

### **3. THE LEGAL AND POLICY FRAMEWORK RELATED TO EQUALITY**

This part of the report describes and analyses the legal and policy framework governing discrimination and equality issues in Solomon Islands, in order to assess its adequacy to address the patterns of discrimination identified in the preceding part. It covers both the international legal obligations of the state, and the domestic legal and policy framework which protect the rights to equality and freedom from discrimination. In respect of domestic law, it predominantly examines the 1978 Constitution of Solomon Islands, the main source of anti-discrimination protection in the country. Notably, Solomon Islands is currently in the process of reforming its constitution. This part also considers the constitutional reform process, including by examining the draft constitutions that have been published by the Constitutional Reform Unit, the body set up and tasked with drafting a new constitution. This part goes on to explore limited domestic laws and draft laws which have some equality and anti-discrimination relevance before referring to government policies which may have an impact on equality. Finally, this part examines the implementation and enforcement mechanisms of the law, both through the courts and through specialised institutions.

In order to assess the full picture of the legal framework as it relates to equality in Solomon Islands, this part should be read together with the previous part which examined laws that discriminate, or which are open to discriminatory interpretation.

Throughout this part, Solomon Islands legal and policy framework is analysed in relation to the extent to which it complies with international law and best practice on equality. Whilst focusing on the laws, policies and mechanisms of enforcement, it also references comments by equality and human rights lawyers in Solomon Islands on their practical efficacy and the extent to which they are used.

#### **3.1 International Law**

This section provides an overview of Solomon Islands international obligations in relation to the rights to equality and non-discrimination. Solomon Islands has ratified four key UN human rights treaties and has thereby expressly agreed to protect, respect and fulfil the rights contained in these

instruments and to be bound by the legal obligations contained therein. In addition, Solomon Islands is bound by customary international law which provides some important protection in respect of the right to non-discrimination on certain grounds.

### **3.1.1 Major United Nations Treaties Relevant to Equality**

Solomon Islands has a mixed record of participation in international human rights and other legal instruments. It has committed itself to four of the nine core United Nations human rights treaties, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (as well as the Optional Protocol to CEDAW); and the Convention on the Rights of the Child (CRC). Solomon Islands has signed, but not ratified, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the First and Second Optional Protocols to the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Calls have been made for Solomon Islands to join the remaining international human rights instruments. At Solomon Islands' Universal Periodic Review by the Human Rights Council in May 2011, several recommendations highlighted the need to join the remaining international human rights instruments, all of which were accepted by Solomon Islands.<sup>499</sup> Despite this commitment, Solomon Islands has not since ratified or signed any further core treaties.

---

499 Solomon Islands Country Statement, *Solomon Islands Response to HRC-UPRWG 115 Recommendations*, 21<sup>st</sup> September 2011, p. 3, available at: [http://www.uprinfo.org/sites/default/files/document/solomon\\_islands/session\\_11\\_may\\_2011/solomonislandplenarystatement2011.pdf](http://www.uprinfo.org/sites/default/files/document/solomon_islands/session_11_may_2011/solomonislandplenarystatement2011.pdf).

<b>Instruments Relevant to Equality</b>	<b>Signed</b>	<b>Ratified / Acceded / Succeeded</b>
International Covenant on Civil and Political Rights (1966)	No	No
Optional Protocol I to the International Covenant on Civil and Political Rights (1966)	No	No
International Covenant on Economic, Social and Cultural Rights (1966)	n/a	Succeeded
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)	24 October 2009	17 March 1982
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	n/a	No
Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)	No	Succeeded
Convention on the Elimination of All Forms of Discrimination against Women (1979)	n/a	17 March 1982
Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (1999)	n/a	No
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	No	Acceded
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	No	6 May 2002
Convention on the Rights of the Child (1989)	n/a	Acceded
Optional Protocol I to the Convention on the Rights of the Child (2000) – involvement of children in armed conflict	24 September 2009	6 May 2002
Optional Protocol II to the Convention on the Rights of the Child (2000) – sale of children, child prostitution and child pornography	24 September 2009	No
Optional Protocol III to the Convention on the Rights of the Child (2011) – communicative procedure	No	No
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	No	Acceded
Convention on the Rights of Persons with Disabilities (2006)	23 September 2008	10 April 1995
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	24 September 2009	No
International Convention for the Protection of All Persons from Enforced Disappearances (2006)	No	No

Further, the extent to which Solomon Islands' ratification of ICESCR, ICERD, CEDAW and CRC has resulted in a full acceptance and co-operation with the obligations and relevant treaty body regimes has been patchy.

### 3.1.1.1 International Covenant on Economic, Social and Cultural Rights

Solomon Islands succeeded to the ICESCR in 1982, four years after its independence from the United Kingdom. Upon succession, the government declared that Solomon Islands maintained the reservations entered by the United Kingdom on its own ratification in 1976 “save in so far as the same could not apply to Solomon Islands”.<sup>500</sup> As a result, Solomon Islands has reserved or maintained rights to postpone a number of the ICESCR obligations with significant implications on the right to equality.

Notably, Solomon Islands reserves the right to postpone the application of the Article 7(a)(i) requirement to ensure fair wages and equal remuneration for work of equal value without distinction, “in so far as it concerns the provision of equal pay to men and women for equal work in the private sector”.<sup>501</sup> This reservation is directly contrary to the principle of equality, which demands equal pay to men and women for equal work. In addition to the ICESCR, the principle of equal pay for work of equal value is enshrined in several international instruments, including the CEDAW<sup>502</sup> and the Equal Remuneration Convention (No. 100) of the International Labour Organization (ILO) both of which have been ratified without reservation by Solomon Islands and so constitute binding obligations on the state.

Solomon Islands has also reserved the right to postpone the obligations to ensure the widest possible protection and assistance be accorded to the family and that marriage be entered into with the free consent of the intending spouses in respect to “a small number of customary marriages”.<sup>503</sup> This reservation seriously limits the rights and freedoms of women. Customary marriages in Solomon Islands are based on inter-familial and inter-clan loyalties and obligations and usually envisage the payment of a bride price

---

500 See endnote no. 14 to the list of participants to the International Covenant on Economic, Social and Cultural Rights, available at: [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty#14](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty#14).

501 United Kingdom of Great Britain and Northern Ireland, Declarations and Reservations to the ICESCR, available at: [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mt-dsg\\_no=iv-3&src=treaty#EndDec](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mt-dsg_no=iv-3&src=treaty#EndDec).

502 Convention on the Elimination of All Forms of Discrimination against Women, Article 11.

503 See above, note 501.

and the exchange of food and gifts during a traditional ceremony.<sup>504</sup> In this context, women are not always free to decide whether, when and whom to marry. There is also evidence that the bride price significantly shapes the relationship of the couple by subjecting women to their husband's authority and making them more likely to experience domestic violence.<sup>505</sup> The bride price may affect customary decisions in custody disputes when the marriage ends. Thus, if the bride price has been paid, in case of divorce or death of the spouse, the father or his family will be entitled to custody of the couple's children, whilst if it has not been paid the mother or her family will have the right to take care of them.<sup>506</sup> Allowing young girls to be married after the age of puberty, customary law also favours early marriages and it is not uncommon for a girl to be married at the age of 11–12.<sup>507</sup> As a result of the realities of customary marriage in Solomon Islands, the reservation creates serious concerns from the perspective of equality and non-discrimination.

In addition, Solomon Islands' declaration in relation to the obligation to require compulsory primary education is problematic from an equality perspective.<sup>508</sup> Ensuring equality of opportunity and participation of all people regardless of their socio-economic and other characteristics necessitates some important basic socio-economic provisions. Compulsory primary education is one of these.<sup>509</sup>

Under Articles 16 and 17 ICESCR Solomon Islands must comply with a reporting procedure which enables the extent to which the state is observing

---

504 Care, J.C. and Brown, K., "Marit Long Kastom: Marriage in the Solomon Islands", *Int J Law Policy Family* 18 (1), 2004, pp. 52–75, available at: <http://lawfam.oxfordjournals.org/content/18/1/52.short>.

505 Secretariat of the Pacific Community for Ministry of Women, Youth & Children's Affairs, *Solomon Islands Family Health and Safety Study: A study on violence against women and children*, 2009, pp. 149–151, available at: <http://countryoffice.unfpa.org/pacific/drive/SolomonIslands-FamilyHealthandSafetyStudy.pdf>.

506 *Ibid.*

507 Jalal, I., *Harmful Practices against Women in Pacific Islands Countries: Customary and Conventional Laws*, EGM/GPLHP/2009/EP.15, 2009, available at: [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2009/Expert%20Paper%20EGMGPLHP%20Imrana%20Jalal\\_.pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Imrana%20Jalal_.pdf).

508 The declaration relates to Article 13(2)(a) and Article 14 of the ICESCR.

509 For further discussion of access to education in Solomon Islands see Parts 2.1–2.4 and, in particular, Part 2.6, above.

the rights contained within the ICESCR to be assessed. Solomon Islands submitted its initial report in 2001 and was examined by the Committee on Economic, Social and Cultural Rights (CESCR) for the first time in 2002. However, despite the Committee's request for the second periodic report to be submitted by 30 June 2005, no further report has been submitted.

### **3.1.1.2 International Convention on the Elimination of All Forms of Racial Discrimination**

Solomon Islands succeeded to the ICERD in 1982, four years after its independence from the United Kingdom. However, it has not submitted any of the reports it is required to submit in accordance with the reporting procedure contained in Article 9 ICERD since its initial report in 1983, resulting in criticism from the Committee on the Elimination of Racial Discrimination (CERD) when it examined Solomon Islands in 2002.<sup>510</sup>

### **3.1.1.3 Convention on the Elimination of All Forms of Discrimination against Women**

In 2002, *Solomon Islands* acceded to the CEDAW and the first Optional Protocol to the CEDAW which recognises the competence of the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) to consider complaints from individuals. It made no reservations or declarations. However, Solomon Islands has failed to comply with its reporting obligations under Article 18 CEDAW. It submitted its combined initial to third periodic report to the Committee in 2013.<sup>511</sup> On 14 November 2014, the Committee, in its concluding observations on the combined reports, welcomed the "constructive dialogue" it had had with Solomon Islands but expressed its regret that the combined reports were only submitted in 2013 despite the state acceding to the Convention in 2002.<sup>512</sup>

---

510 United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations: Solomon Islands*, CERD/C/60/CO/12, 21 May 2002, Para 2.

511 United Nations Committee on the Elimination of Discrimination against Women, *Consideration of reports submitted by States parties under article 18 of the Convention, Initial to third periodic reports of States parties; Solomon Islands*, UN Doc. CEDAW/C/SLB/1-3, 30 January 2013.

512 United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined initial, second and third periodic reports of Solomon Islands*, UN Doc. CEDAW/C/SLB/CO/1-3, 14 November 2014, Para 2.

The reservation made under ICESCR regarding “a small number of customary marriages” taken together with the continued practices of customary marriage amount to a violation of Solomon Islands’ binding obligation to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” under Article 16 of the CEDAW. Specifically, arrangement of marriages by the families significantly restricts the possibility for women to decide if, whom and when they will marry, contravening, *inter alia*, Article 16(1)(a) and (b) of the CEDAW; the limitations of women’s rights in marriage compromise their equal status and accord to the husband the status of head of household, violating, *inter alia*, Article 16(1)(c) of the CEDAW; and the possibility that, through the practice of bride price, women are subjected to the authority and decisions of their husbands, also in relation to issues of health and fertility affects, their access to education, information, and employment, has a significant impact on their physical and mental well-being, and would be a violation of Article 16(1)(e) of the CEDAW. In addition, the consideration on whether a bride price has been paid for the marriage in order to make a custody decision impinge upon the prioritisation of the “best interest of the child” and violate Article 16(1)(d) and (f) of the CEDAW. Finally, child marriage is in violation of Article 16(2) of the CEDAW which requires a minimum age for marriage.

Solomon Islands has retained a reservation regarding its right to interpret the CEDAW Article 6 right of everyone to work as “not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory,”<sup>513</sup> demands attention from an equality perspective. The principle of non-discrimination in employment is enshrined in several international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the ICESCR and the ICERD. Discrimination on the grounds of national origin, place of birth and place of residence is explicitly prohibited by the ICESCR (Article 2(2) as interpreted by the CESCR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 7) and the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (Article 1(1)). The principle of equality and non-discrimination cannot be derogated in international human rights law

---

513 See above, note 501.

as doing so would undermine the realisation of any of the international treaties' rights. Only when the justification for differential treatment is "reasonable and objective", the aim of such differentiation is "promoting the general welfare in a democratic society" and the measures taken are proportionate to the aim sought, some form of differentiation is considered admissible.<sup>514</sup> The right to equality also requires that positive action is taken to overcome past disadvantage.<sup>515</sup> Positive measures applied to any groups in order to increase their representation at work or in any other sphere, or accelerate the achievement of equality, should be temporary and last only for the time necessary to reach the aim sought.<sup>516</sup>

Whether or not measures which favour people in the employment sphere on grounds of their place of birth or residence can be justified from an equality perspective depends in large part upon the context in which the measures are introduced. As pointed out in the introduction, Solomon Islands is characterised by deep ethnic and cultural divisions. Solomon Islanders identify strongly with others on the basis of *wantok* – groups defined on the basis of shared linguistic and cultural heritage, and place of origin – and on the basis of the island from which they originate.<sup>517</sup> Ethnic resentment over jobs and land rights was also the key causal factor to the 1998–2003 conflict between Guadalcanal people and Malaitian immigrants in Guadalcanal.<sup>518</sup> Against this backdrop, the government may be pursuing a legitimate aim in keeping this reservation. However, it would be necessary to ensure that any measures taken to promote access to employment for certain groups must be benefitting disadvantaged groups, must be temporary,<sup>519</sup> as well as proportional. It is difficult to see how a measure which completely bans people from other regions from applying for a particular job can be justified when, for example, a more proportionate approach, even if there is a legitimate

---

514 United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, UN Doc E/C.12/GC/20, Para. 13.

515 Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, Principle 3, p. 5.

516 See above, note 514, Para. 39.

517 See Introduction, Country Context (section 1.3).

518 See Introduction, History, Government and Politics (section 1.4).

519 United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: Article 4, Paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women (Temporary Special Measures)*, 2004, Para 14.

aim being pursued, would be to allow applications from all but prefer those from local residents.

### 3.1.1.4 Convention on the Rights of the Child

Solomon Islands acceded to the Convention on the Rights of the Child (CRC) in 1995. It submitted its initial report to the Committee on the Rights of the Child (the CRC Committee) in 2002 in accordance with Article 44 CRC.<sup>520</sup> However, despite the CRC Committee's request for the second and third periodic report to be combined and submitted by 9 May 2007, no further reports have been submitted by the state.

As noted above in the discussion of the CEDAW, the reservation on ICESCR regarding a "small number of customary marriages" is arguably a violation of duties under the CEDAW: the practice of paying a bride price in marriage has an impact on custody decisions, impinging upon the prioritisation of the "best interest of the child", in violation of Article 16(1)(d) and (f) CEDAW. It also arguably violates Article 18 of the CRC. The practice of child marriage itself violates Articles 12(1) and 19(1) of the CRC, which enshrine respectively the right of the child to express their views freely and the right to protection from all forms of abuse.

### 3.1.2 Other Treaties Related to Equality

Solomon Islands ratified Convention No. 100 of the International Labour Organisation (ILO) on Equal Remuneration in 2012, and ILO Convention No. 111 (Discrimination (Employment and Occupation) Convention) in 2012. It has not, however, ratified ILO Convention No. 169 on Indigenous and Tribal Peoples. Solomon Islands succeeded to the 1960 UNESCO Convention against Discrimination in Education in 1982. It acceded to the 1951 UN Convention relating to the Status of Refugees in 1995, but has not ratified the 1954 UN Convention relating to the Status of Stateless Persons.

---

<sup>520</sup> United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention, Initial reports of States parties: Solomon Islands*, UN Doc CRC/C/51/Add.6, 12 July 2002.

<b>Instruments Relevant to Equality</b>	<b>Signed</b>	<b>Ratified / Acceded / Succeeded</b>
Convention Relating to the Status of Refugees (1951)	n/a	Acceded 28 February 1995
Convention Relating to the Status of Stateless Persons (1954)	No	No
Convention on the Reduction of Statelessness (1961)	No	No
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	n/a	Succeeded 3 September 1981
UN Convention against Transnational Organised Crime (2000)	No	No
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)	No	No
Rome Statute on the International Criminal Court (2002)	3 Dec 1998	No
UNESCO Convention Against Discrimination in Education (1960)	n/a	Succeeded 19 March 1982
Forced Labour Convention (1930) (ILO Convention No. 29)	n/a	Ratified 6 August 1985
Equal Remuneration Convention (1951) (ILO Convention No. 100)	n/a	Ratified 13 April 2012
Discrimination (Employment and Occupation) Convention (1958) (ILO Convention No. 111)	n/a	Ratified 13 April 2012
Worst Forms of Child Labour Convention (1999) (ILO Convention No. 182)	n/a	Ratified 13 April 2012
Indigenous and Tribal Peoples Convention (1989) (ILO Convention No. 169)	No	No

### 3.1.3 Treaties Not Ratified by Solomon Islands

While the abovementioned treaties relevant to equality which have not been ratified by Solomon Islands do not bind the state they, together with comments of their respective treaty bodies, do have an important interpretative function when determining the obligations of Solomon Islands. They should be used to elucidate: i) Solomon Islands' obligations under the treaties to which it is a party, to the extent that the treaties to which it is not a party can explain concepts which are also found in those treaties to which

it is a party; ii) the content of the right to equality and non-discrimination for persons covered by ICESCR, CERD, CEDAW and CRC who are vulnerable to multiple discrimination on grounds which include those protected by other treaties; and iii) Solomon Islands' obligations under customary international law.

### 3.1.4 Customary International Law

Under international law, binding legal obligations on states derive from customary international law as well as from treaty law. Customary international law is deduced over time from the practice and behaviour of states.<sup>521</sup> Customary international laws are particularly significant when they reach a level – known as peremptory norms<sup>522</sup> – at which they are binding on all states and cannot be derogated from. It is largely accepted that the prohibition of racial discrimination is a peremptory norm of international customary law.<sup>523</sup> In addition, it can be said that the prohibition of discrimination on other grounds, such as gender and religion, may now be part of customary international law, although not yet reaching the status of a peremptory norm.<sup>524</sup> Some argue, and it has been stated by the Inter-American Court of Human Rights, that the broader principle of non-discrimination

---

521 Shaw, M., *International Law*, Fifth edition, Cambridge University Press, 2003, p. 69.

522 *Prosecutor v Anto Furundzija* (Judgement) ICTY-IT-95-17/1-T (10 December 1998), Para 153; Parker, K. and Neylon, L.B., "Jus Cogens: Compelling the Law of Human Rights", *Hastings International and Comparative Law Review*, Vol. 12, 1988–1989, p. 417. See also Vienna Convention on the Law of Treaties, Article 53.

523 De Schutter, O., *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2010, pp. 64–68 and the materials referred to therein; Pellett, A., "Comments in Response to Christine Chinkin and in Defense of *Jus Cogens* as the Best Bastion against the Excesses of Fragmentation", *Finnish Yearbook of International Law*, Vol. 17, 2006, p. 85; cf Shaw, M., *International Law*, Sixth edition, Cambridge University Press, 2008, p. 287, who refers to it as part of customary international law, with no reference to it being a peremptory norm; Tanaka, J. (in dissent) *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ Rep (International Court of Justice), pp. 293, 299–300.

524 *Ibid.*, Shaw, p. 287; *Ibid.*, Pellett, p. 85; Cassel, D., "Equal Labour Rights for Undocumented Migrant Workers", in Bayefsky, A. (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, Martius Nijhoff Publishers, 2006, pp. 511–512.

is a peremptory norm of customary international law<sup>525</sup> but this is subject to debate.<sup>526</sup> Accordingly, it is clear that, as a matter of customary international law, Solomon Islands cannot derogate from the obligation to protect, respect and fulfil the right to be free from racial discrimination; is obliged to protect, respect and fulfil the right to be free from gender and religious discrimination; and it is arguably obliged to protect, respect and fulfil the right to be free from discrimination on other grounds.

### 3.1.5 Status of International Obligations in National Law

Solomon Islands is a dualist state, its 1978 Constitution making no provision for the automatic incorporation of international law into domestic law. In order for international treaties to become part of domestic law, they must therefore be enacted in legislation.

Of course, states remain obliged to comply with their international legal obligations, regardless of their domestic laws. It is not a defence to a breach of Solomon Islands' international obligations to argue that it was complying with its own national law.<sup>527</sup> Further, international human rights law requires the passing of national legislation to provide protection from violations of human rights, including the rights to equality and non-discrimination.<sup>528</sup> Part 2 of this report has identified that national law falls short in relation to enacting important international equality and non-discrimination protections.

---

525 Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 - Juridical Condition and Rights of Undocumented Migrants*, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), 17 September 2003, p. 23. See also, by way of example, Martin, F.F. et al, *International Human Rights and Humanitarian Law: Cases, Treaties and Analysis*, Cambridge University Press, 2006, pp. 34–35.

526 Bianchi, A. "Human Rights and the Magic of *Jus Cogens*", *The European Journal of International Law*, Vol. 19, 2008, p. 506; See Cassel, above note 524, pp. 511–512; and see Pellett above, note 523, p. 85.

527 Vienna Convention on the Law of Treaties, Article 27. This rule is also accepted to be customary international law: see Shaw, above note 523, pp. 124–126.

528 See, for example, Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C, No. 4, Paras 166-177; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001) A.H.R.L.R. 60 (ACHPR 2001), Para 46; European Court of Human Rights, *A. v The United Kingdom*, Application No. 25599/94, 23 September 1998, Paras 22-24; United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc, CCPR/C/21/Rev.1/Add. 13, Para 7.

Where national law falls short in this way, the approach of courts in countries where English common law was adopted to the application of international law has largely been the same. In the event of ambiguity in domestic law, courts have favoured the interpretation that complies with international treaty obligations. However, where there is no ambiguity, precedence is given to domestic law.<sup>529</sup> Solomon Islands' courts largely take this approach.

There appears to be only one case in Solomon Islands which considers the principles of interpretation with regard to Solomon Islands' international human rights law obligations. In *Kelly v Regina*,<sup>530</sup> the Court of Appeal, the supreme court of Solomon Islands, considered the application of the CRC in an appeal from a conviction and sentence to life imprisonment of a 14 year old convicted of murder. The Court stated that international treaties and conventions relating to the treatment of children "may provide interpretative assistance in applying local law".<sup>531</sup> However, the Court, as the High Court had done in the case before it,<sup>532</sup> significantly limited the extent to which it considered itself bound to apply them. It stated that, unless there is ambiguity, such treaties and conventions "cannot control or displace the positive provisions of Solomon Islands law under which the prosecution was instituted and the trial of the appellant took place".<sup>533</sup> It noted that the CRC had not been incorporated into domestic law by parliamentary ratification and that "[a]t most, therefore, it serves as a guide to the procedure to be followed in case of this kind [sic]".<sup>534</sup> Further, it made no reference to customary international law.

In the case, the Court dealt with the issues of the prosecution of the appellant and the sentence of life imprisonment separately. In respect to prosecution, the Court stated relevant national law, the Penal Code, did not contain any ambiguity on this point "that would permit recourse to international law in order to interpret it or alter it even if it laid down a different norm

---

529 See Shaw, above note 523, pp. 128–147; 151–154.

530 *Kelly v Regina* [2006] SBCA 21, CA-CRAC 019 of 2006 (25 October 2006).

531 *Ibid.*

532 *K v Regina* [2005] SBHC 150; HCSI-CRC 368 of 2005 (16 September 2005).

533 *Ibid.*

534 *Ibid.*

altogether”.<sup>535</sup> With respect to the issue of sentencing, the Court appeared to allow the appeal on the basis that the sentencing court had failed to apply a national law, section 13 of the Juvenile Offenders Act 1972, which displaced the requirement of a mandatory life sentence under section 200 of the Penal Code and gave the court discretion to sentence a person under 18 years of age to a sentence of detention.<sup>536</sup> However, the Court went on to say that, to the extent that there was any ambiguity, this was resolved by section 5(g) of the Constitution and “if need be, also by international treaties and conventions on the subject”.<sup>537</sup> Earlier in its judgment the Court had noted that Article 37(a) of the CRC prohibited life imprisonment without the possibility of release for those under 18 and that the International Guidelines for the Administration of Juvenile Justice (the “Beijing Rules”), which did not constitute terms of binding treaty, laid down “desiderata” relevant to sentencing but that the latter appeared to have been complied with in any event. While these comments of the Court do indicate some recognition, albeit *obiter*, of the importance of national law complying with international norms, the Court did little more than pay them lip service. It did not give full consideration to the various provisions of the CRC that set out protections for prosecution of those under the age of 18, instead preferring the “safeguards” in its own domestic laws.

The case was remitted to the High Court for a new sentencing hearing. In its sentencing judgment the High Court demonstrated a greater willingness to consider the provisions of the CRC, noting that, in reaching its decision, it had in mind:

*[T]he guidelines set out in the Convention on the Rights of the Child regarding how young persons ought to be treated. That the best interests of the child should be the central concern in any sentencing process and that care and rehabilitation should be the main focus of any order of the courts on conviction.*<sup>538</sup> (Footnotes removed.)

---

535 *Ibid.*

536 *Ibid.*

537 *Ibid.*

538 *Regina v K* [2006] SBHC 53; HCSI-CRC 419 of 2005 (6 December 2006).

Nonetheless, no further explanation of the meaning of the CRC requirements was provided. This suggests that Solomon Island courts will not step in to rectify gaps in national law and guidance on important matters of human rights.

In 2012, the High Court demonstrated a greater willingness to rely in part on international human rights law in reaching a decision although it provided no comments on the principles of the interpretation of international obligations by national courts. In *Regina v Gua*,<sup>539</sup> a case with important gender equality implications, the High Court considered whether, as a matter of law, a man could be found guilty of raping his wife.<sup>540</sup> In finding that the common law rule that he could not was no longer applicable, the Court relied in part on the CEDAW. The Court held that:

*[I]n this modern time, marriage is now regarded as a partnership of equals and this principle of equality has been reflected, not only in international conventions to which Solomon Islands is a party, but also in the entrenched provisions of the Constitution.*<sup>541</sup>

Article 15 and 16 of CEDAW were then referenced among the reasons for it reaching its decision, although the decision was brief and so the extent to which the Court was influenced by the CEDAW is unclear.

It is noteworthy that the current constitutional reform process looks likely to result in a constitution which retains the dualist system. Each of the 2004, 2009, 2011 and 2013 Draft Constitutions includes an identically worded provision, which would provide that the law of Solomon Islands would include “customary international law, international conventions, treaties and agreements applicable to Solomon Islands so far as they are incorporated into domestic law after this constitution has come into effect”, thereby expressly

---

539 *Regina v Gua* [2012] SBHC 118; HCSI-CRC 195 of 2011 (8 October 2012).

540 For a more detailed discussion of the case, particularly with respect to its implications for equality and non-discrimination, see subsection 3.2.5 below.

541 See above, note 539, Para. 51.

retaining the dualist system.<sup>542</sup> The 2014 Draft requires courts to consider international law when interpreting its Bill of Rights.<sup>543</sup>

## 3.2 National Law

There is a dearth of national law dealing with matters of equality and non-discrimination. Aside from the provisions of the 1978 Constitution of Solomon Islands, there is not even partial protection from discrimination in the law. What follows is predominantly an analysis of the constitutional protections provided, together with a consideration of those which may become available through the reform process as this looks likely to remain the most significant legal protection on offer for some time. There is no sign of any move towards comprehensive equality legislation and even attempts to provide single-ground protection in national law have been hampered by slow processes and disagreements.

### 3.2.1 The 1978 Constitution

The 1978 Constitution of Solomon Islands is currently the principal instrument governing the protection of human rights in national law. It is the supreme law of Solomon Islands and other laws which are inconsistent with it shall be void.<sup>544</sup> As a result, this section considers its provisions in some detail. However, it is important to note that, since 2004, there has been ongoing consultation on constitutional reform and this is predicted to be nearing its conclusion. As such, it is currently unclear how long the 1978 Constitution will remain in force.<sup>545</sup>

---

542 2004 Draft Constitution of Solomon Islands, section 9(1)(f); 2009 Draft Constitution of Solomon Islands, section 9(1)(h); 2011 Draft Constitution of Solomon Islands, section 12(1)(h); and 2013 Draft Constitution of Solomon Islands, section 15(1)(i). For a further discussion of the constitutional reform process in so far as it relates to equality and non-discrimination, see subsection 3.2.2 below.

543 Draft Constitution of Solomon Islands 2014, section 48. Please note that a reference to the 2014 Draft in this report is a reference to the Bill of Rights section of the Draft Constitution published by the Constitutional Reform Unit: Office of the Prime Minister and Cabinet Joint Constitutional Congress and Eminent Persons Advisory Council on 6 May 2014. The full 2014 Draft is only available in full in hard copy form at the offices of the Constitutional Reform Unit. The full draft has not been analysed in this report.

544 Constitution of Solomon Islands, 1978, section 2.

545 For a detailed discussion of the constitutional reform process in so far as it relates to equality and non-discrimination see subsection 3.2.2 below.

The non-binding preambular pledges to the Constitution indicate a recognition of the importance of equality and its centrality to the Constitution. The upholding of the principle of equality is identified as a key purpose of the Constitution in one of the five pledges:

*(b) we shall uphold the principles of equality, social justice and the equitable distribution of incomes.*

The pledges also identify the need to “enhance human dignity”, “build communal solidarity” and “cherish and promote the different cultural traditions within Solomon Islands”.<sup>546</sup> Accordingly, at the outset a commitment to equality, diversity and cohesion is indicated. However, when reviewing the substance of the 1978 Constitution itself it becomes clear that there are large gaps in the protections it provides.

The *Fundamental Rights of the Individual*, the most significant provisions of the 1978 Constitution for the purpose of upholding equality and non-discrimination, are contained within Chapter II. According to section 3, “every person in Solomon Islands” is entitled to fundamental rights. This creates a territorial limitation on the scope of the state’s human rights obligations which does not accord with international human rights law. Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), the key international instrument protecting rights of the sort included within the 1978 Constitution, requires that a state respect and ensure the rights of all individuals within its territory and subject to its jurisdiction. The Human Rights Committee has elaborated that this means a state must respect and ensure the ICCPR rights “to anyone within the power or effective control of that [state], even if not situated within the territory of the [state]”.<sup>547</sup> Principle 10 of the Declaration of Principles on Equality also requires that states “respect, protect, promote and fulfil” the right to equality of all of those within their territory and subject to their jurisdiction. The 1978 Constitution falls short in this respect.

Section 3 goes on to state that an individual is entitled to the fundamental rights accorded by the 1978 Constitution “whatever his race, place of origin, political opinions, colour, creed or sex”. Accordingly, it acknowledges to a limited extent

---

546 See above, note 544, Pledges (c) and (d).

547 See United Nations Human Rights Committee, above note 528, Para 10.

that the rights contained in the 1978 Constitution, which include a range of civil and political rights from the right to life to the right to privacy, are to be enjoyed without discrimination on the mentioned grounds. This protection is limited as compared to the protection which Solomon Islands is required to afford under its international human rights obligations due to the cumulative effect of two key factors. First, the list of grounds identified in section 3 is closed and significantly shorter than those found in the key international human rights treaties. For example, Article 2(2) of CDESCR states that the rights enunciated in ICESCR must be exercised “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Secondly, international human rights law provides protection for a more extensive list of rights than those protected under Chapter II of the 1978 Constitution. As a result, the right to non-discrimination explicitly applies to the enjoyment of a wider range of rights in international human rights law than are in fact protected by the 1978 Constitution.

There is no right to equality in the 1978 Constitution. However, section 15 of the Constitution provides a right – albeit limited – to non-discrimination. In the absence of specific anti-discrimination legislation and non-discrimination provisions in other legislation, it is the principal legal protection from discrimination in the country.

Section 15 prohibits discrimination in three areas: (i) legislation, (ii) the acts of public officials and authorities; and (iii) the provision of certain services. It reads:

- (1) Subject to the provisions of subsections (5), (6) and (9) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*
- (2) Subject to the provisions of subsections (7), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or performance of the function of any public office or any public authority.*
- (3) Subject to the provision of subsection (9) of this section, no person shall be treated in a discriminatory*

*manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating-houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.*

- (4) *In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*
- (5) *Subsection (1) of this section shall not apply to any law so far as that law makes provision –*
- (a) for the imposition of taxation or the appropriation of revenue by the Government or the government of Honiara city, or any provincial government, or the Honiara city council or any provincial assembly for local purposes;*
  - (b) with respect to persons who are not citizens of Solomon Islands;*
  - (c) for the application, in the case of persons of any such description as is mentioned in the preceding subsection (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description;*
  - (d) for the application of customary law;*
  - (e) with respect to land, the tenure of land, the resumption and acquisition of land and other like purposes;*

- (f) for the advancement of the more disadvantaged members of the community; or*
  - (g) where persons of any such description as is mentioned in the preceding subsection may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.*
- (6) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or qualifications (not being standards or qualification specifically relating to race, place of origin, political opinions, colour, creed or sex) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of the government of Honiara city or any provincial government or any office in a body corporate established directly by any law for public purposes, or who wishes to engage in any trade or business.*
- (7) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (5) or (6) of this section.*
- (8) Subsection (2) of this section shall not affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.*
- (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that*

*the law in question makes provision whereby persons of any such description as is mentioned in subsection (4) of this section may be subjected to any restriction on the rights and freedoms guaranteed by section 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorised by section 9(2), 11(6), 12(2), 13(2) or 14(3), as the case may be.*

This section is highly problematic. It contains a confused mixture of discrimination principles, limitations to their scope and exceptions to their application. Section 15's three prohibitions are contained in sub-sections (1) to (3). These sub-sections are to be interpreted in part by reference to section 15(4) which defines the meaning of "discriminatory" for the purpose of section 15.

The section 15(4) definition of "discriminatory" as "meaning affording different treatment to different persons", accords most closely with the definition of direct discrimination under international law.<sup>548</sup> It does not, in itself, encompass other important forms of prohibited conduct, namely indirect discrimination and harassment. The formulation of the definition differs from the formulation of direct discrimination under international law in ways which may be significant. First, while international law generally considers direct discrimination to involve "less favourable treatment" or the suffering of a "detriment", section 15(4) refers to the subjection to "disabilities or restrictions" or the exclusion from "privileges or advantages". One could argue that the two forms of wording should be interpreted in the same way. However, the extent to which the difference in wording may result in a difference in application has yet to be tested in the courts. Secondly, section 15(4) requires that "persons of another such description" are not made subject to disabilities or restrictions or accorded the privileges or advantages in question. Although there is no case law on this point either, this could well be interpreted as requiring that there be a comparator in order for discrimination to be found. There is an increasing recognition that, as a matter of best practice, a comparator need not be actual and may be hypo-

---

<sup>548</sup> For a detailed description of direct discrimination, please see section 1.2 of this report.

thetical.<sup>549</sup> Again, there is no case law on whether this is the approach that would be taken in Solomon Islands in interpreting section 15(4).

A key limitation of the definition of “discriminatory” in section 15(4) is that the list of grounds upon which discrimination is prohibited is limited to six: race, place of origin, political opinion, colour, creed and sex. As such, it excludes a number of grounds upon which discrimination is prohibited under the international treaties to which Solomon Islands is party such as ethnic origin, descent, pregnancy, maternity, civil, family or carer status, language, birth, national or social origin, nationality, economic status, sexual orientation, gender identity, age, disability and health status.<sup>550</sup> It should be noted that the grounds of “ethnic origin” and “descent” are often read into the generalising notion of “race”, but again, absent judicial interpretation, one can’t be sure that this would be the case in Solomon Islands. The closed list of grounds read together with the definition of “discriminatory” also does not appear to cover discrimination on multiple, intersecting grounds, as is required by international law and best practice.<sup>551</sup>

Section 15(1) prohibits provisions of law which are “discriminatory” either of themselves or in effect. As a result it meets, in part, Solomon Islands’ obli-

---

549 See, for example, the European Union Equality Directives definitions of direct and indirect discrimination which allow for hypothetical comparators: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Articles 2(2)(a) and (b); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Articles 2(2)(a) and (b); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Articles 2(a) and (b); and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2(1)(a) and (b).

550 “Ethnic origin” (ethnicity) and “descent” are protected grounds under Article 1(1) of the ICERD; Article 11 of the CEDAW requires states parties to take steps to protect women from discrimination on grounds of “pregnancy and maternity”. “Marital status” is a protected ground under Articles 1 and 11 of the CEDAW and the CESCR has stated that “marital and family status”, “nationality”, “economic status”, “sexual orientation”, “gender identity”, “age”, “disability” and “health status” are protected grounds falling within “other status” in Article 2(2) of the ICESCR. (See above, note 514, Paras. 31, 30, 35, 32, 29, 28 and 33); “Language”, “birth”, “national origin” and “social origin” are protected grounds under Article 2(2) of the ICESCR.

551 See above, note 514, Para. 17; See above, note 515, Principle 12, p. 10.

gation to ensure that legislation does not discriminate.<sup>552</sup> However, the gaps and exceptions contained in the remainder of section 15 substantially reduce its impact and, as a result, section 15 falls far short of what is required under Solomon Islands' international obligations. In addition, case law has further limited the scope of its application.<sup>553</sup>

The definition of what constitutes discriminatory legislation itself is problematic. Section 15(1) refers to legislation which is "discriminatory either of itself or in its effect". Accordingly, read alone, section 15(1) prohibits legislation which discriminates either directly or indirectly. However, when taken together with section 15(4), the wording becomes less clear as to whether legislation discriminating indirectly is indeed prohibited. In the 2001 decision of the High Court in *Folotalu v Attorney-General*,<sup>554</sup> which is the only case in which a court has provided interpretation of section 15(1), the court applied the section as if it only covers direct discrimination.<sup>555</sup> Under international human rights law, the obligation of states is to ensure that legislation does not discriminate either directly or indirectly.<sup>556</sup> Further, in *Tanavalu v Tanavalu*, the High Court stated that section 15(1) "refers to a law to be made in the future", suggesting that the section will not apply in relation to laws already made – a major restriction on the scope of section 15(1).<sup>557</sup>

Section 15(5) contains a list of exceptions to the prohibition set out in section 15(1). The first exception, in section 15(5)(a), is legislation for the imposition of taxes or the appropriation of revenue by national or local government. No international human rights instrument to which Solomon Islands is party

---

552 See, for example, the Convention on the Elimination of All Forms of Discrimination against Women, Article 2(f); the International Convention on the Elimination of All Forms of Racial Discrimination, Article 2(1)(c); and the United Nations Committee on Economic, Social and Cultural Rights, above note 514, Para 10.

553 See section 3.4.2 below.

554 Civil Case (Constitutional) No. 234 of 2001 [2001] SBHC 149; HC-CC 234 of 2001 (19 October 2001).

555 *Ibid.*, p. 16.

556 See, for example, Committee on the Elimination of Discrimination against Women, above note 519, Para 7; *L.R. et al v Slovakia*, Communication No.31/2003, UN Doc. CERD/C/66/D/31/2003, 2005, Para 10.4; and Committee on Economic, Social and Cultural Rights, above note 514, Para 10.

557 *Tanavalu v Tanavalu* [1998] SBHC 4; HC-CC 185 of 1995 (12 January 1998), p.10. For a further discussion of the case see section 3.4.2 below.

contains an exception to the right to non-discrimination for taxation or tax legislation. On the contrary, at least one UN treaty body – the CEDAW Committee – has criticised systems of taxation which have the effect of limiting women’s full participation in all areas of life.<sup>558</sup>

The second exception, in section 15(5)(b), is for legislation which makes provision with respect to persons who are not citizens of Solomon Islands. In general, international human rights law requires equal treatment between citizens and non-citizens. Different treatment between citizens and non-citizens is generally only permissible in respect of certain rights (such as certain political rights related to elections, freedom of movement and certain economic rights) and not others.<sup>559</sup> In addition, any exceptions to this principle may be made only if they are to serve a legitimate objective and are proportionate to the achievement of that objective.<sup>560</sup>

For example, whilst Article 2(2) of ICESCR provides that:

*[D]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*

The CESCR has interpreted this provision narrowly, stating that:

*The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless per-*

---

558 United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations: Switzerland*, UN Doc. CEDAW/C/CHE/CO/3, 7 August 2009, Paras 37 and 38.

559 Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination: *The rights of non-citizens: Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283*, UN Doc. E/CN.4/Sub.2/2003/23, 26 May 2003, Paras 18 and 19.

560 *Ibid.*, Para 1.

*sons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*<sup>561</sup>

Similarly, whilst ICERD contains an exception for differences between citizens and non-citizens through Article 1(2), the CERD has, too, interpreted this restriction narrowly:

2. *Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;*
3. *Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;*
4. *Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Conven-*

---

561 See above, note 514, Para 30.

*tion relating to special measures is not considered discriminatory...*<sup>562</sup>

The right to non-discrimination under CEDAW applies to all women and the CEDAW Committee has also made clear that CEDAW's prohibition on discrimination includes discrimination between citizens and non-citizens, even in times of conflict or during a state of emergency.<sup>563</sup> Summing up provisions in a number of instruments, Principle 9 of the Declaration of Principles on Equality states that "the right to equality is to be freely exercised by all persons present in or subject to the jurisdiction of a State".<sup>564</sup> Thus, the exception in section 15(5)(b) relating to discrimination against non-citizens is in clear violation of Solomon Islands' international obligations. It is of particular concern given the existence of legislation identified in Part 2 of this report, permitting discrimination against non-citizens in relation to a number of freedoms including in relation to land and the ability to hold or to acquire perpetual title to land under the Land and Titles Act.<sup>565</sup>

The third exception, in section 15(5)(c) concerns laws relating to adoption, marriage, divorce, burial, devolution of property on death or similar matters. This provision thus excludes a large and important area of law from the application of the prohibition on discrimination, thereby permitting discriminatory laws which are likely to have a significant impact on women in particular. The CEDAW Committee has raised concerns in a number of countries where such legislation exists to the disadvantage of women and criticised exceptions to the right to non-discrimination for personal laws.<sup>566</sup> International best practice clearly requires that protection from discrimination be accorded in "all areas of activity regulated by law".<sup>567</sup>

---

562 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 2004.

563 United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013, Para 2.

564 See above, note 515, Principle 9, pp. 8-9.

565 See section 2.7 of this report.

566 United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations: Zambia*, UN Doc. CEDAW/C/ZMB/CO/5-6, 27 July 2011, Paras 13-14 and 41.

567 See above, note 515, Principle 10, p. 8.

The fourth exception, in section 15(5)(d), means that customary law can still discriminate. There is no such exception to the right to non-discrimination under international law, which requires that all law, customary or otherwise, comply with the right to non-discrimination.<sup>568</sup> The CEDAW Committee, in particular, has raised concerns in countries where there is an exception to the right to non-discrimination for customary law, noting that it often has a significant impact upon women.<sup>569</sup> The research outlined in this report identifies some serious discrimination occurring in Solomon Islands in the name of “customary law”.<sup>570</sup>

The fifth exception, in section 15(5)(e), means that laws relating to land, the resumption and acquisition of land and other like purposes can discriminate, which is another exception not recognised in international law. As noted above, the Land and Titles Act discriminates against those who are not Solomon Islanders by preventing them from holding or acquiring perpetual title to land. “Solomon Islanders” is defined in the Act in a manner even more restrictive than simply being a national of Solomon Islands: a person must be both born in Solomon Islands and have two grand-parents who were members of a group, tribe or line indigenous to Solomon Islands.<sup>571</sup> As a result this exception leaves the 1978 Constitution and the courts applying it unequipped to address a serious issue of discrimination in the country.

The sixth and seventh exceptions – contained within sections 15(5)(f) and (g) – exclude preferential treatment and restrictions for “the more disadvantaged members of the community” under certain circumstances. Under section 15(5)(f), laws which make provision “for the advancement of the more disadvantaged members of the community” are excepted from the right to non-discrimination. This provision thus permits positive action (also referred to in international instruments as “special measures”). Whilst such a provision is welcome, the consideration of positive action as an exception to

---

568 See, for example, the determination of the CEDAW Committee that civil law, common law and religious or customary laws and practices can all constitute discrimination in contravention of CEDAW: Committee on the Elimination of Discrimination against Women, *General Recommendation No. 29: Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, UN Doc. CEDAW/C/GC/29, 26 February 2013, Para 2.

569 *Ibid.*, Para 41.

570 See section 2.1 of this report for a discussion on discrimination and inequality under customary law.

571 Land and Titles Act, section 2 (Cap 133).

the right to non-discrimination rather than an essential element of the right to equality represents a major weakness, particularly since section 15(5)(f) is permissive rather than compelling such measures to be taken.

The Declaration of Principles on Equality considers positive action to be a “necessary element within the right to equality”.<sup>572</sup> This approach reflects the current best practice approach on positive action. The CESCR has stated, for example, that:

*In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.*<sup>573</sup>

In respect of equality between men and women, CEDAW provides at Article 4 that:

*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.*

The CEDAW Committee has, however, made clear that:

*[T]he application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.*<sup>574</sup>

The seventh exception, section 15(5)(g), relates to laws which make provision:

---

572 See above, note 515, Principle 3, p. 5.

573 See above, note 514, Para 9.

574 See above, note 519, Para 14.

*[W]here persons of any such description as is mentioned in the preceding subsection [the more disadvantaged members of the community] may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.*

To the extent that laws provide “privileges or advantages”, it is not clear how such laws would differ from those that make provision “for the advancement” which are excepted under section 15(5)(f). To that extent, again, it is problematic that such laws are considered an exception to the right to non-discrimination rather than an essential means of ensuring *de facto* equality.

It is particularly difficult to envisage how laws which make provisions subjecting “the more disadvantaged members of the community” to a disability or restriction could ever be “reasonably justifiable in a democratic society” since such legislation would result in further disadvantage. Whilst it is difficult to envisage this provision ever having any effect in practice, it is nevertheless problematic that it remains within section 15 given that it indicates that such legislation could, in theory, exist and that it could be justified to subject disadvantaged individuals to further disadvantage.

The final exception contained within section 15 which applies only to the section 15(1) prohibition is section 15(6). Section 15(6) provides an exception for laws which make provision with respect of standards or qualifications to be required of certain persons (such as officials in the public service) provided that such standards or qualifications do not specifically relate to any of the six protected characteristics listed in section 15(4) (race, place of origin, political opinions, colour, creed or sex). The purpose of the exception is not at all clear. The apparent effect is to allow legislative provisions which set standards or qualifications required of certain categories of persons and which indirectly (but not directly) discriminate against individuals on one of the six protected characteristics. There are only a small number of legislative provisions which theoretically could fall within this exception such as minimum height requirements for police officers (which would indirectly discriminate on grounds of sex) or English-language requirements for persons in public

office (which would indirectly discriminate on grounds of race and place of origin). International human rights law might permit such limitations if they were necessary in a democratic society and proportionate to a legitimate aim, however the exception in section 15(6) is a blanket one, and thus is broader than that which international human rights law would permit.

The second prohibition of discrimination under section 15 is contained in section 15(2) which prohibits discriminatory treatment “by any person acting by virtue of any written law or performance of the function of any public office or any public authority”. When taken together with section 15(4), this section only covers direct discrimination and thus falls short of Solomon Islands’ international obligations. Further, international human rights law requires the prohibition of discriminatory treatment not only by persons acting in pursuance of legislation or their public functions, but by persons in both the public and private sector in all areas of activity regulated by law.<sup>575</sup> This would include, for example, the provision of housing in the private sector, the provision of goods and services and employment by private companies. In addition, reference only to “written law” is problematic, as it excludes from the section’s protection acts taken by virtue of a range of laws which may discriminate. This is evidenced by the High Court in *Tanavalu v Tanavalu*,<sup>576</sup> which, in considering the meaning of section 15(2), stated:

*[C]ustomary law is not “written law”. The Constitution does not define the expression, written law, the expression is defined in the Interpretation and General Provisions Act as, “an Act, any subsidiary legislation or an imperial enactment”. That excludes customary law. So a person acting “by virtue of” customary law may treat another in discriminatory manner if that is in accordance with the applicable rule of customary law.*

---

575 See above, note 515, Principle 9, p. 8; the Committee on the Elimination of Discrimination against Women, for example, has referred to the rights to equality and non-discrimination as applying “in all fields of women’s lives throughout their lifespan, as enshrined in the Convention” (emphasis added) (Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, Para. 31.

576 See above, note 557.

Section 15 contains two limitations specific to section 15(2) alone. First, section 15(7) concerns action taken (explicitly or by implication) under laws excluded from the operation of the prohibition of discrimination under sections 15(5) and 15(6). This is clearly problematic in that if such a provision of law unjustifiably discriminates in contravention of international human rights law, actions sanctioned by such laws will similarly constitute unjustifiable discrimination and cannot be justified simply because they were taken in accordance with legislation.

Second, section 15(8) concerns “any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law”. Allowing the discriminatory exercise of discretion by any person in court proceedings, including judges, is unacceptable in that it would permit the prosecution services and courts to commence or discontinue civil or criminal proceedings for entirely irrelevant reasons such as the individual in question’s sex or race.

The final prohibition of discrimination is contained in section 15(3) which prohibits “discriminatory treatment” in respect to “access” to a list of services and public places: shops, hotels, lodging-houses, public restaurants, eating-houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public. This falls significantly short of international best practice on equality and non-discrimination which requires discrimination to be prohibited in treatment by a much broader range of private actors including employers (in respect, for example, to recruitment, working conditions, and pay), educational institutions, as well as providers of all goods and services, including housing.<sup>577</sup> Further, by using the term “access”, the provision is limited in simply accessing those services rather than their use or enjoyment. For example, a person who is allowed into a restaurant or hotel but is treated discriminatorily whilst using the services may be restricted from making use of section 15(3).

Given the application of section 15(4) to the definition of the prohibition of discrimination, section 15(3) only covers direct discrimination in these areas,

---

<sup>577</sup> See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 3(1). See also the ICESCR which requires states parties to prohibit discrimination (Article 2(2)) in the enjoyment of just and favourable conditions of work (Article 7) and in education (Article 13).

whereas international best practice requires that all forms of discrimination, including indirect discrimination and harassment, also be prohibited.<sup>578</sup>

Finally, section 15 contains a limitation on the scope of all three of the prohibitions of discrimination within the section. Section 15(9) provides an exception for legislation which restricts the rights and freedoms of a person with a protected characteristic to the extent that that legislation amounts to a restriction to the rights guaranteed by sections 9 (privacy of home and other property), 10 (secure protection of law), 11 (freedom of conscience), 12 (freedom of expression), 13 (freedom of assembly and association) or 14 (freedom of movement), and that restriction is authorised under the Constitution by sections 9(2), 11(6), 12(2), 13(2) or 14(3), as the case may be.

This complicated provision creates a wide-ranging exception which is clearly contrary to international human rights law. It carves out swathes of legislation from the applicability of constitutional rights. As a result, legislation which discriminates in the exercise of conscience, expression and movement, for example, may be constitutional. This is of particular concern given the broad scope of some of the exceptions which it encompasses. Notably, section 14(3) enables the state to restrict the movement of “any class of persons” where “reasonably required”.<sup>579</sup> Section 15(9) is a flagrant breach of international human rights law. As the Human Rights Committee, for example, has stated in the context of the rights to freedom of opinion and expression as protected under Article 19 of the ICCPR:

*Laws restricting the rights enumerated in article 19 (...) must (...) themselves be compatible with the provisions, aims and objectives of the Covenant. Laws must not violate the non-discrimination provisions of the Covenant.*<sup>580</sup>

Other limitations on the scope and effect of section 15 are contained elsewhere in the Constitution. Notably, its application during periods of public emergency is significantly limited, in contravention of international human rights norms.

---

578 See above, note 515, Principle 9, p. 8.

579 See above, note 544, section 14(3)(b).

580 United Nations Human Rights Committee, *General Comment No. 34: Article 19: Freedom of opinions and expression*, UN Doc. CCPR/C/GC/34, 12 September 2011, Para 26.

Section 16 provides that when Solomon Islands is “at war” or when the Governor-General declares a state of emergency (which he or she may do “at any time by proclamation”), the applicability of a number of the fundamental rights provisions in the Constitution will change. Section 16(7) states:

*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section (...) 15 of this Constitution to the extent that the law in question makes in relation to any period of public emergency provision, or authorities the doing during any such period of any thing, that is reasonably justifiable in circumstances of any situation arising or existing during the period for the purpose of dealing with that situation.*

This provision makes a very broad range of discriminatory actions “reasonably justifiable”. In any case, at the least, Solomon Islands remains bound by its obligation not to discriminate in the enjoyment of economic, social and cultural rights under the ICESCR. As the Covenant does not contain a derogation provision, it must be concluded that Covenant rights remain applicable in times of emergency, at the very least in respect of their core requirements, including that of non-discrimination.<sup>581</sup> Further, it is clear that under international human rights law, derogations from civil and political rights during times of emergency must not discriminate on grounds of “race, colour, sex, language, religion or social origin”.<sup>582</sup> As a matter of international best practice, no derogation from the right to equality, or its subsumed right to non-

---

581 A strong case is made for the fact that state obligations under the ICESCR are non-derogable in Saul, B., Kinley, D., and Mowbray, J., (eds) *The International Covenant on Economic Social and Cultural Rights: Commentary, Cases and Materials*, Oxford University Press, 2014, pp. 258–262. Among other things, they refer to the fact that, at a minimum, the CESCR has stated that the minimum core of the rights contained within the Covenant, which includes the right to their enjoyment without discrimination, is non-derogable: see the United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11, Paras 37 and 40. For other useful discussion see Müller, A., “Limitations to and Derogations from Economic, Social and Cultural Rights”, *Human Rights Law Review*, 9(4), 2009, pp. 557–601.

582 International Covenant on Civil and Political Rights, Article 4(1). For a further discussion of the meaning of Article 4(1), see Equal Rights Trust, *In Search of Confluence: Equality and Non-Discrimination in Sudan*, 2014, pp. 166–167.

discrimination, is permitted. Principle 27 of the Declaration of Principles on Equality, states:

*No derogation from the right to equality shall be permitted. Any reservation to a treaty or other international instrument, which would derogate from the right to equality, shall be null and void.*<sup>583</sup>

While Solomon Islands' public emergency clause relates to national provisions, the same principle should be said to apply and so the inclusion of section 15 within the scope of the public emergency provisions violates Solomon Islands' international obligations as well as best practice.

More positively, from a non-discrimination perspective, although there are significant restrictions on the rights of members of "disciplined forces" (including navy, military, police and prisons service amongst others) as relates to the law or authority of the relevant force, section 15 still applies, maintaining the protection from discrimination contained within it, for those types of personnel.<sup>584</sup>

Chapter II of the 1978 Constitution also contains a number of rights which, although not directly relating to equality and non-discrimination, have an important role in ensuring that particular groups can participate in civil and political life of Solomon Islands. For example, section 11 protects freedom of conscience which includes freedom of religion or belief. However, it is noteworthy that the majority of the rights contained within Chapter II have, like section 15, a large number of exceptions built in, which severely limits their scope and, in some cases, raises particular concerns from an equality and non-discrimination perspective.<sup>585</sup>

### **3.2.2 Constitutional Reform Process**

Calls for reform of the 1978 Constitution gained momentum during "the Tensions" and a commitment to constitutional reform was included in the Towns-

---

583 See above, note 515, Principle 27, p. 14.

584 See above, note 544, section 19(3). For the full definitions of "disciplinary law" and "disciplined force", see section 19(1).

585 See above, note 544, section 14(3)(b) and (c).

ville Peace Agreement.<sup>586</sup> While the reforms are predominantly aimed at replacing the unitary system of government inherited from the United Kingdom with a federal system, they have also resulted in a review of the constitutional rights guaranteed in Solomon Islands.<sup>587</sup> The first draft constitution was completed in 2004 and there have been several subsequent drafts, the most recent of which is the Second Draft Constitution of Solomon Islands 2014, which was published on 6 May 2014 and on which a public consultation began in May 2015 and is scheduled to end in April 2016. The online publication of the 2014 Draft has not been sanctioned and the Draft is only available to the public in hard copy form at the offices of the Constitutional Reform Unit.<sup>588</sup> The Equal Rights Trust has obtained the revised Bill of Rights chapter. Any references to the 2014 Draft herein are references to that extract.

This section briefly explores the key equality and non-discrimination provisions of the published drafts. It identifies the way in which the approach to these rights has evolved throughout the consultation. Through this process, it becomes clear that the provisions relating to matters of equality and non-discrimination were changed in each subsequent draft until the most recent 2014 Draft. Despite marking a progress compared to the previous drafts, the 2014 Draft retains a number of provisions that are of concern from an equality and non-discrimination perspective. Further, the limited availability of the 2014 Draft highlights a key concern with the reform process. In our discussions with key stakeholders since early 2015, concerns have been raised that the constitutional reform process has lacked transparency. And whilst the Draft is currently undergoing a series of public awareness consultations, key stakeholders have not been included.

### ***The 2004 Draft Constitution***

The 2004 Draft Constitution, which was the first draft in this process, made some improvements on the 1978 Constitution from an equality and non-dis-

---

586 Townsville Peace Agreement, 15 October 2000, part 4(1).

587 The Preamble of the 2013 Draft Federal Constitution of Solomon Islands, refers to the “incompatibility of the unitary system of government for political independence with our heterogeneous character”.

588 The Equal Rights Trust has obtained the revised Bill of Rights chapter. Any references to the 2014 Draft herein are references to that extract.

crimination perspective. It retained a section on rights and freedoms, moving this from its location in chapter 2 of the current Constitution to chapter 4. Significantly, chapter 4 of the 2004 Draft Constitution contained 38 sections compared to the 17 found in the 1978 Constitution, contained a newly worded right to non-discrimination and, crucially, inserted a right to equality.

Unlike the 1978 Constitution, the 2004 Draft provided in section 21(1)(a) that the rights and freedoms contained within bind:

- (i) all branches and levels of government; and*
- (ii) all persons performing the functions of any public authority or government office; and*
- (iii) all other persons and bodies if, and to the extent that it is applicable taking into account the nature of the right and the nature of the duty imposed by the right;*

The extent to which private persons could be bound under (iii) was not expanded on and therefore introduced an additional source of uncertainty. However, it is certainly arguable that the subsection meant the scope of the rights was wider than under the 1978 Constitution.

However, section 21 also included some potentially wide reaching limitations on the rights contained within chapter 4. While these were arguably not as extensive as the overall limitation to the rights in the 1978 Constitution, they did constitute significant limitations on the rights to equality and non-discrimination contained in the Draft.

Section 21(1)(b) provides that the rights and freedoms affirmed and protected therein include:

*[T]he rights of clans and tribal village communities to maintain and develop laws or customary practices whereby they –*

- (i) determine the responsibilities of individuals within their communities;*
- (ii) promote, develop and maintain their institutional structures and their distinctive customs, traditions, procedures and practices;*

*(iii) determine the methods customarily practised by clan or tribal communities for dealing with offences or breaches of custom.*

The relationship between these rights and the rights contained in the rest of the Chapter, including the rights to equality and non-discrimination, is not further explained. Similarly, section 21(2) provided that:

*The Rights and Freedoms in this Constitution shall be subject only to such reasonable limitations found in law or custom as may be demonstrably justifiable in a free and democratic society, taking account of the objectives of this Constitution, the cultures in Solomon Islands society and the state of development of the country.*

Further, section 21(4) provided:

*Any law and any action taken pursuant to a law may interpret the application of a Right and Freedom having regard to the collective right and responsibilities of an individual in his or her traditional community.*

Again, it is not clear what the limits of these sections would be and how they would be interpreted in practice. To leave this ambiguity to the judiciary to resolve may result in an outcome which wouldn't favour equality and non-discrimination over discriminatory custom or practices which were seen to be in the interests of the community.

The newly proposed right to equality is contained in section 23 which provided that “[e]very person is equal before the law and has the right to equal protection of law”. The inclusion of this right to equality was an important and promising development in the Draft and represented a significant improvement from the 1978 Constitution which has no such provision. The wording provided partial coverage of the right to equality as understood in international best practice which requires that all persons have the right to equal protection and benefit of the law.<sup>589</sup> Section 23 contains no limitations

---

589 See above, note 515, Principle 1, p. 5.

beyond those set out in section 21, as outlined above. As a result, there would be scope for individuals to claim their right to equality before the law regardless of their particular background or status.

The right to non-discrimination appears in section 27(1) and provided:

*Every person has the right not to be unfairly discriminated against whether directly or indirectly on the grounds of actual or supposed characteristics or circumstances, including race, religion, clan or tribal origins, ethnic origin, colour, place of origin, island or region, sex, gender, pregnancy, birth, language, economic status, age, disability or illness, opinions and beliefs.*

This proposed section is a marked improvement on the 1978 Constitution in a number of ways: it is much clearer; its scope is not explicitly limited to certain laws or areas of life; it expressly prohibits indirect discrimination. This extension in scope is particularly important given that a far wider range of rights were proposed to be protected under the 2004 Draft which included a wide range of economic, social and cultural rights not contained in the 1978 Constitution.<sup>590</sup> In addition, section 27 made clear that discrimination on the basis of a supposed (perceived) characteristic is prohibited, in accordance with best practice.<sup>591</sup> The Draft incorporated a presumption in section 27(2) that:

*Discrimination on one or more of the grounds in subsection (1) is unfair unless it is established to be fair.*

The Draft did not include any indication of what “fair” discrimination may be. Section 27(3)(c) provided that:

*A law, or any administrative action taken under a law is not inconsistent with these rights on the ground that it (...) makes provision of some interests over others in government or organs of government in order to address inequalities or to preserve public order and to facilitate peace.*

---

590 2004 Draft Constitution of Solomon Islands, Part III, Chapter 4.

591 See above, note 515, Principle 5, p. 6.

However, the relationship between these two provisions is not clear. International human rights law requires any exceptions to have a legitimate aim and a proportionate relationship between the means used to carry out that aim and the discriminatory effect.<sup>592</sup> The requirement of fairness in section 27(2) is not sufficiently clear to ensure that exceptions to discrimination will be limited according to international human rights standards.

The Draft significantly expanded on the number of grounds upon which discrimination is explicitly prohibited from six to 17,<sup>593</sup> and, critically, introduced an open-ended list of characteristics, which is in accordance with international human rights law. Several important grounds of discrimination are still not expressly prohibited in the 2004 Draft Constitution, including sexual orientation, maternity, gender identity and family or carer status.

Several problematic exceptions to the prohibition of non-discrimination contained in the 1978 Constitution did not appear in the 2004 Draft Constitution, including the exceptions for laws relating to adoption, marriage, divorce, burial, devolution of property on death or other like matters and laws relating to land, the resumption and acquisition of land and other like purposes. Further, the allowance for discriminatory conduct in court proceedings had been removed. However, section 27(3)(b) of the 2004 Draft Constitution retained an exception on the prohibition of discrimination against non-citizens, although using a different formulation:

*A law, or any administrative action taken under a law is not inconsistent with these rights on the ground that it (...) imposes on persons who are not citizens a disability or restriction, or confers on them a privilege or advantage not imposed or conferred on citizens.*

As noted above, such an exception is contrary to international law and best practice.<sup>594</sup>

---

592 See above, note 514, Para 13; see also United Nations Human Rights Committee, *General Comment No. 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1989, Para 13. See above, note 515, Principle 5, p. 8.

593 See above, note 590, sections 21–58.

594 See subsection 3.2.1 above.

The exception relating to discrimination arising from customary law contained in section 15(5)(d) of the 1978 Constitution did not appear in the 2004 Draft Constitution. However, the new section 21(1)(b), set out above, resulted in ambiguity as to the relationship between customary law and the right to non-discrimination.

The Draft also made specific provisions for children, women, the elderly and persons with disabilities. Whilst none of these sections fully replicated international human rights law and best practice protections, their inclusion marked an important move towards recognising the specific protection needs of some particular groups. Section 54(2) reads: “The Republic affirms its commitment to the Convention on the Elimination of All Forms of Discrimination Against Women” which could arguably have amounted to incorporating the text of the Convention into the Draft.

Section 58 stated:

*Social justice and affirmative action – Special measures taken to relieve inequality shall not of themselves constitute unlawful discrimination provided such measures are for a lawful purpose and are reasonable and proportional temporary measures to relieve an established inequality.*

Accordingly, the Draft permits affirmative action, an important step towards substantive equality. It did not go as far as international best practice however, as it did not require positive action to be taken in certain instances.<sup>595</sup>

Also of note is the positive move away from gender discriminatory nationality law with gender neutral citizenship provisions, and important improvement on the 1978 Constitution.

Less positively, while the limitations on the rights to equality and non-discrimination are limited, the Draft failed to ensure that the rights were not breached during states of emergency (section 60(2)).

---

595 See above, note 515, Principle 3, p. 5.

### *The 2009 Draft Constitution*

The provisions of the 2009 Draft Constitution that relate to equality and non-discrimination are similar to those found in the 2004 Draft Constitution. As such, we focus here only on the amendments to the earlier Draft in so far as they impact on the protection of equality and non-discrimination. A new provision in the 2009 Draft requires the fundamental rights, freedoms and other rights in the constitution to be affirmed in all State Constitutions.<sup>596</sup> This includes the right to equality, which was retained without change in the Draft. It also includes the right to non-discrimination in section 27, which was also retained with only one small change, the welcome addition of sexual orientation, marital status and employment status to the explicitly listed protected characteristics.

On the other hand, further limitations were introduced. These included the extension of section 21(1)(b) to:

*(b) include the rights of clans and tribal village communities to maintain and develop laws or customary practices whereby they (i) determine the **behaviour, conduct** and responsibilities of individuals within their communities. (Emphasis added.)*

This change would arguably have extended the reach of customary law, potentially further limiting the application of the rights to non-discrimination and equality. Notably, the rights of children contained in section 52 were also extended to include “firm discipline”, and children were given the following set of rights and obligations:

- (a) respect parents, elders and others.*
- (b) participation in family chores.*
- (c) participation in community activities.*
- (d) participation in the observation of cultural and religious activities.*
- (e) reasonable chastisement by parents or guardians.*

---

<sup>596</sup> 2009 Draft Constitution of Solomon Islands, section 21(4). The previous section 21(4) in the 2004 Draft Constitution becomes section 21(3).

The lack of definition around discipline and chastisement was extremely worrying as was the inclusion of obligations for children but not for adults. The inclusion of these obligations in any law would constitute age discrimination and it is difficult to envisage how this could be justified without further elaboration.

The rights of the elderly differ slightly between the 2004 and 2009 drafts. In 2009, rights to participation in the affairs of society and to “perusal of personal development” were qualified by the phrase “where appropriate”.<sup>597</sup> However, the right for “elderly” persons to die in dignity was included and their right to non-discrimination was reiterated.<sup>598</sup>

### ***The 2011 Draft Constitution***

The 2011 Draft Constitution represented a radical departure from the 2004 and 2009 versions in terms of its protection of the rights to equality and non-discrimination. The Draft reverted to provisions similar to those in the 1978 Constitution, removing the right to equality and reinstating the wording of the protection from discrimination provision in section 15 of the 1978 Constitution, in the Draft’s section 37.

The Preamble to the 2011 Draft Constitution commits Solomon Islands “[t]o govern through democracy, accountability, equality and social justice”, reflecting the pledge to uphold equality in the Preamble to the 1978 Constitution. Section 13(k) of the 2011 Draft introduces a new commitment to some aspects of equality for the government, stating that the government:

*[S]hould create the conditions conducive for unity, peace, security, order and good governance and in particular shall (...) (e) promote equal participation of both men and women in public affairs, with particular emphasis on the involvement of women, youth and disabled persons in the life of the Republic.*

Further, section 225 imposes a number of “essential qualifications” for registration of political parties, one of which is that “by its constitution or rules the

---

597 2009 Draft Constitution of Solomon Islands, section 55(a) and (b).

598 *Ibid.*, section 55.

political party has a federal or state character, which seeks to (...) (d) promote and respect Rights and Freedoms and gender equality”. Section 229 provides the “guiding principles in public administration of the Republic”, one of which is “equal and adequate opportunities for training and advancement of men and women equally”. Nonetheless, the addition of these few general statements and ideals did not compensate for the loss of the improved, albeit imperfect, equality and non-discrimination provisions that existed in the previous two drafts.

### ***The 2013 Draft Constitutions***

The right to non-discrimination in the 2013 Draft Constitution differs little from that of the 2011 Draft Constitution. Section 40 of the 2013 version replicates section 37 of the 2011 version with the addition of one further exception: new section 40(5)(e) which exempts from the prohibition of discrimination laws “for the prohibition of cohabitation of same sex partners and same sex marriages”. The effect of this would be to prevent same-sex couples from arguing before a court that the right to non-discrimination in section 40 prohibits the limitation of marriage or of other forms of relationship recognition to same-sex couples.

Whilst international human rights law does not explicitly provide for a right for same-sex couples to marry or to have their relationship recognised by the state, the right to non-discrimination is not entirely toothless when it comes to same-sex relationships. Article 10(1) ICESCR states that:

*The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.*

Section 40 potentially violates Article 10(1) of the Covenant both alone and in combination with Article 2(2). Whilst the CESCR has not yet provided a definition of “the family” in Article 10(1), the term should not be considered to exclude same-sex couples living together in a manner equivalent to spouses or cohabiting different-sex couples, particularly given that some same-sex couples may be raising children. An inclusive interpretation would be consist-

ent with the recognition by the CESCRC that Article 2(2) prohibits discrimination on the basis of sexual orientation which, by its logical inference, should cover same-sex couples. To protect only single LGBT people in the enjoyment of their economic, social and cultural rights and not same-sex couples – personal relationships being the natural expression of one’s sexual orientation – would be to deny that same-sex couples, with or without children, can constitute a family, and this would be contrary to the growing international consensus that such families are as valid as “traditional” families.

### ***The 2014 Draft Constitution***

As noted above, our analysis of the 2014 Draft is limited to the Bill of Rights within that Draft (sections 15 to 49). The Bill of Rights within the 2014 Draft is a substantial departure from that which is contained in its two most recent predecessors, reintroducing a right to equality and expanding its non-discrimination provision significantly from earlier drafts. However, similar to all the previous Drafts and the 1978 Constitution currently in force, the rights contained within the Bill of Rights are expressly limited by custom. Section 16(2) provides that:

*The rights and freedoms in this Chapter are subject to any necessary limitation or qualification to accommodate a custom or customary practice that is –*

- (a) traditionally observed and currently practiced in a particular locality of the Republic;*
- (b) is not harsh, or repugnant to general humanity; and*
- (c) is reasonably justifiable in a democratic society.*

This is a potentially significant limitation and it is unclear how the determination of which customs are “harsh” or “repugnant” will be made. Section 16(3) further subjects the rights to limits that are set out in any law and:

- (a) are reasonably necessary to protect or promote:  
(...)*
- (ii) customary traditions and ownership of land, resources or property  
(...) and*

- (b) are justifiable, considering both customary traditions and the principles of an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*
- (i) the nature of the right or freedom;*
  - (ii) the importance of the purpose of the limitation;*
  - (iii) the nature and extent of the limitation; and*
  - (iv) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Although section 16(3) incorporates a requirement of proportionality, it is again unclear how the balance would be struck in practice. Section 48 provides guidance to courts and similar bodies on interpreting Chapter 3.<sup>599</sup> However, it too creates uncertainty as it requires courts to “protect the customs and customary practices referred to in section 16(2)” and also to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” and “consider international law relevant to the protection of the rights and freedoms in this Chapter”. As noted above, international law requires that all law, customary or otherwise, complies with the right to non-discrimination.<sup>600</sup> It is therefore difficult to see how courts will be able to reconcile discriminatory customs and international law, such as those identified in this report, with international law.

Further limitations on equal rights to ownership of land and inheritance in accordance with customary law are contained in section 43, discussed below. In addition to the limitations relating to custom and customary law, section 46 of the 2014 Draft allows for laws relating to a state of emergency to derogate from the rights contained in Chapter 3. Such limitations must be strictly required, “consistent with the Republic’s obligations under international law applicable to a state of emergency” and only take effect once published. As noted above, as a party to the ICESCR, Solomon Islands cannot derogate from its obligation of non-discrimination in the enjoyment of economic, social and cultural rights in times of emergency.

---

<sup>599</sup> This section expressly notes that it is in addition to compliance with section 245, a section which had not been seen by the Equal Rights Trust at the time of writing.

<sup>600</sup> See above, note 568.

The substance of the rights in the 2014 Draft gives reason for optimism that there may have been a reversal in approach since the 2013 Draft. Crucially, as in the 2004 and 2009 Drafts, the 2014 Draft includes a right to equality in section 19(1). This provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. The inclusion of the words “and benefit of the law” is additional to the 2004 and 2009 Drafts and brings the section into line with international best practice. Section 19(2) provides that “[e]quality includes the full and equal enjoyment of all rights and freedoms recognised in this Chapter or elsewhere in the law”. The wording of this section means that the relationship between it and section 19(1) is not completely clear. However, it appears that section 19(2) provides that the scope of the right to equality provided in section 19(1) includes all laws in Solomon Islands.

Section 19 also contains a prohibition on direct or indirect discrimination on a range of non-exhaustive grounds listed in sub-section 3. The use of a non-exhaustive list of grounds is a positive development, in line with international best practice.<sup>601</sup> However, the list explicitly excludes sexual orientation from these grounds. This exclusion is completely contrary to international human rights law, which has long recognised sexual orientation as a protected characteristic.<sup>602</sup> Further, the prohibition does not cover discrimination on the grounds of perceived characteristics (unlike the 2004 and 2009 Drafts) or discrimination by association. The draft extends to discrimination on one or more grounds, thus recognising multiple discrimination.

Section 19(4) provides that no person may discriminate against another on the grounds contemplated in Section 19(3). The scope of the prohibition is therefore extensive, applying to private persons in all settings, which would apparently encompass their private life. This scope is beyond that required

---

601 See above, note 514, Para 27.

602 See, for example, ICCPR *Young v Australia*, (Communication No. 941/2000), UN Doc. CCPR/C/78/D/941/2000, 2003; see the CESCR, above note 514, Para 32; ECtHR: *Salgueiro da Silva Mouta v Portugal* (Application No. 33290/96), 21 December 1999; *Smith and Grady v the United Kingdom* (Application Nos. 33985/96 and 33986/96), 27 September 1999; *Karner v Austria* (Application No. 40016/98), 24 July 2003; *Buczkowski and Others v Poland* (Application No. 1543/06), 3 May 2007; and *E.B. v France* (Application No. 43546/02), 22 January 2008; and EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

by international best practice<sup>603</sup> and raises some concerns with respect to the individual right to a private life. As a result, it seems likely to be unenforceable in practice.

An exception to the prohibition on discrimination is provided in section 19(5), which allows for differential treatment that is “reasonable in the circumstances”. This leaves scope for a potentially wide range of circumstances to be considered as reasonable and for subjectivist bias. As noted above, any exceptions allowing for differential treatment must have a legitimate aim and there must be a proportionate relationship between the means used to carry out that aim and the discriminatory effect.<sup>604</sup>

Significantly, positive action is permitted under section 19(6). However, international best practice goes further to require positive action to be taken in certain instances.<sup>605</sup> The recognition of the rights of particular groups is also welcome. The rights of children are recognised in section 20, without any of the “obligations” that were cause for serious concern in the 2009 Draft. Sections 42 to 45 elaborate on the rights of particular groups and section 41 provides express clarity that these additional sections should in no way be seen to limit or qualify the rights of these groups. Section 42 provides additional rights for persons with disabilities, including the right to reasonable accommodation. The inclusion of reasonable accommodation is a positive step; however, it is unclear whom the duty to provide reasonable accommodation falls on. Sections 44 and 45 provide additional rights to elderly persons and cultural, religious and linguistic communities respectively.

Section 43 is headed “Men, women and families” and provides for equal treatment between women and men, together with the rights to paternity and maternity leave. Although equal rights for men and women to land ownership and inheritance are provided for, these are “[s]ubject to customary ownership, and to customary laws relating to land ownership and land usage”. This provision leaves a degree of uncertainty as to how rights to land ownership and inheritance will be decided in practice. This uncertainty is further compounded by section 43(8) which provides that “[w]omen and men have the

---

603 See above, note 515, Principle 10, p. 9.

604 See above, note 514, Para 13; See also United Nations Human Rights Committee, above note 592.

605 See above, note 515, Principle 3, p. 5.

right to be free from any law, culture, custom or tradition that undermines their dignity, health, welfare, interest or status". The section also expressly provides that marriage is a relationship between a man and a woman, thereby excluding same sex marriages. While international human rights law does not recognise a right to marry for same-sex couples, international consensus among the community of equality experts increasingly considers that discriminating between same-sex and different-sex couples with respect to the ways in which they may recognise their relationship in law, is contrary to the right to equality.

Despite the limitations which remain in the Bill of Rights of the 2014 Draft, it is a welcome improvement both on earlier drafts and on the 1978 Constitution. Accordingly, it should be seen as an important starting point to be finessed through further consultation.

### ***Summary***

The constitutional reform process has not reached its completion. The significant regression in terms of the protection of equality and non-discrimination following the 2004 Draft is worrying. However, the Bill of Rights of the 2014 Draft improves significantly on the current Constitution and the previous drafts in relation to the rights to equality and non-discrimination. This is a promising development. Nonetheless, there are problematic provisions in the 2014 Draft such that the rights to equality and non-discrimination as understood in international law and best practice would still not be fully guaranteed.

### **3.2.3 Specific Equality and Anti-Discrimination Legislation**

Solomon Islands legal protection of equality and non-discrimination is very poor. There is no specific equality or anti-discrimination legislation in the country and very few pieces of legislation which touch on equality issues. While there has been greater development of legislation over recent years and a number of pieces of legislation which would prohibit discrimination on grounds of disability and HIV status are in the process of being drafted, the landscape of legal protections is still woefully inadequate. In fact, there is only one draft bill with a sufficient equality and non-discrimination focus to belong in this section and it is currently unclear whether or not it will ever be enacted.

## ***Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Bill 2006***

A Bill protecting persons with disabilities from discrimination has been in place for many years. This section of the report provides an overview of the provisions proposed in the most recent draft of the Bill, Draft No. 5.

Part II of the Bill establishes two complementary mechanisms to ensure the protection of persons with disabilities: a Director and a National Coordinating Council for Disability (the Council). The Director is responsible for the overall administration of the legislation. The Director has a variety of tasks including conducting research, raising public awareness, reporting annually to the Council and advising the Council on any development at international or regional levels regarding the recognition, protection or rehabilitation of persons with disabilities. The Council is tasked with formulating policies for the employment, education, transportation, infrastructure, health rehabilitation and welfare of persons with disabilities; evaluating and co-ordinating the execution of its policy at national and provincial levels; overall responsibility for the achievement of the objectives of the legislation; providing advice to the Minister on matters of policy relating to the recognition, protection and rehabilitation of persons with disabilities; and providing advice to the Director regarding any preparation, adoption, implementation and review of development plans as necessary.

Part III of the Bill provides that persons with disabilities “enjoy, on an equal basis with other persons, rights in political, educational, economic, spiritual, cultural and social fields, in family life and all other aspects of life” but does not specify precisely what those rights are, nor how they are to be enforced. It makes it an offence to “discriminate against, insult or harass a person with disabilities on the basis of their disabilities”. In addition, it requires persons with disabilities, their family members and carers to be advised of their human rights and any rights under the scope of the legislation.

Part IV of the Bill seeks to ensure that children with disabilities are able to access education on an equal basis with other children through a number of actions: free or reduced cost of education, better integration of children with disabilities in schools, the establishment of specialist schools and

classes, free or a reduced cost of assistive devices, teacher training, and the production of a comprehensive education scheme by the Minister for Education incorporating provisions enhancing equal access to education.

Part V of the Bill prohibits discrimination on grounds of disability in employment, specifically in any application procedures; the hiring, promotion or discharge of employees; remuneration; job training; and other terms, conditions and privileges of employment. Employers are required to provide reasonable accommodation for employees with disabilities, and the Director can conduct inspections of places of employment.

Part VI of the Bill requires the government to take “necessary measures to provide persons with disabilities with accessible medical assistance needed to restore or provide vital functions”. It also entitles persons with disabilities to receive medical help according to their immediate needs; and requires reasonable funds for accessing medical or rehabilitation services; and equipment and training for rehabilitation.

Part VII of the Bill requires the Director to make provision for counselling services to: parents and family members of people with disabilities; persons with disabilities and their families; and requires the Director to encourage persons with disabilities to seek medical care and/or rehabilitation and counselling services, and encourage persons with disabilities and their families to aim “for a life that is inclusive”.

Part VIII of the Bill provides for various enforcement provisions. Clause 22 provides that persons may lodge a complaint, or have a complaint lodged on their behalf, with the Director. The Director must then investigate whether a violation has occurred or not. If she/he determines that such a violation has occurred, she/he must write a warning letter to the person against whom the complaint was lodged and file a petition with the court if the violation continues. Clause 24 provides that a court may grant “any equitable relief that it considers to be appropriate” including granting temporary or permanent relief to the complainant; providing an auxiliary aid or service, modification of policy, practice or procedure, or alternative method; making facilities readily accessible to and usable by person with disabilities; or such other orders as the court shall consider appropriate under the circumstances.

Clause 23 creates an offence of fraudulently receiving, or attempting to receive “any material, financial or other benefit meant for persons with disabilities”, punishable by a fine of up to 3000 SBD (US\$370) or imprisonment for up to 12 months. Clause 25 creates a penalty for persons who violate any provision of the legislation of up to 2000 SBD (US\$247) for the first violation and of at least 2000 SBD for any subsequent violation.

Clause 26 provides for the creation of Regulations on a number of issues: the construction and design of public buildings to ensure that such buildings are accessible to persons with disabilities; safety requirements in workplaces for persons with disabilities; counselling services; safety and accessibility to public transport, roads, public utilities and recreational areas; and access to and participation in social, sporting and cultural activities.

With the Bill containing such important and detailed protections for people with disabilities, it is dispiriting that it is taking so long for the legislative process to run its course. It is noteworthy that, while Solomon Islands has signed but not ratified the Convention on the Rights of People with Disabilities (CRPD), some of the Bill’s clauses would provide important rights for persons with disabilities that are required under the CRPD. There is some room for improvement but overall the priority should be ensuring that the Bill or an improved version of it is passed as soon as possible.

### **3.2.4 Non-discrimination Provisions in Other Fields**

There are no non-discrimination provisions in any other pieces of legislation in Solomon Islands. There is, however, a single provision containing a positive action measure, namely section 48(1) of the Political Parties Integrity Act 2014 which requires political parties to ensure that at least 10% of all candidates it selects and endorses for an election are women. In addition, political parties who see their female candidate elected will receive a “temporary special measures grant” of 10,000 SBD (US\$1,227) each year for each woman elected.<sup>606</sup> It is evident that there is severe underrepresentation of women in government in Solomon Islands and so the Act’s attempt to address this is welcome. It remains to be seen whether these positive action measures will begin to redress the balance.

---

606 Political Parties Integrity Act, Section 58(1)(a).

Further, the passing of the Family Protection Act 2014 (FPA), while not including any reference to non-discrimination, is an important development from an equality perspective. The Act aims to prohibit all forms of domestic violence. This legislation is particularly welcome, given the widespread nature of violence against women in Solomon Islands, including in the domestic sphere.<sup>607</sup> It also represents an important step towards Solomon Islands complying with a number of its obligations under the CEDAW. Domestic violence, which disproportionately affects women, is recognised as a form of sex (gender) discrimination under international law and the state is obliged to take adequate measures to protect people, and particularly women, from this violence.<sup>608</sup> The FPA 2014 defines domestic violence, in Part 1, section 4, as actual or threatened conduct constituting physical, sexual, psychological or economic abuse, committed through a single act, or a series of more minor actions. The FPA defines potentially affected persons as those in a domestic relationship (as per sections 5 and 6) and offers protection to them and to their family members, including parents and children. Accordingly, it provides protection to men as well as women. The FPA defines any commission of domestic violence as an “offence” which, under the meaning of the FPA, is punishable by a jail term of three years, a fine of 30,000 “penalty units”, or both. As well as penalising domestic violence with criminal sanctions, the FPA makes provision for certain forms of protection for those affected, including temporary Police Safety Notices, and court-issued Protection Orders.

Protection Orders are governed by Part 3 FPA, and may be issued by courts as interim or final orders. The former are to be issued by a court or authorised justice, satisfied that an immediate order is necessary to prevent the commission of domestic violence on an affected person, protect another vulnerable person from exposure to such violence, or to avoid the affected person being prevented from pursuing an application for a final protection order. The latter may be made following an interim order, or independent of it, if the court is satisfied on the balance of probabilities that the respondent has committed or is likely to commit domestic violence against the affected person, and that the making of an order is necessary to protect the affected person from domes-

---

607 See above, note 512, Para 24.

608 See for example, United Nations Committee on Ending all forms of Discrimination Against Women, *General Comment No. 19: Violence Against Women*, UN Doc. A/47/38, 1992, Paras. 4–7; *Opuz v Turkey*, Application No. 33401/02, 9 June 2009 and CEDAW Committee, *Gegidze v Georgia*, Communication No. 24/2011, 26 July 2013.

tic violence. The need for protection, the effect of the relevant behaviour, the opinion and the well-being of the affected person must always be considered by the court before making an order. The application for a protection order may be made by the affected person, or on behalf of the affected person. If the affected person is a vulnerable person, those able to apply on behalf of that person are more limited. The conditions of a protection order are to an extent standardised, at section 35, but may be tailored to specify certain criteria, as per section 36 FPA.

The affected person in an application for a final protection order is permitted to seek mediation with the respondent which the court must facilitate. However, the CEDAW Committee has actively discouraged the use of mediation in domestic violence cases.<sup>609</sup> The FPA, in Part 5, establishes a Family Protection Advisory Council composed of representatives from different areas of government, as well as from civil society and the police force. Part 5 also allows the registration of domestic violence counsellors, and requires the establishment and support of public awareness programmes aimed at preventing domestic violence.

Despite its declaration in the introductory text that it aims to draw upon and implement principles underlying the CEDAW and the CRC, the FPA itself contains no specific reference to any of the articles listed therein and does not address domestic violence as a form of discrimination. This is a significant gap as, in order to be fully protective, it is arguable that measures taken to address domestic violence are based on the key recognition that sex discrimination is central to the issue. Whilst the FPA is a very positive step towards tackling an invidious form of discrimination, in order to be effective, it must be coupled with a strategy which raises public awareness, offers a widespread programme of counselling, is inclusive of NGOs and addresses the issue that many victims of domestic violence will be extremely reluctant to report it. Cases must therefore be more actively investigated, rather than acknowledged only when they are brought to the attention of the relevant authorities.

### **3.3 National Policies Impacting on Discrimination and Inequality**

In contrast to the notable absence of national legislation on equality and non-discrimination, there has been a recent proliferation of national policies which

---

609 See above, note 512, Para. 25(c).

may potentially have some impact on the protection from discrimination or advancement towards equality of certain groups. These are outlined in this section. However, these policies cannot fill the huge protection gap left by the dearth of equality legislation in Solomon Islands. The policies are not legally binding, there is limited awareness of their existence and no clear evidence that they have had any impact on the position of the groups they purport to assist. Indeed, the regular reporting that is to be expected from a government detailing the extent to which measures promised in a policy have been taken does not exist. Accordingly, the policies are currently of limited use in determining the position of equality and non-discrimination rights in Solomon Islands. We include them herein as they provide some limited exposition of the issues that have been discussed and considered as relevant by the national government. They may help to indicate the potential shape of future legislation.

### **3.3.1 National Policy on Gender Equality and Women's Development 2010–2015**

The National Policy on Gender Equality and Women's Development was produced by the Ministry of Women, Youth & Children Affairs and endorsed by the Cabinet in 2009. It has as its central goal "to advance gender equality and enhance women's development ensuring the active contribution and meaningful participation of both Solomon Islands women and men in all spheres, and at all levels, of development and decision making".<sup>610</sup> It is a detailed policy with overall laudable aims and proposed measures. However, as with other policies, there is little evidence of the extent to which measures have been taken to implement its aims.

The policy details five priority outcomes to be achieved by 2015, as well as a sixth outcome in relation to monitoring:

*(i) Improved and equitable health and education for women, men, girls and boys*

This includes seeking to reduce the maternal mortality ratio from 184 out of every 100,000 live births, the infant mortality rate from 34 out of every 1,000

---

<sup>610</sup> Ministry of Women, Youth and Children Affairs, *Solomon Islands National Policy on Gender Equality and Women's Development*, 2010–2013, p. 1, available at: [http://www.pso.gov.sb/index.php/resources/doc\\_download/190-sig-final-evaw-policy](http://www.pso.gov.sb/index.php/resources/doc_download/190-sig-final-evaw-policy).

live births, and the prevalence of sexually transmitted infections. Further, it includes seeking to address the gender gap in access to education. The measures it envisages taking are broad and relate mostly to improving systems and access.

*(ii) Improved economic status of women*

The policy notes that improving the economic status of women through their access to, and share of, productive resources such as land, income, financial services, training opportunities, enterprise development services and technology contributes significantly to poverty reduction. It also notes that decisions over customary land management in Solomon Islands are invariably made by men, and that women's employment in the non-agricultural sector is restricted largely to low-paid, low status jobs in the tertiary and services sector with average earnings half that of men's. It identifies a range of measures to address the situation including developing policies and programs that involve women and men in natural resource development and management, improve women's access to, and ownership of, resources and land, developing opportunities for women in the fishery, agriculture, forestry and mineral sectors and a range of other opportunities for economic empowerment.

*(iii) Equal participation of women and men in decision-making and leadership*

The policy notes the underrepresentation of women in decision-making and leadership from the parliamentary to the local community level. It states that measures will be taken to increase participation of women including through training opportunities in leadership, cultural change at levels of decision-making and providing gender awareness and training for provincial and national decision makers.

*(iv) Elimination of violence against women*

The policy notes the level of violence against women is extremely high, in fact the third highest in the world. In addition to calling for a specific policy on eliminating violence against women which would strengthen legislative protection and law enforcement; treatment and rehabilitation programs for perpetrators; preventative approaches and provision of support services, the policy suggests a number of measures to be taken. These include: developing

national commitments to eliminate violence against women; strengthening legal frameworks, law enforcement and improving justice systems; conducting public awareness and advocacy; strengthening and improving protective and support services; rehabilitating and treating perpetrators; and working with men to end violence against women. In relation to this aim, the enactment of the FPA 2014 (discussed above) is a positive development. However, the extent of the government's engagement with the other promised measures is less evident.

*(v) Increased capacity for gender mainstreaming*

The policy recognises the importance of capacity building among partners and stakeholders and across government and calls for a strengthened and highly skilled national women's machinery to coordinate policy implementation and reporting. The policy also states the aim of embedding articles from the CEDAW in legislative and regulatory provisions. The failure to do this adequately in the FPA 2014 is not a positive beginning in achieving this aim, especially considering one of the stated measures is to embed CEDAW articles into legislative and statutory reforms and policy initiatives across governments. Other stated measures include: assessing capacities and strengthening the National Women's Machinery in policy advocacy, gender awareness, gender training and gender analysis; establishing and managing a Gender Management Information System in MYWCA (Ministry of Women, Youth and Children Affairs); establishing gender desks as a priority in the Ministry of Finance (gender budgeting and national statistics), Ministry of Planning (Gender Planner), and the Prime Minister's Office (Gender Policy Analyst); supporting women's development, gender awareness, leadership development and livelihood programmes at the provincial, community and village levels; and conducting a public sector-wide stock-take of capacities for gender mainstreaming.

*(vi) Effective monitoring and evaluation of policy outcomes*

The policy states that monitoring and evaluation are critical to achieving gender equality results and for gathering evidence that the action strategies stated above are indeed closing the gender gaps and improving women's development to advance the status of women. The policy therefore contains an additional outcome to integrate this monitoring and evaluation focus. The

stated measures to be taken to achieve this outcome include establishing a National Steering Committee on Gender Equality and Women's Development to meet quarterly and ensuring there are a number of different reporting mechanisms to monitor policy outcomes.

### **3.3.2 National Policy on Eliminating Violence against Women**

The National Policy on Eliminating Violence against Women was produced by the Ministry of Women, Youth and Children Affairs and includes a three year National Action Plan lasting from January 2010 to January 2013. The policy was guided by four principles and values:

- i. zero tolerance of violence;
- ii. recognition of women's rights;
- iii. shared responsibility for eliminating violence against women; and
- iv. achieving gender equality.

The policy seeks to eliminate violence against women through seven strategic areas.

#### *Developing National Commitments to Eliminate Violence against Women*

The first strategic area involves the establishment of "a mechanism for high-level collaboration and co-operation between governments, donors and CSOs with regard to service delivery to women victimised by violence";<sup>611</sup> reforming national legislation to incorporate national, regional and international commitments on violence against women; a nation-wide advocacy campaign to secure national support and commitment; developing appropriate mechanisms for effectively implementing, monitoring, evaluating and reviewing relevant policy mechanisms; advising government's ministries; and capacity-building of implementing mechanisms.

#### *Strengthening the Legal Framework and the Law Enforcement and Justice System*

The second strategic area involves reforming criminal law, protective law and family law; providing information and education about the law reform; pro-

---

611 *Ibid.*, p. 16.

viding training and education for relevant stakeholders in the criminal justice system (such as police, prosecutors, magistrates and judges) about the law reform; and enforcement of laws prohibiting violence against women.

### *Eliminating and Preventing Violence against Women through Public Awareness and Advocacy*

The third strategic area involves supporting social marketing research and data collection to improve the effectiveness of advocacy and awareness activities; and preparing and disseminating information on eliminating violence against women in all provinces and Honiara. The latter will include programmes in school, parenting programmes, and broadcast and print media programmes.

### *Improving Protective, Social and Support Services*

The fourth strategic area involves strengthening a number of existing protective, social and support services, including the Ministry of Health and Medical Services, the Royal Solomon Islands Police Force, the Social Welfare Department, the Family Support Centre and the Christian Care Centre; increasing the number and quality of existing services for women who have suffered violence; and supporting community-based initiatives to help victims of violence.

### *Treating Perpetrators*

The fifth strategic area primarily involves developing effective behaviour change and rehabilitation programmes for perpetrators and offenders.

### *Working with Men to End Violence against Women*

The sixth strategic area involves establishing and supporting partnerships between men's and women's groups that engage men as vital contributors to collective action to change perceptions, attitudes, and behaviours of men and as champions in ending violence against women; targeting training for men on gender equality, masculinity, the role of men in society and men's responsibility to eliminate violence against women through acting as role models for other men in the treatment of women; and supporting men to continue to

take initiative in community and civic education activities such as The White Ribbon Campaign.

*Coordinating the Policy with Related Policies and Coordinating Violence against Women Elimination Services with Each Other and with the Policy*

The seventh strategic area primarily involves the establishment of an Eliminating Violence against Women National Task Force (NTF) to coordinate the implementation of the policy, and oversee and monitor the implementation of the National Action Plan.

### **3.3.3 National Policy on Disability 2005–2010**

Solomon Islands National Policy on Disability 2005–2010 was published by the Ministry of Health and Medical Services in 2004. While a more recent policy has been finalised, as of May 2015, it had not been placed before Cabinet for approval.<sup>612</sup> The 2005–2010 policy comprised 11 objectives with the ultimate goal of:

*A society that will accept and embrace the equal rights of all people with disability, assist and involve them physically, socially, spiritually and culturally and ensure the achievement of their goals and visions.*<sup>613</sup>

The eleven objectives were:

- i. To establish a National Coordinating Council for Disability (NCCD) with representation from policy makers from key government ministries, NGOs, churches, the private sector and with equal representation from women and men with disability;
- ii. To strengthen and provide technical, financial and appropriate resources to support groups and networks for parents, families, teachers and the wider community at the local, provincial and national level;

---

612 People with Disabilities Solomon Islands, *Submission to the Universal Periodic Review for Solomon Islands*, May 2015, available at: <http://uprdoc.ohchr.org/uprweb/downloadfile.aspx?file-name=2288&file=EnglishTranslation>.

613 Solomon Islands, *National Policy on Disability, 2005–2010*, p. 6.

- iii. The promotion of equal participation of women with disabilities and mainstreaming their issues on a national, regional and international level;
- iv. For the NCCD, in collaboration with all stakeholders, to raise national awareness concerning disability issues;
- v. For the Ministry of Education and Human Resources Development in consultation with people with disabilities, to review education and training policies to ensure that they give opportunity to boys and girls with disabilities, improve their access and their equal right to education, and provide compulsory special education modules in all teacher training courses;
- vi. For the Community Based Rehabilitation Programme of the Ministry of Health and Medical Services, in collaboration with relevant stakeholders, to develop and strengthen support services (e.g. physical training, sign language, interpreters, trainer aids) to enable persons with disabilities to fully participate in all sectors of training and include people with disabilities in the planning and provision of training;
- vii. To develop early intervention measures for children from 0 to 4 years old, particularly including compulsory vision and hearing tests for all children between the ages of 0–4 years;
- viii. To create more opportunities for income generation, employment and promotion based on equal rights and empowerment of all persons regardless of disability or gender;
- ix. To distribute and acquire assistive equipment and improve accessibility of transport services, structures and buildings (e.g. hospitals, hotels, churches, banks, schools, roads, sports facilities, bridges, etc.);
- x. To improve communication links between national and provincial government offices and dissemination of information through media (e.g. radio, pamphlets, newspapers, etc.) to people with disabilities;
- xi. To review the legal system to ensure that it is inclusive of people with disabilities.

### **3.4 Enforcement and Implementation**

The extent to which Solomon Islands limited legal protections can be said to be effective, at least within their limited scope, depends on their enforcement and implementation at the executive and judicial levels. Unfortunately, as this section identifies, there are significant enforcement and implementation gaps in both areas.

### 3.4.1 Enforcement

States do not meet their obligation to protect people from discrimination by simply prohibiting discrimination in the law. They must also ensure that the rights to equality and non-discrimination are effectively enforced in practice. This means that, in addition to improving legal protection from discrimination, Solomon Islands must also put in place mechanisms which guarantee victims of discrimination effective access to justice and appropriate remedies.

According to Principle 18 of the Declaration of Principles on Equality:

*Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.<sup>614</sup>*

#### ***Access to Justice***

Access to justice will only be effective where victims of discrimination are able to seek redress unhindered by undue procedural burdens or costs. Remedies must be “affordable, accessible and timely” and “legal aid and assistance” must be provided where necessary.<sup>615</sup> Rules on standing which allow organisations to act on behalf, or in support, of victims of discrimination are particularly important in overcoming the disadvantages faced by individuals in the justice system. It is also important to allow groups of victims who have experienced similar discriminatory treatment to bring claims on behalf of a group, if the systemic nature of discrimination is to be effectively addressed.

---

614 See above, note 515, Principle 18, p. 12.

615 See United Nations Committee on the Elimination of Discrimination against Women, above note 575, Para. 34.

Section 18 of the 1978 Constitution sets out the process by which individuals are able to bring claims alleging a violation of the right to non-discrimination as provided for by section 15 (or, indeed, for violations of any of the rights and freedoms in Chapter II of the 1978 Constitution). While it provides some recourse to the courts, section 18 does not provide sufficient access to justice for victims of discrimination.

Where a person believes that a violation of section 15 has been, is being or is likely to be committed in relation to him, then he may apply to the High Court for redress under section 18(1). Where the person is in detention, another person may bring a claim on behalf of that person alleging a contravention. The limitation on persons not in detention to bringing a claim only where the alleged contravention is “in relation to him” limits standing to bring a claim more narrowly than international best practice requires. Principle 20 of the Declaration of Principles on Equality, for example, states that:

*States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.*<sup>616</sup>

Section 18(2) gives the High Court original jurisdiction (a) to hear and determine any applications made under section 18(1) and (b) to determine any question arising in the case referred to it in pursuance of section 18(3). Section 18(3) provides that if in proceedings in a lower court a question arises as to the contravention of section 15 (or any other section in Chapter II), the judge may (and shall, if any party to the proceedings so requests) refer the question to the High Court. The High Court can, however, reject the reference if it believes that the raising of the question is “merely frivolous or vexatious”. This is not uncommon. Further, section 18(2) provides that the High Court can reject a claim if it deems that adequate means of redress were available under another law. The High Court has declined to

---

616 See above, note 515, Principle 20, pp. 12–13.

hear claims in relation to other sections of the Constitution where it considers that alternative redress is available.<sup>617</sup>

Under section 18(4), a person aggrieved by any determination of the High Court under section 18 may appeal the decision to the Court of Appeal. A person may not, however, appeal a determination of the High Court that the original application was “frivolous or vexatious”. This is problematic. Where the High Court has wrongly made this determination, the applicant is left with no further recourse to the courts to adjudicate their discrimination complaint.

Section 18(5) gives the Parliament the power to confer additional powers to the High Court for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by section 18. However, from the information available publicly and through discussions with lawyers in Solomon Islands, we have seen no evidence that this power has been exercised.

Section 18(6) allows for rules of court making provision with respect to the practise and procedure of the High Court in relation to the jurisdiction conferred on it by or under this section to be made (including rules with respect to the time within which any application or reference shall or may be made or brought). Such rules were made in 1982: the Constitutional Provisions Rules 1982 which amended the High Court (Civil Procedure) Rules 1964 which states that “no application for redress made under Section 18(1) of the Constitution (...) shall be made unless leave has been granted under this rule”<sup>618</sup>

Concerns over access to justice for victims of discrimination in Solomon Islands have been raised by, *inter alia*, the CEDAW Committee which, in 2014, noted:

*Structural barriers to women’s access to the formal justice system, in particular the lack of human and financial resources allocated to the judiciary at the provincial level and of legal practitioners who provide legal aid to*

---

617 For example, in *Solomons Mutual Insurance Ltd v Controller of Insurance* [2003] SBHC 115; HC-CC 114 of 1999 (31 July 2003), Palmer J declined to exercise his power to grant redress under the Constitution in relation to the validity of search and seizure warrants because adequate redress was otherwise available to the applicant.

618 Rule 1(1) of Order 61A of the High Court (Civil Procedure) Rules 1964.

*women, as well as the high costs for seeking redress in the High Court.*<sup>619</sup>

### ***Legal Aid System***

Section 92 of the 1978 Constitution establishes the office of the Public Solicitor whose functions are set out in section 92(4) as: (a) to provide legal aid, advice and assistance to any person in need who has been charged with a criminal offence and (b) to provide legal aid, advice and assistance to any person when directed to do so by the High Court.

The Public Solicitor's office was not established, however, until the Public Solicitor Act in 1987.<sup>620</sup> Prior to this, the only legal aid services in Solomon Islands were provided by the Social Welfare Solicitors from an office in the Honiara City Council in the late 1970s.<sup>621</sup> The first lawyers were volunteers from Voluntary Service Overseas who worked for Social Welfare Solicitors. Following the passage of the Public Solicitor Act, Voluntary Service Overseas lawyers started to work at the Public Solicitor's office and were later joined by Solomon Islands law graduates.<sup>622</sup> There are three Public Solicitor's offices in the country now: in Honiara, Gizo and Auki, but only the Honiara Public Solicitor's Office has a Family Protection Unit.

The Public Solicitor Act governs the provision of legal aid in Solomon Islands. Under section 3, legal aid (a) consists of representation of persons in proceedings, including all such assistance as is usually given in the steps preliminary or incidental to the proceedings or in arriving at, or giving effect to, a compromise to avoid or bring an end to the proceedings; and (b) includes the providing of legal advice and assistance to persons in need of such advice and assistance.

Legal aid is strictly limited under section 4 only to (a) persons who qualify for it in the terms set out in section 92(4) of the Constitution; and (b) to oth-

---

619 See above, note 512, Para 12.

620 Public Solicitor Act (Cap 30).

621 Public Solicitor's Office, *History of the PSO*, available at: <http://www.pso.gov.sb/index.php/about-us>.

622 *Ibid.*

er persons whose income does not exceed the amount set out in secondary legislation. The secondary legislation is the Legal Aid (Income Limit) Order which sets out a maximum income of 12,000 SBD (US\$1,482.00) for a person to be eligible for legal aid. While this provision is restrictive, the Public Solicitor’s Office is in the process of establishing a “Means and Merits Test”, which includes cases of domestic violence and child protection as priority areas when allocating legal aid.<sup>623</sup> The guidelines also make clear that matters of criminal justice, domestic violence and child protection are not subjected to the means test when considering whether they are eligible for legal aid.

Nonetheless, the poor provision of legal aid has been criticised by the CEDAW Committee which urged Solomon Islands in 2014 to “ensure the provision of free legal aid to women without sufficient means to claim their rights”.<sup>624</sup>

### ***Evidence and Proof***

International law recognises that it can be difficult for a person to prove that discrimination has occurred, and thus requires that legal rules on evidence and proof are adapted to ensure that victims can obtain redress. Principle 21 of the Declaration of Principles on Equality states that:

*Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (prima facie case), it shall be for the respondent to prove that there has been no breach of the right to equality.*<sup>625</sup>

---

623 The “Means and Merits” Guidance sets out the priority areas as: (i) criminal cases (including extradition matters and appeals); (ii) matters relating to domestic violence and child protection; (iii) matters directed by the High Court pursuant to section 92(4) of the Constitution; and (iv) family matters.

624 See above, note 512, Para 13.

625 See above, note 515, Principle 21, p. 13.

As this principle indicates, the “burden of proof” in cases of discrimination should be transferred to the defendant, once a *prima facie* case that discrimination has occurred has been made. The CESCR has stated in its General Comment No. 20 that:

*Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.*<sup>626</sup>

As noted above, however, Solomon Islands has no anti-discrimination legislation, and there are no provisions in the Constitution relating to the burden of proof.

### ***Remedies and Sanctions***

It is essential that remedies are designed so as not only to address the needs of the individual bringing a claim, but to address structural causes of the discrimination experienced by the individual in the case, which are likely to affect others. In this respect, the CEDAW Committee has said:

*This obligation requires that States parties provide reparation to women whose rights under the Convention have been violated. Without reparation the obligation to provide an appropriate remedy is not discharged. Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.*<sup>627</sup>

---

626 See above, note 514, Para 40.

627 See United Nations Committee on the Elimination of All Forms of Discrimination against Women, above note 575, Para 32.

The CESCR has also said that “effective” remedies include compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies.<sup>628</sup> Sanctions imposed on discriminators must be effective, proportionate and dissuasive.<sup>629</sup>

Section 18 of the 1978 Constitution provides that the High Court:

*[M]ay make such orders, issue such writs and give such directions, including the payment of compensation, as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.*

Whilst this remedy-making power appears to be fairly broad, in 2014, the CE-DAW Committee criticised Solomon Islands for “the lack of effective remedies and redress available to women in both the traditional justice and the formal justice system”.<sup>630</sup> The Committee recommended that Solomon Islands:

*[E]stablish specific remedies to provide redress for women in both the formal and the traditional justice systems, and sensitize the public on the importance of addressing violations of women’s rights through judicial remedies.*<sup>631</sup>

### ***Administrative Mechanisms***

In addition to judicial remedies, states are required to establish effective administrative mechanisms such as a national human rights institution or an independent equality body. The CESCR has stated that:

*National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm*

---

628 See above, note 514, Para 40.

629 See above, note 515, Principle 22, p. 13.

630 See above, note 512, Para 12.

631 *Ibid.*, Para 13.

*caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination.*<sup>632</sup>

Such mechanisms should also promote respect for the enjoyment of human rights without any discrimination, review government policy, monitor legislative compliance, and educate the public.<sup>633</sup>

Whilst the 1978 Constitution of Solomon Islands establishes the office of an Ombudsman, this role is limited to:

- (a) Making enquiries into the conduct of any person to whom section 97(3) of the 1978 Constitution applies in the exercise of his office or authority, or abuse thereof (section 97(3) lists such persons as members of the public service, the Police Force, the Prisons Service, the government of Honiara city, provincial governments, and other offices, commissions, corporate bodies or public agencies);
- (b) Assisting in the improvement of the practices and procedures of public bodies; and
- (c) Ensuring the elimination of arbitrary and unfair decisions.

Whilst such functions could, in theory, include investigations into discrimination carried out by the persons listed in section 97(3), it is unclear whether, in practice, the Ombudsman does carry out such investigations. Indeed, in 2014, the CEDAW Committee criticised Solomon Islands for “the lack of information about the mandate of the Solomon Islands Ombudsman to receive and deal with complaints about violations of women’s human rights” in its state party

---

632 See above, note 514, Para 40.

633 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 17 on the establishment of national institutions to facilitate the implementation of the Convention*, UN Doc. A/48/18, 1993, Para 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, UN Doc. E/C.12/1998/2510, 1998, Para. 3. See also *Principles relating to the Status of National Institutions (the Paris Principles)*, adopted by General Assembly Resolution 48/134 of 20 December 1993.

report.<sup>634</sup> The Committee recommended that the government “take measures to ensure that the Ombudsman Office or another entity has a mandate to receive and address complaints by women about discrimination”.<sup>635</sup>

In addition, during the 2011 Universal Periodic Review, the government of Solomon Islands accepted recommendations that Solomon Islands take steps towards the establishment of a national human rights institution for the promotion and protection of human rights.<sup>636</sup> The government stated that the establishment of the body was dependant on the draft Federal Constitution being passed, although it also showed some openness in considering the issue independently from the Constitution.<sup>637</sup>

### 3.4.2 Jurisprudence on Equality and Non-discrimination

The judiciary plays an important role in shaping the law of Solomon Islands through the existence of precedent. Unfortunately, in part because there is no specific national law on equality and non-discrimination and human rights protections are a recent development in Solomon Islands, the judiciary has yet to develop jurisprudence on the rights to equality and non-discrimination. The development of jurisprudence is further hampered by a lack of information and resources. In addition, there are few lawyers with sufficient human rights experience to bring cases where rights have been violated or to make detailed submissions on violations of rights.

The cases set out below evidence the limited extent of the discussion of equality and non-discrimination by the judiciary, representing a big gap in the protection of these rights in Solomon Islands, especially given the problematic protection under the 1978 Constitution and the lack of other anti-discrimination law at the national level. What follows is an expansion of the detail in relation to cases already identified as having an impact on the international

---

634 See above, note 512, Para 12.

635 *Ibid.*, Para 13.

636 United Nations Human Rights Council, Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Solomon Islands*, UN Doc. A/HRC/18/8, 11 July 2011, Paras 79.1 (Canada), 79.2 (Ireland), 79.3 (Argentina), 79.4 (Spain), 79.5 (United Kingdom), 79.6 (Morocco) and 79.7 (Indonesia).

637 *Ibid.*, Para 25.

and national obligations outlined above coupled with an exploration of a limited number of cases in other areas which show a poor appreciation on the part of the judiciary of Solomon Islands' of the obligation to protect equality and freedom from discrimination.

Despite the issue of discrimination being central in several cases, including *Regina v Gua*,<sup>638</sup> there does not appear to be any judicial discussion of the rights to equality and non-discrimination as set out in international law. The cases which follow in the below section are all concerned with discrimination, yet none makes any reference to international standards or obligations. Instead, each case is decided through interpretation of the provisions of the Constitution and of domestic law.

There are few cases in which the courts discuss and apply section 15 of the 1978 Constitution, although lawyers are increasingly presenting arguments relating to discrimination and violations of section 15.

A decision of the High Court of Solomon Islands in 2001, discussed in brief under 3.2 above, appears to interpret section 15(1) as only applying to cases of direct discrimination, a significant limitation on the ordinary meaning of the section. In *Folotalu v Attorney-General*,<sup>639</sup> the applicant, Walter Folotalu, challenged the constitutionality of section 2 of the National Parliament Electoral Provisions (Amendment) Act 2001 which increased the non-refundable deposit from 2,000 SBD (US\$247) to 5,000 SBD (US\$618) to be paid by intending candidates contesting in the upcoming general elections. One of the arguments of the claimant was that it was discriminatory against him on grounds of place of residence as a non-wage earner living in the rural areas. As the provision applied to all persons equally, it could not be said to be directly discriminatory but there were arguments that could be made in relation to indirect discrimination. The Court paid scant attention to the section 15(1) arguments. And the language of the Court in determining whether the provision could be considered discriminatory provides a clear indication that it was only considering direct discrimination and did not consider the possibility that legislation could discriminate indirectly.

---

638 See discussion in subsection 3.1.5 of this report.

639 See above, note 554. See also brief discussion of the case at 3.2 above.

The Court referred to a decision of the High Court of Fiji in a similar case in which that court had stated:

*In this latter regard learned Counsel for the applicant argued that a nomination fee of \$1,000 unlawfully discriminated against the poor as opposed to the rich. I cannot agree. The requirement of a \$1,000 refundable deposit on nomination is a general requirement which applies to all persons who are nominated for election to parliament. It applies to both rich and poor alike and although it may cast an unequal burden on the latter that does not in my view render the requirement discriminatory...*<sup>640</sup>

Whilst the specific arguments of the applicant are not detailed within the judgment, it would appear that he argued that the legislation discriminated against him indirectly:

*I take note though of the point which the Applicant seeks to establish, that the increase makes it more difficult and in some instances, well in his case, impossible, to pay the deposit and thereby disqualifying him from running for office in the coming elections.*

However, the Court went on to say:

*I think the more accurate word to use in his case is that he is being penalized (disadvantaged) by this increase, but not discriminated (treated unfairly) against.*

The Court thus concluded that the applicant had not been discriminated against. By considering discrimination as not possible where legislation applied to all persons equally, the Court took a narrow view of “discriminatory” which includes only direct and not indirect discrimination.

In addition, as also discussed in brief at 3.2 above, one of the areas in which the prohibition of discrimination contained in section 15 has been considered

---

640 *Sakeasi Butadroka v Attorney-General & Electoral Commission* (1992), Fiji High Court, unreported.

is in its relationship to customary law. Section 15(5)(d) of the 1978 Constitution provides an exception to the right to non-discrimination in application of customary law. In *Tanavalu v Tanavalu*,<sup>641</sup> the High Court confirmed that the 1978 Constitution permitted the use of customary law even if it discriminated against women.

The case concerned customary inheritance for the purpose of the National Provident Fund Act. The Act provided that where a member of the Fund dies without nominating a beneficiary for their accumulated funds, distribution is to be in accordance with the custom of the member, “to the children, spouse and other persons” entitled in custom.<sup>642</sup> The Act did not say how this custom was to be established. The plaintiff in the case was a widow whose husband had nominated his brother and nephew as beneficiaries when he joined the fund. Section 32 of the Act provided that the nomination became void when he married the plaintiff the following year. When he died, his father applied for, and was paid, the amount held in the fund on the basis of local custom. Of the 11,079 SBD (US\$1,368) paid to him, the father deposited 4000 SBD (US\$494) in an interest-bearing deposit account in the name of the deceased’s son. He used 3000 SBD (US\$370) to meet funeral expenses and paid 2000 SBD (US\$247) each to the deceased’s brother and nephew. Seventy-nine SBD (US\$10) was used for his own purposes. The plaintiff challenged this distribution, seeking a declaration in the High Court that she and her infant child were entitled to a third share of the money each. The evidence in the case showed that inheritance in the deceased’s tribe was patrilineal and that the deceased’s father was entitled to distribute the estate to relatives. According to customary law the deceased’s father had the discretion to pay some amount of the inheritance to the widow, but in some circumstances, for example, as where she had left the father’s house, he was entitled to leave her out of the distribution altogether.

The plaintiff argued that the customary law as found was discriminatory and hence unconstitutional. Section 15(1) provides that “[s]ubject to the provisions of subsections (5), (6) and (9) of this section, no law shall make any pro-

---

641 See above, note 557.

642 Brown, K. and Corrin Care, J., “More on Democratic Fundamentals in Solomon Islands: *Minister for Provincial Government v Guadalcanal Provincial Assembly*”, 32, *Victoria University of Wellington Law Review*, 2001, p. 653.

vision that is discriminatory either of itself or in its effect". The Court found that the word "law" in section 15(1), did not include customary law:

*Does the word law therein include customary law? I do not think so, because the section refers to a law to be made in the future and customary law is not made; it evolves or was already pertaining at the time of the adoption of the Constitution.*

The Court went on to say that discriminatory customary law would not be outlawed by sub-section (1) in any event because section 15(5)(d) (and section 15(5)(c)) excused discriminatory law in a case such as this. Section 15(2) was also considered. It provides that:

*Subject to the provisions of subsections (7), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or performance of the function of any public office or any public authority.*

The Court considered that it was clear that "written law" in section 15(2) did not extend to customary law:

*[C]ustomary law is not "written law". The Constitution does not define the expression, written law, the expression is defined in the Interpretation and General Provisions Act as, "an Act, any subsidiary legislation or an imperial enactment." That excludes customary law. So a person acting "by virtue of" customary law may treat another in discriminatory manner if that is in accordance with the applicable rule of customary law.*

The allegations of discrimination were not pursued before the Court of Appeal. Nor were the arguments expressed above on the meaning of section 15 put forward. The Court of Appeal upheld the first instance decision and limited its consideration of the conflict between customary law and protection from discrimination to the following words:

*The Constitution (s 15(5) and cl 3 of Schedule 3) recognises the importance of customary law to citizens of the Solomon Islands. The former provision recognises that the application of customary law may have certain discriminatory consequences. The learned trial judge was correct in holding that the Act was not unconstitutional because section 36(c) discriminated against the widow.*

The case of *The Premier of Guadalcanal v The Attorney General*<sup>643</sup> revolved around the Provincial Government Act 1996 which replaced the existing system of provincial government with a new regime. The Act provided for ten Area Assemblies. Each Assembly would be made up of 50% elected members and 50% appointed chiefs and elders. The Act was challenged by the Guadalcanal Provincial Assembly as unconstitutional. Although the challenge was primarily based on arguments that the Act was contrary to constitutional principles of representative and responsible government, arguments were also made that the Act contravened the right to non-discrimination in section 15 of the 1978 Constitution.

In customary societies, “patriarchal values are, at least formally, overriding and ubiquitous”.<sup>644</sup> This was acknowledged by Williams JA in his judgment:

*Firstly the traditional position is that only a male can be a “traditional chief”. That means that one-half of the members of the Area Assembly must be males and that, it might be said, effectively denies females equal opportunity with males. There is certainly force in this argument, but the answer in essence is that the Constitution recognises that the “traditional chiefs” should play a role in government at the provincial level. The Constitution itself therefore recognises this imbalance or discrimination and it will remain until the role of “traditional chiefs” under the Constitution is re-evaluated. Initially the role of women in government will be limited to standing for election to Area Assemblies, and un-*

---

643 Unreported, Court of Appeal, Solomon Islands, [1997] SBCA 1, CA-CAC 3 of 1997, 11 July 1997.

644 See above, note 642, p. 662.

*doubtedly when that has become more readily accepted, consideration will be given to the discriminatory effect of appointing chiefs and elders pursuant to sections 30 and 31 of the 1996 Act.*<sup>645</sup>

A similar conclusion was reached by Goldsbrough JA:

*Parliament has made provision for provincial government. It was required to do so. It has considered, as required, the role of traditional chiefs. Indeed it has decided to enhance their role, as compared to the repealed legislation. In this regards it is clear that women at present may be disadvantaged, given that traditional chiefs are male. This I conclude cannot be said to offend against the constitution as it is required consideration by that same constitution.*<sup>646</sup>

Neither of these judges, nor the third judge, Kapi P, referred to section 15 of the Constitution, nor analysed the discriminatory effect of the Act on the right to non-discrimination contained therein. The judgments have been criticised by Brown and Corrin Care for contending that:

*Parliament was charged by the Constitution to provide for the position of traditional chiefs and that if it devised a formula for doing so that was discriminatory then that discrimination was sanctioned by the Constitution itself.*<sup>647</sup>

This reasoning has been criticised as “circuitous and faulty”.<sup>648</sup> It certainly results in a significant restriction on non-discrimination in respect of the ability to stand for elections and represent one’s community at the provincial level. The fact that the Court has made a judgment with such significant implications on equality without even referring to section 15 of the 1978 Constitution, is deeply disquieting.

---

645 *Ibid.*, p. 664.

646 *Ibid.*, p. 665.

647 *Ibid.*

648 *Ibid.*

Unlike in the above cases, in the case of *Director of Public Prosecutions v Bowie*,<sup>649</sup> a violation of the prohibition of non-discrimination contained in section 15 of the 1978 Constitution was found. However, its conclusion as to the remedy following the finding is seriously regressive. The case concerned section 155 of the Penal Code, which created an offence of gross indecency between males and which, when first enacted, read:

*Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private shall be guilty of a felony, and shall be liable to imprisonment for five years.*

In 1988, a prosecution was instigated against Noel Bowie. At the close of the prosecution case, his lawyer submitted to the court that section 155 was inconsistent with section 15 of the Constitution on the basis that it was discriminatory against men. The submission was upheld and the defendant acquitted.

The Director of Public Prosecutions appealed the acquittal and the matter reached the High Court. The Court noted that section 155 was limited to men and that there was no similar or corresponding offence relating to women. As such, the Court considered it “hard to imagine a clearer case” of a violation of section 15. An argument had been made by the appellant that, even if section 155 was discriminatory under section 15(1), it was saved by section 15(9). It was argued that as section 15(9) provides an exception for legislation which restricts the rights and freedoms of a group of people sharing a protected characteristic and which is guaranteed by sections 9 (privacy of home and other property) and 13 (freedom of assembly and association) where such a restriction would be authorised by sections 9(2) or 13(2) as the case may be. The appellant argued that section 155 restricted the rights to privacy and to freedom of association but that such a restriction was justified on grounds of public morality and public health, both of which were legitimate justifications under sections

---

649 Criminal Appeal Case No. 32 of 1988 [1988] SBHC 1; [1988-1989] SILR 113 (13 October 1988).

9(2) and 13(2). The Court, however, rejected this argument stating that for it to succeed it would be necessary to interpret section 15 too widely with the result that any justified restriction of sections 9 and 13 would mean it could never violate section 15. Instead, section 15(9) could only be interpreted to save section 155 in relation to privacy and freedom of association and not generally.

Whilst the Court's conclusions thus far were welcome, the means by which the inconsistency was remedied led to a deeply unjust result. Section 2 of the Constitution provides that "if any law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void". The court was faced with two options: either holding that the law was void in its entirety or only to the extent that it was inconsistent with section 15. In deciding which option to choose, the Court asked itself whether the inconsistent part of the section was so inextricably bound up with the remainder that the loss of the part would destroy the whole. The Court held that it was only the use of the word "male" that led to the inconsistency and that simple removal of that word – in effect, making the offence gender-neutral – would not "prevent the remainder having a clear and complete meaning and, therefore, being able independently to survive".<sup>650</sup> The perverse result was that the scope of the offence was therefore extended to cover all persons, rather than simply men, extending beyond the original intentions of the legislature when drafting the provision:

*One cannot escape the irony that, by invoking the protective provisions of the Constitution in the aid of part of the community, the population as a whole is now subject to a criminal offence that had not affected it hitherto but, ironical though it is, I feel that is the correct result.*<sup>651</sup>

The Court justified this result on the basis that the legislature had probably not even considered the idea of acts of gross indecency between females but that, had it been so considered, the legislature would have widened the offence to include such acts rather than not prohibit any attempts to make

---

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*

such conduct criminal. The appeal was therefore allowed and the defendant tried *de novo*.<sup>652</sup>

Perhaps the only positive result which has been reached before the courts in relation to non-discrimination was the case of *Regina v Gua*,<sup>653</sup> which was noted in 3.1.5 above due to the court's reliance on the international obligations contained in the CEDAW. Until 2012, the principle of the common law of England that a man may not be found guilty of raping his wife had been adopted in Solomon Islands, despite the principle's abolition in English law in 1991 by a decision of the House of Lords.<sup>654</sup> In *Regina v Gua*, the High Court of Solomon Islands ruled that the principle no longer formed part of the law of Solomon Islands. After summarising the history of the principle and its abolition in English law, Justice Apaniai analysed the law of Solomon Islands in order to determine whether it remained a principle of Solomon Islands law.

The appellant had argued that, despite the decision of the House of Lords, the law of Solomon Islands remained unchanged by virtue of section 2(1) of Schedule 3 to the Constitution of Solomon Islands which provides that:

*Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as:*

---

652 Shortly after the decision, the National Parliament adopted the Penal Code (Amendment) Act 1989 (Act No. 5 of 1989), which amended section 155 by making it gender neutral. The new section 155 provided: "Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private shall be guilty of a felony, and shall be liable to imprisonment for five years." The offence could therefore be committed by both men and women and involve acts between persons of the same or the opposite sex. Perhaps realising that the drafting of this new offence meant that it included acts between opposite-sex couples, a year later, the National Parliament adopted the Penal Code (Amendment) Act 1990 (Act No. 9 of 1990) which repealed section 155 and replaced it with an entirely new section which applied only to acts between persons of the same sex: "Any person who, whether in public or private - (a) commits any act of gross indecency with another of the same sex; (b) procures another of the same sex to commit any act of gross indecency; or (c) attempts to procure the commission of any act of gross indecency by persons of the same sex, shall be guilty of a felony and be liable to imprisonment for five years."

653 See above, note 539.

654 *R v R* (House of Lords) [1991] UKHL 12, [1992] 1 AC 599, [1991] 3 WLR 767, [1991] 4 All ER 481, (1991).

- (a) they are inconsistent with this Constitution or any Act of Parliament;
- (b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or
- (c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

Justice Apaniai rejected this argument on the basis that the principles and rules of the common law had changed as a result of the decision of the House of Lords. He also held that, even if this were not the case, the principle that a man could not be found guilty of raping his wife had “run its course” and was no longer “applicable nor appropriate in the circumstances of the Solomon Islands”, adding that “[t]he proposition should now be confined to its grave”.<sup>655</sup>

Of particular importance from the perspective of the right to equality, Justice Apaniai also commented on the evolution of the understanding of equality between men and women in Solomon Islands and Solomon Islands’ obligations under international human rights law:

- (50) *The time when women are considered as sex objects or as subservient chattel of the husband in Solomon Islands has gone.*
- (51) *In this modern time, marriage is now regarded as a partnership of equals and this principle of equality has been reflected, not only in international conventions to which Solomon Islands is a party, but also in the entrenched provisions of the Constitution.*
- (52) *One of the international conventions to which Solomon Islands is a party is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which, in article 15, calls on all state parties to accord women equality with men before the law and, in article 16, calls for the same personal rights between husband and wife.*
- (53) *As for the Constitution, sections 3 and 15 of the Constitution guarantees women equal rights and freedoms as men and affords them protection against*

---

<sup>655</sup> See above, note 539, Para 49.

- all forms of discrimination, including discrimination on the ground of sex.*
- (54) *Furthermore, judicial decisions regarding rape and similar offences against women have also reflected the judicial approach to offences affecting women.*
- (55) *The courts have stated time and again that rape is an offence which is often committed out of a selfish desire to gratify a man's own sexual desires, appetite and fantasies in disregard for the rights, dignity and feelings of the victim.*
- (56) *A husband raping his own wife does so for no other reason than to satisfy his own selfish desires at the expense of the wife's dignity and feelings. Such behaviour must come to an end.*
- (57) *All these instances show the changing attitude in Solomon Islands towards the status of women and the recognition that women are equal partners with men in nearly all things, including marriage.*
- (58) *In my view the time has come for this court to take a hard look at this old marital exemption rule and see whether its terms accord with what is now regarded generally in these modern times as acceptable behaviour. (Footnotes removed.)*

Thus, whilst not strictly overturning the law on the basis of its discriminatory nature or of international human rights law, the judge nevertheless appears to take into account the relevant international human rights law, including the right to equality between men and women, in his analysis of the common law's development on this issue. This analysis was again limited in its exploration of the nature of the obligations set out in the relevant treaty. However, in the context of an otherwise woeful consideration of equality and non-discrimination by the judiciary of Solomon Islands, the judgment is to be strongly welcomed as one of the few positive results for the enforcement of the rights to equality and non-discrimination in Solomon Islands.

### 3.5 Conclusion

This report finds that Solomon Islands' legal and policy framework is manifestly inadequate to address the patterns of discrimination and inequality prevalent in the country. Not only does Solomon Islands have a poor record of participation in international instruments, having acceded to only four key UN human rights treaties, but its national legislation and jurisprudence indicate scant regard for the human rights that Solomon Islands has agreed to uphold.

The 1978 Constitution provides no constitutional right to equality and its very limited non-discrimination provision, as is the case with many of the limited number of fundamental rights it contains, is rendered incredibly narrow by numerous limitations and exceptions. In the context of the constitutional reform process, from 2004 to 2013 the constitutional drafts showed a decrease in the protection proposed to be provided in respect of the rights to equality and non-discrimination, which is indeed a worrying trend. It is reassuring however that the Bill of Rights from the 2014 Draft constitution reversed the trend and that the latest Draft would mark a significant improvement on the 1978 Constitution with respect to equality and non-discrimination protection. However, there is further work to be done before the 2014 Draft is in line with international law and best practice. Disappointingly, there is currently no sign that the reform process will be opened up wider to ensure that, amongst others, expert voices from the human rights community will have sufficient traction in the process.

Beyond the thin protection contained within the 1978 Constitution, Solomon Islands legislation provides almost no protection from discrimination. Not only does the state lack comprehensive equality legislation, but it also lacks specific anti-discrimination laws. While the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Bill 2006 contains important provisions to advance the equality of persons with disabilities, its progress through the legislative process has been slow and it remains to be passed. The Family Protection Act 2014 provides important and much needed law relating to domestic violence, which is endemic in Solomon Islands, with women the usual victims. While the Act fails to mention the relevance of discrimination to such violence, it is nevertheless to be strongly welcomed. Aside from this, there is little to celebrate within the legal framework.

The absence of effective constitutional and legislative protections of the rights to equality and non-discrimination are exacerbated by a weak and ineffective system of implementation and enforcement. The judiciary has demonstrated an evident lack of capacity with respect to arguments relating to international human rights law and also the constitutional right to non-discrimination, with comments contained in the High Court judgment in *Regina v Gaa* a notable exception. The dearth of jurisprudence itself also signifies that not enough discrimination cases are coming before the courts. This is in part because of the ongoing lack of public awareness in respect of the constitutional right to non-discrimination.