BRIEFING NOTE

SISTERS FOR CHANGE

The criminalisation of marital rape across the Commonwealth

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The origins of the marital rape exemption trace back to the English common law, which entrenched the concept of women as the property of men and the implied irrevocable consent by a woman to sex upon marriage. Through the process of colonisation, a husband's immunity from prosecution for marital rape was transported to British colonies across the Commonwealth. Today, marital rape constitutes an act of gender-based violence prohibited under international human rights law. This briefing note outlines three legislative models which have been adopted by Commonwealth countries to criminalise marital rape and end the legacy of the marital rape exemption.

INTERNATIONAL STANDARDS ON THE CRIMINALISATION OF MARITAL RAPE

1 Article 2 of the UN Declaration on Violence Against Women 1993 was the first official document to identify explicitly martial rape as included in the definition of violence against women, providing:

"Violence against women shall be understood to encompass, but not be limited to, the following:
(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, ***marital rape****, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation."*

Article 4(d) of the Declaration requires States to "develop penal, civil... sanctions in domestic legislation to punish and redress wrongs caused to women who are subjected to violence."

2 Today, marital rape constitutes an act of gender-based violence (GBV) prohibited under international human rights law. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights oblige States to protect fundamental human rights that are commonly violated in gender-based violence cases, including the right to life, the right to physical and mental integrity, the right to equal protection of the law and the right to be free from discrimination. All forms of gender-based violence against women constitute a form of sex-based discrimination under Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and rape has been recognised as a form of torture under the Convention Against Torture. Gender-based violence inclusive of rape within the family, therefore, violates the principles of non-discrimination and substantive equality and States can be held accountable for violations by private actors. CEDAW General Recommendation No. 35 (2017) explicitly addresses criminalisation of marital rape as a form of gender-based violence against women:

"Gender-based violence against women constitutes ***discrimination against women*** *under Article 1 and therefore engages all of the obligations in the Convention. Article 2 establishes that the overarching obligation of States Parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women.* ***That is an obligation***

***of an immediate nature**; delays cannot be justified on any grounds, including economic, cultural or religious grounds. In General Recommendation No. 19 it is indicated that, with regard to gender-based violence against women, the obligation comprises two aspects of State responsibility for such violence that which results from the actions or omissions of both **the State Party or its actors**, on the one hand, and **non-State actors**, on the other."* (para.21)

3 The CEDAW Committee recommends that States Parties take the following legislative measures:

a) ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual, or psychological integrity, are criminalised and introduce, without delay, or strengthen legal sanctions commensurate with the gravity of the offence as well as civil remedies;

b) ensure that all legal systems, including plural legal systems, protect victims/survivors of gender-based violence against women and ensure they have access to justice and to an effective remedy in line with the guidance provided in the Committee's General Recommendation No. 33 (2015);

c) repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them, including in customary, religious and indigenous laws;

d) examine gender-neutral laws and policies to ensure that they do not create or perpetuate existing inequalities and repeal or modify them if they do so;

e) ensure that sexual assault, including rape is characterised as a crime against women's right to personal security and their physical, sexual and psychological integrity. Ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances. Any time limitations, where they exist, should prioritise the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to competent services/authorities.

4 And yet, almost half of all Commonwealth countries require legislative reform to remove the marital rape exception in all circumstances and without limitation in order to establish a statutory definition of rape that complies with international and regional standards. Legislative advances in the criminalisation of marital rape have varied considerably among Commonwealth countries. Partly due to piecemeal development over the years, legislation relating to sexual offences in some countries is inconsistent or out of date. In many countries, it remains discriminatory, whether on the grounds of marital status, gender or sexual orientation and definitively not in alignment with international norms and standards. Social, cultural, religious and political tolerance for intimate partner sexual violence has thwarted the internalisation of international human rights legal norms, leaving many countries without adequate legislative protections for victims/survivors of marital rape. The Bahamas, Saint Lucia, Nigeria and Malaysia provide examples of Commonwealth countries that do not have adequate legislation criminalising marital rape and intimate partner sexual violence.

5 The Commonwealth is characterised by political and geographic regions with distinct legal cultures. The criminalisation of marital rape therefore requires different paths to legislative reform given the challenges of post-colonial States' legal architectures. Three areas of law are often involved in the reform process – criminal, family, and, in some Commonwealth countries, customary or religious law. Below we outline three legislative models which have been adopted by Commonwealth countries to criminalise marital rape.

MODEL 1: CRIMINAL CODE OR PENAL CODE REVISION

The first model seeks to criminalise marital rape and intimate partner sexual violence through reform or revision of the criminal law or penal code. Table 1 sets out those Commonwealth countries which have adopted this model.

Table 1: Criminal or Penal Code Revision

Country	Criminal Code/ Penal Code
Canada	Criminal Code R.S.C., 1985, c. C-46
New Zealand	Crimes (Amendment) Act, 1986
Australia	Criminal Code, 1992
Papua New Guinea	Criminal Code (Sexual Offences and Crimes against Children) Act, 2002
Belize	Criminal Code, 2000
Fiji	Crimes Decree 2009
Grenada	Criminal Code (Amendment) Act, 2012
Samoa	Crimes Act, 2013
Mozambique	Penal Code Lei no. 35/2014 (Penal Code Amendment), 2015
Singapore	Penal Code as amended by the Criminal Law Reform Act 2019
Solomon Islands	Penal Code (Amendment) Sexual Offences Act, 2016
Nauru	Crimes Act, 2016

This model is common in civil law jurisdictions, hybrid or dual jurisdictions, and in some common law jurisdictions. The most effective way to remove the martial rape exception in this instance is to remove the exception and amend the definition of rape to include a consent-based definition of sexual assault with no restrictions or limitations. In the case of India, for example, although a broader definition of consent has been added to the definition of rape in 2013, the marital rape exception remains: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." As India is a hybrid system, due consideration would need to be taken in parallel reform of customary and religious laws.

The Solomon Islands also has a mixed common law and customary law system where the criminalisation of marital rape required an amendment to the Penal Code with the Penal Code (Amendment) Sexual Offences Act, 2016. Like India, customary law is recognised under Schedule 3 of the Constitution as a formal source of law. The lack of harmonisation of customary family law is detrimental to women seeking justice for sexual crimes perpetrated against them and seeking legal knowledge of their rights under both legal systems. The Solomon Islands Law Reform Commission has been primarily focused on civil law rather than customary law reform.

As previously stated, understanding the history and legal cultures of Commonwealth countries is key to understanding how each state ought to approach the criminalisation of marital rape.

MODEL 2: REFORM OF SEXUAL OFFENCES LEGISLATION

Another reform model is through amendment or revision of the "Sexual Offences Act." Table 2 sets out those Commonwealth countries which have adopted this approach.

Table 2: Sexual Offences Legislation

Country	Criminal Code/ Penal Code
United Kingdom	Sexual Offences Act, 2003 (House of Lords (R v. R) 1991 overturned the marital rape exception)
Trinidad and Tobago	Sexual Offences (Amendment) Act, 2000
Lesotho	Sexual Offences Act, 2003
Jamaica	Sexual Offences Act, 2009
Guyana	Sexual Offences Act, 2010
Sierra Leone	Sexual Offences Act, 2012
Dominica	Sexual Offences Amendment Act, 2016
Swaziland	Sexual Offences and Domestic Violence Act, 2018

A stand-alone Sexual Offences Act was commonplace during colonial times particularly in the Commonwealth Caribbean and many countries kept the colonial formulation without amendments when they became independent. A Sexual Offences Act is part of the laws of Antigua and Barbuda, The Bahamas, Barbados, Dominica, Jamaica, Guyana, and Trinidad and Tobago. In the 1980s and 1990s, the region began to recognise the inadequacies of the definitions of sexual offences and criminal law reform focused on: 1) the removal of gendered language in keeping with human rights legal norms; 2) alleviating problems associated with the prosecution of sexual offences (eg: the pre-trial and trial setting for victims).[1] The marital rape exception remained. In 2016, Dominica repealed and replaced Section 3 of the Act and redefined rape using more "gender-neutral" language, provided sentencing guidelines based on harm and gravity and removed the marital exception.[2]

This model of reform is most relevant to Commonwealth Caribbean countries.

1 Rodney-Edwards, Thelma, *CARICOM Model Legislation on Violence Against Women in the Areas of Sexual Offences, Domestic Violence and Sexual Harassment: Comparison with International Standards and Existing Commonwealth Caribbean Legislation*, 2000, pp. 257-297 in Adams, K. et A. Byrnes (ed.s), *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level*, Commonwealth Secretariat, London. Accessed online: https://dx.doi.org/10.14217/9781848596665-en

2 Commonwealth of Dominica Sexual Offences (Amendment) Act, 2016. Act 9 of 2016. Accessed online: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/104938/128169/F-151352353/DMA104938.pdf

MODEL 3: GENDER BASED VIOLENCE/ VIOLENCE AGAINST WOMEN/ DOMESTIC VIOLENCE LAWS

This model addresses marital rape and intimate partner sexual violence through separate legislation on specific forms of gender-based violence. Table 3 sets out those Commonwealth countries which have adopted this model to address marital rape and intimate partner sexual violence.

Table 3: GBV/ VAW/ Domestic Violence Legislation

Country	Gender Based Violence/Violence Against Women/ Domestic Violence Legislation
South Africa	Prevention of Family Violence Act, 1993, Domestic Violence Act 1998, The Criminal Law (Sexual Offences & Related Matters) (Amendment) Act, 2007
Republic of Cyprus	The Violence in the Family (Prevention and Protection of Victims) Laws 2000, 2004
Namibia	Combating Rape Act of 2000
Ghana	Domestic Violence Act (Act 732), 2007
Rwanda	Rwanda Law No 59/2008 Law on the Prevention and Punishment of Gender-Based Violence 2009
Zambia	Gender Based Violence Act 2010
Tonga	Family Protection Act, 2013
Kiribati	Te Rau N Te Mwenga Act (Family Peace Act), 2014
Malawi	Family Relations Act, 2015
Saint Vincent and the Grenadines	Domestic Violence Act No. 7, 2015
Kenya	Protection Against Domestic Violence Act 2015
Mauritius	Protection from Domestic Violence (Amendment) Act 2016
Malta	The Laws of Malta (Chapter 9 of the Criminal Code) and the Gender-Based Violence and Domestic Violence Act, 2016

This legislative model is an option for all types of jurisdictions including those with dual or hybrid legal systems. The failure to repeal or amend criminal law in concurrence with the passing of gender-based violence legislation means, however, that victims of marital rape may only have access to civil remedies and perpetrators may avoid criminal prosecution and punishment commensurate with the gravity of their crime.

Namibia provides a unique example of the complexity of legal reform in a legally pluralist state. In the 1990s, the Law Reform and Development Commission embarked on a broad range of legal research areas relevant to the rights of women including the: Customary Law Marriages Project; Domestic Violence Project; and the Cohabitation Project. The Domestic Violence Project led to the passing of the Combatting Rape Act 2000, which removed the marital rape exception, and the Combatting Domestic Violence Act 2003, which provided an expansive definition of sexual abuse as a form of domestic violence. Both Acts are written in such a way as to ensure access to criminal remedies under the Criminal Procedure Act 1977. Further, in the Community Courts Act 2003, a victim can concurrently seek civil remedy (compensation) under customary law and criminal remedy under civil law.

RECOMMENDATIONS FOR LEGAL REFORM

6 These models are useful for thinking through how Commonwealth countries that have not criminalised marital rape might best approach legislative reform. Table 4 sets out those Commonwealth countries which have yet to engage in legislative reform to criminalise marital rape. Almost half of all Commonwealth countries require legislative reform to completely remove the marital rape exception in all circumstances and without limitation, in order to provide a definition of the crime of rape in accordance with international and regional norms, and to seek to harmonise other relevant laws whether they be from civil or customary sources.

7 In the third column of the table, suggestions are made as to which areas of law require reform. For some countries, legal reform is relatively easy – repeal or amend one section of one act. For other countries, particularly those with plural legal systems, legal reform requires harmonisation across all bodies of law. Ethnic, linguistic, and religious diversity cannot be held as an impediment to legal reform in legally those with plural legal systems. All Commonwealth countries in Asia share these features: penal law based on the Indian Penal Code of 1860 and a dual, hybrid or plural legal system that includes Constitutional recognition of religious and/or customary law. This means that legal reform efforts must focus on criminal, customary and family law so that women's access to justice is not impeded by their ethnic and religious identities.

For further information about international and regional legal standards on the criminalisation of marital rape and models of legislative reform, please access the SFC-EJA report *The Criminalisation of Marital Rape and Intimate Partner Sexual Violence: An Appraisal of Commonwealth States* available on our website, www.sistersforchange.org.uk/global-law-reform-resource-hub/

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Key to table symbols

- Penal code/Criminal code
- Sexual offence laws
- Criminal laws
- Customary law
- Shari'a law
- Religious laws/Personal laws
- Family laws
- Domestic violence laws

Table 4: Commonwealth countries requiring legislative reform

Country	No legislation or inadequate legislation*	Suggested reform
Africa		
Botswana	Botswana Penal Code, 1964* (unclear definition of rape)	
Cameroon	Penal Code (Law No. 2016/007 of 12 July 2016)	
The Gambia	Criminal Code (At No. 25 of 1933) (amended 2014), Sexual Offences Act, 2013 s.3	
Nigeria	Criminal Code Cap "C38" Laws of the Federation, Section 357 2004 Penal Code Act, Chapter 53, LFN, 1990	
Seychelles	The Penal Code, 1955 Penal Code	
Uganda	The Penal Code, 1950 Penal Code	
United Republic of Tanzania	The Penal Code, 1945 Sexual Offences Special Provisions Act, 1998, s.130	
Asia		
Bangladesh	The Bangladesh Penal Code, 1860	
Brunei Darussalam	The Penal Code Cap. 22 of 1951, 1984 Ed. Cap.22 The Syariah Penal Code Order, 2013 (revised edition 2019)	
India	The Indian Penal Code, 1860, as amended by the Criminal Law Amendment Act No. 13 of 2013, s.375	
Malaysia	Section 375 of The Penal Code 2015	
Pakistan	Criminal Laws Amendment Act, 2006, s.375 of the Penal Code	
Sri Lanka	Section 363 (a) of the Penal Code of Sri Lanka, (as amended by the Act, No. 22 of 1995)	
Caribbean and the Americas		
Antigua and Barbuda	Sexual Offences Act 1995*; Sexual Offences (Amendment) Act 2004; Domestic Violence (Protection Orders) (Amendment) Act 2015	
The Bahamas	Sexual Offences and Domestic Violence Act, 1991* (limited circumstances)	
Barbados	Sexual Offences Act, 1992* (limited circumstances)	
Saint Lucia	Saint Lucia Criminal Code, 2005 Domestic Violence (Summary Proceedings Act) 1995	
Saint Kitts and Nevis	Saint Christopher and Nevis, Chapter 4.21, Offences Against the Person Act, 2002. Domestic Violence Act 2009	
Pacific		
Tuvalu	Tuvalu Penal Code 2008 (Section 128)	
Vanuatu	Vanuatu Family Protection Act, No. 28 of 2008, 2009*, Penal Code, 1981	

* Criminalisation in limited circumstances and/or no explicit definition of the crime of "marital rape."