



# Translating CEDAW Into Law

CEDAW Legislative Compliance In Nine Pacific Island Countries



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Chapter cover photos (in order of appearance): Roderic Evers/UNDP, Fiji Times, UNIFEM, Richard Hatfield, Steven Nowakowski, Georgina Bonin/UNDP, Natascha Spark, Eiko Narita/UNDP, Jeff Liew/UNDP.

Designed by: Imaging Systems, Suva, Fiji

Printed by: Star Printery, Suva, Fiji

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Nine Pacific Island Countries

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Pacific Centre



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1st Edition February, 2007  
This Edition May, 2007

## **USP Library Cataloguing-in-Publication Data**

Jivan, Vedna

Translating CEDAW into law : CEDAW legislative compliance in nine Pacific island countries / Vedna Jivan and Christine Forster. – Suva, Fiji : UNDP Pacific Centre : UNIFEM Pacific Regional Office, 2006.

p. : col. ill. ; 22 cm.

ISBN 978-982-304-022-6

1. Sex discrimination against women—Oceania 2. Convention on the Elimination of All Forms of Discrimination against Women (1980) 3. Sex discrimination against women—Law and legislation—Oceania 4. Women—Legal status, laws, etc.—Oceania I. Forster, Christine II. Title.

HQ1237.5.O3J48 2006  
305.42

# Foreword

*The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, known as the international bill of rights for women, remains the most comprehensive international human rights instrument addressing discrimination against women in a wide range of areas. Commitment to CEDAW in the Pacific has increased steadily over the last few years and it is now the second most ratified treaty in the Pacific (the Convention on the Rights of the Child has now been ratified by all 15 Pacific Island Forum countries).

This joint UNIFEM/UNDP Pacific Centre publication; *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries*, is an example of the important and groundbreaking work that can happen when governments, civil society, regional organisations and the United Nations (UN) family work together towards the goals of universal ratification and implementation of CEDAW in the Pacific. There were many contributing activities and efforts that eventually led to the idea of developing concrete indicators to assess the degree to which national legislation complies with CEDAW. In particular, in April 2005, UNDP, UNIFEM, UNICEF, the Pacific Islands Forum Secretariat and the Secretariat for the Pacific Community convened a Sub-Regional meeting for Polynesia<sup>1</sup>, held in Nuku'alofa, Kingdom of Tonga, on “integrating MDGs, CEDAW and CRC into National Development Plans”. This workshop considered how the MDGs, CEDAW and CRC commitments could best be reflected in national plans and budgets. It also attempted to find practical solutions for achieving this integration, while at the same time reducing

perceptions that each new convention or agreement simply added to the burden of governments and communities in the region. During the discussions, it became clear that while the MDGs and associated targets and indicators are a tangible means of monitoring development performance, there was a need to develop more concrete and measurable performance indicators for CEDAW.

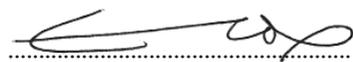
Following that Sub-Regional workshop, UNIFEM Pacific initiated work with the consultants who authored this report to develop indicators to measure legislative compliance with CEDAW. After much research, analysis and consultation, 113 indicators were developed and agreed upon that reflect how the spirit and guidelines contained in CEDAW, could be translated into law. UNIFEM Pacific then commissioned reviews of legislative compliance with CEDAW in the six Pacific Island countries covered by its original CEDAW project; Fiji, Papua New Guinea, Samoa, Solomon Islands, Tuvalu, and Vanuatu, using the legislative indicators that had been developed. In March 2006, UNIFEM, in partnership with the newly established UNDP Pacific Centre, the Pacific Islands Forum Secretariat and the SPC Pacific Women's Bureau, convened a roundtable on CEDAW where the legislative compliance indicators and the 6 completed country reviews were presented. The UNDP Pacific Centre then followed up on requests from the three Pacific countries that had most recently ratified CEDAW; the Federated States of Micronesia, Kiribati, and the Marshall Islands, to have national legislative compliance reviews completed for these three countries. This support

1. Cook Islands, Niue, Samoa, Tokelau, Tonga and Tuvalu.

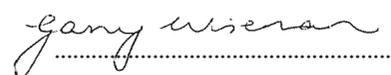
also included further analysis and substantive input into the rationale and application of the indicators first developed for UNIFEM. This joint publication contains the legislative compliance indicators developed, instructions on how to use them, and full details of the nine completed country compliance reviews.

Following ratification, many governments struggle with how to plan for the process of implementing CEDAW. The completed country compliance reviews provide an important road map for each country to use in developing its short term and longer term national plan for implementation. As is noted in the introduction to this work, while legislative compliance will not, on its own result in the full implementation of CEDAW, “the pursuit of legislative compliance is nevertheless an important initial measure towards that goal”.

The development of the CEDAW legislative compliance indicators and the associated country reviews mark an important milestone in treaty implementation. UNIFEM and the UNDP Pacific Centre, along with other development partners, remain ready, willing and able to provide support to governments and civil society as they work towards realising substantive equality between women and men (and girls and boys) in the Pacific. It is our sincere hope that the development of these CEDAW legislative compliance indicators will provide practical assistance in this regard to the nine Pacific Island countries involved, and also to those governments still working towards the ratification of CEDAW.



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# Acknowledgements

The authors wish to acknowledge and thank the following individuals and organisations for their generous time, contribution and expertise;

Doug Hastings	Attorney General's Dept FSM
Koila Costello-Olsen	Ecumenical Centre for Research, Education and Advocacy (ECCREA)
Sharon Bhagwan Rolls	femLINKpacific
Virisila Buadromo and Seema Naidu	Fiji Women's Rights Movement (FWRM)
Dr A M Zakariah, Urmila Bhoola, Tasneem Ali, and Margaret Read Rounds	International Labour Organisation (ILO) for the South Pacific
Vani Dulaki	International Planned Parenthood Federation (IPPF)
Grace Dom	Justice Department, PNG Government
Scott Garvey	Legislative Counsel, Pohnpei, FSM
Donald Marahare	PACLI
Imrana Jalal, Gina Houg Lee and Amelia Fasi Pasikala-Faasau	Regional Rights Resource Team (RRRT)
Stuart Watson	UNAIDS
Garry Wiseman	United Nations Development Programme (UNDP)
Dr Seta Vatucawaqa, Dr Annette Sachs Robertson	United Nations Population Fund (UNFPA)
Gillian Mellsop, Katherine Gilbert and Holly Doel Mackaway	United Nations Children's Fund (UNICEF)
Yoli Tom'tavala	University of the South Pacific Faculty of Law
Peter Murgatroyd	University of the South Pacific Law Library
Noelene Nabulivou, Eta Tuitoga and Carlos Perera	Women's Action for Change (WAC)

The authors would like to acknowledge the staff at the UNIFEM Pacific Regional Office and the UNDP Pacific Centre; Amelia Kinahoi Siamomua, Sofia Vuibureta Rayasi, Salote Chang, Seru Vukivou, Francis Mangru, Laisani Komairasea, Jainesh Lal, Mary Anne Fong, Shobhna Decloitre, and especially Laisa Bale Tuinomaola and Suki Beavers for all their support and assistance.

Finally, the authors would like to thank in particular Alison Aggarwal and Rathy Santhiran for their support and assistance, and Imrana Jalal and Suki Beavers for their invaluable input, suggestions and guidance.



# Executive Summary

1. This report presents the results of a desk review conducted to assess if, how, and the degree to which the national laws of nine Pacific countries; Federated States of Micronesia (FSM), Fiji, Kiribati, Marshall Islands, the , Papua New Guinea (PNG), Samoa, Solomon Islands, Tuvalu and Vanuatu comply with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
2. This review assesses legislative (*de jure*) compliance with CEDAW rather than real or actual equality (*de facto*). Whilst it has been universally recognised, and emphasised in the Beijing Platform for Action, that *de jure* legislative compliance may not of itself result in *de facto* compliance, the pursuit of legislative compliance is nevertheless an important initial measure towards that goal.
3. The task of assessing legislative compliance required the application of a set of indicators. Indicators are a tool by which the question of how much (or whether) progress is being made towards a certain objective is measured. Indicators also provide a means of monitoring progress in the future.
4. The authors in collaboration with UNIFEM Pacific developed a set of 113 indicators which were based on the text of each of the articles of CEDAW; a close analysis of the 25 General Recommendations of the CEDAW Committee; a review of literature and information obtained from non-government and government sources and finally through consultations conducted with government officials, and non-governmental organisations (NGOs).
5. The national constitutions and laws of the nine countries were evaluated against the set of indicators. FSM, however, (which consists of a national system and four state systems: Chuuk, Kosrae, Pohnpei and Yap) was measured against a reduced set of 111 indicators. This reflects the presence of reservations (a formal declaration that the State Party does not accept as binding certain parts of the Convention) on some of the articles of CEDAW. It should also be noted that, through the national constitution of the FSM, which is the basis for all legal authority, the power to legislate is divided between the FSM parliament and the state parliaments. Whilst the FSM has express power over areas such as tax, trade and national crimes, it *may* also establish systems of social security and public welfare concurrently with the states. The division of powers did not reduce the indicators and the FSM was measured against both the indicators which concern its express powers to legislate and against the indicators that relate to its power to implement systems of social security and public welfare.
6. The results showed a varying level of compliance in the nine countries and from article to article. In each of the nine countries, in some areas, there is significant compliance with CEDAW, in others some progress has been achieved, whilst in others non-compliance remains a considerable issue and significant legislative change is required. Whilst full compliance with CEDAW has not been achieved by any of the nine countries examined, it should be noted that this is yet to be achieved by any country in the world.
7. Fiji has achieved full compliance with 49 out of 113 indicators, partially complied with 26 and had no compliance with 38; Kiribati has achieved full compliance with 26 indicators,

partial compliance with 29 indicators and no compliance in relation to the remaining 58 indicators; the Marshall Islands has achieved full compliance with 39 indicators, partial compliance with 19 indicators and no compliance with the remaining 55 indicators; the FSM has achieved full compliance with 26 of 111 indicators, partial compliance with 18 indicators and no compliance with the remaining 69 indicators. Chuuk has achieved full compliance with 30 indicators, partial compliance with 21 indicators and no compliance in relation to the remaining 62 indicators. Kosrae has achieved full compliance with 33 indicators, partial compliance with 18 indicators and no compliance with the remaining 62 indicators. Pohnpei has achieved full compliance with 34 indicators, partial compliance with 17 indicators and no compliance in relation to the remaining 62 indicators. Yap has achieved full compliance with 29 indicators, partial compliance with 16 indicators and no compliance with the remaining 68 indicators. PNG fully complied with 28 indicators, partially complied with 32 and had no compliance with 53; Samoa fully complied with 40 indicators, partially complied with 23 and had no compliance with 49; Solomon Islands fully complied with 23 indicators, partially complied with 33 and had no compliance with 57; Tuvalu fully complied with 21 indicators, had partial compliance with 31 and no compliance with 61; finally Vanuatu fully complied with 34 indicators, partially complied with 27 and had no compliance with 52.

8. Article 2 requires States Parties to guarantee a range of fundamental rights and freedoms in their constitutions including substantive equality and freedom from discrimination on the grounds of sex, marital status, sexual orientation, HIV status and disability. All nine

countries guarantee the rights and freedoms of women in most of the areas required by CEDAW. However, although the Marshall Islands, FSM and its states guarantee men and women the equal *protection* of the law and Fiji, Kiribati, Samoa and Vanuatu guarantee equality *before* the law, and finally Tuvalu guarantees *freedom* under the law, none of the nine countries examined guarantee women equal benefits or outcomes as required by CEDAW.

9. Fiji, the Marshall Islands, the FSM and three of its states (Yap, Chuuk and Pohnpei), Samoa, the Solomon Islands and Vanuatu have anti-discrimination clauses through which individuals who have experienced sex-discrimination can seek remedies against either a state institution or in some instances, an individual person or organisation. Whilst Kiribati and Tuvalu have anti-discrimination clauses in their constitutions, they do not include sex as a protected ground. This means discrimination against women is lawful in Kiribati and Tuvalu. Consequently, domestic laws which discriminate against women, although non-compliant with CEDAW, are not in breach of the Constitution in either country.
10. Only Fiji (expressly) and the Solomon Islands (implicitly) extend their anti-discrimination protection to include indirect discrimination (enabling challenge to a rule that appears to apply to a group of people in the same way but in practice places on particular members of that group a burden not faced by the majority). Further, with the exception of Fiji (which provides protection on the grounds of a range of factors other than sex, including sexual orientation and disability), the grounds of protection in all countries fall short of that required by CEDAW.

11. Articles 2 and 3 together mandate the establishment by legislation of national bodies and machinery to monitor the implementation of law and policy to foster the advancement of women. Two of the nine countries have instituted such mechanisms. Fiji has established a Human Rights Commission which is empowered to institute affirmative action in the areas nominated in the Constitution (education, employment, housing, commerce and advancement in the public service) and Samoa has established a Ministry of Women's Affairs. However, although not established with enabling legislation (which leaves them vulnerable during times of political or economic upheaval), Divisions and Departments of Women with differing powers to participate in the implementation of law and policy for the advancement of women have been established in the remaining seven countries.
12. Article 2 condemns discrimination against women in all its forms and obligates States Parties to eliminate discrimination against women without delay. General Recommendation 19 adopted by the CEDAW Committee makes explicit that the definition of discrimination includes gender violence and recommends that 'sanctions, penalties and compensation' be introduced in relation to gender based violence. All nine countries examined *have* legislated against sexual assault. PNG in 2003 and the Marshall Islands in 2005 have introduced new sexual assault regimes which, in compliance with CEDAW, include a comprehensive range of offences, graded to reflect the seriousness of the harm to the victim. The offences include penetration of all orifices by a penis or any other object, sexual assault in circumstances that breach the trust between a person in authority and a child, and serious penalties for a range of other offences that do not involve penetration. The sexual assault laws, however, in all of the seven remaining countries, fail to provide adequate protection for the range of sexual violations perpetrated against girls and women. They fail to prescribe adequate penalties implying that sexual assault is not a serious offence, and all treat the sexual assaults of girls over 12 (or 15 in Pohnpei) as dramatically less serious than assaults of girls under 12. Although an assault against a young girl may have more serious consequences, particularly if perpetrated by a person in a position of trust, the vast disparity between sentences in these jurisdictions is unjustified and perpetuates an erroneous assumption that it is less serious and harmful to assault a 'more mature' girl.
13. Three common law rules have historically made it difficult for prosecutions against sexual assault offenders to succeed, and are contrary to CEDAW. Compliance with CEDAW requires that legislation prohibits the use of all three rules. The first, the admission of the prior sexual history of a victim in order to establish that she consented to the sexual act in question, is a common law rule which perpetuates the myth that a victim's previous sexual relationship with either the accused or others makes it more likely that she consented. Fiji, PNG, Samoa, Solomon Islands, Tuvalu and Vanuatu are in non-compliance with CEDAW because they have not legislated against the use of prior sexual history. Kiribati, Marshall Islands and FSM in compliance with CEDAW, have legislated against the use of evidence of the victim's prior sexual conduct. However, in the Marshall Islands and in the FSM (with the exception of Pohnpei) evidence of previous sexual conduct with the accused (but not other actors) can be admitted to prove consent, and in Kiribati, it can be admitted if it is relevant to the reliability of the complainant's evidence.

14. Corroboration (independent evidence such as that of a witness that connects the accused person with the crime) is a common law rule that requires a judge to advise the jury that it is dangerous to convict the accused on uncorroborated evidence. Whilst Kiribati and the Marshall Islands have taken the positive step of legislating against the requirement for corroboration, none of the remaining seven countries have done so.
15. Proof of resistance is a common law rule which requires victims to establish that they physically resisted the perpetrator, otherwise consent may be inferred. It is discriminatory because physical resistance may be an unrealistic expectation of a victim against a strong or armed perpetrator, and does not take into account how fear and power imbalances may immobilise the victim. Only the Marshall Islands has legislated against the requirement for proof of resistance and all other countries are therefore non-compliant with CEDAW.
16. To comply with CEDAW, the legislation should not provide a defence to perpetrators in sexual assault offences of an 'honest and reasonable belief that the victim is of legal age'. This places the onus (erroneously) on the minor to reveal her age rather than upon the accused to ascertain her age. In the Marshall Islands, Vanuatu and the FSM state of Pohnpei, in compliance with CEDAW, there is no defence in sexual assault prosecutions for the accused to claim that he did not know the girl was not of legal age. In all other countries, however, the accused *can* claim that he did not know the girl was not of legal age. In Samoa, the defence is only available if the defendant is under 21.
17. Compliance with CEDAW requires that consent is not a defence in a sexual assault offence in relation to any girl under 18, which is the age of adulthood stipulated by CEDAW. In all nine countries consent is not available as a defence in relation to girls under 16. This means, in effect, that the defence is available in relation to sexual assaults including rape of girls 16 or over and this is non-compliant with CEDAW.
18. Minimum sentences and mandatory prosecutions ensure that sexual violence against women is treated seriously. However, none of the nine countries examined have mandatory prosecutions for sexual and domestic violence offences (as required by CEDAW). In addition, only Vanuatu has incorporated into its legislation minimum sentences for sexual offences. Further, none of the nine countries automatically denies bail in instances of domestic and sexual offences where the safety of women and girls is at risk. In partial compliance, the Marshall Islands enables the court to deny bail if there is reasonable grounds to believe the person will be 'offensive' to the public.
19. Although General Recommendation 19 (which concerns violence against women), issued by the CEDAW Committee identifies domestic violence as a form of discrimination that inhibits women's ability to enjoy rights and freedoms on a basis of equality with men, none of the nine countries examined have incorporated domestic violence offences into their criminal laws.
20. Infanticide refers to the killing of a child by its mother (in contrast to abortion which refers to the destruction of a foetus). Full compliance with CEDAW requires that an offence of infanticide replaces a charge of murder or manslaughter and has a reduced sentence, recognising the societal pressures that lead women to kill their children. Vanuatu has no offence of infanticide in non-compliance with

CEDAW. An offence of infanticide *is* contained in the criminal legislation of Fiji, Kiribati, PNG, Solomon Islands and Tuvalu. However it reduces a charge of murder to manslaughter, rather than replacing both murder and manslaughter with a separate offence and a corresponding less severe penalty, and is therefore only partially compliant with CEDAW. In full compliance with CEDAW, an offence of infanticide is contained in the Samoan criminal legislation replacing a charge of murder and manslaughter with a separate offence of infanticide and a corresponding reduced penalty of 3 years. Further, the definition of infanticide is not restricted to the effects of lactation and birthing as in the other eight countries but includes ‘any disorder consequent on childbirth’ which in accordance with the research recognises that such killings are linked to post-natal depression caused in large part, by the social pressures of raising children.

21. Article 4 requires that temporary special measures provisions be introduced into national constitutions and legislation. Special measures provisions are an equality measure with real potential to redress historical discrimination and to achieve substantive equality for women. Vanuatu, PNG and Samoa *have* incorporated extensive affirmative action provisions into their constitutions for the advancement of women. Fiji provides for affirmative action in the areas of education, employment, housing and commerce, and it is unclear whether Tuvalu’s special measures provision can be utilised for the advancement of women.
22. Article 5 requires States Parties to abolish or modify customary practices that discriminate against women. The Constitutions of all nine countries give constitutional status to custom

law in a range of capacities and none contain a guarantee that equality law will take precedence over custom law. This is in non-compliance with CEDAW as it leaves women with uncertain legal recourse against discriminatory custom and practice.

23. Article 6 requires States Parties to suppress all forms of traffic in women and exploitation of women in prostitution (hereafter ‘sex work’) whilst Articles 2 and 11 require the elimination of discrimination against women in employment. Cumulatively, these articles mandate both the protection of sex workers from exploitation whilst also affording them the rights and protections of other workers. Soliciting in Fiji, the FSM states of Chuuk and Pohnpei, and the Solomon Islands is an offence. Whilst formally equal in that the provisions apply equally to men and women, CEDAW requires that soliciting is decriminalised. This is to avoid ‘punishing’ sex workers for their occupation and denying them the rights and protections enjoyed by other workers. In a first for the Pacific, the act of soliciting is an offence in the Marshall Islands for sex workers (men and women) *and* their clients. Although this measure does introduce formal equality between men and women, full compliance with CEDAW requires that sex workers are not criminalised. In the FSM states of Yap and Kosrae, in Kiribati, Samoa, the Solomon Islands, Tuvalu and Vanuatu soliciting is *not* an offence in compliance with CEDAW (although in Kiribati it is an offence for males).
24. The operation of organised premises and the aiding and abetting of soliciting is criminalised in all nine countries. However, research and experience shows that organised premises rather than street work is safer for sex workers and therefore, compliance with CEDAW (as per Article 11) requires legalising brothels and

implementing the safeguards that are present in other workplaces (such as regulated standards of occupational safety, standard rates of pay, parental leave, sick leave).

25. In compliance with CEDAW, Fiji, Kiribati, the Marshall Islands, PNG, Samoa, Solomon Islands and Tuvalu have adopted a rigorous approach to the exploitation of girls under 18 and women who have been forced into sex work without their consent and trafficked to other locations within the country or abroad. PNG in particular has introduced a comprehensive range of offences and severe penalties for the exploitation of children including criminalising the clients of children. However, the states of the FSM provide only minimal protection for women and girls procured into sex work against their will and are non-compliant with CEDAW. Further, in non-compliance with CEDAW there are no offences for trafficking or sex tourism in the FSM, the Marshall Islands, or Vanuatu. Although Kiribati provides some protection for girls and women who have been trafficked to other locations both within the country or abroad, the low penalty of 2 years provides an insufficient deterrent required for full compliance with CEDAW.
26. Article 7 obligates States Parties to take all appropriate measures to eliminate discrimination in women's political and public lives. Universal suffrage and equal legal rights for women to political representation has been achieved in all nine countries. However, few women nominate for political representation and the absence of minimum quotas to ensure higher numbers of women enter parliament and participate in the governance of their countries means that all nine countries are not fully compliant with CEDAW.
27. Article 8 requires States Parties to ensure that women have equal opportunities to represent their governments at the international level. Although there is no legal barrier preventing women from representing their governments in any of the nine countries, the low numbers of women who do so requires all nine countries to introduce quotas to raise participation.
28. Article 9 requires States Parties to eliminate discrimination in the areas of nationality, citizenship and domicile. FSM, Fiji, the Marshall Islands, PNG and Samoa have achieved equality in this area. Some discriminatory provisions are however still in operation in the remaining four countries. For example, Kiribati, Solomon Islands, Tuvalu and Vanuatu retain provisions whereby a woman who renounces her citizenship after marriage to a non-national can only regain her citizenship in her country of origin upon evidence of the breakdown of her marriage. Although this is intended to protect women and enable their return to their country of origin if the marriage relationship ends, it makes a woman's return contingent on her marriage rather than her own autonomy and choice. The provision does not apply to men presumably based on the stereotyped assumption that men will not join their non-national wives in another country. In Kiribati, women also do not have equal rights to include their husband and children in an application for citizenship or to include their husband and children in their passports.
29. Article 10 obligates States Parties to ensure women have equal rights and opportunities in the field of education. The provision of compulsory education is essential to ensure girls are equally prioritised and not discriminated against in education. Seven of the nine countries examined have introduced compulsory schooling at both primary and secondary levels. The FSM in particular,

guarantees free elementary education for all throughout the country and has established student loans for all young men and women to undertake higher education. However, girls and women continue to access education in lower numbers than boys and men in all nine countries. Therefore, full compliance with CEDAW requires the adoption of special measures for the advancement of women in education and a prohibition on the expulsion of pregnant students to ensure that girls are not discriminated against by educational institutions.

30. Article 11 requires States Parties to eliminate sex discrimination in the area of employment and it also requires the enactment of specific guarantees that protect the labour rights of women in legislation.
31. In non-compliance with CEDAW, six of the nine countries examined restrict women's employment choices banning them from night work, working in mines and, in Samoa and PNG, women are also prohibited from undertaking manual work. Fiji, in compliance with CEDAW, has removed these limitations from its employment law although the Minister still has a discretion to impose restrictions. Such protectionist provisions interfere with women's autonomy and place unreasonable restrictions on their right to choose professions and employment. Conversely, however, and in compliance with CEDAW, women's employment choices are not restricted in the Marshall Islands or the FSM and its states, leaving women to lawfully undertake night work, manual work and working in mines. It should be noted, however, that neither the FSM nor the Marshall Islands has yet put in place legislative mechanisms to protect the employment and labour rights of workers other than in the Public Service.
32. In the area of maternity leave the public service sectors of all nine countries offer more generous allowances than the minimum standards granted in the private sector. However, none of the countries examined meet the standards of 14 weeks paid maternity leave recommended by CEDAW and the International Labour Organisation (the ILO recommends a period of 14 weeks maternity leave and CEDAW recommends that it be paid). Further, whilst there is a general duty on employers to provide 'safe' working conditions, no country has introduced any specific health protection for pregnant workers. Breastfeeding mothers are provided with breaks of half hour duration twice daily in all countries except Marshall Islands, FSM and Samoa. However, these conditions are insufficient to enable breastfeeding mothers to balance the needs of young children with the demands of work. Similarly, the absence of any state or employer funded childcare facilities in any of the nine countries is likely to accentuate the difficulties nursing mothers face in the workplace. In all countries (except Marshall Islands and the FSM where there is no protection from dismissal) protection from dismissal ends upon the expiry of the approved maternity leave period, leaving women in precarious positions in relation to job security if they require (or choose) to take further leave.
33. Protection from sexual harassment is absent in all nine countries although there is limited scope for remedies under some criminal codes (e.g. Solomon Islands); human rights legislation (e.g. Fiji) and public sector legislation (e.g. PNG). None of these remedies, however, adequately address the range of unwanted behaviours that women experience in the workplace. It should be noted that new industrial laws proposed in Fiji and PNG will, if enacted, address many of

the issues noted above and achieve substantial compliance with Article 11 of CEDAW.

34. Article 12 requires States Parties to ensure that women have access to health care services including those related to family planning. Whilst the Marshall Islands, and the FSM states of Kosrae, Pohnpei and Yap have no legislation that criminalises abortion, all other countries do criminalise abortion with an exception only to save the mother's life (except PNG). However, in all countries access to safe abortion facilities is limited. The failure to provide safe accessible facilities for women who require abortions endangers their life, health and that of any child subsequently born after a failed abortion.
35. Article 13(b) of CEDAW requires that women be afforded equal rights to bank loans, mortgages and other forms of financial credit free from discrimination. Although there are no legislative barriers to women obtaining bank loans and mortgages in any of the nine countries examined, discrimination continues to hinder women from obtaining credit and loans to purchase property or businesses, thereby interfering with their autonomy and ability to earn a livelihood. Article 13(c) of CEDAW requires that women have an equal right to participate in recreational activities, sports and all aspects of cultural life and there are no legislative barriers in any of the countries preventing women from doing so.
36. Article 14 obligates States Parties to put in place measures to ensure equality of rural women and to ensure their equal access to, amongst other things, education, health, development and housing. Fiji *has* incorporated affirmative action provisions into legislation in relation to land and housing which may assist rural women whilst Vanuatu, in full compliance with CEDAW, has incorporated special measures for the 'special benefit, welfare and protection of inhabitants of less developed areas'. None of the other seven countries, however, have implemented measures such as affirmative action to achieve such ends.
37. Article 15 requires States Parties to guarantee women equality before the law and equal rights to participate in all aspects of civil life. The Marshall Islands and the FSM and its states guarantee men and women the equal *protection* of the law (the right of all persons to be treated equally by the law), Fiji, Kiribati, Samoa and Vanuatu guarantee equality *before* the law (the right of all persons to the equal application of the law), and Tuvalu guarantees *freedom* under the law and all are therefore compliant with CEDAW. However, PNG and the Solomon Islands do not provide a guarantee of equality before the law and are non-compliant with CEDAW. Further, in all nine countries in compliance with CEDAW, there are no legislative barriers to women's participation in court and tribunal processes, nor to conclude contracts or to administer property.
38. Article 16 obligates States Parties to remove discrimination in family and personal laws including; marriage, separation, divorce, child custody, property division, paternity and inheritance. The application of the indicators in this area to the nine countries revealed low compliance, as shown below.
39. In General Recommendation 21, which relates to equality in marriage and family relations, the CEDAW Committee recommends 18 as the minimum age of marriage for both males and females. Kiribati alone is compliant in this area with an equal minimum marriageable age for both males and females of 18. In Fiji, the Marshall Islands, the FSM states of Kosrae, Chuuk and Pohnpei, PNG (which permits marriage at 14 with the consent of the court), Samoa and

Vanuatu, the minimum age of marriage for males is 18 but it is 16 for females, in non-compliance with CEDAW. Whilst the Solomon Islands and Tuvalu prescribe an equal age for males and females (15 and 16 respectively), both ages, are well below the CEDAW and CRC recommended marriageable age of 18. Customary marriages are recognised in PNG and the Solomon Islands and such marriages are not subject to the statutory age restrictions and other protections in relation to marriage.

40. In the marriage of minors, in compliance with CEDAW, permission must be sought from *both* parents in Kiribati, PNG and Vanuatu. In the Marshall Islands, the FSM states of Chuuk and Pohnpei and in Samoa the consent of either parent is required. Whilst this represents formal equality, the failure to require both parents consent may lead to the prioritisation of the father's consent and does not constitute full compliance with CEDAW. Finally in Fiji, the Solomon Islands and Tuvalu, the consent of fathers is prioritised reinforcing the stereotype of the father as the head of the household, and denying the equal parenting responsibilities mandated by Article 16.
41. The registration of all marriages is required by CEDAW to ensure that the minimum age for marriage, and the prohibitions on bigamy and polygamy are adhered to. Registration is required in all nine countries (except in the FSM state of Yap). However in the Solomon Islands and Tuvalu, customary marriages are exempt from registration in non-compliance with CEDAW.
42. Fault based divorces, which require proof of a matrimonial offence such as desertion or habitual rape, place women in the difficult position of having to provide evidence of situations that may be humiliating, embarrassing, or that may interfere with their dignity and privacy. It also denies women autonomy and the free choice to leave a relationship. Divorce in Kiribati, FSM, Tuvalu, PNG, Samoa and Vanuatu, in non-compliance with CEDAW, is based on fault based criteria (including adultery, desertion and cruelty). In the Marshall Islands, divorce, although also primarily formulated to reflect fault based criteria, allows for divorce after a two year separation. In Fiji, the recent introduction of no-fault criteria allows the parties to divorce on the basis of a 12 month separation without any requirement to find or prove fault, whilst in Tuvalu the fault based criterion plays an evidentiary role and is not essential to secure a divorce. Further, in both the Marshall Islands and the FSM, forgiveness, which can include restoration of marital rights, will prevent a divorce from proceeding. This fails to take into account possible power imbalances between the spouses and the significant family and community pressure that may be placed on women to forgive. Both countries are therefore non-compliant with CEDAW as a result.
43. In General Recommendation 19(23) the CEDAW Committee states that a lack of economic independence or an inability to gain custody of their children upon separation forces many women to stay in violent or difficult relationships. Whilst all nine countries provide for maintenance during separation and after divorce for both children and spouses, the criteria applied in all but Fiji is inadequate to comply with the requirements of CEDAW. The right and the calculation of the amount to be paid is uniformly based (except in Fiji) on judicial interpretation and discretion of 'just' or 'reasonable' or 'the best interests of all'. In Kiribati it is determined on the basis of 'the age of the person for whose benefit the application is made and the personal circumstances of

every person'. The 'conduct' of the parties also determines the maintenance payable in several countries, revealing how principles of fault have been imported into judicial decision making. In contrast, the CEDAW recommended standards need; the means of both parties, the financial commitments of both parties to themselves and others, their respective capacities to earn, and the needs of any children for whom maintenance is sought, are unlikely to be prioritised in any of the countries which are therefore non-compliant. Fiji however, *has* adopted the approach that is most in accord with the principles of CEDAW. Fiji's approach includes an assessment of the means of both parties, the financial commitments of both parties to themselves and others, their respective capacities to earn and the needs of any children for whom maintenance is sought.

44. In General Recommendation 21, the CEDAW Committee states that the division of marital property should include recognition of non-financial contributions during a marriage such as, raising children, caring for elderly relatives, and discharging household duties. In the Marshall Islands and the FSM, property division upon divorce, like maintenance, is determined on the basis of 'justice' and 'the best interests of all'. This is unlikely to lead to property settlements in which women's non-financial contributions to the marriage are recognised. In Kiribati there is no legislative provision for the division of property after separation and divorce. Consequently, any determination is left to custom, which may discriminate against women. Again, Fiji alone recognises both financial and non-financial contributions to the marriage partnership, including caring for children and household responsibilities. Fiji is therefore the only country that is CEDAW compliant.
45. De facto relationships, including same-sex relationships, are not recognised in eight of the nine countries leaving women without any support and right to an equal division of property after the breakdown of a relationship. However, in Kiribati 'any person' can apply for maintenance and the children of non-married women are specifically provided for.
46. The best interests of the child as the paramount consideration is universally accepted as the principle on which custody determinations should be based, according to Article 16(f) of CEDAW and General Recommendation 21. Fiji, Kiribati, PNG and Tuvalu *have* adopted the recommended standard of the 'best interests of the child' as the paramount consideration in custody disputes after separation and divorce, in compliance with CEDAW. However, in Kiribati and Tuvalu an unmarried mother automatically loses custody of her child at the age of two years to the father (provided he admits paternity and wishes to have the custody of the child). The latter situation although intended to protect the inheritance rights of the children of unmarried parents may not represent the best interests of the child, and discriminates against mothers. In FSM, the Marshall Islands, Samoa, the Solomon Islands and Vanuatu, the legislative criterion for custody determinations is based on what is 'just' and 'reasonable' and in 'the best interests of all'. This criterion *can* be interpreted by the courts in line with the principle of the best interests of the child (as practised in the Solomon Islands). It nevertheless falls well short of the standard mandated by CEDAW, because the principle of the best interests of the child should be legislated and not left to the discretion and uncertain process of the courts.
47. Article 16 requires that legislation should embody inheritance laws that equally benefit males and females. Despite this requirement, in

non-compliance with CEDAW, there is no legislation yet in the Marshall Islands or in any of the FSM states to regulate inheritance, leaving it instead to be determined according to custom. Finally, although inheritance in both the Marshall Islands and the FSM is historically matrilineal, which means that land and property are passed through females, men still control many aspects of the use of land and property despite ownership residing with women. In

all other countries, legislation does govern inheritance law which, with the exception of Tuvalu and Kiribati (where eldest sons are advantaged over daughters in relation to both land and important resource rights such as fishponds), are equal. However in all countries, customary laws in relation to land, which may discriminate against women in relation to inheritance, have constitutional status.



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# Introduction

## Terms of Reference

UNIFEM is the Women's Fund at the United Nations which provides financial and technical assistance to innovative programmes and strategies that promote women's human rights, political participation and economic security. UNIFEM promotes gender equality and links women's issues and concerns to national, regional and global agendas by fostering collaboration and providing technical expertise on gender mainstreaming and women's employment strategies.

United Nations Development Programme (UNDP) is the United Nations' global development network, an organisation advocating for change and connecting countries to knowledge, experience and resources. UNDP operates in 166 countries, and works with partner organisations and countries to develop solutions to global and national development challenges.

This Report comprises the results of two desk reviews commissioned by UNIFEM Pacific and the UNDP Pacific Centre to assess the legislative compliance with the *Convention on the Elimination of All Forms of Discrimination against Women 1979* (CEDAW) of nine Pacific countries: Federated States of Micronesia (FSM), Fiji, Kiribati, Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu. The reviews required the application of 113 (111 for FSM) legislative indicators (originally developed by the authors in conjunction with UNIFEM) to the constitutions and legislation of the nine subject countries. The reviews aimed, with the application of the indicators, to provide a thorough stock-take of the legislation of the nine countries to assess legislative compliance with CEDAW. The findings of the two reviews have been collated into this report.

This report is not intended to reflect negatively on any particular government but is aimed at assessing the level of current compliance of each State Party with a view to identifying priorities and working towards greater compliance in the future. It is intended as a resource and a tool for governments and non-government organisations to achieve full participation and non-discrimination for women in all aspects of their lives.

## Background

On 18 December 1979, the UN General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women*. The Convention came into force on 3 September 1981 with over 20 countries becoming signatories. As of 30 December 2006, 185 countries had ratified or acceded to the Convention, making it one of the most recognised conventions in the world.

CEDAW seeks to comprehensively address women's rights to equality in all areas of women's lives including civil, political, economic, social and cultural. Further, CEDAW provides a comprehensive definition of discrimination against women and requires States Parties to take all the necessary measures to eliminate such discrimination. States Parties are therefore required to pursue policies that will result in substantive equality (real or actual) in the lives of women, including taking active steps to amend or introduce legislative measures aimed at the full realisation of the rights of women and girls.

In the Pacific region, 11 of the 14 South Pacific Forum Island Countries have ratified or acceded to the Convention: the Cook Islands, Micronesia (Federated States of), Fiji, Kiribati, the Marshall Islands, Niue (through its protectorate), Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu. The

Forum island countries yet to ratify CEDAW include Nauru, Palau and Tonga. The remaining non-forum Pacific nations of Tokelau, New Caledonia, Tahiti and Wallis & Futuna have acceded to the Convention through the ratification of their Protectorates. To date, three Pacific Island countries (Fiji, Samoa and Vanuatu) have submitted their Initial, Second and Third Reports to the CEDAW Committee and the Cook Islands has submitted its Initial Report. Fiji and Samoa have entered into constructive dialogue with the CEDAW Committee and Vanuatu and the Cook Islands are scheduled to be reviewed in 2007.

The first desk review, commissioned by UNIFEM Pacific, sought to analyse and document legislative compliance with CEDAW in the six Pacific countries of; Samoa (which ratified CEDAW on 25 September 1995), Papua New Guinea (12 January 1995), Fiji (28 August 1995), Vanuatu (8 September 1995), Tuvalu (6 October 1999) and the Solomon Islands (6 May 2002). As none of the above six countries have entered reservations upon the Convention, all are obligated to comply with all of its articles.

The second review, commissioned by the UNDP Pacific Centre sought to analyse and document legislative compliance with CEDAW in the three Pacific countries that have most recently become States Parties: Kiribati (acceded 17 March 2004), the FSM (acceded 1 September 2004), and the Marshall Islands (acceded 2 March 2006). Kiribati and the Marshall Islands have not entered reservations upon the Convention and are therefore obligated to comply with all of its articles. However, the FSM has placed reservations on Article 11(1)(d) of the Convention to enact comparable worth legislation (pay equity), Article 11(2)(b) to enact maternity leave with pay or with comparable social benefits throughout the nation, Articles 2 (f), 5, and 16 to the succession of certain well-established traditional titles, and to marital customs that divide tasks or decision-making in purely voluntary or consensual private conduct.

## Methodology

There are two accepted approaches to assessing a country's compliance with CEDAW, the examination of *de jure* and/or *de facto* compliance. Whilst it has been universally recognised and emphasised in various instruments such as the Beijing Platform for Action, that legislative compliance (*de jure*) may not of itself achieve real or actual equality (*de facto*), the pursuit of legislative compliance is nevertheless an important initial measure towards that goal.

This study has been designed to provide both descriptive and analytical information concerning the legislative implementation of CEDAW in the nine Pacific countries. It involved the application of the 113 indicators to the legislative and constitutional framework of each of the nine countries. However, the FSM and each of its four states were measured against 111 indicators. The indicators were reduced because of the reservations placed on CEDAW by the FSM (detailed above), which mean that it has excluded itself from meeting the obligations under the reserved provisions until such time as they are removed. It should also be noted that, through the national constitution of the FSM, which is the basis for all legal authority, the power to legislate is divided between the FSM Parliament and the State Parliaments. Whilst the FSM has express power over areas such as tax, trade and national crimes, it *may* also establish systems of social security and public welfare concurrently with the states. This review has measured FSM against both the indicators which concern its express powers to legislate, and against the indicators that relate to its power to implement systems of social security and public welfare. Although the FSM is not obligated to legislate in the area of social security and public welfare (which includes many of the areas covered by CEDAW) the authors have taken the view that the national government, which has a direct obligation to implement CEDAW, should lead and encourage the four states towards compliance with CEDAW.

Measurement of the nine countries was primarily undertaken with reference to the primary sources available i.e., the legislation and constitutions of the nine countries. In some instances, however, it was not possible to obtain relevant legislation and a range of secondary sources including texts, academic articles, parliamentary reviews and resources produced by a variety of organisations were utilised.

### How to Use this Report

This report is divided into 10 Chapters. Chapter 1 introduces and overviews the indicators used in the subsequent parts of this Report to assess the legislative compliance of the nine countries. This Chapter begins with the text of each article of CEDAW and is followed by the indicators relevant to that article. Each indicator is accompanied by an explanation of its link to CEDAW and provides a rationale for its inclusion in the set of indicators.

Chapters 2 to 10 contain the results of the two reviews and show the legislative compliance of each of the nine countries against the indicator template. Chapter 2 (the FSM) contains five subsections, one

for each of the five legislative systems operating in that country (the national system of the FSM, and the four states of Chuuk, Kosrae, Pohnpei and Yap). To assist the reader, following a detailed synopsis of the results of the desk reviews, are the indicators and the country's corresponding performance under each indicator shown in table form. In brief, the template, in table form, identifies the article of CEDAW, the corresponding indicator(s), the level of compliance (i.e., yes, no and partial compliance), and the relevant legislation. Finally a brief commentary is provided where necessary on why a legislative provision does or does not meet the standard prescribed in the indicator, and to explain the level of compliance or any issues that arise.

In sum, the reader should (after reading the introduction) read the relevant chapter (i.e. the results of each country) in conjunction with the indicators chapter which explains why a particular indicator was adopted, its link to CEDAW and what is expected for compliance.

A glossary of terms has been provided at the end of this report to assist the reader.

