice(s)	22.22%	0.00%	5.75%	11.72%
Gender Stereotype(s)	11.11%	25.00%	18.39%	15.86%
Other Factor(s)	1.85%	0.00%	8.05%	5.52%
Grand Total	100.00%	100.00%	100.00%	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	10.14%	89.86%	100.00%
Unknown	25.00%	75.00%	100.00%
Combination	75.00%	25.00%	100.00%
Customary Practice(s)	47.06%	52.94%	100.00%
Gender Stereotype(s)	13.04%	86.96%	100.00%
Other Factor(s)	37.50%	62.50%	100.00%
Grand Total	26.21%	73.79%	100.00%

Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	DV	M	SA	GRAND TOTAL
None	1.59	7	8.25	6.45
Unknown	0		5.43	4.75
Combination	0.03		5.81	1.19
Customary Practice(s)	0.3		2.4	0.92
Gender Stereotype(s)	1.91	5.25	7.15	5.70
Other Factor(s)	0		3.65	3.20
Grand Total	0.82	6.13	7.00	4.66

Appendix 3: Data by Country - Kiribati

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	2
Sexual Assault (SA)	119
Murder (M)	4
Grand Total	125



Courts

TYPES	NUMBER OF CASES
Court of Appeal	10
High Court	115
Grand Total	125

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	2	45	1	48
Child	0	66	3	69
Unknown		8		8
Grand Total	2	119	4	125

Age of Victim/ Survivors in Cases



Sentencing in Sexual Assault Cases*

Average starting sentence	4.18
Average final sentence	2.39
% of cases leading to a custodial sentence	82%

*Due to the small sample size of DV and Murder cases we have only provided analysis for SA cases in Kiribati.

Contentious Factors Considered?

	SA
None	26.89%
Unknown	3.36%
Combination	19.33%
Customary Practice(s)	18.49%
Gender Stereotype(s)	11.76%
Other Factor(s)	20.17%
Grand Total	100.00%

Contentious Factor Led to Sentence Reduction?

	SA
None	47.90%
Unknown	13.45%
Combination	12.61%
Customary Practice(s)	10.92%
Gender Stereotype(s)	6.72%
Other Factor(s)	8.40%
Grand Total	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	12.28%	87.72%	100.00%
Unknown	6.25%	93.75%	100.00%
Combination	33.33%	66.67%	100.00%
Customary Practice(s)	38.46%	61.54%	100.00%
Gender Stereotype(s)	25.00%	75.00%	100.00%
Other Factor (s)	20.00%	80.00%	100.00%
Grand Total	18.49%	81.51%	100.00%

Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	SA
None	2.48
Unknown	2.48
Combination	2.14
Customary Practice(s)	1.73
Gender Stereotype(s)	3.11
Other Factor (s)	2.39
Grand Total	2.39

Appendix 4: Data by Country - PNG

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	13
Sexual Assault (SA)	103
Murder (M)	28
Grand Total	144



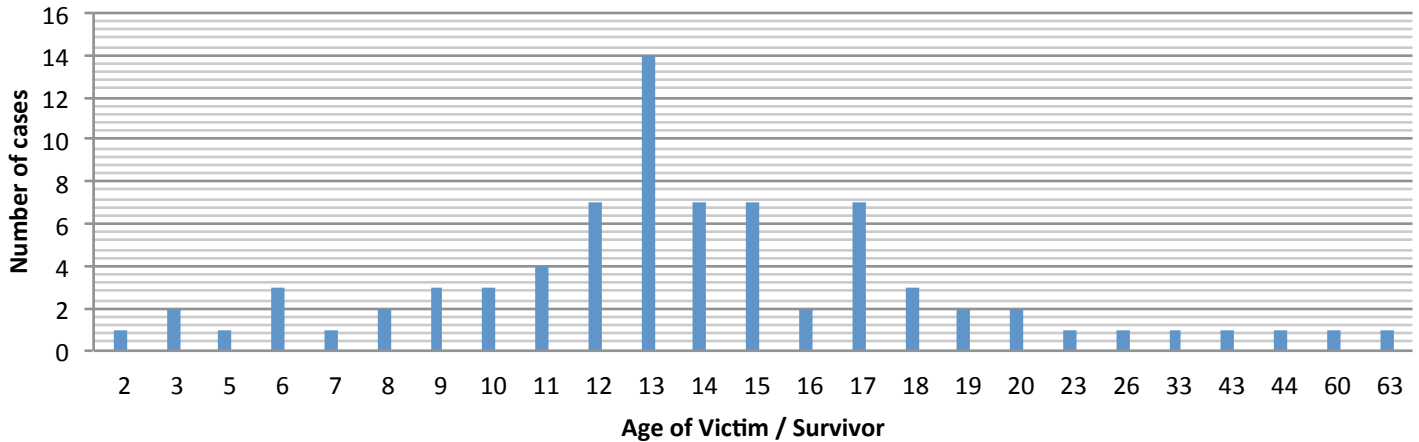
Courts

TYPES	NUMBER OF CASES
National Court	121
Supreme Court	16
District Court	7
Grand Total	144

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	13	31	24	68
Child		66	2	68
Unknown		6	2	8
Grand Total	13	103	28	144

Age of Victim/ Survivors in Cases



Imposition of Custodial Sentencing

	NON-CUSTODIAL	CUSTODIAL	TOTAL
DV	7	6	13
M		28	28
SA	10	93	103
Total	17	127	144

Average Starting & Final Sentences

	AVG STARTING SENTENCE (YRS)	AVG FINAL SENTENCE (YRS)
DV	5.6	1.96
M	19.67	15.40
SA	15.19	10.14
Total	14.79	10.19

Contentious Factors Considered?

	DV	SA	M	ALL CASES
None	15.38%	21.36%	10.71%	18.75%
Combination	23.08%	45.63%	42.86%	43.06%
Customary Practice(s)	15.38%	8.74%	17.86%	11.11%
Gender Stereotype(s)	46.15%	8.74%	10.71%	12.50%
Other Factor(s)	0.00%	15.53%	17.86%	14.58%
Grand Total	100.00%	100.00%	100.00%	100.00%

Contentious Factor Led to Sentence Reduction?

	DV	M	SA	ALL CASES
None	46.15%	39.29%	39.81%	40.28%
Unknown	0.00%	7.14%	0.97%	2.08%
Combination	15.38%	14.29%	25.24%	22.22%
Customary Practice(s)	7.69%	17.86%	6.80%	9.03%
Gender Stereotype(s)	30.77%	10.71%	3.88%	7.64%
Other Factor(s)	0.00%	10.71%	23.30%	18.75%
Grand Total	100.00%	100.00%	100.00%	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	3.45%	96.55%	100.00%
Unknown	0.00%	100.00%	100.00%
Combination	25.00%	75.00%	100.00%
Customary Practice(s)	30.77%	69.23%	100.00%
Gender Stereotype(s)	27.27%	72.73%	100.00%
Other Factor(s)	0.00%	100.00%	100.00%
Grand Total	11.81%	88.19%	100.00%

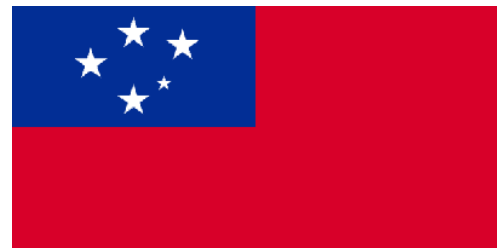
Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	DV	M	SA	GRAND TOTAL
None	3.92	19.50	11.83	11.80
Unknown		9.50	27.00	15.33
Combination	0.00	8.67	7.81	7.39
Customary Practice(s)	0.00	14.75	3.57	7.00
Gender Stereotype(s)	0.00	16.50	9.75	8.00
Other Factor(s)		18.00	11.04	11.81
Grand Total	1.96	15.40	10.14	10.19

Appendix 5: Data by Country - Samoa

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	5
Sexual Assault (SA)	216
Murder (M)	4
Grand Total	225



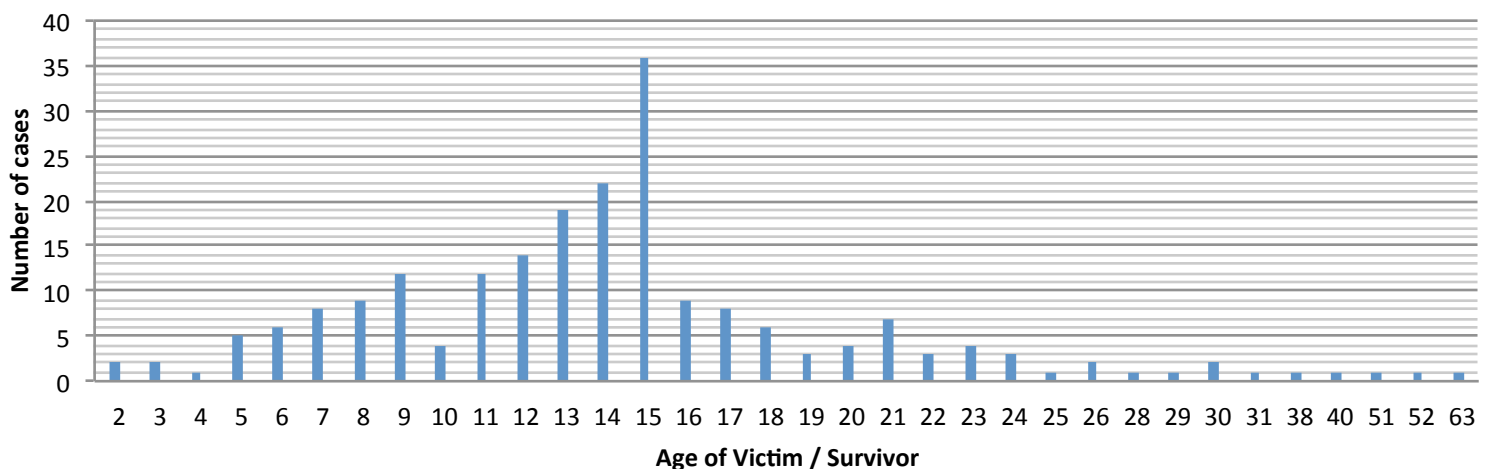
Courts

TYPES	NUMBER OF CASES
Court of Appeal	10
Supreme Court	213
Youth Court	2
Grand Total	225

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	4	40	4	48
Child	1	170		171
Unknown		6		6
Grand Total	5	216	4	225

Age of Victim/ Survivors in Cases



Sentencing in Sexual Assault Cases*

Average starting sentence	8.05
Average final sentence	5.07
% of cases leading to a custodial sentence	94%

*Due to the small sample size of DV and Murder cases we have only provided analysis for SA cases in Samoa.

Contentious Factors Considered?

	SA
None	29.17%
Unknown	0.46%
Combination	20.37%
Customary Practice(s)	31.02%
Gender Stereotype(s)	10.65%
Other Factor(s)	8.33%
Grand Total	100.00%

Contentious Factor Led to Sentence Reduction?

	SA
None	44.91%
Unknown	1.85%
Combination	8.33%
Customary Practice(s)	36.11%
Gender Stereotype(s)	4.63%
Other Factor(s)	4.17%
Grand Total	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	0.00%	100.00%	100.00%
Unknown	0.00%	100.00%	100.00%
Combination	16.67%	83.33%	100.00%
Customary Practice(s)	8.97%	91.03%	100.00%
Gender Stereotype(s)	30.00%	70.00%	100.00%
Other Factor (s)	0.00%	100.00%	100.00%
Grand Total	6.02%	93.98%	100.00%

Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	SA
None	6.60
Unknown	1.96
Combination	3.95
Customary Practice(s)	3.97
Gender Stereotype(s)	2.07
Other Factor (s)	5.07
Grand Total	5.07

Appendix 6: Data by Country - Solomon Islands

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	1
Sexual Assault (SA)	113
Murder (M)	2
Grand Total	116



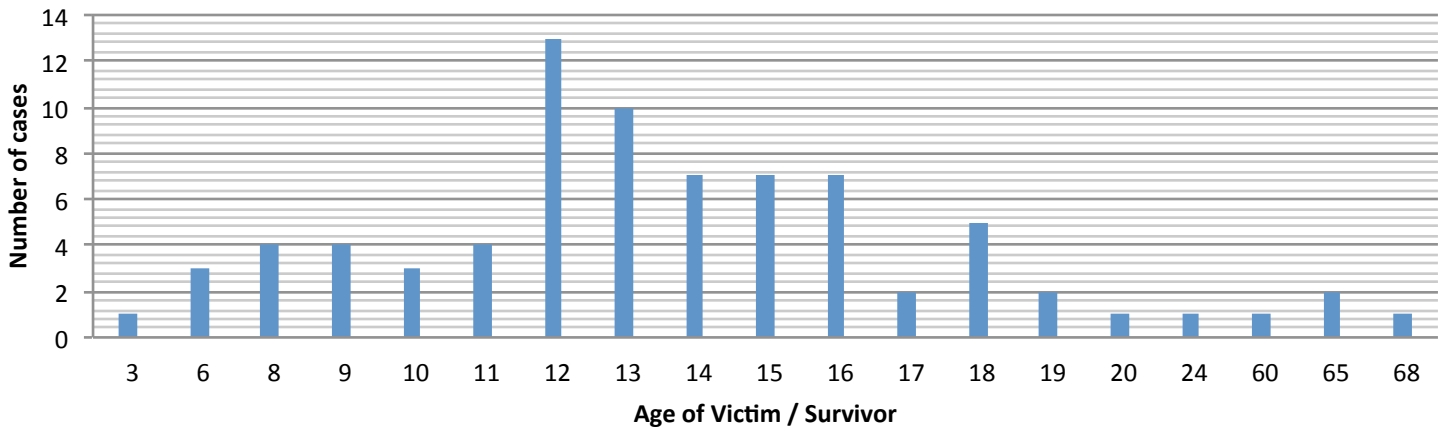
Courts

TYPES	NUMBER OF CASES
Court of Appeal	12
High Court	104
Grand Total	116

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	1	30	1	32
Child		68	1	69
Unknown		15		15
Grand Total	1	113	2	116

Age of Victim/ Survivors in Cases



Sentencing in Sexual Assault Cases*

Average starting sentence	8.8
Average final sentence	4.43
% of cases leading to a custodial sentence	89%

*Due to the small sample size of DV and Murder cases we have only provided analysis for SA cases in Solomon Islands.

Contentious Factors Considered?

	SA
None	23.01%
Unknown	31.86%
Combination	15.04%
Customary Practice(s)	21.24%
Gender Stereotype(s)	8.85%
Other Factor(s)	0.00%
Grand Total	100.00%

Contentious Factor Led to Sentence Reduction?

	SA
None	38.94%
Unknown	3.54%
Combination	19.47%
Customary Practice(s)	15.04%
Gender Stereotype(s)	15.04%
Other Factor(s)	7.96%
Grand Total	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	11.36%	88.64%	100.00%
Unknown	25.00%	75.00%	100.00%
Combination	9.09%	90.91%	100.00%
Customary Practice(s)	5.88%	94.12%	100.00%
Gender Stereotype(s)	17.65%	82.35%	100.00%
Other Factor (s)	0.00%	100.00%	100.00%
Grand Total	10.62%	89.38%	100.00%

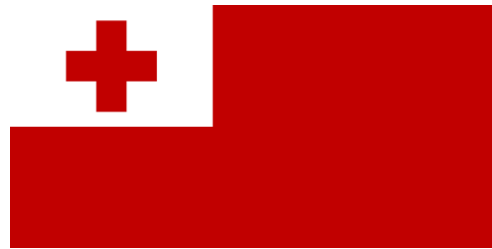
Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	SA
None	5.59
Unknown	3.25
Combination	3.46
Customary Practice(s)	4.62
Gender Stereotype(s)	3.49
Other Factor (s)	3.03
Grand Total	4.43

Appendix 7: Data by Country - Tonga

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	3
Sexual Assault (SA)	36
Murder (M)	2
Grand Total	41



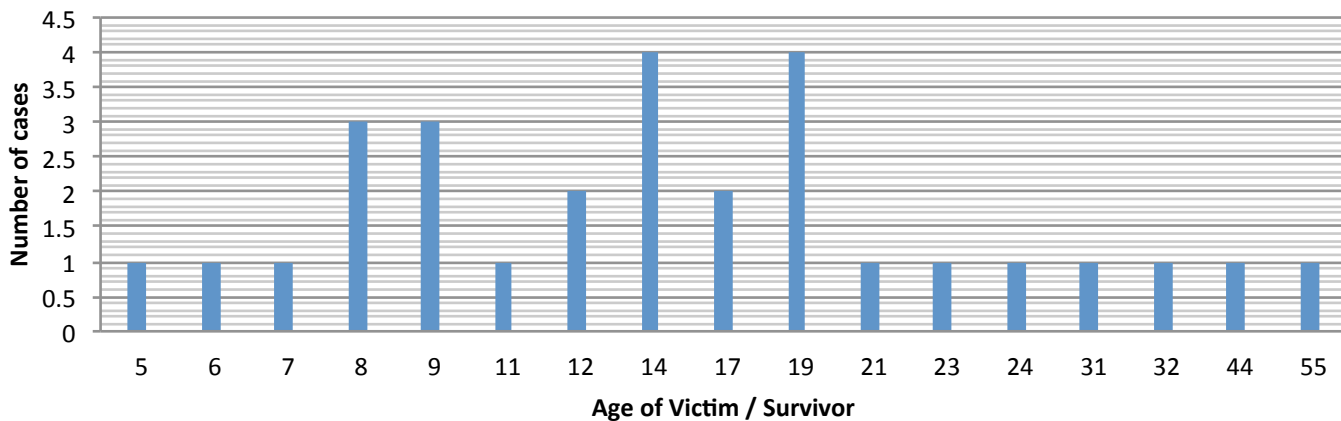
Courts

TYPES	NUMBER OF CASES
Court of Appeal	15
Supreme Court	26
Grand Total	41

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	3	12	1	16
Child		21	1	22
Unknown		3		3
Grand Total	3	36	2	41

Age of Victim/ Survivors in Cases



Sentencing in Sexual Assault Cases*

Average starting sentence	7.54
Average final sentence	4.69
% of cases leading to a custodial sentence	86.11%

*Due to the small sample size of DV and Murder cases we have only provided analysis for SA cases in Tonga.

Contentious Factors Considered?

	SA
None	33.33%
Unknown	11.11%
Combination	22.22%
Customary Practice(s)	16.67%
Gender Stereotype(s)	11.11%
Other Factor(s)	5.56%
Grand Total	100.00%

Contentious Factor Led to Sentence Reduction?

	SA
None	52.78%
Unknown	22.22%
Combination	8.33%
Customary Practice(s)	11.11%
Gender Stereotype(s)	2.78%
Other Factor(s)	2.78%
Grand Total	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	5.26%	94.74%	100.00%
Unknown	25.00%	75.00%	100.00%
Combination	33.33%	66.67%	100.00%
Customary Practice(s)	25.00%	75.00%	100.00%
Gender Stereotype(s)	0.00%	100.00%	100.00%
Other Factor(s)	0.00%	100.00%	100.00%
Grand Total	13.89%	86.11%	100.00%

Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	SA
None	5.46
Unknown	4.81
Combination	1.25
Customary Practice(s)	2.25
Gender Stereotype(s)	11.00
Other Factor(s)	3.00
Grand Total	4.69

Appendix 8: Data by Country - Vanuatu

Types of Cases

	NUMBER OF CASES
Domestic Violence (DV)	2
Sexual Assault (SA)	105
Murder (M)	5
Grand Total	112



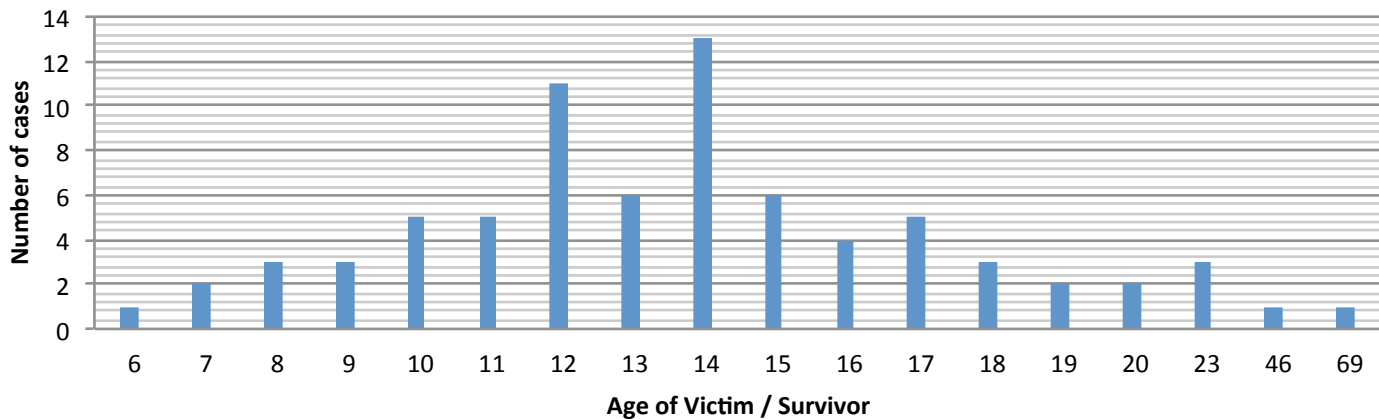
Courts

TYPES	NUMBER OF CASES
Court of Appeal	28
Supreme Court	82
Magistrates Court	2
Grand Total	112

Victims/ Survivors - Adult or Child?

	DV	SA	M	ALL CASES
Adult	2	24	4	30
Child		73		73
Unknown		8	1	9
Grand Total	2	105	5	112

Age of Victim/ Survivors in Cases



Sentencing in Sexual Assault Cases*

Average starting sentence	7.11
Average final sentence	3.58
% of cases leading to a custodial sentence	82.14%

*Due to the small sample size of DV and Murder cases we have only provided analysis for SA cases in Vanuatu.

Contentious Factors Considered?

	SA
None	15.24%
Unknown	1.90%
Combination	32.38%
Customary Practice(s)	29.52%
Gender Stereotype(s)	14.29%
Other Factor(s)	6.67%
Grand Total	100.00%

Contentious Factor Led to Sentence Reduction?

	SA
None	33.33%
Unknown	3.81%
Combination	12.38%
Customary Practice(s)	39.05%
Gender Stereotype(s)	7.62%
Other Factor(s)	3.81%
Grand Total	100.00%

Contentious Factors and Custodial Sentences

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	NON-CUSTODIAL	CUSTODIAL	GRAND TOTAL
None	11.43%	88.57%	100.00%
Unknown	0.00%	100.00%	100.00%
Combination	38.46%	61.54%	100.00%
Customary Practice(s)	17.07%	82.93%	100.00%
Gender Stereotype(s)	25.00%	75.00%	100.00%
Other Factor(s)	25.00%	75.00%	100.00%
Grand Total	18.10%	81.90%	100.00%

Average of Final Custodial Sentence Length

CONTENTIOUS FACTOR LED TO SENTENCE REDUCTION?	SA
None	4.10
Unknown	3.38
Combination	1.87
Customary Practice(s)	3.10
Gender Stereotype(s)	2.26
Other Factor(s)	3.00
Grand Total	3.22



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