

Supplement to LAW FOR PACIFIC WOMEN A Legal Rights Handbook

Pacific Regional Rights Resource Team
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About the Regional Rights Resource Team

The Pacific Regional Rights Resource Team (RRRT) provides human rights training, technical support and policy services. It is a programme of the Secretariat of the Pacific Community (SPC), an international organisation that provides technical assistance, policy advice, training and research services to 22 Pacific Island countries and territories.

Initially established in 1995 as a gender and legal literacy programme funded by the United Kingdom's Department for International Development, RRRT has since expanded its programme in response to the human rights needs in the Pacific region. It now supports and works with the largest pool of human rights defenders in the region.

SPC RRRT is unique in that its programme base continues to have a gender and a rights-based approach as its foundation. In 1998 RRRT was awarded the prestigious UNICEF Maurice Pate Award for its cutting-edge work in gender and human rights and, in 2005, it was chosen by the Office of the United Nations High Commissioner for Human Rights (Asia Pacific Office) as one of 14 'best practice' rights-based projects in the region.

SPC RRRT has specific programmes in Kiribati, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, and works on request in all other SPC member countries and territories. With its partners, which include governments and regional and civil society organisations, it has been described as a 'cutting-edge programme' in human rights capacity building, due to its approach of tackling both systemic and socio-economic issues through interventions at the micro, meso and macro levels.

Its goal is to strengthen the capacity of the Pacific region to promote principles of human rights and good governance in order to achieve democracy based on social justice. It seeks to achieve this goal at the country level by providing training, mentoring, links and support to community organisations through its networks of country focal officers, community paralegals and civil society partners. At the regional level, it seeks to achieve this goal by training lawyers, magistrates, judges and policy-makers to adopt and apply human rights principles and good governance practices in their work.

SPC RRRT acknowledges the financial assistance of the United Nations Trust Fund to Eliminate Violence Against Women and Australian AID in preparing and publishing this supplement to *Law for Pacific Women: A Legal Rights Handbook*.

Acknowledgements

The Pacific Regional Rights Resource Team is profoundly grateful to Imrana Jalal for generously allowing us to update her excellent publication, *Law for Pacific Women: A Legal Rights Handbook* (1998). We hope that this publication does justice to Imrana's landmark work in the area of women's rights in the Pacific. In addition, we thank the Fiji Women's Rights Movement, which has partnered with us on this supplement. We thank also our consultants, the Honourable Mere Pulea for her extensive research and dedication to this work and Lucy Watts for her excellent writing skills. Our thanks also go to the editorial team, specifically Ms Bess Flores who edited *Law for Pacific Women* and who generously offered her time and expertise to this project, and Frances Pene, editor with SPC Publications. RRRT staff members past and present, Ms Gina Houn Lee, Ms Sandra Bernklau and Ms Daiana Buresova, also come in for our thanks and, lastly, we thank our donors and partners, the UN Trust Fund to Eliminate Violence Against Women and Australian AID, without whom this publication would not have been possible.

Foreword

Gender discrimination is still systemic throughout the Pacific, although significant gains have been made over the last two decades. After a decade of research, writing, and travels throughout the Pacific, I completed *Law for Pacific Women: A Legal Rights Handbook* (the Handbook). I wish to again thank The Asia Foundation, and the UK Department for International Development for funding my research. In 1998, the Fiji Women's Rights Movement (FWRM), of which I am a co-founder, published the Handbook. I set up a financial trust for FWRM which has to date received the income from the sale of the Handbook. It will continue to do so. At that time gender equality had barely made a dent in the legal and other sectors. Since then, however, progress has been made by leaps and bounds, both in terms of progressive legislation and improved, equitable court decisions. I hope the Handbook has helped gender equality advance in the Pacific Island region, at least in the legal and justice sectors.

It is pleasing to note that the Handbook sold out many years ago, that it is recommended reading at the University of the South Pacific's Law School, and that FWRM continues to receive requests for copies. During my 15 years or so teaching part of the post-graduate law course at the Law School I saw how useful it was to law students and human rights activists, and sorely wished to update it. Unfortunately, I did not find the time to do so. I owe a debt of gratitude to my former employers, the Secretariat of the Pacific Community (SPC) and the Pacific Regional Rights Resource Team (SPC RRRT) for taking up this demanding task. Owing to the demand for it and the need for updates, the Handbook has been put into an electronic version by SPC, and RRRT has produced an update, in the form of this publication, titled, the *Supplement to Law for Pacific Women: A Legal Rights Handbook* (the Supplement).

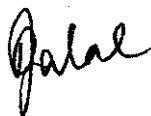
Let it not be forgotten why both the Handbook and the Supplement are as relevant today, as the former was in 1998. The quest for gender equality is still to be pursued, as it has not yet been achieved, either in the legal or any other sector. Significant dents in gender injustice have been made, but substantive equality is still ephemeral. An orchestration of multiple forces continues to determine the overall status of women within the justice system of the Pacific Island countries and territories. The law, whether formal or customary, is neither neutral nor gender blind: nor is it legislated or interpreted in a vacuum without reference to the political, economic, religious, social and cultural contexts. The law, both *de jure* and *de facto*, written and unwritten, by act or omission and by interpretation, significantly affects the capacity of women to harness the full potential of the benefits of development. The Handbook closely examined the gaps between the law *de jure* and women's experiences of the law on the ground, *de facto* reality. The Supplement updates this with information on new legislation and court cases from around the region. However, changing law should not be an end in itself – formal legislative equality by itself is meaningless. Law can enhance human development only if it is used positively to expand opportunities for women's greater participation in economic activities and in the political sphere, and to alter the outcome of women's overall participation in development.

The link between the law and gender justice is both causal and mutually reinforcing. Both conventional and customary legal systems are important for gender justice, and positively shaping and influencing both systems is vital. In this regard, Pacific Island courts have increasingly resorted to the *UN Convention on the*

Elimination of All Forms of Discrimination against Women (CEDAW), which identifies discrimination in terms of historical disadvantage, as a source of law and as a guide to interpretation, with positive outcomes for women. However, influencing the customary legal system has proven more difficult. Further legal battles need to be waged in that arena. Customary decisions that continue to discriminate against women need to be held accountable to the constitutions and legislation of the region, most of which guarantee equality for women.

A combination of strategies is needed to change outdated legislation, shape discriminatory interpretations of legislation and ensure commitment to the effective implementation of new laws. Both FWRM and RRRT have been at the vanguard of these strategies, albeit in different forms, as have other women's rights-based organisations. These strategies include mobilising the women's movement; mass educating at all levels; informing; lobbying and campaigning with all stakeholders about the existing law and the need for law reform; altering the substance of discriminatory legislation through working with members of legislatures; training judicial officials, lawyers and court officials on the new law and in gender equality principles that affect the functioning of law; ensuring that sufficient financial, human and technical resources are allocated to effectively implement new laws; and, finally, closely monitoring the new law to assess whether it fulfills its promise. Good law is only as good as the political will behind it.

I would like to thank the authors of the Supplement, Hon. Mere Pulea and Lucy Watts, as well as the editors, Bess Flores and Frances Pene of SPC. I am particularly pleased at Bess' involvement as she edited the original Handbook. I am gratified that the Handbook will be sold in an electronic version by FWRM, and that the Supplement will be made freely available with all requests for the Handbook. FWRM, needs all the financial support it can get in this era of dwindling donor funds. I would also like to thank the initial donors, the UN Trust Fund to Eliminate Violence against Women, as well as Australian AID, for their generous support in funding this Supplement.



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1. Introduction

This section covers a number of topics related to violence against women (VAW), including sexual offences, domestic violence, legal proceedings and evidence, sorcery-related violence, harmful cultural practices, as well as trafficking in persons.

All core international human rights treaties directly or indirectly refer to violence against women as a violation of women's rights. By June 2013, CEDAW had been adopted by all Pacific Island countries except Tonga, and had been bolstered by the 1990 *Convention on the Rights of the Child (CRC)* and the *Beijing Declaration and Platform for Action* adopted in 1995. All these, including the landmark Declaration on the Elimination of Violence against Women adopted by the United Nations General Assembly in 1993, stressed that women's rights are human rights and that comprehensive legislation and coordinated response are fundamental to addressing violence against women and children.

In 1994, the United Nations Special Rapporteur on violence against women, its causes and consequences was mandated to seek and receive information on violence against women and to 'recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences'. On 19 December 2006, the United Nations General Assembly adopted Resolution 61/143, calling on member states to intensify their efforts to eliminate all forms of violence against women. In response, the United Nations Division for the Advancement of Women and the United Nations Office on Drugs and Crime convened an expert group meeting in Vienna, Austria in May 2008, chaired by former RRRT Human Rights Advisor P. Imrana Jalal. Its aims were to analyse different legislative approaches, identify good practices with regard to legal reform and develop a model framework for legislation on violence against women. In 2010, the United Nations Department of Economic and Social Affairs, Division for the Advancement of Women published its *Handbook for Legislation on Violence against Women* based on the framework developed by the 2008 expert group.

The Commission on the Status of Women, a key international platform, reaffirmed condemnation of all forms of violence against women and girls at its 57th session in March 2013. It called on states to implement and strengthen legislative frameworks to address, *inter alia*, domestic violence and insisted that this be complemented by multi-sectoral support from both government and non-government sectors so that women and girl child victims are supported.

The UN Special Rapporteur, in her report presented at the twenty-third session of the Human Rights Council in May 2013, looked at the topic of state responsibility for eliminating violence against women. She recognises a distinction between 'individual due diligence' and 'systemic due diligence'. Both approaches are flexible and require both state and non-state actors working together to ensure that women are supported throughout their journey in and outside the national justice system.

In recent years in the Pacific region, there have been a number of significant reforms in the laws concerning VAW, including amendments to existing legislation, the development and enactment of stand-alone domestic violence legislation, significant case law, and developments in policy. Alongside reforms to existing legislation, many women's rights groups, development actors and government women's machineries have been advocating the development of a comprehensive integrated legislation that covers all forms of VAW. This is the most structural, sustainable, holistic and logical way to deal with VAW and is consistent with international best practice.¹ The legislation should criminalise domestic violence and contain a broad definition of domestic violence that includes all forms of violence (for example, psychological and economic). It should also provide a strong protection regime, contain court options and processes that are conducive to the participation of women, contain a no drop policy for police in cases of domestic violence, outline multidisciplinary support services, and address the prevention of violence. In addition, court proceedings and evidence need to support the reporting of crimes, provide options for survivors, and not

disadvantage women during the court process. With regard to sexual assault, it is now generally accepted that a comprehensive definition of rape is required with sexual offences graded on their level of severity with corresponding penalties. There should be no exemption for marital rape, and all language in reference to sexual assault should be gender neutral.

These changes have taken place slowly in Pacific jurisdictions, with countries differing in their approaches to law reform. Changes to sexual assault offences and the removal of the marital rape exemption have taken place in Fiji, Papua New Guinea (PNG) and the Republic of the Marshall Islands (RMI), with the marital rape exemption also being removed in Tonga and Vanuatu. A significant 2012 case in Solomon Islands, *Regina v Macberth Gua*, removed the common law marital rape exemption in that jurisdiction. Vanuatu, Fiji, and RMI have all introduced integrated stand-alone legislation on domestic violence, with Tuvalu enacting the *Police Powers and Duties Act 2009*, which governs the powers of police to respond and act in cases of domestic violence. Palau passed a dedicated domestic violence act, the *Family Protection Act 2012*, and Samoa passed the *Family Safety Act 2013*. A number of prominent cases have been heard in the region that confirms the serious nature of domestic violence and the need for tougher, more consistent penalties for perpetrators. All three draft legislative frameworks developed in Kiribati, Tuvalu and Solomon Islands are currently undergoing national consultations prior to being tabled either in cabinet or in parliament. Tonga Parliament enacted the Family Protection Act in September 2013.

Some changes have also taken place regarding legal proceedings and evidence, which has improved court processes for complainants. The corroboration rule has been abolished in a number of jurisdictions (Cook Islands, Fiji, Solomon Islands, RMI) and partially abolished in Kiribati, consent must be proved by the defendant rather than disproved by the complainant, submission of the complainant does not imply consent, and in some jurisdictions special court arrangements are made for vulnerable complainants giving evidence.

Finally there have been significant developments in the region regarding human trafficking and people smuggling, particularly of women and girls. A number of states have now ratified the *Convention against Transnational Organised Crime* and its Protocol, with Fiji, Cook Islands, Kiribati, Tonga, Tuvalu, and Vanuatu all having legislation with a range of offences related to human trafficking.

2. Background

Over the last decade, many studies have added to our understanding of violence against women and children. A significant study by the World Health Organization (WHO) began in 2002 in collaboration with the London School of Hygiene and Tropical Medicine, PATH, USA research institutions and women's organisations in participating countries. This multi-country study on women's health and domestic violence involved 24,000 women and was designed to estimate the prevalence of physical, sexual and emotional VAW, with particular emphasis on violence by intimate partners (Graph 1).² The methodology was adapted and used in the Pacific Island countries of Kiribati, Samoa, Vanuatu and Solomon Islands, with Tuvalu, Fiji and Tonga also conducting similar research on the prevalence of VAW (Table 1). The studies offer critical insight into the scale and patterns of violence and the context in which new measures and strategies to address these problems are likely to develop.

The data from the studies indicate an extremely serious and endemic problem in the Pacific region. Based on the data, it is reasonable to conclude that VAW is a systemic problem with a high degree of social, cultural, legal, and institutional acceptance and/or tolerance. This tacit acceptance is unacceptable and violates women's fundamental human rights, including their right to freedom from violence, the right to live their life with dignity, and the right to life.

Graph 1: Prevalence of physical or sexual violence, or both by an intimate partner among ever-partnered women, according to where the violence took place.

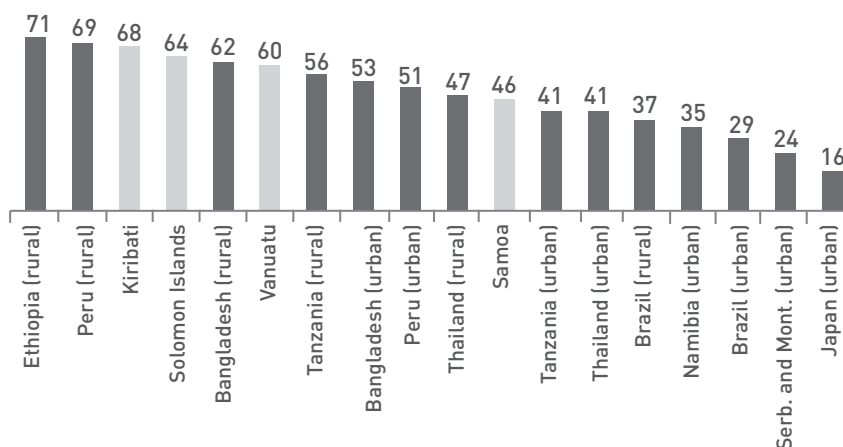


Table 1: The prevalence of intimate partner violence in selected Pacific Island countries.

Country	Physical violence (%)	Sexual violence (%)	Physical and/or sexual violence (%)
Kiribati ³	60	46	68
Vanuatu ⁴	51	44	60
Solomon Islands ⁵	46	55	64
Samoa ⁶	38	20	46

Studies from other countries in the region have also shown high rates of VAW. The *National Study on Domestic Violence against Women in Tonga 2009* found that 40 per cent of women experienced physical or sexual violence by an intimate partner,⁷ with 77 per cent reporting that they had experienced physical or sexual violence in their lives by someone (partner or non-partner).⁸ The *Demographic and Health Survey*⁹ in Tuvalu found 33 per cent of ever-married women between the ages of 15 and 49 years have experienced physical violence, 10 per cent have experienced sexual violence, and 41 per cent have experienced any kind of violence (physical, emotional, or sexual) by a husband or intimate partner.¹⁰ In PNG, 67 per cent of women reported physical violence by a male partner,¹¹ and 64% of women in Fiji reported physical or sexual violence or both by a male partner or husband.¹²

Although not covered by the multi-country studies, there is sufficient anecdotal evidence that women and girls with disabilities experience higher levels of violence and sexual assault than non-disabled women. The intersectional discrimination that women with disabilities face is highlighted in a study conducted in 2009 (*Pacific sisters with disabilities at the intersection of discrimination*¹³) which notes and documents the specific vulnerabilities of women and girls with disabilities. These findings highlight the need for legislation to ensure that intersectional discrimination is addressed and that women and girls with disabilities are able to access equal treatment, support and opportunities.

According to the 2012 Report of the UN Special Rapporteur, ‘women with disabilities experience many of the same forms of violence that all women experience — when gender, disability and other factors intersect — the violence against them takes on unique forms, has unique causes and results in unique consequences.’¹⁴

3. Sexual offences

In all PICs, rape is a serious offence that carries heavy penalties. However, the treatment of rape victims has long been criticised by human rights defenders, academics, civil society groups and victims themselves. In 2009, Christine Forster examined sexual offence provisions in 15 Pacific Island countries.¹⁵ She argued that, except for Papua New Guinea, all countries retained out-dated models, adopted from the colonising countries of the region and based on notions of morality rather than on the protection of women and children. Criminal law reform cannot itself prevent sexual assault but a strong legal framework has an important role in designating acceptable standards of sexual conduct and provides for more effective means of prosecuting offenders.¹⁶

Confusion still exists within the region regarding the definitions of rape, sexual assault, indecent assault, incest, and defilement, with different penalties and charges being applied in court. However, the definitions do not take into account the full range of sexual violations experienced by complainants. Sexual assault encompasses a wide variety of acts, ranging from rape to unwanted sexual contact (including touching). Sexual assault by definition is an act performed without consent, but if the act is forced by the threat or use of a weapon, the crime is more severe. Rape has been the main form of sexual assault addressed by criminal law with the definition of rape focusing on proof of penetration, but rape can include different acts, ranging from penile penetration to penetration by foreign objects such as bottles, sticks and body parts, and can include penetration of different orifices, including, for example, forced oral sex. If the definition of rape does not include penetration by foreign objects, other body parts or penetration of different orifices, then it is not comprehensive, and if sexual assault is not graded by the severity of the incident, then victims do not have sufficient protection.

(1) Definitions of rape

Over the last decade Fiji, PNG, RMI and Samoa have reformed their sexual offence laws, with the Solomon Islands Law Reform Commission currently reviewing the definition of sexual penetration to make it consistent with the sexual offences model law prepared by the Pacific Islands Forum Secretariat (PIFS) and other countries in the region.¹⁷ As a part of these reforms, Fiji, PNG, RMI and Samoa have extended the traditionally narrow definition of rape. Here we see reform in important areas of the law not included in past legislation.

- The definition of rape has been expanded to include penetration of the vulva, vagina, anus and mouth, and penetration by other objects.
- The new laws on rape are now gender-neutral and refer to any person who has sexual intercourse with another person without that person's consent. This is in stark contrast to earlier provisions of rape law, for example 'any person who has unlawful carnal knowledge of a woman or girl without her consent.'
- The reforms also make rape a criminal offence, irrespective of the nature of the relationship, including marriage.

The expansion of the definition of rape means that higher penalties will be enforced for a wider range of offences, which recognises the severity of acts which are perpetrated against women. It also recognises that women are not the property of their husbands, and that they cannot be forced to engage in sexual acts against their will. Despite these changes, some countries in the region still lag behind with outdated, gender discriminatory legislative frameworks that have a limited scope of offences and lesser penalties for equally serious crimes.

(2) Marital rape

In Fiji,¹⁸ RMI, PNG, Tonga and Vanuatu, rape by a husband of his wife is a criminal offence. In the remaining states in the region, however, marital rape is not seen as a crime. If a man is legally married to the woman he rapes, he may be exempt from being prosecuted for rape, or not be found guilty.¹⁹ Cook Islands,²⁰ Niue and Samoa have legislation stating that marital rape is illegal only if the parties are separated, divorced or where consent has been withdrawn through the process of law. If, in the process of raping his wife, a husband causes bodily harm, he may be prosecuted for the bodily harm but not rape.

There is still a long way to go in the area of marital rape in the region, with outdated legislation and common law principles taking precedence over women's rights. It was shown in Solomon Islands, however, (see *Regina v Macberth Gua* below) that outdated principles can be changed through one significant case when the relevant international standards are understood and applied.

(3) Indecent assault

Fiji, RMI, PNG and Tonga distinguish between penetrative and non-penetrative sexual offences. The *Papua New Guinea Criminal Code 1974* defines rape as a penetrative offence²¹ and defines sexual assault as a non-penetrative offence.²² In countries that define rape as penile penetration of the vagina, all other forms of sexual penetration are prosecuted as indecent assault, and are therefore given lesser penalties. This demonstrates a lack of understanding of the ways that women can be sexually assaulted and implies that penetration of other orifices and penetration with objects are somehow less severe.

(4) Incest

In some countries, for example in Tonga, incest by a male person²³ where the female is his granddaughter, daughter, sister, mother, aunt, mother's sister's daughter, father's sister's daughter, father's brother's daughter, or niece carries a maximum ten-year sentence whilst rape carries the higher maximum penalty of 15 years in prison.

In situations where the defendant is on trial for incest and the jury is satisfied that they are not guilty of the offence of incest but are guilty of the offence of rape or attempted rape, the jury may acquit the defendant of the crime of incest and find him guilty of rape or attempted rape.²⁴ Similarly, if the jury is not satisfied that the defendant is guilty of rape or attempted rape, the jury may acquit the defendant of rape and find them guilty of incest. In the case of *R v Tu'ifua*, a father was found guilty of incest after raping his daughter on multiple occasions over a period of three years and was given a seven-year sentence, the maximum penalty for incest in Tonga being ten years and 15 years for rape. If, therefore, the father had been charged with rape he may have received a longer sentence. This demonstrates the continuing confusion between rape and incest, just as there remains confusion between rape and indecent assault. This confusion means that perpetrators of incest receive lesser penalties for crimes that are arguably of increased severity. It is recommended that there is no separate offence of incest and that, instead, the crime of sexual assault be graded on severity, so that penalties reflect the reality of the offence.

(5) Sorcery and harmful practices

Witchcraft and sorcery occur in many societies, including Melanesian, Polynesian and Micronesian societies.²⁵ Men and women engage in both witchcraft and sorcery and children can be victims. Witches and sorcerers are said to use magical and supernatural powers, or herbs, oils, sticks, boards or stones and other things to frighten and bring harm, injury or death to those who may have caused harm or injury to another, sometimes in 'payback' or exploitative situations. Kiribati, Solomon Islands, Tuvalu, Cook Islands, Niue and Vanuatu²⁶ criminalise acts of sorcery and witchcraft that cause harm to another. Since 1971, Papua New Guinea, through its Sorcery Act, has criminalised 'sorcery'. However, this Act was

found to be largely ineffective and was repealed in May 2013, in accordance with the recommendation of the Papua New Guinea Constitutional and Law Reform Commission. There were obvious difficulties of proof in establishing that a person did engage in sorcery, and the prescribed penalties were considered insufficient by the affected communities. There had been numerous cases where, under the allegation of ‘sorcery’, people had committed offenses and were seen to be taking the law into their own hands. Many of these incidents were directed at women and children. The now repealed Act insinuated a belief in sorcery; if sorcery did not exist, there would be no need to make it unlawful.

Persons suspected of acts related to beliefs in sorcery can be brought before the courts under existing criminal law provisions. However, some individuals and communities continue to act outside the law by administering their own punishments. Women – witches or not – may be especially vulnerable because of ancient fears of women as producers and destroyers of life, particularly when menstruating. Women, more than men, are still being burnt, murdered, sexually assaulted, bashed, tortured or banished because they are assumed to have caused death or illness to others.²⁷ The United Nations Special Rapporteur on violence against women, its causes and consequences²⁸ recommends that legislation on violence against women should apply to all forms of violence, including sorcery and witchcraft. Women accused of harmful witchcraft or sorcery should have equal access to the justice system and their human rights should be assured.

Legislation

Fiji - Crimes Decree 2009

The Fiji Crimes Decree 2009 widens the definition of rape to include other orifices and the insertion of objects. It is also phrased in gender neutral language and does not include a marital rape exemption. The Crimes Decree 2009 has also increased the maximum penalty for incest from seven years to 20 years imprisonment, and if the victim is under the age of 13 years, the penalty increases to life imprisonment.²⁹ The maximum penalty for rape is life imprisonment, for aggravated sexual assault it is 14 years and for sexual assault it is ten years.

s. 207. The offence of rape

(1) Any person who rapes another person commits an indictable offence.

Penalty — Imprisonment for life.

(2) A person rapes another person if —

- (a) the person has carnal knowledge with or of the other person without the other person’s consent; or
- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or
- (c) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.

(3) for this section, a child under the age of 13 years is incapable of giving consent.

Papua New Guinea – Criminal Code Act (Sexual Offences and Crimes against Children) Act 2002

In 2002, PNG reformed its sexual offences provisions in the *Criminal Code Act 1974*³⁰ by expanding the definition of sexual penetration to include the anus or mouth of another person, and sexual penetration by an object or a part of the body other than the penis. Section 6 states:

6. SEXUAL PENETRATION.

When the expression ‘sexual penetration’ or ‘sexually penetrates’ are used in the definition of an offence, so far as regards that element of it, is complete where there is –

- (a) the introduction, to any extent, by a person of his penis into the vagina, anus or mouth of another person; or
- (b) the introduction, to any extent, by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.

The *Criminal Code* has separate offences for rape and sexual assault. However, as the definition of rape is broad, it can include a wide range of acts of penetration. The definition is also gender neutral and there is no marital rape exemption. The maximum penalty for rape is imprisonment for 15 years and for sexual assault it is five years, but for aggravated sexual assault it is raised to ten years.

347. DEFINITION OF RAPE. (1) A person who sexually penetrates a person without his consent is guilty of a crime of rape.

349. SEXUAL ASSAULT. (1) A person who, without a person’s consent –

- (a) touches, with any part of his body, the sexual parts of that other person; or
- (b) compels another person to touch, with any part of this body, the sexual parts of the accused person’s own body.

Republic of the Marshall Islands – Criminal Code 2011 [31 MIRC Ch 1]

The revisions to the *Criminal Code 2011* saw the replacement of the offence of rape with several grades of sexual assault (first degree, second degree, third degree and fourth degree). The offence is also worded in gender neutral language, and covers a range of sexual offences, including anal and oral penetration. Article 213 describes sexual assault in the first degree as:

§213.1. Sexual Assault in the First Degree.

1. A person is guilty of a felony of the first degree if:

- (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion; or
- (b) The person knowingly engages in sexual penetration with another person who is younger than fourteen years of age; or
- (c) The person knowingly engages in sexual penetration with a person who is at least fourteen years of age but less than sixteen years of age; provided that:
 - (i) The person is not less than three years older than the minor; and
 - (ii) The person is not legally married to the minor; or
- (d) The person knowingly subjects to sexual penetration another person who is mentally defective; or
- (e) The person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person’s consent.

The revised *Criminal Code* also includes a distinction between penetrative and non-penetrative sexual offences, with separate definitions for sexual penetration and sexual contact.

- (9) 'Sexual contact' means any touching of the sexual or other intimate parts of a person, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.
- (10) 'Sexual penetration' means vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight. Emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense.

The code does not place any limitations or specifications on who the code applies to, e.g. married couples, or to the gender of the perpetrator or victim. Neither does the code have a separate defilement or incest offence; instead, these offences are included in the grades of sexual assault based on severity. Grouping all sexual offences together and grading them on severity ensures that lesser penalties are not sought for other offences and it is clear which grade the offence fits.

Samoa - Crimes Act 2013

In 2013 the Samoa Parliament passed its *Crimes Act*. It expands the range of the sexual violation offence to include unlawful sexual connection in addition to rape.

50. 'Sexual connection' defined - Sexual connection means:

- (a) connection occasioned by the penetration of the genitalia or the anus of any person by -
 - (i) any part of the body of any other person; or
 - (ii) any object held or manipulated by any other person; or
- (b) connection between the mouth or tongue or any part of the body of any person and any part of the genitalia, anus or breasts of any other person;
- (c) the continuation of sexual connection as described in either subsections (1)(a) or (b).³¹

Tonga - Criminal Offences (Amendment) Act 1999

Despite the Criminal Offences Act (Cap 18) still containing a restrictive and non gender neutral definition of rape, in 1999, section 118 of the Act was amended by repealing the marital rape exemption, making rape within a marriage a criminal offence.³²

Vanuatu - Penal Code (Amendment) Act 2003

In the 2003 amendment to the Penal Code, the definition of rape was amended to make it gender neutral.

Section 90 states:

Any person who has sexual intercourse with another person:

- a) without that person's consent; or
- b) with that person's consent if the consent is obtained:
 - (i) by force; or
 - (ii) by means of threats of intimidation of any kind; or
 - (iii) by fear of bodily harm; or
 - (iv) by means of false representation as to the nature of the act; or

(v) in the case of a married person, by impersonating that person's husband or wife; commits the offence of rape. The offence is complete upon penetration.³³

Case law

Solomon Islands - *Regina v Macberth Gua* [2012] SBHC 118

In this landmark case from 2012, the marital rape exemption was overruled by the court despite it still existing in practice in Solomon Islands. In the case, the husband was accused of the rape of his wife, after she had deserted him and was living with another man. She was forced into a car by him, taken to a remote location and was forced to perform oral sex, and have sexual intercourse with him in the back of his taxi. She denied consenting and stated she did not resist because he had threatened her and she was afraid of him. In his judgement, Justice Apaniai stated that:

'The time when women are considered as sex objects or as subservient chattel of the husband in Solomon Islands has gone. In this modern time, marriage is now regarded as a partnership of equals and this principle of equality has been reflected, not only in international conventions to which Solomon Islands is a party, but also in the entrenched provisions of the constitution. One of the international Cs to which Solomon Islands is a part is the *Convention on the Elimination of All forms of Discrimination against Women (CEDAW)* which, in article 15, calls on all state parties to accord women equality with men before the law and, in article 16, calls for the same personal rights between husband and wife...All these instances show the changing attitude in Solomon Islands towards the status of women and the recognition that women are equal partners with men in nearly all things including marriage. In my view the time has come for this court to take a hard look at this old marital exemption rule and see whether its terms accord with what is now regarded generally in these modern times as acceptable behaviour. If the court considers the rule as no longer applicable then in my view it has a duty to change it. That is what I now do.'

This decision means that a husband can now be criminally liable for raping his wife in Solomon Islands.

Policy

Pacific Island Forum Sexual Offences Model Provisions 2010

In 2010, the Pacific Island Forum set out its Sexual Offences Model Provisions 2010.³⁴ The model provides for two distinct approaches to laws on sexual offences:

- a penetrative offence is described as a sexual violation. Incest is a sexual violation and will be prosecuted as rape;
- a non-penetrative sexual offence is described as sexual assault.

The approaches in this model are similar to those already adopted by Fiji, RMI and PNG and, if adopted by Forum member countries, should go a long way towards reducing confusion about sexual offences towards both adults and children.

Developments to watch

Solomon Islands - Review of the Penal Code

The Solomon Islands Law Reform Commission undertook extensive consultations in Solomon Islands in 2010 and received submissions to reform the laws on sexual offences in the Penal Code. During these consultations, there was support for marital rape to be made a criminal offence and the penalty for attempted rape to be increased. Whilst the consultations are ongoing, draft recommendations from the Law Reform Commission consultations are:

- that the definition of ‘sexual intercourse’ be expanded to cover all forms of penetration of the vagina, anus and mouth of a person by the penis, or the penetration of the vagina and anus of a person by other parts of the body or foreign objects.
- that the new definition of sexual intercourse in the Penal Code be extended to cover acts of licking, sucking or kissing, to any extent, the vulva, vagina or anus of a person.
- that gender-neutral and non-discriminatory terminology be used throughout legislation.
- that consent be redefined as ‘free and voluntary agreement’.

4. Domestic violence

Criminal assaults are crimes: if you assault anybody, whether a stranger, acquaintance, friend or family member, you may be charged with having committed a crime. The problem is that, although domestic violence is a criminal matter, law enforcement agencies and courts have until recently treated it as a private family matter. Complainants may be pressured into reconciliation and there are few legal methods of ensuring that violence does not continue.³⁵ Reconciliation is incorporated into the legal systems of Kiribati, Tuvalu and Solomon Islands. In the case of Tuvalu, s 32 of the *Magistrates Court Act* provides for reconciliation and compensation. Where reconciliation is unlikely, the ‘keeping the peace’ strategy is often used, as in s 30 of the *Tuvalu Criminal Procedure Code*. As a result, despite the seriousness and the prevalence of domestic violence and the resulting injustices to women and children, laws that criminalise domestic violence have yet to be developed in many states.

All core international human rights treaties, directly or indirectly refer to VAW as being a violation of women’s rights. They emphasise that women’s rights are human rights and that comprehensive legislation and coordinated responses are fundamental to addressing violence against women. Developing new laws and changing existing laws are complex processes, particularly in attempts to make domestic violence a specific criminal offence and to provide protective laws for survivors. However since 1998, Fiji, RMI, Vanuatu, Palau and Samoa have developed new domestic violence legislation. The first of these was the *Fiji Family Law Act 2003*, which incorporated powers to prevent domestic violence and the illegal disposal of marital property in matrimonial cause’s proceedings.³⁶ In 2008, Vanuatu passed the *Family Protection Act*, a specific legislation which makes domestic violence a criminal offence and provides protective measures for survivors of violence. In 2009, Fiji decreed its *Domestic Violence Decree*; in 2010, Palau passed its *Family Violence Act 2010*; in 2011, RMI passed its *Domestic Violence Prevention and Protection Act*³⁷; and in 2013 Samoa passed the *Family Safety Act 2013*.

Two semi-autonomous states of FSM – Pohnpei and Kosrae – have introduced stand-alone domestic legislation for their legislature’s approval: the *Family Violence Bill 2012* and *Domestic Violence Bill 2012* respectively. Currently Kiribati’s draft *Family Peace Bill 2012*; Tuvalu’s draft *Family Protection and Domestic Violence Bill 2011* and Solomon Islands *Family Protection Bill* introduce substantial reforms with a new and more rigorous regime for the protection of survivors of violence. These draft bills are currently going through extensive national consultations.

Police ‘no drop’ policies have been adopted in Cook Islands, Fiji, Kiribati, Samoa, Solomon Islands, Tonga, and Tuvalu. The ‘no drop’ policy obliges police to investigate cases of domestic violence, and charge where there is sufficient evidence of violence and abuse, a significant change from past practices where police would try and reconcile parties instead of holding abusers accountable.

(1) Protection orders

Protection orders are designed to provide complainants with immediate relief and protection from further harm. They offer powerful remedies, but they can be sometimes difficult to obtain. Police attitudes and

processing may delay the progress of the complaint, or result in failure if the court has been given insufficient evidence. Police may also try to reconcile the parties rather than proceed to formal charges.

In some countries, protection orders may be issued only if the complainant takes legal action, such as bringing criminal charges or filing for a divorce. In such situations, survivors may choose not to seek legal protection because they lack alternative support and opportunities for employment, or they are being pressured by the abuser or the family. The orders vary greatly in specifying the type and length of the order, its enforceability, who may apply for it, who issues it, and whether counselling, financial support or other relief may be included.

(2) Implementation

Potential challenges to effectively implement a domestic violence law include a lack of development of a clear implementation plan, lack of trained human resources and lack of political 'buy-in' from other agencies in the government machinery.

Best practice in terms of implementation requires setting out clear responsibilities in the legislation for implementation; drafting an implementation plan based on multi-sectoral negotiations and consultations alongside the draft legislation; and, where necessary, costing the implementation plan through key government agencies such as a ministry of finance. A clear monitoring framework within the legislation and links to service delivery will contribute to improved implementation of the integrated stand-alone legislation.

While it is unfair to offer a critical analysis on the effectiveness of the various legislative national frameworks of domestic violence legislation, early indications suggest that implementation has been met with mixed success.

Legislation

Fiji - Domestic Violence Decree 2009

The definition of domestic violence in the *Domestic Violence Decree 2009* includes both physical assault and sexual abuse, as well as psychological violence. It does not specifically mention economic abuse, although this might be included in offences such as behaving in an inhumane manner. The definition of a family or domestic relationship is also broad, as it includes the relationship of boyfriend/girlfriend as well as others living in the same residence. Section 3 of Fiji's *Domestic Violence Decree 2009* defines domestic violence as:

- (1) 'Domestic violence' in relation to any person means violence against that person ('the victim') committed, directed or undertaken by a person ('the perpetrator') with whom the victim is, or has been, in a family or domestic relationship.
- (2) In relation to subsection (1), 'violence' means any of the following-
 - (a) physical injury or threatening physical injury;
 - (b) sexual abuse or threatening sexual abuse;
 - (c) damaging or threatening to damage property of a victim;
 - (d) threatening, intimidating or harassing;
 - (e) persistently behaving in an abusive, cruel, inhumane, degrading, provocative or offensive manner;
 - (f) causing the victim apprehension or fear by-

- (i) following the victim; or
- (ii) loitering outside a workplace or other place frequented by the victim, or
- (iii) entering or interfering with a home or place occupied by the victim, or
- (iv) interfering with property of the victim, or
- (v) keeping the victim under surveillance;
- (g) causing or allowing a child to see or hear any of the violence referred to in paragraphs (a) to (f) inclusive;
- (h) causing another person to do any of the acts referred to in paragraphs (a) to (g) inclusive towards the victim.

Section 2 of Fiji's *Domestic Violence Decree 2009* defines 'family or domestic relationship' to mean:

- (a) spouse;
- (b) other family member;
- (c) person who normally or regularly resides in the household or residential facility;
- (d) boyfriend or girlfriend;
- (e) a person who is wholly or partly dependent on ongoing or unpaid care or a person who provides such care.

Fiji - Family Law Act 2003

Fiji's *Family Law Act 2003* s 202 contains the region's first protective measures against domestic violence. Under s 202, parties to a matrimonial cause (for example, a divorce or separation) may obtain personal protection by applying to the Family Court for an injunction ordering another party not to do a certain act, or behave in a certain way, such as abusing and threatening the complainant. In matrimonial proceedings, such applications for protection orders may be made independently of other legal proceedings. A court may grant an injunction under the *Family Law Act 2003* following an *ex parte* application by the complainant. The *Domestic Violence Decree 2009* provides for six standard non-molestation conditions, as follows:

- (a) physically assault or sexually assault the protected person;
- (b) threaten to physically assault or sexually abuse the protected person;
- (c) damage or threaten to damage any property of the protected person;
- (d) threaten, intimidate or harass the protected person;
- (e) behave in an abusive, provocative or offensive manner towards the protected person;
- (f) encourage any person to engage in behaviour against a protected person, where the behaviour if engaged in by the respondent would be prohibited by the order.³⁸

There are additional conditions relating to contact, housing, children, possessions, weapons, urgent monetary relief and counselling.

Palau Family Protection Act 2012

The Palau *Family Protection Act 2012* covers a wide range of people in its definition of family or household member.

Section 3

- (c) 'Family or houseful members' include: adults and minors who are current or former spouses;

who are living together or have lived together; who are dating; who are or have been in a sexual relationship; who are related by blood or adoption to the fourth degree affinity; who are related or formerly related by marriage; who have children in common; and minor children in any of these relationships.

The Act contains only a limited definition of family violence, omitting economic and psychological violence, as well as stalking, verbal abuse, and forcible or unlawful entry. It also limits itself to 'assault' where the survivor sustains bodily injury, which offers less protection than general assault provisions in criminal laws. Similarly it contains only 'rape', which is narrowly defined as only against a woman, the definition of rape therefore neglects other non-penetrative sexual offences.

Section 3

- (a) 'Family Violence' means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defence or defence of others
- 1) Attempting to cause or causing bodily injury to another family or household member;
 - 2) Placing a family or household member in fear of bodily injury;
 - 3) Committing the rape as defined in this act, of a family or household member.

The Act also treats all family violence as one crime with one penalty, which shows that the law does not properly account for the relative gravity of offences. The maximum penalty for all family violence acts is five years' imprisonment, with a minimum penalty of six months' imprisonment.

Section 10 of the Act allows survivors of family violence to file a petition with the Supreme Court for a protection order. This process could take a substantial amount of time and may be too slow or inaccessible for survivors. Therefore, the range of ways protection orders can be issued needs to be expanded.

Papua New Guinea - Family Protection Act 2013

This Act aims to prevent and deter domestic violence by, inter alia, providing for an offence of domestic violence and establishes a regime for family protection orders. Its definition of domestic violence includes psychological violence but omits economic violence. It clearly states, however, that a number of acts that form part of a pattern of behaviour can amount to domestic violence, even if, when viewed in isolation, they are considered trivial.⁴² The act contains a wide definition of the 'spouse of a person':

'spouse of a person' means an individual of the opposite sex to the person who:

- (a) is or has been married to the person; or
- (b) Although not married to the person, is living with the person in a marriage-like relationship or has lived with the person in such a relationship; or
- (c) is a biological parent of a child with the person (whether or not they are or have been married or are living or have lived together).

Part III of the Act provides for provisions relating to family protection orders. In this section protection orders can be made by:

- (a) the complainant; or
- (b) a friend or other family member on behalf of the complainant if the complainant has given his or her oral or written consent for that friend or family member to make the application; or
- (c) a qualified legal practitioner on behalf of the complainant if the complainant has given his or her oral or written consent for that practitioner to make the application; or

- (d) a police officer on behalf of the complainant if the complainant has given his or her oral or written consent for that officer to make the application.

Section 20(2) states that the court should not take into account 'whether the defendant has paid an amount of money or given other valuable consideration, in accordance with his or her custom' when dealing with a breach of protection order.

At the time of publication, the Act had yet to be certified by the Speaker of the House of Representatives and signed by the PNG Governor General in order that it become law.

Republic of the Marshall Islands - Domestic Violence Prevention and Protection Act 2011

The *Domestic Violence Prevention and Protection Act 2011* is very specific to domestic violence and does not address harassment (outside of the home), rape, sexual assault of all kinds or trafficking. However, it does for the first time provide a legislative approach to protection orders in domestic violence cases, which was lacking in existing legislative provisions. The Act is similar to the *Vanuatu Family Protection Act 2008* in that it criminalises domestic violence, provides for specific punishment and contains comprehensive protection order provisions. It also allows the court to consider related family matters such as distribution of marital property, separation, and custody and access for children. The Act also creates a Domestic Violence Prevention and Protection Fund, which can be used to assist a 'domestic violence centre or safe house for women and children, community education program, counseling program, transportation services and call forwarding during the night or any other services in accordance with the purpose for which the fund is created'.⁴⁰ The Act takes an expansive approach to the definition of domestic violence, by including psychological and economic abuse:

§904. Domestic violence offenses.

- (1) Any person who:
- (a) assaults a family member;
 - (b) psychologically abuses or intimidates a family member;
 - (c) sexually assaults a family member;
 - (d) economically abuses a family member;
 - (e) continuously and unlawfully restrains the freedom of movement of a family member;
 - (f) stalks a family member;
 - (g) unlawfully behaves in an indecent manner to a family member;
 - (h) unlawfully damages or causes damage to a family member's property, commits an act of domestic violence.

It also contains a 'no drop' policy in cases of domestic violence:

§924. No-drop policy.

- (1) A police officer upon receiving reports of domestic violence cases shall immediately investigate and press charges if appropriate.
- (2) A prosecutor shall proceed with the case in court, before proceeding however, the prosecutor must:
- (a) believe that an act of domestic violence has been committed;

- (b) have sufficient evidence to proceed with the case.

Samoa - Family Safety Act 2013

In 2013, Samoa passed its domestic violence law, the *Family Safety Act*. The Act attempts for the first time to provide for a range of specific protection orders,⁴³ where abuse and violence occurs in intimate partner and other relationships.⁴⁴ The Act provides for the interpretation of domestic violence in s 2, to include 'physical abuse, sexual abuse, emotional, verbal, psychological abuse, intimidation, harassment, stalking and any other controlling or abusive behaviour towards a complainant which causes harm to the safety, health or wellbeing of the complainant'. The Act also provides a definition of emotional, verbal and psychological abuse:

'A pattern of degrading or humiliating conduct towards a complainant, including:

- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or
- (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as constitute a serious invasion of the complainant's privacy, liberty, integrity or security.⁴⁵

The prosecution of perpetrators of violence, however, is left to the general criminal law. Whilst the *Family Safety Act 2013* provides important basic protection to survivors of violence through protection orders, it is less than ideal from the survivor's perspective if the various forms of domestic violence in s 2 are not criminalised with penalties included for the harm caused. These baseline protections have been strengthened with the passing of the *Crimes Act* this year. The *Crimes Act* repeals the *Crimes Ordinance 1961*.

The Samoa *Family Safety Act 2013* binds the state (s 3) which meets good practice standards. The scope of persons covered by the Act is set out in the definition of domestic relationship in s 2.

Domestic relationship means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, whether in accordance to law, custom or religion;
- (b) they live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child;
- (d) they are family members related by blood or marriage;
- (e) they are family members related by legal or customary adoption;
- (f) they are or were in an engagement, courting or customary relationship, including an actual or perceived intimate or sexual relationship of any duration; or
- (g) they share or recently shared the same residence.⁴⁶

Protection Orders

Part II of the *Family Safety Act 2013* has comprehensive provisions for protection orders as follows:

- Interim protection orders (s 5).
- Protection orders where respondent does not appear on due date (s 6).
- Protection orders where respondent appears on due date (s 7).

- Court procedures for protection of complainant (s 8).
- Protection orders available to the court (s9).
- Court's power to impose conditions on a protection order (s10).
- Breach of protection order (s 11).
- Variation or setting aside of protection order (s 12).
- Seizure of arms and dangerous weapons (s 13).
- Attendance of proceedings and prohibition of certain information (s 14).

Under s 9, prohibited acts include: committing any act of domestic violence or enlisting another to commit such act;⁴⁷ entering a residence or part of such residence shared by the complainant with the respondent;⁴⁸ entering the complainant's place of employment, or part of such place;⁴⁹ preventing the complainant who ordinarily lives or lived in a shared residence from entering or remaining in the shared residence;⁵⁰ or committing any other act which the court considers appropriate in the circumstances in order to protect the complainant.⁵¹ The court may impose a number of conditions on protection orders under s 10, such as the seizure of any arm or dangerous weapon, arrangements for collection of complainant's personal property with the assistance of a police officer, and requiring the respondent to pay rent/mortgage for the property or emergency monetary relief.

The *Family Safety Act 2013* provides an overall strategy to minimise the risks to complainants by providing for substitute persons to make an application for a protection order on behalf of the complainant. Such persons include a village authority, counsellor, health service provider, member of the police service, social worker and teacher.⁵² Where substitute persons make an application on behalf of the complainant, the application must be brought with the written, free and full consent of the complainant, except in circumstances where the complainant is under s 4(4). Complainants listed under s 4(4) are children, those suffering from mental illness, those in a coma who have been unconscious for a period exceeding six hours, or any person whom the court reasonably considers unable to provide the required consent. A child or any person on behalf of the child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.⁵³ A child in the Act is defined as any person under 18 years.⁵⁴ These provisions are consistent with good practice.

Samoa's *Family Safety Act 2013* provides for penalties against those who breach an order, condition, direction or obligation imposed by the court. Upon conviction, the person is liable up to two years imprisonment or a maximum fine of 20 penalty units.⁵⁵

Section 15 of the Samoa *Family Safety Act 2013* provides for the duties of members of the police service. The police are required to provide assistance at the earliest opportunity to complainants of domestic violence without discrimination.⁵⁶ Police assistance includes arrangements for complainants and dependants to find suitable shelter, medical treatment and counselling where needed.⁵⁷ The police are required in s 15(2)(b) to provide information to the complainant of the remedies available under the Act, and the right to lodge a criminal complaint.

Tonga - Family Protection Act 2013

This Act aims to, inter alia, promote the health, safety and wellbeing of victims of domestic violence. It does this by making provision for a broad definition of domestic violence and domestic relationships.

It further provides for protection orders and clarifies the role of police officers and health practitioners.

Under section 9 of the Act, the following persons can apply for a protection order:

- a complainant
- a family member, guardian or friend
- a registered counsellor
- a law practitioner
- a health practitioner
- a head of school; or
- a police officer

Under section 37 a Family Protection Advisory Council is established that consists of key stakeholders who will advise the relevant Minister on the implementation of the legislation to ensure it is consistent with the objectives of the Act. Complementary to this Council is the creation of a Family Protection Trust Fund under section 38. The purpose of the trust fund is to assist victims of domestic violence on matters such as transportation services and health care services.

At the time of publication, the Act was awaiting Royal assent before it becomes law.

Tuvalu - Police Powers and Duties Act 2009

Section 32 of the *Police Powers and Duties Act 2009* provides for definitions of ‘domestic relationship’ and ‘domestic violence’. Despite the presence of “economic violence” in Tuvalu it is notably absent from the definition of “violence” under s32 of the *Police Powers and Duties Act*. The Act includes a wide definition of domestic relationship, including people in personal relationships (not necessarily intimate) and relationships with children living in the same residence.

‘Violence’ means:

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) psychological abuse, including:
 - (i) intimidation; or
 - (ii) harassment; or
 - (iii) damage to property; or
 - (iv) threats of physical abuse, sexual abuse, or psychological abuse; or
 - (v) for a child – abuse of the kind mentioned in subsection (2).

‘Domestic relationship’ means a relationship between two persons –

- (a) who are, or were, married to each other; or
- (b) who are, or were, in an intimate personal relationship or other personal relationship with each other; or
- (c) who are, or were, related to each other; or
- (d) one of whom is a child who -
 - (i) ordinarily resides or resided, with the other person; or
 - (ii) regularly resides or stays, or resided or stayed, with the other person; or

- (e) one of whom is, or was, a child of whom the other person is, or was, a guardian.

Division 2.9.3 of the Act makes provision for police to act in cases of domestic violence.

Section 40 states that:

A police officer is to investigate whether an act of domestic violence is being, has been, or is likely to be, committed, if the police officer reasonably suspects that a person is committing, or has committed, an act of domestic violence that: (a) is a criminal offence; or (b) has put the safety of a person at risk.⁴¹

In Tuvalu, there is no comprehensive provision in the law providing for protection orders, but there are a number of limited orders available that are centred around domestic violence. Non-molestation orders and restraining orders (protection orders), for example, are available as a common law remedy. 'Keeping the peace' is an order most commonly used in domestic violence cases by Pacific Island courts, including Tuvalu. In s 42 of the *Police Powers and Duties Act*, a police order may be issued by a police officer against a perpetrator so that the survivor of domestic violence is, *inter alia*, protected from acts of domestic violence. It also prescribes the matters that a police officer has to consider when issuing a police order against a perpetrator of domestic violence.

42 When police order may be made

(1) A police officer may make a police order if the police officer:

(a) either:

(i) reasonably believes that:

i.A. A person has committed an act of domestic violence and is likely again to commit such an act; or

i.B. A child has been exposed to an act of domestic violence committed by or against a person with whom the child is in a domestic relationship and the child is likely again to be exposed to such an act; or

(ii) reasonably fears, or reasonably believes that another person reasonably fears, that:

ii.A. a person will have committed against him or her an act of domestic violence; or

ii.B. a child will be exposed to an act of domestic violence committed by or against a person with whom the child is in a domestic relationship; and

(b) reasonably believes that making an order is necessary to ensure the safety of a person.

44 Effect of police order

(1) The person against who a police order is issued must immediately:

(a) surrender to a police officer any weapon in his or her possession or control; and

(b) vacate any land or building occupied by a person at risk, whether or not he or she has a legal or equitable interest in the land or building.

(2) It is a condition of every police order that the person against whom the police order is issued must not:

(a) physically or sexually abuse a person at risk; or

(b) threaten to physically or sexually abuse a person at risk; or

(c) damage, or threaten to damage, property of a person at risk; or

- (d) engage, or threaten to engage, in other behaviour, including intimidation or harassment, that amounts to psychological abuse of a person at risk; or
- (e) encourage any person to engage in behaviour against a person at risk, where the behaviour, if engaged in by the person against whom the order is issued, would be prohibited by the order; or
- (f) watch, loiter near, or prevent or hinder access to or from the dwelling, business, or employment of a person at risk, or an educational institution attended by a person at risk, or any other place that a person at risk often visits; or
- (g) follow a person at risk, or stop or accost a person at risk, in any place; or
- (h) where a person at risk is present on any land or building — enter or remain on that land or building in circumstances that constitute a trespass; or
- (i) make any other contact with a person at risk (whether by telephone, correspondence, or otherwise) except such contact as is reasonably necessary in any emergency.

Vanuatu - Family Protection Act 2008

The definition of domestic violence provided in the *Family Protection Act 2008* includes physical assault and sexual abuse, which could also be dealt with under the criminal code if needed. It also includes psychological violence by using the words ‘psychologically abuses, harasses or intimidates’. These definitions (found in both the Fiji and Vanuatu Acts) are very important when a person applies for a protection order since they determine whether or not the person is eligible to apply. Protection orders may be issued where there has been violent and abusive behaviour towards an intimate partner, children or other members of the family in the same household. Therefore they are an integral part of legislation addressing gender-based violence such as domestic violence and sexual assault. The following definitions are given in Part 1 of the Act, Preliminary matters.

3. Meaning of family member

Each of the following is a member of a person’s family.

- (a) the spouse of the person;
- (b) a child of the person and/or the person’s spouse;
- (c) a parent of the person or the person’s spouse;
- (d) a brother or sister of the person or the person’s spouse;
- (e) any other person who is treated by the person as a family member.

4. Meaning of domestic violence

- (1) A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:
 - (a) assaults a family member (whether or not there is evidence of a physical injury);
 - (b) psychologically abuses, harasses or intimidates the family member;
 - (c) sexually abuses the family member;
 - (d) stalks the family member so as to cause him or her apprehension or fear;
 - (e) behaves in an indecent or offensive manner to the family member;

- (f) damages or causes damage to the family member's property;
- (g) threatens to do any of the acts in paragraphs (a) to (f).

Section 17 of the *Family Protection Act* allows for a temporary protection order lasting 14 days. This may be renewed once, for a further period of 14 days, giving time for a complainant to get to a court. Section 36(3) allows temporary protection orders to be communicated orally, by telephone, radio or similar facility, or by personal service. It also allows many different people to apply for a protective order.³⁹ Violation of a protection order is a criminal offence under s 21 of the Act.

Case law

Kiribati - *Toakarawa v The Republic of Kiribati* [2006] KICA 9

The Kiribati case of *Toakarawa v The Republic of Kiribati*⁵⁸ illustrates the recognition by the court that domestic violence will not be condoned, and that the culture of silence surrounding the issue only perpetuates abuse and violence. In this case the husband, whilst he was intoxicated, beat his pregnant wife, dragged her by the hair and bit her nose, cheek, lips and the fingers of both hands. The injuries to his wife were permanent, including the loss of her upper and lower lips, exposing her teeth. The husband argued that he was so intoxicated that he did not know what he was doing, that he had apologised for his actions, and had later reconciled with his wife.

The Chief Justice for this case emphasised that domestic violence was not a private matter. He stated that the violence was shameful and should be severely punished. He added that it was a serious crime, regardless of the victim, but that, because such violence had been inflicted upon his wife, the crime was significantly worse. The Chief Justice took into account the apology, the reconciliation, his drunken state, the absence of previous convictions, and the early plea of guilt. The husband was sentenced to three years' imprisonment. He challenged the sentence, arguing that he needed to earn money for the family. The Court of Appeal refused to lessen the sentence saying that assaults on wives were to be treated as serious matters of public concern and that the extraordinary ferocity, the duration of the attack, and the permanent disfigurement made the sentence appropriate.

Solomon Islands - *R v Ligiau and Dori* [1985/86] SILR 214

It is not recommended to have a specific domestic violence offence with only a minor penalty, as it fails to recognise the serious nature of domestic violence offences. Therefore, a range of offences must be provided for within the legislation, complemented by strong penalties. Today, the penalties metted out by the courts' reflect the changes that are occurring in cases of sexual offences as demonstrated in the Solomon Islands case of *R v Ligiau and Dori*.

In this case the two accused pleaded guilty to rape of a twelve-year-old girl and to attempted rape of a girl aged ten years and four months. Both men used no more force than was necessary to commit the offences, but both threatened to kill their victims unless they submitted and so frightened them to ensure that further violence was unnecessary. In this case, the extremely young age of the victims was a serious aggravating factor. The case against the second accused was distinguishable from that of the first because it was an attempt only. Finally, the guilty pleas were given particular allowance as they not only showed remorse by the accused, but also spared the young victims from testifying and reliving the experience. Accordingly, the first accused was sentenced to six years' imprisonment for rape and the second accused to five years' imprisonment for attempted rape.

In making his decision, Chief Justice Ward stated:

Rape is an extremely serious offence. It is an offence of violence based on a selfish disregard of the rights and feelings of another and is likely to cause, more than almost any other offence, serious and

long-lasting harm to the victim.

The problem in sentencing for such an offence is that, when the court is faced with a contrite offender, too often mitigating factors are allowed to push consideration of the victim and the offence itself into the background. In sexual offences as a whole, and rape and attempted rape in particular, matters of mitigation personal to the offender must have less effect on the sentence than in most other serious crimes.

Policy

Cairns Communiqué 2009

The Pacific Islands Forum leaders meeting in Cairns in August 2009 recognised violence against women as pervasive and under reported. The following extract is from the Cairns Communiqué.⁵⁹

64. Sexual and gender-based violence (SGBV) is now widely recognised as a risk to human security and a potential destabilising factor for communities and societies alike. It remains pervasive across the Pacific, and as it is still considered a sensitive issue in most Pacific cultures, its prevalence often goes underreported. There is an urgent need to acknowledge the prevalence of SGBV in the Pacific at all levels of the community, whether occurring in the domestic context or during conflict and post-conflict situations.
65. While accepting the differing contexts of Forum member countries, Leaders noted the importance of encouraging and ensuring national ownership of necessary processes to address SGBV. Recognising the significance of this issue, Leaders:
- (a) reaffirmed support for ongoing action by the Secretariat and Forum members at the highest level, in collaboration with relevant stakeholders, to raise awareness of the seriousness of sexual and gender based violence (SGBV) and its impact on the Pacific, and to establish firmly on the political agendas of Forum members the issue of SGBV;
 - (b) acknowledged the prevalence of SGBV in the Pacific and the risk that it poses to human security and as a potential de-stabilising factor for communities and societies alike;
 - (c) welcomed and supported efforts and important contributions at the local, national and regional levels to address SGBV, including through increased Pacific engagement in relevant global initiatives aimed at preventing and eliminating violence against women and girls in all parts of the world; and
 - (d) committed to eradicate SGBV and to ensure all individuals have equal protection of the law and equal access to justice.

Pacific Leaders Gender Equality Declaration 2012

During the 2012 meeting of the Pacific Islands Forum leaders, a commitment was made to lift the status of women and to encourage them to be active in all areas of economic, social and political life. The Pacific Leaders gender equality declaration came as recognition was given to the fact that progress towards gender equality in the region had been slow, and women remain marginalised in all areas of public and private life. In the area of VAW, the leaders committed to:

Ending violence against women

- **Implement** progressively a package of essential services (protection, health, counselling, legal) for women and girls who are survivors of violence.
- **Enact** and implement legislation regarding sexual and gender based violence to protect women

from violence and impose appropriate penalties for perpetrators of violence.

Solomon Islands - National policy on eliminating violence against women

In 2009, the Solomon Islands government published a comprehensive *National policy on eliminating violence against women*. The policy states that the government:

will exercise leadership to end all forms of violence against women, and it will support advocacy in this regard at the local, provincial, national, regional and international levels. It will take positive measures to address the inequalities that cause and perpetuate VAW, strengthen VAW prevention efforts, address the triggers of VAW, and improve awareness of women’s rights and the equality of all citizens.⁶⁰

The policy also provides that Solomon Islands has agreed to implement CEDAW and other international agreements, including the CRC and the *International covenant on economic, social and cultural rights (ICESCR)* that require action to stop violence against women.

Kiribati - National approach to eliminating sexual and gender based violence in Kiribati – Policy and national action plan 2011–2021

In 2010, the Kiribati government developed the *National approach to eliminating sexual and gender-based violence*. The approach comprises a national policy and national action plan. The policy and plan are complementary. The policy recognised that the elimination of gender-based violence requires long-term commitment, coordination, vision and passion to improve the life and future of Kiribati girls, women and children.

LONG TERM COMMITMENT

This policy recognises that the elimination of gender based violence requires long term commitment, coordination, vision and passion to improve the life and future of Kiribati girls, women and children.

.....

The five key Strategic Areas which form the Policy’s main intervention are as follows:

- (i) *Develop National Leadership and Commitments to Eliminate Gender Based Violence*
- (ii) *Strengthen Legal frameworks, Law enforcement and the Justice system*
- (iii) *Build Institutional and Community Capacity*
- (iv) *Strengthen & Improve Preventive, Protective, Social and Support services*
- (v) *Eliminate and Prevent GBV through Civic Engagement and Advocacy*⁶¹

Developments to watch

Tuvalu - Draft Family Protection and Domestic Violence Bill 2011

This bill provides for a broad definition of domestic violence, includes a section on the prevention of domestic violence, establishes a comprehensive regime of protection orders and evidence procedures during domestic violence cases, and also establishes a Family Protection Fund. The definition of domestic violence in s 7 includes psychological and economic abuse, and also the psychological abuse of a child:

Without limiting the definition of violence in subsection (2):

- (a) a person psychologically abuses a child if the person:
 - (i) causes or allows the child to see or hear the physical, sexual, psychological or economic

abuse of a person with whom the child has a domestic relationship; or

- (ii) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring; and
- (b) the person who suffers that abuse is not regarded, for this subsection, as having caused or allowed the child to see or hear the abuse, or as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

Parts V to XII of the Bill relate to the provision of protection orders, of which there are five types; temporary, consent, emergency, interim and final. All provisions related to protection orders are given with consideration of the best interests of the complainant.

Cook Islands - Draft Family Law Bill 2011

The Cook Islands Government prepared their Family Law Bill in 2011 which has a comprehensive definition of ‘domestic violence’, provides for protection, occupation and emergency orders, including mandatory conditions and an enforcement mechanism.

5. Legal proceedings and evidence

Regardless of age or sex, the specific issues of consent, corroboration and credibility are important in sexual offence cases and laws. Archaic laws, gender bias, a lack of knowledge of VAW and children, and a lack of competent representation continue to hamper justice systems in the Pacific. Despite the overwhelming presence of domestic violence and child abuse at home and in the community, comprehensive approaches and effective interventions have been slow to develop.

(1) Consent and proof of resistance

Consent is a basic issue in sexual offences such as rape, indecent assault, incest and defilement of persons. Proof of resistance is a common law rule requiring prosecutors to establish that the complainant physically fought back and resisted the perpetrator, or else consent is inferred or assumed. Physical resistance may be an unrealistic expectation of a complainant against a strong or armed perpetrator, and it does not take into consideration women who are physically or mentally disabled, drugged, asleep, or those immobilised by fear.

In deciding whether the complainant consented to such actions, courts may need to consider the following questions:

- Was the complainant under the age of consent?
- Was the accused a close relative or guardian of the complainant?
- Was the accused married to the complainant at the time?
- What were the circumstances of the act? (For example, was the complainant under duress or under threat of death or injury? Was the complainant physically or mentally disabled, asleep, drunk or drugged?)
- Did the accused hold an honest and reasonable belief that the complainant consented?
- Did the complainant resist the accused?
- Is there physical proof of resistance?

These questions cover not only the legal definitions of sexual offences, but also aspects of consent, corroboration and credibility. The basic reason for requiring evidence of physical harm is to prove that the victim did not consent and suffered sexual violence. In recent years, some jurisdictions have moved towards a free and voluntary consent model, such as the one adopted by the UK in the *Sexual Offences Act 2003*.

Significant features are that consent must be free and voluntary, and that the accused must describe the steps taken to obtain the victim's consent.⁶² This is an important change; the burden is on the accused to prove that he obtained the consent of the victim, not on the victim to prove resistance.

(2) Corroboration and credibility

The corroboration warning is a common law doctrine whereby a judge warns him or herself, or issues instructions to the court and/or jury that the testimony of a witness needs to be corroborated. The position of courts is that it is dangerous to convict on the uncorroborated evidence of the complainant in sexual assault cases. However, this position is now changing, as it is seen as discriminatory. Questions that may be asked by a court include:

- Is the complainant a credible witness?
- Can the complainant's evidence be backed up by other independent evidence?

The corroboration rule has been abolished in Cook Islands,⁶³ Fiji,⁶⁴ Solomon Islands⁶⁵ and in the Marshall Islands⁶⁶ however it is only partially abolished in Kiribati.⁶⁷

Legislation

Fiji - *Crimes Decree 2009*

The *Crimes Decree 2009* describes the conditions under which free and voluntary consent may not be assumed, and specifically states that submission without physical resistance by a person to an act of another person shall not alone constitute consent.

206. In this Part —

- (1) The term 'consent' means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.
- (2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained —
 - (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

Kiribati - *Evidence Act 2003*

Until the passage of the amendment to the *Evidence Act 2003*, the corroboration warning was allowed under Kiribati law. Unfortunately, the amendment did not go far enough and still allows a judge to exercise discretion to allow such warnings to be made.

- (1) It is not necessary that evidence on which a party relies be corroborated.
- (2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence, or for the offence of high treason.
- (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions

of this Act, if there is a jury, it is not necessary that the judge –

- (a) warn the finder of facts that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
- (b) give a direction relating to the absence of corroboration.⁶⁸

The Kiribati *Evidence Act 2003* also excludes evidence of general reputation of the complainant with respect to chastity under section 14A. Under section 14B, permission of the court is needed to admit evidence or to cross examine the complainant about prior sexual conduct with men other than the accused. Leave is supposed to be granted only where evidence of substantial relevance to the facts is in issue under section 14C.⁶⁹

Republic of the Marshall Islands - Criminal Code 2011 [31 MIRC Ch.1]

The Republic of the Marshall Islands has passed specific legislation stating that the court should not require proof of actual resistance and that a victim’s testimony need not be corroborated.

§213.8. Provisions Generally Applicable to this Article.

- (2) Victim’s Testimony Need Not be Corroborated. For prosecutions under this Article, there is no requirement that the testimony of the victim be corroborated.
- (3) Resistance Not Required. A victim need not resist the actor for a proper prosecution under this Article.

Solomon Islands - Evidence Act 2009

Section 58 of the Solomon Islands *Evidence Act 2009* does not specifically remove the ‘proof of resistance’ rule. It does, however, provide in subsection (3)(b) that no evidence or question can be put to the complainant to establish the complainant’s consent without the permission of the court. In practice and under common law, consent is assumed if there was no proof that the complainant resisted the sexual assault of the perpetrator. The court may disallow improper questions during cross-examination if the court considers the questions to be ‘annoying, harassing, intimidating, humiliating, offensive, oppressive ... or without basis, other than a sexist, racial, cultural or ethnic stereotype.’⁷⁰ The court may disallow questions on ‘proof of resistance’ by the victim under ss 58(3) and 66 of the *Evidence Act 2009*.

Until the passage of the *Evidence Act 2009*, the corroboration warning was allowed under Solomon Islands law. The enactment of the *Evidence Act 2009* removed the corroboration and caution requirements.

- 18. Subject to any other written law, it is not necessary that evidence on which a party relies be corroborated.
- 19. A court need not exercise caution before convicting an accused in reliance on the following evidence -
 - (a) evidence given by a child;
 - (b) evidence given by a victim of an offence against morality; or
 - (c) evidence in relation to an offence against morality where there was delay in reporting the crime.

Section 58(1) of the *Evidence Act 2009* excludes evidence of general reputation of the complainant with respect to chastity. Section 58(2) permits the court to admit evidence which has direct relevance to the facts in issue, as it would be contrary to the interests of justice to exclude it. No evidence can be given directly or

indirectly on the reputation of the complainant except with the permission of the court in accordance with section 58(3).

58. (1) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the accused, except with the permission of the court.

(2) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused unless the evidence or question:

- relates directly to the acts, events, or circumstances which constitute the offence for which the accused is being tried; or
- is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interest of justice to exclude it.

(3) In case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters:

- for the purpose of supporting or challenging the truthfulness of the complainant; or
- for the purpose of establishing the complainant's consent; or
- for any other purpose except with the permission of the court.

The problem with the legislation in Solomon Islands is the use of the words '...except with the permission of the court' in section 58(1) meaning that past sexual history is admissible without any explanation needed by the court.

Section 19(c) of the *Evidence Act 2009* provides 'a court need not exercise caution before convicting an accused in reliance on the ... (c) evidence in relation to an offence against morality where there is a delay in reporting a crime.' This provision adequately protects complainants of sexual violence by specifically providing for the court not to exercise caution with respect to the delay in prosecution, and is consistent with good practice.

Section 41(4) of the Solomon Islands *Evidence Act 2009* states that special arrangements may be made for vulnerable witnesses; to give their evidence without facing their assailants, allow remote audio visual taking of evidence, closure of the court, restriction on publication and allowing a support person to accompany the witness.

Case Law

Fiji - *Balelala v State* [2004] FJCA 49⁷¹

In this 2004 case, the defendant held the complainant prisoner and raped her three times at a popular nature reserve. He was found guilty and corroboration of the evidence was a point of discussion. On appeal in the Supreme Court, the defendant argued that because of the corroboration warning, it was dangerous to convict him on the complainant's words alone, and therefore his conviction should be overturned. In a ground-breaking precedent, the court removed the corroboration practice ('the rule') after examining the legal basis of it, the rationale behind the rule, the laws of Fiji and those of other jurisdictions. The code did not require corroboration in a rape offence or other sexual offences, but it was enforced in Fiji as a long-standing practice under common law. The court gave a warning to itself that it was dangerous to convict on the uncorroborated evidence of the victim.

The court examined the origin of the common law rule and said it was representative of the practice in force

in England at the time the evidence legislation was enacted in 1944. The rule was based on an outmoded and fundamentally flawed rationale, which was unfairly demeaning to women. The rule had been applied to victims of either gender. In other jurisdictions it had been confined to women and girls because, under criminal law, rape and other sexual offences were crimes committed against women. Victims of sexual offences were effectively placed in a special category of suspect witnesses. This resulted in convictions that were solely based on the complainant's evidence being regarded as unsafe and unsatisfactory. Moreover, it afforded the accused protection which did not exist in other cases of serious criminality. In addition, it almost certainly had the effect in many instances of deterring the rape victims from reporting offences committed against them or from cooperating in the prosecution of offenders.

The court found that the rule discriminated against women who were victims of sexual violence, in violation of article 38(1) of the Fiji 1997 Constitution. Also using article 43(2), the court found that the provisions of the Bill of Rights 'to promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the rights set out in the Bill of Rights' required it to do away with the corroboration warning. CEDAW was cited as prohibiting any form of discrimination against women. The elimination of the rule placed complainant's testimony regarding sexual assault on an equal footing with testimony offered by victims of other crimes. The court noted that legislation might be necessary to put any residual question to rest.

Samoa - *Police v AB* [2003] WSSC 24 and *Police v Avia* [2007] WSSC 24

The *Evidence Ordinance 1961* of Samoa does not provide for the rules of corroboration in sexual offences cases, but common law practice requires that, where the evidence of a witness is not corroborated, a warning of the danger of convicting on uncorroborated evidence be given. In the landmark case of *Police v AB*⁷² His Honour Chief Justice Sapolu summarises the position of the court on the common law rule of corroboration.

Counsel for the prosecution and for the accused referred to corroboration of the victim's testimony. In England and New Zealand there is no longer a requirement for the traditional corroboration warning in sexual cases. The rationale usually given for that warning is that it is easy for a girl to allege rape or indecency but difficult for the man to disprove it. That rationale is no longer accepted in the jurisdictions I have referred to.

I, myself, for a number of years now, have been in doubt about the validity of the rationale for the corroboration warning. The real question ought to be, does the evidence, including that of the victim in a sexual case, establish the elements of the charge beyond reasonable doubt. There should be no preconceived prejudice that it is easy for a girl to cry rape or indecency. Not only is there no data in Samoa to show that is in fact the case, but the rationale for the traditional corroboration warning is somewhat insulting of girls and women. It puts their credibility into question right from the commencement of a trial without any solid justification for doing so. I will therefore consider the evidence given for the prosecution and for the defence without a preconceived prejudice that it is easy for a girl to cry rape or indecency.

In the case of *Police v Avia*⁷³ his Honour, Mr Justice Nelson confirms the position on the rule of corroboration in sexual offences cases as provided by The Honourable Chief Justice Sapolu in *Police v AB*. He stated:

It is certainly not a requirement of the law of this country that a female complainant's evidence of a sexual assault requires some sort of special corroboration. Such evidence need not be treated differently from the evidence of any other witness and the matter of corroboration only goes towards its credibility and weight. See the judgment of Sapolu CJ in *Police v AB* [2003] WSSC 24. The law now is able to convict on the testimony of a complainant standing alone.

Whilst the common law requirement for corroboration has been abrogated by the courts in Samoa, there are other sexual offences in the *Crimes Ordinance 1961*, where evidence of survivors could be treated differently. It will bring about more certainty if the abrogation of the corroboration rule was provided by statute by way of an amendment to the *Evidence Ordinance 1961*.

6. Human trafficking

Trafficking in persons, also called human trafficking, is the illegal trade of human beings for the purposes of commercial sexual exploitation and forced labour. It is a violation of human rights and another form of VAW and children. Poverty, lack of employment, lack of education, discrimination, subordinate status in society, and lack of comprehensive protective legislation contribute to their vulnerability to trafficking, prostitution and violence. Trafficked women and children suffer serious economic, social, educational and health risks, including drug and alcohol addiction, and HIV and AIDS.

Because of their geographical isolation, porous borders and limited law enforcement capability, PICs are vulnerable to organised crime networks and illegal activities. The illicit manufacture and trade in drugs, the trade in endangered wildlife, money-laundering, trans-shipment of drugs through Pacific corridors and other forms of transnational criminal activities have been highlighted from time to time in the media of various Pacific countries.

In Kiribati, Solomon Islands, Tonga and Tuvalu, the existing penal codes and the *Criminal Offences Act* in Tonga include limited provisions to protect persons from being trafficked. Such codes covered the procuring, abduction or kidnapping of women and girls for the purposes of prostitution, or to have illegal sexual intercourse with another person within or across national borders.

Since 2002, Cook Islands and Fiji have amended their criminal codes to include separate provisions on human trafficking, while Kiribati, Tonga, Tuvalu and Vanuatu have passed separate comprehensive legislation on transnational organised crime, including human trafficking offences. The new human trafficking laws contain substantially increased penalties. At the end of 2011, Cook Islands, Fiji, Kiribati, Tonga, Tuvalu and Vanuatu had complied both with the United Nations *Convention against Transnational Organised Crime* and with its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*. This means that most Pacific Islands Forum members have adopted some legislation to protect women and children against being trafficked.

Legal frameworks must criminalise people smuggling and trafficking in persons, but must also make provision for protection of asylum seekers, refugees, smuggled migrants and victims of trafficking in line with relevant international human rights instruments, and the people smuggling and trafficking protocols to the UN *Convention on Transnational Organised Crime*.⁷⁴ The trafficking protocol provides for protection of victims of trafficking under article 6, where parties are urged to protect the privacy and identity of victims and to secure anonymity during trials. Other protective measures include counselling for survivors, housing, medical treatment, education and training. The trafficking protocol also includes measures designed to give protection to people who might be considered illegal immigrants because they have been trafficked across national borders.

Addressing the causes of trafficking involves both short and long term measures. The short term measures include providing immediate safety and protection for victims, as set out in the trafficking protocol. Long term measures must be embedded in law and policy frameworks. They must include improved capacity building, investigative and enforcement measures, working with the police, customs and immigration officials and with relevant international and regional organisations. They must be based on policies surrounding poverty reduction and the education and training of disadvantaged women and girls. These are fundamental to any efforts to fight the crime of human trafficking.

The legislative framework in Pacific Island countries cover trafficking under the country’s counter terrorism, transnational organised crimes act or immigration acts, and so the criminalisation of trafficking is considered only as a cross-border immigration issue. Fiji is one country that criminalises internal trafficking through the *Crimes Decree 2009*. The FSM *Human Trafficking Act 2012* includes assistance to victims and witness of trafficking, including full protection support and care. However, most do not allow for immigration authorities to provide temporary visas to work or stay. Some PIC laws will not charge a person suspected of being a victim of trafficking with an immigration offense such as procurement of fraudulent travel documents. Some do allow for immediate removal from the country. While there is a concern that the legislation can be resource intensive it should be noted that some services already exist to assist victims of trafficking.

Country	Relevant legislative framework
Cook Islands	<i>Crimes (Amendment) Act 2003</i>
Federated States of Micronesia	<i>Human Trafficking Act 2012</i>
Fiji	<i>Immigration Act and the Crimes Decree 2009</i>
Kiribati	<i>Measures to Combat Terrorism and Transnational Organised Crime Act 2005</i>
Nauru	<i>Immigration (Amendment) Act 2005</i>
Niue	<i>Terrorism Suppression and Transnational Crimes Act 2006</i>
Palau	<i>Anti People Smuggling and Trafficking Act 2005</i>
Solomon Islands	<i>Immigration Act 2012</i>
Tonga	<i>Transnational Crimes Act 2005</i>
Vanuatu	<i>Counter Terrorism and Transnational Organised Crimes Act 2005</i>
Tuvalu	<i>Counter Terrorism and Transnational Organised Crimes Act 2009</i>

International law

Convention against Transnational Organised Crime 2000

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

A wave of reforms has begun in the Pacific as a result of countries becoming parties to the UN *Convention against Transnational Organised Crime*. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, specifically targets women and children. State parties to the Protocol are urged to adopt necessary legislative measures to establish criminal offences in trafficking.

Table 4.6 shows the countries that are currently parties to the *Convention against Transnational Organised Crime and its protocol*.

Table 4.6 Parties to the Convention against Transnational Organised Crime 2000.⁷⁵

Convention against Transnational Organised Crime		Protocol to CTAC	
Country	Date of ratification/ascension	Country	Date of ratification/ascension
Cook Islands	4 March 2004	Kiribati	15 September 2005
FSM	24 May 2004	FSM	2 November 2011
Kiribati	15 September 2005	Nauru	12 July 2012
Marshall Islands	15 June 2011		
Nauru	12 November 2011		
Vanuatu	4 January 2006		
Nauru	12 July 2012		

Regional declarations

Nasonini Declaration on Regional Security 2002

In 2002, the Thirty-Third Pacific Islands Forum in Suva, Fiji, issued the *Nasonini Declaration on Regional Security 2002*, which provides a regional mandate for the island member countries to combat trafficking in persons.

8. Leaders underlined the importance to Members of introducing legislation and developing national strategies to combat serious crime including money laundering, drug trafficking, terrorism and terrorist financing, people smuggling, and people trafficking in accordance with international requirements in these areas, taking into account work undertaken by other bodies including the UN and the Commonwealth Secretariat.

Legislation

Fiji - Crimes Decree 2009

Fiji's *Crimes Decree 2009* (Part 12, Division 3) contains new and wide-ranging offences to cover crimes against humanity, including the crimes of torture, rape, sexual slavery, sexual violence and enforced prostitution. Division 5 of the decree provides for the offences of slavery, sexual servitude and deceptive recruiting. Division 6 provides for trafficking in children, and the offence of people-smuggling is covered in Division 7.

Cook Islands - Crimes Amendment Act 2003

The Cook Islands Crimes Amendment Act 2003 added a number of criminal offences to the Crimes Act under a section entitled Organised Crime. Offences in this section include smuggling migrants and trafficking in people by means of coercion or deception. Section 109D states:

109D. Trafficking in people by means of coercion or deception –

(1) Everyone is liable to the penalty stated in subsection (2) who -

- (a) arranges the entry of a person into the Cook Islands or any other state by one or more acts of coercion against the person, one or more acts of deception of the person, or both; or
- (b) arranges, organises, or procures the reception, concealment, or harbouring in the Cook Islands or any other state of a person, knowing that the person's entry into the

Cook Islands or that state was arranged by one or more acts of coercion against the person, one or more acts of deception of the person, or both.

- (2) The penalty is imprisonment for a term not exceeding 20 years, a fine not exceeding \$500,000, or both.

Kiribati - *Measures to Combat Terrorism and Transnational Organised Crime Act 2005*

In 2005, Kiribati improved legislation on trafficking in persons and people smuggling by passing the *Measures to Combat Terrorism and Transnational Organised Crime Act 2005*, with comprehensive provisions set out in Part VIII. Any person who engages or arranges trafficking of a person is committing an offence and is liable to 15 years' imprisonment.⁷⁶ Heavier penalties of 20 years' imprisonment have been established for trafficking in children,⁷⁷ with the consent of persons trafficked not available as a defence.⁷⁸ Protection for trafficked persons is provided by s 45 of the act with the offence of people smuggling created by s 46 of the act. The penalty of life imprisonment is created by s 49, where persons smuggled are subjected to cruel, inhuman, degrading or exploitative treatment, and/or endangering the life and safety of the person smuggled. Protection for smuggled persons is provided under s 50.

Tonga - *Transnational Crimes Act 2006*

The Transnational Crimes Act 2006 makes provision for offences of trafficking in persons, where any person engaged in trafficking is liable to a maximum prison sentence of 25 years.⁷⁹ A harsher penalty of 30 years' imprisonment can be imposed upon any person trafficking in children.⁸⁰ A child is defined as a person under the age of 18 years⁸¹ and consent of persons trafficked is not a defence.⁸² There are a number of articles in the CRC which require state parties to protect children from all forms of sexual exploitation, abuse, torture, sale, trafficking and the exploitative use of children in prostitution, unlawful sexual and pornographic practices.⁸³

Tuvalu - *Counter Terrorism and Transnational Organised Crimes Act 2009*

In 2009, Tuvalu passed the *Counter Terrorism and Transnational Organised Crime Act 2009* on trafficking in persons and people smuggling. Any person who engages or arranges to traffick persons commits an offence and is liable to 25 years' imprisonment.⁸⁴ Heavy penalties of 20 years' imprisonment have been established for trafficking in children,⁸⁵ with the consent of persons trafficked not available as a defence.⁸⁶ Protection for trafficked persons is provided by s 72 of the act. The offence of people smuggling is provided in s 74 of the act, with those guilty of such an offence liable to 20 years imprisonment.⁸⁷ Aggravated offences with a 15 year imprisonment penalty are also created under s 77, where persons smuggled are subjected to cruel, inhuman, degrading or exploitative treatment, including endangering the life and safety of the person(s) smuggled.

Vanuatu - *Counter Terrorism and Transnational Organised Crimes Act (Cap 313)*.

The Vanuatu *Counter Terrorism and Transnational Organised Crimes Act (Cap 313)* establishes the offences of people trafficking and people smuggling in Part 5 of the act. The act contains a specific provision for the offence of trafficking in children⁸⁸ and the exploitation of those without the right to work.⁸⁹ In section 37, the act states that the consent of the trafficked person cannot be raised as a defence, with section 38 covering provisions for the protection of the victim.

Protection for trafficked persons

38. (1) A trafficked person is not liable to criminal prosecution for:

- (a) the act of trafficking in persons or being a party to an offence of trafficking in persons; or
- (b) the person's illegal entry into Vanuatu in connection with the act of trafficking in persons if Vanuatu is the receiving country; or

- (c) the person's period of unlawful residence in Vanuatu after being trafficked if Vanuatu is the receiving country; or
- (d) the person's procurement or possession of any fraudulent travel or identity documents that the person obtained, or with which the person was supplied, for the purpose of entering the receiving country in connection with the act of trafficking in persons.

7. Conclusion

In this chapter, changes to laws relating to VAW, including sexual offences, domestic violence, legal proceedings, and trafficking in persons, were discussed. Changes to these laws have been significant over the past decade, but there is still a long way to go to ensure that women and children achieve safety and equality. Also, as many of the laws have been enacted only recently, a substantial body of evidence demonstrating that the changes in the laws have created significant changes in the lives of women is yet to emerge. For example, legislation might be enacted or amended, but if law enforcement agencies and the legal profession are not aware or willing to apply the legislation, then changes to laws are negated. Similarly, if women are not aware of their own legal rights or are prevented access to the system, law reform will not change their situation.

The development and enactment, in particular of domestic violence legislation in the region, has been a significant change, but many countries have drafted only the minimum requirements, leaving out prevention initiatives and the provision of support services for women. Comprehensive legislation needs to be coupled with political, cultural and social will in order to achieve lasting and sustained changes for women experiencing violence.

¹United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, UN Doc ST/ESA/329 (July 2010).

²Claudia Garcia-Moreno et al, *WHO Multi-country Study on Women's Health and Domestic Violence against Women*, (World Health Organisation, 2005), 7.

³Secretariat of the Pacific Community (for the MISA, Kiribati) *Kiribati Family Health and Support Study: A Study on Violence against Women and Children* (2010) 81.

⁴Vanuatu Women's Centre and Vanuatu National Statistics Office *Vanuatu National Survey on Women's Lives and Family Relationships* (2011) 16.

⁵Secretariat of the Pacific Community, *Solomon Islands Family Health and Safety Study: A Study on Violence against Women and Children* (2009) 62.

⁶Secretariat of the Pacific Community and UNFPA, *Samoa Family Health and Safety Study* (2006) 14.

⁷Ma'a Fafine mo e Famili, *National Study on Domestic Violence against Women in Tonga 2009* (June 2012) xxiv.

⁸Ibid xxv.

⁹Secretariat of the Pacific Community and Macro International Inc. *Demographic and Health Survey* (2007) 278.

¹⁰Ibid.

¹¹UNESCAP, *Economic and Social Survey of Asia and the Pacific* (2007) 119.

¹²Fiji Women's Crisis Centre: Preliminary Findings of the National Research on Women's Health and Life Experiences in Fiji (2010/2011) – a survey exploring the prevalence, incidence and attitudes to intimate partner violence in Fiji.

¹³Daniel Stubbs and Sainimili Tawake, *Pacific sisters with disabilities at the intersection of discrimination*, UNDP Pacific Centre (2009).

¹⁴Report of the Special Rapporteur on violence against women, its causes and consequences (August 2012).

¹⁵Christine Forster, 'Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standard', *Melbourne University Law Review* [2009] 28.

¹⁶Ibid 1.

¹⁷<http://www.forumsec.org>

¹⁸Section 207 *Crimes Decree 2009* (Fiji); *Criminal Code 2011* Section 213.0 [31 MIRC Ch.1] (Marshall Islands); section 347 *Criminal Code Act 1974* (Papua New Guinea); section 118 *Criminal Offences Act (Cap.18)* and *Criminal Offences (Amendment) Act 1999* (No.17/1999) which repealed sub-section (2) of section 118 making rape within marriage a criminal offence, *Penal Code (Amendment) Act 2003*, s.90.

¹⁹Jalal (1998) p. 82

²⁰Section 141(3) *Crimes Act 1969* (Cook Islands); section 162(4) *Niue Act 1966* (Niue); section 47(3) *Crimes Act 1961* (Samoa).

²¹Section 347 (1) states ' a person who sexually penetrates a person without consent is guilty of rape.'

²²Section 349

²³Section 132 *Criminal Offences Act Cap.18* (1988 Ed.).

²⁴Section 135 (1) (2) *Criminal offences Act Cap. 18* [1988 Ed.]

²⁵Miranda Forsyth 2006. 'Sorcery and the Criminal Law in Vanuatu' [2006] *LawAsia Journal*; Imrana Jalal. Expert Paper on 'Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Law' United Nations Division for the Advancement of Women, United nations Economic Commission for Africa Expert Group meeting on good practices in legislation to address harmful practices against women, Ethiopia May 2009.

²⁶Kiribati *Penal Code Cap. 67 s. 183*; Solomon Islands *Penal Code Cap. 26 s.190*; Tuvalu *Penal Code Cap.8 s. 183*; Vanuatu *Penal Code s.151*.

²⁷Miranda Forsyth 2006. 'Sorcery and the Criminal Law in Vanuatu' [2006] *LawAsia Journal*; Imrana Jalal. Expert Paper on 'Harmful Practices against Women in Pacific Island Countries: Customary and Conventional Law' United Nations Division for the Advancement of Women, United nations Economic Commission for Africa Expert Group meeting on good practices in legislation to address harmful practices against women, Ethiopia May 2009.

²⁸1994 Radhika Coomaraswamy of Sri Lanka.

²⁹Section 223.

³⁰S.6 of PNG *Criminal Code Act 1974* amended by No.27 of 2002 s.1. See Section 347.

³¹*Crimes Bill 2012* s 50.

³²*Criminal Offences (Amendment) Act 1999* s 5.

³³*Penal Code (Amendment) Act 2003* s 90.

³⁴<http://www.forumsec.org> . Viewed 20 September 2010.

³⁵Jalal (1998): 153-174

³⁶*Family Protection Act* (Fiji), s 202.

³⁷*Family Protection Act 2008* (Vanuatu); *Domestic Violence Decree 2009* (Fiji); *Domestic Violence Prevention and Protection*

Act 2011 (Marshall Islands).

³⁸Fiji Domestic Violence Decree 2009, section 27.

³⁹Vanuatu Family Protection Act 2008, section 27.

⁴⁰Domestic Violence Prevention and Protection Act 2011 s 926(3).

⁴¹Police Powers and Duties Act 2009 s 40.

⁴²Family Protection Act 2011 s 5(3).

⁴³Family Safety Act 2013 pt II.

⁴⁴Family Safety Act 2013 s 2.

⁴⁵Family Safety Act 2013 s 2.

⁴⁶Family Safety Act 2013 s 2.

⁴⁷Family Safety Act 2013 s 9(a).

⁴⁸Family Safety Act 2013 s 9(b).

⁴⁹Family Safety Act 2013 s 9(c).

⁵⁰Family Safety Act 2013 s 9(d).

⁵¹Family Safety Act 2013 s 9(e).

⁵²Family Safety Act 2013 s 4(3).

⁵³Family Safety Act 2013 s 4(5).

⁵⁴Family Safety Act 2013 s 2.

⁵⁵Family Safety Act 2013 s 18.

⁵⁶Family Safety Act 2013 s 15.

⁵⁷Family Safety Act 2013 s 15(2)(a).

⁵⁸*Toakarawa v The Republic of Kiribati* [2006] KICA 9.

⁵⁹The Pacific Islands Forum, *Cairns Communique* (2009), [64] [65].

⁶⁰Solomon Islands Government, *National Policy on Eliminating Violence against Women* (2010) 9.

⁶¹page 11–12 National Approach to Eliminating Sexual and Gender Based Violence in Kiribati Policy and National Action Plan 2011-2021

⁶²UK Sexual Offences Act 2003, Part 1, section 1 (2).

⁶³Cook Islands Evidence Amendment (No.2) Act 1986-87 s20B

⁶⁴Fiji Criminal Procedure Code Decree 2009 s129

⁶⁵Solomon Islands Evidence Act 2009 s.18

⁶⁶Marshall Islands Criminal Code 2011 s213.8(2)

⁶⁷Kiribati Evidence Act 2003 s. 11

⁶⁸Evidence Act 2003 s 11.

⁶⁹See also Evidence Act 2003 s 14E.

⁷⁰Evidence Act 2009 s 66(1)b; s 66(1)d.

⁷¹*Balelala v State* [2004] FJCA 49 cited in RRRT *Pacific Human Rights Law Digest* (RRRT, vol. 1, 2005) 4-7.

⁷²*Police v AB* [2003] WSSC 24.

⁷³*Police v Avia* [2007] WSSC 34.

⁷⁴Joint PIDC – Bali Process People Smuggling, Human Trafficking and Irregular Migration Workshop, Vanuatu 19-20 October, 2010. Workshop Chairs Summary para.6. <http://www.pidCSEC.org/files/workshop/chairs/summary>

⁷⁵<http://treaties.un.org/Pages/ViewDetails.aspx>. Viewed 14 November 2011.

⁷⁶*Measures to Combat Terrorism and Transnational Organised Crime Act 2005* s 42.

⁷⁷*Measures to Combat Terrorism and Transnational Organised Crime Act 2005* s 43.

⁷⁸*Measures to Combat Terrorism and Transnational Organised Crime Act 2005* s 44.

⁷⁹*Transnational Crimes Act 2006* s 24.

⁸⁰*Transnational Crimes Act 2006* s 25.

⁸¹*Transnational Crimes Act 2006* s 2.

⁸²*Transnational Crimes Act 2006* s 26.

⁸³*Convention on the Rights of the Child*, art 34, 35, 36 and 37.

⁸⁴*Counter Terrorism and Transnational Organised Crime Act 2009* s 67.

⁸⁵*Counter Terrorism and Transnational Organised Crime Act 2009* s 68.

⁸⁶*Counter Terrorism and Transnational Organised Crime Act 2009* s 70.

⁸⁷*Counter Terrorism and Transnational Organised Crime Act 2009* s 74(3).

⁸⁸*Counter Terrorism and Transnational Organised Crime Act (Cap 313)* s 35.

⁸⁹*Counter Terrorism and Transnational Organised Crime Act (Cap 313)* s 36.

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Family Law

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Introduction

Family law is an important area of the law for both men and women as the family remains the pivotal unit for social organisation and personal identity in the Pacific region. Family law covers a wide range of areas including marriage, separation, divorce, adoption and child custody, maintenance, and the division of matrimonial property. It provides a framework for the legal recognition and breakdown of relationships, and guides people through the division of assets and responsibilities. Changes in family law have been slow to occur in the Pacific, with out-dated principles continuing to be applied. The laws governing family matters are scattered and incoherent, and in most countries are spread across a range of different legislation, some of which are clearly archaic. The only significant change in the region regarding comprehensive family law has been the enactment of the *Family Law Act 2003* in Fiji (which came into force in 2005). Smaller changes have also occurred regarding child custody in Tonga (with the enactment of the *Guardianship Act 2005*) and divorce laws in Samoa (with the enactment of the *Divorce Matrimonial Causes Amendment Act 2010*). Comprehensive family law has also been drafted in the *Family Law Bill 2011* in the Cook Islands, which is yet to be enacted by its parliament. In Vanuatu and Solomon Islands, a number of significant cases that improve women's access to matrimonial property following divorce have been decided. The following sections contain a summary of the major changes and how those changes have and will affect women.

(1) Marriage

There have been limited changes to the laws governing marriage in the region. The only change has been in Fiji where the age of marriage has been lowered from 21 years to 18 years.¹ Before 2009, a person below the age of 21 years would have needed parental, guardian or court permission to marry. Under the new law, such consent is required only for persons of less than 18 years.

The Papua New Guinea *Marriage Act 1963* forbids the customary marriage of a woman if she objects to the marriage. In Solomon Islands, the *Moli Ward Customary Law Ordinance 2010* prohibits forced marriage. This is similar to the Vanuatu *Control of Marriage Act 1966*, which makes it a criminal offence to compel another person of any age to marry against his or her will. The actual impact of these legislative provisions on women and children remains unclear.

(2) Divorce

The law on divorce has been changing slowly in the Pacific. The no-fault divorce law, a revolutionary departure from the fault-based system, is in place in Cook Islands,² Fiji, Nauru, Tuvalu and Samoa. The shift in Fiji from fault grounds to no-fault grounds is enshrined in the *Family Law Act 2003*. In Samoa, the *Divorce Matrimonial Causes Amendment Act 2010* introduced the no-fault regime into Samoa which provides for one ground for divorce, the 'irretrievable breakdown of marriage'.³ No-fault divorce systems remove blame for cruel and other harmful forms of behaviour, whereas the fault-based system is based on the premise that where there is fault, there needs to be consequences. In a fault-based system, society disapproves of certain types of behaviour in marriages and penalises the offending party.

Fiji and Samoa have a true no-fault system. This means that the guilty party concept has been eliminated and marital fault is not considered in order to obtain a divorce. As a consequence, marital fault has no role in determining spousal maintenance, or the distribution of marital property unless there are claims that one of the parties engaged in the destruction, fraudulent disposal, dissipation or concealment of marital property. Domestic violence, cruelty and adultery will also have no effect on obtaining a divorce, spousal maintenance or the distribution of property. Under the true no-fault divorce system, the financial needs of the parties and the equitable distribution of property are the only considerations, regardless of fault. This true no-fault system means that women no longer have to prove the reasons they would like to obtain a divorce, even when the reasons include domestic violence, rape, or neglect. Consequently, women will not be forced by the law to stay in an abusive marriage.

Since the *Fiji Family Law Act 2003* came into force, two issues have arisen. The first is the impact on financial support of women and children, and the second is that the no-fault system has developed some unintended results. The no-fault divorce system is equitable in nature, in that either party or both parties can apply jointly for divorce, which can be obtained one year after separation of the parties. In practice, only one party appears in court unless the divorce is contested. There is evidence in Fiji that some women do not know that they have been divorced until they are told by a third party, perhaps following the husband's remarriage. This may happen if the husband files for divorce in a court that is not the court closest to where he lives. It may also happen if the wife's signature is forged on documents claiming that the divorce documents have been served on her, as required by the Family Law Rules (see Fiji High Court decision in *Famiza Azam and Mohammed Khan*).⁴

The second issue concerns the financial status of the now divorced wife and children. Locating the former husband, and filing for maintenance, child contact (access), residence (custody) and marital property proceedings can take a long time, during which the former wife and children have no proper means of support. The *Fiji Family Law Act 2003* has been in operation for over five years, and it might be timely for analysis to be undertaken on the financial impact of the no-fault system on women and children. As the Act should be reviewed on a regular basis and this review period has subsequently lapsed, it is now up to the state to take action to review the effectiveness of its implementation.

(3) Separation

It is not uncommon for couples to separate during their marriage. In some cases, separation may happen more than once and the length of separation can range from days to weeks or much longer. It is also not uncommon for separating parties to make their own arrangements about the care of children and other domestic matters and they often rely on their extended families to provide accommodation and child care support. Generally, such cases do not come to court and the marriage remains intact until either party acts to legally terminate it.

The other avenue provided by law is judicial separation. The major changes in the last decade have been in Fiji, where judicial separation and restitution of conjugal rights provided for in the *Matrimonial Causes Act (Cap 51)* have been abolished. This is a positive change, as judicial separation was rarely used and it is easier to physically separate than to make an application for a decree of judicial separation. Similarly, the restoration of conjugal rights was an inappropriate method of attempting to effect reconciliation as it forces a husband and wife to live together when they may not want to, or it may not be in the best interests of both parties.

(4) Reconciliation

Today, the narrow focus on reconciliation has expanded to new areas of alternative dispute resolution, such as conferences, counselling and mediation, that were previously unavailable in family law matters. This development is most noticeable in the *Fiji Family Law Act 2003*, where parties are given a greater say in decisions that affect their personal lives.

These processes are helpful to parties in understanding disputed issues and reaching agreements quickly, and at reduced legal and time costs. The conferences, facilitated by the registrar or, in the case of children's matters, by the court counsellor, directly involve the parties, who control the outcome of the conferences. Where the parties reach settlement, an agreement is drawn up and submitted to the court for a consent order to be issued. The court reviews consent agreements before issuing consent orders.

Dispute resolution services are also provided by the court counselling services, established under the *Family Law Act 2003*, as well as by the Social Welfare Department, and religious and civil society organisations. Samoa, Vanuatu and Fiji (under the *Domestic Violence Decree 2009*) have adopted greater use of alternative

dispute resolutions such as pre-trial conferences, counselling and mediation. These dispute resolution and reconciliation processes allow parties to discuss marital issues in the presence of an impartial official, and gives greater autonomy to parties to resolve disputes. This means that parties are not forced to reconcile or separate by the courts but are assisted to make the right decision for themselves.

(5) Custody, access and guardianship

Over the last decade, Pacific jurisdictions have aimed at modernising family law to focus more clearly on recognising the rights of the child. This is the position to which Fiji has moved in the *Family Law Act 2003*. The Act abolishes the terms ‘custody, access and guardianship’ in order to weaken the traditional view of children as property, and to focus on the rights of the child. The Act also employs the best interests of the child principle, which is enshrined in Article 3 of the *UN Convention on the Rights of the Child*, in cases of child custody. The act encourages parents to resolve disputes over children’s residence and access. However, if disputes cannot be resolved, they will be referred to the court. The act provides an exhaustive list of factors that must be taken into account when determining the best interests of the child, including family violence involving the child or a member of the family. Section 125 of the act also provides for the child to be represented separately to the parents to ensure the interests of the child are explicitly considered. Finally, the act also provides for the drafting and submission of parenting plans, where both parents discuss and agree on provisions for residence and contact with the assistance of a court counsellor.

The act also removes illegitimacy from children born outside of the marriage, with ex-nuptial children having the same rights as children of the marriage under the act. This is seen as a major step in changing the historical discrimination and attitudes towards children born out of wedlock. Removing the legal disabilities of children born out of wedlock is also the first step in diminishing the discrimination surrounding those in *de facto* relationships.

(6) Maintenance for women and children

While various aspects of maintenance law have been problematic, we have come a long way from when the husband is solely responsible for supporting his wife and where the wife loses her rights to her own property upon marriage. Similarly, laws have moved on from when the award and denial of maintenance was based on need as well as fault; and where the award granted was permanent until the recipient remarried or died. In some jurisdictions the award of maintenance is still based on fault, where a husband guilty of a matrimonial offence is required to pay maintenance to the wife, and the wife is not entitled to maintenance if she is guilty of an offence. This was the case in Fiji up until the enactment of the *Fiji Family Law Act 2003* where a spouse has a right to maintenance and to whatever financial support is required, with no requirement to prove fault of the other party.⁵ This gives greater freedom for women to receive maintenance without investigation and judgement of matrimonial offences by the court.

Two significant changes to maintenance laws have also been seen: the adoption of a gender-neutral approach, where either the husband or the wife can pay maintenance; and the introduction of maintenance agreements that can be made by consent or agreement of the parties. The maintenance guidelines provided in the *Fiji Family Law Act 2003* and Samoa’s *Divorce Matrimonial Causes Amendment Act 2010* are fairly similar. Both laws provide that a party to the marriage is liable to maintain the other, only if the person liable is ‘reasonably able to do so and if the other party is unable to support herself or himself adequately for appropriate gainful employment or if the claimant is caring for a child under 18 years or for any other adequate reason.’⁶ In the 2010 Fiji case of *Wahida v Mohammed*, the court took into account a range of factors (including the wife’s unemployment, and her ongoing caring role for their disabled daughter) when ruling that child maintenance could be extended beyond when a child reaches the age of 18.

Maintenance classifications are fairly common in all jurisdictions, but rehabilitative maintenance is a new form of spousal support introduced in the *Family Law Act 2003*. The object of this type of maintenance is to rehabilitate a spouse to enable her or him to undertake training and be self-supporting. Such maintenance is for a short duration and recognises the educational advances made by women in society.

Choices made at marriage have varying effects on women at divorce. In some cases, giving up employment to start a family and never returning to work, interrupting education to raise a family, or choosing to be a homemaker to ensure a stable and supportive family life, may disadvantage women at divorce. Depending on the age, health and commitments, short duration maintenance may be awarded to assist a spouse to be self-sufficient. However, short duration maintenance may not compensate a spouse for the sacrifices made to raise a family, and may threaten her opportunity to earn and be self-supporting.

(7) Matrimonial property

Norms, principles and rules have evolved to address problems associated with the economic consequences of divorce. In the matrimonial property regime, two significant developments have occurred. The first is a case management system to involve parties in resolving their own disputes, with some assistance from the court. The other imposes a duty on the courts to consider a list of factors when considering how the property interests of divorcing spouses should be adjusted.

As matrimonial property law is new in the region, courts are still determining what constitutes homemaker responsibilities to ensure that women (who do not work) are treated fairly in the distribution of marital assets on divorce. Homemaker responsibilities may cover a whole range of efforts and services such as cleaning, washing, decorating, cooking, gardening, raising children, supporting a spouse, and maintaining the wellbeing of the family. These efforts need to be taken into account when dividing material assets, especially when assets are in only the husband's name.

A number of cases have been heard in the region regarding the division of matrimonial property, with general principles emerging of how assets should be distributed. These general principles include: where there is a dispute, ownership should be determined according to principles of law and equity; the length of the marriage needs to be taken into account in dividing assets; non-financial contributions to the marriage must be taken into consideration; and assets during a marriage should generally be regarded as built on joint effort. This means that non-financial contributions made by women to the well-being of the family should be taken into consideration alongside financial assets. It also means that even if assets were listed solely in the husband's name (including businesses), the wife has a right to a share of these assets on divorce. This practice will increase access of women to joint marital assets and places significant and equal value to their contribution to a marriage. These principles are contained in the *Fiji Family Law Act 2003*.

In the case of *Joli v Joli*, it was also determined that these principles apply to disputes concerning the division of property between unmarried (*de facto*) couples who have lived together for an extended period of time.

(8) Family courts

Cases involving families are complex, highly emotional, with ongoing relationships and disputes involving more than one member of the family. Complex family cases are slow to resolve, with many court appearances, negative impacts on work and finances, and increased tension within families. Fiji and Nauru are the only countries in the region with specific family courts. In other jurisdictions, family matters are heard as part of the general caseload of courts, covering all matters relating to matrimonial causes, children and domestic violence. The advantages of specific family courts are that they provide direct services to families, have easy public access, provide a timely resolution of cases, and have support services and well-trained judicial officers and court staff to assist. We will briefly examine Fiji's Family Court as an example of a recently established court in the region.

Fiji Family Court

The Fiji Family Court has the most comprehensive jurisdiction in the region. The Family Court is a separate court, with its own court registries, administration and judicial officers specifically warranted to sit in it. Created under Part IV of the *Family Law Act 2003*, as a division of the High Court and the Magistrates' Court, family courts have been established throughout Fiji.

The Fiji Family Court has jurisdiction to hear divorce, nullity, residence and contact cases involving children, paternity, spousal and child maintenance, parental maintenance, marital property dispute settlement, recovery of children, adoption, domestic violence and child abuse. Cases involving a number of these issues are generally inter-related and can be resolved together. Section 8 of the *Fiji Domestic Violence Decree 2009* has conferred jurisdiction on the Family Court to hear and make orders in cases of domestic violence. The Family Court also hears adoption cases, although adoption is not specifically part of the *Family Law Act 2003*.

Section 16(2) of the act provides that a judge appointed to the Family Court 'must be, by reason of training, experience and personality, a suitable person to deal with family matters'. Training of judicial, court and support staff is crucial to the efficient functioning of the Fiji Family Court.

The Fiji Family Court has instituted a number of systems and processes, which have improved the experience of those accessing the court, as well as increasing efficiency in court administration. Some of these include:

- the availability of a court counselling service;
- a public information system with leaflets and brochures explaining the law and procedures in simple easy-to-read format in three languages (English, Fijian, Hindi);
- Ongoing flexible on-the-job training for staff;
- computerisation of the case management system, enabling the staff to link cases when various applications are filed involving the same family. This system also lists cases for the next day, the time, and the court in which the cases are to be heard, which enables the court staff, judicial officers, parties and legal representatives to log onto the Family Court website to view all of the case listings for the day and download any of the forms required;
- all forms relating to the Family Court are available in court registries all over Fiji and anyone interested is able to obtain a form and fill it out with the assistance of a family member, friend or lawyer. Once the form is filed, a hearing date for the case is given immediately and recorded on the application form;
- some forms are exempt from court fees and a party may make an application to the court registrar to waive the fees or request the partial payment of fees.

Legislation

Fiji -Family Law Act 2003

Divorce, separation and reconciliation

The Fiji *Family Law Act 2003* contains only one ground for dissolution of marriage: that it has broken down irretrievably.

Ground for dissolution

30. (1) An application under this Act by a party to a marriage for an order for dissolution of the marriage must be based on the ground that the marriage has broken down irretrievably.

- (2) Subject to subsection (3), in a proceeding instituted by an application, the ground will be held to have been established, and an order for dissolution of the marriage must be made, if, and only if, the court is satisfied that the parties have separated and have thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.
- (3) An order for dissolution of marriage will not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

The *Family Law Act 2003* contains a range of alternative dispute resolution processes which allows couples to negotiate their own arrangements with less judicial intervention. Examples of the conferences available in the legislation are given below.

- A **conference** aims to help the parties and a court to arrive at a just, quick and cost-effective resolution to the case. If agreement cannot be reached, the conference will shorten a subsequent trial as the issues have been identified, and only those in dispute will go to trial.
- The **case assessment conference** is the first court event. This conference provides parties with an early opportunity to settle their dispute with the assistance of court staff. In the case of Fiji, the court registrar is designated by law to conduct case assessment conferences. Where the case assessment conference is about children, the conference is convened by a court counsellor. Where the parties cannot reach agreement the registrar and counsellor may propose further sessions where it seems that further progress will be made.
- A **conciliation conference** is convened by the registrar when it is about financial and property matters only. The registrar will look at the case from both sides and assist the parties to explore all options to try to settle the case without proceeding to trial. If the parties do not settle their dispute, the registrar may adjourn the case and make additional procedural orders.
- The **pre-trial conference** is the step taken before a trial. This conference, convened by the registrar, is designed to encourage full disclosure through the exchange of information and documents about the case. This conference assists the parties to resolve their differences and to reach agreement and to identify the real issues that are in dispute. Once the issues have been identified with relevant documents produced, the registrar sets the date for trial.
- **Custody, access and guardianship**

The standard adopted in custody and access cases is that the best interest (overall welfare) of a child is the first and paramount consideration.⁷ The *Fiji Family Law Act 2003* s 56 encourages parents as far as possible to:

- (a) agree about matters concerning the child rather than seeking an order from the Court;
- (b) in reaching agreement regard the best interest of the child as the paramount consideration.

If parents do not agree, or if they disregard the child's best interest, the matters may be referred to a court. The standards used by courts in determining the child's best interest in custody and access decisions have largely been based on individual assessments of parental fitness and cultural influences of male and female roles in the family and society. The court's jurisdiction on child custody and access has been broadened and now more guidance is given on how to determine the child's best interest.

In s 121 the factors the court must consider in determining the child's best interests are:

- (a) any wishes of the child;

- (b) the nature of the relationship between the child and each parent and with other persons;
- (c) the likely effect of the child's circumstances, such as separation from either parent, child or any other person with whom the child has been living;
- (d) practical difficulty and expense of a child having contact with a parent affecting the child's right to maintain personal relations and direct contact with both parents on a regular basis.
- (e) the capacity of each parent, or any other person, to provide for the needs of the child, including emotional and intellectual needs.
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and tradition of the child);
- (g) the need to protect the child from physical or psychological harm;
- (h) the attitude to the child and responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or any member of the child's family;
- (j) any family violence order applying to the child or a member of the child's family;
- (k) any other fact or circumstance the Court thinks relevant.

This section also provides guidelines for determining where the child should be best placed. Custody assessments involve the interests of the entire family, including not only the parents, but also other persons, such as grandparents, with whom the child has significant relationships.

The residence (custody) laws in the *Family Law Act 2003* have adopted a gender-neutral approach where either parent is empowered to act in the best interest of the child. This is set out in the act.

Meaning of 'parental responsibility'

45.-In this part, 'parental responsibility', in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.
Each parent has parental responsibility.

46.-(1) Each of the parents of a child who is under 18 years has parental responsibility for the child.

Balancing the rights of parents and the child's welfare are constant challenges. The court has jurisdiction to make orders relating to the welfare of the child⁸ and for the personal protection of the child.⁹ For example, s 125 of the *Family Law Act 2003* gives the court the power and discretion to have the child represented separately from the parents. This means that a child is now no longer an onlooker in custody proceedings as the child's wishes must be taken into account and the child can actively participate with the assistance of a legal representative.¹⁰ The court may order that a child may be separately represented if considered necessary or upon the request of the child or an organisation concerned with the welfare of the child or any other person.¹¹

Encouraging parents to reach agreement is designed to shift parents away from fighting over children in a win/lose custody battle to a more cooperative parenting arrangement. Section 57 of the act introduces parenting plans, which are a written agreement between parents.¹² The plan must deal with issues such as child welfare provisions, which include with whom the child should live and the contact between the child and the non-custodial parent or other persons. A parenting plan may be registered in court and the application to register the plan must be accompanied by a copy of the plan, a statement that each party has

been provided with independent legal advice and a statement that the plan was developed after consultation with a counsellor or court registrar.¹³

The involvement of the court counsellor or court registrar aims to ensure an impartial assessment of factors such as parenting capacity; the involvement of both parents in the child's development; the economic security and accommodation circumstances of each parent; and the presence of violence, abuse and family support. The court may review a parenting plan and may set it aside if fraud, duress or undue influence is used to obtain the agreement of a parent.¹⁴ Any variation in the circumstances of the parents or the child may mean that a new plan should be submitted.¹⁵

The court is empowered to issue residence (custody) and contact (access) orders. It is also empowered to make specific issues orders with respect to the child. A 'specific issues order' deals with any other aspect of parental responsibility, such as conferring on a person (alone or jointly with another person) responsibility for the long-term care, welfare and development of the child or the day-to-day care of the child.¹⁶

Child of a de-facto relationship

In the interpretation section of Part VI of the act relating to children, a child is defined to mean a 'nuptial, ex-nuptial child and includes an adopted child and a still-born child'.¹⁷ Section 44 makes it clear that legal disabilities surrounding illegitimate children have been removed.

44.(1) A reference in this Act to a child of a marriage includes a reference to each of the following children –

- (a) a child adopted since the marriage by husband and wife or by either of them with the consent of the other;
- (b) a child of a husband or wife born before the marriage.

In s 100, the father of the child is required by the act to make contributions towards child-bearing expenses, even if he is not married to the mother.

100. If the father of a child is not married to the child's mother the father must make a proper contribution towards-

- (a) the maintenance of the mother for the childbirth maintenance period in relation to the birth of the child;
- (b) the mother's reasonable medical expenses in relation to the pregnancy and birth;
- (c) if the mother dies and the death is as a result of the pregnancy or birth – the reasonable expenses of the mother's funeral; and
- (d) if the child is stillborn, or dies and the death is related to the birth – the reasonable expenses of the child's funeral.

Affiliation

The *Fiji Family Law Act 2003* prescribes a number of ways a child is presumed in law to be the child of both parents.

It also provides for a parentage test to assist in determining the parentage of the child.¹⁸ The *Family Law*

Table 12.2

Where a child is born to a woman:	The couple is presumed to be the parents if:
Arising from cohabitation - Who cohabited with a man and was not married to him during this period (s 132)	The period of cohabitation was at any time during the period beginning 44 weeks and ending 20 weeks before the child was born.
Arising from registration of birth(s 133)	If a person's name is entered as a parent of the child in the register of birth, the person is presumed to be the parent of the child.
Arising from findings of the court (s 134)	The court expressly finds a particular person (during the person's lifetime or after death) is the parent of a particular child and the findings have not been altered, set aside or reversed.
Arising from acknowledgements (s 135)	If, under the laws of Fiji or of a prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child and the instrument has not been annulled or set aside.

*Regulations 2005*¹⁹ introduce a wider range of genetic testing procedures²⁰ available under blood typing technology to be carried out in specified laboratories competent to carry out parentage-testing procedures.²¹ The *Family Law Regulations 2005* provide a timeframe in which the testing of the samples in a laboratory is to be completed.²²

• **Maintenance for women and children**

The conditions for maintenance are:

155. A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately...²³

The needs of the person claiming will be balanced against the ability of the person liable to pay. A spouse may not be able to maintain herself or himself adequately, whether:

- (a) by reason of having the care and control of a child of the marriage who is under the age of 18 years;
- (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
- (c) for any other adequate reason;

having regard to any relevant matter referred to in Section 157.²⁴

Given the wide variation in family circumstances at divorce, the notion of adequate support is structured around need and economic loss suffered at the breakdown of marriage and the establishment of two separate households. In Fiji, the court must consider the reasonable needs of both parties as relevant in assessing the level of maintenance to be paid.

Fiji spousal maintenance laws work on four general principles:

- the liability for spousal maintenance immediately arises upon separation or divorce;
- either a husband or a wife may be liable for maintenance;
- spousal maintenance rests on economic considerations and not on fault;
- at the end of their marriage, each spouse should maintain himself or herself if this is reasonable in the circumstances.

These principles are illustrated by the factors that courts must take into account when determining maintenance.

Personal circumstances

The law makes it clear that the age and health of the parties²⁵ are important considerations. Therefore, in s 157(b) it states that:

(T)he income, property and financial resources (including any interesting leasehold or real estate which is inalienable) of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment.

Section 157(l) also directs the court to take into account if either party is cohabiting with another person and the financial circumstances relating to that cohabitation. In such situations, the parties may either come to some agreement to reduce the maintenance obligation of the payer or the payer may apply to the court for a variation of the maintenance ordered due to changes in circumstance.

Property in lieu of maintenance

Section 164(c) enables the court to transfer or make property settlement in lieu of maintenance. This is seen in the case *Wahida v Mohammed* discussed below, where the husband agreed in 2006 to transfer the matrimonial home to the wife in exchange for no further maintenance to be paid to the wife and daughter. The settlement of property enabled the wife and daughter to secure a permanent residence, and freed the husband from paying maintenance in the future.

Parties may also negotiate other marital assets, real estate, furniture and other household assets to lower or reduce the period of maintenance or to seek early termination.

The standard of living

Under Section 157(h) the court is required to take into account ‘a standard of living that in all the circumstances is reasonable’ in awarding maintenance. Given the wide variety of post-divorce family situations, courts have differing interpretations of reasonable standard of living, especially if the party’s ability to pay maintenance is limited.

Section 157 (i) provides for maintenance that would increase the earning capacity of the party, by enabling that party to undertake a course of education or training or to establish a business or some other venture in order to obtain an adequate income. This type of maintenance under Section 157(i) directs the court to consider the transitional and rehabilitative function of maintenance to enable a spouse to be independent and self-supporting.

Past circumstances of the marriage

Section 157(j) is the only provision that looks at the applicant’s past contributions to the marriage. It requires consideration of the applicant’s financial and non-financial contributions to the marriage. Such contributions could include:

- financial contributions made by one spouse to the other to improve the other spouse’s earning capacity through support to obtain a qualification or a higher degree;
- income and financial resources in bank accounts;
- joint property or the property of the other spouse or to support his or her lifestyle.

The acquisition of family assets and any contributions made to rent, mortgage, furniture, gardens and household chores will be considered, as well as whether a party has the care of children under 18 years.

Urgent maintenance orders

If the court has not been able to decide what order, if any, should be made, but sees that a party needs immediate financial assistance, it has powers under s 158 to issue urgent maintenance orders pending further consideration.

Cessation of maintenance

The obligation to pay maintenance ceases upon the death of the party, or upon the death of the party liable to pay maintenance.²⁶ Maintenance also ceases upon re-marriage of the party to whom the maintenance is being paid, or where a party cohabits with another in a domestic relationship unless special circumstances exist. Where parties are self-sufficient, maintenance may not be awarded or, if awarded, may be terminated.

Enforcement of maintenance

Part XIII of the *Family Law Act 2003* introduces enforcement of maintenance procedures. It states that the *Family Law Rules 2005* may make provision for enforcement including 'in the case of a maintenance order under Part VII, provision for an officer of a court exercising jurisdiction under this Act or an authority or person specified in the Rules'.²⁷ The *Family Law Rules 2005* do not make specific provision for enforcement of maintenance.²⁸ However, div 7.11 of the rules authorises the Chief Justice to appoint persons as family law enforcement officers, with the authority to take proceedings and enforce orders under the act. In the act there are other enforcement procedures, such as contempt proceedings under s 196 which may be used to punish persons for disobeying a court order, whilst the *Magistrates Court Act* and *Rules*²⁹ may also be used to enforce maintenance.

- **Matrimonial property**

The Family Courts in Fiji have jurisdiction to entertain proceedings for financial orders on divorce. Property is defined in s 2 of the act:

'property', in relation to the parties to a marriage or either of them, means property within or outside of the Fiji Islands to which those parties are, or that party is, entitled whether in possession or reversion.

The three categories of property referred to in the act are:

- income;
- property (not including native, customary or i-Taukei³⁰ land which cannot be alienated);
- financial resources (e.g. monies in bank accounts, pensions).³¹

On divorce, untangling and tracing marital assets, documentation and determining whether the assets relate to the marriage or not, takes a considerable amount of court time. For this reason, the *Family Court Rules 2005* provide for disputing parties to settle their dispute in a conference with the aid of the court registrar and if parties are legally represented, their lawyers.³² Not all cases of property disputes are addressed through the case management system as some are able to reach agreement on the division of property. The case management system has proved beneficial to parties in arriving at a settlement and thus avoiding further costs and investment of time.

There is an extensive list of factors, financial and non-financial, set out in s 162(1) of the act, which the court is required to consider in assessing the parties' contributions. As a starting point, s 162(2) provides that:

(2) For the purposes of subsection (1) the contribution of the parties to a marriage is presumed to be equal, but the presumption may be rebutted if a court considers a finding of equal contribution is on the facts of the case repugnant to justice, (for example as a marriage of short duration.)

This provision, therefore, treats the contribution of a woman who stays at home and cares for the house, husband, children and any relatives as being of equal value to the contributions of a husband who goes out to work. There are a host of non-financial contributions that can be taken into consideration, including painting, gardening, landscaping, as well as caring for the welfare of the family as homemaker or parent. Section 162 (1)(c) provides:

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent.

After the assessment of contributions made by each party to the assets, there are a number of other factors that the court is required to take into account, as well as contributions. These other factors are provided in s 162(3):

- (a) the age and state of health of the parties;
- (b) the income, property and financial resources, including any interest in inalienable property, of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
- (c) whether either party has the care and control of a child of the marriage who has not attained the age of 18 years;
- (d) the commitments of each of the parties that are necessary to enable the party to support –
 - (i) himself or herself; and
 - (ii) a child or another person that a party has the legal or customary duty to support.
- (e) a standard of living that in all the circumstances is reasonable;
- (f) the financial resources available to a person if cohabiting with another person;
- (g) the duration of the marriage;
- (h) the terms of any order. A spouse or child maintenance order made in favour of or against a party;
- (i) any other fact or circumstance which, in the opinion of the court, the Justice of the case requires to be taken into account.

On the assessment of contributions, section 162(3) differs from section 162(1), which looks at assets acquired in the past and before the marriage breakdown. Section 162(3) looks at future needs, especially for the person who has the custody of the children, or for those disabled or aged.

Fiji - Family Law (Amendment) Decree 2012

With the passing of the *Family Law (Amendment) Decree 2012*, *de facto* relationships are given recognition in respect of spousal maintenance and property in the same way as legally married persons. The decree also outlines the criteria for determining whether two persons are in a *de facto* relationship.

154A. In determining whether two persons are in a *de facto* relationship, all the circumstances of the relationship are to be taken into account, including but not limited to the following as may be relevant in a particular case -

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;

- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence and arrangements for financial support between parties;
- (e) the ownership, use and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children, if any;
- (h) the performance of household duties; and
- (i) the reputation and public aspect of the relationship.

Tonga - Guardianship Act 2004

Tonga's *Guardianship Act 2004* states:

15. (1) The Court shall regard the welfare of the child as the paramount consideration in any proceedings where any matter relating to the custody, guardianship or access to a child, or the administration of any property belonging to or held in trust for a child.³³

It also requires the court to have regard to the conduct of any parent with respect to the welfare of the child and to ascertain, depending on the child's age and maturity, the wishes of the child with respect to parental custody and access.³⁴ It also provides the Supreme Court with powers to appoint a *guardian ad litem* in respect of the child in guardianship proceedings.³⁵

Samoa - Divorce Matrimonial Causes Amendment Act 2010

Courts are guided in the distribution of matrimonial property under new statutory provisions passed in 2010 in the *Divorce and Matrimonial Causes Amendment Act*.³⁶ The new provisions provide a definition of property in s 22C (5).

(5) For the purposes of subsection (2), the property of each party brought into the marriage is not to be considered property of the marriage unless it would be inequitable to do so.

In considering what orders might be appropriate with respect to property of the parties, the court may take into account:

- (a) The matters referred to in section 22A(1); and
- (b) the financial or other contribution made directly or indirectly by or on behalf of a party to the acquisition or improvement of any of the property of the parties to the marriage; and
- (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage, including any contribution made in the capacity of homemaker or parent; and
- (d) any special circumstances which, if not taken into account in the particular case, would result in injustice and undue hardship to any person.

(3) Subject to subsection (4), for the purposes of subsection (2) the contribution of the parties to a marriage is presumed to be equal, but the presumption may be rebutted if a court considers a finding of equal contribution is, on the facts of the case, not appropriate.

These provisions do not fetter the discretion of the court to deal with each individual case on its own merit and what is reasonable and fair in the circumstances.

Samoa - *Alternative Dispute Resolution Act 2007*

This act provides the provision for pre-trial orders, consent orders, arbitration and reconciliation in matters of dispute.

Case law**Fiji** - *Wahida v Mohammed* [2010] FJMC 77

The husband and wife were divorced on 15 May 2008. The applicant (the wife) lived in the matrimonial home and cared for their 36-year-old daughter who suffered from ongoing illness. The husband was a retiree and had subsequently remarried. Maintenance had been paid to the wife since 9 August 2004, but the parties agreed in 2006 that no maintenance would be paid in exchange for the transfer of the matrimonial home to the wife, in which the wife and daughter had lived since the divorce. There was no subsequent application made to cancel the court's maintenance order and the wife filed an application on 4 May 2010 seeking FJD 130 per week maintenance for the daughter's medicine, food and necessities.

The court stated that s 92(1)(a) of the *Family Law Act 2003* stipulates that a court must not make a child maintenance order in relation to a child who is aged 18 years or over unless the court is satisfied that the maintenance is necessary because of a mental or physical disability of the child. The court took into account that the wife was unemployed and that the daughter suffered from a chronic illness. It also considered the income, earning capacity and financial resources of both parties, as well as the necessities of their child. The court therefore stated that 'it is just and reasonable that the husband pay \$120 a month as maintenance for his physically disabled daughter'.

This is a case of a long-term marriage, where a child over 18 years had never been employed due to a long-term illness, and where the father had retired and remarried. It is not uncommon for a child with a disability to be left in the custody of the mother rather than the father but this case is not typical of most maintenance support cases. Given the decision in this case, it is possible that norms might begin to emerge that the duration of child support will depend on the father's ability to provide financial support.

Solomon Islands *Goodhew v Goodhew* [2007] SBHC 140

Whilst the *Islander's Divorce Act* makes provision for child custody and child and spousal maintenance, no provision is made for matrimonial property. In the absence of legislation, the courts are authorised under sch 3 of the Solomon Islands Constitution to use Acts of Parliament 'of the United Kingdom of general application and in force on 1st January 1961' and the principles and rules of common law and equity as they have effect as part of the law of Solomon Islands.³⁷

The High Court case of *Goodhew v Goodhew*, amongst others, examines the existing legal framework for matrimonial property distribution at divorce or separation, and provides guidance on the division of matrimonial property.

In this case the couple were married in 2000. There were no children to the marriage. They separated in 2007. The wife filed for divorce and applied for a division of matrimonial property. She claimed one third of all assets, which she said were acquired during the currency of their marriage. She owned a 20% share of the company Lalae Charters Ltd and worked on the boat as crew. All other assets were paid for by the husband and it was not disputed that the wife did not financially contribute towards the purchase of other assets.

The court made the following orders: that the wife transfer her 20% share of Lalae charters; and that the husband pay a sum of SBD 397,000 by way of a lump sum settlement. By way of default, there was an order for the sale of the boat and the wife was to be paid from the proceeds.

In this case, the court took into account the non-financial contributions of the wife to the family and the length of marriage, and then identified the assets to determine each party's contributions. In a marriage of reasonable duration, eight years in this case, the assets of the home and the business had been built on joint efforts. Whilst His Honour Judge Faulkona in this case made the observation that, in the case of the business assets, the contribution of the parties are unequal, His Honour cited the Vanuatu case of *Fisher v Fisher* [1991],³⁸ which he considered appropriate to the circumstances of Solomon Islands, where the court held that:

Even if she does not earn money, a wife looking after the home and children contributes substantially to the family wellbeing. Over the years she acquires an increasing interest in the family property, which can include property acquired by either party before marriage. A non-working wife who brings nothing into a marriage acquires very little in the first few years of marriage, but for a marriage lasting several years, the starting point for assessing her share is one third.

Therefore, in this case, the contribution of homemaker and wife was given substantive recognition and was of equal value to the financial contribution in the division of matrimonial property.

Solomon Islands - *Emmett v Emmett* [2009] SBHC 29

In the case of *Emmett v Emmett*, the court discussed the various sources of the law regulating matrimonial property on divorce or separation. The explanation of the direct link to English statutes of general application and common law and equity, as part of the law of Solomon Islands, was to show that there is no lacuna in the matrimonial property regime in the Solomon Islands, and to develop guidance on matrimonial property law. The court considered previous court decisions and the general application of sch 3 of the *Solomon Islands Constitution*, and found that the wife, the petitioner in this case, is entitled to the distribution of matrimonial properties. This is despite there being no such provision for the allocation of property under the *Islanders' Divorce Act*.

Vanuatu - *Joli v Joli* [2003] VUSC 63

According to Farran,³⁹ the Court of Appeal ruling in the case of *Joli v Joli* marks an important innovation in family law in Vanuatu, but it also offers the possibility of a new way of resolving legal problems, not just in the area of divorce, but potentially in other legal areas as well. The case of *Joli v Joli* creates an expansive basis for matrimonial asset division under the framework of the *Matrimonial Causes Act* (Cap 192) of Vanuatu.

The husband (the petitioner) and the wife (the respondent) started living together in 1980 and married on 3 January 1982, subsequently separating in 2002. They had two children.

There is no Vanuatu statute that addresses matrimonial property so the court had to consider which assets were to be considered matrimonial property. The starting point was the recognition of gender equality in Article 5 of the Constitution of Vanuatu and *CEDAW*, which Vanuatu ratified in 1995.

The wife was employed for the entire time the parties were together. Her parents helped in the early days with accommodation for them, and work for her husband. Over the years, businesses were formed and monies earned by both parties, which were then invested into joint marital assets. The wife contributed to the wellbeing of the family, and paid the household running expenses.

In his decision His Honour Justice Coventry stated that:

'In these circumstances, I shall look at the whole period from 1982 until 2002. The parties have had a relationship of over 20 years with each contributing to the family over all those years. Assets are held, some in joint names, some in separate names. There is a presumption that all such assets are beneficially owned jointly, no matter in whose name they are in or who paid for them, made

them or acquired them. The presumption can be rebutted on any asset by showing that it was the intention of the parties that at the time of its acquisition or subsequently, both intended it should be the sole property of one.

I cannot find on the evidence anything to rebut the presumption that all the assets in dispute are beneficially owned by both parties and rule that all the assets listed as being in dispute are matrimonial assets for the purposes of negotiating a settlement.’

The husband appealed the Supreme Court’s decision to the Court of Appeal on the grounds that the Supreme Court did not have the power to make any order that had the effect of transferring any part of his legal and equitable interests to his wife.

The Court of Appeal held that the Supreme Court did have the power to make an order to adjust the proprietary interest of the husband regarding the assets in dispute. There was already a law in Vanuatu to deal with the manner in which an adjustment of proprietary interests between parties was to be made. The *Matrimonial Causes Act* (UK) was applicable by virtue of Article 95(2) of the Constitution of Vanuatu. Part II of this Act empowered the Supreme Court to make property adjustment orders to bring about a division or settlement of property. There was no lacuna in the law of Vanuatu. Therefore, there was no need to have applied the Constitution of Vanuatu and *CEDAW* to govern property settlements.⁴⁰

The Supreme Court cited the provisions of the Constitution of Vanuatu and *CEDAW* to apply the principles of gender equality in this case. The Court of Appeal, in finding there was no lacuna in the law relating to the division of matrimonial property, adopted a narrower interpretation than the application of rights conferred by these laws. It stated that the rights and concepts set out in those instruments needed to be given substance by parliament in accordance with the separation of powers doctrine.⁴¹

Vanuatu - *Mariango v Nalau* [2007] VUCA 15

The case of *Joli v Joli* was considered in *Mariango v Nalau* which concerned *de facto* property rights in Vanuatu. In this case, the Supreme Court found that equitable principles based on such concepts as constructive trust, unjust enrichment and estoppels apply to *de facto* relationships in Vanuatu.

These principles then provide guidance for future cases where *de facto* relationships end. The Court of Appeal stated:

We see no reason why these equitable principles should not therefore be applied to *de facto* marriages within this jurisdiction and every reason to do so, given the development of this area of the law internationally and the constitutional imperatives ... There is no basis to introduce ‘fault’ for the relationship break-up into property division, unless directly relevant to such matters as contribution or asset preservation.⁴²

Developments to watch

Cook Islands – Draft Family Law Bill 2011

The Cook Islands *Family Law Bill 2011* does not create a specialist family court but confers jurisdiction on the High Court to hear and determine all matters under the act.⁴³

The bill does not have any specified grounds for divorce in the legislation. However, if a single party applies for a divorce, the court is not able to make a divorce order until 12 months after separation.⁴⁴ The bill has excellent provisions for spousal and child support, with the purpose of that part of the bill:

- (1) to recognise that each parent has an equal obligation to provide support for their children; and
- (2) to recognise equally the financial and non-financial contributions to a marriage or *de facto* relationship made by each spouse; and

(3) to recognise the economic consequences of a marriage or *de facto* relationship for each spouse.

The bill also creates a gender-neutral approach in making support orders, where they are defined as ‘the provision of support by one spouse to the other spouse’. Regarding cases of child contact and residence, the best interests principle is paramount⁴⁵ and separate legal representation will be provided for the child under a number of circumstances, including if there are allegations of child abuse, whether physical, sexual or psychological.⁴⁶

The bill also provides for the development of parenting plans between the parents regarding such issues as where the child shall live, the time the child will spend with other person(s), the allocation of parental responsibilities, how a child will communicate with other person(s), how to change the plan based on changes to the child’s needs and/or circumstances, and dispute resolution processes.⁴⁷

The Cook Islands *Family Law Bill 2011* contains the following definition of a *de facto* relationship:

3A Definition of *de facto* relationship

- (1) A *de facto* relationship means a man and a woman who are (or were) living together as if they were husband and wife.
- (2) In determining whether a person is (or has been) in a *de facto* relationship, the court may consider all or any of the following :
 - (a) The length of the period during which the parties have been living together (or lived together);
 - (b) The degree of financial dependence or interdependence and any arrangements for financial support, between the parties;
 - (c) The degree of mutual commitment to a shared life;
 - (d) The degree of shared care and support of children.
- (3) No findings in respect of the specific factors listed in subsection (2), or any specific combination of them, is necessary for a finding that there is or has been a *de facto* relationship.
- (4) The court is entitled to have regard to such matters, and to attach such weight to any matter, as seems appropriate to the court in the circumstances of the case.

In ss 2 (a) – (d) of the Cook Islands *Family Law Bill 2011* we find a list of factors for the court to take into account. The court’s determination may be made on one factor, or on a combination of factors, or on all factors. This flexibility is important as, for a variety of reasons, not all parties in a *de facto* relationship live together in the same house, the same area or the same country.

It also provides for DNA parentage testing in s 23. The court may recommend that a DNA parentage test be carried out on the child and on any person who may be the parent of the child.⁴⁸ The court may draw any inferences that may be appropriate where a person refuses to consent to a DNA parentage test.⁴⁹ A DNA test may be carried out on a child only with consent of the child’s parent or the person who, under a parenting order, provides day-to-day care of the child.⁵⁰ Section 20 provides for the presumption of paternity where, if a man is named on the child’s birth certificate, he is presumed to be the father of the child.

Conclusion

The *Family Law Act 2003* of Fiji provides a comprehensive legal framework for the resolution of family related cases and disputes. It provides increased rights for women in the areas of equal distribution of marital assets following a divorce, a no-fault divorce regime where women are not forced to stay with an abusive husband, and increased provisions for claims of maintenance. It also acknowledges the changing

nature of relationships by recognising the rights of ex-nuptial children, the responsibilities of those in *de facto* relationships, and the best interests of the child in deciding child contact and residence. The legislation also contains excellent provisions for support services provided by the court including dispute resolution services by qualified court officers.

Despite this model legislation being in force since 2005, no concrete analysis of the application of the law has been done, and as stated above there have been challenges and unintended consequences resulting from its introduction. An analysis needs to be undertaken to ensure that the changes in the law have actually achieved real sustainable changes in the lives of women.

Unfortunately in the rest of the Pacific there has been little movement in the reform of family laws, with outdated legislation continuing to be used. Laws in many countries still uphold divorce regimes based on fault, recognise only financial contributions to a marriage as marital assets (which discriminates against non-financial contributions) and make it difficult for women to receive maintenance for themselves and their children. These regimes mean that women remain or are forced into poverty following the dissolution of marriage and, in some instances, will choose to stay in an abusive marriage rather than seek a divorce. There has, however, been some movement in case law within the region (particularly in the area of matrimonial property), which has shown a trend towards recognising the contributions of women to a marriage and dividing marital assets equally between parties. These changes do, however, need to be enshrined in legislation to ensure that rules are interpreted and applied fairly for both men and women.

¹ *Marriage Act (Amendment) Decree 2009*.

² When the *Family Law Bill* is passed by Parliament.

³ *Divorce and Matrimonial Causes Ordinance Amendment Act 2010* s 7(1).

⁴ *Famiza Azam and Mohammed Khan*, Lautoka Family Appeal Case No. 1328/06. Heard by Pulea.J.

⁵ Jalal (1998) 203.

⁶ *Family Law Act 2003* s 155.

⁷ *Family Law Act 2003* s 120(1).

⁸ *Family Law Act 2003* s 116(1)

⁹ *Family Law Act 2003* s 118.

¹⁰ *Family Law Act 2003* s 125.

¹¹ *Family Law Act 2003* s 125(3).

¹² *Family Law Act 2003* s 57.

¹³ *Family Law Act 2003* s 59.

¹⁴ *Family Law Act 2003* s 62 (1)(a).

¹⁵ *Family Law Act 2003* s 62 (3)(b).

¹⁶ *Family Law Act 2003* s 63 (3), 63(4), 63(6), 63(7), 63(8).

¹⁷ *Family Law Act 2003* s 42(1).

¹⁸ See *Family Law Act 2003* s 137, 138, 139, 140, 141.

¹⁹ *Family Law Regulations 2005* reg 18.

²⁰ *Family Law Regulations 2005* reg 18.

²¹ *Family Law Regulations 2005* reg 17.

²² *Family Law Regulations 2005* pt III, div 2 reg 27.

²³ *Family Law Act 2003* s 154.

²⁴ *Family Law Act 2003* s 155.

²⁵*Family Law Act 2003* s 157(a); *Divorce Matrimonial Causes Amendment Act 2010* s 22A (1)(a).

²⁶*Family Law Act 2003* s 165(1).

²⁷*Family Law Act 2003* s 195.

²⁸The regulations also do not make provisions except for overseas maintenance orders.

²⁹*Magistrates' Court Act 1945* (Cap 14)(1978 ed) and *Magistrates' Court Rules Order XXXIV* and *Order XXXVI* which makes provision for enforcement by a party in whose favour a judgement is made for the payment of money.

³⁰The term i-Taukei is adopted in Fiji and replaces the word 'native' e.g. the *Native Land Trust Amendment Decree 2011*—where all references to 'native' are deleted and replaced by the word 'i-Taukei'.

³¹*Family Law Act 2003* s 162(3)(b).

³²*Family Law Regulations 2005* Order 9.

³³*Guardianship Act 2004* s 15.

³⁴*Guardianship Act 2004* s 15.

³⁵*Guardianship Act 2004* s 7(3).

³⁶These provisions are now incorporated into the Principal Act, the *Divorce and Matrimonial Causes Act 1961*.

³⁷*Solomon Islands Constitution* sch 3(1)(2).

³⁸*Fisher v Fisher* [1991] VUCA 2.

³⁹*Ibid* 13.

⁴⁰Jalal and Madraiwivi (co eds.), *Pacific Human Rights Law Digest* Volume 1 (2005) Pacific Regional Rights Resource Team (RRRT) 12, 13.

⁴¹Sue Farran, 'The Joli Way to Resolve Legal Problems: A New Vanuatu Approach' (2003) 7(2) *Journal of South Pacific Law* 1.

⁴²*Mariango v Nalau* [2007] paras 18, 22, 28, 29, 30.

⁴³*Family Law Bill 2011* s 148.

⁴⁴*Family Law Bill 2011* s 5(3).

⁴⁵*Family Law Bill 2011* s 26.

⁴⁶*Family Law Bill 2011* s 27.

⁴⁷*Family Law Bill 2011* s 37.

⁴⁸*Family Law Bill 2011* s 23(1)(a), (1)(b).

⁴⁹*Family Law Bill 2011* s 23(2).

⁵⁰*Family Law Bill 2011* s 24.

Chapter 3

Social and Economic Issues

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Introduction

This chapter groups together a number of issues related to the social and economic spaces that women occupy. Issues covered in this chapter include: constitutional status, citizenship, custom, land and succession, and employment. There have been some significant movements in these areas in favour of women but, in other areas, changes have been slow, as governments give priority to customary practices and domestic policies over commitments to ratified international conventions. We also find that existing laws that could economically empower women (for example, land ownership and inheritance rights) continue to discriminate against women. For various reasons, including resource constraints, legislatures are slow to incorporate ratified human rights conventions into domestic law, and courts in some jurisdictions are reluctant to give recognition to ratified human rights conventions unless given the force of law by the legislature.

In the area of employment, there have been a number of significant changes in the laws of Fiji and Kiribati that have resulted in provisions for equal pay and conditions for men and women, paid maternity leave, non-discrimination provisions including on the grounds of sex, and provisions that prohibit sexual harassment. These are significant steps for women in the workforce and provide the foundation for fairer work practices and safer workplaces for women. However, there is still a long way to go in terms of extending employment reforms, such as the introduction of paternity leave – which can relieve the burden on women – or regulating the system to ensure that employers are employing non-discrimination standards, and that equal pay and conditions are actually implemented.

Constitutional status

The constitution of a country is its supreme law; it has a higher status than all other laws and provides the framework for how a country is governed.¹ All constitutions in the Pacific contain provisions granting all citizens equality before the law. This means that citizens are entitled to basic rights, regardless of their race, language, religion, political or other opinion, national or social origin, property, birth, etc. These very general provisions, however, do not automatically guarantee protection against discrimination on the basis of sex, unless this is specifically included in the definition.²

In 1998, Kiribati,³ Nauru,⁴ Tonga⁵ and Tuvalu⁶ did not have specific provisions in their constitutions against discrimination on the basis of sex. Aside from Kiribati, which has moved towards changing this provision (see *Developments to Watch*), no changes have taken place regarding anti-discrimination provisions on the basis of sex/gender in the constitutions of Nauru, Tonga, or Tuvalu. Therefore, in theory, it is still lawful to pass laws which discriminate against women. The addition of an anti-discrimination clause on the grounds of sex/gender provides the overall ‘mechanics by which the principle of equality can be achieved and by which individuals can seek redress against discriminatory practices.’⁷ Once this provision is included, all laws that discriminate against women become unconstitutional and therefore need to be revised.

Legislation

Fiji - *Fiji Constitution Amendment Act 1997 Revocation Decree 2009*

The most significant change in Pacific Island constitutions has been the purported abrogation of the *Constitution Amendment Act 1997* in 2009 by President Ratu Josefa Iloilo through the *Fiji Constitution Amendment Act 1997 Revocation Decree 2009*. The purported abrogation of the Constitution occurred following a military coup in 2006 after the Court of Appeal in *Qarase v Bainimarama [2009] FJCA 9* found the actions by the military and the President at the time unlawful.

The *Constitution Amendment Act 1997*, unlike the 1990 *Constitution*, includes gender as prohibited grounds of discrimination. The 1997 *Constitution Amendment Act* also added sexual orientation as a prohibited ground of discrimination.

In early 2013, the Fiji State rejected the draft constitution prepared by the Constitutional Commission headed by Professor Yash Ghai. The State then prepared and facilitated national consultations on its draft constitution. This constitution was assented to by the Fiji President on 6 September.

Developments to watch

Kiribati

On 12 March 2012, a bill to amend s 15(3) and (5) of the *Constitution* to include sex as an anti-discriminatory provision was submitted to the *Manaeaba ni Maungatabu*. Under s 69(3) of the *Constitution of Kiribati*, any amendment to ch II, Protection of Fundamental Rights and Freedoms of the Individual, will require the approval of two-thirds of all persons entitled to vote at a referendum of electors. The proposed amendment was unsuccessful. Therefore the amendments proposed for s 15(3) and (5) will have to be submitted to a referendum and, if approved, will only then become law.

Citizenship

Citizenship laws have traditionally discriminated against women in the acquisition and retention of citizenship, especially where a female citizen is married to a non-national. The preferential treatment given to male nationals married to foreign wives is still the law in some countries (Vanuatu,⁸ Nauru,⁹ Solomon Islands,¹⁰ Kiribati¹¹). This continued discrimination means that women may be forced to leave their country of citizenship as their husbands find it more difficult to reside permanently, and therefore lose their right to live in their country of nationality. There should be equal rights for foreign husbands to enter and reside in the country of their wife, in the same way that foreign wives can.

Conversely, Fiji, Tonga and Samoa, have made some significant changes to address gender inequalities in citizenship laws. Their citizenship laws have been redrafted in gender-neutral language and no distinction is made between men and women married to non-nationals in the acquisition of citizenship. Non-nationals may acquire citizenship by registration or naturalisation, a process by which a foreign person acquires a country's nationality and becomes entitled to the privileges of citizenship.

In 1998, Fiji, Kiribati and Tonga had discriminatory provisions in their citizenship laws regarding children born overseas. These provisions stated that, if a woman married to a foreigner gives birth overseas, her child is denied citizenship rights in its mother's country. In the case of Fiji this meant that the child could claim citizenship only through its grandparents. Conversely, if a non-national woman married to a Fijian man gave birth overseas, the child would automatically have full rights of citizenship.

These laws have subsequently changed in Fiji and in Tonga and have been reinforced in Samoa through the *Citizenship Act 2004*. This leaves Kiribati as the only country in the Pacific to still possess discriminatory citizenship laws against I-Kiribati women married to a non-national who gives birth to a child outside of Kiribati. This means that I-Kiribati women who are married to non-nationals are actively discouraged to return to their country of origin, denied the right of the child to its mother's nationality, and being raised within its mother's cultural and social environment.

Legislation

Fiji - *Citizenship of Fiji Decree 2009*

The citizenship provisions in the 1997 *Constitution* and the *Fiji Citizenship Act*,¹² have been replaced by the *Citizenship of Fiji Decree 2009*.¹³ The decree states that an application for citizenship by registration made by an adult who is or has been married to a citizen, must be granted if he or she has been lawfully present

in Fiji for a total of three of the five years in residence, and if there is a genuine and continuing marital relationship. Similarly, an application for naturalisation can be made if the applicant has been lawfully in Fiji for five of the ten years; complies with the test for character, language and continued residence; and understands the responsibilities of being a citizen of Fiji. Under s 14, the decree allows Fiji citizens to be citizens of other countries as well as of Fiji.

Children born or abandoned in Fiji are entitled to citizenship. A child born in Fiji at the date of birth is a Fiji citizen unless a parent of the child has diplomatic immunity accorded to envoys of sovereign foreign powers accredited to Fiji; or neither parent is a citizen. The mother and father have equal rights to transfer citizenship to their child by birth, irrespective of the status of the parents. To protect a child from being stateless, an infant found abandoned in Fiji is deemed to be a citizen of Fiji unless there is proof to the contrary.¹⁴

Fiji - Citizenship Act (Amendment) Decree 2000

In Fiji, the *Citizenship Act (Amendment) Decree 2000* s 21(1) now permits a child born outside Fiji to become a citizen by registration if, at the date of his or her birth, either parent was a citizen.

Samoa - Citizenship Act 2004

The *Citizenship Act 2004* provides for citizenship by marriage to a Samoan citizen. Under s 9, a non-national may apply to the minister to be registered as a citizen of Samoa by reason of marriage. A person registered as a citizen under s 9 becomes a citizen of Samoa on the date on which registration takes place. Section 13 entitles him or her to full and equal rights to obtain a Samoan passport and engage in employment. Both spouses will have equal rights to determine the nationality of their children.

Samoa's *Citizenship Act 2004* s 7 permits a child born outside Samoa to become a citizen by registration.

Citizenship by descent (1) Any person born outside Samoa shall be a citizen of Samoa by descent provided that at the time of the person's birth at least one parent of the person is a Samoan citizen:

- (a) Otherwise than by descent; or
- (b) Who has resided in Samoa for a period of three years or more.¹⁵

Tonga - Nationality (Amendment) Act 2007

Discrimination against Tongan women married to foreigners was removed in 2007 with the passing of the *Nationality (Amendment) Act 2007*. Under the act, any non-Tongan who marries a Tongan is entitled to become naturalised upon taking the necessary legal steps under the Act. The act also enables Tongans to hold dual nationality and provides that any child born in Tonga or abroad to a Tongan parent is deemed to be a Tongan subject.

Kiribati, Nauru, Solomon Islands and Vanuatu

Kiribati has not made any changes to discriminatory provisions in its citizenship laws regarding I-Kiribati women married to non-nationals or for children born overseas to an I-Kiribati woman and a non-national. Nauru, Solomon Islands and Vanuatu still discriminate against non-national husbands married to female nationals regarding citizenship and residency provisions.

Customary Law

There have been no significant changes in customary law since 1998. Statute law and customary law are part of the dual systems of law in many countries in the Pacific region. Table 2.1 sets out the current situation of countries that legally recognise customary law.

Table 2.1 Countries that legally recognise customary law

Country	Article or Act
Cook Islands	<i>Cook Islands Act s 422.</i>
Fiji	<i>I-Taukei Lands Act 1905; i-Taukei Land Trust Act 1940.</i> ¹⁶
Kiribati	<i>Magistrates Courts Act s 42(2); Laws of Kiribati Act 1989; Native Lands Act 1956; Native Divorce Act 1948.</i>
Nauru	<i>Custom and Adopted Laws Act 1971 s 3.</i>
Niue	<i>Niue Act 1966 s 296; Niue Amendment Act No. 2, 1968 NZ.</i>
Solomon Islands	<i>Art 75, 76; Islanders Marriage Act (Cap 4); Islanders Divorce Act (Cap 48); Wills, Probate and Administration Act 1987; Local Courts Act (Cap 46).</i>
Tuvalu	<i>Art 4(3) and Art 29(4)(b); Laws of Tuvalu Act 1987.</i>
Vanuatu	<i>Art 7, 8, 51 and 52; Constitution</i>
Samoa	<i>Art 100, 101, 103, 111; Samoan Status Act 1963; Lands and Titles Act 1981; Village Fono Act 1990.</i>

Customary law is as relevant and important today as it was a generation ago. There has been a steady growth in legislation, and most conflicts are handled by courts that apply statute law and/or customary law. Some important trends of resolving conflicts in customary law are now emerging with the influence of the CRC, CEDAW and human rights standards. For example, the Solomon Islands High Court in *R v Belo* [2012] SBHC 88 on 10 August 2012 made clear that the defendant’s family’s payment of shell money and SBD 200 cash to the mother of the rape victim, who was a person with a disability, was considered by the court as not mitigating the wrong done by the offender. Further, the court’s reasoning was consistent with Solomon Islands’ obligations under the *Convention of the Rights of the Child* Article 19. It also gives effect to Articles 6, 7, 14, 16 and 17 of the *Convention on the Rights of Persons with Disabilities*, which Solomon Islands has signed but not ratified.

Since 1998, there has been some evidence that courts are increasingly interpreting customary law in accordance with international human rights standards. Vanuatu enacted CEDAW as part of its domestic law in 1995 and clearly established respect for the constitutional rights of women in the case of *Noel v Toto*.¹⁷ Since 1995 at least three cases¹⁸ have referred to *Noel v Toto*, CEDAW and the constitution to ensure customary land rights for women. The Supreme Court of Vanuatu in the case of *Joli v Joli*¹⁹ cited CEDAW as a guide to formulate a principle for the distribution of matrimonial assets.

Conflicts between customary and international law illustrate the dilemma of all Pacific countries that recognise customary law as part of the legal system. Courts and legislation may seem to weaken customary laws, but such weakening happens only where laws are no longer responsive to justice. Judicial decisions to give women equal rights should be followed by amendments to relevant laws. Adjustments to customary law are also inevitable.

Land and succession rights

Land

Land is the most important asset for all communities, particularly in the Pacific region. It forms the basis of custom, wealth and economic returns, and it directly benefits families. Diverse customary law continues to determine the different types of rights that members of the community, particularly men and women, have over land and natural resources.

Women play multiple roles in the food system and in the agricultural sector. Whilst men and women have different roles in resource and land management, gender inequality in land rights and access to

resources has been one of the causes of tension and disharmony in families and communities. [*Tonga Land Commission Report 2012 & Tari v Tari [2012] VIIC2*] These inequalities are deep-rooted in custom and tradition. Even in matrilineal societies where women have rights to their mother's land, control and management by male relatives is common.

Despite the gains made by women in the areas of education, life expectancy, and the work force, there remain two areas of persistent inequality: ownership of assets, and women's agency over those assets.²⁰ In all PICs, except Tonga, land legislation does not directly discriminate against indigenous women. However, in practice, the control and management of land and decisions about how land should be used, still rest with men. This creates and reinforces the dependence of women on men for economic power and status.

Consequently, since 1998 not much has changed in the ingrained imbalances between men and women regarding ownership and usage of land in the Pacific. Small gains have been made in specific areas of customary law by defining and recording the role of women in ownership and decision making. Case law has mostly reinforced the patrilineal system, with land being passed to the eldest female only if there is no male heir. It has also confirmed that women do not lose their inheritance rights to land upon marriage, and that widows are entitled to remain on land belonging to their deceased husband. There have been significant developments in Tonga with the recommendations of the Tonga Royal Commission on Land released in 2012. The Commission recommended a complete overhaul of Tonga's land laws, including a number of changes that would increase women's rights to own land, the rights of widows and deserted wives, and inheritance rights for married daughters.

Women need to continue to challenge the decisions of land courts and fight to have positive interpretations of custom reinforced in favour of women. It is also important to challenge the existing customary system when it does discriminate against women, such as when the ownership of land is passed only through the male line. The system of land ownership is so deeply rooted in custom that it is difficult to see radical change happening quickly. However, if small gains can be made and built upon, precedents in favour of women will increase, and laws will slowly change.

Legislation

Solomon Islands – Moli Ward Customary Law Ordinance 2010

In Solomon Islands there has been some evidence of enshrining women's rights to land in customary law. The *Moli Ward Customary Law Ordinance 2010*²¹ sets out and enforces the rights to land ownership in accordance with the traditional values of the people of Guadalcanal. Women inherit land through matrilineal descent and women affiliated to the tribe have the right to be involved in decision making pertaining to any land belonging to the tribe. Section 68(1) specifies women's rights to equal ownership of customary land, equal rights to participation and decision making, and signing rights to any agreements or documents relating to tribal customary land.

68. (1) A woman has –

- (a) equal right to ownership of customary land in Moli Ward.
- (b) equal participation in any transaction dealing with customary land in Moli Ward to which she is affiliated, and may take part in the following activities -
 - (i) consultation or decision making regarding any customary land or any property or resources within such land; or
 - (ii) signing of any agreement or any other document regarding any customary land.

This law fully integrates women in the development process and enables them to participate in any decision making involving tribal customary law and resources. Documenting these customary arrangements is important to not only reconfirm the matrilineal nature of land inheritance, but their equal right to own, make decisions and sign documents related to the land. Documenting practices is a good step. However, whether women are truly able to make decisions and be supported by the community in those decisions remains to be seen, especially when economic development opportunities and conflicts arise. It also remains to be seen whether the rights outlined in the ordinance have an effect on decision making on the ground, and whether women's experiences have changed as a result. This change is also only relevant to Moli ward (one ward of 21 in Guadalcanal province), with customary land tenure systems and practices in other parts of Solomon Islands remaining complex, with discriminatory customary norms against women still in existence.

Case law

Case law in the region has been consistent with past precedents regarding the application of the patrilineal system, where it exists, and the passing of land through male heirs. This can be circumvented only in special cases where there is no male heir, and land can pass between fathers and daughters. This was seen in the case of *Hila v Eno* in Papua New Guinea, where the first-born female child inherited the right of succession, ownership and control of the land from her father, as there was no male heir.

In a similar case in Vanuatu, *Awop v Lapennal*,²² the principal claimant Tolsie Awop claimed land ownership which was challenged by ten other claimants. The court held that:

Land is traditionally transferred or inherited patrilineally from the chief or original ancestor to the eldest son who would normally bear the responsibility for providing equal distribution of the deceased father's land to other siblings, relatives and kinships. This is a male predominated system which is twinned with the land tenure system handed down from generation to generation. The only exceptional condition to the general principle of land ownership is that in the situation where there are no more surviving male heirs to the land then ownership will pass on to the matrilineal offspring. This is typically seen where a woman's children having bloodline to the extinct patrilineal line are given land acquisition. Conversely and by custom, the matrilineal descendants cannot claim land ownership if there are surviving male descendants.

In its judgement, the court referred to both *CEDAW* and the constitution and stated that Vanuatu had made a commitment to remove all forms of discrimination against women and that the court could not allow custom to discriminate against women. The court also followed the appellate court decision in *Noel v Toto*, which upheld the philosophy of equality.

In *Naime v Sarimani*²³ in Papua New Guinea, despite a will being in existence (but subsequently lost) which specifically passed land from the father to the eldest daughter, the court ruled that the *Papua New Guinea Wills, Probate and Administration Act 1966* prevents a custom land-owner from making a will to dispose of an interest in custom land contrary to the custom of land inheritance, which in this case is inherited through the male line. Therefore the custom of land inheritance was upheld and the land ownership passed to a younger male heir, with the appellant and her children granted user rights, subject to the control and permission of the land owner. This case demonstrates the continued influence of custom on the passing of land from fathers to sons, despite the wishes of the father to pass it to his eldest daughter.

In *Olowa v Gola*²⁴ in Papua New Guinea, a widow was allowed to remain and not be evicted from her husband's land following his death, based on her equitable interest in the land. This meant that the court took into account that the widow had lived on the land whilst her husband was alive with his consent, and was married to him. On appeal, the National Court of Papua New Guinea dismissed his adopted son's

claim that the widow should be evicted on the grounds that no will had been made.

In the above cases, the courts have ruled consistently that the patrilineal system of land inheritance should prevail but that, if there is no male heir, the land can pass to the eldest daughter. It was also confirmed in the case of *Noel v Toto* that women do not lose their customary rights to their father's land on marriage. It seems that more cases are coming forward in which women are claiming their inheritance rights to customary land, which is a positive step forward. More cases that are determined in favour of women having increased access to land and resources is a welcome development. However, the number of cases where land is passing to a female in a patrilineal system is low, and women still cannot fully exercise their full decision-making rights, even to land they have inherited through the matrilineal system. There is still a long way to go regarding women's ownership and access to land and resources to achieve full results-based equality with their male counterparts. There will be more disputes over customary land with the development of the logging and mining industries and other commercial activities, which could marginalise women further if affirmative action is not taken in law and policy to give women equal rights.

Policy/Consultations

Pacific Regional Consultation on Women's Right to Adequate Housing and Land 2004

The *Pacific Regional Consultation on Women's Rights to Adequate Housing and Land*, held in Fiji in October 2004²⁵ was the 'fifth in a series of civil society regional consultations that have played a critical role in unearthing experiences of women facing violations of their right to adequate housing and land on a daily basis.'²⁶ Testimonies by regional participants were grouped around the following five themes:

- violence against women and the human right to housing;
- indigenous land rights and rights to natural resources;
- discrimination and segregation in eviction and housing;
- legal, customary and religious practices as obstacles to land, property, and inheritance;
- housing, land and property rights of women (migration, shift to urban areas, urban settlements).²⁷

The key issues and problems shared by regional participants included women's lack of equal participation in decision making, perpetuation of patriarchal cultures and systems that discriminate against women, and the retrogression in women's enjoyment of housing and land rights.²⁸ The consultations shed light on the inadequacies of actions to improve women's rights to land and housing. By and large, few significant legal, customary or socio-structural changes have improved women's rights to land in the Pacific.

Vanuatu Land Summit 2006

A key development that placed women's access to land on the national agenda was the first land summit held in Vanuatu in 2006 to develop a national land policy.

The most pressing issue as far as women were concerned was the need for women to have a greater role in decision making about land, participation in the interpretation of custom and in the granting of leases and to ensure definition of custom owner in the legislation. The current legislation does not recognise women's rights over land. The recommendations to ensure women's rights are recognised include mainstreaming consultation with women stakeholders in the granting of leases, environmental impact assessments and infrastructure development; women's rights to land are registered in the land registry and compulsory joint titling and equal rights to land after divorce are considered.²⁹

Developments to watch

Tonga Royal Commission on Land

One of the most important recent developments for women in Tonga was the 2012 release of the final report and recommendations of the Tonga Royal Commission on Land. The Commission's report pays greater attention to gender equality than at any other time in the past. It records that women's rights to land were one of the most discussed topics at all public meetings. The report stated that 'human rights are important and there is a need to review discriminatory provisions in the current land law, including succession rights to daughters, adopted children, illegitimate children, as well as the heir's male siblings.'³⁰

In Tonga, the traditional land tenure system is codified in the *Land Act* (Cap 132). The land is divided into royal estates, noble estates and land under the control of the government. From these estates, the two types of land holdings that individual Tongans can acquire are tax allotments and town allotments. These allotments are given by a grant and are not sold for money.³¹ Women may lease land but by law are not allowed to own land. Every male Tongan over the age of 16 years³² is entitled to a tax allotment and a town allotment.³³ Upon the death of a male holder of a tax or town allotment, the eldest son has a hereditary right to his father's land.

Recommendations by the Commission

Widows

The widow of a deceased titleholder is entitled to a life interest in such an allotment.³⁴ The law currently provides for the maintenance and upkeep of a widow, and recognises the rights of such women and ensures that they are not left destitute.³⁵ Section 80 of the *Land Act* (Cap 132) states:

On the death of the lawful male holder of any tax or town allotment his widow shall be entitled to a life estate in such allotment which estate shall terminate on her re-marriage or upon proof in legal proceedings (as provided by section 81) of her having committed fornication or adultery.³⁶

The Commission recommended that the termination of a widow's life interest upon proof of having committed adultery or fornication be repealed. A widow's limited right to utilise her deceased husband's allotment will be enlarged by permitting her to lease or mortgage land she holds as a widow, but if there are children to the marriage, with the consent of the heir.

Ownership of allotments

With regard to the ownership of town allotments, the Commission recommended that a woman, on attaining the age of 21 years, should have the right to be granted a town allotment that can be registered in her name. This will settle the shortcomings in the law where women are unable to register a piece of land in their own name, including land that has been gifted from a land holder such as a father or a close relative. Women's inability to register land in her own name has had unintended consequences. For example, a married woman who is gifted a plot of land by her father or male relative loses control and rights to the gifted land as the land is usually registered in her husband's name. Where marital difficulties occur, a woman can become homeless and landless, as her husband has legal rights to the gifted land and if there are no male children to the marriage, the land will devolve through her husband's family.³⁷

Granting women the right to register town allotments will enable them to have equal access to bank loans and finance on the basis of ownership and they will not be forced to jointly borrow funds with a male relative. Upon the death of the title holder, the land will devolve according to succession laws, which give the legitimate male heir prior claim.

Inheritance by daughters

The public consultations on succession laws revealed the concern of some members of the public who claim that ‘the current succession laws are discriminatory and it appears to look down on daughters and this would encourage people to think that it is a curse to have a daughter’.³⁸ The Commission recommended that the restrictions on a daughter’s inheritance to land when she marries are to be removed. This means that marriage is no longer an impediment to a daughter’s right to land. Where there are no male heirs of the deceased landholder, his daughters will succeed, with the eldest daughter succeeding to the estate. When the last sister dies, the land will devolve to the children of the daughters (sons in order of age and if there are no sons, then daughters in order of age), starting with the eldest daughter.

Deserted wives

A deserted wife shall have the right to remain on family land and in the home with her children until she remarries or dies. This recommendation has far-reaching consequences, as a spouse’s substantial time and efforts to maintain and improve the marital property during the marriage and raising children is given value. The deserted wife has only occupation rights, which will be terminated upon remarriage or death. The Commission’s recommendation includes the concept of marital fault and, since property division is a consequence of divorce, the major goal of this reform is to lessen the financial and parenting consequence of desertion by ensuring that the deserted wife has security of accommodation.

Succession

The law on succession concerns the disposal and distribution of property and assets left by a deceased person. It concerns the administration of the estate of a spouse, partner or family member who has died, including the distribution and disposal of the property and assets of that person. Succession practices relating to the estates of deceased persons have some grey areas because making wills is not common in Pacific societies, although this is beginning to change. There is no distinctive South Pacific model of succession as statutes and the customary principles of succession are so diverse.³⁹

As we have seen in cases discussed earlier, problems may occur when a spouse or partner dies. These might be associated with debts, business, property ownership and division of property and other assets. If the deceased person leaves a will, executors appointed under the will are authorised to deal with the property of the deceased person, and will need to go to the relevant section of the court to probate the will. If a person dies without a will, a close relative of the deceased would need to apply to the relevant section of the court for letters of administration to administer the estate of the deceased person.

Women suffer injustices when their husbands die without a will and where succession is based on patrilineal descent and on the rules of primogeniture.⁴⁰ Most women, in both urban and rural areas, do not have the knowledge and resources to pursue or protect their rights to the deceased estate. Given the restrictions placed on women in both law and customary law, reforms that are not discriminatory to women are needed to settle the basis upon which property and assets of the deceased are effectively and efficiently disposed of, and distributed to those who are deemed entitled.

Family provisions are one of the most contested areas of succession law. In most acts, there are family provision schemes that accommodate challenges to the provisions under the will.⁴¹ In such situations, a court will not issue a document of authority unless satisfactory provision has been made for the deceased’s spouse and children. For example, the *Vanuatu Wills Act* (Cap 55) provides that, when a will is published, the court will issue a document of authority to the executors of the will to carry out a number of duties set out in the will by the deceased person. The court will not issue a document of authority ‘until it is satisfied that adequate provision has been made for the maintenance of the deceased’s spouse and children under the age of 18. Where the court considers that adequate provision has not been made it shall vest such part of the property of the deceased as it thinks fit in the said spouse and children’.⁴²

Such provisions have been aimed to eliminate discrimination against the surviving spouse, but family schemes may be restricted to a certain class of persons who might apply and the types of orders sought.

Legislation

Solomon Islands - *Wills, Probate and Administration Act 1987*

The court may refuse an application under the family scheme of the *Wills, Probate and Administration Act 1987*, on the basis of character and conduct of the applicant.⁴³ The court has the power to adjust property in cases where a deceased has left a will but the will does not make adequate provision for the surviving spouse and children.⁴⁴

Adopted children, whether adopted in accordance with relevant statutes applying to Solomon Islands or by customary adoption, are entitled to succeed to the deceased person's estate.⁴⁵ Part IX of the act sets out the property rights of illegitimate children. Where there is no will, an illegitimate child or the parents (foster/step father or mother) of an illegitimate child are entitled to succeed to the estate of the deceased.

Fiji - *Inheritance (Family Provision) Act 2004*

The *Inheritance (Family Provision) Act 2004* gives the court powers to make adequate provisions for a spouse, child or dependant, such as an aged parent, from the estate of the deceased person, whether the person has made a will or not. The term child has been given wide meaning to include any children of the deceased person, including adopted, illegitimate, stepchild and a child in the mother's womb.⁴⁶

A spouse of the deceased claiming under this act includes a surviving spouse or a surviving spouse who has been divorced but not remarried before the death of the person, if the surviving spouse is receiving or is entitled to receive maintenance from the person at the time of the person's death.⁴⁷

Samoa - *Administration Act 1975*

The *Administration Act 1975* makes provision for family protection and relief out of a deceased's estate. The court has the power to grant relief to claimants if satisfied that the will of the deceased person has made inadequate provisions.⁴⁸ Part III of the act sets out the distribution of intestate estates.

Kiribati - *Gilbert and Phoenix Islands Land Code*

The *Gilbert and Phoenix Islands Land Code*⁴⁹ has well defined schemes of succession differing from island to island. Section 10 of the code provides that the court may allow a will of a person disposing of his or her property, provided that it is in accordance with the *Land Code*. The right of disposition is subject to limitations imposed by custom and the *Land Code*.⁵⁰ For example, the next of kin can be disinherited if he or she has deliberately neglected the property owner, provided that during the owner's lifetime the neglectful next-of-kin has been successfully prosecuted for his/her neglect.

Vanuatu - *Wills Act*

The *Wills Act* (Cap 55)⁵¹ limits the classes of persons to the spouse and children younger than 18 years who may benefit from the deceased's estate, provided that adequate provision has not been made for their maintenance.

Employment

The acceptance of the traditional sexual division of labour, lack of educational opportunities, lack of land entitlements, and dependency on males and their wages, combine to ensure that the overwhelming majority of women in the Pacific remain in the informal sector and at home. The role of women in the informal sectors of the economy is influenced by the environment in which they live. They enter the cash economy through the sale of products available from the local environment. Women tend to dominate

the local markets and the roadside stalls, selling a variety of seafood, garden and handcrafted products. Female labour is essential for the survival of the family and continues to be part of the backbone of the rural economy and a substantial element in the national economies.⁵²

An increasing number of women in the Pacific have, however, begun to enter the formal economy, with education and wage employment providing women with more opportunities to be more mobile and engage in the economic sector. Recent economic downturns in the region have adversely affect the lives of both men and women, but for women the effects are more pronounced since women already have a marginal and secondary status in the wage-labour market. Women become the first victims of retrenchment, forced part-time work, and salary reductions.

Since 1998, Fiji and Kiribati have undertaken significant reforms in labour and employment to protect the rights of individual workers and to establish new mechanisms for the settlement of disputes in the workplace. The new legislation in Fiji under the *Fiji Employment Relations Promulgation 2007* provides for equal pay and conditions between males and females; contains non-discrimination provisions, including on the basis of gender; prohibits sexual harassment and child labour; and contains paid maternity leave provisions and vigorous dispute resolution provisions.

Legislation

Fiji - *Employment Relations Promulgation 2007*

The *Employment Relations Promulgation 2007* applies to all employees and workers in workplaces in Fiji, including local authorities, statutory authorities and the sugar industry. However, this section was repealed with the introduction of the *Employment Relations (Amendment) Decree 2011* which removed its application to the Fiji government, the Public Services Commission, the Republic of Fiji Military Forces, the Fiji Police Force and the Fiji Prisons and Correction Services.⁵³ These are regulated by their own terms and conditions of service.

The promulgation introduces fair labour practices for all persons,⁵⁴ prohibits discrimination and forced labour,⁵⁵ and requires equality of pay for both males and females for work of equal value.⁵⁶

Discrimination

Section 75 sets out the prohibited grounds of discrimination:

For the purposes of this Part, the prohibited grounds for discrimination whether direct or indirect are actual or supposed personal characteristics or circumstances, including: ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age, disability, HIV/AIDS status, social class, marital status (including living in a relationship in the nature of a marriage), employment status, family status, opinion, religion or belief.

It also provides for exceptions to the anti-discrimination clause in s 74(c). Different treatment based on gender, race, ethnic or national origins, or sexual orientation may be permitted in certain circumstances. For example, counsellors of a certain ethnicity or gender may be hired to deal with highly personal issues such as sexual matters or the prevention of violence.⁵⁷ Actions taken for those requiring special protection and assistance will not be regarded as discriminatory. Other areas where different treatment is permitted are listed below.

- Organised religion where it is limited to one gender⁵⁸
- Persons with physical disability⁵⁹
- Persons of different age groups⁶⁰

- Persons of a political orientation, including political advisers or secretaries to a member of parliament, political advisers to a member of a local authority or a candidate seeking election to parliament, or a member of a political party⁶¹
- Family status where the nature of the employee's relationship could adversely affect the employer⁶²
- Prohibiting females from underground work in mines except those in managerial positions, those in health and welfare services, education and training and for occasional non-manual work⁶³
- Prohibiting children from engaging in work that is harmful to their health, safety and morals and from the worst forms of child labour⁶⁴

The *Employment Relations Promulgation 2007* s 78 provides that an employer must not refuse, or omit to offer, the same rates of pay to persons of the same or substantially similar qualifications employed in substantially similar work. The following criteria are set out in s 79:

- a) the extent to which the work or class of work calls for the same, or substantially similar, degrees of skill, effort, and responsibility;
 - (b) the extent to which the conditions under which the work is to be performed are the same or substantially similar; or
 - (c) the rate of remuneration that would be paid to workers with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort.
- (2) An instrument ...must not contain classifications of work or rates of remuneration that differentiate on the basis of the gender of workers in the work which male workers or female workers may perform.
- (3) An instrument ...that contains classifications of work or rates of remuneration that differentiate on the basis of the gender of workers in the work which male workers or female workers may perform is void and of no effect.

Sexual harassment

The *Employment Relations Promulgation 2007* includes statutory improvements to prohibit sexual harassment in the workplace in s 4, and describes sexual harassment as follows:

'sexual harassment' means when a worker is sexually harassed in his or her workplace, or places where workers are gathered for work-related purposes including social activity, when an employer or its representative or a co-worker:

- (a) makes a request of a worker for sexual intercourse, sexual contact or any other form of sexual activity which contains an implied or overt—
 - (i) promise of preferential treatment in that worker's employment;
 - (ii) threat of detrimental treatment in that worker's employment; or
 - (iii) threat about the present or future employment status of that worker;
- (b) by the use of a word (whether written or spoken) of a sexual nature or materials of a sexual nature;

- (c) by physical behaviour or gestures of a sexual nature; or
- (d) creates an intimidating, hostile or humiliating work environment by conduct, word or both on the basis of gender, that subjects the worker to behaviour which is unwelcome or offensive to that worker (whether or not that is conveyed to the employer, its representative or the perpetrator) and which is either repeated or of such a nature that it has a detrimental effect on the worker's employment, job performance or job satisfaction; In this context, detrimental effect includes the creation of an environment which affects a worker's physical, emotional or mental health and well-being.

Section 76 states that if an employer does not take reasonable and necessary steps to prevent sexual harassment, both the employer and the harassing worker will be held liable for the sexual harassment of the harassed worker. Where a complaint of sexual harassment is made by a worker, the previous sexual experience or reputation of the worker being harassed is not to be taken into account by the employer, a court or a tribunal. These new provisions mean that employers and perpetrators of sexual harassment cannot escape liability for their actions. Section 76 also mandates that a sexual harassment policy in the workplace be developed in accordance with the national guidelines.

Child labour

The Promulgation also regulates the employment of children and prohibits the worst forms of child labour in pt 10. The categories of the worst forms of child labour set out in s 91 include all forms of labour, slavery, sale and trafficking in children, debt bondage, forced or compulsory labour, including the compulsory recruitment of children into armed conflict, trafficking in drugs, using children for the purposes of prostitution, pornography or for pornographic performances. The minimum age of employment is 15 years⁶⁵ but may be restricted if work is injurious to health, or is dangerous or hazardous.⁶⁶ Employers are required to keep a register of all children employed, which is subject to inspection by labour authorities.⁶⁷

Maternity leave

In the public sector, the employment law provides for paid maternity leave and protects women from dismissal as a result of pregnancy. Under Fiji's *Employment Relations Promulgation 2007*, a woman is entitled to paid maternity leave to the normal remuneration she would have received as if she had been at work, for the first three births.⁶⁸ For the fourth and subsequent births, she is entitled to half her normal remuneration.⁶⁹ The law also specifically prohibits the termination of employment due to pregnancy.⁷⁰

Dispute resolution processes

The promulgation incorporates three new structures to improve the settlement of disputes: a mediation unit, and two specialist courts, the Employment Relations Tribunal and the Employment Relations Court, both established to hear labour law cases. The mediation unit is staffed by qualified industrial and workplace mediators and provides for alternative resolution of disputes. It saves time and money, and parties are given the opportunity to settle their own disputes with the aid of a mediator. The mediation process must first be exhausted before any referral of the dispute is made to the Employment Relations Tribunal.⁷¹

The Employment Relations Tribunal⁷² has lower status than the Employment Relations Court, which is a division of the High Court.⁷³ The government is subject to the Employment Relations Tribunal for any claims under the *Workmen's Compensation Act* (Cap 94) and the *Health and Safety at Work Act 1996*.

Kiribati - Employment (Amendment) Act 2008

The *Employment (Amendment) Act 2008* introduced the prohibition of discrimination and provisions for equal remuneration for men and women.

Section 75(A) states that:

75A. (1) No person shall discriminate, directly or indirectly, against any employee or applicant for employment on the grounds of race, colour, sex, religion, political opinion, national extraction, social origin, disability, non contagious disease including actual or perceived HIV/AIDS status, in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

The *Employment (Amendment) Act 2008* also prohibits the employment of children between the ages of 14 and 18 years in hazardous work that is likely to jeopardise their health, safety, education, morals and development.⁷⁴

Vanuatu - *Employment (Amendment) Act 2008*

Vanuatu's amendment to the *Employment Act* (Cap 160) with the passing of the *Employment (Amendment) Act 2008*⁷⁵ provides that:

(4) A woman who returns to her employment after maternity leave:

- (a) must return to the same or equivalent position held prior to proceeding on maternity leave, without any loss of salary, wages, benefits or seniority; or
- (b) may be appointed to a higher position.

Samoa - *Labour and Employment Relations Act*

In March 2013 the Government of Samoa passed the *Labour and Employment Relations Act*. The act, *inter alia*, provides that it is unlawful to discriminate either directly or indirectly in employment, based on real or perceived HIV and AIDS status.

Other Pacific countries are yet to reform their employment laws to prohibit discrimination on the grounds of sex, marital status and pregnancy and to prohibit sexual harassment.

Case law

Tuvalu - *Katea v Niutao Kaupule & Satupa* [2006] TVHC1; Case No.2 of 2006 (16 October 2006) and *Katea v Kaupule* [2007] TVHC1; Civil Case No.2 of 2006 (26 October 2007)

The following case shows how an unfair dismissal case in Tuvalu⁷⁶ was dealt with under tort of assault and unfair dismissal, as Tuvalu has no formal civil or criminal offence of sexual harassment. The plaintiff sought damages for the crime of sexual assault under the tort of unfair dismissal, as well as the breach of her constitutional rights against the defendants. The plaintiff was appointed as a clerk for the Niutao Kaupule⁷⁷ and her superior was the second defendant, Satupa.

In 2001, the defendant began sexually harassing the plaintiff and continued to the extent that he approached her at home asking her for sexual intercourse. In 2002, she was allowed Christmas leave only after she consented to have sexual intercourse with the defendant upon her return. After her leave she told him that there was no possible way she would agree. In 2003, after she had taken two days off to look after her sick daughter, she received a letter of dismissal from him for alleged lack of competence. The defendants filed a joint statement of defence, denying all the allegations of sexual harassment, but admitted to improper procedure in the termination of her employment.

The court held that there was enough evidence to prove the sexual assault and that the defendants were liable for unfair dismissal. The tort protected individuals not only from physical harm, but also from any

interference with her person that was offensive to a person with a reasonable sense of honour and dignity. Consequently, both Niutao Kaupule and Satupa were liable for assault and for unlawful dismissal.

In this case, the law of torts was used to establish sexual harassment suffered by the complainant as an intentional, unlawful and direct interference with her person and liberty as an assault. Under tort law, assault consists of intentionally creating in another an apprehension of imminent physical contact. If actual physical contact occurs, the tort of battery is committed. This differs from the criminal law where assault connotes an application of physical force.⁷⁸

Developments to watch

Kiribati - *Employment and industrial relations code*

A draft employment and industrial relations code is in the final stages of development. The ILO has provided technical assistance with preparing this bill. The bill provides, inter alia, that it is unlawful to discriminate either directly or indirectly against an applicant or employee, based on real or perceived HIV AIDS status.

Papua New Guinea - *Industrial relations bill*

The draft industrial relations bill was developed almost ten years ago and the government is focussing on enacting this legislation in the near future. It provides that it is unlawful to discriminate against a person in employment either directly or indirectly, based on actual or perceived HIV AIDS status. It also requires employers to develop and communicate policies to eliminate discrimination in the workplace. It notably includes a provision making any form of harassment in the workplace unlawful, which would extend to harassment based on HIV AIDS status

Vanuatu - *Employment relations bill*

The ILO has been providing technical assistance to develop a new employment relations bill to substantially modernise existing labour legislation. The bill is in its final stages of preparation. Similar to other countries developing labour legislation, it provides that it is unlawful to discriminate either directly or indirectly in employment, based on real or perceived HIV AIDS status. The government is aiming to pass this legislation during 2013.

Tonga – *Draft employment relations bill 2013*

The draft bill is currently being developed by the Government of Tonga. It will cover a range of employment matters, including maternity leave and a prohibition of sexual harassment in the workplace.

However, there appears to be some resistance to the draft Bill in that some argue that it is unfairly driven by employees' rights and will increase the cost of doing business in Tonga.⁷⁹

Conclusion

There have been limited changes in the social and economic spheres for women over the past decade. There have been incremental changes regarding the citizenship status of non-nationals married to women, with gender neutral language being introduced into the citizenship laws of Fiji, Tonga, and Samoa. Children born overseas have also been given the right to their mother's nationality in Fiji and Tonga, but this right is still denied for children of I-Kiribati women born outside Kiribati. Custom, land and succession laws have not significantly changed over the period, with the status quo being reinforced in custom and common law. Land is, therefore, still passed through the male line, with land passing to the eldest female only if there is no male heir. This means that women can be denied access to land and have no say in how that land is used, distributed or sold. Finally, in employment, there have been a few changes in Fiji and Kiribati that have increased the rights of women in the workforce. It is yet to be seen, however, how these changes will be enforced and whether inequalities in pay and conditions will be overcome.

¹P. I. Jalal, *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, 1998) 29.

²Ibid 30.

³Kiribati Constitution 1979 art 15.

⁴Nauru Constitution 1968 art 3.

⁵Tonga Constitution 1875 art 4.

⁶Tuvalu Constitution 1978 art 27.

⁷CEDAW Legislative Compliance Indicators (UNDP)

<http://www.undppc.org.fj/_resources/article/files/TCL_Indicators_Chapter_s.pdf>.

⁸See Vanuatu Citizenship Act (Cap 112) and Office of the Ombudsman, *Illegal and Unconstitutional Discrimination in the Citizenship Act* (19 May 1999).

⁹Nauru Constitution art 74.

¹⁰Solomon Islands Constitution art 20.

¹¹Kiribati Constitution art 22, 26.

¹²*Laws of Fiji*, (1985 Revised Edition) Cap.87.

¹³*Citizenship of Fiji Decree 2009* s8 (7-9); s 14; s 6; s 7.

¹⁴*Citizenship of Fiji Decree 2009*, s 6, 7.

¹⁵*Citizenship Act 2004* s 7.

¹⁶See *Native Lands (Amendment) Decree 2011 and Native Land Trust (Amendment) Decree 2011*. http://www.paclii.org/fj/promu/promu_dec/nld2011224/.

¹⁷*Noel v Toto* [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995).

¹⁸*Awop v Lapenmal* [2007] VUIC 2; Land Case 10 of 1984 (15 October 2007); *Haitong v Tavulai Community* [2007] VUIC 3; Land Case 04 of 1994 (22 October 2007); *Meltenoven v Meltesaen* [2008] VUIC 14; Land Case 10 of 1985 (7 November 2008).

¹⁹*Joli v Joli* [2003] VUSC 63.

²⁰Nicholas Menzies and Georgia Harley, 'We Want What the OK Tedi Women Have! Guidance from Papua New Guinea on Women's Engagement in Mining Deals' (Briefing Note J4P Vol 7, Issue 2, The World Bank 2012) <<http://www-wds.worldbank.org/external/default/WSDContentServer/WDSP/IB/2012/09/21/000386194-2012>>.

²¹*Moli Ward Customary Law Ordinance 2010* <[http://www.paclii.org/cgi-bin/disp.pl/sb/legis/sub_act/mwclo2010320/mwclo2010320.html?query=moli land ordinance](http://www.paclii.org/cgi-bin/disp.pl/sb/legis/sub_act/mwclo2010320/mwclo2010320.html?query=moli%20land%20ordinance)>

²²*Awop v Lapenmal* [2007] VUIC 2; Land Case 10 of 1984 (15 October 2007) <<http://www.paclii.org/cgi-bin/disp.pl/vu/cases/VUIC/2007/2.html>>.

²³*Naime v Sariman* [2006] PGLLC 2; DC555 (11 December 2006).

²⁴*Olowa v Gola* [2011] PGNC 6; N4192 (17 January 2011).

²⁵See <http://www.ohchr.org/EN/Issues/Housing/Pages/WomenAndHousing.aspx>.

²⁶See Alison Aggarwal, 'Proceedings of the Pacific Regional Consultation on 'Women's Rights to Adequate Housing and Land' (Housing and Land Rights Network, Habitat International Coalition, New Delhi, 2006); Cema Bolabola et al, *Land Rights of Pacific Women* (Institute of Pacific Studies, University of the South Pacific, 1986); R G Crocombe, *Land Tenure in the Cook Islands* (Australian National University, Oxford University Press, 1964); R G Crocombe (ed) *Land Tenure in the Atolls* (Institute of Pacific Studies, University of the South Pacific, 1987); Peter Lamour (ed) *Land Tenure in Vanuatu* (Institute of Pacific Studies, University of the South Pacific, 1984).

²⁷Alison Aggarwal, 'Proceedings of the Pacific Regional Consultation on 'Women's Rights to Adequate Housing and Land' (Housing and Land Rights Network, Habitat International Coalition, New Delhi, 2006) 2.

²⁸Ibid 3.

²⁹A Ellis, C Bowman, J Cutura, and C Manuel, *Women in Vanuatu: Analysing Challenges to Economic Participation*, (The International Bank for Reconstruction and Development/The World Bank, World Bank Publications, Washington DC, 2009) 50-51.

³⁰*Tonga Royal Land Commission Report 2012*, vol 2, app 9, 17.

³¹*Tonga Royal Land Commission Report 2012*, vol 1, 1 <<http://www.tongaroyalandcommission.com/>>.

³²The Tonga Royal Land Commission recommends that the legal age entitlement to a town or tax allotment by a Tongan male be increased from 16 years to 21 years. See *Tonga Royal Commission Report 2012*, ch 9, recommendation 1.

³³Land Act s 43 and s 45.

³⁴Land Act s 80.

³⁵Mosikaka Moengangongo, 'Tonga: legal constraints and social potential' in Cema Bolabola et al, *Land Rights of Pacific Women* (Institute of Pacific Studies, University of the South Pacific, 1986) 98-99.

³⁶Land Act s 80 and Jalal, above n 1, 58-59.

³⁷Tonga Royal Land Commission Report 2012 27, para 4.1(g).

³⁸Tonga Royal Land Commission Report 2012 vol 2, app 9, 24.

³⁹R A Hughes, *Succession Law in the South Pacific* (Laws of the South Pacific Series, IJALS, University of the South Pacific, 1999) 18.

⁴⁰Mere Pulea, 'Women's Dignity and Rights: Situating Pacific experiences' in M Shivdas and S Coleman (eds) in *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context* (Commonwealth Secretariat, London, 2010) 114.

⁴¹For example Wills Act (Cap 55); Inheritance (Family Provision) Act (Cap 61).

⁴²Wills Act 1969 (Cap 55) s 13.

⁴³Wills, Probate and Administration Act 1987 s 93.

⁴⁴Wills, Probate and Administration Act 1987 s 91(1).

⁴⁵Wills, Probate and Administration Act 1987 ss 97-98.

⁴⁶Inheritance (Family Provision) Act 2004 s 3.

⁴⁷Inheritance (Family Provision) Act 2004 ss 2-3.

⁴⁸Administration Act 1975 s 47.

⁴⁹Gilbert and Phoenix Islands Land Code (Cap 61).

⁵⁰R A Hughes, *Succession Law in the South Pacific* (Laws of the South Pacific Series, IJALS, University of the South Pacific, 1999) 21.

⁵¹Wills Act 1969 (Cap 55).

⁵²Pulea, M, *Gender and Trade: women act as backbone of fishing activities in Vanuatu*

⁵³Employment Relations (Amendment) Decree 2011.

⁵⁴Employment Relations Promulgation 2007 s 5.

⁵⁵Employment Relations Promulgation 2007 s 6.

⁵⁶Employment Relations Promulgation 2007 s 4.

⁵⁷Employment Relations Promulgation 2007 s 82.

⁵⁸Employment Relations Promulgation 2007 s 83.

⁵⁹Employment Relations Promulgation 2007 s 84.

⁶⁰Employment Relations Promulgation 2007 s 85.

⁶¹Employment Relations Promulgation 2007 s 86.

⁶²Employment Relations Promulgation 2007 s 87.

⁶³Employment Relations Promulgation 2007 s 88.

⁶⁴Employment Relations Promulgation 2007 ss 90 – 99.

⁶⁵Employment Relations Promulgation 2007 s 92.

⁶⁶Employment Relations Promulgation 2007 s 92.

⁶⁷Employment Relations Promulgation 2007 s 99.

⁶⁸Employment Relations Promulgation 2007 s 101(2)(a).

⁶⁹Employment Relations Promulgation 2007 s 101(2)(b).

⁷⁰Employment Relations Promulgation 2007 s 104(1).

⁷¹Employment Relations Promulgation 2007 s 170(5).

⁷²Employment Relations Promulgation 2007 s 202.

⁷³Employment Relations Promulgation 2007 s 219.

⁷⁴Employment (Amendment) Act 2008 s 8.

⁷⁵Amendment made to s 36 of the *Employment Act 1988* (Cap 160) by adding a new subsection (4) to section 36.

⁷⁶See the analysis of *Katea v Niutao Kaupule & Satupa* in Jalal and Madraiwiwi (co eds.), *Pacific Human Rights Law Digest* Volume 2 (2008) Pacific Regional Rights Resource Team (RRRT) 92.

⁷⁷The Niutao Kaupule is a traditional local island council.

⁷⁸Stephen Offei, *Law of Torts in the South Pacific* (Laws of the South Pacific Series, IJALS, 1997) 25.

⁷⁹See: <http://www.mzi.com/pages/news.php?op=read&id=75910>

Chapter 4

Women as Criminal Defendants

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Introduction

In the section on VAW, we considered sexual offences and other crimes against women and children. In this section we turn our focus to women as criminal defendants, and crimes that women commit because they are women; abortion, infanticide, and prostitution.

Abortion occurs when a pregnancy is ended before the unborn child is able to survive independently outside of the mother. In all Pacific countries, abortion is prohibited by criminal law, which aims to protect and promote healthy live births. In most Pacific Island countries, abortion laws have not changed since 1998 and still require reform,¹ with abortion only legal on the grounds of saving the mother's life.² The only recent reform of abortion law in the region has been in Fiji, with the enactment of the *Crimes Decree 2009*. This reform permits an abortion to take place on health grounds other than saving the mother's life, under strict guidelines and with counseling requirements. This is an improvement on the previous law, which required no counselling and placed no 'restrictions on the age of the foetus which might operate as a cut off point for legal abortion'.³ These reforms help to ensure that the woman is fully aware of the consequences of having an abortion, that the abortion is performed by a qualified medical practitioner, and that the woman has given her informed consent. The changes to the law also assist women who have been the victims of rape or incest to procure a safe and legal termination.

The Fiji law constitutes a good model, especially in counselling support to those considering abortion, the offer of alternative solutions such as adoption, and the central role of the medical profession to provide safe procedures and emergency services. These new procedures are expected to diminish maternal deaths related to abortion complications, illegal abortions and existing harmful practices.

Infanticide is the killing of a new-born infant or child and, in most jurisdictions in the Pacific, the killing of a child under the age of 12 months by its mother. Only women can be charged with infanticide. If a man kills a child, he is charged with murder. The law distinguishes between abortion and infanticide by defining when a child is deemed to be a person.⁴ Punishments for infanticide are less than those for murder because infanticide penalties take into account the condition of the mother who might be suffering from the effects of pregnancy, birth, lactation, and the post-natal state.

The only significant change in law regarding infanticide has been in Fiji with the introduction of the *Crimes Decree 2009*. In Fiji, before 1998, the Office of the Director of Public Prosecutions recommended that a new defense of 'diminished responsibility' be introduced in infanticide law.⁵ Diminished responsibility is used to mitigate an offence. For example, Vanuatu's *Penal Code* includes a mitigating issue where 'the court may decide that the accused, although not insane within the meaning of section 20 (insanity)...was suffering from such abnormality of the mind...as diminished his responsibility for his acts.' In Fiji, the *Crimes Decree 2009* has extended the diminished responsibility defense and stated clear conditions that are specific to the crime of infanticide and that the court must take into account. These changes mean that the court will consider the full range of conditions the woman may have been experiencing and take these conditions into consideration when charging the offence as infanticide or murder.

Abortion

Legislation

Fiji – Crimes Decree 2009

Under Part 14, the *Crimes Decree 2009* outlines an improved statutory scheme on the termination of pregnancies. The general rule is that abortion is illegal and that anyone who 'unlawfully performs an abortion' is liable to a conviction up to 14 years' imprisonment.⁶ Section 234(2) states that the situations where abortion is not criminalised are:

- (a) the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and
- (b) the pregnancy is the result of sexual intercourse between –
 - (i) a parent and child; or
 - (ii) a brother and sister (whether of the whole blood or half blood); or
 - (iii) a grandparent and grandchild; or
- (c) the pregnancy is the result of sexual intercourse that constitutes the offence of rape under this decree.⁷

Countries that permit abortion on medical grounds set a time-frame stipulated by law. The *Crimes Decree 2009* stipulates 20 weeks.⁸ Beyond this time, performance of the abortion will be justified only:

- (a) where two medical practitioners have agreed that the mother, or the unborn child, has a severe medical condition; and
- (b) the abortion is performed in a facility approved by the Minister for Health.⁹

Section 234(5) states that an abortion is justified if:

- (a) serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed; or
- (b) the pregnancy of the woman concerned is causing serious danger to her physical or mental health.¹⁰

Sections 234 (2)(a)-(c) do not apply unless the woman has given informed consent, or it is impractical for her to give her consent in the case of 2(b) and 2(c). Informed consent is defined to mean that a medical practitioner has properly, appropriately and adequately provided the woman with counselling about the medical risks of pregnancy termination and of carrying a pregnancy to term. The medical practitioner is also required to offer the woman the opportunity of referral to an appropriate and adequate counselling agency, if one is available.¹¹

The Fiji *Crimes Decree 2009* s 234(10)(b) defines a dependent minor as a person under the age of 16 years. A dependent minor will be regarded as having given informed consent only if her custodial parent:

- has been informed about the proposed abortion; and
- is given the opportunity to participate in the counselling process and in consultations between the dependent minor and her medical practitioner as to whether the abortion is to be performed.

A dependent minor who does not agree to the custodial parent being involved or given any information may apply to a magistrate for a court order. The magistrate, if satisfied that the application should be granted, may make an order in those terms.

Infanticide

Legislation

Fiji – Crimes Decree 2009

The *Crimes Decree 2009* has improved the law on infanticide. A court will now take into account the following conditions:

244 1. (c) at the time of the act or omission whether the balance of her mind was disturbed by reason of —

- (i) her not having fully recovered from the effect of giving birth to the child; or
- (ii) the effect of lactation consequent upon the birth of the child; or
- (iii) any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state that is proved to the satisfaction of the court.¹²

These defences are unique to infanticide, and are available only to the biological mother of a child under 12 months of age. If the biological mother raises the defence in s 244 1(c) of infanticide that at the time of her act or omission, the balance of her mind was disturbed, she will be sentenced as charged for infanticide rather than the more serious offence of murder. The reform will allow the courts ‘to impose more humane sentences such as probation orders and community work orders’.¹³

Prostitution

The laws on prostitution in the Pacific have not undergone any significant changes, with prostitution remaining a criminal offence. The laws in Fiji under the *Crimes Act 2009* have, in fact, introduced stronger anti-prostitution laws with increased penalties against clients of sex workers and the owners of premises where prostitution activities occur.

Conclusion

Laws relating to abortion, infanticide and prostitution have been slow to reform in the Pacific region. This is because the law is heavily influenced by social and religious beliefs, and attitudes towards women and their role in society. The law needs to take into account the potential social and economic burdens leading to a woman procuring an abortion or killing her own child, and apply the penalties in a clear and logical manner. The introduction of mandatory counseling, informed consent and medical safeguards is an important step in the development of the law regarding abortion in Fiji. Other countries in the region need to take steps to ensure that women have choices and control over their own bodies.

¹Jalal(1998), 181-188.

²See *Kiribati Penal Code* s 214.

³Statement by the Minister for Social Welfare, Women & Poverty Alleviation of the Government of the Republic of Fiji at the 46th session of the *United Nations Convention on the Elimination of All Forms of Discrimination against Women (UN CEDAW)* Committee in New York, 14 July, 2010, 13 <<http://www2.ohchr.org/english/bodies/cedaw/docs/statement/Fiji46-statement.pdf>>.

⁴Mark Findley, *Criminal Laws of the South Pacific 2nd Edition* (University of the South Pacific, 2000) 124-125.

⁵Jalal (1998), 193.

⁶*Crimes Decree 2009* s 234.

⁷*Crimes Decree 2009* s 234(2).

⁸*Crimes Decree 2009* s 234(9).

⁹*Crimes Decree 2009* s 234(8).

¹⁰*Crimes Decree 2009* s 234(5).

¹¹*Crimes Decree 2009* s 234(7).

¹²*Crimes Decree 2009* s 244(1)(c).

¹³Statement by the Minister for Social Welfare, Women & Poverty Alleviation of the Government of the Republic of Fiji Islands at the 46th session of the *United Nations Convention on the Elimination of All Forms of Discrimination against Women (UN CEDAW)* Committee in New York, 14 July, 2010, pp. 12-13 <<http://www2.ohchr.org/english/bodies/cedaw/docs/statement/Fiji46-statement.pdf>>

Chapter 5

Lessons Learned

Introduction

Women in the Pacific continue to suffer discrimination and inequalities. Gender-based violence, discriminatory laws and practices, lack of access to resources, discriminatory customary practices, and discrimination in education, employment and decision making are just some of the areas in which women struggle to find equality with men. The low participation of women in decision-making roles and in leadership highlights a clear pattern of entrenched discrimination against women. For example, in Cook Islands in 2010, only ten female candidates contested the general elections compared to 60 male candidates, with only one female candidate elected to parliament. The problem faced by women in Cook Islands, as elsewhere, is the 'ingrained beliefs that decision making and politics is the domain of men, and they therefore are more competent in national decision making'.¹

We have seen throughout this supplement how the law acts as an instrument of control by, for example, inhibiting women's access to resources such as land. The male blood line determines inheritance and succession rights, and property ownership and control continue to be a man's prerogative. We also saw in the area of VAW that the law has been slow to protect women from violence and exploitation. Physical assault and battering, sexual assaults, trafficking, prostitution and pornography all relate to male domination and control of female sexuality. Criminalising marital rape has been met with resistance in some jurisdictions and remains a challenge. On the plus side, new domestic violence legislation has been promulgated and some pieces of legislation are in various stages of drafting. New criminal laws that address all forms of sexual violence have also been promulgated.

Regarding changes in family law, it took more than a decade of lobbying by RRRT, the Fiji Women's Rights Movement and the Fiji Women's Crisis Centre to reform the family law in Fiji. Cook Islands now has a draft *Family Law Bill 2011*, whilst other countries are at various stages of improving family-related laws. In these new laws, women enjoy equal rights in marriage, divorce, custody and access to children and, in some jurisdictions, a share in the marital property is prescribed by law. Where statutes are silent on the division of marital property, the recognition of women's rights to marital property is influenced by judicial decisions. An amendment in 2012 to the *Fiji Family Law Act 2003* extended equal rights to maintenance and property to those in *de facto* relationships, provided they met the criteria contained therein.² Whilst women's groups in Fiji lobbied for the inclusion of *de facto* relationships at the drafting stages of the *Family Law Bill*, the resistance to its inclusion from various sectors would have meant sacrificing the whole bill from being accepted by parliament. Therefore, the compromise in that instance, was the recognition of children who were born out of these relationships. In other areas of the family, the law and cultural practices continue to marginalise illegitimate children and single mothers.

Labour and employment laws have special relevance for women, with long-term discrimination against women workers slowly improving. Pay gaps, working conditions, maternity benefits and sexual harassment in the workplace have been or are being addressed. Yet, despite improvements made to the law, 'there is still a patriarchal attitude towards women in the world of work and ... management should not talk about gender equality but also follow up with action.'³

How we can effect change

There are a number of strategies that can be used to effect changes in the rights of women, and to ensure that laws are working to protect the rights of women both in theory and in practice.

- **Law reform**

The first of these is law reform, where activities could include:

- advocacy and lobbying to change and challenge discriminatory laws and provisions;
- research to determine the impact of various areas of the law on women; and
- lobbying to discard archaic laws and introduce new laws that meet human rights and gender equality benchmarks.

- **Using the law to bring about change**

Lobbying to change existing legislation or drafting and passing new legislation may be a long and difficult process but, when successful, it has the potential to significantly change the lives of large numbers of women.

It is also possible to be influential in the ways laws are applied and how they will be applied in the future, by using them to bring about change. For example, test cases can be used as advocacy and lobbying tools to raise awareness of the provisions and rights outlined in *CEDAW* and *CRC* to strike down discriminatory practices against women and children. This occurred in the 2012 case of *Regina v Macberth Gua* in Solomon Islands, where the presiding judge sought advice on the international conventions the Solomon Islands was a party to (in this case *CEDAW*) to inform his ruling in this case. If this advice and information had not been provided by interested parties, it is unlikely that this case would have had the same result.

Implementation of *CEDAW* provisions are, however, slow in most countries in the region due to a lack of political will, lack of budget allocation for implementation and, in some countries, the lack of a coordinating mechanism to monitor progress and appropriate strategies to implement the convention. In addition, in some countries, improving and adopting new legislation is slow due to a lack of drafting skills and limited sittings of parliament.

Sue Farran,⁴ discussing the Tuvalu case of *Tepulolo v Pou*, stated that it demonstrated a 'harsh illumination of the problems individuals face when Pacific Island countries sign up to international conventions and do nothing to implement them in their domestic laws'. She claims that custom, poorly drafted laws, inertia of parliament to make international conventions part of national laws, and the reluctance of courts to take a proactive human rights approach all conspire to deny women their rights.

- **Education**

Providing legal literacy to women can help them understand how the legal process works and give them the confidence to take cases to court. It can also be useful to dispel myths about the law and how it works, and empower women to utilise it to their advantage. Training of community paralegals can also help women to access free legal advice from someone who can explain the law clearly and concisely in layman's terms. Gender sensitivity training can also be implemented for law enforcement agencies, lawyers, paralegals and members of the judiciary, as well as members of parliament, to try and get people to unpack their own biases and see how those biases may affect the rights of others.

- **Women as decision makers**

Over the last decade, more women have begun to make it to positions of leadership and decision making – in the community, in local government, within the legal profession and in national parliaments. For

example, the numbers of men and women graduating in law from the University of the South Pacific over the last 14 years have been almost equal, with 412 males compared to 390 females. Changes are also taking place in national parliaments in the region. Table 5.1 shows the current numbers of women in parliament. It is clear that the numbers are still low and in some countries there are still no female members of the national parliament.

Table 5.1 - Numbers of women in parliament in the Pacific region

Country	Number of female members	Total number of seats	Percentage of females
Tuvalu	1	15	6
Samoa	2	49	4
Tonga	1	28	4
Vanuatu	1	52	2
Republic of the Marshall Islands	1	33	3
Federated States of Micronesia	0	14	0
Kiribati	4	46	9
Nauru	0	18	0
Solomon Islands	2 ⁵	50	4
Palau	0	16	0
Papua New Guinea	3 ⁶	109	3
Cook Islands	1	24	4

Affirmative action or temporary special measures are time-limited actions taken to ensure that women and other disadvantaged groups have the same opportunities in employment, education and other sectors where they are discriminated against. It is appropriate for state parties to adopt such measures 'to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing the group members into the mainstream of political, economic, social, cultural and civil life'.

Whilst affirmative action can be used to achieve equality for women, in some cases such measures can pose difficulties, as seen in Kiribati in 2012. Four women were elected to Kiribati's 44 seat parliament but the

Examples of strategies in the area of VAW

At the local level, a number of strategies to support and keep victims of domestic violence safe have been implemented, such as:

- developing specific stand-alone legislation to address domestic violence;
- protecting victims from all forms of violence through protection orders, which is a unique form of victim protection;
- establishing special units within the police force to deal with domestic violence cases, with female police officers trained to be part of this response team;
- collecting data on the incidence of domestic violence,
- officials and civil society groups conducting awareness-raising campaigns on domestic violence, with materials widely distributed, especially in rural areas and amongst vulnerable groups in society.

newly re-elected President of Kiribati ruled out special measures to increase women's political participation. He supported greater participation but said:

... I just wonder whether it would be democratic to put as a matter of law that women must have reserved seats. I think we must always be careful [that] culture and the tradition must be ready to accept that. Greater women's participation will happen of its own accord, with women taking on leadership roles in different sectors of the community.⁷

What we can learn from changes in the region

Case study 1

Fiji – Family Law Act 2003⁸

The process of passing the *Family Law Act 2003* took over 12 years of sustained pressure and ongoing liaison between key civil society organisations and lawmakers. The result was law-making at its best as one of the most consulted and discussed laws in Fiji's history. The passing of this law gained the unanimous explicit support of all members of parliament, in both upper and lower houses across party lines. For the first time in Fiji's legislative history, the state complied with most, if not all, good governance processes of law-making – consultation, participation and compliance with human rights standards and international, ratified UN conventions.

The following were identified as key enabling factors that allowed legislative change to take place.

- **Well researched, informed and mandated women's groups with tenacity** – It is critical that the group initiating change is regarded by both governance institutions and other women's groups as being experts. The group must also have the political skills to inform and mobilise the community and the mandate of those whom they purport to represent, in this case disadvantaged women. The tenacity of the Fiji Women's Rights Movement (FWRM) in sustaining this long project (through three coup d'états and a hostile political climate) was also a critical factor of success.
- **Education of all major stakeholders on the need for reform, especially major opinion shapers** – FWRM conducted legal literacy workshops throughout Fiji in which family laws were explained, injustices discussed, case studies documented and the reform process outlined. Once women began to understand their legal rights, FWRM felt justified in mounting a family law reform campaign. This targeted campaign led to the appointment of FWRM co-founder and RRRT lawyer as the government appointed part-time Commissioner for Family Law Reform. This provided a rare opportunity in which critical law reform affecting women was led by a feminist human rights expert, rather than a lawyer who may have been unwilling to push for advanced reform. It also meant that immediate linkages were created between civil society and the government, and the nature of the position gave it legitimacy in the eyes of the key players.
- **Media skills** – Strategic use of the media in the family law campaign and communication skills of the lobbyists were crucial. FWRM and the Commissioner mainly used low-cost radio talk-back shows, press releases and letters to the editor. Some FWRM members who were journalists were able to help by maximising the coverage. Regional networks and media coverage offered solidarity and changed public opinion about the *Fiji Family Law Bill*.
- **State-wide community consultations** – The consultation process must be a meaningful one. The community must understand the law and its impact to be able to make appropriate submissions. In the family law consultations (funded by the UK Department for International

Development as the state did not have funds) the Commissioner and the Fiji Law Reform Commission made presentations about the law, the impact of the law and the reforms proposed.

- **Links and donor support** – Donors provided strong but flexible core funding. FWRM’s experience in management and project implementation gave it credibility with donors and, in return, donors were flexible in the application of their funds. The campaign benefited from NGOs’ extensive regional and international women’s networks. For example, the Asia Pacific Forum on Women, Law and Development and International Women’s Rights Action Watch-Asia Pacific provided technical, financial and logistical support when FWRM presented its CEDAW Alternative Report. This in turn gave FWRM more confidence, knowledge and valuable guidance on how best to promote their points.
- **Sustained campaigning and campaigning style** – FWRM’s campaigning style was to try and engage rather than lobby against. This was particularly important towards the end of the campaign, when the proposed law was being debated in parliament and was being covered in the media daily with prominent headlines. The powerful Methodist church was opposed to the proposed law and it was critical to counter the opposition with rational and logical responses. It is also crucial in any law reform campaign to be prepared to accept that the entire process is generally a long one. If the proposed law is one that will change the fundamental nature of family relationships and personal beliefs, then the road is even longer. Coalitions, women’s groups, donors and technical support should be prepared to accept incremental progress, celebrate minor advances and not get overwhelmed by the complexity of the process.
- **The political and legal environment must be conducive to engagement between disadvantaged groups and governance institutions** – The political and legal environment is crucial to inclusive governance. If the conditions of democracy are not present, disadvantaged groups are unable to require accountability from the state as citizens are not allowed to challenge existing policies, law and practices.
- **Recognising and working with champions of change within governance institutions** – Analysis of power relationships is a key principle of political lobbying. Family law advocates from within the Parliament and Senate were identified and approached for support. They gave valuable insights into tactics being used to delay or compromise the bill. This information was then shared among the lobbyists and FWRM board members so that appropriate actions could be developed. The Attorney General himself played a critical individual role. Such important relationships with key opinion shapers need to be nurtured and supported in any campaign.
- **Women’s legislators/MPs** – Women’s training and ability to get elected and appointed to the Fiji parliament played an important role in providing key support for the proposed law within parties. However, not all female Parliamentarians supported changes. In 2000, FWRM and the Family Law Commissioner met with female members of the House who had formed a women’s caucus just before the attempted coup and ensuing crisis. During the 1999 elections, UNIFEM had included the proposed law in its training of new male and female parliamentarians. This meant that members of parliament were already aware of its significance. Significantly, both major political parties had indicated passing of the law as part of their 2001 campaign platforms. Despite some much controversial posturing by politicians, when the vote came, the *Family Law Act 2003* was passed unanimously.
- **Ministry of women and culture working within government** – An active and strong women’s ministry/department working from within government can be a considerable advantage. However, although Fiji’s Ministry of Women and Culture worked from within to

create support for change, at the time of the parliamentary debate, the women's minister was new to parliament and an inexperienced politician, so was not able to speak with authority in the House of Representatives. It can happen that a women figurehead is not the most powerful or even most strategic person to argue for a gender equity law. So, while some felt that the ministry responsible for women should have championed the new law, the Attorney General as representative of the executive powers of government had more power and influence.

There also existed a number of challenges that had to be overcome to ensure the passing of the legislation.

- **Lack of information and technical expertise** – Community empowerment is often limited by misunderstanding of laws and reliance on expensive legal interpretation. Legal literacy is an extremely important tool for empowering women. Any information should be written simply, using as many culturally appropriate illustrations and case studies as possible.
- **Being willing to negotiate and compromise** – The Commissioner's mandate was to reflect community input. Only one community consultation argued for giving full legal recognition to *de facto* relationships. Most consultations and submissions (apart from two women's NGOs) had either not commented or emphatically stated that they did not want *de facto* relationships to be recognised. Even though in early discussion papers the Commissioner had recommended legal recognition of *de facto* relationships, the Commissioner was forced to compromise with the Attorney General and omit legalising *de facto* partnerships. Hence, to achieve the much-needed overhaul of family laws, *de facto* relationships were removed from the final recommendations.
- **Dealing with religious and cultural bias** – The most significant and obvious challenges to the proposed law were culture and custom, pitting culture against human rights, and custom against equality for women. Race, religion, class and sexuality were all used to oppose changes to the family laws. The concept of women's empowerment and gender equality in Fiji were considered, like democracy, 'a foreign flower'. This challenge required activists from FWRM and RRRT's extensive network, as well as women's NGOs, to support the campaign at provincial, village and community level, providing education on the proposed law and lobbying for support.

Case study 2

Vanuatu – Family Protection Act 2008⁹

Movements towards the *Family Protection Act 2008* began in 1997 when a bill began to be drafted with the purpose of preserving and promoting harmonious relationships, preventing domestic violence in all levels of society in Vanuatu, ensuring effective legal protection for victims of domestic violence, and providing for the punishment of any or all persons who commit acts of domestic violence. The bill was finalised in 1998 and consultations began with the Department of Women's Affairs, the State Law Office, the courts, the National Council of Women and some civil society organisations. Over the next ten years, regional and national civil society organisations engaged in lobbying efforts to raise public awareness of family violence. These efforts included conducting consultations with communities, women's organisations, government departments and local chiefs, and providing further training, awareness and information on the controversial bill. CEDAW state and shadow reports submitted in 2006 highlighted the increasing levels of domestic violence and the absence of a clear protection framework and legislation. Although CEDAW reporting was a separate process, it played an important role in increasing global interest and government commitment to enacting family violence protection legislation.

One of the challenges faced in getting the legislation passed by parliament was the volatile political landscape, which saw frequent changes in government over the decade of lobbying, with no government willing to support it. For this reason, it was not until 2005 that it was finally presented to parliament. The bill was passed on the first reading, but the government called for wider national consultations, given the cultural sensitivities around land and women's rights.

One of the factors that assisted in the bill finally being passed was the setting up of a parliamentary ad hoc committee with members from both sides of the chamber. This committee was asked to conduct national consultations and report back during the second reading in parliament. The comments in the report allowed a more open and rigorous debate about a wide range of issues facing Vanuatu, including customary land ownership, women's rights and corporal punishment of children. On 18 June 2008, the government reflected on the ad hoc committee's report and unanimously passed the *Family Protection Act 2008*.

It is evident, when looking at this case, that change happened relatively slowly with periods of intense action and long periods of inaction. This is evidenced by the fact that it took ten years from its drafting in 1998 to pass the revised legislation by parliament. Because legislative change can be a long and difficult process, it is important to maintain momentum in lobbying and advocacy campaigns to ensure that the public, in particular, stay engaged. If campaigns go on too long with the same tired messages, it is likely that the public and those in power will stop listening.

It is also important to respect the law-making process and understand that changes take place incrementally over time. Sometimes it may even feel as if the process is going in the opposite direction to what you intended. In the case of Vanuatu, for example, the ad hoc committee that was created stalled the passing of the legislation by parliament, but it turned out to be a positive step in that it examined current laws and practices. The process was justified, as it gave law-makers the opportunity to think about the consequences of enacting such a legislation, and this subsequently allowed the bill to pass.

Case study 3

Solomon Islands – *Regina v Macberth Gua*

This case was discussed in the section on VAW and was a landmark case in Solomon Islands overruling the common law principle of the marital rape exemption. The context in which this case was decided must firstly be acknowledged, as women in Solomon Islands are seen as inferior to men, with men making decisions about how women should act and behave. This context makes the decision in this case even more remarkable.

There were a number of enabling factors that were instrumental in getting this judgement:

- The judge in this case was proactive. He sought advice from the Ministry of Foreign Affairs about the applicability of international conventions, in this case *CEDAW*, and was told it applied. He was also given the specific articles of *CEDAW* that applied in this case by the Ministry.
- One of the reasons that this case saw the overturning of the marital rape exemption was due to increased public awareness of *CEDAW*, women's equality and their rights, these issues being the subject of public discussion and debate. The most recent case of marital rape prior to this case was in 1991, where the marital rape exemption was reinforced, despite this rule already being overturned in the House of Lords and in Australia. (This was prior to Solomon Islands ratifying *CEDAW*, when there was less awareness of women's rights and equality.)

- The prosecutor and police officer were aware of gender and women's rights and had been trained on these principles. The prosecutor was from Fiji and had been involved in the corroboration precedent, whilst the police officer was trained in human rights and knew there was a right to protection under the law in this case. Because of this training, she was confident enough to pursue the case, whereas others in the Domestic Violence and Sexual Assault Unit may not have thought it possible to get a conviction.
- Stakeholders and the public were involved. The RAMSI Gender Advisor and other interested stakeholders were all watching the case closely, and there was a lot of public discussion (including in the local newspapers) about what the decision in this case might mean.

Since the decision in this case, there has been further action in the area where the Legislative Working Group, as a subcommittee under the National Committee on Eliminating Violence Against Women, has been mandated to go for an amendment to the *Penal Code* on this particular issue.

Case study 4

RMI - Domestic Violence Prevention and Protection Act 2011

Gender equality efforts in the Republic of the Marshall Islands (RMI) began in earnest in the 1990s, with the ratification of the *Convention on the Rights of the Child* in 1993 and engagement in the Beijing processes leading to the *Beijing Platform for Action* in 1995. These efforts intensified in 2000, when RMI became a party to the *Millennium Development Declaration*. Policy level commitments towards advancing human rights and gender equality continued to gain visibility. However, at the same time, the National Women's Policy expired in 2001 and was yet to be redeveloped.

In 2003, Women United Together Marshall Islands (WUTMI) partnered with the Ministry of Health (MoH) on implementing a planning grant from the Centres for Disease Control (CDC) that led to the Women Against Violence through Education (WAVE) survey. This survey was developed by WUTMI and then administered on the atolls of Majuro, Kwajalein, Ebon and Mili. This project also included a legislative review and a review of documented cases at the police station and hospital. The WAVE survey showed high levels of violence experienced by women on all atolls.

In 2006 WUTMI, with support from the US Embassy, developed a DVD entitled *Ekakwikwi Jinen Emaan* (A Call to Arms). This DVD looks at traditional customs as well as the modern situation of women in the Marshall Islands. Traditional leaders, members of parliament, religious leaders, government officials and healthcare professionals all participated, sharing their views and experiences of violence against women. Around this time, awareness was further increased through the UNDP Good Governance Project, which enlightened members of parliament on gender equality and other important issues affecting communities.

On 2 March 2006, RMI reached a milestone with the ratification of *CEDAW*. In addition, a bill addressing domestic violence was drafted and presented to the Nitijela (parliament). However, with the recent passage of *CEDAW*, it was clear that the bill did not go far enough in terms of compliance with *CEDAW* and would need to be strengthened, so it was shelved.

In 2007, the Economic Policy Planning and Statistics Office, which is located under the Office of the President, conducted a comprehensive demographic and health survey (DHS). The DHS covered a number of areas, and included a section on domestic violence. According to the DHS, three in ten women have experienced physical violence, and one in five have experienced sexual violence. Also at this time, WUTMI was implementing a project entitled *Protecting Our Women – Enhancing Human Rights*, funded by AusAID. This project focused on strengthening response and awareness practices on violence against women.

In 2008, the first parliament induction workshop took place, and the topics covered were MDGs, domestic violence, HIV/AIDS and women in leadership. In 2009, a gender stocktake began, conducted by SPC, which was finalised in 2012. There was also a sub-regional training on VAW legislation in Fiji that WUTMI attended.

In the second half of 2009, WUTMI began a project on violence against women funded by the Iceland Ministry for Foreign Affairs. This project focused on awareness, development of legislation and first response protocols. The major focus was raising awareness on the issue of violence against women. Then, at the end of 2010, WUTMI began the Initiative for a Better Response to Address Violence Everywhere, funded by the United Nations Trust Fund to End Violence Against Women. These two projects spearheaded the 16 Days of Activism campaign in RMI that included the Ministry of Internal Affairs, the Marshall Islands Police Department and the College of the Marshall Islands. As part of these initiatives, WUTMI produced packets for members of government: a presentation on *CEDAW*, the legislative indicators of *CEDAW* – including RMI's compliance – and brochures on family violence, types of violence, a wristband and a pen.

2010 was also a significant year for the push to get a law passed addressing domestic violence. In August of 2010, Emson Makroro, a faculty member of the College of the Marshall Islands (CMI) was murdered inside her house by her husband, also a faculty member at CMI. Bystanders outside the house heard her cries for help but a call to the police was cancelled when the cries from inside the house ceased. By the time help arrived, Emson Makroro was dead. Also in 2010, the *Domestic Violence Prevention and Protection Bill* was drafted by the Nitijela Legislative Counsel and sent for review. Once drafting began, internal consultations happened first, and then the bill went out to other agencies and persons for review. The law was reviewed by RRRT, the RMI Ministry of Education, the Attorney General, the Office of the Public Defender, the Department of Public Safety, CMI, and the Single State Agency. By October, community consultations on the bill was ongoing with WUTMI, the police, the church and community groups. The bill received coverage from local media and several prominent international radio stations, including Pacific Media, ABC Australia and Radio New Zealand.

Regional and international events further supported regional political will for comprehensive violence against women legislation. RMI participated in the SPC/RRRT sub-regional consultations and was able to learn from other Pacific Island countries. WUTMI also shared developments in legislative reforms on domestic violence in RMI which were well received by other Pacific countries.

In November 2010, RMI presented its Universal Periodic Review Report at the Human Rights Council. Key recommendations supporting the enactment of the domestic violence bill (Bill 93) were made. The UPR stakeholder submission called for increased protection for women and children who are subject to gender-based violence. The RMI government accepted the recommendations made by the Human Rights Council.

Bill 93 was introduced in January 2011 but time ran out in the session, so it was further delayed. It was introduced again in the second session of 2011 and, after a public hearing that was widely attended, especially by WUTMI members and female chiefs, all wearing purple, the bill was passed in September 2011. Leading up to the passage of *Domestic Violence Prevention and Protection Act 2011*, WUTMI undertook an extensive lobbying campaign, working with members of parliament and the general public. Efforts are now being focused on successful implementation of the act.

The challenges ahead

There remain significant challenges to women in the Pacific region fully gaining equal rights with their male counterparts. Changes to laws in the Pacific have been significant in some areas (e.g. VAW) whereas in others not much has changed, and the status quo is continuing to be reinforced in some areas, such as

custom and land rights. We have also seen that changes in laws have not necessarily improved the lives of women or enabled women to control and influence more aspects of their lives. In some cases, new laws may have actually made it more difficult for women to understand and access services, or have resulted in unintended negative consequences. Therefore, it is important to celebrate and acknowledge changes in law only after full interpretation and application have taken place - seeing cases being challenged and women and children being vindicated in court, for example. Many of the laws in the region are, unfortunately, too young to have created large-scale changes in the lives of women yet, and anecdotal evidence suggests that there has been mixed success in prosecuting cases under stand-alone and integrated legislation in Vanuatu, RMI and Fiji.

Changes to laws have been the result of momentous efforts in perseverance, tenacity and long-term thinking by a wide range of players, from government to civil society to the everyday public. Taking into consideration the social and cultural environment in which these changes have taken place, they are significant achievements.

Unfortunately, the process of changing laws to effect real change in the lives of women is not over in the Pacific. People from all levels need to be involved and informed about the law and how it can positively affect their life. Government and civil society need to continue their work to get the laws right for the people they serve and in the best interests of all, including the weak, the vulnerable and the oppressed. It is hoped that this publication will give activists, lobbyists, law makers and the public a better grasp of the most recent laws across the region that have and will affect the lives of women, and that they will use this knowledge to move forward with increased vision, insight and motivation to enhance and improve the situation of women in the Pacific.

¹Government of Cook Islands, *Cook Islands National Police on Gender Equality and Women's Empowerment & Strategic Plan of Action (2011 – 2016)* published in May 2011 by Gender and Development, Ministry of Internal Affairs, Rarotonga, Cook Islands, p.15.

²Fiji Family Law Amendment Act 2012 . See Chapter 12 of this Update.

³Kasanita Seruvatu on “*Working in a ‘man’s world’: Women in t Fiji police force*” on 8 October 2008 http://www.ilo.org/global/about-the-ilo/press-and-media-centre/insight/WCMS_099054/lang_en/index.htm. Viewed 13/4/2012. See also Chapter 13.

⁴S.Farran, *A Mother’s Care or Land, but Not Both, Tepulolo v Pou* [2005] TVHC 1 Volume 9 2005 – Issue 1. <http://www.paclii.org/journals/JSPL/vol09no1/10.shtml> . Viewed 7/6/2012.

⁵Change as of August 2012.

⁶Change as of August 2012.

⁷Cook. R.J. & Cusack.S , 2010 *Gender Stereotyping Transnational Legal Aspects*, University of Pennsylvania Press, p. 98.

⁸Island Business, 19 January 2012.

⁹This is adapted from a larger analysis of the passing of the *Fiji Family Law Act 2003* in Fiji Women’s Rights Movement and Pacific Regional Rights Resource Team, ‘An Analysis of Influencing Fiji’s Family Law - A Case Study of Legislative Advocacy & Campaigning in Fiji’

¹⁰This is adapted from the case study in Fiji Women’s Rights Movement and Pacific Regional Rights Resource Team, *Changing Laws: A Legislative Lobbying Toolkit for Understanding Law-Making, Parliamentary Procedures and Advocacy for Legislative Change* (2010).

