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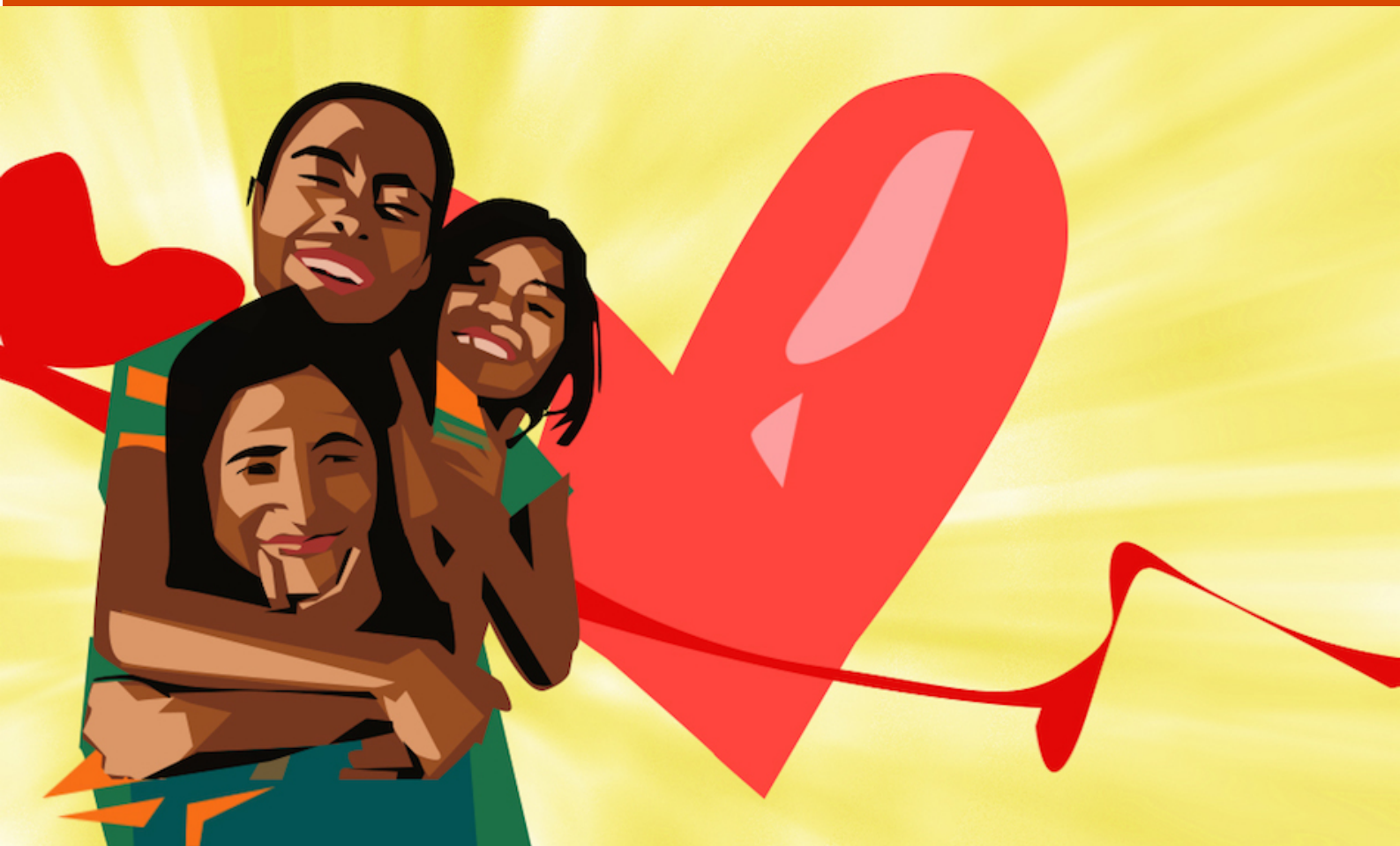


**ALFeLa**  
Asistêcia Legál ba Feto no Labarik

## Improving the Penal Code to better protect women and children

Submission to the National Parliament of Timor-Leste

January 2015



The Asia Foundation



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ALFeLa's Mission is to support women and children in Timor-Leste to access a formal justice system which is fair, through:

Legal aid;  
Legal education; and  
Advocacy.

ALFeLa's Vision is to ensure that all women and children in Timor-Leste are able to access a formal justice system which is fair and without discrimination. We believe that legal assistance for women and child victims is essential to ensure justice, protect their human rights and promote gender equality in Timor-Leste.

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**ALFeLa**  
Asistênsia Legál ba Feto no Labarik

## **Improving the Penal Code to better protect women and children**

### **A submission to the Timor-Leste National Parliament**

**January 2015**

Judicial System Monitoring Programme (JSMP)  
Women and Children's Legal Aid (ALFeLa)

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## EXECUTIVE SUMMARY

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Through court monitoring and legal assistance to victims of gender-based violence, JSMP and ALFeLa have identified a number of provisions in the Timor-Leste Penal Code that fail to adequately protect women and children consistent with Timor-Leste's international and constitutional obligations. This submission identifies those provisions and gives JSMP and ALFeLa's recommendations for amendments to the Penal Code to rectify these deficiencies. The following is a summary of our recommendations which are explained in greater detail in the body of the submission.

### *Incest and sexual crimes against minors*

JSMP first called for the creation of a specific crime of incest in the Penal Code in 2012 in its report *Incest in Timor-Leste: An Unrecognised Crime*, having found that incest is a widespread problem in Timor-Leste and that the Penal Code affords only limited protection to victims, particularly those above the age of 14. In mid-2014, the National Parliament sought JSMP and ALFeLa's comments concerning its proposal to amend Article 172 (rape) of the Penal Code to include a new subsection on the crime of incest.

JSMP and ALFeLa commend Parliament for ensuring that the proposed crime of incest applies irrespective of the victim's consent, age, and whether or not violence or serious threats are used, as well as ensuring that incest is a public crime and is applicable to a range of family members, including step-relations. However, in JSMP and ALFeLa's view, there are a number of ways in which the National Parliament could improve the proposed draft, which are outlined in this submission. These include:

- separating the crime of incest from the crime of rape to avoid confusion between the two crimes, which are different in nature and require a different standard of proof;
- criminalising other incestuous sexual acts to recognise that incest is not limited to sexual intercourse and can include many other sexual acts that can cause harm to the victim;
- ensuring that the crime of incest covers the uncle-niece relationship;
- ensuring that the penalty for incest (both intercourse and other sexual acts) is consistent with the penalties for the crime of aggravated sexual abuse of a minor; and
- ensuring that only the perpetrator may be prosecuted by clarifying that the perpetrator must be in a position of family authority over the victim.

The National Parliament also sought JSMP and ALFeLa's comments in relation to its proposed changes to Article 177 (sexual abuse of a minor) and Article 178 (sexual acts with an adolescent). The changes to Article 177 effectively increase the age of consent in Timor-Leste to 17 years, which means that minors aged 16 and under cannot lawfully consent to sexual acts, including intercourse. While this change provides stronger protection to minors aged 14-17 by reducing the evidentiary requirements previously necessary to prosecute sexual abuse against minors in this age range, it also criminalises consensual sexual relations between and with minors aged 16 (those under 16 are not criminally liable). JSMP and ALFeLa recommend that there should be some flexibility in the Penal Code to allow for such consensual relationships, particularly as the Civil Code permits minors aged 16 to marry with parental consent. This could be achieved by including a defence to the crime of sexual abuse of a minor in circumstances where the 'victim' is 16 years of age and the 'offender' is close in age to the victim (for example, within 3 years of age), or where the parties are legally married.

The proposed changes to Article 177 also mean that Article 178 is no longer necessary, as the amended Article 177 will cover acts previously covered by Article 178. Accordingly, JSMP and ALFeLa recommend the removal of Article 178 concurrent with the approval of changes to Article 177.

### ***Sexual Coercion and Rape***

Separately, JSMP and ALFeLa have found that the Penal Code's provisions concerning sexual coercion (Article 171) and rape (Article 172) require significant reform to comply with international obligations and best practice. Currently, these provisions require proof of force or threats to demonstrate lack of consent. In JSMP and ALFeLa's experience, this is often difficult for victims to prove, particularly when they have been raped or otherwise sexually abused in coercive circumstances not involving obvious force. Consequently, these provisions do not afford women, who are most often the victims of such crimes, adequate protection. International best practice suggests rape provisions should require proof:

- that the victim did not voluntarily agree by demonstrating that the defendant failed to ascertain that the victim was consenting; or
- that the act took place in certain coercive circumstances in which consent is presumed to be absent.

JSMP and ALFeLa believe that the latter approach, and a comprehensive (although non-exhaustive) list of coercive circumstances will provide prosecutors, public defenders and judges with a clear framework for the prosecution of rape and sexual coercion.

Broadening Articles 171 (sexual coercion) and 172 (rape) in this way means that they will also cover acts previously covered by Articles 179 (sexual abuse of a person incapable of resistance) and 180 (sexual fraud), resulting in more consistent evidentiary requirements and sentencing outcomes. Accordingly, JSMP and ALFeLa recommend the removal of Articles 179 and 180 from the Penal Code.

JSMP and ALFeLa have also considered the issue of marital rape. Although marital rape in Timor-Leste can be theoretically prosecuted in the same manner as rape by persons outside a marriage, JSMP and ALFeLa recommend specifically criminalising marital rape for compliance with international obligations and best practice, and to generate greater public awareness that rape is a criminal offence both within and outside marriage. This will both deter perpetrators and encourage more victims to access the formal justice system and other support services.

### ***Aggravating factors in sexual offences and physical assault***

Increasing a sentence based on the presence of aggravating factors is another way the law can better protect victims, serving as both a specific deterrent for reoffenders and a general deterrent for potential perpetrators within the community. JSMP and ALFeLa recommend amending the Penal Code to include a more consistent and broader range of aggravating factors to enable the courts to impose more suitable punishments for sexual crimes committed in aggravated circumstances. Recommended new factors include:

- physical and psychological injury to the victim;
- pregnancy resulting from the relevant acts;
- the involvement of multiple perpetrators;
- the use or threat of force;
- the presence or implied presence of a weapon; and
- a degree of planning prior to committing the acts.

To improve the consistency of existing aggravating factors, JSMP and ALFeLa recommend changes to the current Article 173, which is only applicable to sexual coercion and rape, and to Article 182, which is more broadly applicable to sexual crimes. These include:

- adding the aggravating factors relating to the abuse of a position of authority arising within educational, medical or corrective facilities and committing an offence upon an unconscious or incapable persons in Article 173 to Article 182;
- changes to resolve confusion arising from the similarities between the aggravating factor relating to abuse of familial relationship in Article 173(a) and existence of familial relationship in 182(1)(d);

- amending Article 182(1)(c) concerning transmission of the venereal disease, syphilis or HIV/AIDS so that it refers to a broader category of 'sexually transmitted infections' and to ensure that both infection of the victim *or* knowledge by the perpetrator that they carry such infection can be considered aggravating factors; and
- if JSMP and ALFeLa's recommended amendments are made to Article 177 on sexual abuse of a minor, removing Article 173(d) to avoid confusion.

In addition, in order to recognise the serious nature of crimes against the person which involve the use of weapon, as well as the additional threat and likelihood of serious injury in such crimes, JSMP and ALFeLa recommend that the use or threatened use of a weapon is incorporated as an aggravating factor in crimes against physical integrity.

### ***Law Against Domestic Violence***

JSMP and ALFeLa have identified that the proposed amendments to the Penal Code outlined in this submission require amendments to the *Law Against Domestic Violence* (LADV) to ensure consistency between the two pieces of legislation. These include incorporating the new article criminalising incest in Article 35(a) and deleting references to Articles 178 (sexual acts with an adolescent) and 179 (sexual abuse of a person incapable of resistance) from Article 35(b).

JSMP and ALFeLa also recommend that Article 35 of the LADV be amended to include Articles 157 (threats), 258 (property damage), 259 (aggravated property damage) and 260 (property damage with use of violence) for consistency with the definition of domestic violence in Article 2 of the LADV, which includes both psychological violence (such as threats) and economic violence (for example, partial or total destruction of personal effects or other economic resources intended to meet personal and household needs). Including these crimes in Article 35 of the LADV also has an important practical effect. Article 35 lists all crimes considered to be domestic violence, enabling otherwise semi-public crimes to be treated as public crimes when committed in a family context (pursuant to Article 36). Threats and property damage committed in a family context should not be dependent on the victim filing a complaint.

### ***Failure to Report Crimes of Domestic Violence***

Finally, while this submission primarily focuses on legislative change to better protect women and children, JSMP and ALFeLa also wish to draw attention to failure to report crimes in accordance with the law. The Penal Code criminalises failure to report a public crime where a person is aware of such a crime, and has an obligation to report it.

These people include police officers, teachers employed by the Ministry of Education, doctors employed by the Ministry of Health and public servants such as social workers and Child Protection Officers employed by the Ministry of Social Solidarity. JSMP and ALFeLa are not aware of any prosecutions of failure to report crimes of domestic violence, and urge the public prosecution to pursue these cases. Prosecuting police and public servants who fail to report crimes will encourage the reporting of public crimes, such as those of domestic violence, ultimately ensuring better protection for victims. At the same time, JSMP and ALFeLa encourage the PNTL and government departments such as the Ministry of Social Solidarity, Ministry of Education and Ministry of Health to incorporate as part of their training the positive obligation for police officers and public servants to report public crimes in the event they learn that one has been committed.

## **Recommendations**

The following is a summary of the recommendations made by JSMP and ALFeLa in this submission:

### **Recommendation 1: Incest**

A new article should be inserted in the Penal Code after Article 172 (rape) that criminalises both incestuous intercourse and other sexual acts, covers the uncle-niece relationship, has a penalty commensurate with that for aggravated sexual assault of a minor, and clarifies that the crime applies only to the person who is exploiting the family relationship to ensure that only the perpetrator is prosecuted.

### **Recommendation 2: Sexual abuse of a minor**

The proposed changes to Article 177 should be amended to include a defence to the crime of sexual abuse of a minor where the sexual relations are consensual, the 'victim' is 16 years of age, and the 'offender' is close in age (for example, within 3 years of age) to the victim or the parties are legally married.

### **Recommendation 3: Sexual abuse of an adolescent**

Given that the amended Article 177 will cover acts previously covered by Article 178, Article 178 should be removed from the Penal Code.

### **Recommendation 4: Rape**

Article 172 (rape) of the Penal Code should be redrafted so that it defines rape as sexual intercourse (consistent with the Code's current definition: vaginal, anal or oral sex with a person, or introducing objects into the vagina or anus of a person) when the act takes place without that person's consent. It should also define 'consent' as free and voluntary agreement, and include a non-exhaustive list of circumstances in which a person does not consent to an act. Further, it should include guidance for judges about circumstances which do not necessarily mean that the victim consented (for instance, lack of physical resistance or injury) and to ensure judges do not draw adverse inferences from a victim's delay in reporting a rape.

### **Recommendation 5: Sexual coercion**

Article 171 (sexual coercion) of the Penal Code should be redrafted in a similar manner to that recommended above for Article 172 (rape).

### **Recommendation 6: Marital rape**

Articles 171 (sexual coercion) and 172 (rape) of the Penal Code should expressly state that a relationship of marriage (whether in law, church or custom) or any other relationship between the defendant and victim does not preclude the prosecution of the offence.

### **Recommendation 7: Sexual abuse of a person incapable of resistance and sexual fraud**

Should National Parliament agree to Recommendations 4 and 5 relating to Articles 172 (rape) and 171 (sexual coercion), Article 179 (sexual abuse of a person incapable of resistance) and Article 180 (sexual fraud) should be removed from the Penal Code, as acts currently covered by these articles will be covered by the amended Articles 171 and 172.

### **Recommendation 8: Aggravation in crimes of sexual aggression and sexual abuse**

- (1) Subparagraph 173(b) relating to abuse of a position of authority within educational, medical or corrective facilities, and subparagraph 173(c) relating to committing an offence upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency, should be added to Article 182 so that they apply to all sexual crimes.

- (2) Article 182 should be expanded to include the following aggravating factors in sexual crimes:
- physical and psychological injury to the victim;
  - pregnancy resulting from the relevant acts;
  - the involvement of multiple perpetrators;
  - the use or threat of force;
  - the use, presence or implied presence of a weapon; and
  - a degree of planning prior to committing the acts.
- (3) Subparagraph 182(1)(b) should be redrafted so that it refers to a broader category of ‘sexually transmitted infections’, and so that both infection of the victim *or* knowledge by the perpetrator that they carry such an infection at the time of the relevant act/s constitutes an aggravating factor.
- (4) Subparagraph 173(a) should be redrafted to be consistent with 182(1)(d), and subparagraph 182(1)(d) redrafted to include wards and children under guardianship. In addition, if the recommended amendments are made to Article 177, subparagraph 173(d) should be removed.

#### **Recommendation 9: Aggravation in crimes of physical assault**

Articles 147 and 156 should be amended to include use or threatened use of a weapon as an aggravating factor in crimes of physical assault.

#### **Recommendation 10: Law Against Domestic Violence**

Article 35 of the Law Against Domestic Violence should be amended to ensure consistency with the proposed amendments to the Penal Code. Specifically, the new article criminalising incest should be included in subsection (a) of Article 35 and reference to Articles 178 (sexual acts with an adolescent) and 179 (sexual abuse of a person incapable of resistance) should be deleted from Article 35 subsection (b). Subsection (b) of Article 35 should also be amended to include Articles 157, 258, 259 and 260 of the Penal Code relating to threats, property damage, aggravated property damage and property damage with the use of violence.

#### **Recommendation 11: Prosecution of failure to report crime of domestic violence**

The public prosecution should prosecute cases of failure to report under Article 286 of the Penal Code when it becomes aware of cases where a police officer or public servant has failed to report a crime of domestic violence.

#### **Recommendation 12: Training about obligation to report**

The PNTL and other government departments such as the Ministry of Social Solidarity, Ministry of Education and Ministry of Health should incorporate as part of their training the positive obligation for police officers and public servants to make a notification in the event they learn that a public crime has been committed.

## INTRODUCTION

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Timor-Leste has obligations under international law to promote gender equality arising from the *Convention on the Elimination of Discrimination Against Women* (CEDAW), which it ratified without reservation in 2003.<sup>1</sup> CEDAW requires that State Parties take immediate steps to eliminate all aspects of discrimination in women's lives. In order to fully implement its obligations under CEDAW, Timor-Leste must take steps to adopt and incorporate its principles in national legislation, national policies and the national development plan. In 2009, the Committee on the Elimination of Discrimination Against Women highlighted Timor-Leste's obligations under this Convention to protect victims of gender-based violence and guarantee their access to justice.<sup>2</sup>

Gender-based violence is widely recognised as a violation of human rights and a form of discrimination that seriously affects women's ability to enjoy many of their human rights.<sup>3</sup> Among others, these include women's right to life, the right to liberty and security of person, and the right to the highest standard attainable of physical and mental health.<sup>4</sup>

Women and children in Timor-Leste are disproportionately subject to physical and sexual violence, particularly within the home. Although government, civil society and international partners are working towards improving the protection of women and children in Timor-Leste across a range of sectors, JSMP and ALFeLa believe that comprehensive legislation remains key to Timor-Leste's ability to respond to this problem in an effective manner.

Timor-Leste's Penal Code is now in its fifth year of effect, having entered into force in 2009 pursuant to Decree Law No. 19/2009. It was developed by a commission of Timorese and international experts to ensure the protection of fundamental rights and freedoms enshrined in the Timor-Leste Constitution, with the objective of respecting the cultural and social realities of Timorese society. The Code, described in its own enacting legislation as 'more than an end in itself... a fundamental step in the construction of the Timorese legal system', was recognised as an organic, living law open to future enhancements based on advances in international law, judicial practice and lessons learned.

It is within this context that JSMP and ALFeLa have reviewed the Penal Code with a special focus on offences that most directly affect women and children. This submission aims to bring attention to weak provisions which currently fail to protect women and children consistent with Timor-Leste's constitutional and international obligations, assess approaches taken by different jurisdictions, discuss possible amendments appropriate to the Timorese context, and provide the National Parliament with a basis from which it can draft an amendment and conduct community consultation. On this note, JSMP and ALFeLa implore the National Parliament to prepare future draft amendments in both Portuguese and Tetum. Given the low numbers of Portuguese-speakers in National Parliament, civil society and the broader community, only a Tetum version will enable thorough understanding and Parliamentary debate, and a genuine consultation process.

In this submission, JSMP and ALFeLa have assessed provisions relating to incest, sexual abuse of minors and adolescents, rape, sexual coercion, sexual fraud, sexual abuse of a person

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<sup>1</sup> CEDAW's principles became immediately applicable in Timor-Leste following publication of its ratification in Timor-Leste's Official Gazette. See: Constitution of the Democratic Republic of Timor-Leste, article 9 (International Law)

<sup>2</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations: Timor-Leste, No. CEDAW/C/TLS/CO/1, (7 August 2009).

<sup>3</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (IIth session, 1992) (available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>). See also Raoul Wallenberg Institute, 'Gender Justice Best Practices' (Report, International Legal Assistance Consortium, September 2007), 23

<sup>4</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (IIth session, 1992) (available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>). See also 'Achieving Justice for Victims of Rape and Advancing Women's Rights: A Comparative Study of Legal Reform' (Report, TrustLaw, December 2011), 14

incapable of resistance, as well as aggravating factors applicable to both sexual and physical violence.

JSMP and ALFeLa have also reviewed and made recommendations in relation to Timor-Leste's Law Against Domestic Violence to ensure consistency with this submission's proposed amendments to the Penal Code, and to improve its own protection of women and children by recommending the inclusion of both threats and property damage as crimes of domestic violence.

Finally, JSMP and ALFeLa raise the crime of failure to report and urge the public prosecution to prosecute such crimes committed by police and public servants, particularly when they fail to report crimes of domestic violence.

## THE ROLE OF THE PENAL CODE

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The purpose of the Timor-Leste Penal Code is to protect the fundamental rights and freedoms enshrined in the Constitution of the Democratic Republic of Timor-Leste.<sup>5</sup> The Penal Code demonstrates both the State's respect for individual freedoms and its responsibility to intervene when it observes harm to legal interests fundamental to life in society. Intervention can involve imposing punishment and also reintegrating the offender into society.<sup>6</sup>

In particular, Title II of Book II of the Penal Code, which describes crimes against individuals, aims to provide '...special protection to eminently personal legal interests' such as the protection of life, physical integrity, and personal and sexual freedom.<sup>7</sup> This Title, and particularly the crimes relating to the mistreatment of minors and spouses, is considered fundamental to the affirmation of the rule of law and protection of human rights in Timorese society.<sup>8</sup>

In brief, the Penal Code aims to both punish and protect. Some people understand punishment as simply making a person who commits a crime suffer for the suffering they caused (known as "retribution"). However, punishment is better understood as a way to prevent people from committing criminal offences. Appropriately punishing criminal offences both deters criminals from reoffending (specific deterrence), and deters potential perpetrators in the broader community (general deterrence) in order to reduce the number of offences committed against community members. This provides protection to the whole community, but particularly those community members who are less able to defend themselves, including women and child victims of physical and sexual abuse.

The Penal Code states that 'penalties are always (to be) executed as a teaching or re-socialising tool'<sup>9</sup> and provides a range of non-custodial means of applying sanctions to criminal behaviour. This is consistent with the concept of rehabilitation, one of the broadly understood purposes of sentencing. Sentencing aimed at rehabilitating offenders will consider the prospects of, and ways in which the offender could be rehabilitated. This can include the court suspending sentences on the basis that the offender will undergo treatment, amongst other measures to address the underlying causes of their criminal conduct.<sup>10</sup>

Other considerations in sentencing include preventing the offender from reoffending, which may require imprisonment for offenders who are considered at risk of reoffending. Sentencing can also

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<sup>5</sup> Penal Code (Timor-Leste), preamble, paragraph 1

<sup>6</sup> Penal Code (Timor-Leste), Annex, paragraph II

<sup>7</sup> Penal Code (Timor-Leste), Annex, paragraph III

<sup>8</sup> Penal Code (Timor-Leste), Annex, paragraph III

<sup>9</sup> Penal Code (Timor-Leste), Annex, paragraph II

<sup>10</sup> Australian Law Reform Commission (ALRC), 'Family Violence—A National Legal Response' (Report, November 2010), paragraph 4.96

aim to show to the offender and the community that the consequences of disobeying the law are serious, and it can aim to repair the harm to the victim caused by the offender's criminal conduct through recognition of the harm to the victim and the community.<sup>11</sup>

The Penal Code clearly plays many important roles, all of which ultimately contribute to a safer community. JSMP and ALFeLa hope that our suggested improvements to offences directly affecting women and children will facilitate more prosecutions, and sentences which better reflect the severity of the offence; in turn, deterring offenders and reducing the number of offences committed against these vulnerable members of society.

## INCEST

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Incest is a particularly insidious form of sexual abuse that involves the exploitation of a position of familial authority. Most often, the targets of incest are children who are abused by persons that they depend upon and trust. Incest is an offence against social, moral and religious values and its psychological and physical impacts can be both serious and lasting. In August 2012, JSMP published the report *Incest in Timor-Leste: An Unrecognised Crime* calling for the creation of a specific crime of incest in the Penal Code. JSMP's report found that incest is a widespread problem in Timor-Leste<sup>12</sup> and that victims are not afforded adequate protection by the Penal Code, particularly those above the age of 14 years.

### Current legal provisions relating to incest

Currently, victims under the age of 14 are protected by Article 177 (sexual abuse of a minor) which makes it a crime for an adult to practice any sexual act with a child under the age of 14. It is not necessary to prove the use of force or lack of consent under this provision. Where the perpetrator is a family member, the offence becomes aggravated sexual abuse of a minor pursuant to article 182(1)(d) (aggravation on account of familial relationship).

Victims above the age of 14 are protected only by ordinary rape and sexual coercion provisions (articles 171 and 172), which are dependent on proving that the perpetrator used force or serious threat of force against the victim. JSMP's report found this to be a serious limitation of the Penal Code because victims of incest are often pressured by the perpetrator, their family and community to avoid testifying against the perpetrator, or are reluctant to testify due to the associated shame and social stigma. Further, perpetrators of incest often use coercive means other than physical force to oblige the victims to submit to sexual acts. The victim might not know how to say no, where they can find help, or fear that the offender will abuse their younger siblings if they do not accept the abuse. In cases of incest, where the perpetrators are in positions of such power and authority against the victim, proving actual use of force or serious threat of force can be difficult.

JSMP recommended that a specific crime of incest be incorporated in the Penal Code that applies irrespective of the victim's age, and is not dependent on proving the use of force or serious threat of force against the victim.

### National Parliament's proposed law to amend the Penal Code

In July 2014, the National Parliament provided ALFeLa and JSMP with a draft law to amend the Penal Code to specifically criminalise incest. This draft law recognises that incest is an extreme violation of the victim's human rights and destroys the relationship of trust on which the family unit is built.

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<sup>11</sup> ALRC, 'Family Violence—A National Legal Response' (Report, November 2010), paragraph 4.98-4.104

<sup>12</sup> For more detail, see pages 6-8 of JSMP's report 'Incest in Timor-Leste: An Unrecognised Crime' August 2012.

This draft law proposes to amend Article 172 (rape) to include a new subsection on the crime of incest. The proposed subsection is italicised below:

**Article 172 (rape):**

- (1) Any person who, by the means referred to in the previous article, practices vaginal, anal, or oral coitus with another person or forces the same to endure introduction of objects into the anus or vagina is punishable with 5 to 15 years imprisonment.
- (2) *Any person who practices the behaviour described above with a descendant, collateral, relative or affinal<sup>13</sup> to the second degree, adopted by the perpetrator or person with whom he or she lives together in similar circumstances, even if violence or serious threat is not proven, is punishable with 10 to 15 years imprisonment, irrespective of the consent of the victim.*

### Analysis and Recommendations

JSMP and ALFeLa commend the National Parliament for ensuring that the proposed amendment criminalising incest applies irrespective of the victim's consent, age and whether or not violence or serious threats are used.

We also commend Parliament for ensuring that the prosecution of incest is a public crime, therefore not dependent on the victim filing a complaint. This is important, because victims often fail to report that the crime of incest has been committed against them for reasons of fear, shame and coercion.

Further, we welcome the application of the crime of incest to a range of family members, including step-relations. From JSMP and ALFeLa's experience, many crimes of incest are committed by step-fathers against adopted daughters.

However, JSMP and ALFeLa have some significant concerns about the proposed amendment, which are outlined below.

#### *The crime of incest should be separate to the crime of rape*

The proposed amendment is drafted as a subsection of Article 172 concerning rape. However, incest is very different to rape and should be recognised a separate crime. In most cases of incest, a perpetrator exploits their position of familial authority to abuse a child or teenager who trusts and depends on them. Victims are often repeatedly raped or abused over a period of months or years before the crime is discovered; sometimes only once the victim becomes visibly pregnant. Victims also face strong barriers to reporting the crime, including shame, stigma, and pressure from the perpetrator, their family and community.

As currently drafted in the proposed amendment, rape and incest have different standards of proof. Rape requires proof that the perpetrator used violence, serious threats or rendered a person unconscious for the purpose of the sexual acts, and incest does not. In practice, this may create confusion between the two crimes.

Creating a separate crime of incest may also increase recognition of the crime and generate action to strengthen prevention efforts. With greater awareness of the seriousness of incest as a crime, and its consequences for both the victim and society more broadly, interventions may occur sooner and authorities may be asked to respond to community demands for justice.

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<sup>13</sup> Article 1473 (Concept of affinity; elements and termination) of the Timor-Leste Civil Code defines 'affinity' as the bond connecting each of the spouses to the relatives of the other.

### *The crime of incest should include other sexual acts*

Incest is not limited to sexual intercourse or putting objects in the victim. There is a range of other incestuous sexual acts that can cause harm to the victim, particularly psychological harm. These acts should also be criminalised and punishable with an appropriately harsh penalty. This would be similar to Article 177 of the Penal Code on sexual abuse of a minor which recognises that sexual abuse includes all sexual acts, including intercourse.

### *The crime of incest should include additional relationships*

The proposed amendment currently refers to acts with a “descendant, collateral, relative or affinal to the second degree”. This covers parents, grandparents and siblings, but we understand that the restriction to “second degree” collateral relatives may not include uncle/aunt to nephew/niece relationships.<sup>14</sup> JSMP and ALFeLa have observed many cases in which crimes of incest have been committed by uncles against nieces and we believe it is important to ensure this relationship is also captured by the incest provision. The new provision should be clarified to ensure that it includes uncle-niece relationships. We suggest the new provision refers to acts with a “descendant, collateral, relative or affinal to the **third** degree”, but also recommend Parliament obtains expert advice regarding the wording of this provision to ensure uncle-niece relationships are included.

### *The crime of incest should have a higher penalty*

The draft law criminalising incest imposes a penalty of 10-15 years which is more severe than that for rape (5-15 years). This penalty may be increased to 20 years if the victim is aged less than 17 years.<sup>15</sup> This is consistent with JSMP’s past recommendation that incest carry a penalty that, at a minimum, is consistent with the crime of rape.

JSMP and ALFeLa now recommend that the maximum penalty for incest be increased to ensure that the penalty for incest committed against minors is commensurate with that for sexual abuse of a minor committed by a family member (that is, aggravated sexual abuse of a minor). The maximum penalty for incest under the proposed draft amendment is 20 years (with aggravation). In comparison, the maximum penalty for sexual abuse of a minor committed by a family member (also with aggravation) is currently 25 years. This means under the current draft amendment, perpetrators of incest against minors face a lower maximum penalty than currently provided for under the Penal Code.

The below table summarises the sentencing ranges for sexual abuse of a minor, rape, sexual coercion and the proposed crime of incest. It also includes JSMP and ALFeLa’s recommended sentencing ranges for the proposed crime of incest, which – as discussed above – should include sexual acts.

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<sup>14</sup> See the Timor-Leste Civil Code, articles 1468 to 1473. There are different methods of counting degrees of consanguinity and it is not clear from these provisions which method applies in Timor-Leste. This should be clarified to ensure consistency.

<sup>15</sup> Amongst other aggravating factors listed in Article 173, which also includes where the crime is committed through an abuse of authority arising from a familial or dependent relationship, or if the victim is unconscious or vulnerable due to disease, physical or mental disability.

*Table 1: Sentencing ranges for sexual crimes*

| Offence                              | Relevant article | Relevant act       | Applicable to victims aged: | Ordinary sentencing range* | Relevant aggravating circumstances | Sentencing range with aggravation* |
|--------------------------------------|------------------|--------------------|-----------------------------|----------------------------|------------------------------------|------------------------------------|
| <b>Sexual coercion</b>               | Article 171      | Sexual acts        | Any age                     | 2 - 8 years                | Article 173 or Article 182         | 4 - 12 years or 2.6 - 10.6 years   |
| <b>Rape</b>                          | Article 172      | Sexual intercourse | Any age                     | 5 - 15 years               | Article 173 or Article 182         | 5 - 20 years or 6.6 - 20 years     |
| <b>Sexual abuse of a minor</b>       | Article 177(1)   | Sexual intercourse | Under 14                    | 5 - 20 years               | Article 182                        | 6.6 - 25 years                     |
|                                      | Article 177(2)   | Sexual acts        | Under 14                    | 5 - 15 years               | Article 182                        | 6.6 - 20 years                     |
| <b>Incest (as currently drafted)</b> | Article 172      | Sexual intercourse | Any age                     | 5 - 15 years               | Article 173 or Article 182         | 5 - 20 years or 6.6 - 20 years     |
| <b>Incest (recommended)</b>          | Article XXX(1)   | Sexual intercourse | Any age                     | 10-20 years                | Article 173 or Article 182         | 10 - 25 years or 13.3 - 25 years   |
|                                      | Article XXX(2)   | Sexual acts        | Any age                     | 5-15 years                 | Article 182                        | 7 – 19 years or 6.6 - 20 years     |

\*Minimum prison sentence under the Penal Code is 30 days; maximum prison sentence under the Penal Code is 25 years (article 66(1)). Calculations are approximate.

### *The crime of incest should ensure that only the perpetrator may be prosecuted*

The crime of incest should ensure that only the perpetrator may be prosecuted. That is, the crime should only apply to the person who is exploiting the family relationship and should not be used to prosecute a victim. The draft amendment refers only to descendants to the second degree, which means grandparents or parents can be guilty of incest where they have sexual intercourse or practice sexual acts with their child or grandchild. However, 'collateral, relative or affinal to the second degree' does not specify which member of the relationship should be considered the perpetrator. This creates a risk that a victim of incest could be prosecuted. While incest most commonly involves an older relative exploiting a younger relative, it may not always be the case that the younger person in the relationship will be the victim – for example, a younger male sibling may abuse his older sister. While unlikely, it is also possible that relatives by marriage who are not aware of their relationship could have consensual sexual relations and then be prosecuted for the crime of incest. The amended provision should therefore be drafted carefully to ensure it applies to those who exploit family relationships and not to victims or acts which have no element of exploitation. In order to clarify the provision, JSMP and ALFeLa recommend that the amendment refers to an abuse of familial authority.

## Case study<sup>16</sup>

### Case Study 1: Incest – father raped two daughters

In this case, the father repeatedly raped his two daughters over many years.

He started raping his oldest daughter when she turned 16 years old. He threatened her with a machete and said that he would kill her if she told anyone. The victim was scared and didn't tell anyone what was happening. He raped her at least twice a week over two years. As a result of the rape, the daughter fell pregnant and gave birth to a boy with mental and physical disabilities. Later, she fell pregnant again as a result of the rape.

The father also started raping his younger daughter when she turned 14 years old. She tried to scream, but he threatened and choked her. The rape continued, night after night over five years, until she also fell pregnant.

The younger daughter managed to run away to an aunt's house. She told the aunt what had been happening, and the aunt sought help from a local leader and together they reported the crime to the police. The police then placed the older daughter in a safe house with the younger sister. Both girls gave birth in the safe house. One baby died after three months.

The prosecutor at first found that the daughters had consented to have sex with their father. On further investigation, the father was charged with rape. During the trial, the father confessed to having sex with his daughters.

The court sentenced the father to 14 years and 6 months in prison.

This case highlights the importance of having a separate article on incest, which is not dependent on proving lack of consent. Victims of incest may suffer in silence for many years. Often, it is when they fall pregnant that the crime is revealed. It should not be assumed that because a victim has been forced to suffer in silence, that this amounts to consent. This case also shows the devastating consequence of incest on children born as a result of the incestuous relationship. Such children are likely to suffer greatly increased risk of birth defects and developmental disorders due to genetic diseases caused by inbreeding.

### Recommendation 1: Incest

A new article should be inserted in the Penal Code after Article 172 (rape) that criminalises both incestuous intercourse and other sexual acts, covers the uncle-niece relationship, has a penalty commensurate with that for aggravated sexual assault of a minor, and clarifies that the crime applies only to the person who is exploiting the family relationship to ensure that only the perpetrator is prosecuted. For example (and subject to expert drafting advice):

#### Article [X]: Incest

- (1) Any person who practices any relevant sexual act with a descendant, or collateral, relative or affinal to the third degree, adopted by the perpetrator or person with whom he or she lives together in similar circumstances, being in a position of family authority over such person, even if violence or serious threat is not proven, is punishable with 5 to 15 years imprisonment, irrespective of the consent of the victim.
- (2) Any person who practices vaginal, anal or oral coitus with, or introduces objects into the anus or vagina of, a descendant, or descending collateral, relative or affinal to the third degree, adopted by the perpetrator or person with whom he or she lives together in similar circumstances, being in a position of family authority over such person, even if violence or serious threat is not proven, is punishable with 10 to 20 years imprisonment, irrespective of the consent of the victim.

<sup>16</sup> Case studies are based on ALFeLa clients and cases monitored by JSMP. Personal details have been changed to protect confidentiality.

## SEXUAL ABUSE OF A MINOR OR ADOLESCENT

As demonstrated by JSMP's recent report on *Children's Access to Formal Justice in Timor-Leste* (2014), the legal framework in Timor-Leste could be improved to better protect children from exploitation. The Penal Code provisions in relation to sexual offences against minors are particularly important given that:

- Timor-Leste has a large population of children and young people, many of whom are already in vulnerable situations (for example because of poverty and lack of access to education);<sup>17</sup>
- There is a seemingly high incidence of violence against children in Timor-Leste;<sup>18</sup>
- There is high incidence of sexual violence against young girls, or girls in early adolescence and most cases involving children that reach the courts involve adolescent girls (12-16 years of age) who have suffered sexual violence;<sup>19</sup>
- Acts of sexual violence against children and young people are serious crimes which can have substantial and long-lasting effects on victims. Children and adolescents are in an early stage of physical and psychological development which means they are particularly vulnerable to trauma and violence. When children experience violence or abuse it can affect their health and development for many years to come.

### Current legal provisions relevant to sexual offences against minors

#### **Article 177: Sexual abuse of a minor**

1. Any person who practices vaginal, anal or oral coitus with a minor aged less than 14 years is punishable with 5 to 20 years imprisonment.
2. Any person who practices any relevant sexual act with a minor aged less than 14 years is punishable with 5 to 15 years imprisonment.

#### **Article 178: Sexual acts with an adolescent**

Any person who, being an adult and apart from situations provided in this section, practices any relevant sexual act with a minor aged between 14 and 16 years, taking advantage of the inexperience of the same, is punishable with up to 5 years imprisonment.

### *Definition of a minor*

Timor-Leste ratified the Convention on the Rights of the Child (CRC) on 16 April 2003. Article 1 of the CRC provides that a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

Article 118 of the Timor-Leste Civil Code provides that a minor in Timor-Leste is a person who has not yet completed seventeen years of age. Article 126 provides that a person acquires the full rights of majority at the age of 17 years. That is, they reach adulthood, acquire full capacity to exercise rights, and cease to be minors. Therefore, minors in Timor-Leste are those persons who are below the age of 17 years.

A number of other provisions in the laws of Timor-Leste set ages at which a person is able to exercise certain rights or be held responsible for their actions, including:

- Article 47 of the Constitution sets the age for voting and for being able to choose Timorese citizenship at 17 years, consistent with the age of majority;
- Article 1500 of the Civil Code allows people aged 16 to marry with parental consent;

<sup>17</sup> JSMP, *Children's Access to Formal Justice in Timor-Leste*, 2014, p10

<sup>18</sup> JSMP, *Children's Access to Formal Justice in Timor-Leste*, 2014, p47

<sup>19</sup> JSMP, *Children's Access to Formal Justice in Timor-Leste*, 2014, p44

- Article 20 of the Penal Code provides that minors under 16 years of age are exempt from criminal responsibility. This means that minors aged over 16 can be criminally responsible for their behaviour.

### ***Age of consent to engage in sexual activities***

Laws specifically criminalising sexual acts with children and adolescents provide protection for these vulnerable groups against sexual exploitation and abuse, as is required by Article 34 of the CRC. Laws of this nature are common across the world, but the age ranges for the application of sexual offences against children or adolescents vary from country to country. Sometimes the age of 'majority', when a person is considered a legal adult, differs from the 'age of consent' when a person is considered capable of consenting to sexual acts.

Under the current provisions of the Timor-Leste Penal Code (set out above), the effective age of consent for sexual acts in Timor-Leste is 14 years of age. Article 178 also gives some recognition to the vulnerability of minors aged 14 to 16 for sexual acts where the person takes "advantage of the inexperience" of the minor, but this provision seems to assume that consent to sexual acts can be given by 14-16 year olds.

### **Analysis of Articles 177 and 178**

JSMP has expressed concern in the past regarding the application of Articles 177 and 178, in particular in relation to inadequacies for dealing with crimes involving incest, the inconsistent use of the term 'minor', and the uncertain application of Article 178.

Our submissions in relation to crimes of incest are set out in the 'Incest' section above.

Article 177 makes it a crime to sexually abuse a 'minor', however it applies only to sexual abuse committed against children under 14 years of age. As explained above, under Timor-Leste's laws a person is considered a minor until the age of 17 years and should be entitled to special protection from the law against sexual abuse.<sup>20</sup> Currently, Article 177 does not provide this special protection to all minors because it applies only to children aged under 14.

Article 177 covers both sexual intercourse in subsection (1) and other sexual acts in paragraph (2), however, JSMP and ALFeLa have observed that prosecutors often overlook subsection (2) and assume that sexual abuse of a minor under the age of 14 years must involve sexual intercourse. One reason for this may be that the term "any relevant sexual act" is not well understood by judicial actors in Timor. This term is also used in Article 178 where it may also cause confusion. JSMP and ALFeLa note that the translation of this from the original Portuguese "acto sexual de relevo" into both Tetum and English is not always consistent, which may also contribute to the confusion. JSMP and ALFeLa believe the term "any relevant sexual act" is intended to include any other act of a sexual nature that does not meet the definition of intercourse. Therefore, all sexual acts against children under 14 are criminal in Timor-Leste and JSMP and ALFeLa urge prosecutors and the Courts to properly apply Article 177(2). JSMP and ALFeLa also believe this is a topic on which judicial actors should receive special training in order to improve their understanding of the Penal Code and of the particular vulnerabilities of children.

Article 178 creates a separate crime in respect of sexual acts with an adolescent aged 14 to 16, but this is a much less serious offence punishable only with a maximum of 5 years imprisonment. JSMP and ALFeLa believe that Article 178 is unclear and does not provide sufficient protection to adolescents who experience sexual violence or abuse. In particular:

- The term used in Article 178 - "relevant sexual acts" - is not defined in the Penal Code and can create confusion.

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<sup>20</sup> The right of children to special protection is recognised in the Timor-Leste Constitution in Article 18(1) which provides that children are entitled to special protection by the family, the community and the State, particularly against all forms of abandonment, discrimination, violence, sexual abuse and exploitation.

- There is the potential for cases of sexual abuse of children aged 14 to 16 years, including acts which meet the criteria of rape or sexual coercion, to be mistakenly prosecuted under Article 178 instead of the more serious charges of rape or sexual coercion.
- The penalty range for this crime is low (up to 5 years imprisonment) in comparison to other sexual crimes. For example, the crime of sexual coercion carries a sentencing range of 2 to 8 years. The victims of these crimes are young and vulnerable and the impact of the crimes on their lives can be severe and the penalty should reflect this.
- It is necessary to prove that the perpetrator took “advantage of the inexperience” of the victim. The meaning of “inexperience” is not clear, nor are the circumstances in which it would be considered “taking advantage”. If the court is required to examine this element of the crime the victim may be subject to additional scrutiny in relation to their prior sexual experience and behaviour. This kind of scrutiny can be unfair and distressing for victims. For young victims in this position of vulnerability, their prior experience or inexperience should not be relevant to the crime.

### Draft amendment to Penal Code provisions

The draft law in relation to incest, which JSMP and ALFeLa received in July 2014, also proposes amendments to the Penal Code in relation to Articles 177 and 178. JSMP and ALFeLa welcome the positive steps from the National Parliament towards addressing the shortcomings of these provisions, and are grateful to be given the opportunity to comment on the proposed amendments.

The draft law proposes amendments to Articles 177 and 178 as follows:

#### **Proposed amended Article 177: Sexual abuse of a minor**

- (1) Any person who practices vaginal, anal or oral coitus with a minor aged less than 17 years is punishable with 5 to 20 years imprisonment.
- (2) Any person who practices any relevant sexual act with a minor aged less than 17 years is punishable with 5 to 15 years imprisonment.

#### **Proposed amended Article 178: Sexual abuse of an adolescent**

Any person who, being an adult and apart from situations provided in this section, practices any relevant sexual act with a minor aged between 14 and 17 years, taking advantage of the inexperience of the same, is punishable with up to 5 years imprisonment.

The proposed amendment to Article 177 would raise the age of a person who can be a victim of the crime of sexual abuse of a minor from under 14 years to under 17 years. The effect of this would be to raise the age of consent in Timor-Leste to 17 years of age.

This amendment uses a definition of “minor” which is consistent with the Civil Code and ensures sexual crimes against all minors are recognised as serious offences.

While it is vital to ensure children between the ages of 14 and 17 receive sufficient protection from the law, JSMP and ALFeLa wish to raise some issues that should be considered carefully before the Penal Code is amended. In particular, we are concerned that the amended Article 177 could be inconsistent with other provisions of the Penal Code and the Civil Code. It may also have unintended consequences in respect of adolescents who have consensual sexual relationships with each other.

In addition, because the amended Article 177 would criminalise all sexual acts with a person under 17 years of age (including intercourse and other acts of sexual relief), Article 178 is not necessary. All “relevant sexual acts” with a person aged between 14 and 17 years would be covered by Article 177.

## Comparison of legal provisions between jurisdictions

The approach to sexual offences concerning minors varies across the world. In relation to the ‘age of consent’ there is no international standard and the age varies, generally between 12 years to 18 years of age. For example, in India the age of consent is 18, in Malaysia it is 16, in Laos it is 15, and in Brazil it is 14.<sup>21</sup>

Some jurisdictions provide for defences, such as that the offender had reasonable grounds to believe the victim was above the age of consent.<sup>22</sup> Some jurisdictions also recognise that adolescents may engage in sexual conduct with each other before they reach the age of consent and provide exceptions to the general crime in circumstances where the persons involved are both under the age of consent or are close in age to each other. The Model Codes for Post-Conflict Criminal Justice include an exception of this kind for persons under the age of 18, which is intended to allow for cases where teenagers who are very close in age voluntarily and consensually have sexual relations.<sup>23</sup> Because adolescents are still vulnerable to exploitation by older adults, this type of exception is usually restricted to persons who are within a few years of age of each other. For example, in parts of Australia and in Canada the age of consent is 16 years, but if the under-age person consents to the sexual act and the other person is a similar age (up to 2 years older in some cases or up to 5 years older in others), the act is not criminal.<sup>24</sup>

The current provisions in Articles 177 and 178 seem to be broadly based on the age ranges used in Portuguese law, although they are less comprehensive. The Portuguese Penal Code criminalises intercourse and any relevant sexual act with a person under the age of 14.<sup>25</sup> Sexual intercourse and relevant sexual acts with an adolescent aged 14-16 are only criminal where there is an “abuse of inexperience”,<sup>26</sup> or with an adolescent aged 14-18 where the offender was entrusted with the education or care of that person.<sup>27</sup> The concepts of “relevant sexual acts” and “abuse of inexperience” have been translated into the Penal Code of Timor-Leste, although as explained above, this presents a number of problems for the effective protection of vulnerable young people from sexual exploitation.

Some jurisdictions also have specific crimes regarding acts which occur prior to actual sexual abuse, but which are for the purpose of preparing a child for sexual abuse.<sup>28</sup> Examples of such acts include giving gifts or special attention to the child to gain the child’s trust, or showing the child pictures of a sexual nature to make it easier for the child to accept later sexual behaviour. These acts are known as “grooming” because they prepare or “groom” a child for later sexual acts committed by the adult. Grooming can also take the form of communications with a child using mobile telephones or the internet and some jurisdictions have laws directed specifically at these

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<sup>21</sup> Penal Code (India), s375; Penal Code (Malaysia), Section 375; Penal Code (Laos), Article 129; Penal Code (Brazil), Article 217A

<sup>22</sup> For example, some states in Australia have a ‘belief on reasonable grounds’ exception: Crimes Act 1900 (ACT) s 55, Criminal Code Act 1924 (Tas) s 124, Crimes Act 1958 (Vic) s 45

<sup>23</sup> United States Institute of Peace, Model Codes for Post-Conflict Criminal Justice, 2007, Article 95 and p230

<sup>24</sup> For example, in the Australian state of Victoria it is a defence if a person aged 12 years consents to sexual intercourse if the accused is not more than 2 years older: Crimes Act 1958 (Vic) ss 44, 47. In the Australian state of Tasmania a person aged from 12 to 14 can lawfully consent to sexual intercourse with a person who is not more than 3 years older and a person aged 15 or 16 can lawfully consent with a person who is not more than 5 years older: Criminal Code Act 1924 (Tas) s 124. In Canada consent is available as a defence if the person is between the age of 12 and 14 and the accused is not more than two years older or if the person is 14 or 15 and the accused is no more than five years older: Criminal Code (Canada) section 150.1(2)–(2.1).

<sup>25</sup> Penal Code 1995 (Portugal), Article 171

<sup>26</sup> Penal Code 1995 (Portugal), Article 173

<sup>27</sup> Penal Code 1995 (Portugal), Article 172

<sup>28</sup> For example, in England and Wales it is an offence to arrange a meeting with a child, for oneself or someone else, with the intent of sexually abusing the child: sections 14 and 15 of the Sexual Offences Act 2003.

acts.<sup>29</sup> At present it is not clear whether behaviour of this kind is a significant problem in Timor-Leste, however, JSMP and ALFeLa recommend further consideration is given to this issue in the future.

## Recommendations

The proposed amendment to Article 177 would make it a crime in all circumstances to have sexual relations with a person under the age of 17, regardless of consent. In effect, the age of consent to engage in sexual activities in Timor-Leste would be raised to 17 years. Seventeen years is also the age of majority under the Civil Code (Article 118) and the voting age as set by the Constitution (Article 18). However, the age of criminal responsibility and the age at which a person is able to marry (with parental consent) is 16 years.

It is important that the legal framework in Timor-Leste provides adequate protection to adolescents, particularly girls, in relation to sexual offences, given that most child victims involved in criminal cases that reach the Timorese courts are adolescent girls who have suffered sexual violence.<sup>30</sup>

JSMP and ALFeLa agree that amending Article 177 and raising the age of consent would strengthen the legal protection available to young people, particularly girls, against sexual abuse. As stated above, JSMP and ALFeLa also encourage prosecutors and the Courts to ensure both parts (1) and (2) of Article 177 are applied, including sexual intercourse as well as any other sexual act committed against children.

However, lifting the age of consent to 17 years may also have unintended consequences for those same young people the provision is intended to protect. For example, if a 16 year old person has a consenting sexual relationship with another 16 year old person, both would be guilty of a crime under Article 177. This is because currently the Penal Code sets the age of criminal responsibility at 16 years of age but the age at which a person would legally be able to have sexual relations without committing a crime would be 17 years.

This also creates an inconsistency with the Civil Code provisions that permit marriage of persons aged between 16 years and 17 years with parental consent.<sup>31</sup> Reports suggest that early marriage in Timor-Leste is common,<sup>32</sup> so this may represent a real difficulty for young married people because it could result in a situation where a 16 year old is legally married but cannot have sexual relations with his or her spouse without the spouse committing a crime under Article 177.

JSMP and ALFeLa believe that at least for persons aged 16 years, there should be some flexibility in the Penal Code to allow for consensual sexual relationships. This should be balanced with the need to protect vulnerable young people from sexual exploitation. Our suggested solution is to include a defence to the crime of sexual abuse of a minor in circumstances where the 'victim' is 16 years of age and the 'offender' is a similar age to the victim (for example, within 3 years of age), or where the parties are legally married, provided in all circumstances that the relations are consensual.

As discussed above, if Article 177 is amended as proposed to cover any sexual act with a person under the age of 17, Article 178 is no longer necessary. Given the problems with the existing Article 178, JSMP and ALFeLa agree that it is an effective solution to ensure Article 177 covers sexual offences against all minors, but to avoid confusion Article 178 should be removed from the Penal Code.

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<sup>29</sup> For example, in Canada it is an offence to communicate with a child through a computer system for the purpose of committing a sexual offence: Criminal Code section 172.1.

<sup>30</sup> JSMP, *Children's Access to Formal Justice in Timor-Leste*, 2014, p44

<sup>31</sup> See Civil Code 2011 (Timor-Leste), Article 1500

<sup>32</sup> See JSMP, *Children's Access to Formal Justice in Timor-Leste*, 2014, p10

### **Recommendation 2: Sexual abuse of a minor**

The proposed changes to Article 177 should be amended to include a defence to the crime of sexual abuse of a minor where the sexual relations are consensual, the 'victim' is 16 years of age and the 'offender' is close in age (for example, within 3 years of age) to the victim or the parties are legally married. For example:

#### **Article 177: Sexual abuse of a minor**

1. Any person who practices vaginal, anal or oral coitus with a minor aged less than 17 years is punishable with 5 to 20 years imprisonment.
2. Any person who practices any relevant sexual act with a minor aged less than 17 years is punishable with 5 to 15 years imprisonment.
3. If an act described in this Article is practised with a minor aged between 16 and 17 years and the minor consents without coercion to the act, the act will not be unlawful in the following cases:
  - (a) if the person is not more than 3 years older than the minor; or
  - (b) if the minor and the person are legally married.

### **Recommendation 3: Sexual abuse of an adolescent**

Given that the amended Article 177 will cover acts previously covered by Article 178, Article 178 should be removed from the Penal Code.

## **RAPE AND SEXUAL COERCION**

Following an international rape reform movement spanning several decades, rape is now considered a crime against the bodily integrity of the person who is forced to engage in sexual activities without their free consent.<sup>33</sup> The international best practice definition of rape does not require proof that the victim physically resisted, does not accept submission as consent, and requires both parties to ensure that the other is consenting to the sexual activity.<sup>34</sup> Such a definition is commonly referred to as a 'consent-based' rape provision. The Committee on the Elimination of Violence Against Women has recommended jurisdictions adopt the 'consent-based' rape provision by amending legislation to define the crime of rape as sexual intercourse without consent.<sup>35</sup>

Progressive jurisdictions also treat rape committed by a person against his or her spouse in the same way as rape outside marriage. International best practice calls for sexual offences legislation to specifically state that sexual offences apply irrespective of the nature of the relationship between the perpetrator and complainant, or by stating that no marriage or other relationship will constitute a defence to a charge of sexual assault.<sup>36</sup>

<sup>33</sup> 'Achieving Justice for Victims of Rape and Advancing Women's Rights: A Comparative Study of Legal Reform' (Report, TrustLaw, December 2011), 12.

<sup>34</sup> Bianca Fileborn, Sexual Assault Laws in Australia (Resource Sheet, Australian Centre for the Study of Sexual Assault, February 2011), 7

<sup>35</sup> See for example, the Czech Republic: Committee on the Elimination of Violence Against Women, Concluding Observations, Exceptional Session, UN DOC A/57/38 (5 - 23 August 2002) (available at: [http://www2.ohchr.org/english/bodies/cedaw/cedaws\\_exceptional.htm](http://www2.ohchr.org/english/bodies/cedaw/cedaws_exceptional.htm))

<sup>36</sup> Department of Economic and Social Affairs, Division for the Advancement of Women, 'United Nations Handbook for Legislation on Violence Against Women', (report, United Nations, 2010), 26

The Timor-Leste Penal Code currently has a ‘force-based’ rape provision, which requires proof that the perpetrator used violence, serious threats or rendered a person unconscious for the purpose of sexual acts.<sup>37</sup> Lack of consent does not constitute an element of the crime itself. Marital rape in Timor-Leste can be prosecuted in the same manner as rape by persons outside a marriage, however there is no express provision stating that the rape provision applies irrespective of the nature of the relationship between the perpetrator and complainant.

## **Current legal provisions relevant to rape and sexual coercion**

### **I. Rape**

In Timor-Leste, rape is criminalised in Article 172 of the Penal Code which provides that any person who uses violence, serious threats, or renders a person unconscious, or in a condition where resistance is impossible, to have vaginal, anal or oral sex with a person, or to introduce objects into the vagina or anus of a person, is punishable with 5 to 15 years imprisonment.

### **II. Sexual coercion**

Article 171 of the Penal Code provides that any person who uses violence, serious threats, or renders a person unconscious, or in a condition where resistance is impossible, to compel another person to endure or practice with the offender or a third person any relevant sexual act (that is, acts of a sexual nature up to but not including vaginal, anal or oral intercourse) is guilty of sexual coercion, which is punishable by 2 to 8 years imprisonment.

### **III. Aggravating circumstances**

Article 173 of the Penal Code raises the maximum term of imprisonment for rape to 20 years, and for sexual coercion to 12 years, when the rape or coercion is committed in a range of aggravating circumstances ranging from abuse of authority to the victim’s age being under 17.<sup>38</sup> Further aggravating factors in Article 182 raise both the minimum and maximum terms of imprisonment by one third, including where the perpetrator transmits disease to the victim or where the offence results in the victim’s death or suicide. General aggravating circumstances<sup>39</sup> and penalties for repeat offences and habitual criminality also apply.<sup>40</sup> In practice, it is rare for all relevant aggravating circumstances to be taken into account, and for the term of imprisonment to be adjusted in a methodical manner, if at all. These circumstances are discussed in more detail below under the heading Aggravation (sexual offences).

### **IV. Marital rape**

Theoretically, marital rape in Timor-Leste can be prosecuted in the same manner as rape by persons outside a marriage, and the same aggravating circumstance can be taken into account in determining the sentence.

## **Comparison of legal provisions between jurisdictions**

Like Timor-Leste, other jurisdictions, such as the Lao People’s Democratic Republic, Indonesia and Brazil, require proof that the perpetrator used force or threat of the use of force to establish that rape or sexual assault has occurred.<sup>41</sup> Such definitions neglect the fact that consent can be

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<sup>37</sup> Penal Code (Timor-Leste), articles 171 and 172.

<sup>38</sup> Penal Code (Timor-Leste), article 173

<sup>39</sup> Penal Code (Timor-Leste), article 52

<sup>40</sup> Penal Code (Timor-Leste), articles 53 and 54

<sup>41</sup> See, eg, Penal Law (1990) (Lao People’s Democratic Republic) article 128 which defines rape by reference to the use of force, armed threats or the use of drugs or other substances, articles 285 and 289 of the Indonesian Penal Code which define rape and obscene acts by reference to the use of force or threats of force and Penal Code (1940) (Brazil) article 213 which defines rape via coercion by violence or serious threat of violence.

vitiated by a variety of factors, including abuse of power by the perpetrator, fraud or other coercive measures. As discussed above, this definition is inconsistent with international best practice and the recommendations of the Committee on the Elimination of Violence Against Women. While the Committee has not yet scrutinised this aspect of Timor-Leste's Penal Code, JSMP and ALFeLa urge the National Parliament to be proactive in updating the Code consistent with international best practice.

Many other jurisdictions have based the criminal definition of sexual crimes on the absences of consent. For example, Fiji,<sup>42</sup> South Africa,<sup>43</sup> Singapore,<sup>44</sup> Australia<sup>45</sup> and Canada<sup>46</sup> all require the lack of consent in order to constitute a crime. For example, the fact that the perpetrator is in a position of power or authority over the victim<sup>47</sup> automatically negates any consent that may have been obtained by the perpetrator. Other jurisdictions also exclude consent given because of threats of force or violence against themselves or others, consent given because the victim is unlawfully detained, consent obtained via intimidating conduct, consent based on the belief that the acts are required for medical or hygienic purposes, or consent based on mistaken identity of the perpetrator.<sup>48</sup>

Some jurisdictions have expanded the concept of the lack of consent to include all situations in which the perpetrator knows of the lack of consent, is reckless as to whether or not the victim is consenting or when the perpetrator has no reasonable grounds for believing that a person consented to the acts in question.<sup>49</sup> Others provide that mistaken belief of consent is not a defence where it arose from self-induced intoxication or where the accused did not take reasonable steps to ascertain that the complainant was consenting.<sup>50</sup>

Many jurisdictions have also specifically stated in laws that it cannot be presumed that people always consent to sexual acts within marriage. The Australian state of New South Wales clearly states that the fact a person is married to the person whom they rape or upon whom they commit a sexual offence, is no bar to that person being convicted of the offence.<sup>51</sup> In contrast, the American state of California has a separate offence that criminalises the rape of a person who is the spouse of the perpetrator.<sup>52</sup>

Some jurisdictions have also legislated to prevent courts drawing adverse inferences from a victim's delay to report a rape, including Namibia, South Africa and the Philippines.<sup>53</sup>

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<sup>42</sup> Crimes Decree Act (2009) (Fiji) section 207(2).

<sup>43</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007) (South Africa) sections 3-7.

<sup>44</sup> Penal Code (2008) (Singapore) sections 375 and 376.

<sup>45</sup> See, eg, Crimes Act (1900) (NSW) sections 61I, 61J and 61JA.

<sup>46</sup> Criminal Code of Canada (1985) (Canada) sections 150-153 and sections 271-273.

<sup>47</sup> See, eg, Criminal Code of Canada (1985) (Canada) section 273.1(2).

<sup>48</sup> Crimes Act (1900) (NSW) section 61HA(4)-(6).

<sup>49</sup> Crimes Act (1900) (NSW) section 61HA(3)

<sup>50</sup> Criminal Code (Canada), section 273(2)(a)(i) and (b)

<sup>51</sup> Crimes Act (1900) (NSW) section 61T

<sup>52</sup> Criminal Code of California (1872) section 262

<sup>53</sup> See Department of Economic and Social Affairs, Division for the Advancement of Women, 'United Nations Handbook for Legislation on Violence Against Women', (report, United Nations, 2010), 43

## Case studies

### Case Study 2: Rape – dragged from the street

A 22 year-old woman was on her way home from buying something at the kiosk. The defendant, a 42 year-old man, suddenly appeared in the street, and dragged the victim from the road into a nearby field. There, he hugged and kissed the victim, and removed her clothes and underwear in order to have sexual intercourse.

In court, the defendant claimed that the intercourse was consensual (*hakarak ho hakarak*) and that he did not force the victim to have sex with him. He also said that he gave the victim \$20 after they finished having intercourse. The victim agreed that they had sexual intercourse, and conceded that she did not resist or shout out.

The public prosecutor asked the court to acquit the defendant because the facts and evidence did not prove that the defendant had committed the crime. The public defender asked the court to acquit the defendant because he did not commit the crime. The court concluded the case by acquitting the defendant.

In this case, the victim was dragged from the street into a field where the defendant removed the victim's clothes and had sexual intercourse with her. While the defendant claims that the intercourse was with the victim's consent, the facts indicate otherwise. It appears that the court considered the victim's lack of resistance or shouting as evidence of consent. However, given the victim was dragged forcefully from the street, it seems unlikely that she freely consented.

Where rape is defined as a force-based offence committed forcibly and against the will of the person, a woman's lack of consent is often judged by her physical resistance and the injuries received by the force/resistance, which in turn demonstrate the defendant's awareness of the victim's lack of consent.<sup>54</sup> This places an unfair evidentiary burden on the victim who faces a difficult task of proving her resistance if there were no witnesses or she did not sustain injury. In modern, consent-based provisions, consent is not implied by lack of resistance – the use or threat of force is enough to demonstrate that the victim did not consent (that is, consent is presumed to be absent in such circumstances).

This case demonstrates why it is important to have a consent-based rape provision which does not rely on the victim to demonstrate resistance to force, particularly given victims often experience immobility/paralysis during rape.<sup>55</sup> This type of response is often described as 'freeze fright', and is a physiological reaction to a perceived attack or threat in which the person becomes involuntarily immobile or paralysed as part of their body's evolutionary response to danger.

### Marital rape or rape within a relationship

JSMP and ALFeLa have found that prosecution of rape within marriage is virtually non-existent in Timor-Leste, although elsewhere in the Asia-Pacific region, rape has been found to occur most frequently within marriage.<sup>56</sup> The reporting, investigation and prosecution of marital rape is likely

<sup>54</sup> Bianca Fileborn, Sexual Assault Laws in Australia (Resource Sheet, Australian Centre for the Study of Sexual Assault, February 2011), 7

<sup>55</sup> Grace Galliano, Linda Noble, Carol Puechl and Linda Travis, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates' available at Australian Institute of Criminology: [http://www.aic.gov.au/media\\_library/publications/proceedings/20/galliano.pdf](http://www.aic.gov.au/media_library/publications/proceedings/20/galliano.pdf). See also Katrina Marson 'Jury convinced by expert evidence on "freeze fright" response in rape victims' Sydney Morning Herald 6 April 2014: <http://www.smh.com.au/comment/jury-convinced-by-expert-evidence-on-freeze-fright-response-in-rape-victims-20140406-zgrkd.html> where a doctor with extensive experience in forensic medicine and specialist expertise in sexual health testified in a recent Australian rape trial that the freeze fright reaction has been documented in approximately half of rape cases since the 1970s.

<sup>56</sup> A UN Multi-Country Study of 10,000 men and 3,000 women in nine sites across Bangladesh, Cambodia, China, Indonesia, Sri Lanka and PNG between 2010-2013 found that rape of an intimate partner was more common than non-partner rape in all sites except PNG (p. 3). See Fulu, E., Warner, X., Miedema, S., Jewkes, R., Roselli, T. and Lang, J.

hampered by many of the same factors that affect the prosecution of domestic violence, including the victim's fear of losing her family's breadwinner through incarceration or divorce/abandonment, pressure to resolve the dispute within the family/community to maintain social harmony, a general lack of awareness of the formal justice system, and its perceived or real cost, inaccessibility and slowness. This is likely compounded by the community's understanding of, and attitudes towards marriage, and what it does and does not permit a man to do within it.

The below case study outlines the court's treatment of a case of rape within a relationship of boyfriend and girlfriend.

### **Case Study 3: Rape within a relationship**

The defendant, a 27 year-old man, was driving the victim, a 21 year-old woman, to her house when he stopped his motorbike, and took her to an adjacent field. There, he hugged the victim, squeezed her breasts, and put his hand over her nose and mouth before having sexual intercourse. The defendant testified that the intercourse was consensual and he did not force the victim because they were boyfriend and girlfriend. The defendant also submitted that he had resolved the 'problem' by paying the victim \$2000 to 'cover her shame'.

The public prosecutor asked the court to acquit the defendant because the facts and evidence did not prove he had committed the crime. The public defender similarly asked for acquittal on the basis that the defendant had not committed the crime. The court subsequently acquitted the defendant.

This case points to a misconception that rape within a relationship is permissible, and demonstrates why it is important to expressly state in the Penal Code that marriage or any other relationship between the defendant and victim does not preclude the prosecution of rape.

### **Delay in reporting**

JSMP and ALFeLa have observed a number of cases where the court has inferred from the victim's delay to report a rape that she is unreliable, therefore giving rise to assumptions that she may have consented to sexual intercourse and later changed her mind, or that sexual intercourse did not occur at all. However, victims often delay reporting rape to authorities for a number of legitimate reasons, including:

- fear of stigmatisation, humiliation, not being believed, and retaliation;
- financial or emotional dependence on the perpetrator; or
- distrust in, and lack of access to, police, courts or other responsible public institutions.<sup>57</sup>

In one case, the Dili District Court considered the fact that the victim had made a complaint to the police three days after the crime happened gave rise to sufficient doubt (in combination with other factors, such as the lack of a medical report) to acquit the defendant.<sup>58</sup> Cases like this demonstrate a need to provide legislative guidance to prevent courts drawing adverse inferences from a victim's delay to report.

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(2013) *Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific*. Bangkok: UNDP, UNFPA, UN Women and UNV.

<sup>57</sup> Department of Economic and Social Affairs, Division for the Advancement of Women, 'United Nations Handbook for Legislation on Violence Against Women', (report, United Nations, 2010), 42-3

<sup>58</sup> See JSMP Press Release 'Court acquits defendant in case of sexual violence due to a lack of evidence', 27 June 2014, accessed at [http://jsmp.tl/wp-content/uploads/2014/01/PrTribunalDistritalDiliLakonsegeKondenaKazuVS\\_ENGLISH.pdf](http://jsmp.tl/wp-content/uploads/2014/01/PrTribunalDistritalDiliLakonsegeKondenaKazuVS_ENGLISH.pdf)

## Recommendations

### Rape and sexual coercion

Rape provisions can be drafted in a number of different forms. The *United Nations Handbook for Legislation on Violence Against Women* recommends that jurisdictions remove the requirement that sexual assault be committed by force or violence by drafting a provision that either:

- Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the victim was consenting; or
- Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.<sup>59</sup>

Both provisions avoid ‘secondary victimisation’ of rape and sexual assault victims because instead of examining the victim’s behaviour (to prove consent or lack thereof), the court looks at the steps taken by the defendant to ascertain the victim’s consent, or at the ‘coercive’ circumstances in which the rape or sexual assault took place. The second approach defines rape and sexual coercion by listing a range of coercive circumstances in which – if sexual intercourse or sexual acts take place – rape or sexual assault is considered to have occurred.

This approach recognises that force is just one of a range of circumstances in which sexual contact is criminal because it occurs without consent. Coercion, fraud and abuse of power are other circumstances where, even though physical force (or threats of force) is not used, a woman might not consent to sexual acts. Similar approaches have been adopted in many jurisdictions, including California, Papua New Guinea and Namibia.<sup>60</sup> JSMP and ALFeLa suggest such an approach should also be adopted in Timor-Leste.

Adopting a consent-based rape provision which includes a non-exhaustive list of circumstances in which consent is considered to be absent will provide prosecutors and judges with a clear framework for the prosecution of rape and sexual offences. The list of circumstances should, at a minimum, include:

- the person submits to the act because of the use of violence or force on that person or someone else;<sup>61</sup>
- the person submits because of the threats or intimidation against them or someone else;<sup>62</sup>
- the person submits because of fear of harm to them or to someone else;
- the person submits because he or she is unlawfully detained;
- the person is asleep, unconscious or so affected by alcohol or another drug so as to be incapable of freely consenting;
- the person is incapable of understanding the essential nature of the act or of communicating his or her unwillingness to participate in the act due to mental or physical disability;
- the person is mistaken about the sexual nature of the act or the identity of the accused;
- the person mistakenly believes that the act is for medical or hygienic purposes;
- the accused induces the victim to engage in the activity by abusing a position of trust, power or authority;
- the person, having consented to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity; or
- the agreement is expressed by the words or conduct of a person other than the person.

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<sup>59</sup> Department of Economic and Social Affairs, Division for the Advancement of Women, ‘United Nations Handbook for Legislation on Violence Against Women’, (report, United Nations, 2010), 26

<sup>60</sup> Criminal Code of California (1872) section 262, Combating Rape Act No. 8 of 2000 (Namibia), section 2(1), Criminal Code Act 1974 (Papua New Guinea), sections 347-347A.

<sup>61</sup> ‘Use of violence or force includes the use of a weapon in its broadest sense (machete, knife, piece of wood or metal, electrical cord, rope and firearms), as well as strangling or suffocating a victim in addition to the typical hitting, punching and kicking.

<sup>62</sup> Similarly, ‘threats or intimidation’ includes the threat of the use of a weapon in its broadest sense.

These circumstances have been drawn from Papua New Guinea's Criminal Code,<sup>63</sup> which has been commended for providing an example of good practice for the region and the world. Papua New Guinea's provisions were amended in 2003, and commentators have observed that its new framework has since led to some increases in the range of violations prosecuted, which has subsequently led to successful convictions and serious penalties.<sup>64</sup>

Papua New Guinea's Criminal Code provides further guidance to judges by stating that they shall have regard to certain circumstances, including:

- the fact that the person did not say or do anything to indicate consent to a sexual act is normally enough to show that the act took place without the person's consent;
- a person is not to be regarded as having consented to a sexual act just because –
  - o they did not physically resist; or
  - o they did not sustain physical injury; or
  - o on that or on an earlier occasion, they freely agreed to engage in another sexual act with that person or some other person.

Given JSMP and ALFeLa's proposed changes to Article 172 will require Timorese judges to change the way in which they consider and convict rape, we believe that they would also benefit from such guidance and recommend the inclusion of similar wording in the Penal Code. Such wording will make it explicitly clear that victims who fail to say or do anything that indicates consent are not normally consenting. It will also make clear that lack of physical resistance, lack of injury or consenting on previous occasions does not necessarily mean that the victim consented.

JSMP and ALFeLa also recommend incorporating guidance in the Penal Code to ensure that courts do not draw adverse inferences from a victim's delay in reporting a rape.

#### **Recommendation 4: Rape**

Article 172 (rape) of the Penal Code should be redrafted so that it defines rape as sexual intercourse (consistent with the Code's current definition: vaginal, anal or oral sex with a person, or introducing objects into the vagina or anus of a person) when the act takes place without that person's consent. It should also define 'consent' as free and voluntary agreement, and include a non-exhaustive list of circumstances in which a person does not consent to an act. Further, it should include guidance for judges about circumstances which do not necessarily mean that the victim consented (for instance, lack of physical resistance or injury) and to ensure judges do not draw adverse inferences from a victim's delay in reporting a rape. For example:

##### **Article 172 (rape)**

Any person who practices vaginal, anal or oral coitus with another person, or introduces objects into the vagina or anus of a person, without that person's consent, is punishable with 5 to 15 years imprisonment. For the purposes of this Article:

- (a) 'Consent' means free and voluntary agreement.
- (b) Circumstances in which a person does not consent to an act include, but are not limited to, the following:
  - (i) (see above)
  - (ii) ...
  - (iii) ...
- (c) In determining whether or not a person consented, the court shall consider:
  - (i) the fact that the person did not say or do anything to indicate consent to a sexual act is normally enough to show that the act took place without the person's consent, and
  - (ii) a person is not to be regarded as having consented to a sexual act just because:
    - (A) they did not physically resist;

<sup>63</sup> Criminal Code Act 1974 (Papua New Guinea), section 347A(2)

<sup>64</sup> Forster, Christine 'Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards' (2009) 33:3 Melbourne University Law Review 833

- (B) they did not sustain physical injury; or
- (C) on that or on an earlier occasion, they freely agreed to engage in another sexual act with that person or some other person.
- (d) The court shall not draw any inference only from the length of the delay between the commission of the sexual act and making a complaint.

#### **Recommendation 5: Sexual Coercion**

Article 171 (sexual coercion) of the Penal Code should be redrafted in a similar manner to that recommended above for Article 172 (rape). For example:

Article 171 (sexual coercion)

Any person who practices any relevant sexual act or acts with a person, without that person's consent, is punishable with 2 to 8 years imprisonment. For the purposes of this article, 'consent' has the same meaning as in Article 172.

#### **Marital rape**

During Timor-Leste's most recent appearance before the Committee on the Elimination of Violence Against Women in August 2009, the Committee requested that it ensure the criminalisation of marital rape.<sup>65</sup> It is considered international best practice to specifically criminalise marital rape by either:

- Providing that sexual assault provisions apply "irrespective of the nature of the relationship" between the perpetrator and complainant; or
- Stating that "no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation."<sup>66</sup>

Both of the above approaches make it undeniably clear that the jurisdiction does not tolerate marital rape, and that marriage between the defendant and victim does not preclude prosecution of rape or other sexual offences, nor does it constitute a defence. Adopting one of the above approaches could also enable the specific statement to be used as a tool for advocacy, education and cultural change. Greater public awareness that rape is a criminal offence both within and outside marriage may result in more husbands respecting the bodily integrity of their wives, and more victims accessing the formal justice system and other support services.

#### **Recommendation 6: Marital Rape**

Articles 171 (sexual coercion) and 172 (rape) of the Penal Code should expressly state that marriage (whether in law, church or custom) or any other relationship between the defendant and victim does not preclude the prosecution of the offence. For example:

(X) No marriage (whether in law, church or custom) or other relationship shall constitute a defence to the criminal offence in this Article.

<sup>65</sup> Committee on the Elimination of Violence Against Women, Concluding Observations, CEDAW/C/TLS/CO/1 (20 July – 7 August 2009) (available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.TLS.CO.1.pdf>) at para. 30

<sup>66</sup> Department of Economic and Social Affairs, Division for the Advancement of Women, 'United Nations Handbook for Legislation on Violence Against Women', (report, United Nations, 2010), 26

### Sexual abuse of a person incapable of resistance and sexual fraud

The Penal Code also criminalises taking advantage of persons who are unconscious or vulnerable due to illness, or physical or mental deficiency to practice of sexual acts,<sup>67</sup> and fraudulently taking advantage of mistaken identity to have intercourse or oral sex.<sup>68</sup>

Defining rape and sexual coercion by listing a range of coercive circumstances in which – if sexual intercourse or sexual acts take place – rape or sexual assault is considered to have occurred, results in provisions with much broader application, including to victims of sexual fraud and persons vulnerable by virtue of unconsciousness, illness, physical or mental deficiency.

Firstly, amending Articles 171 and 172 as JSMP and ALFeLa recommend, will simplify the law's application to persons vulnerable by virtue of unconsciousness, illness, physical or mental deficiency. Currently, Article 179 protects such persons from other people taking advantage of their incapacity in order to practice relevant sexual acts. This is punishable by 4-12 years imprisonment.

Including *'where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act'* as a coercive circumstance in Articles 171 and 172 will mean that rape and sexual coercion of these vulnerable people is easier to prosecute. Instead of needing to demonstrate how the offender 'took advantage' of the person's incapacity pursuant to Article 179, the fact that the person was vulnerable by virtue of unconsciousness, illness, physical or mental deficiency will demonstrate absence of consent pursuant to the revised Articles 171 or 172. The sentence for sexual acts (4-12 years) will remain the same, and rape will be 5-20 years – on account of the aggravating factor relating to the unconsciousness or vulnerability of the victim in Article 173(c).

Secondly, it will enhance the protection to victims of sexual fraud. Currently, Article 180 only criminalises fraudulently taking advantage of mistaken identity to practice intercourse and oral sex, not sexual acts. Further, it is a semi-public crime on which investigation and prosecution is dependent on the victim filing a complaint. Such intercourse or oral sex is also only punishable with up to three years' imprisonment. Including *'where a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief'* in Articles 171 and 172 will criminalise both fraudulent all forms of fraudulent sexual acts, and will ensure that the penalty for such acts is commensurate with other criminal sexual acts.

In view of this, should National Parliament amend Articles 171 and 172 in accordance with JSMP and ALFeLa's recommendations, Articles 179 and 180 will no longer be necessary and should be removed from the Penal Code.

#### **Recommendation 7: Sexual abuse of a person incapable of resistance and sexual fraud**

Should National Parliament agree to Recommendations 4 and 5 relating to Articles 172 (rape) and 171 (sexual coercion), Article 179 (sexual abuse of a person incapable of resistance) and Article 180 (sexual fraud) should be removed from the Penal Code, as acts currently covered by these articles will be covered by the amended Articles 171 and 172.

<sup>67</sup> Penal Code (Timor-Leste), article 179

<sup>68</sup> Penal Code (Timor-Leste), article 180

## AGGRAVATION (sexual offences)

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Aggravating factors are factors particular to the offence, the victim or the defendant that make the offence more serious, and therefore deserving of a higher penalty. Examples of aggravating factors particular to the offence include using or threatening to use a weapon or committing an offence with one or more persons; factors particular to the victim include the victim's age, vulnerability due to physical or mental disability, or familial relationship with the defendant; and factors relevant to the defendant include whether the defendant was acting in contravention of a court order or was under the influence of alcohol (particular for offences causing death or harm by dangerous driving).

In Timor-Leste, general aggravating factors are listed in Article 52 in Title III (Circumstances) of the Penal Code. Penalties are determined according to the perpetrator's guilt, and the court must consider general aggravating and mitigating factors to determine the specific penalty within the range prescribed in the offence.<sup>69</sup> Specific aggravating factors, such as those relating to crimes of sexual aggression or sexual abuse, are defined in separate provisions adjacent to the crimes to which they apply, and increase the ordinary penalty range either by a fraction (for example, one third) or a specific number of years.

The type and number of aggravating factors vary greatly from jurisdiction to jurisdiction. Timor-Leste's approach to aggravating factors is discussed below, and is compared with those taken in other jurisdictions.

In JSMP and ALFeLa's view, improving existing provisions on aggravating factors and incorporating new aggravating factors within the Penal Code for crimes of sexual aggression and sexual abuse will more effectively protect victims, particularly women and children who are disproportionately affected by such crimes. A more consistent, and broader range of aggravating factors will enable the courts to impose more suitable punishments for sexual crimes committed in aggravated circumstances, serving as both a specific deterrent for potential re-offenders, and general deterrent for potential perpetrators within the community.

### Current legal provisions relevant to aggravation in sexual offences

Crimes of sexual aggression and sexual abuse fall within Chapter III of the Penal Code 'Crimes against Personal Liberty'. Chapter III comprises five sections, with crimes of sexual aggression (rape and sexual coercion) contained in Section II, and crimes of sexual abuse (sexual abuse of a minor, sexual acts with an adolescent, sexual abuse of a person incapable of resistance, sexual fraud and sexual exhibitionism) in Section IV.

For crimes of sexual aggression (rape and sexual coercion), Article 173 of the Penal Code can be used to increase the penalty range when the crime is committed in one or more aggravating circumstances:

- through abuse of authority arising from a family relationship, guardianship, hierarchical or economic dependence (for example, children, cousins, aunts and uncles, grandparents) or labour-related dependence (such as housekeepers, servants, maids and other workers);
- through taking advantage of a position of authority in certain education, correctional and health related institutions (such as teachers and doctors);
- upon the unconscious or disabled; or
- against victims under the age of 17.<sup>70</sup>

For rape, the term of imprisonment may be increased from 5-15 years to 5-20 years, and for sexual coercion from 2-8 years to 4-12 years.

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<sup>69</sup> Penal Code (Timor-Leste) Article 51 (determination of the measure of penalty)

<sup>70</sup> Penal Code (Timor-Leste), article 173

Article 182 applies to both Section II (crimes of sexual aggression) and Section IV (crimes of sexual abuse) as well as Section III (crimes of sexual exploitation), and raises both the minimum and maximum terms of imprisonment by one third where:

- the victim is less than 12 years of age;
- the perpetrator transmits venereal disease, syphilis or AIDs;
- the offence results in death or suicide (including attempts); or
- the victim and the perpetrator are related by blood (to the second degree) or adoption (first degree), or the victim is co-habiting with the perpetrator under similar conditions or where there is a hierarchical, economical, or work-related dependence.

Article 42 provides that articles 173 and 182 cannot apply concurrently. The court will determine whether article 173 or 182 is specifically applicable to the facts of the case in order to determine the sentencing range.

*Table 2: A comparison of aggravating factors in sexual crimes*

| Article 173                                                                                                                                                                                                                                                                   | Article 182                                                                                                                                                                                                                                                                                                                   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Applies to:</b><br>Sexual coercion (article 171)<br>Rape (article 172)<br><b>ONLY</b>                                                                                                                                                                                      | <b>Applies to:</b><br>Sexual coercion (article 171)<br>Rape (article 172)<br>Sexual abuse of a minor (article 177)<br>Sexual acts with adolescent (article 178)<br>Sexual abuse of a person incapable of resistance (article 179)<br>Other crimes involving sexual acts or sexual exploitation (articles 174-176 and 180-181) |
| Crime occurred through taking advantage of duties exercised or office held in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment | --                                                                                                                                                                                                                                                                                                                            |
| Victim is an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency                                                                                                                                               | --                                                                                                                                                                                                                                                                                                                            |
| Victim aged less than 17 years of age                                                                                                                                                                                                                                         | Victim is less than 12 years of age at time of act                                                                                                                                                                                                                                                                            |
| Crime occurred through abuse of authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labour-related dependence                                                                                                                    | Victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence                                                   |
| --                                                                                                                                                                                                                                                                            | Perpetrator transmitted venereal disease, syphilis or AIDS to the victim                                                                                                                                                                                                                                                      |
| --                                                                                                                                                                                                                                                                            | Due to the act, victim attempts or commits suicide or the same results in death                                                                                                                                                                                                                                               |

### Comparison of legal provisions between jurisdictions

Similar aggravating factors to those in the Timor-Leste Penal Code are found in many other jurisdictions. For example, most jurisdictions recognise the young age of the victim as a potential aggravating factor or as a separate offence. Many jurisdictions also specify other aggravating circumstances which are considered to increase the severity of the crime and result in increased penalties. The following provides a brief overview of aggravating factors in several other jurisdictions.

## I. Portugal

Aggravating factors for crimes of sexual aggression and sexual abuse include:<sup>71</sup>

- The victim has a relevant family relationship with the perpetrator or the perpetrator is the victim's guardian
- The crime is committed within a relevant hierarchical, work or economic relationship of dependence
- The perpetrator is the carrier of a sexually transmitted disease
- The acts result in pregnancy
- The acts result in serious harm to physical integrity of the victim
- The acts result in transmission of a pathogen that endangers life
- The act results in suicide or death of the victim;
- The victim is under the age of 16 years or 14 years (if the victim is under the age of 14 years the increase in penalty is greater).

Many of these aggravating factors appear in a similar form in the Timor-Leste Penal Code, however, the Timor-Leste Penal Code does not recognise pregnancy or serious physical injury as particular aggravating factors in Articles 173 or 182.

## II. Indonesia

Indonesian crimes of sexual aggression differ from Timor-Leste and other jurisdictions as they require the perpetrator to have 'carnal knowledge' of the victim and specify the victim as being a woman.<sup>72</sup> This limits the law regarding male rape and sexual assault. Beyond this gender-bias, sexual crimes are defined in similar terms and carry similar sentences in Indonesia as in Timor-Leste.

Indonesia's aggravating factors are tied to the degree of physical injury experienced by the victim, so that the maximum penalty for crimes of carnal knowledge of an unconscious or helpless person, carnal knowledge of a minor (less than 15 years of age), whether in or out of marriage, and obscene acts with an unconscious person or a minor is increased to:

- 12 years when the victim suffered serious physical injury;<sup>73</sup> and
- 15 years if the crime results in death.<sup>74</sup>

Indonesia also has separate crimes involving abuse of a familial, hierarchical or labour-based dependence relationship.<sup>75</sup>

## III. Vietnam

Vietnam acknowledges not only the direct physical and potential societal impact on the victim (through physical injury, exposure to HIV/AIDS and resulting pregnancy) but also considers the nature of the perpetrator (through the consideration of organisation, multiple perpetrators and recidivism).

The Vietnamese Penal Code incorporates many of the same aggravating factors as the Timor-Leste Penal Code, including:

- The victim's age (less than 13 years old);
- Familial relationship with the perpetrator;
- Violation of a relationship based on education, care or medical treatment; and
- The victim's lack of consciousness or inability to resist, which is incorporated into the definition of rape itself.<sup>76</sup>

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<sup>71</sup> Penal Code (Portugal), Article 177

<sup>72</sup> Penal Code (Indonesia), articles 285 – 288

<sup>73</sup> Penal Code (Indonesia), article 291(1)

<sup>74</sup> Penal Code (Indonesia), article 291(2)

<sup>75</sup> Penal Code (Indonesia), article 294

Vietnam recognises the transmission of HIV/AIDS as an aggravating factor, although only requires that the perpetrator is aware that they are HIV positive (that is, infection of the victim is not required) in order for the crime to be considered in its aggravated form<sup>77</sup> rather than actual transfer as in Timor-Leste.<sup>78</sup>

In addition, Vietnam considers other aggravating factors including:<sup>79</sup>

- The victim becomes pregnant as a result of the crime;
- The victim suffers either moderate or serious physical injury;
- The crime was committed in an organised manner;
- Multiple perpetrators were involved;
- The crime is committed multiple times;
- The crime is committed against more than one person; and
- Dangerous recidivism.

#### IV. Australia

Australian jurisdictions tend to incorporate aggravation into separate crimes<sup>80</sup> or as part of the broader definition of sexual assault.<sup>81</sup> Aggravating factors but generally include:

- Age of the victim;<sup>82</sup>
- Physical harm afflicted upon the victim or threats of physical harm;<sup>83</sup>
- Multiple people are present;<sup>84</sup>
- The perpetrator is armed with a weapon (or pretends to be);<sup>85</sup>
- Abuse of a position of authority over the victim;<sup>86</sup>
- The victim is deprived of their liberty before or after the offence;<sup>87</sup> and
- The perpetrator degrades or humiliates the victim.<sup>88</sup>

Of these, the Timor-Leste Penal Code does not currently consider the number of people present during the act itself, the presence (or implied presence) of a weapon and the mental effects on the victim (i.e. humiliation) as relevant aggravating factors.

#### V. United Kingdom

A variety of aggravating factors are considered for sexual crimes within the United Kingdom, including:<sup>89</sup>

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<sup>76</sup> Penal Code (Vietnam), Article 111

<sup>77</sup> Articles 111 – 113 of the Vietnamese Penal Code.

<sup>78</sup> Penal Code (Timor-Leste), article 182

<sup>79</sup> See articles 111(2) and (3), 112(2), (3) and (4), 113(2) and (3), 114(2) and (3), 115(2) and (3) and 116(2) of the Vietnamese Penal Code.

<sup>80</sup> Examples include section 130 of the Criminal Code Act (NT), section 216 of the Criminal Code 1899 (Qld) section 55A of Crimes Act 1900 (ACT).

<sup>81</sup> For example, section 49 of the Criminal Code Consolidation Act 1935 (SA) (Unlawful sexual intercourse) includes consideration of the abuse of position of authority (5) and abuse of person's intellectual disability (6).

<sup>82</sup> See, eg, Crimes Act 1900 (NSW) section 61J(2)(d), Criminal Code Consolidation Act 1935 (SA) sections 5AA (1)(e) and (f) and Criminal Code Act Compilation Act 1934 (WA) section 319(1)(b).

<sup>83</sup> See, eg, Crimes Act 1900 (NSW) sections 61J(2)(a) and (b), Criminal Code Consolidation Act 1935 (SA) section 5AA (1)(a) and Criminal Code Act Compilation Act 1934 (WA) sections 319(1)(a)(iii) and (v).

<sup>84</sup> See, eg, Crimes Act 1900 (NSW) sections 61J(2)(c) and 61M(3)(a), Criminal Code Consolidation Act 1935 (SA) section 5AA (1)(h) and Criminal Code Act Compilation Act 1934 (WA) section 319(1)(a)(ii).

<sup>85</sup> See, eg, Criminal Code Consolidation Act 1935 (SA) section 5AA (1)(b) and Criminal Code Act Compilation Act 1934 (WA) section 319(1)(a)(i).

<sup>86</sup> See, eg, Crimes Act 1900 (NSW) sections 61J(2)(e) and 61M(3)(c) and Criminal Code Consolidation Act 1935 (SA) section 5AA (1)(k).

<sup>87</sup> See, eg, Crimes Act 1900 (NSW) section 61J(2)(i).

<sup>88</sup> See, eg, Criminal Code Act Compilation Act 1934 (WA) section 319(1)(a)(iv).

- Severe psychological or physical harm to the victim;
- Relevant acts result in pregnancy or transfer to the victim of a sexually transmitted disease;
- Additional degradation/humiliation;
- Abduction and/or prolonged detention;
- Significant degree of planning;
- Perpetrator acts with others to commit the offence;
- Use of alcohol/drugs on victim to facilitate the offence;
- Abuse of trust;
- Recording of the offence;
- Commercial exploitation and/or motivation; and
- Offence racially or religiously aggravated or motivated by the victim's sexuality or disability.

## Case study

### Case Study 4: Aggravated rape

In this case, the victim – a girl in her early teens – was raped ten times by her uncle, the defendant. Each time, the defendant entered the victim's room during the middle of the night and used both threats and force to have sexual intercourse with her. As a result, the victim became pregnant.

The court sentenced the defendant to eight years in prison, recognising the defendant's abuse of authority arising from his familial relationship with the victim as an aggravating factor.

Rape is ordinarily punishable by 5-15 years imprisonment, or by 5-20 years in aggravated circumstances. In this case, the court recognised the familial relationship between the defendant and the victim as an aggravating factor but failed to consider other factors such as the victim's young age (which was believed to have been between 12-15 years) pursuant to Article 183(d), and the number of times the defendant raped the victim in accordance with Article 52(2)(g). JSMP and ALFeLa believe that the pregnancy resulting from the defendant's acts should also be considered an aggravating factor given the wide-ranging implications for the victim's health (particularly given her young age), education, capacity to work, and financial circumstances.

## Recommendations

JSMP and ALFeLa recommend improving existing and incorporating new aggravating factors within the Penal Code for crimes of sexual aggression and sexual abuse to enable the courts to impose more suitable punishments for sexual crimes committed in aggravated circumstances, serving as both specific and general deterrents.

### Expand the range of aggravating factors

As discussed above, not all jurisdictions recognise the same set of aggravating factors or even consider identical aggravating factors in the same manner. Currently, Timor-Leste recognises as aggravating factors the abuse of a position of authority or existence of familial/dependent relationship, transfer of venereal disease, syphilis or AIDS, the victim's age, and whether the act results in the death or suicide of the victim.

JSMP and ALFeLa are concerned that key aggravating factors present in many sexual crimes in Timor-Leste that are recognised in other jurisdictions are missing from the Penal Code. We

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<sup>89</sup> Coroners and Justice Act (2009) (United Kingdom) section 125(1), read in conjunction with the Sentencing Guidelines Council Sexual Offence Definitive Guideline (2014).

recommend that the following be incorporated into Article 182 to ensure their broadest application to sexual crimes:

- physical and psychological injury to the victim;<sup>90</sup>
- pregnancy resulting from the relevant acts;
- the involvement of multiple perpetrators;
- the use or threat of force;
- the presence or implication of the presence of a weapon; and
- a degree of planning prior to committing the acts.

Unless these factors are considered when sentencing the perpetrators of sexual crimes, the courts cannot adequately address the full degree of harm that a victim may suffer during and after the crime itself.

Abuse of a position of authority arising within educational, medical or corrective facilities (article 173(b)), and committing an offence upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency (article 173(c)), are both currently applicable only to the crimes of rape and sexual coercion. These aggravating factors should be added to Article 182 to ensure they can be applied to all sexual crimes.

### ***Improve existing aggravating factors***

The aggravating factors relating to abuse of a position of authority arising from a familial/dependent relationship in Article 173(a), and the existence of a familial/dependent relationship in Article 182(1)(d), are intended to cover the same situation but are currently drafted inconsistently. This may undermine their consistent application.

Article 173(a) requires the crime to have occurred through abuse of authority arising from a familial/dependent relationship whereas Article 182(1)(d) simply requires the existence of such a familial/dependent relationship. However, it is clear that both articles were intended to enable the courts to give more severe sentences to defendants who have taken advantage of familial/dependent relationships to commit a crime of sexual abuse.

In order to streamline the sentencing process and to ensure an equitable application of sentencing principles to all sexual crimes, JSMP and ALFeLa recommend redrafting Article 173(a) and Article 182(1)(d) to ensure consistency and include wards and children under guardianship in Article 182(1)(d).

Article 182(1)(c) should also be redrafted so that it refers to a broader category of ‘sexually transmitted infections’, and so that both infection of the victim *or* knowledge by the perpetrator that they carry such an infection at the time of the relevant act/s constitutes an aggravating factor. Mere exposure of another unwilling person to such infection is an unacceptable risk.

Finally, if the amendments recommended above are made to Article 177 in relation to sexual abuse of a minor, the aggravating factor in Article 173(d) will no longer be necessary because Article 177 will cover all sexual acts with a person under the age of 17 regardless of consent. The sentencing range in Article 173 (4-12 years for sexual coercion and 5-20 for rape) is inconsistent with Article 177 (5-15 for sexual acts and 5-20 for sexual intercourse, both increased if an aggravating factor is present). To avoid confusion in charging and sentencing, JSMP and ALFeLa

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<sup>90</sup> This aggravating factor should be drafted in a way that ensures it carries greater weight in relation to minors and adolescents to better reflect the degree of damage that may have already been done but will not manifest until a considerable period of time after the act itself. Sexual abuse of minors is said to result in psychological injury to a high percentage of victims, including depression, anxiety, eating disorders, poor self-esteem, sleeping and other disorders like post-traumatic stress disorder. Child victims of sexual abuse may experience learning difficulties and behavioural problems. They may also exhibit risky sexual behaviours as adolescents, and may be at a higher risk of teenage pregnancy. The psychological harm can be greater if the abuser is a relative, the abuse involves intercourse or attempted intercourse, or if threats or force are used. All of these psychological conditions can have a profound impact on the child’s education and quality of life.

recommend that Article 173(d) is removed if the amendments recommended above are made to Article 177.

When redrafting the aggravating factors to be considered for a sexual crime, those currently in the Penal Code should not be weakened or limited in their application. Redrafting is only intended to simplify the application of the factors, while the addition of further aggravating factors is designed to expand the protection already offered to women and children and to bring Timor-Leste into line with regional best practices regarding sexual crimes.

#### **Recommendation 8: Aggravation in crimes of sexual aggression and sexual abuse**

- (1) Subparagraph 173(b) relating to abuse of a position of authority within educational, medical or corrective facilities, and subparagraph 173(c) relating to committing an offence upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency, should be added to Article 182 so that they apply to all sexual crimes.
- (2) Article 182 should be expanded to include the following aggravating factors in sexual crimes:
  - physical and psychological injury to the victim;
  - pregnancy resulting from the relevant acts;
  - the involvement of multiple perpetrators;
  - the use or threat of force;
  - the use, presence or implied presence of a weapon; and
  - a degree of planning prior to committing the acts.
- (3) Subparagraph 182(1)(b) should be redrafted so that it refers to a broader category of 'sexually transmitted infections', and so that both infection of the victim *or* knowledge by the perpetrator that they carry such an infection at the time of the relevant act/s constitutes an aggravating factor.
- (4) Subparagraph 173(a) should be redrafted, and subparagraph 182(1)(d) redrafted to include wards and children under guardianship. If the recommended amendments are made to Article 177, subparagraph 173(d) should be removed. For example:

##### **Article 173 (Aggravation)**

If the sexual offenses referred to in articles 171 and 172 are committed:

- a) **Against a victim who is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence, including a victim who is a ward or under the guardianship of the perpetrator** ~~Through abuse of authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labor-related dependence;~~
- b) Through taking advantage of duties exercised or office held, in any capacity, in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment; or
- c) Upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency;
- ~~d) Against a victim aged less than 17 years;~~

The perpetrator is punishable with 4 to 12 years imprisonment in the case of article 171 and 5 to 20 years imprisonment in the case of article 172.

##### **Article 182 (Aggravation)**

1. The penalties prescribed from Section II to Section IV of this chapter shall have their minimum and maximum limits increased by one third if:
  - a) The victim is less than 12 years of age at the time the act was committed;
  - b) The perpetrator has transmitted to the victim any sexually transmitted**

|    |                                                                                                                                                                                                                                                                                                                                                                               |
|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    | <b>infection or has knowledge that they carry a sexually transmitted infection;</b>                                                                                                                                                                                                                                                                                           |
| c) | Due to the act, the victim attempts or commits suicide or the same results in death.                                                                                                                                                                                                                                                                                          |
| d) | The victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence, <b>including where the victim is a ward or is under the guardianship of the perpetrator;</b> |
| e) | <b>The perpetrator commits the offence through taking advantage of duties exercised or office held, in any capacity, in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment;</b>                                                  |
| f) | <b>The perpetrator commits the offence upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency;</b>                                                                                                                                                                                                        |
| g) | <b>The victim suffers serious physical and psychological injury;</b>                                                                                                                                                                                                                                                                                                          |
| h) | <b>The victim becomes pregnant;</b>                                                                                                                                                                                                                                                                                                                                           |
| i) | <b>The commission of the crime was facilitated by cooperation of two or more persons;</b>                                                                                                                                                                                                                                                                                     |
| j) | <b>The perpetrator used or threatened to use force;</b>                                                                                                                                                                                                                                                                                                                       |
| k) | <b>A weapon was present, or its presence was implied;</b>                                                                                                                                                                                                                                                                                                                     |
| l) | <b>The perpetrator undertook a degree of planning prior to committing the act or acts;</b>                                                                                                                                                                                                                                                                                    |
| 2. | Whenever more than one of the circumstances described in the preceding subarticle are present, only one may be evoked as a modifying circumstance and those remaining shall be weighed in determining a specific penalty.                                                                                                                                                     |

## AGGRAVATION (physical assault)

### Current legal provisions relevant to aggravation in crimes of physical assault

Chapter II 'Crimes Against Physical Integrity' of the Penal Code comprises a range of crimes against the person, including simple and serious offences against physical integrity (articles 145 and 146), negligence resulting in bodily harm (article 148), medical negligence (article 149), poisoning (article 150), reciprocal assault (article 151), affray resulting in death or serious bodily harm (article 152), as well as mistreatment of a disabled person (article 153), a spouse (article 154), and a minor (article 155).

According to JSMP court monitoring, simple assault is overwhelmingly the most common type of crime against physical integrity heard by the courts. Serious assault and to a lesser extent, mistreatment of a spouse, are also commonly heard cases. In many of these cases, a weapon such as a machete, knife or a piece of wood is used in the commission of the crime. This submission will focus on these crimes and the application of aggravating circumstances in sentencing.

#### I. Simple offences against physical integrity

'Simple Offences Against Physical Integrity' in Article 145 of the Penal Code, or simple assault, is a semi-public crime ordinarily dependent on the filing of a complaint. The effect of Article 35 of the *Law Against Domestic Violence* (LADV) means that this semi-public crime (among others) is considered a public crime (of domestic violence) when committed in the family context.<sup>91</sup> Simple assault involves harm to the body or health of another person and is punishable with up to 3 years' imprisonment or a fine.

<sup>91</sup> Law Against Domestic Violence (Timor-Leste), articles 2 and 36

## II. Serious offences against physical integrity

‘Serious Offences Against Physical Integrity’ in Article 146 of the Penal Code, or serious assault, is a public crime involving harm to the body or health of another person with the purpose of depriving the victim of an important organ or limb, causing serious or permanent disfigurement, long-term impairment of the victim’s intellectual/working/reproductive capacity, permanent illness or an incurable mental condition, or endangering life. Serious assault is punishable with 2 to 8 years’ imprisonment.

## III. Mistreatment of a spouse

Mistreatment of a spouse in Article 154 of the Penal Code is a public crime involving physical or mental mistreatment or cruel treatment upon a spouse or person cohabiting with the perpetrator in a situation analogous to that of spouse, and is punishable by 2 to 6 years’ imprisonment unless there is an alternative crime with a heavier penalty.

## IV. Aggravating factors

Article 147 provides a limited range of aggravating factors applicable to simple and serious assault that are largely based on the degree of physical or psychological injury to the victim and death by negligence.

Where a person intends to cause harm to the body or health of another person but causes one of the types of injury described in Article 146 relating to serious assault, the court may apply a penalty of up to 5 years’ imprisonment (for injury) or between 1 and 6 years’ imprisonment (for negligent manslaughter).<sup>92</sup>

Where a person intends to cause harm to the body or health of another person with the purpose of causing the injuries described in Article 146 (serious assault) and instead causes death by negligence, their act is punishable with 4 to 12 years’ imprisonment.

Article 156 outlines aggravating factors relating to articles 153 to 155 (mistreatment of a disabled person, spouse and minor). Where, as a consequence of mistreatment, a person causes any injury described in Article 146 (serious assault) or death, the penalty is increased to between 3 - 10 years, and 5 - 15 years respectively.

The articles relating to mistreatment of a disabled person and of a minor also contain an individual aggravating factor which increases the penalty by one third where the victim is related to the defendant as described in the article.

## Comparison of legal provisions between jurisdictions

In addition to the degree of injury or death and the identity of the victim, in other jurisdictions the use or presence of a weapon is often considered an aggravating factor in crimes such as physical assault or mistreatment resulting in injury. Many jurisdictions consider the use of a weapon or threatened use of a weapon to constitute a more serious offence, because the degree of likely harm to the victim is higher when a weapon is involved.

For example, in many United States jurisdictions, the more serious crime of aggravated assault (which is similar to the crime of serious offences against physical integrity) incorporates the use of a deadly weapon as a relevant factor.<sup>93</sup> This means that an assault which causes only minor injuries can be considered a more serious assault where a weapon was used. The justification for this is that when a weapon is involved there is both a greater threat of injury and a greater

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<sup>92</sup> Penal Code (Timor-Leste), article 147(1)(a) and (b).

<sup>93</sup> For example, California’s Penal Code has a increasing range of penalties for the use of a weapon depending on the type of weapon (section 245); the use of a deadly weapon in Arizona elevates a simple assault to an aggravated assault (Az. St. § 13-1204); in New Jersey attempting to cause, knowingly or recklessly causing bodily injury with a deadly weapon is considered aggravated assault (N.J.S.A § 2C:12-1(b)).

likelihood of serious injury to the victim. Other examples of jurisdictions which specifically acknowledge use of weapons in this type of crime include Vietnam, which provides use of dangerous weapons as a factor which makes a crime more serious (even if minimal harm results).<sup>94</sup> Singapore also has separate crimes with more severe penalties for causing harm or serious harm by use of dangerous weapons or means.<sup>95</sup>

On the other hand, many jurisdictions do not specify use of a weapon as a separate factor, but rely on the degree of harm or injury to determine the penalty range. For example, Brazil's Penal Code includes offences for physical harm of a person and provides two levels of penalty depending on the severity of injury.<sup>96</sup> Brazil's Penal Code does refer to some aggravating factors relating to the position of the perpetrator or the victim (for example, if the victim is a family member, under 14 years of age or over 60 years of age) but does not provide for increased penalties in relation to the means of causing the harm, such as by use of a weapon.

The provisions of the Timor-Leste Penal Code in relation to crimes against physical integrity appear to be modelled on the equivalent provisions in the Portuguese Penal Code, which also define serious assault by reference to the degree of injury intended by the perpetrator.<sup>97</sup> It may be possible to recognise the additional threat of injury which comes from use of a weapon using this approach, by arguing that the more serious offence requires the perpetrator to have the intention to cause a more serious injury (whether or not the act results in a more serious injury) and the use of a weapon demonstrates the person had that intent. However, the crime of serious offences against physical integrity does not seem to be applied this way in Timor-Leste. The case study below demonstrates that even where a more serious injury could have resulted because a knife was used, the court applied the less serious crime of simple offences against physical integrity. For this reason, JSMP and ALFeLa suggest that the use of a weapon should be specified as an aggravating factor for crimes against the person. Explicitly stating in the Penal Code that the use of a weapon is an aggravating factor will encourage prosecutors and the courts to consider the serious threat of injury that results from the use of a weapon.

## Case studies

### Case Study 5: Serious assault with a knife

The defendant and the victims were drinking wine in a friend's house, and arguing about family relationships, when the defendant became angry and hit the table. He then went to the kitchen to get a knife, stabbed the first victim in the stomach, and the second in the left hand and left calf.

The defendant confessed that the allegations were true, and that at the time, they were all drunk. When he grabbed the knife, the victims tried to snatch it from him. The defendant said he was drunk until the morning, when he woke and realised that he had stabbed and injured the victims.

The first victim testified that he was drinking and arguing with the defendant and the other victim when suddenly the defendant went to the kitchen, stabbed him, and injured his stomach, causing him to fall down. He then spent two weeks in hospital receiving treatment.

The second victim testified that when they were arguing with each other, he said 'calm down' and suddenly the first victim fell down. He then tried to defend himself but the defendant stabbed his hand and calf.

The defendant was convicted of simple assault and the court sentenced the defendant to two years for both assaults, and suspended the sentence for three years.

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<sup>94</sup> Penal Code (Vietnam) Article 104(1)(a)

<sup>95</sup> Penal Code (Singapore), section 324 and 326

<sup>96</sup> Penal Code (Brazil), Article 129

<sup>97</sup> Penal Code (Portugal), Article 144

Simple assault is ordinarily punishable by up to three years imprisonment or a fine. While the courts must give preference to a non-custodial sentence where the law provides for an alternative penalty, a suspended sentence is inappropriate for a stabbing resulting in injuries requiring two weeks' hospital treatment, as is the charge of simple assault. However, if use or threat of the use of a weapon were to be included as an aggravating factor in Article 147, the Public Prosecutor could have argued that it was a more serious offence punishable by up to five years imprisonment on the basis that the defendant used a knife to assault the victims. Had the defendant been charged appropriately, such an aggravating factor would have further increased the penalty.

#### **Case Study 6: Assault of a spouse with a machete**

A wife returned home after selling meat at the markets. When she returned home, her husband was sleeping in the house. She woke him up to ask whether she should cook rice, because she was hungry. The husband became angry, stood up and kicked her repeatedly until she fell down. He then got some cooking fuel and poured it over her body. The wife tried to run away, but the husband got a fan cable and hit her face and back. The husband then fetched a machete, intending to slash his wife's throat. The wife called out for someone to call her family, but those watching were too scared to help.

In this case, the public prosecutor charged the husband with simple assault under Article 145 of the Penal Code. The court fined the husband \$75, to be paid \$1 a day over 75 days.

It is difficult to argue in this case that the defendant's acts constituted simple assault – he kicked the victim repeatedly until she fell to the ground, poured cooking fuel over her (which suggests the defendant planned to, or at least was threatening to, set the victim alight), hit her with an electrical cord on the back and face (an act that could cause blindness), then threatened to use a machete to slash the victim's throat. At a minimum, the public prosecutor should have charged the defendant with serious assault pursuant to Article 146 of the Penal Code which carries a heavier penalty of two to eight years imprisonment, and cannot be punished with a fine. Alternatively, the prosecutor could have charged the defendant with attempted homicide pursuant to Articles 23 and 138 of the Penal Code.

Either way, the defendant's acts clearly fulfilled several different elements of serious assault which require a person to, amongst other things, have caused harm to the body or health of another person with the purpose of seriously or permanently disfiguring that person, affecting their working capacity or endangering their life. In this case, the way in which the defendant attacked his wife suggested he intended to cause permanent disfigurement through burns, blindness by blows to the face, and generally threaten her life.

Setting aside the issue of inappropriate charging, were use or threat of the use of a weapon to be included as an aggravating factor in Articles 147, this simple assault could have been considered as a more serious offence punishable by up to five years imprisonment. Had the defendant been charged appropriately, such an aggravating factor would have further increased the penalty.

#### **Case Study 7: Assault of a spouse using a piece of wood**

The defendant hit his wife on the head with a piece of wood, resulting in a head injury and causing a lot of bleeding. The victim's wound required stitches at hospital.

In this case, the defendant was charged with simple assault under Article 145 of the Penal Code. The court issued the defendant with a sentence of six months, suspended for one year.

Again, it is difficult to argue in this case that the defendant's acts constituted simple assault – the defendant used a heavy object to inflict a head wound requiring stitches, which could have resulted in a brain injury. The public prosecutor should have charged the defendant with serious assault (described above) for endangering the victim's life. If use or threat of the use of a weapon were to be included as an aggravating factor in Articles 147, this simple assault could have been

considered as a more serious offence punishable by up to five years imprisonment. Had the defendant been charged appropriately, such an aggravating factor would have further increased the penalty.

## Recommendation

JSMP and ALFeLa have observed through our court monitoring and legal assistance activities that the use of a weapon, such as a machete or knife, is common in cases of crimes against physical integrity in Timor-Leste. However, in such cases, the additional threat and likelihood of serious injury that results from the use of a weapon is rarely acknowledged in the charge or in sentencing. JSMP and ALFeLa believe that crimes involving the use or threat of use of a weapon constitute more serious instances of assault and this should be recognised in the Penal Code. For these reasons, we suggest that use of a weapon should be included as an aggravating factor in crimes against the person in the Penal Code.

### Recommendation 9: Aggravation in crimes of physical assault

Articles 147 and 156 should be amended to include use or threatened use of a weapon as an aggravating factor in crimes of physical assault. For example:

#### Article 147 (aggravation)

1. Any person who, with the sole intent to cause harm to the body or health of another person:
  - a) causes any of the results provided in article 146 is punishable with up to 5 years imprisonment;
  - b) causes death by negligence is punishable with 1 to 6 years imprisonment; or
  - c) uses or threatens to use a weapon to cause such harm is punishable with up to 5 years imprisonment.**
2. If, with intent to cause any of the offenses provided in article 146, causes death by negligence, is punishable with 4 to 12 years imprisonment;
3. If the victims of the crimes referred to in the two previous articles are any of the persons mentioned in article 139, paragraph (i), because of or while performing their aforementioned duties, the limits of the penalty shall be increased by one-third, where no heavier penalty is applicable by force of another legal provision.

#### Article 156 (aggravation due to results)

If, as a consequence of mistreatment described in articles 153 to 155, any of the effects referred to in article 146 occurs, **or the perpetrator uses or threatens to use a weapon**, the perpetrator is punishable with 3 to 10 years imprisonment and if death is caused by such mistreatment, then the perpetrator is punishable with 5 to 15 years imprisonment.

## LAW AGAINST DOMESTIC VIOLENCE

### Corresponding amendments to the Law Against Domestic Violence

The proposed amendments to the Penal Code outlined in this submission also require amendments to the Law Against Domestic Violence (**LADV**) to ensure consistency between the two pieces of legislation.

Article 35 of the LADV includes an exhaustive list of crimes which are considered crimes of domestic violence. Pursuant to Article 36, these crimes are public crimes meaning that prosecution does not depend on the filing of a complaint by the victim.

In order to ensure consistency with the proposed amendments to the Penal Code, the article of the Penal Code corresponding to the new crime of incest should be included in Article 35 subsection (a) of the LADV. In addition, consistent with JSMP and ALFeLa's earlier recommendations, Articles 178 (sexual acts with an adolescent) and 179 (sexual abuse of a person incapable of resistance) should be deleted from Article 35 subsection (b).

## Inclusion of threats and property damage in the LADV

Article 2 of the LADV defines domestic violence as including physical violence, sexual violence, psychological violence and economic violence.

Psychological violence is understood to mean “any conduct that causes emotional harm and reduces self-esteem, aimed at degrading or controlling the actions, behaviour, beliefs and decisions of another person through *threats*, coercion, humiliation, manipulation, isolation, constant surveillance, systematic persecution, insults, blackmail, ridiculing, exploitation, restrictions to the right to move freely or by any other means that cause harm to the psychological well-being and to self-determination.”<sup>98</sup> (emphasis added)

Article 35 of the LADV defines crimes of domestic violence by reference to specific articles of the Penal Code. Currently, Article 35 does not include Article 157 of the Penal Code which concerns threats. Article 157 provides as follows:

1. Any person who, by any means, threatens another person with commission of a crime in order to cause fear or unrest or to undermine that person’s freedom of decision-making is punishable with up to 1 year imprisonment or a fine.
2. Prosecution depends on the filing of a complaint.

This means that threats which occur within the family context are not public crimes and depend upon the filing of a complaint by the victim. JSMP and ALFeLa consider this gives rise to an inconsistency between Article 2, which recognises threats can constitute domestic violence, and Article 35 which fails to include Article 157 of the Penal Code as a crime of domestic violence.

In JSMP and ALFeLa’s experience, threats within the family context that are reported to police are often not investigated or prosecuted because they are not considered public crimes. Even those threats which are prosecuted are often resolved either before or at the court hearing because they have been mediated within the family or community. JSMP and ALFeLa consider this may discourage victims from reporting further threatening behaviour or violence.

In addition to psychological violence, Article 2 of the LADV includes economic violence as a form of domestic violence. Economic violence means “any conduct that results in the retention, subtraction, partial or total destruction of personal effects, working instruments, impediment to work or outside the home, personal documents, assets, valuables and rights or economic resources, including those intended to meet personal needs and the needs of the household.”<sup>99</sup>

There are three articles in the Penal Code which relate to property damage. Article 258 states that “any person who wholly or partially destroys, causes damage to, defaces or renders unusable the property of another is punishable with up to three years imprisonment or a fine.” This offence is a semi-public crime. In addition, Article 259 creates a separate offence of aggravated property damage and property offences committed with the use of violence has an increased penalty range under Article 260.

None of these articles are included in Article 35 of the LADV which means that they are not considered public crimes when committed in a family context. Accordingly, property damage which occurs within the family context depends upon the victim filing a complaint. JSMP and ALFeLa considers this gives rise to an inconsistency between Article 2, which recognises property damage as a form of domestic violence, and Article 35 which fails to include Articles 258, 259 and 260 of the Penal Code as crimes of domestic violence.

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<sup>98</sup> Law Against Domestic Violence (Timor-Leste), article 2(2)(c)

<sup>99</sup> Law Against Domestic Violence (Timor-Leste), article 2(2)(d)

## Case study

### Case Study 8: Threats

A 50 year-old woman returned home from looking after her grandchildren to find that her husband (52 years old) had sold the couple's buffalo and spent that money, together with the money they had set aside to pay their monthly expenses. This amounted to over \$500.

The victim and defendant argued about the money and the defendant threatened the victim with his machete, saying he was going to kill her. The defendant then used his machete to slash all the couple's household items such as the water thermos and bed. The victim fled from the house and contacted the police by telephone.

ALFeLa met with the victim and she said she wanted the case to be brought before the court. A mobile court heard the case. The defendant was charged with threatening the victim pursuant to Article 157 of the Penal Code. Due to the semi-public nature of the crime, in court the judge attempted to conciliate the matter. The public prosecutor submitted that the victim and defendant had already reconciled in front of the court building before the hearing. The judge decided to absolve the defendant because the victim and defendant had already made peace.

In this case study, the defendant threatened to kill the victim with a machete and then proceeded to destroy the victim's property. Conduct of this nature has a serious psychological impact on victims and JSMP and ALFeLa believe it should be recognised as a public crime under the LADV.

## Recommendation

### Recommendation 10: Law Against Domestic Violence

Article 35 of the Law Against Domestic Violence should be amended to ensure consistency with the proposed amendments to the Penal Code. Specifically, the new article criminalising incest should be included in subsection (a) of Article 35 and reference to Articles 178 (sexual acts with an adolescent) and 179 (sexual abuse of a person incapable of resistance) should be deleted from Article 35 subsection (b). Subsection (b) of Article 35 should also be amended to include Articles 157, 258, 259 and 260 of the Penal Code relating to threats, property damage, aggravated property damage and property damage with the use of violence. For example:

#### **Article 35 (Crimes of domestic violence)**

For the purposes of this law, the following shall be considered crimes of domestic violence:

- a) the types of crime provided for in articles 153, 154, 155 and 156 of the Criminal Code;
- b) the types of unlawful conduct provided for in articles 138, 139, 141, 145, 146, **157**, 167, 171, 172, **< article concerning incest >**, 175, 177, ~~178 and 179~~, **258, 259 and 260** whenever, in addition to fulfilling the typical elements of fact contained in the incriminating norm, any of the circumstances described in article 2 of this law occur.

## FAILURE TO REPORT CRIMES OF DOMESTIC VIOLENCE

### Current legal provisions containing obligations to report domestic violence

Article 286 of the Penal Code provides:

Any person who, being aware of the commission of a public crime, and having the obligation to report it, fails to do so, is punishable with the penalty that corresponds to said unreported crime with its minimum and maximum limits decreased by two thirds.

Pursuant to Article 211(1) of the Criminal Procedure Code, any police officer who learns that a crime has been committed is required to immediately prepare a notification. This article is also applicable to any "civil servant, public manager or any other public agent or authority who, in the

exercise of his or her functions or as a result there from, learns that a crime has been committed.”<sup>100</sup>

This provision means that police officers, teachers employed by the Ministry of Education, doctors employed by the Ministry of Health and public servants such as social workers and Child Protection Officers employed by the Ministry of Social Solidarity have a positive obligation to report crimes of domestic violence. Crimes of domestic violence are considered public crimes pursuant to Article 36 of the LADV.

Article 286 may also apply to *Chefe Sucos* as they have an obligation under Article 11(f) of the Community Leaderships and Their Elections Law (Law No. 3 of 2009) to “request the intervention of the security forces ... whenever crimes are committed or disturbances occur.” However, it is unclear under this provision which types of crimes *Chefe Sucos* are required to report and whether they are required to report crimes in all circumstances or just in cases of civil disturbance when “intervention of the security forces” is necessary. JSMP and ALFeLa consider that further consideration should be given to mandatory reporting requirements for *Chefe Sucos* as the existing legislative provisions are unclear.

### Lack of prosecutions of failure to report

Whilst a former PNTL Commander of Criminal Investigations was recently convicted of failing to report a crime pursuant to Article 286 in a case involving alleged drug offences,<sup>101</sup> as far as JSMP and ALFeLa are aware, there have been no prosecutions under this provision of the Penal Code regarding failure to report a crime of domestic violence. JSMP and ALFeLa believe that the Public Prosecutor should prosecute cases where the police or a public servant has knowledge of a crime of domestic violence but has failed to report it. A strong response from the Public Prosecutor on this issue will encourage the reporting of public crimes and ensure better protection for victims of crimes of domestic violence.

### Recommendations

#### **Recommendation 11: Prosecution of failure to report crime of domestic violence**

The public prosecution should prosecute cases of failure to report under Article 286 of the Penal Code when it becomes aware of cases where a police officer or public servant has failed to report a crime of domestic violence.

#### **Recommendation 12: Training about obligation to report**

The PNTL and other government departments such as the Ministry of Social Solidarity, Ministry of Education and Ministry of Health should incorporate as part of their training the positive obligation for police officers and public servants to make a notification in the event they learn that a public crime has been committed.

<sup>100</sup> Article 211(2), Criminal Procedure Code

<sup>101</sup> Case No. 364/2014, Dili District Court, 8 August 2014. See JSMP Press Release, “Court sentences former commander of criminal investigations to 9 years in prison”, 14 August 2014, accessed at [http://jsmp.tl/wp-content/uploads/2014/01/PrTribunal-Kodena-eis-komandante-investigasaun-ho-pena-tinan-9-prizaun\\_ENGLISH.pdf](http://jsmp.tl/wp-content/uploads/2014/01/PrTribunal-Kodena-eis-komandante-investigasaun-ho-pena-tinan-9-prizaun_ENGLISH.pdf).

## SUMMARY OF RECOMMENDATIONS

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### Recommendation 1: Incest

A new article should be inserted in the Penal Code after Article 172 (rape) that criminalises both incestuous intercourse and other sexual acts, covers the uncle-niece relationship, has a penalty commensurate with that for aggravated sexual assault of a minor, and clarifies that the crime applies only to the person who is exploiting the family relationship to ensure that only the prosecuted is prosecuted. For example (and subject to expert drafting advice):

#### Article [X] (incest)

- (1) Any person who practices any relevant sexual act with a descendant, or collateral, relative or affinal to the third degree, adopted by the perpetrator or person with whom he or she lives together in similar circumstances, being in a position of family authority over such person, even if violence or serious threat is not proven, is punishable with 5 to 15 years imprisonment, irrespective of the consent of the victim.
- (2) Any person who practices vaginal, anal or oral coitus with, or introduces objects into the anus or vagina of, a descendant, or descending collateral, relative or affinal to the third degree, adopted by the perpetrator or person with whom he or she lives together in similar circumstances, being in a position of family authority over such person, even if violence or serious threat is not proven, is punishable with 10 to 20 years imprisonment, irrespective of the consent of the victim.

### Recommendation 2: Sexual abuse of a minor

The proposed changes to Article 177 should be amended to include a defence to the crime of sexual abuse of a minor where sexual relations are consensual, the 'victim' is 16 years of age, and the 'offender' is close in age (for example, within 3 years of age) to the victim, or the parties are legally married. For example:

#### Article 177 (sexual abuse of a minor)

- (1) Any person who practices vaginal, anal or oral coitus with a minor aged less than 17 years is punishable with 5 to 20 years imprisonment.
- (2) Any person who practices any act of sexual relief with a minor aged less than 17 years is punishable with 5 to 15 years imprisonment.
- (3) If an act described in this Article is practised with a minor aged between 16 and 17 years and the minor consents without coercion to the act, the act will not be unlawful in the following cases:
  - (a) if the person is not more than 3 years older than the minor; or
  - (b) if the minor and the person are legally married.

### Recommendation 3: Sexual abuse of an adolescent

Given that the amended Article 177 will cover acts previously covered by Article 178, Article 178 should be removed from the Penal Code.

### Recommendation 4: Rape

Article 172 (rape) of the Penal Code should be redrafted so that it defines rape as sexual intercourse (consistent with the Code's current definition: vaginal, anal or oral sex with a person, or introducing objects into the vagina or anus of a person) when the act takes place without that person's consent. It should also define 'consent' as free and voluntary agreement, and include a non-exhaustive list of circumstances in which a person does not consent to an act. Further, it should include guidance for judges about circumstances which do not necessarily mean that the victim consented (for instance, lack of physical resistance or injury) and to ensure judges do not draw adverse inferences from a victim's delay in reporting a rape. For example:

#### Article 172 (rape)

Any person who practices vaginal, anal or oral coitus with another person, or introduces objects into the vagina or anus of a person, without that person's consent, is punishable with 5 to 15 years imprisonment. For the purposes of this Article:

- (a) 'Consent' means free and voluntary agreement.
- (b) Circumstances in which a person does not consent to an act include, but are not limited to, the following:
  - (i) the person submits to the act because of the use of violence or force on that person or someone else;
  - (ii) the person submits because of the threats or intimidation against them or someone else;
  - (iii) the person submits because of fear of harm to them or to someone else;
  - (iv) the person submits because he or she is unlawfully detained;
  - (v) the person is asleep, unconscious or so affected by alcohol or another drug so as to be incapable of freely consenting;
  - (vi) the person is incapable of understanding the essential nature of the act or of communicating his or her unwillingness to participate in the act due to mental or physical disability;
  - (vii) the person is mistaken about the sexual nature of the act or the identity of the accused;
  - (viii) the person mistakenly believes that the act is for medical or hygienic purposes;
  - (ix) the accused induces the victim to engage in the activity by abusing a position of trust, power or authority;
  - (x) the person, having consented to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity; or
  - (xi) the agreement is expressed by the words or conduct of a person other than the person.
- (c) In determining whether or not a person consented, the court shall consider:
  - (i) the fact that the person did not say or do anything to indicate consent to a sexual act is normally enough to show that the act took place without the person's consent, and
  - (ii) a person is not to be regarded as having consented to a sexual act just because:
    - (A) they did not physically resist;
    - (B) they did not sustain physical injury; or
    - (C) on that or on an earlier occasion, they freely agreed to engage in another sexual act with that person or some other person.
- (d) The court shall not draw any inference only from the length of the delay between the commission of the sexual act and making a complaint.

### **Recommendation 5: Sexual Coercion**

Article 171 (sexual coercion) of the Penal Code should be redrafted in a similar manner to that recommended above for Article 172 (rape). For example:

#### **Article 171 (sexual coercion)**

Any person who practices any relevant sexual act or acts with a person, without that person's consent, is punishable with 2 to 8 years imprisonment. For the purposes of this article, 'consent' has the same meaning as in Article 172.

### **Recommendation 6: Marital Rape**

Articles 171 (sexual coercion) and 172 (rape) of the Penal Code should expressly state that marriage (whether in law, church or custom) or any other relationship between the defendant and victim does not preclude the prosecution of the offence. For example:

- (X) No marriage (whether in law, church or custom) or other relationship shall constitute a defence to the criminal offence in this Article.

### **Recommendation 7: Sexual abuse of a person incapable of resistance and sexual fraud**

Should National Parliament agree to Recommendations 4 and 5 relating to Articles 172 (rape) and 171 (sexual coercion), Article 179 (sexual abuse of a person incapable of resistance) and Article 180 (sexual fraud) should be removed from the Penal Code, as acts currently covered by these articles will be covered by the amended Articles 171 and 172.

### Recommendation 8: Aggravation in crimes of sexual aggression and sexual abuse

- (1) Subparagraph 173(b) relating to abuse of a position of authority within educational, medical or corrective facilities, and subparagraph 173(c) relating to committing an offence upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency, should be added to Article 182 so that they apply to all sexual crimes.
- (2) Article 182 should be expanded to include the following aggravating factors in sexual crimes:
  - physical and psychological injury to the victim;
  - pregnancy resulting from the relevant acts;
  - the involvement of multiple perpetrators;
  - the use or threat of force;
  - the use, presence or implied presence of a weapon; and
  - a degree of planning prior to committing the acts.
- (3) Subparagraph 182(1)(b) should be redrafted so that it refers to a broader category of 'sexually transmitted infections', and so that both infection of the victim *or* knowledge by the perpetrator that they carry such an infection at the time of the relevant act/s constitutes an aggravating factor.
- (4) Subparagraph 173(a) should be redrafted, and subparagraph 182(1)(d) redrafted to include wards and children under guardianship. If the recommended amendments are made to Article 177, subparagraph 173(d) should be removed. For example:

#### Article 173 (Aggravation)

If the sexual offenses referred to in articles 171 and 172 are committed:

- a) **Against a victim who is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence, including a victim who is a ward or under the guardianship of the perpetrator** ~~Through abuse of authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labor-related dependence;~~
- b) Through taking advantage of duties exercised or office held, in any capacity, in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment; or
- c) Upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency;
- d) ~~Against a victim aged less than 17 years;~~

The perpetrator is punishable with 4 to 12 years imprisonment in the case of article 171 and 5 to 20 years imprisonment in the case of article 172.

#### Article 182 (Aggravation)

1. The penalties prescribed from Section II to Section IV of this chapter shall have their minimum and maximum limits increased by one third if:
  - a) The victim is less than 12 years of age at the time the act was committed;
  - b) **The perpetrator has transmitted to the victim any sexually transmitted infection or has knowledge that they carry a sexually transmitted infection;**
  - c) Due to the act, the victim attempts or commits suicide or the same results in death.
  - d) The victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence, **including where the victim is a ward or is under the guardianship of the perpetrator;**
  - e) **The perpetrator commits the offence through taking advantage of duties exercised or office held, in any capacity, in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment;**

- f) **The perpetrator commits the offence upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency;**
  - g) **The victim suffers serious physical and psychological injury;**
  - h) **The victim becomes pregnant;**
  - i) **The commission of the crime was facilitated by cooperation of two or more persons;**
  - j) **The perpetrator used or threatened to use force;**
  - k) **A weapon was present, or its presence was implied;**
  - l) **The perpetrator undertook a degree of planning prior to committing the act or acts;**
2. Whenever more than one of the circumstances described in the preceding subarticle are present, only one may be evoked as a modifying circumstance and those remaining shall be weighed in determining a specific penalty.

### **Recommendation 9: Aggravation in crimes of physical assault**

Articles 147 and 156 should be amended to include use or threatened use of a weapon as an aggravating factor in crimes of physical assault. For example:

#### **Article 147 (aggravation)**

1. Any person who, with the sole intent to cause harm to the body or health of another person:
  - a) causes any of the results provided in article 146 is punishable with up to 5 years imprisonment;
  - b) causes death by negligence is punishable with 1 to 6 years imprisonment; or
  - c) **uses or threatens to use a weapon to cause such harm is punishable with up to 5 years imprisonment.**
2. If, with intent to cause any of the offenses provided in article 146, causes death by negligence, is punishable with 4 to 12 years imprisonment;
3. If the victims of the crimes referred to in the two previous articles are any of the persons mentioned in article 139, paragraph (i), because of or while performing their aforementioned duties, the limits of the penalty shall be increased by one-third, where no heavier penalty is applicable by force of another legal provision.

#### **Article 156 (aggravation due to results)**

If, as a consequence of mistreatment described in articles 153 to 155, any of the effects referred to in article 146 occurs, **or the perpetrator uses or threatens to use a weapon**, the perpetrator is punishable with 3 to 10 years imprisonment and if death is caused by such mistreatment, then the perpetrator is punishable with 5 to 15 years imprisonment.

### **Recommendation 10: Law Against Domestic Violence**

Article 35 of the Law Against Domestic Violence should be amended to ensure consistency with the proposed amendments to the Penal Code. Specifically, the new article criminalising incest should be included in subsection (a) of Article 35 and reference to Articles 178 (sexual acts with an adolescent) and 179 (sexual abuse of a person incapable of resistance) should be deleted from Article 35 subsection (b). Subsection (b) of Article 35 should also be amended to include Articles 157, 258, 259 and 260 of the Penal Code relating to threats, property damage, aggravated property damage and property damage with the use of violence. For example:

#### **Article 35 (Crimes of domestic violence)**

For the purposes of this law, the following shall be considered crimes of domestic violence:

- a) the types of crime provided for in articles 153, 154, 155 and 156 of the Criminal Code;
- b) the types of unlawful conduct provided for in articles 138, 139, 141, 145, 146, **157**, 167, 171, 172, **< article concerning incest >**, 175, 177, ~~178 and 179~~, **258, 259 and 260** whenever, in addition to fulfilling the typical elements of fact contained in the incriminating norm, any of the circumstances described in article 2 of this law occur.

**Recommendation 11: Prosecution of failure to report crime of domestic violence**

The public prosecution should prosecute cases of failure to report under Article 286 of the Penal Code when it becomes aware of cases where a police officer or public servant has failed to report a crime of domestic violence.

**Recommendation 12: Training about obligation to report**

The PNTL and other government departments such as the Ministry of Social Solidarity, Ministry of Education and Ministry of Health should incorporate as part of their training the positive obligation for police officers and public servants to make a notification in the event they learn that a public crime has been committed.