Welcome

Welcome to the first 2015 bumper issue of Talanoa!

A key focus of the Pacific Islands Law Officer’s Network (PILON) is to provide a forum for communication and cooperation between members. Produced bi-annually, Talanoa is aimed at facilitating discussion of key regional law and justice issues and providing a further connection for PILON with regional organisations and initiatives. It includes articles designed to keep members up to date on some of the great initiatives that have been occurring in the region, emerging issues, recent cases, and generally to allow for the sharing of ideas between members. We invite you to actively contribute to the discussion! Content ideas, articles, suggestions and feedback are always welcomed by the Secretariat, and we encourage you to sign up to our mailing list so you never miss an issue.

We are grateful to PILON Observer Members - Commonwealth Secretariat, SPC/RRRT, PIFS and the ICRC and IFRC; as well as the Australian Attorney General’s Department for their contributions to this issue. If you would also like to contribute to the discussion please contact us.

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33rd PILON Annual Meeting
The 33rd PILON Annual Meeting was held at the Marine Training Centre, Tarawa, Kiribati, in early November 2014. Representatives from PILON Member countries, Observer Members and other regional organizations met to discuss law and justice issues focusing on the theme “Combating Environmental Crime in the Pacific: Issues and Best Practices”.

The meeting considered presentations from government representatives relating to the theme of the meeting including trends and best practices in combating environmental crime, climate change, and illegal fishing.

Members were also given the opportunity to report on their activities in 2014 and priorities for the New Year.

Presentations from Observer Members and meeting observers included discussion of the Pacific Islands Chiefs of Police (PICP) Forensic Working Group’s Forensic Legislation Review; the Model Law for the Arms Trade Treaty...”

Applications for PILON observer membership by the South Pacific Lawyers Association (SPLA) and the International Federation of the Red Cross and Red Crescent Societies (IFCR) were considered by Members. Their applications for membership were unanimously approved and both organisations were warmly welcomed to PILON by Members.

Members extended their thanks to Kiribati for hosting the 33rd Annual Meeting and now look forward to the Solomon Islands hosting the 34th PILON Meeting, which will be held in Honiara in December 2015.

Further information including the outcomes report, presentation and the 2015 Secretariat work plan can be found on the PILON website at: www.pilonsec.org.

1 Developed by the NZ Ministry for Foreign Affairs and Trade.
The Pacific Prosecutors’ Association (PPA) meeting was held in November 2014 at the Novotel Nadi, Fiji, prior to the 33rd PILON meeting.

The Pacific Prosecutors’ Conference (PPC) 2014 was organized by the PILON Secretariat with assistance from the Australian Attorney-General’s Department (AGD). The focus of the meeting was: ‘Prosecuting in Remote Areas’. Fifteen participants from ten member countries attended along with two representatives from AGD, a representative from the New Zealand Crown Law Office and an advisor of the Papua New Guinea Public Prosecutions Office.

Sessions included presentations from Papua New Guinea and the Cook Islands on their experiences of prosecuting in remote areas, an interactive capabilities mapping session to agree on the core capabilities of Pacific prosecutors and identify common capability gaps, training requirements and technology needs across jurisdictions to inform future PPA/PILON work plan.

The meeting also hosted a workshop on the PICP Pacific Forensic Legislation Review, facilitated by Ms Corinne Vale from AGD. The Review, conducted in 2014 by AGD, found that police in most Pacific island countries lack many of the legal powers they need to use modern forensic investigation techniques. Without modern laws to support the collection of forensic evidence, law enforcement will not be as effective as it can be. Likewise, ensuring police have adequate legal powers will reduce risks that forensic evidence will be challenged in court and found inadmissible.

The Review recommends that a regional approach be taken to drive law reform in this area by developing model forensic provisions. At the request of PICP’s Forensic Working Group, AGD is now developing model laws to facilitate reform of Pacific forensic legislation.

The PPA in keeping with its history and the reasons for its formation successfully created a forum for regional prosecutors to raise and discuss issues they face within their countries. It was also successful in passing the Constitution and Strategic Plan 2014-2015.

The conference concluded with Tonga offering to host the PPC 2015 in July.
- SPOTLIGHT ON -

Developing sustainable legal policy development and implementation capabilities in the Pacific

Strengthening policy capabilities to produce effective outcomes

Georgia Hinds and Dr Marie Wynter
Australian Attorney-General’s Department

As PILON members would be aware, good legal policy development has the potential to bring about change and give effect to the security, social, economic and governance reforms that are sought by Pacific leaders. Implementation of policy reforms is most successful when policy makers have a thorough understanding of what the policy problem is, what can be done about it, who needs to be consulted and involved, and how to deal with implementation risks and challenges. Only with this understanding can policy makers effectively advise government. Upfront planning helps policy makers flesh out these issues and negotiate solutions.

An important tool for implementing legal policy reform is legislation. Recently, there has been growing recognition in the Pacific of the need to “improve the availability and quality of underlying policy for legislative proposals”. ²

To assist PILON members to address this issue, AGD has developed a Legal Policy Development course covering the key aspects of the legal policy development framework, from issue identification through to creating effective and tailored solutions. The course is relevant to a wide range of Pacific groups, including government officials, legislative drafters, police officers and law and justice officials. Since its successful pilot in the Solomon Islands in September 2013, it has since been completed by over 120 Pacific participants in Australia, Samoa, Fiji, Tuvalu and Nauru.

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AGD is now training a network of Pacific Policy Champions to deliver the course to their home agencies and the region. The first two champions, Pauline Beiatau and Leotrina Macomber were trained through AGD’s 2014 Pacific Legal Policy Twinning Program, and AGD is looking forward to training more champions this year.

“...countries can request the course to be delivered as a stand-alone training aimed at general capacity building, or ask for it to be tailored...”

Broadly, the Legal Policy Development course aims to build participants’ capabilities to identify legal policy priorities for their home countries, develop policy proposals for government, draft and implement clear policies and evaluate the effectiveness of those policies.

Policy Training in Nauru, December 2014

To achieve this, the course begins with an overview of the concept of policy development, exploring definitions of ‘policy’ and the place of ministers and the public service within the process. Participants are then guided through a seven step ‘OUTCOME’ model in which they are assisted to:

1. Obtain information through research, consultation and analysis, to clarify the problem and think broadly about potential solutions
2. Uncover, identify and understand the views and concerns of stakeholders early on, to ensure the ultimate policy is balanced and well-informed
3. Think ahead and plan the policy process. Assess potential risks, their consequences, and mitigating strategies
4. Create, develop and assess possible options to solve the problem
5. Outreach to stakeholders and decisions-makers through clear, targeted consultation and communication
6. Make the policy ‘happen’ through implementation and delivery, and
7. Evaluate and monitor the policy to assess its effectiveness and success.

The course is flexible, but is normally delivered over one full day, or two half-days. It is run in an interactive format, using themed exercises, hypotheticals, case studies and group discussions. Participants are encouraged to develop consultation plans for stakeholders and Ministers, as well as take-home action plans detailing strategies to further strengthen the policy process in their own countries.

Member countries can request the course to be delivered as a stand-alone training aimed at general capacity building, or ask for it to be tailored to work through a specific reform project they are undertaking. Participants have noted wide-ranging benefits of the course, including that it assisted them with specific ministerial consultations, helped them to identify the pros and cons of policies, and helped set an example of good practice for public servants.

PILON members who are interested in having the course run in their country should contact Caroline Scott, Director, Pacific Crime and Policing Section, Attorney-General’s Department on Caroline.Scott@ag.gov.au or pacific@ag.gov.au or their local Policy Champions, listed on the AGD website.

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Building institutional effectiveness — the Pacific Legal Policy Twinning Program

Dr Marie Wynter
Australian Attorney-General’s Department

Australia’s Attorney-General’s Department recently hosted Pauline Beiatau of Kiribati and Leotrina Macomber of Tonga under the 2014 AGD Pacific Legal Policy Twinning Program.

This program, which involves a two month placement in Australia, enables legal policy officers from Pacific law and justice agencies to build their capacity to develop and implement policy, which in turn helps their policy agencies to fight crime, improve community safety, regional stability and security, and support strong economic growth.

AGD has innovatively redesigned the twinning program so legal policy officers bring with them a crime or policing policy project affecting their country to work on during their stay. They then return home with tangible policy deliverables and skills to help build institutional effectiveness in the Pacific.

Throughout the program Pauline and Leotrina shared their knowledge and learnings with AGD and our partner agencies by delivering seminars on their legal systems and how they intend to progress their project on their return home.

Pauline is the Director of Public Prosecutions of Kiribati. During her stay she worked closely with Tim Mitchell and Louise Bartholomew from AGD to review the rape and sexual assault provisions in the Kiribati Penal Code, which are outdated and fail to reflect the full range and severity of offending behaviour.

‘Rape occurs frequently in homes and out there in the public, on all the islands of my country,’ said Pauline. ‘It is becoming prevalent and deterrence should be taken immediately. I think amending inadequate criminal provisions, including penalties, is one way in which serious sexual offences will be addressed properly by law. It will also help improve our ability to prosecute these offences.’

Leotrina is an Assistant Crown Counsel in the Attorney-General’s Office in Tonga. She worked closely with Dr Marie Wynter to review Tonga’s cybercrime and mutual assistance laws to identify reforms to support Tonga to become the first Pacific nation to accede to the Council of Europe’s Convention on Cybercrime. Australia is well placed to assist Tonga with this project, having acceded to the Convention in 2012.

“...program expects to offer two placements per year with applications for the 2015 program due to open in May.”
‘Tonga’s recent connection to high speed internet has seen internet usage soar,’ said Leotrina. ‘The Tongan Government has taken a proactive approach to cybercrime, acknowledging that Tonga has become a susceptible target for illegal cyber activities. Tonga could not pass up a great avenue through the Twinning Program to review its current legal framework on cybercrime.’

Towards the end of the program, Leotrina attended a meeting of the Cybercrime Convention in Strasbourg. ‘The department’s help to conduct a legislative review of Tonga’s compliance with the Convention provided a solid foundation for me to be able to confidently participate at the Council of Europe hosted meetings and map out a realistic action plan for Tonga’s accession process to the Convention,’ said Leotrina.

In addition to the lasting friendships and networks built across government, Pauline and Leotrina have each returned home with a well-developed policy proposal for their projects, plans for future action, and the skills to share their knowledge about good policy development and consultation processes with their agency.

AGD will provide follow-up assistance to the twins to help progress their projects and support their delivery of policy development training at home.

‘I learnt a lot of new things from the program, particularly understanding what “legal policy development” actually is, and how to train the trainer,’ said Pauline. ‘Along with a well-developed policy for my project, I intend to bring this knowledge home and to implement this in Kiribati. I find this training very helpful. Thank you so much AGD!’

The program expects to offer two placements per year with applications for the 2015 program due to open in May. If you intend to apply, please keep an eye on the AGD Pacific Legal Policy Twinning Program website for selection criteria and application dates.

If you would like further information about the Legal Policy Development Course or its modules on Sources of Law and Stakeholder Engagement, please contact Marie at marie.wynter@ag.gov.au or pacific@ag.gov.au.

“...Pauline and Leotrina have each returned home with a well-developed policy proposal for their projects, plans for future action, and the skills...”
In Conversation with Pauline Beiatau, Kiribati DPP

Pauline, you have been back in Kiribati for a few months now after your ‘Twinning’ placement. Can you tell us a bit about the project you have been working on and what you have been up to since your return?

My twinning project is to strengthen rape and incest laws in Kiribati so we can make Kiribati a safer place for women, men, and children.

Our office in Kiribati is quite small – there are only 3 prosecutors, and one of them is in Australia doing her Masters at the moment, so we all have a very full caseload. It can sometimes be hard to schedule in policy work as well, as the deadlines are not as close.

With the help of the Action Plan I developed during my stay in Australia, I have been able to keep going on my project. When I got home I called a meeting with the Ministry of Women, Youth and Social Affairs and the Domestic Violence and Sexual Offences Unit of the Kiribati Police Service. Together we established a committee to discuss the law reform recommendations and draft a Cabinet paper outlining our recommendations. We have now circulated the paper to other members of Kiribati’s ‘Changing of Laws Committee’ for comment and input.

We hope Cabinet will be able to consider the paper in the next few months – it has been very exciting to be a part of this important law reform process.

It’s also been great fun sharing what I’ve learnt with my colleagues back in Kiribati. It’s been a busy few months, but it’s also been incredibly rewarding applying some of the policy and training skills I learnt during the Pacific Legal Policy Twinning Program.

I am also grateful for all the friends I made in Australia and hope to see them all again soon!

“...the Action Plan I developed during my stay in Australia, I have been able to keep going on my project.”

I also missed my family very much while I was away, but they were so happy to see me when I got back! I have 10 kids and it has been great being back with my husband and with them, and over Christmas we had a big family get together. As much as I love my work, I always make time for my family and try to get back to my home island with them as much as I can. I think that’s the same all over the world.

Pauline with her SES mentor, Kelly Williams
The Commonwealth responds to virtual currencies

David Tait
Commonwealth Secretariat

The perception of cybercrime has long been rooted in the archetype of the “lone bedroom hacker”\(^3\). This model of offending has become outdated as increasingly simple interfaces and a proliferation of online sources of advice for would-be criminals diminish the digital barriers to entry. Technical skill is now no longer necessary to commit crime via electronic means.\(^4\) Where such knowledge is required the rise of social networking has allowed criminals with these skills to sell their services online.\(^5\)

It was against this background that the Commonwealth Heads of Government tasked the Commonwealth Secretariat with improving members’ “legislation and capacity in tackling cybercrime and other cyber space security threats”.\(^6\) Even member states which had not previously felt the effects of cybercrime are increasingly exposed following the roll out of high speed broadband connectivity, such as that which came to Tonga via the Southern Cross Cable in 2013.

This already fluid situation has been further complicated with the advent of virtual currencies, exemplified by Bitcoin. Virtual currencies are “digital representation[s] of value that can be digitally traded and functions as a medium of exchange, a unit of account and/or a stored value, but does not have legal tender status in any jurisdiction”.\(^7\) However, it is the attribute of anonymity in transactions for which certain virtual currencies are best known. Such ‘crypto-currencies’ present a risk of exploitation by criminals. This ‘risk’ can be understood as having two components. The first of these is the use of virtual currencies to undertake criminal activity. The second relates to the effect which enhanced anonymity has upon the capacity of law enforcement to undertake ‘follow the money’ investigations.\(^8\) As a result there are concerns regarding the facilitation of crimes such as money laundering and, potentially, terrorism.

Recognising these risks the Commonwealth Secretariat used its convening power to bring together 10 Commonwealth member states and leading international experts in the field for a Roundtable discussion. This was hosted at the Commonwealth’s Headquarters, Marlborough House in London on the 17 – 18 February 2015. The experts included Europol, the Eastern and Southern

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\(^3\) J. Brokenshire speech to Charted Institute for IT, 14 March 2013 as quoted at https://www.gov.uk/government/news/cyber-crime-is-no-longer-the-preserve-of-bedroom-hackers

\(^4\) Europol iOCTA Report 2014 at 9

\(^5\) Europol iOCTA Report 2014 at 19

\(^6\) Commonwealth Heads of Government Meeting Communiqué 2011 at 7(i)

\(^7\) FATF/OECD, Virtual Currencies – Key Definitions and Potential AM/CFT Risks at 4

\(^8\) Testimony of Acting Assistant Attorney General Mythili Raman before US Senate Committee on Homeland Security and Governmental Affairs, November 18, 2013
Africa Anti-Money Laundering Group, Interpol, the International Monetary Fund, the UN Office on Drugs and Crime and the United Nations Economic Commission for Latin America and the Caribbean. The Pacific was strongly represented by New Zealand and Tonga.

The Roundtable discussed virtual currencies as drivers of transnational crime. Of particular focus were the major changes which had arisen within mature markets in illegal drugs. It was reported that some Commonwealth members had shifted from being net importers to net exporters of drugs—criminals relying upon virtual currencies. Despite these dangers the participants were also keen to stress the potential of virtual currencies for developing economies. The reduction in transaction costs for services such as remittances and foreign exchange, as well as the potential for innovations like micro-tipping⁹, are extremely exciting.

The Commonwealth Secretariat intends that this event will provide a foundation for increased cooperation between the members of the Commonwealth to maximise the benefits of virtual currencies without permitting their use by criminals.

“…growing network of international partnerships, states in the Pacific are well placed to harness the potential of virtual currencies…”

Many Pacific Commonwealth member states already play a leading role in attempting to disrupt transnational crime—particularly in relation to money laundering and terrorist financing. Indeed, Tonga and Vanuatu, through the Asia/Pacific Group on Money Laundering (‘APG’), are leading a typologies study into risks and vulnerabilities associated with trans-Pacific drug trafficking. The role which virtual currencies will play in the future development of these trends is sure to be of significant interest.

The capacity of Pacific states to respond to cybercrime continues to increase. For Commonwealth members the Commonwealth Cybercrime Initiative, the Commonwealth Model Law on Computer and Computer Related Crime and the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters are ready sources of assistance. In 2014 Tonga was formally invited to join the Council of Europe’s Convention on Cybercrime (the ‘Budapest Convention’). This accords with the recommendation, endorsed by Commonwealth Law Ministers at their meeting in Gaborone, Botswana in May 2014, that Commonwealth members should, where practical, accede to the Budapest Convention.¹⁰

Through this growing network of international partnerships, states in the Pacific are well placed to harness the potential of virtual currencies while inhibiting them as a drive of cyber and transnational crime.

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### Ombudsmen Work to Prevent Corruption

A new anti-corruption project, focusing on the role of Ombudsmen and complaint-handling systems, is starting this year in the Pacific. Funded by DFAT and managed by the Commonwealth Ombudsman in Canberra, this project will build on the work of the Pacific Ombudsman Alliance (POA). POA was founded in 2009, and is a service delivery and mutual support organisation for Ombudsman and allied institutions in the Pacific.

The new project aims to support Ombudsmen to strengthen the existing anti-corruption organisations or systems in their country. While the UN is working for long-term change in support of the

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⁹ A form of peer-to-peer tipping using Bitcoins to show appreciation for online content or services

¹⁰ Communique: Commonwealth Law Ministers Meeting 2014, 8 May 2014, Gaborone, Botswana 5-8 May 2014 at 19
implementation of the UN Convention Against Corruption (UNCAC), this project aims to improve existing structures and organisations. By building on what is already there, the Ombudsmen will work on bringing together elements of current anti-corruption work, such as police, prosecutors, and ethics bodies or integrity bodies where they exist.

The first part of this program will be formal training for Ombudsmen staff, held in conjunction with the Pacific Island Centre for Public Administration at the University of South Pacific. This will cover issues such as financial and administrative investigations, and writing briefs and reports. The second part will be working with individual ombudsman offices to identify the anti-corruption mechanisms in that country, and develop protocols for an integrity network.

The project will continue for two and a half years. The aim is to assist with a practical and sustainable integrity framework in each country. If you have any questions about this project, please contact the Pacific Ombudsman Alliance secretariat at the Commonwealth Ombudsman’s office, via pacific@ombudsman.gov.au.

SGBV AND RIGHTS RELATED TREATIES

Istanbul Convention - an important step in tackling gender-based and domestic violence

Georgia Hinds
Australian Attorney-General’s Department

Although geographically removed from the Pacific region, the Council of Europe’s (COE) recent adoption of the Convention on preventing and combating violence against women and domestic violence (the Convention) provides an interesting example for PILON members, given the Network’s working group on Sexual and Gender Based Violence.

The Convention, which entered into force on 1 August 2014, is a progressive “regional treaty that builds on pre-existing international instruments addressing human rights and violence against women (VAW) and children”\(^\text{12}\) It is far-reaching in

\(^{11}\) The Convention is available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm
\(^{12}\) Mridula Shrestha, Istanbul Convention Poised to Enhance Global Efforts to Eradicate Violence against Women and Domestic Violence, (11 February 2015), *ASIL Insights,*
In order to address these areas, the Convention draws primarily on the framework of the *Convention on the Elimination of All forms of Discrimination against Women* (CEDAW) and case law developed by the CEDAW Committee. However, the Convention builds upon and extends this CEDAW framework; for instance, it explicitly applies to all forms of VAW (including DV) but then also encourages the State Party to apply the protections and services to all victims of DV, thereby potentially covering male, elderly and child sufferers (Article 2(2) of the Convention).

Importantly, the Convention also contains definitions (at Article 3) of VAW, DV, gender and gender-based VAW. VAW is understood as a violation of human rights and a form of discrimination, whilst DV is broadly framed to encompass all acts of violence including economic harm. These definitions, and the way in which they are applied in future cases, may assist the PILON working group when formulating its SGBV strategies.

PILON members may also appreciate the practical guidance offered by the Convention as to ways in which States can change attitudes and eliminate stereotypes at the individual and institutional level. Obligations include:

- regularly running awareness-raising campaigns (Article 13);
- taking steps to include issues such as gender equality and non-violent conflict resolution in interpersonal relationships in teaching...

...Convention appears to have at least instigated crucial discussions around the prevalence of DV and VAW...


Shrestha (2015); Convention Articles 75 – 76.


COE website: The Istanbul Convention and the CEDAW framework:
materials at all levels of education (Article 14);
- training professionals in close contact with victims (Article 15);
- setting up treatment programmes for perpetrators of DV and for sex offenders (Article 16);
- involving the media and the private sector in eradicating gender stereotypes and promoting mutual respect (Article 17); and
- ensuring that culture, tradition or so-called “honour” is not regarded as justification for any of the forms of violence covered by the Convention (Article 12(5)).

Of course, these measures will not necessarily be relevant or applicable for all countries; there can be no one panacea to be applied across the board. However, the Convention appears to have at least instigated crucial discussions around the prevalence of DV and VAW and, at the least, its growing acceptance indicates a willingness by states to invest in gender equality as a means of preventing such violence.

Domesticating international human rights treaties in the Pacific

Romulo Nayacaalevu
Regional Rights Resources Team (RRRT)

Human Rights law finds its source in both international treaties and declarations as well as within domestic laws. However the interface between the two sources of laws is dependent upon the legal systems in which they operate. The legal systems of the Pacific are monoist, dualist or a mixture of both, so the processes of domesticating international human rights treaties are subject to these systems. However while domestic application of core treaties is one known to lawyers who argue the merits of human rights norms and principles in legal cases, there is a demand for Pacific legal systems to be able to absorb principles of customary international law and other human rights laws as they evolve.

While judges, magistrates and lawyers contextualise these standards in the legal systems in which they practice, law and policy makers are pressured to incorporate the demands of the international human rights systems including treaty body, Special Procedures and recently the Universal Periodic Review (UPR) recommendations within domestic systems.

All Pacific countries are State parties to the Convention on the Rights of the Child (CRC) and with the exception of Tonga and Palau; others are State Parties to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). The process of domestication of the treaties though remains a challenge for most Pacific States however considerable progress has been observed. Moreover in the domestic context, the evidence of legitimising international treaties is visible in progressive legislation and the usage of international treaties by Pacific courts. These include CEDAW used in the Balelala v State (Fiji), Republic of Kiribati v Timiti & Robuti (Kiribati), Ephrahim v Pastory and Kazilege (Vanuatu), CRC used in Simona v R (Tuvalu) and Tone & Others v

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Within its 4.5 year reporting cycle to the UPR, Kiribati enacted a *Children, Young Persons and Family Welfare Act 2013*; *Te Rau n Te Mweenga Act 2014* (Family Protection Act); *Education Act 2013* and the amendment of Kiribati Constitution to recognise the creation a new Ministry for Women (CEDAW). Tonga enacted the *Police Act 2010*, *Prisons Act 2010*,\(^{21}\) *Criminal Offences (Amendment) Act 1999*, and recently the *Family Protection Act 2014*; Fiji promulgated the *Crimes Decree* with a comprehensive provisions on crimes against the international order, *Domestic Violence Decree*; *2013 Constitution; Electoral Decree 2014* etc. and Tuvalu enacted the *Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010*; *Leadership Code Act*; *Police Powers and Duties Act 2009*; *Counter Terrorism and Transnational Organized Crimes Act 2009*, and recently the *Family Protection and Domestic Violence Act 2014*.

\(^{20}\) All these countries have completed their second cycle of review to the Human Rights Council on implementation of the recommendations made in their first review.

\(^{21}\) The new Act was processed to meet the United Nations Standard Minimum Rules for Treatment of Prisoners. The Act ensures that prisoners have access to clean prison cells, drainage, warmth and ventilation, sufficient clothing and drinking water.

The domestic application of these core treaties translated into legislation, policies and usage by Pacific courts in many respects legitimises the role of international human rights law within Pacific jurisprudence; however domestic legislation is crucial in legitimizing the application of international human rights treaties.

The Australian High Court recently stated in *CPCF v Minister for Immigration and Border Protection [2015] HCA 1 (28 January 2015)* that: *Australian courts are bound to apply Australian statute law "even if that law should violate a rule of international law". International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read "general words ... subject to the established rules of international law" unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation."

However the long standing dicta in *Minister of State for Immigration & Ethnic Affairs v Teoh (128) ALR 353* remains relevant in that: "ratifications by Australia of an international convention is not to be dismissed as merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention."

Pacific law makers must ensure that treaty obligations are translated into domestic legislation and policies to give effect to these treaty commitments.
Vanuatu and Fiji delegations at the Human Rights Council during their UPR 2nd review in 2013 and 2014 respectively.

Photo Source: UN Webcast

Pacific Progress with the UN Convention on the Rights of Persons with Disabilities

Nola Faasau
Pacific Islands Forum Secretariat (PIFS)

The promotion of equal rights for persons with disabilities has become an important regional priority in recent years. In 2010, Pacific Islands Forum Leaders endorsed the Pacific Regional Strategy on Disability (PRSD), which facilitates and supports a regional approach to protecting and promoting the human rights of Pacific persons with disabilities, and to progressing disability inclusive development in Forum Island Countries. The PRSD emphasises the importance of Forum Island Countries’ ratification and implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD).

The CRPD is a relatively young Convention (only entering into force in May 2008) and is the first international human rights treaty to comprehensively canvas all human rights of persons with disabilities and clarify State obligations to respect, protect and realise these rights. The CRPD recognises persons with disabilities as those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. The principles articulated in the CRPD include respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices and independence of persons, non-discrimination, inclusion, equality of opportunity, and accessibility.

Forum Leaders and Forum Disability Ministers have encouraged Member countries to ratify and implement the CRPD, and a majority of Forum Countries have signed, ratified, or acceded to the Convention. To date: 6 Forum countries have ratified the Convention – Australia, Kiribati, New Zealand, Palau, Papua New Guinea, and Vanuatu; 5 countries have signed but have yet to ratify – Federated States of Micronesia, Fiji, Samoa, Solomon Islands, and Tonga; and 4 countries – Cook Islands, Nauru, Republic of the Marshall Islands (RMI), and Tuvalu – have acceded, with RMI being the most recent to accede on 17 March 2015.

Since 2011, the Pacific Islands Forum Secretariat has worked together with relevant regional and international organisations in the Pacific to provide assistance to Member countries to ratify and implement the CRPD. This assistance has included working with national governments, in partnership with the Pacific Office of UN Economic and Social Commission for Asia and the Pacific (UNESCAP), to develop and review national disability policy, review legislation for consistency with the CRPD, and develop new legislation to meet legislative commitments under the CRPD.

Recently, the Forum Secretariat and UNESCAP, drawing on expert advice from the UN Office of the High Commissioner for Human Rights (Geneva), provided legislative review and drafting assistance to RMI, in particular contributing to the development of the Rights of Persons with Disabilities.
Disabilities Bill 2015. The Bill passed its first reading in the RMI Parliament – the Nitijela – on 23 February 2015. Support will continue to be provided to the RMI Government during the public consultations that are currently underway on the Bill.

Plans are also ongoing for the development of CRPD legislative indicators as a resource for supporting Members’ efforts to develop CRPD compliant legislation.

For further details relating to this article, please contact the Forum Secretariat: Ms Lorraine Kershaw, International Legal Adviser, lorrainek@forumsec.org.fj / (679) 322 0216; and Ms Nola Faasau, Legislative Drafting Officer, nolaf@forumsec.org.fj / (679) 322 0389.

2015 Meeting of the Pacific Legislative Drafters’ Technical Forum

Nola Faasau
Pacific Islands Forum Secretariat (PIFS)

In September 2015, the Office of the Attorney-General of Samoa, with support from the Pacific Islands Forum Secretariat, will convene the next meeting of the Pacific Legislative Drafters’ Technical Forum in Apia, Samoa.

The Drafters’ Forum brings together legislative drafters from governments and legislatures of Pacific Island Forum countries to share experiences and best practices for addressing constraints commonly experienced by small jurisdictions in developing and drafting laws.

The Drafters’ Forum developed from a meeting of the Pacific Working Group on Legislative Drafting in November 2006 in Auckland, New Zealand. One of the Working Group’s key recommendations was the establishment of a regional network of drafters to facilitate the exchange of information and experiences. Since its first meeting in 2007, the Drafters’ Forum has met in 2009, 2012, and 2014. Further background information about the Drafters’ Forum is available on the PILON website.

The 2014 meeting of the Drafters’ Forum was convened by the Forum Secretariat in April 2014 at its headquarters in Suva, Fiji. Participants discussed: current institutional and resource issues affecting legislative development in their countries and ways to address them; and legislative reforms concerning priority regional policy issues, including the implementation of human rights treaties and environmental and maritime regulation. Participants also benefitted from a one and half day Legal Policy Development course delivered by the Australian AG’s Department.

Further details of the 2015 meeting will be released in due course. Please contact the Forum Secretariat’s Legislative Drafting Officer, Ms Nola Faasau, at nolaf@forumsec.org.fj for further information about the 2015 meeting and the Drafters’ Forum.

An explainer: What is the International Red Cross and Red Crescent Movement?

Netta Goussac
International Committee of the Red Cross (ICRC)

The International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC) are both observer members of PILON. So what do they do, and how are they different?
Both are part of the largest humanitarian network in the world – the International Red Cross and Red Crescent Movement. The Movement’s mission is to alleviate human suffering, protect life and health, and uphold human dignity, especially during armed conflicts, disasters and other emergencies. The Movement is present in every country and supported by millions of volunteers. The Movement has three main components: the ICRC, the IFRC and the global network of 189 member Red Cross and Red Crescent Societies.

The IFRC is a global humanitarian organisation that coordinates and directs international assistance following natural and man-made disasters in non-conflict situations. Founded in 1919, the IFRC carries out relief operations to assist victims of disasters, and combines this with development work to strengthen the capacities of its 189 member Red Cross and Red Crescent National Societies. The IFRC’s work focuses on four core areas: promoting humanitarian values, disaster response, disaster preparedness, and health and community care.

The final component of the Movement is the network of 189 National Red Cross and Red Crescent Societies, covering almost every country in the world. In the Pacific region, there are fourteen National Red Cross Societies: in Australia, Cook Islands, Fiji, Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and the territories of the Pacific.

The ICRC’s Pacific Regional delegation promotes international humanitarian law (IHL) and provides assistance to governments in the region in giving effect to IHL in their domestic laws. In 2014, the ICRC welcomed the entry into force of the Arms Trade Treaty, the first treaty regulating the international trade in conventional arms. The Treaty sets out standards that States must apply when authorising transfers of arms, ammunition and parts and components of conventional weapons, including the risk of weapons being used to commit serious violations of IHL or human rights law. The ICRC commends Australia, New Zealand Samoa on their ratification of the Treaty, and encourages all other Pacific States to seize this historic opportunity to reduce the human cost of the widespread and poorly regulated availability of conventional arms.
More recently, the ICRC participated in the Pacific Members of Parliament Consultation on Human Rights for Good Governance, hosted by the Secretariat of the Pacific Community Regional Rights Resource Team. As part of these consultations, the ICRC’s Regional Legal Adviser led a discussion about the Rome Statute and the International Criminal Court, and the need to end impunity for international crimes.

Later this year, the ICRC is looking forward to a number of multilateral meetings addressing IHL issues. From 20 to 24 July 2015, the 4th Commonwealth Red Cross Red Crescent Conference on IHL will bring together Commonwealth Member States and their National Red Cross and Red Crescent Societies to discuss developments and current issues in IHL, and share experiences of national implementation.

The 32nd International Conference of the Red Cross and Red Crescent will take place in Geneva from 8 to 10 December 2015. Representatives of nearly every government in the world, the Red Cross and Red Crescent Movement and partner organisations will gather for this Conference, which takes place every four years and is the premier global form to enhance and inspire humanitarian debates.

The ICRC will share further information about these Conferences as it becomes available, and encourages PILON members to keep these dates in their calendars.

In addition to our work in promoting IHL, the ICRC helps communities affected by conflict, visit detainees and support the region’s National Red Cross Societies.

In the last year, the ICRC continued to assist people in Papua New Guinea affected by inter-communal violence and, for the first time, victims of police raids. In Bougainville, the ICRC facilitated workshops to enhance awareness of the issue of persons unaccounted for as a result of the conflict, among residents, authorities, civil society actors and other stakeholders. In September 2014, the Bougainville government passed a historic policy to clarify the fate and whereabouts of missing persons.

In Fiji, Solomon Islands, Nauru and Papua New Guinea, ICRC delegates visited places of detention, including people held in processing centres, and reported findings and recommendations confidentially to the authorities concerned, to help them improve detainees’ treatment and living conditions.

The ICRC also continues to support Pacific Islands National Red Cross Societies (11 in total) in enhancing their capacity to promote humanitarian principles and IHL, including by hosting a Regional Communication Workshop in Nadi in December 2014.

The ICRC stands ready to provide assistance, advice, information and tools to PILON members. Please contact Netta Goussac, Regional Legal Adviser (ngoussac@icrc.org, +61 2 6273 2968).
SAMOA:

Key v Police [2013] WSCA 3 (28 June 2013) – Rape

The appellant in this case (Mr. Peti Key) stood trial before Justice Malosi on the 2nd April 2013. He faced two charges of rape, one of attempted rape and one of assaulting a constable. He was convicted on one charge of rape, the attempted rape and resisting and assaulting a constable. On the 22nd April 2013, Justice Malosi imposed a sentence of 14 years on the charge of rape, five years on the charge of attempted rape, and six months on the charges of resisting and assaulting police officers, those latter sentences being concurrent with the sentence on the rape charge.

The appellant therefore appealed his conviction and sentence on the charge of rape only.

Held:

(i) At its discussion of the appeal against conviction, the Court noted that “…the sole ground advanced is one of counsel incompetence.” The Court of Appeal ruled that the appeal against conviction must be dismissed on the basis that counsel who represented the appellant during his trial, did exercise good judgment (as part of his defence strategy) when he opted for the appellant not to give evidence in Court.

(ii) For the appeal against sentence, the Court of Appeal was of the view that the starting point taken by the trial judge for sentencing was too high. The Court proposed and set out the following bands (for sentencing) contained in the case of R v AM as appropriate for Samoa:

(a) Rape band one: 8 – 10 years
   - Where the offending is at the lower end and where there is an absence of aggravating features or their presence is very limited.

(b) Rape band two: 9 – 15 years
   - Where violence and premeditation are moderate.

(c) Rape band three: 14 – 20 years
   - Offending where there are aggravating features at a relatively serious level.

(d) Rape band four: 19 years to life
   - Presence of aggravating features in band three likely to consist of multiple offending over considerable time.
   - Repeat family offending would also fall into this band.

The Court noted that “…the trial judge relied on the Police v Skippy Afioga case, where a starting point of 18 years was adopted on one count of rape, with a sentence of 15 years imposed. However, the facts of that case are far removed from the present.” The court after taking into consideration all the circumstances of this case, were satisfied that an appropriate starting point was one of nine years’ imprisonment, with an uplift of two years to reflect the aggravating features. Accordingly, the sentence of 14 years for rape was quashed, and a sentence of 11 years imprisonment was imposed in its place.

The significance of this prosecution was that it established a guideline decision for the offence of rape in Samoa.
Tell us what you think:
How does this approach to sentencing compare with the approach used in your jurisdiction?

Do you have any cases on rape or other criminal matters which you would like to share, or cases that may challenge the advice of counsel?

Attorney General v Fiti [2014] WSSC 63 (30 August 2014) – Proceeds of Crime

An application by the Attorney General (the applicant) for a forfeiture order in respect of a motor vehicle (“vehicle”) and $2,000 cash against the respondent was made pursuant to section 14 of the Proceeds of Crime Act 2007 (the Act).

By way of facts, the respondent was convicted on five counts of conspiracy to defraud, to which he pleaded guilty after an initial plea of guilt was vacated, and was sentenced to a total of 2 ½ years’ imprisonment. This led to the application by the applicant for a forfeiture order under section 19 of the Act in respect of the vehicle in question. The order was granted in favour of the applicant on 21 August 2014. Subsequently, three third parties opposed the application and were joined later as third parties to the proceedings.

i. the first third party opposed the application for the order (section 19 of the Act) and sought relief against the order pursuant to section 21(1) and (2) on the basis that he is the registered owner of the vehicle in question;

ii. the second third party on the other hand claimed that the vehicle in question was a security provided for a loan made by the first third party to the second third party in 2010;

iii. the third party claimed an interest in the vehicle on the basis that the third party had filed a civil claim against the respondent and judgment may be made against the respondent in relation to the vehicle in question.

The Court was satisfied that the first and second third parties both have an interest in the vehicle, whereas the third party does not have an interest in the vehicle because the vehicle in question is not owned by the respondent but the first third party.

What was considered vital in this proceeding was the definition of “tainted property” and section 19(4) of the Act. In considering the definition of “tainted property”, the Court took into account the case of R v Dunsmir [1996] 2 NZLR which provided two definitions of tainted property to include proceeds of crime and property used in the commission of a serious offence. The Court was satisfied that the vehicle in question was used in connection with the commission of the conspiracy to defraud which is a serious offence, therefore the vehicle is tainted property. The Court therefore issued a forfeiture order in respect of the vehicle pursuant to section 19(1) of the Act.

Under section 19(4), in considering whether to make a forfeiture order against property, the Court may take into account any right or interest of a third party. Further, Section 21 entitles a third party who has an interest in property that is the subject of an application for a forfeiture order, to apply to the Court for relief against the order. In dealing with the application for relief by the third parties against the forfeiture order under Section 19(1), the Court took into account the cases of R v Elliot [2010] NZHC 1409, Solicitor General v Wong (1997) CRNZ 624 and also Commissioner of New Zealand Police v Bradley [2012] NZHC 1594. The application by the first third party and the second third party for relief against the forfeiture order were granted by the Court and the nature, extent and value of both parties’ interest were noted in the order. Due to the developments between the parties since the forfeiture order was made (21 August 2014), the
The forfeiture order was discharged by way of consent between the applicant and the second third party.

The significance of this case is that the decision handed down by the Court is first of its kind, in the sense that the Court took in account the application by the third parties with regards to proceeds of crime.

Tell us what you think:
How are Proceeds of Crime matters dealt with in your jurisdiction?

Do you have any interesting Proceeds of Crime decisions which you would like to share?

PB Sea Tow Ltd v Attorney General [2014] WSCA 6 (28 April 2014) – International Maritime Law

In this matter, PB Sea Tow Ltd (“Appellant”) lodged an appeal against the Attorney General (the Respondent) on the grounds of unlawful interference with rights of a flag state. This is pursuant to the Respondent detaining PB Matua (the vessel) from departing for Tokelau, due to the Appellant being in breach of certificate requirements under the Safety of Life at Sea (SOLAS) international convention. SOLAS is one of the major pillars of the international maritime regulatory regime which applies to all vessels engaged on international voyages.

The Court of Appeal agreed with the Chief Justice decision in the Supreme Court and the Appellant’s appeal was dismissed, on the following grounds:

i. The provisions of SOLAS had been incorporated into the domestic law of Samoa under the Shipping Act 1998, and were applicable to visiting foreign vessels.

ii. The flag state, Cook Islands, failed to issue the vessel with a “passenger ship safety certificate” given that the vessel was intended to carry more than 12 passengers in order to operate efficient ferry service, this was a requirement under SOLAS.

iii. From an international law perspective, Samoa was in the context a port state carrying out port state control measures under Regulation 19 of SOLAS.

iv. The Respondent was able to prove that the vessel was unfit to depart for Tokelau as the certificate issued by the flag state was invalid under SOLAS.

The significance of this case for Samoa was that it concerned international maritime laws which showcased concerns regarding the flexibility of the international agreements regulating the international merchant shipping industry, and the balance of power between port and flag states when it comes to administering those agreements.

Police v Soesa [2014] WSSC 16 (5 May 2014) – Sexual Connection

In this matter, the accused was charged with four counts of sexual connection, by having sexual intercourse with a severely intellectually disabled person. The accused was an 18 year old, whilst the victim was 31 years old, at the time of the offence.

The court made mention of aggravating features related to the offending which included the victim falling pregnant as a result of the offence. Also, there were mitigating features noted relating to the accused, such as being a first time offender.

In the end, the court took a starting point of 2 1/2 years and after assessing the mitigating factors (“the young age of the accused, his previous good character, the apologies by his grandfather to the family of the victim and the pulenumu of the village which were accepted”), came up with 9 months sentencing period.
The significance of this case is that because it involved consensual intercourse with a severely intellectually impaired person, not rape, the Court found that the rape cases the prosecution had put forward were not of assistance when determining sentence.

**Police v TF [2014] WSDC 1 (24 April 2014) – Rape case involving a minor as the accused and an under-aged victim**

This matter was between two minors. At the time of offence, the accused was 14 years old and the victim, his first cousin, was 6 years old. The accused was charged with one charge of indecent assault, and two charges of sexual connection

The Court acknowledged for sentencing *Key v Police* [2013] WSCA 3 as the leading case on sexual violence and considered that the matter before the court fell within Band 1 (rape band one: 8-10 years). However, the Court went further to emphasise a crucial point of difference in the present case, which was that a young person committed the crime.

Accordingly, the Court took into account the principles of rehabilitation and reintegration when deciding the accused’s sentence and held that he be sentenced to two years probation with additional conditions for all the charges. The significance of this case is seen in how the Court moved away from applying the same band for rape as discussed in *Key v Police* and focused rather on the importance of rehabilitation and reintegration of a young person charged with such a serious offence. Further, the Court expressed its disagreement on how this matter was not taken to the village council, particularly given the serious sexual nature of the offence committed against a female gender of a very young age. The court reiterated that “sexual offences which happen within the family must be brought out and addressed openly so that the matter could be dealt with accordingly.”

**Police v Taulapapa [2014] WSSC 66 (11 November 2014) – sexual acts to a consenting minor**

In this matter, the accused was a 30 year old male and the victim a 14 year old female. The accused appeared for sentence on five counts of having sexual connections with a young person and also on five counts of committing an indecent act on a young person.

The two parties were in a relationship for some time before they engaged in sexual acts on different occasions. The parties lived in a de-facto relationship, with both their families agreeing that the victim live with the accused.

The court made careful consideration in this matter, given the circumstances and decided that a custodial sentence would not be the appropriate action to take. Although at the same time, the court was conscious of the purpose of section 59 of the Crime Act 2013 which sought to protect young girls from being taken advantage of sexually and also protecting them from themselves due to immaturity and inexperience. The accused was sentenced to 12 months supervision and ordered to perform 200 hours of community service.

The court acknowledged the victim was a willing and active party to the acts of sexual intercourse and thus decided to order a non-custodial sentence for the accused. Most significantly, the court made every effort to inform not only the accused and the victim but also both of their families that although the parties involved appeared to be in love and lived together as husband and wife, this was still a criminal offence by the accused for them to have sexual intercourse while the victim is under the age of 16. The families were told to bear this in mind and ensure that the offending does not happen again while the victim is still under-age.
Tell us what you think:
How are cases like these handled in your jurisdiction? What kinds of penalties are awarded?

Do you have any relevant cases involving minors and persons with intellectual disabilities that you can share to further regional understanding of these issues?

Talanoa is produced by the PILON Secretariat. For enquiries, subscriptions, discussion or to discuss submission of newsletter content, please contact the Secretariat:
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HOW SAMOA CELEBRATES EASTER
Church services include plays depicting the crucifixion of Christ:

And of course an Easter egg hunt: