



JUDICIAL SYSTEM MONITORING PROGRAMME  
PROGRAMA MONITORIZASAUN SISTEMA JUDISIÁL

# INCEST IN TIMOR-LESTE: AN UNRECOGNISED CRIME

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## EXECUTIVE SUMMARY

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Incest, defined in this report as sexual acts that take place between an offender and his/her child or parent, grandchild or grandparent, brother or sister, half brother or sister, or step or legally adopted relation of a similar kind, is a particularly insidious form of sexual abuse that involves the exploitation of a position of familial authority. Most often, the targets of incest are children who are abused by persons that they depend upon and trust. Incest is an offence against social, moral and religious values and its psychological and physical impacts can be both serious and lasting.

Although the prevalence of incest in Timor-Leste is unknown, monitoring by the Judicial System Monitoring Program (JSMP), consistent with the limited data available from other sources, suggests that incest is a widespread problem in Timor-Leste. Between January 2010 and June 2012, the JSMP Victim Support Service (VSS) provided case support to 32 victims of incest. Notably, only nine of these cases have received a final hearing in court and the majority of cases are still being processed by the Public Prosecutor's Office. According to data collected by JSMP, the most common victims of incest are girls between 11 and 14 years of age who are sexually abused by a male family member more than 35 years of age, most often a father or an uncle. The JSMP Women's Justice Unit (WJU) has monitored a further 18 cases of incest in court between January 2010 and June 2012, of which only five are known to have resulted in a prison sentence of between four and 16 years. Only one case monitored by WJU involves a VSS victim, meaning that in total, 49 independent cases of incest have come to the attention of JSMP between January 2010 and June 2012.

The Timor-Leste Penal Code (2009) does not contain a specific crime of incest. Victims of incest who are less than 14 years of age are protected by article 177 concerning sexual abuse of a minor, in combination with article 182 concerning aggravation on account of the familial relationship. Victims of incest who are more than 14 years of age are protected by articles 171 and 172 concerning sexual coercion and rape, in combination with 173 concerning aggravation, similarly on account of the familial relationship, but only where it can be proven that the act was nonconsensual. This is a serious limitation of the Penal Code. Victims of incest are often pressured by the perpetrator, their family and/or their community to avoid testifying against perpetrators, or may elect not to testify to avoid the social stigma and shame that accompanies the crime. Alternatively victims may consent to the crime, but the validity of such consent must be questioned in light of the manipulative techniques that perpetrators of incest employ to devoid themselves of responsibility and persuade the victim to tolerate the crime. Too often, perpetrators of incest in Timor-Leste are able evade punishment due to the evidentiary burden of 'use of violence or serious threat', and the victim and other vulnerable persons are left without protection.

A comparative analysis of Timor-Leste's existing legal framework as it relates to crimes of incest reveals that it is significantly weaker than other jurisdictions in terms of its ability to protect victims, regardless of age or consent, from incestuous sexual acts perpetrated in a context of dependency. While not all jurisdictions examined contain an explicit crime of incest, they do provide for the punishment of perpetrators of sexual crimes who abuse a relationship of dependency irrespective of consent. Where there is a specific crime of incest, this has the additional benefit of reducing police and prosecutorial discretion about which crimes to charge defendants with and consequently reduced the risk of lenient charging and sentencing.

There are also serious limitations concerning the implementation of existing law in Timor-Leste and associated mechanisms for the protection of victims. The Timor-Leste Government has put in place some mechanisms to protect children, specifically the Protection and Assistance to Children at Risk and Victims of Abuse section of the Ministry of Social Solidarity (MSS) (aka the Child Protection Unit); the National Child Protection working group and Child Protection Networks; and the National Commission on the Rights of the Child (NCRC). The Law Against Domestic Violence (2010) (LADV) also commits the government to expand public awareness of domestic violence and improve assistance to victims. While there are existing systems for protecting children, there is not yet effective implementation mechanisms to protect children against all forms of sexual and domestic violence. In particular, the government does not yet have capacity to provide appropriate and timely intervention to protect children from incest, as demonstrated by the case studies included in this report.

The specific concerns that have come to the attention of JSMP relating to the implementation of the law, as exemplified in the case studies included in this report, include:

- the infrequent uptake of protection or coercive measures available to judicial actors for the purpose of preventing further crime and protecting the victim and other vulnerable persons prior to and during the trial period
- extensive delays in trial hearings leading to loss of evidence, prolonged suffering of the victim and decreased confidence in the ability of the formal justice sector to deliver justice
- a tendency towards lenient and/or suspended sentencing in cases of domestic violence and sexual crimes, which disregards the severity of the crime, belittles the suffering of the victim, reduces public confidence in the formal justice sector and fails to deter future crimes
- a child protection system that is in it's infancy, under resourced, and without a legislative basis or clear authority to intervene in cases of child abuse
- poor coordination and inadequate case management and data collection among state and non-state actors and consequent lack of a strong evidence base on which the state can formulate tailored legal and public policy responses to the issue of incest
- a lack of public engagement concerning prevention of incest, arising from an absence of public education activities to raise awareness of the crime and its detrimental impacts on the victim, family and community.

The failure of the state to protect victims of incest can be seen as a failing to fulfill it's obligations under article 18(1) of the Timor-Leste Constitution, the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

In response to these observed limitations, JSMP recommends the following actions:

- 1. Incorporate a specific crime of incest into the Penal Code that applies irrespective of victim consent or age.**
- 2. Strengthen provisions in the Penal Code relating to sexual crimes in circumstances of dependency to deter and punish perpetrators of sexual crimes who abuse their familial authority or exploit a relationship of dependency.**
- 3. Utilize available protective and coercive measures to prevent further crime and protect victims and other vulnerable persons from abuse.**
- 4. Increase resources for the courts and prosecution services and introduce a system for case prioritization to reduce delays in the prosecution of perpetrators.**
- 5. Enhance capacity of justice actors to charge and sentence perpetrators of sexual crimes consistently and appropriately, in accordance with the severity of the crime.**
- 6. Increase investment in child protection structures and establish a clear legal framework that defines the authority of the state to intervene in cases of child abuse.**
- 7. Improve coordination, case management and data collection procedures among state and non-state actors involved in provision of services to victims of incest.**
- 8. Invest in public education activities to raise community understanding and mobilize community action around the crime of incest.**

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## 1. INTRODUCTION

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*'A child molested by a stranger can run home for help and comfort. A victim of incest cannot.'*<sup>1</sup>

Incest is commonly understood as sexual acts that take place between family members, excluding persons in a spousal relationship. Incest is an extreme example of a violation of an individual's rights to dignity and security. Incest is a violation of the authority that one family member has over another and undermines the trusting relationship upon which the family unit is built. Victims of incest are most commonly children who are exploited by those on whom they depend. The perpetrator exploits the child's inherent vulnerability and employs manipulative measures to persuade the victim to maintain secrecy. Fear is used to perpetuate secrecy, while secrecy enables the perpetuation of abuse.

This report is prompted by JSMP's observations of continuing impunity for crimes of incest in Timor-Leste. The Government of Timor-Leste has an obligation to protect the rights of all citizens, especially those most vulnerable.<sup>2</sup> It can therefore be seen as a fundamental responsibility of the State to prevent and protect citizens from incest and to hold those who commit incest accountable. However, in reality, perpetrators of incest are rarely brought before the court, and when they are, the crime of incest is typically met with inadequate punishment due to insufficient laws to prevent and protect against incest.

Incest is not specifically criminalized in Timor-Leste, and while there are other provisions in the Penal Code which can be used to prosecute acts of incest, they are inadequate. Acts of incest are punishable by law only in circumstances where the victim is less than 14 years of age or where it can be proven that force was used and the act was nonconsensual. Proving non-consent in a court of law can be very difficult, as victims often decline to give evidence due to social stigma or pressure from the perpetrator or their family. Furthermore it appears that lack of consent alone is insufficient to prove sexual assault; there is a further requirement for proof of the use or serious threat of violence.

There is an urgent need to address the crime of incest comprehensively in a manner that best protects the rights of the victim. Prosecution and punishment of crimes of incest is essential to ensure victims can obtain justice and are protected from further crimes, and to deter potential perpetrators from committing such crimes in the future.

The first section of this report contains a definition of incest, an explanation of the harm caused by incest, and an overview of what is known regarding prevalence, based primarily upon JSMP court monitoring and legal aid provision. The second section of the report examines existing legislation relevant to incest, and the third section examines associated procedures relevant to incest and support structures in place to protect victims. The fourth and fifth sections respectively provide an analysis of limitations relating to the current legislative framework, its implementation, and associated protection structures, including case studies. The final section of the report contains JSMP's proposed changes and a list of recommendations to strengthen the legislative framework and child protection structures in order to protect victims and reduce the incidence of incest in the future.

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<sup>1</sup> Judy H. Wright, *What is Incest?* Accessed 15 May 2012 <http://ezinearticles.com/?What-is-Incest?&id=61110>.

<sup>2</sup> Article 18(1) of the Timor-Leste constitution states: Children shall be entitled to special protection by the family, the community and the State, particularly against all forms of abandonment, discrimination, violence, oppression, sexual abuse and exploitation.

## 2. INCEST

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### A. Incest defined

The legal definition of incest varies between jurisdictions. A crime of incest typically refers to sexual relations that take place between the offender and his or her child or parent, grandchild or grandparent, brother or sister, or half brother or sister. This sometimes includes step relations and relations defined by legal adoption.<sup>3</sup>

Nonetheless, it is recognized that sexual relations between other familial relations, such as between an offender and his or her niece or nephew, or between the offender and an unrelated child to whom the offender is like a parent, similarly represents an abuse of familial authority and exploitation of dependency. In addition, sexual acts that take place between family members but fall short of sexual intercourse can have equally detrimental impacts on the victim and family unit as crimes involving intercourse. While these relations and types of sexual abuse are absent from most legal definitions of incest, they are typically acknowledged through provisions that protect victims from sexual abuse in relationships of dependency more broadly.<sup>4</sup>

This report advocates for the inclusion of a crime of incest in the Timor-Leste Penal Code, whereby a crime of incest is defined as sexual acts that take place between the offender and his or her child or parent, grandchild or grandparent, brother or sister, or half brother or sister. This definition includes parents or siblings who are step relations or relations through legal adoption.

In addition, to protect against exploitative sexual relations between persons who fall outside the familial relations included in the definition above, but are nonetheless in a relationship of domination and dependency with the victim, JSMP advocates for the strengthening of existing legal provisions in the Penal Code relating to sexual crimes. This is particularly important in Timor-Leste given the common occurrence of informal adoption and the potential for exploitation of relationships of dependency between extended family members. The basis for these recommendations is explained further below.

### B. The harm caused by incest

Incest deeply offends social, moral and religious values, and can cause serious physical, psychological and emotional harm. It is a particularly insidious form of sexual abuse because the perpetrator is someone upon whom the victim depends upon and trusts. The act of incest is therefore both a physical violation as well as an abuse of trust and position, and is destructive and disorientating for the family, regardless of whether the act is consensual or both parties are above the age of consent.

Victims of incest may suffer physical harm, depending upon the sexual act carried out and the degree of force used. This can include internal lacerations, bleeding, damage to genitalia, infection, and in extreme cases, permanent damage to internal organs or death.<sup>5</sup>

Victims also commonly experience extensive psychological and emotional suffering. This can include depression,<sup>6</sup> post-traumatic stress disorder,<sup>7</sup> anxiety,<sup>8</sup> eating disorders, low self-esteem, dissociative and

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<sup>3</sup> This definition is broadly analogous to legal definitions of incest adopted in Vanuatu, Fiji, Vietnam and Laos. A summary of legal definitions of incest, relevant articles and associated penalties contained in other jurisdictions is included in Appendix A.

<sup>4</sup> In Portugal for example, where there is a relationship of dependency, sexual acts or intercourse with a child less than 18 years of age is a crime, irrespective of consent. Sexual acts or intercourse with an adult are similarly a crime, irrespective of whether the perpetrator used force, where there is a relationship of economic dependency. This is explored further in Section 3A of this report.

<sup>5</sup> Anderson, James; Mangels, Nancie; Langsam, Adam (2004). "Child Sexual Abuse: A Public Health Issue". *The Justice Professional* 17: 107.

<sup>6</sup> Roosa MW, Reinholtz C, Angelini PJ (1999). "The relation of child sexual abuse and depression in young women: comparisons across four ethnic groups". *Journal of Abnormal Child Psychology* 27(1): 65–76.

<sup>7</sup> Widom CS (August 1999). ["Post-traumatic stress disorder in abused and neglected children grown up"](#). *The American Journal of Psychiatry* 156 (8): 1223–9.

<sup>8</sup> Levitan RD, Rector NA, Sheldon T, Goering P (2003). "Childhood adversities associated with major depression and/or anxiety disorders in a community sample of Ontario: issues of co-morbidity and specificity". *Depression and Anxiety* 17 (1): 34–42.



anxiety disorders, psychopathology,<sup>9</sup> learning difficulties, behavioral problems, self-destructive behavior including substance abuse<sup>10</sup> and suicide.<sup>11</sup> Research has also shown that traumatic stress, including stress caused by sexual abuse, causes notable damage to brain functioning and development.<sup>12</sup>

The psychological and emotional impacts of incest can be exacerbated by concealment of the crime. Victims may avoid disclosing incest due to associated stigma and shame, social and familial pressure, fear of family breakdown, or coercion by the abuser.<sup>13</sup>

Additionally, children born as a result of incestuous relations have greatly increased risk of birth defects and developmental disorders due to genetic diseases caused by inbreeding. They may also suffer feelings of shame, stigma and ostracism.

These repercussions of incest are public policy concerns with implications and costs for the health of citizens and society more broadly.

### C. Incest in Timor-Leste

There is an almost total absence of reliable data concerning the prevalence of incest in Timor-Leste, which makes it virtually impossible to determine the extent of the problem or develop tailored responses.

The limited government statistics that exist show only the number of child abuse cases that come to the attention of Child Protection Officers within MSS and the Vulnerable Person's Unit of the police. These statistics reveal that sexual abuse is the most common form of violence against children reported, but do not reflect the actual prevalence of sexual violations against children.<sup>14</sup> Limited trust in and access to the formal justice system,<sup>15</sup> coupled with prevailing social norms which dictate that abuse within families is dealt with outside of the formal justice system except in the most extreme circumstances,<sup>16</sup> mean that most incidences of child abuse in Timor-Leste go unreported. According to organizations working for the protection of women and children's rights, incest is a frequent occurrence, especially in remote areas,<sup>17</sup> and anecdotal evidence indicates a high level of abuse, violence and neglect within families more broadly.<sup>18</sup>

### D. JSMP monitoring of incest cases

The JSMP WJU and VSS units have collectively identified 49 individual cases of incest between January 2010 and June 2012.

#### I. Findings from VSS legal aid provision

VSS have provided services to 32 identified victims of incest between January 2010 and June 2012.<sup>19</sup> This number only includes victims who come to the attention of VSS, primarily via referrals from police,<sup>20</sup> and likely represents only a small proportion of the total number of incest victims in Timor-Leste. A breakdown of the specific crimes perpetrated is included in Table 1.

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<sup>9</sup> "Long-term correlates of child sexual abuse: Theory and review of the empirical literature". *Applied and Preventive Psychology* (Elsevier Ltd.) 4 (3, Summer 1995, Pages 143–166).

<sup>10</sup> NIDA Notes, National Institute of Drug Abuse (April 2002) [Childhood Sex Abuse Increases Risk for Drug Dependence in Adult Women](http://www.nida.nih.gov/NIDA_Notes/NNVol17N1/Childhood.html), volume 17, no. 1. National Institute of Health. [http://www.nida.nih.gov/NIDA\\_Notes/NNVol17N1/Childhood.html](http://www.nida.nih.gov/NIDA_Notes/NNVol17N1/Childhood.html)

<sup>11</sup> Freyd JJ, Putnam FW, Lyon TD, *et al.* (April 2005). "Psychology. The science of child sexual abuse". *Science* 308 (5721): 501

<sup>12</sup> Teicher MH (March 2002). "Scars that won't heal: the neurobiology of child abuse". *Scientific American* 286 (3): 68–75.

<sup>13</sup> Matsakis, Aphrodite. (1991). *When the Bough Breaks*. Oakland, CA: New Harbinger Publications.

<sup>14</sup> UNICEF (2011) *Mapping and Assessment of the Child Protection System in Timor-Leste*, p. 30

<sup>15</sup> *Ibid.* p. 127

<sup>16</sup> *Ibid.* p. 33

<sup>17</sup> IRIN Asia (2009) *Timor-Leste abortion Laws in spotlight*. Accessed 19 March 2012

<http://www.irinnews.org/Report/83526/TIMOR-LESTE-Abortion-laws-in-spotlight>

<sup>18</sup> UNICEF (2011) *Mapping and Assessment of the Child Protection System in Timor-Leste*, p. 28

<sup>19</sup> This represents the number of new cases opened by VSS between January 2010 and June 2012.

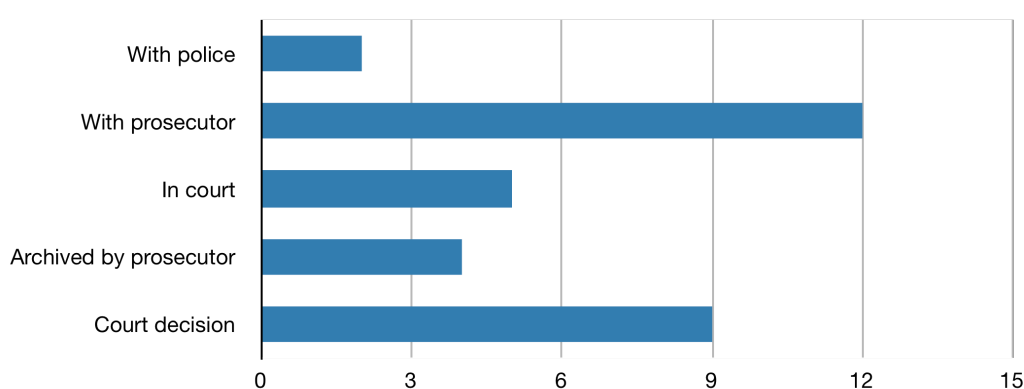
<sup>20</sup> 33 out of 40 cases were referred to VSS by police, five cases were referred by an NGO and one case was referred by MSS

Table 1: Crimes perpetrated against victims of incest

| Type of crime                         | Number of cases |
|---------------------------------------|-----------------|
| Attempted rape of a minor             | 1               |
| Sexual abuse of a minor <sup>21</sup> | 14              |
| Rape                                  | 16              |
| Attempted rape                        | 1               |

Of these 32 cases, only 9 have been processed by the courts. A further four cases have been archived by the Public Prosecutor's Office. Figure 1 shows the current status of all VSS incest cases. It can be seen from Figure 1 that the majority of the cases that have come to the attention of VSS between January 2010 and June 2012 are still being processed by the Public Prosecutor's Office.

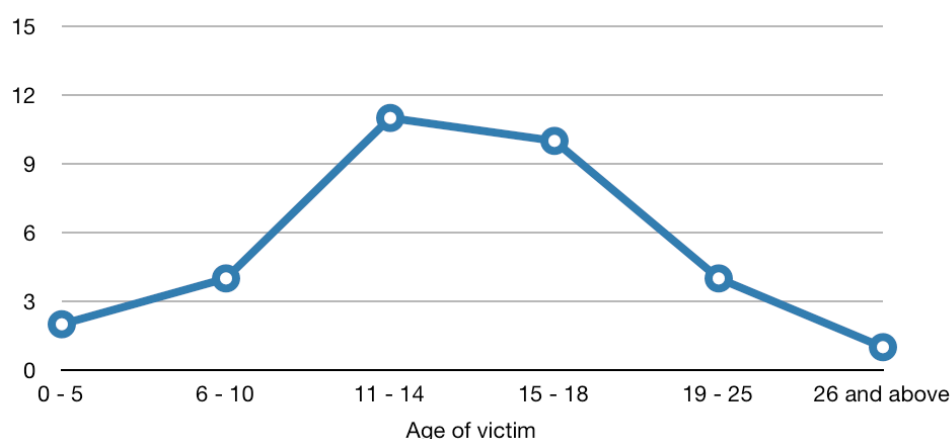
Figure 1: Status of existing incest cases in the formal justice system



\*Includes cases where a sentence is yet to be handed down.

According to VSS client records, the typical victim of incest is less than 25 years of age (97%), and female (100%). The age range of the victims is shown in Figure 2 below.

Figure 2: Age range of victims of incest

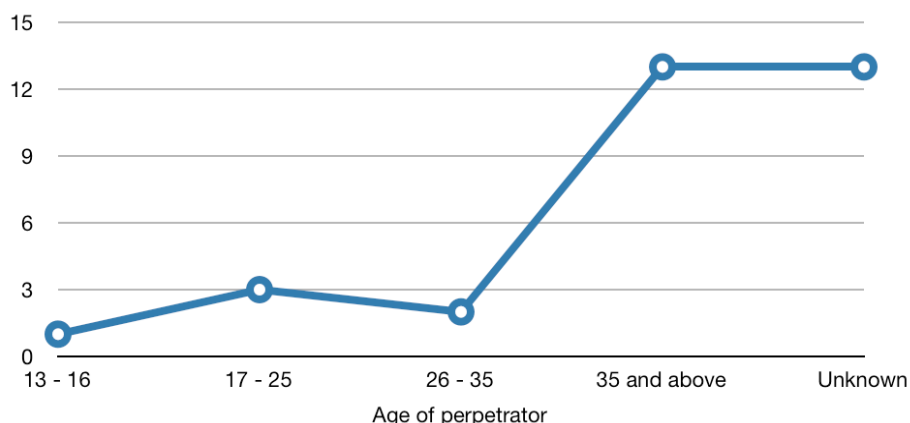


VSS client data also reveals that perpetrators of incest are male and usually above 35 years of age (41%). The age range of perpetrators is shown in Figure 3.

<sup>21</sup> Cases dealt with under article 77 of the Penal Code on sexual abuse of a minor (includes sexual abuse with and without penetration). In this table, 'minor' refers to a child under 14 years old as defined in article 177 of the Penal Code.

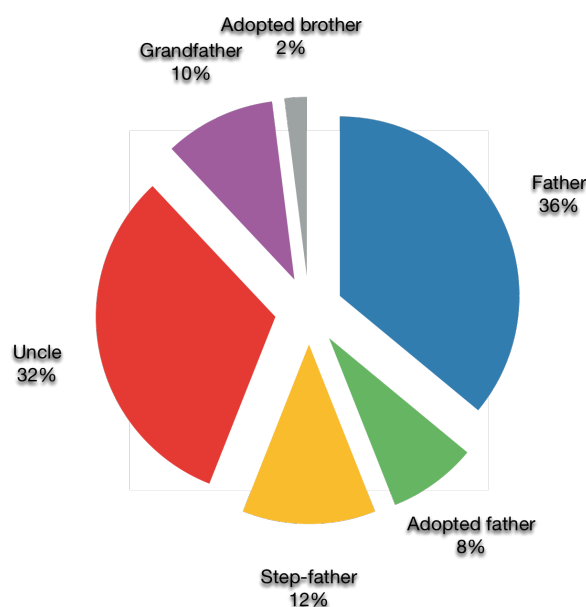


Figure 3: Age range of perpetrators of incest



The combined data from WJU court monitoring and VSS client records shows that perpetrators of incest are often the victim's father or uncle. The distribution of cases involving incest between various familial relations is shown in Figure 3.

Figure 4: Relationship between victim and perpetrator



## II. Findings from WJU court monitoring

WJU has monitored 18 cases of incest in the courts between January 2010 and June 2012. Only one of these cases involves a VSS client, meaning a total of 49 independent cases of incest have come to the attention of JSMP between January 2010 and June 2012.

Of the 18 cases that WJU has monitored, only five were met with prison sentences, which ranged between four and 16 years. Three cases were absolved; two due to lack of evidence and one because the victim was believed to have consented to the crime. Since trials involving sexual assault, particularly against children, are typically closed to the public, JSMP has been unable to determine the outcome of the remaining 10 cases.

### 3. LEGAL PROVISIONS RELEVANT TO INCEST

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In order to prevent incest and improve protection for victims it is necessary to understand the existing legal framework, its strengths and limitations. This section provides an overview of current legislation that applies to cases of incest in the absence of a specific provision on a crime of incest.

#### A. The Timor-Leste Constitution

The Timor-Leste Constitution provides a strong foundation for the protection and rights of children. Article 18(1) of the Constitution states that ‘Children shall be entitled to special protection by the family, the community and the State, particularly against all forms of abandonment, discrimination, violence, oppression, sexual abuse and exploitation.’ Article 18(2) further states ‘Children shall enjoy all rights that are universally recognized.’

Article 9 of the Constitution incorporates into national law the rules of international conventions, treaties and agreements that have been ratified or acceded to by the Timor-Leste Government, and invalidates national laws that are contrary to such agreements. Timor-Leste is a State Party to several important international instruments that impact responses to incest and violation of children’s rights. Those with the greatest implications for incest include the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the International Covenant on Civil and Political Rights. These Conventions affirm the responsibility of the Timor-Leste government to uphold the dignity of every child; protect children from physical and mental violence and abuse, including sexual abuse; and promote the recovery and reintegration of child victims of abuse. The specific articles relevant to incest are listed as Appendix B.

#### B. The Timor-Leste Penal Code (2009)<sup>22</sup>

The Penal Code includes provisions that protect victims of incest in limited circumstances. An overview of the relevant articles and associated penalties that may apply to crimes of incest as per the existing Penal Code provisions is included in Table 2 at the end of this subsection. All of the relevant crimes outlined below are public crimes and thus do not depend on the victim filing a complaint in order to be prosecuted.<sup>23</sup> The full text of all articles listed is included in Appendix C.

##### I. Sexual aggression

If the victim of incest is not a minor (is more than 14 years of age), articles 171 (sexual coercion), 172 (rape) and 173 (aggravating circumstances) may apply. These provisions cover acts up to and including sexual intercourse. A specific aggravating circumstance is where the perpetrator abuses authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labor-related dependence. This factor will always be present in cases of incest and will increase the minimum and maximum sentences applicable.

These articles only apply if the incest involves use of violence or serious threat of violence. There is currently no penalty for a person who commits incest against a victim above 14 years of age, unless it can be proven that there was use of or serious threat of violence.

##### II. Sexual abuse of a minor

If the victim of incest is a minor (is less than 14 years of age), article 177 (sexual abuse of a minor) may apply. Consent is irrelevant as a person under 14 years of age cannot give lawful consent. Article 177 covers both sexual intercourse and relevant sexual acts with a minor.

##### III. Sexual acts with an adolescent

If the victim of incest is an adolescent (is between 14 and 16 years of age), article 178 (sexual acts with an adolescent) may apply. Article 178 provides that it is a crime for an adult (above 16 years of age) to practice any relevant sexual act with a minor aged between 14 and 16 years of age by taking advantage of the minor’s inexperience.

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<sup>22</sup> Democratic Republic of Timor-Leste, Law No 19/2009 of 8 April (*Approving the Penal Code*).

<sup>23</sup> Penal Code, article 106(2).

While in theory this provision could be used to prosecute consensual incest where the victim is between 14 and 16, in practice JSMP has never seen this provision used in Timor-Leste and does not believe that it sufficiently reflects the harm that occurs in such cases.

#### IV. Aggravation

The minimum and maximum sentences applicable to all of the above crimes are increased by one third if any of the following aggravating circumstances exist, as outlined in article 182:

- a) The victim is less than 12 years of age at the time the act was committed;
- b) The perpetrator has transmitted to the victim any venereal disease, syphilis or AIDS;
- c) Due to the act, the victim attempts or commits suicide or the same results in death;
- d) The victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence.

Article 182 cannot apply concurrently with article 173.<sup>24</sup> The court will determine either article 182 or 173 as specifically applicable to the facts of the case in order to determine the sentencing range.

Within the applicable sentence range, the court may also consider other general aggravating circumstances which impact on the culpability of the perpetrator under article 52. These do not increase the minimum or maximum applicable sentence but the actual sentence that the court deems appropriate to the gravity of the crime committed. Relevant aggravating circumstances in cases of incest include where the victim is a parent, descendant, sibling, adoptee or adopter of the perpetrator;<sup>25</sup> and where the victim is particularly vulnerable by reason of age.<sup>26</sup>

#### V. Attempt and repeat offender provisions

Attempted incest may be prosecuted as attempted sexual assault under one of the above provisions.<sup>27</sup> Cases of attempt will be punished with an extraordinarily mitigated penalty, i.e. the minimum and maximum penalty applicable will be reduced.<sup>28</sup>

Where the perpetrator is a repeat offender, the minimum sentence applicable will be increased by one third.<sup>29</sup> "Habitual criminality" will also result in an increase of the minimum and maximum sentence applicable by one third.<sup>30</sup>

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<sup>24</sup> Article 42 of the Penal Code provides that only one legal provision may be applied to an act that may fall within the definition of a crime.

<sup>25</sup> Article 52(2)(i) of the Penal Code.

<sup>26</sup> Article 52(2)(m) of the Penal Code.

<sup>27</sup> See article 24 of the Penal Code.

<sup>28</sup> See article 57 of the Penal Code which prescribes formula for decreasing the penalty in cases of extraordinary mitigation.

<sup>29</sup> Article 53 of the Penal Code provides that a person is to be treated as a repeat offender if he/she was sentenced to imprisonment for more than 6 months within 4 years of the commission of the new crime.

<sup>30</sup> Article 54 of the Penal Code.

Table 2: Example penalties applicable to incest as per Timor-Leste Penal Code (2009)

| Age of victim  | Relevant act       | Relevant article | Ordinary sentence range | Relevant aggravating circumstances | Sentence range with aggravation | Consent relevant factor? |
|----------------|--------------------|------------------|-------------------------|------------------------------------|---------------------------------|--------------------------|
| Under 14 years | Sexual acts        | Article 177(2)   | 5-15 years              | Article 182                        | 6.6-20 years                    | No                       |
|                | Sexual intercourse | Article 177(1)   | 5-20 years              | Article 182                        | 6.6-25 years*                   | No                       |
| Over 14 years  | Sexual acts        | Article 171      | 2-8 years               | Article 173 or Article 182         | 4-12 years or 2.7-10.6          | Yes                      |
|                | Sexual intercourse | Article 172      | 5-15 years              | Article 173 or Article 182         | 5-20 years or 6.6-20 years      | Yes                      |

\*Maximum prison sentence under the Penal Code is 25 years (article 66(1)).

### C. Law Against Domestic Violence (2010)

The Law Against Domestic Violence (LADV) establishes the legal framework for the prevention of domestic violence and provision of protection and assistance to victims. The LADV describes generally what is domestic violence by defining it as acts committed within the family context (see article 2 of the LADV). Article 3 contains a broad definition of 'family'.

Article 35 refers to specific offences in the Penal Code that are considered crimes of domestic violence where they occur in the family context described in article 2 and 3.<sup>31</sup> While incest is not explicitly mentioned in the LADV, acts of incest which fall within any of the articles discussed above will constitute crimes of domestic violence because of the nature of the relationship between the perpetrator and victim. The relevant articles of the LADV are included as Appendix D.

#### I. Coercive measures available for crimes of domestic violence

The LADV permits coercive measures to be implemented by the judge, in addition to those provided for in the Timor-Leste Criminal Procedure Code. Available coercive measures are outlined in article 37 and apply to crimes of domestic violence as defined by article 35. Such measures may include the removal of the perpetrator from the place of family residence and prohibition of contact between the perpetrator and complainant in circumstances where there are signs of foreseeable violence that may endanger the life or physical, psychological or sexual integrity of the victim.

#### II. Intervention by hospital and social assistance services

The LADV does not create any positive obligation to report domestic violence to relevant authorities. However, article 22 provides that hospital services should intervene to provide assistance and medical follow up for victims; preserve evidence relating to possible crimes committed; report facts of the case to police or public prosecutor; and refer the victim to a shelter.

Similarly, article 23 states it is the responsibility of social assistance services to provide special services for child victims of domestic violence; report cases of domestic violence to law enforcement officers; facilitate, if necessary, the removal of victims to a place that suits their needs; and at the request of victim provide support and monitor cases in court.

#### III. Witness protection

Article 39 of the LADV makes a specific provision for the protection of witnesses and victims in domestic violence cases, in addition to those contained in the Law on the Protection of Witnesses.

<sup>31</sup> articles 171, 172, 177 and 178

#### IV. Determination of penalty

Article 38 of the LADV makes a specific provision for the determination of penalties in cases of domestic violence. For example, it states that in deciding to substitute a fine for a jail term the court must be satisfied that the security of the victim can be guaranteed, that the defendant will be subject to follow-up by social services and that it is necessary for maintaining the unity of the family. The provision also states that defendants can be sentenced to an additional penalty that they must not have contact with the victim for a period of up to 3 years.

#### D. The Timor-Leste Criminal Procedure Code (2005)<sup>32</sup>

The Timor-Leste Criminal Procedure Code is a framework that outlines the procedural steps and timelines to be followed in criminal proceedings, including standards for proof; guidelines for coercive measures and sentencing; the process of appeal; and the role and duties of police, judges, the public prosecution service, defendant, public defender, witness and victim. The following sections are particularly relevant in cases of incest, for reasons that are clarified below.

##### I. Sentencing

Article 10(2): In the case of accumulation of criminal offences, the highest penalty, which is abstractly applicable to the most serious crime, shall be imposed. This means that if several articles are simultaneously applicable to the crime, the court has an obligation to consider as the maximum penalty that which applies to the most serious crime committed.

##### II. Coercive and property-guarantee measures

As outlined in articles 182-184, during an enquiry the judge can, at the request of the public prosecutor, impose coercive measures on the defendant if there is reasonable fear that the defendant might escape, that the investigation or trial hearing might be disrupted, or that criminal activity might be pursued or public order and peace disrupted. Accordingly, in cases of incest, judges have the discretion to impose coercive measures during the investigative period if there is a risk that the defendant will expose the victim or other persons (such as the victim's siblings, or persons they suspect reported the crime) to further abuse. The judge can also introduce protective measures at any other procedural phase of the trial.

Available coercive measures and respective rules for their implementation are outlined in articles 186 – 203. Available measures include, among others, an obligation to periodically appear before a judicial authority or police (article 191), prohibition against the defendant leaving his/her residence without authorisation (article 193), and pre-trial detention (article 194).

#### E. The Timor-Leste Civil Code (2011)<sup>33</sup>

The following provisions in the Civil Code have implications for persons considered to be members of a family and consequently, persons between who sexual acts should logically fall within the definition of incest.

##### I. Legal relationship amongst family members

According to article 1466 of the Civil Code, family are persons whose relationship is defined by marriage, consanguinity (the bond connecting people as a consequence of descentance from one another or a common parent)<sup>34</sup>, affinity (the bond connecting each of the spouses to the relatives of the other),<sup>35</sup> or adoption.

Adoption, as defined in articles 1853-1854 of the Civil Code, is a legal decision established by way of a court order following an investigation into the personality and health of the adopter and adoptee as well as the competency and circumstances of the adopter. The Civil Code outlines in what circumstances a person can be adopted, who can adopt and be adopted, and who must give consent for adoption to take place.

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<sup>32</sup> Democratic Republic of Timor-Leste, Law No 13/2005 of 1 December (*Approving the Criminal Procedure Code*).

<sup>33</sup> Democratic Republic of Timor-Leste, Law No 10/2011 of 14 September (*Approving the Civil Code*).

<sup>34</sup> Civil Code, article 1468.

<sup>35</sup> Civil Code, article 1473.

## II. Prohibitions on marriage

Relations prohibited from marrying guide us to determine relations who should be prohibited from entering sexual relations for the purpose of defining incest. According to article 1491 of the Civil Code, marriage is prohibited between relations with straight line consanguinity (a person and their grandparent, parent, son or daughter); relations of up to the second degree of consanguinity in the collateral line (understood by JSMP to include a person and their sibling, uncle or aunt, niece or nephew),<sup>36</sup> and relations with straight line affinity (a person and their spouse's grandparent, parent, son or daughter). The latter applies even if the person and their spouse are legally divorced.

### F. The Law on Protection of Witnesses (2009)<sup>37</sup>

The Law on Protection of Witnesses sets out a framework for the protection of all witnesses in civil or criminal proceedings when their lives, physical or psychological integrity, freedom or assets of considerable value are jeopardized due to their contributing to ascertaining the proof of facts or to the discovery of the truth in judicial proceedings.<sup>38</sup> The definition of witness is broad enough to include victims.<sup>39</sup> The protection measures can extend not only to the person in possession of the information, but also to their close family members.<sup>40</sup> These provisions, if applied appropriately, have the potential to protect victims of incest and other family members at risk from pressure and threats by the defendant for the duration of a trial and thereby to improve the court process.

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<sup>36</sup> There are different methods that can be used to count degrees of consanguinity. This interpretation is consistent with Canonical law and common law.

<sup>37</sup> Democratic Republic of Timor-Leste, Law No 2/2009 of 6 May (*Law on Protection of Witnesses*).

<sup>38</sup> Law on Protection of Witnesses, article 1.

<sup>39</sup> Law on Protection of Witnesses, article 2.

<sup>40</sup> Law on Protection of Witnesses, article 1(2).

#### 4. MECHANISMS SUPPORTING IMPLEMENTATION OF THE LAW

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In order for legislation to have an impact, there must be adequate mechanisms (policies, regulations, services and resources) in place to support its implementation. In the case of incest, there must be mechanisms in place to recognize when incest is occurring; support the victim to access the formal justice system; provide protection for the victim and their family prior to and during the trial period; and assist the victim to manage the physical, psychological and social consequences of incest and reintegrate into their community.

The LADV paves the way for improved responses to domestic violence by committing the government to raise public awareness of domestic violence through media campaigns (article 9), development of information and training materials (article 10), incorporation of domestic violence into school curriculum (article 11), and supporting domestic violence research (article 12). It also commits the government to improve assistance to victims (articles 15, 20-21), and goes some way to improving recognition and reporting of domestic violence by requesting that hospital and social assistance services report suspected violence (articles 22-23). However, the LADV does not recognize incest explicitly or give credit to the additional harm inherent in the crime of incest. It also falls short of providing a legal mandate for mandatory reporting of abuse.

Provisions to protect child victims of incest are particularly important, given the inherent vulnerability of children. Timor-Leste already has some formal child protection structures in place, although these do not yet amount to a functioning, comprehensive child and family welfare system. Child and family welfare is primarily the responsibility of the National Directorate for Social Reinsertion (DNRS), a part of the MSS, in combination with the Ministry of Justice and justice sector more broadly. MSS has obligations with respect to children under the LADV,<sup>41</sup> while Article 11 in Decree 10/2008 assigns DNRS a number of responsibilities concerning the protection of children and women, including:

- a) to develop and implement policies and programmes geared towards people in vulnerable circumstances
- b) to develop and implement programmes oriented towards shelters
- c) to develop and implement programmes aimed at promoting and protecting the rights of the child
- d) to strengthen relations and cooperation with other governmental and non- governmental bodies in the implementation of social reintegration services.

Within the DNRS there is the Department of Protection and Social Assistance to Vulnerable Children. This department includes the Protection and Assistance to Children at Risk and Victims of Abuse Unit, also called the Child Protection Unit, which employs a Child Protection Officer in each district of Timor-Leste as well as Social Animators in each sub-district.

MSS is also responsible for coordinating a referral pathway network comprised of government and civil society, which operates as a coordination mechanism for the welfare of women and children at the national and district levels. Under this network there is a National Child Protection working group, incorporating representatives from MSS, UNICEF, NGOs, the Vulnerable Person's Unit of the police, and other government representatives. There are also multi-sector Child Protection Networks that operate in each district to raise awareness of children's rights and support the work of MSS Child Protection Officers.

In addition, the National Commission on the Rights of the Child conducts child rights advocacy and operates as a watchdog for violations of children's rights.

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<sup>41</sup> See for example articles 32 and 33 on provisional alimony and social reintegration of victims.



## 5. CASE STUDIES

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The following case studies demonstrate some of the limitations of the existing legal framework and barriers to its effective implementation. The limitations are explored in more detail in Sections B and C below.

### I. Case study 1: Grandfather and granddaughter

Fidelia was four years old and lived in a remote parte of Timor-Leste in Dili jurisdiction. Her parents were farmers and worked everyday in their fields far from home. Fidelia spent most days alone in her house. One day in 2007, Fidelia was home alone when her 62-year-old grandfather Mauleki came to visit at midday. He said to Fidelia, 'come let's go together to weed the coffee plants'.

Grandfather Mauleki carried Fidelia to the family's coffee plantation. When they arrived and were surrounded by coffee plants, Mauleki took off Fidelia's clothes and forced her to lie down on the ground. He took out his penis, lay on top of her, spread her legs and thrust his penis between her thighs, rubbing between Fidelia's legs. Fidelia was scared and screamed. Eventually, a man named Maubere heard Fidelia's screams and came and saw Grandfather Mauleki lying naked on top of Fidelia. He shouted out 'Oi, what are you doing here?' Grandfather Mauleki was startled. He stood up quickly, grabbed his clothes and ran. Fidelia said to Maubere, 'Grandfather fucked me'. Maubere took Fidelia straight to the Xefi Aldeia and called Fidelia's parents.

This case was resolved simultaneously in the traditional and formal justice systems. Fidelia's family supported the defendant. They did not want Fidelia to give evidence and did not want the case to go the formal justice system; they wanted to resolve the case within the family. However, since sexual abuse of a minor is a public crime, it was explained to the family that the case must progress to trial, whether or not they wished this to happen.

The Dili District Court handed down its decision in 2011, approximately four years after the crime. No coercive measures were placed on the defendant to prevent him reoffending during this time. At trial, Maubere was the primary witness and described everything he saw. The defendant Mauleki confessed to everything. The prosecutor charged Mauleki with attempted sexual abuse under article 177(1) (sexual abuse of a minor) and article 23 (attempt) of the Penal Code.<sup>42</sup> It is not clear why the case was only charged as an attempt when article 177(2) makes it a crime to conduct 'any relevant sexual act' with a child under 14 and does not require penetration. It appears this was a misapplication of the law. Mauleki was sentenced to 2 ½ years imprisonment but the sentence was suspended for 3 years; a decision that was not appealed by the prosecution. There were no measures put in place by the court during the suspension period. Mauleki continues to live in the community near Fidelia's family home.

This case demonstrates that even when there is clear evidence of a serious sexual crime against a child, the formal justice system does not consistently punish the perpetrator or ensure protection of other children. The fact that the case took four years to resolve also shows the need for clear prioritization of child sexual abuse cases at all stages of the criminal process.

### II. Case study 2: Father and daughter

Buirubik was 14 years old and lived with her 45-year-old father, Lekirubik, in a remote part of Timor-Leste. One night in early 2008, Lekirubik entered Buirubik's bedroom while she was sleeping and removed her trousers and underwear. Buirubik had been sleeping heavily and only woke up when her trousers were around her ankles and her father had already penetrated her vagina with his penis. Buirubik wanted to scream but her father said 'Don't scream or I will kill you'. Lekirubik continued to regularly have sex with his daughter in the following months.

Eventually, Buirubik became pregnant to her father. It was only then that her family realised what had been happening. When Buirubik's grandfather Maulu found out, he went straight to the police to process the case in the formal justice sector.

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<sup>42</sup> This crime took place prior to the introduction of the Timorese Penal Code, which came into effect on 28 June 2009. Cases that took place prior to 28 June 2009 should ordinarily be charged under the Indonesian Penal Code. However, where the retroactive application of a law favours the accused, the court may apply the new law (as per article 31(5) of the Constitution).

Buirubik wanted her case to be processed in the formal justice system. Importantly, her family supported her in this decision. Her family believed that what her father had done was not only against the law but also against their local traditions and culture. Buirubik could have withdrawn the case if she had wanted to, as the crime was charged under the Indonesian Criminal Code whereby rape of a minor is a semi-public offence unless the victim is less than 12 years of age. Almost certainly the support of her family was critical in her unwavering resolve to bring the case to trial.

The decision in this case was handed down in 2012, approximately four years after the crime was first perpetrated. During the four-year trial period Buirubik lived in a safe house while Lekirubik was allowed to remain in his home. No legal measures were put in place by the court to prevent Lekirubik from having contact with other vulnerable children during this time.

When the decision was handed down in 2012, Buirubik's whole family travelled from their remote aldeia to the court to support her and hear the decision. The suspect was charged under article 287 of the Indonesian Penal Code, which criminalises sex with a woman less than 15 years of age (maximum penalty 9 years). The suspect was sentenced to 7 years in jail and required to pay civil indemnification of USD 700.

This case shows that the formal justice system can achieve positive outcomes for incest victims when the victim receives sufficient support from their family, community, justice actors and support services. However, the case also shows the problems that arise when courts do not apply pre-trial coercive measures; Buirubik was forced to live for four years in a safe house while the defendant was free to live in his home, with no measures in place to prevent him reoffending, during this time.

### III. Case study 3: Father and daughter<sup>43</sup>

Lia was 17 years old and lived with her mother, father and siblings in a house that sat alone, surrounded by fields. One night in mid 2008 Lia awoke to find her father on top of her removing her clothes. She tried to scream but her father threatened to kill her if she did. She stayed silent while he raped her. This was repeated three times in the following months.

Lia became pregnant to her father later that year. She did not inform anyone, but her mother noticed the changes to Lia's body. Lia's mother questioned Lia's father about what had happened. He was drunk and violently assaulted her. The following day, Lia and her mother and siblings escaped to their neighbours and informed the Xefi Suku, who in turn informed the police. The Vulnerable Person's Unit of the Police notified VSS and transported Lia to the hospital where her pregnancy was confirmed. She was then taken to a safe house.

Lia decided to pursue the case through the legal system. VSS accompanied Lia to meet with the prosecutor, but was denied entry while Lia was being interviewed. Following the interview the prosecutor informed VSS that Lia did not wish to pursue the case for fear that there would be no one left to provide for her siblings. Although this was a public crime and therefore should not have been dependent on Lia's willingness to press charges, VSS was led to believe the case was closed.

For a year-and-a-half Lia lived in the safe house, where she gave birth to a baby girl. She then returned to her community, restored relations with her father, got married, and moved to another district with her husband. Her father refused to allow her to take her daughter with her, so the daughter remained with Lia's father. No measures were put in place to protect Lia's younger siblings or baby against the possibility of themselves becoming victims of incest.

Lia's father received a notification to appear in court in February 2011, much to the surprise of him, Lia and VSS, all of whom believed the case had been closed in 2008. VSS contacted Lia and brought her to Dili to give evidence. The trial was closed to the public.<sup>44</sup> VSS were not permitted to attend the trial, despite article 25 of the LADV that guarantees the right to legal representation for victims of domestic violence in all proceedings. At the trial, Lia's father admitted to having had sex with his daughter on three occasions, but claimed it was consensual. He also admitted he was the father of Lia's child. Lia, however, gave evidence

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<sup>43</sup> This case study was also reported in *Legal Protection for Victims of Gender Based Violence: Laws Do Not Yet Deliver Justice*, published by VSS in 2011 and available from the JSMP webpage [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

<sup>44</sup> Article 76 of the Criminal Procedure Code states that "In the case of a proceeding in connection with a sexual criminal offence against a person aged less than 18 years, the proceeding shall, as a rule of thumb, be devoid of its public character."

that it was not her father's child, possibly to protect her new marriage and avoid the stigma if her family-in-law were to find out about the incest.

In March 2011 the Court handed down its decision, finding the defendant not guilty of rape as defined in article 285 of the Indonesian Penal Code<sup>45</sup> due to a lack of evidence that the sex was non-consensual. The defendant was absolved and returned home to continue living with his wife, 14 year old daughter and three year old daughter born out of his sexual relationship with Lia.

In August 2011 VSS was contacted to assist Lia's 14 year old sister who was allegedly raped by the defendant four times since the March 2011 decision. JSMP is unable to comment further on this case as it is currently in court. With assistance from VSS and MSS, the Vulnerable Person's Unit removed Lia's three-year-old daughter from the defendant's home in late 2011. Lia's daughter and sister now live in a safe house.

The prosecution appealed the decision of the Dili District Court in Lia's case, arguing that the court failed to take into account relevant evidence provided at trial and that important parts of the evidence were not recorded in the trial minutes. In April 2012, the Court of Appeal dismissed the appeal. The Court of Appeal agreed with the Dili District Court that despite it being proven that Lia's father had sexual relations with Lia on three occasions, that prior to this Lia was a virgin, and that Lia's father was also the father of Lia's child, no crime had been established. This was due to the fact that the court considered there was insufficient evidence of use of violence or threat of violence by Lia's father.

This case demonstrates why it is necessary to have an explicit crime of incest that applies regardless of victim consent, or whether the perpetrator uses violence or threat of violence. It is clear that Lia's father abused his position of power to control his daughter, so consent should be irrelevant to the crime and it should not be necessary to show that he used violence or threats. The decisions of the Dili District Court and the Court of Appeal also show a distinct lack of gender sensitivity on the part of the court; in particular a lack of understanding of the acute barriers that victims of sexual assault face when giving evidence.

Furthermore, the fact that Lia's siblings and baby continued to cohabit with Lia's father in an isolated location without any protection or monitoring measures in place for so long illustrates the inadequacies of the existing child protection mechanisms. Consistent with the aforementioned case studies, it also highlights the need for a system for case prioritization whereby cases of sexual assault are given priority in order to guarantee the safety of children, minimize harm to the victim and preserve evidence.

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<sup>45</sup> The Indonesian Penal Code was applied in this case because the incident occurred in 2008 and the Timor Leste Penal Code only came into force in April 2009. The provisions of the Indonesian Penal Code were more favorable to the defendant in this case (Under the Timor Leste Penal Code the maximum penalty for sexual abuse of a minor is 20 years. Under the Indonesian Penal Code, the maximum penalty for committing an obscene act against ones underage child is 7 years). Therefore, in accordance with Article 3 of the Timorese Penal Code dealing with the retrospective application of the law, the Indonesian Penal Code was to be applied.

## 6. LIMITATIONS IN TIMOR-LESTE'S LEGISLATIVE FRAMEWORK

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### A. Limitations of the Penal Code as it relates to incest

The existing legislation in place to protect and prevent against incest has some significant gaps. Most notably, the legal framework does not recognize that the notion of consent in crimes of incest is problematic due to the significant power imbalances that exist between the victim of incest, regardless of age, and the perpetrator. At present, where the victim is more than 14 years of age, incest can only be prosecuted where use of violence or serious threat of violence can be proven. While it may seem obvious that a victim would not freely consent to have sex with her close relative, there are a number of reasons why it can be difficult to prove lack of consent in court.

In JSMP's experience, and as exemplified in Case Study 1, victims of incest are often under significant pressure from their families and communities not to give evidence, or even worse, to give false evidence. The social stigma attached to incest compounds this problem. As was likely the situation in Case Study 3, while a victim may tell the truth in her initial interview with the police or prosecutor, by the time of the trial, often years later, she may have moved on with her life and no longer wish to speak about the event. In Case Study 3, even though the defendant admitted to the sexual intercourse with his daughter, he was absolved because there was no evidence of the victim's lack of consent.

In other circumstances, the victim may accurately state that she consented to incest, but the meaning of consent must be questioned in circumstances where there is significant dominance in power and economic or other dependency between the victim and the perpetrator. This makes it essential to have a specific crime of incest where consent is irrelevant.

A comparison between Timor-Leste's legal framework as it relates to incest and that of Portugal and Australia is provided below. Appendix A also contains an overview of legislation concerning incest in a sample of other jurisdictions. There are many examples of jurisdictions which incorporate incest as an explicit crime in its own right, regardless of consent. This has the benefit of reducing police and prosecutorial discretion about which crimes to charge defendants with, making it less likely that perpetrators of incest will be charged with less serious offences or escape charges altogether. Other jurisdictions, such as Portugal and Indonesia, do not prohibit incest between consenting adult family members, yet still have stronger protections for children and adults who are vulnerable to sexual abuse by people on whom they are economically or otherwise dependent.

### B. Comparison of incest provisions between jurisdictions

#### I. Portugal

Incest is not explicitly criminalized in Portugal. Sexual acts between close family members are only illegal in circumstances where force is used, there is a lack of consent, the victim is under 14, there is exploitation of a relationship of dependency, or where the victim's inexperience is exploited (for victims between 14 and 16). However, the Portuguese Criminal Code contains a number of provisions designed to protect vulnerable members of the community from sexual abuse by those who have a legal responsibility to protect them. This additional protection is based on the idea of 'dependency' rather than family relationship.

Articles 163(1) and 164(1) of the Portuguese Criminal Code define sexual aggression and sexual violation (rape) respectively and are broadly analogous to articles 171(1) and 172(1) of the Timor-Leste Penal Code.

Articles 163(2) and 164(2) of the Portuguese Criminal Code provide that where there is exploitation of a relationship of hierarchical economic or workplace dependency, accompanied by some form of order or threat, relevant sexual acts or penetration are a crime. These provisions appear to apply irrespective of victim consent. However, they are punishable by a significantly lesser sentence than those of sexual aggression or rape.

Regarding minors, article 172 of the Portuguese Criminal Code criminalizes sexual acts with a child less than 14 years of age. Consent by the victim is not relevant to this crime and it is not necessary to prove use of force. This provision is broadly analogous to article 177 of the Timor-Leste Penal Code.

Article 173 of the Portuguese Criminal Code extends the effect of article 172 to children 18 years and under in circumstances where the perpetrator is responsible for the child's education or otherwise for assisting the child. This means that if, for example, a 17-year-old girl has sex with her father, it is not necessary to prove lack of consent or use of force.

Article 174 of the Portuguese Criminal Code criminalizes sexual acts with adolescents (between 14 and 16 years old) where the perpetrator takes advantage of the inexperience of the adolescent. However, the penalty for this crime is substantially less than those under articles 172 or 173. This provision is analogous with article 178 of the Timor-Leste Penal Code.

It can be seen that while Portugal does not criminalize incest explicitly, its legal framework contains significantly stronger protections for victims of incest than the Timor-Leste framework. Where there is a relationship of dependency, sexual acts or intercourse with a child under 18 years is criminalized, irrespective of consent. With respect to adults, if there is exploitation of a relationship of economic dependency and some type of threat or order, a crime will still have been committed. Given that the Timor-Leste Penal Code is modeled on the Portuguese Criminal Code, it is not clear why the additional protections contained in articles 163(2), 164(2) and 173 of the Portuguese Criminal Code were not enacted in Timor-Leste. If they had have been, this may have avoided some of the present limitations.

## II. Australia

All Australian State and Territory jurisdictions provide for specific crimes of incest.<sup>46</sup> For example, Victorian legislation makes it a crime for a person to take part in an act of sexual penetration with a person who that he or she knows to be:

- his or her child or other lineal descendant or his or her stepchild;
- the child or other lineal descendant or the stepchild of his or her de facto spouse;
- his or her father or mother or other lineal ancestor or his or her stepfather or stepmother;
- or his or her sister, half-sister, brother or half-brother.

Consent is not a defense to a charge of incest under the Victorian legislation. Where the incest is committed against a person in a relationship of dependence, such as a child or stepchild, the maximum sentence is 25 years imprisonment.

Other Australian jurisdictions cover adoptive relationships in the incest provision. Section 222 of the Criminal Code of Queensland makes it a crime for a person to have 'carnal knowledge' of a person who he or she knows to be his or her offspring or other lineal descendant, sibling, parent, grandparent, uncle, aunt, nephew or niece. These family relationships also include half, adoptive, step, foster and *de facto* relationships. Consent of the other person is irrelevant. The maximum penalty for the crime of incest is life imprisonment. Attempted incest is punishable by 10 years imprisonment. This provision is significantly broader than the approach taken in the Portuguese Criminal Code.

Some Australian jurisdictions also have offences that apply when a perpetrator commits a sexual act in the context of a special relationship of trust or authority with the victim. Consent is not a defense in these provisions. For example, in New South Wales it is an offence to have sexual intercourse with a child between 16 and 18 years of age where that child is under the 'special care' of the perpetrator.<sup>47</sup> These relationships include where the perpetrator is guardian, foster parent, teacher or health professional to the victim. South Australia defines this relationship more broadly to include where the perpetrator is the victim's employer or has authority over the child's employment.<sup>48</sup>

Specific articles relating to incest found in a sample of other Pacific and South-East Asian jurisdictions are outlined in Appendix A.

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<sup>46</sup> See *Crimes Act 1900* (NSW) section 78A; *Crimes Act 1958* (Vic) section 44(1)–(4); *Criminal Code* (Qld) section 222(5)–(7A); *Criminal Code Act Compilation 1913* (WA) section 329; *Criminal Law Consolidation Act 1935* (SA) section 72; *Criminal Code Act 1924* (Tas) section 133; *Crimes Act 1900 (ACT)* section 62; *Criminal Code Act 1983* (NT) section 134.

<sup>47</sup> *Crimes Act 1900* (NSW) section 73.

<sup>48</sup> *Criminal Law Consolidation Act 1935* (SA) section 49(5).

## 7. LIMITATIONS CONCERNING IMPLEMENTATION OF THE LAW

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In addition to the aforementioned limitations in the legal framework that currently exists in Timor-Leste, JSMP has observed through court monitoring and the provision of legal aid to women and girl victims of violence that the law relating to sexual abuse is not consistently implemented or applied to provide the fairest outcome for victims. The below points highlight key concerns as observed by JSMP relating to protection of incest victims and punishment of perpetrators.

### I. Limited uptake of protective or coercive measures

As noted in Section 2 above, judges have the ability to impose coercive measures on the defendant during investigation (at request of the prosecutor) or at any other procedural phase of the trial if there is reasonable fear that criminal activity might be pursued, the perpetrator will flee, or there will be disruption to peace and public order. The measures available to the judge are outlined in article 186-203 of the Criminal Procedure Code. Further, in the case of domestic violence crimes, the judge can remove the defendant from the place of family residence or prohibit contact between the defendant and victim when it is reasonably foreseeable that the defendant may repeat acts of aggression which endanger the victim's life or physical, psychological or sexual integrity of the victim. These measures are outlined in article 37 of the LADV.

The Law on Protection of Witnesses also sets out a range of measures that can be used by the court to protect any person in possession of information relevant to a court proceeding that puts them in danger. Measures include, for example, non-disclosure of the victim's identity, special security measures, or provision of evidence by teleconference. These provisions are reinforced by article 39 of the LADV.

JSMP has rarely observed these measures being adopted by the courts in cases of domestic and sexual violence. This is to the detriment of victims, who, as shown in the above case studies, are typically forced to spend years in a safe house while the perpetrator continues to reside with the family, often cohabiting with the victim's siblings who may also be at risk of abuse. In other cases, the failure to apply witness protection provisions leads to weakened evidence, as victims change their story under pressure from the defendant or in order to avoid social stigma.

It is unclear why the courts have not made greater use of coercive and protective measures. It may be due to inadequate evidence being made available to the prosecutor or a lack of awareness about the availability of these protective or coercive measures. Either way, it is necessary to ensure that victims and other potential affected parties are provided with adequate protection. A common perception in the community is that when victims bring their case to the formal justice sector it is they who are punished by having their freedom restricted in a safe house, rather than the perpetrator who continues to live in his home. If protective or coercive provisions are not better utilized, public confidence in formal processes will be damaged, victims will be dissuaded from acknowledging and reporting crimes and offenders will not be brought to justice.

### II. Delays in trial hearings

The above case studies demonstrate the typical delays that occur in the formal justice system. In Case Study 1 and 2 approximately four years passed between the crime being reported and the final hearing. In Case Study 3 there were three years between the initial report and the hearing, with a further year waiting for the Court of Appeal decision. The implication of this in the latter case study was a change in the victim's statement and consequent loss of evidence and acquittal.

Other incest cases monitored by JSMP similarly show long time lapses between the reporting of the crime and trial hearing. As noted in Section 2D above, of the 32 incest cases that VSS has supported between January 2010 and June 2012, the court has made a decision in only 9 cases. Two cases are currently being processed by the police and 12 are still being processed by the Public Prosecutor's Office.

Such delays are problematic for a number of reasons. They lead to loss of evidence, making it more difficult to secure convictions at trial, and prolong the trauma for victims wishing to move on with their lives. Delays also lead to victims disengaging from the formal justice sector or choosing not to report crimes in the first place. Furthermore, in circumstances where victims are economically dependent on the perpetrator, these delays leave victims with no choice but to resolve disputes through local justice mechanisms, often 'reconciling' with perpetrators and remaining in the home.



In part, the delays in the justice sector may be due to insufficient numbers of court actors, including public prosecutors, public defenders, judges and translators. There are significant problems with human resources in the justice sector, particularly in jurisdictions outside of Dili. Similarly, the Vulnerable Person's Unit of the police continue to be under-resourced, while rotation of police officers results in continuous gaps in knowledge. These resource limitations must be addressed in order to ensure that perpetrators are prevented from committing further violence or abuse and to increase faith among citizens that the formal justice system is able to deliver justice in a timely fashion.

It is also vital for justice actors to have a system of prioritisation so that serious crimes of sexual assault, crimes involving child victims and crimes of domestic violence are prioritised, in recognition of the gravity of such crimes. This would send a strong message to the community that such behaviour is not accepted by the state. Even without additional resources, such a system of prioritisation could reduce time frames in incest cases and remove discretion from court actors about which cases to focus on.

### **III. Lenient and inappropriate sentencing**

As can be seen in Case Studies 1 and 3, even where there is clear evidence of serious sexual abuse of a child, courts have been unable to appropriately charge, convict and sentence perpetrators. In Case Study 3 this meant that the defendant was acquitted, while in Case Study 1 it meant that the perpetrator was given a suspended sentence and continues to live in the community.

In JSMP's experience it is not uncommon for courts to hand down very short or suspended sentences to perpetrators of child abuse and domestic violence. Doing so disregards the serious nature of such crimes and belittles the suffering endured by the victim. It may also discourage future victims from reporting such crimes to the formal justice system. JSMP has observed that the widespread application of suspended sentences in cases of domestic violence has damaged public confidence in the formal justice sector. Suspended sentences are generally not perceived as a penalty at all, particularly since they are often applied in isolation without accompanying penalties such as fines, community service or prohibitions.

In part the problems with sentencing may be due to incorrect charges being formulated by prosecutors. However where a judge considers that the facts presented at trial constitute a crime different to that charged by the prosecution, the court has an obligation to inform the prosecution and defender and give them the opportunity to prepare a position with respect to a more serious crime.<sup>49</sup> In case study 1, for example, the court could have convicted the defendant of sexual abuse of a minor under article 177(2) of the Penal Code, despite the fact that the prosecutor charged the defendant with attempted sexual abuse of a minor under articles 177(1) and 27.

Inadequate sentencing also represents a failure to appropriately weigh-up the various aggravating and mitigating factors in each individual crime. The Penal Code provides that if the court has a choice between imposing a penalty or security measure that does not restrict the defendant's liberty versus one which does, it must give preference to the former if it sufficiently fulfils the purpose of the penalty or security measure.<sup>50</sup> In JSMP's experience, this has been interpreted to mean that the court should always apply the lowest or least restrictive penalty available, however that is not the case. Courts need to weigh up the full range of aggravating and mitigating factors, including, for example, the relationship between the perpetrator and victim, the age of the victim, whether there has been an abuse of authority, and any other special vulnerability of the victim.<sup>51</sup>

In order to encourage victims of incest to pursue cases in the formal justice system, protect victims from further assaults, and deter perpetrators, it is vital that the capacity of the justice sector to charge and sentence perpetrators appropriately is increased.

### **IV. Inadequate child protection mechanisms**

Although Timor-Leste has a child protection system and the MSS has given significant attention to its development, the system is currently in its very early stages of development and is often weak and ineffective. There is only one Child Protection Officer allocated to each district and these officers have

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<sup>49</sup> Criminal Procedure Code, articles 274-275.

<sup>50</sup> Penal Code, article 62.

<sup>51</sup> See for example article 52 of the Penal Code on general aggravating circumstances.



responsibility for a wide range of tasks, some of which fall beyond the scope of child protection. While some of these officers are very committed and work diligently, they are unable to adequately attend to their many functions and are not qualified social workers or counselors. There is no clear code of conduct, disciplinary procedure, promotion scheme, professional development program, or legislative basis for the work that these child protection officers undertake. There is also limited public understanding of the role of Child Protection Officers and the need for a child protection system more broadly.

Incest is an extreme form of child abuse and as such, strong child protection systems are particularly important in incest cases. It is notable that the child abuse taking place in Case Study 2 and 3 went unnoticed until the victim became pregnant. In a well resourced and functioning child protection system the victim would likely have come to the attention of an adult acquaintance or service provider and child protection would have been notified and able to investigate much earlier, possibly preventing further abuse and pregnancy.

A key limitation of the child protection system is that it has no clear legislative basis. Timor-Leste has not yet passed a law setting out the elements of its child protection system, the responsibilities of different actors and the circumstances in which state officials can intervene for the purpose of protecting children at risk without the consent of the child's family. While MSS and UNICEF have developed referral guidelines for police, service providers and child protection officers dealing with child protection cases, these guidelines do not have legal authority and are useful only when all actors agree to the interventions and referrals proposed. This is seldom the case in situations of incest where the perpetrator will refuse to allow removal of the victim from the home and where local justice actors may be reluctant to intervene due to the social stigma attached to such crimes.

Furthermore, the relationship between the justice system and the child protection system is unclear. Article 3(1)(b) of the Statute of the Public Prosecution Service provides that prosecutors have the responsibility to ensure the defense of legally incompetent persons including minors.<sup>52</sup> Unfortunately however, due to lack of child protection legislation, prosecutors tend only to represent minors once a criminal case has already been instigated or in civil cases such as requests for alimony. They do not generally represent minors at risk of abuse where a crime or civil cause of action has not yet been made out. In this respect it is notable that in the three case studies discussed above, state intervention to protect children at risk only happened after a serious crime had taken place and the case entered the criminal justice process.

## **V. Poor coordination, case management and data collection**

Protection of children from incest and sexual abuse more broadly requires close coordination between different state and non-state actors. It also requires strong case management processes and the collection of accurate data that can be used to formulate effective policy and justice responses. There have been some initiatives undertaken to address case management practices, such as the collection of data by MSS from members of the Child Protection Referral Network and the recent investment in the development of an electronic case management system by the Public Prosecutor's Office and the National Police. However the above case studies and statistics concerning incest show that coordination, case management and data collection remain a barrier to the effective processing of incest cases. In Case Study 3 for example, the Child Protection Officer was not able to effectively coordinate with the prosecutor and police to obtain an order for protection of the victim's sister and daughter. JSMP has also observed that important information relevant to children's protection is not consistently passed by the police to the prosecutor, or by the prosecutor to the court. This leads to delays, failure to apply protective and security measures, and inappropriate sentencing.

In combination with these efforts, there is a need for public education activities to increase community awareness of the crime of incest and the extensive harm it can cause to the victim, their family and community, and to society more broadly. This would assist with efforts to encourage reporting of incest and investigation where there is suspicion of child abuse by persons in authority.

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<sup>52</sup> Democratic Republic of Timor-Leste, Law 14/2005 of 16 September (*Statute of the Public Prosecution Service*).

## 8. PROPOSALS FOR CHANGE

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### A. Amend the Penal Code to better prevent and protect against incest

An effective way to prevent incest from occurring and to better protect victims of incest in the future would be to incorporate a new article in the Penal Code that explicitly recognizes incest as a crime regardless of victim consent or age.

As discussed above, not all jurisdictions incorporate incest as a specific article or prohibit incest between two consenting adults. However, JSMP believes an explicit crime of incest would be appropriate in Timor-Leste in light of the significant power imbalances between men and women that exist within and beyond the family unit and between children and adults, and the limited public awareness concerning incest and its long-term repercussions.

It is important that the crime of incest apply irrespective of consent or age. This is to protect against potential scenarios whereby a person greater than 14 years of age consents to incest without a full understanding of the impacts of incest or their own rights; as a result of manipulative techniques employed by the perpetrator to convince the victim he or she is responsible for the crime; or due to a belief that speaking out will bring shame upon the family or place siblings or other family members in greater harm. It also avoids problems where the evidentiary burden of 'lack of consent' cannot be proven because the victim refuses to give evidence or gives misleading evidence, as was highlighted by Case Study 3 whereby VSS believes the victim felt compelled to give misleading evidence in order to avoid stigma and shame that may threaten her new marriage.

Creating an explicit crime of incest may also serve to increase recognition of the crime and mobilize action to strengthen prevention efforts. As with the LADV, such a provision could be used as a tool for advocacy, education and cultural change. With greater public awareness of the seriousness of incest as a crime and its consequences for both victim and society more broadly, interventions may occur sooner and authorities may be asked to respond to community demands for justice.

In the drafting of a new article, it is important that the following points be given consideration:

- The definition of incest should include both sexual intercourse as well as other relevant sexual acts that take place between the offender and his/her child or parent, grandchild or grandparent, brother or sister, half brother or sister, or parent or sibling that is a step relation or relation through legal adoption.
- The crime of incest should carry, at a minimum, a penalty consistent with the crime of rape to reflect the severity of the crime and extensive harm that can arise for the victim.
- The sentence range for crimes of incest should vary according to whether or not the victim is under 18 years of age and whether the crime involved sexual intercourse.
- A crime of incest should incorporate aggravation provisions including the degree of authority the perpetrator has over the victim, the vulnerability and age of the victim, and the degree of bodily and psychological harm resulting from the act.
- The crime of incest should be a public crime to limit reliance on victim testimony, since victims often do not speak out due to a combination of fear, shame and coercion.
- Consent of the victim should not exclude unlawfulness of the act.
- There should be an exemption to ensure that the person who is the victim cannot be prosecuted for the crime, i.e. ensuring that the crime only applies to the person who is exploiting the family relationship of power and cannot be used to prosecute a victim.

### B. Strengthen provisions in the Penal Code relating to sexual crimes in circumstances of dependency

In addition to the creation of a specific crime of incest in the Penal Code, JSMP recommends the strengthening of existing provisions concerning sexual crimes in the context of dependency. This is to ensure that relations which fall outside the scope of a crime of incest (for example guardians through informal

adoption uncles, aunts, nieces and nephews; or other extended familial relations who cohabit with the victim or are in a position of familial dominance), who abuse their familial authority or exploit a relationship of dependency, are appropriately deterred and punished for their actions. This could mirror articles 163(2) and 164(2) of the Portuguese Criminal Code, whereby penetration and other relevant sexual acts are considered a crime, irrespective of consent, where there is exploitation of a relationship of hierarchical economic or workplace dependency and some form of order or threat.

In carrying out these amendments, the following points should be given consideration:

- Adoption in Timor-Leste is primarily informal rather than legally ratified, but this does not mean that the relationship of dependency between the victim and adoptive parent or sibling is less significant. The degree of dependency in the relationship must be given due consideration when determining an appropriate penalty.
- In Timor-Leste it is common for children to live for long periods with members of their extended family, often in order to attend school or to work in the home. While this is not considered by the community to be adoption, these children can be just as vulnerable to sexual abuse and manipulation of their relationship of dependency. It is therefore important that exploitation of this vulnerability is appropriately criminalised in the Penal Code.
- Many marriages in Timor-Leste are not formally registered and therefore are not recognised by the Civil Code. This means that a step relation who commits incest may not be covered by the definition of incest. Strengthening the Penal Code to cover sexual abuse in relationships of dependency will allow such crimes to be better prosecuted.

The recommended amendments would be:

- Amend article 171 of the Penal Code to include a subsection broadly analogous with article 163(2) of the Portuguese Criminal Code stating that any person who, abusing their authority due to a relationship of dependency, uses an order or threat to practice a relevant sexual act will commit a crime.
- Amend article 172 of the Penal Code to include a subsection broadly analogous with article 164(2) of the Portuguese Criminal Code stating that any person who, abusing their authority due to a relationship of dependency, uses an order or threat to have sexual intercourse, including oral or anal intercourse, will commit a crime.
- Include a new provision in the Penal Code after article 177 analogous with article 173 of the Portuguese Criminal Code stating that anyone who commits the acts referred to in article 177(1) and (2) of the Penal Code with a minor between 14 and 18 years old, where the person is responsible for that person's education or care will commit a crime.

These provisions should have the combined effect of strengthening articles 171 and 172 of the Penal Code where there are relationships of familial dependency, irrespective of age and use of force, and extending the crime of sexual abuse of a minor contained in article 177 to victims up to 18 years of age where a relationship of dependency exists.

Appropriate minimum and maximum penalties for these new crimes should be formulated which reflect the gravity of the abuse of power involved.

### **C. Improve implementation of the law**

JSMP believes that existing legal provisions and structures in place relating to child abuse can be implemented more effectively in order to provide better protection to children and women victims of incest. Specifically, improvements can be made in the following areas:

- Increased consideration and application of protective and coercive measures available under the Penal Code, LADV and Witness Protection Law by judicial actors in cases of incest would benefit victims and help ensure that perpetrators do not engage in any further criminal acts prior to and during the trial period. The choice of appropriate measures should be determined on a case-by-case basis, in consideration of the safety of vulnerable persons cohabiting with the accused, including witnesses, and possible financial dependency.

- Increased resources should be allocated by the State to the courts and prosecution services in order to reduce delays in the formal justice process. These judicial actors should introduce a system of case prioritization for investigation, resources and prosecution in order to ensure that priority is given to the prosecution of crimes involving child victims, sexual assault and domestic violence.
- Justice actors, including the courts and prosecution services, should consider ways to improve charging and sentencing in crimes of sexual assault and domestic violence, such as introducing charging and sentencing guidelines, receiving training on the law relevant to gender-based violence and more active consideration by judges and prosecutors of the appropriateness of particular charges and sentences in each individual case.
- There needs to be increased investment in child protection structures, along with enactment of a comprehensive legal framework for child protection that makes clear the links between the justice system and the child protection system, the role of Child Protection Officers and the circumstances in which the state can intervene in a family without its consent for the purpose of protecting a child at risk.
- The various state and non-state actors involved in provision of services to victims of incest and the justice sector should explore ways to improve coordination, case management and the collection and collation of data on incest cases. Increased publically available data concerning the number of reports of incest and prevalence rates would enable the government and service providers to tailor preventative and response efforts.
- There is a need for public education activities to increase community awareness of the crime of incest and the extensive harm caused by incest, including repercussions for the victim, their family and community, and society more broadly. This would assist with efforts to encourage reporting of incest and investigation of suspicion of child abuse by persons in authority.

## **9. LIST OF RECOMMENDATIONS**

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- 1. Incorporate a specific crime of incest into the Penal Code that applies irrespective of victim consent or age.**
- 2. Strengthen provisions in the Penal Code relating to sexual crimes in circumstances of dependency to deter and punish perpetrators of sexual crimes who abuse their familial authority or exploit a relationship of dependency.**
- 3. Utilize available protective and coercive measures to prevent further crime and protect victims and other vulnerable persons from abuse.**
- 4. Increase resources for the courts and prosecution services and introduce a system for case prioritization to reduce delays in the prosecution of perpetrators.**
- 5. Enhance capacity of justice actors to charge and sentence perpetrators of sexual crimes consistently and appropriately, in accordance with the severity of the crime.**
- 6. Increase investment in child protection structures and establish a clear legal framework that makes clear the authority of the state to intervene in cases of child abuse.**
- 7. Improve coordination, case management and data collection procedures among state and non-state actors involved in provision of services to victims of incest.**
- 8. Invest in public education activities to raise community understanding and mobilize community action around the crime of incest.**

## 10. CONCLUSION

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Incest is a serious crime that entails both a physical violation as well as an abuse of trust and familial authority. It causes severe psychological and often physical harm for the victim and undermines the sanctity of the family. The effects of incest are lasting and should be recognized as serious public policy concerns with implications for the health of society.

JSMP recognizes the extensive efforts and investment that the Timor-Leste Government has made to improve the formal justice sector, mobilize action in response to the issue of domestic violence, and establish a child protection system to better protect the rights of the child. These advances have taken place in a relatively short time and demonstrate a strong commitment on the part of the state to fulfill its obligations as per the Timor-Leste Constitution, the CRC and the CEDAW.

Despite these efforts, it is clear from JSMP's case work and court monitoring observations that victims of incest in Timor-Leste are not yet given adequate protection in the formal justice sector. Most notably, the Penal Code requires victims of incest who are more than 14 years of age to prove lack of consent; a requirement that is inappropriate given the nature of the crime and associated pressures on the victim and associated parties to avoid testifying in order to distance themselves from the stigma and shame attached to the crime. There are also serious limitations concerning the implementation of existing law in Timor-Leste and associated mechanisms for the protection of victims, which need to be addressed immediately in order to deliver justice to long-suffering victims of incest, deter future crimes of incest, and restore public faith that the formal justice system is capable of serving the people it is designed to protect.

## APPENDIX A: TREATMENT OF INCEST IN A SAMPLE OF JURISDICTIONS

| Jurisdiction                                       | Article reference | Applicable relations  | Relevant sexual acts                                    | Treatment of consent | Sentence ranges   | Related articles  |
|--|-------------------|---|---|----------------------|---|---|
| Vanuatu Penal Code (1981)                          | Article 95        | Offender and his/her child or adopted child; parent or adopted parent; grandparent or grandchild; brother or sister, or half brother or sister                    | Sexual intercourse                                      | Not a defence        | 10 years  | Article 96 covers sexual intercourse between an offender and a cohabiting child less than 18 years of age who is living like a member of the family (including a stepchild or foster child). Consent is no defence. Penalty is 10 years imprisonment.   |
| Fiji Penal Code (1945)                             | Article 178       | A male offender and his daughter, mother, granddaughter, sister or half sister<br><br>A female offender and her son, father, grandfather, brother or half brother | Carnal knowledge, or attempt to attain carnal knowledge | Not a defence        | 7 years for male or female offender<br><br>Life imprisonment if victim is less than 13 years of age | Article 155 covers any person who unlawfully and carnally knows a girl less than 13 years of age. The penalty is life imprisonment, with or without corporal punishment, or 5 years imprisonment with or without corporal punishment for attempts. Consent is no defence.<br><br>Article 156 covers any person who unlawfully and carnally knows a girl between 13 and 16 years of age. The penalty is 5 years imprisonment with or without corporal punishment. Consent is no defence. |
| Vietnam Penal Code (1999)                          | Article 150       | Offender and his/her direct blood line; sister, brother, or half sister or brother  | Sexual intercourse                                      | Not stated           | 6 months – 5 years  | Article 112 covers rape of persons 13-16 years of age. Consent is no defence. Where rape is incestuous, the penalty is 12-20 years. If the victim is less than 13 years of age, the penalty is 12-25 years of imprisonment, life imprisonment or capital punishment.<br><br>Article 113 covers persons who employ trickery to induce persons dependent on them to have sexual intercourse against their will. Where this is incestuous, the penalty is 7-18 years imprisonment.         |
| Lao People's Democratic Republic Penal Code (1989) | Article 124       | Offender and his/her child or adoptive child; parent or adoptive parent; grandparent or step grandparent; brother or sister of the same blood; cousin             | Sexual relations  | Not stated           | 6 months – 5 years  | Article 119 covers rape, which carries a penalty of 3-5 years. This is increased to 5 years for rape against a girl 15-18 years of age and 7-15 years for rape against a girl less than 15 years of age.  |



## APPENDIX B: INTERNATIONAL INSTRUMENTS RELEVANT TO INCEST

### Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)<sup>53</sup>

Article 1: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 5: States Parties shall take all appropriate measures: (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

### Convention on the Rights of the Child (CRC)<sup>54</sup>

Article 1: For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 19: States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child 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 child.

Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;

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<sup>53</sup> Democratic Republic of Timor-Leste, Parliamentary Resolution No. 11/2003 Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (17 September 2009).

<sup>54</sup> Democratic Republic of Timor-Leste, Parliamentary Resolution No. 16/2003 Ratification of the Convention on the Rights of the Child (17 September 2009).

(c) The exploitative use of children in pornographic performances and materials.

Article 39: States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment, which fosters the health, self-respect and dignity of the child.

**International Covenant on Civil and Political Rights (ICCPR)<sup>55</sup>**

Article 24: Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

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<sup>55</sup> Democratic Republic of Timor-Leste, Parliamentary Resolution No. 3/2003 Ratification the International Covenant on Civil and Political Rights (23 May 2003).

## APPENDIX C: TEXT OF ARTICLES RELEVANT TO INCEST - TIMOR-LESTE PENAL CODE

### Article 52 General aggravating circumstances

General circumstances aggravating the responsibility of the perpetrator are all those prior to, during or after the fact that, although not part of the legal description of the act, yet reveal a higher degree of unlawfulness of the act, conduct or guilt of the perpetrator, thus increasing the need for punishment.

General aggravating circumstances may include the following:

- a) The crime is committed with disloyalty, as occurs in cases of betrayal, ambush, waiting or disguise
- b) The crime is committed against persons using means or ways that directly or indirectly seek to ensure execution without the danger that could result from possible defense of the victim.
- c) The crime is committed by fraud, deceit, abuse of power or authority, or by taking advantage of circumstances of place and time.
- d) The crime is committed for payment or to receive a sum or reward.
- e) The crime is motivated by racism, or any other discriminatory sentiment on grounds of gender, ideology, religion or beliefs, ethnicity, nationality, sex, sexual orientation, illness or physical disability of the victim.
- f) The perpetrator has the special duty to not commit the crime, to hinder its commission or to take action to punish the same, or takes advantage, for commission of the crime, of public authority that the same holds or invokes.
- g) Not being a case of recurrence, the perpetrator has committed one or more crimes of a similar nature in the course of three years prior to the time the crime for which the same is being tried was committed, regardless of the time when judgment is rendered.
- h) The crime is committed at the same time as another crime in order to facilitate the execution of one or more other crimes;
- i) Commission of the crime was facilitated by the perpetrator's entrance or attempted entrance into the victim's residence or using poison, flooding, fire, explosion; sinking or damaging a vessel or using a weapon;
- j) The commission of the crime or the use of its consequences having been facilitated by cooperation of two or more persons;
- k) The perpetrator intentionally and inhumanely increases the victim's suffering, causing the latter unnecessary suffering for consummation of the crime, or any other acts of theft, cruelty or destruction also unnecessary for commission of the crime.
- l) The victim is or was a spouse or is in a de-facto relationship identical thereto, or is a parent or descendant, sibling, adoptee or adopter of the perpetrator.
- m) The victim is particularly vulnerable by reason of age, illness or physical or mental disability, whenever said circumstance is not part of the definition of the crime itself.

### Article 171 Sexual coercion

Any person who, by means of violence, serious threat, or after having made, for the purpose of compelling another person to endure or to practice with the same or a third person any relevant sexual act, such a person unconscious or placed the same in a condition where resistance is impossible, is punishable with 2 to 8 years imprisonment.

### Article 172 Rape

Any person who, by the means referred to in the previous article, practices vaginal, anal, or oral coitus with another person or forces the same to endure introduction of objects into the anus or vagina is punishable with 5 to 15 years imprisonment.

### **Article 173 Aggravation**

The perpetrator is punishable with 4 to 12 years imprisonment in the case of article 171 and 5 to 20 years imprisonment in the case of article 172 if the sexual offenses referred to in articles 171 and 172 are committed:

- a) through abuse of authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labor-related dependence
- b) through taking advantage of duties exercised or office held, in any capacity, in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment
- c) upon an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency
- d) against a victim aged less than 17 years.

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

Any person who practices vaginal, anal or oral coitus with a minor aged less than 14 years is punishable with 5 to 20 years imprisonment.

Any person who practices a relevant sexual act with a minor aged less than 14 years is punishable with 5 to 15 years imprisonment.

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

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

### **Article 182 Aggravation**

The penalties prescribed from Section II to Section IV of this chapter shall have their minimum and maximum limits increased by one third if:

- a) The victim is less than 12 years of age at the time the act was committed;
- b) The perpetrator has transmitted to the victim any venereal disease, syphilis or AIDS;
- c) Due to the act, the victim attempts or commits suicide or the same results in death.
- d) The victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence;

Whenever more than one of the circumstances described in the preceding sub-article are present, only one may be evoked as a modifying circumstance and those remaining shall be weighed in determining a specific penalty.

## **APPENDIX D: TEXT OF ARTICLES RELEVANT TO INCEST - LAW AGAINST DOMESTIC VIOLENCE**

### **Article 2 Definition of domestic violence**

For purposes of this law, domestic violence is any act or a result of an act or acts committed in a family context, with or without cohabitation, by a family member against any other family member, where there exists influence, notably physical or economic, of one over another in the family relationship, or by a person against another with whom he or she has an intimate relationship, which results in or may result in harm or physical, sexual or psychological suffering, economic abuse, including threats such as acts of intimidation, insults, bodily assault, coercion, harassment, or deprivation of liberty.

### **Article 3 Family**

For the purposes of this Act, the following persons shall be considered members of a family:

- a) Spouses or former spouses
- b) People who live or have lived in conditions similar to that of spouses, even without cohabitation;
- c) Ascendants and descendants of both or only one spouse or whomever is in the situation described in the preceding paragraph, provided they are in the same context of dependency and family economy;
- d) Any other person who is in the same context of dependency or family economy, including whoever carries out continuous and subordinate domestic labor activity.

### **Article 35 Definition of crimes of domestic violence**

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

- a) The types of crime provided for in articles 153, 154, 155 and 156 of the Penal Code;
- b) The types of offenses in articles 138, 141, 145, 146, 167, 171, 172, 175, 177, 178 and 179 are crimes of domestic violence where, in addition to satisfying the typical elements of the crime, the acts also occurred in the circumstances described in article 2 of this Act.

### **Article 36 Public nature of the crimes of domestic violence**

The domestic violence crimes referred to in article 35 are all public crimes.

### **Article 37 Coercive measures**

In addition to the coercive measures provided for in the Criminal Procedure Code, in the case of a domestic violence crime, the perpetrator may be subjected, by determination of the trial judge, to the measure of coercive removal from the place of family residence, including prohibition of contact with the complainant, whenever there are signs of violence which are reasonably foreseeable as acts of aggression which may occur again in a manner that creates danger to the life or the physical, psychological or sexual integrity of the victim.

### **Article 38 Choice and determination of the sentence**

1. The court may substitute the penalty of imprisonment with a penalty of a fine provided the prerequisites provided for in article 67 of the Criminal Code have been met, the security of the victim has been guaranteed, the perpetrator agrees to undergo treatment, or follow-up support services for the victim and such a measure would benefit the preservation of the family unit.
2. The defendant may further be sentenced to an additional penalty prohibiting contact with the victim for a maximum period of 3 years whenever it is considered that the application of the principal penalty is insufficient to prevent the repetition of similar acts.

**Article 39 Witness protection**

Whenever deemed necessary, the competent court shall apply procedural measures to protect witnesses and victims in domestic violence cases and people with knowledge of the facts constituting the object of the proceeding or of other information deemed relevant for the decision pursuant to the applicable law.