

CHAPTER 7 SEXUAL COERCION AND EXPLOITATION

The structure of offences of sexual coercion and exploitation

7.1 The Penal Codes of Solomon Islands, Kiribati and Tuvalu originally contained the same scheme of offences of sexual coercion and exploitation. However, Solomon Islands has now introduced a new scheme through the Penal Code (Amendment) Sexual Offences Act 2016. This scheme differs in a number of significant respects from its predecessor.

7.2 The Penal Codes of Solomon Islands, Kiribati and Tuvalu all retain the traditional common law distinction between two different offences of sexual coercion:

- an offence of ‘rape’ involving sexual penetration of another person’s body without consent, which is subject to very severe penalties. The offence is punishable in Solomon Islands, Kiribati and Tuvalu by up to life imprisonment: SI s 136F; Ki/Tu s 129; and
- a lesser offence of carrying lower penalties. In Kiribati and Tuvalu, this lesser offence is called ‘indecent assault’: Ki/Tu ss 133(1), 154. In Solomon Islands, it has been renamed ‘indecent act without consent’, reflecting broader scope to the offence: SI s 138.

The focus of this chapter is on these offences of penetration and assault.

7.3 The offence of rape historically could only be committed by a male offender upon a female victim. The offence was restricted to the penetration of a woman’s vulva or vagina by a penis, with a special exemption for married partners. Some other forms of sexual coercion fell within the scope of indecent assault. In recent years, offences of sexual coercion have been reformed in many jurisdictions. One of the objects of the reforms has been to expand the range of conduct covered by the offence of rape, with the result of narrowing the field of indecent assault. The marital exemption has also been removed. Jurisdictions which have moved in this direction include Solomon Islands. Kiribati and Tuvalu, however, have retained the traditional conception of rape except for the removal of the marital exemption.

7.4 Analogous to offences of sexual coercion are offences relating to sexual exploitation of children or of persons with mental disabilities who are presumed to be unable to give meaningful consent or whose consent is otherwise viewed as questionable. See, for example, the offences under SI ss 138A-140; Ki/Tu ss 134-135. In addition, some offences prohibit forms of sexual conduct regardless of whether there was consent. See, for example, incest: SI s 163; Ki/Tu s 156.

Elements of rape

Kiribati and Tuvalu

7.5 Kiribati and Tuvalu have retained the traditional, narrow conception of rape at common law, except for the removal of the marital exemption. The Penal Codes provide in Ki/Tu s 128:

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

Rape in this form can only be committed by a male person upon a female victim. The conduct elements require 'sexual intercourse'. 'Sexual intercourse' is not fully defined. It has generally been understood to be synonymous with the common law concept of 'carnal knowledge', both terms referring to the penetration of a female vulva or vagina by a male penis. This meaning seems implicit in Ki/Tu s 161, which provides that for proof of sexual intercourse, 'it shall not be necessary to prove the completion of the intercourse by the actual emission of seed but the intercourse shall be deemed complete upon proof of penetration only.'

7.6 Sexual intercourse that does not amount to rape may still constitute a lesser offence of 'defilement' under Ki/Tu ss 134-137. An offence of defilement occurs when a person has unlawful sexual intercourse with a female under the age of 15 or with a mentally disabled female (the Codes use the expression, 'idiot or imbecile'): Ki/Tu ss 134, 135. For these offences, consent is not a defence: ss 134(3), 135(3). An offence of defilement is also committed whenever threats, intimidation, false pretences or false representations, or drugs are used to procure a female to have sexual intercourse. The maximum penalty for these offences is two years imprisonment, rising to five years where the female is under 13 years old or is mentally disabled.

7.7 No fault elements are specified in Ki/Tu s 128. It is not therefore required that the defendant have acted intentionally or recklessly. Admittedly, it is difficult to conceive of cases where sexual intercourse would be other than intentional. However, an accused person might claim to have made a mistake by believing that there was consent when there was not, or believing that an expression of consent had not been obtained by force, threats, intimidation, fear, or any of the kinds of false representation specified in the Codes. In such cases, resort could only be made to the defence of reasonable mistake of fact under Ki/Tu s 10. To meet the conditions for this defence, there would have to have been evidence that the defendant turned his mind to the issue of consent and formed a positive belief that there was consent and

that it was not obtained in one of the proscribed ways. Furthermore, this belief would have to be judged reasonable under the circumstances. See **4.23-4.27**. See also below, **7.36-7.39**.

Solomon Islands

7.8 Solomon Islands retains the traditional common law term 'rape' for its most serious offence, together with the focus on sexual penetration. The conduct elements of the offence are a person having sexual intercourse with another person without that person's consent: SI s 136F(1).

A person commits an offence if the person has sexual intercourse with another person; (a) without the other person's consent... Maximum Penalty: Life imprisonment.

However, 'sexual intercourse' is defined in s 136D(2) to cover various forms of non-consensual sexual penetration:

"sexual intercourse" means any of the following:

- (a) the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law;
- (b) the penetration, to any extent, of the genitalia or anus of a person by an object manipulated by another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law;
- (c) the introduction of any part of the penis of a person into the mouth of another person;
- (d) fellatio;
- (e) cunnilingus;
- (f) the continuation of sexual intercourse as defined in paragraph (a), (b), (c), (d) or (e).

Defined in this way, 'rape' in Solomon Islands includes what are sometimes called 'anal rape', 'oral rape', 'digital rape' and 'rape by object'. In this context 'object' includes an animal: s 136D(1). The offence can be committed not only by a male person against a female but also by a male person against another male, and in some of its forms by a female person against a male or against another female.

7.9 There is also a supplementary offence of compelled sexual intercourse, which applies when a person compels someone else to have sexual intercourse with another person without the person's consent. The offence is, like rape, punishable by life imprisonment. The person exercising compulsion would also be guilty of rape as a procurer: see **Chapter 14**. On either of these approaches, the person who is compelled would commit no offence if the conditions for a defence of compulsion

under Penal Codes SI/Ki/Tu s 16 are met.

7.10 Section 136F(1)(b) expressly provides for fault elements of the offence of rape. The person must have sexual intercourse without the consent of the other person and '*knowing or being reckless as to the lack of consent*'. Recklessness in this context is defined in s 136E:

- For this Part, a person is reckless as to another person's lack of consent if:
- (a) the person is aware of a risk that the other person does not consent and it is unreasonable to take the risk; or
 - (b) the person does not give any thought as to whether the person is consenting.

Paragraph (a) defines recklessness in conventional terms. On the general concept of recklessness in criminal law, see **4.62-4.67**. Paragraph (b) extends the concept to include a person who has sexual intercourse with another person without giving any thought as to whether there is consent. It is difficult to imagine a scenario to which this extended definition would apply.

Elements of indecent assault

7.11 Forms of sexual violence other than rape are mainly subsumed within the offences of 'indecent assault' under Ki/Tu ss 133(1), 154 and 'indecent act without consent' under SI s 138, one form of indecent act being an indecent assault.

7.12 The general definition of assault allows an indecent assault to be committed by way of threat as well as by actual physical contact: see **6.10-6.22** on the elements of assault.

7.13 In Kiribati and Tuvalu, the meaning of 'indecent' is determined by the common law. However, at common law 'indecent' does not have a precise or fixed meaning. Rather, its meaning depends on prevailing community standards. In *Drago v R* (1992) 8 WAR 488 (WCCA), it was said that indecency simply means conduct that is 'unbecoming or offensive to common propriety'. However, in *R v McBride* [2008] QCA 412, the Queensland Court of Appeal called for greater specificity and endorsed the view that indecency requires an element of 'moral turpitude', acting in a 'base or shameful manner', or even 'lewdness'. Otherwise, it was said, the scope of the offence would be too wide. In *R v Chase* [1987] 2 SCR 293, it was said that the Canadian offence of sexual assault (which is equivalent to indecent assault) is an assault committed in circumstances that violate the sexual integrity of the victim and there is no requirement for any particular part of the body to be involved. On this approach, the 'indecent' character of conduct could conceivably come from the accompanying words

or surrounding circumstances rather than from the character of the physical conduct itself.

7.14 In Solomon Islands, there is a statutory definition of 'indecent act': SI s 136B.

(1) In this Part, "**indecent act**" means an act of a sexual nature..., other than sexual intercourse, which a reasonable person would consider to be contrary to community standards of decency.

(2) Without limiting subsection (1), an indecent act may be committed:

(a) by way of gestures or words; or

(b) by conveying words or images.

This definition echoes the common law in emphasising that that indecent conduct must be sexual in character and that the characterisation of the act is a matter of community standards. Sub-section (2) makes it clear that the 'indecent' character of conduct can come from the accompanying words or surrounding circumstances rather than from the character of the physical conduct itself.

7.15 The indecent character of conduct has therefore traditionally been determined objectively, by reference to how the recipient might be expected to characterise it rather than how the assailant might do so. Generally, fault elements for indecent assault do not encompass awareness of normative standards. In *Atera v Republic* [2006] KICA11, [5], it was said:

To establish an indecent assault, the prosecution must prove beyond reasonable doubt that the accused intended to commit an indecent assault, that is an intentional assault accompanied by circumstances of indecency – *R v Court* [1989] AC 28.

Nor does an indecent assault necessarily require a sexual motivation or purpose: see *R v Court* [1989] AC 28. Nevertheless, it has also been said that the purpose accompanying the act can affect how it is ultimately characterised. An outwardly innocent act may be indecent because of its purpose; conversely, an innocent purpose may legitimise conduct that would otherwise be questionable. Motivation or purpose is, however, only one variable and it is not determinative. Conduct indecent on its face remains so whatever the purpose which accompanied it.

Kiribati and Tuvalu

7.16 There are two offences of indecent assault in Kiribati and Tuvalu:

- Indecent assault on a female, punishable by up to five years imprisonment: Ki/Tu s 133(1).
- Indecent assault on a male, punishable by up to seven years imprisonment.: Ki/Tu s 154.

7.17 The scope of both these provisions extends beyond true assaults.

- Some invasions of the sexual privacy of a female that do not involve an assault are covered by a separate offence under Ki/Tu s 133(3).

Whoever, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or girl, or whoever intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty, shall be guilty of a misdemeanour, and shall be liable to imprisonment for 1 year.

The coverage of this provision would include cases where the victim is forced to hear or see sexual acts rather than being subjected to sexual acts.

- Indecent assault on a male is included in Ki/Tu s 154. This is an odd, grab-bag provision titled, 'Attempts to commit unnatural offences and indecent assaults'. It covers not only indecent assault on a male but also assault with intent to commit buggery and attempt to commit buggery (presumably, even if consensual).

Any person who attempts to commit any of the offences specified in the last preceding section [buggery], or who is guilty of any assault with intent to commit the same, or any indecent assault upon any male person shall be guilty of a felony, and shall be liable to imprisonment for 7 years.

Consensual sexual practices other than buggery are covered by a separate offence of 'Indecent practices between males': Ki/Tu s 155.

Solomon Islands

7.18 In Solomon Islands, indecent assault has now been subsumed within a broader offence of 'indecent act without consent': SI s 138(1).

A person commits an offence if the person commits an indecent act on or in the presence of another person:

- (a) without the other person's consent; and
- (b) knowing about or being reckless as to the lack of consent.

Penal liability depends on the age of the victim and whether the offender is 'a person

in a position of trust' such as a close relative or a teacher:

Maximum penalty:

- (a) if the victim is a child and the offender is a person in a position of trust in relation to the child – 10 years imprisonment; or
- (b) if the victim is under 13 years of age – 10 years imprisonment; or
- (c) if the victim is between 13 and 15 years of age – 7 years imprisonment; or
- (d) in any other case – 5 years imprisonment.

'Person in a position of trust' is defined in SI s 136C: see below, **7.31**.

7.19 This offence is designed to cover not only cases of indecent assault but also cases where the victim is forced to perform or to witness sexual acts rather than being subjected to sexual acts. This is indicated by the use of the phrase 'in the presence of' in s 138(1). It is also made clear by the definition of 'indecent act' in s 136B:

In this Part, "**indecent act**" means an act of a sexual nature (including a person touching themselves in a sexual way or forcing another person to touch themselves in a sexual way), other than sexual intercourse, which a reasonable person would consider to be contrary to community standards of decency.

7.20 Section 138F(1)(b) expressly provides for fault elements of the offence in the same form as for the offence of rape. An offender must commit an indecent act without the consent of the other person and '*knowing or being reckless as to the lack of consent*'. Recklessness in this context is defined in s 136E:

For this Part, a person is reckless as to another person's lack of consent if:

- (a) the person is aware of a risk that the other person does not consent and it is unreasonable to take the risk; or
- (b) the person does not give any thought as to whether the person is consenting.

Indecent acts may be spontaneous and involve little thought. The extension of the concept of recklessness to a person who gives no thought to the matter of consent may therefore have more practical relevance here than it does in the context of sexual intercourse and the offence of rape.

Lack of consent

7.21 The offences of sexual coercion under the Penal Codes require either lack of

consent to the interaction or an induced expression of consent that is treated as invalid.

7.22 Physical submission by itself is clearly not consent: see SI s 136A(3); *Case Stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259 at 265, 278, 282 (SACCA). Consent is a mental act. However, difficult questions are yet to be resolved about the relationship between consent and states of mind such as acquiescence and tolerance.

7.23 Consent may be implied or tacit as well as expressed: see *Horan v Ferguson* [1994] QCA 375; [1995] 2 Qd R 490. The boundaries of implied consent may be problematic in cases where physical advances are made with the intention or hope of persuading the other person to agree to sexual interaction. Nevertheless, there is no special licence to engage in acts of persuasion, even as between regular sexual partners: see *Case Stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259 at 266-267, 282 (SACCA).

7.24 It is generally sufficient for liability that lack of consent occurs at any time in an interaction. Even when consent is given to sexual interaction, it may still be withdrawn. If sexual interaction continues after consent has been revoked, there is no consent and an offence is committed: SI s 138B(2)(k). Moreover, supervening unconsciousness causes an inability to consent: *Saibu v R* (1993) 10 WAR 279. Nevertheless, it has been suggested that an initial denial of consent may be vitiated by a subsequent change of mind. In *R v Redgard* [1956] St R Qd 1, it was said that a preliminary non-consensual act and a subsequent consensual act may be so connected that they should be regarded as forming 'one transaction'. The grant of consent is then taken to characterise the whole transaction.

Kiribati and Tuvalu

7.25 Kiribati and Tuvalu retain the offence of rape in Ki/Tu s 128 in its historical form which prohibits having sexual intercourse without consent or with consent if the consent is obtained in any of these ways:

- 'by force or by means of threats or intimidation of any kind';
- 'by fear of bodily harm';
- 'by means of false representations as to the nature of the act';
- 'in the case of a married woman, by personating her husband'.

In effect, an expression of consent induced by one of the proscribed means is treated as no consent at all. Nevertheless, the list of proscribed means is very restricted. It includes neither false representations other than those specified nor the abuse of positions of authority or trust. A false representation 'as to the nature of the act' has

traditionally been understood to be confined to a representation that the act was something other than a sexual act. For example, it could be a representation that a sexual act was a form of medical treatment: see, for example, *Tebounaba v R* [1999] SBCA 5.

7.26 A lesser offence of 'defilement' is committed whenever threats, intimidation, false pretences or false representations are used to procure unlawful sexual intercourse with a female: see above **7.6**. This may cover some the ground left by the restricted scope of the offence of rape.

7.27 For indecent assault under Ki/Tu s 133(1), 154, the general requirement for lack of consent for an assault is applicable: see **6.14-6.15**.

7.28 A defence of consent is removed where sexual interaction involves a female in certain protected categories:

- Section 133(2) provides that consent is not a defence to an indecent assault on a girl under the age of 15:

It is no defence to a charge of an indecent assault on a girl under the age of 15 years to prove that she consented to the act of indecency.

- Unlawful sexual intercourse with a female under the age of 15 or with a mentally disabled female constitute offences of 'defilement' under Ki/Tu ss 134, 135. For these offences, consent is not a defence: ss 134(3), 135(3).

Solomon Islands

7.29 For the purposes of offences of sexual coercion in Solomon Islands, 'consent' has a statutory definition. It means '*free and voluntary agreement*': Penal Code SI s 138A(1). The test is mental not physical. Mere physical submission is therefore excluded. This is affirmed by s 138A(3):

A person who does not offer actual physical resistance to an act is not, by reason only of that fact, to be regarded as consenting to the act.

Also excluded are mere expressions of consent induced by factors such as threats or fear rather than free and voluntary agreement. The formula has been adopted from some modern Australian legislation.

7.30 For greater certainty, s 138A(2) specifies a number of scenarios which are *not* included in the concept of consent:

Circumstances in which a person does not consent to an act include

circumstances where:

- (a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person; or
- (b) the person submits because he or she is unlawfully detained; or
- (c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing; or
- (d) the person is incapable of understanding the nature of the act; or
- (e) the person is mistaken about the nature of the act or the identity of the other person; or
- (f) the person mistakenly believes that the act is for medical or hygienic purposes; or
- (g) the person mistakenly believes that the act will be beneficial to his or her physical, psychological, social or spiritual wellbeing; or
- (h) the person submits out of respect or fear due to another person's position of authority, trust or responsibility; or
- (i) the person submits because of threats to shame, degrade or humiliate the person or another person; or
- (j) the person submits because of a false representation as to the nature or purpose of the act; or
- (k) the person withdraws consent during the act after initially consenting to it.

These scenarios fall into three groups:

- Fear on the part of a person expressing consent or intimidation by an offender: (a); (b); (h); (i).
- Incapacity of a person to give meaningful consent: (c); (d).
- Mistake by a person expressing consent or misrepresentation by an offender: (e); (f); (g); (j).

7.31 Despite the detail of s 138A(2), the critical phrase in s 138A is 'free and voluntary agreement' in s 138A(1). Sub-section 138A(2) does not alter the meaning of consent: it merely lists some instances where consent is not freely and voluntarily given.

7.32 For the purposes of s 138B(2)(h), the relationships which constitute 'a position of trust' are detailed in s 138C:

- (1) In this Part, a person is a "***person in a position of trust***" in relation to a child if the person holds a position of trust or authority in relation to the child, or if the child is dependent in any way on the person.
- (2) Without limiting subsection (1), a person is in a position of trust in relation to a child if the person is any of the following:
 - (a) the child's parent, grandparent, step-parent or adoptive parent;

- (b) the child's sibling, half-sibling or step-sibling;
- (c) the child's uncle or aunt;
- (d) the child's cousin;
- (e) the child's custodian, guardian or carer;
- (f) the child's custom doctor or healer, or medical practitioner;
- (g) the child's teacher;
- (h) the child's counsellor;
- (i) a leader of the child's religion or community;
- (j) the child's legal practitioner;
- (k) the child's employer;
- (l) a police officer;
- (m) if the child is in a correctional centre, a correctional services officer in the centre.

7.33 There may be room for debate over the significance of harassment and economic pressure as factors negating consent. Nevertheless, s 138(2)(a) refers not only to 'fear of force' but also 'fear of harm of any type'. Moreover, in *Michael v State of Western Australia* [2008] WASCA 66; 183 A Crim R 348 at [74], it was denied that a threat of physical violence need be involved to make an expression of consent not free and voluntary. In that case, there was a threat of police harassment

7.34 There may also be room for debate over the significance of some mistakes, particularly where misrepresentations have occurred. The list in s 138B(2)(j) identifies only misrepresentations as to the 'nature or purpose' of the act. Misrepresentations as to the nature or purpose of the act have been traditionally understood to concern only representations that the act was something other than a sexual act. For example, in *Tebounaba v R* [1999] SBCA 5, a custom medical practitioner had represented that sexual acts were forms of medical treatment. However, other forms of misrepresentation may also be held to negative free and voluntary consent. For example, in *R v Winchester* [2011] QCA 374, it was suggested that promises or offerings which, 'taking into account the circumstances in which the promise or offer is made and characteristics of the offeree such as her intellect, maturity, psychological and/or emotional state', result in the denial of free choice would negative consent. Nevertheless, the significance of minor or vague misrepresentations remains uncertain: see the discussion in *Michael v R* [2008] WASCA 66; (2008) 183 A Crim R 348.

7.35 In *R v Cuerrier* [1998] 2 SCR 371, the Supreme Court of Canada held that fraud in cases of sexual assault should have the same elements as in commercial cases: dishonesty and deprivation. However, it was also ruled that, in order to avoid trivialising offences, the deprivation should be of a kind involving at least a risk of serious bodily harm. On that basis, the Supreme Court upheld the conviction of an

accused who had concealed his HIV positive condition when he had unprotected sexual intercourse. Other courts might be similarly attracted to the idea of consent being invalidated only by a category of serious misrepresentations. However, the decision in *Cuerrier* might still be questioned on another ground: whether non-disclosure as well as active misrepresentation should create liability.

Mistakes about consent

7.36 When issues arise respecting the fault elements of offences of sexual coercion, it is usually because the defendant claims a belief that consent was present even though this belief was a mistake. Admittedly, there may also be cases in which physical contact alleged to be indecent was unintentional. But the conduct will be intentional in most cases of sexual contact and effectively in all cases of sexual penetration. In cases where fault is a separate issue, it is usually because of an assertion by an accused of a mistaken belief in consent. The operation of mistake as an excuse for an act of unwanted sexual contact has been a contentious area of criminal law. The debate has concerned whether a mistake should have to be not only genuine but also objectively reasonable in order to provide a defence.

7.37 Solomon Islands currently has a different answer to Kiribati and Tuvalu.

- In Solomon Islands, the offences of rape and indecent act without consent contain intention or recklessness respecting lack of consent as their fault elements. Both offences require that an offender act 'knowing about or being reckless as to the lack of consent': SI s 136F(1)(b). A mistaken belief in consent will negate either of these states of mind, whether or not it is reasonable. This does not mean that the reasonableness of a claimed mistake is wholly irrelevant. In deciding whether a mistake was actually made, a court may consider the reasonableness of what is alleged. However, reasonableness is not a condition for the negation of responsibility. A foolish mistake may still provide a good defence.
- In Kiribati and Tuvalu, the offences of rape and indecent assault do not contain fault elements respecting lack of consent. Instead, a defendant wishing to assert a mistaken belief in consent must rely on the excusing defence of mistake of fact: Ki/Tu s 10. Section 10 permits the defence only when a mistake is reasonable as well as honest: see **4.23-4.26**.

7.38 The position respecting mistakes in Solomon Islands reflects that at common law. At common law, mistake or ignorance of fact has been treated as an aspect of the general law of fault elements. An honest but mistaken belief in consent, whether or not reasonable, has been held to be a good defence because it negates intention or

recklessness respecting lack of consent: see *DPP v Morgan* [1976] AC 182; [1975] 2 All ER 347. The reasonableness of the accused's belief is relevant only to the question whether the belief was genuinely held. The decision in *Morgan* created a political controversy which largely bypassed jurisdictions that had versions of the Griffith Criminal Code. This was because all these codes made mistake of fact a special excusing defence which required a mistake to be reasonable as well as honest. This is still the law in Kiribati and Tuvalu: Ki/Tu s 10. It was once also the law of Solomon Islands: see *Tahinao v R* [2006] SBCA 12. However, the requirement for knowledge or recklessness was inserted as part of the reorganisation of sexual offences in Solomon Islands in 2016. Curiously, no attempt was made to reconcile this insertion with the general scheme of criminal responsibility in SI ss 9-10.

7.39 It is ironic that Solomon Islands has now brought its law on mistaken belief in consent into line with the mainstream doctrine of the common law. The trend elsewhere has been in the opposite direction. Several jurisdictions which previously subscribed to common law doctrine have now created exceptions for offences of sexual coercion and required that a mistaken belief in consent be reasonable if it is to provide a defence: see, for example, Criminal Code, R.S.C. 1985, c.-46, s 273.2; Crimes Act 1961 (NZ), s 128(2)(b), (3)(b); Crimes Act 2013 (Samoa) s 51(3); Crimes Act 1900 (NSW) ss 61HE(3), 61I. Admittedly Fiji abandoned the model of the Griffith Code in favour of common law doctrine when it adopted the Crimes Act 2009. However, the Fiji legislation restricts the circumstances under which a claim for a mistake of fact can be supported by evidence of self-induced intoxication: Crimes Act 2009 (Fiji) s 30(4)-(5). In the absence of evidence of intoxication, a claim for an honest albeit unreasonable belief in consent is unlikely to have any credibility. Solomon Islands puts no such limit on the use of evidence of self-induced intoxication.

Offences of sexual exploitation

7.40 Lack of consent is not an element of a range of offences relating to sexual activity with children or mentally disabled persons. The rationale for these offences is presumably that the victims are unable to give meaningful consent or that consent has been obtained through exploiting a vulnerability. However, lack of consent is not an element which the prosecution must prove.

Kiribati and Tuvalu

7.41 The Penal Codes of Kiribati and Tuvalu contain several offences relating to sexual intercourse with female children and females who are mentally disabled: Ki/Tu ss 134-136. Some of these offences use the term 'defilement' in their titles but the offence

descriptions refer to having or attempting to have sexual intercourse. There are no equivalent offences relating to males. However, buggery, attempted buggery, and acts of 'gross indecency' between males are offences regardless of the ages and mental states of the persons involved: Ki/Tu ss 154-156.

7.42 There are several age-related offences in Ki/Tus s 134-136.

Ki/Tu s 134(1)) creates an offence of having unlawful sexual intercourse with a girl under the age of 13 years, with liability to life imprisonment;

- Ki/Tu s 134(2) creates an offence of attempting to have unlawful sexual intercourse with a girl under the age of 13, with liability to 5 years imprisonment;
- Ki/Tu s 135(1)(a) creates an offence of having or attempting to have unlawful sexual intercourse with a girl aged 13-15 years, with liability to 5 years imprisonment.
- Ki/Tu s 136 creates an offence of 'procuration', which covers procuring to attempting to procure any female under the age of 18 to have unlawful sexual intercourse: Ki/Tu s 136(1)(a).

Consent is expressly stated to be no defence to any of these offences: Ki/Tu ss 134(3), 135(3), 136(2).

7.43 These offences are all subject to Ki/Tu s 160, which makes ignorance of the child's age immaterial unless otherwise expressly stated.

Except as otherwise expressly stated, it is immaterial in the case of any of the offences referred to in this Part committed with respect to a woman or girl under a specified age, that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age.

7.44 It is a defence to a charge under s 135, concerning a child aged 13-15, to prove that there was reasonable cause to believe and actual belief that the child was above the age of 15. Under s 134, concerning a child is under 13, no provision is made for a defence of reasonable belief that the child was older. Presumably this is because it is considered that a child that young would not look 16 or older, so that an offence under s 135 would be committed even if the mistake was reasonable. In these respects, the Penal Codes follow the common law, where matters of age have been held not to be subject to standard principles respecting mental elements: see, for example, *Prince* (1875) LR 2 CCR 154. Modern legislation in most jurisdictions is to similar effect.

7.45 Exploitation of mentally impaired females is covered by Ki/Tu 135(1)(b). This makes it an offence, punishable by imprisonment for up to 5 years, to have or attempt to have sexual intercourse with a 'female idiot or imbecile woman'. The circumstances

must be such as to prove that the offender knew that the female 'was an idiot or imbecile'. The terms 'idiot' and 'imbecile' are not defined. Presumably they refer to mental disability diminishing the capacity to make a free choice.

7.46 The coverage of these offences of exploitation is limited. Indecent dealing which does not involve sexual intercourse or attempted sexual intercourse falls outside their scope. In most such cases, the only charge which can be brought is indecent assault under Ki/Tu s 133.

7.47 The offence of incest under Ki/Tu s 156(1) applies to any male person '*who has sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother*'. The offence is not age-specific. Nevertheless, where the other person is under the age of 13 years, the maximum penal liability increases from 7 years to life imprisonment. Consent is no defence: Ki/Tu s 156(2).

Solomon Islands

7.48 The Penal Code of Solomon Islands contains a broad-ranging scheme of offences relating to sexual activity with children and persons who have a 'significant disability'. These offences apply to sexual activity with both female and male persons. They cover 'indecent acts' as well as sexual intercourse. On the definition of 'indecent act' in SI s 136B, see above, **7.19**. The concept covers not only cases of indecent assault but also cases where the victim is forced to perform or to witness sexual acts rather than being subjected to sexual acts.

7.49 There are several age-related offences. Some are connected with being in a position of trust in relation to the child. On the meaning of 'a position of trust', see above, **7.32**.

- Having sexual intercourse with a child under the age of 15 years: SI s 139(1). The penalty is liability to: life imprisonment if the child is under 13 and the offender is in 'a position of trust'; 15 years imprisonment if the child is 13-15 years.
- Committing an indecent act on or in the presence of a child under the age of 15 years: SI s 139(2). The penalty is liability to: 7 years imprisonment if the child is under 13; 7 years imprisonment if the child is 13-15 years and the offender is in 'a position of trust'; 5 years in any other case.
- Having sexual intercourse with a child aged 15 -17 years in breach of 'a position of trust': SI s 140(1). The penalty is liability to 15 years imprisonment.
- Committing an indecent act on or in the presence of a child aged 15-17 years in breach of 'a position of trust': SI s 140(2). The penalty is liability to 5 years

imprisonment.

- ‘Procuration’, which includes procuring to attempting to procure a child to perform an indecent act or to have sexual intercourse: SI s 141(1). The penalty is liability to: 20 years imprisonment if the child is under 15; 15 years imprisonment if the child is 15-18 years.
- Commercial sexual exploitation of children is criminalized through a range of offences in SI ss 143-144. The coverage of these offences includes:
 - for children under the age of 18: obtaining commercial sexual services; arranging or facilitating commercial sexual services; obtaining a benefit from the provision of commercial sexual services;
 - for children under the age of 15: possessing, distributing or producing child exploitation material; and offering or procuring a child for the production of child exploitation material.

Consent is expressly stated to be no defence to any of the offences in ss 139-140: SI ss 139(3), 140(3),

7.50 These offences are all subject to SI s 167, which makes ignorance of the child’s age immaterial unless otherwise expressly stated.

Except as otherwise expressly stated, in a prosecution for an offence under this Part committed in relation to a child under a specified age, it is immaterial that the accused person did not know that the child was under that age, or believed that the child was not under that age.”

No provision is made for a defence of belief or reasonable belief that the child was older. In this respect, the Penal Code follows the common law, where matters of age have been held not to be subject to standard principles respecting mental elements: see, for example, *Prince* (1875) LR 2 CCR 154. Modern legislation in most jurisdictions is to similar effect.

7.51 Exploitation of persons with ‘a significant disability’ is addressed by SI s 138A. The term ‘significant disability’ is defined in s 138A(1):

In this section:

“significant disability” means an intellectual, mental or physical condition or impairment (or a combination of more than one of these types of condition or impairment) that affects a person to such an extent that it significantly impairs a person’s capacity to:

- (a) understand the nature of sexual conduct; or
- (b) understand the nature of a decision about sexual conduct; or
- (c) communicate decisions about sexual conduct.

7.52 Under s 138A, it is an offence:

- to have sexual intercourse with a person *knowing* that the person has 'a significant disability' and is submitting as a result of the disability: s 138A(2);
- to commit an indecent act on in the presence of a person *knowing* that the person has 'a significant disability' and is submitting as a result of the disability: s 138A(3).

The penalty structure is the same for both forms of offence: liability to 10 years if the victim is a child (under 18 years) and the offender is a person in 'a position of trust'; 10 years if the victim is a child under 13 years; 7 years if the victim is 13-15 years old; 5 years in any other case.

7.53 The offence of incest applies to any person who has sexual intercourse with a 'close family member': s 163 (2). A 'close family member' is defined as: '(a) a parent or grandparent'; (b) a child or other lineal descendant; (c) a brother, sister, half-brother or half-sister'. It is a defence to prove that:

The accused person did not know, and could not reasonably have been expected to know, that the other person was a close family member.

The offence is not age-specific. Nevertheless, where the other person is under the age of 13 years, the maximum penal liability increases from 10 years to life imprisonment.