

CEDAW Legislative Compliance Indicators

FEDERATED STATES OF
MICRONESIA



CEDAW Legislative Compliance Review

Fiji



CEDAW Legislative Compliance Review

Kiribati



CEDAW Legislative Compliance Review

Marshall Islands



CEDAW Legislative Compliance Review

Papua New Guinea



CEDAW Legislative Compliance Review

Samoa



CEDAW Legislative Compliance Review

Solomon Islands



CEDAW Legislative Compliance Review

Tuvalu



CEDAW Legislative Compliance Review

Vanuatu



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1.1 Overview

Assessing a country's level of *de jure* (legislative) compliance and enabling future assessments to evaluate progress requires benchmarks against which legislation and constitutions can be measured. Benchmarking in turn requires a justifiable and credible set of indicators. Indicators have traditionally been employed in the development sector and in the economic and social sciences. They have recently been adopted in the human rights field to establish objective standards of measurement with a view to assessing a state's progress in complying with its human rights obligations. Put simply, indicators are a tool of measurement that can answer the question of how much (or whether) progress is being made toward a certain objective but they do not answer the question of why progress is or is not being made. As discussed earlier in the introduction, whilst it has been universally recognised that legislative compliance (*de jure*) may not of itself achieve real or actual equality (*de facto*), the pursuit of legislative compliance is nevertheless an important initial measure towards that goal.

This review utilised 113 indicators (111 for the FSM) which were developed by the authors for an initial project with UNIFEM to monitor legislative compliance with CEDAW in the Pacific region. The process of developing indicators to measure legislative compliance with CEDAW involved an assessment of the meaning of CEDAW's articles and how they could be translated into law. That assessment was based on a number of sources including; first, a detailed consideration of CEDAW's articles, and second, extensive reference to the 25 General Recommendations of the CEDAW Committee. The CEDAW Committee, (established to monitor the implementation of CEDAW), has released 25 General Recommendations, each responding to issues of particular concern relating to specific articles of the Convention. The Recommendations provide extended commentary

of many aspects of CEDAW. Third, extensive reference was made to other reports and resources including government and 'shadow' reports to the CEDAW Committee, particularly those submitted by Fiji and Samoa, numerous reports by NGOs and agencies throughout the Pacific region, and the extensive body of feminist literature that interprets legislative frameworks in the areas governed by CEDAW. Finally, the authors engaged in a consultation process with a range of NGOs and women's organisations located in Suva. The indicators were used to develop a template against which the nine subject countries' legislative compliance with CEDAW was measured. Full compliance with CEDAW would require the satisfaction of all indicators, a feat yet to be achieved by any of the 185 States Parties. Rather than being prescriptive, however, this review seeks to assist States Parties in establishing priorities for more comprehensive legislative compliance with CEDAW.

It should be noted that the nine country legislative reviews contained in this document were conducted using all materials available at the time, and although every effort was made to obtain the most recent and up-to-date legal material, it is possible that there will be errors or omissions.

The next section [1.2] includes a discussion of the challenges of formulating indicators followed by a commentary on the indicators identified [1.3]. The commentary explains the meaning of the indicator, its link to CEDAW (and the Beijing Platform for Action) and the rationale underpinning the selection of the indicator. A complete set of the indicators in table form can be found at the end of this chapter.

1.2 Challenges of Formulating Indicators

The development of objective and justifiable indicators is a process which involves several challenges. The challenges posed include the following; first, some of the obligations created by

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

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

Third, whilst the CEDAW Committee has interpreted aspects of many of the articles of the Convention (manifested through the issuing of general recommendations and concluding comments), the status of its recommendations, however, are not

binding. Further, although the consultations and dialogue adopted during the reporting process allow for some vetting of the articles of CEDAW, rigorous legal debate testing the interpretation and meaning of an article is absent. Therefore, whilst the non-judicial interpretations of the articles by the CEDAW Committee provide some assistance in determining the meanings of particular provisions of CEDAW (and consequently assist in the development of indicators), generally however, it is up to each State Party to determine the scope of the provision and to enact changes accordingly.

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

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

(legislative) indicators requires some knowledge of the *de facto* circumstances of a country or region. The indicators developed in this review are partially reflective therefore of regional practices and regional conditions in relation to women in the Pacific.

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

The following section [1.3] identifies the articles of CEDAW, the corresponding indicator(s) and the rationale underpinning the selection of that indicator.

1.3 Indicators: Justification and Rationale

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION

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

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

ARTICLE 1 AND 2 INDICATORS

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

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

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

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

symbolic status. Satisfaction of this indicator would also comply with para 232(c) of the Beijing Platform for Action.

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

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

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

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

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

Article 2 prohibits all discrimination against women and in doing so obligates States Parties to guarantee the autonomy of women. A woman's right to independence and self-determination includes the right to define and express her sexuality and to choose her lifestyle. Discrimination against lesbians in employment, education, child custody and marriage often means that lesbians and lesbian families are denied economic and legal benefits granted to married women, including inheritance rights, tax deductions, insurance benefits, and more. General Recommendation 21(13) acknowledges that the form and concept of the family can vary. Irrespective of their sexuality, the treatment of women in the family, at law, and in private, must accord with the principles of equality and justice for all as Article 2 of CEDAW requires.

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

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

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

The CEDAW Committee states in General Recommendation 18 that Article 2 obligates States Parties to eliminate discrimination

against all women. It notes that women with disabilities suffer from a 'double discrimination linked to their special living conditions'. Historically, areas where women with disabilities have experienced discrimination on the basis of both their sex and their disability have included education, employment, health services and social security.

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

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

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

Article 2(d) of CEDAW obligates States Parties to themselves refrain from engaging in any act or practice of discrimination

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

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

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

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

Article 2(b) of CEDAW recommends that, where appropriate, sanctions for breaches of anti-discrimination provisions be provided. The provision of penalties and remedies is an essential component of effective anti-discrimination measures. This could include penalties such as fines, apologies or loss of government contracts and remedies such as compensation and injunctive relief. An effective system of sanctions provides a clear statement of the unacceptability of discrimination in society. Conversely, a system that is ineffective sends a range of negative symbolic messages. These include the message that discrimination is not regarded seriously by the State; that the wrongs that discrimination victims experience are not serious; and finally that discrimination is not in itself an abhorrent harm that the State considers worthy of sanction or compensation.

1.12 Are there specific domestic violence offences in the

criminal law legislation (Penal Code)?

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

1.13 Is stalking a criminal offence?

General Recommendation 19 notes that full compliance with CEDAW requires States Parties to take positive measures to eliminate all forms of violence against women. Stalking refers to the harassment or intimidation of a person causing them to fear for their safety. It is a course of conduct which may involve individual acts that are not unlawful (such as sending unwelcome gifts, making persistent phone calls or following a person

from home and work). Taken cumulatively however, these acts can amount to intimidating and harmful behaviour. In the NSW Crimes Act in Australia, stalking is defined as ‘following a person about or the watching or waiting, or frequently in the vicinity of, or an approach to, a person’s place of residence, business, or work or any place that a person frequents for the purpose of any social or leisure activity.’ Stalking, therefore, should be specifically identified as an offence in the criminal law legislation.

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

The CEDAW Committee has stated that governments must ‘provide victims of domestic violence with the maximum protection of the law’. General Recommendation 19 notes that States Parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender based violence give adequate protection to all women so as to respect their integrity and dignity. General Recommendation 19 also addresses the accountability of States Parties for the conduct of non-state actors by stating that ‘...discrimination under the Convention is not restricted to action by or on behalf of Governments ...’ and ‘[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’. General Recommendation 19(24)(r) also specifically states that civil remedies in cases of domestic violence are needed to overcome family violence and General Recommendation 19(24)(t) obliges States Parties to take all legal and other measures, including civil remedies to provide effective protection of women against gender based violence. A restraining order obtainable under civil law (on the

balance of probabilities) is one such remedy that would satisfy the above recommendations. States Parties are therefore obliged to provide access to restraining orders to women, including unmarried women, (also known as apprehended violence orders or non-molestation orders) as a crucial means of protecting women from gender based violence.

1.15 *Is there mandatory prosecution for domestic violence offences?*

General Recommendation 19(24)(t) obligates States Parties to institute effective legal measures including penal sanctions to protect women against all kinds of violence including violence and abuse in the family. Article 4(d) of the *Declaration on the Elimination of Violence against Women* 1993 states that penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women who are subjected to gender based violence. Domestic violence has historically been treated by the police and other enforcement agencies as a private and minor matter which should be resolved by the parties themselves. Such an approach allows men to abuse women and children in their homes without fear of sanction. Mandatory prosecution measures ensure that, if reported, such offences against women in vulnerable domestic situations are taken as seriously as other criminal offences by law enforcement agencies. Mandatory prosecution of domestic violence offences also sends a very clear message to the community of the unacceptability of family violence.

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

General Recommendation 19(24)(i), and para 124(a) of the Beijing Platform for Action state that effective complaints procedures and remedies for victims of sexual assault must

be provided. Article 4(d) of the *Declaration on the Elimination of Violence against Women* 1993 states that penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women subjected to gender based violence. Sexual assault is a gendered harm, overwhelmingly perpetrated against women and girls. Women and girls can be sexually violated in a range of ways and all unwanted sexual contact should be unlawful. To effectively redress and punish the sexual violations experienced by women, it is essential to incorporate into the criminal law an appropriate range of sexual assault offences, graded to reflect the seriousness of the invasion of personal integrity. A sexual assault on any girl below the age of consent should be considered a serious offence and no significant differentiation on the basis of age should be made, nor should it be considered much less serious in older girls (as is common Pacific jurisdictions).

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

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

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

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

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

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

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

Consent is a defence to a charge of rape and other sexual assault offences. However,

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

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

The admission of the prior sexual history of a victim in order to establish that she consented to the sexual act in question is a discriminatory common law rule which perpetuates the myth that a victim's previous relationship with the accused or another person or persons makes it more likely she consented. It also perpetuates the myth that promiscuous women or sex workers are more likely to have consented to the act in question. The use of such stereotyped and traditional views of sexual roles can influence the finding of whether a woman consented to sex and as such is discriminatory. Therefore, in order to provide effective complaints procedures and remedies for victims of sexual assault as required by CEDAW, a legislative prohibition on the use of prior sexual conduct is necessary.

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

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

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

Proof of resistance is a common law rule which is used to determine consent. It requires victims to establish that they physically resisted the perpetrator otherwise consent may be inferred. It is discriminatory because physical resistance may be an unrealistic expectation of a victim against a strong or armed perpetrator, and it also ignores the reality that fear and lack of power may immobilise a victim. It also places an onus on women to do more than say no.

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

A defence of honest and reasonable belief that a girl was old enough to legally consent to sexual relations can be used by a perpetrator

of a sexual offence to argue that they honestly believed the victim was of legal age. Such a defence, however, places the onus on the victim to reveal their age rather than an onus on the alleged perpetrator to ascertain their age before engaging in sexual relations.

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

The Convention on the Rights of the Child 1989 (CRC) states that 'a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. The CEDAW Committee in General Recommendation 21 states even more strongly that it considers 18 years to be the age of majority. Although the Committee made this reference in relation to the issue of marriageable age rather than sexual relations, consent of the victim should not be a defence (for the perpetrator) to sexual relations with a girl under the age of 18.

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

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

1.27 *Is there mandatory prosecution for sexual offences?*

Article 4(d) of the *Declaration on the Elimination of Violence against Women* 1993 states that appropriate penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women who are subjected to gender based violence. Sexual violence has historically been treated by the police and other enforcement agencies as less serious than other crimes especially in relation to those perpetrated within a family context. Mandatory prosecution measures ensure that, if reported, such offences are taken as seriously as other criminal offences by law enforcement agencies.

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

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

1.29 *Are there minimum sentences for sexual offences?*

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

legislation should therefore contain minimum sentences for sexual offences.

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

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

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

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

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

Infanticide (in contrast to abortion, which refers to the destruction of a foetus), a criminal offence by which a mother causes the death of her child of 12 months or less, is an alternate offence to murder or manslaughter, with a

reduced sentence. Infanticide recognises that mothers may experience post natal depression in the 12 months after birthing and should not be held accountable to charges of murder or manslaughter.

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

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

ARTICLE 3: GUARANTEE OF BASIC HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

ARTICLE 3 INDICATORS

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

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

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

Article 3 of CEDAW obligates States Parties to ensure in all fields, the full development and advancement of women. The Beijing Platform for Action (para 203) recommends that governments create a national machinery 'for the advancement of women at the highest possible level of government' with the ability and competence to 'influence policy and formulate and review legislation'. Preferably, such machinery would be established through enabling legislation (rather than policy) since this provides an assurance that the body or institution charged with these responsibilities cannot easily be removed during a time of reform, political change or instability, or economic downturn. To enable such a body to function effectively adequate budgetary allocations should be guaranteed.

ARTICLE 4: ACCELERATION OF EQUALITY BETWEEN MEN AND WOMEN

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

ARTICLE 4 INDICATORS

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

The acceleration of *de facto* equality by the use of temporary special measures (affirmative action) is specifically mandated by CEDAW in Article 4. General Recommendations 5, 8, 23 and 25 also encourage States Parties to make more use of temporary special measures to advance women's integration into education, the economy, politics and employment, to provide equal opportunities to represent their governments internationally and to encourage the equal participation of women in public life. This mandate recognises firstly that formal equality is inadequate to redress the historical discrimination experienced by women and secondly that formal equality is

unable to achieve substantive equality. Temporary special measures can include quotas (addressed in General Recommendation 25 (C)(22), preferential treatment, encouraging women to apply for positions in male dominated occupations (such as the police force), training and financially assisting women candidates for election to publicly elected bodies, circulating images of women in advertising material for male dominated occupations, and targeted recruitment for appointment to public positions such as the judiciary or other professional groups.

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

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

ARTICLE 5 INDICATOR

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

Article 5 requires States Parties to take all appropriate measures to eliminate prejudices and customary practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Article 2 requires States Parties to take all appropriate measures including legislation, to modify or abolish customs and practices which constitute discrimination against women. In General Recommendation 19, the Committee highlights how traditional attitudes towards women and the stereotyped roles imposed on them by customs and cultural practices can lead to the perpetuation of widespread violence and discrimination against women. Courts in the Pacific continue to struggle with the conflict between formal law and customary practices, particularly in relation to practices that discriminate against women such as child marriage, bigamy and polygamy to name a few. To ensure discriminatory customary practices do not prevail over principles of equality and non-discrimination a constitutional guarantee is required.

In addition, the modification of sex roles and stereotyping is a cross-cutting theme that has been incorporated within other indicators to the 16 articles. For example, the prohibition on customary practices that discriminate against women is explicitly the subject of indicator 1.13. The

ARTICLE 5: SEX ROLES AND STEREOTYPING

States Parties shall take all appropriate measures:

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

elimination of the stereotype in the area of family relationships that men are the head of the household is dealt with in indicators relating to Article 16. Further, the CEDAW Committee recognises that the primary means of ensuring the removal of stereotyping and ingrained sex roles is through education, media, and a range of policy measures rather than through legislative measures. For example, an understanding of maternity as a social function and the shared responsibility of both men and women in the raising of children requires family education.

ARTICLE 6: EXPLOITATION OF WOMEN

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

ARTICLE 6 INDICATORS

6.1 *Is the act of soliciting decriminalised?*

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

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

Working in organised premises is much safer than street work and therefore brothels and third parties (pimps) who facilitate sex work should not be criminalised for their activities if the sex worker is above the age of majority

and engaging in sex work consensually. The legalisation of brothels enables them to be made subject to the same rules and regulations that regulate other businesses including incorporating occupational health and safety laws and payment of taxes to the benefit of the community. Criminalising those who aid and abet sex work puts sex workers at risk of violence and abuse by maintaining it as an illegal activity and not subject to legal regulation.

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

The CEDAW Committee states in General Recommendation 19 that sex workers should be given the equal protection of the law against rape and other forms of violence. Appropriate legislation to prevent exploitative aiding and abetting (pimping) should include creating offences for procurement of non-consenting women and for the procurement of any girl under 18 in any circumstances.

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

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

6.5 *Is the trafficking of women prohibited?*

Article 6 obligates States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women. General Recommendation 19 states that trafficking of women is incompatible with the equal enjoyment of rights by women and puts them at special risk of violence and abuse. The trafficking of women and children (both within borders and internationally) into bonded sweatshop labour, forced marriage, forced sex work, domestic servitude, and other kinds of work is a global phenomenon. The CEDAW Committee recommends that States Parties introduce specific preventative and punitive measures to overcome and prevent trafficking, including criminalising trafficking.

6.6 *Is sex tourism prohibited?*

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

ARTICLE 7 INDICATORS

7.1 *Is there an equal right to vote?*

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

7.2 *Is there equal eligibility for political representation?*

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

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

Article 7(b) requires States Parties to ensure that women participate in the formulation and implementation of government policy, to hold public office and to perform all public functions at all levels of government. Historically, women have been poorly

ARTICLE 7: POLITICAL AND PUBLIC LIFE

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

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

represented in political processes despite equal eligibility for parliament and other political offices. This denies women access to the governance, decision making and policy formation of their country. CEDAW recognises in Article 4 that to achieve substantive equality for women in many areas, affirmative action measures must be adopted. Minimum quotas can ensure full compliance with CEDAW in this regard.

7.4 *Do women have an equal right to participate in NGOs?*

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

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

Article 7(c) requires States Parties to ensure that women have equal rights to participate in non-governmental organisations and associations involved in the public and political life of the country. In order for NGOs to effectively participate in the public and political life of the country a right to engage in advocacy and lobbying should be confirmed in substantive legislation. Such legislation should clearly identify that this right embraces a wide variety of forms of civic engagement including involvement in the policy process and legal standing to

challenge public authorities in courts of law over access to government information and other matters. A process of registration has been adopted in many countries to clarify the legal status and role of these organisations and to bolster public confidence in them. It should be noted that Charitable Societies legislation typically expressly prohibits 'political' activities and is an insufficient legal response to this indicator.

ARTICLE 8: INTERNATIONAL REPRESENTATION AND PARTICIPATION

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

ARTICLE 8 INDICATORS

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

Article 8 of CEDAW expressly requires States Parties to ensure that equal opportunities are provided to women to represent their governments at the international level and to participate in the work of international organisations. Opportunities for women to engage in international work are often denied because of assumptions about their family and domestic responsibilities. However, the inclusion of women, according to the CEDAW Committee, is increasingly important due to the globalisation of the contemporary world. The Committee recommends the implementation of special measures to facilitate the opportunity for more equal representation.

ARTICLE 9: NATIONALITY AND CITIZENSHIP

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

ARTICLE 9 INDICATORS

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

Article 9 of CEDAW clearly mandates the granting of equal rights to women with men to acquire, change, or retain their nationality. General Recommendation 21 states that nationality is critical to a woman's full participation in society. Nationality affects her right to vote or stand for public office, her choice of residence and her access to public services and benefits. Article 15(4) also requires States Parties to provide to men and women the same rights in law relating to the freedom to choose their residence and domicile.

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

In General Recommendation 21, the CEDAW Committee states that nationality should be capable of change by an adult woman and

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

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

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

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

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

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

Article 9 of CEDAW obligates States Parties to ensure women have equal rights in relation to nationality. Article 15 requires that States Parties ensure women are equal before the law. Article 16 requires States Parties to ensure that women have equal status in all aspects of family life. A requirement that a woman's right to obtain a passport is

contingent on the consent of her husband interferes with her identity, autonomy, freedom of movement, and the right to full participation in society and is therefore, in breach of Articles 9, 15 and 16.

ARTICLE 10: EDUCATION

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

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

ARTICLE 10 INDICATORS

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

Article 10 of CEDAW obligates States Parties to take all appropriate measures to eliminate discrimination in the field of education. The Beijing Platform for Action, para 80, recommends that governments eliminate gender discrimination in all levels of education. In order to achieve this, girls and women must have equal access to all forms and levels of education.

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

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

10.3 *Is there compulsory primary education for girls and boys?*

Article 10(a) of CEDAW obligates States Parties to provide access to education for women and girls on the same basis as men and boys, in preschool and general education. Both the Beijing Platform for Action and the United Nations Millennium Development Goals specifically designate the achievement of universal primary education as a priority. As a minimum standard, compulsory primary education will ensure the literacy of women and girls and assist in eliminating discrimination that may prioritise the education of males over females.

10.4 *Is there compulsory secondary education for girls and boys?*

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

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

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

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

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

ARTICLE 11: EMPLOYMENT

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

ARTICLE 11: EMPLOYMENT (continued)

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

ARTICLE 11 INDICATORS

- 11.1 Are there anti-discrimination provisions in employment legislation on the grounds of sex, marital status, sexual orientation, pregnancy and HIV status, with sanctions?*

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

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

Article 11 of CEDAW obligates States Parties,

amongst other things, to ensure women have equal rights to employment opportunities, free choice of profession and employment, and equal rights to promotion and remuneration. Historically women, despite the presence of formal equality measures (such as equal pay) have not achieved substantive equality in the area of employment. Special measures such as pay equity and quotas, mandated in General Recommendations 5 and 25 for the advancement of women in employment, can provide a means of addressing the historical discrimination experienced by women in employment.

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

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

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

Article 11 requires States Parties to provide women with the right to health and safety in the workplace. It also requires them to eliminate discrimination against women in employment. General Recommendations 12 and 19 define sexual harassment in the workplace as a form of discrimination against women. Equality in employment is seriously impaired when women are subjected to sexual harassment. In effect, it denies them equal opportunities in the workplace. Further, studies indicate that

absenteeism tends to increase among employees who are sexually harassed and as a result, work attitudes are adversely affected, and productivity drops.

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

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

11.6 *Does the legislation contain an equal pay provision?*

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

11.7 Does the legislation contain pay equity provisions?

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

11.8 Does the legislation provide for an equal retirement age?

Article 11 of CEDAW obligates States Parties to eliminate discrimination in the field of employment. The imposition of a different age of retirement for women constitutes discrimination and prevents them from equal access to income, promotion and many associated benefits such as superannuation. Compliance with CEDAW to ensure women are treated on an equal basis with men therefore requires legislation to ensure equal retirement ages for men and women.

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

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

11.10 Does the legislation provide for health protection during pregnancy?

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

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

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

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

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

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

Article 11(2)(c) obligates States Parties to encourage the provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life. In particular, this should be achieved through promoting the establishment and development of a network of childcare facilities. Likewise, it is recommended in the Beijing Platform for Action para 173 that governments provide 'high quality, flexible and affordable childcare services which take into account the needs of working men and women.' Without the provision of childcare facilities women, who continue to be primarily responsible for the raising of children are unable to return to, or commence, work.

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

Article 11(1) of CEDAW obligates States Parties to provide women with equal opportunities in the workplace free from discrimination. The demands of breastfeeding and the reality that they

continue to be responsible for young children may prevent women from continuing or resuming employment. Such a situation is clearly discriminatory to women. In order to balance the needs of young children with the demands of work, women should be given both time and provided with an appropriate location to breastfeed children. Such provision must recognise the frequency with which very young children require feeding and the time that it might take to relocate to and return from a suitable location in the absence of nearby facilities.

ARTICLE 12: HEALTH CARE AND FAMILY PLANNING

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

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

Article 12(1) obligates States Parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis

of equality of men and women, access to health care services, including those related to comprehensive family planning. The failure to decriminalise abortion and to provide safe accessible facilities for women who require abortions endangers their health and that of any child subsequently born after a failed abortion. Research has shown that unsafe abortions lead to a significant increase in both maternal mortality and maternal morbidity particularly in developing countries. Research also indicates that when a mother dies (including as a result of an unsafe abortion) the chance of survival of all surviving children under 5 is significantly reduced.

ARTICLE 13: SOCIAL AND ECONOMIC BENEFITS

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

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

ARTICLE 13 INDICATORS

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

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

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

Article 13(b) of CEDAW provides that women should be afforded equal rights to bank loans, mortgages and other forms of financial credit free from discrimination. Women have historically experienced discriminatory restrictions in obtaining credit and loans to purchase property or businesses, interfering with their autonomy and ability to earn a livelihood.

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

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

ARTICLE 14: RURAL WOMEN

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

care facilities, including information, counselling and services in family planning;

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

ARTICLE 14 INDICATOR

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

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

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

ARTICLE 15: EQUALITY BEFORE LAW AND CIVIL MATTERS

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

ARTICLE 15 INDICATORS

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

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

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

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

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

In General Recommendation 21, the CEDAW Committee states that if a woman's status as a witness or her evidence is accorded less respect or weight than that of a man, her standing as an independent, responsible and valued member of her community is diminished. Women should be afforded, equally with men, status as witnesses or any other capacity in all levels of court proceedings.

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

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

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

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

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

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

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

Domicile refers to the country in which a person intends to reside and to whose jurisdiction they will submit. Domicile is originally acquired by a child through its parents but in adulthood it is determined by the country in which a person normally resides and in which they intend to reside permanently. In General Recommendation 21, the CEDAW Committee clearly states

that any restrictions on a woman's right to choose her domicile thereby prevents her from freely entering and leaving a country in her own right and is therefore discriminatory.

ARTICLE 16 INDICATORS

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

ARTICLE 16: EQUALITY IN MARRIAGE AND FAMILY LAW

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
 - (a) *The same right to enter into marriage;*
 - (b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
 - (c) *The same rights and responsibilities during marriage and at its dissolution;*
 - (d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*
 - (e) *The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*
 - (f) *The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
 - (g) *The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;*
 - (h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*
2. *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry.*

Article 16(1)(b) obligates States Parties to ensure women have the right to freely choose a spouse and to enter into marriage only with their free and full consent. General Recommendation 21 states that a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. A woman's right to choose if and whom she will marry must be protected and enforced at law. Satisfaction of this indicator also meets the recommendation in the Beijing Platform for Action, para 274, that governments enact and strictly enforce laws to ensure marriage is only entered into with the full and free consent of the intending spouses.

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

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

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

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

16.4 *Is there a legislative prohibition on child marriage?*

Article 16(2) of CEDAW states that the betrothal and marriage of a child shall have no legal effect. In General Recommendation No 21, the CEDAW Committee notes that in the *Convention on the Rights of the Child* 1989, a 'child' means any human being below the age of 18 unless majority is attained earlier under national law. Regardless of national law the CEDAW Committee considers the

minimum age for marriage should be 18 for both males and females. Marriage carries with it important responsibilities which require maturity and capacity to act. Marriage, child bearing and raising children can adversely affect the education and health of minors.

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

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

16.6 *Does the legislation prohibit bigamy?*

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

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

Article 16(1)(g) of CEDAW requires States Parties to ensure that a husband and wife have the same personal rights including the right to choose a family name. General

Recommendation 21, states that each partner should have the right to choose his or her own name so as to preserve their individuality, their identity in the community and to distinguish themselves from other members of society. To deny a woman that right either by custom or legislation denies her those rights as well as impinges on her autonomy.

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

Article 16(1)(d) of CEDAW requires that States Parties ensure the same rights and responsibilities to both parents equally, irrespective of their marital status, in matters relating to their children. Article 5 requires the removal of sex role stereotyping. Legislative deference to a father's consent in determining whether a minor child can marry reinforces a stereotype of the father as the head of the household and is discriminatory as it gives greater rights to the father than the mother. If consent is required to facilitate the marriage of minors, a woman's consent should equally be sought and consent should be denied if it has not been provided by both parents.

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

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

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

General Recommendation 19 (23) states that a lack of economic independence or an inability to gain custody of their children upon separation forces many women to stay in violent or difficult relationships. Women who do leave relationships but cannot legally obtain maintenance or the custody of their children may be forced into untenable situations. The legal opportunity to apply for maintenance and custody orders can provide women with real choices as to whether to leave a marriage. It ensures that economic considerations do not prevail over a woman's right to live in a safe environment.

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

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

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

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

- 16.13 *Does the legislation provide for no-fault divorce?*

Article 16 requires States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family. Fault based divorce which requires proof of a matrimonial offence such as desertion or habitual rape, places women in the difficult position of having to provide evidence of situations that may be humiliating, embarrassing, or that may interfere with their dignity. Women also face discrimination

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

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

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

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

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

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

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

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

In General Recommendation 21, the CEDAW Committee states that the responsibilities that women have in bearing and raising children affect their ability to access education, employment opportunities and

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

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

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

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

The principle of damages for adultery is problematic for several reasons. First, it seeks to regulate and punish the sexual behaviour of consenting adults. Second, it treats a married person and their faithfulness as the property of the other and places a price on a person's worth – an inimically offensive concept. Finally, even if it is available to both men and women it is more likely to be used by men since it is unlikely that women will have access to financial and legal resources to be able to

pursue such a claim. As such it interferes with the sexual autonomy of a woman and is therefore not in accord with the principle of autonomy for women espoused by CEDAW.

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

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

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

Article 16(f) of CEDAW specifically states that States Parties must ensure women and men have the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption. Historically, women have been discriminated against in the legal system when seeking guardianship, wardship, trusteeship and adoption. Fathers may on paper appear to a court to be better candidates for guardianship, wardship,

trusteeship and adoption due to greater financial resources and income and status in the public sphere, but such treatment of guardianship issues constitutes discrimination against women and should be legislated against in order to provide adequate protection for women.

16.22 Does the legislation provide an order for establishing parentage?

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

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

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

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

Article 16(d) of CEDAW obligates States Parties to award the same rights and responsibilities to parents, irrespective of their marital status in matters relating to

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

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

In General Recommendation 21, the CEDAW Committee notes that serious discrimination against women occurs when the law and practice concerning inheritance does not treat females equally with men. Women often receive a smaller share of their husband or father's property at his death, than widowers or sons. In some instances women are granted only limited control over the deceased property from which they can derive an income. Sometimes inheritance provisions do not reflect the principles of equal ownership of property acquired during the marriage. Such laws discriminate against women and should be removed.

Satisfaction of this indicator also meets the recommendation in the Beijing Platform for Action, para 274, that governments enact and strictly enforce legislation that guarantees equal right to succession and equal right to inherit regardless of the sex of the child.

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

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

1.4 Indicator Template

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
1.1 Does the Constitution guarantee fundamental rights and freedoms to men and women equally including in the political, economic, social, cultural, civil or any other field?			
1.2 Is there a constitutional guarantee of substantive equality between men and women?			
1.3 Does the Constitution contain an anti-discrimination clause on the ground of sex/gender?			
1.4 Does the Constitution contain an anti-discrimination clause on the ground of marital status?			
1.5 Does the Constitution contain an anti-discrimination clause on the ground of sexual orientation?			
1.6 Does the Constitution contain an anti-discrimination clause on the ground of HIV status?			
1.7 Does the Constitution contain an anti-discrimination clause on the ground of disability?			
1.8 Does the breadth of anti-discrimination clause encompass direct and indirect discrimination?			
1.9 Does the anti-discrimination clause bind public authorities and institutions?			
1.10 Does the anti-discrimination clause bind any person, organisation or enterprise?			
1.11 Are sanctions imposed for breach of anti-discrimination provisions?			
1.12 Are there specific domestic violence offences in criminal law legislation (Penal Code)?			
1.13 Is stalking a criminal offence?			
1.14 Is a restraining order available in situations of sexual and domestic violence regardless of marital status?			
1.15 Is there mandatory prosecution for domestic violence offences?			
1.16 Does the criminal law legislation contain a broad range of sexual assault offences graded on the basis of seriousness to the victim?			
1.17 Does the definition of rape and/or sexual assault offences include penetration of non-penile objects to anus, vagina and mouth?			

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

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
1.18 Is there an offence of incest for girls and women? If there is no offence of incest then there is full compliance with this indicator.			
1.19 Have the terms indecency, carnal knowledge, defilement and insulting modesty been removed from the criminal law legislation?			
1.20 Is consent specifically defined in the criminal law legislation outlining coercive circumstances?			
1.21 Is there a legislative prohibition on use of prior sexual conduct to establish consent?			
1.22 Is there a legislative prohibition on requirement for corroboration?			
1.23 Is there a legislative prohibition on a requirement to provide proof of resistance?			
1.24 Is there a defence of honest and reasonable belief that the victim is of legal age? If there is no defence of honest and reasonable belief then there is full compliance with this indicator.			
1.25 Is a defence of consent unavailable in relation to a victim under 18?			
1.26 Is there an exemption from prosecution for marital rape? If there is no exemption in the legislation then there is full compliance with this indicator.			
1.27 Is there mandatory prosecution for sexual offences?			
1.28 Is bail unavailable for sexual offences if risk to victim?			
1.29 Are there minimum sentences for sexual offences?			
1.30 Is there a provision in the criminal law legislation which states that customary practices of forgiveness shall not affect criminal prosecution or sentencing?			
1.31 Is there legislative provision for compensation for victims of sexual and domestic violence?			
1.32 Does the criminal law legislation allow for infanticide to replace a charge of murder or manslaughter?			
1.33 Does the definition of infanticide include environmental and social stresses?			

ARTICLE 3: GUARANTEE OF BASIC HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
3.1 Is there legislation establishing national human rights machinery charged with promoting and protecting human rights including women rights?			
3.2 Is there legislation establishing a body to monitor the implementation of non-discriminatory law and policy for the advancement of women?			

ARTICLE 4: ACCELERATION OF EQUALITY BETWEEN MEN AND WOMEN

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
4.1 Does the Constitution contain a temporary special measures provision?			
4.2 Are special measures exempt from discrimination on the grounds of sex, marital status, sexual orientation, disability and HIV status?			

ARTICLE 5: SEX ROLES AND STEREOTYPES

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
5.1 Is there a provision in the Constitution which gives precedence to a constitutional guarantee of equality if there is a conflict between customary and equality law?			

ARTICLE 6: EXPLOITATION OF WOMEN

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
6.1 Is the act of soliciting decriminalised?			
6.2 Is aiding and abetting consensual acts of soliciting decriminalised?			
6.3 Is it a criminal offence to procure any woman without consent or any girl under 18?			
6.4 Does employment legislation including occupational health and safety legislation protect sex workers?			
6.5 Is the trafficking of women prohibited?			
6.6 Is sex tourism prohibited?			

ARTICLE 7: POLITICAL AND PUBLIC LIFE

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
7.1 Is there an equal right to vote?			
7.2 Is there equal eligibility for political representation?			
7.3 Is there legislative provision for minimum quotas of women in parliament?			
7.4 Do women have an equal right to participate in NGOs?			
7.5 Is there legislation (other than Charitable Societies legislation) enabling NGOs to register and mobilise to promote the advancement of women without political interference?			

ARTICLE 8: INTERNATIONAL REPRESENTATION AND PARTICIPATION

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

ARTICLE 9: NATIONALITY AND CITIZENSHIP

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
9.1 Do women have an equal right to acquire, change or retain their nationality?			
9.2 Does marriage to an alien or change of husband's nationality affect wife's nationality? If marriage does not affect wife's nationality, then there is no compliance with this indicator.			
9.3 Do both spouses have equal rights to residency, citizenship and employment when married to a non-national?			
9.4 Do both spouses have an equal right to determine the nationality of children?			
9.5 Do women have an equal right to obtain a passport?			

ARTICLE 10: EDUCATION

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
10.1 Do women and girls have equal access to education?			
10.2 Is there legislation that creates special measures for the advancement of women in education?			
10.3 Is there compulsory primary education for girls and boys?			
10.4 Is there compulsory secondary education for girls and boys?			
10.5 Is family life (reproductive and sexual health) education compulsory in schools?			
10.6 Is there a legislative prohibition on expulsion from school because of pregnancy?			

ARTICLE 11: EMPLOYMENT

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
11.1 Are there anti-discrimination provisions in employment legislation on the grounds of sex, marital status, disability, pregnancy, sexual orientation and HIV status with sanctions?			
11.2 Are there special measures provisions for the advancement of women in employment?			
11.3 Do women enjoy equal conditions of work including leave, superannuation and Workers Compensation?			
11.4 Does the legislation provide sexual harassment protection from employers and co-workers?			
11.5 Does the definition of sexual harassment include the breadth of unwanted behaviours?			
11.6 Does the legislation contain an equal pay provision?			
11.7 Does the legislation contain pay equity provisions?			
11.8 Does the legislation provide for an equal retirement age?			
11.9 Are there restrictions on women's choice of employment? If there are no restrictions on women's choice of employment, then there is full compliance with this indicator.			
11.10 Does the legislation provide for health protection during pregnancy?			
11.11 Does the legislation provide paid maternity leave of not less than 14 weeks?			

ARTICLE 11: EMPLOYMENT

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
11.12 Does the legislation provide protection from dismissal because of pregnancy or maternity leave?			
11.13 Does the legislation guarantee the provision of childcare by employer or state?			
11.14 Does the legislation provide reasonable nursing time during work hours?			

ARTICLE 12: HEALTH CARE AND FAMILY PLANNING

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
12.1 Do women have access to safe and legal abortion facilities?			

ARTICLE 13: ECONOMIC AND SOCIAL BENEFITS

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
13.1 Do women have an equal right to family benefits regardless of marital status?			
13.2 Do women have an equal right to receive bank loans, mortgages and financial credit?			
13.3 Do women have an equal right to participate in recreational activities, sports and cultural life?			

ARTICLE 14: RURAL WOMEN

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
14.1 Is there legislation that provides for special measures to advance substantive equality for rural women?			

ARTICLE 15: EQUALITY BEFORE THE LAW AND CIVIL MATTERS

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
15.1 Does the Constitution guarantee equality before the law?			
15.2 Do women have an equal capacity in civil matters – can women sue?			
15.3 Do women have an equal right to participate in courts and tribunals at all stages?			
15.4 Do women (regardless of marital status) have an equal right to conclude contracts and administer property?			
15.5 Do women have an equal right to be executors or administrators of estates?			
15.6 Is there legislation that nullifies all contracts and instruments that limit women's legal capacity?			
15.7 Do women have an equal right to choose their residence and domicile?			

ARTICLE 16: PERSONAL AND FAMILY LAW

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
16.1 Does the legislation guarantee entry into marriage with full and free consent?			
16.2 Does the legislation allow marriages to be nullified if they took place under force, duress or undue influence?			
16.3 Is there an equal minimum age of 18 for marriage?			
16.4 Is there a legislative prohibition on child marriage?			
16.5 Does the legislation require registration of marriage in official registry?			
16.6 Does the legislation prohibit bigamy?			
16.7 Do women have an equal right to choose a family name?			
16.8 Is the consent of both parents equal in marriage of minors?			
16.9 Are both spouses equal in the ownership, acquisition, management, administration, enjoyment and disposition of property?			
16.10 Does the legislation provide for a maintenance and custody order during separation based on need?			

ARTICLE 16: PERSONAL AND FAMILY LAW

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
16.11 Is there legislation to enable women to occupy the marital home when settlement is not possible or in situations of domestic violence?			
16.12 Does the legislation provide an order for restitution of conjugal rights? If there is no such order in the legislation then there is full compliance with this indicator.			
16.13 Does the legislation provide for no-fault divorce?			
16.14 Is there a duty on the court to promote reconciliation? If the legislation does not contain such a duty then there is full compliance with this indicator.			
16.15 Does the legislation provide for an equal division of property after divorce including recognition of unpaid contribution; future needs and future earning capacity calculated?			
16.16 Does the legislation provide for the payment of child support upon divorce based on need?			
16.17 Does the legislation provide maintenance for woman based on commitments, income, earning capacity assets?			
16.18 Is custody and access to children based on best interests of child regardless of relationship of parents?			
16.19 Does the legislation provide damages for adultery? If the legislation does not provide damages for adultery then there is full compliance with this indicator.			
16.20 Does the legislation recognise de facto rights (including same-sex couples) on the same basis as marriage?			
16.21 Do women have equal rights to guardianship, wardship, trusteeship and adoption?			
16.22 Does the legislation provide an order for establishing parentage?			
16.23 Does the legislation provide for a contribution to pregnancy and childbirth costs by father to unmarried mother?			
16.24 Does the legislation provide for the payment of child support for children born outside marriage?			
16.25 Does the legislation provide for equal rules of inheritance?			
16.26 Is there legislation requiring the application of CEDAW and CRC to domestic family law where relevant?			

FEDERATED STATES OF MICRONESIA



CEDAW Legislative Compliance Review

LEGISLATIVE COMPLIANCE OF THE FEDERATED STATES OF MICRONESIA

2.1 Introduction

This Chapter examines and assesses the legislative compliance of the Federated States of Micronesia (FSM) with CEDAW. FSM consists of a national government and four states: Chuuk, Kosrae, Pohnpei and Yap. FSM ratified CEDAW on 1 September 2004, obliging it to work towards the modification of its constitution and legislation to accord with the provisions of CEDAW. However, it is recognised that FSM is at the beginning of its compliance process and that legislative compliance will be achieved through gradual and incremental change.

This review's assessment of FSM's legislative compliance with CEDAW is based on the indicators identified in Chapter One and should be read in conjunction with the commentary on each indicator included in that Chapter. However, the indicators against which the FSM and its four states are measured against have been reduced by two to account for the reservations the FSM has placed on CEDAW. Reservations have been entered against Article 11(1)(d) which requires the enactment of comparable worth legislation (pay equity), Article 11(2)(b), requiring the adoption of maternity leave with pay or with comparable social benefits, and Articles 2(f), 5, and 16 which relate to the succession of certain well-established traditional titles, and to marital customs that divide tasks or decision-making in purely voluntary or consensual private conduct. This review has not measured FSM and the four states' compliance with indicators [11.7] which deals with pay equity and [11.11] which relates to maternity leave, as they are expressly excluded by the reservations. Compliance information on these indicators has however been included in the tables for general interest. The last reservation relating to traditional titles and marital customs is not specific

enough to completely remove the obligations created under any of the indicators for Article 5 and 16 and therefore the legislative compliance of the FSM and its four states has been measured on these indicators. Therefore, in sum, the FSM and its four states have each been measured against 111 indicators.

It should also be noted that, through the national constitution of the FSM, which is the basis for all legal authority, the power to legislate is divided between the FSM parliament and the state parliaments. Whilst the FSM has express power over areas such as tax, trade and national crimes, it *may* also establish systems of social security and public welfare concurrently with the states. This review has measured FSM against both the indicators which concern its express powers to legislate and against the indicators that relate to its power to implement systems of social security and public welfare. Although the FSM is not obligated to legislate in the areas of social security and public welfare which includes many of the areas covered by CEDAW, the authors take the view that the national government, which has a direct obligation to implement CEDAW, should lead and encourage the four states towards compliance with CEDAW.

In sum, FSM has achieved full compliance with 26 of 111 indicators, partial compliance with 18 indicators and no compliance in relation to the remaining 69 indicators. Yap has achieved full compliance with 29 of 111 indicators, partial compliance with 16 indicators and no compliance in relation to the remaining 68 indicators. Kosrae has achieved full compliance with 33 of 111 indicators, partial compliance with 18 indicators and no compliance in relation to the remaining 62 indicators. Chuuk has achieved full compliance with 30 of 111 indicators, partial compliance with 21 indicators and no

compliance in relation to the remaining 62 indicators. Pohnpei has achieved full compliance with 36 of 111 indicators, partial compliance with 17 indicators and no compliance in relation to the remaining 60 indicators. The next section provides a brief synopsis of the findings of the review. Following the synopsis is five sets of tables (one set for the FSM and each of the four states) each related to an article of CEDAW, and each containing the relevant indicators, the level of compliance achieved (i.e. yes, no or partial compliance), the relevant legislation and finally where required, a brief commentary explaining how the legislation does or does not meet the indicator.

It should be noted that the legislative reviews of the FSM, Chuuk, Kosrae, Pohnpei and Yap were conducted using all materials available at the time, and that although every effort was made to obtain the most recent and up-to-date legal material, it is possible that there will be errors or omissions.

2.2 Synopsis of Findings

1. Article 1 defines discrimination and Article 2 requires States Parties to guarantee a range of fundamental rights and freedoms in their constitutions including substantive equality and freedom from discrimination on the grounds of sex, marital status, sexual orientation, HIV status and disability. The constitutions of the FSM and the states guarantee the rights and freedoms of all citizens in most of the areas required by CEDAW. However, whilst they uniformly guarantee men and women the equal *protection* of the law they do not guarantee equal benefits or outcomes as required by CEDAW. FSM and all states except Kosrae, have anti-discrimination clauses through which individuals who have experienced sex discrimination can seek remedies. None, however, extend their anti-discrimination protection to include indirect discrimination (enabling challenge to a rule that appears to apply to a group of people in the same way but in practice places on particular members of that group a burden not faced by the majority). Although the FSM, Chuuk and Pohnpei also provide protection from discrimination on the ground of social status (which could include marital status) there is no protection for women from discrimination on the grounds of sexual orientation, HIV status and disability. The FSM Constitution also provides protection against discrimination on the ground of gender in the equal enjoyment of any service, goods, facilities or advantages by any public institution or any private organisation that provides services to the public. A criminal penalty of 5 years and an express right to bring civil action ensures discrimination in these contexts is seriously regarded and in compliance with CEDAW.
2. Articles 2 and 3 together mandate the establishment by legislation of national bodies and machinery to monitor the implementation of law and policy to foster the advancement of women. Neither FSM nor any of the states have instituted such a mechanism. However, although not established with enabling legislation (which leaves it vulnerable during times of political or economic upheaval) FSM has established a National Gender Office located in the Department of Health Education and Social Affairs.
3. Article 2 condemns discrimination against women in all its forms and obligates States Parties to eliminate discrimination against women without delay. General Recommendation 19, which concerns violence against women, makes explicit that the definition of discrimination includes gender violence and recommends that 'sanctions,

penalties and compensation' be introduced in relation to gender based violence. Sexual assault is a form of gender violence as it is overwhelmingly perpetrated against girls and women, and therefore must be prevented and remedied, as far as possible, through legislative means. FSM has not legislated in the area of sexual assault and is non-compliant with CEDAW. The four states have legislated and have identical (non-compliant) legislation consisting of two categories of sexual assault offences. The first category is sexual assault by penetration with 2 penalties depending on whether serious injury was inflicted, imposing a 10 year sentence with and 5 years without serious injury. Although penetration is widely defined the sentences are low implying that sexual assault is not a serious offence. In particular, a 5 year sentence for a rape that does not cause *serious* injury is an inadequate punishment and deterrent. Regardless of the level of injury, rape is a violation of personal integrity which should be severely punished. The second category is sexual contact with girls under 13, and in the case of Pohnpei 15, with the (non-compliant) result that it is lawful to have sexual contact with girls (and women) 13 (or 15) and over.

4. Further, in Pohnpei, an offender cannot be charged in relation to sexual assault and sexual abuse if the complainant cohabits with the offender in an ongoing voluntary sexual relationship. Such immunity is out of step with most other Pacific countries, and implies that women provide an ongoing and irrebuttable consent to sexual relations with their husbands and partners if they live with them. This denies their autonomy and their right to say no to sexual relations.
5. The admission of the prior sexual history of a victim in order to establish that she consented to the sexual act in question is a discriminatory common law rule which perpetuates the myth that a victim's previous sexual relationship with either the accused or others makes it more likely she consented. All the states, except Pohnpei, have legislated against the use of evidence of the victim's prior sexual conduct with persons other than the accused, although evidence of sexual conduct with the accused can still be admitted if it is offered to prove consent.
6. Corroboration (independent evidence such as that of a witness that connects the accused person with the crime) is a common law rule that requires a judge to advise the jury that it is dangerous to convict the accused on uncorroborated evidence. None of the states have legislated against the necessity for corroboration in sexual offence prosecutions.
7. Proof of resistance is a common law rule which requires victims to establish that they physically resisted the perpetrator otherwise consent may be inferred. It is discriminatory because physical resistance may be an unrealistic expectation of a victim against a strong or armed perpetrator and does not take into account that fear and power imbalances may immobilise the victim. None of the states have legislated against the requirement for proof of resistance by the victim. Further, in all states except Pohnpei there is a defence in 'sexual contact' prosecutions for the accused to claim that he did not know the girl was under 13. This places the onus (erroneously) on the minor to reveal her age rather than upon the offender to ascertain her age.
8. Minimum sentences and mandatory prosecution ensure that sexual violence against women is treated seriously. However, none of the states have mandatory prosecution or minimum sentences for sexual assault offences. Bail, which should not be granted if there is any risk to a sexual assault victim, is available in all

states as a matter of entitlement unless the charge is murder.

9. Although the CEDAW Committee in General Recommendation 19 identifies domestic violence as a form of discrimination that inhibits women's ability to enjoy rights and freedoms on a basis of equality with men, none of the states have as yet incorporated domestic violence offences into their criminal laws.
10. Infanticide (in contrast to abortion which refers to the destruction of a foetus) refers to the killing of a child by its mother. Full compliance with CEDAW requires that an offence of infanticide replaces a charge of murder or manslaughter and has a reduced sentence recognising the societal pressures that lead women to kill their children. Women who do so should not be held accountable to charges of murder or manslaughter. None of the states, however, have included an offence of infanticide in their criminal codes thereby rendering any woman in this situation subject to a charge of murder or manslaughter which carries penalties ranging from 10 years to life imprisonment.
11. Article 4 requires that special measures provisions be introduced into national constitutions and legislation. Neither the FSM nor any of the states have incorporated affirmative action provisions into their constitutions or into any legislation for the advancement of women. The lack of special measures is detrimental for women because they are an equality measure with real potential to redress historical discrimination and achieve substantive equality for women.
12. Article 5 requires States Parties to abolish or modify customary practices that discriminate against women. The constitutions of the FSM and all the states give constitutional status to customary law in a range of capacities. The FSM Constitution states that 'nothing in the Constitution takes away the functions of traditional leaders'. Additionally, the Constitution allows the protection of the 'traditions of the people of FSM' by statute and declares that no challenge can be made to such a statute on the basis that it is in violation of Article IV (Declaration of Rights). Finally, the FSM Constitution empowers Congress to establish a Council of Chiefs. All states also expressly recognise customary law in their constitutions and Yap has created two councils charged with overseeing tradition and custom. The constitutional status given to customary law throughout the FSM coupled with the absence of a provision that guarantees the precedence of equality law over custom law leaves women with uncertain legal recourse against discriminatory customary practises.
13. Article 6 requires States Parties to suppress all forms of trafficking in women and exploitation of women in prostitution whilst Articles 2 and 11 require the elimination of discrimination against women in employment. Cumulatively, these articles mandate both the protection of sex workers from exploitation whilst also affording them the rights and protections of other workers. FSM has not legislated in the area of sex work. In Yap and Kosrae soliciting is not an offence, in compliance with CEDAW. In Chuuk and Pohnpei soliciting is an offence and although the offence applies equally to men and women these two states are non-compliant since CEDAW requires that soliciting is decriminalised. In Chuuk and Pohnpei, aiding and abetting, soliciting and the operation of organised premises are also offences. Since research indicates that organised premises rather than street work is safer for sex workers, legalising brothels and implementing safeguards that are present in other workplaces

would provide greater safety for sex workers and the community. Both Chuuk and Pohnpei are therefore non-compliant in this area.

14. None of the states provide adequate protection for girls and women who are procured against their will or trafficked. Whilst Yap provides no legislative protection, Kosrae, Chuuk and Pohnpei provide only minimal protection. Chuuk and Pohnpei penalise non-consensual procurement with a minimal penalty of one year imprisonment or \$500. Kosrae does not have specific provisions regulating sex work but the sexual assault offences include 'causing a person to have either sexual penetration or sexual contact with another' with a penalty of a 5 year sentence or \$10000 for the first and 3 years or \$5000 for the second. There are no offences for trafficking or sex tourism in any of the states and therefore none of the states are compliant with this aspect of Article 6 of CEDAW.
15. Article 7 obligates States Parties to take all appropriate measures to eliminate discrimination in women's political and public lives. Universal suffrage and equal legal rights for women to political representation has been achieved in FSM and all the states. However, no women have yet achieved political representation in the FSM or any of the four state parliaments and the absence of minimum quotas for women to ensure women enter parliament and participate in the governance of their countries means that the FSM is not fully compliant with Article 7 of CEDAW.
16. Article 8 requires States Parties to ensure that women have equal opportunities to represent government at the international level. Although there are no legal barriers preventing women from representing their governments in the FSM and the states, the low numbers of women who do so requires the introduction of quotas to raise participation to achieve full compliance with Article 8.
17. Article 9 requires States Parties to eliminate discrimination in the areas of nationality, citizenship and domicile. This is an area within the express jurisdiction of the FSM national government and it has achieved equality in this area.
18. Article 10 obligates States Parties to ensure women equal rights and opportunities in education. The provision of compulsory education is essential to ensure girls are equally prioritised and not discriminated against in education. FSM has guaranteed free elementary education for all throughout the country, established student loans for all young men and women to undertake higher education and all states have introduced compulsory schooling at both primary and secondary levels. Pohnpei has established a fund specifically for the vocational training of women. However, girls and women continue to access education in lower numbers than boys and men and therefore full compliance with CEDAW requires the FSM and the states to adopt special measures for the advancement of women in education. FSM and the states also do not prohibit expulsion from school because of pregnancy, in non-compliance with CEDAW.
19. Article 11 requires States Parties to eliminate sex discrimination in employment and to place specific guarantees that protect the labour rights of women into legislation. Whilst discussions with the ILO are continuing to encourage the introduction of a comprehensive employment code, the FSM and the four states are yet to put into place legislation, mechanisms to protect the employment and labour rights of workers other than in the Public Service and the judiciary. There are therefore no anti-discrimination provisions, no maternity leave provisions (note that this an area reserved by the FSM) except in the Chuuk judiciary where female employees may take 3 months of

- accumulated sick leave and unpaid leave, no sexual harassment protection (see below), no guarantee of child care, no breaks for mothers to enable them to nurse young children during work hours and no equal pay provisions except in Pohnpei. Conversely, however, and in compliance with CEDAW, women's employment choices are not restricted in the FSM or in any of the states as in other Pacific countries leaving women to lawfully undertake night work and manual work.
20. The CEDAW Committee in General Recommendations 12 and 19, which concern violence against women, identifies sexual harassment in the workplace as a form of discrimination against women. General Recommendation 19 defines sexual harassment as unwelcome sexually determined behaviour such as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. Such actions can be humiliating for the recipient and are discriminatory when they create a hostile work environment. Protection from sexual harassment is absent in the FSM and for the state codes and there is no scope for a remedy under the criminal code as provided in the Solomon Islands; or in human rights legislation as in Fiji; or in public sector legislation as available in PNG.
 21. Article 12 requires States Parties to ensure that women have access to health care services including those related to family planning. Whilst Kosrae, Pohnpei and Yap have no legislation that criminalises abortion, access to facilities to have an abortion is limited. In Chuuk however, abortion is criminalised with an exception only to save the mother's life and access to safe abortion facilities are therefore denied other than in an emergency.
 22. Article 13(b) of CEDAW provides that women should be afforded equal rights to bank loans, mortgages and other forms of financial credit free from discrimination. Although there is no legislative barrier to women in the FSM or in any of the states to accessing such services, discrimination continues to hinder women from obtaining credit and loans to purchase property or businesses, interfering with their autonomy and ability to earn a livelihood. Article 13(c) of CEDAW requires that women have an equal right to participate in recreational activities, sports and all aspects of cultural life and there are no legislative barriers in any of the states preventing women from doing so.
 23. Article 14 obligates States Parties to put in place measures to ensure the equality of rural women. Rural women often play a significant role in the economic survival of their families and communities although they are frequently disadvantaged in areas such as land ownership, health, education and housing to name a few. The achievement of substantive equality for rural women and compliance with CEDAW requires special measures provisions to be incorporated into legislation. However, the FSM and the states have not as yet implemented measures to achieve such ends.
 24. Article 15 requires States Parties to guarantee women equality before the law and equal rights to participate in all aspects of civil life. FSM and all states provide for the equal protection of the law (the right of all persons to be treated equally by the law) and are compliant with this indicator. In addition, there are no legislative barriers in the FSM and the states to women's participation in court and tribunal processes or that deny women the right to conclude contracts and administer property.

25. Article 16 obligates States Parties to remove discrimination in family and personal laws including marriage, separation, divorce, maintenance, child custody, property division, paternity and inheritance.
26. In the area of marriage, FSM and the states have low compliance. The CEDAW Committee in General Recommendation 21 has nominated 18 as the minimum age of marriage for both males and females. It has stated that marriage should be entered into only with full and free consent and that all marriages should be registered. FSM has not legislated in this area. However since marriage is an aspect of public welfare and therefore an area which falls within the legislative power of the FSM, the lack of legislation means that the FSM is non-compliant in this area. Yap has also not legislated in the area of marriage with the similar result that it is non-compliant. Further, Kosrae, Chuuk and Pohnpei have nominated 18 as the age of marriage for males and 16 for females and are also non-compliant with CEDAW. If the female is under 18 then the consent of either parent is required in all three states. Although formally equal this does not constitute full compliance with CEDAW which would require the consent of both parents to ensure that the father does not assume the role of authority in such matters. In Chuuk and Pohnpei, customary marriages are valid and may therefore be conducted without adherence to the marriage provisions. However in both states, the registration of all marriages including customary marriages is required. Bigamy however is prohibited only in Pohnpei.
27. FSM and the states have identical legislation in the area of divorce. Fault based divorces, which require proof of a matrimonial offence such as desertion or habitual rape, place women in the difficult position of having to provide evidence of situations that may be humiliating, embarrassing, or that may interfere with their dignity and privacy. Women also face discrimination in proving fault, particularly cruelty and adultery if they choose not to be witnesses or they do not wish to attend court. Divorce in FSM and all states is permitted either on fault based criteria (including adultery, desertion and cruelty) or on the basis that there has been a two year separation. In the FSM and all states, forgiveness, which can include restoration of marital rights, will prevent divorce from proceeding, failing to account for possible power imbalances between the spouses. In Yap and Pohnpei, customary marriages are exempt from the divorce provisions. FSM and all the states are non-compliant in the area of divorce as a result.
28. General Recommendation 19(23) (which deals with violence against women, in relation to Articles 16 and 5 of CEDAW) states that a lack of economic independence or an inability to gain custody of children upon separation forces many women to stay in violent or difficult relationships. FSM and all states *do* provide for maintenance orders during separation and after divorce for both children and spouses. The criteria by which the court determines the amount of the order is uniformly based on 'justice' and 'the best interests of all'. This leaves the basis on which maintenance is to be provided largely to the discretion of the court and does not comply with the CEDAW recommended standards of need, the means of both parties, the financial commitments of both parties to themselves and others, their respective capacities to earn and the needs of any children for whom maintenance is sought.
29. In General Recommendation 21, which relates to equality in marriage and family and relations, the CEDAW Committee states that the division of marital property should include recognition of non-financial contributions

during a marriage such as raising children, caring for elderly relatives, and discharging household duties. In the FSM and all the states, property division upon divorce, like maintenance and custody, is determined on the basis of 'justice' and 'the best interests of all'. This is unlikely to lead to a property settlement in which women's non financial contributions to the marriage are recognised. Defacto relationships, including same-sex relationships, are not recognised in the FSM and any of the states, leaving women without any support and right to an equal division of property after the breakdown of a relationship.

30. The best interests of the child as the paramount consideration is universally accepted as the principle on which custody determinations should be based, according to Article 16(f) of CEDAW, General Recommendation 21 and the *Convention on the Rights of the Child* 1989. Although all states include 'the best interests of all' in the criteria to determine custody and access issues

this does not place the child's interests as paramount and is not compliant with Article 16 of CEDAW.

31. Article 16 requires that legislation embodies inheritance laws that apply equally to males and females. There is no legislation in any of the states dealing with inheritance leaving it instead to be determined according to custom. Although inheritance throughout the FSM is matrilineal, which means that land and property are passed through females, men still control of many aspects of land and property.
32. A series of tables detailing the FSM and the four states' compliance with CEDAW (five sets of tables in total) is provided in the following pages. Each table relates to an article of CEDAW and contains the applicable indicator(s), the level of compliance achieved, the relevant legislation and finally where required, a brief commentary explaining how the constitution and legislation of the FSM and the four states does or does not meet the indicator.

FSM: Detailed Analysis of Indicators

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
1.1 Does the Constitution guarantee fundamental rights and freedoms to men and women equally including in the political, economic, social, cultural, civil or any other field?	Partial	<ul style="list-style-type: none"> <i>Constitution of the Federated States of Micronesia 1979, Article IV, s 1-13.</i> Freedom of expression, peaceable assembly, association, petition, right to life, liberty, property unless deprived by due process of law, right to equal protection of the law, right to be secure against unreasonable search, seizure and invasion of privacy, right to travel within the States, criminal defendant has the right to a speedy trial, to be informed of accusation, to have counsel, and not to be compelled to give evidence against his interest, or to face double jeopardy, right to be free from excessive bail, fines, cruel or unreasonable punishment, bill of attainder, capital punishment, slavery, involuntary servitude and imprisonment for debt are prohibited. 	<p>The rights protected include most of those required by CEDAW. There is therefore substantial compliance with this indicator but</p> <ul style="list-style-type: none"> The right to the highest attainable standard of physical and mental health is not a guaranteed right. Substantive equality is not a guaranteed right.
1.2 Is there a constitutional guarantee of substantive equality between men and women?	Partial	<ul style="list-style-type: none"> <i>Constitution of the Federated States of Micronesia 1979, Article IV, s 3, 4.</i> A person may not be denied the equal protection of the law on account of sex. <i>FSM Code 1997 [Title 1, Cap 1] s 107.</i> A person may not be denied the equal protection of the law on account of sex. <i>FSM Code [Title 1, Cap 1] 1997, s 107.</i> No law shall be enacted in the Trust Territory which discriminates against any person on account of sex. 	A guarantee of equal protection of the law requires that the law does not discriminate in its application but does not guarantee equal benefits or outcomes as required by CEDAW.
1.3 Does the Constitution contain an anti-discrimination clause on the ground of sex/gender?	Yes	<i>FSM Code [Title 11, Cap 7] 1997, s 702 (1)(a).</i> All persons entitled without discrimination on the grounds of gender, to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of (i) any department, agency, or institution of the FSM; or (ii) any public accommodation (establishment which provides lodging, is engaged in selling food, beverage, or gasoline to public, any place of recreation, amusement, exhibition, sightseeing, or entertainment which is open to public, any facility for the public transportation of persons or goods) which affects commerce (travel, trade, traffic, transportation, communication, and all other forms of commerce among States, or between any State and any foreign country).	
1.4 Does the Constitution contain an anti-discrimination clause on the ground of marital status?	No		

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
1.5 Does the Constitution contain an anti-discrimination clause on the ground of sexual orientation?	No		
1.6 Does the Constitution contain an anti-discrimination clause on the ground of HIV status?	No		
1.7 Does the Constitution contain an anti-discrimination clause on the ground of disability?	No		
1.8 Does the breadth of anti-discrimination clause encompass direct and indirect discrimination?	No		
1.9 Does the anti-discrimination clause bind public authorities and institutions?	Partial	<p><i>FSM Code [Title 1, Cap 1] 1997, s 107.</i> No law shall be enacted in the Trust Territory which discriminates against any person on account of sex.</p> <p><i>FSM Code [Title 11, Cap 7] 1997-</i></p> <ul style="list-style-type: none"> <i>s 702 (1)(a).</i> All persons shall be entitled, without discrimination on the grounds of gender, to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of (i) any department, agency, or institution of the FSM; or (ii) any public accommodation (establishment which provides lodging, is engaged in selling food, beverage, or gasoline to public, any place of recreation, amusement, exhibition, sightseeing, or entertainment which is open to public, any facility for the public transportation of persons or goods) which affects commerce (travel, trade, traffic, transportation, communication, and all other forms of commerce among States, or between any State and any foreign country). 	<p>Binds the legislature but not public authorities and institutions.</p> <p>Binds public institutions that provide goods, services, facilities, privileges, advantages, and accommodations including places of recreation and transportation.</p>
1.10 Does the anti-discrimination clause bind any person, organisation or enterprise?	Partial	See above at 1.9.	Binds private institutions that provide goods, services, facilities, privileges, advantages, and accommodations including places of recreation and transportation.
1.11 Are sanctions imposed for breach of anti-discrimination provisions?	Yes	<p><i>FSM Code [Title 11, Cap 7] 1997</i></p> <ul style="list-style-type: none"> <i>s 701(1).</i> A person commits a crime if wilfully, whether or not acting under the 	The penalties provided are significant.

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
		<p>colour of law, deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of any right, privilege, or immunity secured to him by the Constitution or laws of the FSM, the laws of the Trust Territory of the Pacific Islands, or the Constitution or laws of the United States of America which are applicable to FSM - 10 years imprisonment.</p> <p><i>FSM Code, 1997 [Title 11, Cap 7]</i> For breaches of s 702 (1)(a) as described in 1.9.</p> <ul style="list-style-type: none"> • s 702(3). Crime to withhold, deny, deprive, (or attempt to) any right or privilege protected under this section - 5 years imprisonment. • s 701(3). A person who deprives another of any right or privilege protected under this section shall be civilly liable to the party injured in an action at law. • s 702(5). Can be civilly liable without regard to whether a criminal case has been brought or conviction obtained. 	
1.12 Are there specific domestic violence offences in criminal law legislation (Penal Code)?	No		FSM has not legislated in the area of personal criminal offences. However as domestic violence is a matter of public welfare it does have the power to legislate and therefore is non compliant with this indicator.
1.13 Is stalking a criminal offence?	No		As above 1.12
1.14 Is a restraining order available in situations of sexual and domestic violence regardless of marital status?	No		As above 1.12
1.15 Is there mandatory prosecution for domestic violence offences?	No		As above 1.12
1.16 Does the criminal law legislation contain a broad range of sexual assault offences graded on the basis of seriousness to the victim?	No		As above 1.12
1.17 Does the definition of rape and/or sexual assault offences include penetration of non-penile objects to anus, vagina and mouth?	No		As above 1.12
1.18 Is there an offence of incest for girls and women? If there is no offence of incest then there is full compliance with this indicator.	No		As above 1.12

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
1.19 Have the terms indecency, carnal knowledge, defilement and insulting modesty been removed from the criminal law legislation?	No		As above 1.12
1.20 Is consent specifically defined in the criminal law legislation outlining coercive circumstances?	No		As above 1.12
1.21 Is there a legislative prohibition on the use of prior sexual conduct to establish consent?	Partial	FSM Rules of Evidence, Article IV, Rule 412. <ul style="list-style-type: none"> • (a)(b). In a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behaviour of an alleged victim, or evidence of a victim's past sexual behaviour is not admissible unless such evidence other than reputation or opinion evidence is (A) Past sexual behaviour with persons other than the accused, offered by the accused with respect to the source of semen or injury; or (B) Past sexual behaviour with the accused and is with respect to whether the alleged victim consented. • (c) If the person accused intends to offer evidence of specific instances of the alleged victim's past sexual behaviour, the accused shall make a written motion and the court shall order a hearing in chambers to determine if such evidence is relevant and if its probative value outweighs the danger of unfair prejudice. 	The use of prior sexual history to establish consent is discriminatory as it perpetuates a view that a previous relationship or history of promiscuity makes it 'more likely' that a woman consented to the act in question.
1.22 Is there a legislative prohibition on the requirement for corroboration?	No		As above 1.12
1.23 Is there a legislative prohibition on a requirement to provide proof of resistance?	No		As above 1.12
1.24 Is there a defence of honest and reasonable belief that the victim is of legal age? If there is no defence of honest and reasonable belief then there is full compliance with this indicator.	No		As above 1.12
1.25 Is a defence of consent unavailable in relation to a victim under 18?	No		As above 1.12
1.26 Is there an exemption from prosecution for marital rape? If there is no exemption in the legislation then there is full compliance with this indicator.	No		As above 1.12

ARTICLE 1: DEFINITION OF DISCRIMINATION AGAINST WOMEN ARTICLE 2: OBLIGATIONS TO ELIMINATE DISCRIMINATION			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
1.27 Is there mandatory prosecution for sexual offences?	No		As above 1.12
1.28 Is bail unavailable for sexual offences if risk to victim?	No		As above 1.12
1.29 Are there minimum sentences legislated for sexual offences?	No		As above 1.12
1.30 Is there a provision in the criminal law legislation which states that customary practices of forgiveness shall not affect criminal prosecution or sentencing?	No		As above 1.12
1.31 Is there legislative provision for compensation for victims of sexual and domestic violence?	No		As above 1.12
1.32 Does the criminal law legislation allow for infanticide to replace a charge of murder or manslaughter?	No		As above 1.12
1.33 Does the definition of infanticide include environmental and social stresses?	No		As above 1.12

ARTICLE 3: GUARANTEE OF BASIC HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS			
INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
3.1 Is there legislation establishing national human rights machinery charged with promoting and protecting human rights including women's rights?	No		
3.2 Is there legislation establishing a funded body to monitor the implementation of non-discriminatory law and policy for the advancement of women?	No		FSM has a National Gender Office located in the Department of Health, Education and Social Affairs. The Office is not established by legislation and therefore is more easily subject to removal in times of economic or political upheaval.

ARTICLE 4: ACCELERATION OF EQUALITY BETWEEN MEN AND WOMEN

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
4.1 Does the Constitution contain a temporary special measures provision?	No		
4.2 Are special measures exempt from discrimination on the grounds of sex, marital status, sexual orientation, disability, and HIV status?	No		

ARTICLE 5: SEX ROLES AND STEREOTYPES

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
5.1 Is there a provision in the Constitution which gives precedence to a constitutional guarantee of equality if there is a conflict between custom and equality law?	No	<p><i>Constitution of the Federated States of Micronesia 1979, Article V</i></p> <ul style="list-style-type: none"> • s 1. Nothing in Constitution takes away function of traditional leader as recognised by custom or prevent traditional leader from being recognised honoured and given formal or functional roles at any level of government. • s 2. Traditions of the people may be protected by statute and cannot be challenged by Article IV (Declaration of Rights). • s 3. Congress may establish a Chamber of Chiefs consisting of traditional leaders from each state. State constitutions may provide active roles for such leaders. <p><i>FSM Code [Title 1, Cap 1] 1997, s 114.</i> Due recognition shall be given to local customs in providing a system of law, and nothing in this chapter shall be construed to limit or invalidate any part of the existing customary law, except as otherwise provided by law.</p>	The Constitution provides authority for legislation that protects custom law. It expressly enables such custom law to take precedence over the fundamental rights and freedoms in the Bill of Rights.

ARTICLE 6: EXPLOITATION OF WOMEN

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
6.1 Is the act of soliciting decriminalised?	Yes		Soliciting by either females or males is not a criminal offence in the FSM in full compliance with this indicator and with CEDAW.
6.2 Is aiding and abetting consensual acts of soliciting decriminalised?	Yes		
6.3 Is it a criminal offence to procure any woman without consent or any girl under 18?	No		Compliance with CEDAW requires that soliciting is not a criminal offence. However, girls and women who should be forced into sex work against their will are protected from exploitation with specific targeted offences. The FSM has not legislated in this area and is non-compliant with CEDAW.
6.4 Does employment legislation including occupational health and safety legislation protect sex workers?	No		
6.5 Is the trafficking of women prohibited?	No		
6.6 Is sex tourism prohibited?	No		

ARTICLE 7: POLITICAL AND PUBLIC LIFE

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
7.1 Is there an equal right to vote?	Yes	<ul style="list-style-type: none"> • <i>Constitution of the Federated States of Micronesia 1979 Article VI, s 1.</i> A citizen of 18 years may vote in national elections. • <i>FSM Code [Title 9, Cap 1] 1997, s 102.</i> Every citizen of the FSM is eligible to vote for Members of the Congress of the FSM if (1) 18 years of age or older on the day of the election (2) a resident or domiciliary of the State of Kosrae, Pohnpei, Chuuk, or Yap and a registered voter therein for at least 30 days immediately preceding the election (3) not currently under a judgment of mental incompetency or insanity (4) not currently under parole, probation, or sentence for any felony for which he or she has been convicted by any court of the FSM. 	

ARTICLE 7: POLITICAL AND PUBLIC LIFE

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
7.2 Is there equal eligibility for political representation?	Partial	<i>FSM Code [Title 9, Cap 2] 1997, s 202.</i> To be eligible for election as a Member of the Congress of the Federated States of Micronesia, a person shall (1) have attained the age of 30 years on the day of the election; (2) be a resident for at least five years of the State from which he is elected; (3) be a citizen of the FSM for at least 15 years (4) not be under a judgment of mental incompetency or insanity; and (5) not have been convicted of a felony. But <i>Constitution of the Federated States of Micronesia 1979, Article V, s 1.</i> Nothing in Constitution takes away function of traditional leader as recognised by custom or prevent traditional leader from being recognised honoured and given formal or functional roles at any level of government.	Traditional leaders can be given formal and functional roles at any level of government and although there are no formal barriers to women becoming traditional leaders they rarely do.
7.3 Is there legislative provision for minimum quotas of women in Parliament?	No		No women have held or currently hold any of the 14 seats in the FSM parliament. Quotas, which have raised numbers of women in parliament in other countries, may assist in achieving substantive equality in this area.
7.4 Do women have an equal right to participate in NGOs?	Yes		There is no legal barrier to participation in NGOs.
7.5 Is there legislation (other than Charitable Societies legislation) enabling NGOs to register and mobilise to promote the advancement of women without political interference?	No		

ARTICLE 8: INTERNATIONAL REPRESENTATION AND PARTICIPATION

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
8.1 Do women have equal opportunity to represent government at international level and participate in the work of international organisations?	Partial	There are no legal barriers to representing the FSM government at international level and participating in the work of international organisations.	Few women represent the national government at the international level and the introduction of a quota system into legislation would ensure full compliance with this indicator.

ARTICLE 9: NATIONALITY AND CITIZENSHIP

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
9.1 Do women have an equal right to acquire, change or retain their nationality?	Yes	<i>Constitution of the Federated States of Micronesia 1979, Article III, s 1.</i> A person who is a citizen immediately prior to the effective date of the Constitution is a citizen and national of FSM.	
9.2 Does marriage to an alien or change of husband's nationality affect wife's nationality? If there is no change to a wife's nationality after marriage there is full compliance with this indicator.	Yes		To be compliant with this indicator, the marriage of a woman to a non-national should not affect her nationality. The FSM legislation does <i>not</i> alter the nationality of female citizens upon marriage and therefore there is full compliance with this indicator in compliance with CEDAW.
9.3 Do both spouses have equal rights to residency, citizenship and employment when married to a non-national?	Yes		
9.4 Do both spouses have an equal right to determine the nationality of children?	Yes	<i>Constitution of the Federated States of Micronesia 1979, Article III, s 2.</i> A person born of parents one or both of whom are citizens of the FSM is a citizen and national of the FSM by birth.	
9.5 Do women have an equal right to obtain a passport?	Yes	<i>FSM Code [Title 50, Cap 2] 1997, s 202.</i> No passport shall be granted to any person other than a citizen of the Federated States of Micronesia.	

ARTICLE 10: EDUCATION

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
10.1 Do women and girls have equal access to education?	Partial	<p><i>Constitution of the Federated States of Micronesia 1979, Article IX, s 2(r)</i>. The legislature of FSM has the power to promote education by setting minimum standards, providing training and assistance to the states and providing support for post-secondary educational programs and projects.</p> <p><i>FSM Code [Title 40, Subcap III] 1997, National Student Loan Revolving Fund Act 1982</i></p> <ul style="list-style-type: none"> • <i>s 325</i>. It is important to identify and educate more of the talented young men and women of the FSM in order to provide the fullest development of their mental resources and technical skills. This subchapter establishes an ongoing fund to provide long-term, low-interest loans from a revolving fund to qualified students who are in need of such financial assistance in order to pursue a full-time course of study at an institution of higher education. • <i>s 327</i>. Loans shall be made only to a student who (1) is a citizen of the FSM (2) is in need of the amount of the loan to pursue a course of study on a full-time basis as an undergraduate, graduate, or professional student at an institution of higher education; and (3) has been accepted for enrolment as a full-time student at an institution of higher education or in the case of a student already attending such an institution, is in good standing at such institution and is carrying a full-time academic work load. <p><i>FSM Code 1997 [Title 1, Cap 1] s 109</i>. Free elementary education shall be provided throughout the Trust Territory.</p>	The FSM government has introduced free elementary education and student loans which assist girls in achieving equal access to education.
10.2 Is there legislation that creates special measures for the advancement of women in education?	No		
10.3 Is there compulsory primary education for girls and boys?	No		Although the four states have introduced compulsory education, FSM has not legislated in this area, in non-compliance with CEDAW.
10.4 Is there compulsory secondary education for girls and boys?	No		See above 10.3
10.5 Is family life (reproductive and sexual health) education compulsory in schools?	No		See above 10.3
10.6 Is there a legislative prohibition on expulsion from school because of pregnancy?	No		See above 10.3

ARTICLE 11: EMPLOYMENT

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
11.1 Are there anti-discrimination provisions in employment legislation on the grounds of sex, marital status, disability, pregnancy, sexual orientation and HIV status, with sanctions?	Partial	<i>FSM Code [Title 52, Cap 1, Subcap I] 1997, s 116.</i> No employee in the public service shall be suspended, demoted, dismissed, laid off, or otherwise discriminated against because of sex, marital status, race, religious or political preference, place of origin, or ancestry.	Protection from discrimination is provided for public service workers but not other workers.
11.2 Are there special measures provisions for the advancement of women in employment?	Partial	<i>FSM Code [Title 52, Cap 1, Subcap I] 1997, s 113.(1).</i> The State Public Service System shall provide equal opportunity for all regardless of sex, race, religion, language, ancestry, social status, or place of origin.	The Public Service has affirmative action measures but no similar provisions exist for other workers.
11.3 Do women enjoy equal conditions of work including leave, superannuation and Workers Compensation?	Partial	<i>FSM Code 1997 [Title 52 Cap 4] Employees' Health Insurance Plan, s 403 (1).</i> All full-time employees of the National Government of the FSM may participate in the plan. <i>FSM Code [Title 53, Subtitle II, Cap 6] 1997, Federated States of Micronesia Social Security Act</i> <ul style="list-style-type: none"> <i>s 603(8).</i> Employment means any service by an employee for an employer incorporated or doing business within the FSM irrespective of where such employment is performed, except family employment. <i>s 603(9).</i> Family employment means employment of a worker by a member of the household, a parent or a son or daughter. 	The exclusion of part time worker will disproportionately impact upon women. The exclusion of family employment will disproportionately impact upon women.
11.4 Does the legislation provide sexual harassment protection from employers and co-workers?	No		
11.5 Does the definition of sexual harassment include the breadth of unwanted behaviours?	No		
11.6 Does the legislation contain an equal pay provision?	No		
11.7 Does the legislation contain pay equity provisions?	No		Note that FSM has placed a reservation on the pay equity provisions of CEDAW (Article 11 (1) (d)).
11.8 Does the legislation provide for an equal retirement age?	No		There are no provisions for retirement in the legislation in non-compliance with CEDAW.
11.9 Are there restrictions on women's choice of employment? If there are no restrictions on women's choice of employment then there is full compliance with this indicator.	Yes		There are no legislative restrictions on women's choice of employment as there are in all other Pacific countries except the Marshall Islands. This is in full compliance with the indicator and with CEDAW.

ARTICLE 11: EMPLOYMENT

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
11.10 Does the legislation provide for health protection during pregnancy?	No		There is no workplace health and safety legislation in FSM.
11.11 Does the legislation provide paid maternity leave of not less than 14 weeks?	No		Note that FSM has placed a reservation on the paid maternity leave provisions of CEDAW (Article 11(2) (b)).
11.12 Does the legislation provide protection from dismissal because of pregnancy or maternity leave?	No		
11.13 Does the legislation guarantee the provision of childcare by employer or state?	No		
11.14 Does the legislation provide reasonable nursing time during work hours?	No		

ARTICLE 12: HEALTH CARE AND FAMILY PLANNING

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
12.1 Do women have access to safe and legal abortion facilities?	Partial	<i>Constitution of the Federated States of Micronesia 1979, Article IX s 2.</i> Congress has the power to promote health by setting minimum standards.	The FSM legislation does not criminalise abortion and the Constitution directs Congress to enact legislation to promote health by setting minimum standards. However, access to abortion facilities throughout the FSM states is limited and therefore further legislation is required to guarantee access to achieve full compliance with this indicator.

ARTICLE 13: ECONOMIC AND SOCIAL BENEFITS

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
13.1 Do women have an equal right to family benefits regardless of marital status?	Yes		There is no comprehensive social security system in the FSM.
13.2 Do women have equal right to receive bank loans, mortgages and financial credit?	Yes		There is no legislative barrier preventing women from receiving bank loans, mortgages and financial credit.
13.3 Do women have an equal right to participate in recreational activities, sports and cultural life?	Yes		There is no legislative barrier to participate in recreational activities, sports and cultural life.

ARTICLE 14: RURAL WOMEN

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
14.1 Is there legislation that provides for special measures to advance substantive equality for rural women?	No		Many women throughout the FSM live in rural communities and it is crucial that the FSM incorporates special measures into either the national constitution or legislation to advance substantive equality.

ARTICLE 15: EQUALITY BEFORE THE LAW AND CIVIL MATTERS

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
15.1 Does the Constitution guarantee equality before the law?	Yes	<i>Constitution of the Federated States of Micronesia 1979, Article IV. 3, 4.</i> A person may not be denied the equal protection of the law on account of sex. <i>FSM Code 1997 [Title 1. Cap 1] s 107.</i> A person may not be denied the equal protection of the law on account of sex.	Equal protection of the law requires that both females and males are treated equally before the law.
15.2 Do women have an equal capacity in civil matters – can women sue?	Yes		There is no legal barrier to women's right to sue.
15.3 Do women have an equal right to participate in courts and tribunals at all stages?	Yes		There is no legal barrier to women's right to participate in court proceedings.
15.4 Do women (regardless of marital status) have an equal right to conclude contracts and administer property?	Yes		There is no legal barrier to women's right to conclude contracts and administer property.
15.5 Do women have an equal right to be executors or administrators of estates?	Yes		There is no legal barrier to women's right to conclude contracts and administer property.

ARTICLE 15: EQUALITY BEFORE THE LAW AND CIVIL MATTERS

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
15.6 Is there legislation that nullifies all contracts and instruments that limit women's legal capacity?	No		There is no specific prohibition on discriminatory contracts and therefore there is no compliance with this indicator.
15.7 Do women have an equal right to choose their residence and domicile?	Yes		There is no legal barrier to women's right to choose their residence and domicile.

ARTICLE 16: PERSONAL AND FAMILY LAW

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
16.1 Does the legislation guarantee entry into marriage with full and free consent?	No		The FSM has not legislated in the area of marriage. However, it has the power to do so and therefore is non-compliant on all indicators in the area of marriage.
16.2 Does the legislation allow marriages to be nullified if they took place under force, duress or undue influence?	No		See above 16.1.
16.3 Is there an equal minimum age of 18 for marriage?	No		See above 16.1.
16.4 Is there a legislative prohibition on child marriage?	No		See above 16.1.
16.5 Does the legislation require registration of marriage in official registry?	No		See above 16.1.
16.6 Does the legislation prohibit bigamy?	No		See above 16.1.
16.7 Do women have an equal right to choose a family name?	Yes		There is no legislative barrier to women choosing their family name and therefore there is full compliance with this indicator.
16.8 Is the consent of both parents equal in marriage of minors?	No		See above 16.1.
16.9 Are both spouses equal in the ownership, acquisition, management, administration, enjoyment and disposition of property?	No		The legislation does not guarantee equality to both spouses in the ownership, acquisition, management, administration, enjoyment and disposition of property.

ARTICLE 16: PERSONAL AND FAMILY LAW

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
			Property rights are largely determined by custom and although customary land tenure is based on a matrilineal inheritance system the control and use of land and other resources often falls on men in the FSM, who are looked upon to provide for and to protect their families. Further, the failure to guarantee equality in the legislation leaves women vulnerable to changes in custom and therefore there is no compliance with this indicator.
16.10 Does the legislation provide for a maintenance and custody order during separation based on need?	Partial	<p><i>FSM Code [Title 6, Cap 16, Subcap 2] 1997,</i></p> <ul style="list-style-type: none"> • s 1622. While an action for annulment or divorce is pending, the court may make temporary orders for custody of minor children for their support, for support of either party as it deems justice and the best interests of all concerned may require covering any of these matters pending final decree. • s 1614. Nothing contained in this chapter shall apply to any divorce effected in accordance with local custom. 	<ul style="list-style-type: none"> • The criteria of ‘justice and the best interests of all concerned’ does not provide sufficient guidance in relation to earning capacity, commitments and needs of the parties. • Customary marriages fall outside the legislation in non-compliance with CEDAW.
16.11 Is there legislation to enable women to occupy the marital home when settlement is not possible or in situations of domestic violence?	No		
16.12 Does the legislation provide an order for restitution of conjugal rights? If there is no provision for restitution of conjugal rights then there is full compliance with this indicator.	Yes		To be compliant with this indicator, the legislation should not empower the courts to provide an order for restitution of conjugal rights. The legislation does <i>not</i> provide for orders for restitution of conjugal rights (which are discriminatory as they take away a woman’s autonomy to choose when and with whom she has sexual relations). The FSM is therefore in full compliance with this indicator and with CEDAW.

ARTICLE 16: PERSONAL AND FAMILY LAW

INDICATOR	COMPLIANCE	RELEVANT LEGISLATION	COMMENTARY
16.13 Does the legislation provide for no-fault divorce?	No	<p><i>FSM Code [Title 6, Cap 16, Subcap 2] 1997-</i></p> <ul style="list-style-type: none"> <i>s 1626(1)-(9).</i> Divorce granted for adultery, cruel treatment, neglect or personal indignity, wilful desertion for one year, habitual intemperance, imprisonment for three years, insanity for three years or more, leprosy, the separation of the parties for two consecutive years without cohabitation, whether or not by mutual consent, wilful neglect by a husband to provide suitable support for his wife when able to do so or when failure to do so is because of his idleness, profligacy or dissipation. <i>s 1628.</i> The Court does not issue a decree of divorce if the injured party has forgiven the ground for the divorce. Proof of forgiveness may be by an express showing or by the voluntary cohabitation of the parties with knowledge of the fact and restoration of the forgiving party to all marital rights. Forgiveness implies a condition that the forgiven party treat the forgiving party with conjugal kindness. <i>s 1629.</i> The Court may not issue a decree of divorce for adultery when the adultery is with the procurement or connivance of the plaintiff. <i>s 1614.</i> Nothing contained in this chapter shall apply to any divorce effected in accordance with local custom. 	<ul style="list-style-type: none"> Fault based criteria disadvantages women who are more likely to be in vulnerable situations and have difficulty establishing cruelty or adultery. Customary marriages fall outside the legislation. Forgiveness does not take into account the power imbalance between the parties.
16.14 Is there a duty on the court to promote reconciliation? If there is no duty on the court to promote reconciliation then there is full compliance with this indicator.	Yes		<p>To be compliant with this indicator the legislation should not place a duty on the court to promote reconciliation between estranged spouses. Such a duty is discriminatory and non-compliant because it removes women's choices or reduces their autonomy to choose to leave a relationship. The legislation does not place a duty on the court to promote legislation and therefore is in full compliance with the indicator and with CEDAW.</p>