TRANSPARENCY INTERNATIONAL VANUATU ADVOCACY AND LEGAL ADVICE CENTRE, *DOCUMENTING AND REPORTING HUMAN RIGHTS ABUSES (VIOLENCE AGAINST WOMEN AND TORTURE/ILL-TREATMENT) AROUND EFATE – RESEARCH REPORT* (2013)

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INTRODUCTORY COMMENT

This report was first launched at an opportune time, when the Vanuatu Law Commission was undertaking a review of sexual offences. Some recommendations contained in this report have already been actioned. In respect of the recommendations regarding violence against women, journalists working for the *Vanuatu Independent* newspaper are now very active in reporting sexual offences cases, so progress on recommendation 2, which concerns the role that media can and should play in responding to the crisis in sexual offending, has been made. In respect of the recommendations regarding torture and ill-treatment, a Professional Standard Unit, which handles complaints against the police has been established, and the Vanuatu Law Commission has undertaken a review of the powers of the Ombudsman.

There is growing public concern about sentencing for sexual offences, which has been driven by media reporting, and which has led to statements by the Minister of Justice about the need to increase sentencing. It is opportune to republish the Transparency International Vanuatu report, as its section on violence against women suggests broader interventions that may be necessary as a complement to a review of sentencing practices. This report also complements other content in this edition of the *Journal of South Pacific Law,* including a comment on sentencing for sexual offences and a student paper on the use of customary ceremonies as mitigating factors in sentencing sexual offenders.

The Transparency International Vanuatu report does not claim to be a comprehensive review of all of the problems. Nor does it provide complete solutions. The methodology the report used was case studies within a set time frame, and recommendations are drawn from issues that arose from them. This methodology means that issues which did not arise in the course of the case studies are not considered. Further, the recommendations were not developed in consultation with agencies such as the police, the Office of the Public Prosecutor and the judiciary. Instead the recommendations are very much intended as initial proposals for further consultation and discussion.

The report has been reformatted to conform to the requirements of the Journal of South Pacific Law. Introductory material (the cover page and contents page) has been removed. As all sources are mentioned in full in the footnotes the bibliography has also been removed. There is also one substantive change. The original report contained a major error, in that it stated 'Whilst the *Public Prosecutor Act* [Cap 293] requires the Public Prosecutor to develop a Code of Practice and Ethics (section 29) this Code has not yet been finalised. The Code should be finalised as a matter of urgency.' The *Code of Practice and Ethics for the Office of the Public Prosecutor* was gazetted in 2004. This recommendation has therefore been changed to read 'The *Code of Practice and Ethics for the Office of the Public Prosecutor* made pursuant to the *Public Prosecutor Act* [Cap 293] should be reviewed with the aim of determining whether a more detailed code, such as that found in Fiji's *Prosecutions Code 2003* would be helpful to avoid mismanagement of prosecutions and to ensure the laying of appropriate charges.'

EXECUTIVE SUMMARY

The views expressed in this paper are those of the authors and do not necessarily reflect the views of the United Nations Secretariat.

There is some concern within Transparency Vanuatu that the human rights situation in Vanuatu appears to be deteriorating. Specifically the Advocacy and Legal Advice Centre (ALAC) has received complaints which indicate that bringing perpetrators of human rights violations to justice is difficult due to dysfunctions within State institutions that are ordinarily responsible to promote and protect human rights of citizens.

The project proposal identified two particular areas of concern:

- violence against women including domestic violence (which also raises issues of abuse of children) and discrimination against women; and
- torture and ill-treatment by Police and Vanuatu Mobile Force officers.

This research report is based on case studies. As such the findings are not a comprehensive analysis of all weaknesses in state institutions. Instead the research findings and recommendations are based upon specific practical instances of dysfunction.

In respect of violence against women main dysfunctions in State institutions identified include:

- Issues with prosecution
    - Failure to prosecute
    - Laying of lesser charges
- Issues during trial
    - Outdated evidentiary rules
- Issues with sentencing

- Lack of consistency in pre-sentencing reports
- Sentencing inconsistency
- Revictimisation of women during sentencing

In respect of ill-treatment and torture case studies reveal a number of instances of torture and ill-treatment by Police and/or VMF Officers, including:

- Extreme violence (torture) occurring in relation to the recapture of escaped prisoners
- Using violence to "punish wrongdoers"
- Using excessive force during arrest
- Assaulting detainees
- Denying necessities (including food, water, and access to representation) whilst in custody
- Detaining suspects in unhygienic conditions

The case studies also revealed practices which create an environment which may facilitate the occurrence of torture or ill-treatment. These practices included:

- Arresting individuals without cause
- Using poor processes in taking statements
- Detaining suspects for lengthy periods without legal authority
- Acting without lawful authority on request of the chief
- Failures to prosecute (or be seen to discipline) police/VMF wrongdoers
- Failures to publically follow up on reports or statements of public authorities
- Ill-treatment of whistleblowers
- Delays in civil claims due to file overloads in the Public Solicitor's Office.

INTRODUCTION

Project background

The Advocacy and Legal Advice Centre (ALAC) has received complaints which indicate that bringing perpetrators of human rights violations to justice is difficult due to dysfunctions within state institutions that are ordinarily responsible to promote and protect human rights of citizens. Whilst there is a lack of data in these areas to quantify the extent of this problem, the presence of ALAC complaints in this area has given rise to concern within Transparency Vanuatu both that human rights abuses are occurring, and that perpetrators are not being held to account.

The project proposal identified two particular areas of concern:

- violence against women including domestic violence (which also raises issues of abuse of children) and discrimination against women; and
- torture and ill-treatment by Police and Vanuatu Mobile Force officers.

These areas were chosen as they were areas where ALAC had received a number of

complaints. One of the objectives of the project was to identify protection gaps and compliance failures caused by corruption/dysfunction of state institutions mandated to uphold human rights and make recommendations for reform based on the identification of these issues. This research report presents these findings and recommendations.

During the finalisation of this research report public discussion on whether to introduce the death penalty in Vanuatu was raised. As this proposal relates to breaches of human rights by State law enforcement agencies the report also contains a brief comment on this proposal.

Method

The project was a pilot aimed at testing a methodology which involved building a network of human rights defenders and having them report cases of human rights abuses to ALAC. It was intended that examination of these cases would be used to identify protection gaps. Few cases were reported to ALAC via the identified methodology. As discussed in the separate project activity report, the causes of this included inadequate training of network partners and inadequate follow up of network partners. The project also expected to be able to supplement case studies from network partners with reports taken directly from victims of human rights abuses following the delivery of human rights workshops in villages. No cases were reported via this mechanism, possibly because of socio-cultural barriers that hinder people from reporting, particularly to strangers.

Because few cases were reported the methodology was supplemented by a review of all Supreme Court cases involving violence against women reported on the Pacific Legal Information Institute[1] (PacLII) website (www.paclii.org) from January – June, 2013 and a survey of court cases involving torture or ill-treatment by police reported on PacLII.

In presenting the case studies, studies which are based upon current ALAC files or cases that were referred to ALAC by the network of human rights defenders, victims' identities remain confidential. Permission to include case studies has also been sought from victims. Cases which are based on public records identify the sources of those public records.

The case studies have been supplemented with a survey of participants in ALAC human rights awareness workshops. ALAC developed a short survey in conjunction with staff of the UNOHCHR Office in Suva, for distribution at village workshops. The aim of this survey was to gather some information about knowledge of and attitudes towards human rights and experience of human rights abuses. In total 44 people attended these workshops (30 females and 14 males). Twenty one surveys were returned. The survey did not ask whether respondents were male or female, so responses cannot be analysed by gender.

As the findings in the research report are based on case studies the findings are not a comprehensive analysis of all weaknesses in state institutions. Indeed, this was not the intention of the project. Instead the research findings and recommendations are based upon specific practical instances of dysfunction.

[1] PacLII unofficially publishes legislation and judgments. As there are currently no other official Vanuatu law reports published it is the only source of published legal decisions.

VIOLENCE AGAINST WOMEN

Background

Vanuatu's *Constitution* prohibits discrimination on the grounds of gender.[2] In 1995 Vanuatu ratified the *Convention on Elimination of Discrimination Against Women*. The Penal Code [Cap 152] contains a number of provisions that prohibit violence, including sexual violence. Specific offences and their maximum sentences (as amended by *the Penal Code Amendment Act 2006*) include:

- Section 90: sexual intercourse without consent (known as rape prior to 2006); life
- Section 92: Abduction; 10 years
- Section 95: Incest; 10 years
- Section 96: Sexual intercourse with a child under care or protection; 10 years
- Section 97: Unlawful sexual intercourse; between 5 – 14 years depending on age of the sexual partner
- Section 97A: Aggravated sexual intercourse with a child; life
- Section 98: Act of indecency without consent; 7 years
- Section 98A: Act of indecency with a young person; 10 years

In addition to the *Penal Code* [Cap 152] the *Family Protection Act 2008* provides for specific offences in relation to domestic violence and provides a range of remedies including protection orders that can be issued by the courts. It also envisages authorising a range of community leaders to make protection orders and establishing registered counsellors. Under this law police are required to lay charges whenever they have reasonable grounds to believe that domestic violence has occurred.[3]

Despite this legal framework violence against women continues to occur with alarming frequency. Results of a survey conducted amongst participants at ALAC human rights workshops indicated that 15 of the 21 respondents had witnessed violence against women. Many respondents also agreed that sexual and gender based violence and domestic violence were the primary human rights concerns in Vanuatu. When respondents were asked what they thought were the two main human rights concerns, 16 identified sexual and gender based violence and 10 identified domestic violence. The only other area of concern that attracted more than one or two responses was abuses of employees, which attracted 5 responses. The survey did not further identify what types of abuses against employees were occurring.

Whilst violence against women was identified to be a major concern, survey results indicated that respondents were divided as to the extent to which violence against women should be punished. 16/21 respondents stated that violence against women is "part of Vanuatu culture". This may mean that such violence is normalised. 6/21 respondents either thought that offenders should not be punished for violence against women, or were undecided. 11/21

[2] Article 5(1).
[3] Sections 44 & 45 *Family Protection Act 2008.*

respondents either thought that the State should not strongly condemn violence against women or were undecided.

The small size of the sample surveyed by Transparency Vanuatu means that one must be cautious about drawing generalisations from the survey data. However, the findings of the Transparency Vanuatu survey are consistent with previous research. The *Vanuatu National Survey on Women's Lives and Family Relationships* (May 2011) conducted by the Vanuatu Women's Centre in partnership with the Vanuatu National Statistics Office is seminal research in this area. It found that:

1. Violence against women is endemic:

   > 'Over half of ever-partnered women (51%) experienced some type of physical violence in their lifetime, and 1 in 3 (33%) were physically abused in the last 12 months. Sexual violence was only slightly less common, with 44% of ever-partnered women experiencing it in their lifetime, and 1 in 3 (33%) suffered from some type of sexual abuse by their husband/partner in the last 12 months. Emotional violence was the most prevalent, with 68% of women (more than 2 in every 3) experiencing it in their lifetime, and over half (54%) in the last 12 months.'[4]
   >
   > 'The combined national prevalence of non-partner physical and/or sexual abuse of women since the age of 15 is 48%. Almost 1 in 3 women (30%) was sexually abused under the age of 15 years. For more than 1 in 4 women (28%), their first sexual experience was forced. The main perpetrators of physical abuse are family members; the main perpetrators of sexual abuse are male family members and boyfriends.'[5]

2. Violence against women is viewed as normal or acceptable by women:

   > 'Three in 5 women (60%) agree with at least one justification for a man to beat his wife; 37% do not agree with any reasons for physical violence by a husband/partner. More than half of the women interviewed (53%) believe that if bride price is paid, a woman becomes the husband's property; and almost 1 in 3 (32%) believe that the payment of bride price justifies physical violence. More than 1 in 3 (36%) believe it is all right for a girl to be swapped or exchanged for marriage. The issue of whether or not bride price has been paid introduces uncertainty in many women's minds about their right to refuse sex with their husband/partner.'[6]

3. Violence against women is unlikely to be reported:

   > 'More than 2 in 5 women (43%) had never told anyone before about the violence, and 56% had told someone. Among the 695 women who told someone about their husband's/partner's behaviour, the people most frequently confided in were family members: her parents (42%); other members of her family (32%) including brothers or sisters (30%), and uncles or aunts (11%); her friends (31%); her

[4] Vanuatu Women's Centre in partnership with the Vanuatu National Statistic Office, *Vanuatu National Survey on Women's Lives and Family Relationships* (2011) 56.
[5] Ibid, 95.
[6] Ibid, 55.

> husband's/partner's family (30%); chiefs (18%); and church leaders (11%).' (At p 148) Police were reported to by about 5% of respondents.[7]

Responding to the causes of violence against women

The causes of violence against women are deeply rooted in the socio-cultural context. Legal responses to incidents of violence against women deal with the results of actions. Whilst legal responses may play something of a deterrent effect they do not directly address the underlying causes.

Whilst addressing the causes of violence against women is outside the scope of this study, the *Vanuatu National Survey on Women's Lives and Family Relationships* report made 30 findings that address the socio-cultural roots of violence against women. Some dealt with developing gender awareness at all levels of society in order to prevent violence against women, others dealt with developing support services for victims and the legal and policy framework for dealing with offenders. These far-reaching recommendations are endorsed. Recommendation 1 bears repeating:

> 'All community awareness, education and training programs to address violence against women by all stakeholders must be explicitly based on a human rights and gender equality approach.
>
> The responses of government agencies, donor agencies, civil society organisations, chiefs, church and other community leaders need to be based on the following fundamental principles: violence under any circumstances is a crime; violence can never be justified or condoned on the basis of any tradition, culture or custom (including bride price); women have a right to live without violence; women and men are equal under Vanuatu's Constitution; and women and children can never be "owned" by men. A human rights and gender equality approach means that all training and awareness programs must be clear about the causes of violence against women, versus the situations that may trigger violent incidents: violence against women is caused by gender inequality in Vanuatu society; and violence reinforces the unequal power and control that many men have over their wives and partners. In other words, violence against women reinforces unequal gender power relations.'[8]

It can also be observed that informal discussions of the case studies found during this study helped to raise awareness. Increasing awareness of cases involving violence against women that do go to court can play a useful educative function, and act as encouragement to report incidents to State authorities. It is therefore recommended that:

- Regular publication in the media of successful prosecutions involving violence against women and sexual violence be considered.

Issue 1: Failure to prosecute

[7] Ibid, 159.
[8] Ibid, 184.

Case study 1 (ALAC file)

The victim was seriously assaulted by her husband, who attacked her with an axe and injured both of her arms and her abdomen. The matter was reported to the Port Vila Police, who have lost the axe used in the assault. After two Magistrates' Court notices, the case was dismissed because of the absence of the Police Prosecutor. The Police Prosecutor later admitted that he did not attend Court as he had a conflict of interest with the accused.

The file was apparently meant to be referred to the Office of Public Prosecutions but this Office later stated that they had never registered such a file.

The Office of Public Prosecutions referred the victim to the Public Solicitor and she is now pursuing a civil claim.

Case study 2 (*Public Prosecutor v Silas* [2013] VUSC 48)

The accused stabbed her husband during a domestic dispute, which resulted in his death. The offence occurred on 17 December, 2012. At her arraignment hearing on 18 December, 2012 she pleaded not guilty on the grounds of self defence and was remanded in custody. The date of the trial was set for April 2013. On 10 April, 2013 the Prosecutor presenting the case (M) requested an adjournment as the Prosecutor who had been handling the file (T) was out of Port Vila on tour. M had only just been given the file, was unfamiliar with it, and did not know if any of the witnesses for the prosecution had been summonsed.

An adjournment would have meant that the trial would be delayed by about 3 months. The judge viewed this as an unacceptable interference with the right to be tried within a reasonable time and the case was dismissed.

Discussion and recommendations

Police do have a 'no drop' policy in respect of cases of domestic violence. However, prosecutions do not always result. Whilst there are lots of anecdotes about prosecutions not occurring, in the absence of reports it is difficult to document such occurrences or their causes.[9] The case studies above do suggest that prosecutions may fail to happen due to

[9] It can be observed that a survey of Supreme Court cases reported in the first 6 months of 2013 included one case involving possession of cannabis, where there was a 4 year delay between police investigations being concluded and the case being brought before the court. No reason for the delay was given. (*Public Prosecutor v John* [2013] VUSC 78.) In another case involving the possession of cannabis the public prosecutor failed to attend, (*Public Prosecutor v Kalsakau* [2013] VUSC 59) although the judge convicted on the basis of written submissions and the defence's presentation.
"Failures to prosecute" may also arise from police inaction. ALAC currently has one file involving inaction by the police. The brief facts of this file are that the complainant alleged that he has made several complaints to the police regarding the many criminal offences committed against him, his property and generally the Ohlen Area. The alleged offences ranged from criminal trespass, robbery, damage to property and drunken and disorderly behavior. He has also experienced much intimidation and harassment. The complainant advised that he made or sought to make requests for assistance from the police to carry out investigations or take action, however only limited action has been taken. Emergency calls for immediate police assistance were ignored. Even when a response was received the police officers failed to attend the scene and lied about their names. The complainant also advised that he sent numerous emails to the investigating officers and received no response. His letters to the former Police Commissioner Patu Lui and Sergeant John Taleo in 16 August and 24 November 2008 were not responded to.

conflicts of interest and disorganisation within the State Prosecutions Office and the Office of the Public Prosecutor. The US Department of State Vanuatu 2012 Human Rights Report observes that there is a lack of data in the area of reporting of domestic violence.[10] The following recommendations are made:

- Further research on the implementation of the police 'no drop' policy be carried out, to see whether this is a cause of lack of prosecutions, or whether the cause is prosecutorial inaction.

    - If the cause is prosecutorial inaction, consideration should be given to amending laws or procedures to require prosecutors to adopt a similar 'no drop' policy.

- The design and implementation of an "active case management system" be explored. Such a system should ensure that conflicts of interest are identified and managed properly, investigations are carried out in a timely manner, evidence is managed properly, files are transferred to prosecutors and recorded as having been transferred, and prosecution files are managed appropriately. Whilst "active case management" is usually associated with the judiciary, the concept can be modified for other settings.

    - One issue may be coordination between stakeholders, and a multi-stakeholder committee to monitor the active management of cases involving violence against women may play a useful part in the design and implementation of an active case management system. If such an approach were implemented, the inclusion of external stakeholders would provide a degree of independent oversight, although this benefit would need to be weighed against possible concerns regarding confidentiality of sensitive information.

- More accurate data on cases involving domestic violence and violence against women be kept. This data may involve the types of offences reported, the actions taken by each agency and the time taken by each agency in dealing with complaints. This data should complement an active case management system and aggregated information should be available to the public.

- The *Code of Practice and Ethics for the Office of the Public Prosecutor* made pursuant to the *Public Prosecutor Act* [Cap 293] should be reviewed with the aim of determining whether a more detailed code, such as that found in Fiji's *Prosecutions Code 2003* would be helpful to avoid mismanagement of prosecutions and to ensure the laying of appropriate charges.

[10] US Department of State 'Vanuatu 2012 Human Rights Report' http://www.state.gov/documents/organization/204460.pdf (Accessed 23 December 2015).

Issue 2: Laying of lesser charges

Case study 1 (*Public Prosecutor v Louis* [2013] VUSC 20)

Louis was convicted of committing unlawful sexual intercourse, an offence which carries a maximum sentence of 14 years imprisonment. He had repeatedly had sex with his 8 year old step daughter. He had not been charged with the more serious offence of sexual intercourse without consent, which carries a maximum sentence of life imprisonment. The judge observed:

> 'I am completely at a loss to understand why you are charged with unlawful sexual intercourse when the victim in this case was only 8 years of age. Surely, it could not be thought that an 8 year old girl was capable of giving a true consent to a person over 4 times her age and who was in the role of step father; it is simply ridiculous… Be that as it may, this is the charge that you faced and to which you have pleaded guilty. So, you are to be sentenced against the maximum penalty of 14 years rather than life imprisonment which should have been the case.'[11]

Case study 2 (*Public Prosecutor v Matthew* [2013] VUSC 79)

Matthew was convicted of one charge of committing an act of indecency with a young person. This is a lesser offence than the offence of sexual intercourse without consent (commonly referred to as rape). The offence was committed against his 9 year old step daughter. Matthew pleaded not guilty to an additional charge of sexual intercourse without consent, and the Public Prosecutor dropped this charge because 'he did not consider that the complainant would be capable of giving any evidence at all if she was required to come to Court.' The judge observed that this 'is not an uncommon situation and simply reflects the reality of the circumstances that prevailed.'[12]

Discussion and recommendations

The judge's observation in case study 1 was perhaps driven by a trend to prosecute under lesser charges. Conversations with staff of the Office of Public Prosecutions in the past have indicated that laying a lesser charge is done when the victim is young as then lack of consent does not have to be proved. Whilst securing a conviction is desirable, only laying the lesser charge sends a message that the "bad part" of the act is the fact that the victim is young and ***not*** the fact that the victim did not consent. This is a dangerous message. The following recommendation is therefore made:

- In any instance where the victim maintains that she or he did not consent to sexual intercourse the greater charge of sexual intercourse without consent should be laid, with lesser charges, including unlawful sexual intercourse, being laid in the alternative.

[11] *Public Prosecutor v Louis* [2013] VUSC 20 [11]-[12].
[12] *Public Prosecutor v Matthew* [2013] VUSC 79 [8].

It can also be observed that no case studies used the offence of aggravated sexual intercourse with a child. This offence requires the victim to be under 15 years and carries a maximum sentence of life imprisonment. Aggravating factors include:

> '(a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or
>
> (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or
>
> (c) the alleged offender is in the company of another person or persons; or
>
> (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or
>
> (e) the alleged victim has a serious physical disability; or
>
> (f) the alleged victim has a serious intellectual disability.' (Section 97A Penal Code)

A number of case studies and cases reported on PacLII in 2013 have involved situations where the victim has been a step-daughter, and as such, under the authority of the offender, or other aggravating factors have been present. Laying lesser charges undermines the action of the legislature in deeming such actions to be particularly serious. It is therefore recommended that:

- Whenever aggravating factors are present, the greater charge of aggravated sexual assault is laid, with lesser charges being laid in the alternative.

The second case study in this section involves the laying of a lesser charge due to difficulties associated with managing young witnesses. It is recommended that:

- Police and prosecutors be trained in taking statements from young witnesses or victims of crime and that the courts consider measures that could be taken to make them more "child friendly" for young witnesses and victims.

Issue 3: Evidentiary issues

Case study 1 (*Public Prosecutor v Jack* [2013] VUSC 81)

The accused (Jack) and his wife had been living separately for about 1 month. Jack found his wife and took her against her will to a beach, where he severely beat her and then had sex with her. The defence was raised that she had consented to sex.

During the trial, questions as to infidelity on the part the victim were asked, although the judge held these to be irrelevant and observed

> 'in other countries (e.g. New Zealand) such questions put to a complainant, are specifically prohibited by statute and that has long been the case.'[13]

The victim also stated 'that this was typical of [Jack's] behaviour in the past, particularly when they were living on Tanna, where he would have sex with her when he wanted and if she said no then he would beat her and then have sex with her.'[14] However, as that evidence was not included in the brief of evidence, the judge was unable to take account of it.

The judge also observed that

> 'In Vanuatu, the evidence of a woman who alleges that she was sexually violated is to be treated with particular care unless it is corroborated in some material respect. That is an old rule of evidence that certainly in New Zealand has been gone for many a year. In other jurisdictions, the Court is not constrained to exercise special care when dealing with the evidence of a woman who alleges that she was raped. The Court is entitled to accept her evidence just as it can accept any other witness's evidence.'[15]

The judge's observations relate to the fact that in Vanuatu's evidentiary laws a rape victim's testimony is "not to be trusted" unless there is other evidence – for instance medical reports, or other eye witness testimony.

The judge did not accept the defence of consent and Jack was found guilty of sexual intercourse without consent.

Case study 2 (*Public Prosecutor v Deidei - Verdict* [2013] VUSC 57)

The case involved an alleged rape within marriage. The difficulty was that the only evidence was the victim's word against the word of the accused. The complainant's evidence was:

> "I recall an incident in 2010, I can't recall the date or time. Can't recall whether it was day or night. I remember an incident involving my "kilot" (panty). The defendant asked for sex but my body was very weak and I refused so he put his hand into my dress and tore my kilot and had forcible sex with me." I was sick and tired after returning from the garden and he still asked for sex. I was not happy with that but I just submitted. I was frightened as he had assaulted me many times and even made me unconscious".[16]

She did not lay a complaint with the police immediately after the alleged incident, or in relation to any other alleged incidences.

The judge observed that 'This is a case of an alleged rape occurring within marriage. Such a case might have been unimaginable many years ago but with changing attitudes and the advancement of human and women's rights it is now accepted that such an offence is capable

[13] *Public Prosecutor v Jack* [2013] VUSC 81 [2].
[14] Ibid, [12].
[15] Ibid, [25].
[16] *Public Prosecutor v Deidei - Verdict* [2013] VUSC 57 [10].

of being committed by a man on his lawfully wedded wife. No longer must a woman submit to her husband whenever he demands or asks for sex.'[17]

On the evidence the charge was not made out and the accused was acquitted.

Discussion and recommendations

The case studies raise a number of points relating to evidence, both in terms of legal rules, and in terms of the processes that victims should go through in order to produce evidence to create compelling cases. Recommendations are:

- Vanuatu's laws of evidence be amended to provide that no special corroboration of evidence given by women who are alleged victims of sexual offences is required;
- Vanuatu's laws of evidence be amended to prohibit asking victims of sexual violence about past sexual behaviour;
- Education of women about their rights in respect of violence should not include information on reporting to police, but should include information on how reporting to others, including friends, family and medical personnel (within 72 hours of the incident if possible) can develop evidence, which can be used if the offender is ever taken to court.

The two case studies also offer illustrations of the gender dynamics, discussed in the background, that can prevent women from making complaints. In both cases the victim's story was one of long-standing normalised violence and abuse. It is also interesting to observe that the judge in the second case study felt that it was important to open his judgement with a statement that rape within marriage, whilst previously "unimaginable" is now accepted to be an offence. Being married is no defence to the offence of sexual intercourse without consent. However, this is something that may only be well understood by lawyers. Indeed the defence offered in case study one, whilst not clearly expressed, appears to have rested on the idea that wives must consent to their husbands. Creating a clear and specific offence of rape within marriage would be a symbolic measure that may help to change societal norms, by creating a clear offence that is easily understood by non-lawyers which everyone in society can be educated about. It is therefore recommended that:

- The Penal Code should be amended to explicitly provide an offence of sexual intercourse without consent within marriage.

Issue 4: Lack of consistency in pre-sentencing reports

Case study 1 (pre sentencing report received from Correctional Services)

X was convicted of sexual intercourse without consent. The incidents happened over a period of time and involved his stepdaughter. The pre-sentencing report indicated that X did not demonstrate any remorse towards his victim and that a cause of the offending was that X had a 'lack of self control over his sexual thoughts'. In the two years since the victim had

[17] Ibid, [1].

removed herself from the house where X lived and the court ordered that X and the mother of the victim separate there had been no reports of re-offending. X had not performed a customary reconciliation ceremony, although as part of the pre-sentencing discussion he had offered to perform one. X was of a chiefly line and this was emphasised in the pre-sentencing report.

A suspended sentence, combined with supervision and community work, was recommended.

No court judgement is available.

Case study 2 (pre sentencing report received from Correctional Services, as well as court judgements)

Y was convicted of unlawful sexual intercourse and sexual intercourse without consent. The incidents happened over a period of time and involved his stepdaughter. Although not mentioned in the pre sentencing report the Supreme Court decision indicated that sometimes the offending was accompanied by threats with a knife. Y had performed a customary reconciliation ceremony. Y had a chiefly title but this was only mentioned briefly in the pre-sentencing report.

A suspended sentence of 5 years was recommended.

The Supreme Court sentenced Y to 7 years 10 months imprisonment, although this was reduced on appeal to 7 years in order to take account of the customary reconciliation that had been performed.

Case study 3 (*Public Prosecutor v Louis* [2013] VUSC 20)

Louis was convicted of unlawful sexual intercourse. The incidents happened over a period of time and involved his stepdaughter. Few mitigating factors were identified in the judgement – with a plea of guilty being the primary mitigator. The pre sentence report recommended a suspended sentence. The judge observed:

> 'That is simply unacceptable. Those who commit sexual offending against young children will go to prison and there can be and must be no leniency in that respect. My concern is that the recommendation suggests that there is a complete misunderstanding or lack of understanding on the part of a probation officer about what the sentencing approach should be.'[18]

Louis was imprisoned for 6 years and 8 months.

Discussion and recommendations

The three case studies presented above all involve similar offences – repeated incidents of non-consensual sex with young step daughters. In two of the instances the pre sentencing report recommended a suspended sentence. It is not clear why suspended sentences were recommended. As the judge in the third case study suggests it may be a lack of understanding on the part of the officer preparing the report. This lack of understanding may stem from a

[18] *Public Prosecutor v Louis* [2013] VUSC 20 [13].

socio-cultural environment in which sex with young female family members is viewed as normal or acceptable. In order to respond to this issue the following recommendations are made:

- Officers who prepare pre-sentencing reports are provided with additional training on gender, human rights and appropriate sentencing.

- In the case of sexual offending consideration be given to using a panel that includes community members who are well-versed in gender issues to prepare pre-sentencing reports. This recommendation is made as the use of a panel, if well selected, will serve an educative function and may help to shift organisational culture.

Issue 5: Sentencing inconsistency

Case study 1 (*Public Prosecutor v Banga* [2013] VUSC 34)

Banga was a "bubu" (grandfather figure, although not necessarily blood related) of the 5 year old victim. He was convicted of indecency with a young person, which carries a maximum sentence of 10 years imprisonment. He had touched the victim's vaginal area, exposed his penis and requested oral sex, and kissed the victim's mouth and cheek.

Banga was sentenced to 2 years imprisonment, with the sentence suspended on the conditions that he 'must stay away from the victim and must not speak to or contact her in any way whatsoever... must stay away from other young girls in your community or anywhere else… [and] must not commit this offence again or commit any other offences for which you would be charged and convicted.'[19]

Discussion and recommendation

It should be observed from the third case study in the section on lack of consistency in pre-sentencing reports that the judiciary has acted effectively as a check on lenient pre sentencing reports, and this should be commended. However, as the case study below indicates, not all sexual offences attract custodial sentences. In order to ensure that the judiciary consistently punishes acts of violence against women and children the following recommendation is made:

- Further discussions are held with the judiciary to explore whether developing a sentencing database or additional sentencing guidelines would be a useful tool to help ensure consistency of decisions.

- Further discussions are held with the judiciary to explore whether additional training in human rights Conventions that Vanuatu has ratified, including the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities is necessary in

[19] *Public Prosecutor v Banga* [2013] VUSC 34 [10].

order to ensure that judges are aware of how international human rights obligations should be taken into account in the decision making process.

Issue 6: Revictimisation of women by the judiciary

Case study 1 (*Public Prosecutor v Vocor* [2013] VUSC 35)

In this case the accused had violated his young niece who was living with him. The judge observed:

> 'A concern I have is that your wife is not standing with you in the dock because she clearly appreciated what was happening and did nothing to stop it. In that respect, she must carry a great deal of responsibility for what you were allowed to get away with. She had the ability and she should have had the moral courage to stand up to you and to prevent or to make this offending stop. Her failure to protect her niece is reprehensible.'[20]

Case study 2 *Public Prosecutor v Amokori* [2013] VUSC 38

This case involved the multiple rape and kidnapping of a 16 year old girl. When considering mitigating factors in relation to sentencing, the judge observed:

> It is also noteworthy that you have even offered to marry the victim as a way of repairing the damage because you realize that what you did to her was wrong.[21]

Discussion and recommendation

The Vanuatu Correctional Services *Detainee Survey 2012*[22] indicates that successful prosecutions for offences involving sexual violence are increasing and the length of sentences is also increasing. This suggests that the Vanuatu judiciary generally treats violence against women seriously, and for this it should be commended. However, care must always be taken to ensure that judgements reflect both the socio-cultural context and respect for human rights.

In case study 1, although the actual perpetrator was on trial his wife, who did not take action, is being held responsible for the perpetrator's actions. This is very problematic and reflects an attitude which puts the burden of wrongdoing on the witness instead of the perpetrator. Given the dynamic of pervasive victimisation and abuse of women within relationships, a court's condemnation of a woman's failure to intervene without having first carefully considered both the socio-cultural context and the specific context of the relationship, may itself be a form of victimisation.

Case study 2 is problematic because it appears that the court is condoning a cultural practice that is a violation of human rights of women. Whilst in custom, women are sometimes treated

[20] *Public Prosecutor v Vocor* [2013] VUSC 35 [16].
[21] *Public Prosecutor v Amokori* [2013] VUSC 38 [37].
[22] Vanuatu Correctional Services, *Detainee Census 2012* http://www.vanuatucorrectionalservices.gov.vu/publications.html (Accessed 23 December 2015).

as property and "married off" in order to build or repair relationships this is a violation of human rights and should be recognised as such.

It is recommended that:

- Gender sensitivity training of law enforcement agencies does not only focus on police, prosecution and correctional services, but also includes the judiciary.

TORTURE AND ILL-TREATMENT BY POLICE

Background

The *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[23]

As such torture involves 4 factors:

1) severe pain or suffering has to have been inflicted,
2) it must be intentional,
3) it must be for a specific purpose, such as to obtain information, as punishment, to intimidate, or for any reason based on discrimination,
4) it must be done by or at the instigation of or with the consent or acquiescence of state authorities.

Ill-treatment is not defined in any Convention, but it is distinguished from torture in that the pain or sufferring inflicted may be less severe. Also, ill-treatment does not need to be done in order to achieve any specific purpose.

Vanuatu ratified the CAT in July 2011. Whilst is has not passed any national laws to further implement the provisions of the CAT a number of laws to prohibit torture and ill-treatment already exist. These include the Constitution, which recognises rights to life, liberty, security of the person and protection of the law and freedom from inhuman treatment and the Penal Code, which criminalises behaviours that are often associated with torture and ill-treatment by state authorities, such as kidnapping, false imprisonment, assault and homicide.

There are two "wings" of the national police in Vanuatu, the Vanuatu Police Force (VPF) and a small paramilitary wing, the Vanuatu Mobile Force (VMF). The Commissioner of

[23] Article 1(1).

Police is the head of both the VPF and VMF. As the case studies below indicate both have been implicated in allegations of torture and ill-treatment. In 2006 the Department of Correctional Services was established and police no longer manage detention centres, although they do manage small holding cells within police stations. Correctional services staff have not been the subject of court cases addressing ill-treatment whilst in detention, which all occurred prior to 2006.

Older incidents

The first group of case studies are based on human rights violations that occurred more than 10 years ago. Since that time there have been a number of activities undertaken to strengthen the VPF. The Police Training College is very active and there have been many new recruits. This raises the question of whether the older human rights violations are still relevant. Yes they are. If perpetrators of violence and human rights abuses have never been brought to justice then older incidents still have not been dealt with. Further, as the Ombudsman observes in a 2010 report:

> 'The incidents at both Police Posts occurred back in 2001. However the Ombudsman issues this report as information to the public that police brutality to civilians is still exercised by police officers within Vanuatu.'[24]

This suggests that practices identified in "old incidents" continue to be publically perceived as indicative of current practices, regardless of whether changes have taken place within the VPF.

Case study 1 (Vanuatu Ombudsman, *Public Report on the Police Brutality at Lakatoro and Lamap Police Posts* [2010] VUOM 4 (16 November, 2010) & ALAC file)

A 2010 Ombudsman's report detailed an incident that occurred on Malekula in 2001, at Lakatoro Police Post. Two police officers had assaulted the victim on the request of the Chief. When questioned by the Ombudsman the police did not deny their actions, but instead stated that 'Police thought that by whipping Mr Tabi they were giving him a lesson (to change his behaviour).'[25]

The same report detailed a second incident involving a number of police and VMF Officers, again on Malekula, at Lamap Police Post. One VMF officer had been called by the Village Committee to a dispute involving the Chief. The Chief did not agree to a meeting so the VMF officer punched the Chief and a fight broke out. As the VMF officer left a threat was called out by a man of the village. Later that day two women from the village were asked to go to the police post, where they were then assaulted for a period of three hours.

The Ombudsman made a number of recommendations, and ALAC has since followed up with the police requesting information on how the recommendations have been acted upon.

[24] Vanuatu Ombudsman, *Public Report on the Police Brutality at Lakatoro and Lamap Police Posts* [2010] VUOM 4 (16 November, 2010) [summary].
[25] Ibid, [4.5].

Whilst the police indicated that they would act as resources allowed, no specific information on how the recommendations have been acted upon have been provided.

One of the women complained to ALAC that the Ombudsman's report had not been acted upon. On behalf of the client ALAC referred this to the Ombudsman, who refused to accept the complaint, saying that it must come directly from the complainant. It can also be observed that section 19 of the *Ombudsman Act* [Cap 252] prevents the Ombudsman from inquiring into why recommendations have not been acted upon or actions taken in response to recommendations.

Case study 2 (*Public Prosecutor v Solo* [1999] VUSC 19)

This case was a voire dire hearing over the admissibility of the Defendant's statement. The 1999 hearing raised a number of general questions, including:

> '(3) Why has it become routine procedure to always detain a suspect before taking his statement? Why cannot his statement be taken immediately when he is taken into, or the moment he arrives at the police station before he is stripped and locked up?
>
> (4) Why should suspects be denied the necessities of life while in custody such as food, drink or right to see and receive attention from a doctor. Similarly the right to see or talk to a lawyer where the allegation against them is serious….
>
> (5) Why has it is become routine procedure to take a suspect's statement without witnesses being present?...'

Other issues raised included:

> The possibility of excessive force being used during arrest;
>
> A delay of 5 days between the Defendant being remanded in custody and having his statement taken; and
>
> Inaccurate records of the length of the Defendant's interview.

On the facts, the Defendant's statement was ruled as being inadmissible due to being involuntary.

Case study 3 (*Working Group for Justice v Government of the Republic of Vanuatu* [2002] VUSC 55)

Between December 1999 and February 2000 the police conducted Operesen Klinim Not, to deal with escalating crime in Luganville. There were a number of allegations of brutality during this operation. In a civil case in which some of the people arrested under Operation Klinim Not claimed compensation, the judge found that the following occurred:

> '(1) The Plaintiffs were arrested without bench warrants and which arrests were not done in accordance with the proper procedure of arrests. Further, that such arrests were made without due regard for the fundamental rights of the plaintiffs as stated. In my opinion those arrests were unlawful.

(2) Some of the Plaintiffs' homes were entered into by Officers and searched forcibly and without search warrants. In my [the judge's] opinion those entries were unlawful.

(3) Some of the Plaintiffs were detained for more than 24 hours without appearance in a Court of Law seeking further remand. In my opinions detentions beyond 24 hours without further remand warrants from a Court of law were unlawful.

(4) Some of the Plaintiffs were brutally beaten by officers with rifle butts, boots, truncheons and fists during the process of arrests.

(5) Some of the Plaintiffs were inhumanely treated or dealt with by Officers. For example –

(i) By pinching their private parts with pliers;
(ii) By dancing naked in pairs before family members or relatives in an open field;
(iii) By kissing the boots of an officer;
(iv) By eating or licking toilet brushes.

(6) Some or all the plaintiffs were denied food, water, medication and treatment including a denial to access to medical reports. In my [the judge's] opinion this is a denial to right to life under Article 5(1) (a) of the Constitution.

(7) Some or all of the plaintiffs were kept and held in unhygienic cell conditions.

(8) No emergency regulations were issued in respect of the Operation under Chapter 11 Articles 69, 70 and 71 of the Constitution suspending the fundamental rights of the Plaintiffs. Even if such regulations were issued; ".....no regulation shall (a) derogate from the right to life and the freedom from inhuman treatment and forced labour ....."'

Case study 4 (*Public Prosecutor v Kota* [1993] VUSC 8)

Marie Kota left her husband on Tanna and moved to Vila. Chiefs decided that she should be returned to Tanna. On the request of the chiefs, police in Vila found Marie and forced her to go to a meeting with the chiefs. Following this meeting she was forced onto a boat and returned to Tanna. Whilst the case did not involve prosecution of the police involved in the event the court observed:

'I find it most astonishing and abhorrent that Vanuatu Police had anything to do with this matter. And had it not been for the fact that they were firstly requested, and secondly agreed to go, this matter would not be where it is today. The Vanuatu Police had no authority in the legislation of this country to act as they did in this case, to bully and force a person to attend a meeting.'

The implication of this comment by the judge was that whilst the chiefs were being prosecuted for kidnapping, the act of the police, in forcibly making Marie attend the meeting was also a violation of Marie's right to freedom of movement, and ill-treatment akin to kidnapping.

Case study 5 (*Kilman v Public Prosecutor* [1997] VUCA 9; *Public Prosecutor v Moses* [1999] VUSC 36)

Case study 5 arose from an ongoing dispute between the Vanuatu Mobile Force (VMF) and the Vanuatu Government over payment of allowances. The disgruntled VMF force members formed the "stand down group". The dispute caused instability over a period of time. Rifts in the management of the VMF were apparent. In the Kilman case a number of VMF officers were prosecuted for kidnapping the President of Vanuatu. They arrived at his house armed and in full combat dress. In the second case a number of VMF officers were arrested for kidnapping other VMF officers. Again the officers went to the victims houses armed and in combat dress.

As the Court of Appeal observed in Kilman:

> The background circumstances relating to the dispute with the Government over the non-payment of allowances may, as the appellants contended, have caused them to have strong feelings of frustration and a perception that the Government was not intending to honour an arrangement that had been reached for the settlement of the dispute. However those feelings cannot justify the action taken by the appellants and other members of the VMF. Their lawful duty was to keep the peace. Their actions on 12 October, 1996 were a most serious and regrettable breach of that duty.

Case study 6 (*Public Prosecutor v Simon* [2003] VUCA 1)

This case arose following the kidnapping of members of the Police Services Commission by members of the police over the appointment of the new Police Commissioner. The offenders were charged with a number of offences, including mutiny, kidnapping and unlawful imprisonment. The Court of Appeal observed:

> Whether it was obsessional arrogance, impatience or blind zeal which permeated the operation, we are left with no doubt that the decision to arrest the Police Commissioner together with all others who had participated in a minor, major or incidental way in his appointment, was not merely misguided and in gross disregard of proper considerations, but manifestly and totally unlawful. It was a naked usurpation of power by taking the law into their own hands without justification or excuse… Nobody in a democratic community founded on the rule of law, can ignore proper processes and adherence to regulation and statute.

Case study 7 (*Alick v Commissioner of Police* [2003] VUSC 131)

This case involved a civil claim. The complainant claimed he had been assaulted during his arrest in 2000, when his hands had been tied behind his back with nylon rope. He also claimed he had been unlawfully imprisoned. On the facts the judge found he had been

detained for 3 days longer than was necessary without lawful warrant or without being charged or brought before an officer of the law.

The judge upheld the claim for assault and unlawful imprisonment.

More recent incidents

Case study 8 (*Koilo v Public Prosecutor* [2009] VUCA 39; *Koilo v Public Prosecutor* [2010] VUCA 27; *Koilo v Public Prosecutor - Comments of Presiding* Judge [2010] VUCA 2)

This case involved an escaped prisoner. The matter came before the court because the prisoner had been assaulted when he was recaptured and the court was required to decide what effect the assaults, which were perceived as police punishment for the wrongdoing of the escape, should have on the prisoner's sentence for the crime he was initially imprisoned for.

The judgment of 2010 stated that:

> a) Mr. Koilo escaped from custody on the 23rd of February, 2009, and gave himself up to the police on the 18th of March 2009. He was sentenced to 12 months imprisonment for his escape from custody concurrent with his sentence of 9 years and 5 months imprisonment;
>
> b) Shortly after his return to custody the Appellant was removed from prison without authority, taken to police premises where he was seriously assaulted by members of the Vanuatu Mobile Force. He suffered serious injuries including broken bones in both legs and one arm;
>
> c) In July 2009 the Appellant filed a Constitutional Application seeking damages for violation to his constitutional rights arising from the assault;
>
> d) In August 2009 the Appellant was unlawfully taken to the Port Vila Police Station and assaulted by Police Officers. As a result the Constitutional Application was amended to include this violation of Mr. Koilo's Constitutional rights;
>
> e) In April 2010 this Court was advised that Mr. Koilo's Constitutional Application had been settled with the State paying Mr. Koilo a sum of money.[26]

The fact that Mr Koilo had been assaulted by both officers of the Vanuatu Mobile Force (VMF) and the police was accepted.

The terms of the settlement were confidential, however the Attorney General:

> provided a copy of a memorandum of agreement between Corrections and the Police. This memorandum was designed to stop the illegal removal of prisoners from the

[26] *Koilo v Public Prosecutor* [2010] VUCA 27 [9].

> custody of Corrections by the Police. Finally, the Attorney General advised that there were ongoing investigations into police actions with respect to Mr. Koilo.[27]

At an interim hearing on 15 July, 2009 the court requested the public prosecutor to provide an update on the request that had gone to the Prime Minister for a Commission of Enquiry into the escapes and the brutality against escaped prisoners. No report was available.

The comments of the Presiding Judge in 2010 stated:

> Mr Koilo like everybody else is subject to rights and responsibilities under the Constitution. He must abide by the laws passed by Parliament. But no one had a right to take the law into their own hands and to punish him in the way he was treated. For reasons which are beyond our comprehension the authorities have done nothing about that. It is as if those in authority think that what happened to him was allowable or acceptable behaviour. The persons who did it have been identified. There is no argument about what happened. What the Judges do not understand is why people have not been charged in the criminal court and in police disciplinary tribunals for their breaches of the Constitution and the laws of this land… When we inquired as to what has been done about this, we are told as there had been no formal complaint made the police can do nothing. The judges find that submission nonsensical.

Case study 9 (Coroner's report into John Bule and *Commissioner of Police v Judicial Service Commission - Decision* [2012] VUSC 37)

Bule was an escaped prisoner. On 29 March, 2009 at about midday he was captured and taken to the VMF barracks for interrogation. About 1 ½ hours later, he was taken to Vila Central Hospital with severe injuries. He died of his injuries about 2 ½ hours after admission to hospital.

The Coroner's report observed that:

> 'The Deceased died as a result of complications of injuries sustained in the setting of blunt force trauma... The Deceased's injuries were sustained in an interrogation room at the Vanuatu Mobile Force (VMF) Cook Barracks at or about 1.00 pm on 29 March 2009 while the Deceased was in the custody of a number of VMF officers. The injuries sustained by the Deceased were reflective of multiple episodes of blunt trauma and involved no less than 20 separate impacts. Many of the injuries sustained were cause by the impact of cylindrical or straight edged objects.'[28]

The Coroner's report was damning of the organisational culture of the VMF and, to a lesser extent, the Vanuatu Police Force. A number of recommendations were made.

Soon after the Coroner's Report was released the Commissioner of Police, Joshua Bong, launched a civil case seeking judicial review and asking for an order "quashing the entire Coroner's Report in respect of the Inquest into the cause of death of John Bule dated 4 March,

[27] Ibid, [22].
[28] Coroner's Report on the Inquest into the Death of John Bule (Coroner's Court of Vanuatu, Post-Mortem Case 29 of 2009), 2.

2010 ...". As a result of this action the Commission of Inquiry into the Coroner's Report was suspended.

In May 2012 the Supreme Court released its decision, which provided that:

> I declare that the Coroner's findings, criticisms and recommendations concerning the claimant as highlighted in this judgment were ultra vires and in breach of natural justice[29] and are accordingly quashed. I further order that the following excerpts in the Coroner's Report be regarded as wholly expunged from the Report:
>
> (a) para 5 of Clause 5.3.1 entitled: The evidence of the VMF/VPF Commanders;
> (b) The whole of Recommendation 2;
> (c) Para 2 of Recommendation 3;
> (d) The heading and all paragraphs other than the last paragraph in Recommendation 9;
> (e) The heading and all paragraphs other than the last paragraph in Recommendation 10.[30]

There has been no public follow up to the Coroner's Report. Officers involved have not been publically identified and dismissed. Nor have there been criminal prosecutions of the offenders. No compensation has been paid to the family.

Case study 10 (ALAC file)

ALAC Vanuatu received a complaint on the 25th January, 2010 by Mrs A concerning the transfer of her husband Mr A who is a captain in the VMF. Mrs A was a witness in the inquest into the death of Mr John Bule, an escaped inmate who allegedly sustained serious injuries in the custody of VMF officers at the barracks in Port Vila. The Coroner stated in his report that Mrs A

> "was a particularly remarkable and brave witness. As the wife of a serving VMF officer, she demonstrated enormous courage in testifying as to her observations of what occurred inside the Cook Barracks on 29 March, 2009."

Her participation during the inquest had resulted in serious repercussions by the VMF towards herself and her family who reside at the VMF barracks in Port Vila. A few days following the inquest, Mrs A alleges that the Commissioner of Police, Joshua Bong, approached Mr A and advised him of his disapproval with Mrs A's participation into the inquest.

[29] Natural justice is a technical legal concept involving the right to a fair hearing. In this case the judge found that the judge expressed his own opinion as to the guilt of people who had given evidence at the inquest. This was in breach of s 226 of the Criminal Procedure Code, which prohibits the Coroner from expressing such an opinion, so was *ultra vires*. It also appears to have indicated bias, which is a breach of natural justice.
[30] *Commissioner of Police v Judicial Service Commission - Decision* [2012] VUSC 37 [69].

On the 25th January, 2010, Mr A was transferred to the VMF in Santo without receiving the proper remuneration which he was entitled to. Having arrived in Santo, Mr A was set up in single quarters which are below acceptable living standards as they need repair.

There was intimidation by the VMF for the A's to move out of the VMF marital quarters in Vila despite the fact that they have every right to be there. Mrs A did refuse to move and took her complaint to the Advocacy and Legal Advice Centre (ALAC).

The matter is ongoing.

Case study 11 (*Public Prosecutor v Ken* [2012] VUSC 182)

This 2012 case involved the prosecution of the then Cabinet Minister Don Ken for intentional assault and abusive language. The alleged crimes occurred when Ken was driving his ministerial vehicle to his house and it was blocked by a police truck. When he tried to go past the truck he was sworn at so stopped. An altercation occurred between the police and Ken and his two passengers and all three were acquitted. In prior hearings the cases against Ken's two passengers were dropped.

In making his decision to acquit Ken of all charges the judge observed that:

> There is overwhelming evidence that police officers assaulted Kenneth Shedrack and Apia Buktan after they were arrested and at the police station during their detention without lawful justification. Evidence of Don Ken are supported by the evidence of Apia Buktan and Roger Tasso on these acts of assault at Police station during their detention as a result of which Kenneth Shedrack lost one of his teeth.[31]

Case study 12 (Moses Kilton newspaper reports & ALAC file)

On 12 July, 2012 escaped prisoner Moses Kilton shot by police during his recapture. He was taken to Vila Central Hospital, here he was confirmed as dead on arrival. The Police confirmed that they had shot Kilton, and said he was shot in self-defence, as he was aiming a .22 rifle at police.[32]

An eye witness to the incident said that after Kilton was shot police slashed his ankle with a knife. Kilton's medical report indicates that he did have a laceration on his left Achilles tendon. The eye witness heard three shots.

A further post-mortem report was prepared by a forensic pathologist, K White. Despite requests from Kilton's family they have not been given a copy of this report.

Kilton's family have also requested an inquest, pursuant to s.227 of the Criminal Procedure Code [Cap 136] which states:

> **227.** The Public Prosecutor shall be bound to require a coroner to hold an inquest –
>
> (a) where a person had died in prison or while in the custody of the police;

[31] *Public Prosecutor v Ken* [2012] VUSC 182 [157].
[32] *Vanuatu Daily Post*, 14 July 2012.

(b) where a person has died under circumstances raising a reasonable suspicion that the death of that person might be due to a crime or foul play, unless a police investigation has already been instituted.

They have received no response to this request. This case is ongoing with ALAC.

Case study 13 (ALAC file)

X was in a dispute with the Chief whose land he was residing on. He alleges that in August 2011 he was kidnapped by a suspended police officer (who has subsequently been reinstated) and taken to Eratap. He was forced to admit involvement in witchcraft that led to the death of a third party and was beaten by the Chief's son.

He was then charged with intentional homicide and remanded in the high risk prison for 7 months. The case was dismissed for lack of evidence.

He has now launched a civil claim with the Public Solicitor, however is experiencing considerable delays in moving this matter forward.

Discussion and recommendations

These case studies raise a number of issues in relation to police actions, including Police and/or Vanuatu Mobile Force officers. Torture and ill-treatment arise in the following ways:

1. Extreme violence (torture) occurring in relation to the recapture of escaped prisoners (Case studies 8 (2009), 9 (2009), 12 (2012)).
2. Using violence to "punish wrongdoers" (case studies 1 (2001), 8 (2009), 9 (2009));
3. Using excessive force during arrest (case studies 2 (1999), 3 (1999 – 2000), 7 (2000), 8 (2009), 9 (2009), 11 (2012), 12 (2012));
4. Assaulting detainees (case studies 1 (2001), 3 (1999 – 2000), 8 (2009), 9 (2009), 11 (2012));
5. Denying necessities (including food, water, and access to representation) whilst in custody (case studies 2 (1999), 3 (1999 – 2000));
6. Detaining suspects in unhygienic conditions (case study 3 (1999 – 2000));

They also reveal practices which create an environment which may facilitate the occurrence of torture or ill-treatment. These practices include:

1. Arresting individuals without cause (case studies 1 (1999), 5 (1997), 6 (2003));
2. Using poor processes in taking statements (case studies 2 (1999), 7 (2000));
3. Detaining suspects for lengthy periods without legal authority (case studies 2 (1999), 3 (1999 – 2000), 7 (2000));
4. Acting without lawful authority on request of the chief (case studies 1 (2001), 4 (1993), 13 (2011));

They also raise issues of failures of management, including:

1. Failures to prosecute (or be seen to discipline) police/VMF wrongdoers (Case studies 1 (2001), 2 (1999), 3 (1999- 2000), 4 (1993), 7 (2000), 8 (2009), 9 (2009), 11 (2012);
2. Failures to publically follow up on reports or statements of public authorities (Case studies 1, (report 2010), 8 (2010), 9 (2009 - with civil case concluding in 2012);
3. Ill-treatment of whistleblowers (Case study 10 (2010)).

Whilst a number of victims of human rights violations attributed to police officers have successfully launched civil claims via the Public Solicitor to seek redress another issue is:

1. Delays in civil claims due to file overloads in the Public Solicitor's Office (Case study 13).

Some of the case studies are not recent, and changes to police operations have been made pursuant to police and justice sector strengthening projects. It can be observed that there have been no recent reported legal cases of denying necessities (including food, water, and access to representation) whilst in custody; detaining suspects in unhygienic conditions, arresting individuals without cause, using poor processes in taking statements and detaining suspects for lengthy periods without legal authority. It can be observed that the lack of recent reported cases does not necessarily mean that incidents are not happening – instead they may not be proceeding through the judicial system, with decisions being reported.

These issues may have been largely dealt with by increased training of police officers and revision of standard operating procedures (SOPs). Increasing public confidence that police do usually follow correct procedures in some areas may be more of a "public relations exercise" that increases public awareness that police comply with international human rights standards in respect of detention and questioning of suspects. Public information on what to do if these rights are breached will also help to create public confidence that redress is available if SOPs are not followed. An environment in which both police and the public are aware of their rights and can act if rights are violated may help to create a culture in which there is public confidence that rights are respected.

It should be emphasised that systems need to be created so that if victims complain their rights are enforced in a timely manner. The Ombudsman is one channel for complaining; however, this Office has no authority to act if recommendations are not acted upon. Civil claims are possible, however significant delays in pursuing civil claims are often experienced as the Public Solicitor is overloaded with files. There is no statutory independent police complaints authority. Instead discipline of subordinate officers is dealt with by the Police Commissioner. Senior officers are disciplined by the Police Service Commission. There is no clear mechanism for the public to lay complaints with the police disciplinary process.

However, there are clearly a number of current issues including acting without lawful authority on request of the chief, using violence to "punish wrongdoers", using excessive force during arrest and assaulting detainees. Whilst some of these issues have arisen in relation to the recapture of escaped prisoners, violence in respect of detainees is not only limited to escaped prisoners. Such violence appears to be widely embedded in Police/VMF culture.

Of particular concern is the lack of prosecution (or discipline) of police/VMF wrongdoers and the failure to publicly follow up on reports or statements of public authorities. This is not only an issue of concern for individual victims. Rather, it undermines the rule of law as a whole. Instances in the past have demonstrated that both police and VMF can act *ultra vires* in manners which threaten to destabilise Vanuatu as a whole. An environment of lack of discipline of wrongdoers strengthens the propensity for these law enforcement agencies to act *ultra vires*.

There have been recent recommendations in respect of the perceived culture of violence within the Vanuatu Police and the VMF, with the most comprehensive of these contained within the Coroner's Report in respect of John Bule. It is not intended to repeat these. Rather previous recommendations should be seen to be acted upon.

It is recommended that:

1. A Commission of Inquiry is established to follow up on the recommendations of the Coroner's Report into John Bule, and other issues arising from the recapture of Koilo and Kilton. In particular:
    a. Wrongdoers should be identified and punished under Vanuatu law;
    b. Training of police and VMF in arrest procedures should be strengthened; and
    c. The role of the Vanuatu Mobile Force and its position in respect of the Vanuatu Police Force should be re-examined.

2. Consideration is given to the establishment of an independent police complaints or police conduct authority, such as can be found in other jurisdictions (i.e. New Zealand), that can provide timely remedies to victims and ensure timely discipline of officers.

3. Consideration should be given to expanding the powers of the Ombudsman to be able to take further action in the event that Recommendations are not acted upon by appropriate authorities.

4. Consideration should be given to the protection of whistleblowers that expose bad behaviour within the police and VMF.

5. Police develop public information on processes and rights during arrest, questioning and detention. This information should include processes for complaining if rights are violated.

6. Publication of police disciplinary actions is considered (although for privacy concerns people involved may have identities protected) in order to increase public confidence in internal discipline of the police force.

PROPOSAL TO REINTRODUCE THE DEATH PENALTY

Recently there have been some demands by the public to introduce the death penalty.[33] The Minister of Justice has also stated that the death penalty may be introduced.[34] The root cause of this demand is frustration with a perception of escalating violent crime. The main idea behind the proposal appears to be deterrence.

The authors of this report are concerned with this proposal. Introducing the death penalty is not addressing the root causes of violence in society. Further, there are many other weaknesses in the criminal justice system and issues that need to be addressed. Addressing these issues will result in more offenders being punished for criminal actions. This in itself will have a deterrent effect.

There is also no evidence that the introduction of the death penalty will have any particular deterrent effect. This is particularly the case if the other issues in the criminal justice system are not addressed, as these issues mean that offenders are not systematically caught and even-handedly punished.

Further, this report suggests that there is already a culture of police brutality. The Vanuatu Government should be cautious to take any action which may be perceived to further validate this by permitting State-sanctioned brutality.

Finally, Vanuatu's Constitution recognises the right to life. Vanuatu is also a signatory to the International Covenant of Civil and Political Rights, which recognises the right to life. Respecting these rights and international obligations requires respecting that offenders, even violent offenders, are still human beings. Whilst offenders should be punished for their actions, a healthy functioning criminal justice system can effectively punish offenders by limiting offenders' freedom of movement via long periods of imprisonment. A healthy functioning criminal justice system does not need to remove offenders' right to life.

It is recommended that:

1. Rather than considering introducing the death penalty, Vanuatu's Government considers other strategies to strengthen the functioning of the criminal justice system as a whole, to ensure that all violent offenders (regardless of where in the country they are located) are swiftly identified and prosecuted and are imprisoned for long periods of time.

SUMMARY OF RECOMMENDATIONS

Before listing the specific recommendations it can be observed that Vanuatu has general human rights obligations under a number of international Conventions and international bodies have already made a number of recommendations in the areas of violence against women and torture and ill-treatment. Vanuatu first participated in the Universal Periodic Review (UPR) process in 2009. During that process 95 recommendations were made, and

[33] *The Vanuatu Times*, 1 July 2013, 1.
[34] *Vanuatu Daily Post*, 2 July 2013, 1.

Vanuatu accepted all but 12 of them.[35] The extent to which these recommendations have been implemented is questionable. Vanuatu is next being reviewed pursuant to the UPR process in 2014 and it can be anticipated that similar recommendations will be made. Further a number of recommendations were contained in the concluding comments of the Committee on the Elimination of Discrimination against Women made in 2007 following the combined 1st, 2nd and 3rd periodic CEDAW report by Vanuatu.[36] The recommendations made by international bodies pursuant to international human rights mechanisms should be implemented.

Violence against Women

It is recommended that:

1. State agencies should act to address the 30 recommendations contained in the *Vanuatu National Survey on Women's Lives and Family Relationships* (May 2011) report produced by the Vanuatu Women's Centre in partnership with the Vanuatu National Statistics Office, which made 30 findings.

2. Regular publication in the media of successful prosecutions involving violence against women and sexual violence should be considered by media agencies.

3. Further research on the implementation of the police 'no drop' policy should be carried out, to see whether this is a cause of lack of prosecutions, or whether the cause is prosecutorial inaction.
    a. If the cause is prosecutorial inaction, consideration should be given to amending laws or procedures to require prosecutors to adopt a similar 'no drop' policy.

4. The design and implementation of an "active case management system" should be explored. Such a system should ensure that conflicts of interest are identified and managed properly, investigations are carried out in a timely manner, evidence is managed properly, files are transferred to prosecutors and recorded as having been transferred, and prosecution files are managed appropriately. Whilst "active case management" is usually associated with the judiciary, the concept can be modified for other settings.
    a. One issue may be coordination between stakeholders, and a multi-stakeholder committee to monitor the active management of cases involving violence against women may play a useful part in the design and implementation of an active case management system. If such an approach were implemented, the

[35]UPR Info, 'Database of UPR Recommendations, Vanuatu' http://www.upr-info.org/database/index.php?limit=0&f_SUR=189&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=25&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly (Accessed 23 December 2015).

[36] Committee on the Elimination of Discrimination against Women, 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Vanuatu' Thirty-eighth session 14 May-1 June 2007 CEDAW/C/VUT/CO/3.

inclusion of external stakeholders would provide a degree of independent oversight, although this benefit would need to be weighed against possible concerns regarding confidentiality of sensitive information.

5. More accurate data on cases involving domestic violence and violence against women should be kept. This data may involve the types of offences reported, the actions taken by each agency and the time taken by each agency in dealing with complaints. This data should complement an active case management system and aggregated information should be available to the public.

6. The *Code of Practice and Ethics for the Office of the Public Prosecutor* made pursuant to the *Public Prosecutor Act* [Cap 293] should be reviewed with the aim of determining whether a more detailed code, such as that found in Fiji's *Prosecutions Code 2003* would be helpful to avoid mismanagement of prosecutions and to ensure the laying of appropriate charges.

7. In any instance where the victim maintains that she or he did not consent to sexual intercourse the greater charge of sexual intercourse without consent should be laid, with lesser charges, including unlawful sexual intercourse, being laid in the alternative.

8. Whenever aggravating factors are present, the greater charge of aggravated sexual assault is laid, with lesser charges being laid in the alternative.

9. Police and prosecutors should be trained in taking statements from young witnesses or victims of crime and that the courts consider measures that could be taken to make them more "child friendly" for young witnesses and victims.

10. Vanuatu's laws of evidence should be amended to provide that no special corroboration of evidence given by women who are alleged victims of sexual offences is required.

11. Vanuatu's laws of evidence should be amended to prohibit asking victims of sexual violence about past sexual behaviour.

12. Education of women about their rights in respect of violence should not include information on reporting to police, but should include information on how reporting to others, including friends, family and medical personnel (within 72 hours of the incident if possible) can develop evidence, which can be used if the offender is ever taken to court.

13. The Penal Code should be amended to explicitly provide an offence of sexual intercourse without consent within marriage.

14. Officers who prepare pre-sentencing reports should be provided with additional training on gender, human rights and appropriate sentencing.

15. In the case of sexual offending consideration be given to using a panel that includes community members who are well-versed in gender issues to prepare pre-sentencing reports. This recommendation is made as the use of a panel, if well selected, will serve an educative function and may help to shift organisational culture.

16. Further discussions should be held with the judiciary to explore whether developing a sentencing database or additional sentencing guidelines would be a useful tool to help ensure consistency of decisions.

17. Further discussions should be held with the judiciary to explore whether additional training in human rights Conventions that Vanuatu has ratified, including the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities is necessary in order to ensure that judges are aware of how international human rights obligations should be taken into account in the decision making process.

18. Gender sensitivity training of law enforcement agencies should not only focus on police, prosecution and correctional services, but should also include the judiciary.

Torture and ill-treatment by Police

It is recommended that:

1. A Commission of Inquiry is established to follow up on the recommendations of the Coroner's Report into John Bule, and other issues arising from the recapture of Koilo and Kilton. In particular:
    a. Wrongdoers should be identified and punished under Vanuatu law;
    b. Training of police and VMF in arrest procedures should be strengthened; and
    c. The role of the Vanuatu Mobile Force and its position in respect of the Vanuatu Police Force should be re-examined.

2. Consideration is given to the establishment of an independent police complaints or police conduct authority, such as can be found in other jurisdictions (i.e. New Zealand), that can provide timely remedies to victims and ensure timely discipline of officers.

3. Consideration should be given to expanding the powers of the Ombudsman to be able to take further action in the event that Recommendations are not acted upon by appropriate authorities.

4. Consideration should be given to the protection of whistleblowers that expose bad behaviour within the police and VMF.

5. Police develop public information on processes and rights during arrest, questioning and detention. This information should include processes for complaining if rights are violated.

6. Publication of police disciplinary actions is considered (although for privacy concerns people involved may have identities protected) in order to increase public confidence in internal discipline of the police force.

Death penalty

1. Rather than considering introducing the death penalty, Vanuatu's government should consider other strategies to strengthen the functioning of the criminal justice system as a whole, to ensure that all violent offenders (regardless of where in the country they are located) are swiftly identified and prosecuted and are imprisoned for long periods of time.