



Translating CEDAW Into Law

CEDAW Legislative Compliance in the Cook Islands



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Translating CEDAW Into Law

CEDAW Legislative Compliance in the
Cook Islands

Vedna Jivan and Christine Forster



Pacific Centre



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Introduction

1.1 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.

The United Nations Development Programme (UNDP) is the UN's 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. The UNDP Pacific Centre's knowledge and regional programme centre in Suva, Fiji is focused on Small Islands Developing States in the Pacific and serves 15 Pacific Island countries. The Centre aims to boost aid efficiency in the Pacific by providing policy advice and technical back stopping in the areas of Crisis Prevention and Recovery, Democratic Governance and Poverty Alleviation and Millennium Development Goals Achievement.

This Report comprises the results of a desk review commissioned by the UNDP Pacific Centre to assess the legislative compliance of the Cook Islands with the *Convention on the Elimination of All Forms of Discrimination against Women* 1979 (CEDAW). The review required the application of 113 indicators (originally developed by the authors in conjunction with UNIFEM and the UNDP Pacific Centre and

previously applied in nine Pacific countries) to the Constitution and legislation of the Cook Islands. The review aimed, through the application of the indicators, to provide a thorough analysis of the legislation of the Cook Islands and to assess its legislative compliance with CEDAW.

This Report is not intended to reflect negatively on the government of the Cook Islands but is aimed at assessing its level of current legislative compliance with CEDAW, with a view to identifying priorities for working towards greater compliance in the future. It is intended as a resource and a tool for the government and for non-government organisations to achieve full participation and non-discrimination for women in all aspects of their lives.

1.2 Background

On 18 December 1979, the United Nations General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The Convention came into force on 3 September 1981 with over 20 countries becoming signatories. As of 20 November 2007, 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, cultural, economic, political, and social. Further, CEDAW provides a comprehensive definition of discrimination against women and States Parties are required to take all 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 Forum Island Countries have ratified or acceded to the Convention: the Cook Islands, Federated States of Micronesia (FSM), Fiji, Kiribati, the Marshall Islands, Niue and Tokelau (through their status as protectorates of New Zealand), Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu. Nauru, Palau and Tonga have yet to ratify CEDAW. To date, two Pacific Island countries, the Cook Islands and Fiji have submitted their initial reports to the CEDAW Committee and two, Samoa and Vanuatu, have submitted their Initial, Second and Third Reports.

The Cook Islands shares its citizenship with New Zealand and is obliged to uphold a 'standard of values generally acceptable to New Zealanders in its law-making and policies'. It is otherwise internally and externally fully self-governing 'in free association with New Zealand'. The Cook Islands initially became a party to CEDAW in 1985 when New Zealand ratified the Convention. However, the Cook Islands acceded to CEDAW in its own right in 2006 and to the Optional Protocol on 27 November 2007 and also furnished its initial report to the CEDAW Committee in the same year. Accession obliges the Cook Islands to work towards the modification of its constitution and legislation to accord with the provisions of CEDAW. However, it is recognised that legislative compliance will be achieved through gradual and incremental change.

1.3 Methodology

Ratification or accession to CEDAW requires State Parties to modify domestic legislation and constitutions to accord with the articles of

CEDAW. There are two accepted approaches to assessing a country's compliance with CEDAW, the examination of *de jure* and *de facto* compliance. The first, *de jure* compliance, requires the legal framework of the State Party to accord with the obligations created by the Convention. The second, *de facto* compliance, requires that the obligations created under the Convention are not just recorded in the laws of the country but implemented in practice with the intended results. 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.

The CEDAW Committee's reporting guidelines require that a State Party's progress toward achieving both *de jure* and *de facto* compliance with the Convention be recorded in both its initial and subsequent reports. In particular, the guidelines specify that the initial report should 'explain the legal and practical measures adopted to give effect to the provisions of the Convention' [D 1.1(b)]; that the 'legal norms' relevant to every article should be described; and that the report should identify how Article 2 of the Convention is applied setting out the principal legal measures which the State Party has taken to give effect to the rights articulated in the Convention [D 2.2(3)]. The report should also outline any 'restrictions or limitations even of a temporary nature imposed by law, practice or tradition' on the enjoyment of the provisions of the Convention. The guidelines also require the report to contain sufficient quotations (or summaries) of the relevant principal 'constitutional, legislative and other texts' which guarantee and provide remedies in relation to Convention rights [D.3.1]. Subsequent periodic reports should document progress towards the implementation of the Convention since the initial report including

any new legal measures [E 4(b)]. A clear record of legislative compliance therefore is an integral component of the reporting process.

This study has been designed to provide both descriptive and analytical information concerning the legislative implementation of CEDAW in the Cook Islands. Its compliance with CEDAW was measured by the application of all 113 indicators to its legislative and constitutional framework. The Cook Islands was previously subject to the reservations placed on CEDAW through its status as a protectorate of New Zealand. At the recent CEDAW hearings in May 2007, however, the government of the Cook Islands indicated its intention to remove all reservations to CEDAW. Accordingly this review has assessed the Cook Islands on the basis of the removal of the reservations and against all 113 indicators. Measurement of the Cook Islands' legislative compliance with CEDAW was primarily undertaken with reference to the primary sources available i.e., the legislation and constitution. 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. It should be noted that the Cook Islands legislative review contained in this report was conducted using all materials available at the time, and although every effort was made to obtain the most recent and up-to-date legal material, it is possible that there will be errors or omissions.

1.4 How to Use this Report

This Report is divided into 3 chapters. Chapter 2 introduces and overviews the indicators used in the third and substantive chapter of this Report to assess the legislative compliance of the Cook Islands. It 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.

Chapter 3 contains the results of the review and details the legislative compliance of the Cook Islands against the indicator template. To assist the reader, following a detailed synopsis of the results of the desk review, is a series of tables containing the indicators and a review of if and how the Cook Islands performed against each indicator. 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 of the Cook Islands. Finally, the last column of the tables contains a brief commentary where necessary explaining why a legislative provision does or does not meet the standard prescribed in the indicator and any other issues that arise.

In sum, the reader should (after reading the introduction) read Chapter 3 in conjunction with Chapter 2 (the indicator chapter) which explains why a particular indicator was adopted, its link to CEDAW and what is expected for compliance.

CEDAW Legislative Compliance Indicators

Cook Islands



CEDAW Legislative Compliance Review

FEDERATED STATES OF
MICRONESIA



CEDAW Legislative Compliance Review

Fiji



CEDAW Legislative Compliance Review

Kiribati



CEDAW Legislative Compliance Review

Marshall Islands



CEDAW Legislative Compliance Review

Papua New Guinea



CEDAW Legislative Compliance Review

Samoa



CEDAW Legislative Compliance Review

Solomon Islands



CEDAW Legislative Compliance Review

Tuvalu



CEDAW Legislative Compliance Review

Vanuatu



CEDAW Legislative Compliance Review

CEDAW Legislative Compliance Indicators

Overview

Assessing a country's level of *de jure* (legislative) compliance and enabling future assessments to evaluate progress requires benchmarks against which legislation and constitutions can be measured. Benchmarking, in turn, requires a justifiable and credible set of indicators. Indicators have traditionally been employed in the development sector and in the economic and social sciences. They have recently been adopted in the human rights field to establish objective standards of measurement with a view to assessing a state's progress in complying with its human rights obligations. Put simply, indicators are a tool of measurement that can answer the question of whether or how much progress is being made toward a certain objective but they do not answer the question of why progress is or is not being made. As discussed earlier in the introduction, whilst it has been universally recognised 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 review utilised 113 indicators which were developed by the authors for an initial project with UNIFEM to monitor legislative compliance with CEDAW in the Pacific region. The process of developing indicators to measure legislative compliance with CEDAW involved an assessment of the meaning of its articles and how they could be translated into law. That assessment was based on a number of sources including; first, a detailed consideration of CEDAW's articles, second, extensive reference to the 25 General

Recommendations of the CEDAW Committee. The CEDAW Committee (established to monitor the implementation of CEDAW) has released 25 General Recommendations to date, each responding to issues of particular concern raised by specific articles of the Convention. The Recommendations provide extended commentary of many aspects of CEDAW. Third, extensive reference was made to other reports and resources including government and 'shadow' reports to the CEDAW Committee, numerous reports by NGOs and agencies throughout the Pacific region, and the extensive body of feminist literature that interprets legislative frameworks in the areas governed by CEDAW. Finally, the authors engaged in a consultation process with a range of NGOs and women's organisations based in the region. The indicators, identified through this process were used to develop a template against which legislative compliance with CEDAW could be measured. Full compliance with CEDAW would require the satisfaction of all indicators, a feat yet to be achieved by any of the 185 States Parties. Rather than being prescriptive, however, this review seeks to assist States Parties in establishing priorities for more comprehensive legislative compliance with CEDAW in the future.

The next section discusses the challenges of formulating indicators and the subsequent section identifies the articles of CEDAW, the corresponding indicator(s) and annotates each indicator, explaining the meaning of the indicator, its link to CEDAW (and the Beijing Platform for Action) and the rationale underpinning the selection of the indicator. A complete set of the indicators in table form can be found at the end of this chapter.

Challenges of Formulating Indicators

The development of objective and justifiable indicators is a process which involves several challenges. First, some of the obligations created by the articles of CEDAW (or components of its articles) are best dealt with by policy measures, education initiatives and consultation and collaboration with civil society rather than through legislative enforcement. For example, Article 5 obligates States Parties to modify the stereotypical, social and cultural conduct of men and women. Such cultural norms are arguably best modified through education in a variety of forums and policy measures rather than through legislative provisions. For this reason, some articles do not have many indicators, as arguably they are more effectively complied with using policy measures and education initiatives.

Second, whilst the legal steps that a State Party must take to comply with CEDAW are clearly articulated in some articles, others are more broadly and generically framed. For example, the obligation to enact a constitutional provision providing for equality between men and women requires a State Party to incorporate an equality provision into its constitution. A corresponding legislative indicator in this instance is easily formulated (i.e., does the Constitution provide equality between men and women as a protected right?) requiring a clear answer either in the affirmative or in the negative. In relation to other CEDAW provisions, however, the legal obligations of the State Party are less straightforward. For example, the obligations created by Article 14 to provide equality for rural women do not easily translate into the legal measures required for compliance. The obvious benefit of a broadly termed provision is that it makes then Convention both sensitive and responsive to the domestic context of countries, allowing for the

development within a national framework of specific domestic responses to issues of concern. At the same time, however, it can be difficult (and ultimately subjective) to specifically identify indicators to guide a State Party towards compliance.

Third, whilst the CEDAW Committee has interpreted aspects of many of the articles of the Convention (manifested through the issuing of general recommendations and concluding comments), the status of its recommendations, however, are not binding. Further, although the consultations and dialogue adopted during the reporting process allow for some vetting of the articles of CEDAW, rigorous legal debate testing the interpretation and meaning of an article is absent. Therefore, whilst the non judicial interpretations of the articles by the CEDAW Committee provide some assistance in determining the meanings of particular provisions of CEDAW (and consequently assist in the development of indicators), generally however, it is up to each State Party to determine the scope of the provision and to enact changes accordingly.

Fourth, there is considerable overlap between some articles of the Convention. Some of the indicators, therefore, could quite conceivably relate to several articles or be quite justifiably dealt with in articles other than where they have been situated in this review. For example, the issue of women's health is a cross-cutting theme which spans a range of articles and is not confined to Article 12 which relates to health care and family planning. Therefore, compliance with Article 12 has been largely encompassed within indicators for other articles such as maternity provisions and the rights of pregnant women in employment (Article 11), violence against women (Articles 1 and 2), and women's access to health services in rural areas (Article 14).

Fifth, in some instances the legislative compliance of a State Party can only be measured in relation to the condition of women's lives in that country. Legislative indicators therefore, are not always universally applicable. If a customary practice discriminates against women in a particular society (e.g. the practice of child marriage) a legislative indicator that requires the prohibition of child marriage would only be relevant and meaningful in those country(ies) where it is practised, and meaningless where not. Further, knowledge of the conditions of women's lives in a particular country is also relevant in relation to those articles which require proactive measures. Affirmative action, for example, would only be required when there is a substantive inequality that is in breach of an area covered by CEDAW. Hence, the formulation of *de jure* (legislative) indicators requires some knowledge of the *de facto* circumstances of a country or region. The indicators developed in this review are partially reflective therefore of regional practices and regional conditions in relation to women in the Pacific.

Finally, standards change as societies change and as new issues emerge. CEDAW must therefore be considered a living document. Consequently, no set of indicators can be fixed as they must change and adapt as circumstances change.

The following section [2.3] identifies the articles of CEDAW, the corresponding indicator(s) and the rationale underpinning the selection of that indicator.

Indicators: Justification and Rationale

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN

For the purposes of the present Convention the term "discrimination against women" shall mean any distinction, exclusion or

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

ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION

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

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

**ARTICLE 2: OBLIGATIONS TO
ELIMINATE DISCRIMINATION**
(continued)

- (f) *To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;*
- (g) *To repeal all national penal provisions which constitute discrimination against women.*

ARTICLE 1 AND 2 INDICATORS

- 1.1 *Does the Constitution guarantee fundamental rights and freedoms to men and women equally including in the political, economic, social, cultural, civil or any other field?*

The definition of discrimination in Article 1 encompasses any interference with the 'human rights and fundamental freedoms of women in the political, economic, social, cultural civil or any other field'. The Committee notes in the *Declaration on the Elimination of Violence Against Women 1993* that these rights include inter alia: the right to life, the right to equality, the right to liberty and security of person, the right to equal protection under the law, the right to be free from all forms of discrimination, the right to the highest standard attainable of physical and mental health, the right to just and favourable conditions, the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment. Such rights and freedoms should be afforded to women free from discrimination.

- 1.2 *Is there a Constitutional guarantee of substantive equality between men and women?*

Article 2(a) of CEDAW and para 232(c) of the Beijing Platform for Action specifically mandate the inclusion of a guarantee of substantive equality (equality of benefits) between men and women in national constitutions or, if not yet incorporated, in other appropriate legislation. Ideally, the principle of equality should be entrenched in national constitutions as this provides greater protection than that provided by legislation as it cannot be as easily repealed. An equality provision in the constitution can also have more expansive application as all legislation must conform to the principles contained therein. This ensures the highest form of protection for the principle of equality and its presence in the supreme law of a sovereign state also provides significant symbolic status. Satisfaction of this indicator would also comply with para 232(c) of the Beijing Platform for Action.

- 1.3 *Does the Constitution contain an anti-discrimination clause on the ground of sex/gender?*

Article 2(b) of CEDAW requires States Parties to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women. This is reinforced in para 232(b) of the Beijing Platform for Action which also specifically requests governments to introduce anti-discrimination legislation to protect women. The definition of discrimination contained in CEDAW explicitly states that discrimination against women means any 'distinction, exclusion or restriction' made on the basis of sex. Specific anti-discrimination provisions provide

the mechanics by which the principle of equality can be achieved and by which individuals can seek redress against discriminatory practices.

1.4 Does the Constitution contain an anti-discrimination clause on the ground of marital status?

Article 2 of CEDAW prohibits all discrimination against women. Article 1 specifically includes in its definition of discrimination ‘any distinction, exclusion or restriction’ made on the basis of sex which aims or has the effect of preventing or hampering the enjoyment by women, whether married or unmarried, of their human rights to the same extent as men. Marital status has been used as a basis for discrimination against women in areas such as; property, inheritance, criminal law, domicile, citizenship to name a few. Such discrimination has the effect of preventing women from enjoying or exercising their human rights and fundamental freedoms.

1.5 Does the Constitution contain an anti-discrimination clause on the ground of sexual orientation?

Article 2 prohibits all discrimination against women and in doing so obligates States Parties to guarantee the autonomy of women. A woman’s right to independence and self-determination includes the right to define and express her sexuality and to choose her lifestyle. Discrimination against lesbians in employment, education, child custody and marriage often means that lesbians and lesbian families are denied economic and legal benefits granted to married

women, including inheritance rights, tax deductions, insurance benefits, and more. General Recommendation 21(13) acknowledges that the form and concept of the family can vary. Irrespective of their sexuality, the treatment of women in the family, at law, and in private, must accord with the principles of equality and justice for all as Article 2 of CEDAW requires.

1.6 Does the Constitution contain an anti-discrimination clause on the ground of hiv status?

General Recommendation 15 recommends that States Parties adopt measures to prevent specific discrimination against women in response to HIV/AIDS. In particular, the CEDAW Committee notes that women’s subordinate position in some societies make them especially vulnerable to infection and discrimination as a corollary. Discrimination on the basis of a person’s HIV status can intersect a range of areas of women’s lives including employment, the right to privacy and confidentiality.

1.7 Does the Constitution contain an anti-discrimination clause on the ground of disability?

The CEDAW Committee states in General Recommendation 18 that Article 2 obligates States Parties to eliminate discrimination against all women. It notes that women with disabilities suffer from a ‘double discrimination linked to their special living conditions’. Historically, areas where women with disabilities have experienced discrimination on the basis of both their sex and their disability

have included education, employment, health services and social security.

1.8 *Does the breadth of the anti-discrimination clause encompass direct and indirect discrimination?*

The definition of discrimination in Article 1 of CEDAW goes beyond a requirement to achieve formal equality (the equal application of legal rules) and requires States Parties to seek substantive equality (real or actual equality). This is evident in the definition of discrimination which encompasses all situations that have the *effect* of impairing or nullifying the recognition, enjoyment or exercise of human rights. The use of the word 'effect' designates not merely formal equality but crucially equality in results. Therefore to be compliant with the definition of discrimination contained in CEDAW, an anti-discrimination clause must recognise and eliminate indirect discrimination. Indirect discrimination refers to a situation where a rule 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, or a requirement more easily met by the majority that results in unequal treatment. The concept of indirect discrimination recognises that discrimination does not always manifest in obvious or direct ways but may be disguised within policies or practices which appear to apply to all persons equally.

1.9 *Does the anti-discrimination clause bind public authorities and institutions?*

Article 2(d) of CEDAW obligates States Parties to themselves refrain

from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation. Therefore, any anti-discrimination clause should bind all state institutions.

1.10 *Does the anti-discrimination clause bind any person, organisation or enterprise?*

Article 2(e) of CEDAW proscribes discrimination not just by the law, government and government authorities but also by any person, organisation or enterprise. The extension of protection beyond that of state actors to all other persons and organisations is indicative of the recognition that to effectively combat discrimination in all areas of women's lives, the regulation of both state and non-state actors throughout the public and private spheres of *women's* lives is required.

1.11 *Are sanctions imposed for the breach of anti-discrimination provisions?*

Article 2(b) of CEDAW recommends that, where appropriate, sanctions for breaches of anti-discrimination provisions be provided. The provision of penalties and remedies is an essential component of effective anti-discrimination measures. This could include penalties such as fines, apologies or loss of government contracts and remedies such as compensation and *injunctive* relief. An effective system of sanctions provides a clear statement of the unacceptability of discrimination in society. Conversely, a system that is ineffective sends a range of negative symbolic messages. These include the message that discrimination is not

regarded seriously by the State; that the wrongs that discrimination victims experience are not serious; and finally that discrimination is not in itself an abhorrent harm that the State considers worthy of sanction or compensation.

1.12 *Are there specific domestic violence offences in the criminal law legislation (penal code)?*

Articles 1 and 2 of CEDAW create an obligation to eliminate discrimination in all its forms. The CEDAW Committee in General Recommendation 19 has interpreted the meaning of discrimination against women in Article 1 as including gender based violence because it nullifies the rights and freedoms of women. The Committee defines gender violence as violence that is directed against a woman because she is a woman or that affects women disproportionately. In particular, in General Recommendation 19(24)(r), the Committee states that CEDAW obligates States Parties to make laws against family violence and abuse. In the *Declaration on the Elimination of Violence against Women* 1993 issued by the CEDAW Committee, violence against women encompasses acts, coercion and other deprivations of liberty and includes psychological, emotional and coercive abuse. Whilst common assault offences, typically present in most Penal Codes could be used in some limited circumstances, they do not incorporate the complexity of domestic violence. Therefore, to fully comply with CEDAW specific domestic violence offences should be incorporated into criminal law legislation. Compliance with this indicator would also satisfy para 124(b) of the Beijing Platform for Action,

which recommends that governments ensure that the legislation effectively protects women from violence and prosecutes offenders.

1.13 *Is stalking a criminal offence?*

General Recommendation 19 notes that full compliance with CEDAW requires States Parties to take positive measures to eliminate all forms of violence against women. Stalking refers to the harassment or intimidation of a person causing them to fear for their safety. It is a course of conduct which may involve individual acts that are not unlawful (such as sending unwelcome gifts, making persistent phone calls or following a person from home and work). Taken cumulatively however, these acts can amount to intimidating and harmful behaviour. In the NSW Crimes Act in Australia, stalking is defined as ‘following a person about or the watching or waiting, or frequently in the vicinity of, or an approach to, a person’s place of residence, business, or work or any place that a person frequents for the purpose of any social or leisure activity.’ Stalking, therefore, should be specifically identified as an offence in the criminal law legislation.

1.14 *Is a restraining order available in situations of sexual and domestic violence regardless of marital status?*

The CEDAW Committee has stated that governments must ‘provide victims of domestic violence with the maximum protection of the law’. General Recommendation 19 notes that States Parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender based violence give adequate protection to all

women so as to respect their integrity and dignity. General Recommendation 19 also addresses the accountability of States Parties for the conduct of non-state actors by stating that ‘...discrimination under the Convention is not restricted to action by or on behalf of Governments ...’ and ‘[U]nder general international law and specific human rights covenants, States may also 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’. General Recommendation 19(24)(r) also specifically states that civil remedies in cases of domestic violence are needed to overcome family violence and General Recommendation 19(24)(t) obliges States Parties to take all legal and other measures, including civil remedies to provide effective protection of women against gender based violence. A restraining order obtainable under civil law (on the balance of probabilities) is one such remedy that would satisfy the above recommendations. States Parties are therefore obliged to provide access to restraining orders to women, including unmarried women, (also known as apprehended violence orders or non-molestation orders) as a crucial means of protecting women from gender based violence.

1.15 Is there mandatory prosecution for domestic violence offences?

General Recommendation 19(24)(t) obligates States Parties to institute effective legal measures including penal sanctions to protect women against all kinds of violence including violence and abuse in the family. Article 4(d) of the *Declaration on the*

Elimination of Violence against Women 1993 states that penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women who are subjected to gender based violence. Domestic violence has historically been treated by the police and other enforcement agencies as a private and minor matter which should be resolved by the parties themselves. Such an approach allows men to abuse women and children in their homes without fear of sanction. Mandatory prosecution measures ensure that, if reported, such offences against women in vulnerable domestic situations are taken as seriously as other criminal offences by law enforcement agencies. Mandatory prosecution of domestic violence offences also sends a very clear message to the community of the unacceptability of family violence.

1.16 Does the criminal law legislation contain a broad range of sexual assault offences graded on the basis of seriousness to the victim?

General Recommendation 19(24)(i), and para 124(a) of the Beijing Platform for Action state that effective complaints procedures and remedies for victims of sexual assault must be provided. Article 4(d) of the *Declaration on the Elimination of Violence against Women* 1993 states that penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women subjected to gender based violence. Sexual assault is a gendered harm, overwhelmingly perpetrated against women and girls. Women and girls can be sexually violated in a range of ways and all unwanted sexual contact should be unlawful. To effectively

redress and punish the sexual violations experienced by women, it is essential to incorporate into the criminal law an appropriate range of sexual assault offences, graded to reflect the seriousness of the invasion of personal integrity. A sexual assault on any girl below the age of consent should be considered a serious offence and no significant differentiation on the basis of age should be made, nor should it be considered much less serious in older girls (as is common Pacific jurisdictions).

1.17 Does the definition of rape and/or other sexual assault offences include penetration of non-penile objects to anus, vagina and mouth?

Historically, rape was considered serious not because of its harmful effects on women but because it interfered with the rights of men to have exclusive sexual relations with their wives or future wives. To comply with CEDAW, however, (which focuses on the harmful effects that rape and other sexual assaults have on women) rape offences should not be restricted to penile penetration but should be extended to include the penetration of all orifices by any object. This would also accord with research which shows that women experience serious harm from all forms of sexual abuse.

1.18 Is there an offence of incest for girls and women? If there is no offence of incest then there is full compliance with this indicator.

The offence of incest was originally based on religious and cultural

prohibitions on sexual interactions between family members and concerns about the genetic implications of having children together. Historically, it was never intended as a means of protection of children, young persons and women from sexual assault by family members. However, research shows that incest is primarily perpetrated in the context of unequal power relations between men and women/girls in the family. Criminalising all parties to an incestuous sexual encounter may dissuade a victim of an incestuous sexual assault from reporting the offence due to the knowledge that she may be charged with an offence.

1.19 Have the terms indecency, carnal knowledge, defilement and insulting the modesty been removed from the criminal law legislation?

In General Recommendation 19, the CEDAW Committee emphasised that States Parties should respect the dignity and integrity of girls and women. The use of these terms to describe sexual offences against women and girls imparts an understanding of women and girls as 'damaged' or 'spoilt' by the offences. Such an approach, which is reflective of Victorian notions about women's purity, gives rise to the view that the victim is no longer 'whole' and even partly responsible for the violation. Instead, sexual offences should reflect the invasion of personal integrity of girls and women and their inability to protect themselves in certain circumstances. The terms should be removed and replaced, as discussed above, with a series of sexual assault offences graded on the basis of their severity.

1.20 Is consent specifically defined in the criminal law legislation outlining coercive circumstances?

Consent is a defence to a charge of rape and other sexual assault offences. However, historically in the common law there has been uncertainty as to what circumstances constitute consent. For example, women may submit to intercourse because of threats, coercion or intimidation, blackmail including threats of harm to a third party (such as a child, sibling or mother). A statutory definition of consent in the criminal law legislation affords greater protection to women by specifically determining the range of circumstances which may induce an unwilling consent and it also designates the standards of acceptable sexual conduct. The definition of consent should specifically include the variety of situations where a woman may submit due to threats or coercion. The definition should outline that such situations do not constitute consent. It should also be non-exhaustive allowing discretion for the court to determine the facts of the particular case before making a finding that the woman consented.

1.21 Is there a legislative prohibition on the use of prior sexual conduct to establish consent?

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 discriminatory common law rule which perpetuates the myth that a victim's previous relationship with the accused or another person or persons makes it more likely she

consented. It also perpetuates the myth that promiscuous women or sex workers are more likely to have consented to the act in question. The use of such stereotyped and traditional views of sexual roles can influence the finding of whether a woman consented to sex and as such is discriminatory. Therefore, in order to provide effective complaints procedures and remedies for victims of sexual assault as required by CEDAW, a legislative prohibition on the use of prior sexual conduct is necessary.

1.22 Is there a legislative prohibition on a requirement for corroboration?

Corroboration (independent evidence that connects the accused person with the crime such as a witness) is a common law rule that requires a judge to advise the jury that it is dangerous to convict the accused on uncorroborated evidence. Corroboration is typically only required for sexual offences and paternity. There are often no witnesses to sexual offences and this requirement discriminates against sexual assault victims as it implies that women may lie about sexual assaults. Similar requirements are not made of victims of other offences such as common assault and there is no reason why victims in trials of sexual offences should be viewed as a particularly unreliable class of witness and/or that the word of women is inherently worth less than that of the male accused. Therefore, in order to provide effective complaints procedures and remedies for victims of sexual assault as required by CEDAW, a legislative prohibition on the requirement for corroboration is necessary.

1.23 *Is there a legislative prohibition on a requirement for proof of resistance?*

Proof of resistance is a common law rule which is used to determine consent. It 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 it also ignores the reality that fear and lack of power may immobilise a victim. It also places an onus on women to do more than say no.

1.24 *Is there a defence of honest and reasonable belief that victim is of legal age to consent to sexual relations? If there is no such defence then there is full compliance with this indicator.*

A defence of honest and reasonable belief that a girl was old enough to legally consent to sexual relations can be used by a perpetrator of a sexual offence to argue that they honestly believed the victim was of legal age. Such a defence, however, places the onus on the victim to reveal their age rather than an onus on the alleged perpetrator to ascertain their age before engaging in sexual relations.

1.25 *Is a defence of consent unavailable in relation to a victim under 18?*

The *Convention on the Rights of the Child* 1989 (CRC) states that 'a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. The CEDAW Committee in General Recommendation 21 states even more strongly that it considers

18 years to be the age of majority. Although the Committee made this reference in relation to the issue of marriageable age rather than sexual relations, consent of the victim should not be a defence (for the perpetrator) to sexual relations with a girl under the age of 18.

1.26 *Is there an exemption from prosecution for marital rape? If there is no such exemption then there is full compliance with this indicator.*

The *Declaration on the Elimination of Violence against Women* 1993 states that violence against women includes marital rape. A failure to criminalise rape within marriage is based on the doctrine that marriage places a woman under the protection and authority of her husband. It assumes that there is an obligation upon women created by the marriage contract to submit to sexual relations at any time. It also led to the erroneous view that women were the property of their husbands and therefore they could not be accused of marital rape. Sexual relations without the consent of either of the parties amounts to sexual violence and cannot be negated by a marriage contract.

1.27 *Is there mandatory prosecution for sexual offences?*

Article 4(d) of the *Declaration on the Elimination of Violence against Women* 1993 states that appropriate penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women who are subjected to gender based violence. Sexual violence has historically been treated by the police and other enforcement agencies as less

serious than other crimes especially in relation to those perpetrated within a family context. Mandatory prosecution measures ensure that, if reported, such offences are taken as seriously as other criminal offences by law enforcement agencies.

1.28 Is bail unavailable for sexual offences if there is a risk to the victim?

Historically, there has been a presumption that bail will be granted to protect the rights of the accused. However, in relation to sexual offences bail should not be granted if there is any risk to a sexual assault victim. In small close knit communities (such as those in the Pacific) where there is close interaction between the accused and victims, rape victims and their families may be subjected to harassment and threats which may force victims to drop charges. If the accused is to be released on bail then there should be legislative provision for the complainant to be informed.

1.29 Are there minimum sentences for sexual offences?

The *Declaration on the Elimination of Violence against Women* 1993 states that sanctions should be developed in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. Courts have historically issued light sentences to perpetrators of sexual offences signalling that it is not a serious offence. The lack of minimum sentences enables this practice to continue and criminal law legislation should therefore contain minimum sentences for sexual offences.

1.30 Is there a provision in the criminal law legislation (Penal Code) which states that customary practices of forgiveness shall not affect criminal prosecution or sentencing?

The *Declaration on the Elimination of Violence against Women* 1993 states that adequate sanctions should be imposed upon perpetrators to punish and redress the wrongs caused to women who are subjected to violence. Prosecution should proceed and adequate sanctions should be imposed regardless of whether traditional practices of seeking forgiveness for violence against women have been pursued. Such customary practices should not be used as a justification for the State not to proceed with a criminal prosecution or, alternatively, to reduce or withdraw a sentence.

1.31 Is there legislative provision for compensation for victims of sexual and domestic violence?

General Recommendation 19 obligates States Parties to provide compensatory provisions for victims of gendered violence including sexual assault. Compensatory redress can be provided either within a state-funded compensation scheme or by introducing reparation provisions into the criminal law legislation to enable the court to award damages to the victim during sentencing and which would be payable by the perpetrator.

1.32 Does the criminal law legislation allow for infanticide to replace a charge of murder or manslaughter?

Infanticide (in contrast to abortion, which refers to the destruction of a foetus), a criminal offence by which a mother causes the death of her child

of 12 months or less, is an alternate offence to murder or manslaughter, with a reduced sentence. Infanticide recognises that mothers may experience post natal depression in the 12 months after birthing and should not be held accountable to charges of murder or manslaughter.

1.33 *Does the definition of infanticide include environmental and social stresses?*

Article 2(f) of CEDAW obligates States Parties to take all appropriate measures, including legislation, to modify or abolish existing laws, which constitute discrimination against women. Historically, the defence of infanticide was linked to perceived ‘biological’ hormonal weaknesses leading to mental disorders that women experience during and after childbirth particularly post-natal depression. This view, which perpetuates a discriminatory and stereotyped view of women as inherently susceptible to mental illness, has been modified and replaced with the position that the environmental stresses and disruption of providing care for a young infant combined with other social factors are also significant triggers for post natal depression and consequent child killing. Therefore, the defence of infanticide should not be solely contingent on lactation and a failure to recover from birthing but instead should be also linked to environmental and social stresses.

ARTICLE 3: GUARANTEE OF BASIC HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full

development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

ARTICLE 3 INDICATORS

3.1 *Is there legislation establishing national human rights machinery charged with promoting and protecting human rights including women’s rights?*

Article 3 of CEDAW obligates States Parties to ensure that the full development and advancement of women in all fields is secured. Article 2(c) obligates States Parties to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination. Human rights machinery that is charged with protecting and implementing human rights including women’s rights assists States Parties to comply with this indicator.

3.2 *Is there legislation establishing a funded body to monitor the implementation of non-discriminatory law and policy for the advancement of women?*

Article 3 of CEDAW obligates States Parties to ensure in all fields, the full development and advancement of women. The Beijing Platform for Action (para 203) recommends that governments create a national machinery ‘for the advancement of women at the highest possible level of government’ with the ability and competence to ‘influence policy and formulate and review legislation’. Preferably, such machinery would be established through enabling legislation (rather than policy) since

this provides an assurance that the body or institution charged with these responsibilities cannot easily be removed during a time of reform, political change or instability, or economic downturn. To enable such a body to function effectively adequate budgetary allocations should be guaranteed.

ARTICLE 4: ACCELERATION OF EQUALITY BETWEEN MEN AND WOMEN

1. *Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*
2. *Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.*

ARTICLE 4 INDICATORS

- 4.1 *Does the constitution contain a temporary special measures provision?*

The acceleration of *de facto* equality by the use of temporary special measures (affirmative action) is specifically mandated by CEDAW in Article 4. General Recommendations 5, 8, 23 and 25 also encourage States Parties to make more use of temporary special measures to advance women's integration into

education, the economy, politics and employment, to provide equal opportunities to represent their governments internationally and to encourage the equal participation of women in public life. This mandate recognises firstly that formal equality is inadequate to redress the historical discrimination experienced by women and secondly that formal equality is unable to achieve substantive equality. Temporary special measures can include quotas (addressed in General Recommendation 25 (C)(22), preferential treatment, encouraging women to apply for positions in male dominated occupations (such as the police force), training and financially assisting women candidates for election to publicly elected bodies, circulating images of women in advertising material for male dominated occupations, and targeted recruitment for appointment to public positions such as the judiciary or other professional groups.

- 4.2 *Are special measures exempt from discrimination on the basis of sex, marital status, disability, sexual orientation and HIV status?*

Special measures must explicitly be exempt from constitutional anti-discrimination provisions. This is to prevent any argument that a program designed to redress a historical disadvantage faced by women disadvantages men. For example, a quota system that provides that a certain number of places in parliament are reserved for women cannot be challenged on the basis that it discriminates against men.

ARTICLE 5: SEX ROLES AND STEREOTYPING

States Parties shall take all appropriate measures:

- a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*
- b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*

ARTICLE 5 INDICATOR

- 5.1 Is there a constitutional provision which gives precedence to a constitutional guarantee of equality if there is a conflict between custom and equality law?*

Article 5 requires States Parties to take all appropriate measures to eliminate prejudices and customary practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Article 2 requires States Parties to take all appropriate measures including legislation, to modify or abolish customs and practices which constitute discrimination against women. In General Recommendation 19, the Committee highlights how traditional attitudes towards women and the stereotyped roles imposed on them by customs

and cultural practices can lead to the perpetuation of widespread violence and discrimination against women. Courts in the Pacific continue to struggle with the conflict between formal law and customary practices, particularly in relation to practices that discriminate against women such as child marriage, bigamy and polygamy to name a few. To ensure discriminatory customary practices do not prevail over principles of equality and non-discrimination a constitutional guarantee is required. In addition, the modification of sex roles and stereotyping is a crosscutting theme that has been incorporated within other indicators to the 16 articles. For example, the prohibition on customary practices that discriminate against women is explicitly the subject of indicator 1.13. The elimination of the stereotype in the area of family relationships that men are the head of the household is dealt with in indicators relating to Article 16. Further, the CEDAW Committee recognises that the primary means of ensuring the removal of stereotyping and ingrained sex roles is through education, media, and a range of policy measures rather than through legislative measures. For example, an understanding of maternity as a social function and the shared responsibility of both men and women in the raising of children requires family education.

ARTICLE 6: EXPLOITATION OF WOMEN

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

ARTICLE 6 INDICATORS

6.1 *Is the act of soliciting decriminalised?*

Article 6 of CEDAW requires States Parties to suppress the exploitation of women in prostitution (hereafter referred to as sex work). The CEDAW Committee in General Recommendation 19 has noted that sex workers are vulnerable to violence and marginalised when their status is unlawful. Decriminalising sex work therefore assists in preventing the exploitation of sex workers who may be forced into such work through poverty and unemployment.

6.2 *Is aiding and abetting consensual acts of soliciting decriminalised?*

Working in organised premises is much safer than street work and therefore brothels and third parties (pimps) who facilitate sex work should not be criminalised for their activities if the sex worker is above the age of majority and engaging in sex work consensually. The legalisation of brothels enables them to be made subject to the same rules and regulations that regulate other businesses including incorporating occupational health and safety laws and payment of taxes to the benefit of the community. Criminalising those who aid and abet sex work puts sex workers at risk of violence and abuse by maintaining it as an illegal activity and not subject to legal regulation.

6.3 *Is it a criminal offence to procure any woman without consent or any girl under 18?*

The CEDAW Committee states in General Recommendation 19 that sex workers should be given the equal

protection of the law against rape and other forms of violence. Appropriate legislation to prevent exploitative aiding and abetting (pimping) should include creating offences for procurement of non-consenting women and for the procurement of any girl under 18 in any circumstances.

6.4 *Does employment legislation including occupational health and safety legislation protect sex workers?*

Whilst Article 6 of CEDAW requires States Parties to suppress the exploitation of women in sex work, Articles 2 and 11 of CEDAW require the elimination of discrimination against women in employment. Cumulatively these articles mandate both the protection of sex workers from exploitation whilst affording them the rights and protections of other workers. Sex workers should therefore be provided with the same rights as other workers. They should be covered by employment and occupational health and safety legislation and have rights to benefits as well as protection from exploitation. This should not take the form, however, of a regulatory model that seeks to regulate the activities of sex workers (i.e., to have health checks) but not clients.

6.5 *Is the trafficking of women prohibited?*

Article 6 obligates States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women. General Recommendation 19 states that trafficking of women is incompatible with the equal enjoyment of rights by women and puts them at special risk of violence and abuse. The trafficking of women and children (both within

borders and internationally) into bonded sweatshop labour, forced marriage, forced sex work, domestic servitude, and other kinds of work is a global phenomenon. The CEDAW Committee recommends that States Parties introduce specific preventative and punitive measures to overcome and prevent trafficking, including criminalizing trafficking.

6.6 *Is sex tourism prohibited?*

General Recommendation 19 states that sex tourism is a new form of sexual exploitation that puts women at special risk of violence and is incompatible with the equal enjoyment of human rights by women. Article 6 obligates States Parties to confront and eliminate this practice.

ARTICLE 7: POLITICAL AND PUBLIC LIFE

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;*
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;*
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.*

ARTICLE 7 INDICATORS

7.1 *Is there an equal right to vote?*

Article 7(a) of CEDAW requires States Parties to ensure that women have an equal right to vote in all elections and public referenda. In General Recommendations 5, 8 and 23 the CEDAW Committee places considerable importance on the participation of women in public life. Universal suffrage is an essential component of women's participation in public life where they enjoy n equal terms with men the right to vote in all elections and referenda.

7.2 *Is there equal eligibility for political representation?*

Article 7 of CEDAW, and General Recommendation 23, both state that women must be eligible for election to all publicly elected bodies. Historically, women have been assigned to the private or domestic sphere engaging primarily in reproduction and raising children. In many societies these activities have been treated as inferior whereas public life by contrast is respected and honoured. It is essential to provide women with equal eligibility to political representation in order to promote their interests and eliminate discriminatory practices.

7.3 *Is there legislative provision for minimum quotas of women in parliament?*

Article 7(b) requires States Parties to ensure that women participate in the formulation and implementation of

government policy, to hold public office and to perform all public functions at all levels of government. Historically, women have been poorly represented in political processes despite equal eligibility for parliament and other political offices. This denies women access to the governance, decision making and policy FORMATION of their country. CEDAW recognises in Article 4 that to achieve substantive equality for women in many areas, affirmative action measures must be adopted. Minimum quotas can ensure full compliance with CEDAW in this regard.

7.4 Do women have an equal right to participate in ngos?

Article 7 of CEDAW expressly requires States Parties to ensure the equal rights of women to participate in non-government organisations that are concerned with the political and public life of the country. General Recommendation 23 specifically identifies the importance of women’s participation in non-government organisations e.g. political parties, trade unions and civil society organisations as a valuable training ground for women to develop political skills, participation and leadership skills and which can serve as a stepping stone towards full participation and representation in political life.

7.5 Is there legislation (other than charitable societies legislation) enabling the registration and mobilisation of ngos to promote the advancement of women without political interference?

Article 7(c) requires States Parties to ensure that women have equal rights to participate in non-governmental

organisations and associations involved in the public and political life of the country. In order for NGOs to effectively participate in the public and political life of the country a right to engage in advocacy and lobbying should be confirmed in substantive legislation. Such legislation should clearly identify that this right embraces a wide variety of forms of civic engagement including involvement in the policy process and legal standing to challenge public authorities in courts of law over access to government information and other matters. A process of registration has been adopted in many countries to clarify the legal status and role of these organisations and to bolster public confidence in them. It should be noted that Charitable Societies legislation typically expressly prohibits ‘political’ activities and is an insufficient legal response to this indicator.

ARTICLE 8: INTERNATIONAL REPRESENTATION AND PARTICIPATION

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

ARTICLE 8 INDICATORS

8.1 Do women have equal opportunity to represent government at the international level and participate in work of international organisations?

Article 8 of CEDAW expressly requires States Parties to ensure that equal opportunities are provided to women to represent their governments at the

international level and to participate in the work of international organisations. Opportunities for women to engage in international work are often denied because of assumptions about their family and domestic responsibilities. However, the inclusion of women, according to the CEDAW Committee, is increasingly important due to the globalisation of the contemporary world. The Committee recommends the implementation of special measures to facilitate the opportunity for more equal representation.

ARTICLE 9: NATIONALITY AND CITIZENSHIP

1. *States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.*
2. *States Parties shall grant women equal rights with men with respect to the nationality of their children.*

ARTICLE 9 INDICATORS

- 9.1 *Do women have an equal right to acquire, change or retain their nationality?*

Article 9 of CEDAW clearly mandates the granting of equal rights to women with men to acquire, change, or retain their nationality. General Recommendation 21 states that nationality is critical to a woman's full participation in society. Nationality affects her right to vote or stand for public office, her choice of residence and her access to

public services and benefits. Article 15(4) also requires States Parties to provide to men and women the same rights in law relating to the freedom to choose their residence and domicile.

- 9.2 *Does marriage to an alien or change of husband's nationality affect wife's nationality? If marriage does not affect wife's nationality then there is full compliance with this indicator.*

In General Recommendation 21, the CEDAW Committee states that nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of a marriage or because her husband changes his nationality. This ensures that women are not captive to their husbands' circumstances and further that their independence and autonomy are not compromised. Further, Article 15(4) also requires States Parties to provide to men and women the same rights in law relating to the freedom to choose their residence and domicile.

- 9.3 *Do both spouses have equal rights to residency, citizenship and employment when married to a non-national?*

Legislation that denies non-national husbands automatic residence or citizenship rights upon marriage to a national denies women equal rights with men. If rights such as residency, citizenship or employment are not afforded to her spouse, a woman married to a non-national is forced to choose between her place of origin and her marriage.

9.4 *Do both spouses have an equal right to determine the nationality of their children?*

Article 9(2) of CEDAW specifically requires equal rights for both men and women in determining the nationality of their children. Citizenship law under which children automatically acquire the nationality or citizenship of their father but not their mother is discriminatory.

9.5 *Do women have an equal right to obtain a passport?*

Article 9 of CEDAW obligates States Parties to ensure women have equal rights in relation to nationality. Article 15 requires that States Parties ensure women are equal before the law. Article 16 requires States Parties to ensure that women have equal status in all aspects of family life. A requirement that a woman's right to obtain a passport is contingent on the consent of her husband interferes with her identity, autonomy, freedom of movement, and the right to full participation in society and is therefore, in breach of Articles 9, 15 and 16.

ARTICLE 10: EDUCATION

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) *The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall*

be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

- (b) *Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;*
- (c) *The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;*
- (d) *The same opportunities to benefit from scholarships and other study grants;*
- (e) *The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;*
- (f) *The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;*
- (g) *The same opportunities to participate actively in sports and physical education;*
- (h) *Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.*

ARTICLE 10 INDICATORS

10.1 *Do women and girls have equal access to education?*

Article 10 of CEDAW obligates States Parties to take all appropriate

measures to eliminate discrimination in the field of education. The Beijing Platform for Action, para 80, contains recommendations that governments eliminate gender discrimination at all levels of education. In order to achieve this, girls and women must have equal access to all forms and levels of education.

10.2 Is there legislation that creates special measures for the advancement of women in education?

Article 10 of CEDAW obligates States Parties to take all appropriate measures to eliminate discrimination in the field of education. General Recommendation 5 encourages States Parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education. Despite the provision of equal access to education in many countries, girls and women continue to be outnumbered by boys and men at all levels of education, particularly, in developing countries. Affirmative action can assist in achieving substantive equality in the area of education and should be specifically incorporated into legislation.

10.3 Is there compulsory primary education for girls and boys?

Article 10(a) of CEDAW obligates States Parties to provide access to education for women and girls on the same basis as men and boys, in preschool and general education. Both the Beijing Platform for Action and the United Nations Millennium Development Goals specifically designate the achievement of universal

primary education as a priority. As a minimum standard, compulsory primary education will ensure the literacy of women and girls and assist in eliminating discrimination that may prioritise the education of males over females.

10.4 Is there compulsory secondary education for girls and boys?

As stated above, Article 10(a) obligates States Parties to provide equal access to education for women and girls on the same basis as men and boys, an equality that should be provided in general, technical, professional and higher tertiary education. The Beijing Platform for Action, para 279, recommended that governments ensure equal access to secondary education for both sexes by 2005. As a minimum standard, compulsory secondary education ensures the literacy of females and assists in ensuring their economic independence.

10.5 Is family life (reproductive and sexual health) education compulsory in schools?

Article 10(h) of CEDAW mandates the provision of equal access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning. Likewise both the Beijing Platform for Action and the Pacific Plan recommend that family life education be provided to all. To ensure such information reaches all children and young people it should be a compulsory subject during secondary school. Provision of access to this information can enable girls to participate more equally in many areas connected with their family lives.

10.6 *Is there a legislative prohibition on expulsion from school because of pregnancy?*

Article 10 of CEDAW prohibits discrimination in education and recommends measures to reduce the early drop out rate of girls. Preventing pregnant girls from pursuing an education is discriminatory and has far reaching impacts on their future lives, their autonomy and in particular their economic independence.

ARTICLE 11: EMPLOYMENT

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:*
 - (a) *right to work as an inalienable right of all human beings;*
 - (b) *The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;*
 - (c) *The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;*
 - (d) *The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;*
 - (e) *The right to social security, particularly in cases of retirement,*

unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

- (f) *The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*
2. *In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:*
 - (a) *To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*
 - (b) *To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*
 - (c) *To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of childcare facilities;*
 - (d) *To provide special protection to women during pregnancy in types of work proved to be harmful to them.*
3. *Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.*

ARTICLE 11 INDICATORS

11.1 Are there antidiscrimination provisions in employment legislation on the grounds of sex, marital status, sexual orientation, pregnancy and hiv status, with sanctions?

Article 11 of CEDAW obligates States Parties to ensure women have the same employment rights, opportunities, choices and benefits as men. It also obligates States Parties to remove both direct and indirect discrimination against women. Likewise, the Beijing Platform for Action, para 178(b), recommends that governments enact laws that prohibit direct and indirect discrimination on the grounds of sex in relation to all aspects of employment. Essential to this process is the inclusion of broad anti-discrimination provisions in employment legislation. Appropriate sanctions for breach are required to ensure the effectiveness of such provisions.

11.2 Are there special measures provisions for the advancement of women in employment?

Article 11 of CEDAW obligates States Parties, amongst other things, to ensure women have equal rights to employment opportunities, free choice of profession and employment, and equal rights to promotion and remuneration. Historically women, despite the presence of formal equality measures (such as equal pay) have not achieved substantive equality in the area of employment. Special measures such as pay equity and quotas, mandated in General Recommendations 5 and 25 for the

advancement of women in employment, can provide a means of addressing the historical discrimination experienced by women in employment.

11.3 Do women enjoy equal conditions of work including leave, workers compensation and superannuation?

Women should be provided with the same conditions of work as other employees including access to leave entitlements, superannuation and workers compensation. Typically, however, domestic workers, casual workers, outworkers and part-time workers are excluded from many such entitlements. This is a form of indirect discrimination as it disproportionately affects women who are typically clustered in such work.

11.4 Does the legislation provide sexual harassment protection from employers and co-workers?

Article 11 requires States Parties to provide women with the right to health and safety in the workplace. It also requires them to eliminate discrimination against women in employment. General Recommendations 12 and 19 define sexual harassment in the workplace as a form of discrimination against women. Equality in employment is seriously impaired when women are subjected to sexual harassment. In effect, it denies them equal opportunities in the workplace. Further, studies indicate that absenteeism tends to increase among employees who are sexually harassed and as a result, work attitudes are adversely affected, and productivity drops.

11.5 Does the definition of sexual harassment include the breadth of unwanted behaviours?

General Recommendation 19 defines sexual harassment as unwelcome sexually determined behaviour such as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. Such actions can be humiliating for the recipient and are discriminatory when they create a hostile work environment. Discrimination can also occur when a woman has reasonable grounds to believe any objection to the harassment will disadvantage her in connection with her employment including recruitment or promotion. It is therefore essential in order to comply with CEDAW that the legislative definition of sexual harassment contains a comprehensive range of unwanted behaviours.

11.6 Does the legislation contain an equal pay provision?

Article 11(1)(d) of CEDAW guarantees women the right to equal remuneration. The Beijing Platform for Action, para 178, recommends that international labour standards, such as that contained in ILO 100, on equal pay for female and male workers, be implemented. Differentiation in the rate of pay for women undertaking the same job as men is therefore discriminatory. Further, Article 5 obligates States Parties to actively seek to remove sex roles and stereotyping. Differentiation of wages reinforces the stereotypical notion that the man is the head of the household and the main 'breadwinner' thereby designating the

earnings of women on a lesser scale of importance.

11.7 Does the legislation contain pay equity provisions?

Article 11(d) of CEDAW and para 165 of the Beijing Platform for Action, require States Parties to provide 'equal treatment in respect of work of equal value'. General Recommendation 13 confirms that the full implementation of this provision requires a mechanism to facilitate comparison of the value of jobs typically undertaken by women with jobs typically undertaken by men. This requires more of States Parties, therefore, than merely introducing equal pay for persons employed in the same work. For example, equal pay requires that all police officers whether male or female be paid the same rate of pay. However, occupations in which women are typically employed are often poorly paid in comparison with jobs where men are typically employed. Equal treatment for work of equal value requires, therefore, that work which is different in nature but requires comparably similar skills, experiences and qualifications and is carried out in comparably similar circumstances should attract the same rate of pay.

11.8 Does the legislation provide for an equal retirement age?

Article 11 of CEDAW obligates States Parties to eliminate discrimination in the field of employment. The imposition of a different age of retirement for women constitutes discrimination and prevents them from equal access to income, promotion

and many associated benefits such as superannuation. Compliance with CEDAW to ensure women are treated on an equal basis with men therefore requires legislation to ensure equal retirement ages for men and women.

11.9 Are there restrictions on women's choice of employment? If there are no restrictions on women's choice of employment then there is full compliance with this indicator?

Article 11(1)(c) of CEDAW obligates States Parties to ensure that women have the right to free choice of profession and employment. Article 11(3) states that 'protective legislation' should be reviewed periodically in the light of scientific and technological knowledge and should be revised, repealed or extended as necessary. Legislation that prohibits women from working in particular fields of employment or particular hours (i.e. at night) should therefore be supported by scientific evidence that provides a substantiated reason for their exclusion. Otherwise such provisions are discriminatory and are contrary to Article 11.

11.10 Does the legislation provide for health protection during pregnancy?

Articles 11(1) and (2) of CEDAW requires the elimination of pregnancy discrimination in employment. Specifically, this includes the provision of special protection to women during pregnancy in types of work harmful to them, thereby safeguarding the function of reproduction, their health and their right to continued employment. Compliance with Article 11 requires the provision of light duties, breaks, time to attend medical checks etc, as

failure to do so may result in women having to give up their employment and livelihoods to attend to their needs during pregnancy.

11.11 Does the legislation provide paid maternity leave of not less than 14 weeks?

Article 11(2)(b) requires States Parties to introduce maternity leave with pay or with comparable social benefits. The International Labour Organisation recommends a minimum of 14 weeks maternity leave in both the public and private sectors.

11.12 Does the legislation provide protection from dismissal because of pregnancy or maternity leave?

Article 11(4) states that to prevent discrimination against women on the grounds of pregnancy and birthing and to ensure their effective right to work, States Parties shall prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy. The Beijing Platform for Action, at para 126 also recommends that governments take measures to prevent the denial of employment and dismissal due to pregnancy and breast feeding. Such protection allows women to combine family life with work and to participate in public life. Without such protection inevitably most women who give birth will be unable to retain their employment.

11.13 Does the legislation guarantee the provision of childcare by the employer or the state?

Article 11(2)(c) obligates States Parties to encourage the provision of

necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life. In particular, this should be achieved through promoting the establishment and development of a network of childcare facilities. Likewise, it is recommended in the Beijing Platform for Action para 173 that governments provide 'high quality, flexible and affordable childcare services which take into account the needs of working men and women.' Without the provision of childcare facilities women, who continue to be primarily responsible for the raising of children are unable to return to, or commence, work.

11.14 Does the legislation provide reasonable nursing time during work hours?

Article 11(1) of CEDAW obligates States Parties to provide women with equal opportunities in the workplace free from discrimination. The demands of breastfeeding and the reality that they continue to be responsible for young children may prevent women from continuing or resuming employment. Such a situation is clearly discriminatory to women. In order to balance the needs of young children with the demands of work, women should be given both time and provided with an appropriate location to breastfeed children. Such provision must recognise the frequency with which very young children require feeding and the time that it might take to relocate to and return from a suitable location in the absence of nearby facilities.

ARTICLE 12: HEALTH CARE AND FAMILY PLANNING

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*
2. *Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the postnatal period, granting free services where necessary, and as adequate nutrition during pregnancy and lactation.*

ARTICLE 12 INDICATORS

12.1 Do women have access to safe and legal abortion facilities?

Article 12(1) obligates States Parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to comprehensive family planning. The failure to decriminalise abortion and to provide safe accessible facilities for women who require abortions endangers their health and that of any child subsequently born after a failed abortion. Research has shown that unsafe abortions lead to a significant increase in both maternal mortality and maternal morbidity particularly in developing countries. Research also indicates that when a mother dies

(including as a result of an unsafe abortion) the chance of survival of all surviving children under 5 is significantly reduced.

ARTICLE 13: SOCIAL AND ECONOMIC BENEFITS

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;*
- (b) The right to bank loans, mortgages and other forms of financial credit;*
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.*

ARTICLE 13 INDICATORS

13.1 *Do women have an equal right to family benefits regardless of marital status?*

General Recommendation 16 notes that women often work in family enterprises without pay or adequate remuneration and recommends that States Parties take necessary steps to guarantee payment of social security and social benefits to women working in family enterprises without pay.

13.2 *Do women have an equal right to receive bank loans, mortgages and financial credit?*

Article 13(b) of CEDAW provides that women should be afforded equal rights to bank loans, mortgages and other forms of financial credit free

from discrimination. Women have historically experienced discriminatory restrictions in obtaining credit and loans to purchase property or businesses, interfering with their autonomy and ability to earn a livelihood.

13.3 *Do women have an equal right to participate in recreational activities, sports and cultural life?*

Article 13(c) of CEDAW requires that women have an equal right to participate in recreational activities, sports and all aspects of cultural life.

ARTICLE 14: RURAL WOMEN

1. *States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.*
2. *States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:*
 - (a) To participate in the elaboration and implementation of development planning at all levels;*
 - (b) To have access to adequate health care facilities, including information, counselling and services in family planning;*

ARTICLE 14: RURAL WOMEN (continued)

- (c) *To benefit directly from social security programmes;*
- (d) *To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;*
- (e) *To organize self-help groups and cooperatives in order to obtain equal access to economic opportunities through employment or self employment;*
- (f) *To participate in all community activities;*
- (g) *To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;*
- (h) *To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.*

ARTICLE 14 INDICATOR

- 14.1 *Is there legislation that provides for special measures to advance substantive equality for rural women?*

Article 14 obligates States Parties to take all appropriate measures to eliminate discrimination against women in rural areas and to ensure equal participation in development planning, equal access to adequate health care facilities, the equal ability to obtain all types of training and

education, to obtain equal access to economic opportunities through employment or self employment and to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes. This is particularly significant in the Pacific where many women live in rural communities and often play a significant role in the economic survival of their families. However, rural women are frequently disadvantaged in areas such as land ownership, health, and education to name a few. To achieve substantive equality for rural women and therefore compliance with CEDAW special measures provisions should be incorporated into legislation.

ARTICLE 15: EQUALITY BEFORE LAW AND CIVIL MATTERS

1. *States Parties shall accord to women equality with men before the law.*
2. *States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.*
3. *States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.*
4. *States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.*

ARTICLE 15 INDICATORS

15.1 *Does the constitution guarantee equality before the law?*

Article 15 obligates States Parties to provide women a constitutional guarantee of equality before the law. Equality before the law ensures that men and women are subject equally to the law and to equal treatment in the application of any law.

15.2 *Do women have an equal capacity in civil matters – can women sue?*

Article 15 obligates States Parties to ensure women have a legal capacity identical to that of men and the same opportunities to exercise that capacity. Likewise, in General Recommendation 21, the CEDAW Committee states that any hindrance to a woman's capacity to initiate litigation, to access legal advice or to seek redress from the courts denies her right to equality. Any denial of a woman's ability to effectively pursue her rights to seek redress in the civil courts and tribunals for any invasion of her rights diminishes her standing as a full and equal citizen in her community.

15.3 *Do women have an equal right to participate in courts and tribunals at all stages?*

In General Recommendation 21, the CEDAW Committee states that if a woman's status as a witness or her evidence is accorded less respect or weight than that of a man, her standing as an independent, responsible and valued member of her community is diminished. Women should be

afforded, equally with men, status as witnesses or any other capacity in all levels of court proceedings.

15.4 *Do women (regardless of marital status) have an equal right to conclude contracts and administer property?*

In General Recommendation 21, the CEDAW Committee states that any restriction on a woman's right to enter into a contract or to enter a contract only with her husband or a male relative's concurrence or guarantee, is a denial of her legal autonomy. Any such restriction may prevent her from holding property as the sole owner or from the legal management of her own business. Such restrictions on women's contractual capacity seriously impede their ability to provide for themselves and their dependants.

15.5 *Do women have an equal right to be executors or administrators of estates?*

Article 15 requires States Parties to ensure women's legal autonomy by guaranteeing them equality before the law. This extends to guaranteeing women an equal legal capacity with men in civil matters such as the administration of estates and the same opportunities to exercise that capacity.

15.6 *Is there legislation that nullifies all contracts and instruments that limit women's legal capacity?*

Article 15(3) requires States Parties to ensure that all contracts and all other private instruments of any kind with a legal effect which are directed at restricting the legal capacity of women are deemed null and void.

15.7 *Do women have an equal right to choose their residence and domicile?*

Domicile refers to the country in which a person intends to reside and to whose jurisdiction they will submit. Domicile is originally acquired by a child through its parents but in adulthood it is determined by the country in which a person normally resides and in which they intend to reside permanently. In General Recommendation 21, the CEDAW Committee clearly states that any restrictions on a woman's right to choose her domicile thereby prevents her from freely entering and leaving a country in her own right and is therefore discriminatory.

ARTICLE 16: EQUALITY IN MARRIAGE AND FAMILY LAW

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
 - (a) *The same right to enter into marriage;*
 - (b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
 - (c) *The same rights and responsibilities during marriage and at its dissolution;*
 - (d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*
 - (e) *The same rights to decide freely and responsibly on the number*

and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

- (f) *The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
- (g) *The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;*
- (h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

2. *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry.*

ARTICLE 16 INDICATORS

- 16.1 *Does the legislation guarantee women's entry into marriage with full and free consent?*

Article 16(1)(b) obligates States Parties to ensure women have the right to freely choose a spouse and to enter into marriage only with their free and full consent. General Recommendation 21 states that a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and

equality as a human being. A woman's right to choose if and whom she will marry must be protected and enforced at law. Satisfaction of this indicator also meets the recommendation in the Beijing Platform for Action, para 274, that governments enact and strictly enforce laws to ensure marriage is only entered into with the full and free consent of the intending spouses.

16.2 Does the legislation allow marriages to be nullified if they took place under force, duress or undue influence?

Article 16(1)(b) obligates States Parties to ensure women have the right to freely choose a spouse and to enter into marriage only with their free and full consent. General Recommendation 21, states that a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. If a marriage is proven to have taken place under duress or undue influence, legislation should provide for it to be nullified.

16.3 Is there an equal minimum age of 18 for marriage?

Article 16(2) obligates States Parties to take all necessary action, including legislation, to specify a minimum age for marriage. General Recommendation 21 states that international standards require 18 years to be the minimum age of marriage for men and women. The Committee also noted that allowing girls to marry at an earlier age is discriminatory and rejected any argument that it protects girls. The Committee further stated that it is incorrect and discriminatory to assume that women have a different rate of intellectual development from men

or alternately that their intellectual or physical development at marriage is immaterial.

16.4 Is there a legislative prohibition on child marriage?

Article 16(2) of CEDAW states that the betrothal and marriage of a child shall have no legal effect. In General Recommendation No 21, the CEDAW Committee notes that in the *Convention on the Rights of the Child* 1989, a 'child' means any human being below the age of 18 unless majority is attained earlier under national law. Regardless of national law the CEDAW Committee considers the minimum age for marriage should be 18 for both males and females. Marriage carries with it important responsibilities which require maturity and capacity to act. Marriage, child bearing and raising children can adversely affect the education and health of minors.

16.5 Does legislation require registration of marriage in an official registry?

Article 16(2) obligates States Parties to take all necessary action including legislation to make the registration of marriages in an official registry compulsory. In General Recommendation 21, the CEDAW Committee again recommends that States Parties require the registration of marriage. The registration of marriage enables States Parties to ensure that the minimum age for marriage and the prohibitions on bigamy and polygamy are adhered to. It also protects women upon the dissolution of marriage against claims that they were not married and thereby not entitled to spousal and other benefits.

16.6 *Does the legislation prohibit bigamy?*

In General Recommendation 21, the CEDAW Committee states that a polygamous (or bigamous) marriage contravenes a woman's right to equality with men and can have serious emotional and financial consequences for her and her dependants. Such marriages also violate Article 5(a) which states that cultural patterns that are based on the inferiority or superiority of either sex should be modified.

16.7 *Do women have an equal right to choose a family name?*

Article 16(1)(g) of CEDAW requires States Parties to ensure that a husband and wife have the same personal rights including the right to choose a family name. General Recommendation 21, states that each partner should have the right to choose his or her own name so as to preserve their individuality, their identity in the community and to distinguish themselves from other members of society. To deny a woman that right either by custom or legislation denies her those rights as well as impinges on her autonomy.

16.8 *Is the consent of both parents equal in the marriage of minors?*

Article 16(1)(d) of CEDAW requires that States Parties ensure the same rights and responsibilities to both parents equally, irrespective of their marital status, in matters relating to their children. Article 5 requires the removal of sex role stereotyping. Legislative deference to a father's consent in determining whether a minor child can marry reinforces a stereotype of the father as the head of

the household and is discriminatory as it gives greater rights to the father than the mother. If consent is required to facilitate the marriage of minors, a woman's consent should equally be sought and consent should be denied if it has not been provided by both parents.

16.9 *Are both spouses equal in the ownership, acquisition, management, administration, enjoyment and disposition of property?*

Article 16(1)(h) obligates States Parties to ensure that both spouses have the same rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. In General Recommendation 21, the CEDAW Committee states that the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence. In many countries it would also be critical to her ability to earn a livelihood and to provide housing, food, clothing etc., for herself and her dependants.

16.10 *Does the legislation provide for a maintenance and custody order during separation calculated on the basis of need?*

General Recommendation 19(23) 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. Women who do leave relationships but cannot legally obtain maintenance or the custody of their children may be forced into untenable situations. The legal opportunity to

apply for maintenance and custody orders can provide women with real choices as to whether to leave a marriage. It ensures that economic considerations do not prevail over a woman's right to live in a safe environment.

16.11 Is there legislation enabling women to occupy the marital home when settlement is not possible or in situations of domestic violence?

Article 16(1) of CEDAW obligates States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Customary practices often designate the male as the head of the household and consequently, the marital home is often in the male partner's name. This can make it difficult for a woman to leave a relationship particularly if she believes she will have few rights to remain in the marital home. The situation is compounded if she has no means of supporting herself or has nowhere else to go. Legislative protection that gives women and their children a legal right to remain in the marital home until a property settlement is finalised preserves her position without disadvantage or discrimination.

16.12 Does the legislation provide an order for restitution of conjugal rights? If there is no such order in the legislation then there is full compliance with this indicator?

Restitution of conjugal rights refers to situations where a married person having left a marriage, is ordered by the court to return to the marriage and resume a sexual relationship

(where according to the court there appears to be no valid reason, such as, desertion, cruelty, adultery etc, for the party to have left). This is more likely to impact on women as men are more likely to have access to the resources and funds to seek the assistance of the court in such matters. An order for restitution of conjugal rights impacts on women's autonomy and may in some circumstances amount to the legal sanctioning of marital rape since the order is not contingent upon a woman's choice to resume sexual relations with her husband. Gender based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, amounts to discrimination within the meaning of Article 1 of the Convention. Article 2 also obligates States Parties to refrain from engaging in any act or practice of discrimination against women and ensure that public authorities and institutions (including courts) do not directly or inadvertently sanction such discrimination.

16.13 Does the legislation provide for no-fault divorce?

Article 16 requires States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family. Fault based divorce which requires proof of a matrimonial offence such as desertion or habitual rape, places women in the difficult position of having to provide evidence of situations that may be humiliating, embarrassing, or that may interfere with their dignity. Women also face discrimination in proving fault, particularly cruelty and adultery if they choose not to be witnesses or they do

not wish to attend court. An adversarial system which relies on proof of such evidence is likely to operate to the detriment of women. Such a system also interferes with women's autonomy and perpetuates economic and legal discrimination by not recognising that financial resources and access to legal services (which many women may not have) are required to pursue a fault based divorce in the courts. Finally, the predominance of men in the legal system and judiciary and the historical discrimination women have suffered in the legal system, work to dissuade women from utilizing the legal system. The abolition of fault based divorce would remove some of these discriminations.

16.14 Is there a duty on the court to promote reconciliation? If the legislation does not contain such a duty, then there is full compliance with this indicator.

The provisions of General Recommendation 19 are strongly focused on the autonomy of women. The imposition of court based reconciliation in family law matters whilst appearing laudable, nevertheless, interferes with the autonomy of the parties, particularly women and particularly in situations where there are unequal power relations, including due to a history of family based violence. The State in reconciling parties may be perpetuating violence and discrimination against women and placing them in vulnerable and fearful situations. Reconciliation should therefore be an 'opt in' measure rather than one imposed by the court.

16.15 Does the legislation provide for an equal division of property after divorce including recognition of women's unpaid contribution, future needs calculated, and future earning capacity calculated?

Women have historically been the subject of discrimination in the area of property division after separation and divorce. In General Recommendation 21, the CEDAW Committee states that the division of marital property should include the recognition of non-financial contributions during a marriage such as raising children, caring for elderly relatives, and discharging household duties (tasks that are viewed as falling within the private sphere rather than the public domain). Such non-financial contributions enable a husband to earn an income and increase the assets of the family and should therefore be recognised on an equal footing or accorded equal weight with the contributions of men, when calculating the division of property after divorce.

16.16 Does the legislation provide for the payment of child support upon divorce based on need?

Article 16 (1)(c) and (d) of CEDAW states that women and men have equal rights and responsibilities as parents. General Recommendation 21 notes that many fathers fail to share the responsibility of care, protection and maintenance of their children after divorce. The payment of child support based on the needs of the child and the earning capacity of mothers ensures that fathers take responsibility for the costs of child rearing and at the same time recognizes the costs that women experience in the raising of children.

16.17 Does the legislation provide for the payment of maintenance for the ex-spouse based on commitments, income, earning capacity and assets?

In General Recommendation 21, the CEDAW Committee states that the responsibilities that women have in bearing and raising children affect

their ability to access education, employment opportunities and other activities related to their personal development. Consequently, upon the breakdown of a marriage a woman may often be left without the means to financially support herself and her children. The assessment of maintenance should account for the disadvantages that women may face in supporting themselves and children after a divorce or separation. The adoption of clear criteria based on the actualities of women's lives such as commitments, income and earning capacity are therefore more likely to achieve fair and non-discriminatory results in maintenance matters.

16.18 Is custody and access to children awarded on the basis of the best interests of the child regardless of relationship of parents?

Article 16(d) of CEDAW specifically states that in all matters relating to children, the interests of the child shall be paramount, a concept that has become universally accepted since the adoption of the Convention on the Rights of the Child 1989. The Convention has been ratified by all 9 countries in this review (and by all Pacific Island countries). This is also supported by General Recommendation 21.

16.19 Does the legislation provide damages for adultery? If there is no provision for damages in the legislation then there is full compliance with this indicator.

The principle of damages for adultery is problematic for several reasons. First, it seeks to regulate and punish the sexual behaviour of consenting

adults. Second, it treats a married person and their faithfulness as the property of the other and places a price on a person's worth – an inimically offensive concept. Finally, even if it is available to both men and women it is more likely to be used by men since it is unlikely that women will have access to financial and legal resources to be able to pursue such a claim. As such it interferes with the sexual autonomy of a woman and is therefore not in accord with the principle of autonomy for women espoused by CEDAW.

16.20 Does the legislation recognise de facto rights (including same-sex couples) on the same basis as marriage?

In General Recommendation 21 the CEDAW Committee notes that many countries do not recognise de facto relationships. Invariably, when a heterosexual de facto relationship ends a woman receives a considerably smaller share of property than her male partner. Property laws and customs that do not recognise de facto relationships on the same basis as marriage should be revoked and discouraged to accord with General Recommendation 21. Further, General Recommendation 21(13) acknowledges that the form and concept of the family can vary and whatever form it takes, the treatment of women in the family at law and in private must accord with the principles of equality and justice for all as required by Article 2 of CEDAW. Women in de facto relationships (including same-sex relationships) according to the CEDAW Committee are therefore to be availed of the same rights and protections as married women.

16.21 Do women have an equal right to guardianship, wardship, trusteeship and adoption?

Article 16(f) of CEDAW specifically states that States Parties must ensure women and men have the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption. Historically, women have been discriminated against in the legal system when seeking guardianship, wardship, trusteeship and adoption. Fathers may on paper appear to a court to be better candidates for guardianship, wardship, trusteeship and adoption due to greater financial resources and income and status in the public sphere, but such treatment of guardianship issues constitutes discrimination against women and should be legislated against in order to provide adequate protection for women.

16.22 Does the legislation provide an order for establishing parentage?

Article 16(d) of CEDAW obligates States Parties to ensure the same rights and responsibilities to parents, irrespective of their marital status in matters relating to children. Both parents are therefore jointly responsible for the raising and maintenance of a child. However, in situations where a child's parentage is not established, a mother may be prevented from accessing child support or maintenance. The availability of procedures such as a court order to establish

parentage enables both parents to assume equal responsibility for a child in accord with Article 16.

16.23 Does the legislation provide for a contribution to pregnancy and childbirth costs by father to mother when unmarried?

Article 16(d) of CEDAW designates both parents as equally responsible for a child (although not a foetus which has no legal personality), irrespective of their marital status. The cost of medical attention and other costs associated with pregnancy and childbirth should therefore be equally assumed by both parents.

16.24 Does the legislation provide for the payment of child support for children born outside marriage?

Article 16(d) of CEDAW obligates States Parties to award the same rights and responsibilities to parents, irrespective of their marital status in matters relating to children. Further, General Recommendation 21(19) recognises that there are many instances where children born outside marriage do not enjoy the same status as those born to married parents. In particular, in situations where the mother is divorced or living apart, fathers fail to share the responsibility of care, protection and maintenance, a burden which has historically been borne by women. Child support or maintenance should therefore be provided to children born outside marriage until the age of majority.

16.25 *Does the legislation provide for equal rules of inheritance?*

In General Recommendation 21, the CEDAW Committee notes that serious discrimination against women occurs when the law and practice concerning inheritance does not treat females equally with men. Women often receive a smaller share of their husband or father's property at his death, than widowers or sons. In some instances women are granted only limited control over the deceased property from which they can derive an income. Sometimes inheritance legislation does not reflect the principles of equal ownership of property acquired during the marriage. Such laws discriminate against women and should be removed. Satisfaction of this indicator also meets the recommendation in the Beijing Platform for Action, para 274, that governments enact and strictly enforce legislation that guarantees equal right to succession and equal right to inherit regardless of the sex of the child.

16.26 *Is there legislation requiring the courts to apply cedaw and crc to domestic family law where relevant?*

Historically, the family is one of the areas dissecting women's lives where custom and sex role stereotyping can have a significant detrimental impact. Requiring the courts to apply the non-discriminatory principles of CEDAW and the *Convention on the Rights of the Child* 1989 (CRC) when interpreting the family law legislation enables judicial decision making to directly and positively impact upon women's lives. This approach also accords with the Bangalore Principles 1988 (formulated by a colloquia of judges from the Commonwealth) requiring domestic courts to interpret legislation in accord with international conventions. The inclusion of this indicator recognises that the obligations of States Parties in the implementation of international conventions extends past legislatures to the judiciary and includes the interpretation of legislation in line with ratified conventions.

Cook Islands



CEDAW Legislative Compliance Review

Legislative Compliance of the Cook Islands

Introduction

The assessment of the legislation of the Cook Islands is based on the indicators identified in Chapter Two and should be read in conjunction with the discussion on each indicator included in that part. Accession obliges the Cook Islands to work towards the modification of its constitution and legislation to accord with the provisions of CEDAW. However, it is recognised that legislative compliance will be achieved through a process of gradual and incremental change.

The Cook Islands has achieved full compliance with 30 of 113 indicators, partial compliance with 27 indicators and is non-compliant on the remaining 56 indicators. It should be noted, however, that the Cook Islands is in a time of legislative change and reform. Therefore, whilst the assessment of the Cook Islands compliance is based on the law in effect as at 30 November 2007, there are nevertheless several important areas relevant to CEDAW that are either the subject of draft legislation before the Parliament or under investigation, in particular the Labour Bill 2007. The next section provides a brief synopsis of the findings of the review on the Cook Islands' legislative compliance with CEDAW. It is divided into sections corresponding with each of the Articles of CEDAW. Following the synopsis is a series of tables each correlating with an article of CEDAW containing the relevant indicators, the level of compliance achieved by the Cook Islands (i.e. yes, no or partial compliance), the relevant legislation and finally where required, a brief commentary explaining how the legislation does or does not meet the indicator.

Synopsis of Findings

1. Article 1 of CEDAW (which defines discrimination) in conjunction with 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 grounds of sex, marital status, sexual orientation, HIV status and disability. The Constitution of the Cook Islands guarantees the rights and freedoms of citizens in most of the areas required by CEDAW. However, whilst the Constitution guarantees men and women the equal *protection* of the law, it does not guarantee them equal benefits or outcomes as required by CEDAW. The Constitution guarantees a range of fundamental rights and freedoms 'without discrimination on the grounds of sex' but it does not define discrimination to include direct and indirect discrimination, nor does it extend protection to the grounds of disability, sexual orientation, marital status and HIV status as required by CEDAW. Further, the Constitution does not expressly bind actions of either private actors or public authorities and institutions, (leaving the scope of the anti-discrimination provisions unclear), nor does it provide a mechanism for redress which leaves the provisions largely unenforceable.
2. Articles 2 and 3 of CEDAW together mandate the establishment by legislation of funded national bodies and machinery to monitor the implementation of law

and policy to foster the advancement of women. The Cook Islands has a Gender and Development Division in the Ministry of Internal Affairs and Social Services. Although the Ministry has some power to monitor implementation of non-discriminatory law and policy for the advancement of women it is not established by legislation nor is funding of the Division guaranteed by legislation. It is therefore more susceptible to removal in times of economic or political upheaval.

3. Article 2 of CEDAW condemns discrimination against women in all its forms and obligates States Parties to eliminate discrimination against women without delay. General Recommendation 19 (on violence against women) issued by the CEDAW Committee makes explicit that the definition of discrimination includes gender-based violence and recommends that ‘sanctions, penalties and compensation’ be introduced in relation to gender-based violence. Sexual assault is a form of gender-based violence as it is overwhelmingly perpetrated against girls and women. It must therefore be prevented and remedied, as far as possible, through legislative means. The Cook Islands *has* legislated against sexual assault. However, the current sexual assault laws provide inadequate protection for the range of sexual violations perpetrated against girls and women. All sexual offences except indecent assault require penile penetration (or an attempt to achieve penile penetration) which is inadequate because it excludes many of the ways in which women are sexually violated. The only offence available for sexual violations that does not involve

penile penetration is indecent assault, which imposes the lesser sentence of 7 years for offences against women and girls over 12, and 10 years for offences against girls under 12. The inclusion of different categories of offences for sexual intercourse and indecent assault perpetrated against girls aged under 12 and girls aged 12 to 15 and the imposition of different sentences appear unjustified because sexual assault causes devastating harm to women and girls of all ages. Finally, in non-compliance with CEDAW, the *Crimes Act 1969* provides immunity to husbands from prosecution for marital rape.

4. Incest is a gendered crime since it is primarily perpetrated against women and girls by men in the context of unequal power relations. Criminalising all parties (including the girl or woman who has been assaulted) to an incestuous sexual encounter is contrary to CEDAW and may dissuade a victim of an incestuous sexual assault from reporting it in fear of being charged with an offence. In the Cook Islands, in non-compliance with CEDAW, incest is an offence for a girl aged 16 years or above attracting a penalty of 10 years imprisonment.
5. Three common law rules have historically made it difficult for prosecutions against sexual assault offenders to succeed and are contrary to CEDAW. 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 she consented. The second common law rule corroboration (i.e. the

requirement that there be independent evidence such as a witness's evidence that connects the accused person with the crime) requires a judge to advise the jury that it is dangerous to convict the accused on uncorroborated evidence, and is non-compliant with CEDAW. The third common law rule, proof of resistance, requires victims to establish that they physically resisted the perpetrator otherwise consent may be inferred. This rule is discriminatory because physical resistance may be an unrealistic expectation of a victim against a strong or armed perpetrator, and it fails to take into account how fear and power imbalances may immobilise the victim, and is, therefore, non-complaint with CEDAW. Compliance with CEDAW requires that legislation prohibits the use of all three rules. The Cook Islands, in partial compliance with CEDAW, *has* legislated against the use of prior sexual conduct in many instances, however it continues to allow evidence of the victim's past sexual experience with the accused to be admitted. The Cook Islands has also legislated that corroboration is not necessary for the accused to be convicted in a sexual offence although the legislation does *not* prohibit a judge from giving a warning to the jury on the absence of corroboration (as is required for full compliance). The Cook Islands has also *not* legislated against the requirement for proof of resistance by the victim in non-compliance with CEDAW.

6. The Cook Islands *Crimes Act 1969* does not provide a defence in sexual assault prosecutions for the accused to claim that he did not know the girl was under the legal age in any offence. However, there

is an exception for persons (usually men) under 21 who have sexual intercourse or commit an act of indecency with a girl between 12 and 16. This is non-compliant with CEDAW because it places the onus on the minor to establish her age rather than the perpetrator to ascertain her age. Consent is not available as a defence for sexual assaults on girls under 12. It is however, available in relation to girls over 12 and under 16 if the person charged is younger than the girl and also if the person charged is under 21 and believed the girl to be of legal age. Full compliance with CEDAW requires that consent is unavailable for girls under 18, the age CEDAW stipulates as the age of adulthood, in all circumstances.

7. Minimum sentences and mandatory prosecutions ensure that sexual violence against women is treated seriously. The Cook Islands, however, does not have mandatory prosecution or minimum sentences for sexual assault offences. In addition, the legislation does not prohibit the customary practice of forgiveness from reducing sentences. In bail matters, to accord with CEDAW, there should be a presumption against bail in sexual assault cases and it should *not* be granted if there is any risk of re-offending. In the Cook Islands, bail is not granted as of right for imprisonable offences. Since all sexual offences in the Cook Islands are imprisonable offences and bail will be granted only after victims of sexual offences have advised the courts of their concerns, there is partial compliance with CEDAW. Full compliance with CEDAW would require, as discussed above, a clear presumption against bail in sexual assault cases when there is any risk of re-offending.

8. Finally, it should be noted that there have been two models of draft Sexual Offences Legislation proposed in the Pacific. The first, prepared in 1996 by the Fiji Women's Rights Movement,, which would bring the Cook Islands significantly in line with the sexual assault indicators developed for Article 2 of CEDAW, and more recently, the Pacific Islands Forum Secretariat has also proposed a regional sexual offences bill for Pacific island countries. However, to date no decision has been made in the Cook Islands to move forward with law reform in this area.
9. General Recommendation 19 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. The Cook Islands *Crimes Act 1969* does contain an offence for the assault by a male on a female. However, both this provision, which has a light penalty of only two years imprisonment, and the general assault provisions are insufficient to encompass the breadth of situations in which women experience violence in their domestic lives. Restraining orders and occupation orders are available however to persons married or in de facto relationships (but not same-sex) if necessary for the protection of the applicant or any child.
10. Infanticide refers to the killing of a child by its mother (in contrast to abortion which refers to the termination of a foetus). Full compliance with CEDAW requires that an offence of infanticide which has a reduced sentence in recognition of the societal pressures that lead women to kill their children, replaces a charge of murder or manslaughter. In compliance with CEDAW an offence of infanticide *is* contained in the Cook Islands' criminal legislation with a reduced sentence of three years imprisonment, replacing a charge of murder or manslaughter. The definition of infanticide, rather than restricting it to the effects of birthing and lactation, includes a disorder 'consequent on childbirth' which could include post natal depression stress syndrome in recognition of the social pressures of raising children.
11. Article 4 of CEDAW requires that temporary special measures provisions (affirmative action) be introduced into the national constitution and legislation. The Cook Islands has not incorporated special measures provisions into its constitution or any legislation for the advancement of women. The lack of special measures is detrimental for women because they are an equality measure with real potential to redress historical discrimination and achieve substantive equality for women.
12. Article 5 of CEDAW requires States Parties to abolish or modify customary practices that discriminate against women. Custom is given lawful status in the Cook Islands in a range of capacities. The *Cook Islands Act 1915* recognises custom in relation to land and the *Constitution of the Cook Islands 1965* enables Parliament to make laws recognising custom and designates custom as law but not if the custom is inconsistent with the Constitution. The Constitution also states that the opinion of traditional chiefs in relation to custom cannot be challenged in a court of law. Therefore, the constitutional and legislative status given to custom in the Cook Islands coupled with the

absence of a provision that guarantees the precedence of equality law over customary law leaves women with uncertain legal recourse against custom that discriminates against them on the basis of sex/gender.

13. Article 6 of CEDAW requires States Parties to suppress all forms of trafficking in women and exploitation of women in prostitution and 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. Criminalising sex work for consenting adult women is therefore not desirable. However, it is imperative that there are laws prohibiting the procuring of women for sex work without their consent and trafficking. Soliciting is a criminal offence in the Cook Islands (for both men and women) denying sex workers both the right to lawful employment and the right to the same protections and employment conditions as other workers (such as regulated standards of occupational safety, standard rates of pay, parental leave, sick leave). Although there is an offence for procuring girls and women which provides some protection against exploitation, the offence does not differentiate between consenting and non-consenting women and is therefore insufficient for full compliance with CEDAW. There is also no protection from the trafficking of women in the Cook Islands in non-compliance with CEDAW.
14. Article 7 of CEDAW obligates States Parties to take all appropriate measures to eliminate discrimination in women's

political and public lives. Universal suffrage and equal legal rights to political representation for women has been achieved in the Cook Islands. However, whilst women are well represented in the House of Ariki (which advises Parliament on matters of custom) the Cook Islands currently has only 3 female Members of Parliament out of a total of 25 seats in Parliament. Compliance with CEDAW therefore requires special measures such as quotas or other programmes to ensure higher numbers of women enter parliament and participate in the governance of their countries.

15. Article 8 of CEDAW 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 government in the Cook Islands, the low numbers of women who do so, necessitates the introduction of quotas or other special measures to raise participation and achieve full compliance with CEDAW.
16. Article 9 of CEDAW requires States Parties to eliminate discrimination in the areas of nationality, citizenship and domicile. The Cook Islands, which takes its citizenship laws from New Zealand, provides women with equal rights in all areas of citizenship and nationality and is in full compliance with CEDAW in this area. Women have equal rights with men when they marry or enter into a de facto relationship with a non-national, they can determine their children's citizenship and nationality on an equal basis with the fathers of their children and they have equal rights to acquire and obtain citizenship through birth, descent or grant.

17. Article 10 of CEDAW obligates States Parties to ensure women have equal rights and opportunities in education. The imposition of free compulsory education is one means of ensuring that the educational needs of boys are not favoured over girls. Compulsory education has been introduced in the Cook Islands for females and males aged from 5-15 evidencing greater compliance with CEDAW. Whilst young people are encouraged to remain at school from age 15 to 19, it is not compulsory. Further, in non-compliance with CEDAW, there is no anti-discrimination provision in the *Education Act 1999* to prevent the expulsion of pregnant students and no special measures provisions to enable the advancement of women in education.
18. Article 11 of CEDAW obligates States Parties to eliminate discrimination in employment. Women in the Cook Islands have many of the same rights in employment as men. However, women (but not men) are prevented from working more than 3 hours overtime on any day or more than 9 hours total hours of overtime per week. Women are also not permitted to work between 10pm and 7am. There is no protection from dismissal during pregnancy and maternity leave is not guaranteed in the private sector (even though women are not permitted to work in factories for six weeks after childbirth). In the public sector some employees receive six weeks paid maternity leave but this is not protected by legislation or regulations but left to the discretion of each department in non-compliance with CEDAW.
19. The CEDAW Committee in General Recommendations 12 and 19 has identified sexual harassment in the workplace as a form of discrimination against women. General Recommendation 19 defines sexual harassment as unwelcome sexually determined behaviour such as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. Such actions can be humiliating for the recipient and are discriminatory when they create a hostile work environment. There is currently no specific protection from sexual harassment in either the public or the private sector in the Cook Islands.
20. It should be noted that new industrial relations legislation, the Labour Bill 2007, is currently before Parliament, and if enacted will satisfy some of the indicators developed for Article 11 of CEDAW. In particular, the Bill contains comprehensive sexual harassment provisions, anti-discrimination provisions (although it does not contain any explicit reference to sex or any other intersections of discrimination such as sexual orientation, disability or HIV status), and 12 weeks (unpaid) maternity leave. It also contains a definition of an employee that is inclusive of domestic and casual workers. It does not, however, contain any targeted occupational health and safety protection for pregnant workers, facilities for women to nurse young children, child care facilities to be provided either by state or employer, or any equal opportunity provisions.
21. Article 12 of CEDAW requires States Parties to ensure that women have access to health care services including those related to family planning. Abortion is criminalised in the Cook

Islands with a penalty of 3 years imprisonment. Although abortion can be lawfully carried out to save a mother's life, women do not have access to safe abortion facilities as of right. The failure to decriminalise abortion and to provide safe accessible facilities for women who require abortions endangers their health and that of any child born subsequent to a failed abortion as research shows that when a mother dies (including as a result of unsafe abortion) the chance of survival of all surviving children under 5 is significantly reduced.

22. Article 13(b) of CEDAW provides that women should be afforded equal rights to bank loans, mortgages and other forms of financial credit free from discrimination. Although there is no legislative barrier to women in the Cook Islands from accessing such services, discrimination continues to hinder women from obtaining credit and loans to purchase property or businesses, thus 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 the Cook Islands preventing women from doing so.
23. Article 14 of CEDAW obligates States Parties to put in place measures to ensure the equality of rural women. Rural women often play a significant role in the economic survival of their families and communities although they are frequently disadvantaged in areas such as land ownership, health, education and housing to name a few. The achievement of substantive equality for rural women and compliance with CEDAW requires temporary special measures provisions to be incorporated into both the Constitution and legislation. Although there is legislation specifically aimed at the rural communities of the outer islands it does not contain any specific provisions for the advancement of women.
24. Article 15 of CEDAW requires States Parties to guarantee women equality before the law and equal rights to participate in all aspects of civil life. The Cook Islands expressly guarantees women equality before the law and there are no legal barriers to women's participation in court and tribunal processes, nor are women denied the right to conclude contracts and administer property.
25. Article 16 of CEDAW obligates States Parties to remove discrimination in family and personal laws including marriage, separation, divorce, maintenance, child custody, property division, paternity and inheritance.
26. The CEDAW Committee in General Recommendation 21 has nominated 18 as the minimum age of marriage for both males and females. The Cook Islands does mandate an equal marriageable age for males and females, although, it is at the lower age of 16 rather than 18 and is therefore not fully compliant with CEDAW. However, in full compliance with CEDAW, the *Marriage Act 1973* requires the registration of all marriages, the consent of both parents in the marriage of minors and the *Crimes Act 1969* prohibits bigamy.
27. Fault based divorce, which requires proof of a matrimonial offence such as desertion or habitual rape, places 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. Women also face discrimination in proving fault, particularly cruelty and adultery if they choose not to be witnesses or they do not wish to attend court proceedings. Divorce in the Cook Islands is based on fault based criteria (including adultery, desertion and cruelty) in non-compliance with CEDAW. Whilst a 1994 amendment permits separation on the basis of a state of disharmony there is no provision for a no-fault divorce.

28. The CEDAW Committee in General Recommendation 19(23) (which deals with violence against women) states that a lack of economic independence or an inability to obtain custody of their children upon separation forces many women to remain in violent or difficult relationships. The Cook Islands *does* provide for maintenance orders during separation and after divorce for both children and spouses. However, the basis on which maintenance is provided is left largely to the discretion of the court with the broad criteria of what the court thinks 'fit' and 'reasonable'. The standards recommended by CEDAW include: the needs and 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. These are therefore, unlikely to be prioritised based on the current criteria provided for in the Cook Islands. However, the legislation does provide for occupation orders both before and after separation enabling married (but not de-facto) women, rather than their

husbands, to remain in the marital home in situations of domestic violence.

29. In General Recommendation 21, which deals with equality in family relations, the 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. The *Matrimonial Property Act 1976* contains provisions for the division of marital property which takes account of both financial and non-financial contributions in full compliance with CEDAW.

30. 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. The Cook Islands has *not* adopted the recommended standard of the best interests of the child as the paramount consideration in custody disputes after separation and divorce, instead the Court determines custody of the basis of what it thinks 'fit'.

31. In General Recommendation 21, the Committee states that the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence. Women in the Cook Islands do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property. Although custom in relation to land, which is given both constitutional and legislative status, does not discriminate against women in relation to ownership men still control and administer many aspects of the use of land.

32. Article 16 requires that inheritance laws should apply equally to males and females. Women have equal rights to make wills although not in relation to native land which is determined on the basis of custom. Although custom in relation to land in the Cook Islands treats men and women equally, the failure to embody this equality in legislation makes it susceptible to change. Further, women may be discriminated against by intestacy inheritance laws which are based either on custom (if concerning native persons), or if custom does not apply, on legislation which leaves two thirds of assets to the children and one third to the surviving spouse who may be left without adequate means of support. Neither custom nor legislation, therefore, provides an adequate and CEDAW compliant framework for inheritance.
33. A series of tables detailing the Cook Islands' compliance with CEDAW is provided in the following pages. Each table relates to an article of CEDAW and contains the applicable indicator(s), the level of compliance achieved, the relevant legislation and finally where required, a brief commentary explaining how the Cook Islands' legislation does or does not meet the compliance indicator.

Detailed Analysis of Indicators

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
|---|------------|---|---|
| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| 1.1 Does the Constitution guarantee fundamental rights and freedoms to men and women equally including political, economic, social, cultural, and civil or any other field? | Partial | <p><i>Constitution of the Cook Islands 1965,</i></p> <ul style="list-style-type: none"> • Article 64(1)(a)-(d). Fundamental rights and freedoms guaranteed without discrimination on the grounds of sex include right to life, liberty, and security of the person, (deprived only in accordance with law), freedom of thought, conscience, and religion, speech and expression, peaceful assembly and association, the right of the individual to equality before the law and to the protection of the law, the right of the individual to own property (deprived only in accordance with law). <u>However</u>, Parliament has the power to prohibit or restrict by Act the alienation of Native land (as defined in section 2(1) of the Cook Islands Act 1915) and under s (2) all rights are subject to the rights and freedoms of others, the interests of public safety, order, or morals and the general welfare, or the security of the Cook Islands. • Article 65(1)(a). Every enactment shall be so construed and applied as not to abrogate, abridge, or infringe any of the rights or freedoms recognised in Article 64, in particular, arbitrary detention, imprisonment, | <p>The rights protected include many of those required by CEDAW and these are afforded equally to men and women. There is therefore partial compliance with this indicator but areas of non-compliance include:</p> <ul style="list-style-type: none"> • Substantive equality is not a guaranteed right • The right to the highest attainable standard of physical and mental health is not a guaranteed right. • All rights are subject to the public safety, order, morals, the general welfare and the security of the Cook Islands which creates scope for the denial of rights. In particular, the potential to restrict women’s rights on the grounds of morality could be used to discriminate against women. To fully comply with CEDAW, these restrictions should be removed. |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
|---|------------|---|---|
| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>or exile of any person, cruel and unusual treatment or punishment; the right to be informed reason for arrest or detention, to retain and instruct a barrister or solicitor without delay, to apply for habeas corpus, right to a fair hearing, presumption of innocence, reasonable bail, wrongful conviction, imposition of penalty heavier than that under the law in force at the time of commission of any offence.</p> | |
| 1.2 Is there a constitutional guarantee of substantive equality between men and women? | Partial | <i>Constitution of the Cook Islands 1965, Article 64(1) (b).</i> Guarantee of the right of the individual to the equal protection of the law. | A guarantee of the equal <i>protection</i> of the law requires the law does not discriminate in its application. This is, however, a formal equality measure that does not guarantee equal benefits and outcomes (or substantive equality) to men and women as required by CEDAW. |
| 1.3 Does the Constitution contain an anti-discrimination clause on the ground of sex/gender? | Partial | <i>Constitution of the Cook Islands 1965, Article 64(1) (a).</i> All persons are entitled to fundamental rights and freedoms of the individual without discrimination on the ground of sex. | This provision represents only partial compliance with CEDAW because: <ul style="list-style-type: none"> • There is no definition of discrimination. • It applies only to the fundamental rights and freedoms protected in the Constitution which do not encompass all areas of women's lives which are required by CEDAW to be free from discrimination. |
| 1.4 Does the Constitution contain an anti-discrimination clause on the ground of marital status? | No | | |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
|---|------------|---|--|
| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| 1.5 Does the Constitution contain an anti-discrimination clause on the ground of sexual orientation? | No | | |
| 1.6 Does the Constitution contain an anti-discrimination clause on the ground of HIV status? | No | | |
| 1.7 Does the Constitution contain an anti-discrimination clause on the ground of disability? | No | | |
| 1.8 Does the breadth of the anti-discrimination clause encompass direct and indirect discrimination? | No | | |
| 1.9 Does the anti-discrimination clause bind public authorities and institutions? | Partial | <i>Constitution of the Cook Islands 1965, Article 65(1).</i> Every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised. | The anti-discrimination clause applies to enactments only and not expressly to actions by public authorities, institutions or their representatives. |
| 1.10 Does the anti-discrimination clause bind any person, organisation or enterprise? | No | | The Constitution does not identify who is bound by the statement of fundamental rights and freedoms. Compliance requires a clear statement that any person, organisation or enterprise is bound by the anti-discrimination provisions. |
| 1.11 Are sanctions imposed for the breach of anti-discrimination provisions? | No | | Enactments must be interpreted to accord with the fundamental rights and freedoms protected in the Constitution but there are no sanctions imposed for discriminating on the ground of sex in the delivery of fundamental rights and freedoms or in any other context. |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| 1.12 Are there specific domestic violence offences in the criminal law legislation? | No | <p><i>Crimes Act 1969</i>,</p> <ul style="list-style-type: none"> • s 214(a). Assault on any child under 14 or (b) being a male, assault on any female - 2 years imprisonment. • s 208. Wounding with intent - 14 years imprisonment, with reckless disregard - 7 years imprisonment. • s 209(1)(2). Injuring with intent to cause grievous bodily harm - 10 years imprisonment; with reckless disregard - 5 years imprisonment. • s 210. Injuring in such circumstances that if death had been caused he would have been guilty of manslaughter -3 years imprisonment. • s 21(1)(2). Aggravated wounding or injury during commission of crime or avoiding arrest (with intent) - 14 years imprisonment; (without intent) - 7 years imprisonment. • s 212(1)(2). Aggravated assault during commission of crime or avoiding arrest - 3 years imprisonment. • s 213. Assault with intent to injure - 3 years imprisonment. • s 215. Every one having the custody, control, or charge of any child under 16, wilfully ill-treats or neglects the child, or wilfully causes or permits the child to be ill-treated, in a manner likely to cause unnecessary suffering, actual bodily harm, injury to health, or mental disorder | <p>The <i>Crimes Act 1969</i> does contain a specific offence for the assault of a male upon a female. However, this provision and the other general assault provisions in the <i>Crimes Act</i> do not embrace the variety of situations that constitute domestic violence and the penalties are too low to represent a serious deterrent. The provisions therefore do not represent compliance with this indicator.</p> |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | or disability - 5 years imprisonment. • s 216. Common assault - 1 year imprisonment. | |
| 1.13 Is stalking a criminal offence? | No | Crimes Act 1969, s 158(1)(2). Every one commits criminal nuisance who does any unlawful act which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual - 1 year imprisonment. | Although this could be used in some circumstances of stalking it is insufficient to incorporate the variety of stalking behaviours experienced by women. The penalty is also too low for effective deterrence. |
| 1.14 Is a restraining order available in situations of domestic and sexual violence regardless of marital status? | Partial | Cook Islands Amendment Act 1994, • s 523I(1). Where the Court makes an occupancy order (available to persons living with their spouse (523G) or living apart from their spouse (523H)) it can also make a non-molestation order if satisfied the order is necessary for the protection of the applicant or any child in the custody of the applicant. • s 523I(2). The person against whom it was made (a) shall not enter or remain on any land or in any building which is in the occupation of the applicant or any child in the custody of the applicant (b)(c) shall not watch, beset, follow or make persistent telephone calls to the applicant's (or any child in applicant's custody) dwelling, house or place of business, employment, or residence. • s 523J(1). Extends to any man or woman not | Restraining orders are available when an occupancy order has been granted and they are available to persons who are married and separated, persons married and still living together and persons in de-facto relationships. However, they do not extend to same-sex relationships and the penalty for breaching an order is insufficient for full compliance. |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | married to the other, but who is or has been living with the other in a relationship in the nature of marriage. <ul style="list-style-type: none"> • s 523O - \$200 or to 3 months imprisonment. | |
| 1.15 Is there mandatory prosecution for domestic violence offences? | No | | Mandatory prosecution ensures that domestic violence is treated seriously. |
| 1.16 Does the criminal law legislation contain a broad range of sexual assault offences graded on the basis of seriousness to the victim? | Partial | Crimes Act 1969, <ul style="list-style-type: none"> • s 141(1). Rape - 14 years imprisonment. • s 142. Attempt to commit rape - 10 years imprisonment. • s 144(1)(a)(b). Have or attempt to have sexual intercourse with any girl under 21 living with him as a member of his family and under his care and protection, not being his wife - 7 years imprisonment. • s 145(1)(2). Sexual intercourse with girl under 12 years - 14 years imprisonment; attempt - 10 years imprisonment. • s 146(1)(a). Indecently assaults girl under 12 or (b) being a male, any indecent act with or upon any girl under 12; or (c) being a male, induces or permits any girl under 12 to do any indecent act with or upon him - 10 years imprisonment. • s 147(1). Has or attempts to have sexual intercourse with any girl of or over 12 years and under 16 years not being his wife - 7 years imprisonment. (2) Indecent assault with girl over 12 and under 16 | The sexual assault provisions do contain a range of offences with serious penalties. However, there are a number of aspects that are discriminatory: <ul style="list-style-type: none"> • Sexual offences against girls under 12 are more seriously regarded than offences against girls between 12 and 16. This implies that a sexual assault is not as serious if the girl is older which is discriminatory and non-compliant as CEDAW regards all sexual offences against girls as equally serious. • In relation to a sexual offence against a girl between the ages of 12 and 16 the action must be commenced within 12 months. This is contrary to evidence that suggests that girls and women often do not report offences because of fear or shame and is in non-compliance with CEDAW. • The categories of offences do not adequately cover the range of sexual violations experienced by women. • The offence of sodomy may protect girls and |

**ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN
ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION**

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| | | - 7 years imprisonment. But s 7: prosecution must be commenced within 12 months from the time when the offence was committed. <ul style="list-style-type: none"> • s 148. Indecent assault on woman or girl over 16 - 7 years imprisonment. • s 155 (1)(a). Where the act of sodomy is committed on a female - 14 years imprisonment. (2) This offence is complete upon penetration. (4). It is no defence to a charge under this section that the other party consented. | women from non-consensual sexual assault in some circumstances. However, it applies only to penile penetration and does not include sodomy by other objects. Further, the offence may also in some circumstances take away the autonomy of consenting women to choose the type of sexual relations and acts they engage in. The removal of this offence and the extension of rape to include penetration of all orifices by any object would achieve compliance with the indicator. <ul style="list-style-type: none"> • The requirement that the offences of sexual intercourse or indecent assault against girls over 12 and under 16 must be prosecuted within 12 months of the offence is discriminatory and non-compliant with CEDAW. It is discriminatory because it ignores the secrecy that often surrounds sexual assault that may lead to lengthy delays before an offence is reported. |
| 1.17 Does the definition of rape and/or sexual assault offences include penetration of non-penile objects to anus, vagina and mouth? | No | <i>Crimes Act 1969, s 140.</i> Sexual intercourse is complete upon penetration. | Penetration is confined to penile penetration and does not include the range of ways that women can be sexually violated. |
| 1.18 Is there an offence of incest for girls and women? If there is an offence of incest for girls and women then there is no compliance with this indicator. | No | <i>Crimes Act 1969, s 143(2).</i> Every one of or over the age of sixteen years who commits incest - 10 years imprisonment. | There is an offence of incest in the <i>Crimes Act</i> which means that women and girls over 16 can be charged with incest, even if they are the victim. There is therefore no compliance with this indicator. This offence is discriminatory because: |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | | <ul style="list-style-type: none"> No girl under 18 should be charged with any sexual offence as she is unable to consent. An offence of incest against women and girls fails to recognise the power imbalance between girls and women and male relatives. Incest is typically perpetrated by men against girls and women in non-consensual and coercive circumstances. |
| 1.19 Have the terms indecency, carnal knowledge, defilement and insulting modesty been removed from the criminal law legislation? | Yes | | These terms, which impart an understanding of women and girls as 'damaged' by the offences rather than reflecting the invasion of personal integrity that sexual assault involves, are not present in the criminal law legislation and therefore there is full compliance with the indicator. |
| 1.20 Is consent specifically defined in the criminal law legislation outlining coercive circumstances? | Partial | <i>Crimes Act 1969, s 141(1)</i> . Rape is the act of a male person having sexual intercourse with a woman or girl (a) Without her consent or (b) With consent extorted by fear of bodily harm or by threats or (c) With consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of or grievous bodily injury to a third person; or (d) With consent obtained by personating [sic] her husband or (e) With consent obtained by false and fraudulent representation as to the nature and quality of the act. | Consent is defined to include fear of bodily harm for oneself or grievous bodily harm or death to a third party. Whilst this extends lack of consent to some situations where consent is obtained through coercive means, it does not effectively incorporate all coercive situations. For example, fear of public humiliation is not covered. The list of circumstances should be non-exhaustive to enable the court to consider the facts of the particular case. |
| 1.21 Is there a legislative prohibition on the use of prior sexual conduct to establish consent? | Partial | <i>Evidence Act 1968,</i> <ul style="list-style-type: none"> s 20A(2). In any rape proceeding no evidence shall be given, and no question shall be put to a witness, relating to (a) | The use of prior sexual history to establish consent is discriminatory as it perpetuates a view that a previous relationship, a history of promiscuity or previous |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>The sexual experience of the complainant with any person other than the accused or (b) The reputation of the complainant in sexual matters, except by leave of the Judge.</p> <ul style="list-style-type: none"> • s 20A(3)(a)(b). The judge can grant leave only if the evidence is of direct relevance to facts in issue in the proceeding or the appropriate sentence and to exclude it would be contrary to the interests of justice. | <p>sexual relations with the accused makes it 'more likely' that a woman consented to the act in question. The <i>Evidence Act 1968</i> excludes the use of prior sexual conduct in many instances, in partial compliance with CEDAW, but it does not fully comply with the indicator because:</p> <ul style="list-style-type: none"> • It does not exclude sexual experience of the complainant with the accused. • The judge has a discretion to grant leave to allow prior sexual conduct and although this can be exercised only if the evidence has direct relevance to facts in issue it could lead to the admission of evidence of prior consent with the accused or a history of promiscuity. |
| 1.22 Is there a legislative prohibition on a requirement for corroboration? | Partial | <i>Evidence Act 1968, s 20B(1).</i> Where any person is tried for 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. | Corroboration is difficult for sexual assault victims to establish as there are rarely witnesses. Corroboration is not required for other offences and it is discriminatory to view sexual assault victims as unreliable witnesses. The <i>Evidence Act 1968</i> does not require corroboration for a conviction and the judge is not required to warn the jury as to the absence of corroboration. However, full compliance with the indicator requires that the judge is <i>prohibited</i> from doing so. |
| 1.23 Is there a legislative prohibition on the requirement for proof of resistance? | No | | Sexual assault victims may not be able to physically resist an armed or threatening perpetrator and a requirement that they do so is discriminatory. |

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN
ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 1.24 Is there a defence of honest and reasonable belief that victim is of legal age? If there is no defence of honest and reasonable belief then there is full compliance with this indicator. | Partial | <p><i>Crimes Act 1969,</i></p> <ul style="list-style-type: none"> • s 145. Sexual intercourse with girl under 12. (3) It is no defence that the person charged believed that she was of or over 12 years. • s 146. Indecency with girl under 12. (2) It is no defence that the person charged believed that she was of or over the age of 12 years. • s 147. Sexual intercourse or indecency with a girl between 12 and 16. (4) It is a defence to a charge under this section if the person charged proves that the girl consented, that he was under the age of 21 years at the time of the commission of the act, and that he had reasonable cause to believe, and did believe, that the girl was of or over the age of 16 years. (5) Except as provided in these sections; it is no defence that the person charged believed that the girl was of or over the age of 16 years. | To be compliant with this indicator, there should be no defence available to the perpetrator of 'honest and reasonable belief that the victim is of legal age'. The defence is not available in most circumstances however it is available in relation to persons under 21 in relation to girls between 12 and 16. Although aimed at protecting young people who engage in consensual sexual relations the provision places the onus on girls to reveal their age rather than on men and boys to ascertain legal age before engaging in sexual relations. |
| 1.25 Is a defence of consent unavailable in relation to a victim under 18? | Partial | <p><i>Crimes Act 1969,</i></p> <ul style="list-style-type: none"> • s 145. Sexual intercourse with girl under 12. (3) No defence that the girl consented. • s 146. Indecency with girl under 12. (2) No defence the girl consented. • s 147. Sexual intercourse or indecency with girl between 12 and 16. (3) It is a defence to a charge under this section if the person charged proves that the girl consented and that he is younger than the girl. (4) It is a | Full compliance with the indicator requires that consent is not a defence in relation to any girl under 18. Whilst it is not a defence in relation to sexual offences against girls under 12, it is a defence in relation to girls over 12 if the person is younger than the girl or if the person is under 21 and believes the girl to be over 16. Full compliance with the indicator requires that consent is not available as a defence in relation to girls under 18 |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>defence to a charge under this section if the person charged proves that the girl consented, that he was under 21 years, and that he had reasonable cause to believe, and did believe, that the girl was of or over the age of 16 years. (5) Except as provided in this section; it is no defence that the girl consented.</p> | |
| <p>1.26 Is there an exemption from prosecution for marital rape? If there is no exemption for husbands for rape then there is full compliance with this indicator.</p> | No | <p><i>Crimes Act 1969 s 141(3)</i>. No man shall be convicted of rape in respect of his intercourse with his wife, unless at the time of the intercourse (a) There was in force a decree nisi of divorce or nullity, and the parties had not resumed cohabitation as man and wife with the free consent of the wife; or (b) There was in force a decree or judicial separation or a separation order.</p> | <p>To be compliant with this indicator, men should not be exempted from being prosecuted for marital rape. If the criminal law legislation contains a law which protects men from being charged with marital rape, there is no compliance with this indicator. In the Cook Islands, the <i>Crimes Act 1969</i> does exempt husbands from prosecution for marital rape in non-compliance with this indicator and with CEDAW.</p> |
| <p>1.27 Is there mandatory prosecution for sexual offences?</p> | No | | |
| <p>1.28 Is bail unavailable for sexual offences if there is risk to victim?</p> | Partial | <p><i>Criminal Procedure Act 1980-1981</i>,</p> <ul style="list-style-type: none"> • s 83(1). Everyone is bailable as of right who is charged with any offence that is not punishable by death or imprisonment. • s 8(5). Everyone who is charged with any offence and is not bailable as of right is bailable at the discretion of the Court. <p><i>Victims of Offences Act 1999 s 10</i>. On an application for bail in respect of a charge of rape or other sexual offence, or other serious assault or injury, the</p> | <p>All sexual offences are punishable by imprisonment and bail is not therefore available as of right to perpetrators. Bail can be granted, however, at the discretion of the court. The <i>Victims of Offences Act 1999</i>, in partial compliance with the indicator, provides an opportunity for victims to convey their fears to guide the court in determining whether to release the offender on bail.</p> |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | prosecutor should convey to the Judge or Justice, any fears held by the victim about the release on bail of the alleged offender. | |
| 1.29 Are there minimum sentences for sexual offences? | No | <p><i>Crimes Act 1969</i>,</p> <ul style="list-style-type: none"> • None of the sexual offences contained in the Crimes Act have minimum sentences specified and instead have a clause 'not exceeding' the specified maximum penalty. • s 108(1). Except where otherwise expressly provided, every one liable to imprisonment for any term for any offence may be sentenced to imprisonment for any shorter term. | The failure to have minimum sentences for sexual offences enables courts to issue sentences at their discretion that do not reflect the severity of sexual offences. |
| 1.30 Is there a provision in the criminal law legislation which states that customary practices of forgiveness shall not affect criminal prosecution or sentencing? | No | | |
| 1.31 Is there legislative provision of compensation for victims of sexual and domestic violence? | No | | |
| 1.32 Does the criminal law legislation allow for infanticide to replace a charge of murder or manslaughter? | Yes | <p><i>Crimes Act 1969</i>,</p> <ul style="list-style-type: none"> • s 198(1). Where a woman causes the death of her child under 10 in a manner that amounts to culpable homicide when the balance of her mind was disturbed, through not having | Compliance with this indicator requires that infanticide should be a replacement offence for <i>both</i> murder and manslaughter with a much lighter sentence to recognise the societal pressures that might lead a mother to kill her child. The legislation <i>does</i> |

| ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>fully recovered from childbirth, or because of the effects of lactation, or any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder or manslaughter - 3 years imprisonment.</p> <ul style="list-style-type: none"> • s 198(3). If court holds she was insane - acquittal but (4)(a). Examination by two medical officers (b) If each of the medical officers certifies that the woman is no longer insane and that she is not in need of care and treatment in any institution, the Judge shall order that the woman be discharged (c) If not order for medical custody. | <p>contain a separate charge of infanticide with a 3 year sentence in compliance with this indicator.</p> |
| 1.33 Does the definition of infanticide include environmental and social stresses? | Partial | See above at 1.32 | <p>Research suggests that women who kill their children do so in part because of the environmental and social stresses of raising children. Basing infanticide solely on the perceived hormonal and biological weaknesses that women suffer during childbirth and lactation does not therefore represent full compliance with this indicator. The legislation <i>does</i> include a disorder 'consequent on childbirth' which could include post traumatic stress syndrome. A clear inclusion of the environmental stresses associated with childrearing and raising would represent full compliance with this indicator.</p> |

ARTICLE 3 GUARANTEE OF BASIC HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 3.1 Is there legislation establishing national human rights machinery charged with promoting and protecting human rights including women rights? | No | | |
| 3.2 Is there legislation establishing a funded body to monitor the implementation of non-discriminatory law and policy for the advancement of women? | No | | The Cook Islands has a Gender and Development Division in the Ministry of Internal Affairs and Social Services. Although the Ministry has some power to monitor implementation of non-discriminatory law and policy for the advancement of women it is not established by legislation. It is therefore more easily subject to removal in times of economic or political upheaval and there is therefore no compliance with this indicator. |

ARTICLE 4: ACCELERATION OF EQUALITY BETWEEN MEN AND WOMEN

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 4.1 Does the Constitution contain a temporary special measures provision? | No | | Substantive equality in many areas cannot be achieved by merely guaranteeing women treatment that is identical to that of men. Special measures are a key means of addressing and overcoming historical discrimination and under-representation of women and achieving a redistribution of resources and power between men and women. Special measures can include quotas, programmes and policies. |
| 4.2 Are special measures exempt from discrimination on the grounds of sex, marital status, sexual orientation, disability and HIV status? | No | | |

ARTICLE 5: SEX ROLES AND STEREOTYPES

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 5.1 Is there a provision in the Constitution which gives precedence to equality between women and men if there is a conflict between custom and equality law? | No | <p><i>Constitution Amendment (No 17) Act, 1994-95, s 7</i> adds the following section to the Constitution:</p> <ul style="list-style-type: none"> • s 66A(1). Parliament may make laws recognising or giving effect to custom and usage. • (2). In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages and values of the indigenous people of the Cook Islands. • (3). Custom and usage is part of the law of the Cook Islands, but not if inconsistent with a provision of this Constitution or of any enactment. • (4). For the purposes of this Constitution, the opinion or decision of the Aronga Mana of the island or vaka as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom shall be final and conclusive and shall not be questioned in any court of law. <p><i>Cook Islands Act 1915,</i></p> <ul style="list-style-type: none"> • s 422. Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Natives of the Cook Islands. • 426(1). When by Native custom any land belongs to an Ariki or other Native chief by virtue of his office the Land Court in making a freehold order may declare the | <p>The <i>Cook Islands Act</i> protects custom in relation to land and the Constitution enables Parliament to make laws recognising custom. The Constitution also recognises custom as law although not if it is inconsistent with the Constitution. The Constitution also states that the opinion of traditional chiefs in relation to custom cannot be challenged in a court of law. The combination of these provisions (e.g. giving constitutional and legal status to custom) and the failure of any provision guaranteeing precedence to equality law as well as the absence of strong anti-discrimination and equality provisions leave women with uncertain recourse against discriminatory custom. There is therefore no compliance with this indicator.</p> |

ARTICLE 5: SEX ROLES AND STEREOTYPES

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| | | land shall vest in fee simple in such Ariki or Native chief and his successors in office in the same manner as if they were a corporation sole (2) Tenure of office as an Ariki or Native chief in any island shall be determined by any enactment in force in that island or if no enactment, then by Native custom. | |

ARTICLE 6: EXPLOITATION OF WOMEN

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 6.1 Is the act of soliciting decriminalised? | No | <i>Crimes Act 1969, s 163.</i> Any common prostitute who loiters and importunes passengers or other persons in any public place for the purpose of prostitution commits an offence – one month imprisonment or fine not exceeding \$20. | Criminalising the act of soliciting punishes sex workers for their occupation thus denying them the right to choose their employment and results in non-compliance with this indicator and with CEDAW. |
| 6.2 Is aiding and abetting consensual acts of soliciting decriminalised? | No | <i>Crimes Act 1969,</i> <ul style="list-style-type: none"> • s 160(1)(a)-(c). Manages, acts or assists in the management of, any brothel, leases, occupies or, knowingly permits the premises or any part to be used as a brothel; or, lets the premises with the knowledge they are to be used as a brothel - 5 years imprisonment. • s 161. Living on earnings of prostitution - 5 years imprisonment. • s 162. Procuring for gain or reward, any woman or girl to have sexual intercourse with any male who is not her husband - 5 years imprisonment. | The legislation criminalises living off sex work or operating brothels. Although applicable to both males and females, criminalising those who aid and abet sex work does not assist women who work in this field to carry out their work in a non-exploitative and protected environment. |

ARTICLE 6: EXPLOITATION OF WOMEN

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 6.3 Is it a criminal offence to procure any non-consenting woman or any girl under 18? | Partial | <i>Crimes Act 1969, s 162.</i> Procuring for gain or reward, any woman or girl to have sexual intercourse with any male who is not her husband - 5 years imprisonment. | This provision provides limited protection to girls under 18 but because it is targeted at preventing sex work rather than protecting girls from exploitation in prostitution. It also restricts the autonomy of consenting adult women to engage in sex work. |
| 6.4 Does employment legislation including occupational health and safety legislation protect sex workers? | No | | Sex workers should be entitled to all the rights and protections of other workers. |
| 6.5 Is the trafficking of women prohibited? | No | | |
| 6.6 Is sex tourism prohibited? | No | | |

ARTICLE 7: POLITICAL AND PUBLIC LIFE

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 7.1 Is there an equal right to vote? | Yes | <i>Constitution of the Cook Islands 1965, s 27(2).</i> Parliament shall consist of 25 members, to be elected by secret ballot under a system of universal suffrage. | |
| 7.2 Is there equal eligibility for political representation? | Yes | <i>Constitution of the Cook Islands 1965,</i> <ul style="list-style-type: none"> • s 28B(2)(a). Every person enrolled as an elector of any constituency shall be capable of being elected as a member for that constituency or for any other constituency; • s 8(1)(3). There shall be a House of Arikis of the Cook Islands appointed by the Queen's Representative. • s 9(a). The House of Arikis shall consider | Women have equal eligibility to represent the Cook Islands in Parliament and in the House of Ariki. Note that in the House of Ariki there are currently 6 females out of 15 members and the President is a female. |

| ARTICLE 7: POLITICAL AND PUBLIC LIFE | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>such matters relative to the welfare of the people of the Cook Islands as may be submitted to it by Parliament for its consideration, and it express its opinion and make recommendations thereon to Parliament; and (b) It shall have such other functions as may be prescribed by law.</p> <p>House of Arikis Act 1966, s 6. No person shall be appointed as a member of the House (a) unless an Ariki of 18 years or over, and (b) if he has at any time been absent from the Cook Islands for three years or more unless resided in the Cook Islands not less than three calendar months immediately prior to his appointment as a member of the House; and (c) unless his usual place of abode is in the Cook Islands.</p> | |
| 7.3 | Is there legislative provision for minimum quotas of women in parliament? | No | <p>Despite equal eligibility to enter parliament currently only 3 women out of 25 hold seats in Parliament and 1 woman holds a cabinet post, and a woman is the deputy speaker of the legislative assembly. Quotas, which have raised numbers of women in parliament in other countries, may assist in achieving substantive equality in this area as required by CEDAW.</p> |
| 7.4 | Is there an equal right to participate in NGOs? | Yes | <p>There is no legal barrier to participation.</p> |
| 7.5 | Is there legislation (other than Charitable Societies legislation) enabling the registration and mobilisation of NGOs to promote the advancement of women, without political interference? | Yes | <p>Incorporated Societies Act 1994 s (1). Any society consisting of not less than fifteen persons associated for any lawful purpose but not for pecuniary gain may, on application being made to the Registrar in accordance with this Act, become incorporated as a society under this Act.</p> |

LEGISLATIVE COMPLIANCE OF THE COOK ISLANDS

ARTICLE 8: INTERNATIONAL REPRESENTATION AND PARTICIPATION

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 8.1 Do women have an equal opportunity to represent government at the international level and to participate in work of international organisations | Partial | | There are no legal barriers preventing women from representing government at the international level and participating in the work of international organisations. However, few women represent government at the international level and the introduction of a quota system or other special measures would ensure full compliance with this indicator. |

ARTICLE 9: NATIONALITY AND CITIZENSHIP

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 9.1 Do women have an equal right to acquire, change or retain their nationality? | Yes | <i>Citizenship Act 1977 (NZ)</i> applies to the Cook Islands as per s 29(1). Citizenship can be obtained by birth (s 6), descent (s 7) and by grant (s 8). All means of acquiring citizenship are equally available to men and women. | |
| 9.2 Does marriage to a non-national or change of husband's nationality affect wife's nationality? If there is no change to a wife's nationality after marriage there is full compliance with this indicator. | Yes | | To be compliant with this indicator, the marriage of a woman to a non-national should not affect her nationality. The legislation does <i>not</i> alter the nationality of female citizen upon marriage to a non citizen and therefore there is full compliance with this indicator and with CEDAW. |
| 9.3 Do non-national spouses have equal rights to residency, citizenship and employment? | Yes | <i>Citizenship Act 1977 (NZ); Immigration Act 1987 (NZ)</i> . Non-national spouses and de-facto partners (including same-sex) of Cook Islands citizens have equal rights to apply for residency and citizenship. Residency and citizenship both give rise to entitlement to employment. | |

ARTICLE 9: NATIONALITY AND CITIZENSHIP

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 9.4 Do both spouses have an equal right to determine the nationality of children? | Yes | | |
| 9.5 Do women have an equal right to obtain a passport? | Yes | <i>Passports Act 1992 (NZ), s 3.</i> Every citizen has an equal right to a passport. | |

ARTICLE 10: EDUCATION

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 10.1 Does the legislation guarantee women and girls equal access to education? | No | <i>Education Act 1999, s 55.</i> Teachers required to 'respect the right of every child to be treated with understanding, dignity and respect.' | There is no legislative guarantee of equal access to education. |
| 10.2 Is there legislation that creates special measures for the advancement of women in education? | No | | |
| 10.3 Is there compulsory primary education for girls and boys? | Yes | <ul style="list-style-type: none"> • <i>Pre-School and Primary Regulations 1999:</i> Voluntary pre-school from 3 and a half years of age • <i>Education Amendment Act 1992, s 31.</i> Compulsory attendance from age 5 to 15. | |
| 10.4 Is there compulsory secondary education for girls and boys? | Partial | <ul style="list-style-type: none"> • <i>Education Amendment Act 1992, s 31.</i> Compulsory attendance from age 5 to 15. • <i>Education (Secondary Schools) Regulations 1999.</i> Permits young people to stay at school from 15-19. | |
| 10.5 Is family life (reproductive and sexual health education) compulsory in schools? | No | | |

ARTICLE 10: EDUCATION

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
|--|------------|----------------------|------------|
| 10.6 Is there a legislative prohibition on expulsion from school because of pregnancy? | No | | |

ARTICLE 11: EMPLOYMENT

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 11.1 Are there anti-discrimination provisions in employment legislation on the grounds of sex, marital status, disability, pregnancy, sexual orientation and HIV status with sanctions? | No | | |
| 11.2 Are there special measures provisions for the advancement of women in employment? | No | | |
| 11.3 Do women enjoy equal conditions of work including leave, superannuation and workers compensation? | Partial | <p><i>Industrial and Labour Ordinance 1964,</i></p> <ul style="list-style-type: none"> • s 30(a)-(c). No worker shall be employed more than 40 hours per week, 8 hours per day, more than 4 ½ hours without ¾ hour break. Can be extended but for women 16 or over. (a) The extension cannot be more than three hours in any day (excluding any time worked before noon on Saturday), nor more than nine hours in any week. (b) The extension shall not be for any period between 10pm and 7am. <p><i>Workers Compensation Ordinance 1964,</i></p> <ul style="list-style-type: none"> • s 2. Excludes casual workers and members of the employee's family. | <p>Restricting women (but not men) from overtime and night work is discriminatory and perpetuates a view that women need to be protected. It also perpetuates a stereotype of women that they are better suited to the private realm of home.</p> <p>Women workers are provided with equal conditions of work in many areas. However, the exclusion of casual workers and family in the Workers Compensation legislation impacts predominantly on women who are typically employed in such jobs.</p> |

| ARTICLE 11: EMPLOYMENT | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| 11.4 Does the legislation provide sexual harassment protection from employers and co-workers? | No | <i>Public Service Act 1995/1996 s 29(a)</i> . Every employee shall comply with generally accepted behaviour in the conduct of his employment. | There is no sexual harassment protection in the private sector and whilst the public service provision <i>could</i> be interpreted to include sexual harassment it is limited in its scope and does not provide any remedy. |
| 11.5 Does the definition of sexual harassment include the breadth of unwanted behaviours? | No | | |
| 11.6 Does the legislation contain an equal pay provision? | No | | No legislative guarantee of equal pay for men and women doing the same job. |
| 11.7 Does the legislation contain pay equity provisions? | No | | |
| 11.8 Does the legislation provide for an equal retirement age? | No | | |
| 11.9 Are there restrictions on women's choice of employment? If there are no restrictions on women's choice of employment then there is full compliance with this indicator. | No | <i>Industrial and Labour Ordinance 1964, s 51</i> . No woman shall be employed to work at any machine in a factory unless she has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed, and unless (a) she has received sufficient training in work at the machine; or (b) she is under adequate supervision by a person who has a thorough knowledge and experience of the machine. | This provision is discriminatory because it applies to women only, and any requirement for training and instruction should apply equally to men and women. Whilst the provision appears positive as it is relates to occupational health and safety, it aims to 'protect' women rather than granting them autonomy and equality |
| 11.10 Does the legislation provide for health protection during pregnancy? | Partial | <ul style="list-style-type: none"> <i>Industrial and Labour Ordinance 1964, s 50</i>. Where a woman worker is employed in any factory where her normal and regular employment involves continuous standing, she shall be allowed 10 minutes rest period every 3 hours if required to work more than 4 hours. | Although this provision could be used by women during pregnancy its intent is to 'protect' women rather than provide them with autonomy and equality. It is also insufficient to provide health protection during pregnancy. Although there is a general duty (in the public service) to provide medical care, there is no particular responsibility on |

ARTICLE 11: EMPLOYMENT

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| | | <ul style="list-style-type: none"> <i>Public Service Act 1995/1996 s 17(1)(2)</i>. Duty to act as a good employer including fair and proper treatment of employees in all aspects of employment including provisions establishing good and safe working conditions. | employers to provide health protection for pre-gnant workers. |
| 11.11 Does the legislation provide paid maternity leave of not less than 14 weeks? | No | <i>Industrial and Labour Ordinance 1964, s 49</i> . No woman shall be permitted during the period of six weeks immediately following her confinement to work in any factory other than a factory in which only members of the same family are employed unless the Medical Officer certifies that a lesser time is sufficient. | There are no maternity leave provisions in the private sector even though women are not permitted to work in a factory for 6 weeks after birth. Although some public service institutions provide 6 weeks paid maternity leave this is not established by legislation or regulations but is instead left to the discretion of the different public service bodies. |
| 11.12 Does the legislation provide protection from dismissal because of pregnancy or maternity leave? | No | | In the absence of the provision of (unpaid) extended leave to care for young children, many women without childcare facilities are likely to lose their employment. |
| 11.13 Does the legislation guarantee the provision of childcare by employer or state? | No | | |
| 11.14 Does the legislation provide reasonable nursing time during work hours? | No | | |

ARTICLE 12: HEALTH CARE AND FAMILY PLANNING

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
|--|------------|--|--|
| 12.1 Do women have access to safe and legal abortion facilities? | No | <i>Crimes Act 1969</i> <ul style="list-style-type: none"> <i>s 203(1)</i>. Any person who administers poison or noxious thing or (2) uses on her any instrument - 7 | These provisions are discriminatory to women because: <ul style="list-style-type: none"> The criminalisation of abortion denies women |

ARTICLE 12: HEALTH CARE AND FAMILY PLANNING

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| | | <p>years imprisonment.</p> <ul style="list-style-type: none"> • s 204(1). Any person who uses any other means other than in s 203 to procure miscarriage - 5 years imprisonment • s 205. Any woman with intent to procure miscarriage administers drug or uses instruments or permits another to do so - 3 years imprisonment. • s 206. Supply drugs or any thing to with intent to procure abortion - 3 years imprisonment. • s 202(1). An offence to kill unborn child that has not become a human being if would have been, guilty of murder if it had - life imprisonment. (2) Exception if in good faith for the preservation of the mother. | <p>access to safe medical facilities and encourages the use of unsafe methods and facilities.</p> <ul style="list-style-type: none"> • The criminalisation of abortion restricts women's autonomy and right to choose if and when they have children. • Although the penalty for procuring their own abortion is less serious than in other Pacific Island Countries (3 years), it fails to account for the reasons why women may choose to abort. • There is however an exception if the abortion is performed to preserve the mother's life. |

ARTICLE 13: ECONOMIC AND SOCIAL BENEFITS

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
|--|------------|--|---|
| 13.1 Do women have an equal right to family benefits regardless of marital status? | Partial | <p>Welfare Act 1989</p> <ul style="list-style-type: none"> • s 4.(1). Child benefit shall be granted in respect of each child under 10 years • s 8.(1). Child benefit shall be payable to the mother of the child or children (whether application for the benefit has been made by the mother or father). (2) The child benefit may be paid to the father of that child if the Chief Examiner determines that payment should be made to him. • s 23(1). Beneficiaries can claim a child benefit advance for housing (3) If | <p>There is only a limited social security system in the Cook Islands and it is substantially compliant with the indicator. The child benefit and the housing advance is available to both unmarried and married women in full compliance with CEDAW. However,</p> <ul style="list-style-type: none"> • Clear criteria should indicate when a family benefit may be paid to the father. • Clear criteria should indicate the circumstances in which both parents must jointly apply for a housing advance. This is to ensure that father's do not apply |

ARTICLE 13: ECONOMIC AND SOCIAL BENEFITS

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| | | the beneficiary is married, the Minister may require the application to be made jointly by the beneficiary and the spouse of the beneficiary. <ul style="list-style-type: none"> • s 40(1). Every person residing in the Cook Islands of the age of sixty years or more who is qualified by the provisions of this section shall be entitled to a pension. | when the mother is the primary caregiver. <ul style="list-style-type: none"> • A sole parent pension should be available to ensure women are able to leave relationships and support children if no or inadequate financial responsibility is taken by the father. |
| 13.2 Do women have an equal right to receive bank loans, mortgages and financial credit? | Yes | | There is no legislative barrier preventing women from receiving bank loans, mortgages and financial credit. |
| 13.3 Do women have an equal right to participate in recreational activities, sports and cultural life? | Yes | | There is no legislative barrier preventing women from participating in recreational activities, sports and cultural life. |

ARTICLE 14: RURAL WOMEN

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 14.1 Is there legislation that provides for special measures to achieve substantive equality for rural women? | No | | Many women in the Cook Islands live in rural communities and it is crucial that the Cook Islands incorporates special measures into either its constitution or legislation to advance substantive equality. The <i>Outer Islands Local Government Act 1987</i> deals with the administration of the outer islands where many rural women live, however, the legislation contains no specific provision for the advancement of women in non-compliance with CEDAW. |

| ARTICLE 15: EQUALITY BEFORE THE LAW AND CIVIL MATTERS | | | |
|---|------------|--|---|
| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| 15.1 Does the Constitution guarantee equality before the law? | Yes | <i>Constitution of the Cook Islands 1965, s 64(1)(b).</i> Guarantees of the right of the individual to equality before the law. | |
| 15.2 Do women have equal capacity in civil matters – can women sue? | Yes | | |
| 15.3 Do women have equal rights to participate in courts and tribunals at all stages? | Partial | <i>Juries Act 1968, s 3(3).</i> Any woman shall be exempt from serving on any jury if she notifies the Registrar of the High Court by writing that she does not wish to serve and on her so doing her name shall be struck off the list. | Although there is no legal barrier preventing women from participating in courts and tribunal processes, the <i>Juries Act</i> which allows all women (but not men) an automatic exemption from jury duty perpetuates a discriminatory assumption that women are not suited to public roles, or that her primary and defining role relates to family responsibilities, an assumption that is not made of men. Family responsibilities and public life should be shared equally between men and women and the <i>Juries Act 1968</i> needs to reflect this to be non-discriminatory. |
| 15.4 Do women (regardless of marital status) have an equal right to conclude contracts and administer property? | Yes | | There are no legal barriers to women's equal right to conclude contracts and administer property. |
| 15.5 Do women have an equal right to be executors or administrators of estates? | Yes | <i>Administration Act 1969 (NZ) s 6.</i> | |
| 15.6 Is there legislation that nullifies all contracts and instruments that limit women's legal capacity? | No | | To comply with this indicator the legislation should specifically nullify all contracts and instruments that limit women's legal capacity. As there is no specific legislation that has this effect, there is not compliance with this indicator. |

ARTICLE 15: EQUALITY BEFORE THE LAW AND CIVIL MATTERS

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
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| 15.7 Do women have an equal right to choose their residence and domicile? | Yes | | There are no legal barriers to women's equal right to choose residence and domicile. |

ARTICLE 16: PERSONAL AND FAMILY LAW

| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
|--|------------|---|--|
| 16.1 Does the legislation guarantee women's entry into marriage with full and free consent? | No | | There is no provision that provides that marriages cannot take place under duress, force or coercion. |
| 16.2 Does the legislation allow marriages to be nullified if they took place under force, duress or undue influence? | No | | |
| 16.3 Is there an equal minimum age of 18 for marriage? | No | <i>Marriage Act 1973, s 17(1).</i> Minimum age for males and females is 16. | Although the marriage age for males and females is equal the CEDAW Committee has recommended 18 as the minimum age for marriage for males and females. |
| 16.4 Is there a legislative prohibition on child marriage? | Partial | <i>Marriage Act 1973 s 17(1).</i> A marriage licence shall not be issued by any Registrar and no marriage shall be solemnised by any Registrar or officiating Minister if either of the persons intending marriage is under the 16 years but (2) No marriage shall be void by reason only of an infringement of the provisions of this section. | Marriages of persons under 16 cannot be solemnised, however, full compliance with the indicator requires: <ul style="list-style-type: none"> • Marriages of persons under 18 cannot be solemnised • That marriage is voided if either party is under 18. |
| 16.5 Does the legislation require registration of marriage in an official registry? | Yes | <i>Marriage Act 1973, s 34 (1).</i> | |
| 16.6 Does the legislation prohibit bigamy? | Yes | <i>Crimes Act 1963, s 228.</i> Bigamy is a criminal offence - 7 years imprisonment. | |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| 16.7 Do women have an equal right to choose a family name? | Yes | | There is no legal barrier preventing women from choosing a family name. |
| 16.8 Is the consent of both parents equal in the marriage of minors? | Yes | <i>Marriage Act 1973 s 18. (1)(2) (a).</i> If either of the parties to an intended marriage is a minor, consent shall be obtained from both parents. | |
| 16.9 Are both spouses equal in ownership, acquisition, management, administration, enjoyment and disposition of property? | No | <i>Cook Islands Act 1915,</i> <ul style="list-style-type: none"> • s 422. Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Natives of the Cook Islands. • s 426(1). When by Native custom any land belongs to an Ariki or other Native chief by virtue of his office the Land Court in making a freehold order may declare the land shall vest in fee simple in such Ariki or Native chief and his successors in office in the same manner as if they were a corporation sole (2) Tenure of office as an Ariki or Native chief in any island shall be determined by any enactment in force in that island or if no enactment, then by Native custom. | The legislation does not guarantee equality to both spouses in ownership, acquisition, management, administration, enjoyment and disposition of property. Land tenure is instead based on custom (which is given legal status by the Constitution and the <i>Cook Islands Act 1915</i>) where women are not fully equal in ownership, acquisition, management, administration, enjoyment and disposition of property. |
| 16.10 Does the legislation provide for a maintenance and custody order during separation based on need? | Partial | <i>Cook Islands Act 1915,</i> <ul style="list-style-type: none"> • s 550 (1). The High Court may make a maintenance order against a husband in favour of his wife, if satisfied husband has failed or intends to fail to provide his wife with adequate maintenance. (2) Unless wife is a destitute person, no maintenance order unless of sufficient ability | Although the legislation does provide for the payment of maintenance during separation, it does not fully comply with the indicator because: <ul style="list-style-type: none"> • Assessment is not based on need but on what the court thinks 'fit' or 'reasonable'. The absence of clear criteria focused on need may leave the supporting parent with insufficient maintenance |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>to contribute (3) When the husband and wife are living apart and the wife has, in the opinion of the Court, reasonable cause for not living with her husband, the husband shall not be deemed to have provided her with adequate maintenance merely by reason of the fact that he is ready and willing to support her if she lives with him.</p> <ul style="list-style-type: none"> • s 551(1). The High Court may make a maintenance order against a married woman in favour of her husband if satisfied that the husband is a destitute person and that his wife is of sufficient ability to contribute to his maintenance (2) No order if the court is satisfied that there is reasonable cause for the failure of the wife to contribute to the maintenance of her husband. • s 564(1). Maintenance order shall be to pay such sum as the Court thinks fit and reasonable. | <p>to support children.</p> <ul style="list-style-type: none"> • The wife must have 'reasonable cause' for not living with her husband in order to receive maintenance. This is discriminatory because she should be free to separate without establishing 'reasonable cause' and because no such restriction applies to a husband in relation to his wife. |
| 16.11 Is there legislation to enable women to occupy the marital home when property settlement is not possible or in situations of domestic violence? | Partial | <p><i>Cook Islands Amendment Act 1994,</i></p> <ul style="list-style-type: none"> • s 523G(1). Notwithstanding section 25(2) of the <i>Matrimonial Property Act 1976</i>, the Court may make an order under section 27 or section 28 of that Act (occupation or tenancy order) in any case where a husband and wife who are still married to each other or are not living apart and are not separated, if the Court is satisfied that such an | The provisions do not extend to de facto relationships. |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>order (a) is necessary for the protection of the husband or wife; or (b) is in the best interests of a child of the marriage.</p> <ul style="list-style-type: none"> • s 523G(2). The Court may make an order <i>ex parte</i> if satisfied that the respondent (a) has threatened or used violence against, or threatened or caused bodily harm to, the applicant or a child of the marriage; and (b) is likely to do so again. | |
| 16.12 Does the legislation provide for the restitution of conjugal rights? If the legislation does not provide such an order then there is full compliance with this indicator. | Yes | <p>Cook Islands Act 1915, s 525. No decree shall be made for restitution of conjugal rights, or any action for criminal conversation.</p> | <p>To be compliant with this indicator, the legislation should <i>not</i> empower the courts to provide an order for restitution of conjugal rights. In compliance with this indicator and CEDAW, the legislation expressly prohibits orders for restitution of conjugal rights (which are discriminatory as they take away a woman's autonomy to choose when and with whom she has sexual relations).</p> |
| 16.13 Does the legislation provide for no-fault divorce? | No | <p>Cook Islands Act 1915,</p> <ul style="list-style-type: none"> • s 531. In any suit in the High Court for dissolution of marriage on the ground of adultery the Court may, if it thinks fit, require the petitioner (being the husband) to make the person with whom the respondent is alleged to have committed adultery a co-respondent in the suit. • s 528(a)-(c). Court can refuse divorce if petitioner's own habits or conduct induced or contributed to the wrong complained of or if petitioner has been accessory to or | <p>The Cook Islands Act 1915 provides a fault based framework of divorce in non-compliance with CEDAW. Although an Amendment Act provides for a separation order if there is a state of disharmony there is no provision for divorce other than on fault based grounds.</p> |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>has connived adultery of the respondent; has condoned the same; or if suit has been instituted or prosecuted in collusion with the respondent.</p> <p><i>Cook Islands Amendment Act 1994, s 523B.</i> The Court may make a separation order if it is satisfied that there is a state of disharmony between the parties to the marriage such that it is unreasonable to require the parties to continue, or, as the case may be, to resume, cohabitation with each other.</p> | |
| 16.14 Is there a duty on the court to promote reconciliation? If the legislation does not contain such a duty then there is full compliance with this indicator. | Yes | | To be compliant with this indicator, there should not be a duty on the court to promote reconciliation between estranged spouses. The legislation does <i>not</i> impose such a duty on the court. |
| 16.15 Does the legislation provide for an equal division of property after divorce including recognition of unpaid contributions; future needs and future earning capacity calculated? | Yes | <p><i>Matrimonial Property Act 1976, s 11.</i> Each spouse shall share equally in the matrimonial home and the family chattels unless: s 15 the contribution of one spouse has been clearly greater than the other. s 18. Contribution includes, care for children or other dependant, management of household, provision of money, work or services in respect of the matrimonial property or other property, the giving of assistance or support to enable the other to acquire qualifications or to carry on business or employment.</p> | The non-financial contribution of either party is to be considered and the legislation specifically identifies the work of homemaker and parent. This recognises that such work contributes equally to the income and assets of the family. This is in full compliance with the indicator. |
| 16.16 Does the legislation provide for the payment of child support after divorce based on need? | Partial | <p><i>Cook Islands Act 1915,</i></p> <ul style="list-style-type: none"> • s 548 (1)(2), s 549(1)(2). The High Court may make a maintenance order against the father or the mother of any child (whether legitimate or | Although the legislation does provide for maintenance during separation, it does not fully comply with the indicator because assessment is not based on need but on what the court thinks 'fit' or 'reasonable. |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>illegitimate) if satisfied that either has failed or intends to fail to provide that child with adequate maintenance. (2) When the parent and child are living apart from each other, and there is reasonable cause for the child continuing so to live apart from the parent, the parent shall not be deemed to have made provision for the adequate maintenance of the child merely by reason of the fact that s/he is ready and willing to support the child if and so long as the child lives with them.</p> <ul style="list-style-type: none"> • s 564(1). Maintenance order to pay such sum as the Court thinks fit, of such sum of money as the Court thinks reasonable. | <p>The absence of clear criteria focused on need may leave the supporting parent with insufficient maintenance to support children.</p> |
| 16.17 Does the legislation provide for the payment of maintenance for ex spouse based on commitments, income, earning capacity, and assets? | Partial | <p>Cook Islands Act 1915,</p> <ul style="list-style-type: none"> • s 537(1). When a decree for the dissolution of marriage is made by the High Court, the Court may, if it thinks fit, order the husband to pay towards the future maintenance of his wife so long as she remains unmarried, a reasonable sum at times and in such manner as the court thinks fit. • s 564(1). Every maintenance order shall be an order for periodical payment, to pay such sum as the Court thinks fit, of such sum of money as the Court thinks reasonable. | <p>Although the legislation <i>does</i> provide for maintenance during separation, it does not fully comply with the indicator because assessment is not based on criteria such as respective earning capacity and means, needs of both parties and other commitments. Instead, it is based on what the court thinks 'fit' and 'reasonable'. The absence of such criteria to guide judicial discretion leaves women without a guarantee of maintenance based on need.</p> |
| 16.18 Is custody and access to children based on the best interests | No | <p>Cook Islands Act 1915, s 538. The High Court may in and by any decree for the dissolution</p> | <p>The best interests of the child is not the basis for custody orders, rather the Court may</p> |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| of child regardless of relationship of parents? | | of marriage, or at any time and from time to time thereafter, make such order as it thinks fit as to the custody of the children of the marriage. | make the order as it sees fit in non-compliance with the indicator. |
| 16.19 Does the legislation provide damages for adultery? If there is no provision for damages then there is full compliance with this indicator. | Yes | | To be complaint with this indicator, the legislation should not provide damages for adultery. Damages for adultery are discriminatory as they seek to punish the sexual behaviour of consenting adults and interfere with their autonomy. The legislation does <i>not</i> provide a right to damages for adultery and therefore is in full compliance with this indicator and with CEDAW. |
| 16.20 Do women have an equal right to guardianship, wardship, trusteeship and adoption? | Yes | <p><i>Cook Islands Act 1915,</i></p> <ul style="list-style-type: none"> • s 461(1)(d). No order of adoption shall be made unless the Court is satisfied that the adopting parent is a fit and proper person to have the care and custody of the child and of sufficient ability to maintain the child, and that the adoption will not be contrary to the welfare and interests of the child. • s 573B. The following persons may apply to the High Court for an adoption order (a) A European husband and his Native wife jointly (b) A Native husband and his European wife jointly (c) A European husband and his European wife jointly: (d) A European alone. • s 494. The Land Court may, in relation to a person under a disability who is entitled to any undivided share in | |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | Native freehold land on the application of that person or of any other person, make an trustee order appointing any person or persons to be the trustee or trustees of the person under disability in respect of the property or any part. <i>Trustee Act 156(NZ)</i> applies to Cook Islands as per s 639 <i>Cook Islands Act 1915</i> . Women have equal right to trusteeship. | |
| 16.21 Does the legislation recognise de facto rights including same-sex on the same basis as marriage? | No | | |
| 16.22 Does the legislation provide an order for establishing parentage? | Partial | <i>Cook Islands Act 1915</i> , <ul style="list-style-type: none"> • s 545(1). On application made to the High Court by or by the authority of an unmarried woman who is the mother of an illegitimate child or who is with child, the Court may, if satisfied that the defendant is the father of that child, make an affiliation order adjudging the defendant to be the father of that child. (2) No affiliation order shall be made unless the application is within 6 years of the birth of the child, unless the defendant has contributed to or made provision for the maintenance of the child, or has since the birth of the child cohabited with the mother as man and wife, or if within 2 years immediately preceding the application the defendant | Although the provisions do provide for the establishment of parentage, they are discriminatory because: <ul style="list-style-type: none"> • The order can only be obtained within 6 years of the birth of the child unless the defendant has previously contributed or lived with the mother. This is discriminatory because it may be difficult for women to seek parentage. • No application can be made if the child is over 12. • Although evidence of a mother is not always required for a parentage order if that is the only source of evidence then corroboration is required. Corroboration is difficult for women to obtain and is discriminatory as it implies a woman's evidence is unreliable. |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>has contributed to or provided for the maintenance of the child or has cohabited with its mother. (3) If at any time the defendant has been absent from the Cook Islands, the period of his absence shall not be counted in computing the respective period or 6 years or 2 years. (4) No application shall be made unless the child is under 12 years of age at the time of the application.</p> <ul style="list-style-type: none"> • s 546(1). The evidence of the mother of an illegitimate child or of any woman who is with child is not necessary for the making of an affiliation order (2) No person shall be adjudged to be the father of an illegitimate child upon the evidence of the mother or of a woman who is with child, unless her evidence is corroborated in some material particular to the satisfaction of the Court. | |
| 16.23 Does the legislation provide for a contribution to pregnancy and childbirth costs by father to unmarried mother? | No | | |
| 16.24 Does the legislation provide for the payment of child support for children born outside marriage? | Partial | <p><i>Cook Islands Act 1915,</i></p> <ul style="list-style-type: none"> • s 547. When an affiliation order has been made by the High Court against any person as the father of an illegitimate child, whether already born or not, the Court may, at the same time thereafter, make a maintenance order in favour of the child against the person | The legislation <i>does</i> provide for the payment of child support for children born outside marriage. However, the criteria of what the court thinks 'fit' and 'reasonable' does not ensure that support is based on need. |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | adjudged to be the father. <ul style="list-style-type: none"> • s 564(1). Every maintenance order (including affiliation order) shall be an order for the periodical payment, as aforesaid, to pay such sum as the Court thinks fit, of such sum of money as the Court thinks reasonable. | |
| 16.25 Does the legislation provide for equal inheritance laws? | No | <p><i>Wills Act 1937 (UK)</i> as amended by <i>Wills Amendment Act 1952 (UK)</i> and applicable to the Cook Islands as per s 640 Cook Islands Act 1915 provides that women have equal right to make will.</p> <p><i>Cook Islands Act 1915,</i></p> <ul style="list-style-type: none"> • s 44 (1). No will made by a Native or descendant shall have any force or effect with respect to his interest in Native land. • s 446. The persons entitled on the death of a Native to succeed to his real estate, and to his personal estate so far as not disposed of by his will, and the persons entitled on the death of a descendant of a Native to succeed to his interest in Native freehold land, and shares shall be determined in accordance with Native custom. If no Native custom is applicable to the case, it shall be determined as if the deceased was a European. <p><i>Administration Act 1969,</i></p> <ul style="list-style-type: none"> • s 77. (i) If the intestate leaves issue, one-third for the surviving husband or wife absolutely, and two-thirds for the issue of the intestate (ii) If the | Although women in the Cook Islands have an equal right to make a will, it does not apply to any interest in Native land. Intestate succession for native persons is based on custom, whilst the <i>Administration Act</i> (which applies to those to whom native custom is inapplicable) leaves 2/3 for children and 1/3 for any surviving spouse, which could leave women without adequate means of support. |

| ARTICLE 16: PERSONAL AND FAMILY LAW | | | |
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| INDICATOR | COMPLIANCE | RELEVANT LEGISLATION | COMMENTARY |
| | | <p>intestate leaves no issue, in trust two-thirds for the surviving husband or wife absolutely, one-third if the intestate leaves both parents, for the father and mother in equal shares absolutely or, if the intestate leaves only one parent, in trust for the surviving father or mother absolutely (iii) If the intestate leaves no issue or parent, for the surviving husband or wife absolutely.</p> | |
| 16.26 Is there legislation requiring the court to apply CEDAW and CRC to domestic family law when relevant? | No | | |

Glossary

Abet

To encourage and assist in the commission of crime.

Abortion

The premature termination of pregnancy and the expulsion of an embryo or a foetus.

Adoption

A legal proceeding that creates a parent-child relation between persons not related by blood. Adoption results in the severing of the parental responsibilities and rights of the biological parents and the placing of those responsibilities and rights onto the adoptive parents.

Affirmative action (also known as temporary special measures)

A policy or a program that seeks to redress past discrimination through active measures (e.g. quotas) to ensure equal opportunity in areas such as education and employment. Article 4 of CEDAW mandates the adoption of temporary special measures to accelerate de facto equality.

Amicus curiae

Latin term meaning 'a friend of the court'. An amicus curiae has no personal interest in the case and does not advocate a point of view in support of one party or another. The court may hear an amicus curiae if it considers it in the interests of justice to do so.

Ariki

The highest stratum in the hierarchy of chiefs. The 15-member House of Ariki (hereditary chiefs) is a purely consultative body that advises on traditional matters.

Bail

The release from custody of a person who has been charged with a criminal offence, on condition that they will appear in court as required and sometimes subject to other conditions. Bail can also refer to the amount of money that may be promised or deposited as a condition of release.

Bangalore Principles

The *Bangalore Principles on the Judicial Application of International Human Rights Law* formulated at a high level colloquium of Commonwealth judges in 1988, state that if legislation is ambiguous, it is consistent with the function of a judge in a common law system to resolve the ambiguity by reference to international human rights principles.

Bigamy

The act of marrying one person while legally married to another.

Citizenship

Membership of a state or nation, which carries with it duties, rights, and privileges.

Common law

Historically, a body of unwritten law derived from the traditional laws of England based on case law precedents and judicial interpretation rather than legislation.

Complainant

Generally, a person who lodges a complaint with a court or other decision maker. In criminal proceedings it is a person, not necessarily the victim, who begins a prosecution by laying a complaint.

Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)

A multilateral agreement recognising the civil, political, economic, social and cultural rights of women. It was adopted by the General Assembly of the United Nations on 18 December 1979 and entered into force generally on 3 September 1981 in accordance with Article 27(1). The Convention sets out, in legally binding form, internationally accepted principles on the rights of women which are applicable to all women in all fields.

CEDAW Committee

The CEDAW Committee was established by the *Convention on the Elimination of all Forms of Discrimination against Women*. The CEDAW Committee, elected by States Parties to CEDAW, is made up of twenty three experts on women's rights and is entrusted with the task of overseeing the implementation of the Convention by States Parties. The Committee considers reports submitted by State Parties in accordance with the reporting obligations laid down by the Convention and issues General Recommendations, which elaborate the CEDAW Committee's view of the treaty's obligations.

Corroboration

In criminal proceedings, corroboration is independent evidence that connects the accused person to the crime. In the common law judges are typically required to advise the jury that it is dangerous to convict the accused on uncorroborated evidence for sexual offences and paternity.

Custody

Custody refers to the daily care and control of a child. It typically encompasses the rights and duties related to the upbringing of children. These rights include the power to make decisions about a child's education, religion and property as well as a personal power of physical control. The corresponding duties include providing the child with food, clothing, shelter, education and other necessities of life.

Custom

A practice in society or a rule of conduct established by long use, which binds those under it. In order for a custom to constitute a valid law, it must date back to time immemorial, and be certain and obligatory. It may run counter to the common law but cannot contravene

existing statute law unless validated by the constitution. A custom can be general, particular or local.

De facto

As it applies to personal relationships, it describes an association which resembles a marriage, but which has not been formalized through a ceremony of marriage. It can include both heterosexual and same-sex relationships.

Defendant

A person sued in a civil proceeding or accused in a criminal proceeding.

De jure

Latin term meaning ‘according to the law’ and in contrast to *de facto* which means ‘in fact’.

Discrimination

Discrimination in general terms is the act of making prejudicial distinctions among individuals or groups by taking irrelevant matters into consideration resulting in unequal treatment. It is treating a person or persons less favourably; distinguishing, excluding, restricting, or preferring another on the prohibited basis of a certain or several features or attributes that the person or persons’ possess. The definition of discrimination contained in Article 1 of CEDAW explicitly states that discrimination against women means any ‘distinction, exclusion or restriction’ made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Direct discrimination

Direct discrimination results from less favourable treatment in comparison with a real or hypothetical

comparator from the mainstream group in the same or similar circumstances on a prohibited ground.

Domicile

A person’s fixed, principal and permanent home to which that person intends to return and remain even if they are currently residing elsewhere.

Equal pay

Equal pay requires that workers are paid at the same rate of pay for doing the same job irrespective of sex.

Executor

A person named by a testator to carry out the provisions of her/ his will.

Formal equality

Formal equality is the requirement that legal rules should apply in the same way to all members of the community regardless of sex, race, sexuality or any other characteristic.

General recommendations

General Recommendations are detailed commentary on CEDAW’s articles issued by the CEDAW Committee to assist States Parties to comply with the Convention. For example, at the 1989 session, the Committee discussed the high incidence of violence against women, requesting information on this problem from all countries. In 1992, the Committee adopted General Recommendation 19 which requires national reports to the Committee to include statistical data on the incidence of violence against women, information on the provision of services for victims, and legislative and other measures taken to protect women against violence in their everyday lives, such as harassment at the workplace, abuse in the family and sexual violence. The following 25 general recommendations have been adopted by the Committee as of February 2007:

| GENERAL RECOMMENDATION: | NUMBER AND YEAR OF ISSUE |
|-------------------------|---|
| General Recommendation | No. 1, 1986 Reporting Guidelines |
| General Recommendation | No. 2, 1987 Reporting Guidelines |
| General Recommendation | No. 3, 1987 Education and Public Information Programs |
| General Recommendation | No. 4, 1987 Reservations |
| General Recommendation | No. 5, 1988 Temporary Special Measures |
| General Recommendation | No. 6, 1988 Effective National Machinery and Publicity |
| General Recommendation | No. 7, 1988 Resources |
| General Recommendation | No. 8, 1988 Article 8 |
| General Recommendation | No. 9, 1989 Statistical Data |
| General Recommendation | No. 10, 1989 Tenth Anniversary of the Adoption of CEDAW |
| General Recommendation | No. 11, 1989 Technical Advisory Services for Reporting |
| General Recommendation | No. 12, 1989 Violence Against Women |
| General Recommendation | No. 13, 1989 Equal Remuneration for Work of Equal Value |
| General Recommendation | No. 14, 1990 Female Circumcision |

| GENERAL RECOMMENDATION: | NUMBER AND YEAR OF ISSUE |
|-------------------------|--|
| General Recommendation | No. 15, 1990 Women and AIDS |
| General Recommendation | No. 16, 1991 Unpaid Women Workers in Rural and Urban Family Enterprises |
| General Recommendation | No. 17, 1991 Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the GNP |
| General Recommendation | No. 18, 1991 Disabled Women |
| General Recommendation | No. 19, 1992 Violence Against Women |
| General Recommendation | No. 20, 1992 Reservations |
| General Recommendation | No. 21, 1994 Equality in Marriage and Family Relations |
| General Recommendation | No. 22, 1995 Article 20 of the Convention |
| General Recommendation | No. 23, 1997 Women in Political and Public Life |
| General Recommendation | No. 24, 1999 Article 12 - Women and Health |
| General Recommendation | No. 25, 2004 Article 4 paragraph 1 - Temporary Special Measures |

Guardian

In relation to a child, a person with the right to make decisions about the long-term needs of the child, as opposed to the day- to-day care of the child. A guardian has responsibility for such matters as decisions about a child's religion or education.

Guardianship

A legal arrangement where one person has been appointed to take care of another person or the property of another.

Incest

Sexual intercourse between persons who are related to each other within the degrees of blood where marriage is prohibited by law.

Indirect discrimination

Indirect discrimination results where there is a requirement that appears to be neutral and fair, but which actually impacts disproportionately on one individual or group as compared with another (and the requirement or condition is not reasonable in the circumstances).

Infanticide

Infanticide is a criminal offence by which a mother causes the death of her child as a result of post natal depression. It is an alternate offence to murder or manslaughter, with a reduced sentence.

Inheritance

The practice of passing on property, titles, debts, and obligations upon the death of an individual to designated beneficiaries.

Intestacy/Intestate

The rules governing the inheritance of the property of a person who dies without a valid will.

Legal standing/locus standi

The entitlement of a person or entity to commence legal proceedings.

Litigation

The act or process of taking a case to court.

Maintenance

The provision of the means of existence or financial support for a minor or adult.

Mandatory prosecution

Obligatory prosecution of an accused in a criminal proceeding (i.e where police discretion to prosecute or not prosecute is removed).

Maternity leave

The period of leave that a woman is entitled to from her employer before and after childbirth. Article 11(2)(e) of CEDAW requires States Parties to introduce maternity leave with pay or with comparable social benefits. The International Labour Organisation recommends a minimum of 14 weeks maternity leave in both the private and public sectors.

Matrilineal

The practice of tracing title and inheritance through the maternal line.

Minimum quota system

Quotas that require women constitute a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee, or a government.

Minor

A child who has not attained the age that generates full legal capacity. The CEDAW Committee recommends 18 as the requisite age of capacity.

No-fault divorce

A no-fault divorce is the dissolution of a marriage, upon petition to the court by either party, without the requirement that the petitioner show fault on the part of the other party. Either party may request, and receive, the dissolution of the marriage, despite the objections of the other party.

Occupation Order

A court order enforcing one partner's right to return to, stay in or exclude someone else from the home. Occupation orders can enforce rights, as well as give or end rights to occupy a property. They can also be used to restrict someone's use of a property, for example, if two partners continue to live in the same home have to live in different parts of the same home It may also exclude one from a defined area.

Party

One of the participants in a legal proceeding who has an interest in the outcome. Parties include the plaintiff (person filing suit), defendant (person sued or charged with a crime), petitioner (files a petition asking for a court ruling) or respondent (usually in opposition to a petition or an appeal).

Patrilineal

The practice of tracing title and inheritance through the paternal line.

Pay equity

Pay equity refers to a situation in which work which is different in nature but requires comparable similar skills, experience and qualifications and is carried out in comparably similar circumstances, attracts the same rate of pay.

Plaintiff

A person or entity who initiates legal proceedings against another in a civil dispute.

Polygamy

Marriage to more than one spouse at the same time or multiple marriages.

Preamble

An introductory statement at the beginning of legislation or an instrument providing information relating to the reason for the enactment, and intent, of the legislation.

Precedent

A prior reported judgment of a court which establishes the legal rule (authority) for future cases on similar facts

or the same legal question. It is also a legal principle or rule created by one or more decisions of a higher court. These rules provide a point of reference or authority for judges deciding similar issues in later cases. Lower courts are bound to apply these rules when faced with similar legal issues.

Prior sexual conduct

The common law rule where the prior sexual conduct of a victim with either the accused or with other men is relied upon to establish that the victim consented to the sexual act in question.

Procurement

To obtain (a sexual partner) for another without their consent.

Proof of resistance

Proof of resistance is a common law rule which requires sexual assault victims to establish that they physically resisted the perpetrator and is used to determine consent.

Public law

The body of law dealing with the rights, powers, obligations and responsibilities of the government including public officers and the governed (the public). It is composed of criminal, international, environmental, administrative and constitutional law.

Ratification

The adoption or confirmation by a state of a convention or treaty. Ratification places an obligation on a State Party to comply with the convention.

Repeal

The deletion, omission, or reduction in scope of an existing law by a subsequent law.

Reservations

A unilateral statement made by a state party when signing or ratifying a treaty, by which the state party excludes or modifies the legal effect of certain provisions of the Convention in their application to that state, i.e., a formal declaration that the State Party does not accept as binding, certain parts of the Convention.

Respondent

A person or entity required to answer a petition for a court order. It is also a party to court proceedings against whom relief is claimed by an applicant, complainant or an appellant. It is analogous to the term defendant, which is used in many jurisdictions.

Restitution of conjugal rights

A court order which directs a person to resume sexual relations with a spouse.

Restraining order

An order from a court directing one person not to do something, such as make contact with another person, enter the family home etc. It tells one person to stop harassing or harming another. Restraining orders are typically issued in cases in which spousal abuse or stalking is feared or has occurred in an attempt to ensure the victim's safety.

Sexual harassment

Unwanted sexual approaches or an unwelcome request for sexual favours or engaging in other unwelcome conduct, of a sexual nature, usually in an employment context. General Recommendation 19 defines sexual harassment as unwelcome sexually determined behaviour such as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. It constitutes violence against women and is discriminatory.

Soliciting

To approach someone with an offer of sexual services in return for payment.

Statute

A law made by parliament.

Stereotyping

An over-generalised and preconceived idea or impression of what characterises someone or something. Stereotyping is discriminatory because it reduces a person to an oversimplified category, image or idea, especially one that does not allow for any individuality or variation. Article 5 requires States Parties to take all appropriate measures to modify and eliminate social and cultural patterns of conduct or customary practices that are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women.

Substantive equality

Substantive equality refers to real or actual equality. Whereas formal equality merely requires the equal application of rules, substantive equality requires equality of access, equal opportunity and crucially, equality of results.

Testator

A person who makes a will.

Tort

A wrongful act from which injury occurs to another. The law of tort attempts through the payment of compensation to restore the injured person to the position they were in before the tort was committed.

Trafficking of women

Global Alliance Against Trafficking in Women defines trafficking as all acts involved in the recruitment or transportation of a woman, within or across national borders, for work or services, by means of violence or threat of violence, debt bondage, deception or other coercion.

Tribunal

A body with judicial or quasi-judicial function set up by statute and existing outside the usual judicial hierarchy of courts. Tribunals are usually specialised (i.e. operate in a particular area of law) and procedures may be much more informal than those followed by courts.

Wardship

The state of being under the charge of a guardian, usually a minor.

Will

A written document in which a person (testator) specifies what is to be done with their property (estate) upon their death. A will usually names an executor who carries out the wishes of the deceased and distributes the estate to named persons or entities.

Acronyms

| | |
|--------------|---|
| BPFA | Beijing Platform for Action 1995 |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women 1979 |
| CRC | Convention on the Rights of the Child 1989 |
| DEVAW | Declaration on the Elimination of Violence against Women 1993 |
| GR | General Recommendation |
| ILO | International Labour Organisation |
| MDG | Millennium Development Goals |
| NGO | Non-Government Organisation |
| para | Paragraph |
| s | Section |
| UNDP | United Nations Development Programme |

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