



## Legal Analysis on Violence Against Women

# TUVALU

DRAFTING OPTIONS FOR LEGISLATIVE REFORM



SPC  
Secretariat  
of the Pacific  
Community

Regional Rights Resource Team



TUVALU

# LEGAL ANALYSIS ON VIOLENCE AGAINST WOMEN

## Drafting Options for Legislative Reform


Technical Background Paper for the  
Ministry of Local Government, Women and Youth  
Government of Tuvalu

Prepared by  
Secretariat of the Pacific Community  
Pacific Regional Rights Resource Team

July 2013



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# Contents

<b>Background and acknowledgements</b>	<b>vi</b>
<b>Abbreviations</b>	<b>vii</b>
<b>Glossary</b>	<b>viii</b>
<b>EXECUTIVE SUMMARY</b>	<b>I</b>
<b>CHAPTER 1 - Reform agenda and violence against women legislation</b>	<b>3</b>
<i>Legislative reform options</i>	5
<i>Advantages of the comprehensive approach</i>	7
<i>Time limit on activating legislation</i>	8
<i>Budget</i>	8
<b>CHAPTER 2 - Background</b>	<b>9</b>
<i>Tuvalu's national legal and policy directions</i>	11
<i>Tuvalu's regional obligations</i>	12
<i>Tuvalu's international obligations</i>	13
<b>CHAPTER 3 - The legislative purpose</b>	<b>16</b>
<b>CHAPTER 4 – Definitions of domestic violence</b>	<b>19</b>
<i>Inclusive definition of domestic violence</i>	20
<i>Domestic violence as a specific offence</i>	22
<i>Definition of victims</i>	25
<b>CHAPTER 5 - Sexual assault, trafficking and sexual harassment</b>	<b>28</b>
<b>CHAPTER 5A - Definitions</b>	<b>28</b>
<i>Inclusive definition of sexual assault</i>	29
<i>Rape as a crime of morality</i>	32
<i>Marital rape</i>	32
<i>Trafficking in persons</i>	33
<i>Sexual harassment</i>	36

<b>CHAPTER 5B – Legal proceedings and evidence</b>	<b>39</b>
<i>Proof of resistance</i>	40
<i>Consent</i>	40
<i>Evidence and corroboration warning</i>	41
<i>Relevance of past sexual history</i>	43
<i>Delays in reporting and processing</i>	46
<i>No offence of false accusation</i>	48
<i>Arrangements for vulnerable witnesses</i>	48
<b>CHAPTER 6 - Protection orders</b>	<b>50</b>
<b>CHAPTER 7 - The justice system and community response</b>	<b>57</b>
<i>The duties of the police and prosecutors</i>	58
<i>The duties of the judiciary</i>	60
<i>Reconciliation and sentencing</i>	61
<i>Alternative sentencing</i>	63
<i>Support programmes in Tuvalu</i>	64
<b>CHAPTER 8 – Family law</b>	<b>66</b>
<b>CHAPTER 8A – Family law and domestic violence</b>	<b>66</b>
<i>Divorce /Dissolution of marriage</i>	68
<i>Children: custody and maintenance</i>	69
<i>Matrimonial property rights</i>	72
<b>CHAPTER 8B – Other relevant family law</b>	<b>74</b>
<i>Ex-nuptial children – affiliation and paternity law</i>	75
<i>Enforcement of maintenance</i>	76
<b>Appendix I - Checklist of items - drafting legislation on violence against women</b>	<b>78</b>
<b>REFERENCES</b>	<b>80</b>



## Background and acknowledgements

This document has been prepared to assist Tuvalu to make changes to their laws and policies relating to violence against women (VAW) in order to ensure the full protection of women from all forms of violence. The recommendations it provides serve as guidelines to support efforts to provide justice, support, protection and remedies to victims, as well as holding perpetrators accountable. It has been specifically designed for the Pacific region, taking into account the particular cultural contexts, constraints and opportunities presented in Pacific countries.

This document was prepared as part of the Secretariat of the Pacific Community (SPC), Pacific Regional Rights Resource Team (RRRT) project, *Changing laws, protecting women: Advocating for legislative change in violence against women/family law in order to enhance protective legislation for women and girls in six Pacific Island countries*, through the United Nations (UN) Trust Fund in Support of Actions to End Violence against Women, managed by UN Women. The overall vision is the development of violence against women legislation that will enhance protection for women and children.

We are extremely grateful for this generous support.

SPC RRRT, in partnership with the Ministry of Local Government, Women and Youth (MLGWY), held two consultative workshops (April 2010, March 2011) to define, analyse and make recommendations to implement new laws on VAW and children.

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The law in this report is expressed as at July 2012.

Whilst acknowledging the contributions made by those named above, the sole responsibility for the proposals made and views expressed in this report is with SPC RRRT.

This report is edited by Lucy Watt and published by SPC RRRT.

## Abbreviations

<b>AI</b>	Amnesty International
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>EKT</b>	Ekalesia Kelisiano Tuvalu
<b>FSM</b>	Federated States of Micronesia
<b>LLP</b>	Legal Literacy Project
<b>MLGWY</b>	Ministry of Local Government, Women and Youth
<b>NGO</b>	non-governmental organisation
<b>PICTs</b>	Pacific Island countries and territories
<b>PJDP</b>	Pacific Judicial Development Programme
<b>PNG</b>	Papua New Guinea
<b>PPDVP</b>	Pacific Prevention of Domestic Violence Programme
<b>RMI</b>	Republic of the Marshall Islands
<b>RRRT</b>	Pacific Regional Rights Resources Team
<b>SPC</b>	Secretariat of the Pacific Community
<b>TNCW</b>	Tuvalu National Council of Women
<b>TFHA</b>	Tuvalu Family Health Association
<b>UN</b>	United Nations
<b>UNDAW</b>	United Nations Division for the Advancement of Women
<b>UNDESA</b>	United Nations Department of Economic and Social Affairs
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UPR</b>	Universal Periodic Review
<b>VAW</b>	violence against women
<b>WHO</b>	World Health Organization



## Glossary

<i>de facto</i>	actually existing but without lawful authority
<i>de jure</i>	legitimate, lawful
<i>ex officio</i>	by reason of their office
<i>ex parte</i>	one side, e.g. an <i>ex parte</i> application or hearing of one party only.
<i>inter alia</i>	among other things
<i>inter parte</i>	both sides, e.g. a hearing where both parties are heard
<i>parens patriae</i>	power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection
<i>stridhan</i>	portion of a woman's wealth over which she alone has the power to sell, gift, mortgage, lease or exchange (India)

## Executive Summary

1. Domestic violence in Tuvalu was highlighted as an issue of national concern in the *Tuvalu demographic and health survey*.<sup>1</sup> The study provides insight into domestic violence in Tuvalu, along with demographic and health data and analysis. The study found that 33 per cent of ever married women (including living together as if married), between the ages of 15 and 49, have experienced physical violence, 10 per cent have experienced sexual violence, with 41 per cent experiencing any kind of violence (physical, emotional, or sexual) by a husband or intimate partner.<sup>2</sup> The data show that almost all violence committed is against women. Tuvalu, along with other countries in the Pacific, does not have comprehensive laws on domestic violence.
2. There is a range of factors that increase women's vulnerability to violence, including economic opportunities, poverty, status and dependency. In patriarchal societies, the status of women is determined by the social ranking system of the family and the kin group, with customary practices determining how women are treated. Female abuse is not seen as a violation of women's human rights as it is often justified as a means of discipline and correction, and dismissed as a private dispute within the family. Law enforcement agencies and the courts, until recently, have traditionally taken a hands-off approach to VAW, deferring to family privacy and the traditional dispute resolution processes. In small close-knit communities where members are closely related, law enforcement agencies are reluctant to arrest perpetrators. Reconciliation of the parties is encouraged in both law and customary practice. The social costs of domestic violence on health care, the justice system, the economy, and on families remains high.
3. Recently, special attention has been given to addressing the various aspects of VAW and children, and ways have been identified to prevent and end such practices through a series of recommendations. These include:
  - legislative reform to provide for a comprehensive multidisciplinary framework law that addresses the protection, safety and wellbeing of survivors to enhance their recovery, and speedy resolutions consistent with international good practices and standards;
  - improving investigation, prosecution and support services to survivors of violence; and
  - improving the responses of the justice system to domestic violence cases.
4. Tuvalu ratified the *Convention on the Elimination of All forms of Discrimination against Women (CEDAW)*<sup>3</sup> in 1999, and in 1995 acceded to the *Convention on the Rights of the Child (CRC)*.<sup>4</sup> Since then, there have been significant developments in Tuvalu, in both the government and in civil society, to address VAW and children. A combined CEDAW/VAW Committee was established in 2009 to build support to address violence through legislative change.
5. Tuvalu, along with most other countries in the Pacific region, does not have comprehensive laws to address VAW and children. However, Tuvalu has addressed VAW and children, in so far as it relates to the role of the police, with the introduction of the *Police Powers and Duties Act 2009*. The focus of this report is on improving laws and the responses of relevant agencies to protecting families and survivors of violence in Tuvalu. The report includes the formulation of recommendations which serve as drafting instructions for the government of Tuvalu to strengthen its current national laws and practices. These drafting instructions are based on the recommendations of the United Nations Division for the Advancement of Women of the Department of Economic and Social Affairs (UNDAW/DESA) *Handbook for legislation on violence against women*<sup>5</sup> and the UNDAW report from the expert group meeting, *Good practices in legislation on violence against women*.<sup>6</sup> Therefore, the purpose of this report is to:
  - provide a summary of the existing legislative framework, common law, customary law and legal practices on VAW in Tuvalu, and to highlight the value and benefits of an integrated and comprehensive approach to passing legislation on VAW;

1 Secretariat of the Pacific Community and Macro International Inc. *Tuvalu demographic and health survey* (2007).


2 Ibid 278.

3 *Convention on the Elimination of All forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS I (entered into force 3 September 1981).

4 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

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


6 United Nations Division for the Advancement of Women and United Nations Office on Drugs and Crime, *Good practices in legislation on violence against women*, Report of the Expert Group Meeting, Vienna, 26-28 May 2008 (2008).

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- comprehensively address the social and legal problems faced by survivors of VAW and children;
  - propose the improvement of legislation and suggest new provisions to specifically address all forms of VAW;
  - propose improvements in court responses and mechanisms to ensure safety and easy court access to meet the unique needs of survivors of violence;
  - propose improved law enforcement responses to domestic violence and sexual assault survivors; and
  - propose a range of community intervention, prevention programmes and support services for survivors of violence.
6. As both family law and laws on domestic violence are inextricably linked through divorce, separation, child custody, maintenance, and property, Chapter 8 of this report discusses the current legislative framework on family law in Tuvalu. Whilst the current civil and criminal laws provide some remedies to address violence, a wider spectrum of tools is required to comprehensively address abuser accountability and ensure the protection of victims and families.



CHAPTER I

**Reform agenda  
and violence  
against women  
legislation**

- 
- 1.1 Violence against women (VAW) is endemic and pervasive, not only in Tuvalu but throughout the Pacific region. It is often reinforced or justified by traditional customs, customary law or culture. The *Tuvalu demographic and health survey* includes a chapter on domestic violence, which has for the first time provided a picture of the prevalence of VAW in the country. The study found that 33 per cent of ever married (including living together as if married) women, between the ages of 15 and 49, have experienced physical violence, 10 per cent have experienced sexual violence, and 41 per cent have experienced any kind of violence (physical, emotional, or sexual) by a husband or intimate partner.<sup>7</sup>
- 1.2 Violence against women is a critical impediment to women being able to fully participate in development processes. It indicates a lack of self-sufficiency and autonomy, and cuts across all social and economic classes. Violence against women can have a lasting psychological impact, as well as lowering women's self-esteem and productivity. It destroys marriages, and harms the family and children. Violence before and during pregnancy may also lead to serious health issues, including miscarriage, premature child delivery and low birth weight. It can also result in significant financial costs, such as lost and lowered wages, counselling fees, medical expenses and legal bills.<sup>8</sup>
- 1.3 For the most part, the laws (legislation and common law) and legal practices in Tuvalu with respect to securing justice for women are archaic and ineffective. Compared to other regions of the world, there has been a paucity of legislative action in the Pacific region addressing this issue.<sup>9</sup> Both Vanuatu<sup>10</sup> and the Republic of the Marshall Islands (Republic of the Marshall Islands)<sup>11</sup> provide good Pacific examples of legislative frameworks in the area of VAW. Fiji has also promulgated a decree to address domestic violence, whilst Papua New Guinea (Papua New Guinea) and the Republic of the Marshall Islands have also made amendments to their sexual assault legislation. Most reforms have involved gradual changes to existing criminal and civil legislation. Recently this has been combined with the establishment of stand-alone legislation dealing with some aspects of domestic violence.
- 1.4 It is important when introducing legislation addressing the problem of VAW to define clearly the various forms of violence suffered by women. The data in the *Tuvalu demographic and health survey* indicate that women in intimate partner relationships experienced physical and/or sexual violence.<sup>12</sup> In addition, amongst women who had experienced physical violence since 15, 90 per cent reported that a current husband or partner was the perpetrator.<sup>13</sup> The UN *Declaration on the Elimination of Violence against Women* defines VAW in article 1 as:
- any act of gender based violence that results in or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>14</sup>
- 1.5 The UN Special Rapporteurs on Violence against Women, its Causes and Consequences, elaborated further on the forms of violence defined in article 2 of the *Declaration on the Elimination of Violence against Women*, and recommended that violence in the family, in the community, and violence perpetrated or condoned by the state should be included.<sup>15</sup> The *Handbook for legislation on violence against women* sets out the following model legislative framework to stop and prevent harm to women and children and hold perpetrators accountable.<sup>16</sup>

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7 Secretariat of the Pacific Community and Macro International Inc., above n 1, 278.

8 World Health Organization, *Violence and injury prevention* (2012) <[http://www.who.int/violence\\_injury\\_prevention/violence/en/](http://www.who.int/violence_injury_prevention/violence/en/)>.

9 Imrana Jalal, *Good practices in legislation on violence against women: A Pacific Islands regional perspective*, UN Doc EGM/GPLVAW/2008/EP.07 (19 May 2008).

10 *Family Protection Act 2008*.

11 *Domestic Violence Prevention and Protection Act 2011*.

12 Secretariat of the Pacific Community and Macro International Inc., above n 1, 278.

13 *Ibid* 270.

14 *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN GAOR, 85<sup>th</sup> plen mtg, UN Doc A/RES/48/104 (20 December 1993) art 1.

15 Yakin Ertürk, *15 Years of the UN Special Rapporteur on violence against women, its causes and consequences (1994–2009) A critical review*, 11<sup>th</sup> sess, Agenda item 3, UN Doc A/HRC/11/6/Add.5 (27 May 2009) [12].

16 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5, 23-24.

## Key recommendations and drafting instructions for Tuvalu

Legislation should:

- apply to all forms of violence against women, including but not limited to:
  - > domestic violence;
  - > sexual violence, including sexual assault and sexual harassment;
  - > harmful practices, including early marriage, forced marriage, female genital mutilation, female infanticide, prenatal sex-selection, virginity testing, HIV and AIDS cleansing, so-called honour crimes, acid attacks, crimes committed in relation to bride-price and dowry, maltreatment of widows, forced pregnancy, and trying women for sorcery/witchcraft;
  - > femicide/feminicide;
  - > trafficking; and
  - > sexual slavery; and
- recognise violence against women perpetrated by specific actors, and in specific contexts, including:
  - > violence against women in the family;
  - > violence against women in the community;
  - > violence against women in conflict situations; and
  - > violence against women condoned by the state, including violence in police custody and violence committed by security forces.

1.6 The handbook further notes that:


Forms and manifestations of violence against women vary, depending on the specific social, economic, cultural and political context. However, legislation regarding violence against women has predominantly addressed intimate partner violence. ... Regardless of whether forms of violence are addressed in separate legislation or in one piece of legislation, a comprehensive legal framework must be applicable to each form, including measures for the prevention of violence, protection and support of the complainant/survivor, punishment of the perpetrator, and measures to ensure the thorough implementation and evaluation of the law.<sup>17</sup>

### Legislative reform options

- 1.7 In order to be fully effective, the adoption of new legislation on VAW must be accompanied by a legislative survey and gap analysis, followed by a review and amendment, where necessary, of all other relevant laws to ensure that women's human rights and the elimination of VAW are consistently incorporated. For example, in conjunction with the *Organic Act on Integrated Protection Measures against Gender Violence 2004* in Spain, a number of other laws were amended in order to ensure consistency, including laws on social security, the national budget, criminal and civil codes, free legal aid and education. In the United States of America (USA), the *Personal Responsibility and Work Opportunity Reconciliation Act 1996* created a family violence option, which permits survivors of domestic violence to be exempted from certain employment restrictions related to receiving public assistance payments.<sup>18</sup>
- 1.8 Ultimately, the question of how best to formulate legislative reform is a political decision for the government and people of Tuvalu. Regardless of whether forms of violence are addressed in separate legislation or in one piece of legislation, a comprehensive, unified legal framework that includes legal, judicial, health, law enforcement and community support to survivors of violence must be applied to each type of reform.
- 1.9 There are several legislative options available to Tuvalu. The first and second approaches, discussed below, allow Tuvalu to deal with VAW as it affects the survivor, the immediate, and extended family, as well as its impact on society. Societal impacts include, but are not limited to, the local community, schools, the social welfare system, civil society, religious groups, police, courts and hospitals.
- 1.10 The third approach is the least favoured as the complexities presented in cases of VAW require a range of skills and supportive services to prevent violence, to hold perpetrators accountable, and to protect and rehabilitate victims of violence. Whilst this option may be achievable in the short term using minimal resources, in the long term, achieving

<sup>17</sup> Ibid 24.

<sup>18</sup> Ibid.



excellence in VAW legislation requires comprehensive law reform to bring about significant changes in law, policy, and practices that are beneficial to survivors of violence.

#### *Comprehensive integrated legislative approach*

- 1.11 The best approach is to enact one piece of comprehensive, integrated legislation covering all forms of VAW, supplemented by a separate piece of stand-alone family law that would also address VAW in family law proceedings, where relevant. This is the most structural, sustainable, holistic and logical way to deal with VAW in Tuvalu. New comprehensive family legislation is needed, as anecdotal evidence from the Pacific suggests that the majority of marriages that end, do so as the result of domestic violence. Under this approach, Tuvalu will also have to amend article 27 of its constitution to include sex/gender in its definition of discrimination.
- 1.12 This option would result in two separate pieces of legislation; one criminal and civil legislation; and one comprehensive family law act. Below are suggestions for legislation that could be enacted under this approach.

- ***Tuvalu Family, Domestic and Sexual Violence Act 2012 or Tuvalu Family Violence Act 2012 or Tuvalu Family Protection Act 2012***<sup>19</sup>

Legislation to cover all forms of VAW (including physical, sexual, trafficking, sexual harassment, stalking, psychological, economic), protection orders, ancillary civil orders, criminal process and procedure, evidence laws and police powers. In addition it should also include prevention and protection, survivor empowerment and support (incorporating health, education and social welfare aspects), traditional safety practices to protect survivors, and should link the criminal justice system to health care providers and social welfare networks.

- ***Tuvalu Family Law Act 2013***

Legislation to cover separation, divorce, child and spousal maintenance, parental care, child residence and contact, the division of matrimonial property and procedures, and orders to effectively deal with VAW and children, applicable to family law. This family law model will provide a legal framework under which a judge or magistrate can simultaneously rule on family, civil and criminal matters.

#### **Stand-alone comprehensive approach**

- 1.13 The second option is to pass multiple pieces of legislation; domestic violence, sexual violence, and a separate family law act. This approach is preferable to the gradual amendment approach but it is not ideal. An example of this is the *Family Protection Act 2008* (Vanuatu), which attempts to deal with domestic violence by addressing criminal and civil matters, including protection aspects. The result of this approach is three separate pieces of legislation. Below are suggestions for legislation that could be enacted under this approach.

- ***Tuvalu Family and Domestic Violence Act or Tuvalu Family Protection Act 2013***

Legislation to cover all forms of domestic violence, including all civil and criminal aspects such as protection orders, evidence laws, health, education, social welfare, and community supportive services.

- ***Tuvalu Sexual Violence Act 2013***

Legislation to cover all forms of sexual violence against women, including trafficking and sexual harassment. Also to include civil and criminal aspects of VAW, such as protection orders, evidence laws, health, education, social welfare and community supportive services.

- ***Tuvalu Family Law Act 2013***

Legislation to cover separation, divorce, maintenance, parental care and contact, matrimonial property, and protection orders, where violence is an issue in family law proceedings.

#### **Gradual amendment approach**

- 1.14 The third, least favoured, option is to amend existing legislation gradually to include a wider definition of domestic violence and a broader spectrum of protection orders. This approach includes scattered amendments to various pieces of current law and single issue legislation. Examples of this include the amendments to the corroboration rule in the Kiribati *Evidence Act 2003* and the new amendment to the Solomon Islands *Evidence Act 2009*. The issue with this approach is that it does not address violence in a holistic manner, nor does it address the way in which society should positively deal with VAW.

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<sup>19</sup> The title of the law is a decision for the government and people of Tuvalu.

## Advantages of the comprehensive approach

- 1.15 The comprehensive approach is best because it incorporates a multidisciplinary approach that includes legal, judicial, health, law enforcement agencies, and community support services as well as sensitisation training, prevention, detection and education among state partners. In contrast, the gradual approach addresses the issues that women face once they are involved in the legal system as complainants, but does not help their families or children before or after the matter has entered the legal system. This is especially problematic due to systematic underreporting of VAW to the authorities.
- 1.16 Similarly, the gradual approach does not, for example, address the consequences of violence, gender inequality, nor would it provide for training of health professionals in the treatment of sexual assault victims. A gradual approach would not tackle the issue of breaking the cycle of intergenerational transmission of violence, where children exposed to domestic violence in the home go on to repeat violent behaviour as adults. There would be no sustainable, structural way of dealing with VAW on a societal scale if comprehensive prevention and support mechanisms were excluded as part of the law to address and eliminate violence.
- 1.17 The legislative initiatives, to date, aimed at preventing VAW have focused on the criminalisation of domestic violence, and protection orders as a remedy. It is important that legal frameworks move beyond this limited approach, and address the prevention of violence, as well as the protection and support of survivors, using civil, criminal, administrative and constitutional law. The Spanish *Organic Act on Integrated Protection Measures against Gender Violence 2004* incorporates provisions on sensitisation, prevention and detection, as well as the rights of survivors of violence. It creates specific institutional mechanisms to address VAW by introducing relevant regulations under criminal law and it establishes judicial protection for survivors.<sup>20</sup>
- 1.18 It is also important that legislation incorporate a multidisciplinary approach in addressing VAW. For example, reforms to the *Swedish Penal Code 1999* regarding VAW emphasised the importance of collaboration between the police, social services and health care providers. Some other examples of the comprehensive approach include the *General Law on the Access of Women to a Life Free of Violence 2007* (Mexico) and the legislative approaches taken in the Philippines<sup>21</sup> and India.<sup>22</sup>
- 1.19 In 1996, the *Report of the Special Rapporteur on violence against women, its causes and consequences* presented a framework for model legislation on domestic violence. In this report, states are urged to adopt the framework in developing legislation that, *inter alia*:
- contains the broadest possible definition of acts of domestic violence and relationships within which domestic violence occurs;
  - includes complaints mechanisms and duties of police officers, including police responsibility to respond to every request for assistance and protection in cases of domestic violence and explain to the victims their legal rights;
  - provides for *ex parte* restraining orders and protection orders;
  - addresses both criminal and civil proceedings; and
  - provides for support services for victims, programmes for perpetrators, and training for police and judicial officials.<sup>23</sup>
- 1.20 A checklist of items to be included in a legislative framework governing VAW, adopting the comprehensive and integrated approach, is contained in Appendix I.

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- be comprehensive and multidisciplinary, criminalising all forms of VAW, and encompassing uses of prevention, protection, survivor empowerment and support (health, economic, social, psychological), as well as adequate punishment of perpetrators and availability of remedies for survivors.

20 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

21 *Anti-Violence Against Women and Their Children Act 2004*.

22 *Protection of Women from Violence Act 2005*.

23 Radhika Coomaraswamy, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 52<sup>nd</sup> sess, Agenda item 9(a), UN Doc E/CN.4/1996/53/Add.2 (2 February 1996).



### Time limit on activating legislation

- 1.21 Experience in the Pacific has shown that there are significant delays in bringing about much needed legislative reform. Women in the Pacific, as well as in other parts of the world, have been at the forefront in lobbying for legislative and policy changes to bring about improvements in family, children, disability, HIV and AIDs, and VAW laws. Whilst there has been consistent lobbying for improvements to the law, the delays tend to exacerbate the situation of families in crisis, and of women and children who are victims of domestic violence. In order to address this, it is recommended that a legislative provision specifies the date on which the relevant legislation, and all its provisions, will come into force. For example, s 72 of the South African *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* provides that most of the Act is to take effect on 16 December 2007 and specifies that chapters 5 and 6 of the Act are to take effect on 21 March 2008 and 16 June 2008, respectively.<sup>24</sup>

### Budget

- 1.22 Comprehensive VAW legislation cannot be implemented effectively without adequate funding. For example, *General Law on the Access of Women to a Life Free of Violence 2007* (Mexico) establishes an obligation on the state and municipalities to take budgetary and administrative measures to ensure the rights of women. In the USA, the *Violence against Women Act 1994* and its reauthorisations provides funding to non-governmental organisations (NGOs) working on VAW. It is important that an extensive analysis of funding requirements be undertaken to implement all measures contained in the new proposed legislation on VAW.<sup>25</sup>

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24 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5, 21.

25 Ibid.



CHAPTER 2

# Background

- 2.1 The current laws (legislation, common law and legal practices) in most Pacific Island countries and territories (PICTs) are inadequate and ineffective in protecting women from violence. Tuvalu has enacted the *Police Powers and Duties Act 2009*, which spells out the powers of the police in preventing domestic violence. A legislative reform strategy is an important element in addressing the systemic, historical and structural problem of VAW, although by no means is it the only strategy. A combination of effective political, economic, cultural and social strategies is required in order to reinforce any legal strategies. Families facing dissolution through separation and/or violence require an array of resources to help facilitate changes in the family situation. Comprehensive and effective legislation dealing with all aspects of VAW and an array of survivor supportive services are the foundations on which individuals and families at risk can secure a safer environment. Legislative reform is the vital first step.
- 2.2 The need for immediate legislative action is supported by the *Tuvalu demographic and health survey* and the *WHO Multi-country study on women's health and domestic violence against women*.<sup>26</sup> The *Tuvalu demographic and health survey* found alarming rates of VAW, both in urban and rural areas.
- 41 per cent of women who have been married (or lived together as married), between the ages of 15 and 49, have experienced physical and/or sexual and/or emotional violence by their husband or intimate partner.<sup>27</sup>
  - 37 per cent of women have experienced physical violence any time since the age of 15, and 21 per cent of women have ever experienced sexual violence by a partner or non-partner. 47 per cent of women have experienced physical or sexual violence by any individual.<sup>28</sup>
  - 40 per cent of women said that their husbands or partners always insist on knowing where they are at all times.<sup>29</sup>
  - More than seven out of ten men (73 per cent) agree that wife-beating under certain circumstances is justified for at least one of the specified grounds (burns the food, argues with him, goes out without telling him, neglects the children, refuses to have sexual intercourse with him).<sup>30</sup>
  - Amongst married women, an increase in age reduces their chances of experiencing emotional, sexual or physical violence at the hands of husbands or partners (e.g. 49 per cent of women aged 15–29 compared to 35 per cent of women aged 40–49).<sup>31</sup>
- 2.3 The data from the *Tuvalu demographic and health survey* indicate an extremely serious and endemic problem in Tuvalu. Based on these data, it is reasonable to conclude that VAW is a systemic problem in Tuvalu with a high degree of social, cultural, legal and institutional acceptance and/or tolerance. This tacit acceptance is unacceptable and violates Tuvaluan women's fundamental human rights, including their right to freedom from violence, the right to live their life with dignity, and the right to life.
- 2.4 The Pacific Islands Forum Leaders 2009 Communiqué recognised sexual and gender based violence as pervasive and underreported.<sup>32</sup> Surveys of the prevalence of VAW using a standardised global methodology (developed by the World Health Organization) have been conducted in Solomon Islands, Kiribati, Vanuatu and Samoa. Of 13 countries (18 sites) around the world that have used the same methodology, two of the Pacific Island countries were among the highest, in terms of the proportion of women who report ever having experienced physical or sexual violence by an intimate partner in their lifetime.<sup>33</sup>

26 World Health Organization, *WHO Multi-country study on women's health and domestic violence against women: Initial results on prevalence, health outcomes and women's responses* (2005).

27 Secretariat of the Pacific Community and Macro International Inc., above n 1, 278.

28 Ibid 267; 273-4.

29 Ibid 275.

30 Ibid 247-248.

31 Ibid 279.

32 The Pacific Islands Forum, *Cairns Communiqué* (2009).

33 World Health Organization, *WHO Multi-country study on women's health and domestic violence against women: Initial results on prevalence, health outcomes and women's responses* (2005) 29 (extracted from Figure 4.2).

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

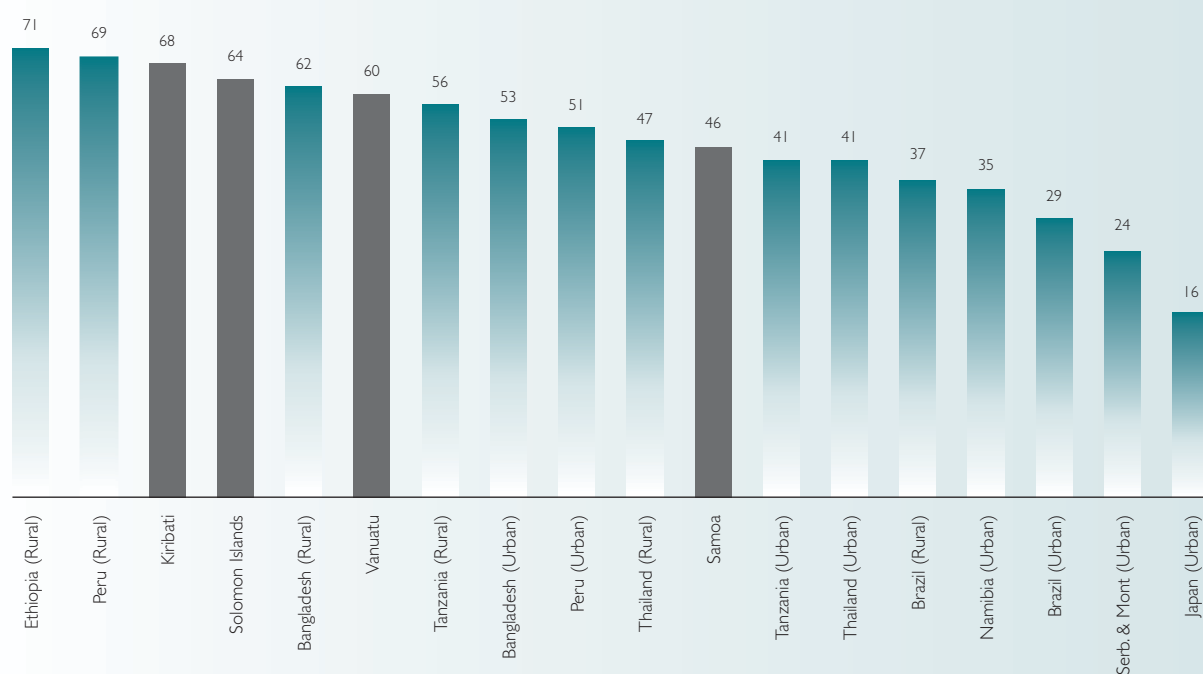


Table 1: The prevalence of intimate partner violence in selected Pacific Island countries.

Country	Physical Violence (%)	Sexual Violence (%)	Physical and/or Sexual Violence (%)
Kiribati <sup>1</sup>	60	46	68
Vanuatu <sup>2</sup>	51	44	60
Solomon Islands <sup>3</sup>	46	55	64
Samoa <sup>4</sup>	38	20	46

1 Secretariat of the Pacific Community (for the MISA, Kiribati) *Kiribati family health and support study: A study on violence against women and children (2010)* 81.

2 Vanuatu Women's Centre and Vanuatu National Statistics Office *Vanuatu national survey on women's lives and family relationships (2011)* 16.

3 Secretariat of the Pacific Community, *Solomon Islands family health and safety study: A study on violence against women and children (2009)* 62.

4 Secretariat of the Pacific Community and UNFPA, *Samoa family health and safety study (2006)* 14.

Studies from other countries in the region have also shown high rates of VAW. The *National study on domestic violence against women in Tonga 2009* found that 40 per cent of women experienced physical or sexual violence by an intimate partner,<sup>34</sup> with 77 per cent reporting that they had experienced physical or sexual violence in their lives by someone (partner or non-partner).<sup>35</sup> 67 per cent of women in Papua New Guinea reported physical violence by a male partner,<sup>36</sup> and 66 per cent of women in Fiji reported that they had been abused by their partner.<sup>37</sup>

34 *Ma'a Fafine mo e Famili, National study on domestic violence against women in Tonga 2009* (June 2012) xxiv.

35 *Ibid* xxv.

36 UNESCAP, *Economic and social survey of Asia and the Pacific (2007)* 119.

37 Fiji Women's Crisis Centre, *National research on the incidence and prevalence of domestic violence (1999)*, cited in UNFPA Pacific Sub Regional Office, *An assessment of the state of violence against women in Fiji (2008)* 13.

## Tuvalu's national legal and policy directions

2.5 The laws of Tuvalu reflect the country's historical evolution from British colonial administration to independence. The *Laws of Tuvalu Act* (Cap 1B) declares that the law of Tuvalu is made up of *The Constitution of Tuvalu* as the supreme law. In addition, the laws of Tuvalu comprise:

- every act;
- customary law (the customs and usages, existing from time to time, of the natives of Tuvalu);<sup>38</sup>
- the common law of Tuvalu (comprising relevant rules (derived from English common law and equity) as applied to the circumstances of Tuvalu);<sup>39</sup>
- every applied law (including inherited imperial enactments of the United Kingdom).<sup>40</sup>

Whilst there is no comprehensive law on domestic violence, there is agreement within government and civil society groups, that domestic violence legislation should be adopted.

### Legislation

2.6 In 2009, Parliament enacted the *Police Powers and Duties Act 2009*, which empowers the police to exercise its enforcement powers in domestic violence cases.

### National policies

2.7 In recent years, Tuvalu has shown an openness and willingness to consider the problems of VAW that exist domestically, and to take steps to address them. For example, the government of Tuvalu established the Department of Women's Affairs, which works with NGOs such as the Tuvalu National Council of Women (TNCW). A National Women's Policy has been reformulated with a focus on gender equality. The policy is an integral part of the *Te Kakeenga* National Strategy for Sustainable Development 2005–2015, launched during the World Leaders' Summit in 2005.<sup>41</sup>

## Tuvalu's regional obligations

### The Pacific Plan

2.8 In October 2005, the leaders of the Pacific Islands Forum endorsed the *Pacific Plan* that declared in part an objective of 'improved gender equality' within the region. Although the document does not specifically mention VAW, gender equality is a key principle under the governance pillar of the *Pacific Plan*.

### The Cairns Communiqué

2.9 The Pacific Islands Forum leaders meeting in Cairns in August 2009 recognised VAW as pervasive and underreported.<sup>42</sup>

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38 *Laws of Tuvalu Act* (Cap 1B) s 5.

39 *Laws of Tuvalu Act* s 6.

40 *Laws of Tuvalu Act* s 7.

41 The Honourable Kokea Malua, 'Tuvalu Statement at the Commission on the Status of Women High Level Meeting' (Speech delivered at Commission on the Status of Women High Level Meeting, New York, 3 March 2006).

42 The Pacific Islands Forum, *Cairns Communiqué* (2009), [64] [65].

**Extract:** The Pacific Islands Forum - *Cairns Communiqué (2009)*

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

### Tuvalu's international obligations

- 2.10 Both the landmark *Declaration on the Elimination of Violence against Women*<sup>43</sup> adopted by the UN General Assembly in 1993, and the *Beijing Declaration and Platform for Action*<sup>44</sup> helped to crystallise the doctrine that women's rights are human rights. All the core international human rights treaties, either directly or indirectly, refer to VAW as a violation of human rights. Tuvalu ratified *CEDAW* on 6 October 1999, and in 1995 ratified *CRC*. States which are parties to *CEDAW* have clear obligations under international law to address all forms of discrimination against women. They are required by article 2(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. So far, most countries in the region, including Tuvalu, are in *de jure* and *de facto* breach of article 2(f). Tuvalu reported against *CEDAW* in 2009 and the Committee on the Elimination of Violence against Women made the following concluding observations on VAW.<sup>45</sup>

43 *Declaration on the Elimination of Violence against Women*, above n 14.

44 *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, Beijing, 4-15 September 1995, 16<sup>th</sup> plen mtg, U.N. Doc. A/CONF.177/20 (15 September 1995).

45 Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*, 44<sup>th</sup> sess, UN Doc CEDAW/C/TUV/CO/2 (7 August 2009) 7-8 [30].

**Extract:** Concluding Observations of the Committee on the Elimination of Discrimination against Women - Tuvalu (2009).

30. The Committee urges the State party to give priority attention to the design and implementation of a comprehensive strategy for addressing all forms of violence against women in conformity with general recommendation No. 19 and to prevent such violence, prosecute and punish offenders and provide services for victims.

The Committee calls upon the State party to enact and implement a comprehensive legal framework that would encompass all types of violence against women, including domestic violence.

The Committee also draws the attention of the State party to the Secretary-General's in-depth study on all forms of violence against women (A/61/122/Add.1 and Corr.1). It requests the State party to take steps to raise public awareness, including through the media and education programmes, that all forms of violence against women, including domestic violence, are a form of discrimination under the Convention and unacceptable.

The Committee calls upon the State party to ensure that women and girls who are victims of violence have access to immediate and effective means of redress and protection, including shelters.

<https://www.google.com.au/>

The Committee recommends the implementation of training for the judiciary and public officials, in particular law enforcement personnel and health-service providers, in order to ensure that they are sensitized to all forms of violence against women and can provide adequate support to victims.

It further calls upon the State party to enhance its data-collection efforts and establish a monitoring and evaluation mechanism in order to regularly assess the impact and effectiveness of measures aimed at preventing and redressing violence against women. It invites the State party to seek international assistance in its efforts to put in place such a comprehensive response.

It also recommends that the State party expeditiously enact the 2009 Police Powers and Duties Bill.

States that are signatories to CRC (including Tuvalu) have an additional obligation to protect children against abuse.

#### *CEDAW Committee General Recommendation No.19*

- 2.11 Over time, the treaty bodies established to monitor implementation of the international human rights treaties within the UN system have increasingly noted and taken up states parties' obligations to addressing VAW. In its General Recommendation No. 19 on VAW, the Committee on the Elimination of Discrimination against Women confirmed that: 'under general international law and specific human rights covenants, states may ... be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.<sup>46</sup>
- 2.12 In relation to national legal frameworks, the Committee recommended that states parties:
- ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity;<sup>47</sup> and
  - take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.<sup>48</sup>

46 General Recommendation No. 19, *Committee on the Elimination of Discrimination against Women*, 11<sup>th</sup> sess, (1992) [9].

47 *Ibid* [24(b)].

48 Special Recommendation 24, *Committee on the Elimination of Discrimination against Women*, 11<sup>th</sup> sess, (1992) [(t)(i)].

### *Declaration on the Elimination of Violence against Women*

2.13 Article 4 of the UN *Declaration on the Elimination of Violence against Women* adopted by the General Assembly requires states:

- to condemn violence against women and not invoke custom, tradition or religion to avoid their obligations to eliminate such violence;
- to develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to victims;
- to provide access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies; and
- to ensure that the secondary victimisation of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.<sup>49</sup>

### *Beijing Declaration and Platform for Action*

2.14 The *Beijing Declaration and Platform for Action* was adopted at the Fourth World Conference on Women in Beijing in 1995.<sup>50</sup> During its five-year review in 2000, reiterated calls were made on governments to:

- enact and reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to victims;
- adopt, implement and review legislation to ensure its effectiveness in eliminating VAW, emphasising the prevention of violence and the prosecution of offenders; and
- take measures to ensure the protection of women subjected to violence, access to just and effective remedies (including compensation and indemnification), healing of victims, and rehabilitation of perpetrators.<sup>51</sup>

### *The Universal Periodic Review (UPR) and Tuvalu*

2.15 The Universal Periodic Review (UPR) is a mechanism of the Human Rights Council created on 15 March 2006 to assess human rights situations in UN member countries once every four years. The Human Rights Council is an intergovernmental body within the UN system responsible for strengthening and promoting the protection of human rights. Tuvalu submitted its national report to the Human Rights Council in 2008. The submissions of the Legal Literacy Project (LLP) of Tuvalu and Amnesty International (AI) made on VAW are summarised below.<sup>52</sup>

**Extract:** Human Rights Council – Universal Periodic Review – Tuvalu 2008

According to the Legal Literacy Project (LLP) (Tuvalu National Council of Women) and Amnesty International (AI), domestic violence in Tuvalu is often overlooked due to the unavailability of data and to the lack of awareness of women's rights and traditional and cultural pressures on victims. AI expressed serious concern regarding reports of traditional apologies and acceptance of these apologies for violence against women and girls, including rape, incest, and assaults, as they result in impunity for serious human rights abuses and encourage their perpetuation.

The LLP also reported about this issue and called on the government of Tuvalu to ensure the compulsory prosecution of domestic violence cases. AI acknowledged the initiative of the Tuvalu police to engage its officers in training with the Pacific Prevention of Domestic Violence Programme (PPDVP) and recommended to the government to ensure greater public awareness of the issues of domestic violence and greater involvement of government agencies and civil society. AI also recommended to the government to equip the police with relevant tools to deal effectively with domestic and sexual violence against women and to work on an enactment of appropriate legislation to address violence against women generally, and domestic violence in particular, after meaningful consultation with relevant stakeholders.

<sup>49</sup> *Declaration on the Elimination of Violence against Women*, above n 14, art 4.

<sup>50</sup> *Beijing Declaration and Platform for Action*, above n 48.

<sup>51</sup> *Further actions and initiatives to implement the Beijing Declaration*, GA Res S-23/3, UN GAOR, 23<sup>rd</sup> sess, Agenda item 10, UN Doc A/RES/S-23/3 (16 November 2000) [69].

<sup>52</sup> Human Rights Council, *Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with Paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1: Tuvalu*, Working Group on the Universal Periodic Review, 3<sup>rd</sup> sess, UN Doc A/HRC/WG.6/3/TUV/3 (16 September 2008) 4 [9].



In response to submissions, the Human Rights Council made a large number of recommendations with regard to women's rights in general, but many of the recommendations specifically addressed VAW.<sup>53</sup>

**Extract:** Human Rights Council – Universal Periodic Review – Tuvalu 2009

- Develop a comprehensive strategy to reduce domestic violence in Tuvalu, including raising public awareness of the issue and identifying ways to combat such violence (New Zealand) (Recommendation 12 [67]).
- Implement effective means to ensure greater public awareness of the issues of domestic violence and gender discrimination and encourage greater involvement of government agencies and civil society in efforts to address this issue (Australia) (Recommendation 12 [67]).
- Eliminate any legislation that has discriminatory effects against women, implement the relevant recommendations of the Committee on the Elimination of Discrimination against Women, and introduce a gender specific dimension to the anti-discrimination provision of the *Constitution* (Switzerland); continue to strengthen measures to promote the equal rights of women and to counter discrimination (Philippines); adopt a law that prohibits discrimination on the basis of gender (Netherlands); amend the *Constitution* to include freedom from discrimination on the grounds of sex (New Zealand); incorporate in its legislation, at all levels, including at the level of the *Constitution*, provisions banning discrimination on the grounds of sex and gender (Mexico); stay strongly committed to the topic and further discussion leading to an amendment of the *Constitution* prohibiting discrimination based on sex and gender (Germany); establish equality between the sexes in the *Constitution* and take all necessary measures to counter gender-based discrimination (France) (Recommendation 6 [68]).
- Continue cooperation with OHCHR with a view to making necessary improvements in the fields of legislative reform on the punishment of sexual abuse of children, and family laws, and the establishment of a national human rights commission or a human rights office (Turkey) (Recommendation 3 [68]).
- Penalise rape, whoever is responsible, including marital rape (France) (Recommendation 7 [68]).
- Reform the Penal Code to cover offences such as sexual abuse against minors and eliminate corporal punishment (Mexico) (Recommendation 8 [68]).

53 Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Tuvalu*, 10<sup>th</sup> sess, UN Doc A/HRC/10/84 (9 January 2009) 16-19 [67-68].



CHAPTER 3

# The legislative purpose

- 3.1 The long title and/or the statement of purpose of a bill provides a brief overview of the reasons for the proposed legislative framework. In order to capture the essence of a comprehensive and integrated approach when drafting these two key legislative clauses, this chapter focuses on how best these two provisions can be drafted, drawing from the legislative examples of other jurisdictions. A number of selected Pacific and international examples of the statement of purpose on the law on VAW are outlined below.

### Options for reform

#### Reform in the Pacific

**Example:** Vanuatu – *Family Protection Act No.28 of 2008*

An Act to provide for an offence of domestic violence and family protection orders in cases of domestic violence, and for related purposes.

1. Purpose:

(1) The purpose of this Act is:

- (a) to preserve and promote harmonious family relationships; and
- (b) to prevent domestic violence in all levels of society in Vanuatu.

(2) This Act is based on traditional values of Vanuatu and on Christian principles and:

- (a) recognises that domestic violence of any kind is not acceptable behaviour; and
- (b) ensures there is effective legal protection for the victims of domestic violence; and
- (c) provides for punishment of all persons who commit acts of domestic violence.

**Example:** Republic of the Marshall Islands - *Domestic Violence Prevention and Protection Act 2011* s 2

The purposes of this Act are:

- (1) to prevent violence between family members and others who are in domestic relationships;
- (2) to recognise that domestic violence of any kind is not acceptable in the Republic;
- (3) to ensure investigation, prosecution and punishment of persons who commit domestic violence.

#### Reform internationally

**Example:** Costa Rica - *Criminalisation of Violence against Women Act 2007* art 1.

This Act is designed to protect the rights of victims of violence and to punish forms of physical, psychological, sexual and patrimonial violence against adult women, as discriminatory practices based on gender, and specifically in a relationship of marriage, de facto union, declared or not, in compliance with the obligations undertaken by the State under the Convention on the Elimination of All Forms of Discrimination against Women...

**Example:** New Zealand - *Domestic Violence Act 1995* s 5.

An Act to provide greater protection from domestic violence.

5. Object

- (1) The object of this Act is to reduce and prevent violence in domestic relationships by:
  - (a) recognising that domestic violence, in all its forms, is unacceptable behaviour; and
  - (b) ensuring that, where domestic violence occurs, there is effective legal protection for its victims.
- (2) This Act aims to achieve its object by—
  - (a) empowering the court to make certain orders to protect victims of domestic violence;
  - (b) ensuring that access to the court is as speedy, inexpensive, and simple as is consistent with justice;
  - (c) providing, for persons who are victims of domestic violence, appropriate programmes;
  - (d) requiring respondents and associated respondents to attend programmes that have the primary objective of stopping or preventing domestic violence;
  - (e) providing more effective sanctions and enforcement in the event that a protection order is breached.
- (3) Any court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1).

**Example:** Brazil - *The Maria da Penha Law 2006* art 2.

All women, regardless of class, race, ethnicity, sexual orientation, income, culture, educational level, age and religion, enjoy the basic rights inherent to the human person, and are ensured the opportunities and facilities to live without violence, preserve their physical and mental health and their modern intellectual and social improvement.

- 3.2 The preamble in the *Maria da Penha Law 2006* of Brazil and the preamble to Costa Rica's *Criminalisation of Violence against Women Act 2007* are examples of a comprehensive approach to drafting VAW legislation. Costa Rica's legislative preamble starts from the premise that all forms of violence (e.g. physical, psychological, sexual, patrimonial) against women is gender based and therefore inherently discriminatory. The Act also mandates punishment for those who inflict such forms of violence. The *Maria da Penha Law 2006* focuses on the well-being of women: 'to live without violence, preserve their physical and mental health, and their moral, intellectual and social improvement'.<sup>54</sup> The New Zealand *Domestic Violence Act 1995* and the Vanuatu *Family Protection Act 2008* focus on criminalising acts of domestic violence and protection orders.
- 3.3 The *Handbook for legislation on violence against women* provides that the purpose of the framework law is to: 'prevent violence against women, punish perpetrators, and ensure the rights of survivors of violence against women everywhere'.<sup>55</sup>


**Key recommendations and drafting instructions for Tuvalu**

In the preamble, legislation should:

- acknowledge that VAW is a form of gender-based violence, a form of discrimination, a manifestation of historically unequal power between men and women, and a violation of women's human rights;
- acknowledge that VAW also includes violence against children, both girls and boys;
- provide that no custom, tradition, culture or religion may be invoked to justify violence against women;
- define discrimination against women as any distinction, exclusion, restriction, practice or policy based on sex that impairs their rights.

<sup>54</sup> *Maria da Penha Law 2006* art 2.

<sup>55</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5, 57.



CHAPTER 4

# Definitions of domestic violence

## Inclusive definition of domestic violence

4.1 Currently, Tuvalu does not have comprehensive legislation that addresses domestic violence, although the *Police Powers and Duties Act 2009* deals with those aspects of domestic violence that apply to police officers. It is therefore important that the types of VAW that will be covered by the proposed comprehensive law be clearly defined. VAW is a term used to refer to all types of violent behaviour (e.g. sexual harassment, stalking) and acts (e.g. sexual assault, physical assault, such as kicking, slapping and punching) used, inflicted, and committed against women. It may also include stranger violence. As stated in Chapter 1, the UN General Assembly defines VAW as:

any act of gender based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>56</sup>

4.2 Domestic violence is a term used to describe a pattern of behaviour that includes the use or threat of violence and intimidation for the purpose of gaining power and control over another person, and is commonly used to describe violence in marital partner relationships. Today the interpretation of the term has been broadened to include intimate partner violence (whether the parties are married or not). Domestic violence is characterised by physical, sexual, emotional, verbal, psychological and economic abuse, isolation and control, over an intimate partner. Domestic violence does not generally include child abuse, elder or sibling violence, which are forms of family violence. Family violence is a term used to describe violence inflicted, committed or used by a family member upon another in the same household. In the extended family arrangements in the Pacific, a person's violent act against an extended family member, whether they physically live in the same household or not, can also be described as family violence.

4.3 The UN General Assembly includes psychological and economic violence within the definition of VAW. Despite the overwhelming presence of psychological and economic violence in Tuvalu, only psychological violence is recognised in s 32 of the *Police Powers and Duties Act 2009*. The types of violence described in the *Tuvalu Penal Code (Cap 8)* are limited to physical assaults, in varying degrees, sexual assaults and violence. Part of the reason for this is inconsistencies in definition in the area of non-physical violence and difficulties defining it in law. Psychological violence, for example, can include threats, degradation through verbal abuse in private or public, isolating survivors from their family, controlling contact with others and creating a constant fear of the perpetrator. Therefore, it is important to clarify in law, what acts and types of psychological violence will be used as the basis for defining an offence of psychological violence.

4.4 Economic abuse also needs to be clearly defined in law and can include acts such as the denial of funds, refusal to contribute financially, denial of food and basic needs, and controlling access to health care and employment.<sup>57</sup> Economic abuse has far reaching consequences and is the leading cause of poverty and homelessness for women and children. When women and children flee the abusive relationship, they are often forced to return (as they have no money and employable skills) to live with the abuser, exchanging the risks to their lives and well-being, for shelter and basic necessities.

4.5 Psychological and economic violence are generally not divorced from physical or sexual violence and are not readily apparent when survivors report violence to authorities. The approach to physical or sexual violence, where only the most recent crimes are considered, ignores the entire history of abuse and violence suffered by the survivor.

### The existing law

4.6 Section 32 of the *Police Powers and Duties Act 2009* provides for definitions of 'domestic relationship' and 'domestic violence'. However, like the *Vanuatu Family Protection Act 2008*, economic abuse is notably absent from the definition of 'domestic violence' under the police powers act.

### Options for reform

4.7 As well as the *Declaration on the Elimination of Violence against Women* definition of VAW, the General Assembly has recognised that domestic violence can 'include economic deprivation and isolation, and that such conduct may cause imminent harm to the safety, health and well-being of women'.<sup>58</sup> As a more gender sensitive and nuanced understanding of the nature of domestic violence has emerged, a number of countries have enacted and/or amended their legislation to adopt definitions that include some or all of the following types of violence: physical, sexual, emotional, psychological, patrimonial, property and economic.<sup>59</sup>

<sup>56</sup> *Declaration on the Elimination of Violence against Women*, above n 14, art 1.

<sup>57</sup> UNICEF, 'Domestic violence against women and girls' (2000) 6 *Innocenti Digest* 32.

<sup>58</sup> *Elimination of domestic violence against women*, GA Res 58/147, UN GAOR, 58<sup>th</sup> sess, 77<sup>th</sup> plen mtg, Agenda item 110, UN Doc A/Res/58/147 (22 December 2003) para 1(e).

<sup>59</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

## Reform in the Pacific

4.8 Every jurisdiction defines domestic violence differently. Clarity of a domestic violence definition is essential for such a law to be effective. The Samoa *Family Safety Bill 2011*, used as an example below was recently passed by Parliament.

**Example:** Vanuatu - *Family Protection Act 2008* s 4

### Meaning of domestic violence

- (1) A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:
  - (a) assaults the family member (whether or not there is evidence of a physical injury);
  - (b) psychologically abuses, harasses or intimidates the family member;
  - (c) sexually abuses the family member;
  - (d) stalks the family member so as to cause him or her apprehension or fear;
  - (e) behaves in an indecent or offensive manner to the family member;
  - (f) damages or causes damage to the family member's property;
  - (g) threatens to do any of the acts in paragraphs (a) to (f).
- (2) Without limiting paragraph (1)(d), a person may stalk another person by:
  - (a) following the person; or
  - (b) watching the person; or
  - (c) loitering outside premises where the person lives, works or frequents for the purposes of any social or leisure activity; or
  - (d) making persistent telephone calls to the person or to premises where the person lives or works.
- (3) For the purposes of this Act, if a person (in this subsection called "the instigator") counsels or procures another person to commit an act that, if done by the instigator, would be an act of domestic violence, then the instigator is taken to have committed the act.
- (4) To avoid doubt:
  - (a) a single act may amount to an act of domestic violence; and
  - (b) a number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts when viewed in isolation may appear to be minor or trivial.

**Example:** Samoa – *Family Safety Bill 2011* cl 2 (recently passed by parliament).

"domestic violence" means:

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) intimidation;
- (e) harassment;
- (f) stalking;
- (g) any other controlling or abusive behaviour towards a complainant where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the complainant.

## Reform options internationally

- 4.9 Chapter II of the *Protection of Women from Violence Act 2005* (India) includes physical, sexual, verbal, emotional and economic abuse (see below) in its definition of domestic violence. Article 5 of the *Maria da Penha Law 2006* (Brazil) states that: 'domestic and family violence against women is defined as any action or omission based on gender that causes the woman's death, injury, physical, sexual or psychological suffering and moral or patrimonial damage'.<sup>60</sup>

**Example:** India – *Protection of Women from Domestic Violence Act 2005* s 3(a)(iv)

(iv) economic abuse includes:

- (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan*, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
- (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and
- (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

**Explanation II:** For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes domestic violence under this section, the overall facts and circumstances of the case shall be taken into consideration.

## Key recommendations and drafting instructions for Tuvalu

Legislation should:

- include a broad and comprehensive definition of domestic violence that includes physical, sexual, psychological and economic violence as well as sexual harassment and stalking;
- expand the current definition of domestic violence under the *Police Powers and Duties Act 2009* to include economic violence and link it to the new comprehensive stand-alone domestic violence legislation.

## Domestic violence as a specific offence

- 4.10 The *Tuvalu demographic and health survey* has shown that the forms of violence committed against women are far wider than physical and sexual assault, and therefore the general assault laws are insufficient to cover the range of violence women suffer. In addition, a number of problems identified pose difficulties for survivors of violence, and for the courts in Tuvalu to deal urgently and efficiently with cases of domestic violence.
- 4.11 Firstly, general sexual and physical assault laws do not take into account the special nature of intimate partner violence, the various ways in which violence can be administered, nor does the law treat domestic violence any differently from other forms of violence. Secondly, under s 32 of the *Magistrates' Courts Ordinance* (Cap 2), a magistrates' court may promote reconciliation in criminal cases, and encourage and facilitate settlement for common assault, or offences of a personal or private nature. If the offence is a felony (serious offence) and the offence is inflicted under aggravating circumstances, the court may order the proceedings to be stayed or terminated on the payment of compensation or on other terms approved by the court.<sup>61</sup>

60 *Maria da Penha Law 2006* art 5.

61 *Magistrates' Courts Ordinance* (Cap 2) s 32(1).



- 4.12 In civil cases, a magistrates' court and officers: 'shall, as far as there is proper opportunity, promote reconciliation amongst persons subject to its jurisdiction and encourage and facilitate settlement in an amicable way and without recourse to litigation of matters in difference between them'.<sup>62</sup> Where there are civil proceedings pending, a magistrates' court and officers may promote reconciliation amongst the parties and encourage and facilitate an amicable settlement.<sup>63</sup>

*The existing law*

- 4.13 Tuvalu, like the majority of PICTs, prosecutes domestic violence under general assault laws, for example under s 237 of the *Tuvalu Penal Code* which states that: 'any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, shall be liable to imprisonment for 6 months.'<sup>64</sup> If the assault is more serious, then it may be prosecuted as an assault causing actual bodily harm. Section 238 states that: 'any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour, and shall be liable to imprisonment for 5 years.'<sup>65</sup>
- 4.14 Simple assault cases that do not involve bodily harm, such as lifting a hand in a threatening manner to strike but not physically injuring the person, attract a lesser penalty than an assault that causes bodily injury. The potential penalties are therefore in a maximum range of six months to five years, with the successful prosecution of the offence being to some extent dependent on the degree of harm to the victim. In reality, anecdotal evidence suggests that the vast majority of domestic violence cases that are prosecuted are under s 237 of the *Tuvalu Penal Code*, regardless of the degree of harm. The consequences are that domestic violence is treated lightly and sentences are grossly ineffective and inadequate. The jurisdiction of the magistrates' courts to hear physical assault cases is limited to offences where the maximum penalty is five years' imprisonment.
- 4.15 Section 32 of the *Police Powers and Duties Act 2009*, defines violence that occurs within a domestic relationship as follows.

**Extract:** Tuvalu – *Police Powers and Duties Act 2009* s 32.

'Violence' means:

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

- 4.16 Cultural acceptance of domestic violence necessitates the establishment of specific offences for domestic violence with penalties equal to that of general crimes set out in the penal code, ranging from a zero or a minimum sentence (in exceptional circumstances, e.g. first offender) to a maximum of life imprisonment for causing death as a result of domestic violence. It is not recommended to have a specific domestic violence offence with only a minor penalty, as it fails to recognise the serious nature of domestic violence offences. Therefore, a range of offences must be provided for within the legislation, complemented by strong penalties. The Kiribati case of *Toakarawa v The Republic of Kiribati*<sup>66</sup> illustrates the recognition by the court that domestic violence will not be condoned, and that the culture of silence surrounding the issue only perpetuates abuse and violence.

62 *Magistrates' Courts Ordinance* s 32(2).

63 *Magistrates' Courts Ordinance* s 32(3).

64 *Tuvalu Penal Code* s 237.

65 *Tuvalu Penal Code* s 238.

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

**Summary of Case:** Kiribati - *Toakarawa v The Republic of Kiribati*

T was a 22 year old married man whose wife was four months pregnant. While he was intoxicated, T beat his wife, dragged her by the hair and bit her nose, cheek, lips and fingers of both hands. Neighbours attempted to intervene, but were unsuccessful. The injuries to T's wife were permanent, including the loss of her upper and lower lips, exposing her teeth. T argued that he was so intoxicated that he did not know what he was doing, that he had apologised for his actions, and had later reconciled with his wife.

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

### Options for reform

4.17 Vanuatu, India the Philippines and many other countries have opted for a specific domestic violence offence. This recognises the need for placing domestic violence high on the criminal justice agenda, reflecting the seriousness and gender specificity of the crime. The creation of a specific domestic violence offence conforms to the recommendations of the Committee on the Elimination of Discrimination against Women and the Human Rights Council.

### Reform in the Pacific

**Example:** Vanuatu - *Family Protection Act 2008* s 10.

#### Domestic violence offence:

- (1) A person who commits an act of domestic violence is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 5 years or a fine not exceeding 100,000 Vatu, or both.
- (2) It is not a defence to an offence under subsection (1) that the defendant has paid an amount of money or given other valuable consideration in relation to his or her custom marriage to the complainant.
- (3) An offence under subsection (1) is in addition to and not in substitution for any other offence constituted by an act of domestic violence.
- (4) If a person (in this subsection called 'the instigator') counsels or procures another person to commit an act that, if done by the instigator, would be an act of domestic violence, then the instigator is taken to have committed the act and subsection (1) applies in relation to the instigator.
- (5) If a person is convicted of an offence against this section, a court may, in determining the penalty to be imposed on the person, take into account any compensation or reparation made or due by the person under custom.
- (6) If under custom such compensation or reparation has not been determined and a court is satisfied that a determination is likely to be made without undue delay, the court may postpone sentencing pending the determination.

## Reform internationally

**Example:** India – *Protection of Women from Domestic Violence Act 2005* s 3

Definition of domestic violence – For the purposes of this Act:

Any act, omission or commission or conduct of the respondent shall constitute domestic violence in the case it:

- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
- (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

**Example:** Philippines - *Anti-Violence Against Women and Their Children Act 2004* s 3

Definition of Terms - As used in this Act,

- (a) 'Violence against women and their children' refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty.

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- establish a specific domestic violence offence with commensurate sentencing, equivalent to a range of criminal assaults, with a minimum sentence to a maximum sentence of life imprisonment if death results;
- ensure that reconciliation in domestic violence cases not be used to mitigate the sentence of the perpetrator or reduce charges against the perpetrator. Amendments to s 32 of the *Magistrates' Court Ordinance* may need to be undertaken to ensure the legislation is compliant with this recommendation.

## Definition of victims

4.18 The definition of a victim under a domestic violence offence is a contentious issue. Laws on domestic violence have often only applied to married couples, meaning that other family members as well as common law partners have not been recognised. Violence against women and children in custody of law enforcement agencies or detained by government military personnel in times of crisis, is also generally not covered by VAW laws. The *UN Declaration on the Elimination of Violence against Women* provides in article 4(c) that due diligence must be exercised in order; 'to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons'.

### The existing law

4.19 Currently, Section 32 of the *Police Powers and Duties Act 2009* defines a domestic relationship.

**Extract:** Tuvalu – *Police Powers and Duties Act 2009* s 32.

'Domestic relationship' means a relationship between 2 persons:

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

### Options for reform

- 4.20 Over time, there has been an expansion of the scope of domestic relationships that are covered under VAW legislation to include other complainants of domestic violence, such as intimate partners who are not married or in a cohabiting relationship, persons in family relationships, including grandparents, aunts, uncles, and cousins, and members of the same household, including domestic workers.<sup>67</sup>

### Reform in the Pacific:

**Example:** Vanuatu – *Family Protection Act 2008* s 3, s 5

#### 3. Meaning of family member

Each of the following is a member of a person's family:

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

#### 5. Meaning of spouse

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

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

**Example:** Samoa – *Family Safety Bill 2011* cl 2 (recently passed by parliament).

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

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

67 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

## Reform internationally

**Example:** New Zealand – *Domestic Violence Act 1995*

### 4. Meaning of domestic relationship

1) For the purposes of this Act, a person is in a domestic relationship with another person if the person:

- (a) is a spouse or partner of the other person; or
- (b) is a family member of the other person; or
- (c) ordinarily shares a household with the other person; or
- (d) has a close personal relationship with the other person.

- 4.21 The Nigerian *Violence against Persons (Prohibition) Bill*, if enacted, would define a domestic relationship broadly, so as to include spouses, former spouses, persons in an engagement, dating or customary relationship, parents of a child, members of the family, or residents of the same household. The Indonesian *Law Regarding the Elimination of Violence in the Household 2004* extends to domestic workers. The Spanish *Organic Act on Integrated Protection Measures against Gender Violence 2004* defines domestic relationships broadly to include: relationships with a spouse or former spouse; non-marital relationships; non-cohabiting relationships; romantic and sexual relationships; and relationships between family or household members, such as ascendants, descendants, persons related by blood, persons residing together, and minors or disabled individuals under guardianship or custody.<sup>68</sup>
- 4.22 Article 5 of the Brazilian *Maria da Penha Law 2006* includes violence committed in the 'domestic unit', defined as the permanent space shared by people, with or without family ties. The Mexican *Law on Access of Women to a life Free of Violence 2007* makes provision in chapter 6 for protection orders to be available to survivors of any form of violence defined in the Act including: violence in the family; violence in the workplace or educational settings; violence in the community; institutional violence; and femicide.<sup>69</sup>


### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- apply to members, whether related or not, living in the same household, including domestic workers; and
- bind the state.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.




CHAPTER 5

# Sexual assault, trafficking and sexual harassment

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CHAPTER 5A

## Definitions

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- 5.1 Sexual assault is a non-consensual sexual act where the severity and force of the act causes injury or death to the victim. Sexual assaults, especially rape, are crimes of violence and remain seriously under-reported in Tuvalu, as in many Pacific countries. The *Tuvalu demographic and health survey* reported physical partner violence as the most prevalent at 33 per cent, followed by sexual partner violence at 10 per cent.<sup>70</sup> The types of sexual violence reported include being physically forced to have sexual intercourse and marital rape.
- 5.2 The treatment of women who have been raped has been the subject of much criticism as women are commonly blamed for being raped. Gaining a conviction for rape has also been difficult as the victim's character, credibility and proof of resistance to being raped, has been scrutinised. The requirement of corroborative evidence and the marital rape exemption are some of the challenges that women face within the criminal justice system.
- 5.3 Many women who are victims of sexual assault live in constant fear of being attacked again and feel powerless against their attackers. The situation is arguably worse in the Pacific with its small populations and communities, where the perpetrator and the survivor may live in the same isolated village. Survivors also face other problems, such as removal from the educational system and a lack of access to fundamental health care. In some communities, young girls do not know that they have the right to refuse unwanted sexual advances or that rape is a criminal offence. Sexual assault is also complicated by cultural attitudes that make excuses for perpetrators. In some cases, forced marriage of a survivor of rape to her perpetrator is seen as a solution to the shame endured by families of the parties involved.

#### **Inclusive definition of sexual assault**

- 5.4 Rape has been the main form of sexual assault addressed by criminal law and the definition of rape focuses on proof of penetration. These definitions do not take into account the full range of sexual violations experienced by survivors. Sexual assault encompasses a wide variety of acts ranging from rape to unwanted sexual contact (including touching). If legislation only includes rape, it neglects other violations. Severity of sexual assaults also varies in the use of force. Sexual assault by definition is an act performed without consent, but if the act is forced by the threat or use of a deadly weapon, the crime is more severe.<sup>71</sup>
- 5.5 Rape itself can include different acts, ranging from penile penetration to penetration by foreign objects like bottles, sticks, body parts and can include penetration of different orifices including, for example, forced oral sex. If sexual assault is not graded by the severity of the incident, then victims do not have sufficient protection. Similarly, if the definition of rape does not include penetration by foreign objects, other body parts or penetration of different orifices, then it is not comprehensive.

#### *The existing law*

- 5.6 *The Constitution of Tuvalu* sets out a number of core fundamental rights that can affect the treatment of women subjected to violence. The *Bill of Rights* in the constitution sets out in ss 16–28 the fundamental rights and freedoms of individuals, which include the protection of the right to life and protection from inhuman treatment. The *Bill of Rights* specifically guarantees protection from torture and inhuman, degrading or other ill-treatment, and the definitions are wide enough to cover all kinds of sexual violence and rape by any method. The constitutional framework provided by s 19 is far broader than the provisions on sexual assaults that are currently available in the *Tuvalu Penal Code*. In addition, s 19 is broad enough to cover inhuman treatment of women by family members and strangers, as well as state officials.
- 5.7 The sexual offences under pt XVI of the *Tuvalu Penal Code* fall into two broad categories: those involving sexual activity between a woman or girl and the perpetrator; and those facilitating sexual activity between one person and another through abduction and/or procurement. The crime of rape as set out in s 128 of the *Tuvalu Penal Code* is gender specific and states:

Any person who has unlawful sexual intercourse with a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.<sup>72</sup>

In addition, s 128 of the *Tuvalu Penal Code* limits rape to penile assault and does not cover the range of ways in which women are sexually assaulted such as by forced anal penetration, forced oral sex and use of objects.

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70 Secretariat of the Pacific Community and Macro International Inc., above n 1, 278.

71 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

72 *Tuvalu Penal Code* s 128.

- 5.8 The *Tuvalu Penal Code* does have grades of sexual assault. Rape is a crime punishable by life in prison,<sup>73</sup> while attempted rape is punishable by seven years in prison.<sup>74</sup> Tuvalu also has a crime of indecent assaults on females, and a crime of intending to insult modesty, punishable by five years and one year respectively.<sup>75</sup> The crime of defiling a girl under thirteen is punishable by life imprisonment.<sup>76</sup> Tuvalu does not define consent, per se, but does state that there is no consent under the following coercive circumstances: ‘if [consent is] obtained by force, threats, intimidation, fear of bodily harm, or false representations’.<sup>77</sup>
- 5.9 All serious sexual offence cases are heard in the high court. Summary offences are heard and determined in the subordinate courts and are prosecuted by police officers. Serious offences that fall under the jurisdiction of the high court are prosecuted by the Attorney-General or Crown Counsel. In recent years, it appears there has been an increase in serious crime in Tuvalu, with a number of sexual offences being brought for prosecution in the high court.<sup>78</sup>
- 5.10 The island courts, the magistrates’ and senior magistrates’ courts all have jurisdiction to hear criminal cases. The criminal jurisdiction of the island courts includes offences of a maximum penalty of AUD 250 and six months’ imprisonment.<sup>79</sup> The magistrates’ courts have criminal jurisdiction over offences where the maximum penalty is one year imprisonment and a fine of AUD 200.<sup>80</sup> The senior magistrates’ court may not impose a sentence exceeding 14 years’ imprisonment.<sup>81</sup> The Chief Justice has the power under the *Magistrates’ Court Act* to invest the lower courts with jurisdiction to try summarily any criminal offence that would be beyond its jurisdiction. Both the senior magistrate’s and the magistrates’ courts have jurisdiction to hear cases of sexual assault, and women can seek urgent orders from these courts. In order to offer a coordinated, efficient and comprehensive support to victims of violence, assigning jurisdiction to the relevant courts and to authorised persons in rural centres and outer islands to issue interim/temporary protection orders would enable the courts to immediately respond to a broad range of domestic violence issues. An example of this arrangement is found in Vanuatu in s 17(4) of *The Family Protection Act 2008*, where authorised persons may make temporary protection orders.

### Options for reform

- 5.11 Many countries have reformed their criminal law to include a broad definition of sexual assault, which encompasses the offence formerly classified as rape, and is not dependent on proof of penetration. Definitions of rape and sexual assault have evolved over time, from requiring use of force or violence, to requiring a lack of consent.<sup>82</sup>

### Reform in the Pacific

- 5.12 Republic of the Marshall Islands, Papua New Guinea and the Federated States of Micronesia (Federated States of Micronesia)<sup>83</sup> have broadened the definition of sexual assault to include rape by other objects and through other orifices.

**Example:** Republic of the Marshall Islands - *Republic of the Marshall Islands Criminal Code 1966* s 213.

‘Sexual penetration’ means vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person’s body or of any object into the genital or anal opening of another person’s body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offence.

73 *Tuvalu Penal Code* s 129.

74 *Tuvalu Penal Code* s 130.

75 *Tuvalu Penal Code* s 133(1); 133(3)

76 *Tuvalu Penal Code* s 134(1).

77 *Tuvalu Penal Code* s 128.

78 Government of Tuvalu, *PILON Report of the Office of the Attorney-General - Tuvalu (2009)* 5.

79 *Island Courts Act (Cap 7.32, 2008 rev ed)* s 6.

80 *Magistrates’ Courts Ordinance* s 25(2).

81 *Magistrates’ Courts Ordinance* s 25(1)(a)(i).

82 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

83 *Kosrae State Code 1997* (Title 13) s 13.311; *Chuuk State Code 2001* (Title 12, Part 1) s 205; *Pohnpei State Code 2006* (Title 61) s 5.141 (4); *Yap State Code 2000* (Title 11) s 201(f).



**Example:** Papua New Guinea - *Criminal Code (Sexual Offences and Crimes against Children) Act 2002* s 6.

6. Sexual Penetration

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

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

*Reform internationally*

- 5.13 Article 102 of the *Turkish Penal Code 2004* defines sexual assault as an offence of violating the bodily integrity of another person by means of sexual conduct. It defines rape as the offence of violating the bodily integrity of another person, including marriage partner, by means of inserting an organ or another object into the body.<sup>84</sup>
- 5.14 Canada's *Criminal Code 1985* provides for the graded offences of sexual assault,<sup>85</sup> sexual assault with a weapon, threats to a third party, or causing bodily harm,<sup>86</sup> and aggravated sexual assault, wherein the perpetrator wounds, maims, disfigures or endangers the life of the complainant.<sup>87</sup> For example, Canada's *Criminal Code 1985* contains a positive consent standard which states that consent means, for the purposes of this section, the voluntary agreement of the complainant to engage in the sexual activity in question.<sup>88</sup>
- 5.15 The *Sexual Offences Act 2004* of the United Kingdom strengthened and modernised the law on sexual offences, and improved preventive measures and the protection of individuals from sexual offenders. Three key provisions in the Act are a statutory definition of consent, a test of reasonable belief in consent, and a set of evidentiary and conclusive presumptions about consent and the defendant's belief in consent.<sup>89</sup>
- 5.16 Experience has shown that definitions of sexual assault based on a lack of consent may, in practice, result in the secondary victimisation of the complainant by forcing the prosecution to prove beyond reasonable doubt that the complainant did not consent. In an attempt to avoid such secondary victimisation, some countries have developed definitions of rape which rely on the existence of certain circumstances, rather than demonstrating a lack of consent. For example, the definition of rape under Namibia's *Combating of Rape Act 2000* requires the existence of certain 'coercive circumstances', instead of a proof of lack of consent. A similar definition has been adopted in the Lesotho *Sexual Offences Act 2003*. In instances where a definition based on 'coercive circumstances' is adopted, it is important to ensure that the circumstances listed are expansive, and do not revert to an emphasis on use of force or violence.<sup>90</sup>

84 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

85 *Criminal Code 1985* s 271.

86 *Criminal Code 1985* s 272.

87 *Criminal Code 1985* s 273.

88 *Criminal Code 1985* s 273.1(1).

89 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

90 *Ibid.*

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- define sexual assault as a violation of bodily integrity and sexual autonomy;
- include a variety of forms of unwanted sexual contact not confined to penile/vaginal/anal penetration and including assault with objects and other body parts;
- provide for aggravating circumstances including, but not limited to, the age and gender of the survivor, the relationship of the perpetrator and survivor, the use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim;
- remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimise secondary victimisation of the complainant in proceedings by enacting a definition of sexual assault that either:
  - > requires the existence of 'unequivocal and voluntary agreement' and requiring proof by the accused of steps taken to ascertain whether the complainant was consenting; or
  - > requires that the act take place in 'coercive circumstances' and include a broad range of coercive circumstances.

### Rape as a crime of morality

5.17 Under the British system of common law inherited by Tuvalu and other PICTs, sexual violence has often been addressed in the problematic framework of morality, public decency and honour, and as a crime against the family or society, rather than a violation of an individual's bodily integrity.<sup>91</sup>

#### Options for reform

##### Reform internationally

5.18 Positive progress has been made internationally in addressing morality in sexual offences. A number of Latin American countries, including Argentina, Bolivia, Brazil and Ecuador, have revised their penal codes to reflect sexual violence as a violation of the complainant, instead of as a threat to her 'honour' and 'morality.' The reform of the Turkish *Penal Code 2004* defined sexual violations as 'crimes against the individual' instead of 'crimes against moral customs and society' and eliminated all references to 'morality', 'chastity' and 'honour', as did reforms to the Swedish *Penal Code* in 1998.<sup>92</sup>

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- replace existing offences of rape and indecent assaults with a broad offence of sexual assault graded on harm.

### Marital rape

5.19 Historically, rape was not criminalised when committed within the context of an intimate relationship. Many countries had marital rape exemptions where rape could not be charged if the parties were married. Even in states where there is not a statutory rape exemption, rape is often not prosecuted if the parties are married. In cases where non-consensual sex occurs in the context of a relationship between intimate partners, survivors are not protected.

91 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

92 Ibid.

### The existing law

- 5.20 The Tuvalu law does not include a marital rape exemption in s 128 of the *Tuvalu Penal Code*, but the code does not specify that rape includes non-consensual sex by intimate partners, married or unmarried. Most PICTs do not have specific laws covering prosecutions for marital rape, with the result that most rapes within marriage or after separation are not prosecuted. A few countries allow for prosecutions in limited circumstances. Cook Islands,<sup>93</sup> Niue,<sup>94</sup> and Samoa<sup>95</sup> have legislation stating that marital rape is illegal only if the parties are separated, divorced or where consent has been withdrawn through the process of law.

### Options for reform

- 5.21 Integral to the reform agenda on rape laws is the inclusion of marital rape and this must be complemented by appropriate amendments to the national evidence laws.

### Reform in the Pacific

- 5.22 In 2003, Papua New Guinea removed marital immunity in their legislation that had previously prevented husbands from being prosecuted on a charge of rape.<sup>96</sup> The States of Chuuk and Kosrae in Federated States of Micronesia also permit the prosecution of husbands statutorily.<sup>97</sup>

### Reform internationally

- 5.23 While the concept of rape within intimate relationships remains highly problematic in many countries, an increasing number of countries are removing exemptions for rape and sexual assault within an intimate relationship from their penal codes and/or enacting specific provisions to criminalise it. Lesotho, Namibia, South Africa and Swaziland have all criminalised marital rape. The Namibian *Combating of Rape Act 2000* does so by stating 'no marriage or other relationship shall constitute a defence to a charge of rape under this Act'. In 2002, the Supreme Court of Nepal in the case of *Forum for Women, Law and Development v His Majesty's Government/Nepal*<sup>98</sup> found the marital rape exemption to be unconstitutional and contrary to the *International Covenant on Civil and Political Rights* and *CEDAW*.<sup>99</sup>

#### Key recommendations and drafting instructions for Tuvalu

##### Legislation should:

- specifically criminalise sexual assault within a marriage or marriage-like relationship (i.e. marital rape);
- provide that sexual assault provisions apply 'irrespective of the nature of the relationship between the perpetrator and the complainant';
- state that no marriage or other relationship shall constitute a defence to a charge of sexual assault;
- remove marital immunity provisions by legislation.

### Trafficking in persons

- 5.24 Human trafficking is another form of VAW and children, and a violation of human rights. Persons trafficked are subjected to rape, assault and battery, and are forced to have sex with others against their will. Women and children trafficked suffer serious economic, social, educational and health risks, including HIV and AIDS. There are documented problems of trafficking both internally and externally within PICTs. Children, youth (both girls and boys) and women are all vulnerable to sexual exploitation. Poverty, lack of employment, lack of education, discrimination, status, and a lack of comprehensive protective legislation, contribute to their vulnerability to trafficking, prostitution, rape, early child bearing and sexual violence.<sup>100</sup>

93 *Crimes Act 1969* s 141(3).

94 *Niue Act 1966* s 162(4).

95 *Crimes Act 1961* s 47(3).

96 *Criminal Code (Sexual Offences and Crimes against Children) Act 2002*.

97 *Kosrae State Code 1997* (Title 13) s 13.311; *Chuuk State Code 2001* (Title 12, Part 1) s 205.

98 *Forum for Women, Law and Development v His Majesty's Government/Nepal* (2002).

99 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

100 UNICEF, UNESCAP and ECPAT, *Commercial Sexual Exploitation of Children (CSEC) and Child Sexual Abuse (CSA) in the Pacific: A Regional Report* (UNICEF, Suva, 2006).

- 5.25 The Pacific Immigration Director's Conference in Port Vila, Vanuatu in October 2010 acknowledged the increase in people smuggling, human trafficking, irregular migration and movement of people. The Conference agreed that:

Legal frameworks must criminalise people smuggling and trafficking in persons, but must also make provision for protection of asylum seekers, refugees, smuggled migrants and victims of trafficking in line with relevant international human rights instruments, and the People Smuggling and Trafficking Protocols to the *UN Convention on Transnational Organised Crime*.<sup>101</sup>

- 5.26 Concern over trafficking in women and children has been raised from time to time in both informal and formal fora. Trafficking in persons is a global issue of concern and persons, mainly women and children, are trafficked annually within nations and across borders. The *Nasonini Declaration on Regional Security* of 2002 provides a regional mandate for the Pacific Islands Forum countries to combat trafficking in persons, and urges member countries to introduce legislation and develop national strategies to combat serious crime. This includes money laundering, drug trafficking, terrorism, terrorist financing, people smuggling, and people trafficking in accordance with international requirements.<sup>102</sup>

#### *The existing law*

- 5.27 In 2009, Tuvalu passed the *Counter Terrorism and Transnational Organised Crime Act 2009* on trafficking in persons and people smuggling. Any person who engages or arranges to traffick persons commits an offence and is liable to 25 years imprisonment.<sup>103</sup> Heavy penalties of 20 years imprisonment have been established for trafficking in children,<sup>104</sup> with the consent of persons trafficked not available as a defence.<sup>105</sup> Protection for trafficked persons is provided by s 72 of the Act. The offence of people smuggling is provided in s 74 of the Act, with those guilty of such an offence liable to 20 years imprisonment.<sup>106</sup> Aggravated offences with a 15 year imprisonment penalty are also created under s 77, where persons smuggled are subjected to cruel, inhuman, degrading or exploitative treatment, including endangering the life and safety of the person(s) smuggled.
- 5.28 The *Tuvalu Penal Code* also has some provisions to protect persons from being trafficked. Procuring or attempts to procure a girl or woman under the age of 18 years to have unlawful sexual intercourse either in Tuvalu or elsewhere with another person(s), could attract a charge under s 136 (1)(a) of the *Tuvalu Penal Code*. Any person procuring or attempting to procure any woman or girl to become a common prostitute<sup>107</sup> or to leave her place of residence to become an inmate of or to frequent a brothel in Tuvalu or elsewhere<sup>108</sup> will be guilty of a misdemeanour and liable to imprisonment for two years. The consent of the victim being trafficked is not a defence.<sup>109</sup> Anyone who uses threats, or drugs, makes false representation or intimidates and overpowers the victim to enable her to have unlawful sexual intercourse with another will be guilty of a misdemeanour and liable to two years imprisonment.<sup>110</sup> A householder permitting defilement of a girl under 13 years of age<sup>111</sup> and under 15 years of age<sup>112</sup> or detaining a person in a brothel against her will,<sup>113</sup> will be guilty of an offence. A parent or person having care and custody of a minor under 15 years who disposes of her for the purposes of prostitution or unlawful sexual intercourse will also be guilty of an offence.<sup>114</sup>
- 5.29 As Tuvalu is a party to the *CRC*, the best interests of the child is the paramount consideration. There are also a number of articles in the *CRC* that require state parties to protect children from all forms of sexual exploitation, abuse, torture, sale, trafficking and the exploitative use of children in prostitution, unlawful sexual and pornographic practices.<sup>115</sup>

101 *Workshop Chair's Summary, Joint Pacific Immigration Director's Conference – Bali Process People Smuggling, Human Trafficking and Irregular Migration Workshop, Vanuatu 19-20 October, 2010*, para 6.

102 *Nasonini Declaration on Regional Security*, 33rd Pacific Islands Forum, Suva, Fiji 15-17 August, 2002.

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

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

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

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

107 *Tuvalu Penal Code* s 136(1)(b).

108 *Tuvalu Penal Code* ss 136(1)(c); 136(1)(d).

109 *Tuvalu Penal Code* s 136(2).

110 *Tuvalu Penal Code* s 137.

111 *Tuvalu Penal Code* s 138.

112 *Tuvalu Penal Code* s 139.

113 *Tuvalu Penal Code* s 140.

114 *Tuvalu Penal Code* ss 141-142.

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

### Options for reform

- 5.30 The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime* specifically targets transborder crimes against women and children and it is the first global agreement with an agreed definition on trafficking in persons.<sup>116</sup> State parties are urged to adopt necessary legislative measures to establish criminal offences in trafficking. The global agreed definition of trafficking in persons and the meaning of the use of terms in the Protocol are set out in article 3.<sup>117</sup>

**Extract:** *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime* art 3.

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of the position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) 'Child' shall mean any person under eighteen years of age.

### Reform in the Pacific

- 5.31 Palau's legislature enacted the *Anti-Trafficking and Smuggling Act 2005* which criminalises people smuggling and people trafficking. Kiribati complies with the minimum standards through the introduction of the *Measures to Combat Terrorism and Transnational Organised Crime Act 2005*. Additionally, the Federated States of Micronesia has enacted the *Trafficking in Persons Act 2012*, which creates the offence of human trafficking. The Vanuatu *Counter Terrorism and Transnational Organised Crime Act 2005* also criminalises human trafficking and people smuggling. The Cook Islands *Crimes (Amendment) Act 2003* criminalises trafficking in people by means of coercion and deception.

### Reform internationally

- 5.32 The *Victim of Trafficking and Violence Protection Act 2000 (USA)* is a comprehensive Act promulgated specifically to combat trafficking in persons, especially those in the sex trade and those held in slavery or involuntary servitude, and it also reauthorises certain federal programmes to prevent VAW.
- 5.33 Malaysia's *Anti-Trafficking in Persons Act 2007* is a comprehensive legislation which establishes a Council for Anti Trafficking in Persons to monitor the implementation of the Act and creates offences in trafficking in persons, children and profiting from exploitation of trafficked persons. The consent of trafficked persons is an irrelevant consideration<sup>118</sup> and a victim's past sexual behaviour is also irrelevant.<sup>119</sup> The positions of enforcement officers<sup>120</sup> and protection officers<sup>121</sup> are established under the Act. The *Anti-Trafficking in Persons Act 2003 (Philippines)* aims to protect persons under the threat of violence and exploitation, mitigate pressures from involuntary migration and servitude, and support trafficked persons to ensure their recovery, rehabilitation and integration into society.
- 5.34 As Tuvalu complies with the minimum standards through the introduction of the *Counter Terrorism and Transnational Organised Crime Act 2009*, the following recommendations are provided as a checklist.

<sup>116</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime*, opened for signature 15 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

<sup>117</sup> *Ibid* art 3.

<sup>118</sup> *Anti Trafficking in Persons Act 2007* s 16.

<sup>119</sup> *Anti Trafficking in Persons Act 2007* s 17.

<sup>120</sup> *Anti Trafficking in Persons Act 2007* s 27.

<sup>121</sup> *Anti Trafficking in Persons Act 2007* s 43.

## Key recommendations and drafting instructions for Tuvalu

### Legislation should:

- provide for the full range of offences for trafficking in persons;
- provide for the definition of a child to mean any person under 18 years of age;
- provide that the consent of trafficked persons is irrelevant;
- provide that a victim's past sexual behaviour is irrelevant;
- make provision for the care and protection of trafficked persons;
- provide for a structure such as a council of anti trafficking in persons to monitor and make recommendations on the implementation of the legislation.

## Sexual harassment

- 5.35 There is no specific legal protection from sexual harassment in most PICTs, including Tuvalu. Available criminal remedies are not adequate to address the range of unwanted behaviour that women experience, especially in the workplace. There are, however, some countries that recognise, in criminal legislation, blatant forms of sexual harassment that involve outrageous indecent behaviour, such as deliberate exposure of genitals.
- 5.36 Sexual harassment in the workplace is a form of discrimination against women. *CEDAW* General Recommendation No. 19 states that sexual harassment includes 'such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions'.<sup>122</sup> The *Tuvalu demographic and health survey* did not canvass data on sexual harassment.

### The existing law

- 5.37 There is no legal protection from sexual harassment in Tuvalu, and there is no scope for a remedy under the *Tuvalu Penal Code*, as permitted in Solomon Islands, Fiji and Papua New Guinea. However, it is possible to argue that the law on indecent assaults on females in s 133(3) of the *Tuvalu Penal Code* could be used to protect persons from behaviour that insults the modesty of any woman or girl. Any person who utters any word, makes sounds or gestures, or exhibits any object, intending the words and sounds to be heard, and gestures and objects to be seen by any women or girl, thereby offending her modesty and intruding upon her privacy, will be liable to imprisonment for one year.<sup>123</sup>
- 5.38 However, in the case of *Katea v Niutao Kaupule & Satupa*,<sup>124</sup> the law of torts was used to establish sexual harassment suffered by the complainant as an intentional, unlawful and direct interference with her person and liberty as an assault. Under tort law, assault consists of intentionally creating in another, an apprehension of imminent physical contact. If actual physical contact occurs, the tort of battery is committed. This differs from the criminal law where 'assault' connotes an application of physical force.<sup>125</sup> The common law of England is the basis for tort law in Tuvalu.<sup>126</sup>

122 General Recommendation No. 19, *Committee on the Elimination of Discrimination against Women*, 11<sup>th</sup> sess, (1992).

123 *Tuvalu Penal Code* s 133(3).

124 *Katea v Niutao Kaupule & Satupa* [2006] TVHC 1.

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

126 Martin Tsamenyi, 'Tuvalu' in Michael Ntummy (ed), *South Pacific Islands Legal Systems*, (University of Hawaii Press, 1993) 342, 361.

### Summary of Case: Tuvalu - *Katea v Niutao Kaupule & Satupa*

There is no criminal or civil law offence for sexual harassment in Tuvalu so the plaintiff (K) sought damages for the tort of sexual assault and breach of her constitutional rights against the defendants (NK and S). The Niutao Kaupule (NK) is a traditional local island council.

K was appointed as a clerk for the NK and her superior was the second defendant (S). In 2001, S began sexually harassing K and continued to the extent that S approached K at home asking her for sexual intercourse. In 2002, K was allowed Christmas leave, only after she consented to have sexual intercourse with S upon her return. After her leave she told S that there was no possible way she would agree.

In 2003, after she had taken two days off to look after her sick daughter, K received a letter of dismissal from S for lack of competence. The defendants filed a joint statement of defence denying all the allegations of sexual harassment, but admitted to improper procedure in the termination of K's employment. The court held that there was enough evidence to prove the sexual assault and that the defendants were liable for unfair dismissal. The tort protected individuals not only from physical harm, but also from any interference with his or her person that was offensive to a person with a reasonable sense of honour and dignity. Consequently, both NK and S were liable for assault and for unlawful dismissal.

### Options for reform

- 5.39 Sexual harassment has traditionally been associated solely with labour-related offences and defined as occurring only in the context of unequal power relations (such as a boss against an employee). As a result, sexual harassment has often been dealt with in countries' labour codes and has applied only to those who have experienced such behaviour in the formal employment sector. Over time, countries have acknowledged these limitations and begun to address sexual harassment in a more comprehensive manner and in various areas of the law, such as anti-discrimination and criminal law.<sup>127</sup>

#### Reforms in the Pacific

- 5.40 The *Fiji Human Rights Commission Act 1999* makes sexual harassment a civil offence by providing that: '... sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination'.<sup>128</sup> No other PICT has specific civil laws against sexual harassment, although Papua New Guinea's code, applying only to government civil servants, provides that dismissal may result from an act of sexual harassment.<sup>129</sup> Sexual harassment lawsuits are virtually unheard of in the Pacific region.

#### Reform internationally

- 5.41 The *Anti-Discrimination Act 1977* of the State of New South Wales, Australia, provides that sexual harassment is against the law when it takes place in employment, educational institutions, receipt of goods or services, renting or attempting to rent accommodation, buying or selling land, and sporting activities. In Turkey, one of the major reforms to its *Penal Code 2004* was the criminalisation of sexual harassment. In Kenya, sexual harassment is covered in three laws: the *Sexual Offences Act 2006*,<sup>130</sup> the *Employment Act (Cap 226)*,<sup>131</sup> and the *Public Officer Ethics Act 2003*.<sup>132</sup> In the case of *Vishaka v State of Rajasthan & Ors*,<sup>133</sup> the Supreme Court of India applied articles 11, 22, and 23 of CEDAW, as well as General Recommendation No. 19, and the relevant sections of the *Beijing Declaration and Platform for Action* in order to create a legally binding definition of sexual harassment, invoking a broad definition of the workplace.<sup>134</sup>

127 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

128 *Human Rights Commission Act 1999* pt III s 17(2).

129 Public Service General Order 15.59.20.73 in V Jivan and C Forster, *Translating CEDAW into Law* (UNIFEM, UNDP, 2007) 284.


130 *Sexual Offences Act 2006*, s 23.

131 *Employment Act (Cap 226, 2007)*, s 6.

132 *Public Officer Ethics Act 2003*, s 21.

133 *Vishaka v State of Rajasthan & Ors* AIR 1997 SC 3011.

134 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.



### Key recommendations and drafting instructions for Tuvalu

#### Legislation should:

- criminalise sexual harassment;
- recognise sexual harassment as a form of discrimination and a violation of women's human rights with health, economic, social, educational and safety consequences;
- define sexual harassment as unwelcome sexually determined behaviour in both horizontal and vertical relationships, including in employment (including the informal employment sector), education, receipt of goods and services, sporting activities, and property transactions; and
- provide that unwelcome sexually determined behaviour includes (whether directly or by implication) physical conduct and advances; a demand or request for sexual favours; sexually coloured remarks; displaying sexually explicit pictures, posters or graffiti; and any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.





CHAPTER 5B

**Legal proceedings  
and evidence**

## Proof of resistance

5.42 Rape is sexual penetration that occurs without the consent of the victim. Common law in most PICTs, except Republic of the Marshall Islands, has deemed lack of consent to be critical, and requires that the prosecutor show that the complainant offered resistance. Proof of resistance is a common law rule requiring prosecutors to establish that the complainant physically fought back and resisted the perpetrator, or else consent is inferred or assumed. Physical resistance may be an unrealistic expectation of a complainant against a strong or armed perpetrator, and it does not take into consideration women who are physically or mentally disabled, drugged, asleep, or those immobilised by fear.

### *The existing law*

5.43 Tuvalu has not passed any legislation against the requirement for proof of resistance by the survivor.

## Options for reform

### *Reform in the Pacific*

**Example:** Republic of the Marshall Islands – *Republic of the Marshall Islands Criminal Code 1966* s 213.8(3).

(3) *Resistance Not Required.* A victim need not resist the actor for a proper prosecution under this Part. [amended by P.L. 2005-31].

### **Key recommendation and drafting instructions for Tuvalu**

Legislation should:

- specifically state the court should not require proof of actual resistance to prove lack of consent in sexual violence cases.

## Consent

5.44 The age at which a person can be regarded to have legal capacity to consent to sexual relations has often been debated over the years and across jurisdictions. Low legal age of consent to engage in sexual activity can affect both females and males adversely, as having child care responsibilities too early poses health risks for the mother and child, and restricts educational opportunities and economic autonomy.

### *The existing law*

5.45 The *Tuvalu Penal Code* stipulates three ages as relevant to the capacity of women and girls to give legal consent to sexual intercourse: 13, 15 and 18. Below 13 years of age, a child's consent is irrelevant.<sup>135</sup> A person who has sexual intercourse with a girl under 13 years is guilty of a felony and is liable to be imprisoned for life.<sup>136</sup> Between the ages of 13 and 15 years, there is a defence to unlawful sexual intercourse, if the person charged had reasonable cause to believe, and in fact believed that the girl was of or above the age of 15 years.<sup>137</sup> Unlawful indecent assault on any woman or girl is an offence which carries a maximum period of 5 years imprisonment.<sup>138</sup> It is no defence to prove that a girl under 15 years consented to an act of indecency.<sup>139</sup>

5.46 Abducting a girl under the age of 18 years for unlawful sexual intercourse is an offence but a defence would lie if the person charged believed that the person was 18 years or over.<sup>140</sup> Where a person, especially in a position of power, rapes or coerces another to having non-consensual sexual intercourse, then the offence of rape or incest is available. The belief, although mistaken, that the victim was over the age of 15 years is not a defence in cases of rape or incest.

135 *Tuvalu Penal Code* s 134(3).

136 *Tuvalu Penal Code* s 134(1).

137 *Tuvalu Penal Code* s 135(1)(b).

138 *Tuvalu Penal Code* s 133(1).

139 *Tuvalu Penal Code* s 133(2).

140 *Tuvalu Penal Code* s 132.

- 5.47 The age of marriage in Tuvalu is 16 years for both parties<sup>141</sup> and the age of consent to sexual relations is 15 years.<sup>142</sup> There is a trend in some countries (for example, Kiribati<sup>143</sup>) to raise the age of marriage and the age of consent to 16<sup>144</sup> or 18 years. Raising the age of consent to sexual relations to 18 requires consideration by the government of Tuvalu. This would ensure consistency with the *CRC*. The laws on incest makes it a criminal offence for a female person of or above the age of 15 years to knowingly consent and permit her grandfather, father, brother or son to have sexual intercourse with her. This felony carries a maximum of seven years' imprisonment.<sup>145</sup> This provision does not recognise that persons of 15 years, particularly in Pacific societies, are dependent on parental and family support and are in a subordinate position to those in positions of authority.
- 5.48 Consent is not valid where a person does not have the ability or legal capacity to offer consent. This is specifically provided for in s 135 (1)(b) for defilement of any female idiot or imbecile. In section 135(1)(a), a defence would lie if the accused had reasonable cause to believe that the girl was of or above the age of 15 years but the girl's consent is not a defence.<sup>146</sup>

### Options for reform

- 5.49 Section 128 of the *Tuvalu Penal Code* does not specify an age for the offence of rape. Rape is committed if unlawful sexual intercourse takes place without the consent of the victim or if the victim's consent was obtained by force. In the case of a married woman, rape is committed if there is unlawful sexual intercourse by a person impersonating her husband. There are a number of limitations to the current law as women who are intoxicated, drugged, asleep, or unconscious, and those who are disabled physically or mentally would have difficulty in proving 'lack of consent'. The reform in the law is necessary to protect those in a range of vulnerable situations.

### Reform internationally

- 5.50 In s 4(2) of the United Kingdom *Sexual Offences Act 2003* (Cap 42), the defendant must now be seen to have taken steps to ascertain clearly whether the complainant was consenting in all the circumstances.<sup>147</sup> This abolishes the defence of reasonable but mistaken belief regarding consent.

#### Key recommendations and drafting instructions for Tuvalu

##### Legislation should:

- increase the age of consent to 18 years in order to be compliant with *CRC*;
- state that it is an offence to have unlawful sexual intercourse with a person under 18 years;
- amend the law on incest in s 156(5) of the *Tuvalu Penal Code* which criminalises a female person aged 15 years and over who knowingly has sexual intercourse with her grandfather, father, brother or son. If this provision is to be retained, it is recommended that the age be raised from 15 to 18 years;
- ensure that a lack of knowledge about the age of a victim is not a defence in cases of rape, sexual assault or incest;
- impose deterrent punishment on those who rape or sexually assault those in vulnerable situations;
- change the age for defilement from 13 to 18 years to make it compliant with *CRC* and consistent with the minimum age of marriage.

### Evidence and corroboration warning

- 5.51 The corroboration warning is a common law doctrine, whereby a judge warns himself or herself, or issues instructions to the court and/or jury that the testimony of a witness needs to be corroborated. The position of courts is that it is dangerous to convict on the uncorroborated evidence of the complainant in sexual assault cases. However, this position is now changing, as it is seen as discriminatory. Findley states: 'The function of corroboration is not of itself to prove all essential ingredients of the offence charged. Its function is to establish that the evidence of the complainant is true

<sup>141</sup> *Marriage Act* (Cap 29) s 5.

<sup>142</sup> *Tuvalu Penal Code* s 133(2).

<sup>143</sup> *Marriage (Amendment) Act 2002* s 2.

<sup>144</sup> *Criminal Code Act 1974* s 213, 216 (Papua New Guinea), *Crimes Ordinance 1961* s 51, 53 (Samoa).

<sup>145</sup> *Tuvalu Penal Code* s 156(5).

<sup>146</sup> *Penal Code* s 135(3).

<sup>147</sup> *Sexual Offences Act* (Cap 42) s 4(2).

and that it is reasonably safe to act upon it'.<sup>148</sup> This has become a controversial issue, as in some cases the evidence of complainants of sexual offences could be fabricated or there are difficulties in finding corroborative evidence. The abolition of the corroboration rule does not necessarily disadvantage the accused, as medical tests for evidence of the defendant's semen and the condition of the complainant (e.g. physical bruising) can corroborate the allegations. The accused can also appeal the decision of the court.

#### *The existing law*

- 5.52 Tuvalu does not have an evidence act but the United Kingdom laws of evidence, common law and equity are applicable as part of the existing common law of Tuvalu, as provided for by *The Constitution of Tuvalu*. There are no corroboration requirements for evidence of a minor.<sup>149</sup>

#### **Options for reform**

##### *Reforms in the Pacific*

- 5.53 The example from Fiji below demonstrates the rationale of the Fiji Supreme Court decision in *Balelala v State*<sup>150</sup> in relation to the removal of the common law rule of corroboration.

#### **Summary of case:** Fiji – *Balelala v State*

In 2002, the defendant (B) held the complainant (C) prisoner and raped her three times at a popular nature reserve. B was found guilty and corroboration of the evidence was a point of discussion. On appeal in the Supreme Court, B argued that because of the corroboration warning, it was dangerous to convict him on C's words alone, and therefore his conviction should be overturned. In a ground-breaking precedent, the court removed the corroboration practice ('the rule') after examining the legal basis of it, the rationale behind the rule, the laws of Fiji and those of other jurisdictions. The code did not require corroboration in a rape offence or other sexual offences, but it was enforced in Fiji as a long-standing practice under common law. The court gave a warning to itself that it was dangerous to convict on the uncorroborated evidence of the victim.

The court examined the origin of the common law rule and said it was representative of the practice in force in England at the time the evidence legislation was enacted in 1944. The rule was based on an outmoded and fundamentally flawed rationale, which was unfairly demeaning to women. The rule had been applied to victims of either gender. In other jurisdictions it had been confined to women and girls because, under criminal law, rape and other sexual offences were crimes committed against women. Victims of sexual offences were effectively placed in a special category of suspect witnesses. This resulted in convictions which were solely based on the complainant's evidence being regarded as unsafe and unsatisfactory. Moreover, it afforded the accused protection which did not exist in other cases of serious criminality. In addition, it almost certainly had the effect in many instances of deterring the rape victims from reporting offences committed against them or from cooperating in the prosecution of offenders. The court found that the rule discriminated against women who were victims of sexual violence, in violation of article 38(1) of the *Constitution of the Republic of the Fiji Islands*. Also using article 43(2), the court found that the provisions of the Bill of Rights 'to promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the rights set out in the Bill of Rights' required it to do away with the corroboration warning. CEDAW was cited as prohibiting any form of discrimination against women. The elimination of the rule placed complainant's testimony regarding sexual assault on equal footing as testimony offered by victims of other crimes. The court noted that legislation might be necessary to put any residual question to rest.

**Example:** Republic of the Marshall Islands – *Criminal Code* s 213.8(2).

*Victim's Testimony Need not be Corroborated.* For Prosecutions under this Part, there is no requirement that the testimony of the victim be corroborated.

148 Mark Findley, *Criminal Laws of the South Pacific: text and materials on criminal law and procedure in the South Pacific* (Institute of Justice and Applied Legal Studies, University of the South Pacific, 1996) 179.

149 See *R v Teafua* [2002] TVHC 2.

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

**Example:** Cook Islands – *Evidence Amendment Act 1986-87* s 20B.

20B. Corroboration in sexual cases:

- (1) Where any person is tried for an offence against any of sections 141 to 157 (inclusive) of the *Crimes Act 1969* or for any other offence of a sexual nature, no corroboration of a complainant's evidence shall be necessary for the accused to be convicted; and in any such case the judge shall not be required to give any warning to the jury relating to the absence of corroboration.
- (2) If, in any such case, the judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required.

### Reform internationally

**Example:** Namibia – *Combating of Rape Act 2000* s 5.

Abolition of cautionary rule relating to offences of a sexual or indecent nature:

No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with such offence.

**Example:** New Zealand – *Evidence Act 2006* s 121(1).

- (1) It is not necessary in criminal proceedings for the evidence on which a prosecution relies be corroborated, except with respect to certain specified offences (perjury, false oath, false statement and declaration, treason).
- (2) If in a criminal proceeding, there is a jury, it is not necessary for the judge to –
  - a) warn the jury that it is dangerous to action uncorroborated evidence or give warning to the same or similar effect; or
  - b) give direction to the absence of corroboration.

### Key recommendations and drafting instructions for Tuvalu

- In the event a new evidence act for Tuvalu is considered, the law should specifically state there shall be no requirement that the victim's testimony be corroborated.

### Relevance of past sexual history

5.54 The admission of the complainant's past sexual history with other men (other than the accused) can affect her credibility. If a complainant's past sexual history is allowed into evidence, the defendant's lawyer is allowed to ask questions about her past sexual history with other men, which is not relevant to the rape. A second concern with regard to the sexual history of the complainant is the practice, post-conviction, of reducing or mitigating the sentence because the complainant is sexually promiscuous.

#### *The existing law*

5.55 Tuvalu does not have an evidence act and therefore the common law applies.

#### **Options for reform**

5.56 It is recommended that legislation should completely prevent the introduction of the complainant's sexual history in both civil and criminal proceedings.

## Reform in the Pacific

5.57 Under s 14A of the Kiribati *Evidence Act 2003* evidence of general reputation of the complainant with respect to chastity is excluded. Under s 14B, permission of the court is needed to admit evidence or to cross examine the complainant about prior sexual conduct with men other than the accused. The leave is to be granted only where evidence of substantial relevance to the facts is in issue under ss 14C and 14E.

**Example:** Kiribati - *Evidence Act 2003* s 14.

### Hearing Rules:

- A. The court shall forbid any question as to and shall not receive evidence of the general reputation of the complainant with respect to chastity;
- B. Without the leave of the court –
  - (a) the complainant shall not be cross-examined as to her sexual activities other than with the accused; and
  - (b) no evidence shall be admitted as to the sexual activities of the complainant other than with the accused;
- C. The court shall not grant leave under Rule B unless –
  - (a) it is satisfied that the evidence has substantial relevance to facts in issue and it is a proper matter for cross-examination as to credit; or
  - (b) it is satisfied that the evidence has substantial relevance to the issue of appropriate sentence and the accused person has –
    - (i) prior to the preliminary examination signified in writing before a Magistrate his intention of pleading guilty to all sexual offences on which he is there charged; or
    - (ii) pleaded guilty to all such offences; or
    - (iii) been convicted of all such offences.
- D. Evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities other than with the accused shall not be regarded –
  - (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or
  - (b) as being a proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.
- E. An application for leave under Rule B –
  - a) shall be made in the absence of the jury (if any) and, if the accused so requests, in the absence of the complainant;
  - b) shall be determined after the court has allowed such submissions or other evidence as the court considers necessary for the determination of the application; and
  - c) shall not be granted unless the court considers that the requirements of Rules C and D are satisfied but in that case may be granted provided that the court considers it desirable in the interests of justice so to do.

5.58 Papua New Guinea and Cook Islands have changed the credibility practice, not allowing the admission of the survivor's past sexual history through legislation, whilst Federated States of Micronesia has only partially addressed this by deferring to the discretion of the court.<sup>151</sup> Tonga and Fiji have also partially addressed this practice through landmark court cases and new precedents.

5.59 Solomon Islands has similarly only partially addressed the practice through legislative reform.

<sup>151</sup> Jivan and Forster, above n 134, 53.

**Example:** Solomon Islands – *Evidence Act 2009* s 58.

- (1) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the accused, except with the permission of the court.
- (2) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the accused, except with the permission of the court.
- (3) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused unless the evidence or question –
  - (i) relates directly to the acts, events, or circumstances which constitute the offence for which the accused is being tried; or
  - (ii) is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interest of justice to exclude it.
- (4) In case of a offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters –
  - (i) for the purpose of supporting or challenging the truthfulness of the complainant; or
  - (ii) for the purpose of establishing the complainant's consent; or
  - (iii) for any other purpose except with the permission of the court.

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

#### Reform internationally

**Example:** Namibia – *Combating of Rape Act 2000* s 227A

Evidence of sexual conduct or experience of complainant of rape or offence of an indecent nature

(1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning -

- (a) tends to rebut evidence that was previously adduced by the prosecution; or
- (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or
- (c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused:

Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.

(2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be admissible in such proceedings.

(3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, shall not be present at such application proceedings.

(4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or to put such question shall be recorded, and shall form part of the record of the proceedings.

**Example:** New South Wales, Australia – *Criminal Procedure Act 1986* s 293(2).

- (2) Evidence relating to the sexual reputation of the complainant is inadmissible.

- 5.60 As can be seen from the examples set out above, various countries have addressed the issue of the victim's past sexual history in rape trials. The admission into evidence of the victim's past sexual history stigmatises women as being promiscuous and tends to influence the outcome of the case. Women are greatly disadvantaged by this rule as they are judged by social and moral values, resulting in the reluctance of some rape victims to seek justice through the police and the courts.

#### Key recommendation and drafting instructions for Tuvalu

New legislation on domestic violence and evidence to explicitly state that:

- evidence relating to the sexual reputation of the complainant in regard to those, other than the accused, is inadmissible.

#### Delays in reporting and processing

- 5.61 Survivors of sexual violence often delay in reporting a violation to public authorities. Such delays may be due to a number of reasons including: the survivor's fear of stigmatisation, humiliation, not being believed, and/or retaliation; financial or emotional dependence on the perpetrator; and distrust in, and lack of access to, responsible institutions. Despite these legitimate concerns, delays in the reporting of VAW are often interpreted as a demonstration that the allegation is unreliable.<sup>152</sup>
- 5.62 Although the practice is not legislatively mandated, police officers and courts routinely discriminate against survivors who delay in reporting sexual assault. Additionally, there are high levels of withdrawal of complaints and the length of time to process such cases to their conclusion is part of the delay within the justice system.
- 5.63 Whilst there are no data available on the length of time it takes for a case of domestic violence to be heard and resolved by courts, anecdotal evidence suggests that there are varying periods of time in which domestic violence cases are processed. There are often delays caused by a number of factors such as: non-appearance of the defendant; reluctance by the complainant to assist prosecutors for fear of more violence; delays in defended hearings; multiple adjournments; and the length of time taken to resolve matters such as custody of children, maintenance, living arrangements, property matters, family protection and counselling.

#### The existing law

- 5.64 Under s 135(2) of the *Tuvalu Penal Code*, no prosecution can be commenced for unlawful sexual intercourse with any girl aged between 13 and 15 years more than 12 months after the commission of the offence. There are no other limitations in other sexual offence provisions and therefore bringing a prosecution more than 12 months later would not appear to be a problem.<sup>153</sup>

#### Options for reform

- 5.65 Many countries are now legislating to ensure that adverse inferences are not drawn from any delay between an act of VAW and the reporting of the incident to the authorities. Whilst a time limit to bringing criminal prosecution is imposed by s 135(2) of the *Tuvalu Penal Code*, survivors of violence, especially children, have been known not to report acts of violence against them for fear of further abuse. Survivors might want prosecution to occur when they feel confident enough to initiate proceedings. Delays in reporting are most evident in crimes of incest and sexual assault against children (both females and males). It is therefore proposed that a time limit should not be imposed to bar prosecution for all forms of VAW and children.

#### Reform in the Pacific

**Example:** Solomon Islands – *Evidence Act 2009* s 19(c).

19. A court need not exercise caution before convicting an accused in reliance on the ...
- (c) evidence in relation to an offence against morality where there was a delay in reporting a crime.

<sup>152</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

<sup>153</sup> See *R v Setaga* [2008] TVHC 13.



## Reform Internationally

**Example:** Namibia – *Combating of Rape Act 2000* s 7.

In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference, only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint.

**Example:** Philippines – *Anti-Violence against Women and Their Children Act 2004* s 16.

The court shall not deny the issuance of a protection order due to lapse of time between the act of violence and the filing of the application.

5.66 A timely and efficient response from the judiciary is also necessary to prevent further violence and protect victims. An example of a timeline to expedite domestic violence cases is provided in the *New Zealand Practice Note – Domestic Violence Prosecutions*.<sup>154</sup>

**Example:** New Zealand – *Practice Note – Domestic Violence Prosecutions*.

5. A plea to a domestic violence charge is to be entered not more than two weeks after the defendant's first appearance.
6. If the defendant pleads guilty, he or she is to be sentenced or remanded for sentence in the usual way.
7. If the defendant pleads not guilty, and if status hearings are held for domestic violence cases at the court where the charge is to be heard, the following timetable is to apply.
  - (a) The status hearing is to be not more than four weeks after the plea is entered.
  - (b) If the charge is not resolved at the status hearing, the defended hearing is to be not more than six weeks after the status hearing (if practicable, the date for the defended hearing should be allocated, on an "if required" basis, when the status hearing date is allocated).
8. If the defendant pleads not guilty, and if status hearings are not held for domestic violence cases at the court where the charge is to be heard, the defended hearing is to be not more than six weeks after the plea is entered.
9. The time limits which are prescribed in this practice note may be extended to the minimum extent necessary in circuit courts which sit less frequently than fortnightly. However, consideration should then be given to whether a case should be transferred to the nearest court where sittings are more frequent.
10. Notwithstanding the preceding paragraphs, but subject to paragraph 11, any domestic violence charge is to be heard and determined, with the exception of any sentencing, within 13 weeks (i.e. three months) after the defendant's first appearance. If such a charge is replaced by another domestic violence charge, that time limit relates to the first appearance on the original charge.
11. The time limits which are prescribed in this practice note may be extended by not more than a total of four weeks if the defendant's first appearance is between 10 November and 10 January, both inclusive.

<sup>154</sup> New Zealand Ministry of Justice, *Practice Note – Domestic Violence Prosecutions* (The Waitakere and Manukau Family Violence Courts, 2004).

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- state that, 'in criminal proceedings at which an accused is charged with a serious offence of a sexual or indecent nature, the court shall not draw any inference from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint';
- not impose a time limit to bar a prosecution for all criminal matters;
- provide that domestic violence cases not be dismissed due to delays in prosecution;
- provide for the timely processing of domestic violence cases in both the criminal and civil jurisdictions of the court.

### No offence of false accusation

5.67 Legislation sometimes contains a provision that falsely accusing someone constitutes a criminal offence. Provisions of this kind may dissuade complainants from filing cases due to fear of not being believed, and there is a high risk that such provisions may be applied incorrectly and used by the defendant for purposes of retaliation. Intentionally misleading the court is commonly dealt with in other areas of the law and should not be included in legislation on VAW.<sup>155</sup>

#### Options for reform

##### Reform internationally

5.68 A number of recent pieces of legislation on VAW, such as South Africa's *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007*, do not include such a provision.<sup>156</sup>

### Key recommendation and drafting instruction for Tuvalu

Legislation should:

- not include a special provision criminalising false accusations, or allegations for rape or sexual assault. False accusations should be prosecuted in the same way as other false reporting of a crime or false testimony.

### Arrangements for vulnerable witnesses

5.69 There are pressures on courts to deal with domestic violence cases quickly and efficiently. The traditional judicial approach to domestic violence generally focuses on the perpetrator, and in busy criminal courts, the needs and protection of complainants is sometimes overlooked. Domestic and family violence cases are extremely complex and require court time and attention. There is also the risk of re-victimising the survivor from being a part of legal proceedings.

#### The existing law

5.70 There are no statutory protections for victims of domestic and family violence in Tuvalu.

#### Options for reform

5.71 To prevent the re-victimisation of complainants, it is important to ensure that court proceedings are conducted in a manner that protects the safety of the complainant and provides her with options for her participation in the court process. When the complainant appears in court, evidence should be given in a manner that does not require the complainant to confront the defendant.<sup>157</sup>

155 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

156 *Ibid.*

157 *Ibid.*

### Reform in the Pacific

- 5.72 There are good practice examples of specialised courts in the Pacific. There are juvenile, children or youth courts in Fiji, Kiribati, New Zealand, Papua New Guinea, Samoa, Solomon Islands and Vanuatu. Family courts have been established in Fiji and Nauru. In Fiji, the family court is authorised by s 202 of the *Family Law Act 2003* to grant injunctions where domestic violence is an issue in matrimonial proceedings.
- 5.73 The Solomon Islands *Evidence Act 2009* states that special arrangements may be made for vulnerable witnesses: they can give their evidence without facing their assailants, screens and remote audio visual taking of evidence are allowed, the court can be closed, publication can be restricted, and a support person is allowed to accompany the witness.<sup>158</sup>

### Reform internationally

- 5.74 Namibia's *Combating of Rape Act 2000* stipulates that the complainant has the right to attend court, or to request that the prosecutor present the relevant information on her behalf if the accused has applied for bail.<sup>159</sup> Section 5 of the Philippines *Rape Victim Assistance and Protection Act 1998* provides for; closed-door investigation, prosecution or trial; and for non-disclosure to the public of the name and personal circumstances of the offended party and/or the accused, or any other information tending to establish their identities. The *Domestic Violence Act 2007* of Ghana provides in s 13(2) that the presence of the accused is likely to have a serious adverse effect on the victim or a witness, and that the court may take the steps it considers necessary to separate the respondent from the victim or the witness, without sacrificing the integrity of the proceedings.<sup>160</sup>

#### Key recommendations and drafting instructions for Tuvalu

##### Legislation should:

- provide for the establishment of a specialist court with jurisdiction to hear both family law cases and domestic violence cases;
- guarantee, throughout the legal process, the complainant's right to:
  - > decide whether or not to appear in court or to submit evidence by alternative means, including drafting a sworn statement/affidavit, requesting that the prosecutor present relevant information on her behalf, and/or submitting taped testimony;
  - > when appearing in court, give evidence in a manner that does not require the complainant to confront the defendant, including through the use of in-camera proceedings, witness protection boxes, screens, closed circuit television, and video links;
  - > protection within the court structure, including separate waiting areas for complainants and defendants, separate entrances and exits, police escorts, and staggered arrival and departure times;
  - > testify only as many times as is necessary;
  - > request closure of the courtroom during proceedings, and
  - > a gag on all publicity regarding individuals involved in the case, with applicable remedies for non-compliance.

<sup>158</sup> *Evidence Act 2009* s 41(4).

<sup>159</sup> *Combating of Rape Act 2000* s 12.

<sup>160</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.



## CHAPTER 6

# Protection orders

- 6.1 Protection orders are an integral part of any VAW legislation. Protection orders provide immediate relief to complainants and protection from further harm. Protection orders are among the most effective legal remedies available to survivors of VAW. They offer an immediate remedy by authorising courts to order an offender out of the home or to protect the survivor against further violence and harassment. Such orders vary greatly in their specificity i.e. the length of the order, its enforceability, who may apply for it, who grants it, and whether financial support or other relief may be given as part of the order. The more protections that can be legally included in a protective order, the more effective an order can be.<sup>161</sup>
- 6.2 Protection orders are often hard to get for a range of reasons including: uncertainty in processing the complaint by the police; insufficient evidence gathered by the police for the court to grant a protection order; and attempts by police to reconcile the parties without formal charges. Without a comprehensive legislative framework setting up a system for issuing protection orders, problems arise around the range and form of an order and powers of enforcement. The issuance of protection orders in some countries depends on the survivor taking further legal action, such as bringing criminal charges and/or filing for divorce. This requirement may stop survivors from seeking protection orders and could result in them being penalised if they fail to comply with this requirement.<sup>162</sup>
- 6.3 The issuance of protection orders does not pose difficulties in Tuvalu as there are senior magistrates' courts, magistrates' courts and island courts. Island courts have been established in all eight of the islands of Tuvalu (Nanumea, Niutao, Nanumaga, Nui, Vaitupu, Nukufetau, Funafuti and Nukulaelae) and are presided over by three island court magistrates, comprising a president, vice president and ordinary member.<sup>163</sup>

#### *The existing law*

- 6.4 In Tuvalu, there is no comprehensive provision in the law providing for protection orders, but there are a number of limited orders available that are centred around domestic violence. Non-molestation orders and restraining orders (protection orders), for example, are available as a common law remedy. 'Keeping the peace' is an order most commonly used in domestic violence cases by Pacific Island courts, including Tuvalu.

The Tuvalu *Criminal Procedures Code* s 30(1) provides as follows:

Whenever a Magistrates' Court is informed on oath that a person is likely to commit a breach of the peace, or do any wrongful act that may probably occasion a breach of the peace, the Magistrates' Court may, in manner, hereinafter provided, require such person to show cause why he should not be ordered to enter into a recognisance, with or without sureties, for keeping the peace for such period, not exceeding 1 year, as the Magistrates' Court thinks fit.

Further, in section 42 of the *Police Powers and Duties Act, 2009*, a police order may be issued by a police officer against a perpetrator so that the victim of domestic violence is, *inter alia*, protected from acts of domestic violence. The effect of such a police order is spelt out in section 43.

The police or the court may impose bail conditions for an accused to appear in court on a given date and to 'keep the peace' by being restrained from committing further offences whilst on bail.

- 6.5 Dispute settlement in Tuvalu society has been incorporated into the legal system. This is noted in s 32 of the *Magistrates' Court Act* which incorporates reconciliation and compensation. With the proposal to introduce new legislation on VAW, there is a need to address the traditional practices of dispute settlement and how it can be used to protect survivors of domestic violence. Whilst there is a greater reliance on the court systems to resolve disputes in urban areas, the traditional practices of dispute settlement in outer island communities remain influential. Any legislation on VAW would need to take into account women's human rights as well as appropriate traditional practices and methods of dispute settlement. Whilst little is known of traditional safety practices and processes that protect women and children in violent situations, practices that may have existed in the past might be worth exploring and examining as part of the community response to preventing violence and protecting survivors.

161 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

162 *Ibid.*

163 *Island Courts Act* s 9(1).

## Options for reform

6.6 Protection orders should be broad and provide for a range of remedies, such as:

- forbidding the offender to approach the complainant directly or through third persons;
- ordering the accused to keep a specified distance away from the complainant as well as her children, her family, her residence, her place of work or any other place she might visit or frequent;
- granting temporary child custody;
- payment for child support and basic living expenses, including rent and insurance; and
- orders to evict the perpetrator from the home and for the survivor and children to remain in occupation until further order of the court.

## Relationship between protection orders and other proceedings

6.7 The issuance of protection orders in some countries is dependent on the complainant taking further legal action, such as bringing criminal charges and/or filing for divorce. This requirement may deter survivors from seeking protection orders and could result in complainants being penalised if they fail to comply with this requirement. Under the *Domestic Violence Act 2007* in Ghana, individuals may apply for protection orders independently of any other proceedings, and the institution of criminal or civil proceedings does not affect the rights of an applicant to seek a protection order under the Act. In Fiji, applications for protection orders under s 202 of the *Family Law Act 2003* may be made independently of other legal proceedings.<sup>164</sup>

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- make protection orders available to survivors without any requirement that the survivor institute other legal proceedings, such as criminal or divorce proceedings, against the defendant;
- state that protection orders are to be issued in addition to and not in lieu of any other legal proceedings;
- allow the issuance of a protection order to be introduced as a material fact in subsequent legal proceedings.

## Content and granting of protection orders

6.8 Over time, the range of measures included in protection orders has broadened. The Spanish *Act Regulating the Protection Order for Victims of Domestic Violence 2003* provides for a range of remedies such as: forbidding the offender to approach the complainant directly or through third persons; ordering the accused to keep a specified distance away from the complainant, her children, her family, her residence, her place of work or any other place she might visit or frequent, including the obligation to abandon the common residence; temporary child custody; vacation determination; and payment for child support and basic living expenses, including rent and insurance.<sup>165</sup>

6.9 In some countries, including Albania, the Netherlands, and the USA, courts may order the perpetrator to pay child support, as well as to make payments towards the survivor's rent, mortgage and insurance as a condition in the granting of a protection order. Article 20 of the Indian Protection of Women from Domestic Violence Act 2005 states that: 'the magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence'.<sup>166</sup> Article 10(1) of Albania's Law on Measures against Violence in Family Relations 2006 authorises the courts to order the perpetrator to leave the shared dwelling, and/or to pay rent for the permanent or temporary residence of the complainant. Under ss 33 to 41 of the *Family Law Act 1996* in the United Kingdom, complainants may apply for an occupation order, in addition to a protection order, which would entitle her to remain in the home and bar the offender from the premises or restrict him to a particular part of the home. Similar orders are provided for in s 20 of the Ghanaian *Domestic Violence Act 2007* and article 19 of the Indian *Protection of Women from Domestic Violence Act 2005*.<sup>167</sup>

<sup>164</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

<sup>165</sup> Ibid.

<sup>166</sup> *Protection of Women from Domestic Violence Act 2005* art 20.

<sup>167</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

### Key recommendations and drafting instructions for Tuvalu

Legislation should provide:

- that protection orders contain the following measures:
  - > order the perpetrator to stay a specified distance away from the complainant and her children (and other people if appropriate) and the places that they frequent;
  - > order the perpetrator to provide financial assistance to the complainant, including payment of medical bills, counselling fees or shelter fees, monetary compensation, and, in addition, in cases of domestic violence, mortgage, rent, insurance, alimony and child support;
  - > prohibit the perpetrator from contacting the complainant or arranging for a third party to do so;
  - > restrain the perpetrator from causing further violence to the complainant, her dependents, other relatives and relevant persons;
  - > prohibit the perpetrator from purchasing, using or possessing a firearm or any such weapon specified by the court;
  - > instruct the perpetrator in cases of domestic violence to vacate the family home, without in any way ruling on the ownership of such property and/or to hand over the use of a means of transportation and/or other essential personal effects to the complainant;
- for an order granting the complainant the right to live in the dwelling house;
- for the issuance of protection orders in both criminal and civil proceedings; and
- that authorities may not remove a complainant from the home against her will.
- that the authorities do not dismiss the case upon an application for withdrawal, in the first instance, but adjourn the case for a period no longer than 30 days, to monitor and to ensure the safety of the complainant and her children.

### Ex-parte and interim, emergency, temporary protection orders

- 6.10 Legislation in an increasing number of countries provides for the issuance of emergency protection orders in situations where there is immediate danger of an act of violence. The procedural requirements for emergency/temporary protection orders differ from country to country. In Austria, Germany, the Czech Republic, the Netherlands and Slovenia, police may issue *ex officio*, an order that expels a person who endangers the life, health or freedom of another person from a shared dwelling for ten days. In Bulgaria under the *Law on Protection against Domestic Violence 2005*, complainants may apply for an emergency protection order through either the court or the nearest police department.<sup>168</sup>
- 6.11 Laws on domestic violence in many Latin American countries including Brazil, Chile, Paraguay, Uruguay and Venezuela, provide for similar orders, which are called 'urgency' or 'protection' measures. In Fiji, a court may grant an injunction under the Family Law Act 2003 following an *ex parte* application by the complainant.<sup>169</sup>

### Key recommendations and drafting instructions for Tuvalu

Where there is an allegation of immediate danger of violence, legislation should:

- provide for an issuance of an interim, temporary, emergency protection order as soon as possible and no later than 12 hours after the complaint is filed;
- provide that magistrates and island court magistrates can grant urgent *ex parte*, interim, emergency and temporary protection orders.
- provide relevant officials with the authority to order a respondent out of the home and to stay away from the survivor;
- state that the procedure should occur on an *ex parte* basis without a hearing and should prioritise survivor safety over property rights and other considerations;
- require the authorities to undertake, with the complainant, family safety planning, risk assessment and management.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

## Post-hearing orders

- 6.12 In order to promote complainant safety, some jurisdictions have introduced long-term or final protection orders. By reducing the number of times that a complainant must appear in court, such orders diminish the financial, emotional and psychological burdens carried by complainants, as well as the number of times they are forced to confront the perpetrator. For example, in the State of New Jersey in the USA, a final protection order may be issued following a full court hearing. The final protection order stays in effect unless affirmatively dismissed by a court.<sup>170</sup>

### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- grant courts the authority to issue long-term, final or post-hearing orders after notice and an opportunity for a full hearing based on allegations of violence.

## Applications for protection orders by persons other than the victim

- 6.13 Different experiences exist regarding who should apply for protection orders. Some argue that only the complainant should be able to apply, whilst others argue that police, social workers, and other family members should be able to apply on behalf of the complainant, regardless of whether she consents. Under the *Organic Act on Integrated Protection Measures against Gender Violence 2004* in Spain, family members living in the same house and public prosecutors are able to apply for criminal law protective orders, although the complainant's wishes must be taken into account in the full hearing by a court.<sup>171</sup>
- 6.14 Those who argue that only the complainant should be able to apply, emphasise that authorising third parties, independent of the survivor's wishes, may compromise her interests and safety. One of the original purposes of the protection order remedy was to empower the complainant. Third parties whose motivations are not in the best interests of the complainant or her children may abuse the ability to apply for a protection order. Further, survivors of violence are often the best judges of the danger presented to them, and allowing others to apply removes significant control over the process.<sup>172</sup>

### Key recommendations and drafting instructions for Tuvalu

Legislation should either:

- limit applications for protection orders to the complainant and, in cases where the complainant is legally incompetent, a legal guardian; or
- allow other actors, such as state actors, family members, and relevant professionals to have standing in such applications, while ensuring that the agency of the complainant is respected.

## Evidence of complainant to grant a protection order

- 6.15 Legislation and/or legal practice sometimes requires that evidence, in addition to the complainant's statement or affidavit, must be submitted in order for a protection order to be granted. Such a requirement may compromise the complainant's safety by causing significant delays and rescheduling of hearings. In some countries, courts have issued mutual protection orders on the application of a complainant. Mutual orders imply that both the complainant and perpetrator are equally at fault and create ongoing legal problems for the complainant.<sup>173</sup>

170 Ibid.

171 Ibid.

172 Ibid.

173 Ibid.



### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- state that live testimony or a sworn statement or affidavit of the complainant is sufficient evidence for the issuance of a protection order; and
- that no independent evidence (medical, police or otherwise) should be required for the issuance of a protection order following live testimony or a sworn statement/affidavit of the complainant;
- not authorise state officials to issue mutual orders for protection – meaning in favour of both parties.

### Addressing child custody in protection order proceedings

- 6.16 In many countries, violent offenders have used custody of children as a way to continue to abuse and gain access to survivors. In Georgia, the *Law on Elimination of Domestic Violence, Protection of and Support to its Victims 2006* authorises courts to consider the safety of the child in custody decisions in protection order proceedings. In Bulgaria, courts may temporarily relocate: ‘the residence of the child with the parent who is the victim or with the parent who has not carried out the violent act at stake’.<sup>174</sup> Section 28 of the Philippines *Anti-Violence against Women and their Children Act 2004* provides that: ‘the woman victim of violence shall be entitled to the custody and support of her child/children and in no case shall custody of minor children be given to the perpetrator of a woman who is suffering from battered woman syndrome’.<sup>175</sup>
- 6.17 Experience in some countries and cases suggests that custody decisions in protection order proceedings should be temporary, and permanent custody issues should be dealt with only in divorce proceedings or family court. An alternative view is that courts deciding custody matters in protection order cases, have a better understanding of domestic violence than courts deciding custody in the context of divorce or other family law matters, and should therefore be empowered to make permanent custody orders.<sup>176</sup>

### Key recommendations and drafting instructions for Tuvalu

Legislation should include the following provisions regarding child custody and visitation in protection order proceedings:

- presumption against award of custody to the perpetrator;
- presumption against unsupervised visitation by the perpetrator;
- requirement that, prior to supervised visitation being granted, the perpetrator must show that at least three months has passed since the most recent act of violence, that he has stopped using any form of violence, and that he is participating in a treatment programme for perpetrators; and
- no visitation rights are to be granted against the will of the child.

### Criminal offence for violation of protection order

- 6.18 In countries where legislation does not criminalise the violation of a civil protection order, prosecutors and police have expressed frustration about their inability to arrest the perpetrator. In Spain, any violation of a protection order is criminalised and, when a protection order is violated, the complainant is entitled to a full hearing on whether aspects of the protection order should be amended. Such amendments may include the distance the perpetrator must keep away from the survivor, the duration of the protection order, or the use of electronic devices to track the perpetrator. In cases of severe risk or harm, the offender may be put in precautionary pre-trial detention.<sup>177</sup>

<sup>174</sup> *Protection Against Domestic Violence Act 2005* s 5(1)(4).

<sup>175</sup> *Anti-Violence against Women and their Children Act 2004* s 28.

<sup>176</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

<sup>177</sup> *Ibid.*

### Key recommendation and drafting instructions for Tuvalu

Legislation should:

- criminalise violations of protection orders.

#### Reform in the Pacific

- 6.19 In Fiji, applications for protection orders under s 202 of the *Family Law Act 2003* may be made independently of other legal proceedings. A court may grant an injunction under the Act following an *ex parte* application by the complainant in matrimonial proceedings.
- 6.20 Section 17 of the Vanuatu *Family Protection Act 2008* allows authorised trained officials to issue temporary protection orders for 14 days, which may be renewed once for a further period of 14 days, until the complainant can get to a court of law. Section 36(3) allows temporary protection orders to be communicated orally, by telephone, radio, or by personal service, and many different people can apply for a protective order under the Act.<sup>178</sup> Violation of a protection order is a criminal offence under s 21 of the Act.

#### Reform internationally

- 6.21 Experience has shown that complainants of forms of violence other than domestic violence also seek protection orders, and a number of recent legislative developments have extended the application of such orders accordingly. Chapter 6 of the Mexican *Law on Access of Women to a Life Free of Violence 2007* makes protection orders available to survivors of any form of violence defined in the Act, including violence in the family, violence in the workplace or educational setting, violence in the community, institutional violence, and femicide. The *Forced Marriage (Civil Protection) Act 2007* in the United Kingdom allows courts to issue an order: 'for the purposes of protecting (a) a person from being forced into a marriage or from any attempt to be forced into a marriage; or (b) a person who has been forced into a marriage'.<sup>179</sup>
- 6.22 Under the Philippines *Anti-Violence against Women and their Children Act 2004*, the complainant may apply for a protection order independently of a criminal action or other civil action. The *Punong Barangay* or *Kagawad* (elected village officials) in the Philippines may issue *ex parte* protection orders of 15 days duration.<sup>180</sup> In instances where legislation allows traditional authorities to exercise quasi-judicial powers, it is important that the procedure is transparent and prioritises the rights of the complainant over other considerations, such as the reconciliation of families or communities. The Philippines law also has an extensive list of persons who are able to apply for a protection order, including: the complainant; parents, guardians, ascendants, descendants and other relatives of the complainant; social workers; police officers; village officials; and lawyers, counsellors and healthcare providers of the complainant. The final protection order stays in effect unless affirmatively dismissed by a court.<sup>181</sup>
- 6.23 Under s 14 of the *Domestic Violence Act 2007* of Ghana, an interim protection order (of no more than three months) will become final if the respondent does not appear before the court to show cause why the interim order should not be made final. Under the *Law on Protection against Domestic Violence 2005* in Bulgaria, courts may issue an emergency or regular protection order based solely upon the complainant's application and evidence.<sup>182</sup>
- 6.24 Under s 17 of the South African *Domestic Violence Act 1998*, violation of a protective order is criminalised, and when a court issues a protection order, it also issues a warrant for the arrest of the respondent which is suspended, subject to compliance with the order. The United Kingdom also specifically criminalises breaches of a protection order.<sup>183</sup> In Turkey a perpetrator who violates a protection order may be sentenced to prison for three to six months, while in the Philippines, violation of a protection order is a criminal offence punishable by a fine and/or six months imprisonment.<sup>184</sup>

<sup>178</sup> *Family Protection Act 2008* s 27.

<sup>179</sup> *Forced Marriage (Civil Protection) Act 2007* s 1(63A)1.

<sup>180</sup> *Anti-Violence against Women and their Children Act 2004* s 14.

<sup>181</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Domestic Violence, Crime and Victims Act 2004* s 12.

<sup>184</sup> *Anti-Violence against Women and their Children Act 2004* s 12.



CHAPTER 7

**The justice system  
and community  
response**

## The duties of the police and prosecutors

- 7.1 Despite education and training of police officers and prosecutors, many members of these professions continue to believe that VAW, and particularly domestic violence, does not constitute a crime. In many instances, prosecutors do not institute proceedings in cases of VAW for a range of reasons, including perceptions that complainants in such cases cannot be trusted, and/or difficulties in gathering evidence. In addition they may pressure women into a forced reconciliation through church priests or others, often putting women in extreme danger. Various policies have been adopted to address these issues, including mandatory arrest and prosecution, pro-arrest, and pro-prosecution policies.<sup>185</sup>

### The existing law

- 7.2 Division 2.9.3 of the Police Powers and Duties Act 2009 makes provision for domestic violence. Section 40 states that:

A police officer is to investigate whether an act of domestic violence is being, has been, or is likely to be, committed, if the police officer reasonably suspects that a person is committing, or has committed, an act of domestic violence that: (a) is a criminal offence; or (b) has put the safety of a person at risk.<sup>186</sup>

Section 42 prescribes the matters that a police officer is to have regard to when issuing a police order against a perpetrator of domestic violence.

**Extract:** Tuvalu – *Police Powers and Duties Act 2009* s 42(1)

A police officer may make a police order if the police officer:

- (a) either:
- (i) reasonably believes that:
    - A. A person has committed an act of domestic violence and is likely again to commit such an act; or
    - B. A child has been exposed to an act of domestic violence committed by or against a person with whom the child is in a domestic relationship and the child is likely again to be exposed to such an act; or
  - (ii) reasonably fears, or reasonably believes that another person reasonably fears, that:
    - A. a person will have committed against him or her an act of domestic violence; or
    - B. a child will be exposed to an act of domestic violence committed by or against a person with whom the child is in a domestic relationship; and
- (b) reasonably believes that making an order is necessary to ensure the safety of a person.

- 7.3 The person against who a police order is made must:

- surrender weapons;
- vacate the land/building occupied by the person at risk;
- not physically or sexually assault the person at risk or threaten to do so;
- not damage or threaten to damage property;
- not engage in other behaviour including intimidation or harassment that amounts to psychological abuse;
- not watch, loiter near, or prevent access to or from the dwelling, business, employment, or educational institution attended by a person at risk;
- not follow, stop, or accost a person at risk, in any place;
- not enter or remain on any land or building where a person at risk is present, in circumstances that constitute a trespass;
- not make any other contact with a person at risk except such contact as is reasonable necessary in any emergency.<sup>187</sup>

<sup>185</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

<sup>186</sup> *Police Powers and Duties Act 2009* s 40.

<sup>187</sup> *Police Powers and Duties Act 2009* s 44(1)-(2).

- 7.4 A police order is of a limited duration of 72 hours and cannot be renewed or extended.<sup>188</sup> A person may be brought before the magistrates' court for non-compliance with a police order.<sup>189</sup> A person against whom a police order is issued and who breaches the order commits an offence.<sup>190</sup>
- 7.5 Before the enactment of the *Police Powers and Duties Act 2009*, a typical response in Tuvalu was that police officers often cautioned or reprimanded perpetrators of VAW, rather than taking more serious action, such as arrest. Over the last three years, there has been increased effort to improve the police response to cases of domestic violence with assistance from the Pacific Prevention of Domestic Violence Programme (PPDVP). Through a tripartite partnership between NZAID, the Pacific Islands Chiefs of Police and the New Zealand Police, the long-term vision of the PPDVP is: 'to achieve a safer Pacific, free from domestic violence'.<sup>191</sup>

### Options for reform

- 7.6 Mandatory arrest policies require that a police officer arrest the perpetrator if the officer's assessment of a situation gives him/her probable cause to believe that a crime has occurred. If a mandatory arrest policy is in place, police may not impose an alternative penalty and the person must be arrested without any exception. Some studies have shown mandatory arrest to be the most effective policy in deterring perpetrators from future violence. Sherman and Berk were the first to study mandatory arrest, with numerous studies to follow.<sup>192</sup> They examined 314 cases of misdemeanour assault over six months and found mandatory arrest to be a significantly more effective deterrent than either physical separation or officer mediation.<sup>193</sup> However, each of the studies in the USA that replicated the Sherman and Berk methodology produced varying results on the efficacy of mandatory arrest.<sup>194</sup>
- 7.7 Mandatory and pro-arrest policies present the potential problem that survivors may be arrested at the scene of an assault if a police officer is unable to identify the primary aggressor. For example, the victim may have defended herself, causing injury to the perpetrator, and thus be subject to arrest. In response to this problem, strategies to determine the primary aggressor and corresponding police training modules have been developed in the USA.<sup>195</sup>
- 7.8 A few studies have examined mandatory or no-drop prosecution policies. Ford and Regoli conducted a randomised study of no-drop prosecution.<sup>196</sup> They found that the type of prosecution strategy used (drop-permitted versus no-drop) has a significant effect on the future behaviour of the perpetrator. Complainants who chose to file charges against the perpetrator under a drop-permitted policy were less likely to experience future violence than were complainants whose perpetrators were prosecuted without their input. However, the opposite was true for survivors who chose to drop charges against their perpetrators; they were more likely to experience abuse again than those dealt with under mandatory prosecution.<sup>197</sup>
- 7.9 An alternative approach is pro-arrest and pro-prosecution policies, which are more flexible than the mandatory approach and retain a level of agency of the complainant, whilst ensuring that the issue is treated seriously by police and prosecutors. In Spain, there is a pro-arrest and detention policy in cases where police deem there to be severe risk to the complainant or when the police witness the offender committing the crime. In Honduras, a variation of this policy was introduced by amendments to the *Law on Domestic Violence 2006*. This law states that if a complainant wishes to drop a case, the judge cannot close it without an investigation of the reasons why the complainant wants to drop the case.<sup>198</sup>

188 *Police Powers and Duties Act 2009* s 47.

189 *Police Powers and Duties Act 2009* s 49.

190 *Police Powers and Duties Act 2009* s 50

191 Pacific Prevention of Domestic Violence Programme, *The Programme: Pacific Prevention of Domestic Violence Programme (2012)* < <http://www.ppdvp.org.nz/about/>>.

192 L Sherman & R Berk 'The Minneapolis domestic violence experiment' (1984a) I *Police Foundation Reports* I; L Sherman & R Berk 'The specific deterrent effects of arrest for domestic assault' (1984b) 49 *American Sociological Review* 261.

193 Ibid.

194 See Linda G Mills, 'Mandatory arrest and prosecution policies for domestic violence - a critical literature review and the case for more research to test victim empowerment approaches' (1998) 25 *Criminal Justice and Behaviour* 306.

195 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

196 Ford, D.A., & Regoli, M.J. 'The criminal prosecution of wife assaulters' in Z. Hilton (ed.), *Legal responses to wife assault: current trends and evaluation* (Sage, 1993) 127-164.

197 Ibid.

198 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

- 7.10 This report suggests a mandatory-arrest, but a pro-prosecution (not a mandatory prosecution) policy, so that arrest is mandatory but prosecution is not, unless there has been full consultation with the complainant and other relevant parties.

#### *Reform in the Pacific*

- 7.11 Mandatory, pro-arrest and/or pro-prosecution policies are now being legislated in some PICTs, including Tuvalu. In Vanuatu, for example, arrest is mandated if the complainant is in danger of personal injury.<sup>199</sup>

#### *Reform internationally*

- 7.12 Under the *Sexual Offences Act 2006* in Kenya, police must file each charge and only the Attorney General can withdraw the case. If passed, the *Nigerian Violence against Persons (Prohibition) Bill* would provide that: 'no prosecutor shall (a) refuse to institute a prosecution, or (b) withdraw a charge, in respect of a contravention of s 18(1), unless he or she has been authorised thereto, whether in general or in any specific case by the Director of Public Prosecutions'. While some have welcomed the vigour of such policies, others are concerned by the removal of agency from the complainant, particularly in cases of domestic violence.<sup>200</sup>
- 7.13 The *Police Powers and Duties Act 2009* is in compliance with good practice. The recommendation below is provided for information only.

#### **Key recommendation and drafting instructions for Tuvalu**

Legislation should:

- provide for the application of mandatory-arrest and pro-prosecution policies in cases of VAW where there is probable cause to believe that a crime has been committed.

#### **The duties of the judiciary**

- 7.14 Sentences imposed in cases of VAW within countries have varied, been inconsistent and often informed by discriminatory attitudes held by justice officials regarding complainants. Efforts have been made to reduce sentencing discrepancies and to ensure that sentences in cases of VAW are commensurate with the gravity of the crime committed. Experience shows that the introduction of sentencing guidelines may contribute to the normalisation of sentences imposed in VAW cases.<sup>201</sup>
- 7.15 The absence of a specific domestic violence offence means that domestic violence perpetrators are charged with offences under the national equivalent of the penal code. An offence of domestic violence is therefore not given the special attention it deserves, as it is treated like any other criminal offence. Due to the procedural rules and, in some instances, negotiations between lawyers using the criminal justice system, this can mean considerable delays in the hearing of a domestic case. This in turn creates further hardship for the survivor financially and risks the possibility of further harm. One way of resolving this challenge would be to have the court devote a day to hearing all domestic violence cases so that cases are disposed of in an expeditious and humane manner.

#### **Options for reform**

##### *Reform in the Pacific*

- 7.16 The *Fiji Sentencing and Penalties Decree 2009* sets out legislative guidelines that the court must take into account when meting out punishment to offenders, including domestic violence perpetrators.

199 *Family Protection Act 2008* s 44(2)(c)-(d).

200 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

201 *Ibid.*

### Reform internationally

- 7.17 In the United Kingdom, the Sentencing Guidelines Council finalised sentencing guidelines on the *Sexual Offences Act 2003* in 2007. Mandatory minimum sentences have been implemented in a number of countries in an attempt to reduce sentencing discrepancies. However, experience varies regarding their efficacy and deterrent value.<sup>202</sup>

#### Key recommendations and drafting instruction for Tuvalu

Legislation should provide:

- that sentences should be commensurate with the gravity of crimes of VAW; and
- that sentencing guidelines be developed to ensure consistency in sentencing.

### Reconciliation and sentencing

- 7.18 Domestic violence legislation often faces a challenge when customary laws and practices conflict with the formal criminal justice system. In the Pacific, domestic violence is considered a private matter, and traditional reconciliation, forgiveness practices and ceremonies remain influential. In some societies, the survivor is not involved and her wishes remain subordinate to many other factors that shape and promote harmony in the community. A survivor could be subject to banishment from the family home for the shame brought on the family, or abuse by members of the family for affecting the family's standing in the community. In some situations the survivor is forced to marry the perpetrator, to save the family from further embarrassment.
- 7.19 Customary reconciliation practice is important in Tuvalu. In small, close-knit island communities, reconciliation promotes harmony within the community and between families. Compensation is often paid to the family wronged, but rarely to a victim of domestic violence. There is a strong argument that traditional reconciliation should continue to be considered in minor, non-repetitive cases of domestic violence. Ultimately, however, this will be a decision for the government of Tuvalu. Whilst reconciliation restores peace between the wrongdoer, the survivor and their families, the culture of reconciliation often hinders the exposure of details of the violence committed. It is unknown whether reconciliation prevents VAW in the long term or in fact perpetuates it. In considering the importance of reconciliation in Tuvaluan society, it is also important for survivors of violence to be given the protection of the law. It is therefore proposed that in all cases of domestic violence, reconciliation should not be used as a mitigating factor in reducing the perpetrator's sentence, nor used to reduce the charges against the perpetrator.
- 7.20 There are customary reconciliation practices or ceremonies of apology and forgiveness in most PICTs. In Tuvalu, s 32 of the *Magistrates' Courts Ordinance* provides for reconciliation. In other Pacific jurisdictions, (for example, *bulubulu* in Fiji or *ifoga* in Samoa) reconciliation does take place between the perpetrator's family and the survivor's family, with little to no participation of the survivor. If the apology is accepted by the family, the police and courts use such reconciliation ceremonies to justify not bringing formal charges or if charges are brought, in a reduction of sentencing of those convicted.

### The existing law

- 7.21 The *Laws of Tuvalu Act* provides that customary law: 'shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest'.<sup>203</sup> In Tuvalu, some cases of VAW continue to be dealt with through customary law practices, such as the provision of compensation to the family or community of the survivor by the perpetrator and his family. Apologising (*fakatoese*) and seeking forgiveness and reconciliation from the family of the victim, the perpetrator and his family may seek the assistance of a church pastor or a respected person in the community.<sup>204</sup> The customary practice of apology and forgiveness foregoes the traditional punishment of the court system. For example, if a man impregnates a young woman, the woman's family may decide to allow him to marry her rather than prosecute him for having sex with an underage girl. Customary law does not provide redress to the survivor and, in many instances, the use of customary law inhibits or precludes the survivor from seeking redress within the formal justice system. Customary law may not apply in all cases, as it is subject to *The Constitution of Tuvalu* and any custom that will result in injustice, will not be enforced. Sometimes, survivors are discouraged from seeking relief from the courts for fear of loss of entitlements to marital property and the children's loss of rights to the father's land.<sup>205</sup>

202 Ibid.

203 *Laws of Tuvalu Act* sch 1 s 2.

204 Email from Saini Malalau, 12/5/2011.

205 Email from Saini Malalau, 12/5/2011.

7.22 Compensation is available under s 32(1) of the *Magistrates' Courts Ordinance* which provides:

In criminal cases a magistrate's court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such court, and may thereupon order the proceedings to be stayed or terminated.

Under Tuvaluan law, it is clear that reconciliation and compensation are taken into account and, depending on the compensation paid or other terms approved by the court being met, a case can be stayed or terminated. It must be noted that this applies only in cases 'not amounting to a felony' and 'not aggravated in degree', which means that compensation would not be a factor in cases of rape or cases of assault causing bodily injury.

### Options for reform

7.23 It is important to clarify the relationship between customary law, practices in the community, and statute law with respect to this issue, and to codify the complainant's right to be treated in accordance with human rights and gender equality standards under both processes.<sup>206</sup>

### Reform in the Pacific

7.24 Customary law is part of the law of Papua New Guinea and Vanuatu and is subject to each country's constitution, as the supreme law. Any law, including customary law, in conflict with the constitution or 'repugnant to justice' will be removed. Claiming compensation for wrongdoing is a common feature of customary law in Papua New Guinea, and the enactment of legislation on compensation was intended to reduce the occurrence of 'payback' crimes. The *Criminal Law (Compensation) Act 1991* of Papua New Guinea allows survivors of crimes, including sexual violence and domestic violence, to claim compensation from the perpetrator.

7.25 Section 10 of the *Vanuatu Family Protection Act 2008* states that the payment of bride price has no bearing on prosecution or guilt in domestic violence cases. However, the payment may affect the punishment of the offender.

**Extract:** Vanuatu – *Family Protection Act 2008* s 10.

- (1) A person who commits an act of domestic violence is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 5 years or a fine not exceeding 100,000 Vatu, or both.
- (2) It is not a defence to an offence under subsection (1) that the defendant has paid an amount of money or given other valuable consideration in relation to his or her custom marriage to the complainant.
- (3) An offence under subsection (1) is in addition to and not in substitution for any other offence constituted by an act of domestic violence.
- (4) If a person (in this subsection called "the instigator") counsels or procures another person to commit an act that, if done by the instigator, would be an act of domestic violence, then the instigator is taken to have committed the act and subsection (1) applies in relation to the instigator.
- (5) If a person is convicted of an offence against this section, a court may, in determining the penalty to be imposed on the person, take into account any compensation or reparation made or due by the person under custom.
- (6) If under custom such compensation or reparation has not been determined and a court is satisfied that a determination is likely to be made without undue delay, the court may postpone sentencing pending the determination.

206 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.



## Key recommendations and drafting instructions for Tuvalu

### Legislation should:

- state that where there are conflicts between customary law, practices and the formal justice system, the matter should be resolved with respect to *The Constitution of Tuvalu*, the human rights of the survivor, and in accordance with gender equality standards;
- state that processing of a case under customary law does not preclude it from being brought before the formal justice system;
- ensure that reconciliation and compensation paid as part of customary settlement for sexual violation be not considered as mitigating factors in sexual assault, or physical violence cases.

## Alternative sentencing

- 7.26 Alternative sentencing refers to all sentences and punishment other than prison incarceration. An increasing number of countries provide for the option of a sentence mandating that a perpetrator attend an intervention programme for perpetrators, either in addition to, or in substitution for, other penalties. While there have been some positive experiences with such programmes, service providers for survivors have emphasised that, where limited funding is available, services for survivors should be prioritised over programmes for perpetrators, and that such sentences should be imposed only after an assessment, to ensure that there will be no risk to the safety of the survivor.<sup>207</sup>
- 7.27 Fines for offences of domestic violence are an inappropriate punishment, as in subsistence economies, fines create an extra burden for the family and could be a source of further violence. Women living in small communities tend to lose so much more by the imprisonment of violent husbands, particularly when the women's place of residence is with the husband's family. Probation or community service orders would also be unhelpful to survivors of violence as they would live in perpetual fear of being assaulted for actions taken against the perpetrator.

### The existing law

- 7.28 Part VI of the *Tuvalu Penal Code* deals with punishment and sentencing. The range of non-custodial sentences include fines,<sup>208</sup> suspended sentences,<sup>209</sup> security for keeping the peace<sup>210</sup> and residence orders,<sup>211</sup> where a person can be ordered to be 'conveyed to his place or island of origin ... for a period not exceeding 1 year'. As the greatest risk and harm occurs at the time of court proceedings and separation from the perpetrator, courts must address safety measures to prevent violence from escalating through a range of preventive and community support tools such as shelters and counselling services.

## Options for reform

### Reform internationally

- 7.29 There are a number of international examples on alternative sentencing. Articles 11 to 20 of the *Costa Rican Criminalisation of Violence against Women Law 2007* provide detailed instructions on when alternative sentences may be imposed and the alternatives available. In Spain, the *Organic Act on Integrated Protection Measures against Gender Violence 2004* provides the possibility of suspension or substitution of other penalties in cases of VAW, when the possible jail penalty would be less than two years. In cases where the sentence is suspended, the perpetrator is obliged to participate in an intervention programme. Experience has highlighted the importance of instituting well developed programmes in order to ensure that the survivor remains safe and the perpetrator benefits from the programme.<sup>212</sup>
- 7.30 The United Kingdom has had positive experiences with the Integrated Domestic Abuse Programme as an option in sentencing. The programme runs for 26 weeks and is focused on getting perpetrators to accept responsibility for their behaviour and commit to altering their behaviour and attitudes. Accredited programmes must be associated with an organisation supporting survivors, so that there is feedback from the survivor regarding whether violence is continuing.<sup>213</sup>

207 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

208 *Penal Code* s 29.

209 *Penal Code* s 28A.

210 *Penal Code* s 35.

211 *Penal Code* s 37.

212 UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

213 *Ibid.*

### Key recommendations and drafting instructions for Tuvalu

#### Legislation should:

- provide that intervention programmes for perpetrators may be prescribed in sentencing and mandate that operators of such programmes work in close cooperation with survivor service providers;
- amend pt VI of the *Tuvalu Penal Code* to give the court powers to impose other requirements with respect to domestic violence cases, e.g. perpetrator attendance at an anger management programme, counselling or other intervention programme;
- provide that, where alternative sentencing to imprisonment is used, such sentencing is approached with serious caution and handed down only in instances where there will be continuous monitoring of the sentences by justice officials and women's NGOs to ensure survivor safety and the effectiveness of the sentence;
- clearly state that fines, probation or community service orders are not appropriate for cases of VAW and children.


### Support programmes in Tuvalu

- 7.31 State and public commitments to improving laws to protect survivors of domestic violence have been due to changing social mores, improved knowledge of comparative family and domestic violence issues, and the expectations arising from international commitments and obligations. The changes so far have been incremental. Family support services are generally dependant on the programmes offered by various agencies and resources available. The breakdown in family relationships, VAW and child abuse has seen growing demands for counselling and family support services.
- 7.32 The Tuvalu National Council of Women (TNCW) is an umbrella organisation for all women's organisations in Tuvalu. They assist with fundraising, and with projects and awareness programmes. They recently received funding from AusAID to set up a counselling support service for survivors of domestic violence.
- 7.33 The Ekalesia Kelisiano Tuvalu (EKT) church runs a counselling service for youth at risk and for those with family problems, including domestic abuse. The Department of Community Affairs, in affiliation with EKT, provides counselling for young people with mental health problems. Counselling is provided on a one-to-one basis or in a workshop with target groups, such as young people, seafarers and their families.<sup>214</sup> The Tuvalu Family Health Association (TuFHA) was established in 1989 to address sexual and reproductive health issues, predominantly amongst young people.<sup>215</sup> They provide peer education for marginalised young people, young people attending school, women, people living in rural/remote communities, and seafarers.<sup>216</sup>
- 7.34 The Office of the People's Lawyers offers free legal service to Tuvaluan people. The People's Lawyers provide general legal advice and, in criminal cases, act for complainants and defendants in a range of matters, including domestic violence, personal injury, land disputes, adoption and employment disputes.
- 7.35 The NGO community in Tuvalu continues to grapple with social changes, and building alliances to undertake various projects and initiatives has become necessary. Any new legislation on VAW would be expected to increase the demand for services, and an interactive partnership between civil society groups, the courts, the police, the medical services, local government and government welfare services. Developing proactive responses to VAW will require funds and resources. A number of initiatives listed in the recommendations can be implemented without a substantial contribution.

214 Teuleala Manuella, *Youth and mental health in Tuvalu : a situational analysis*, Foundation of the Peoples of the South Pacific International (Suva, 2009) 22.

215 Secretariat of the Pacific Community, *HIV / AIDS prevention and capacity development in the Pacific: Peer education and support program mapping consultancy – Tuvalu Country Report* (April 2009) 4.

216 Ibid 5.



### **Key recommendations and drafting instructions for Tuvalu**

Legislation should:

- provide for the establishment of a national toll-free hotline and number;
- ensure support for independent women's counselling services and shelters, which utilise a rights-based framework;
- ensure training of judges, magistrates, police officers, relevant and appropriate community workers and authorised persons, on all forms of child abuse, domestic/family violence, VAW and how to protect survivors of violence;
- ensure that the Ministry of Local Government, Women and Youth annually collects statistics and evaluates services provided to survivors of violence, makes recommendations, and compiles and disseminates information on the evaluation of services.



## CHAPTER 8

# Family Law\*


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## CHAPTER 8A

# Family law and domestic violence

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\* This chapter draws primarily from Imrana Jalal, *Law for Pacific Women – A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva 1998) and Imrana Jalal as former Law Reform Commissioner (Fiji) for the review and reform of the family law with the Fiji Law Reform Commission.

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- 8.1 The current laws in Tuvalu relating to families do not comprehensively capture and address the myriad of challenges faced by families in crisis, including domestic violence. The laws must be reviewed and reformed so that family legal matters are resolved more effectively. With the complexities in family law cases, greater use is now made of community services to provide support and counselling to families in crisis, and this needs to be integrated into family law decision making. By extension, these reforms must be complemented by changes to the judicial systems and procedures so that courts are empowered to resolve family legal matters in a more comprehensive and effective manner.
- 8.2 This section of Chapter 8 focuses on the impact of domestic violence in relation to custody, access and maintenance matters, as well as property distribution in the context of family law.

#### *The existing law*

8.3 The Tuvalu family laws that relate to VAW include:

- *Marriage Act (Cap 29)*
- *Custody of Children Act (Cap 20)*
- *Adoption of Children Act 1985*
- *Native Lands Ordinance (Cap 22)*
- *Matrimonial Proceedings Act (Cap 21)*
- *Matrimonial (Miscellaneous Provision Act)(Cap 4)*

#### **Options for reform**

##### *Comprehensive family law legislative framework*

- 8.4 The scattered scheme of the current legislative framework governing families in crisis lends little or no support to women who are the subject of domestic violence. The creation of comprehensive and specialised family law legislation with clear links to the proposed VAW legislation is critical. This will prevent domestic violence being treated as a distinct (and minor) matter which has little influence on family legal proceedings. Experience has shown that, where legislation exists, relatively few people know about it or understand it.<sup>217</sup> Even the common law provisions do not appear to be widely understood.<sup>218</sup>
- 8.5 Any specialised family law legislation should cover these areas; a minimum marriage age at 18 years for both males and females, financial support for all parties without having to prove fault after separation and divorce, no fault divorce grounds, and equal rights to share in matrimonial property and family finances. *CEDAW* and *CRC* provide the guiding principles that should underpin such legislation. In addition, judicial discretion should be limited so as to narrow the possibility of interpreting new legislation in further discriminatory ways.
- 8.6 There is no perfect legislation that exists in the area of human relationships. However, gender equality based family law can help to diminish some of the challenges that women escaping from violence encounter, including sinking into poverty following separation or divorce. Anecdotal evidence from the Pacific suggests that the largest numbers of the newly poor consist of separated, divorced or single women with children. Arguably the laws on the family, which are closely linked to domestic violence laws, affect the largest numbers of women and children in the region.

##### *Separate family court*

- 8.7 In most PICTs, a major legal handicap is the lack of specialised courts. A specialised court would facilitate families in crisis to resolve their disputes in a dignified way. A useful guide on the shape and form of a specialised court is found in Fiji where the family court is a specialised division of the high court. This specialised court prioritises the hearing and determination of children's needs and parental support.

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<sup>217</sup> Ibid 174.

<sup>218</sup> Ibid 174.

### Key recommendations and drafting instructions for Tuvalu

- Draft and enact specialist family legislation such as the *Tuvalu Family Law Act*.
- Establish a separate family court with comprehensive civil and criminal jurisdiction. The court could be a stand-alone court or a division of the supreme court and the magistrates' court.
- Ensure that specially trained judicial officers and court staff are assigned to the family court.
- Ensure the application of *CEDAW* and *CRC* to family law.

### Divorce /Dissolution of marriage

- 8.8 There are many unnecessary anachronistic, technical and burdensome rules that discriminate and have a disproportionate impact on women.<sup>219</sup> However, of all the rules, the burden of fault-based divorce has the most disproportionate impact on women. In order to obtain a divorce, a spouse has to prove that the other spouse has committed a matrimonial offence or, as is more commonly known, a spouse has to offer 'fault'. This type of divorce regime is premised on the unrealistic assumption that only one spouse is ever to blame for the breakdown of the marriage.
- 8.9 In countries with a fault-based system, there is a duty on the court to promote reconciliation and forgiveness by the injured spouse. This can include the restoration of marital rights and might prevent a divorce from taking place.<sup>220</sup> The duty to promote reconciliation also neglects to take into account possible power disparities between the spouses and the significant financial, customary, family and community pressures that may be placed on a woman.

#### *The existing law*

- 8.10 Tuvalu has a fault-based divorce regime and under the *Matrimonial Proceedings Act*, matrimonial proceedings may be commenced in the island courts or in the magistrate's court. The island courts have jurisdiction to hear divorce cases where; both parties are Tuvaluan citizens, both parties are present, both consent to the divorce, and there are no major problems with ancillary proceedings (for example child custody and matrimonial property distribution).<sup>221</sup> Where difficulties arise in any ancillary proceedings, the court must transfer the matrimonial proceedings to the magistrate's court.<sup>222</sup> Where special difficulties arise in the magistrate's court, the matrimonial proceedings may be transferred to the senior magistrate's court.<sup>223</sup>
- 8.11 The *Matrimonial Proceedings Act* allows divorce in three situations: where one party has wilfully refused to consummate the marriage;<sup>224</sup> where the marriage has been induced by fraud, duress or mistake;<sup>225</sup> and where the marriage has broken down.<sup>226</sup> Evidence of marital breakdown includes: adultery, desertion, cruelty, insanity and unlikely to recover, and circumstances in which it would be unreasonable to expect one party to continue in a marital relationship with the other.<sup>227</sup> In proceedings based on marital breakdown, the court is obliged to adjourn proceedings for three months for parties to attempt reconciliation unless the court is satisfied that reconciliation is unlikely to succeed. The court may refuse to grant a divorce if adequate arrangements have not been made for the welfare of the children.<sup>228</sup>
- 8.12 In practice, courts look for evidence that the cruelty is habitual.<sup>229</sup> Because cruelty is narrowly interpreted, legal and cultural obstacles make it the most difficult ground to prove. This means that a divorce application may not be made until after three years of legal marriage, as the legislation may condemn a newly married woman to remain in an abusive relationship before she becomes eligible to apply for a divorce. This is further compounded by the reconciliatory period of three months.

219 Ibid chs 7-12.

220 Ibid 267. See also Jivan and Forster, above n 118, xiii.

221 *Matrimonial Proceedings Act* (Cap.21) s 5.

222 *Matrimonial Proceedings Act* s 5(4).

223 *Matrimonial Proceedings Act* s 6(2).

224 *Matrimonial Proceedings Act* s 8(a).

225 *Matrimonial Proceedings Act* s 8(b).

226 *Matrimonial Proceedings Act* s 9(1).

227 *Matrimonial Proceedings Act* s 9.

228 *Matrimonial Proceedings Act* s 12(2).

229 These criteria are relevant when considering the scope of 'habitual cruelty' (a) there must be proof of real injury to health or of a reasonable fear that the cruelty will cause harm; (b) the cruelty need not be deliberate; (c) the cruelty must be habitual, that is regular, systematic and constant; and (d) cruelty is not necessarily physical violence. See Jalal, above n 174, 245.

## Options for reform

### Reform in the Pacific

- 8.13 Fiji, Nauru, New Zealand and Australia have various versions of the no-fault regime. This is a more humane and human rights compliant response to marriage breakdown and is consistent with CEDAW. The Fiji *Family Law Act*, which is based on the no-fault principle of divorce, utilises, *inter alia*, a non-adversarial counselling system.

#### Key recommendations and drafting instructions for Tuvalu

Legislation should:

- provide for a gender neutral no-fault ground of dissolution of marriage after continuous separation for one year where the marriage has broken down irretrievably;
- remove any form of restitution of conjugal rights;
- remove the fault-based grounds under s 9 of the *Matrimonial Proceedings Act* and replace it with 'irretrievable breakdown of marriage after one year's continuous separation.' The only basis for dissolution of marriage should be the failure of the personal relationship between husband and wife;
- remove the term 'divorce' and replace it with 'dissolution of marriage';
- remove all adversarial pleadings from the law on dissolution of marriage, and provide that proceedings can commence by either or both spouses with the filing an application for dissolution of marriage;
- include the grounds for dissolution along the lines of the Australian legislation, which also allows for separation under one roof. A husband or wife should not be forced to live apart as a condition of obtaining dissolution of marriage if economic circumstances dictate that they cannot;
- include with the no-fault dissolution of marriage, provision for community-based reconciliation facilities, and court-based counselling and conciliation facilities in children, property and financial matters. This process should:
  - > enable the spouses to explore the possibility of reconciliation without forfeiting their rights to dissolution if the reconciliation fails;
  - > emphasise negotiation and agreement on justiciable issues;
  - > provide for litigation on justiciable issues of agreement that cannot be reached after a reasonable period of time;
  - > provide for dissolution of marriage after all the steps have been complied with.
- provide that the dissolution of marriage process should be completed within a reasonable time frame having regard to the psychological stresses on all parties.

## Children: custody and maintenance

### Custody and guardianship of children

- 8.14 Protection from domestic violence and the right to a life free from violence should not only be a principle embraced in legislation on VAW, but also in all relevant areas of family law. The awarding of child custody to a perpetrator of domestic violence poses a danger to both the adult survivor and the child. For many women, ending the relationship does not necessarily end the violence, as the need for ongoing contact after separation to make custody and visitation arrangements is often used by the perpetrator to continue abuse of the survivor.<sup>230</sup>
- 8.15 The current laws governing custody in most PICTs, including Tuvalu, discriminate against women. Women suffer distinct disadvantages due to their lack of financial independence, land rights, access to shelter, equal rights to matrimonial property, and limited capacity to enforce maintenance awards. If parents negotiate an agreement, it is more likely that mothers get custody by consensus. However, it is more likely that should a custody dispute reach the court system, the father (even if he is alleged to have committed domestic violence) has a significantly better chance of obtaining custody. This is because men are generally better financially situated than women, implying better home conditions and financial advantages for the children.

<sup>230</sup> L. Laing, 'Domestic violence and family law' (Topic Paper No. 8, Australian Domestic and Family Violence Clearinghouse, 2003) 2.

### The existing law

8.16 The Tuvalu *Custody of Children Act* is based on the welfare of the child and with both parents having equal rights of custody and access.<sup>231</sup> However, if the child is illegitimate, there is a legislative bias towards the father in s 20 of the *Native Lands Ordinance* (Cap 22). It states that:

if the father being a native accepts the child as being his, such child shall after reaching the age of 2 reside with the father or his relations and shall in accordance with native customary law inherit land and property from his father in the same way as the father's legitimate children.<sup>232</sup>

8.17 In Tuvalu, the legislation specifically allows custom law to be applied in cases affecting the right to custody of children. This is in violation of *CEDAW*, *CRC* and children's rights. Pulea states that:

whilst the goal of this provision is to confer land inheritance rights on the child, it also transfers custody rights to the father without enquiry or the application of child welfare principles. The transfer of custody rights to the father and his family is not subject to challenge as to parental fitness; there is a presumption that the biological tie to the father would service all of the child's best interests. These gender-based customary rules, which deny the mother parental responsibilities and rights, violate equality between men and women as parents.<sup>233</sup>

### Options for reform

#### Reform in the Pacific

8.18 Divisions 4 and 5 of pt VI of the Fiji *Family Law Act 2003* provide specific and comprehensive guidelines to assist courts in making proper parenting orders regarding children.

#### Reform internationally

8.19 In the USA, Congress unanimously passed a resolution in 1990 urging every state to adopt a statutory presumption against awarding custody to a parent who has committed domestic violence.

#### Key recommendations and drafting instructions for Tuvalu

##### Legislation should:

- use the language of parental care, residency and contact rather than custody and access;
- provide comprehensive guidelines on how residency (custody) and parental care or parenting orders should be made that are consistent with *CRC*;
- provide that custom law shall not influence the making of orders in the best interests of the child;
- provide for a statutory presumption against ordering residency to a violent offender;
- provide that if the complainant has acted in self-defence and fled the marital home, no negative inference should be drawn against her in custody and visitation rights;
- ensure that child abuse and neglect proceedings target the offenders and are based on the best interests of the child;
- ensure that the language of the legislation dealing with custody and access must be positive, user-friendly, gender-neutral and free of fault;
- adopt new terminology as follows:
  - > 'parenting plans' should contain all such details of parental obligations and responsibilities pertaining to residence, contact, and other important details agreed to by the parties with, or without court intervention;
  - > 'residence order', 'parenting orders' or 'care order' replaces custody order and defines with whom the child resides and other details;
  - > 'contact order' replaces 'access order' and defines with whom the child comes in contact with and other details.

231 *Custody of Children Act* s 3.

232 *Native Lands Ordinance* s 20.

233 Mere Pulea 'Women's dignity and rights: Situating Pacific experiences' in Meena Shivdas and Sarah Coleman (eds.), *Without prejudice – CEDAW and the determination of women's rights in a legal and cultural context* (Commonwealth Secretariat, 2010) 109.





## Spousal and child maintenance

- 8.20 A significant factor affecting women's capacity to survive following separation, divorce and domestic violence is the law affecting maintenance and matrimonial property. Regular spousal and child maintenance can help to reduce the load and create a better life for herself and her children. Specific problems stem from limiting those who are eligible for maintenance, the conditions upon which maintenance is awarded, the enforcement of maintenance orders when payment is not made, and the legal basis for the distribution of matrimonial property.
- 8.21 Maintenance awards should be based on need, the financial commitments of both parties, their respective capacities to earn, and the needs of the children. Owing to the fact that Tuvalu legislation provides no guidelines for the amount of maintenance to be calculated, most courts award grossly inadequate amounts of maintenance, rarely based on reason. The lack of adequate guidelines in the legislation causes great economic injustice to women, and their children. The enforcement of maintenance orders is also difficult as there is a reluctance to imprison for non-payment of maintenance.

### *The existing law*

- 8.22 Section 3 of the *Maintenance (Miscellaneous Provision) Act* (Cap 4) empowers any person to apply for spousal and child maintenance from any person liable to provide maintenance under a legal or customary provision. Both wives and children could legally be entitled to maintenance from husbands under this provision and adult children might be liable to maintain their parents.

## Options for reform

### *Reform in the Pacific*

- 8.23 In Fiji, both legal and *de facto* couples may apply for maintenance for themselves and their children under the *Fiji Family Law Act 2003* and the *Family Law (Amendment) Decree 2012*, which now recognises *de facto* relationships, provided certain criteria are satisfied by the claimant.

### *Reform internationally*

- 8.24 Under the Australian *Family Law Act 1975*, a spouse has a right to be maintained. Section 75 of that Act lists the criteria to determine the basis of spousal maintenance. It further gives credit to the fact that maintenance of a spouse is essential for his/her upkeep. This right is not dependent on spousal conduct, during or after the marriage; rather it is based on need and the ability to pay. Section 157 of the *Fiji Family Law Act 2003* is modeled on section 75 of the Australian *Family Law Act*.

## Key recommendations and drafting instructions for Tuvalu

### Legislation should:

- define financial support as the provision of money, property and services by a person (payer) who has the ability to so provide to his or her spouse (the recipient), who has a need for such provision in order to meet day-to-day living expenses;
- provide several circumstances in which financial support may be sought and ordered by the court:
  - > when a husband and wife decide to separate;
  - > when the husband refuses to provide for the wife and children;
  - > when they are living together (in some jurisdictions, maintenance will not be ordered if the spouses are still living under one roof);
  - > when the parties divorce;
- provide that the cohabitation rule be abolished so that an order for financial support is based on the need of the recipient and the ability of the payer to pay;
- give the court power to make an order of support where the parties are:
  - > living separate and apart; or
  - > not living separate and apart but they are, in the opinion of the court, experiencing marital discord of such a degree that they cannot reasonably be expected to live together;
- provide that the fault under which maintenance is currently sought be abolished and replaced by a single ground based on failure to maintain, the needs of the recipient, and the ability of the payer to pay, and where there is a legal or customary obligation to do so;
- ensure that the conduct of the parties does not affect an order for support, or a decision as to the amount of support, unless a party is deliberately avoiding employment where s/he is able to do so;
- base financial provision on factors such as need of the recipient and ability of the payer to pay. The relevant factors provided in s 75 of pt VIII of the Australian *Family Law Act 1975* and s 157 of the Fiji *Family Law Act 2003* should be adopted.

## Matrimonial property rights

- 8.25 In Tuvalu, complex customary inheritance laws govern the ownership of land and there is no legislation governing land use or distribution following divorce. If litigated, the legal regime is based on financial contributions and broad principles of constructive trust. Therefore, the fundamental question is whether the evidence of domestic violence should be considered relevant at all in the process of adjusting property interests between persons in a domestic relationship.
- 8.26 Current property laws are interpreted on the basis that property is owned by the person who provided the money to pay for it, regardless of whether the owner is single or married. The sharing of property is therefore based on whether a spouse earned money from work or managed the home and children. It is common in Pacific Island urban communities for one spouse to make the mortgage and similar payments, and for the other to assume responsibility for living expenses and household purchases. Economic aspects of the law should, in this instance, treat the family as a joint venture in which the spouses are equals.

## Options for reform

### Reform in the Pacific

- 8.27 No country in the Pacific, apart from Fiji, clearly states in its legislation that women are entitled to an equal share of property after divorce based on principles of equality.
- 8.28 Following separation or divorce, the most sensible course of action would be to allow the person with custody of the children to stay in the house, with the option of buying out the other spouse's share. If this is not practical, the court should be able to make an occupation order enabling the custodial parent to stay in the house with the children until he or she can afford to buy the other spouse's share, or until the youngest child reaches adulthood, or the custodial parent remarries or agrees to some other arrangement fair to all parties, or the custodial parent seeks a further order based on changed circumstances.
- 8.29 Native land is exempt from matrimonial property laws except where the court can order sharing of leased native land. The proposed family law legislation should specifically provide that the permanent disposal of native land is exempt from sharing. The court can, however, regard native land that is leased as mutually owned property and make an order about the rights of the parties for the remainder of the lease.

## Key recommendations and drafting instructions for Tuvalu

### Legislation should:

- establish equal rights to matrimonial property, regardless of financial and non-financial contribution;
- provide comprehensive guidelines to assist courts make appropriate decisions based on gender equality;
- guarantee the complainant's right to stay in the family dwelling if she is a victim of domestic violence;
- secure the pension/provident fund rights of children.
- take into consideration matrimonial property, together with issues of custody, maintenance and occupation of the marital home;
- provide specific powers enabling the court to order that one parent occupy the matrimonial home, where it is not possible or economically feasible to sell the home and divide the proceeds, or for one spouse to buy the other out if it is in the best interests of the children;
- provide that occupation orders or exclusive possession orders should apply to any dwelling in which the parties live, including leased property;
- provide a statutory assumption, which can be displaced if the circumstances warrant it, that the parent with custody of the children remain in the matrimonial home;
- consider that domestic violence is a factor in granting orders for exclusive possession of the shared home and that an *ex parte* civil remedy be available in such circumstances. This application should be within the exclusive domain of the family division of the courts;
- provide that orders for exclusive possession in cases of family violence should apply to any dwelling where the parties live, including leased property;
- provide that the Registrar of Titles become a nominal party in all matrimonial property proceedings;
- provide a special category of caveat to protect the non-owning spouse's legal interest. This caveat should be lifted only when a matrimonial property order is finally obtained or the family division of the court orders accordingly;
- automatically create the non-owning spouse's right of possession to the matrimonial home. This should be a registrable charge on a certificate of title;
- contain a provision to enable the court to set aside a transaction that has been made to defeat a spouse's matrimonial property claim. The 'claw back' provision in the legislation will enable the court to set aside a property disposition that was made to defeat a husband or wife's rights or claims;
- provide that the government direct all government-owned, partly owned, or supported lending institutions to initiate a policy requiring both spouses names to be on all legal documents for private home residences.



CHAPTER 8B

**Other relevant  
family law**

- 8.30 This section of Chapter 8 focuses on other aspects of family law that are relevant to gender equality, but may not specifically relate to domestic violence. This information is provided to ensure that all aspects of family law are considered when reviewing and updating legislation.

### Ex-nuptial children – affiliation and paternity law<sup>234</sup>

- 8.31 There are several elements of the laws affecting affiliation and paternity that create injustice for unmarried women and their children.<sup>235</sup> For children born outside legal or custom marriage that is recognised by the courts, affiliation or paternity cases have to be filed to establish fatherhood in order to obtain maintenance (financial support) for the children. Evidential burdens are extremely difficult to satisfy. Corroborative evidence is required, either through legislation or common law, to prove fatherhood. Apart from Fiji, there is no legislation requiring alleged fathers to submit to compulsory blood tests for blood or DNA testing. The courts do not allow assumptions about liability to be made when a man accused of fathering a child refuses to submit to a blood test. Affiliation cases are replete with false assumptions about women's sexual behaviour. Trials often proceed on the unstated belief, held by not only the judge, that unmarried women with children are promiscuous and are taking advantage of innocent men.
- 8.32 In traditional Pacific Island cultures, children have equal status, regardless of their parents' marital status. The law in most Pacific countries, however, as imported from Britain, discriminates against ex-nuptial children who are deemed children of the marriage only in specified circumstances. English common law preserves the status of legitimacy for property and religious reasons. The legal and social implications for an ex-nuptial child are many. S/he is not eligible for any financial support unless paternity is proved, and cannot make a claim on a parent's estate unless paternity has been admitted during the lifetime of the parent. Illegitimacy itself can be a social and psychological burden.
- 8.33 CRC prohibits discrimination on the basis of 'birth or other status'<sup>236</sup> with the *Universal Declaration on Human Rights (UDHR)* stating that: 'all children, whether born in or out of wedlock, shall enjoy the same social protection'.<sup>237</sup> Equal legal status is also guaranteed, which gives rights to children that were previously attributed only to adults. The 'best interests of the child' principle underpins these rights and imposes a duty on state parties to ensure direct and continued contact between a child and her/his parents, irrespective of their status.

#### The existing law

- 8.34 Tuvalu and Kiribati have the most restrictive and direct gender discriminatory laws regarding custody over ex-nuptial children. The legislation in both requires that natural children be given to their fathers, if paternity is accepted, on reaching the age of two.<sup>238</sup> This is to ensure the rights of the children to their father's land.

### Options for reform

#### Reform internationally

- 8.35 The distinction between nuptial and ex-nuptial children has been removed in seven Canadian jurisdictions, in line with changing social attitudes. In New Zealand, a person's relationship with his or her parents must not be defined by the parents' marital status. This applies to any person born any time in, or outside of New Zealand, whether or not their parents are domiciled in New Zealand. Entries relating to illegitimate children are deemed to be expunged and deleted. The *Family Law Reform Act 1987* of the United Kingdom shares this objective. It improves the unmarried father's position in gaining parental responsibility for his children's upbringing. It prevents any law being passed, or legal document made, from expressly including reference to children of, or other relationships traced through, unmarried parents. These include all familial references like 'father', 'son' or 'grandfather' unless a different intention is specified.
- 8.36 The United Kingdom position is ambiguous, and less bold than in New Zealand. However, in both cases the status of legitimacy is losing its meaning. Many parents favour cohabitation over marriage and plan to have children outside marriage. Accordingly, the focus has also shifted from making material provision for the future of a selection of children, to ensuring the future welfare or best interests of all children.
- 8.37 Administering two parallel regimes based on the different legal status of children is both unwieldy and costly. The shift is evident in the study of statutory definitions from other jurisdictions. In other legal systems, the definition of a child of a marriage includes children who are ex-nuptial, those resulting from artificial insemination, adopted, stillborn, or of no blood relation to either parent.

234 Fiji Law Reform Commission, *Fiji Family Law Discussion Paper 8* (1998).

235 Jalal, above n 174, 450-497.

236 *Convention on the Rights of the Child*, art 2(1).

237 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 25(2).

238 *Native Lands Act* (Cap 60) s X; *Magistrates' Court Act* (Cap 52) s 65(2).

## Key recommendations and drafting instructions for Tuvalu

### Legislation should:

- remove the discriminatory corroboration rule and require ordinary burdens of proof in civil law in proving paternity including:
  - > requiring a blood test/DNA test for establishing paternity;
  - > allowing the court to draw a reasonable inference from a refusal to submit to a blood/DNA test;
- repeal the various sections of legislation that automatically grant custody of ex-nuptial or natural children to their father;
- provide that, in the making of any order regarding children, the law shall be based on the best interests of the child;
- remove the separate legal status given to nuptial and ex-nuptial children (including in relation to maintenance) and references to the marital status of their parents;
- provide that the definition of a child of the marriage should include all children in defined circumstances.

## Enforcement of maintenance

8.38 Enforcement of maintenance (and of all family law orders) is a major problem in Tuvalu as well as in other Pacific countries. The current system is inefficient, despite the number of legislative remedies currently available to the maintenance recipient. The problem of maintenance enforcement is escalated by sheer lack of resources, unreasonable delays, lack of enforcement officers and the placing of the onus of enforcement on recipients.

### Options for reform

- 8.39 An automatic income attachment is automatic garnishment of wages, which ought to be made as a matter of course if a defendant is in regular employment. In Samoa, such an order is automatically made at the time the maintenance order is made, unless there is a compelling reason not to. The costs of garnishing wages are considered minimal, when compared to the potential costs of enforcing orders against repeat defaulters. It is generally accepted that this system has a certain advantage, despite concerns that the programme may increase the bureaucracy of maintenance enforcement, by requiring wage garnishment even in cases where there may never be payment problems. In those cases it is an unnecessary expense for both the employer and the agency, which must regulate the process. Further, it does not give the payer an opportunity to demonstrate a good payment history before garnishment of income occurs.<sup>239</sup>
- 8.40 Substantial fines should be imposed whenever an income source fails to forward money to the court or agency. The income source should be responsible for making deductions from the income of the employees. The onus should be on the payer and the income source for informing the unit if there is a change in employment (including termination, transfer or change in payment rate).

### Reform in the Pacific

- 8.41 If a defendant leaves the country without arranging maintenance payments s/he can be stopped temporarily from leaving through the 'absconding debtor' process. In the Republic of Nauru, if the court thinks that a party is trying to hide or transfer money out of the country, or transfer money/property to someone else in order to avoid paying maintenance, it can undo the transfer or make an order to ensure court orders are met. The legislation of most PICTs provides for the enforcement of maintenance where it appears that the defendant intends to go overseas without paying maintenance or without ensuring that her/his maintenance will continue to be paid whilst s/he is abroad. The legislation provides that, if the defendant tries or intends to leave the country with the intention of avoiding payment, s/he can be imprisoned. Most countries allow the court to hold the defendant's passport until s/he has made satisfactory arrangements to pay maintenance, whether s/he is in arrears or not, and to prevent future arrears.

<sup>239</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women, above n 5.

**Example:** Fiji – *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act 1962* ptV s 23.

A judge, magistrate or court may require -

- (a) any person who is in arrears with payments under a maintenance order,
- (b) any person who is brought before the court under arrest in the course of enforcement of a maintenance order,

to deposit his passport with the Court. The passport may be detained until the Court is satisfied that suitable arrangements have been made either by the provision of sureties or otherwise for compliance during the absence of such person overseas with any maintenance order made or to be made against him.

- 8.42 This means that the magistrate's court may keep the passport until arrangements to pay have been made. The defendant might have to pay a lump sum into court so that the recipient can collect a specified amount over a number of years. The defendant might also be ordered to provide a guarantor who will be made to pay instead of the defendant if s/he fails to pay future maintenance. Judges are very reluctant to seize a person's passport, as they regard this option as violating a person's freedom of movement guaranteed in the constitution. They prefer to rely on inter-country reciprocal arrangements involving the registration of overseas orders to enforce maintenance payments. However, such procedures can be inefficient due to inter-government administrative procedures being vastly inadequate.

#### **Key recommendations and drafting instructions for Tuvalu**

Legislation should:

- provide for the establishment of maintenance officers to initiate and enforce maintenance obligations, enforce automatic income attachment (if the defendant is in regular formal employment), and utilise alternative and innovative methods of enforcement;
- provide that an attachment order should be available as a remedy at the option of the recipient after the first default of payment;
- provide legal and administrative procedures for enforcing payments by absconding debtors, including the strengthening of overseas orders;
- empower the court to undo a transfer of maintenance offshore or make an order to ensure that court orders are properly met.

## Appendix I - Checklist of items - drafting legislation on violence against women

### Comprehensive legislation should:

a. explicitly recognise VAW as a form of gender-based discrimination and a violation of women's human rights;	
b. contain provisions for its effective implementation, monitoring and evaluation;	
c. provide an organic link to a comprehensive national policy, action plan or strategy;	
d. mandate a budget for its implementation;	
e. provide for the elaboration of rules, regulations, and protocols necessary for the law's full and effective implementation;	
f. require the training of all relevant officials;	
g. mandate the creation of specialised institutions and officials to implement legislation on VAW;	
h. emphasise the critical importance of monitoring the implementation of the law and establish institutional mechanisms, such as multi-sectoral task forces or committees, or national rapporteurs, to undertake this task;	
i. require the regular collection of statistical data and research to ensure an adequate knowledge base for effective implementation and monitoring;	
j. include broad definitions of all forms of VAW, including trafficking in persons, in accordance with international human rights standards;	
k. provide specific recommendations as to how domestic violence, sexual violence and trafficking in persons should be defined;	
l. prioritise prevention and provide for a range of measures to be undertaken including awareness-raising campaigns, sensitisation of the communications media, and materials on VAW and women's human rights in educational curricula;	



m. provide for the empowerment, support and protection of the complainant/survivor through the enactment of legislative provisions that ensure access to comprehensive and integrated support services and assistance;	
n. guarantee the rights of immigrant women who are complainants/survivors of violence;	
o. legislate specific duties of police and prosecutors in cases of VAW;	
p. provide detailed provisions, with the aim of preventing the secondary victimisation of the complainant/survivor throughout the legal process, including in evidentiary rules, in the collection of evidence, in legal procedure, and during legal proceedings;	
q. protection orders in cases of VAW;	
r. criminalisation of any violation of protective order;	
s. ensure that sentences in cases of VAW are consistent with the gravity of the crime committed;	
t. eliminate exemptions or reductions in sentencing granted to perpetrators of VAW in certain circumstances;	
u. highlight the valuable role that civil law suits may play as a supplement or alternative to criminal prosecution, civil protection orders, and other available legal remedies;	
v. amend existing family law to ensure the sensitive and appropriate consideration of VAW in family law proceedings, and consider issues of alimony and the right to remain in the family dwelling;	
w. acknowledge that VAW may constitute persecution and that complainants/survivors of such violence should constitute 'a particular social group'.	

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