

CHALLENGING CONVENTIONS: IN PURSUIT OF GREATER LEGISLATIVE COMPLIANCE WITH CEDAW IN THE PACIFIC

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A recent review of the legislation and constitutions of 10 Pacific Island countries that have ratified or acceded to the Convention on the Elimination of Discrimination against Women revealed a uniformly low level of legislative compliance with the Convention across a range of areas. These include in the areas of equality and nondiscrimination law, employment law, criminal law, protection against gender-based violence and marriage and family law. This commentary considers the reasons for the low levels of legislative compliance with CEDAW in the Pacific, such as the lasting impact of Western colonisation, which has left many PICs with outdated legislative frameworks; the prioritisation of practices deemed customary or traditional above addressing discrimination against women; the stark lack of female representation in political institutions including legislatures at both local and national levels; and the weaknesses of the CEDAW reporting system. Whilst legislative reform is but a first step towards gender equality in the region, this commentary argues that it is a necessary and important goal. Legislation provides a mechanism through which individuals who have experienced discrimination can seek redress and, importantly, can represent a societal commitment to equality, diversity and nondiscrimination, thereby benefiting not only women's lives but also Pacific communities at large.

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I INTRODUCTION

The ratification of the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW')¹ obliges states parties to enact or modify domestic legislation and constitutions to accord with the substantive articles of the Convention. A recent review of the legislation and constitutions of 10 Pacific Island countries ('PICs') that have ratified or acceded to CEDAW revealed, however, a uniformly low level of legislative compliance across a range of areas, including equality and nondiscrimination law, employment law, criminal law protection against gender-based violence and marriage and family law.² Whilst the achievement of legislative compliance with CEDAW is primarily a first step towards gender equality in the region, it is nevertheless an important goal, as legislation provides a mechanism through which individuals who have experienced discrimination can seek redress. It also serves as a vehicle for change for those who seek to promote equality, and importantly, it represents a societal commitment to equality, diversity and nondiscrimination, thereby potentially stimulating and facilitating cultural change.

The reasons for low legislative compliance in the region, despite the presence of a strong non-governmental organisation ('NGO') movement and commendable examples of law reform initiatives, are complex. This commentary suggests some significant reasons for the low compliance findings. First, the lasting impact of Western colonisation has left many Pacific nations with outdated legislative frameworks, reflective not of local values or contemporary international norms, but rather of the mid-20th century values of the former colonial powers. Second, a powerful reason for resistance to gender-equality law reform initiatives is the view that proposed changes are contrary to practices deemed customary or traditional to the region and that they are instead reflective of 'Western' norms.³ The legitimisation of custom and traditional practices in the constitutions of Pacific countries — coupled with an inability or unwillingness to distinguish discriminatory customs from non-discriminatory customs — thus creates a considerable impediment to regional law reform initiatives. Ensuring a balance of (non-discriminatory) local and universal values may therefore be critical to the success of further law reform initiatives. Third, the paucity of women in political institutions and in legislative bodies at both the national level (which is amongst the lowest in the world) and in councils, as well as the strength of the male-dominated chiefly and traditional systems throughout the region, can be linked to a corresponding lack of political will in the region to engender change. Finally, the weaknesses of a treaty monitoring system that does

¹ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

² For a detailed overview of the results of the review, see Vedna Jivan and Christine Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries* (United Nations Development Programme ('UNDP') Report, 2007); Vedna Jivan and Christine Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in the Cook Islands* (UNDP Report, 2008).

³ See CEDAW Committee, 'Statement to Commemorate the Twenty-Fifth Anniversary of the Adoption of CEDAW' (Press Release, 13 October 2004) 2 <<http://www.un.org/womenwatch/daw/cedaw/cedaw25anniversary/cedaw25-CEDAW.pdf>>, which stated that the failure of CEDAW to achieve even de jure equality was due to 'discriminatory social norms, cultural practices, traditions, customs and stereotypical roles of men and women'.

not enable the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') to wholly utilise the main monitoring and implementation mechanism afforded to it, namely the *CEDAW* reporting system, has enabled PICs to avoid their international obligations to date. Indeed, only five countries in the region have progressed through the reporting process. This commentary suggests a stricter admonition of states parties who fail to report. For example, in the absence of government reports, proceeding to country hearings on the basis of NGO shadow reports and providing greater visibility and credit to those that do fulfil their reporting obligations might assist in encouraging tardy states to report and be held accountable for their failure to instigate legislative changes in line with *CEDAW*.

This commentary first introduces *CEDAW* and its monitoring mechanisms in Part II; Part III provides an overview of and examines 10 PICs' legislative compliance with *CEDAW* in key areas of women's lives, including equality and nondiscrimination, gender-based violence, employment and marriage and family relations; Part IV highlights and analyses the major factors contributing to low legislative compliance. In concluding remarks, Part V suggests that modifying custom and traditional practices that discriminate against women and increasing women's political participation across the region are critical to law reform initiatives seeking to engender compliance with *CEDAW*.

II AN OVERVIEW OF *CEDAW* AND ITS MONITORING MECHANISMS

CEDAW, described as an international 'Bill of Rights' for women⁴ and considered the 'most important of the conventions on the status of women',⁵ was adopted by the United Nations in 1979. The Convention is premised on the position that 'international human rights laws were not effectively addressing the specific disadvantages and injustices faced by women'.⁶ *CEDAW* had its beginnings in the work of the Commission on the Status of Women, which was established by the UN in 1946 to address discrimination against women and to promote their advancement.⁷ The Commission was integral to the drafting of the Convention, which entered into force in September 1981, faster than any previous human rights convention.⁸ Since *CEDAW* came into force, the number of states that have ratified or acceded to it has increased from 20 in 1981⁹ to 186

⁴ See Kerri Ritz, 'Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination against Women' (2001) 25 *Suffolk Transnational Law Review* 191, 196.

⁵ Hilikka Pietila and Jeanne Vickers, *Making Women Matter: The Role of the United Nations* (1990) 123.

⁶ See Laboni Hoq, 'The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights' (2001) 32 *Columbia Human Rights Law Review* 677, 680.

⁷ Felipe Isa, 'The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women's Human Rights' (2003) 20 *Arizona Journal of International and Comparative Law* 291, 295.

⁸ See Rebecca Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* 643, 643.

⁹ Malvina Halberstam, 'United States Ratification of the Convention on the Elimination of All Forms of Discrimination against Women' (1997) 31 *George Washington Journal of Law and the Economy* 49, 49.

as of 1 October 2009, comprising over 90 per cent of the members of the UN.¹⁰ In the Pacific region, 10 countries have ratified or acceded to the Convention, namely the Cook Islands, Fiji, Kiribati, the Federated States of Micronesia ('FSM'), Marshall Islands, Papua New Guinea ('PNG'), Samoa, Solomon Islands, Tuvalu, and Vanuatu. Other PICs and territories, including Niue, Tokelau and the Wallis and Futuna Islands, have become parties to the Convention through the ratification of the Convention by their Protectorate or, as in the case of French Polynesia and New Caledonia, through their continued status as overseas territories of a colonial power. The only three remaining Pacific countries not yet parties to *CEDAW* are Nauru, the Republic of Palau and Tonga as well as territories of the United States such as American Samoa and Guam.

The Convention consists of a Preamble and 30 articles, which are divided into six parts. In the Preamble, states parties declare that they are 'determined to adopt the measures required for the elimination of discrimination in all its forms and manifestations'. Part I (arts 1–6) frames the basic principles underscoring the Convention. Article 1 provides a comprehensive definition of 'discrimination' to include:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2 explicitly prohibits discrimination against women and defines state obligations to ensure nondiscrimination against women, including taking 'all appropriate measures, including legislation' to 'modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. Uniquely, whilst other international human rights treaties are typically limited to the conduct of states parties and their agencies, states parties under *CEDAW* are obliged to eliminate discrimination against women by any person, organisation or enterprise. Part II (arts 7–9) is primarily concerned with discrimination against women in the public sphere. States parties are obliged to ensure equal voting rights, equal opportunities to enable women to represent their governments and equal opportunities to participate in the work of international organisations. The rights of women to full and equal citizenship and to pass on their nationality to their children are also identified in this Part. Part III (arts 10–14) envisages broader social reform in relation to access to education, equality in employment, access to health care, access to financial services and equal participation in social and cultural life. In addition, this Part addresses the specific needs of rural women. Part IV (arts 15–16) covers the rights of women to equality before the law and within the family.

Part V (arts 17–22) contains the provisions governing the operation and international enforcement of *CEDAW*, including the creation of the CEDAW Committee to oversee its implementation.¹¹ Although there is an interstate

¹⁰ See United Nations Division for the Advancement of Women, *States Parties* (2009) <<http://www/un.org/womenwatch/daw/cedaw/states.htm>>.

¹¹ *CEDAW*, above n 1, art 17(1).

procedure (allowing states parties to initiate proceedings against another state for alleged breaches of the Convention),¹² the primary means provided to the CEDAW Committee to monitor the domestic implementation of *CEDAW* is a periodical reporting system.¹³ All states parties are required to provide a national report within one year of ratification, followed by periodical reports at least once every four years.¹⁴ There is no particular standard for the procedure to which states parties should adhere in collecting the relevant data and compiling the report.¹⁵ The CEDAW Committee has, however, issued guidelines on the information that reports should contain.¹⁶

The CEDAW Committee meets twice per year (increased to three times as a temporary and exceptional measure by the General Assembly for the period of 2006–07)¹⁷ to review initial and periodical reports and to scrutinise states parties' progress in implementing the Convention.¹⁸ During the review process, the CEDAW Committee adopts a 'dialogue' approach, questioning the states' representatives on specific portions of their respective reports, and on deficiencies and discrepancies between the report and information received from other sources.¹⁹ The CEDAW Committee can request 'specialized agencies', which can include NGOs and UN agencies, 'to submit reports on the implementation of the Convention in areas falling within the scope of their activities'.²⁰ After considering the state's report and other information gathered, the CEDAW Committee compiles its Concluding Comments and submits this to the UN General Assembly through the Economic and Social Council.²¹ Additionally, the CEDAW Committee is empowered by art 21 of the Convention to formulate General Recommendations based on the examination of reports and information received from the states parties and other sources.²² General Recommendations are issue-based and common to all states parties, rather than directed at specific states. Their purpose is to make suggestions and recommendations that provide clear guidance on the meaning of *CEDAW*'s articles.²³ *General Recommendation 19*, for example, identifies gender-based violence as a form of discrimination that seriously inhibits women's ability to

¹² See Hoq, above n 6, 684.

¹³ *CEDAW*, above n 1, arts 18, 21–2.

¹⁴ *Ibid* art 18 (a)–(b).

¹⁵ Julia Ernst, 'US Ratification of the Convention on the Elimination of All Forms of Discrimination against Women' (1995) 3 *Michigan Journal of Gender and Law* 299, 341.

¹⁶ Commission on the Status of Women, *Results of the Fortieth Session of the Committee on the Elimination of Discrimination against Women: Note by the Secretary-General*, 52nd sess, Agenda Item 3(c), UN Doc E/CN.6/2008/CRP/1 (11 February 2008) annex I (*Reporting Guidelines of the Committee on the Elimination of Discrimination against Women*).

¹⁷ *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 60/230, UN GAOR, 60th sess, 69th plen mtg, Agenda Item 64, UN Doc A/RES/60/230 (23 March 2006) [14]–[15].

¹⁸ *CEDAW*, above n 1, arts 20–2.

¹⁹ See Ernst, above n 15, 341.

²⁰ *CEDAW*, above n 1, art 22.

²¹ *Ibid* art 21(1).

²² *Ibid*.

²³ See Andrew Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination against Women' (1989) 14 *Yale Journal of International Law* 1, 43.

enjoy rights and freedoms on a basis of equality with men.²⁴ As of June 2009, the CEDAW Committee had made 26 General Recommendations,²⁵ the most recent concerning migrant workers.²⁶

The CEDAW Committee's powers of enforcement were strengthened on 6 October 1999, with the adoption of the *Optional Protocol* to *CEDAW* by the UN General Assembly.²⁷ It entered into force on 22 December 2000 and as at 1 October 2009, 97 countries had ratified as parties. The *Optional Protocol*, containing 21 articles, introduces two enforcement procedures: first, a communications procedure through which the CEDAW Committee can receive and consider complaints from 'individuals or groups of individuals who claim to be victims of violations of rights set forth in the Convention, or by their designated representatives, or by others on behalf of an alleged victim where the alleged victim consents';²⁸ and second, an inquiry procedure giving the CEDAW Committee the power to investigate 'grave or systematic violations' of women's rights.²⁹ Unlike *CEDAW*, no reservations to the *Optional Protocol* are permitted,³⁰ although art 10 does permit states parties to opt out of the inquiry procedure. Whilst the *Optional Protocol* places *CEDAW* on a more equal footing with other international instruments, only two Pacific countries — the Solomon Islands and the Cook Islands — have ratified it to date, and therefore the primary means of monitoring in the region continues to be the reports-based procedure under the Convention.

III CEDAW LEGISLATIVE COMPLIANCE IN THE PACIFIC: THE CURRENT SITUATION

Ratification of, or accession or succession to an international convention or treaty obliges states parties to 'respect, protect and fulfil' the provisions of the convention.³¹ Fulfilment of those obligations is typically considered (and measured) in relation to two key indicia. The first, *de jure* compliance, requires that the legal framework of the state party accord with the obligations created by the Convention. The second indicium, *de facto* compliance, requires that the obligations created under the Convention are not just recorded in the laws of the country, but implemented in practice with the intended results. The laws of the

²⁴ *General Recommendation No 19: Violence against Women*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.9(Vol.II) (27 May 2008) 331.

²⁵ See Office of the United Nations High Commissioner for Human Rights, *Committee on the Elimination of Discrimination against Women — General Recommendations* (2009) <<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>>.

²⁶ CEDAW Committee, *General Recommendation No 26 on Women Migrant Workers*, UN Doc CEDAW/C/2009/WP.1/R (5 December 2008).

²⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000) ('*Optional Protocol*').

²⁸ *Report of the Committee on the Elimination of Discrimination against Women (Twenty-Fourth Session)*, UN GAOR, 56th sess, Supp 38, UN Doc A/56/38 (2001) annex I (*Rules of Procedure of the Committee on the Elimination of Discrimination against Women*) r 68(1).

²⁹ *Optional Protocol*, above n 27, art 8(1).

³⁰ *Ibid* art 17.

³¹ See Theo C van Boven, Cees Flinterman and Ingrid Westendorp (eds), *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 4.

Pacific region are sourced from a combination of legislation, constitutions, common law and custom. This commentary focuses on legislation and constitutions, and does not seek to consider common law and custom. Although the common law is an important part of the formal law, it is subject to change by the judiciary, unlike legislation which is enacted and amended by a representative legislature. De jure compliance with *CEDAW* therefore requires that national legislation incorporate the Convention's substantive legal rights and obligations. Further, whilst it is beyond the scope of this commentary to assess de facto compliance with *CEDAW*, we acknowledge that legislative change may occur merely to comply with external expectations and that it is the achievement of de facto compliance that marks the effective implementation of the Convention. However, we maintain that the achievement of legislative or de jure compliance is an important 'first step' in achieving de facto compliance as it marks a level of political commitment by a state party towards change and a societal commitment to equality, diversity and nondiscrimination. Additionally, low legislative compliance is likely to be a strong and relevant indicator of unsatisfactory de facto compliance. Thus, with the use of 'best practice' models developed from an analysis of the text of *CEDAW*, the 26 General Recommendations of the CEDAW Committee, the Concluding Comments — particularly for the period 2006–09, which encapsulate the Committee's most recent thinking — and other relevant literature and practices from around the world,³² the authors mapped the legislative compliance with *CEDAW* of 10 PICs in a number of key legal areas relevant to women's lives. The areas targeted were equality and nondiscrimination, gender-based violence, employment, and marriage and family relations³³ in the following 10 countries: the Cook Islands, Fiji, Kiribati, Marshall Islands, the FSM, PNG, Samoa, Solomon Islands, Tuvalu and Vanuatu. The results revealed a low level of legislative compliance throughout the region in the selected areas, despite some specific and commendable examples of compliance. The proceeding Parts of this commentary provide an overview and summary of results of the research in relation to the four key areas identified above.

³² See, eg, American Bar Association Central and East European Law Initiative, *The CEDAW Assessment Tool: An Assessment Tool Based on the Convention to Eliminate All Forms of Discrimination against Women (CEDAW)* (Report, January 2002) <http://www.abanet.org/rol/publications/assessment_tool_cedaw_tool_2002.pdf>; Centre for Women's Research, *CEDAW Indicators for South Asia: An Initiative* (Centre for Women's Research Report, August 2004); United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (Report, 2000); Shanthi Dairiam, 'The Status of CEDAW Implementation in ASEAN and Selected Muslim Countries' (International Women's Rights Action Watch Asia Pacific Occasional Paper No 1, 2004); Hanna Beate Schöpp-Schilling, 'The Nature and the Scope of the Convention' in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (2007) 10; *Report of the Fourth World Conference on Women, Beijing, 14–15 September 1995*, UN Doc A/CONF.177/20/Rev.1 (14–15 September 1995) annex I (*List of Documents*).

³³ Although the breadth of *CEDAW* is much more extensive than these four selected areas, they were chosen on the basis of their centrality to current campaigns in the region and the emphasis placed by the CEDAW Committee on these areas in its Concluding Comments to each of the countries that have reported to date.

A Equality, Nondiscrimination and Temporary Special Measures

1 Legislative Requirements of the Convention

Articles 1, 2 and 4 of *CEDAW* obligate states parties to ensure that domestic legislation incorporates the principles of equality and nondiscrimination and that it authorises the use of temporary special measures ('TSM') in areas where substantive inequalities are identified. This obligation has three central components. The first — a legislative or constitutional guarantee of substantive ("true", "effective", "real", "genuine", or "normative")³⁴ equality between men and women — is mandated in art 2 of *CEDAW*. Article 2 obligates states parties to 'embody the principle of equality of men and women in their national constitutions or other appropriate legislation' and, importantly, to ensure the 'practical realisation of this principle'. The CEDAW Committee has explained that the meaning of equality in art 2 incorporates not only formal equality (equality in the application of the law),³⁵ but also substantive equality.³⁶

The second central component, contained in art 2(b) of *CEDAW*, obligates states parties to ensure that domestic legislation incorporates effective anti-discrimination provisions 'prohibiting all discrimination against women'. Effective anti-discrimination provisions contain a number of key sub-components. The first of these is that in order to satisfy the comprehensive definition of 'discrimination' in art 1, anti-discrimination provisions must extend not only to direct discrimination but also to indirect discrimination.³⁷ Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex or any of the grounds of discrimination prohibited by the law. Indirect discrimination, on the other hand, occurs when a law, policy or program does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities, such as

³⁴ Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination* (2000) 61.

³⁵ *Ibid.*

³⁶ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia*, UN Doc CEDAW/C/MYS/CO/2 (31 May 2006) [8]. See also CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Serbia*, UN Doc CEDAW/C/SCG/CO/1 (1 June 2007) [16]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Peru*, UN Doc CEDAW/C/PER/CO/6 (2 February 2007) [13]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia*, UN Doc CEDAW/C/SAU/CO/2 (8 April 2008) [14]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Azerbaijan*, UN Doc CEDAW/C/AZE/CO/3 (2 February 2007) [14]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: China*, UN Doc CEDAW/C/CHN/CO/6 (25 August 2006) [10]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Kazakhstan*, UN Doc CEDAW/C/KAZ/CO/2 (2 February 2007) [12].

³⁷ CEDAW Committee, *General Recommendation No 25: Temporary Special Measures*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.9(Vol.II) (27 May 2008) 365.

minimum height requirements for particular occupations.³⁸ Second, the CEDAW Committee has clearly stated that anti-discrimination protection should extend beyond sex and marital status (explicitly included in arts 1 and 2) to other forms of intersections such as HIV/AIDS,³⁹ race,⁴⁰ disability,⁴¹ and ‘marginalised family forms’,⁴² in line with, and as recommended by, a significant body of feminist academic literature.⁴³ Third, art 2(e) of *CEDAW* requires states parties to prohibit discrimination not only by the law, government and public authorities, but also by any person, organisation or enterprise. The extension of anti-discrimination protection to ‘acts of both public and private actors in accordance with article 2’ recognises that to effectively combat discrimination in all areas of women’s lives,⁴⁴ the regulation of both state and non-state actors throughout the public and private spheres of women’s lives is required.⁴⁵ Finally, adequate sanctions and remedies should be provided for breaches of anti-discrimination provisions in accordance with art 2(b) of *CEDAW* and the

³⁸ See Joni Hersch, ‘Employment Discrimination, Economists, and the Law’ in Karine Moe (ed), *Women, Family and Work: Writings on the Economics of Gender* (2003) 217, 228.

³⁹ CEDAW Committee, *General Recommendation No 15: Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS)*, as contained in CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women (Ninth Session)*, UN GAOR, 45th sess, Supp No 38, UN Doc A/45/38 (6 June 1990) 81. See also CEDAW Committee, *Concluding Comments: Lebanon*, UN Doc CEDAW/C/LBN/CO/2 (22 July 2005) [38].

⁴⁰ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Bolivia*, UN Doc CEDAW/C/BOL/CO/4 (8 April 2008) [15]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Nicaragua*, UN Doc CEDAW/C/NIC/CO/6 (2 February 2007) [31]; CEDAW Committee, *Concluding Comments: Peru*, above n 36, [36].

⁴¹ See *General Recommendation No 18: Disabled Women*, as contained in CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women (Tenth Session)*, UN GAOR, 46th sess, Supp No 38, UN Doc A/46/38 (30 January 1991) 3, in which the CEDAW Committee stated that women with disabilities suffer from a ‘double discrimination linked to their special living conditions’. See also the CEDAW Committee’s concluding comments to Sweden that ‘women with disabilities suffer from multiple forms of discrimination, including with respect to access to education, employment, health care and protection from violence’: CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Sweden*, UN Doc CEDAW/C/SWE/CO/7 (8 April 2008) [40].

⁴² CEDAW Committee, *General Recommendation No 21: Equality in Marriage and Family Relations*, as contained in CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women (Thirteenth Session)*, UN GAOR, 49th sess, Supp No 38, UN Doc A/49/38 (12 April 1994) [13], where the Committee recommends the recognition of de facto relationships.

⁴³ See, eg, Julissa Reynoso, ‘Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins’ (2004) 7 *Harvard Latino Law Review* 63; Trina Grillo, ‘Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House’ (1995) 10 *Berkeley Women’s Law Journal* 16; Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581; Kimberlé W Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics’ (1989) *University of Chicago Legal Forum* 139.

⁴⁴ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cook Islands*, UN Doc CEDAW/C/COK/CO/1 (10 August 2007) [10]. See also CEDAW Committee, *Concluding Comments: Saudi Arabia*, above n 36, [13].

⁴⁵ *General Recommendation No 19*, above n 24, [10], [24]. See also Andrew Clapham, *Human Rights in the Private Sphere* (1993) 100.

CEDAW Committee's recommendation that states parties 'ensure that effective remedies are available to women whose rights have been violated'.⁴⁶ Possible sanctions include penalties such as fines, apologies, loss of government contracts or imprisonment, and possible remedies include 'restitution, rehabilitation and measures of satisfaction such as public apologies, public memorials and guarantees of non-repetition'.⁴⁷

The third component of establishing a legislative basis for the achievement of equality and nondiscrimination requires the incorporation of provisions that authorise the adoption and implementation of TSM.⁴⁸ The acceleration of de facto equality between men and women by the use of TSM is specifically mandated by CEDAW in art 4(1). In *General Recommendations 5, 8, 23 and 25*,⁴⁹ the CEDAW Committee encourages states parties to make more use of TSM to advance women's integration into education, the economy and employment, to provide equal opportunities to represent their governments internationally and to encourage the equal participation of women in all aspects of public life. This mandate recognises that:

a purely formal or programmatic approach is not sufficient to achieve women's de facto equality with men and that the application of temporary special measures is part of a necessary strategy towards the accelerated achievement of ... substantive equality between women and men under the relevant areas of the Convention.⁵⁰

⁴⁶ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Maldives*, UN Doc CEDAW/C/MDV/CO/3 (2 February 2007) [14]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Morocco*, UN Doc CEDAW/C/MAR/CO/4 (8 April 2008) [11]; CEDAW Committee, *Concluding Comments: Malaysia*, above n 36, [8].

⁴⁷ United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.9(Vol.I) (27 May 2008) 246–7.

⁴⁸ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Sierra Leone*, UN Doc CEDAW/C/SLE/CO/5 (11 June 2007) [19]; CEDAW Committee, *Concluding Comments: Bolivia*, above n 40, [30].

⁴⁹ CEDAW Committee, *General Recommendation No 5: Temporary Special Measures*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.9(Vol.II) (27 May 2008) 320; CEDAW Committee, *General Recommendation No 8: Implementation of Article 8 of the Convention*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/Gen/1/Rev.9(Vol.II) (27 May 2008) 322; CEDAW Committee, *General Recommendation No 23: Women in Public Life*, as contained in CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women (Sixteenth Session and Seventeenth Session)*, UN GAOR, 52nd sess, Supp 38, UN Doc A/52/38/REV.1 (12 August 1997) 61 [15]; *General Recommendation No 25*, above n 37.

⁵⁰ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Germany*, UN Doc CEDAW/C/DEU/CO/6 (12 February 2009) [26]. See also CEDAW Committee, *Concluding Comments: Morocco*, above n 46, [25]; CEDAW Committee, *Concluding Comments: Sweden*, above n 41, [24]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Belize*, UN Doc CEDAW/C/BLZ/CO/4 (10 August 2007) [39]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Chile*, UN Doc CEDAW/C/CHI/CO/4 (25 August 2006) [10].

TSM can include ‘quotas, benchmarks, targets and incentives, in particular with regard to accelerated implementation of arts 7, 8, 10, 11 and 14 of the Convention’.⁵¹ Article 4(1) and (2) also specifically requires that the adoption of TSM and other ‘special measures, including those measures contained in the present Convention, aimed at protecting maternity’, not be considered discrimination as defined in the Convention. TSM and special measures provisions should therefore explicitly exempt any anti-discrimination actions of this kind to prevent any argument that these programs — designed to redress a historical disadvantage faced by women, or to accommodate a genuine biological difference such as pregnancy — disadvantage men.

2 Compliance in the Pacific

Legislative compliance in relation to the three aspects of equality, nondiscrimination and TSM identified above is low amongst the 10 PICs reviewed. Only three countries — the Cook Islands, the Marshall Islands, the FSM and each of its states — contain a guarantee that affords men and women the equal *protection* of the law in their constitutions;⁵² this terminology has been interpreted by some commentators in different contexts as amounting to a guarantee of substantive equality.⁵³ In contrast, Fiji, Samoa and Vanuatu guarantee equality *before* the law,⁵⁴ and Tuvalu guarantees *freedom* under the law,⁵⁵ terms which have been interpreted by courts and commentators alike to require the application of formal equality but not substantive equality in noncompliance with art 2 of *CEDAW*.⁵⁶ The constitutions of PNG, Kiribati and the Solomon Islands do not contain any equality clauses.⁵⁷

In partial compliance with art 2 of *CEDAW*, the Cook Islands, Fiji, the Marshall Islands, the FSM and three of its states (Yap, Chuuk and Pohnpei), Samoa, the Solomon Islands and Vanuatu, have anti-discrimination clauses in their constitutions. These clauses enable individuals who have experienced sex

⁵¹ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Guinea*, UN Doc CEDAW/C/GIN/CO/6 (10 August 2007) [19]; CEDAW Committee, *Concluding Comments: Sweden*, above n 41, [24].

⁵² *Constitution of the Cook Islands 1965* (Cook Islands) art 64(1); *Constitution of the Marshall Islands 1979* (Marshall Islands) art II, s 4; *Constitution of the Federated States of Micronesia 1979* (FSM) art IV, s 3–4; *Constitution of Yap 1982* (FSM) art II, s 4; *Constitution of Chuuk 1989* (FSM) art III, s 2; *Constitution of Kosrae 1984* (FSM) art II, s 1; *Constitution of Pohnpei 1984* (FSM) art 4, s 3.

⁵³ Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005) 18. See also James Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (2005); Martha Jackman and Bruce Porter, ‘Women’s Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*’ in Status of Women Canada (ed), *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (1999) 43.

⁵⁴ *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 38; *Constitution of the Independent State of Western Samoa 1960* (Samoa) s 15(1); *Constitution of Vanuatu 1980* (Vanuatu) s 5(1). Note, however, that the Constitution of Fiji is currently suspended and laws are made by decree: see generally ‘President Abrogates Fiji Constitution’, *Fiji Times* (Fiji) 10 April 2009 <<http://www.fijitimes.com/story.aspx?id=118886>>.

⁵⁵ *Constitution of Tuvalu 1986* (Tuvalu) s 10.

⁵⁶ See Henrard, above n 34, 61.

⁵⁷ *Constitution of the Independent State of Papua New Guinea 1975* (PNG); *Constitution of Kiribati 1979* (Kiribati); *Constitution of the Solomon Islands 1978* (Solomon Islands).

discrimination to seek remedies against either a state institution⁵⁸ or, in some instances, an individual person or organisation.⁵⁹ However, only Fiji (expressly)⁶⁰ and the Solomon Islands (implicitly)⁶¹ extend their anti-discrimination protection to include indirect discrimination. Further, with the exception of Fiji (which provides protection on the grounds of a range of factors other than sex, including sexual orientation and disability),⁶² none of the countries examined include protection for other intersections of discrimination and therefore fall short of the requirements of *CEDAW*. Additionally, whilst Kiribati and Tuvalu have anti-discrimination clauses in their constitutions, they do not include sex as a protected ground and the *PNG Constitution*, as stated above, does not contain any anti-discrimination provisions. This means discrimination against women is not legally prohibited in all three countries and, consequently, domestic laws which discriminate against women, although noncompliant with *CEDAW*, are *not* in breach of their respective constitutions.

The final component of *CEDAW*'s mandate for effective legislative guarantees of equality and nondiscrimination — namely a sound legislative basis for the application of TSM — has had very poor compliance in the PICs examined. Only four of the 10 countries — Fiji, Vanuatu, PNG and Samoa — have included TSM provisions for the advancement of women in their constitutions. Commendably, all are exempt from discrimination actions on the ground of sex.⁶³ Fiji's TSM provision is limited, however, to the areas of education, employment, housing and commerce.⁶⁴

B Gender-Based Violence

1 Legislative Requirements of the Convention

Whilst specific provisions on gender-based violence were not included in the original Convention, the gravity of this issue was recognised by the CEDAW Committee in *General Recommendation 19* in 1992. *General Recommendation 19* broadens the meaning of 'discrimination' as articulated in art 1 of *CEDAW* to include gender-based violence.⁶⁵ Furthermore, whilst the prevention of gender-based violence is currently largely situated within the parameters of education and policy (rather than law), the Committee has

⁵⁸ *Constitution of the Cook Islands 1965* (Cook Islands) art 64(1); *Constitution of the Marshall Islands 1979* (Marshall Islands) art II, s 12(2); *FSM Code 1997* (FSM) tit 11, ch 7, § 702(1)(a); *Constitution of Chuuk* (1989) art III, s 2; *Constitution of Pohnpei* (1984) art 4, s 3; *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 21; *Constitution of the Independent State of Western Samoa 1960* (Samoa) s 15; *Constitution of Solomon Islands 1978* (Solomon Islands) s 15(1)–(2); *Constitution of Vanuatu 1980* (Vanuatu) s 6.

⁵⁹ *Constitution of Chuuk 1989* (FSM) art III, s 2; *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 38(4); *Constitution of Solomon Islands 1978* (Solomon Islands) s 15(3).

⁶⁰ *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 37(2).

⁶¹ *Constitution of Solomon Islands 1978* (Solomon Islands) s 15.

⁶² *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 38(2).

⁶³ *Constitution of Vanuatu 1980* (Vanuatu) s 5(1)(k); *Constitution of the Independent State of Samoa 1960* (Samoa) s 15(3)(b); *Constitution of the Independent State of Papua New Guinea 1975* (PNG) s 55(2); *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 44(4).

⁶⁴ *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 44.

⁶⁵ *General Recommendation No 19*, above n 24.

nevertheless recognised the importance of a strong system of laws to protect women from family violence and abuse, rape, sexual assault and other gender-based violence.⁶⁶ Effective legal protection against gender-based violence requires, according to the Committee, the incorporation of specific and targeted domestic violence legislation into national criminal and civil law frameworks.⁶⁷ Such legislation should include: a comprehensive definition of domestic violence recognising its psychological, financial and physical forms in both criminal and civil law; targeted domestic violence offences in the criminal law framework; access to restraining orders issued by courts and/or the police for both married and unmarried persons;⁶⁸ access to free legal aid;⁶⁹ and a legislative guarantee of the establishment of safe homes and shelters for victims.⁷⁰

As well as recommending the enactment of specific domestic violence legislation, the CEDAW Committee has called on states parties to criminalise all forms of sexual abuse including child sexual abuse,⁷¹ noting that rape and other forms of sexual violence constitute ‘grave and systemic violations of women’s human rights’.⁷² To effectively redress and punish the sexual violations experienced by women, a number of legal measures should be taken. First, it is essential to incorporate into the criminal law an appropriate and comprehensive range of sexual assault offences, including ‘forced oral–genital contact or

⁶⁶ Ibid 6 [24(r)].

⁶⁷ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Suriname*, UN Doc CEDAW/C/SUR/CO/3 (2 February 2007) [20]; CEDAW Committee, *Concluding Comments: Guinea*, above n 51, [27]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Algeria*, UN Doc CEDAW/C/DZA/CC/2 (15 February 2005) [32]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Burundi*, UN Doc CEDAW/C/BDI/CO/4 (8 April 2008) [24]; CEDAW Committee, *Concluding Comments: Serbia*, above n 36, [22]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Viet Nam*, UN Doc CEDAW/C/VNM/CO/6 (2 February 2007) [17].

⁶⁸ See the views in *AT v Hungary*, CEDAW Committee, Communication No 2/2003, as contained in *Report of the Committee on the Elimination of Discrimination against Women (Thirty-Second Session and Thirty-Third Session)*, UN GAOR, 60th sess, Supp No 38, UN Doc A/60/38 (10–28 January 2005, 5–22 July 2005) annex III (*Views of the Committee on the Elimination of Discrimination against Women under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*), where the Committee censured Hungary for not having legal provisions for restraining orders and stated that this was in noncompliance with *CEDAW*. For a further discussion of the Communication, see Beate Rudolf and Andrea Eriksson, ‘Women’s Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion and Domestic Violence’ (2007) 5 *International Journal of Constitutional Law* 507, 521.

⁶⁹ CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Iceland*, UN Doc CEDAW/C/ICE/CO/6 (18 July 2008) [223].

⁷⁰ CEDAW Committee, *Draft Concluding Observations of the Committee on the Elimination of Discrimination against Women: Finland*, UN Doc CEDAW/C/FIN/CO/6 (15 July 2008) [16]; CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Nigeria*, UN Doc CEDAW/C/NGA/CO/6 (8 July 2008) [24].

⁷¹ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: India*, UN Doc CEDAW/C/IND/CO/3 (2 February 2007) [23].

⁷² CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Democratic Republic of the Congo*, UN Doc CEDAW/C/COD/CO/5 (25 August 2006) [13].

penetration with objects [which] could be at least as frightening, humiliating, invasive and injurious' as penile penetration,⁷³ graded to reflect the seriousness of the invasion of personal integrity.⁷⁴ Second, the CEDAW Committee has stated that a marital rape immunity, which protects a husband from a charge of rape against his wife, is discriminatory and should be removed from criminal law frameworks.⁷⁵ Third, good practice also requires that the defence of consent is defined in the legislation to mean 'free agreement'.⁷⁶ This explicitly includes a non-exhaustive list of circumstances which cannot constitute consent such as when the person is asleep; is affected by drugs and/or alcohol; and where there are threats, coercion or intimidation; or blackmail, including threats of harm to a third party (such as a child, sibling or mother).⁷⁷ Fourth, in criminal procedure legislation and/or the law of evidence, it is important that there are prohibitions on the use of corroboration,⁷⁸ prior sexual conduct and proof of resistance in sexual offence proceedings, as all three are discriminatory common law rules that contribute to the low conviction rates in sexual offence matters worldwide. Similar requirements are *not* made of victims of other offences such as common assault and it is discriminatory to suggest that sexual assault victims should be viewed as a particularly unreliable class of witness. Such a proposition also ignores the way in which fear and a lack of power may prevent a victim from physical resistance.⁷⁹

2 Compliance in the Pacific

None of the 10 PICs examined have incorporated 'targeted and specific' domestic violence offences into their criminal law frameworks, although the Cook Islands criminal law legislation does contain a single offence for 'assault on any female'.⁸⁰ Whilst all 10 countries do have common assault offences in

⁷³ See Mary Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in Patricia Eastale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 19.

⁷⁴ Ratna Kapur, *Draft Sexual Offences Legislation* (Fiji Women's Rights Movement Report, 25 May 1996) 16 (on file with authors).

⁷⁵ See *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/RES/48/104 (20 December 1993) art 2(a) ('*DEVAW*'). See also CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Lebanon*, UN Doc CEDAW/C/LBN/CO/3 (8 April 2008) [27]; CEDAW Committee, *Concluding Comments: Morocco*, above n 46, [21]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Syrian Arab Republic*, UN Doc CEDAW/C/SYR/CO/1 (11 June 2007) [20]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Singapore*, UN Doc CEDAW/C/SGP/CO/3 (10 August 2007) [28]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Kazakhstan*, above n 36, [16].

⁷⁶ Bernadette McSherry, 'Constructing Lack of Consent' in Patricia Eastale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 26, 31–3.

⁷⁷ *Ibid.*

⁷⁸ See P Imrana Jalal, *Law for Pacific Women: A Legal Rights Handbook* (1998) 114–15.

⁷⁹ See Committee of Ministers, Council of Europe, *Recommendation Rec(2002)5 of the Committee of Ministers to Member States on the Protection of Women against Violence* (30 April 2002) appendix [35], in which the Council stated that national law should penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance.

⁸⁰ *Crimes Act 1969* (Cook Islands) s 214.

their criminal law legislation, which can be utilised to prosecute perpetrators in some limited circumstances of domestic violence, these general offences are insufficient to incorporate the complexity and specificity of domestic violence.⁸¹ All PICs, however, except Kiribati, the FSM, PNG and Tuvalu, have incorporated civil law remedies (such as restraining orders) for domestic violence victims into their legal frameworks. Whilst these are positive initiatives, they are nevertheless inadequate as access is limited to married persons,⁸² except in the Cook Islands and Vanuatu where access is afforded to both married persons and those in de facto (but not same-sex) relationships.⁸³

All 10 countries *have* legislated against sexual assault in their criminal law legislation. Only PNG and the Marshall Islands (discussed below), however, have introduced legal models which substantially meet the good practice standards described in the previous Section. The eight remaining countries have a limited set of sexual assault offences in their criminal law legislation, which fails to encompass the range of sexual violations experienced by women and girls. For example, the offence of rape is restricted to penile penetration in seven countries.⁸⁴ Further, the Cook Islands and Samoa, in noncompliance with the CEDAW Committee's explicit directive, continue to provide immunity from prosecution for marital rape.⁸⁵ Whilst the penalties for penile rape are serious in most jurisdictions,⁸⁶ the penalties for other sexual assault offences are uniformly low in all seven countries⁸⁷ and, additionally, all jurisdictions treat the sexual assault of girls over 12 (or 15 in Pohnpei) as much less serious than assaults of girls under 12.⁸⁸ Although an assault against a young girl may have very serious consequences, particularly if perpetrated by a person in a position of trust, the

⁸¹ Nicola Harwin, Marianne Hester and Chris Pearson, *Making an Impact: Children and Domestic Violence: A Reader* (2000) 111.

⁸² *Family Law Act 2003* (Fiji) s 202; *Divorce and Matrimonial Causes Ordinance 1961* (Samoa) s 20; *Affiliation, Separation and Maintenance Act 1996* (Solomon Islands) ch 1, s 22.

⁸³ *Cook Islands Amendment Act 1994* (Cook Islands) s 523J(1); *Family Protection Act 2008* (Vanuatu) s 5.

⁸⁴ *Penal Code 1945* (Fiji) ch 17, s 183; *Penal Code 1965* (Kiribati) ch 67, s 161; *Crimes Ordinance 1961* (Samoa) s 47; *Crimes Act 1969* (Cook Islands) s 140; *Penal Code 1981* (Vanuatu) ch 135, s 90; *Penal Code 1978* (Tuvalu) ch 8, s 161; *Penal Code 1966* (Solomon Islands) ch 26, s 168.

⁸⁵ *Crimes Act 1969* (Cook Islands) s 141(3).

⁸⁶ The sentence for rape is life imprisonment in Fiji, Kiribati, Samoa, Vanuatu, Tuvalu and Solomon Islands, and 14 years in the Cook Islands: *Penal Code 1945* (Fiji) ch 17, s 150; *Penal Code 1965* (Kiribati) ch 67, s 129; *Crimes Ordinance 1961* (Samoa) s 47; *Penal Code 1981* (Vanuatu) ch 135, s 91; *Penal Code 1978* (Tuvalu) ch 8, s 129; *Penal Code 1966* (Solomon Islands) ch 26, s 137; *Crimes Act 1969* (Cook Islands) s 141(2).

⁸⁷ The penalty for indecent assault is five years in Fiji, Kiribati, Samoa, Tuvalu and Solomon Islands: *Penal Code 1945* (Fiji) ch 17, s 154(1); *Penal Code 1965* (Kiribati) ch 67, s 133(1); *Crimes Ordinance 1961* (Samoa) s 54(a); *Penal Code 1965* (Tuvalu) ch 8, s 133(1); *Penal Code 1966* (Solomon Islands) ch 26, s 141(1). Tuvalu, Solomon Islands, Kiribati and Fiji have an additional offence of insulting the modesty of a girl or woman with a penalty of one year imprisonment: *Penal Code 1965* (Tuvalu) ch 8, s 133(3); *Penal Code 1966* (Solomon Islands) ch 26, s 141(3); *Penal Code 1965* (Kiribati) ch 67, s 133(3); *Penal Code 1945* (Fiji) ch 17, s 154(4). The FSM states have no indecent assault category for women and, therefore, rape is the only possible offence in these states.

⁸⁸ *Penal Code 1945* (Fiji) c 17, ss 155–6; *Penal Code 1965* (Kiribati) ch 67, ss 134–5; *Crimes Ordinance 1961* (Samoa) ss 51–3; *Crimes Act 1969* (Cook Islands) ss 145–7; *Penal Code 1981* (Vanuatu) ch 135, s 97; *Penal Code 1978* (Tuvalu) ch 8, ss 134–5; *Penal Code 1966* (Solomon Islands) ss 142–3.

vast disparity between sentences is unjustified and perpetuates an erroneous assumption that it is less serious and harmful to assault a ‘more mature’ girl. In PNG and the Marshall Islands, the sexual assault provisions that have recently been introduced can provide good practice examples for the Pacific region. Both models include a comprehensive range of offences covering the range of sexual violations that women experience, including non-penile penetration of all orifices and sexual assault in circumstances that breach the trust between a person in authority and a child with serious penalties.⁸⁹

Fiji, PNG, Samoa, Solomon Islands, Tuvalu and Vanuatu have not legislated against the discriminatory evidentiary rule that enables the use of prior sexual history in sexual assault trials, which ultimately reduces the likelihood of successful prosecutions. In accordance with *CEDAW*’s mandate, the Cook Islands, the FSM, Kiribati, and the Marshall Islands *have* legislated against the use of evidence of the victim’s prior sexual conduct but not in all circumstances. In the Cook Islands, the Marshall Islands and the FSM (with the exception of Pohnpei), evidence of previous sexual conduct with the accused (although not other actors) can be admitted to prove consent,⁹⁰ and in Kiribati, such evidence can be admitted if it is ‘relevant’ to the reliability of the complainant’s evidence.⁹¹ Whilst the Cook Islands, Kiribati and the Marshall Islands have taken the positive step of legislating against the requirement for corroboration,⁹² the remaining seven countries have not prohibited the use of corroboration, in noncompliance with *CEDAW*. Finally, only the Marshall Islands has legislated against the requirement for proof of resistance.⁹³ The continuing application of these three discriminatory common law rules in many PICs and the failure to legislatively prohibit their application impacts significantly upon sexual assault prosecutions in the region.⁹⁴

C Employment

1 Legislative Requirements of the Convention

Article 11(1) of *CEDAW* obligates states parties to take all appropriate measures to eliminate discrimination against women in employment and identifies a range of guarantees to be incorporated into employment legislation. Since art 2(e) of *CEDAW* requires states parties to prohibit discrimination not only by the law, government and public authorities but also by any person, organisation or enterprise, the obligation of the state extends to the private as

⁸⁹ *Criminal Code 1966* (Marshall Islands) ch 1, § 152 A–E; *Chuuk State Code 2001* (FSM) tit 12, pt 1, ch 4, §§ 2053, 2054(1); *Kosrae State Code 1997* tit 13, ch 3, §§ 13.311, 13.312 (FSM); *Pohnpei State Code 2006* (FSM) tit 61, §§ 5.141, 13.101; *Yap State Code 2000* (FSM) tit 11, ch 2, §§ 205–6; *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* (PNG).

⁹⁰ *Evidence Act 1968* (Cook Islands) s 20A; *FSM Rules of Evidence* (FSM) r 412; *Evidence Act 1989* (Marshall Islands) r 412.

⁹¹ *Evidence Act 2003* (Kiribati) s 14.

⁹² *Evidence Act 2003* (Kiribati) s 11; *Criminal Code 1966* (Marshall Islands) ch 1, § 153(2); *Evidence Act 1968* (Cook Islands) s 20B(1).

⁹³ *Criminal Code 1966* (Marshall Islands) ch 1, § 153(3).

⁹⁴ See P Imrana Jalal, *Good Practices in Legislation on Violence against Women: A Pacific Islands Regional Perspective*, UN Doc EGM/GPL/VAW/2008/EP.07 (28 May 2008) 4.

well as the public sector. First, art 11(1)(b) obligates states parties to ensure that women have the right to the same employment opportunities as men, ‘including the application of the same criteria for selection in matters of employment’. According to the International Labour Organization, advertising should explicitly encourage applications from both men and women and ‘selection criteria should be objective, related to the requirements of the job and consistently applied to all applicants’.⁹⁵ Second, art 11(1)(c) of *CEDAW* obligates states parties to ensure that women have, on a basis of equality with men, the right to free choice of profession and employment. Legislation banning women from working in certain occupations (such as manual labour or in mines), working at night or overtime continues to restrict women’s employment choices throughout the world.⁹⁶ Whilst these laws were historically grounded in early ILO conventions⁹⁷ and justified on the basis that they ‘protected’ women, they are now considered to be ‘discriminatory, paternalistic and as stereotyping women’.⁹⁸ Third, art 11(1)(d) of *CEDAW* requires states parties to ensure that women have, on an equal basis with men, the right to ‘equal treatment in respect of work of equal value’,⁹⁹ in accordance with the *ILO Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.¹⁰⁰ Further, the CEDAW Committee in *General Recommendation 13* (on equal treatment in respect of work of equal value) emphasises that more is required of states parties than the introduction of equal pay for persons employed in the same work; rather, it is the value of the work that is the point of comparison.¹⁰¹ This addresses research that has repeatedly illustrated that a primary reason for a continuing pay gap worldwide is the prevalence of women employed in industries and sectors where jobs are undervalued and attract lower rates of pay.¹⁰²

Fourth, art 11(2)(a) of *CEDAW* explicitly requires that states parties take all appropriate measures to prohibit (subject to the imposition of sanctions) dismissal on the grounds of pregnancy, maternity or marital status. Such protection enables women to combine family life with work and public life participation, and is a ‘precondition of genuine equality of opportunity and

⁹⁵ International Labour Office, ILO, *ABC of Women Workers’ Rights and Gender Equality* (2000) 9–10.

⁹⁶ Faustina Pereira, *The Fractured Scales: The Search for a Uniform Personal Code* (2002) 9.

⁹⁷ *ILO Convention (No 89) concerning the Night Work of Women Employed in Industry (Revised 1948)*, opened for signature 9 July 1948, 81 UNTS 147 (entered into force 27 February 1951); *ILO Convention (No 45) concerning the Employment of Women on Underground Work in Mines of All Kinds*, opened for signature 21 June 1935, 40 UNTS 63 (entered into force 30 May 1937).

⁹⁸ See Fareda Banda, *Project on a Mechanism to Address Laws that Discriminate against Women* (UN Office of the High Commissioner for Human Rights Report, 6 March 2008) 110 <<http://www.unhcr.org/refworld/docid/482067fe2.html>>.

⁹⁹ CEDAW Committee, *Concluding Comments: Azerbaijan*, above n 36, [24].

¹⁰⁰ Opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953).

¹⁰¹ CEDAW Committee, *General Recommendation No 13: Equal Treatment in Respect of Work of Equal Value*, as contained in CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women (Eleventh Session)*, UN GAOR, 44th sess, Supp 38, UN Doc A/44/38 (13 February 1990).

¹⁰² Women are typically employed in lower paying sectors and occupy lower status positions worldwide. See ILO, *Global Employment Trends for Women* (ILO Report, March 2008) 1–4.

treatment for men and women'.¹⁰³ Fifth, art 11(2)(b) of *CEDAW* requires states parties to introduce maternity leave 'with pay or with comparable social benefits'. However, the Convention does not stipulate a rate of pay for maternity leave,¹⁰⁴ nor does it explicitly designate a specified period of leave. The ILO recommends a minimum of 14 weeks maternity leave in both the public and private sectors.¹⁰⁵ Sixth, a further protection provided by *CEDAW* in art 11(2)(c) obligates states parties

to encourage the provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of childcare facilities.

Seventh, art 11(2)(d) of *CEDAW* requires states parties to provide special protection to women during pregnancy in types of work proved to be harmful to them. Eighth, whilst art 11 of *CEDAW* does not specifically identify sexual harassment as a form of employment discrimination, the CEDAW Committee in *General Recommendation 19* states that 'sexual harassment and intimidation at work' is a form of gender-specific violence and calls on states parties to condemn it and to pursue a policy to eliminate it.¹⁰⁶ Finally, to ensure the achievement of 'de facto equal opportunities for women' in the labour market,¹⁰⁷ TSM are specifically recommended by the CEDAW Committee in *General Recommendation 5* and *General Recommendation 25*.

2 Compliance in the Pacific

The treatment of employment-related issues in all 10 countries examined revealed not only a uniform pattern of low compliance but also marked and discriminatory similarities throughout the region. No country examined has anti-discrimination provisions in their employment legislation, although some PICs prohibit dismissal from employment during a period of approved maternity

¹⁰³ International Labour Office, ILO, *Maternity Protection at Work* (ILO Report No V(1), 1999) 51.

¹⁰⁴ The CEDAW Committee noted in its 'Views' in relation to a Communication pursuant to the *Optional Protocol* (*Nguyen v Netherlands*, CEDAW Committee, Communication No 3/2004, 36th sess, UN Doc CEDAW/C/36/D/3/2004 (29 August 2006) annex [10.2]–[10.3]) that art 11(2)(b) 'does not use the term "full pay" or "full compensation for loss of income" in relation to maternity leave, "leaving states parties with a margin of discretion"'.

¹⁰⁵ See *ILO Convention (No 183) concerning the Revision of the Maternity Protection Convention*, opened for signature 15 June 2000, 2181 UNTS 253 (entered into force 7 February 2002) art 4(1).

¹⁰⁶ *General Recommendation No 19*, above n 24, [17]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Mauritania*, UN Doc CEDAW/C/MRT/CO/1 (11 June 2007) [38]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Saint Lucia*, UN Doc CEDAW/C/LCA/CO/6 (2 June 2006) [30]. See also *DEVAW*, above n 75, art 2(b).

¹⁰⁷ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Honduras*, UN Doc CEDAW/C/HON/CO/6 (10 August 2007) [29]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Republic of Moldova*, UN Doc CEDAW/C/MDA/CO/3 (25 August 2006) [29]; CEDAW Committee, *Concluding Comments: Malaysia*, above n 36, [20]; CEDAW Committee, *Concluding Comments: Serbia*, above n 36, [32].

leave.¹⁰⁸ Additionally, there are no legislative guarantees that selection criteria must be applied equally to men and women; no guarantees of equal working conditions or equal access to social security; no equal treatment for work of equal value provisions; and no guarantees of state or employer funded childcare. Six of the 10 countries surveyed restrict women's employment choices by banning them from night work.¹⁰⁹ In PNG, women are also prohibited from undertaking manual work, whilst in Samoa, women are prohibited from undertaking 'unsuit[able]' manual work.¹¹⁰ Fiji, singularly, has removed these limitations from its employment law, although the relevant minister still retains discretion to impose restrictions.¹¹¹

Women's employment choices are currently *not* restricted in the Marshall Islands or the FSM and its states, enabling women to lawfully undertake night work and manual work. However, this is due to the fact that neither the FSM nor the Marshall Islands has, as yet, put in place legislative mechanisms to protect the employment and labour rights of any workers other than in the public service. Protection from sexual harassment is absent in all 10 countries, although there is limited scope for remedies under some criminal codes (for example, the Solomon Islands),¹¹² human rights legislation (for example, Fiji)¹¹³ and public sector legislation (for example, PNG).¹¹⁴ These options, however, do not adequately address the range of unwanted behaviours that women experience in the workplace.

The employment legislation in six of the 10 countries reviewed provides some paid maternity leave for women. Only Fiji, with a three month maternity leave provision, satisfies the ILO recommended minimum of 14 weeks maternity leave. However, only 84 days of that period is paid and at a minimal rate of FJ\$1.50 per day provided that the applicant has worked 150 days in the previous nine months.¹¹⁵ In Kiribati, the Solomon Islands and Tuvalu, maternity leave is guaranteed for 12 weeks on not less than 25 per cent of her wage;¹¹⁶ in Vanuatu, maternity leave is guaranteed for 12 weeks on not less than half pay,¹¹⁷ and in PNG, maternity leave includes whatever is 'necessary for hospitalisation' before the birth, six weeks after the birth plus an additional four weeks if the applicant is sick and unpaid.¹¹⁸ The Cook Islands, the FSM, the Marshall Islands and

¹⁰⁸ *Employment Ordinance 1965* (Fiji) ch 92, s 79; *Employment Act 1966* (Kiribati) ch 30, s 81; *Employment Act 1978* (PNG) s 100(b); *Labour Act 1960* (Solomon Islands) ch 73, s 43; *Employment Ordinance 1966* (Tuvalu) ch 84, s 81; *Employment Act 1983* (Vanuatu) ch 160, s 37.

¹⁰⁹ *Employment Act 1966* (Kiribati) ch 30, s 77; *Employment Act 1978* (PNG) s 99; *Labour and Employment Act 1972* (Samoa) s 33(1); *Labour Act 1960* (Solomon Islands) ch 73, s 39; *Employment Ordinance 1966* (Tuvalu) ch 84, s 77; *Employment Act 1983* (Vanuatu) ch 160, s 35.

¹¹⁰ *Labour and Employment Act 1972* (Samoa) s 33(2); *Employment Act 1978* (PNG) s 98.

¹¹¹ *Employment Amendment Act 1996* (Fiji) s 3.

¹¹² *Penal Code 1966* (Solomon Islands) s 141(3).

¹¹³ *Human Rights Commission Act 1999* (Fiji) s 17.

¹¹⁴ *Public Service General Order 15.55* (PNG).

¹¹⁵ *Employment Ordinance 1965* (Fiji) ch 92, s 74.

¹¹⁶ *Employment Act 1966* (Kiribati) ch 30, s 80(1)–(2); *Labour Act 1960* (Solomon Islands) ch 73, s 42(3); *Employment Ordinance 1966* (Tuvalu) ch 84, s 80(1)–(2).

¹¹⁷ *Employment Act 1983* (Vanuatu) ch 160, s 36(1)–(2).

¹¹⁸ *Employment Act 1978* (PNG) s 100.

Samoa make no provision for maternity leave. Further, whilst there exists a general duty on employers to provide 'safe' working conditions in eight countries,¹¹⁹ none of the 10 countries examined has introduced any specific health protection for pregnant workers. Finally, whilst breastfeeding mothers are provided with breaks of half an hour duration twice daily in five countries,¹²⁰ this is unlikely to be sufficient to enable mothers to easily combine nursing with paid employment.

D Marriage and Family Relations

1 Legislative Requirements of the Convention

(a) Marriage

Article 16 obligates states parties to ensure equality and nondiscrimination in marriage laws. Article 16(1)(b) of *CEDAW* expressly obligates states parties to ensure on a basis of equality with men, that women have the same right to freely choose a spouse and to enter into marriage only with their free and full consent. *General Recommendation 21* states that 'a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'.¹²¹ Article 16(2) of *CEDAW* obligates states parties to take all necessary action, including legislation, to specify a minimum age for marriage and also explicitly states that the betrothal and marriage of a child shall have no legal effect. In *General Recommendation 21*, the CEDAW Committee notes that international standards require the minimum age of marriage for both men and women be set at 18 years, since marriage carries with it important responsibilities which require maturity and capacity to act.¹²² The Committee has explained that 'a low legal age of marriage may prevent girls from continuing their education, lead them to drop out of school early and may result in difficulties in their achievement of economic autonomy and empowerment'.¹²³ Article 16(2) of *CEDAW* obligates states parties to take all necessary action including the enactment of legislation to make the registration of marriages in an

¹¹⁹ *Health and Safety Work Act 1996* (Fiji) s 9; *Employment Act 1966* (Kiribati) ch 30, s 107(1); *Employment Act 1978* (PNG) ss 127–132; *Occupational Safety and Health Act 2002* (Samoa) s 11; *Safety at Work Act 1982* (Solomon Islands) ch 74, s 4; *Employment Ordinance 1966* (Tuvalu) ch 84, s 107; *Health and Safety at Work Act 1987* (Vanuatu) ch 195, s 2.

¹²⁰ *Employment Act 1966* (Kiribati) ch 30, s 80(3); *Employment Act 1978* (PNG) s 101; *Labour Act 1960* (Solomon Islands) ch 73, s 42(5); *Employment Ordinance 1966* (Tuvalu) ch 84, s 80(3); *Employment Act 1983* (Vanuatu) ch 160, s 36(3).

¹²¹ *General Recommendation No 21*, above n 42, [16].

¹²² *Ibid* [36]. In the Recommendation, the CEDAW Committee notes that in the *Convention on the Rights of the Child* (opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)) a 'child' means any human being below the age of 18 unless majority is attained earlier under national law. See also CEDAW Committee, *Concluding Comments: Azerbaijan*, above n 36, [30]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Tajikistan*, UN Doc CEDAW/C/TJK/CO/3 (2 February 2007) [36]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Pakistan*, UN Doc CEDAW/C/PAK/CO/3 (11 June 2007) [45].

¹²³ CEDAW Committee, *Concluding Comments: Peru*, above n 36, [34].

official registry compulsory including customary marriages.¹²⁴ Ensuring the registration of all marriages enables states parties to establish ‘equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children’.¹²⁵ Finally, art 16(1)(g) of *CEDAW* requires states parties to ensure, on a basis of equality of men and women, the same personal rights as husband and wife, including the right to choose his or her family name. In *General Recommendation 21*, the CEDAW Committee explains the importance of such a right for women in preserving ‘their individuality and identity in the community and distinguishing that person from other members of society’.¹²⁶

(b) *Separation and Divorce*

Article 16 of *CEDAW* obligates states parties to ensure the principles of equality and nondiscrimination are incorporated into legislation governing separation, divorce, maintenance, property settlement and custody. In particular, the CEDAW Committee has stated that divorce provisions should be ‘by mutual consent’ and has called upon states parties to abolish fault-based divorce, which requires proof of a matrimonial offence (typically desertion, adultery or cruelty).¹²⁷ Additionally, the CEDAW Committee has called upon states parties to ensure that women have ‘equal rights to property accumulated during marriage’ after divorce,¹²⁸ and that financial and non-financial contributions be ‘accorded the same weight’.¹²⁹ Further, legislation should guarantee and facilitate the payment of maintenance after separation and divorce and its assessment should fully account for the historical and ongoing disadvantages that women face in supporting themselves and their children. The CEDAW Committee states in *General Recommendation 21* that after separation and divorce ‘many fathers fail to share the responsibility of care, protection and maintenance of their children’ and has urged states parties to ‘put in place adequate legislative measures, including the review and amendment of existing laws, to guarantee that women obtain child support’.¹³⁰ The payment of both child support and maintenance for an ex-spouse should be based on clear criteria such as commitments, income and earning capacity, which are more likely to achieve fair and non-discriminatory results in maintenance matters.¹³¹

Whilst *CEDAW* does not expressly mandate the protection of de facto relationships, the CEDAW Committee’s support for their recognition has been

¹²⁴ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Namibia*, UN Doc CEDAW/C/NAM/CO/3 (2 February 2007) [29]. See also *General Recommendation No 21*, above n 42, [39].

¹²⁵ *General Recommendation No 21*, above n 42, [39].

¹²⁶ *Ibid* [24].

¹²⁷ CEDAW Committee, *Concluding Comments: Saint Lucia*, above n 107, [36]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Luxembourg*, UN Doc CEDAW/C/LUX/CO/5 (8 April 2008) [34].

¹²⁸ CEDAW Committee, *Concluding Comments: Lebanon*, above n 75, [45].

¹²⁹ *General Recommendation No 21*, above n 42, [32].

¹³⁰ *Ibid* [19]; CEDAW Committee, *Concluding Comments: Cook Islands*, above n 44, [41].

¹³¹ For a discussion of the economic consequences of divorce for women, see Mark A Fine, Lawrence H Ganong and David H Demo, ‘Divorce as a Family Stressor’ in Patrick McKenry and Sharon Price (eds), *Families and Change: Coping with Stressful Events and Transitions* (2005) 235.

highlighted in *General Recommendation 21*, which posits that the form and concept of the family can vary and in whatever form it takes, the treatment of women in the family at law and in private must accord with the principles of equality and justice for all.¹³² In the same Recommendation, the Committee states that women living in de facto relationships should 'have their equality of status with men both in family life and in the sharing of income and assets protected by law'.¹³³ Additionally, in the Recommendation, the CEDAW Committee notes that there are many instances where children born outside marriage do not enjoy the same status as those born within marriage.¹³⁴ It is therefore important that the legislation guarantees child support to children born outside marriage based on the needs of the child, to ensure that fathers take responsibility for the costs of child-rearing.

2 Compliance in the Pacific

Legislative compliance with *CEDAW* in the area of family relations and, in particular, the rules governing marriage, separation and divorce is low in all PICs examined except Fiji, which introduced new family law legislation in 2003.¹³⁵ Of the 10 countries examined, only the Kiribati legislation provides an equal minimum marriageable age of 18.¹³⁶ In Fiji; the Marshall Islands; the FSM states of Kosrae, Chuuk and Pohnpei; Samoa; Vanuatu and PNG (which permits marriage at the age of 14 with the consent of the court), the minimum marriageable age for males is 18 but it is 16 for females, in noncompliance with *CEDAW*.¹³⁷ Whilst the Solomon Islands, the Cook Islands and Tuvalu provide an equal marriageable age for males and females (at ages 15, 16 and 16 respectively),¹³⁸ both are well below the *CEDAW* recommended age for marriage of 18. On a positive note and in accord with *CEDAW*'s requirements, the registration of marriage is required by legislation in all 10 countries (except in the FSM state of Yap).¹³⁹ However, it is important to note that customary marriages in PNG and the Solomon Islands are not subject to statutory age

¹³² *General Recommendation No 21*, above n 42, [13]

¹³³ *Ibid* [19].

¹³⁴ *Ibid*.

¹³⁵ *Family Law Act 2003* (Fiji).

¹³⁶ *Marriage Amendment Act 2000* (Kiribati) s 2.

¹³⁷ *Chuuk State Code 2001* (FSM) tit 23, ch 2, § 1021(1); *Kosrae State Code 1997* (FSM) tit 16, pt 1, ch 1, § 16.101(1); *Pohnpei State Code 2006* (FSM) tit 51, § 2.101(1) (although note that this law relates only to a marriage involving at least one non-citizen of the FSM. Marriages between two FSM citizens are valid as long as they accord with 'recognised customs: tit 51, § 2.105); *Marriage Act 1969* (Fiji) ch 50, s 12; *Births, Deaths and Marriages Act 1988* (Marshall Islands) s 428(a); *Marriage Act 1963* (PNG) s 7; *Marriage Ordinance 1961* (Samoa) s 9.

¹³⁸ *Islanders Marriage Act 1945* (Solomon Islands) ch 171, s 10; *Marriage Act 1975* (Cook Islands) s 17; *Marriage Ordinance 1968* (Tuvalu) ch 29, s 5.

¹³⁹ *Chuuk State Code 2001* (FSM) tit 23, ch 2, § 1024; *Kosrae State Code 1997* (FSM) tit 16, pt 1, § 16.103; *Pohnpei State Code 2006* tit 51, ch 2, § 2.104 (FSM); *Marriage Act 1969* (Fiji) ch 50, s 25; *Births, Deaths and Marriages Ordinance 1968* (Kiribati) ch 5, s 33; *Births, Deaths and Marriages Act 1988* (Marshall Islands) s 431; *Births, Deaths and Marriages Registration Act 2002* (Samoa) s 55; *Marriage Act 1963* (PNG) s 45(4); *Islanders Marriage Act 1945* (Solomon Islands) ch 171, s 15; *Marriage Ordinance 1968* (Tuvalu) ch 29, s 17; *Marriage Act 1971* (Vanuatu) ch 60, s 15.

restrictions, registration requirements and other protections in relation to marriage.¹⁴⁰

Divorce in six of the 10 countries examined — namely, Kiribati, the FSM, Tuvalu, PNG, Samoa and Vanuatu — continues to be fault-based.¹⁴¹ In the Marshall Islands, divorce law, although also primarily formulated to reflect fault-based criteria, allows for divorce after a two year separation.¹⁴² In Fiji, the recent introduction of no-fault criteria, in line with *CEDAW*, allows the parties to divorce on the basis of a 12 month separation without any requirement to find or prove fault,¹⁴³ whilst in Tuvalu, the fault-based criterion plays an evidentiary role and is not essential to secure a divorce.¹⁴⁴ In both the Marshall Islands and the FSM, forgiveness of a marital ‘crime’ such as adultery will prevent a divorce from proceeding.¹⁴⁵ This fails to take into account possible power imbalances between spouses and the significant family and community pressure that may be placed on women to forgive.

All 10 countries examined make legislative provision for maintenance for both children and ex-spouses, although the criteria applied in all countries except Fiji does not meet the good practice standards discussed above. Whilst Fiji’s legislation includes the recommended standards against which to consider the means of both parties, their financial commitments to themselves and others, their respective capacities to earn and the needs of any children,¹⁴⁶ in all other countries the right to and the calculation of the amount of maintenance to be paid is based on the judicial interpretation of terms such as ‘just’ or ‘reasonable’ or ‘proper’.¹⁴⁷ In Kiribati, the amount of maintenance is determined on the basis of ‘the age of the person for whose benefit the application is made and the personal circumstances of every person’.¹⁴⁸ Additionally, in relation to property division after divorce, only legislation in Fiji and the Cook Islands recognises both financial and non-financial contributions to the marriage partnership, including caring for children and household responsibilities, as recommended by the CEDAW Committee.¹⁴⁹ There are no legislative provisions for property division in Kiribati, Samoa, Solomon Islands and Vanuatu. In the Marshall Islands and the FSM, property division is determined on the basis of ‘justice’ and ‘the best interests of all’; in PNG, determination is based on what is ‘just and equitable in

¹⁴⁰ *Islanders Marriage Act 1945* (Solomon Islands) ch 171, s 18; *Marriage Act 1963* (PNG) s 6(3).

¹⁴¹ *Native Divorce Ordinance 1948* (Kiribati) ch 60, s 4; *Divorce and Matrimonial Causes Ordinance 1961* (Samoa) s 7; *Matrimonial Proceedings Act 1984* (Tuvalu) ch 21, ss 8–9; *Matrimonial Causes Act 1986* (Vanuatu) ch 193, s 2; *Matrimonial Causes Act 1963* (PNG) s 17; *FSM Code 1997* (FSM) tit 6, ch 16, § 1626.

¹⁴² *Domestic Relations Act 1988* (Marshall Islands) s 115(1)(h).

¹⁴³ *Family Law Act 2003* (Fiji) s 30.

¹⁴⁴ *Matrimonial Proceedings Act 1984* (Tuvalu) ch 21, ss 8–9.

¹⁴⁵ *FSM Code 1997* (FSM) tit 6, ch 16, sub-ch 2, § 1628; *Domestic Relations Act 1988* (Marshall Islands) s 117.

¹⁴⁶ *Family Law Act 2003* (Fiji) ss 90–1, 157.

¹⁴⁷ *Marriage and Affiliation Act 1967* (Samoa) s 18(1); *Matrimonial Causes Act 1986* (Vanuatu) ch 193, s 15; *Matrimonial Causes Act 1963* (PNG) s 73; *FSM Code 1997* (FSM) tit 6, ch 16, sub-ch 2, § 1622.

¹⁴⁸ *Maintenance (Miscellaneous Provisions) Ordinance 1921* (Kiribati) ch 53, s 3.

¹⁴⁹ *Matrimonial Property Act 1976* (Cook Islands) s 18; *Family Law Act 2003* (Fiji) s 162.

the circumstances’;¹⁵⁰ and in Tuvalu, it is based on what is ‘necessary and desirable’.¹⁵¹ The use of these criteria in both maintenance and property division matters is unlikely to lead to equitable settlements.

In the determination of custody after separation or divorce, Fiji, Kiribati, PNG and Tuvalu have adopted the recommended standard of ‘the best interests of the child’ as the paramount consideration in custody disputes, in compliance with *CEDAW*. However, in Kiribati and Tuvalu, an unmarried mother automatically loses custody of her child at the age of two years to the father (provided he admits paternity and wishes to have the custody of the child). The latter situation, although intended to protect the inheritance rights of the children of unmarried parents, may not represent the best interests of the child, and discriminates against mothers. In the Marshall Islands, the FSM, Samoa, the Solomon Islands and Vanuatu, the legislative criterion for custody determinations is based on what is ‘just’, ‘necessary’ and in ‘the best interests of all’ and as the court ‘thinks fit’.¹⁵² This criterion *can* be interpreted by the courts in line with the principle of the best interests of the child¹⁵³ (as practised in the Solomon Islands), but falls short of the standard mandated by *CEDAW*, since the principle of the best interests of the child should be legislated and not left to the discretion and uncertain processes of the courts. Finally, *de facto* relationships, including same-sex relationships, are not recognised in nine of the 10 countries, rendering women without rights to maintenance, custody or an equitable share of property after the breakdown of a relationship.

IV EXPLORING THE REASONS FOR LOW LEGISLATIVE COMPLIANCE WITH *CEDAW* IN THE REGION

A *Colonial Legacies and the Origins of Pacific Legislative Frameworks*

The history of colonisation in the Pacific region, which saw the widespread introduction of systemised legal frameworks based on the written legal systems of the major colonising powers (France, Britain and the US), provides a partial explanation for the low legislative compliance with *CEDAW* outlined in the previous section. The explanation is partial because, whilst the history of colonisation provides a chronological explanation for the outdated and discriminatory legislative frameworks operating in the region, it does not provide an explanation as to why such frameworks remain largely in their original form. These legislative frameworks, introduced by the colonial powers and largely remaining today in their original form, reflect the early to mid-20th century values and norms of the colonising powers, which do not accord with

¹⁵⁰ *Matrimonial Causes Act 1963* (PNG) s 75.

¹⁵¹ *Matrimonial Proceedings Act 1984* (Tuvalu) ch 21, s 13.

¹⁵² *Matrimonial Causes Act 1986* (Vanuatu) ch 192, s 15(1) (‘as appears just’); *Islanders’ Divorce Act 1960* (Solomon Islands) ch 170, s 21 (‘just and necessary’); *Divorce and Matrimonial Causes Ordinance 1961* (Samoa) s 24 (‘as appears just’); *Domestic Relations Act 1988* (Marshall Islands) § 110 (‘as it deems justice and the best interests of all concerned may require’); *FSM Code 1997* (FSM) tit 6, ch 16, sub-ch 2, § 1622 (‘as it deems justice and the best interests of all concerned may require’).

¹⁵³ See Jalal, *Law for Pacific Women*, above n 78, 297.

contemporary notions of gender equality.¹⁵⁴ As a result, legal frameworks in the region reflect arcane values that are not indicative of a dynamic system of contemporary, modern day law. The amendment or repeal of such legislation could therefore facilitate the removal of the vestiges of colonisation and engender the development of legal frameworks that reflect international standards on gender equality.

The Pacific region is typically divided into the subregional classifications of Melanesia (comprised of the Solomon Islands, Vanuatu, New Caledonia, PNG, and Fiji), Micronesia (a set of small islands north of the equator including Kiribati, the FSM, the Marshall Islands, the Republic of Palau and Nauru), and Polynesia (the islands in the triangle stretching from Hawaii to New Zealand including the Cook Islands, French Polynesia, Niue, Samoa, Tokelau, Tonga and Tuvalu). These divisions, although originally based on European distinctions, have nevertheless today become part of a shared Pacific identity. Whilst there is considerable diversity amongst and within PICs,¹⁵⁵ the three regions also share many commonalities. Excepting Tonga, all PICs were colonised and annexed by one or more colonial powers consisting of Spain, Germany, Japan, the US, France, Britain, New Zealand and Australia. By the mid-20th century however, the number of major colonial powers remaining in the region had decreased to three, namely Britain (with New Zealand and Australia taking control of some former British colonies), France and the US. It is therefore unsurprising that it is these three colonial powers, whose legacies are firmly imprinted on the legislative frameworks of the Pacific, which have become a major source of law in the region.

The rising dominance of these three imperial powers in the Pacific can briefly be charted as follows. France's rule began with a declaration of sovereignty over the Marquesas Islands in 1842 and a protectorate over Tahiti in 1843, islands that were later consolidated to form what is now French Polynesia. New Caledonia was annexed in 1855 and in 1887 France declared a protectorate over Wallis and Futuna. Both later became French overseas territories. On another front, the second major power in the region, Britain, annexed Fiji in 1884 and declared protectorates over the Cook Islands, the Phoenix Islands (now part of Kiribati), Tokelau and the Gilbert and Ellice Islands (now Kiribati and Tuvalu). It also later declared protectorates over Niue and the Solomon Islands, removing them from German control. The process of colonisation continued in the region with the annexation by New Zealand of the Cook Islands and Niue in 1901 followed by the sequestration of Samoa from Germany in 1914. In 1906, France and Britain agreed to jointly administer New Hebrides (now Vanuatu). Following World War II, Australia, at the behest of the near-defunct League of Nations, accepted a mandate to govern PNG (then Papua and New Guinea) until such time as it could be self-governing. The third major colonial power in the Pacific region, the US, also primarily asserted itself in the region after World War II. Whilst retaining possession of American Samoa (an American territory since 1899) and Guam (an American territory since 1898), the US took control of the

¹⁵⁴ Jennifer Care, 'Colonial Legacies? A Study of Received and Adopted Legislation Applying in the University of South Pacific Region' (1997) 21 *Journal of Pacific Studies* 33, 33.

¹⁵⁵ Graham Hassall and Cheryl Saunders, *Asia Pacific Constitutional Systems* (2002) 50.

FSM (from Spain, Germany and Japan), and the Marshall Islands and Palau (from Japan) under a UN-negotiated Strategic Trusteeship.

Each of the three major powers, although recognising local laws in many instances, introduced legislation into their colonies and protectorates based on their own domestic legal frameworks. This period of colonial expansion was, however, coming to an end. In 1960, the *UN Declaration on the Granting of Independence to Colonial Countries and Peoples*¹⁵⁶ placed pressure on the colonial powers to establish independent Pacific Island states. Full independence was established in all former British-controlled islands, except for the Cook Islands, Tokelau and Niue, which remain in 'free association' with New Zealand. Whilst Vanuatu was granted independence in 1980, France has retained New Caledonia, Wallis and Futuna and French Polynesia (with partial internal autonomy since 1984) as overseas territories. Additionally, whilst the US has retained American Samoa and Guam as US territory, the FSM, the Marshall Islands and the Republic of Palau have shifted from trusteeship arrangements to 'compacts of free association'.¹⁵⁷ Under this arrangement, these PICs receive extensive US federal funding and support and as a result, their laws and policies are strongly US-influenced.¹⁵⁸

Moves towards independence and sovereignty generated strong ambitions in emerging PICs to establish legal systems that reflected Pacific norms and values free of colonial influence. Constitutions of Pacific countries were executed by all new states during the transition from colonial rule to independence. However, whilst some countries drafted their own (for example, Samoa) and some have since amended their constitutions (for example, Fiji and Tuvalu), each was greatly influenced by the legal institutions and practices of the relevant colonising power.¹⁵⁹ Indeed, the expert commissions established by colonial authorities to draft constitutions largely conferred with the elite members of local communities, who had gained their positions through cooperation with the colonial rule.¹⁶⁰

All 10 PICs reviewed opted to 'save' the law in force before independence, which preserved pre-independence statute law and which could be repealed or amended only by the newly independent PIC.¹⁶¹ The growing importance of the principles of gender equality and nondiscrimination led to the amendment and repeal of many aspects of legislation in the legal frameworks of the colonising powers. However, much of the legislation in PICs has remained in force in its original and arcane form despite a clear intent and desire at independence to introduce legislation reflecting local values.¹⁶² Consequently, the Pacific

¹⁵⁶ GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (14 December 1960).

¹⁵⁷ See *Compact of Free Association Act of 1985*, Pub L No 99-239, 99 Stat 1770 (1986); *Compact of Free Association with Palau*, Pub L No 99-658, 100 Stat 3672 (1986).

¹⁵⁸ E Robert Statham, *Colonial Constitutionalism: The Tyranny of United States Offshore Territorial Policy and Relations* (2002) 125.

¹⁵⁹ See 'Dejo Olowu, 'Invigorating Economic, Social and Cultural Rights in the South Pacific: A Conceptual Approach' (2007) 7 *Queensland University of Technology Law and Justice Journal* 84.

¹⁶⁰ See Hassall and Saunders, above n 155, 54-5.

¹⁶¹ Care, above n 154, 33.

¹⁶² Richard Maidment, David Goldblatt and Jeremy Mitchell (eds), *Governance in the Asia-Pacific* (1998) 49.

legislative frameworks reflect, in large part, the values and norms of the colonising powers at the time of and during colonisation rather than those of the local and indigenous inhabitants. As such, the frameworks do not reflect similarities (or differences) in the norms, customs and traditional practices in the region.

For example, Kiribati and Tuvalu have legislative frameworks that are almost identical, despite Kiribati and its inhabitants being part of Micronesia and Tuvalu and its inhabitants being part of Polynesia. Their identical legislative frameworks reflect the fact that both were colonised by Britain, rather than reflecting intrinsic similarities in customs and norms of the two cultures. Likewise, two Micronesian countries, the Marshall Islands and the FSM, previously under US trusteeship and now in 'free association' with the US, have very similar legislative frameworks but very different legislative frameworks from Kiribati, the third Micronesian country colonised by Britain. For example, the FSM and the Marshall Islands do not provide legislative protection for workers such as maximum hours of work or occupational safety, nor health standards and sick leave entitlements. Additionally, in noncompliance with *CEDAW*, they do not provide protection for women workers such as maternity leave entitlements, sexual harassment protection, nursing breaks, and protection from dismissal while pregnant. In contrast, Kiribati has an employment code, which displays the same features as other codes in Pacific countries colonised by Britain. Although noncompliant with *CEDAW* on a number of issues, the I-Kiribati *Employment Code* does offer women some protection from discrimination in employment as required by art 11 of *CEDAW*. The reasons for this difference do not lie in different value systems and norms in relation to the protection of women in employment but in the different approaches to the regulation of employment by the US and Britain. The US has historically pursued a non-regulatory 'at will' approach to employment, enabling either party to terminate the employment relationship at any time for any reason (or without a reason). Although minimum standards in relation to discrimination have been introduced throughout the US, the 'at will' approach is still dominant within those prescribed limitations, and this has, it appears, fostered the introduction of this approach into the FSM and the Marshall Islands.

Thus, it would appear that the current legislative frameworks throughout the Pacific are largely representative of the norms and values held by the colonial powers during the colonial period. However, whilst the history of colonisation provides the context for *CEDAW* noncompliant legislation in PICs, it fails to explain why PICs have not modified their legislation since independence, despite the ratification of *CEDAW* and despite the reform of the original legislation in the home countries of their former colonial powers to embrace the principles of gender equality. The following Sections therefore explore some of the factors which contribute to the low level of legislative compliance with *CEDAW* in the Pacific region.

B *The Impact of Lack of Women in the Law-Making Process*

A significant hurdle for law reform initiatives in the Pacific region is the lack of female representation and voice at all political levels. The male-dominated nature of political structures at all echelons, both in the formal political system

and in the provincial councils, as well as the powerful influence of the traditional hierarchies, means that women are largely absent from the law-making process. At the national level of political representation, the Pacific region has the lowest percentage of women in political office worldwide. Whilst 18.5 per cent of parliamentary seats in the world are held by women (an inadequate percentage in and of itself), only 2.5 per cent of parliamentary seats are occupied by women in the Pacific region.¹⁶³ Moreover, of the six countries in the world that have no female members of parliament, four are found in the Pacific — the FSM, Nauru, the Solomon Islands and Tuvalu.¹⁶⁴ Of the remaining Pacific countries, PNG has a single female member of Parliament (a recent call for seats to be reserved for women to improve the representation of women in parliament requiring 73 votes failed by 13 votes (60 votes for, 16 against).¹⁶⁵ However, the issue has since been put back on the agenda and if passed, could see 22 reserved seats for women in the 2012 elections. In Vanuatu, currently 2 of 52 members of Parliament are female. In Samoa, 2 of the 49 members of Parliament are female. In Kiribati, only 2 of the 46 members of Parliament is female and in the Cook Islands, 3 out of the 24 members of Parliament are female. Finally, in the Marshall Islands, 1 of 33 members of Parliament is female.¹⁶⁶ In the 2006 Fijian elections, 8 women were elected to the 71-member House of Representatives (although the parliament has not sat since December of that year).¹⁶⁷

Research suggests that higher numbers of women in parliament are a contributing factor to stronger attention being paid to ‘women’s issues’,¹⁶⁸ and that if women’s participation in political office reaches 30–35 per cent (generally termed a ‘critical mass’), there is, in some instances, a significant impact on the outcomes of political and public processes, leading to policy changes and legislative outputs that favour women’s interests.¹⁶⁹ For example, a study conducted in Australia and New Zealand found that ‘the entry of women into parliament ... has seen a significant broadening of the issues under debate’ such as ‘abortion, domestic violence, sexual harassment, rape, single parenthood, women’s health and urban isolation’.¹⁷⁰ A recent UNIFEM study recorded a large-scale survey of members of parliament worldwide, undertaken by the Inter-Parliamentary Union, which found that ‘over 90 per cent of respondents

¹⁶³ See Pacific Centre, UNDP, *Promoting Women in Pacific Legislatures* <<http://www.undppc.org.fj/pages.cfm/our-work/democratic-governance/strengthening-parliaments-democratic-institution/promoting-women-parliament>>. This number excludes Australia, New Zealand and the French Overseas Territories.

¹⁶⁴ See Inter-Parliamentary Union, *Women in National Parliaments* (2009) <<http://www.ipu.org/wmn-e/classif.htm>>.

¹⁶⁵ ABC Radio Australia, ‘PNG Women Fail’, *ABC Radio Australia* (Australia) 11 March 2009 <<http://www.presse.com.vu/world-news/187-opposition-to-proposal-to-nominate-women-to-png-Parliament>>.

¹⁶⁶ Inter-Parliamentary Union, above n 164.

¹⁶⁷ Inter-Parliamentary Union, *Fiji House of Representatives: Last Elections* (2006) <http://www.ipu.org/parline-e/reports/fiji-hr_E.htm>.

¹⁶⁸ United Nations Development Fund for Women (‘UNIFEM’), *Who Answers to Women?: Gender and Accountability* (UNIFEM Report, 2008) 26 <http://www.unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf>.

¹⁶⁹ Pamela Paxton and Melanie Hughes, *Women, Politics and Power* (2007) 193. See also Jocelyn Crowley, ‘When Tokens Matter’ (2004) 29 *Legislative Studies Quarterly* 109, 207, 111.

¹⁷⁰ Commonwealth Secretariat, *Women in Politics: Voices from the Commonwealth* (1999) 7.

agreed that ‘women bring different views, perspectives and talents to politics’.¹⁷¹ The lack of female representation in the formal parliaments of the Pacific therefore provides a compelling reason for the failure of PICs to achieve legislative compliance with *CEDAW*.

The low representation of women in parliament and their lack of participation in the law-making process are partially attributable to, and have a direct correlation with, the traditional hierarchies that dominate in many Pacific communities. Membership of noble, chiefly or other titled systems, which are either not open to women or difficult for them to obtain, is both an entry point for candidacy in the national legislatures of many PICs and a significant source of political power. In Samoa, a chiefly *matai* title is actually required to run for Parliament and, whilst titles are available ‘equally’ to men and women in law,¹⁷² they are rarely bestowed on women. In the Marshall Islands, election to the Council is restricted to those recognised by customary law or traditional practice as having rights and obligations equivalent to those of the *iroijlaplap* (paramount chiefs) and whilst there is no formal barrier to women becoming chiefs, they rarely do.¹⁷³ In the Cook Islands, the Constitution empowers the *Aronga Mana* of the island or *vaka*, councils chosen through customary practices and traditions, to provide the final opinion or decision in relation to custom. This can neither be questioned nor challenged in any court of law.¹⁷⁴ Membership of such councils is either chosen through customary practices and traditions or is based on chiefly status, which typically excludes or restricts women’s access or membership.¹⁷⁵ Such councils are influential in the passage of legislation.

Achieving female political representation in significant percentages is therefore an important and related aspect of realising legislative compliance with *CEDAW* in the Pacific region. This is a formidable barrier, given the strength of traditional hierarchies in the region described above and the prescribed nature of gender roles where women continue to be associated primarily with the domestic arena, thus impacting heavily upon their ability to participate in public leadership. The multiple challenges faced by women seeking to enter the realm of formal politics therefore include, but are not limited to: local perceptions about women’s roles; land ownership; the pervasiveness of masculine political cultures; violence against women; the lesser social mobility of women; poor health; and the limited economic independence of women.¹⁷⁶ Individually, these

¹⁷¹ UNIFEM, above n 168, 26, quoting (albeit incorrectly) Julie Ballington, *Equality in Politics: A Survey of Women and Men in Politics* (Inter-Parliamentary Union Report No 54, 2008) 31.

¹⁷² *Samoan Status Act 1963* (Samoa) s 6.

¹⁷³ See New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* (2006) 92–3.

¹⁷⁴ *Constitution of the Cook Islands* (1965) s 66A(4).

¹⁷⁵ See Sue Farran, ‘Land Rights and Gender Equality in the Pacific Region’ (2004) 11 *Australian Property Law Journal* 131.

¹⁷⁶ Elise Huffer, ‘Report 1: A Desk Review of the Factors Which Enable and Constrain the Advancement of Women’s Political Representation in Forum Island Countries’ in Elise Huffer (ed), *A Woman’s Place Is in the House — The House of Parliament: Research to Advance Women’s Political Representation in Forum Island Countries* (Pacific Islands Forum Secretariat Report, 2006) 1 (on file with authors); Abbey McLeod, ‘Where are the Women in Simbu Politics?’ (2002) 59 *Development Bulletin* 43; Jane Strachan and Seman Dalesa, ‘The Experiences of Women Political Candidates in Vanuatu’ (2005) 67 *Development Bulletin* 119.

issues are large enough. Cumulatively, they make the task of achieving political representation and the ability to influence and participate in the law-making process considerable.

C Customary and Traditional Practices

The strength of practices identified as ‘customary’ and ‘traditional’ that discriminate against women in the Pacific region, coupled with a general unwillingness of governments to modify or prohibit such practices through legislation, is another significant factor that can hinder the implementation of CEDAW.¹⁷⁷ Custom occupies an important and authoritative position in the post-independence legal landscapes of PICs. As PICs gained independence and sovereignty, an immense upsurge of interest across the region in culture, custom and traditions also emerged, as these traditions were thought to illustrate an important national identity. Accordingly, there was a uniform desire to have legal frameworks that encapsulated local values and objectives, and custom was afforded the status of formal or recognised law in almost all of the newly sovereign states as detailed below.¹⁷⁸

The *Constitution of Fiji* preserves Fijian custom in relation to the ownership of Fijian land,¹⁷⁹ the *Laws of Kiribati Act* designates all customary law to have formal legal status,¹⁸⁰ prevailing over common law,¹⁸¹ and states that custom should be recognised and enforced by all courts unless it results in an injustice or is contrary to the public interest.¹⁸² The *Constitution of the Marshall Islands* preserves customary law that relates to land tenure,¹⁸³ and empowers Parliament to declare customary law through legislation which in turn cannot be challenged by art II (Bill of Rights).¹⁸⁴ In addition, the Marshall Islands’ *Domestic Relations Act 1988*, which governs separation, divorce, maintenance and custody, has no jurisdiction over annulment, divorce and adoption effected in accordance with local custom.¹⁸⁵ Further, the *Constitution of the Independent State of Western Samoa* states that law includes ‘any custom or usage which has acquired the force of law ... under the provisions of any Act or under a judgment of a Court of competent jurisdiction’;¹⁸⁶ the *Constitution of Vanuatu* empowers Parliament to designate how custom will be determined,¹⁸⁷ to establish village or island courts with jurisdiction over custom¹⁸⁸ and declares custom to be the basis of land ownership and use;¹⁸⁹ and the *Constitution of the Federated States of Micronesia* authorises the protection of the ‘traditions of the people of the Federated States of Micronesia’ by statute and declares that no challenge can be

¹⁷⁷ See generally New Zealand Law Commission, above n 173, 84.

¹⁷⁸ See Care, above n 161, 33.

¹⁷⁹ *Constitution of the Republic of the Fiji Islands 1997* (Fiji) s 6(b).

¹⁸⁰ *Laws of Kiribati Act 1989* (Kiribati) s 4(2)(b).

¹⁸¹ *Laws of Kiribati Act 1989* (Kiribati) s 6(3)(b).

¹⁸² *Laws of Kiribati Act 1989* (Kiribati) sch 1, s 2.

¹⁸³ *Constitution of the Marshall Islands* (1979) art X, s 1.

¹⁸⁴ *Constitution of the Marshall Islands* (1979) art X, s 2(1)–(2).

¹⁸⁵ *Domestic Relations Act 1988* (Marshall Islands) s 105.

¹⁸⁶ *Constitution of the Independent State of Western Samoa* (1960) s 111.

¹⁸⁷ *Constitution of Vanuatu* (1980) s 51.

¹⁸⁸ *Constitution of Vanuatu* (1980) s 52.

¹⁸⁹ *Constitution of Vanuatu* (1980) s 74.

made to any such statute on the basis that it is in violation of art IV (Declaration of Rights).¹⁹⁰ The *Constitution of the Cook Islands* empowers Parliament to make laws giving effect to custom,¹⁹¹ and declares custom to be part of the law unless it is inconsistent with the Constitution or any statute.¹⁹² The *Constitution of the Independent State of Papua New Guinea* declares customary law part of the ‘underlying law’,¹⁹³ unless it is inconsistent with the Constitution, or any other statute, or repugnant to the general principles of humanity;¹⁹⁴ and the *Constitution of the Solomon Islands* declares customary law to have effect as part of the law of the Solomon Islands,¹⁹⁵ unless it is inconsistent with the Constitution or any other legislation.¹⁹⁶ In the Solomon Islands and the Cook Islands, some legal protection against discriminatory provisions is afforded, as both constitutions contain anti-discrimination protection on the grounds of sex, however this protection is absent in PNG. Finally, whilst the *Constitution of Tuvalu* does not expressly recognise custom as law, it requires the Constitution to be interpreted in the light of ‘Tuvaluan values’¹⁹⁷ and also gives the state the authority to restrict rights if their exercise directly ‘threatens Tuvaluan values or culture’.¹⁹⁸

The constitutional status given to custom and traditional practices in all PICs, and the failure to place any specific limits on that recognition on the basis of discrimination, is a significant hurdle and has left law reform initiatives vulnerable to the claim that they are contrary to custom. There are numerous practices that are designated ‘customary or traditional’ throughout the Pacific that discriminate against women, as demonstrated by the following examples. First, the custom of seeking and receiving forgiveness after the commission of a crime through symbolic presentations, apologies, compensation in the form of valuables or shell money, as well as ‘a prayer and a feast’¹⁹⁹ between the families of the wrongdoer and the wronged, is practised in many PICs (for example, *bulubulu* in Fiji and the *ifoga* in Samoa).²⁰⁰ Commentators argue, particularly in instances of sexual assault and domestic violence, that the practice can be characterised as a means of ‘buying yourself out of trouble’ and that, whilst it may have played an important role in pre-colonial societies operating to restore relationships in small communities,²⁰¹ it discriminates against women in

¹⁹⁰ *Constitution of the Federated States of Micronesia* (1979) art V, s 2.

¹⁹¹ *Constitution of the Cook Islands* (1965) s 66A(1), as amended by *Constitution Amendment (No 17) Act 1994–1995* (Cook Islands) s 7.

¹⁹² *Constitution of the Cook Islands* (1965) s 66A(3), as amended by *Constitution Amendment (No 17) Act 1994–1995* (Cook Islands) s 7.

¹⁹³ *Constitution of the Independent State of Papua New Guinea* (1975) sch 2.1.1(1).

¹⁹⁴ *Constitution of the Independent State of Papua New Guinea* (1975) sch 2.1.1(2).

¹⁹⁵ *Constitution of the Solomon Islands* (1978) sch 3, s 3(1).

¹⁹⁶ *Constitution of the Solomon Islands* (1978) sch 3, s 3(2).

¹⁹⁷ *Constitution of Tuvalu* (1986) s 4(3).

¹⁹⁸ *Constitution of Tuvalu* (1986) s 29(4)(b).

¹⁹⁹ Nick Goodenough, ‘Reconciliation and the Criminal Process in the Solomon Islands’ (2006) 10 *Journal of the South Pacific Law* 3.

²⁰⁰ See Jalal, *Good Practices in Legislation on Violence against Women*, above n 94, 4.

²⁰¹ See Don Paterson, ‘Customary Reconciliation in Sentencing for Sexual Offences: A Revision of *Public Prosecutor v Ben and Others & Public Prosecutor v Tariling and Gamma*’ (2006) 10 *Journal of the South Pacific Law* 12.

contemporary Pacific society.²⁰² The practice can leave women without a voice if their permission is not sought, as they may feel pressured to drop charges by the offender or by the community.²⁰³ In addition, light sentences may be awarded by judges in the event of a trial and conviction and, in many instances, any compensation awarded is given to fathers and brothers, rather than to the victim.²⁰⁴ A second example is provided by the practice of 'bride price', in which there is an exchange of goods and cash from the family of the groom to the family of the bride. Although historically and traditionally the exchange of goods in 'bride price' was intended to bind clans together upon marriage, it has since been displaced by the exchange of cash and a desire to accumulate capital, a process in which women are viewed as chattels for sale and often expected to 'redeem the brideprice by working for the [husband's] family and by bearing children'.²⁰⁵ This practice, now part of modern custom law in Melanesian nations, implies that the bride is being bought and in doing so 'demeans and dehumanises the women involved'.²⁰⁶ A third example is polygyny (where men take multiple wives but women are not permitted more than one husband), which still occurs in some Melanesian cultures.²⁰⁷ Fourth, throughout the Pacific, women do not enjoy equal rights in relation to land ownership and succession, which are both largely determined on the basis of customary rules.²⁰⁸ Women in the Pacific typically lack independent rights to land and additionally have less input than men into decisions about land. Indeed, most women in the Pacific region gain access to customary land as daughters, nieces or wives and rarely in their own right. Accordingly, women's rights to land depend on the maintenance of good marital, familial and social relations, and in particular on 'continuing their relationship with men'.²⁰⁹ Even in matrilineal societies common in Micronesian societies, recent research has confirmed that men increasingly control many aspects of land use and management.²¹⁰ These practices can be detrimental to women's position in society, particularly when translated into legal norms. In some PICs, customary rules in relation to succession are explicitly incorporated into legislation and do not provide equally for men and

²⁰² Jalal, *Good Practices in Legislation on Violence against Women*, above n 94, 4.

²⁰³ See Jalal, *Law for Pacific Women*, above n 78, 161–3.

²⁰⁴ See Goodenough, above n 199, 2.

²⁰⁵ Jean G Zorn, 'Custom Then and Now: The Changing Melanesian Family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (2003) 95, 103–4. For a discussion of traditional gender roles and relations in PNG, see generally Berit Gustafsson, "'In Papua New Guinea We Never Talk about Gender": Traditional Male and Female Roles and Gender Relations in Modern Society' in Katarina Ferro and Margit Wolfsberger (eds), *Gender and Power in the Pacific: Women's Strategies in a World of Change* (2003) 21, 26.

²⁰⁶ Zorn, above n 205, 103. See also Sue Farran, *Human Rights in the South Pacific: Challenges and Changes* (2009) 178–9.

²⁰⁷ See, eg, Owen Jessep, 'Customary Family Law and Gender Discrimination in Papua New Guinea' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (2003), 215, 223–4.

²⁰⁸ See Jalal, *Law for Pacific Women*, above n 78, 53–5.

²⁰⁹ AusAID, *Making Land Work: Reconciling Customary Land and Development in the Pacific* (Vol 1) (AusAID Report, 2008) 82 <http://www.ausaid.gov.au/publications/pdf/MLW_VolumeOne_Bookmarked.pdf>.

²¹⁰ See Elise Huffer (ed), *Land and Women: The Matrilineal Factor — The Cases of the Republic of the Marshall Islands, Solomon Islands and Vanuatu* (2008).

women (for example, in Tuvalu and Kiribati). Equally, in unwritten custom in relation to land and succession, customary rules generally favour men and, since the majority of land in PICs is held under custom, the impact on gender equality is considerable.²¹¹

The legal legitimization of custom and traditional practices in the constitutions of Pacific countries (to varying extents), coupled with the failure to distinguish discriminatory from non-discriminatory customs in all 10 countries examined, fails to accord with the equality mandate of *CEDAW*. Resistance to the modification of discriminatory practices is often justified on the basis that first, human rights, including *CEDAW*, pose a threat to traditional values and customary norms of the region and second, that custom is ‘ancestral and therefore authoritative’ and that it should be respected and not modified.²¹² Indeed, there are a number of examples of resistance to change on the grounds of the protection of custom that have hindered legislative developments that promote gender equality. For example, the *Vanuatu Family Protection Act*, before its enactment in 2008, was unsuccessful before Parliament eight times after 1997 in part due to the fears of chiefs and church groups that it could ‘promote divorce, encourage homosexuality and adultery and impact on land ownership as it could give women more rights than men’.²¹³ Attempts to introduce sexual offences law reform in the Pacific region in recent years through the development of three draft bills (in Fiji,²¹⁴ in the Cook Islands²¹⁵ and a regional ‘good practice model’)²¹⁶ have been unsuccessful to date. Indeed, the draft Fiji sexual offences Bill was rejected because, inter alia, it was too “‘western”, feminist, radical and clashed with so-called Pacific culture’.²¹⁷

D *Limitations of the Reporting Process in the Pacific*

A final contributing factor to the continuing low levels of legislative compliance with *CEDAW* in the Pacific region lies in the weaknesses of the reporting system of monitoring afforded to the CEDAW Committee at its inception. Ideally, implementation of and compliance with human rights treaties should occur because of a state’s willingness to meet its human rights obligations. However, it is upon noncompliance, as is often the case, that an effective system of monitoring is most required. As discussed earlier, the reporting process is the primary tool of the CEDAW Committee to oversee implementation of the Convention by states parties. The reporting process, adopted by many treaty bodies, has much to commend it; as Ernst puts it, the

²¹¹ See Farran, ‘Land Rights and Gender Equality in the Pacific Region’, above n 175, 17.

²¹² See New Zealand Law Commission, above n 177, 99.

²¹³ See generally, Pacific Regional Rights Resource Team, ‘Vanuatu MPs Pledge to Back Family Protection Bill’ (Press Release, 19 December 2006) <http://www.rrrt.org/page.asp?active_page_id=210>.

²¹⁴ Kapur, above n 74.

²¹⁵ See CEDAW Committee, *Concluding Comments: Cook Islands*, above n 44, [25]. But see Cook Islands Government, ‘Response to the United Nations Questionnaire on the Implementation of the Beijing Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly’ (Paper submitted by Gender and Development Division, Cook Islands Ministry of Internal Affairs, April 2009) 4.

²¹⁶ Pacific Islands Forum Secretariat, *Sex Offences Model Provisions* (November 2005) (on file with authors).

²¹⁷ See Jalal, *Good Practices in Legislation on Violence against Women*, above n 94, 3.

scrutiny it demands can have a 'significant and salubrious' effect upon states parties.²¹⁸ The process involves several potentially constructive stages and can ensure that states parties keep their treaty obligations in constant and public view. First, the reporting state party must compile a government report that requires them to identify and assess de jure and de facto compliance in relation to each article and to consider and justify any continuing reservations. Additionally at this stage, NGOs typically compile a shadow report, enabling local women to become involved in the process. Second, the focused 'constructive but critical' dialogue between the CEDAW Committee and the state party at the hearing itself leads to recommendations and suggestions for future compliance. Finally, the views, recommendations and directives contained in the concluding comments have the potential to facilitate valuable legal and policy reform activism. Indeed, the Concluding Comments, General Recommendations and other statements of the CEDAW Committee have provided a valuable frame of reference for NGOs and civil society both in terms of setting the standards required and in requiring accountability when the state does not meet those standards.²¹⁹

Concomitantly, the *CEDAW* reporting process has also attracted considerable criticism. These include, but are not limited to, the following: first, the short meeting time provided under the Convention does not allow enough time for the CEDAW Committee to consider the reports fully;²²⁰ second, the scant resources provided to the Committee hinder the thoroughness with which it can consider reports, gather information and respond to them;²²¹ third, the lateness of reports by many states (if submitted at all) and the inability of the Committee to challenge such tardiness often renders the process incomplete;²²² fourth, the reporting process requires the Committee to rely primarily on information provided by states parties, with little recourse if it is given misinformation;²²³ and finally, the reporting process does not empower the Committee to place sanctions on states or engage in any form of arbitration between states or between states and individuals in relation to the interpretation or application of the Convention.²²⁴ These weaknesses have perpetuated the criticism that the Committee is not truly an enforcement mechanism,²²⁵ but rather a monitoring

²¹⁸ See Ernst, above n 15, 342.

²¹⁹ See Olowu, above n 159, 177.

²²⁰ See Isa, above n 7, 304.

²²¹ Markus Schmidt, 'Servicing and Financing Human Rights Supervisory Bodies' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 481, 482. See also Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 220–1, who commend the lucidity of the Committee's General Recommendations, but condemn the limited resources made available to the Committee.

²²² Marsha Freeman, 'The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities Compliance' (1997) 91 *American Society of International Law Proceedings* 378, 381.

²²³ Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Cross Roads* (2001) 64.

²²⁴ Kerri Ritz, 'Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination against Women' (2001) 25 *Suffolk Transnational Law Review* 191, 205.

²²⁵ See Ernst, above n 15, 342.

body lacking enforcement powers, a characteristic that severely undermines its ability to facilitate and improve women's rights.²²⁶

Such criticisms of the reporting process are indeed borne out in the Pacific region. To date, despite many having ratified or acceded to *CEDAW* over a decade ago, only half of the 10 states parties in the Pacific have been examined by the Committee — namely, the Cook Islands, Fiji, Samoa, Tuvalu and Vanuatu. The resultant concluding comments issued by the CEDAW Committee contained a range of constructive suggestions and directions, some of which have been subsequently pursued and implemented by the PIC.²²⁷ For example, the CEDAW Committee encouraged Vanuatu to 'set a clear timetable for such reforms, in particular for the passage of the family protection bill',²²⁸ which has since been enacted; the Cook Islands withdrew its reservations to the Convention and 'implement[ed] a comprehensive programme of law reform to ensure that laws were consistent with the Convention';²²⁹ in Samoa, the drafting of domestic violence legislation 'in line with the Concluding Comments of the UN CEDAW Committee as well as the CEDAW and CRC Legislative Compliance Reviews that have been completed' is underway.²³⁰ Of the remaining countries that are yet to submit a report to the CEDAW Committee, PNG acceded to the Convention in 1995, the Solomon Islands in 2002, the FSM and Kiribati in 2004 and the Marshall Islands in 2006. The failure of these five countries to report, and the inability of the Committee to compel them to do so, means that they forego the positive encouragement and constructive assistance of the Committee and avoid any regional pressure to engage in law reform. Solutions to the shortfalls of the reporting systems, however, lie largely outside the Pacific context. One approach that has been utilised by other treaty bodies and which is gaining traction, has been to proceed to country hearings based on NGO shadow

²²⁶ See Andrew Byrnes and Jane Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?' (1995) 21 *Brooklyn Journal of International Law* 679, 682–4.

²²⁷ CEDAW Committee, *Concluding Comments: Cook Islands*, above n 44; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Vanuatu*, UN Doc CEDAW/C/VUT/CO/3 (11 June 2007); CEDAW Committee, *Concluding Comments: Samoa*, UN Doc CEDAW/C/WSM/CC/1–3 (15 February 2005); CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women (Twenty-Sixth Session, Twenty-Seventh Session and Exceptional Session)*, UN GAOR 57th sess, Supp 38, UN Doc A/57/38 (7 May 2002) ch IV pt B(1)(b) (*Consideration of Reports Submitted by States Parties under Article 18 of the Convention: Fiji: Concluding Comments*).

²²⁸ CEDAW Committee, *Concluding Comments: Vanuatu*, above n 227, [13].

²²⁹ UN Department of Public Information, News and Media Division, 'Cook Islands Announces Withdrawal of Three Reservations to Women's Convention as Anti-Discrimination Committee Considers Its First Report' (Press Release, 3 August 2007) <<http://www.un.org/News/Press/docs/2007/wom1651.doc.htm>>. The Cook Islands also acceded to the *Optional Protocol* and approved a 'CEDAW Law Reform Programme' to achieve legislative consistency with *CEDAW*: Cook Islands Government, *Response to the United Nations Questionnaire on the Implementation of the Beijing Platform for Action and the Outcome of the Twenty-Third Special Session of the General Assembly* (Submission, April 2009) 4 <http://www.unescap.org/ESID/GAD/Issues/Beijing+15/Responds_to_Questionnaire/Cook_Islands.pdf>.

²³⁰ Luagalau Elisa Foisagaasina Eteuati Shon, Chief Executive Officer, Ministry of Women, Community and Social Development, Samoa (Statement delivered at the 53rd Session of the Commission on the Status of Women, New York, 6 March 2009) 3 <http://www.un.org/womenwatch/daw/csw/csw53/statements_missions/Samoa.pdf>.

reports only.²³¹ Additionally, stricter admonition of and negative publicity for those who fail to report, coupled with greater visibility and publicity to those PICs that do fulfil their reporting obligations, might also encourage states parties to report.

V CONCLUSION

This commentary has considered the uniformly low levels of legislative compliance with *CEDAW* across a range of legal frameworks impacting women's lives in the Pacific, including equality and nondiscrimination law, employment law, criminal law protection against gender-based violence and marriage and family law. It has concluded that low legislative compliance with *CEDAW* can be explained by reference to a number of factors. Such factors include: the lasting impact of Western colonisation, which has left many PICs with outdated legislative frameworks hitherto introduced by imperial powers; the prioritisation of practices deemed customary or traditional above addressing discrimination against women; the stark lack of female representation in political institutions including legislatures at both local and national levels throughout the Pacific and a related lack of political will; the strength of the male-dominated chiefly, titled or noble systems throughout the Pacific, which have considerable influence within political institutions; and finally, although not a cause in itself of discriminatory practices, the weaknesses of the CEDAW Committee's reporting system, which has lacked the authority to induce PICs to fulfil their reporting obligations. Clearly, law reform on its own is insufficient to achieve gender equality in the region and must be accompanied by the force of strong partnerships between governments, NGOs and UN agencies in order to facilitate capacity-building and groundswell movements to ensure the actual implementation of the law. Whilst these are considerable hurdles, achieving gender equality and real solutions not only benefits all aspects of women's lives but Pacific communities at large.

²³¹ The Committee on the Rights of the Child ('CRC') at its 29th session took this approach and requested three tardy states parties to submit their report within one year or the CRC would consider the situation of child rights in the state in the absence of the initial report, as foreseen in CRC, *Overview of the Reporting Procedures*, UN Doc CRC/C/33 (24 October 1994) [29]–[32], and in light of CRC, *Provisional Rules of Procedure*, UN Doc CRC/C/4.Rev.1 (25 April 2005) r 67. See CRC, *Report on the Twenty Ninth Session*, UN Doc CRC/C/114 (14 May 2002) [561]. The Committee on the Elimination of Racial Discrimination has also taken this approach at recent sessions, for instance, it considered Belize and Peru in the 73rd session (28 July – 15 August 2008) without the country report: Committee on the Elimination of Racial Discrimination, *73rd Session: Consideration of Country Situation in the Absence of a State Report* (2009) <<http://www2.ohchr.org/english/bodies/cerd/cerds73.htm>>.