

# Talanoa

**Issue 6: April | June 2016**

**Welcome** readers to the first issue of Talanoa for 2016!

We are grateful to PILON Observer Members—the Asia/Pacific Group on Money Laundering, the Secretariat of the Pacific Community, and the International Committee of the Red Cross, PILON member—Samoa, as well as the Australian Attorney-General's Department (AGD) and the International Center for Advocates Against Discrimination (ICAAD) for their contributions to this issue. Articles, suggestions and feedback are always welcomed by the Secretariat. We encourage you to sign up to our mailing list so you never miss an issue and are kept up to date with what's been happening in the region. Contact the Secretariat on [Temalesi.Buatoaka@pilonsec.org](mailto:Temalesi.Buatoaka@pilonsec.org).

## **Monitoring & Evaluating Sexual & Gender Based Violence Legislation**

*Article by: Pacific Island Law Officers' Network*

During PILON's 34th annual meeting in December 2015, the PILON Sexual and Gender Based Violence (SGBV) Working Group presented their 2015 report on Monitoring and Evaluating SGBV legislation.

With the majority of PILON members having specific SGBV legislation in place or currently being drafted, this was seen to be an opportune time to consider how to monitor and evaluate this legislation to ensure it is responsive, efficient and effective.

The report covers a range of issues, including the benefits of monitoring and evaluation, and provides a series of templates to assist with developing monitoring and evaluating frameworks for protection/police safety orders and prosecutions under SGBV legislation. These resources were developed by the Working Group over the course of 2015 with input from prosecutors, policy officers, police and regional experts.

In order to ensure that SGBV legislation achieves its aims of reducing violence in the domestic setting, it must be monitored in its implementation and

evaluated against its aims. The report and associated templates have been developed to assist PILON members with this task and are able to be adapted in ways that are appropriate for and tailored to each country.

If you are interested in learning more about how the templates could be used in your jurisdiction please contact Tracey Pearce ([Tracey.Pearce@ag.gov.au](mailto:Tracey.Pearce@ag.gov.au)).

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## Pacific Region Cybercrime Criminal Justice Training

**Article by: The Commonwealth Secretariat**

Law enforcement, legal officers and government officials from across the Commonwealth Pacific region met in February 2016 in Nuku'alofa, Tonga for a three day regional meeting to tackle deepening concerns around cybercrime.

Commonwealth Deputy Secretary-General Josephine Ojiambo said: “Cybercriminals do not respect national boundaries. Consequently, the Commonwealth is working at a regional level to stem the scourge of a debilitating threat to national security. High-tech crime is particularly challenging at a time when countries seek to allocate precious resources so as to achieve the most effective development goals. The Commonwealth’s anti-cybercrime effort is crucial to underpinning both the rule of law and to provide the space for civil societies to prosper.”

The three-day meeting was hosted in collaboration with the Government of Tonga, the International Association of Prosecutors and PILON, and provided delegates with the opportunity to analyse regional trends and share expertise in cybercrime amongst law enforcement officials. Participants were exposed to specialist and technical training aimed at improving their skills and competencies, to facilitate more effective investigations and

prosecutions of cybercrime-related offences. The training sort to establish an informal network of Pacific Region Cybercrime Justice Practitioners on a secure virtual platform to foster collaboration within the region and beyond.

Cross-country collaboration by the member states, including assistance from international agencies, is hoped to enhance individual country responses to the disturbing growth of advanced cybercrime in resource-constrained environments.



Shadrach Haruna, Legal Adviser in the Commonwealth Secretariat’s Rule of Law Division commented: “The complexity and speed of evolution of cybercrime makes it essential that expertise in policy, law, law enforcement, prosecution and prevention not only be developed but also monitored, maintained and updated frequently.”

## 2016 Pacific Legal Policy Champions

**Article by: Australian Attorney-General’s Department**

Lawyers from the Federated States of Micronesia, Fiji, Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu participated in the 2016 Pacific Legal Policy Champions Program, facilitated by AGD in Canberra, from 15-26 February 2016.

The program focusses on building legal policy development capability in the Pacific region, and

includes sessions with subject-matter experts and practical workshops in policy development and implementation. Participants included:

- Mr Johnson Asher, Federated States of Micronesia Department of Justice
- Ms Sophina Ali, Fiji Office of the Attorney General
- Ms Ruria Iteraera, Kiribati Office of the Attorney-General
- Ms Lagafuaina Tavita, Samoan National Prosecution Office
- Ms Kyla Vonkana, Solomon Islands Ministry of Justice and Legal Affairs
- Mr Jasper Anisi, Solomon Islands Office of the Director of Public Prosecutions
- Ms Corinna Ituaso, Tuvalu Office of the Attorney-General, and
- Mr Powrie Vire, Vanuatu Law Commission.

This year the programme included discussion on the PILON strategic priority issues of sexual and gender based violence, cybercrime, and environmental crime and corruption (with a focus on illegal fishing and maritime pollution). Other policy issues discussed included transnational organised crime (including drug trafficking), juvenile justice, road safety and police professional standards.

“I have learnt a lot from my fellow champions, namely that we do have numerous similar issues and we can learn so much from each other,” said Lagafuaina Tavita from the Samoan National Prosecution Office.

Participants enjoyed the program and developed plans to deliver AGD’s Pacific Legal Policy Development Course and progress priority legal policy projects upon their return home. Johnson Asher from the Federated States of Micronesia Department of Justice said, “the Legal Policy Development course provides a comprehensive problem-solving approach to developing policy and will be a wonderful tool to apply in my jurisdiction.”

“Helping the participants grow and develop their policy skills, and learn how to share their knowledge

with others, is so rewarding,” Dr Marie Wynter from AGD said. “It’s been great to see tight bonds form so quickly between the participants, and hear them debate the best options to address some of the ‘wicked’ policy problems we face today.”

AGD expects to continue the program with eight new Policy Champions in early 2017. To find out more, email [Pacific@ag.gov.au](mailto:Pacific@ag.gov.au).



## **OBSERVER MEMBERS UPDATE**

### **Asia/Pacific Group on Money Laundering**

The APG is an autonomous and collaborative international organisation consisting of 41 members from the Asia/Pacific region and a number of international and regional observers. APG members and observers are committed to the effective implementation and enforcement of internationally accepted standards against money laundering and the financing of terrorism, in particular the Forty Recommendations of the Financial Action Task Force (FATF).

APG Pacific members include the Cook Islands, Fiji, the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu. APG Pacific observers include Kiribati, Federated States of Micronesia, Pacific Islands Chiefs of Police (PICP), Pacific Islands Forum Secretariat (PIFS), PILON, Pacific Financial Technical Assistance Centre (PFTAC) and the Oceania Customs Organisation, as well as other

international organisations with Pacific members such as the United Nations and the Commonwealth Secretariat.

The APG has five primary functions as follows:

1. **Mutual evaluations**: assess compliance by APG members with the global anti-money laundering and countering the financing of terrorism (AML/CFT) standards through a mutual evaluation (peer review) programme;
2. **Technical assistance and training** (TA&T): coordinate bilateral and donor-agency TA&T in the Asia/Pacific region in order to improve compliance by APG members with the global AML/CFT standards;
3. **Typologies research**: conduct research on and analysis of money laundering and terrorist financing methods in order to better inform APG members and the general public of trends, methods, risks and vulnerabilities;
4. **Global policy development**: participate in and contribute to policy development of the international AML/CFT standards by active participation in the global network; and
5. **Private sector engagement**: provide information to the private sector to better inform them of international developments in AML/CFT and provide a forum for them to engage with the APG.

### **MUTUAL EVALUATIONS – PEER REVIEWS OF MEMBERS’ AML/CFT SYSTEMS AND EFFECTIVENESS**

The APG’s third round of mutual evaluations commenced in 2014-15 using the FATF’s 2012 Recommendations and the 2013 Assessment Methodology. The 2012 FATF Recommendations place a new level of emphasis on issues of risk and context, and the 2013 Assessment Methodology takes a new approach to assessing members’ compliance with the Recommendations, incorporating an assessment of the jurisdiction’s effectiveness in combating money laundering and the financing of terrorism.

The mutual evaluation reports of Samoa, Vanuatu, Australia, Malaysia and Sri Lanka were adopted at the APG Annual Meeting held in Auckland, New Zealand in July 2015. The reports for Samoa and Vanuatu are available via each member’s profile on the APG website.

The APG is currently in the process of completing the mutual evaluations of Fiji, Bangladesh, Bhutan and Singapore with the reports scheduled for adoption by APG members at the 2016 APG Annual Meeting in Dhaka, Bangladesh, 23-28 July 2016. The draft reports will be distributed to members and observers prior to the meeting for consideration and comment. In particular, members and observers will be asked to respond with any key issues that should be prioritised for discussion at plenary.

While the mutual evaluation reports highlight the successes of Pacific (and other) APG members in combating money laundering and the financing of terrorism, they also identify the significant challenges facing APG Pacific members. Broadly, the mutual evaluations commenced to date show that in order to effectively combat money laundering and terrorism financing in the Pacific, APG Pacific members should continue to develop the AML/CFT-related organisational capacity of their financial sector regulators/supervisors, law enforcement, prosecutors and the judiciary, and that they may require further support to do so.

### **TECHNICAL ASSISTANCE FOR APG MEMBERS**

To help Pacific and other APG members to overcome the challenges identified in mutual evaluation reports and, more broadly, improve compliance with the global AML/CFT standards, the APG holds an annual forum on TA&T in parallel with the APG annual meeting.

In preparation for this forum, the APG collects AML/CFT-related needs information from each APG Pacific member and distributes this information to TA&T donors/providers active in the APG. During the forum the APG coordinates

individual meetings between a number of APG Pacific members and donors/providers to discuss the jurisdiction's TA&T needs.

### **INTER-ORGANISATIONAL COOPERATION**

In addition, during the annual TA&T forum, the APG and PIFS co-chair a meeting designed to enhance cooperation and coordination on AML/CFT-related TA&T and other activities in the Pacific. Last year in New Zealand, this meeting was attended by all APG Pacific members and donors/providers including the Commonwealth Secretariat, International Monetary Fund, United Nations Office on Drugs and Crime, United States, Japan, Australia and New Zealand. One of the primary outcomes of this meeting was that APG Pacific members suggested donors/providers consider providing more in-country AML/CFT mentoring as this method of assistance is more effective at enhancing AML/CFT-related organisational capacity than regional workshops.

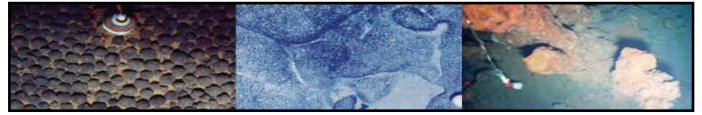
A similar joint meeting will be held during the 15<sup>th</sup> APG Annual Forum on TA&T in Dhaka, Bangladesh.

In order to further support APG Pacific members, the APG recently held the first APG and Pacific Islands secretariats' coordination teleconference. The purpose of the teleconference was to facilitate on-going communication between the APG and Pacific secretariats in order to improve AML/CFT related TA&T coordination in the Pacific. The meeting was attended by the PICP, PIFS, PILON, PFTAC, Pacific Transnational Crime Coordination Centre (PTCCC) and the United Nations Office on Drugs and Crime AML/CFT mentor in the Pacific. A key outcome of this meeting was agreement on the need to work collaboratively to address de-risking in the Pacific.

*For further information related to the APG or its activities in the Pacific, please contact the APG Secretariat via [mail@apgml.org](mailto:mail@apgml.org).*



EUROPEAN UNION



### **SPC–EU Deep Sea Minerals (DSM) Project**

The SPC-EU DSM Project is currently being implemented in 15 Pacific member states of the African, Caribbean and Pacific Group of States (ACP). Since 2011, the DSM Project has been providing assistance in developing regional and national legal frameworks for DSM activities to enable Pacific ACP States to make informed decisions and meaningfully participate in DSM activities.

In doing so, Pacific ACP States are at the forefront of establishing laws to govern their DSM activities in order to protect and preserve the marine environment, conserve living marine resources, habitats and rare or fragile ecosystems, minimise pollution and accidents to the fullest extent possible, mitigate impacts on other marine use (e.g. fisheries) and predict and prevent any adverse socio-economic impacts in-country.

For example, in moving forward with DSM activities in Nauru, the Nauru Government passed its International Seabed Minerals Bill on 23 October 2015, becoming one of the few countries in the world to have an Act governing its engagement in seabed mineral activities undertaken within international waters known as 'the Area'. To effectively control contractors, the Act promotes good governance by establishing the Nauru Seabed Minerals Authority that will guide, monitor and manage Nauru's involvement with seabed mineral activities in the Area. The Act further acknowledges the governing body of the Area known as the International Seabed Authority (ISA) and ensures that the Act adheres to the standards set out by the ISA. The Act also stipulates that revenues generated

will be vested into a Seabed Minerals Fund that will be managed for the benefit of the people of Nauru.

Furthermore, the Executive Council of the Cook Islands approved their Seabed Minerals Prospecting and Exploration Regulations in July 2015. Cook Islands has had in place a Seabed Minerals Act since 2009, however to ensure proper management of the seabed mineral activities, the Regulations were passed to ensure that each step was followed during a Prospecting or an Exploration Phase through a tender process. The Tender Process allows interested applicants to (i) purchase a data package payable to the Ministry of Finance and Economic Management, (ii) make an application, (iii) have their application evaluated, (iv) be granted an exploration licence, and (v) pay fees to conduct DSM activities. More information can be found at <http://www.seabedmineralsauthority.gov.ck/cook-islands-seabed-minerals-tender-2015>.

*For any information or queries regarding the above laws, contact the SPC-EU DSM Project Legal Adviser, Ms Marie Bourrel ([marieb@spc.int](mailto:marieb@spc.int)) or visit <http://gsd.spc.int/dsm/>.*



### **Governments and Red Cross Crescent Leaders Tackle the Most Pressing Humanitarian Issues**

Over three days in December 2015, more than 2,200 representatives of nearly every government in the world, the Red Cross Red Crescent Movement, and partner organisations gathered in Geneva for the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, in an effort to find a common vision for future humanitarian action.

The International Conference is a unique global forum bringing together the State Parties to the Geneva Conventions of 1949 and the International Red Cross and Red Crescent Movement. By the end of the Conference, participants had made 137 pledges for strengthened humanitarian action, and adopted nine resolutions by consensus, with the drafting committee working for more than 45 hours over two days.

The Conference adopted a resolution that will improve the facilitation and regulation of international disaster response, strengthen coordination and laws for disaster risk reduction, and promote enabling laws for first aid.

The Conference also resolved to do more to fight and prevent two of the biggest humanitarian scourges in current times: attacks on health care personnel and facilities, and sexual and gender based violence in crises.

Other resolutions included measures to strengthen compliance with international humanitarian law and protection for people detained in connection with non-international armed conflicts.

A session on analysing the role of domestic law in promoting disaster risk reduction drew on the experience of Cook Islands in discussing how an integrated approach with international regulations could improve not only the impact of development programmes, but also the effectiveness of humanitarian relief operations during emergencies.

Her Excellency Nazhat Shameem Khan (Permanent Representative of Fiji to the United Nations and Other Organisations in Geneva, and Ambassador to Switzerland) chaired a Commission examining prevention of and responses to sexual and gender based violence. The Commission highlighted that SGBV is one of the most serious forms of violence, which leaves often-irreparable wounds for survivors and their relatives. SGBV is used as a weapon of war in almost all conflicts, and it is also a prevalent risk in societies that have been affected by disasters.

At a side-event addressing legal preparedness for disasters and disaster risk reduction, Her Excellency Nazhat Shameem Khan also highlighted the vulnerability of Pacific islands to natural disasters, and participants shared the difficulties that arise when humanitarian relief is needed. Jacqueline Deroin of Vanuatu Red Cross called for a more comprehensive framework that ‘takes the realities of our region into account’.

The humanitarian impact of nuclear weapons was also discussed at a side event, articulating the case for elimination of nuclear weapons. Speakers were unanimous on the point that the move towards elimination would require the political will of States (possessors and non-nuclear States) and increased awareness and commitment.

The Tuvalu Red Cross Society became the 190<sup>th</sup> National Society to join the International Red Cross and Red Crescent Movement!

You can find out more on the outcomes of the Conference at <http://rcrcconference.org/>.



## Pacific Legal Research Resources

*Article by: Australian Attorney-General's Department*

The photo below shows part of the AGD library's Pacific collection, which includes a collection of law reports and text books from across the Pacific. In the top left corner of the photo are some historical German language legal resources from Papua New Guinea. Of course, methods of legal research have progressed dramatically since those days!



Do you ever struggle to find freely available and reliable online resources to assist your legal research?

The AGD library sends out a fortnightly alert on articles recently added to the Attorney-General's Information Service database, if you would like to receive that alert please email [pacific@ag.gov.au](mailto:pacific@ag.gov.au). You may then request a copy of any articles listed in the alert.

### Legislation

**[www.pacii.org](http://www.pacii.org)** – The Pacific Islands Legal Information Institute (PacLII) collects and publishes legal materials from 20 Pacific island countries on its website. The materials consist mainly of primary materials such as court decisions and legislation but also include decisions of various tribunals, panels, Ombudsmen reports or secondary information such as court rules or bench books.

**[www.legify.com.au](http://www.legify.com.au)** – Legify helps you find the authoritative version of almost 14,000 Australian Acts and Regulations, instantly and direct from the legislative publishers of the Commonwealth, States and Territories.

**[www.legislation.govt.nz](http://www.legislation.govt.nz)** – This site is the authoritative source for New Zealand Acts, Bills, and Legislative Instruments.

Many Pacific island countries also have their own legislation websites.

- Tuvalu (<http://tuvalu-legislation.tv/cms/>)
- Nauru ([http://ronlaw.gov.nr/nauru\\_lpms/](http://ronlaw.gov.nr/nauru_lpms/))
- Tonga (<http://crownlaw.gov.to/cms/>)

## Legal Dictionaries

Legal dictionaries are a helpful way to better understand terms used in the field of law.

- <http://thelawdictionary.org/>
- <http://legal-dictionary.thefreedictionary.com/>
- <http://dictionary.law.com/>
- <http://www.nolo.com/dictionary>

## Citators

Citators help you find documents which cite the original document such as case law, legislation or articles.

- Lawcite (<http://www.paclii.org/LawCite/>)
- Cardiff Index to Legal Abbreviations (<http://www.legalabbrevs.cardiff.ac.uk/>)  
(*search for the meaning of abbreviations for English language legal publications and law reports*)

## Journals

A range of free journal resources are available to assist with your legal research.

- Directory of Open Access Journals ([www.doaj.org](http://www.doaj.org))  
(*online directory that indexes and provides access to quality open access, peer-reviewed journals*)
- National Library of Australia (<http://www.nla.gov.au/app/eresources/list/free>)  
(*free eResources includes journals and databases*)
- National Library of New Zealand (<http://natlib.govt.nz/collections/a-z/subscription-e-resources>)  
(*some free eResources*)
- American Bar Association Law Journal Search Engine (<http://tarltonguides.law.utexas.edu/>)  
(*free search engine that searches the full text of over 400 law reviews and law journals, as well as document databases that host academic papers and related publications; be aware coverage is limited*)

## Alerts

Did you know you can set up your own alerts to monitor the internet for content of interest?

Go to <https://www.google.com.au/alerts>, add your keywords and email and select **Create Alert**. Select **Options** to choose how often you'd like to receive an alert along with language, region and source options.




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## CASE LAW

### **The Court's Jurisdiction to Determine "Native Customs & Usages"**

*Reviewed by: Catherine Evans, Crown Counsel, Crown Law Office, Rarotonga, Cook Islands*



### Introduction

1. In February this year, the Cook Islands Court of Appeal was required to consider whether it had jurisdiction pursuant to Article 66A of the Constitution of the Cook Islands (the Constitution) to determine custom in the case of *Hunt & Browne & Ors v Love de Miguel* CA 2/14, 3/14, 7/14 & 8/14 (the Makea Nui Ariki title).<sup>1</sup>

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<sup>1</sup>*Hunt & Browne & Ors v Love de Miguel* CA 2/14, 3/14, 7/14 & 8/14



2. The Makea Nui Ariki title had remained vacant since 9 March 1994 after the death of Makea Teremoana.

3. Article 66A of the Constitution provides:

*(1) In addition to its power to make laws pursuant to Article 39, 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) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in any respect of any custom, tradition, usage or value that is, and to the extent that it is, 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 to which a custom, tradition, usage or value relates, as to matters to and concerning custom, tradition, usage or existence, extent or application of custom shall be final and conclusive and shall not be questioned in any court of law.*

### **Background**

4. Applications were made to the High Court in 1995 and 1999 to determine the Makea Nui Ariki title. Each proceeding was dismissed because the proposed candidate did not come within the primogeniture rule.<sup>2</sup>

5. In 2013 four applicants made applications pursuant to section 409(f) of the Cook Islands Act 1915 (the Principal Act) to the High Court to succeed to and administer the affairs of the Makea Nui Ariki title. Arising out of the proceedings was a challenge to the jurisdiction of the High Court to determine the matter according to “ancient custom and usage of the Natives of the Cook Islands”.

6. In the 2013 High Court hearing from which the Court of Appeal case arose, Isaac J. noted that the Court did not have the jurisdiction to appoint the Ariki, instead its role is limited to answering questions as to the right of the person to hold office. Isaac J. observed that he was bound by precedent to apply this principle when determining a person’s right to hold the title: “It is clear that since 1923 the Courts have regarded eligibility for appointment to the Makea Nui Ariki Title as being governed by the custom of primogeniture.”<sup>3</sup>

### **The Appeal**

7. The four applicants appealed the High Court decision and the respondent opposed the applications on the ground that the primogeniture rule is to be applied.

8. The issues for the Court of Appeal were:

- a. Do the Courts have jurisdiction to determine the issues noted in paragraphs (b) - (g) below in view of Article 66A(4) of the Constitution?
- b. Does the primogeniture rule apply when considering eligibility for appointments as Ariki of Makea Nui?
- c. If so what is the primogeniture rule and what, if any are the exceptions to it?
- d. What is the role of the Kopu Ariki in the appointment of Makea Nui Ariki?
- e. Who are the members of the Kopu Ariki of Makea Nui?
- f. What role, if any, does the Aronga Mana have in the appointment of Makea Nui Ariki?
- g. Have the Fourth Appellants established that they are the Aronga Mana of the Te Au O Te Tonga?
- h. What role, if any, does an established Aronga Mana have in the appointment of the Makea Nui Ariki?

<sup>2</sup> Supra n 1, para [27]

<sup>3</sup> Supra n 1 quoted by the Court at para [28]

- i. Are the Aronga Mana entitled to be appointed as caretakers of the Makea Nui Ariki title?
  - j. Is Mrs MacQuarie, subject to the completion of the investiture, entitled to be appointed Makea Nui Ariki?<sup>4</sup>
9. During the Court of Appeal hearings the Fourth Appellants raised additional jurisdictional issues which had not been put before the High Court including constitutional issues about the jurisdiction of the Courts in relation to traditional Cook Islands custom. The Court of Appeal considered it appropriate to entertain such fresh arguments following precedent on the ability of parties to raise jurisdictional issues at any time and applied that principle to constitutional questions.
10. The Court of Appeal sought and considered the submissions of all Counsel and because of the constitutional issues that had been raised the Court requested the assistance of the Crown Law Office. All counsel were asked to address the following two points raised on behalf of the fourth appellants:
- a. Whether the effect of Article 66A of the Constitution is to provide the Aronga Mana are the sole and final judge of “matters relating to and concerning custom” to the exclusion of the Courts; and
  - b. Whether Article 66A of the Constitution overruled section 409(f) of the Principal Act and therefore the Court is without jurisdiction in relation to all matters concerning customary titles with the effect that only the Aronga Mana could determine the matter before the Court.<sup>5</sup>
11. In its summary the Court of Appeal preferred the Crown’s submissions which it said expressed the true interpretation of Article 66A:  
 “In short, the effect of Article 66A(4), ... is that if a properly constituted Aronga Mana makes a

relevant ruling or finding as to a point of custom or usage in their respective area/vaka, then as a matter of evidence that opinion must be treated as final and conclusive by the Court and the Court is unable to go behind it.”

12. The Court agreed with the distinction the Crown made between “identification” and “judicial application” as having the effect of leaving intact the judicial role in the application of custom, while deferring to the Aronga Mana’s role in identifying the custom to be applied.<sup>6</sup>
13. The Court went on to note that “as an evidential matter, the opinion of the Aronga Mana can only be binding when such an opinion has actually been properly formulated and expressed. The “final and conclusive” force of the Aronga Mana’s opinion under Article 66A(4) as to custom presupposes the existence of such an opinion. If there is no evidence that an Aronga Mana has actually expressed an opinion on the relevant principle of custom or usage, then it remains open to the Court to determine the applicable custom itself.”<sup>7</sup>
14. The Justices were faced with the problem of there being no clear definition of Aronga Mana or procedure by which it expresses its opinion. The Court was not satisfied that the fourth appellants had established on evidence the custom of who comprises the appropriate Aronga Mana or that they are the appropriate Aronga Mana to advise the Court on the custom of appointing the Makea Nui Ariki. The Court held that it retained the residual power to determine the applicable custom itself.<sup>8</sup>

### **The Primogeniture Rule as Custom**

15. All appellants disputed the applicability of the primogeniture rule because it had not been the determinative factor in the majority of cases concerning succession to the title. The Court reviewed the cases back to the arrival of the missionaries in 1823 and accepted that the

<sup>6</sup> Supra n 1 para [66] & [67]

<sup>7</sup> Supra n 1 para [71]

<sup>8</sup> Ibid

<sup>4</sup> Supra n 1 para [24]

<sup>5</sup> Supra n 1 para [33]

primogeniture rule was not always adopted. The Court observed that as far as the Makea Nui title is concerned, the courts have recognised three exceptions to the rule, an arrangement to comply with the wishes of the last deceased Ariki; suitability to perform the role; and whether the person has left the tribe.<sup>9</sup> The exceptions should not be used to defeat the purpose of the primogeniture rule, there must be compelling reasons to appoint an Ariki who is not entitled to be appointed under the rule, although each succession will depend on its circumstances.<sup>10</sup>

16. The Court expressed caution noted by Sir Thadeus McCarthy that custom should not be seen as immutable – matters which were relevant in 1940 may no longer be relevant and what may have disqualified a candidate 80 years ago may not disqualify a candidate today.<sup>11</sup>

17. The role of the Kopu Ariki is to elect the Ariki, it is required to apply the primogeniture rule as a matter of custom unless one of the three exceptions applies. There must be a clear majority of the members of the Kopu Ariki; earlier court decisions have suggested it is better to keep talking rather than have a divisive position. The Kopu Ariki decision can be challenged in the High Court if the primogeniture rule has not been applied or if the reason for departing from it does not fall within the exceptions referred to above.<sup>12</sup>

### **Decision**

18. The Court dismissed the appeals and made the following declarations:

- a. The primogeniture rule, by custom, applies to the appointment of the Makea Nui Ariki.
- b. The primogeniture rule is that “the eldest surviving child of the deceased Ariki, or in default of issue, the eldest of the next branch succeeds”.

- c. The exceptions to the primogeniture rule are:
  - i. There exists an arrangement requested by the deceased Ariki and approved by the Kopu Ariki before the Ariki’s death.
  - ii. The person is unsuitable to be the Ariki.
  - iii. The person otherwise entitled has left the tribe and/or is living abroad.
  - iv. The Kopu Ariki appoints the Makea Nui Ariki but its selection, including a decision on suitability or unsuitability, is reviewable by the High Court if it falls to follow custom.
  - v. The members of the Kopu Ariki are the descendants of Makea Apera, namely the members of the families descending from Rangi, Upokotohoa, Tataraka and Mere.
  - vi. In terms of custom relating to the Makea Nui Ariki title, the Aronga Mana have no right to be appointed as caretakers and the Court has no power to make such an appointment.<sup>13</sup>

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### **Pacific Researcher’s Colloquium**

*Article by: Australian National University*

The Pacific Research Colloquium (PRC) is a yearly event run by the State Society and Governance in Melanesia Program (SSGM) with the Australia National University’s College of Asia and the Pacific. It brings a wide range of early career researchers and public servants from the Pacific (including Papua and Timor-Leste) to a two week intensive workshop in Canberra to develop skills in social science research in the special context of the Pacific.

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<sup>9</sup> Supra n 1 para [129]

<sup>10</sup> Ibid

<sup>11</sup> Supra n 1 para 134

<sup>12</sup> Supra n 1 para 137 - 138

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<sup>13</sup> Supra n1 para 168 -169

The 2016 PRC was held from 25 January to 5 February. The 23 participants from the region came from Fiji, New Caledonia, Papua, Papua New Guinea, Samoa, Solomon Islands, Vanuatu, and Timor-Leste.

The PRC program included intensive and interactive training on designing, planning, conducting, and writing reports on, research projects. Part of the PRC's focus is on developing the research writing and presentation skills of participants. Scholars from SSGM, other parts of the ANU, and other universities provide mentoring to participants in advance of the PRC, as they develop their research projects, and during the PRC.



There have been two big developments with the PRC in the last year. The first is that the PRC has now been recognised as an accredited course by the ANU. Initially this will only be as a course that SSGM post-graduate students must take as part of their preparation for their research work. In due course, however, this approach to training in research methodology for the Pacific will be part of broader teaching programs.

The second major development is that for the first time a two week program based on the PRC approach was presented in Port Moresby, Papua New Guinea to twenty-five staff of the Constitutional and Law Reform Commission (CLRC). This was SSGM's first experience of presenting an intensive social science research methodology training program to a group of practitioners. The SSGM facilitators learned a great deal from developing and presenting this training

and plan to present a similar course to the Vanuatu Law Commission, as well as similar courses for staff of other Papua New Guinea government institutions on an annual basis over the next few years.

Further information about the PRC program is available at <http://ips.cap.anu.edu.au/ssgm/Pacific-Research-Colloquium2016>.

Information on the 2017 PRC will be available on the SSGM website later in the year, but interested applicants can contact Joanne Ridolfi in the meantime at [joanne.ridolfi@anu.edu.au](mailto:joanne.ridolfi@anu.edu.au).

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## **SPOTLIGHT**

### **Justice system: the moral imperative to root out patriarchy**

*Article by: Hansdeep Singh, ICAAD Co-Founder, Director of Legal Programmes & Jaspreet Singh, ICAAD Co-Founder, Director of Advocacy & Policy*

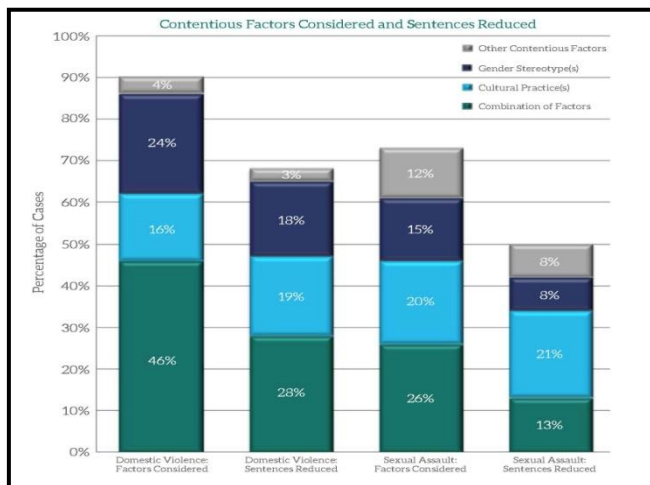
Over a two-year period, ICAAD, an international human rights non-government organisation, and international law firm DLA Piper LLP, reviewed over 900 cases in seven countries in the region to determine whether gender stereotypes, customary reconciliation, informal reconciliation, or other contentious factors were considered during sentencing in domestic violence and sexual assault cases.

*'Contentious factors are those factors which, when used in mitigation by the court, discriminate against the victim on the basis of her gender. This may be through gender stereotyping and rape myths, the consideration of customary practices which may be imbued with gender discrimination (such as forgiveness ceremonies), or other factors which unjustly privilege the interests of the perpetrator over the interests of the victim.'*<sup>14</sup>

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<sup>14</sup> Emily Christie, Hansdeep Singh, and Jaspreet Singh, *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region*, ICAAD &

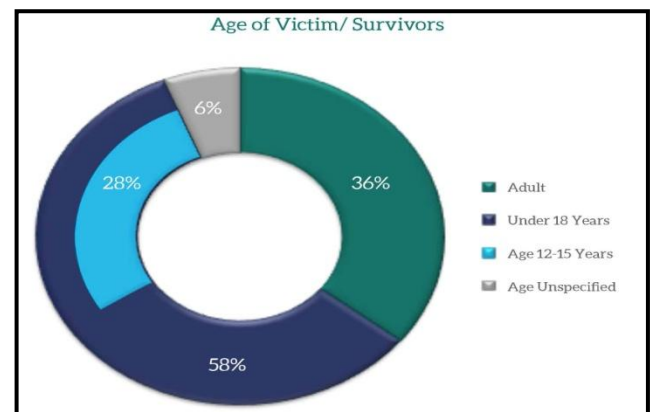
The purpose of the research was to look at how pervasive gender bias was within a wide spectrum of SGBV cases, but not what the particular sentence range should be for particular offences. When contentious factors are relied upon to determine the outcome of sentencing, justice for the victim/survivor and the rule of law are undermined. There are already numerous barriers to successfully addressing SGBV, for example, obtaining a protection order, proper preservation and documentation of evidence at health centers, and just getting the case to prosecution. Therefore, once a case is tried and the result is a suspended or greatly reduced sentence, the perpetrator's violence will likely continue or escalate, and women in the community feel they cannot trust the justice system.



Some of the most important findings from the research were:

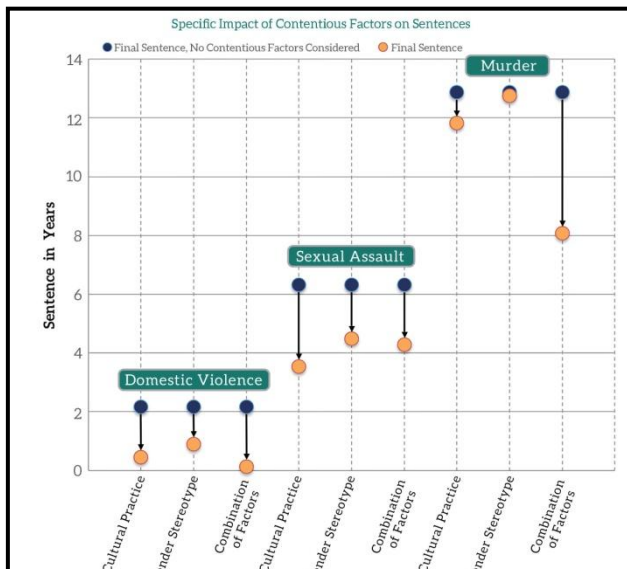
- 58% of victim/survivors were under the age of 18 and 40% were under the age of 15.
- Contentious factors accounted for a 60% reduction in sentences for domestic violence cases and a 40% reduction in sexual assault cases.
- 47% of domestic violence cases resulted in a non-custodial sentence vs. 11% for sexual assault cases.

- In 75% of all cases analysed, contentious factors were raised in court and led to an actual reduction in sentence in more than half of all cases (52%).



The research clearly demonstrates that gender stereotypes and customary/informal reconciliation play a significant role in denying women and girls equal protection under both national and international law. Nevertheless, the justice system is the very institution that needs to be a progressive voice for substantive equality, challenging and ultimately shattering the illusion of male supremacy. Throughout our research, we heard progressive voices from both male and female judges in every jurisdiction. For example, one judge in a sexual assault case concluded:

*'Women are your equal and therefore must not be discriminated on the basis of gender. Men should be aware of the provisions of the 'Convention on the Elimination of all forms of Discrimination against Women' which our country had ratified in 1981. Under the Convention the State shall ensure that all forms of 'discrimination against women' must be eliminated at all costs. The Courts shall be the watchdog with this obligation. The old school of thoughts, that women were inferior to men; or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society.'*<sup>15</sup>



This sentiment echoes a 2006 UN study which noted, '[v]iolence against women is both a means by which women's subordination is perpetuated and a consequence of their subordination.'<sup>16</sup> Armed with the data from our report, *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region*, ICAAD hopes that justice systems in the Pacific region will rise to meet the long-standing challenge of providing equal justice while recognising that civil society can be a strong ally in helping to eradicate gender bias from the judiciary.

## IN FOCUS

### Samoa's National Prosecution Office

Early in 2014, the Attorney General was tasked by the Prime Minister of Samoa to assess whether or not the establishment of an independent national prosecution office for Samoa would resolve some of the issues raised by members of the public concerning prosecution in the country. The main issues raised were the quality of prosecution services within the Government Ministries other than the police, and the apparent conflict between the Attorney General's role as Chief Prosecutor for the country and his role as principal legal advisor for

the Government, as well as the need for uniformity for prosecutions at all levels in Samoa.

The Attorney General then sought the financial assistance of the Commonwealth Secretariat to hire a consultant for the project. The Consultant eventually contracted by the Commonwealth Secretariat through the bidding process was Mr. Nick Cowdery AM, QC, BA, LLB, HonLLD, FAAL and former Director of Public Prosecutions for New South Wales.

A paper was developed by the Attorney General with the assistance of the Consultant for the Cabinet and in consultation with stakeholders such as members of the judiciary, law society, members of the public sector and non-government organisations. The paper eventually submitted to Cabinet discussed all the issues raised in the consultations as well as the issues raised by the Prime Minister which initiated the whole project, and recommended the establishment of a National Prosecution Office (NPO). On 2 December 2014, the Cabinet endorsed the paper and instructed the Attorney General to commence work in the establishment of the NPO.

The Attorney General in close consultation with Mr. Nick Cowdery commenced works in the establishment of such an office. As of 1 January 2016, the NPO officially commenced with the Amendment Act (No.2) 2015 and National Prosecution Office Act 2015.

The core function of the NPO is to conduct, institute and supervise all criminal prosecutions and appeals for the country. Since the beginning of this year, police officers have been seconded to the office to assist the office in taking over all the prosecutions in the District Court. The NPO is now appearing in the District Court as well as taking over all the criminal functions of the Attorney General in the Supreme Court of Samoa.

The Office is to be headed by the Director of Public Prosecutions. At this early stage in effecting the work of the NPO, acknowledgement is given to the

<sup>16</sup> UN Women, *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights*, at 33 (2015)

Ministry of Police and the Ministry of Finance for its assistance and support, as well as the National Provident Fund and the Samoa Land Corporation for their continual support.

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### Send Off: Shang Hai Style

A night in Shang Hai was the theme of the farewell party to Tuatagaloa Aumua Ming Leung Wai, the Attorney General of Samoa.

The theme was a result of brain storming by the Social Committee, of which at the time some questioned whether there was much brain involved in the storming of ideas. Some said that it was the girls in the office because they knew how good they would look, and some said it was the guys because of kung fu moves they always wanted to try out in public but others whispered that it was because Aumua is a descendant of Shang Hai. In any event, whatever the reason, the night was perfect.



It was a celebration of nine years of service to the country as Attorney General of Samoa. As per tradition in everything Samoan, it opened with a prayer from our Chief Legal Drafter Loretta Teueli, followed with a speech delivered by Precious Chang on behalf of the staff, and a farewell song put together by Aumua's young prosecutors Fuifui Ioane and Lagafuaina Tavita. The presentation of the farewell gift, and all formalities ended with the cutting of the "golf" cake designed and created by Aumua's senior prosecutor Leone Sua-Mailo.

Entertainment then started 'Shang Hai style' with items from four different teams in the office. The

teams had to compete on who could perform the best kung fu moves whilst dancing in genuine Shang Hai style. The team led by Aumua's young drafter Kylie Wilson won the competition. The dance floor then opened and the Attorney General was also able to show us that he too had some impressive kung fu moves on the dance floor. It was a great night to thank the Attorney General for being an amazing person who led our office throughout these nine years and inspired us to go where no Office of the Attorney General had gone before. As we told the Attorney General that night, it is not goodbye but hello to a new journey for him, for us, and our new relationship with him. 'Ziezie' is the word 'new journey in life' in Shang Hai style.

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### RECENT APPOINTMENTS

#### New Samoan Attorney General: Lemalu Hermann Retzlaff



After starting as a Refugee Branch Officer for the New Zealand Immigration Service as a graduate 1999, Mr Retzlaff moved to Samoa (his country of birth) and was the Senior Commercial Law Lecturer and Head of Department for the Faculty of Commerce, National University of Samoa from 2001 to 2004.

In 2005, he moved to Auckland with his family to take up a position as a Crown Prosecutor with Meredith Connell. At the end of 2009, Mr Retzlaff became Senior Solicitor with the Public Defence

Service. This rounds up ten straight years of litigation work experience.

Mr Retzlaff has also acted as a Moot Judge for the Faculty of Law, and the Pacific Students Moot Court, and has completed his third year in a row of being an Instructor for the Auckland District Law Society, *Introduction to Criminal Law Course*.

### New Marshall Islands Attorney General: Dr Filimon Manoni



Dr Manoni formerly served as the Legal Advisor to the Forum Fisheries Agency (FFA) in Solomon Islands. In addition, he provided in-house legal advice on contracts, legal support to Corporate Services and the FFA Management for the past two years and three months.

Prior to taking up this role with FFA, Dr Manoni had served four years as the Marshall Islands Attorney General. He is a member of the Marshall Islands Bar Association and holds a Marshall Islands Citizenship.

Dr Manoni holds a Bachelor of Laws Degree (LLB) from the University of Papua New Guinea, a Masters (International Law) from the International Maritime Law Institute, University of Malta, and a PhD (Oceans Resources and Maritime Security) from the Australian National Centre for Oceans Resources and Security, University of Wollongong.

## WORKSHOPS & OPPORTUNITIES

### AGD Pacific Legal Policy Twinning Program

*Interested in doing a placement with the Australian Attorney-General's Department?*

Applications for the AGD Pacific Legal Policy Twinning Program are now open, and close on **11 July 2016**. The Twinning Program will run from 24 October to 16 December 2016 in Canberra, and acceptance is through a competitive process.

The successful candidates will undertake a two month placement in AGD to work on a current legal policy project with a crime and policing focus, improve their legal policy development skills, and become effective role models and advocates for good policy practices at home and in the region.

You can apply online or download an application form from:

<https://www.ag.gov.au/Internationalrelations/InternationalLegalAssistance/Pages/PacificLegalPolicyTwinningProgram.aspx>

Highly ranked applicants may be offered other professional development opportunities including participation in the AGD Pacific Legal Policy Champions Training Program.

Enquiries about the program and the application process more generally should be directed to Marie Wynter on [marie.wynter@ag.gov.au](mailto:marie.wynter@ag.gov.au) or +61 2 6141 2742, and cc'ed to [Pacific@ag.gov.au](mailto:Pacific@ag.gov.au).



## PILON Advanced Litigation Skills Training Programme

Planning is now well underway for the 2016 PILON Advanced Litigation Skills programme to be held in Wellington, New Zealand, 6-11 November 2016.

The programme is aimed at practitioners with at least six years' post-admission litigation experience who are intending to put their training to use for the benefit of their indigenous communities by remaining in practice in their respective countries. The course is limited to 18 participants from all PILON nations and demand will be high for the limited number of positions. The experience and learning opportunities for the participants is of the highest order with past participants having benefitted through career progression, many rising to senior public positions in the Pacific.

The goal of the programme is to improve the administration of justice in the Pacific and increase confidence in Pacific legal systems by improving the standard of advocacy in Pacific courts by providing practical advocacy and litigation skills training that covers both preparation for and management of litigation as well as courtroom advocacy.

If you or anyone you know is interested, please contact Jacki Cole on [Jacki.Cole@crownlaw.govt.nz](mailto:Jacki.Cole@crownlaw.govt.nz)



## JOB OPPORTUNITY:



### **PILON Secretariat Coordinator.**

The PILON Secretariat requires a Coordinator based in Apia, Samoa for a period of two years (from September 2016, or as negotiated), with the possibility of an extension. Potential candidates should be from a PILON member country.

Applications are due by 11:30pm (Australian Eastern Standard Time) **25 July 2016** to [pacific@ag.gov.au](mailto:pacific@ag.gov.au).

The salary range is \$WST 65,000 - 85,000 per annum, with reasonable relocation expenses, plus first month's accommodation for applicants living outside of Samoa.

The Coordinator will be expected to undertake a range of activities to progress the PILON work plan, including coordinating the PILON Annual Meeting as well as other related initiatives and working groups, representing the interests of PILON members at regional forums, actively managing the PILON budget, facilitating law and justice development through cooperation with donors and development service providers in the region, and liaising and maintaining productive relationships with numerous stakeholders, including PILON members, observers, donors, regional organisations and other interested parties.

For a detailed position description, please visit [www.pilonsec.org](http://www.pilonsec.org)