



Government of Samoa

Samoa
Law Reform Commission
Komisi o le Toefuataiga o Tulafono a Samoa

**CHILD CARE AND PROTECTION
LEGISLATION
Final Report 11/13**

FEBRUARY 2013



GOVERNMENT OF SAMOA
OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE
SAMOA LAW REFORM COMMISSION

The Honourable Speaker

THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with Section 9 (2) of the Samoa Law Reform Commission Act 2008, I have the honour of submitting to you copies of the Report 11/13 on the review of the Child Care and Protection Legislation, as referred to the Samoa Law Reform Commission for review.

This Report sets out recommendations for reform of the Child Care and Protection Legislation after public consultations and research in accordance with section 4 of the Samoa Law Reform Commission Act 2008.

(Tuilaepa Fatialofa Lupesoliai Aiono Neioti Dr. Sailele Malielegaoi)

PRIME MINISTER AND MINISTER FOR THE SAMOA LAW
REFORM COMMISSION



GOVERNMENT OF SAMOA

Tuilaepa Fatialofa Lupesoliai Aiono Neioti Dr. Sailele Malielegaoi

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(Leota Theresa Potoi)

EXECUTIVE DIRECTOR

SAMOA LAW REFORM COMMISSION

Preface

This Final Report is based on issues raised during the Commission’s public consultations in February 2010 and the *2011 Child Protection Baseline Research* “Baseline Research”¹. The Baseline Research was carried out by the Ministry of Women Community and Social Development “MWCSA” in collaboration with the United Nations International Children’s Emergency Fund “UNICEF”. The Law Reform Commission (Commission) verified the legislative review findings of the Baseline Research.

The Baseline Research used 251 child protection indicators (Indicators) deduced from the Convention on the Rights of a Child (CRC)². These Indicators were used to measure how far Sāmoa has complied with its obligations under CRC. These indicators were also used in similar work in Fiji, Kiribati, Solomon Islands and Vanuatu. The findings of baseline research in these respective countries have initiated reforms in the area of child protection³.

Baseline research uses indicators to determine the extent of compliance with approved standards⁴. The results and findings from a baseline research inform policy makers, lawmakers and service providers of appropriate approaches to adopt to ensure that standards and goals are achieved. Appropriate approaches include policy development, legislative enactment, reforms of existing policies and laws and provision of necessary services where none have been offered before or the improvement of existing services. Baseline researches are therefore an integral part of a results-based accountability system⁵.

The National Council for the Convention on the Rights of a Child “NCCRC”⁶ and the Convention on the Rights of a Child Partnership “CRCP”⁷ have endorsed the Baseline Research findings⁸.

The Commission therefore is relying on the *Baseline Research* findings to guide its work on this Report. The time frame for this work is set out under the Government of Samoa/UNICEF Pacific Annual Work Plan 2012.

The Commission also recently received a reference from the Attorney General to assess the appropriateness of establishing a Sex Offenders Register for Samoa. Whilst there are overlaps between the present reference and the reference on Sex Offenders Register, the Commission believes that the scope of the new reference is not limited to child protection alone but affects other members of the community. The Commission is therefore addressing Sex Offenders Registry as a separate Reference⁹.

¹ The *Baseline Research on Child Protection* in Samoa carried out in 2011 by MWCSA in collaboration with the UNICEF (United Nations International Children’s Emergency Fund).

² These indicators were developed by Penelope Taylor as part of UNICEF Pacific’s baseline research in Fiji, Kiribati, the Solomon Islands and Vanuatu based on the Convention on the rights of a Child.

³ Solomon Islands has recently finished drafting its Child and Family Welfare Bill.

⁴ These standards may be international or domestic in nature.

⁵ <http://www.hfrp.org/publications-resources/browse-our-publications/indicators-definition-and-use-in-a-results-based-accountability-system> (Accessed 13 April 2012).

⁶ The NCCRC was established under Cabinet Directive; The CRCP is a working group established by the MWCSA.

⁷ Appointed by the Ministry of Women Community and Social Development.

⁸ The Samoa Law Commission is a member of both the NCCRC and CRCP.

⁹ Reference on the Sex Offenders Register.

We are grateful for the assistance of the following people who provided comments on earlier drafts of this paper: The Chief Executive Officer for the Ministry of Women Community and Social Development (MWCSD), Ms Leituala Kuiniselani Toelupe Tago-Elisara and her staff at the MWCSD, the members of the National Council for the Convention on the Rights of a Child¹⁰ and the members of the Convention on the Rights of a Child Partnership¹¹.

We also acknowledge the contributions of our interns Brooke Nelson and Su'e Tervola to this work and assistance from the UNICEF, Professor Sue Farran¹², Anika Kingmele of UNICEF Solomon Islands and the Australian National University - State Society and Governance in Melanesia (SSGM)¹³.

We emphasize however that the views expressed in this paper are those of the Commission and not necessarily those of the people or organisations who have helped us.

¹⁰ Attorney General's Office, Sāmoa Law Reform Commission, Ministry of Health, Ministry of Justice and Courts Administration, Ministry of Education Sports and Culture, Ministry of Police and Prison Services, National Council of Early Childhood Education, Mapusaga o Aiga and Ministry of Women Community and Social Development.

¹¹ Attorney General's Office, Sāmoa Law Reform Commission, National Council of Churches, National Council of Early Childhood Education, Nuanua o le Alofa, Ministry of Police and Prison Services, Ministry of Education Sports and Culture, Ministry of Health, Loto Taumafai, Mapusaga o Aiga, Sāmoa Victim Support Group, Ministry of Justice and Court Administration, Faataua le Ola, National Health Services, Aoga Fiamalama, Fiaola Crisis Centre and Ministry of Women Community and Social Development.

¹² Professor of Laws Northumbria University; Adjunct Professor University of the South Pacific

¹³ The State, Society & Governance in Melanesia Program (SSGM) is a leading centre for interdisciplinary research into contemporary issues in the Pacific and one of the most vibrant units in the Australian National University College of Asia and the Pacific.

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1. Introduction

- 1.1 Samoa ratified the Convention on the Rights of a Child (CRC) on the 29 November 1994 with one reservation¹⁴. In ratifying CRC, Samoa has a legal duty to comply with its legal obligations under the Convention¹⁵. This means that Samoa has to align its policies and laws with the objectives of the CRC which prioritise the care and protection of children.
- 1.2 In November 2008, one of the first references the Samoa Law Reform Commission received from Cabinet when it was established was the Care and Protection (Protection of Children) project “Project”. The Project commenced in February 2009 as an in-house Project focussing on: (i) identifying legislation dealing with the care and protection of children in Samoa and (ii) extent of Samoa’s compliance with obligations under CRC.
- 1.3 The Commission produced an Issues Paper in December 2009 (IP 03/09). Relevant public consultations were undertaken in Upolu and Savaii in February 2010. Given the number of legislation affected and the increasing national interest in CRC, the Commission resolved to produce a series of Issues Papers rather than proceeding immediately to develop a Final Report.
- 1.4 The preliminary public consultations for this Project linked the Commission to MWCSO through the assistance of its Internal Affairs Division with the Commission’s public consultations and the work done by its Division for Women on CRC. The collaboration with the MWCSO through NCCRC and CRCP catapulted this Project into a Major Law Reform Project. The Commission was asked to verify the findings under *Output 1.1*¹⁶ of the Baseline Research. *Output 1.1* dealt with the review of domestic legislation against CRC indicators to determine the extent of compliance with CRC objectives. The Commission was also asked to assist with the writing and editing of Samoa’s *Second Periodic Report on the Implementation of the Convention on the Rights of the Child (Draft Report)*. These efforts and other NCCRC and CRCP child protection initiatives such as public awareness programmes and radio talk back shows, directs the Commission’s work in this project.
- 1.5 Upon finalising the Baseline Research, the Commission was of the view that this was sufficient to develop its Final Report. Therefore it proceeded to produce this Report.

¹⁴ Samoa ratified the convention on the rights of the child with one reservation which is stated as follows: The Government of Western Samoa whilst recognizing the importance of providing free primary education as specified under article 28 (1)(a) of the Convention on the Rights of the Child and being mindful of the fact that the greater portion on schools within Western Samoa that provide primary education are controlled by bodies outside the control of the government. Pursuant then to article 51, the Government of Western Samoa thus reserves the right to allocate resources to the primary level sector of education in Western Samoa in contrast to the requirement of article 28 (1)(a) to provide free primary education. (United Nations Convention on the Rights of the Child; Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 1994, United Nations, New York, p. 198.(www.icrc.org))

¹⁵ These legal obligations under the CRC are underpinned both in the Millennium Development Goals (MDGs) and the Pacific Plan’s Strategic Objectives. This is important as Millennium Development Goals (MDGs) will only be sustainable if States human rights obligations are respected and strengthened in the strategies to achieve those goals (*Ratification of International Human Rights Treaties: Added Value for the Pacific Region*, United Nations Office of the Human Rights Commissioner For Human Rights (OHCHR)-Regional Office for the Pacific (July 2009).

¹⁶ Baseline Research, p.9.

1.6 The indicators used in the Baseline Research to review existing domestic legislation are classified under a number of categories as follows:

- Child Welfare/Child protection system;
- Family separation and alternative care;
- Violence against children;
- Sexual abuse and sexual exploitation of children;
- Abduction, sale and trafficking;
- Child labour and children in the streets situations;
- Child friendly investigative and court processes;
- Rehabilitation;
- Children in Conflict with the Law;
- Refugee Accompanied Migrant Children;
- Children in Armed Conflict;
- Information access; and
- Birth Registration.

1.7 This Report will examine the Baseline Research findings and make relevant recommendations for law reform to improve child care and protection in Samoa. This Report will only examine and make recommendations on categories that the Commission believes are relevant to Samoa and require immediate attention.

The role of child care and protection laws

1.8 Childhood is a period of innocence, defencelessness and susceptibility during which a child needs protection¹⁷. The child by reason of his or her physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth¹⁸. Children therefore require special treatment¹⁹.

1.9 Children who grow up in adverse environments are prone to having short life spans and poor physical and mental health. They are susceptible to social and educational problems and poor parental skills later in life. They are likely to become homeless and displaced and are often exposed to problems such as trafficking and prostitution²⁰.

1.10 Child Care and Protection laws provide a safe environment for children to live in harmoniously and develop their personalities²¹. The statistics from Ministry of Police and Prisons²² and Ministry of Health²³ reveal the need for Samoa to strengthen its legislative frameworks for the care and protection of children.

C Smith 'Children's rights: Judicial ambivalence and social resistance' (1997) 11 *International Journal of Law, Policy and the Family* 103, 133.

¹⁸ CRC Preamble.

¹⁹ *Police v Vailopa* [2009] WSSC 69 (2 July 2009) as per Justice Nelson.

²⁰ http://www.ipu.org/pdf/publications/childprotection_en.pdf (Accessed 18 June 2012)

²¹ Development of the Convention on the Right of a Child and national work on child protection.

²² Baseline Research, p.72.

²³ <http://www.sbs.gov.ws/> (Accessed 2 November 2012)

A need for change

1.11 There are currently more than fifty separate pieces of legislation in Samoa that operate independently to provide some protection for children²⁴. Despite this number of legislation, many problems continue to affect the lives of children. The Baseline Research reveals that these problems are due to weak legislative protection and/or poor enforcement. Samoa still has a fair way to go in addressing its obligations under CRC.

1.12 The Baseline Research revealed that out of 251 CRC indicators, Sāmoa has only fully complied with 46 (18.3%); Partial compliance 84 (33.5%); and Non-compliance 121 (48.2%)²⁵.

1.13 The lack of full compliance with CRC objectives has prompted judicial intervention in cases affecting children. The Courts have applied the principles of CRC to cases within their scope. In *Attorney General v. Maumasi*²⁶, the Court of Appeal increased the respondent's earlier imprisonment sentence from three and a half years to five years after considering relevant articles of CRC. Judicial activism is however just a provisional remedy limited by the fact that Judiciary's primary role is to interpret and apply the law.

1.14 The appropriate approach is for CRC objectives to be fully and properly incorporated or translated into domestic legislation. This however must be done in light of the local context, to ensure that subsequent reforms are workable. Thus there is a need for appropriate legislative reform to improve child care and protection in Sāmoa.

Focus of recommendations for reform

1.15 The Commission's recommendations for reform are made with a view of addressing Samoa's obligations under CRC and keeping in mind that²⁷:

- all children have a right to grow up in an environment free from neglect and abuse;
- children's best interests are paramount in all decisions affecting them;
- children and their families have a right to participate in decisions affecting them;

Accident Compensation Act 1989; Accident Compensation Act 1989; Acts Interpretation Act 1974; Administration Act 1975; Administration Act 1975; Administration Act 1975; Alienation of Freehold Land Act 197; Apprenticeship Act 197; Arms ordinance 196; Bankruptcy Act 190; Business Licences Ordinance 196; Community Justice Act 200; Constitution of Samoa; Co-operative Societies Ordinance 1952; Police Powers Act 200; Credit union Ordinance 1960; Crimes Ordinance 1959; Crimes Ordinance 1961; Criminal Procedure Act 1972; Diplomatic Privileges and Immunities Act 1978; District Courts act 1969; Births Deaths and Marriages Registration Act 2002; Divorce and Matrimonial Causes Ordinance 1961; Education Act 2009; Film Control Act 1978; Fisheries Act 1988; Health Ordinance 1959; Income Tax Act 1974; Infants Ordinance 1961; Infants (Adoption) Regulation 2006; Insurance Act 2007; international Criminal Court Act 2007; International Trust Act 1987; Labour and Employment Act 1972; Limitation Act 1975; Liquor Act 1971; Marriage and Affiliation Act 1967; Marriage Ordinance 1961; Mental Health Act 2007; National Provident Fund Act 1972; Nursing and Midwifery Act 2007; Oath, Affidavits and Declarations Act 1963; Occupational Safety and Health Act 2002; Poisons Act 1968; Property Law Act 1952; Public Finance Management Act 2001; Public Trust Office Act 1975; Reciprocal Enforcement of Judgment Act 1970; Remuneration Tribunal Act 2003; Road Traffic radiance 1960; Samoan Status Act 1963; Taking of Land Act 1964; Wills Act 1975; Young Offenders Act 2007.

²⁵ Baseline Research pp 11 -26.

²⁶ [1999] WSCA 1; 07 1999 (27 August 1999).

²⁷ Convention on the Rights of a Child, Preamble.

- improving the safety and wellbeing of children is a national priority;
- the safety and wellbeing of children is primarily the responsibility of their families, who should be supported by their communities and governments;
- the community values, supports and works in partnership with parents, families and others in fulfilling their caring responsibilities for children;
- children’s rights are upheld by systems and institutions;
- laws of Samoa are kept in a modern state which meets the needs of Government;
- community social, cultural, economic and commercial development of Samoa is enhanced; and
- reforms should be placed in the context of Samoan customs and traditions.

1.16 It is important to note that due to the complexity and sensitivity of some reforms, a progressive approach must be adopted to ensure that people affected fully understand the extent and necessity of recommended changes.

2. A Consolidated Child Care and Protection Legislation

2.1 A legislative review conducted during the *Baseline Research* revealed that the problems affecting child care and protection of children today are due to inadequate legislative protection and poor enforcement of existing legislation arising from the confusion and impracticality of having too many separate legislation.

Commission’s views

2.2 The enactment of a new child care and protection legislation will be practical. It will facilitate CRC compliance and make future child related law reform easy. It will also render ongoing child care and protection efforts expedient and less antagonising.

2.3 The new child care and protection legislation will ensure that children live in safe and supportive families and communities; children and families access adequate support to promote safety and early intervention; risk factors for child abuse and neglect are addressed; children who have been abused or neglected receive the support and care they need for their safety and wellbeing; child sexual abuse and exploitation is prevented and survivors receive adequate support²⁸.

Recommendation 1: A new principal legislation (Child care and protection legislation) should be drafted to replace the *Infants Ordinance* and consolidate all appropriate child care and protection provisions currently accommodated in different pieces of specific legislation. The new principal legislation should address the issues raised in the Baseline Research. It should also accommodate the proposed child care and protection framework.

All consequential amendments to be made in specific legislation listed in **Footnote 17** of this Report should be undertaken by the Drafting Division of the Attorney Generals Office during its annual legislative revision and consolidation programme.

²⁸ Convention on the Rights of a Child.

3. Cultural factors which impact child care and protection

- 3.1 Samoa has a unique hierarchical society in which many traditional values and customs remain robust. One such traditional value is the perception of children as precious and a blessing from God. This is reflected in the Samoan saying “*O au o matua fanau*”. This is with the view that children are the future custodians of family lands and assets. They guarantee the continuation of the family lineage²⁹.
- 3.2 Parents and relatives are therefore often very protective over their children³⁰. There is a general responsibility amongst members of the extended family: grandparents, uncles, aunties, older cousins and other relatives to care for a child even in the event of family (nuclear family) breakdown³¹.
- 3.3 It is important to note that central to the Samoan culture and society, is the dignity and achievement of the community rather than the individual³². This is often viewed by CRC advocates as conflicting with the human rights approach, which places prominence on the dignity and achievements of an individual rather than a community³³. The Courts in numerous constitutional cases have clarified the priority of human rights over cultural practises³⁴.
- 3.4 Equally important in the Samoan culture and society is the accepted use of physical discipline to chastise children and point them in the right path³⁵. The use of physical discipline is another point of variance between Samoan culture and CRC principles. The CRC provides that a child should be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child³⁶. The deaths of a number of children during the administration of corporal punishment by their parents or teachers, has placed this practice under a lot of criticism³⁷. There are three known cases of parents convicted of manslaughter as a result of being carried away in the course of physically disciplining their children.
- 3.5 In *Police v Maumasi* (2/11/98) an unreported case, the accused father was sentenced to three and a half years imprisonment resulting from the death of his eight year old stepson upon whom he inflicted a severe beating with a rubber hose. On appeal, the sentence was increased to a five year imprisonment term.
- 3.6 In *Police v Taimi Peleuaga* (1999) an unreported case, a seven year old girl died as a result of being struck with a wooden tong (iofi) and slapped twice by her father causing

²⁹ This is the common perception amongst most Samoan families, is to raise and prepare the next generation leaders to choose from, to hold *matai* titles and lead and protect the families’ interests.

³⁰ CRC Implementation Report 2005.

³¹ Family members are often very protective of their kinsmen. As the Samoan saying goes, “*Uo i aso uma ao le uso i aso vale*”.

³² Baseline, p.15

³³ Ibid.

³⁴ *Leituala v Mauga* [2004] WSSC 9.

³⁵ *Police v Tūtogi* [2007] WSSC 6 (15 February 2007)

³⁶ *Convention on the Rights of a Child*, arts 19 and 37; Also see *Attorney General v Maumasi* [1999] WSCA 1; 07 1999 (27 August 1999).

³⁷ *Attorney General v. Maumasi* [1999] WSCA 1; 07 1999 (27 August 1999).

her to fall and strike her head against the cement floor. On a guilty plea the accused was sentenced to 4 years imprisonment.

3.7 In *Police v Tutogi* 15/2/07 an unreported case, a thirty two year old mother pleaded guilty and was sentenced to two years for swinging a stick at her twelve year old son who was running away to avoid being beaten. As a result of injury to the back of his head the son fell to the ground and died soon after.

Commission's views

3.8 Corporal punishment is part of the Samoan culture and has been an effective means of discipline at home and at school in the local context³⁸. Children's lives however have been lost during the administration of corporal punishment both in schools and in homes. The Commission also believes that numerous children continue to suffer severe injuries from the administration of corporal punishment. Since there is no mandatory obligation on health professionals and officers such as educators to report such cases to authorities, this issue of children suffering injuries from the unreasonable administration of corporal punishment by parents, teachers and guardians is not effectively addressed. It is only when it has resulted in the death of a child that the criminal law reacts to punish the parent, teacher or guardian.

3.9 The Commission acknowledges the difficulty in legislating corporal punishment in a proactive manner to protect the lives of children and control corporal punishment in homes. The CRC promotes the prohibition of corporal punishment in all contexts. The Commission believes this to be a proactive means of preventing injuries and deaths from corporal punishment. But considering that corporal punishment is an integral part of the Samoan culture, an immediate prohibition will criminalise many Samoan parents and guardians. The fact that many Samoans will be affected by such prohibition will render such enactment unworkable and unenforceable, in which case it will do more harm than good.

3.10 The prohibition of corporal punishment, will also create a fear of being prosecuted in parents causing them to be reluctant to take their children to the doctor for treatment (if their children are suffering injuries from the administration of corporal punishment) in case the doctor or nurse will report them to the police.

3.11 An immediate move to prohibit corporal punishment in homes in Samoa will also create further opposition to the work on the care and protection of children given the misconception many Samoans now have of the concept of rights of a child.

3.12 The Commission therefore believes that the best way forward in addressing corporal punishment in homes is through awareness programmes and training at the village level, focussing on the effects of the practice and providing alternative methods of discipline, before legislating against it.

3.13 In schools, the Commission believes that the *Education Act 2009* sufficiently addresses corporal punishment in public schools at the compulsory education age by completely prohibiting it. The Commission however is concerned that private schools are not covered under the *Act*. This leaves children in private schools vulnerable. Furthermore, the onus should not be placed on schools to develop and provide a

³⁸ Ibid.

discipline policy as required under the *Act*³⁹. The Ministry of Education Sports and Culture should develop a national discipline policy within the National Education Policy applicable to all schools in Samoa regardless of whether they are private or public.

Recommendation 2: Corporal punishment in homes should be addressed through awareness programmes and trainings by the MWCSO and its partners, at the village level, focussing on the effects of corporal punishment on the development of children. These trainings should also provide alternative methods of discipline. This should be done before Samoa legislates against corporal punishment in homes.

Recommendation 3: The Ministry of Education, Sports and Culture should explore the option of including private schools under the scope of the *Education Act 2009*.

Recommendation 4: The Ministry of Education Sports and Culture must develop a national discipline policy applicable to all private and public schools in Samoa.

3.14 As children grow older, their parents' expectations of them grow dramatically as well. These expectations can be demanding and challenging by the time children reach puberty⁴⁰. Societal demands arising from cultural and church obligations often trigger such expectations. These expose children to serious harm as they are habitually left to be supervised by older siblings or relatives while parents or guardians attend to such demands.

3.15 Numerous incest incidents and indecent assaults on young children occur during this time of absence by parents or guardians. The perpetrator of such harm is usually the step-father, biological father, the father figure or a close male relative or male friend of the family⁴¹.

3.16 The Commission questions whether there is a link between these social issues and suicide cases in Samoa. A report by the Ministry of Health on Suicide Attempts, Outcomes, Suicide Deaths, between 1999 and 2008 reveals that the number of attempted suicide cases (an average of 33 suicide attempts per year) and deaths (an average of 16 deaths per year) is still very high⁴². It is unclear from the report what percentage of these cases were children. This is something that the Ministry of Health and Sāmoa Bureau of Statistics could address by recording and reporting disaggregated data in relation to suicide cases of children.

3.17 The statistics from the Police Domestic Violence Unit reveal that 29 percent of 551 sexual offences⁴³ from November 2003 to May 2010, involved victims or survivors who

³⁹ *Education Act 2009*, s. 23.

⁴⁰ CRC Implementation Report 2005.

⁴¹ *Police v Taivale* (Reasons) [2000] WSSC 34 (29 September 2000); *Police v Pasina* [2011] WSSC 37 (16 February 2011); *Police v AT* [2011] WSSC 72 (18 April 2011); *Police v Lemusu* [2009] WSSC 98 (14 September 2009); *Police v Taito* [2007] WSSC 31 (4 May 2007); *Police v PM* [2011] WSSC 112 (1 August 2011); *Police v Lokeni* [2010] WSSC 45 (30 April 2010); *Police v Fretton* [2009] WSSC 17 (3 March 2009); *Police v F* [2009] WSSC 32 (30 March 2009).

⁴² <http://www.sbs.gov.ws/> (Accessed 2 November 2012)

⁴³ Warranting a sentence of detention of 5 years or more - Indecent assault, carnal knowledge, rape, attempted rape, incest, indecent act, having sexual intercourse with related girl, indecency between a man and a boy, having sexual intercourse with an imbecile woman, sodomy, having sexual intercourse with a mental

were below 20 years of age⁴⁴. Eighty percent (80%) of attempted rape and rape offences that came before the Court between 2011 and April 2012 involved female complainants below 18 years old⁴⁵.

Recommendation 5: This issue of long absence of parents from homes, frequency of such absence and the link to cases of incest and sexual assault on children should be emphasised in awareness programmes by the MWCSO and its partners.

4. Limited Translation of CRC principles into Domestic Legislation

4.1 The *Constitution* is clear that international law is not a source of law for Samoa⁴⁶. Therefore, like most jurisdictions in the Pacific, Samoa adopts the dualist approach when it comes to complying with its obligations under international conventions that it has ratified. This means, that the principles of an international convention that Samoa has ratified, need either to be incorporated through or translated into domestic legislation before such principles can become part of the law of Samoa.

4.1 The Samoan Parliament however, has been very slow in passing relevant legislation to give the principles of CRC the force of law. This has prompted the Courts to delve into international law to assist them with their judgments⁴⁷. The Supreme Court in *Wagner v Radke*⁴⁸ applied the policy and principles of the *Hague Convention on International Child Abduction 1980* even though Samoa was not a signatory or a party to the Hague Convention.

4.2 In *Attorney General v Maumasi*,⁴⁹ the Court of Appeal applied the relevant articles of the CRC in its judgment even though they have not been formally adopted through domestic legislation. It decreed that all Samoan Courts should have regard to articles of the Convention but only in cases within its scope⁵⁰. In *Leituala v Mauga*⁵¹, the Supreme Court in considering the principles of the CRC and the consequences of the defendants' actions on the lives of the plaintiff's children, imposed punitive damages in addition to the substantial award of damages against the defendants. The reasoning for such a radical approach is clear in Lord Cooke of Thorndon's assertions in *Tavita v Minister of Immigration*,⁵² where he stated that Samoa's ratification of the Convention should not be mere window dressing.

4.3 The Courts in Fiji⁵³, Kosrae (in Federated States of Micronesia)⁵⁴, Nauru⁵⁵, Tonga⁵⁶, Papua New Guinea⁵⁷ and Tuvalu⁵⁸, have also adopted the same approach and have

person, attempt to have sex with an imbecile girl, attempt to commit sexual intercourse, sexual abuse and indecency between females.

⁴⁴ Baseline Research, p.72.

⁴⁵ <http://www.samlii.org> (Accessed 16 August 2012)

⁴⁶ *Constitution of Sāmoa*, art. 111.

⁴⁷ *Wagner v Radke* [1997] WSSC 6; Misc 20701 (19 February 1997); *Police v Kum* [2000] WSCA 6; 11 1999 (18 August 2000); *Police v Vailopa* [2009] WSSC 69 (2 July 2009);

⁴⁸ [1997] WSSC 6.

⁴⁹ [1999] WSCA 1 Also see *Police v Kum* [2000] WSCA 6 and *Police v Vailopa* [2009] WSSC 69 (2 July 2009).

⁵⁰ *Attorney General v Maumasi* [1999] WSCA 1. Also see *Police v Kum* [2000] WSCA 6; *Police v Vailopa* [2009] WSSC 69 (2 July 2009).

⁵¹ [2004] WSSC 9.

⁵² [1994] 2 N.Z.L.R. 257, 266.

⁵³ *Ali v State* [2001] FJHC 169.

directly applied the principles of the CRC in their decisions without formal adoption through domestic legislation.

5. Definition of “Child”

- 5.1 The definition of child under domestic legislation is inconsistent with that provided under CRC. The CRC defines a “child” as every human being below the age of eighteen (18) years unless under the law applicable to the child, majority is attained earlier⁵⁹.
- 5.2 In Samoa, the *Infants Ordinance* defines a “child” as any infant under the age of sixteen years⁶⁰. The Ordinance refers to an “infant” as a person under the age of twenty one years⁶¹. A person under the age of twenty one years is referred to as a “minor” under the *Acts Interpretation Act 1974*⁶².
- 5.3 The CRC definition of “child” implies that age of majority is eighteen years unless majority is attained earlier under certain circumstances defined by law. A minor may attain majority at an earlier age or said to be emancipated, under certain circumstances such as marriage, labour agreements and in some jurisdictions when a female minor gives birth⁶³.
- 5.4 The position in Sāmoa seems to be that a minor can receive emancipation through marriage⁶⁴ and employment⁶⁵. The minimum age of marriage for females is sixteen (16) years and a male is eighteen (18) years. A child under the age of fifteen (15) years can be employed in a safe environment, be given light work suited to his or her capacity and be subjected to conditions that may be imposed by the Commissioner of Labour. In the absence of judicial interpretation of such provisions, it is unclear what the precise legal position is in Samoa with regards to circumstances that can cause a minor to attain early emancipation.
- 5.5 The idea of emancipation originated from the civil law world and it is to relieve a minor from parental power and control to allow him/her to live life and make decisions as a person of majority even though he or she has yet to acquire the necessary age of majority⁶⁶.

⁵⁴ *Kosrae v Ned* [2005] FMKSC 11.

⁵⁵ *Re Lorna Gleeson* [2006] NRSC 8.

⁵⁶ *Faaoso v Paongo* [2006] TOSC 37.

⁵⁷ *State v Noimbik* [2007] PGDC 63.

⁵⁸ *Regina v Setaga* [2008] TVHC 3.

⁵⁹ Convention on the Rights of a Child, art. 1.

⁶⁰ *Infants Ordinance*, s. 2.

⁶¹ *Ibid.*

⁶² *Acts Interpretation Act 1974*, s. 4.

⁶³ http://www.lawreform.ie/_fileupload/consultation%20papers/wpAgeofMajority.htm (Accessed 22 August 2012).

<http://www.russian-civil-code.com/PartI/SectionI/Subsection2/Chapter3.html> (Accessed 22 August 2012).

⁶⁴ *Marriage Ordinance 1961*, ss. 9 and 10

⁶⁵ *Labour and Employment Act 1972* s. 32.

⁶⁶ http://www.lawreform.ie/_fileupload/consultation%20papers/wpAgeofMajority.htm (Accessed 22 August 2012); See <http://www.russian-civil-code.com/PartI/SectionI/Subsection2/Chapter3.html> (Accessed 22 August 2012).

Recommendation 6: The definition of “child” in all domestic legislation should be made consistent with the definition in the CRC. A child is “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

Recommendation 7: The age of majority should be reduced to eighteen years. This will be consistent with the definition of child in the CRC. It will also be consistent with the definition of adult in *section 2* of the *Young Offenders Act 2007*.

Recommendation 8: All domestic legislation should refrain from using different terms such as infant⁶⁷ and young person⁶⁸ to refer to different age groups. All legislation should use the term “child” throughout all legislation. These terms however, can still be used if they are properly defined as referring to a child of a certain age group.

Recommendation 9: The minimum age of marriage in Sāmoa should be amended to eighteen years for both males and females. There is no real justification as to why the minimum age of marriage for females should be lower than males. It is discriminatory. It is contrary to **Article 15(4)** of the *Constitution* which provides for the equal protection of all persons under the law. *Section 9* of the *Marriage Ordinance 1961* should be amended to make minimum age of marriage eighteen years (18) for both males and females. Parental consent should be sought for marriages below the age of 18 years and *section 10* of the *Marriage Ordinance 1961* should be amended accordingly.

Recommendation 10: It should also be clearly expressed in the new *Child Care and Protection Legislation* that the concept of emancipation does not apply to Samoa. This will ensure that female minors giving birth below the age of eighteen (18) years will still enjoy their rights as a child and not lose them due to child birth.

6. Child Welfare/Services and Child Protection Services

6.1 The *Infants Ordinance* empowers the Court to commit a child living in a place of ill repute, is a neglected, indigent or delinquent child, is not under proper control or is living in an environment detrimental to his or her physical or moral well being, to the care of a Child Welfare Officer⁶⁹. The Minister of Police is empowered under the *Ordinance* to appoint a fit and proper person as a Child Welfare Officer on an honorary basis or for remuneration⁷⁰.

6.2 A Child Welfare Officer is given powers and rights as a guardian appointed under the *Infants Ordinance* to provide for the child under his or her care. It is unclear what powers and rights are available to a guardian under PART I of the Ordinance, hence it is unclear what standard of care should be given to a child under a Child Welfare Officer’s supervision. The Court may make directions regarding the upbringing, education, employment, treatment, control or discipline of such child and for the variation or discharge of any such order which committed the child to the custody of the Child Welfare Officer.

⁶⁷ *Infants Ordinance 1961*, s. 2.

⁶⁸ *Young Offenders 2007*, s. 2.

⁶⁹ *Infants Ordinance 1961*, s. 16

⁷⁰ *Ibid*, s. 15.

Commission's views

- 6.3 The Ordinance is silent about the provision of shelter and maintenance for the child committed to the care of the Child Welfare Office. Presumably the child lives with the Child Welfare Officer. The Commission proposes that children should no longer be placed under the care of a Child Welfare Officer but placed in a proper social welfare/services system.
- 6.4 However, in a setting where a fully functioning western social welfare/services system for children does not exist, an option for the extended family members to provide care and protection for their kin is a viable one. It would be appropriate however, that before placing a child in such an environment, an initial assessment of the extended family environment must be undertaken to ensure that it is safe and healthy for the child. This can be the new role of the Child Welfare Officer.
- 6.5 Relevant guidelines and standards must therefore be created in order to measure the suitability of the extended family's environment. It is also important to determine at the outset whether choosing this option would be in the best interests of the child. The placement should be closely monitored and evaluated from time to time.
- 6.6 The success of such a placement will depend on the loyalty, faith and love of the family members for their kin. It was revealed in earlier consultations that such an arrangement can place financial burden and other problems on the extended family, particularly if changes need to be made to meet any care and protection standards⁷¹.
- 6.7 The Government can assist the efforts of the extended family by providing support in terms of free medical and health care (free medicine, counselling and treatments of injuries suffered) and free education (for those who are above the age of compulsory education), uniform, stationary and reasonable transportation costs to and from school. There should be controls put in place to minimise any possible abuses and to ensure that such support ceases when it is no longer needed. This can be the responsibility of the MWCSO.
- 6.8 There should be another option available, in the case that the placement with the extended family fails or is unfavourable at the first instance. It might be necessary to explore the option of working together with Non-Governmental Organisations⁷² who are currently offering shelters and care and protection for victims of crimes and see how such efforts may be complemented rather than the Government establishing new shelters. The MWCSO should develop guidelines and standards to be implemented to ensure that such shelters are safe and healthy for children and for children to be closely monitored and evaluated.

Recommendation 11: Children removed from the care of their parents should have the first option of being placed in the care and protection of members of their extended family under the new legal framework.

Recommendation 12: There should be a second option for shelters in the case that the placement with the member(s) of extended family fails or is unfavourable at the first

⁷¹ These are deduced from the relevant indicators under this category.

⁷² The Samoa Victim Support has recently opened a shelter for victims of violence and sexual abuse.

instance. It is recommended that the provision of shelters by Non-Governmental Organisations are explored to determine if they can be utilised and if possible how such efforts can be complemented.

Recommendation 13: Proper guidelines and standards should be created to ensure that any new environment that a child is to be placed in is safe and healthy for the child's physical, mental and spiritual development.

Recommendation 14: The MWCSO should be responsible for carrying out an initial assessment of a relative's home that a child is going to be placed in to identify any necessary improvements to be made to ensure that the new environment is safe and healthy for the child's physical, mental and spiritual development. In the case of emergencies then a child must be placed in a safe place whilst such assessments are being carried out.

Recommendation 15: The Government should determine how it can complement or subsidise both options for shelter. It should also look at how it can assist with the costs of necessary improvements to a relative's home.

6.9 The Baseline Research findings reveal that Samoa has not fully complied with 96% of the CRC indicators for child welfare and child protection services. It stated that despite provisions for child protection objectives under the National Policy for Children (2010-2015) no formal legal framework has been established. Thus it recommended that Samoa needs to implement a framework to specify the rights, powers and responsibilities of Government services, the Courts, traditional authorities, parents and children and all actors involved in providing child welfare and child protection services⁷³.

6.10 The ideal framework should⁷⁴:

- have clear procedures and accountabilities for reporting, assessment and intervention in cases of children at risk and children who have experienced violence, abuse, neglect or exploitation;
- require all persons (particularly professionals)⁷⁵ to report children (even children suspected or at risk) suffering violence, abuse, neglect or exploitation to relevant authorities and to protect persons who report from any liabilities;
- set out duties and powers of social welfare agencies and others working to prevent child abuse and exploitation;
- have available a variety of supportive and protective measures⁷⁶ and relevant procedures and criteria for applying for those interventions to prevent child abuse and exploitation;

⁷³ Baseline Research, pp. 11-12.

⁷⁴ These are deduced from the relevant indicators under this category.

⁷⁵ Professionals working with children (health professionals, teachers, child care workers, etc) specifically relieved from confidentiality obligations. [This law to be enacted only in the context of a functioning and confidential child protection system]

⁷⁶ For example, counselling, financial assistance, income generation support, family supervision orders, respite care, parental education, temporary foster or other alternative care, emergency shelter, education/vocational training assistance etc.

- make available support for children and families at risk;
- have child-friendly reporting and complaints system⁷⁷;
- promote a coordinated and multidisciplinary response to children in need of protection;
- only allow for the separation of a child from his/her family when it is necessary for the best interest of the child and by order of a competent authority⁷⁸;
- clearly define the State's legal obligation to provide alternative care for children without parental care or who cannot in their best interests be permitted to remain in parental care, and the forms of alternative care to be provided⁷⁹;
- put the best interest of the child as the paramount consideration in all decisions affecting the child;
- specify criteria for determining the best interest of a child;
- seek and respect the views of a child in any decision about intervention or support services and to uphold their right to privacy;
- set out minimum standards for professional qualification, training and ethical conduct of social workers and individuals working in institutions caring for children;
- require accreditation of social workers and individuals working in institutions caring for children;
- set minimum standards for the types and quality of support services provided by both government and non-governmental service providers to children in need of protection and their families;
- require accreditation of all institutions providing care and protection to children;
- eliminate any discrimination;
- make available an independent and child-friendly avenue for complaints for children in relation to service providers within the child protection and social welfare framework and expediently consider and resolve such complaints;
- embrace informal customary processes relating to child welfare and protection and set standards to ensure that they are suitable for the caring and protecting of children;
- be prepared to supply care and protection to children during emergency situations (natural and manmade disasters).

Commission's views

6.11 The Commission confirms the Baseline Research findings. Samoa does not have a comprehensive legal framework regulating and coordinating child welfare and child protection services. There is a discreet and fragmented framework established through

⁷⁷ For example, telephone helplines.

⁷⁸ See **Family Separation and Alternative Care** below.

⁷⁹ For example, foster care, kinship care, guardianship, adoption and institutional care. Also see **Family Separation and Alternative Care** below.

different pieces of legislation discussed earlier in this Report. This fragmented framework requires a total overhaul to appropriately regulate and coordinate child welfare and child protection services in Samoa.

- 6.12 The establishment of a comprehensive legal framework based on CRC standards which pays due regard to Samoan customs and traditions⁸⁰ would properly guide present efforts by Government Ministries such as the Ministry of Justice and Courts Administration (MJCA), Ministry of Police and Prisons (MOPP), Ministry of Women Community and Social Development (MWCSD) and all relevant Non Governmental Organisations⁸¹. It will prevent unnecessary duplication of services and guarantee the efficient utilization of resources. It will also ensure that child welfare and child protection services offered comply with accepted international standards (but these standards need to be considered in light of the Samoan context⁸²) and a great proportion of child welfare and child protection concerns are addressed properly and promptly.
- 6.13 The reporting of cases of children suffering violence, abuse, neglect or exploitation to relevant authorities (including children suspected or at risk) should not be made mandatory but on a voluntary basis. Parents, guardians or teachers will hesitate to bring children to the hospital for the treatment of any injuries if they know that in doing so, they will expose themselves to either a fine of ST\$500 or an imprisonment term for up to one year⁸³.
- 6.14 There is also a requirement under the CRC for parties to first put in place a functioning and confidential child care and protection framework before considering mandatory reporting. Samoa does not have a functioning and confidential child care and protection framework in place yet. Therefore mandatory reporting should not be part of the proposed framework.

Recommendation 16: A new comprehensive framework must be established to effectively and properly regulate child welfare and child protection services in Samoa through the new Child Care and Protection Legislation based on the CRC standards.

Recommendation 17: The features of the new framework should reflect the concerns identified in the Baseline Research. These concerns should be addressed in light of the local context. (such as Samoan culture and traditions, available resources and the existing framework under the *Infants Ordinance*)

Recommendation 18: The reporting of cases of children suffering violence, abuse, neglect or exploitation to relevant authorities (including children suspected or at risk) should be made only on a voluntary basis at this stage. Samoa has to put in place a functioning and confidential child care and protection framework first before considering the issue on reporting.

⁸⁰ For example, children have their place, role and responsibilities in the structure of the Samoan family depending on their ages/physical capacities. Take note of the current legal status of corporal punishment in homes in Sāmoa. Attempts to control and eliminate corporal punishment should be done through awareness and training programmes.

⁸¹ Baseline Research.

⁸² Ibid 74.

⁸³ *Infants Ordinance*, s. 12.

7. Family Separation and Alternative Care

- 7.1 A child can be separated from his or her family and placed in alternative care under certain circumstances recognised by the law in Samoa. These are: when the institution of family is broken down and the custody and upbringing of a child is awarded to either parent(s) after a divorce proceeding⁸⁴; when the Court places the child under the care of a guardian because the parents are unfit to have the custody and upbringing of such child⁸⁵; when the child has been adopted⁸⁶; when the Court commits a child who has been living in a place of ill repute or is a neglected, indigent or delinquent child, or is not under proper control, or is living in an environment detrimental to its physical or moral well-being to the care of a Child Welfare Officer⁸⁷; when a child who has a mental disorder⁸⁸ is placed in a place of care and support and given treatment and protection⁸⁹; when a child's parent(s) is/are convicted of a crime and serving an imprisonment term and the child is placed either with one of the parent(s) or with relatives⁹⁰; abducted⁹¹ or kidnapped⁹² or when a parent(s) is banished from the village by the village council⁹³.
- 7.2 The Baseline Research found legislation⁹⁴ dealing with the separation of a child from his or her family and alternative care to be lacking in clarity⁹⁵. They also provided very limited options for alternative care⁹⁶. The Baseline Report attributed this limitation to the existence of a traditionally strong extended family relationships and their sense of responsibility⁹⁷.
- 7.3 It also pointed out that the law needs to be more explicit in stating the best interests of a child as the primary consideration in all decisions affecting him or her. In determining what the best interests of a child are, his or her views must be heard and taken seriously⁹⁸.

⁸⁴ Ibid, s. 4(1); Also see *Divorce and Matrimonial Causes Ordinance* 1961, s. 24 and *Maintenance and Affiliation Amendment Act 2010*, s. 12A.

⁸⁵ *Infants Ordinance 1961*, s. 4(2).

⁸⁶ Ibid, ss. 7-11.

⁸⁷ *Infants Ordinance 1961*, s. 16.

⁸⁸ Mental disorder is defined as includes a mental illness and means a medical condition that is characterized by a significant disturbance of thought, mood, perception or memory, save that a person is not to be considered mentally ill by reason only of one or more of the following: (a) that the person expresses or refuses or fails to express a particular political opinion or belief; (b) that the person expresses or refuses or fails to express a particular religious opinion or belief; (c) that the person expresses or refuses or fails to express a particular philosophy; (d) that the person expresses or refuses or fails to express a particular sexual preference or sexual orientation; (e) that the person engages in or refuses or fails to engage in a particular political activity; (f) that the person engages in or refuses or fails to engage in a particular religious activity; (g) that the person engages in sexual promiscuity; (h) that the person engages in immoral conduct; (i) that the person engages in illegal conduct; (j) that the person is intellectually disabled; (k) that the person takes drugs or alcohol; (l) that the person has an antisocial personality; and (m) that the person has a particular economic or social status or is a member of a particular cultural or racial group.

⁸⁹ *Mental Disorder Act 2007*, ss. 5 to 9.

⁹⁰ *Crimes Ordinance 1961*.

⁹¹ Ibid, ss. 83 and 83B.

⁹² Ibid, s. 83A

⁹³ *Leituala v Mauga [2004] WSSC 9*

⁹⁴ *Infants Ordinance 1961*; *Divorce and Matrimonial Causes Ordinance 1961*; *Mental Health Act*; and *Maintenance and Affiliation Amendment Act 2010*.

⁹⁵ Baseline Report, p. 58.

⁹⁶ Ibid, p. 58.

⁹⁷ Ibid, p. 58.

⁹⁸ Ibid, p. 59.

7.4 Overall, the existing laws relating to family separation and alternative care failed to fully comply with 71% of the relevant indicators.

7.5 The Baseline Research pointed out issues that require attention under this category to ensure that they fully comply with relevant indicators under this part. The relevant legislation must:

- clearly define the parent's roles and responsibilities under all circumstances such as after a divorce;
- due regard should be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background;
- the nature of the parents' relationship is explicitly excluded as a consideration in the allocation of parental responsibility when parents separate;
- a child is separated from his or her parents only as a last resort and where it is in the best interests of the child and necessary for his or her protection;
- family preservation is explicitly stated in the relevant law as the priority in arrangements for child protection;
- there are provisions for limitations on the ability of parents to voluntarily give up their parental responsibilities⁹⁹;
- clearly state alternative care options under the proposed child care and protection legislation¹⁰⁰;
- should specifically provide that cases dealing with the separation of children from their parents must be dealt with confidentially and where court proceedings are involved, in a closed court;
- all children in alternative care are subject to a regular review of that placement;
- there is an independent, child-friendly avenue of complaint for consideration and resolution of complaints by children regarding state actions to separate them from their parents and related issues such as alternative care;
- require that all cases dealing with the separation of children from their parents be dealt with speedily;
- explicitly provide that, when parents separate, the grounds for allocating parental responsibility are based on the individual child's best interests;
- provide a presumption that when parents separate, that it is in the best interests of a child to maintain contact with both parents, unless the contrary is proven;
- explicitly exclude neglect arising from poverty as a grounds for child removal;

⁹⁹ For example, by admitting a child to an orphanage or other institution.

¹⁰⁰ For example, family member care, foster care, adoption, institutional care.

- require that priority be given to placement of a separated child with members of his/her wider family, with appropriate support where necessary and explicitly state that institutionalisation is a measure of last resort;
- require that the best interests of the child be the primary consideration in making decisions about alternative care;
- require that the child's views be taken into consideration in any decision made about alternative care, and that those views be given due weight in accordance with the child's age and maturity;
- require that the views of all interested parties be heard and taken into consideration in any decision made in relation to the separation of a child from his or her parents and the allocation of alternative care;
- give children separated from their parents the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests;
- establish standards of care for residential care facilities and available forms of alternative care and accreditation required;
- require in adoption matters the seeking of a child's consent or views and to consider such consent or views in light the child's age and capacity;
- require that counselling be provided to a child where consent is required under the law;
- put in place border controls to monitor the entry and exit of babies and children travelling with adults who are not their parents;
- require the consideration of the child's right not to be separated from his or her parents unless necessary for his or her best interests in deportation matters¹⁰¹;
- permit children to visit their parents serving time in prison;
- recognize the right of a child to know the whereabouts of his or her parents where separation results from action by the State; and
- prohibit traditional customs which separate parents and children unnecessarily.

Commission's views

7.6 The Commission agrees with the Baseline Report findings. However, given the number of legislation that are affected by the Baseline Report findings, it is best that the issues identified for this category be addressed in the principal legislation¹⁰² or in the proposed Child Care and Protection legislation. The consequential amendments can be made through the legislative review process.

7.7 It is important to note that some issues raised in the Baseline Report under this category have been addressed in recent law reform. In some cases they have already form part of

¹⁰¹ This should also be reflected in relevant laws and procedures governing deportation;

¹⁰² *Infants Ordinance 1961*.

existing laws and in others they have formed part of draft legislation awaiting Parliamentary endorsement.

- 7.8 The Baseline Research pointed out the need to have the permission for children to visit their parents in prison to be explicitly provided for in legislation. The *Prisons and Correction Bill 2011 clause 42(1)(e)* prohibits impermissible penalties which will deny a prisoner from seeing his or her children. However, such right of communication can be withdrawn under relevant Regulations or Commissioner's Orders, under certain circumstances but only for a period of time.
- 7.9 *Clause 60(1)(p)* of the *Bill* also allows arrangements for female prisoners and their children consistent with the rights and obligations under CEDAW and CRC in particular the rights of mothers to feed and care for their infant children whilst in prison.
- 7.10 The *Divorce and Matrimonial Causes Ordinance 1961* was recently amended to provide that a decree of divorce does not take effect unless the Court has, by order, declared that it is satisfied that proper arrangements in all the circumstances have been made for the care, welfare and development of those children of the marriage under the age of 18 years¹⁰³. Also under these recent amendments, the Attorney General can join divorce and matrimonial proceedings as one of the parties upon the request of the Court to intervene, contest or argue any question in relation to an order relating to the welfare of a child¹⁰⁴.

Recommendation 19: The issues identified in Baseline Research under the Family Separation and Alternative Care category should be all addressed in the new Child Care and Protection Legislation. The consequential amendments can be made through the legislative review process by the Legal Drafting Division of the Attorney General's Office.

Recommendation 20: In relation to alternative care, the Commission has already made recommendations earlier with regards to using the extended family as an option and the use of existing efforts by non-governmental organisations. Guidance can be sought from the framework provided under the *Mental Health Act 2007*, where voluntary care and support within family and community is first used before considering the use of a formal institution.

Recommendation 21: The new Care and Protection Legislation should address the issues raised in paragraph 7.5 of this Report.

¹⁰³ *Divorce and Matrimonial Causes Ordinance 1961*, s. 7D.

¹⁰⁴ *Ibid*, s. 26E.

8. Violence and Maltreatment

- 8.1 Violence and maltreatment of children cut across boundaries of geography, race, class, religion and culture. It happens in homes, schools, on the streets, in places of work and entertainment, and in care and detention centers¹⁰⁵. Perpetrators include parents, family members, teachers, caretakers, law enforcement authorities and other children¹⁰⁶. No country is immune, whether rich or poor¹⁰⁷.
- 8.2 In Samoa, the *Constitution* provides that no person shall be subjected to torture or to inhuman or degrading treatment or punishment¹⁰⁸. The *Crimes Ordinance* operates to protect the public from such treatment¹⁰⁹. Neglect¹¹⁰ is captured under *sections 76 and 77* of the *Crimes Ordinance*¹¹¹ which charges a person who neglects to provide necessities of life to a person under his or her charge. Any person that is convicted of failing to provide necessities of life to a person with a disability or a child under the age of 16 years is liable to an imprisonment term of up to 7 years¹¹².
- 8.3 It also an offence under the *Infants Ordinance* to cause a child under the age of 14 years unnecessary suffering, or injury to its health, wilfully ill-treats, neglects, abandons, or exposes such child or causes or procures such child to be ill-treated, neglected, abandoned, or exposed¹¹³. An exception to this is administering of reasonable punishment by a parent, teacher, or any other person who lawfully has control or charge of such child¹¹⁴. A person who is convicted of this offence is liable to a fine not exceeding ST \$500 or to an imprisonment term not exceeding five years¹¹⁵.
- 8.4 The *Education Act 2009* also does not permit the use of: corporal punishment; any form of punishment that may cause harm to the recipient; or any form of punishment that humiliates or is intended to humiliate the recipient; on compulsory school-aged¹¹⁶ children¹¹⁷. The Act does not apply to children above fourteen (14) years of age.
- 8.5 The Baseline Research revealed that Samoa has only fully complied with 6% of the relevant indicators for Violence and Maltreatment¹¹⁸. The relevant legislation lacked clear definitions and prohibitions of the different forms of violence¹¹⁹ against children¹²⁰.

¹⁰⁵

<http://www.unicef.org/violencestudy/I.%20World%20Report%20on%20Violence%20against%20Children.pdf> (Accessed 16 May 2012)

¹⁰⁶

<http://www.unicef.org/violencestudy/I.%20World%20Report%20on%20Violence%20against%20Children.pdf> (Accessed 16 May 2012)

¹⁰⁷

Ibid.

¹⁰⁸

Constitution, art. 7.

¹⁰⁹

Crimes Ordinance ss. 59 to 84.

¹¹⁰

Neglect is the leaving a child on his or her own either for a period of time or without any intention of returning to ensure their safety and wellbeing.

¹¹¹

Police v Toga Pe'e Fuimaono [2001] WSSC 37; Police v Rosa Loi [2005] WSSC 33 (2 December 2005)

¹¹²

Crimes Ordinance, s. 76.

¹¹³

Infants Ordinance, 1961, s. 12.

¹¹⁴

Ibid., s. 14.

¹¹⁵

Ibid., s. 12.

¹¹⁶

Compulsory school aged child means a child who is between five (5) years of age and 14 years of age who has not completed the work of Year 8 of school.

¹¹⁷

Education Act 2009, s. 23(2).

¹¹⁸

Baseline Research, p. 15.

¹¹⁹

Physical violence, sexual, emotional and Neglect, (Baseline Research, p .59).

¹²⁰

Baseline Research, p. 60.

Physical punishment although prohibited in schools and early childhood education settings, is not prohibited in other settings including the home¹²¹. The Baseline Research also found that relevant legislation failed to address domestic violence¹²². There is a need to legislate against violence in educational and other institutional settings¹²³. It identified the need to provide a child friendly complaints mechanism in order to improve the enforcement of existing child protection provisions¹²⁴.

8.6 It pointed out that relevant legislation needs to address these issues before they can fully comply with the relevant indicators. They need to¹²⁵:

- clearly define and strictly prohibit all forms of violence against children¹²⁶;
- explicitly prohibit corporal punishment in the home, school, institutions and community and remove any legal exceptions or defences under the law to parents or others in relation to assaults on children¹²⁷,
- make it an offence to use threat or mental violence in homes, public and private schools, public and private child care institutions, foster care, alternative care, day care and the penal system;
- prohibit all expressions of violence in schools, whether by pupils or teachers, including physical violence, emotional violence (bullying), sexual harassment, stigma and discrimination;
- make the negligent treatment of a child by any person who has care of that child an offence but poverty can be used as a defence; and
- establish an independent child-friendly complaints avenue outside of the criminal legal system available to child victims/survivors of violence.
- call for the reporting and investigation of all child deaths¹²⁸;
- counter spousal violence and its impact on children including (but not restricted to):
 - i) Criminal assault against women in the home is a specific offence;
 - ii) Domestic violence legislative provisions provide for the removal of the perpetrator from the home by police following acts or threats of violence;
 - iii) A system of apprehended violence orders; and
 - iv) Definition of mental violence includes witnessing acts of violence;
- identify and prohibit traditional practices¹²⁹ harmful to children and prescribe appropriate penalties for those who violate these provisions;

¹²¹ Ibid.

¹²² Currently being addressed under the *Family Safety Bill 2011*.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Baseline Research 62.

¹²⁶ Namely physical, sexual, emotional and neglect.

¹²⁷ For example, the defence of “parental correction” in some jurisdictions.

¹²⁸ This was recommended (Recommendation 3) by the Commission in its Final Report on the Review of the *Coroners Act 1959*.

¹²⁹ For example, early marriage, female genital mutilation, honour killings, the tattooing of children, banishment of one or both parents, banishment of a child’s whole family, destruction of a child’s family properties as part of a traditional fine.

- ensure that all provisions protecting children from violence are free from discrimination; and
- call for institutions dealing with reports of violence against children to record and report disaggregated data in relation to reports received and actions taken.

Commission's views

8.7 Some children are particularly vulnerable because of gender, race, ethnic origin, disability or social status. Children born outside of wedlock are at risk of abandonment due to fear of public ridicule and/or severe admonishment by family and/or community¹³⁰. This was the cause for a single mother to abandon her new born baby in ***Police v Toga Pe'e Fuimaono***¹³¹.

8.8 Child abandonment can also stem from the emotional breakdown and feelings of despair due to domestic problems¹³². This was the case in ***Police v Rosa Loi***¹³³ and ***Police v Saipaia***¹³⁴.

8.9 The Chief Justice in his concluding comments in ***Police v Saipaia***¹³⁵ expressed a concern and the need for the relevant authorities and the non-governmental organisations to investigate the cause(s) of mothers abandoning newly born babies and identify practical solutions¹³⁶.

8.10 In assessing the Baseline Research findings, the Commission agrees with the outcomes. It recommends that necessary reforms be undertaken based on the issues identified in the Baseline Report, in relation to violence and maltreatment except in the case of corporal punishment where the Commission recommends that a progressive approach be adopted as indicated in the section of this Report dealing with cultural factors which impact child care and protection in Part 2 of this Report.

8.11 It is also important to note that some of the relevant concerns pointed out in the Baseline Research have been addressed already in recent reforms and have formed part of legislative amendments or enactments currently awaiting Parliaments approval. The ***Family Safety Bill 2011***, addresses concerns in relation to domestic violence. The Bill provides a detailed definition of domestic violence¹³⁷. It also defines the different types of violence identified under the Baseline Research¹³⁸.

¹³⁰ http://www.samoaoobserver.ws/index.php?option=com_content&view=article&id=5927:abandoning-a-child&catid=74:viewpoint&Itemid=56 (Accessed 7 June 2012).

¹³¹ [2001] WSSC 37.

¹³² ***Police v Sipaia*** [2007] WSSC 16 (13 March 2007); ***Police v Rosa Loi*** [2005] WSSC 33 (2 December 2005).

¹³³ [2005] WSSC 33 (2 December 2005).

¹³⁴ [2007] WSSC 16 (13 March 2007).

¹³⁵ Ibid.

¹³⁶ The causes of child abandonment vary from jurisdiction to jurisdiction and change from time to time. It is often linked to: poor or no support from the father of the baby; mothers having very poor social and moral adjustment in early life and have difficulty in accepting responsibility; and babies born from extramarital affairs (Barthelemy, 1972).

¹³⁷ Clause 2 defines domestic violence as meaning physical abuse; sexual abuse; emotional, verbal and psychological abuse; intimidation; harassment: stalking; any other controlling or abusive behaviour towards a complainant where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

¹³⁸ These are: physical abuse; sexual abuse; emotional, verbal and psychological abuse; intimidation; harassment; and stalking.

Recommendation 22: The new Care and Protection Legislation should:

- clearly define and strictly prohibit all forms of violence against children¹³⁹;
- prohibit all expressions of violence in schools, whether by pupils or teachers, including physical violence, emotional violence (bullying), sexual harassment, stigma and discrimination;
- identify and prohibit traditional practices¹⁴⁰ harmful to children and prescribe appropriate penalties for those who violate these provisions; and
- call for institutions dealing with reports of violence against children to record and report disaggregated data in relation to reports received and actions taken.

9. Sexual Abuse and Sexual Exploitation

9.1 Sexual abuse is defined under the *Family Safety Bill* as any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity and privacy of the complainant without his or her free will or consent¹⁴¹.

9.2 Sexual exploitation is the abuse of a position of vulnerability, differential power, or trust for sexual purposes. It often includes profiting monetarily, socially or politically from the exploitation of such person as well as personal sexual gratification¹⁴². Sexual exploitation often involves child prostitution, trafficking of children for sexual abuse and exploitation, child pornography and sexual slavery¹⁴³.

9.3 The review of relevant legislation under the Baseline Research reveals that Samoa has only complied with 6% of the relevant indicators for sexual abuse and sexual exploitation¹⁴⁴. The Baseline Research indicated in its findings that the *Crimes Ordinance* needs major reform. The relevant criminal provisions dealing with sexual assault and abuse of female children require strengthening. These provisions require amendments to provide male children with the same protection. There should also be higher penalties for cases involving children.

9.4 The Baseline Research also indicated that the age thresholds in these provisions need to be reconsidered to provide better protection for children between the ages of 16 and 18 years. It proposes that explicit definitions of sexual offences against children such as sexual harassment, be provided and given higher penalties. The definitions should also take into consideration international development in defining sexual offences against children relating to information and communication technologies such as the internet¹⁴⁵.

9.5 The Baseline Research pointed out that in order for Samoa to fully comply with the relevant indicators its criminal laws and related legislation need to:

¹³⁹ Namely: physical, sexual, emotional and neglect.

¹⁴⁰ For example, early marriage, female genital mutilation, honour killings, the tattooing of children, banishment of one or both parents, banishment of a child's whole family, destruction of a child's family properties as part of a traditional fine.

¹⁴¹ *Family Safety Bill*, cl. 2.

¹⁴² <http://resourcecentre.savethechildren.se/save-childrens-definition-abuse-neglect-exploitation-and-violence> (Accessed 7 June 2012)

¹⁴³ Ibid.

¹⁴⁴ Baseline Research, p. 61.

¹⁴⁵ Ibid.

- separately criminalise and penalize all forms of unlawful sexual acts against children as separate and serious crimes much more serious than similar conduct against adults;
- establish under criminal law an age which a child is deemed to be unable to consent to sexual activities;
- remove the defence of honest and reasonable belief that the victim/survivor was of legal age;
- set the minimum legal age for marriage for boys and girls at 18 years;
- put in place special protections for vulnerable children, such as disabled children;
- create a separate and specific criminal offence(s) for prostituting children, defined in accordance with the Optional Protocol and sanctioned in a manner that reflects the gravity of the crime;
- create separate and specific criminal offence(s) relating to child pornography that covers internet pornography, defined in accordance with the Optional Protocol and sanctioned in a manner that reflects the gravity of the crime. Offences should also include the production, possession or dissemination of child pornography;
- include ‘extraterritorial’ provisions permitting the prosecution of nationals/residents for unlawful acts committed against children in other countries;
- properly define unlawful sexual activity involving children;
- have no exemption from rape prosecution for marital rape;
- define rape as including penetration of any part of the body by any body part/object and is not gender specific;
- explicitly prohibit sexual harassment between children and between children and adults in all institutional contexts;
- ensure that Government has acceded to and promoted bilateral and multilateral measures to protect the child from sexual abuse and sexual exploitation;
- exclude discriminatory provisions in protective legislation in relation to sexual abuse and exploitation; and
- call for institutions dealing with reports of sexual abuse and exploitation of children to record and report disaggregated data in relation to reports received and actions taken.

Commission’s views

9.6 The Commission agrees with the Baseline Report findings¹⁴⁶. It supports the call for relevant law reform to be undertaken to address the issues identified. In Samoa the sexual abuse and sexual exploitation of children can be addressed under the ***Crimes Ordinance*** under its ***Sexual Crimes*** and ***Crimes against Public Welfare*** provisions¹⁴⁷. These provisions criminalises rape, incest, sexual intercourse and indecency with a girl of a certain age and state of mind, homosexual activities, keeping a brothel and living off the earnings of prostitution.

¹⁴⁶ Ibid, pp. 60-61.

¹⁴⁷ ***Crimes Ordinance***, ss. 46 to 58P.

- 9.7 The *Indecent Publication Ordinance 1960* prohibits the sale, printing, drawing, publication, circulation of an indecent document¹⁴⁸. Indecent document is defined under the *Ordinance* as any book, newspaper, picture, film, photograph, print, or writing, a paper or other thing of any description whatsoever, which has printed, impressed or attached to it any indecent word, statement, significant sign, indecent picture, illustration, representation, or which unduly emphasises matters of sex, horror, crime, cruelty, or violence¹⁴⁹.
- 9.8 It is important to note however, that a recent review of the *Crimes Ordinance* by the Commission has addressed some of the issues raised in the Baseline Report. These changes are currently embodied in the *Crimes Bill 2011* awaiting Parliament's endorsement.
- 9.9 The *Crimes Bill* specifically provides for all forms of unlawful sexual acts against children¹⁵⁰. However, the age threshold issue has yet to be increased in some clauses provide protection for children between the ages 16 and 18 years¹⁵¹.
- 9.10 Consent and honest and reasonable belief the victim/survivor was of legal age are generally not available as defences to sexual crimes under the *Crimes Bill*¹⁵². However they are a defence to a charge under the proposed crime of sexual conduct with a person under the age of 16¹⁵³. The onus however is on the accused to prove on the balance of probabilities that he or she was under the age of 21 years at the time of the commission of the act and before the time of the act concerned, he or she had taken reasonable steps to find out whether the victim was over the age of 16 years; he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and the young person consented.
- 9.11 Rape has been redefined under the *Bill*. It is now sexual violation¹⁵⁴. Sexual violation is defined as the act of a male raping a female or the act of a person having unlawful sexual connection with another person¹⁵⁵. Sexual connection means a connection occasioned by the penetration of the genitalia or the anus of any person by any part of the body of any other person; or any object held or manipulated by any other person, also means a connection between the mouth or tongue of any person and any part of the genitalia or anus of any other person. It also means the continuation of sexual connection as described above¹⁵⁶. A person convicted of the proposed crime of unlawful sexual connection is liable to an imprisonment term not exceeding 14 years¹⁵⁷.
- 9.12 "Marital rape" is also addressed under the *Crimes Bill*. It provides that a person may be convicted of sexual violation in respect of sexual connection with another person

¹⁴⁸ *Indecent Publication Ordinance 1960*, s. 3.

¹⁴⁹ *Ibid*, s. 2.

¹⁵⁰ *Crimes Bill 2011*, cls. 58 and 59.

¹⁵¹ *Ibid*, cls. 58 to 61.

¹⁵² *Ibid*, cl. 58 to 61.

¹⁵³ *Ibid*, cl. 59.

¹⁵⁴ *Ibid*, cl. 49.

¹⁵⁵ *Ibid*, cl. 49(1).

¹⁵⁶ *Ibid*, cl. 50.

¹⁵⁷ *Ibid*, cl. 52.

notwithstanding that those persons were married to each other at the time of that sexual connection¹⁵⁸.

- 9.13 The **Bill** also provides protection for vulnerable children such as disabled children¹⁵⁹. A person who is convicted of having or attempting to have a sexual intercourse with a person who is severely intellectually disabled is liable to an imprisonment term not exceeding 7 years¹⁶⁰. A person who indecently assaults or attempts to indecently assault a person who is severely intellectually disabled will also be liable for a term of imprisonment not exceeding 7 years¹⁶¹.
- 9.14 Child pornography is addressed under the **Bill**. A person convicted of publication, distribution or exhibition of indecent material on a child is liable upon conviction to an imprisonment term not exceeding 5 years¹⁶².
- 9.15 The **Bill's** provisions dealing with crimes against public welfare criminalises brothel keeping¹⁶³, keeping a place of resort for homosexual acts¹⁶⁴, prostitution¹⁶⁵, solicitation¹⁶⁶, living on earnings of prostitution¹⁶⁷, procuring sexual intercourse¹⁶⁸, are wide enough to protect children from sexual abuse and exploitation. A person convicted under any of these clauses can be liable to a range of imprisonment terms, the highest being up to 10 years.
- 9.16 The **Bill** also deals specifically with the sexual exploitation of people under 18 years of age.¹⁶⁹ A person convicted under this clause is liable to an imprisonment term not exceeding 10 years. Sexual exploitation is also recognised as an aggravating factor under the proposed crimes of smuggling migrants and trafficking in people by means of coercion or deception¹⁷⁰.
- 9.17 Behaviour such as cyber bullying, solicitation of children on the internet and other offensive behaviour associated with electronic communication that is affecting children of this age, can be caught under the provisions dealing with harassment utilising means of electronic communication and solicitation of children¹⁷¹. This can capture a person who intentionally initiates any electronic communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using an electronic system to support severe, repeated, and hostile behaviour. A person convicted under this clause will be liable to imprisonment for a term not exceeding five years.

¹⁵⁸ Ibid, cl. 49.

¹⁵⁹ Ibid, cls. 55, 56, 57 and 63.

¹⁶⁰ Ibid, cl. 63(1).

¹⁶¹ Ibid, cl. 63(2).

¹⁶² Ibid, cl. 76.

¹⁶³ Ibid, cl 70.

¹⁶⁴ Ibid, cl 71.

¹⁶⁵ Ibid, cl. 72.

¹⁶⁶ Ibid, cl. 73.

¹⁶⁷ Ibid, cl. 74.

¹⁶⁸ Ibid, cl 75.

¹⁶⁹ Ibid, cl. 151.

¹⁷⁰ Ibid, cls. 149 and 150.

¹⁷¹ Ibid, cls. 218 and 219.

9.18 The *Crimes Bill* also contains extraterritorial provisions that can permit the prosecution of nationals or residents for unlawful acts committed against children in other countries¹⁷².

Recommendation 23: In light of the recent reforms, Samoa's criminal laws still need to:

- create a separate and specific criminal offence(s) for prostituting children, defined in accordance with the Optional Protocol to the Convention on the Rights of a Child and sanctioned in a manner that reflects the gravity of the crime;
- properly define unlawful sexual activity involving children;
- call for institutions dealing with reports of sexual abuse and exploitation of children to record and report disaggregated data in relation to reports received and actions taken.

Recommendation 24: Samoa also needs to accede to and promote bilateral and multilateral measures to protect the child from sexual abuse and sexual exploitation. This will guarantee the effective enforcement of the extraterritorial application of its criminal laws under the new *Bill* through international cooperation.

10. Abduction, Sale and Trafficking

10.1 Child abduction or child theft and sale of children are often discussed in the context of trafficking¹⁷³. Children who are victims of trafficking are highly vulnerable to sexual abuse and exploitation¹⁷⁴.

10.2 The sale of children is any act or transaction whereby a child is transferred by any person or group of persons to another for a consideration¹⁷⁵. The concept of sale overlaps with that of trafficking, except that trafficking implies a practice whereby a child is moved.

10.3 Trafficking is the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation¹⁷⁶. Trafficking can be from one country to another but it can also occur within a country, often from rural to urban areas¹⁷⁷.

10.4 The smuggling of migrants, although illegal, is not trafficking if the migrants freely contract the services of smugglers and if they are not exploited. Smuggling however

¹⁷² Ibid, cl. 8.

¹⁷³ The UN Study on Violence Against Children (UNVC, 2006: 300).

¹⁷⁴ http://www.ecpat.net/ei/Programmes_trafficking.asp (Accessed 7 June 2012).

¹⁷⁵ International Labour Organization, *A Future Without Child Labour*, ILO, 2002 p.32

¹⁷⁶ United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, Article 3.

¹⁷⁷ International Labour Organization, *A Future Without Child Labour*, ILO, 2002 p.32

becomes trafficking if fraud or deception of the migrants is involved, or if they are forced to live and work in conditions of servitude¹⁷⁸.

10.5 The *Crimes Ordinance* in its current status does not criminalise the sale and trafficking of people. The *Ordinance* however provides for the criminalization of “kidnapping” which is an activity that is analogous to human trafficking. A person is guilty of kidnapping under the *Ordinance* if he or she unlawfully carries off or detains any person without the person’s consent or with the person’s consent obtained by fraud or duress, with the intention to cause the person to be confined, or imprisoned; to be sent or taken out of Samoa; or to hold the person for ransom or for service¹⁷⁹. A person convicted of kidnapping is liable to an imprisonment term not exceeding 10 years.

10.6 Abduction is also a crime under the *Crimes Ordinance*. A person convicted for abducting a woman or girl is liable to an imprisonment term not exceeding 7 years¹⁸⁰.

10.7 The Baseline Research reveals that the current Crimes Ordinance does not fully comply with any of the relevant indicators for Abduction, Sale and Trafficking of children¹⁸¹. It found the relevant legislation and guidelines very weak. It stated that better protection of children is guaranteed through the specific and comprehensive anti-trafficking laws that offer high penalties indicating the seriousness of such crime, the effective prosecution of the traffickers and all involved in trafficking, and the rehabilitation and repatriation of victims.

10.8 The Baseline Research provides that in order for Samoa to fully comply with indicators, it needs to¹⁸²:

- include a specific crime relating to the sale of children, defined broadly in accordance with the Optional Protocol to the Convention on the Rights of a Child and sanctioned in a manner that reflects the gravity of the crime;
- include a specific crime of trafficking in humans, defined in accordance with the Trafficking Protocol¹⁸³, and sanctioned in a manner that reflects the gravity of the crime;
- criminalize all activities related to trafficking, including forced or compulsory labour, debt bondage, forced marriage, forced prostitution, unlawful confinement, labour exploitation, and illegally withholding identity papers;
- put in place measures to assist the prosecution of those engaged in child trafficking outside of Samoa; and

¹⁷⁸ Ibid.

¹⁷⁹ *Crimes Ordinance 1961*, s. 83A.

¹⁸⁰ Ibid, s. 83.

¹⁸¹ Baseline Research, p. 62.

¹⁸² Ibid.

¹⁸³ Trafficking is defined in the Trafficking Protocol as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation

- to provide procedures and guidelines for immediate and safe emergency care for children who have been rescued from trafficking;
- designate a central authority to deal with issues of international child abductions;
- to secure the prompt return of children wrongfully removed to or retained in Samoa and to ensure that rights of custody and access under the law of other countries are effectively respected;
- empower the Courts to make any orders necessary to prevent child abduction;
- ensure the effective communication of court orders to border officials¹⁸⁴;
- empower state institutions to release information that will help to trace the whereabouts of abducted children;
- ensure that human trafficking provisions provide additional penalties where trafficking involves children;
- impose civil or criminal liability on legal entities¹⁸⁵ for trafficking offences;
- seize and confiscate goods, assets and other instrumentalities used to commit or facilitate trafficking, and that proceeds or assets confiscated from traffickers be used to support trafficking victims/survivors;
- promote cooperation between relevant agencies, in particular the police, immigration and welfare services, in identifying child victims/survivors of trafficking;
- provide guidelines for border officials for the identification and handling of child victims/survivors of trafficking;
- permit the use of testimony of foreign trafficked victims/survivors taken before repatriation, for example, through the use of video and audio tapes of the trafficked victims/survivors' testimony as evidence¹⁸⁶;
- permit foreign trafficked children to remain in the country, temporarily or permanently, in appropriate cases, and in accordance with the stated views of the child¹⁸⁷;
- provide protection, rehabilitation and support services to all child victims/survivors of trafficking regardless of nationality and agreement to appear as witnesses in any criminal proceedings; and
- provide guidelines for the safe and timely return and repatriation of child victims/survivors of cross-border trafficking where appropriate.

Commission's views

10.9 The Commission agrees with the Baseline Research finding. It recommends that appropriate law reform be undertaken to address the issues identified. It is worth noting

¹⁸⁴ For example, travel restrictions.

¹⁸⁵ For example, travel agencies, marriage brokers, sex shops, bars, brothels or employment agencies.

¹⁸⁶ This is in relation to evidence laws and court procedures.

¹⁸⁷ This is in relation to immigration laws.

however that some of these issues have been addressed in recent law reforms and form parts of draft legislation currently awaiting Parliamentary endorsement.

10.10 Under the *Crimes Bills 2011*, a person can be charged with the smuggling of migrants¹⁸⁸. A person guilty of smuggling migrants is liable to an imprisonment term not exceeding 7 years.

10.11 The *Bill* also criminalises trafficking¹⁸⁹. A person guilty of trafficking in people by means of coercion or deception is liable to an imprisonment term not exceeding 10 years. If trafficking is linked to activities such as forced or compulsory labour, debt bondage, forced marriage, forced prostitution, unlawful confinement, labour exploitation and illegally withholding of identity papers, then it is highly likely the convicted will receive a sentence on the higher end of the scale¹⁹⁰. The age of the person in respect of whom the offence was committed and in particular, whether the person was under the age of 18 years is also an aggravating factor¹⁹¹.

10.12 Once the *Crimes Bill* is enacted and enforced, the goods, assets and other instrumentalities used to commit or facilitate trafficking, and proceeds or assets confiscated from traffickers can be forfeited by the State under the *Proceeds of Crime Act 2007*. However, legislative changes are recommended to the *Proceeds of Crime Act 2007* to allow the use of part of the proceeds of trafficking forfeited to be used to support trafficking victims/survivors.

10.13 The Commission's *Final Report 07/12* on the review of the *Criminal Procedure Act* also recommended the use of video-conferencing to take the evidence of witnesses overseas. This will not only suit victims/survivors of trafficking, who have been repatriated before the commencement of a criminal case but it can also be adopted in the cases where a child was a victim/survivor of a sexual crime. This recommendation should also be extended to include the use of other electronic means and formats such as high definition, digital or analogue video recordings and audio recordings to take testimonies of children as evidence.

Recommendation 25: In light of the recent criminal law reviews, Samoa still needs to:

- include a specific crime relating to the sale of children, defined broadly in accordance with the Optional Protocol to the Convention on the Rights of a Child and sanctioned in a manner that reflects the gravity of the crime;
- permit the use of testimony of foreign trafficked victims/survivors taken before repatriation, for example, through the use of video and audio tapes of the trafficked victims/survivors' testimony as evidence¹⁹²; and
- impose civil or criminal liability on legal entities¹⁹³ for trafficking offences.

Recommendation 26: The proposed legal framework for child care and protection should:

¹⁸⁸ Crimes Bill 2011, s. 148.

¹⁸⁹ Ibid, s. 149.

¹⁹⁰ Ibid, s. 150.

¹⁹¹ Ibid, s. 150.

¹⁹² This is being addressed in the new *Criminal Procedure Bill 2012* which is still in draft form.

¹⁹³ For example, travel agencies, marriage brokers, sex shops, bars, brothels or employment agencies.

- designate a central authority (depending on available resources or designate an existing one) to deal with issues of international child abductions;
- have procedures and guidelines for immediate and safe emergency care for children who have been rescued from trafficking;
- ensure the effective communication of court orders to border officials;
- empower state institutions to release information that will help to trace the whereabouts of abducted children;
- promote cooperation between relevant agencies, in particular the police, immigration and welfare services, in identifying child victims/survivors of trafficking; and
- provide protection, rehabilitation and support services to all child victims/survivors of trafficking regardless of nationality and agreement to appear as witnesses in any criminal proceedings.

Recommendation 27: Samoa's immigration laws should:

- permit foreign trafficked children to remain in the country, temporarily or permanently, in appropriate cases, and in accordance with the stated views of the child;
- have guidelines for border officials for the identification and handling of child victims/survivors of trafficking;
- secure the prompt return of children wrongfully removed to or retained in the Samoa and to ensure that rights of custody and access under the law of other countries are effectively respected; and
- have guidelines for the safe and timely return and repatriation of child victims/survivors of cross-border trafficking where appropriate.

Recommendation 28: Amend the relevant provision of the *Proceeds of Crime Act 2007* to allow the use of proceeds or part of the proceeds of trafficking forfeited, to be used to support trafficking victims/survivors.

11. Child Labour and Children in the Streets

11.1 Child labour refers to the employment of children in any work that deprives children of their childhood, interferes with their ability to attend regular school, and is mentally, physically, socially or morally dangerous and harmful¹⁹⁴. Therefore, not all work done by children should be classified as child labour¹⁹⁵. Only work that is dangerous or carried out in unhealthy conditions that can result in a child being killed or injured and/or ill as a consequence of poor safety, poor health standards and poor working arrangements should be classified as child labour and should be targeted for elimination¹⁹⁶.

11.2 In Samoa, the *Labour and Employment Act 1972* prohibits the employment of a child under the age of 15 years in any place of employment except in a safe and light work suited to his or her capacity and subject to such conditions imposed by the Commissioner¹⁹⁷.

11.3 The *Occupational Health and Safety Act 2002*, directs an employer to take all reasonably practicable steps to protect the safety, health and welfare at work of employees and to provide and maintain a safe and healthy working environment including substances, systems of work and any building or public or private area in which work takes place¹⁹⁸.

11.4 The *Education Act 2009*, prohibits the employment of a compulsory school-aged¹⁹⁹ child to engage in street trading or to carry out other work of any kind, whether for reward or not at any time during school hours; or at any other time if the work would prevent or interfere with the child's attendance at school, active participation in school activities or the child's educational development²⁰⁰. An exception to this provision is if the Chief Executive Officer of the Ministry of Education Sports and Culture has exempted the child from the obligation to be enrolled as a pupil at a school on the ground that the child is receiving a suitable education elsewhere than at school; or the Chief Executive Officer has exempted the child from the obligation to attend school each day during the whole of the school day²⁰¹.

11.5 The *Police Offences Ordinance 1961*, provides that a person may peddle certain goods²⁰², upon obtaining a licence from the Police Commissioner provided that the selling of Samoan food stuff does not breach any law regulating markets²⁰³. It also prohibits people from wandering abroad or placing themselves in a public place to beg or gather alms or causes, procures or encourages a child to beg²⁰⁴. A person convicted under this provision is liable to imprisonment for a term not exceeding six months or to a fine of ST\$100.

¹⁹⁴ <http://www.ilo.org/ipec/facts/lang--en/index.htm> (Accessed 09 October 2012)

¹⁹⁵ Ibid.

¹⁹⁶ <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=17075> (Accessed 7 June 2012)

¹⁹⁷ *Labour and Employment Act 1972*, s. 32.

¹⁹⁸ *Occupational Health and Safety Act 2002*, s. 11.

¹⁹⁹ Ages of 5 years to 14 years.

²⁰⁰ *Education Act 2009*, s. 20.

²⁰¹ Ibid, s. 20(3).

²⁰² Foodstuffs (other than milk, cream, bread or meat) grown in or produced in Samoa; Fish and shell fish caught within territorial limits of Samoa; and Samoan curios and artefacts of the Samoan people.

²⁰³ *Police Offences Ordinance 1961*, s. 18.

²⁰⁴ Ibid, s. 15.

11.6 The review of these legislation under the Baseline Research reveals that Samoa has not fully complied with 82% of the indicators for Child Labour and Children in the Streets²⁰⁵.

11.7 The Baseline Research states that the protection provided by the existing laws needs strengthening. The existing laws need to explicitly address in detail the pay/wages of children; the conditions and the type of work that is permissible or not permissible for the different age groups. The current laws also need a complaints mechanism that is child specific and child friendly.

11.8 The Baseline Research also found the enforcement provisions of the *Education Act 2009* are inadequate particularly in relation to the increase in child vendors in Apia. This is attributed to lack of inter-ministerial coordination and cooperation, training and resources²⁰⁶.

11.9 In order for Samoa to fully comply with indicators, it needs to:

- ensure that they do not criminalize vagrancy or other status offences and children living and working on the street are not subject to arbitrary police arrest or detention;
- provide appropriate standards for children's work and pay in both the formal and informal sectors;
- define minimum age for employment as not less than 15 years and at least equal to the age of completion of compulsory education;
- include provisions regulating permissible work by children over the minimum age, including regulations defining the hours and conditions of work for children (formal and informal sector);
- prohibit anyone under the age of 18 years from engaging in any type of employment or work that by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons, including hazardous work, work that interferes with the child's education or any work that involves cruel, inhuman or degrading treatment, the sale of children or servitude;
- clearly define the types of work that are prohibited for children;
- specify exemptions to the definition of child labour²⁰⁷;
- require that employers should have, and produce on demand, proof of age of all children working for them;
- train and sufficiently empower Labour inspectors to enforce child labour laws, including the authority to immediately remove a child from a work environment that is hazardous or harmful to the child's health or physical, mental, spiritual, moral or social development; and
- provide independent, child-friendly complaints avenue for investigation, consideration and resolution of complaints regarding breaches of children's labour rights;

²⁰⁵ Baseline Research, pp. 63 and 64.

²⁰⁶ Ibid, p. 64.

²⁰⁷ For example, domestic assistance in the child's own family home.

- prohibit the use of children for all forms of research, including medical or scientific experimentation, unless appropriate consents have been obtained from the child and/or parents or legal guardians; and
- establish a national strategy for the elimination of the worst forms of child labour.

Submissions:

11.10 The members of the NCCRC and CRCP voiced their dissatisfaction with the enforcement of the *Education Act 2009* in relation to the prohibition of compulsory aged children from selling goods during school hours. The members of the NCCRC and CRCP also voiced their concern with regards to the age of children selling goods on the streets in Apia as well as the number of hours they spend on the streets.

11.11 The representative from the MOPP pointed out that the requirements under *section 20(b)* which calls for them check the child’s attendance at school, active participation in school activities and educational development renders it onerous and difficult to enforce.

11.12 The members of the NCCRC and CRCP recommended that compulsory aged children should be prohibited from selling goods on the street after 7 p.m. They also proposed that an age limit be set for children selling goods on the street. The concern was that children below the age of seven (7) years were seen selling goods as late as 10 p.m. during week days.

Commission’s views

11.13 The Commission agrees with the Baseline Research findings. Appropriate law reform should be undertaken to address the issues identified. Children in Samoa often help their parents in the home or in the family plantation or business, as long as the work is not dangerous and does not interfere with school attendance and other normal childhood activities²⁰⁸. This is usually referred to as ‘light work’. The term ‘child labour’ refers only to forms of employment or unpaid work that violate the rights of children and should be prohibited.

11.14 It is also important to identify the root causes of child labour. International reports have identified poverty and scarcity as the root cause of children entering child labour²⁰⁹. It is important therefore for Samoa to determine whether poverty is an issue in Samoa and what activities are causing financial pressures on the incomes of families that is causing children to engage in work that is classified as child labour.

11.15 Some of the issues raised in the Baseline Report have been addressed in recent law reforms and form parts of draft legislation currently awaiting Parliamentary endorsement.

11.16 The *Labour and Employment Relations Bill 2011*, now prohibits anyone under the age of 18 from engaging in any type of employment or work that by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons, including hazardous work, work that interferes with the child’s education or any work that involves cruel, inhuman or degrading treatment and the sale of

²⁰⁸ Eliminating the Worst Forms of Child Labour, A Handbook for Parliamentarians, ILO and the IPU (2002) p.15.

²⁰⁹ UNVC 2006: 239

children or servitude²¹⁰. The *Bill* still maintains that a person must not employ a child under the age of 15 years of age in a place of employment except in safe and light work suited to his or her capacity, and subject to such conditions as may be determined by the Chief Executive Officer of the Ministry of Commerce Industry and Labour²¹¹. The age of employment for children provided under the *Labour and Employment Relations Bill 2011* is equivalent to the age of completion of compulsory education provided under the *Education Act 2009*, as obligated under CRC²¹².

11.17 The *Crimes Bill 2011*, also criminalises forced labour of people under 18 years²¹³.

11.18 The Commission supports the recommendations by the NCCRC and CRCP to prohibit compulsory aged children from selling goods on the street after 7 p.m. The Commission also believes that an age limit should be set for children selling goods on the street. The Commission proposes the age of 10 years²¹⁴.

Recommendation 29: The *Labour and Employment Act 1972* and/or *Labour and Employment Relations Bill 2011* should be amended to require employers to have and be ready to produce on demand proof of age of all children working for them.

Recommendation 30: The *Crimes Ordinance* should be amended to explicitly prohibit the use of children for all forms of research, including medical or scientific experimentation, unless appropriate consents have been obtained from the child and/or parents or legal guardians.

Recommendation 31: An independent child-friendly national forum should be established to hear complaints, investigate, consider and resolve complaints regarding breaches of children's labour rights through the Ministry of Commerce Industry and Labour (MCIL).

Recommendation 32: A national strategy for the elimination of the worst forms of child labour in Samoa should be established if nothing has been established to date by the MCIL.

Recommendation 33: The *Education Act 2009* should be amended to prohibit children below the age of 10 years from selling goods on the street at any time.

Recommendation 34: The *Education Act 2009* should be amended to provide that any child over the age of 10 years who sells goods on the street should be prohibited from selling such goods after 7 p.m. everyday.

²¹⁰ *Labour and Employment Relations Bill 2011*, cl. 51(2).

²¹¹ *Ibid*, cl. 51(1).

²¹² Baseline Research, p. 63.

²¹³ *Crimes Bill 2011*, cl. 151.

²¹⁴ The Commission believes that since the age of innocence (criminal liability) is set at 10 years, this will be a suitable age.

12. Child Friendly Investigative and Court Procedures

- 12.1 Child-friendly investigative and court procedures refer to investigative and court procedures adapted to address the needs and rights of the child. They ensure that the rights of a child are respected and effectively implemented to the highest attainable level giving due consideration to the child's level of maturity and understanding and the circumstances of a case²¹⁵. This will promote a justice system that is age appropriate, speedy, diligent and accessible by children²¹⁶.
- 12.2 In the *Police Powers Act 2007*, the only protection for children provided under the *Act* is the permission for the presence of a relative whilst a forensic procedure²¹⁷ is being carried out on a minor²¹⁸.
- 12.3 The *Constitution* provides for the exclusion of members of the public and representatives of news services from all or part of the trial in the interests of justice, morals, public order or national security, or where the protection of children or the parties' private life requires it²¹⁹.
- 12.4 The relevant orders²²⁰ can be made under the *Criminal Procedure Act 1972* which can be used to prevent child victims/survivors from having direct confrontation with persons accused of violating their rights and from hostile, insensitive or repetitive questioning or interrogation²²¹. The granting of these orders are not automatic but dependent on the discretion of the Court. On the application of an informant, before any hearing, a Judge or Magistrate may make an order for the evidence of any witness to be taken at any place if they are satisfied that it is desirable or expedient in the interests of justice. The Court can exclude the public and representatives of news services from all or part of the trial and prohibit the publication of the name, or of any particulars likely to lead to the identification of, any person connected with the trial²²².
- 12.5 A similar provision exists under the *Young Offenders Act 2007* which automatically prohibits the publishing by the Media or any other person, the name and identifying details of a victim involved in an offence for which a young person is charged²²³. A person who does not comply is liable upon conviction to a fine not exceeding ST\$10,000. It is important to note however, that this is only limited to matters heard in the Youth Court²²⁴.

²¹⁵ <http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines> (Accessed 10 October 2012)

²¹⁶ Ibid.

²¹⁷ Forensic procedure means: an examination of a part of the body that requires touching of the body or removal of clothing; the taking of a sample of hair; the taking of a sample from or under a fingernail or toenail; the taking of a sample of saliva or a sample by a swab; the taking of a sample by swab or washing from any external part of the body; the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body; the taking of a handprint, fingerprint, footprint or toe print; the taking of a photograph of, or an impression or cast of a wound from, a part of the body; the taking of a sample for breathalyser analysis; and the taking of a sample of blood or other bodily fluid. (*Police Services Act 2007*, s. 2.)

²¹⁸ *Police Powers Act 2007*.

²¹⁹ *Constitution of Samoa*, art. 9(1).

²²⁰ *Criminal Procedure Act 1972*, ss. 61 and 164V.

²²¹ Ibid, s. 28.

²²² Ibid, s. 28.

²²³ *Young Offenders act 2007*, s. 8(3).

²²⁴ Ibid.

12.6 The *Evidence Ordinance 1961* also empowers the Court to exercise its jurisdiction to limit the cross-examination of any witness as to credit, and refuse to permit any such cross-examination²²⁵. This can reduce trauma and secondary traumatisation of child witnesses who are victims/survivors of sexual assault.

12.7 The *Alternative Dispute Resolution Act 2007*²²⁶ can also provide some protection for a child who is involved in an alternative dispute resolution proceeding. A Court can make a pre-trial order upon application to protect the interests of a person and to ensure that a fair trial is facilitated. This provision can provide some assistance in ensuring that the best interests of the child is given primary consideration in any alternative dispute resolution proceeding.

12.8 A review of the relevant legislation dealing with Investigative and court procedures during the Baseline Research reveals that Samoa has not fully complied with 92% of the relevant indicators²²⁷.

12.9 The Baseline Research stated that the relevant law and policy are silent on many essential aspects of supportive and child friendly investigative and court procedures²²⁸. It acknowledged the strong recognition of the role of informal customary processes as part of the alternative dispute resolution and safeguards are in place to ensure that victims/survivors are not pressured into taking such an option against their will. However, particular care is needed to ensure this specifically in relation to children who may be additionally vulnerable to coercion in such matters²²⁹.

12.10 In order for Samoa to fully comply with indicators, it needs to:

- include measures to protect the rights and interests of children at all stages of the justice process and to reduce trauma and secondary traumatisation, including:
 - inter-agency referral procedures to promote coordination between police, health care workers, social workers and other service providers;
 - coordination/referral mechanism is in place for children who come to the attention of the police;
 - in any actions taken the best interests of the child will be the primary consideration;
 - any actions taken to take into account the child's views in accordance with their age and maturity and respect the child's right to privacy;
 - the law guarantees children the right to participate in any judicial proceedings that affect them, to express their views, and to have those views given due weight;
 - child-friendly interview environments and interview techniques²³⁰;
 - special procedures to reduce the number and length of interviews which child victims/survivors are subjected to;

²²⁵ *Evidence Ordinance 1961*, s. 17.

²²⁶ *Alternative Dispute Resolution Act 2007*, s.4.

²²⁷ Baseline Research, pp. 64 and 65.

²²⁸ *Ibid*, p. 65.

²²⁹ *Ibid*, p. 65.

²³⁰ Employed by people such as police officers, prosecutors, judges, social workers.

- victim/survivor/witness support programs to familiarize children with the court process and provide support at all stages of the process, including social and legal counseling;
 - children are entitled to have a support person²³¹ present with them at all stages of the investigation and trial proceedings;
 - law permits child-friendly court procedures, including alternative arrangements for giving testimony such as screens, video-taped evidence and closed circuit television;
 - measures to ensure child victims/survivors are protected from direct confrontation with persons accused of violating their rights and from hostile, insensitive or repetitive questioning or interrogation;
 - law requires investigations and trials of cases involving child witnesses to be expedited and prioritized in the legal system;
 - measures to protect the child's privacy, such as closed court proceedings and bans on publishing the child's identity or any information leading to identification of the child;
 - measures to protect the safety of child victims/survivors and their family and to prevent intimidation and retaliation, including safe shelter (emergency and longer-term), relocation, and prohibition on the disclosure of information concerning the victim/survivor's identity and whereabouts;
 - requirement that police, prosecutors, lawyers and judges receive specialized training in dealing with cases where children are victims/survivors;
- police, prosecutors and courts have specialised units, or designated specialists to handle cases involving child victims/survivors/witnesses;
 - prohibit the requiring of proof of resistance to establish non-consent in sexual assault proceedings;
 - prohibit the requirement for corroboration of child victim/survivor's evidence in criminal proceedings for sexual assault;
 - prohibit the use of prior sexual conduct to establish non-consent in sexual assault proceedings;
 - provide for the automatic admissibility of expert evidence regarding patterns of disclosure or behaviour in child victims/survivors;
 - remove any discriminatory provisions or processes; and
 - provide for an independent and child-friendly complaints tribunal available for the investigation, consideration and resolution of any complaints by children regarding their treatment within the justice system.

²³¹ Such a legal representative or family member.

Submissions

12.11 The CRCP representative from Aoga Fiamalamalama School pointed out in their written submissions that for persons with health disability, sign language is a need. Therefore, there is a need for police officers and officers of the court to know sign language or have access to a person who can communicate through sign language to assist them in their investigation or during a case in court if the victim or accused is a person with a hearing disability. The representative from Aoga Fiamalamalama School also encouraged family members to learn sign language in order to assist a person with a severe hearing disability during an investigation or in court.

Commission's views

12.12 The Commission approves the Baseline Research findings and issues identified in the legislative review. Appropriate law reform needs to be undertaken to address these issues. It is important to note that some of these issues have been addressed in recent law reforms and have form parts of draft legislation currently awaiting Parliamentary endorsement.

12.13 The **Family Safety Bill 2011**, places a duty on police officers to assist and inform complainants of domestic violence of their rights. The assistance provided by the police under the **Bill** involves: finding a suitable shelter, to obtaining medical treatment or counseling service where needed; providing written material or explanation in a language that the complainant understands, the remedies available at his or her disposal and the right to lodge a criminal complaint; or where the complainant is a person under 18 years of age, to refer such person to a Child Welfare Officer²³². The Court is authorized under the **Bill** to refuse the alleged perpetrator of domestic violence any contact with his or her child or order contact with conditions, if in the Court's view such refusal or limited contact is in the best interest of the child²³³.

12.14 The **Family Safety Bill** also makes provisions for child-friendly court procedures and alternative arrangements for giving testimony such as screens, video-taped evidence and closed circuit television²³⁴. It makes provisions that can protect a child's privacy, such as closed court proceedings and bans on publishing the child's identity or any information leading to identification of the child²³⁵.

12.15 A 'no drop' policy is also provided for under the **Family Safety Bill**. It provides that where a report of domestic violence involves any form of physical or sexual abuse, and provided that there is sufficient evidence for doing so, every Police Officer handling the matter shall ensure and undertake to do all things necessary in order that a charge or information is laid with the Court in order to commence prosecution of the matter in Court; and not endeavour to withdraw a charge or information laid²³⁶. The Commissioner of Police however, can withdraw such charge or information laid²³⁷.

²³² *Family Safety Bill 2011*, cl.15.

²³³ *Ibid*, cl. 10.

²³⁴ *Ibid*, cl. 8.

²³⁵ *Ibid*, cl. 14.

²³⁶ *Ibid*, s.16(1).

²³⁷ *Ibid*, s.16(2).

12.16 The Commission's *Final Report 07/12* on the *Criminal Procedure Act* recommended that a person charged with an offence that occurred in the context of domestic violence not be bailable as of right²³⁸.

12.17 The *Criminal Procedure Bill 2012* provides offences which relate to assault on a child or by a male on a female under the proposed *Crimes Act 2012*. The *Bill* also provides for the taking of evidence of a witness out of Court²³⁹. This relates to child witnesses and victims who cannot present their evidence in Court. An order to take such special recourse however is dependent on the discretion of a presiding judge²⁴⁰.

12.18 The Commissions also acknowledges the submission made by the CRCP representative from Aoga Fiamalamalama School. This is an issue that needs to be considered when engaging interpreters in Court and during police investigations.

Recommendation 35: In order for national investigative and court procedures to be child friendly and protect the rights and interests of children at all stages of the justice process they need to:

- have comprehensive inter-agency referral procedures to promote coordination between police, health care workers, social workers and other service providers;
- have specialised units (in police, prosecutors and courts) designated to handle cases involving child victims, survivors or witnesses;
- specialised units should undergo special training for police, prosecutors, lawyers and judges in dealing with cases where children are victims/survivors;
- take the best interests of the child into consideration in every matter that concerns them;
- take into account the child's views in accordance with their age;
- adopt child-friendly interview environments and interview techniques²⁴¹;
- control the number and length of interviews child victims/survivors are subjected to;
- provide support at all stages of the process, including social and legal counselling and allow the victim/survivor or witness to become familiar with the court process;
- give investigations and trials of cases involving child witnesses priority so that they are conducted expediently;
- adopt measures to prevent intimidation and retaliation towards a child victim/survivor and their family such as safe shelter (emergency and longer-term), relocation, and prohibition on the disclosure of information concerning the victim/survivor's identity.

²³⁸ *Criminal Procedure Act 1972 Final Report 07/12*, p. 18.

²³⁹ *Criminal Procedure Bill 2012* cl. 45.

²⁴⁰ Ibid.

²⁴¹ Employed by people such as police officers, prosecutors, judges, social workers.

13. Rehabilitation

13.1 Rehabilitation is a process where a person who has suffered violence, trafficking, sexual abuse, sexual exploitation, neglect, torture or any other form of cruel, inhuman, degrading treatment or punishment undergoes a healing process aimed at facilitating mental, physical and spiritual recovery before being urged to return to society²⁴².

13.2 The Baseline Research found the laws in Samoa to be silent on rehabilitation of victims and survivors of violence, trafficking, sexual abuse, sexual exploitation, neglect, torture or any other form of cruel, inhuman, degrading treatment or punishment. Samoa has not fully complied with any of the Rehabilitation indicators²⁴³. There is some degree of protection however, for survivor/victims' privacy/identity as well as protection from any possible intimidation or prosecution from the perpetrator²⁴⁴.

13.3 In order for Samoa to fully comply with all the relevant indicators, it needs to:

- provide for a range of services to support the protection and psychological recovery and reintegration of child victims/survivors of abuse and exploitation, including:
 - short-term care, where necessary²⁴⁵;
 - medical care;
 - psychological counselling;
 - advice about their legal rights;
 - education, employment and training opportunities; and
 - protection for the victim/survivor and his/her family from intimidation and retaliation;
- provide standards or guidelines for the above programs and services;
- protect all child victims/survivors of exploitation from prosecution and involuntary detention;
- provide independent, child-friendly complaints tribunal for the investigation and resolution of complaints regarding discriminatory treatment by child victims/survivors;
- compensate child victims/survivors of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment or armed conflicts;
- provide for the protection of the privacy and identity of child victims/survivors with appropriate sanctions;
- provide that preference be given to promoting recovery and reintegration in families and communities (rather than institutional care); and
- seek the views of a child in relation to any recovery and reintegration processes.

²⁴² <http://medical-dictionary.thefreedictionary.com> (Accessed 11 October 2012)

²⁴³ Baseline Research, pp. 66.

²⁴⁴ Ibid.

²⁴⁵ For example, by foster families, shelters.

Commission's views

13.4 It is important for child victims/survivors of violence, trafficking, sexual abuse, sexual exploitation, neglect, torture or any other form of cruel, inhuman, degrading treatment to undergo rehabilitation before being encouraged to reenter back into society.

13.5 The victims/survivors particularly from child trafficking, child sexual exploitation and child labour should receive some compensation from the proceeds of such crimes forfeited by the state, to support the victims/survivors²⁴⁶.

13.6 The relevant officials of the country of origin of the trafficked should be contacted as soon as possible to facilitate the reunion of the trafficked with his or her family. Whilst in transit, appropriate shelters and provisions for daily maintenance should be provided.

13.7 The Commission agrees with the Baseline Research findings and recommends appropriate law reform to ensure that the findings are addressed appropriately.

Recommendation 36: The proposed framework for the care and protection of children should provide a range of services to support the rehabilitation and psychological recovery of child victims/survivors of abuse and exploitation. These support services should include:

- short-term care, where appropriate²⁴⁷;
- medical care;
- psychological counselling;
- advice about their legal rights;
- education, employment and training opportunities; and
- protection for the victim/survivor and his/her family from intimidation and retaliation.

Recommendation 37: Rehabilitation services should:

- set relevant standards and guidelines;
- protect all child victims/survivors from involuntary detention and the harshness of the criminal prosecution processes;
- compensate child victims/survivors of crimes;
- protect the privacy and identity of child victims/survivors with appropriate sanctions;
- promote recovery and reintegration in families and communities (rather than institutional care); and
- seek the opinions of children to determine preferred recovery and reintegration processes.

²⁴⁶ UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, E/CN.4/198/101 paragraph 124.

²⁴⁷ For example, by foster families, shelters.

14. Children in Conflict with the Law

14.1 Children in conflict with the law should be treated by the justice system in a manner consistent with their rights and their inherent dignity as human beings which takes into account their needs and targets their transformation. The administration of juvenile justice should be directed towards their rehabilitation and reintegration into society and not their punishment²⁴⁸.

14.2 The deprivation of a child's liberty should never be unlawful or arbitrary and should only be a measure of last resort and for the shortest appropriate period of time. Torture and other cruel, inhuman and degrading treatment or punishment should be prohibited²⁴⁹. Children have the right to be heard and to have their views taken seriously even under such circumstances²⁵⁰. When detained, every child should have contact with his or her family and access to prompt legal or other appropriate assistance.

14.3 Jail and detention should be a last resort for children in conflict with the law²⁵¹. Juvenile justice should focus on reducing recourse to deprivation of liberty, through the promotion of non-custodial sanctions, restorative justice, and diversion²⁵². Diversion is referring cases away from formal criminal justice proceedings towards community support to avoid the negative effects of being implicated in such proceedings. Diversionary measures can come into play at any stage - at the time of the arrest or immediately before the foreseen court hearing - either as a generally applicable procedure or on the decision of the police, prosecutor, court or an alternative adjudicative body²⁵³. Diversion may involve a restorative justice component²⁵⁴. The community, the victim and the offender must take active roles in order for justice to be truly restorative²⁵⁵.

14.4 In Samoa, a number of legislation deal with children in conflict with the law.

14.5 An arresting officer has a general obligation under the *Criminal Procedure Act 1972* to produce an offender before a remanding officer²⁵⁶. The *Police Powers Act 2007* allows police officers to use force and things that are necessary in the circumstances²⁵⁷. The *Police Service Act 2009* also provides that a police officer may use reasonable force in exercising his or her powers as a police officer²⁵⁸.

14.6 In prison, the *Prisons Regulations 1954* prohibit the use of violence on any prisoner except in self-defence, to prevent an escape and to preserve the peace²⁵⁹. The

²⁴⁸ <http://www.penalreform.org/files/man-2005-V7-childrens-rights-en.pdf> (Accessed 12 October 2012).

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ The alternative to formal adjudication must be compatible with the rights of the child which preclude measures such as corporal punishment. (http://www.ipu.org/PDF/publications/chil_law_en.pdf (accessed 12 October 2012))

²⁵⁴ Restorative justice is an approach that recognises how crime affects the victim, the community and the offender. Its primary focus is to repair the damage caused by the offence, to make reparation to the community and to the victim, and to return the offender to a productive place in the community. (http://www.ipu.org/PDF/publications/chil_law_en.pdf (accessed 12 October 2012))

²⁵⁵ http://www.ipu.org/PDF/publications/chil_law_en.pdf (accessed 12 October 2012)

²⁵⁶ *Criminal Procedure Act 1972*, s. 9.

²⁵⁷ *Police Powers Act 2007*, s. 33(b).

²⁵⁸ *Police Service Act 2009*, s. 64(2).

²⁵⁹ *Prisons Regulations 1954*, reg. 61.

Regulations also allow the use of handcuffs and stout canvas dresses to restrain violent prisoners²⁶⁰. These provisions are applied in general but can be used to protect children who are in conflict with the law.

14.7 The **Young Offenders Act 2007** on the other hand operates more specifically to provide a criminal justice system for young persons and their treatment by the courts. The **Act** applies to young persons who are offenders. A young person is a person of or over the age of 10 years and under the age of 17 years²⁶¹. A person under the age of 10 years cannot be charged with any criminal offence²⁶². This is because in the eyes of the law a person below the age of criminal liability cannot tell right from wrong.

14.8 The **Young Offenders Act** establishes a special division of the District Court called the “Youth Court” which is presided over by a District Court Judge. Criminal charges brought against a young person are laid in the Youth Court and the hearing of each charge is subject to the provisions of the **Act**²⁶³.

14.9 A young offender is entitled under the **Young Offenders Act** to have a parent or an adult member of his or her family present during investigation and throughout the trial proceedings²⁶⁴. The young offender is also entitled to apply for legal aid and receive independent legal advice²⁶⁵. This is in line with *articles 6(3) and 9(4)* of the **Constitution** which guarantees an arrested person the right to free legal assistance of his or her choosing where it is required by the interest of justice²⁶⁶.

14.10 The **Young Offenders Act** and **Community Justice Act 2008** provide police, prosecutors and judges a broad discretion to resolve child cases through diversion²⁶⁷. Both **Acts** provide a wide range of alternative, community-based dispositions including probation; care, guidance and supervision orders; diversion to mental health treatment, counselling; victim/survivor reparation and restitution, community service work opportunities; education and vocational training, and living arrangement orders²⁶⁸.

14.11 The **Young Offenders Act** also provides that a young person remanded in custody, must be remanded to a residential youth facility, or if none exists, to a prison or place of residence as may be directed by the Court²⁶⁹. A young person who is remanded in custody held in prison must be kept separate from adult prisoners²⁷⁰. This is also the case if a young person is convicted of a crime and is liable to an imprisonment term. He or she must be separated from adult prisoners²⁷¹.

14.12 The review of these legislation in the Baseline Research reveals that Samoa has not fully complied with 57% of all the relevant indicators²⁷².

²⁶⁰ Ibid, reg. 170.

²⁶¹ *Young Offenders Act 2007*, s. 2.

²⁶² Ibid, s. 3.

²⁶³ Ibid, s. 5.

²⁶⁴ Ibid, ss. 9, 11 and 18.

²⁶⁵ Ibid, s. 9.

²⁶⁶ *Constitution* arts. 6(3) and 9(4).

²⁶⁷ Ibid, ss. 6, 11, 12, 17 and 18; *Community Justice Act 2008* s. 11.

²⁶⁸ Ibid, ss. 12, 15 and 16; *Community Justice Act 2008* ss. 8 and 9.

²⁶⁹ *Young Offenders Act 2007*, s. 22.

²⁷⁰ Ibid, s. 22(3).

²⁷¹ Ibid, ss. 16(2) and 22(3).

²⁷² Baseline Research, pp. 69.

14.13 The Baseline Research compliments the strength of the laws protecting children in conflict and credits the *Young Offenders Act 2007*. However, the implementation of the *Act* requires further capacity building and support, particularly in relation to diversion, police warnings and cooperation between different actors in the justice sector, so that young offenders are able to fully benefit from the *Act*²⁷³. The Baseline Research also noted that there is still a need for law reform to address areas that the *Young Offenders Act* failed to address²⁷⁴.

14.14 In order for Samoa to fully comply with the set indicators, it needs to²⁷⁵:

- restrict the use of force or restraints against children;
- require the consent of the child and/or the child's parents for diversion procedures to be applied;
- explicitly limit the duration and use of pre-trial detention against children accused, used only as a measure of last resort and to put in place alternative measures for supervising such children pending trial;
- require that all children's cases are tried by a specialized court or a specially designated judge, separate from adult court proceedings. All court proceedings involving offenders under 18 required to occur in a closed court;
- strictly prohibit the publication of the name or any information leading to the identification of a child offender;
- require that children's cases are expedited;
- require that any penalties imposed are based on the best interests of the child and aimed at rehabilitation rather than punishment, with an explicit emphasis in drug and substance offences;
- separate children from adults in all places of detention, including police custody, pre-trial detention centres and prisons;
- explicitly provide for the right to family contact, visitors and correspondence while imprisoned with restrictions to these rights limited only in exceptional circumstances;
- regulate disciplinary procedures within detention centres and to specifically prohibit:
 - corporal punishment; solitary confinement; placement in a dark cell; reduction of diet; and
 - denial of contact with family members; and any other punishment that may compromise the physical or mental health of the child concerned.
- require that children deprived of liberty be subject to a periodic review of their situation;
- require that police, prosecutors, courts and prison officials have specialised units, or designated specialists, to handle children in conflict with the law;

²⁷³ Ibid, pp. 70.

²⁷⁴ Ibid, pp. 69.

²⁷⁵ Baseline Report, pp 69-72.

- give all children in conflict with the law access to effective complaints procedures concerning all aspects of their treatment;
- require mechanisms to be put in place to monitor the treatment of children in conflict with the law, and to appropriately sanction justice sector officials who violate children's rights;
- require all processes defined in legislation to have the best interests of the child (including the maximum development of the child) specified as the primary consideration;
- make special procedures and protections for children who are in conflict with the law available to all children under the age of 18;
- require the police to notify legal assistance immediately upon the arrest of a child and legal assistance is entitled to be present during all investigative and trial proceedings, in accordance with the views of the child;
- require the police to have parents, legal guardians and/or a defence lawyer present whenever questioning a child;
- separate children detained pre trial from convicted children;
- give children explicit right of access to education and training suited to child's needs and abilities;
- require that while in detention children receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality, in the interests of their wholesome development;
- provide for the establishment of an effective system for inspection and monitoring of all institutions in which children may be deprived of their liberty;
- explicitly apply the Standard Minimum Rules for prisoners to children in detention, with regulations addressing at least the following:
 - Register; Hygiene; Clothing and bedding; Food; Exercise & sport; Medical services; Discipline and punishment; Instruments of restraint; Complaints; Contact; Books; Religion; Prisoner property; Death, illness, transfer; Institutional personnel; Privileges systems; Work; and Education and recreation.
- designate an authority to put in place programmes to assist children who are released from detention and to provide support for their reintegration into the community;
- require that the needs of disabled children are catered for at all stages of the legal process;
- require all justice sector officials, including police, prosecutors, judges, lawyers and prison officials to receive training and sensitization on children in contact with the law as part of their induction training²⁷⁶ as well as on an in-service basis; and

²⁷⁶ At police academies, law schools and judicial training programmes.

- require the recording and reporting of systematic disaggregated data by all institutions dealing with child offenders.

Commission's views

14.15 It is important to note that there is a need to differentiate between children in conflict with the law and children in need of protection. Child victims of a crime are sometimes subjected to pre-trial detention in closed facilities or adult prisons, to safeguard their evidence or to obtain information from them²⁷⁷. In such cases, the child victim, who may be in need of special care and protection, suffers twice: first in the hands of the perpetrator and then in detention²⁷⁸.

14.16 The new *Prisons and Corrections Bill 2011* makes provisions for young prisoners who are prisoners aged 18 years or younger²⁷⁹. It provides special procedures for young prisoners once they are admitted²⁸⁰. Young prisoners are classified according to set criteria to determine how they are to be separated to achieve their effective rehabilitation²⁸¹. These procedures also provide for the allocation of prison labour in accordance with the age of the young prisoner; release and pre release programs to comply with CRC; and ensure that the right to education of a young prisoner is protected. The *Bill* boasts a system for inspection and monitoring of the prisons²⁸².

14.17 The *Prisons and Corrections Bill* will provide an accessible complaint mechanism for prisoners and support after their release²⁸³. The guiding principles of the *Prisons and Corrections Bill* during interpretation and application of any of its provisions includes to the fullest extent possible the rights and obligations of CEDAW and CRC in the administration of Samoa's prisons and the treatment of prisoners. It also applies the Standard Minimum Rules. Standard Minimum Rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of prison institutions.²⁸⁴ This means the prohibition of corporal punishment, solitary confinement, placement in a dark cell, reduction of diet, denial of contact with family members and any other punishment that may compromise the physical and mental health of a young prisoner.

Recommendation 38: The *Young Offenders Act* needs to be amended to:

- change the ages of children in which the *Act* applies from between 10 years and 17 years to between 10 years and 18 years;
- require the consent of the child and/or the child's parents for diversion procedures to be applied;
- require that pre-trial detention be used only as a measure of last resort and to put in place alternative measures for supervising an accused child pending trial;

²⁷⁷ http://www.ipu.org/PDF/publications/chil_law_en.pdf (accessed 12 October 2012)

²⁷⁸ Ibid.

²⁷⁹ *Prisons and Corrections Bill 2011*, cl. 2.

²⁸⁰ Ibid, cl. 27.

²⁸¹ Ibid, cl. 39.

²⁸² Ibid, cl. 20.

²⁸³ Ibid, cl.54.

²⁸⁴ <http://www2.ohchr.org/english/law/treatmentprisoners.htm> (Accessed 25 October 2012)

- explicitly limit the duration and use of pre-trial detention against an accused child;
- require that cases involving young children be expedited;
- require that children deprived of liberty be subject to a periodic review of their situation;
- require that police, prosecutors, courts and prison officials have specialised units, or designated specialists, to handle children in conflict with the law;
- require all processes defined in the above legislation to have the best interests of the child (including the maximum development of the child) specified as the primary consideration;
- require the police to notify legal assistance immediately upon the arrest of a child and legal assistance is entitled to be present during all investigative and trial proceedings, in accordance with the views of the child;
- require that the needs of disabled children are catered for at all stages of the legal process;
- require all justice sector officials, including police, prosecutors, judges, lawyers and prison officials to receive training and sensitization on children in contact with the law as part of their induction training²⁸⁵ as well as on an in-service basis; and
- require the recording and reporting of systematic disaggregated data by all institutions dealing with child offenders.

15. Information Access

15.1 Information access empowers individuals and advances development. A society where information is freely accessible empowers its people and supports participatory democracy. Thus, when information access is hindered whether for political or technological reasons, a society's capacity to function is stunted²⁸⁶.

15.2 Whilst access to information is primordial to the exercise of the basic human right of freedom of expression, freedom of expression is not absolute. Therefore, where information access is detrimental to the lives of children, any controls and perhaps prohibitions are justifiable²⁸⁷.

15.3 The *Films Control Act 1978* establishes the Film Control Board whose function is to regulate and control the public exhibition of films and their censorship²⁸⁸. The Board is responsible for issuing licences to each exhibitor such as broadcast, cable or satellite television service providers; picture theatres; educational institutions; internet or other computer based suppliers; and other classes of exhibitors determined by the Board²⁸⁹.

15.4 The principal censor is responsible with the censoring of films and advertisements. The Board however determines the policy to be adopted in the exercise of the powers of the principal censor.

²⁸⁵ At police academies, law schools and judicial training programmes.

²⁸⁶ <http://unesdoc.unesco.org/images/0013/001330/133015e.pdf> (Accessed 12 October 2012)

²⁸⁷ <http://unesdoc.unesco.org/images/0013/001330/133015e.pdf> (Accessed 12 October 2012)

²⁸⁸ *Films Control Act 1978*, s. 4.

²⁸⁹ *Ibid*, s. 10.

15.5 A film cannot be released for a public exhibition or renting without the approval of the principal censor²⁹⁰. The principal censor's approval shall not be given if a film or advertisement is in his or her opinion:

- “... (a) Describes, depicts, or otherwise deals with-
- (i) acts of torture, the infliction of serious physical harm, acts of significant cruelty or extreme violence;
 - (ii) sexual violence or sexual coercion, or violence or coercion in association with sexual conduct;
 - (iii) other sexual or physical conduct of a degrading or dehumanizing or demeaning nature;
 - (iv) sexual conduct with or by children, or young persons, or both; or
 - (v) physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain;
- (b) Exploits the nudity of children, or young persons, or both;
- (c) Degrades or dehumanizes or demeans any person;
- (d) Promotes or encourages criminal acts or acts of terrorism;
- (e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristics that is a prohibited ground of discrimination specified under the Constitution of the Independent State of Samoa; and
- (f) Any matter which is contrary to public order or undesirable in the public interest.”²⁹¹

15.6 In approving films for public exhibition, the principal censor shall classify them in certain categories:

- Approved for general exhibition; or
- Approved for exhibition to a specified class or description of persons only (being persons of or over the age of 5 years), or for specified purposes only, or on one or more specified occasions only.

15.7 A person who fails to comply with the provisions of the Act is liable upon conviction to a fine not exceeding 20 penalty units for individuals and 50 penalty units for a company. In addition to such fines the Court may order that any film or advertisement in respect of which such offence was committed be confiscated and disposed of in such manner as the Court may direct²⁹².

15.8 The legislative review under the Baseline Research reveals that Samoa has not fully complied with any of the relevant indicators²⁹³. The Baseline Research stated that the

²⁹⁰ Ibid, s. 18.

²⁹¹ Ibid, s. 18.

²⁹² Ibid, s. 26.

²⁹³ Baseline Research, pp. 69.

current protection of children from exposure to inappropriate and damaging material applies only in relation to films and is therefore very limited, particularly given children's increasing access to other forms of information and communication technologies including the internet.

15.9 In order for Samoa to fully comply with indicators, it needs to:

- ensure that the Censorship board or equivalent body has jurisdiction over all media – print, electronic and audio/visual;
- require that pubertal change and sex education be included in school curricula;
- require that legal rights and human rights education be included in school curricula; and
- remove discriminatory provisions from access to information laws.

Commission's views

15.10 The Commission believes that information access is necessary in order for a child to fully enjoy his or her human rights. Communication therefore is a vital piece of the puzzle.

15.11 The discussions in the Oceania Deaf and Disability Forum in November 2011 revealed that Sāmoa is working towards developing a national sign language²⁹⁴. This is important for children with physical disabilities (deaf and mute) so they can fully enjoy their human rights. The work on CRC should embrace the work on children with disabilities. The Commission however believes that a better and more a coordinated support will be made through the work on the Convention on the Rights of People with Disabilities (CRPD)²⁹⁵.

15.12 The Commission also believes that the right to access information also comes with the responsibility to ensure that such access is not detrimental to the welfare of children. Children accessing internet unsupervised should not be permissible as this can expose them to problems such as cyber bullying²⁹⁶, cyber stalking²⁹⁷, exposure to pornography, grooming²⁹⁸, identity theft and other harmful activities²⁹⁹. There should be a proper policy, standards and relevant legislative protection for children on cyber/internet safety.

²⁹⁴ Oceania Deaf and Disability Forum *Building a Vision - Disability Not Inability*, Sāmoa, Tofamamao Conference Centre. The Commission as a member of the CRC Partnership was invited to share its views/experience on legal issues affecting children with disabilities and special needs. 25 - 28 November 2011.

²⁹⁵ Sāmoa has yet to ratify the Convention on the Rights of People with Disabilities.

²⁹⁶ Cyber bullying is when one person or a group of people try to threaten or embarrass someone else using a mobile phone or the internet. Cyber bullying is just as harmful as physical bullying.

²⁹⁷ This is often performed in public forums, social media or online information sites where a person uses available information to threaten a victim's earnings, employment, reputation, or safety.

²⁹⁸ Solicitation of children for sex.

²⁹⁹

http://www.dbcde.gov.au/__data/assets/pdf_file/0004/119416/ECU_Review_of_existing_Australian_and_international_cyber-safety_research.pdf (Accessed 12 October 2012)

15.13 The *Crimes Bill* criminalises computer related activities such as accessing computer system for dishonest purpose³⁰⁰; damaging or interfering with computer system³⁰¹; making, selling, or distributing or possessing software for committing crime³⁰²; and accessing computer system without authorisation³⁰³. It also criminalises harassment utilising means of electronic communication.

15.14 The *Films Control Act 1978* needs to be effectively enforced. Indecent programmes are still filtering through public television and censoring of some movies are too low³⁰⁴. The Commission feels that the Censorship Board's jurisdiction should be extended to censor and classify other types of materials such as computer games, television programs, cartoons, magazines, books and other types of electronic materials.

15.15 In relation to the issue of including pubertal change and sex education in the school curricula, the Commission believes that this should be introduced at the appropriate level of education and age. There is a concern that if these are introduced at an inappropriate level then it might cause more harm than good. However, there is no better place to discuss such issues than in the home. Parents should be encouraged to share such knowledge, fathers to their sons and mothers to their daughters.

15.16 The Commission agrees with the introduction of legal rights and human rights education into school curricula but this should be done at an age where children can understand.

Recommendation 39: The NCCRC and CRCP should provide the necessary support for the development of the national sign language by MESC and relevant partners. The NCCRC and CRCP should continue its support for the work on children with disabilities. This support will diminish accordingly as the work on the Convention on the Rights of People with Disabilities (CRPD)³⁰⁵ escalates. A wide-ranging support will be received from international partners for children with disabilities once Sāmoa ratifies the Convention on the Rights of People with Disabilities (CRPD)³⁰⁶.

Recommendation 40: The *Films Control Act 1978* needs to be effectively enforced.

Recommendation 41: The Censorship Board's jurisdiction needs to be extended to allow them to censor and classify other types of materials such as computer games, television programs, cartoons, magazines, news paper articles, books and other types of electronic materials. They should also be able to receive and determine complaints on breaches of censoring standards or protocol.

Recommendation 42: Proper guidelines and policies should be formulated to guide regulatory work on information access by children.

³⁰⁰ *Crimes Bill 2011*, cl. 199.

³⁰¹ Ibid, cl. 200.

³⁰² Ibid, cl. 201.

³⁰³ Ibid, cl. 202.

³⁰⁴ Some movies that should not be for General Audience are rated as such. Cartoons should also be rated accordingly.

³⁰⁵ Sāmoa has yet to ratify the Convention on the Rights of People with Disabilities.

³⁰⁶ Sāmoa has yet to ratify the Convention on the Rights of People with Disabilities.

16. Birth Registration

16.1 Birth registration is fundamental to the protection of a child's human rights³⁰⁷. It gives the child a legal existence, identity and it is the sign that he or she belongs to a family, a community and a nation³⁰⁸. It shows that a child has a place, and a stake, in all three.

16.2 A child who is not registered does not have a nationality. A child without a nationality is deemed stateless. Stateless children are not considered as nationals by any state under the operations of its laws³⁰⁹. This means they do not enjoy any social, economic, civil and political rights. They cannot access benefits available under national schemes such as free/subsidized education and free/subsidized medical treatment. In states where social welfare services are available, an unregistered child cannot have access to funds disseminated under social welfare schemes.

16.3 In Samoa, the Registrar of Births, Deaths and Marriages has a statutory duty to establish a Register and record all births, deaths and marriages³¹⁰. All births including still-births³¹¹ are registered under the *Births, Deaths and Marriages Registration Act 2002*³¹².

16.4 A birth cannot be registered if the details of the parents are incomplete or incorrect and/or where a child has no name or is given a name that is prohibited³¹³. Prohibited names are names that in the Registrar's opinion, will cause offence to a reasonable person, is unreasonably long or resembles a *matai* title or other official title or rank³¹⁴. The confidentiality of the information in the Register is guaranteed under the *Births, Deaths and Marriages Registration Act 2002*³¹⁵.

16.5 The Baseline Research reveals that the relevant legislation dealing with birth registration in Samoa has not fully complied with 50% of the relevant indicators³¹⁶.

16.6 In order for Samoa to full comply with all of the indicators it needs to remove discriminatory provisions in the birth registration laws.

Commission's views

16.7 The Commission found no discriminatory provisions within the *Births, Deaths and Marriages Registration Act 2002*. Thus it disagrees with the Baseline Research findings under this category. The Commission believes that the *Births, Deaths and Marriages*

³⁰⁷ http://www.childinfo.org/files/birthregistration_Digestenglish.pdf (Access 04 May 2012)

³⁰⁸ The World Health Organization defines a live birth as a baby that breathes or shows any other sign of life after delivery, irrespective of the duration of pregnancy. The UN view is that all babies born alive should be registered and their existence recognized, whatever their gestational age and regardless of whether they are still alive at the time of registration.

³⁰⁹ *Convention Relating to the Status of Stateless Persons* 1954, Art 1.

³¹⁰ *Births, Deaths and Marriages Registration Act 2002*, s. 5.

³¹¹ A still-born child means a child of at least 20 weeks gestation; or, if it cannot be reliably be established whether the period of gestation is more or less than 20weeks; (b) A child with a body mass of at least 400 grams at birth, that exhibits no sign of respiration or heartbeat, or other sign of life, after birth.

³¹² *Births, Deaths and Marriages Registration Act 2002*, ss. 17 and 18.

³¹³ *Ibid*, ss. 19 and 20.

³¹⁴ *Ibid*, s. 2.

³¹⁵ *Ibid*, s. 75.

³¹⁶ Baseline Research, pp. 72.

Registration Act 2002 fully complies with all the relevant indicators under this part. It has satisfied all the relevant CRC indicators under this category.

16.8 It is also important to note that just as birth registration is important, child death registration is equally important as well. The data on numbers of child deaths and causes of child death are essential in determining national priorities and to formulate and monitor policies, for public health care as well other government policy that may be based on such data³¹⁷. There should be emphasis on child death registration as well in Sāmoa.

17. Final Comments

17.1 The Commission when undertaking this work believes that all children have the right to be safe and to receive loving care and support. They have a right to receive the facilities and services that they need to enable them to succeed in life.

17.2 All parents including single parents have the primary responsibility of nurturing their children, and ensuring that their rights are protected.

17.3 The Commission recognizes that the best way to protect children is to take a proactive approach. In order to do this, we need to build capacity and strength in our families and communities and across our nation.

17.4 The Commission is aware that vast majority of Samoan parents have the capacity to raise happy and healthy children. But some families need help hence they may require the support and guidance of their relatives, communities and the state. In some extreme cases, statutory intervention may be necessary.

17.5 The Commission also identified that investment by governments and the non-government sectors into family support and child protection services are significant but isolated hence such efforts require better coordination in order for children to reap maximum benefits.

17.6 Samoa requires a unified approach which recognises that protection of children is not simply a matter of concern for Government and its national and international partners but a responsibility for all.

³¹⁷ http://www.unicef.org/esaro/Technical_paper_low_res_.pdf (Accessed 28 November 2012).

List of Recommendations

Recommendation 1: A new principal legislation (Child care and protection legislation) should be drafted to replace the *Infants Ordinance* and consolidate all appropriate child care and protection provisions currently accommodated in different pieces of specific legislation. The new principal legislation should address the issues raised in the Baseline Research. It should also accommodate the proposed child care and protection framework.

All consequential amendments to be made to specific legislation listed in **Footnote 17** of this Report should be undertaken by the Drafting Division of the Attorney Generals Office during its annual legislative revision and consolidation programme.

Recommendation 2: Corporal punishment in homes should be addressed through awareness programmes and trainings by the MWCSO and its partners, at the village level, focussing on the effects of corporal punishment on the development of children. These trainings should also provide alternative methods of discipline. This should be done before Samoa legislates against corporal punishment in homes.

Recommendation 3: The Ministry of Education, Sports and Culture should explore the option of including private schools under the scope of the *Education Act 2009*.

Recommendation 4: The Ministry of Education Sports and Culture must develop a national discipline policy applicable to all private and public schools in Samoa.

Recommendation 5: This issue of long absence of parents from homes, frequency of such absence and the link to cases of incest and sexual assault should be emphasised in awareness programmes by the MWCSO and its partners.

Recommendation 6: The definition of “child” in all domestic legislation should be made consistent with the definition in the CRC. A child is “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

Recommendation 7: The age of majority should be reduced to eighteen years. This will be consistent with the definition of child in the CRC. It will also be consistent with the definition of adult in *section 2* of the *Young Offenders Act 2007*.

Recommendation 8: All domestic legislation should refrain from using different terms such as infant³¹⁸ and young person³¹⁹ to refer to different age groups. All legislation should use the term “child” throughout all legislation. These terms however, can still be used if they are properly defined as referring to a child of a certain age group.

Recommendation 9: The minimum age of marriage in Sāmoa should be amended to eighteen years for both males and females. There is no real justification as to why the minimum age of marriage for females should be lower than males. It is discriminatory. It is contrary to *Article 15(4)* of the *Constitution* which provides for the equal protection of all persons under the law. *Section 9* of the *Marriage Ordinance 1961* should be amended to make minimum age of marriage eighteen years (18) for both males and females. Parental

³¹⁸ *Infants Ordinance 1961*, s. 2.

³¹⁹ *Young Offenders 2007*, s. 2.

consent should be sought for marriages below the age of 18 years and *section 10* of the *Marriage Ordinance 1961* should be amended accordingly.

Recommendation 10: It should also be clearly expressed in the new *Child Care and Protection Legislation* that the concept of emancipation does not apply to Samoa. This will ensure that female minors giving birth below the age of eighteen (18) years will still enjoy their rights as a child and not lose them due to child birth.

Recommendation 11: Children removed from the care of their parents should have the first option of being placed in the care and protection of members of their extended family under the new legal framework.

Recommendation 12: There should be a second option for shelters in the case that the placement with the member(s) of extended family fails or is unfavourable at the first instance. It is recommended that the provision of shelters by Non-Governmental Organisations are explored to determine if they can be utilised and if possible how such efforts can be complemented.

Recommendation 13: Proper guidelines and standards should be created to ensure that any new environment that a child is to be placed in is safe and healthy for the child's physical, mental and spiritual development.

Recommendation 14: The MWCSO should be responsible for carrying out an initial assessment of a relative's home that a child is going to be placed in to identify any necessary improvements to be made to ensure that the new environment is safe and healthy for the child's physical, mental and spiritual development. In the case of emergencies then a child must be placed in a safe place whilst such assessments are being carried out.

Recommendation 15: The Government should determine how it can complement or subsidise both options for shelter. It should also look at how it can assist with the costs of necessary improvements to a relative's home.

Recommendation 16: A new comprehensive framework must be established to effectively and properly regulate child welfare and child protection services in Samoa through the new Child Care and Protection Legislation based on the CRC standards.

Recommendation 17: The features of the new framework should reflect the concerns identified in the Baseline Research. These concerns should be addressed in light of the local context, (such as Samoan culture and traditions, available resources and the existing framework under the *Infants Ordinance*).

Recommendation 18: The reporting of cases of children suffering violence, abuse, neglect or exploitation to relevant authorities (including children suspected or at risk) should be made only on a voluntary basis at this stage. Samoa has to put in place a functioning and confidential child care and protection framework first before considering the issue on reporting.

Recommendation 19: The issues identified in Baseline Research under the Family Separation and Alternative Care category should be all addressed in the new Child Care and Protection Legislation.

The consequential amendments can be made through the legislative review process by the Legal Drafting Division of the Attorney General's Office.

Recommendation 20: In relation to alternative care, the Commission has already made recommendations earlier with regards to using the extended family as an option and the use of existing efforts by non-governmental organisations. Guidance can be sought from the framework provided under the *Mental Health Act 2007*, where voluntary care and support within family and community is first used before considering the use of a formal institution.

Recommendation 21: The new Care and Protection Legislation should address the issues raised in paragraph 7.5 of this Report.

Recommendation 22: The new Care and Protection Legislation should:

- clearly define and strictly prohibit all forms of violence against children³²⁰;
- prohibit all expressions of violence in schools, whether by pupils or teachers, including physical violence, emotional violence (bullying), sexual harassment, stigma and discrimination;
- identify and prohibit traditional practices³²¹ harmful to children and prescribe appropriate penalties for those who violate these provisions; and
- call for institutions dealing with reports of violence against children to record and report disaggregated data in relation to reports received and actions taken.

Recommendation 23: In light of the recent reforms, Samoa's criminal laws still need to:

- create a separate and specific criminal offence(s) for prostituting children, defined in accordance with the Optional Protocol to the Convention on the Rights of a Child and sanctioned in a manner that reflects the gravity of the crime;
- properly define unlawful sexual activity involving children;
- call for institutions dealing with reports of sexual abuse and exploitation of children to record and report disaggregated data in relation to reports received and actions taken.

Recommendation 24: Samoa also needs to accede to and promote bilateral and multilateral measures to protect the child from sexual abuse and sexual exploitation. This will guarantee the effective enforcement of the extraterritorial application of its criminal laws under the new *Bill* through international cooperation.

Recommendation 25: In light of the recent criminal law reviews, Samoa still needs to:

- include a specific crime relating to the sale of children, defined broadly in accordance with the Optional Protocol to the Convention on the Rights of a Child and sanctioned in a manner that reflects the gravity of the crime;
- permit the use of testimony of foreign trafficked victims/survivors taken before repatriation, for example, through the use of video and audio tapes of the trafficked victims/survivors' testimony as evidence³²²; and

³²⁰ Namely: physical, sexual, emotional and neglect.

³²¹ For example, early marriage, female genital mutilation, honour killings, the tattooing of children, banishment of one or both parents, banishment of a child's whole family, destruction of a child's family properties as part of a traditional fine.

³²² This is being addressed in the new *Criminal Procedure Bill 2012* which is still in draft form.

- impose civil or criminal liability on legal entities³²³ for trafficking offences.

Recommendation 26: The proposed legal framework for child care and protection should:

- designate a central authority (depending on available resources or designate an existing one) to deal with issues of international child abductions;
- have procedures and guidelines for immediate and safe emergency care for children who have been rescued from trafficking;
- ensure the effective communication of court orders to border officials;
- empower state institutions to release information that will help to trace the whereabouts of abducted children;
- promote cooperation between relevant agencies, in particular the police, immigration and welfare services, in identifying child victims/survivors of trafficking; and
- provide protection, rehabilitation and support services to all child victims/survivors of trafficking regardless of nationality and agreement to appear as witnesses in any criminal proceedings.

Recommendation 27: Samoa's immigration laws should:

- permit foreign trafficked children to remain in the country, temporarily or permanently, in appropriate cases, and in accordance with the stated views of the child;
- have guidelines for border officials for the identification and handling of child victims/survivors of trafficking;
- secure the prompt return of children wrongfully removed to or retained in the Samoa and to ensure that rights of custody and access under the law of other countries are effectively respected; and
- have guidelines for the safe and timely return and repatriation of child victims/survivors of cross-border trafficking where appropriate.

Recommendation 28: Amend the relevant provision of the *Proceeds of Crime Act 2007* to allow the use of proceeds or part of the proceeds of trafficking forfeited, to be used to support trafficking victims/survivors.

Recommendation 29: The *Labour and Employment Act 1972* and/or *Labour and Employment Relations Bill 2011* should be amended to require employers to have and be ready to produce on demand proof of age of all children working for them.

Recommendation 30: The *Crimes Ordinance* should be amended to explicitly prohibit the use of children for all forms of research, including medical or scientific experimentation,

³²³ For example, travel agencies, marriage brokers, sex shops, bars, brothels or employment agencies.

unless appropriate consents have been obtained from the child and/or parents or legal guardians.

Recommendation 31: An independent child-friendly national forum should be established to hear complaints, investigate, consider and resolve complaints regarding breaches of children's labour rights through the Ministry of Commerce Industry and Labour (MCIL).

Recommendation 32: A national strategy for the elimination of the worst forms of child labour in Samoa should be established if nothing has been established to date by the MCIL.

Recommendation 33: The *Education Act 2009* should be amended to prohibit children below the age of 10 years from selling goods on the street at any time.

Recommendation 34: The *Education Act 2009* should be amended to provide that any child over the age of 10 years who sells goods on the street should be prohibited from selling such goods after 7 p.m. everyday.

Recommendation 35: In order for national investigative and court procedures to be child friendly and protect the rights and interests of children at all stages of the justice process they need to:

- have comprehensive inter-agency referral procedures to promote coordination between police, health care workers, social workers and other service providers;
- have specialised units (in police, prosecutors and courts) designated to handle cases involving child victims, survivors or witnesses;
- specialised units should undergo special training for police, prosecutors, lawyers and judges in dealing with cases where children are victims/survivors;
- take the best interests of the child into consideration in every matter that concerns them;
- take into account the child's views in accordance with their age;
- adopt child-friendly interview environments and interview techniques³²⁴;
- control the number and length of interviews child victims/survivors are subjected to;
- provide support at all stages of the process, including social and legal counselling and allow the victim/survivor or witness to become familiar with the court process;
- give investigations and trials of cases involving child witnesses priority so that they are conducted expediently;
- adopt measures to prevent intimidation and retaliation towards a child victim/survivor and their family such as safe shelter (emergency and longer-term), relocation, and prohibition on the disclosure of information concerning the victim/survivor's identity.

³²⁴ Employed by people such as police officers, prosecutors, judges and social workers.

Recommendation 36: The proposed framework for the care and protection of children should provide a range of services to support the rehabilitation and psychological recovery of child victims/survivors of abuse and exploitation. These support services should include:

- short-term care, where appropriate³²⁵;
- medical care;
- psychological counselling;
- advice about their legal rights;
- education, employment and training opportunities; and
- protection for the victim/survivor and his/her family from intimidation and retaliation.

Recommendation 37: Rehabilitation services should:

- set relevant standards and guidelines;
- protect all child victims/survivors from involuntary detention and the harshness of the criminal prosecution processes;
- compensate child victims/survivors of crimes;
- protect the privacy and identity of child victims/survivors with appropriate sanctions;
- promote recovery and reintegration in families and communities (rather than institutional care); and
- seek the opinions of children to determine preferred recovery and reintegration processes.

Recommendation 38: The *Young Offenders Act* needs to be amended to:

- change the ages of children in which the *Act* applies from between 10 years and 17 years to between 10 years and 18 years;
- require the consent of the child and/or the child's parents for diversion procedures to be applied;
- require that pre-trial detention be used only as a measure of last resort and to put in place alternative measures for supervising an accused child pending trial;
- explicitly limit the duration and use of pre-trial detention against an accused child;
- require that cases involving young children be expedited;
- require that children deprived of liberty be subject to a periodic review of their situation;
- require that police, prosecutors, courts and prison officials have specialised units, or designated specialists, to handle children in conflict with the law;

³²⁵ For example, by foster families and shelters.

- require all processes defined in the above legislation to have the best interests of the child (including the maximum development of the child) specified as the primary consideration;
- require the police to notify legal assistance immediately upon the arrest of a child and legal assistance is entitled to be present during all investigative and trial proceedings, in accordance with the views of the child;
- require that the needs of disabled children are catered for at all stages of the legal process;
- require all justice sector officials, including police, prosecutors, judges, lawyers and prison officials to receive training and sensitization on children in contact with the law as part of their induction training³²⁶ as well as on an in-service basis; and
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Recommendation 41: The Censorship Board’s jurisdiction needs to be extended to allow them to censor and classify other types of materials such as computer games, television programs, cartoons, magazines, news paper articles, books and other types of electronic materials. They should also be able to receive and determine complaints on breaches of censoring standards or protocol.

Recommendation 42: Proper guidelines and policies should be formulated to guide regulatory work on information access by children.

³²⁶ At police academies, law schools and judicial training programmes.

³²⁷ Sāmoa has yet to ratify the Convention on the Rights of People with Disabilities.

³²⁸ Ibid.