Sex Discrimination in Employment in the Cook Islands
Research Report

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Sex Discrimination in Employment in the Cook Islands

Introduction

The Cook Islands has neither legislation prohibiting discrimination against women in hiring, wages or dismissal practices nor legislation prohibiting sexual harassment in the workplace.

Although the Cook Islands has made national and international commitments to eliminate discrimination against women in the field of employment there are few rules governing employment relations in the Cook Islands, and virtually nothing to ensure equal treatment between men and women.

This Report considers current quantitative and qualitative information to explain why Cook Islands' employers have not offered employees discrimination free workplaces. The Report is divided into three parts: Part 1 describes the problem of sex discrimination in the workplace, Part 2 explains the underlying causes of the problem, and Part 3 proposes a legislative solution.

The goal of this Report is to provide draft legislation that goes beyond surface compliance with national and international commitments. The draft *Bill* that accompanies this Report is designed to provide conformity inducing measures that will bring about the real substantive changes promised by the Cook Islands' government.

The draft *Bill*, entitled *The Sex Discrimination Bill*, requires employers to offer women a discrimination free workplace. It prohibits sex-based discrimination in employment, and provides a process for resolving complaints. Perhaps most importantly, the *Bill* proactively addresses sex discrimination in employment by raising public awareness of this issue, and by helping employers develop non-discriminatory employment policies.[1]

Part 1 - The Problem of Sex Discrimination in the Workplace

Introduction to this Part

This Part of the Report provides background information on sex discrimination in employment in the Cook Islands. It begins by describing the most common behaviours associated with "sex discrimination" in employment and the consequences of those behaviours. Next, the Report examines workplace discrimination in its larger social context. It considers the low social status of women in the Cook Islands, and international commitments made by the Cook Islands to improve the status of women.

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[1] The legislative changes proposed by this Report are gender neutral. They protect men as well as women from sex discrimination in the workplace. However, the Report focuses on sex discrimination against women since women are much more likely to experience this kind of employment discrimination.

What is Sex Discrimination?

Sex discrimination is any *distinction, exclusion or restriction* made on the basis of sex which impairs the enjoyment or exercise of human rights or fundamental freedoms.[2]

Keeping this definition in mind, consider the following real life case study.

R relocated to the Cook Islands from Australia after completing a course in hotel management. Although R had educational qualifications and was eager to begin work, she was told by an employer that they wouldn't take her because she was a girl and might get pregnant.[3]

Sex discrimination in employment can take a variety of forms. If the "distinction, exclusion or restriction" is openly based on sex it is called "direct discrimination". In this case study, the employer's behaviour is an example of "direct discrimination" since excluding R from employment was directly based on sex.

Cook Islands' women have complained privately that in the service industry men are sometimes paid more than women for the same work.[4]

This is another example of direct discrimination: an employee receiving less pay simply because she is a woman. As unfair as this sounds, this kind of employment practice is not illegal in the Cook Islands. There is no process to address this kind of complaint.

Direct discrimination is usually obvious. Sometimes, however, discrimination is more subtle. "Indirect discrimination" against women occurs when women are adversely affected by an employment "requirement" that is unrelated to the actual work, and which has the effect of favoring men over women. For example, if a company has an employment policy which requires all employees to be 6' or taller when the job does not require large physical stature, the policy would indirectly discriminate against women since relatively few women are 6' or taller. In this example, the employment policy is not directly based on sex (it is based on height) but the policy has the same adverse effect. Since physical stature is unrelated to job performance the employment "requirement" adversely affects women by unfairly, and disproportionately, excluding women from employment.

A third form of sex discrimination is "sexual harassment". This form of discrimination is illustrated by the following case study.

P is 18 years old. She was hired as a secretary-receptionist in a small factory. Soon after she started this employment, her middle aged male employer began touching her in ways

[2] Abbreviated CEDAW definition.
[3] Confidential communication, May 2, 2005.
[4] Myra Moekaa, Assistant International Legal Advisor, Ministry of Foreign Affairs and Immigration, personal communication, March 30, 2005.

that made her feel uncomfortable. On some occasions he put his hands on her shoulders. At other times he rubbed his hands up and down her arms, patted her stomach and bumped up against her. He made sexual comments about her body and her clothes. When she complained about his behaviour to the factory foreman the employer became increasingly critical of her work, claiming she was incompetent. The working relationship became so strained that P finally quit.[5]

This illustration is typical of sexual harassment in the workplace: sexual behaviour that is unwelcome or offensive. Although both men and women experience sexual harassment in the workplace, the greatest number of victims, by far, are women. In New Zealand during the period 1995 – 2000, 94% of formal complaints of sexual harassment dealt with by the Human Rights Commission involved female victims.[6]

Social and Economic Effects of Sex-based Discrimination

The present population of the Cook Islands is about 14,000 – about half of whom are women. With such a small population it is vitally important that the entire labour pool is used to its maximum potential. This will ensure that, regardless of sex, the most capable person is hired for the job. This is an issue of basic fairness. It is also one of good economics. The Joint Secretariat of the Pacific Community/ Cook Islands Government Sub-Regional Polynesian Meeting concluded that women's full participation in a country's development "*is essential to building an efficient and stable economy".*[7] This is not just rhetoric. Studies from many regions of the world demonstrate that improving the status of women not only has positive social benefits but positive economic benefits as well.[8] This is particularly so in a country with a small and declining population such as the Cook Islands.

Cook Islands' women hold only 2 of 24 seats in Parliament. Women are also underrepresented in upper level non-elected positions of government. Of the 30 "Departmental Heads" in government, which comprise the top executive officers in the various ministries as well as the highest ranking officials for major government funded agencies, 21 are held by men and 5 by women.[9]

The evident bias in favour of men in Parliament and in upper level government positions in the Cook Islands demonstrates poor human resource management because it draws most of its talent from just half of the potential labour pool. Employment segregation is a direct result of sex discrimination. A common complaint in the Cook Islands is the difficulty of finding enough members of parliament with a record of successful

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[5] Proceedings Commissioner v Harwood [1996] NZAR 431.
[6] New Zealand Government, CEDAW Report (NZ Government Publication: Sept 2002), p. 84.
[7] Secretariat of the Pacific Community, Joint SPC/Cook Islands Government Sub-Regional Polynesian Meeting, Report of Meeting (Noumea, New Caledonia: SPC, 1998), Annex 8, p.3.
[8] See for example, United Nations, "UN Tallies the Economic Costs of Gender Discrimination", UN State of Population Report, United Nations 2000.
[9] Cook Islands Government Website, March 10, 2005. No person is referred to in relation to 4 of the positions.

management in complex organizations.[10] Surely, one of the best strategies to address this shortcoming is to ensure that everyone, regardless of sex, has the same employment opportunities. Although there is no quick fix for employment segregation, providing basic rules prohibiting discrimination in employment on the basis of sex is a significant step.

The Consequences of Sexual Harassment in the Workplace

The effects of sexual harassment are well documented in many countries. The victim of sexual harassment suffers emotional distress which may have serious implications for physical and mental health. As well, sexual harassment leaves the victim economically vulnerable. In New Zealand nearly two-thirds of the women who experience sexual harassment lose their jobs. Just under half quit because they can't tolerate the work environment, and the others are fired when they complain.[11]

The consequences of sexual harassment in employment extend beyond the victim. The employer's business is affected, and the community suffers as well. Tension and gossip in the workplace lessen efficiency and productivity and can create a bad public image. As well, there are costs associated with increased staff turnover. The problems of the victim and the organization affect the victim's family and the community. Moreover, it has been suggested that a society that ignores mistreatment of female employees implicitly condones others forms of mistreatment, including violence against women.[12]

Sex Discrimination in the Larger Social Context

Sex discrimination in employment is only one aspect, or manifestation, of the broader issue of the low social status of women in the Cook Islands. Indicators of low social status include the prevalence of violence against women; the prevalence of pregnancy among young teenagers; the under representation of women in the highest public offices; the concentration of women in lower paid "traditional female" occupations; and wage disparity between men and women.

When considering sex discrimination in the workplace in its larger social context consider the following facts:

[10] Iaveta Short, Ron Crocombe, John Hermann, Commission of Political Review: Preparing for the Challenges of the 21st Century (Cook Islands: Office of the Prime Minister, 1998), p.21.

[11] New Zealand Government CEDAW Report, p.84.

[12] Imrana P. Jalal, Law for Pacific Women: A Legal Rights Handbook, (Suva, Fiji: Fiji Women's Rights Movement, 1998), 523.

- Domestic violence is generally seen as an acceptable part of life in the Cook Islands. [13]

- Throughout the Pacific, including the Cook Islands, the majority of calls requesting police attendance involve violence against women. [14]

- The Cook Islands has a very high prevalence of young teenage pregnancy. These pregnancies often involve older men, and situations of abuse, rape and incest.[15]

- Women are concentrated in professions that pay less than traditional "male" occupations. Men predominate as senior officials and managers; skilled agriculture and fisheries workers; craft and related trade workers; and plant and machinery operators. Women predominate as clerks and service workers. [16]

- The average male's income is about 37% higher than the average female's income.[17]

Discrimination in employment both *reflects* and *contributes* to the low status of women. Policies that discriminate against women in hiring and promotion practices, and wages and working conditions are both a cause of the larger social problem facing women, and an effect of this larger problem. Addressing sex discrimination in employment is an important initiative that will have a positive impact not only in the workplace but also on the broader issues facing women.

International Commitments to Improve the Status of Women

In 1994 the Cook Islands endorsed the *Pacific Platform for Action*. This was an international commitment to promote the full and equal participation of women in the political and economic life of the community.

The following year, in preparation for the Beijing International Conference on Women, the Cook Islands adopted the "Cook Islands National Policy on Women". This policy envisions women as "equal partners in the development process".

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[13] Commonwealth Secretariat, "Police Work in Kiribati and Cook Islands", Strengthening Pacific Partnerships for Eliminating Violence against Women, a Pacific Regional Workshop Report (London: Commonwealth Secretariat, 2003), p. 44.
[14] Commonwealth Secretariat, "Cook Islands Domestic Violence Strategy", Strengthening Pacific Partnerships for Eliminating Violence against Women, a Pacific Regional Workshop Report (London: Commonwealth Secretariat, 2003), p. 96.
[15] UNICEF confidential report, 2004.
[16] Cook Islands Statistics Office, Social Statistics: June Quarter 2004 (Avarua, Cook Islands: Cook Islands Statistics Office), "Table 3.05: Cook Island Residents Employed Population by Principal Occupation, Gender and Island".
[17] Secretariat of the Pacific Community, Unpublished Census Analysis for the Cook Islands based on 2001 Census (Noumea, New Caledonia: unpublished, 2005), p. 29.

As a subscriber to the *Beijing Platform for Action* the Cook Islands committed to enact and enforce employment laws prohibiting direct and indirect discrimination on the ground of sex.[18]

As a party to the *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, the Cook Islands committed to eliminate discrimination in the field of employment in order to ensure equal rights for women. This includes, among other things, a guarantee to the same criteria in hiring and promotion practices, remuneration and benefits, and job security. As well, States Parties are required to prohibit dismissal or loss of benefits on the grounds off pregnancy, maternity leave, and marital status.[19]

The Cook Islands has taken some bold steps in a very short period of time committing to equal opportunities for women in the workplace. If the Cook Islands is to remain faithful to its international commitments, and the commitments made to its own people, it must introduce legislation to address sex discrimination in employment. The draft Bill that accompanies this Report provides practical workplace rules that go a long way toward implementation of these policy commitments.

Summary of this Part

This part of the Report described the behaviours associated with sex discrimination in the workplace. Sex discrimination can take a variety of forms but whether the discrimination is direct, indirect, or a form of sexual harassment it has significant consequences for the victim, for the employer, and for Cook Islands' society. The problem of being unable to offer workplaces that are free from sex discrimination is a subset of the larger problem of the low status of women. International commitments require implementation. The best approach to implementation in the Cook Islands is revealed by considering the underlying causes of discrimination. This is the next topic of discussion.

Part 2 - Explaining the Problem

Introduction to this Part

Why are Cook Islands' employers unable to offer women a workplace free from discrimination?

There are a number of interrelated explanations for this problem. First, there is a lack of legislation specifically prohibiting discrimination on the basis of sex. Existing laws only peripherally impact sex discrimination in employment, and are not conducive to complaints of sex-based discrimination. A conservative business climate and traditional gender attitudes underlie government inaction on this issue.

[18] Beijing Platform for Action – Strategic Objectives and Actions, F5.
[19] CEDAW Article 11

Legislation – The State of Existing Law

Consideration of the state of the existing law provides a legislative context for the draft bill that accompanies this Report. This section begins with a look at legislation that applies to employers in both the public and private sectors: the *Constitution*, and the *Crimes Act 1969*. It continues with analysis of legislation specific to each sector. For the public sector this is the *Public Service Act 1995* and the *Ombudsman Act 1984*. Private sector employers are governed by the *Industrial and Labour Ordinance 1964.*

Legislation that Applies to Both Public and Private Sector Employers

The *Constitution of the Cook Islands*
Section 64 of Part 1VA of the *Constitution* lists a number of "fundamental human rights and freedoms" that exist without discrimination on a number of grounds including "sex". Two of these subsections indirectly impact on sex-discrimination in the workplace:

> (a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;
>
> And
>
> (b) The right of the individual to equality before the law and to the protection of the law;

The *Constitution* is designed primarily to ensure that ordinary statutes conform to basic notions of fairness. In the absence of specific rules, constitutional "safeguards" are of little consequence since the *Constitution* does not proscribe penalties for its breach. The right to equality before the law only becomes a valid, exercisable right when there is a law in place prohibiting unequal treatment. Constitutional rights cannot advance issues of sex discrimination in the workplace without specific legislation prohibiting sex discrimination.

Crimes Act 1969
Apart from the *Constitution* the only other enactment that applies to both public and private sector employees that has implications for the issue of sex discrimination in employment is the *Crimes Act*. Although the *Crimes Act* was not designed to address the issues associated with sex discrimination in the workplace it could be used in some situations to prosecute incidents of *sexual harassment* where the offensive conduct is so serious that it is also "criminal" in nature. Although relatively few incidents of sexual harassment would fall into this category it would include fact patterns where there is an allegation of assault. In addition, there are two sections of the *Crimes Act* concerned respectively with "profane, indecent, or obscene language" and "indecent acts" that could potentially be used to prosecute other situations of sexual harassment.

First, section 99 makes it an offence to use "any profane, indecent or obscene language in any public place or within the hearing of any person in any public place". "Public place"

includes "any road, any place or public resort open to or used by the public as of right…"[20] It is questionable whether this definition, as written, would include government offices or private business such as retail stores that are open to the public, but it would certainly not include factories, workshops, or other places of employment not available to "the public as of right".

A second section of the *Crimes Act* that may apply to some cases of sexual harassment is section 137: "Every one is liable…who, with intent to insult or offend any person, does any indecent act in any place". The term "indecent act" is not defined. This is determined by the court on the facts of each case.

Although these sections, and others governing assault, indecent assault and sexual assault, could be used, in specific situations, to prosecute incidents of sexual harassment in the workplace the criminal law has a number of limitations which make it a poor instrument of redress for sexual harassment in the workplace.

For one thing, the high standard of proof that is required in a criminal prosecution is particularly difficult to discharge in cases involving sexual harassment since often the only witness to the conduct is the complainant. As well, since the criminal law requires proof of "mens rea"[21] only the harasser can be charged - the criminal law does not impose an obligation on an employer or business owner to ensure a discrimination free workplace. Finally, sexual harassment is just one aspect of sex discrimination in employment. Other manifestations of sex discrimination including discriminatory hiring, promotion and dismissal practices are not addressed by criminal law.[22]

Legislation Specific to Public Sector Employment

There are two statutes relevant to a discussion of sex discrimination in public sector employment. The first and most important is the *Public Service Act 1995-96.* This legislation establishes the Office of the Public Service Commissioner, describes the duties of a Public Service employer, and provides a process for resolving disputes between an employer and an employee. The second statute that could potentially impact sex discrimination in the public sector is *The Ombudsman Act 1984*. This legislation establishes the Office of the Ombudsman to allow investigation of "any decision of a government department". The degree to which these statutes are effective in preventing sex-based discrimination is discussed below.

The *Public Service Act 1995-96*
The *Public Service Act* governs employment relationships in the public sector.

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[20] Section 2
[21] Mens rea is the mental element that must be proven in a criminal case. For example, proof of *intention* to insult or offend, as in section 137.
[22] It is unlikely that the Cook Islands' Crown Law Office has the inclination or capacity to prosecute cases of sexual harassment in the workplace. Limited by budget constraints, and faced with a backlog of cases, Crown Law cannot even handle present prosecutions. See Transparency International, National Integrity Systems: Transparency International Country Study Report: Cook Islands 2004 (Transparency International Australia: Blackburn, Australia), p.21.

Under the *Public Service Act* each head of a government department or agency is responsible for all matters relating to employment within that department or agency.[23] There are few government-wide standards in employment practices. This has resulted in inconsistent rules and practices within the Public Service.

Although the *Public Service Act* requires that decisions on hiring and career development be based on merit, in practice this is not the case. Transparency International has observed that appointment of incompetent individuals is regarded as commonplace in the public service. [24] Similarly, political interference in employee recruitment has been identified as a problem in both the Northern and Southern Islands. [25]

It is not known to what extent patronage in the Cook Islands' Public Service favours men over women. However, it is obvious that if men cannot rely on unbiased treatment in hiring and promotion practices, the expectation of fair treatment for women is even less. To ensure fair treatment for everyone including women, clearly stated rules prohibiting sex discrimination are required to guide Public Service employers in the exercise of discretion.

Investigation of Public Service Complaints under the *Public Service Act*
Under the *Public Service Act* a public service employee who wishes to complain about an employment practice is required to take the following action:

1. Refer the complaint to the employer.

2. If the complaint cannot be resolved by reference to the employer, it is referred to the Commissioner who investigates the complaint and makes a recommendation to the employer as to how the complaint should be determined.

3. If the employer refuses to follow the Commissioner's recommendation or if either the employer or employee is not satisfied with the recommendation, either one can appeal to the Appeal Board. The Appeal Board has the same authority as a court with respect to hearing evidence and providing a remedy.

This complaint process is not suited to most complaints of sex discrimination. Requiring an employee, in the first instance, to take a complaint to the department head has a "chilling" effect. In many cases the discriminatory decision will have been made by the department head. This makes complaining of sex discrimination awkward because it may be seen as a direct challenge to the employer's authority. A case of sexual harassment which involves a department head poses even greater difficulties since the victim is required to complain directly to the harasser.

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[23] Section 15
[24] Transparency International, pp. 20, 28.
[25] Asia Development Bank, Cook Islands 2001 Economic Report: Policies for Progress (Philippines: ADB 2002), 345.

The *Ombudsman Act (1984)*
The *Ombudsman Act* establishes the office of the Ombudsman. The Ombudsman has authority to investigate "any decision or recommendation made by any government department". At least in theory then, a person who experiences sex-based discrimination in the public service has an additional process for complaint that does not exist in the private sector. Moreover, since the Public Service Commission can hear complaints only from "employees" the only avenue of complaint for a person who is not an employee, for example, an unsuccessful job applicant who claims discrimination in the hiring process, is through the Office of the Ombudsman.

Unfortunately, the Office of the Ombudsman has been largely ineffective since its inception. It has been described as a "sinecure for the incumbent political party's most faithful".[26] Cook Islanders have very low confidence in the Office of the Ombudsman. In one survey, 92% of those polled expressed dissatisfaction. [27] Given the poor public image of the Ombudsman and the lack of public confidence its capabilities it is not an appropriate authority to hear complaints of sex discrimination.

Summary of Public Sector Legislation
Although there is legislation that could potentially impact sex discrimination in public sector employment it is largely ineffective. The *Public Service Act* grants wide discretion to politically appointed heads of departments and agencies, and provides no clear rules on sex discrimination in the workplace. Moreover, patronage in the Public Service is common. The Office of the Ombudsman is not independent of government and has low credibility. The processes for complaint, both within the Public Service and through the Office of the Ombudsman, are not conducive to sex-based discrimination complaints.

Legislation Specific to Private Sector Employment

Apart from the statutes that apply to both public and private employers outlined above (the *Constitution* and the *Crimes Act*), there is only one law that impacts peripherally on sex discrimination in employment in the private sector: the *Industrial and Labour Ordinance 1964.* The information provided under this heading contains a brief overview of the provisions in the *Ordinance* that have implications for issues of sex discrimination including an outline of the employment complaints process under the *Ordinance*.

The *Industrial and Labour Ordinance 1964*
In addition to providing basic rules governing industrial unions, industrial agreements, and industrial disputes, the *Industrial Labour Ordinance* is the principal legislation governing workers' basic entitlements.

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[26] Cook Islands, Cook Islands Report – First Draft of Report on CEDAW (Cook Islands: unpublished), pp.7-8.

[27] Iaveta Short, p. 75.

"Worker" is defined as a person of any age or either sex employed to do any work for hire or reward. Accordingly, the few entitlements that workers are accorded under this statute apply equally to men and women. These include rules governing the maximum number of hours an employee can work, rate of pay for overtime, a minimum wage and basic health and safety in the workplace.

In addition to the basic entitlements listed above, the *Industrial and labour Ordinance* has three sections that deal specifically with the employment of women for which there are no equivalent provisions for men. First, a woman is not permitted to work in any factory for a period of 6 weeks following her "confinement" other than a factory which employs only members of the same family, or with special permission of the Medical Officer. Second, a woman working in a factory where the work requires continuous standing "shall be allowed" a 10 minute break every 3 hours if required to work more than 4 hours at a stretch. Third, a woman is not permitted to operate any machine in a factory unless she has received sufficient training, or works under the supervision of an experienced operator and is instructed on the dangers of using the machine.

On close inspection, these so called "minimum standards" for female factory workers are chauvinistic, and provide little, if any real benefit. The requirement that a woman receive training before operating machinery, for example, is covered by an earlier section of the Ordinance, which applies to every worker.[28] As well, allowing (although not mandating) a 10 minute break when a single shift lasts in excess of 4 hours will, in most cases, be of no consequence since the usual 8 hour day worked in the Cook Islands is divided by a lunch break after 4 hours anyway.

Although the Ordinance disallows a female factory worker from working for 6 weeks following " her confinement" there is no provision requiring that her employment be preserved for that time, and there is nothing to prevent an employer (in a factory, or anywhere else in the private sector) form firing a woman on account of pregnancy. The prohibition against working for 6 weeks following "confinement" is on the woman, not the employer; and may actually serve to frustrate a factory worker's desire to return to work before 6 weeks has passed, assuming her job is still available.

In short, the *Industrial and Labour Ordinance* reflects outmoded stereotypes about women. It is completely inadequate to prevent sex-based discrimination in the private sector.

Investigation of Private Sector Complaints under the *Industrial and Labour Ordinance*

The present process for investigating private sector labour complaints in the Cook Islands involves providing details of the complaint to a division of the Ministry of Internal Affairs. The investigator receives upwards of four to five complaints each week. However, in the past few years the Ministry has received only two complaints that were

[28] Section 48 requires an employer to provide "reasonable training" to every worker required to operate "dangerous machinery".

considered to be sex-based discrimination. Both of these cases involved sexual harassment and were referred to the police. In one case, an employer was having a sexual relationship with a minor female employee on promise of promotion. These cases were referred to the police because in the words of the investigator "harassment is a criminal offence". [29]
Apart from these two cases, however, it is "not uncommon" for the Ministry to receive anonymous "complaints" suggesting improper conduct by a male employer or manager. Typically, the female caller does not identify herself or otherwise indicates that the behaviour in question occurred to an unnamed friend. Since the investigator requires basic details to investigate a complaint, including the name of the complainant, no action is taken on these calls.[30] Apart from this, it is questionable as to what action could be taken anyway since sex discrimination (including most cases of sexual harassment) is not illegal in the private sector.

The experience of the Ministry suggests two problem areas relating to the reception and investigation of complaints.

First, if a complaint of sexual harassment is only valid if the behaviour in question attracts criminal liability there is an obvious need for legislation that addresses other forms of sexual harassment that would not be appropriate for prosecution under the *Crimes Act*. If in the anecdote described above, for example, the female employee was not a minor but an adult, no law would have been broken because the prohibited act was having sex with a minor, not having sex on promise of promotion or some other unethical workplace practice.

The second problem relating to the reception and investigation of complaints relates to the apparent reluctance of women to come forward with complaints, preferring anonymity when they do. This may be due to a number of reasons including fear of reprisal including loss of employment, or concern about public disclosure that could adversely effect the reputation of the complainant or the reputations of others. Further, a woman may be embarrassed about what has occurred, or may be concerned that she may not be believed if there is no independent observer to the actions. [31]

Summary of Private Sector Legislation

In summary, current private sector legislation provides almost no protection against sex-based discrimination. Beyond minimum wage requirements, hours worked, and basic health and safety standards which apply equally to men and women, there is no

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[29] David Greig, Labour and Consumer Division, Ministry of Internal Affairs, personal communication, March 14, 2005

[30] Ibid
[31] Kairangi Samuela, Legal Rights Training Officer, Cook Islands Women Counselling Centre, Punanga Tauturu Inc. personal communication, March 3, 2005.

legislation prohibiting sex-based discrimination. The private sector remains almost completely unregulated with respect to discriminatory practices in recruitment, hiring, promotion, wages and benefits, conditions of work, opportunity for training, and dismissal. Finally, there is no prohibition against sexual harassment in the workplace unless it is also criminal in nature.

Cook Islands Business Culture

In the last 15 years there has been a significant shift in the Cook Islands from public sector employment to private sector employment. Government downsizing started in the early 1990s and was accelerated by the economic reform program instituted by the government in 1996. In 1991 the public sector accounted for 44% of jobs in the Cook Islands but by 2001 the public sector accounted for only 24% of the jobs. For this same ten year period private sector employment increased from 40% to 56%. [32]

In December 2000, there was about 750 businesses in the Cook Islands[33] each operating with its own standard of employment practice with regard to women**:** 750 businesses and 750 unregulated employment practices. Although no statistical information is available, it is likely, by comparison to other jurisdictions including New Zealand, that the vast majority of Cook Islands businesses have no formal employment policies let alone policies prohibiting sex discrimination. Moreover, even if an employer has a non-discriminatory employment policy there is no guarantee that it will be followed, and there will usually be no recourse if it is not. Although basic fairness issues could be covered by collective agreements, and enforced by labour-management grievance procedures, there are currently no trade unions in the Cook Islands.

A conservative business culture has inhibited action on legislation that would help redress sex discrimination in employment. Using maternity leave as an example, Cook Islands' women in the public sector are entitled to 6 weeks paid maternity leave after 12 months full time employment but there are no legislative provisions for paid or even unpaid maternity leave for the private sector. Although some private sector employers provide maternity leave benefits the vast majority do not. Draft employment legislation dating back to 1991 sought to address this inequity by proposing basic nation wide employment standards which included provisions for maternity as well as paternity leave. However, the Cook Islands' Chamber of Commerce led the charge opposing the bill.

Although the debate on extending maternity leave benefits to the private sector continues, no legislative action has been taken to date. Concern has been expressed by the President of the National Council of Women that legislation providing for maternity leave could affect women detrimentally since an employer may prefer not to hire a woman than, at

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[32] SPC. Unpublished Census Analysis, p. 27; Cook Islands Population Profile, p. 26. Most of the employment that is not categorized as either "public sector" or "private sector" was provided by religious organizations.

[33] Asia Development Bank, p. 97)

some point in the employment relationship, pay maternity leave benefits. This concern highlights the fragile position of women in the workplace.

The Cook Islands' Chamber of Commerce is not alone in promoting a narrow economic business agenda. Major development partners including the Asia Development Bank (ADB) have advocated business-oriented conservative policies. In 2002 the ADB in collaboration with New Zealand Agency for International Development published a 367 page economic report on the Cook Islands for the principal purpose of assisting the Government in the effective management of the economy. [34] The report writers observed: "The policy environment is generally favourable for business development in the Cook Islands. Few approvals are required and there is little interference by government in business operation." [35]

"Few approvals" and "little interference by government" are often viewed by economists as the ideal government "policy". Although the ADB report states that this environment helps to minimize opportunity for corruption in government in relation to the private sector, it also represents the abandonment by government of its responsibility to its people. In a country in which a $4.00 minimum wage is "almost universally considered to be too low", [36] the ADB questions the desirability of a minimum wage for the Cook Islands since, apparently, "it can reduce demand for labor and does reduce efficiency of the marketplace in allocating labor to its most productive use". [37]

This particular business philosophy which advocates a "hands off" policy by government and even questions the validity of an employee protection as basic as a minimum wage, does not appear to be conducive to the extension of human rights legislation in the workplace. This said however, a conservative business philosophy need not be inconsistent with providing a workplace free from sex discrimination. It is highly probable that if Cook Islands' employers had all of the facts about employment discrimination at their disposal, including its economic costs to their own businesses, they would choose to offer workplaces that are free from discrimination.

Like any other aspect of business an employer must understand the problem of sex discrimination before it can be addressed. In a recent letter to the *Cook Islands News* the writer said that "business is an entirely new ball game" for many Cook Islanders. The letter advocated that government take a more supportive role with fledgling business enterprises. [38]

To ensure that Cook Islands' employers, including new employers with little business experience, can deliver workplaces that are free from discrimination, the government must provide employers with information on the economic benefits of a discrimination

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[34] Ibid. p.xv
[35] Ibid p 98.
[36] Cook Islands First Draft of Report, p. 17.
[37] Asia Development Bank, 81.
[38] Cook Islands News Online, March 31, 2005.

free workplace. Taking a supportive role also means offering practical assistance to employers to develop non-discriminatory employment policies.

Custom and Traditional Values – Broader Cultural Issues

As noted above, the low social status of women in the Cook Islands is clearly evident in such indicators as violence against women, employment segregation, wage disparity, and the under representation of women in Parliament and upper management positions.

Although women's issues have been pushed onto the government agenda, successive governments have shown a lack of understanding of the real issues facing women. A former Minister of Women's Affairs, Mr. Papamama Pokino was quoted as saying that women should "know their place". Indeed, even when a woman is appointed as Minister of Women's Affairs that does not equate with a progressive stance on women's issues: Ms. Ngamau Munokoa supported a traditional role for women in the home and as mothers. [39]

The challenge of political reform presents associated challenges for deeply rooted attitudes and traditions. It has been noted, for example, that the importance placed on conformity hinders the development of women. In the Cook Islands, as in other Pacific Island cultures, it is considered socially inappropriate to openly challenge one's superior:

> The cultures of the Pacific Island countries are collectively-oriented and often have very similar customary practices. Values such as conformity governing all interpersonal relations, harmony, acceptance of authority [and] interdependence…are inherent aspects of a collectivist culture…Thus disturbing the status quo is often seen as something to be avoided at all cost. [40]

In the Cook Islands the political and social hierarchy ensures that people obey their superiors and political bosses. This principle operates in families, villages, churches and the public service.[41] In traditional Cook Islands society decision making was accepted as the prerogative of men. It was culturally appropriate for women to be passive observers in the development process.[42] The extent of deference that women must sometimes show men and elders leads to the underutilization of their skills. Cook Islands' women often feel powerless even when they want to act positively[43]

Sex-based discrimination in the Cook Islands almost certainly stems from the same cultural values as the problem of domestic violence. As previously stated, it has been

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[39] Cook Islands First Draft of Report, p. 9.
[40] Rev. Akuila Yabaki, , "The Impact of Tradition and Religion on Women's lives in the South Pacific" Proceedings of the 9th Triennial Conference of Pacific Women, Volume 2, , 2-3
[41] Transparency International, p. 28.
[42] Cook Islands, Cook Islands Progress Report: Beijing + 5, Cook Islands: 2000), p 9.
[43] Iaveta Short, p. 74.

noted that some women in the service industry are paid less than men for doing the same work. When asked why this would be so one source explained that traditional gender attitudes toward women in the home influence the way some men make decisions in regard to women in the workplace.[44]

The converse is also true. If the law allows sex discrimination in the workplace – in the community, it demonstrates a public acceptance of an inferior attitude toward women which may, in turn, be reflected in the home. Although receiving less pay for the same work may not appear to be as serious an issue as violence against women, they are really two symptoms of the same multifaceted problem - the inferior status of women.

Cultural Impediments to Reporting Sex-based Problems

The *Samoa Family Health and Safety Study*, undertaken by the Secretariat of the Pacific Community in 2003, goes a long way to explain the underreporting of sex-based violence, and, by extension, the under reporting of sex-based discrimination in other areas including employment. Samoa was selected for the study as a country representative of Polynesia. The Study found that 97% of women who were victims of violence did not report it to the police.[45] The reason most often given was that physical abuse was "normal" and "not serious".[46] The report concluded that the main supports for domestic abuse were *individual and community attitudes.*

The problem of under-reported violence against women is a phenomenon common to most countries: and the Cook Islands is no exception. The President of the Punanga Tauturu of the Cook Islands is reported as saying that customs and cultural sensitivity on the issue of domestic violence play a major role in discouraging Cook Islands' women from even taking the first step of seeking help from relevant authorities. [47]

The reluctance to report sex-based discrimination is evident in a number of areas of Cook Islands life. In a recent court case, for example, a woman testified that a male "friend" kissed her and touched her inappropriately on three different occasions. Although she said the man's behaviour angered her, and described it as "a kind of sexual harassment", she never complained to the police.[48] Similarly, of the three known pregnancies to girls 14 years of age and under in 2003 all involved older men, at least one of whom was married with children. Although these situations were known to island residents the

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[44] Myra Moekaa.
[45] Secretariat of the Pacific Community, Samoa Family Health and Safety Study (Suva, Fiji: SPC, 2003), p. 7.
[46] Ibid, 43.
[47] Fiji Women's Crisis Centre: Press Release, February 15, 2005, Online.
[48] Cook Islands News Online, April 6, 2005.

police did not act on their own to lay charges, and the parents of the girls refused to lay official complaints because of "family shame". [49]

The same values that inhibit women from complaining about misconduct outside the workplace are intensified inside the workplace. A woman who is financially dependent on a job is constrained from complaining not only by culture but by fear of losing her source of income.

The challenge for government is to ensure that the positive aspects of collectivist culture are preserved and nurtured while ensuring that all persons are accepted on equal terms in the social, political and economic life of the community. Legislation is required to address historical inequities in the workplace. The *Sex Discrimination Bill* that accompanies this Report will help ensure that working women do not feel powerless, and that their skills are not underutilized. Requiring Cook Islands' employers to provide women with workplaces free from discrimination represents a collective commitment to break the complex cycle leading to the low status of women and violence against women.

It is likely that after legislation is implemented prohibiting sex discrimination in employment and providing a process for bringing complaints forward, women will assert their rights. Using Fiji as an example, the Fiji Women's Crisis Centre reports that in its first 12 years of operation to 1996, no one sought counseling for sexual harassment from the Centre. However, in the 7 and ½ year period between 1997 and mid-2004 the Centre dealt with 98 cases.[50] This does not mean that sexual harassment is on the rise in Fiji but simply that cases are being reported more frequently. This is due to increased awareness of the problem through the efforts of the Centre and other organizations. It is also likely due to Fiji's enactment of Human Rights Legislation in 1999 specifically prohibiting sexual harassment.

Summary of this Part

Cook Islands' employers are unable to offer women a workplace free from discrimination because existing laws in both the public and private sectors provide no real protection against discrimination on the basis of sex, and in any event, complaint processes are not suitable for sex-based claims. A conservative business culture that lacks awareness of the consequences of employment discrimination combined with outmoded stereotypes of women embedded in culture and tradition underlie the lack of appropriate legislation.

Part 3 – Solutions to the Problem

Introduction to this Part

Cook Islands' culture is dynamic and changing, and like most other countries of the world, Cook Islands' policy makers have committed to changes that embrace new ideas

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[49] UNICEF – Confidential Report, 2004

[50] Fiji Women's Crisis Centre Newsletter vol. 8, issue 3, September, 2004, Online.

about human rights. *CEDAW*, the *Pacific Platform for Action*, and the *Beijing Platform for Action* provide vision and direction for policy change. The next step is to devise laws that lead not only to pro forma changes by government, but laws that will induce the real substantive changes sought by these international conventions.

An effective legislative solution to sex discrimination in employment in the Cook Islands must address each of the underlying causes of this social problem. The low social status of women in Cook Islands' culture suggests a need for legislation that provides for educational initiatives that help empower women to report incidents of sex discrimination including incidents of sexual harassment. Similarly, employers need to be educated about the social and economic costs of sex discrimination. Educational initiatives must be combined with clearly stated prohibitions against discriminatory behaviors that attract legal liability for failure to comply. As well, the law must provide a process for dispute resolution that is accessible to women, economical and fair to both employees and employers.

National strategies to implement human rights instruments by copying legislation from other countries are seldom successful, but much can be learned from earlier experiences. This Part of the Report considers some of the lessons and experiences of Pacific countries with anti discrimination legislation. It begins with a look at the only anti discrimination legislation in the Cook Islands – The *Race Relations Act*. It continues with consideration of other country experiences with human rights legislation prohibiting discrimination on the basis of sex. Understanding these experiences assists in developing legislative policy options for the Cook Islands. The legislative option recommended by this Report, the *Sex Discrimination Bill*, is discussed in detail along with an analysis of the costs and benefits of this legislative approach.

Anti-Discrimination Legislation in the Cook Islands - The *Race Relations Act 1972*

The *Race Relations Act 1972* is the Cook Islands only foray into human rights legislation. This statute prohibits racial discrimination in several areas of community life including employment in both the public and private sectors. Although it was proclaimed over 30 years ago, no case has ever been litigated under this legislation. [51]

The process for the investigation and resolution of complainants under the *Race Relations Act* begins with a civil action in High Court. At the first court appearance the case is referred to a Court appointed conciliator whose job is to investigate the complainant, attempt to secure a settlement, and then report back to the Court. In this task the conciliator is granted wide ranging powers to "regulate his procedure" and "hear or obtain information" as "he thinks fit".[52]

If the conciliator is successful in reaching a settlement the Court dismisses the case. If the intervention is not successful, or if there is a breach of the settlement agreement, the aggrieved person may recommence proceedings that will be heard by the Court.

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[51] Clerk of the High Court, personal communication, April 26, 2005.
[52] Section 12

Presumably, if the conciliator concludes that there was no breach of the *Race Relations Act* the plaintiff is entitled to proceed in Court, but the statute is silent on this issue. The Court may choose from a variety of civil remedies if the claim is established but damages for "humility, loss of dignity, and injury to feelings" are limited to $200.

Since workplace discrimination is often very subtle, a complainant may not know the exact nature of the discrimination at the time the complaint is made. A female migrant worker for example, may experience differential treatment by an employer but not know whether the discriminatory behaviour is based on sex or race. In jurisdictions where both race and sex are prohibited grounds of discrimination it is usual for a complainant to "plead" both grounds to ensure that the claim is not defeated by a failure to include the other ground. However, as the law presently stands in the Cook Islands, a female migrant worker who files a complaint under the *Race Relations Act* could actually have her claim defeated by an employer who explains that the deferential treatment was not based on race but based on sex.

It is reasonable to conclude from this brief discussion of the *Race Relations Act* that this legislative model is not suited to most claims of sex discrimination. The public nature of court proceedings, combined with the lack of a legal aid plan to assist complainants navigate through the Court will surely inhibit women from coming forward. What is required is a process that offers conciliation without the necessity of initiating court proceedings. As well, in order to be effective, anti discrimination legislation must allow fair compensation for the indignity imposed on the victim. It is likely, that even when the *Race Relations Act* was proclaimed, the ceiling on general damages was too low. Perhaps most importantly, the *Race Relations Act* is solely remedial in nature. It contains no provisions to proactively address discrimination. In order to be effective, sex discrimination legislation must address, through education, the problematic ideology that underlies discriminatory behaviours.

Comparative Law and Experience – Human Rights Legislation in Other Countries

Fiji

Apart from Australia and New Zealand, Fiji is the only south Pacific Island country to have comprehensive human rights legislation. The *Fiji Human Rights Commission Act 1999* prohibits discrimination on the same grounds as are prohibited in the rights section of the Fiji Constitution (Amendment) Act 1997. This requires the reader to refer to the Constitution for the list of prohibited grounds. The prohibited grounds include race, colour, disability, sexual orientation, age, religion, and "gender". The drafters of the Fiji Constitution chose the word "gender" rather than "sex" as a prohibited ground of discrimination. [53] The *Fiji Human Rights Commission Act* prohibits discrimination on

[53] The word "gender" refers to the different *social roles* ascribed to males and females. The word "sex" refers to the *biological differences* between males and females. These words are not always used consistently, and are sometimes used interchangeably, as in the case of the Fiji Constitution. It is likely that the word "gender" was chosen in preference to "sex" in the Fiji Constitution because, in common parlance,

the ground of “gender” in an application for employment, and in employment practices generally including the provision of “training”, and “opportunities for training”. In addition, the Act specifically prohibits “sexual harassment” but does not define this term.

The Fiji Human Rights Commission is required by statute to carry out a variety of functions: to increase rights awareness; advise the government on international reporting obligations under international human rights instruments; investigate allegations of contraventions; advise the government on human rights issues; and make recommendations on any proposed government policy that may effect human rights.

Although the Fiji Constitution allows direct access to the courts by a complainant who alleges a breach of a fundamental right, about 90% of complainants opt for the less formal resolution process offered by the Human Rights Commission. [54]

In its role as investigator and conciliator of human rights complaints the Human Rights Commission is granted the same powers as a judge of the High Court of Fiji “in respect of the attendance and examination of witnesses and the production of documents”. The investigation does not lead to a binding decision. Instead the Commission simply informs the parties of the results of the investigation and whether in the Commission’s opinion the complaint has “substance”. If the Commission concludes that the complaint has substance the Commission is required to act as a conciliator toward settlement. If the Commission is of the opinion that the complaint does not have substance or chooses not to investigate the allegation, the complainant may proceed in High Court. If the claim is upheld, the High Court may order such relief as it thinks fit including an award of damages, a declaration that the defendant has engaged in unfair discrimination, and an injunction prohibiting similar conduct. Under Fiji law it is not a defence that the discriminatory behaviour was “unintentional” or “without negligence” but the Court is required to take these factors into account when determining an appropriate remedy.

The most important lesson to be learned from the first six years of Fiji’s experience with human right legislation is revealed in the Commission’s view that public education is the most effective way of achieving its policy vision of “human rights for everyone”. The first objective of the Fiji Human Rights Commission Strategic Plan for 2004 to 2006 is to improve awareness of human rights legislation and human rights issues. To this end the Strategic Plan speaks of human rights training programs to train trainers, programs to raise awareness among parliamentarians and the judiciary, on-line human rights resources, and the development of human rights teaching aids including videos, radio programs, and informational material. [55] Clearly, the Fiji Human Rights Commission recognizes that raising awareness is its primary task.

“sex” is a more “loaded” term with other meanings including the act of sex. Personal communication with Usaia Ratuvili, Senior Legal Officer, Fiji Human Rights Commission, June 3, 2005.

[54] Usaia Ratuvili, Senior Legal Officer, Fiji Human Rights Commission, personal communication June 3, 2005.

[55] Fiji Human Rights Commission – Publications. Strategic Plan 2004 – 2006, April 30, 2005, Online.

New Zealand

Consideration of New Zealand's experience with human rights legislation is important not only because New Zealand is a Pacific country but also because the Cook Islands has close political, economic and social ties with New Zealand.

New Zealand has a number of statutes that impact on human rights. For the purpose of this study two are particularly important: the *Employment Relations Act 2000*, and the *Human Rights Act 1993.* Both of these acts prohibit sex discrimination and sexual harassment in employment. The definitions of discrimination and sexual harassment in the two acts are the same.

The New Zealand statutes provide separate systems for complaint resolution and the complainant must choose between the *Employment Relations Act* and the *Human Rights Act* as a forum for complaint. Under the *Human Rights Act* if a complaint cannot be resolved informally through a dispute resolution processes managed by the Commission the complainant will generally receive free legal representation to have the case brought before the Human Rights Review Tribunal. The Tribunal is independent of the Commission. It hears evidence and decides cases in much the same way as a court.

Unlike the human rights legislation in Fiji, the New Zealand statutes include very specific information about what constitutes sexual harassment. Under New Zealand law sexual harassment can take one of two forms. First, requests for sexual activity which contain an implied or overt promise of preferential treatment or a threat of detrimental treatment; and second, the use of language, behaviour or visual material of a sexual nature, that is unwelcome or offensive, and is either repeated or sufficiently significant to have a detrimental effect on the victim.

The advantage of New Zealand's sexual harassment law over Fiji's law is that a reader will know precisely what behaviours are prohibited in New Zealand. This assists employers when devising anti-discrimination policies. It assists employees by informing them of their rights. It assists the courts and the persons assigned to conciliate complaints by providing clear rules to apply to different fact patterns.

A study of sexual harassment under the *Human Rights Act* revealed that most complaints of sexual harassment arise in workplaces with fewer than 10 employees. Typically the employer had no sexual harassment policy. In the majority of cases the alleged harasser was either the employer/operator of the business or senior to the complainant. [56]

As noted earlier, one study of sexual harassment in New Zealand revealed that almost two-thirds of those who complain about sexual harassment lose their jobs. This is due to a poisoned work environment after the alleged harasser is made aware of the allegation. This statistic speaks to the need for a rule prohibiting retaliation by an employer after a complaint is made. Among other things, the rule would prohibit changes to conditions of work on the ground of a complaint. Rules of this nature exist in Fiji, New Zealand and

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[56] New Zealand CEDAW Report, 84

Australia. All contain prohibitions against what is described in these statutes as "victimization".

No studies exist on the effectiveness of this kind of provision. It is questionable whether in an emotionally charged situation this rule would preserve the complainant's job or prevent other kinds of discriminatory behaviour. However, as a separate ground of complaint, a rule prohibiting retaliation or victimization provides an additional damage award.

Australia

The Human Rights and Equal Opportunity Commission of Australia is a federally constituted, independent government body. The Commission plays a central role in awareness and education programs in Australia, and has responsibility for several anti-discrimination statutes concerned variously with race, aboriginal issues, age, disability, and sex discrimination under the *Sex Discrimination Act 1984.* The Commission is composed of a president and 5 Commissioners. Each of the Commissioners has responsibilities in relation to one of the prohibited grounds of discrimination. The Sex Discrimination Commissioners job is to "undertake research, policy and educative work designed to promote greater equality between men and women". [57]
Australia's *Sex Discrimination Act* prohibits discrimination on the basis of sex, marital status, pregnancy, and dismissal from employment because of "family responsibilities". It also prohibits sexual harassment. As in other jurisdictions, the vast majority of sex-based complaints under Australia's *Sex Discrimination Act* are in the area of employment and most of these involve incidents of sexual harassment.[58] This is hardly surprising as a recent Australian survey found that 41 % of Australian women had experienced sexual harassment, and two-thirds of these incidents occurred in the workplace. [59]

A formal complaint usually begins with a call to an "info line". If, after receiving some initial information, the complainant decides to proceed with a complaint an investigator/conciliator is assigned to the case. The investigator/conciliator will attempt to determine if the complaint is valid, and may call a conciliation conference to give both sides a chance to talk through the situation without legal formalities. If the complaint cannot be conciliated, the complainant may apply to the Federal Court of Australia or the Federal Magistrates Service to have the original allegations heard.

Australia's current Sex Discrimination Commissioner, Pru Goward, has described the advantages and disadvantages of complaint resolution processes for advancing the goals of human rights legislation. She points out that developing law on a case by case basis has consequences for everyone, not just those directly affected by the complaint. There is a beneficial "ripple effect" which educates, and transforms behaviour. On the other hand, the Commissioner cautions that in a country with a work force of 5 million people, complaint conciliation is the "slow boat" to equality. [60]

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[57] HEROC Website, June 30, 2005
[58] HEROC Website March 24, 2004
[59] HEROC Website, June 30, 2005
[60] Pru Goward, On Line Opinion, Australia's E-Journal of Social and Political Debate, August 13, 2004

The beneficial ripple effect of complaint conciliation may be diminished for any number of reasons including a very large work force or, in the context of the Cook Islands, a very small work force. In order for complaint conciliation to have an educational effect there must be a sufficient number of complaints to develop and publicize the law. The ripple effect is further diminished by granting privacy in complaint procedures – which of course is done for the purpose of encouraging complainants to come forward.

Summary of Comparative Law and Experience

The legislation and experiences of other jurisdictions provide valuable clues for drafting sex discrimination legislation for the Cook Islands with respect to: the degree of specificity in describing prohibited behaviour; the structure of the organization responsible for raising awareness of sex discrimination issues; and the processes for resolving complaints. The 3 jurisdictions noted above have fairly elaborate legislative schemes to deal with human rights complaints.

Legislative Options for the Cook Islands

What is the best legislative policy to address the issue of sex-based discrimination in the Cook Islands?

Four policy options are outlined below with consideration of the advantages and disadvantages of each option. The option recommended by this Report is *Policy Option #4*.

Policy Option #1
Maintain the status quo: no legislative changes to address sex-based discrimination in employment.

Advantages
The advantage of this option is that it requires no immediate commitment of financial or human resources.

Disadvantages
The problem of being unable to offer women workplaces free form discrimination derives largely from the fact that the Cook Islands has no law prohibiting discrimination on the basis of sex. Current laws do not address this issue effectively. Lack of specific legislation prohibiting discrimination on the basis of sex combined with a growing private sector, a conservative business philosophy, and gender roles deeply rooted in tradition, strongly suggest that maintaining the status quo will only make the problem worse.

Without legislation that provides an educational component to raise awareness of sex discrimination in the workplace, outdated stereotypes of women that provide the

philosophical foundation for employment discrimination specifically, and the low status of women generally, will continue to linger.

Since there is currently no effective mechanism for complaining about sex discrimination the problem of sex discrimination in employment, including sexual harassment, will remain underground and underreported.

The social and economic costs of allowing sex-based discrimination in employment are outlined in an earlier section of this Report. These include a smaller labour pool from which to draw the most qualified candidates, lower productivity in the workplace, and public countenance of women's low social status.

Policy Option #2

Prohibit sex-based discrimination in the public and private sectors by amending existing legislation that applies to these sectors.

As discussed above, the Cook Islands has several statutes which peripherally impact sex-based discrimination in employment. Most significantly, employment practices in the public sector are governed by the *Public Service Act*, and in the private sector, by the *Industrial Labour Ordinance*. These laws could be amended to include clear provisions prohibiting sex-based discrimination in employment practices. The processes already in place for complaint resolution could be adapted to accept sex-based discrimination complaints.

Advantages

Prohibiting discriminatory behaviour under existing legislation requires no new institutions or processes.

Disadvantages

This policy option attempts to work with existing government structures to bring about the desired changes. Providing a law which prohibits discrimination is a step in the right direction. However, without an educational component to raise public awareness, and actively assist employers in the development of sex discrimination policies, the legislation will not achieve the desired goal. To be effective, anti-discrimination legislation must address the underlying causes of discrimination. In the Cook Islands, as elsewhere, this means a legislative initiative directed at changing basic attitudes about women in employment. Without this component, change is relegated to the "slow boat" of dispute resolution.

Policy Option #3

Introduce Human Rights legislation administered by a Human Rights Commission. The new legislation would incorporate and replace the *Race Relations Act 1972*, and include

sex-based discrimination in employment as an unlawful ground of discrimination. The Commission would act as an autonomous body, and assume complete responsibility for the implementation and enforcement of the law. This model is used, in various forms around the world including Australia, New Zealand, and Fiji.

Advantages
As a specialized body with expertise in human rights, a Human Rights Commission provides the most comprehensive response to human rights issues.

Disadvantages
A commission charged with the tasks of raising awareness of human rights issues as well as investigating and hearing complaints is very expensive. In order to avoid actual and perceived conflict of interest a Commission that handles all three functions – education, complaint investigation, and adjudication will require a minimum of three positions as well as support staff.

The small number of complaints one would reasonably expect to receive in a population of 14, 000 people does not justify the expense of a comprehensive commission.

Policy Option #4 (Recommended)
Introduce sex discrimination legislation which deals specifically with sex-based discrimination in employment. The legislation would create a single position – that of the Sex Discrimination Officer. This position would be located within the Ministry of Internal Affairs and Social Services. The Sex Discrimination Officer would be responsible for raising awareness of sex-based discrimination issues, and provide practical support to help ensure that employers can offer discrimination free workplaces. Complainants would have the option of bringing an action in High Court or attempting conciliation through a privately contracted, independent conciliator.

Advantages
This option proactively addresses sex discrimination in employment through the provision of education and information services without the costs associated with an independent commission.

Raising awareness of sex discrimination issues is the only realistic way to address a significant underlying cause of discrimination**:** sexual stereotypes rooted in traditional ideology. Since Cook Islands' women are disinclined to complain to authorities about sex-based problems, simply waiting to react to complaints of sex discrimination will not be effective. Educational and informational activities will demonstrate a clear, proactive commitment by government to a discrimination free workforce and will generate free publicity for this goal.

The education function is compatible with the notion that, apprised of all the facts, most Cook Islands' employers would want to provide workplaces free from discrimination. The Sex Discrimination Officer will be able to assist managers and supervisors develop

non-discriminatory hiring and promotion practices, and help them offer neutral interviews and job performance evaluations.

Providing a process for complaint resolution is necessary for any legislation that prohibits behaviours. Under this option, complainants may proceed in court or opt for the less formal and more discrete process of conciliation. Independent conciliators are contracted by government as need arises. This limits the costs of dispute resolution to actual time spent on conciliation without the necessity of additional government bureaucracy.

Disadvantages
This option requires funding for the position of Sex Discrimination Officer, and contingent funding, on a case by case basis, for complainants who wish the services of a conciliator. However, in order to achieve the desired goal of providing discrimination free workplaces this is the most cost effective approach.

Major Provisions of the *Sex Discrimination Bill*

Policy Option #4 provides the policy foundation for the *Sex Discrimination Bill*. This section of the Report outlines the Bill's major provisions. The Bill is divided into 4 parts: discriminatory practices in employment; the appointment and duties of the Sex Discrimination Officer; dispute resolution; and miscellaneous provisions. Each subject area is discussed in turn.

Discriminatory Practices in Employment – *Sex Discrimination Bill* – Outline of Part 1

The *Sex Discrimination Bill* prohibits discrimination in the **area** of employment on the **ground** of sex. Discrimination in the area of employment is already prohibited on the grounds of "colour, race or ethnic or national origins" under the *Race Relations Act.* If a complainant alleges that the employment discrimination that is the subject of the complaint is based on a ground prohibited under the *Race Relations Act* as well as sex, both grounds of complaint are considered under the procedures provided by the *Sex Discrimination Bill.* (**Section 20**).

Part 1 of the Bill describes the behaviours that constitute discrimination in the employment context. There are three categories of prohibited behaviours. First, discrimination in benefits and conditions. Second, sexual harassment. Third, retaliation by an employer or anyone else in response to a complaint. Each of these prohibited behaviours is discussed below.

Discrimination in Benefits or Conditions
The first category of prohibited behaviours is listed in **section 6**. This section addresses sex discrimination in the following areas: recruitment practices, hiring and dismissal practices, wages, benefits, and opportunity for training and promotion. However, these

prohibitions are not absolute. Deferential treatment is allowed between male and female employees in some employment situations. The exceptions are listed in **section 7**.

The exceptions fall into to three general categories: to accommodate privacy issues; to accommodate the established practices of institutional religion; and to allow for other differences between men and women that genuinely impact work performance. This third category is common in human rights and sex discrimination legislation. Different jurisdictions have different names and different parameters for this "exception" but in all three Pacific countries with human rights legislation it is called a "genuine occupational qualification". This is the term adopted by the attached Bill.

A genuine occupational qualification has been interpreted in other jurisdictions as an employment restriction that is imposed in good faith and objectively based. This means that the restriction must be related in a meaningful way to the employment, and not based on a stereotype. For example, employment that is restricted to men because it requires strength would not be a genuine occupational qualification. If a job requires strength then it is strength that is the genuine occupational qualification not sex. To exclude an applicant on the basis of sex in this situation would not be justified under this exception. On the other hand, certain employment may require a person of a particular sex. For example, work in a dramatic performance may require a person of one sex or the other for reasons of authenticity.

What constitutes a "genuine occupational qualification" may not always be obvious. This exception is necessarily flexible to accommodate new and changing employment situations. One of the potential duties of the Sex discrimination Officer under **section 16 (2**) is to issue non binding guidelines on the meaning of this exception.

The onus of proving that deferential treatment falls within one of the exceptions to discrimination lies with the employer. The employer will be in the best position to explain, in the context of that employer's business, the reasons for treating male and female employees differently.

Sexual Harassment

The second category of behaviour prohibited by the *Sex Discrimination Bill* is sexual harassment. As discussed above, sexual harassment is the most common kind of sex discrimination in the workplace. Two kinds of sexual harassment occur in employment situations. First, where one person makes a request to another person for sexual activity which contains a suggestion of preferential or deferential treatment. A classic illustration of this kind of harassment is referred to on page 12 of this Report**:** a woman having sex with her male employer on promise of promotion. The second kind of sexual harassment occurs when a person is subjected to behaviour of a sexual in nature that is unwelcome or offensive. This category of sexual harassment can encompass a variety of workplace behaviours including the behaviours outlined in the case study on page 3 of this Report**:** comments, sexual innuendo and inappropriate touching.

Sexual harassment is prohibited by **section 9** of the Bill. This section deals specifically with the two kinds of sexual harassment outlined above.

Retaliation in Response to a Complaint

The third category of prohibited behaviour is retaliation in response to a complaint. As will be recalled, a New Zealand study on sexual harassment revealed that nearly two-thirds of complainants lose their jobs. Some quit due to a poisoned work environment and others are fired. This is in spite of the fact that New Zealand has a rule prohibiting retaliation. Nevertheless, prohibiting retaliation in response to a complaint is an affirmation of the right to speak out against acts of discrimination. As a separate ground of prohibited behaviour it is actionable in itself. A retaliator is liable for damages under **section 12** of the Bill whether or not the original complaint is proven.

Employer Liability for Acts of Discrimination in the Workplace

Discrimination under the *Sex Discrimination Bill* does not require proof of intention to discriminate. (**Section 11**). As discussed above proof of intention is a characteristic of criminal enactments but is not appropriate for discrimination law. It is not a defence to say "I didn't know that sex discrimination was occurring in my workplace" Stated as a positive obligation; **section 13** requires an employer to maintain a workplace free from the three kinds of discrimination described above. The effect is that an employer is liable to a complainant whether or not the behaviour complained of relates directly to the employer. This rule places the burden directly on the employer to ensure that an employee is offered a workplace free from discrimination.

This burden is accompanied by an incentive in **section 14** of the Bill. An employer is not liable for the acts of an employee if the employer has taken "reasonable care" to ensure that the employer's workplace is free from discrimination. This goes beyond Fiji's legislation which takes reasonable care (described as "negligence" in Fiji's statute) into consideration only when determining remedy.

What constitutes "reasonable care" under the *Sex Discrimination Bill* will differ from one situation to another but **section 14** requires a judge to consider the following criteria**:** whether the employer took practical steps to prevent the behaviour that is the subject of the complaint; whether the employer had an anti-discrimination policy that complies with the law; and whether the employer took practical steps to bring the anti-discrimination policy to the attention of the employees.

Providing an incentive to employers to, in effect, "judgment proof" their businesses from complaints of discrimination is a significant inducement to employers to develop discrimination free work practices. In line with the adage that "an ounce of prevention is worth a pound of cure", proactively assisting Cook Islands' employers to take practical steps to ensure that sex discrimination does not occur is an important aspect of the *Sex Discrimination Bill.*

Sex Discrimination Officer – *Sex Discrimination Bill* – Outline of Part 2

The *Sex Discrimination Bill* does not create anything as elaborate as a Human Rights Commission. Instead, Part 2 of the *Bill* assigns the awareness raising functions that would ordinarily be carried out by a commission in a larger country to a single position – the Sex Discrimination Officer.

The position of Sex Discrimination Officer is located within the Ministry of the Internal Affairs and Social. It will complement the work performed by the Women's Division of this Ministry. The principal duty of the Sex Discrimination Officer is to raise public awareness of sex discrimination issues in the area of employment. This single well informed source will ensure consistent and accurate information is provided to employers, employees and the general public.

The Sex Discrimination Officer is appointed by the Minister of the Interior. The Minister is required by **section 15** of the *Bill* to have regard to the person's ability to carry out the duties of the office including the person's knowledge and experience of discrimination law.

The duties of the Sex Discrimination Officer are described in **section 16:** to provide education, information and assistance to employers, employees and the general public necessary to achieve the purposes of the Act. More specifically, the Sex Discrimination Officer is required to conduct workshops on workplace discrimination, assist employers develop non-discriminatory employment policies, and respond to public enquiries about rights and responsibilities under the Act. (**Section 16 (2**)).

In addition to these responsibilities, the Sex Discrimination Officer has two further functions. First, the Sex Discrimination Officer is responsible for preparing an annual report to keep the Government and the public informed about activities and developments under the Bill. This function is discussed below under "Monitoring". Second, the Sex Discrimination Officer is the first point of contact for a complainant who desires resolution through an informal conciliation process.

Dispute Resolution – Sex Discrimination Bill – Outline of Part 3

The process for complaints must be accessible to complainants. In the context of the Cook Islands this means offering a process which take into consideration the following factors:

> 1. A process that is conducted in private to induce complainants to come forward, and,
> 2. Since there is no legal aid plan, a process that is sufficiently informal to accommodate unrepresented parties.

Under **section 20** of the *Sex Discrimination Bill* the complainant has two options for perusing a complaint. The complainant can either bring an action in High Court or enlist the services of a conciliator. Unlike the processes provided by some other jurisdictions as well as the process provided under the *Race Relations Act*, the *Bill* allows a court hearing

in the first instance. A complainant who is represented by counsel or who thinks that informal conciliation will not be effective may actually prefer to proceed directly to Court. Allowing direct access to the Court is also a practical recognition that conciliation is a non binding process, and is without a guarantee of settlement. A complainant who wishes to peruse a complaint after 1 year from the date of the alleged discriminatory behaviour is limited to bringing an action in Court as this is a decision which requires judicial discretion. (**Sections 21 and 29(4)**).

A complainant who chooses to attempt resolution by conciliation begins the process by filing a complainant with the Sex Discrimination Officer. Upon receiving a complainant; the Sex Discrimination Officer's discretion is limited to determining whether the complaint is within the jurisdiction of the Act, and whether the complaint is made within the specified time frame. If these criteria are met and the same complaint is not currently before the Court nor has been previously decided by the Court the Sex Discrimination Officer must refer the complaint to a conciliator for investigation and conciliation.

The conciliator is appointed by the Sex Discrimination Officer from a list compiled by the Minister. **Section 28** of the Bill provides the criteria for inclusion in the list. The Minister must consider the person's knowledge of discrimination law, the person's experience as a conciliator, formal legal training and experience, and the person's reputation in the community.

The conciliator's job is to bring the parties together to reach a settlement that is fair to both parties. The conciliator does not have the same broad powers as are given to similar appointments in other jurisdictions or to a conciliator under the *Race Relations Act*. The more limited grant of power is a recognition that a conciliator's success depends not so much on powers of investigation as on powers of persuasion.

If the parties are able to reach an agreement the conciliator is required to put the agreement is in writing and have it signed by both parties. Copies are provided to the parties and to the Sex Discrimination Officer. A party may file the agreement with the Registry of the High Court to enforce its provisions. (**Section 27**).

Miscellaneous Provisions – *Sex Discrimination Bill* – Outline of Part 4

In Part 4, the *Bill* gives power to the Minister to make regulations. Although the *Bill* will not require a lot of regulations, provision must be made for a schedule of fees and allowable expenses for a conciliator appointed under the Act. The other miscellaneous provision relates to evaluating the Bill's performance.

Monitoring Performance

Monitoring performance of government initiatives is necessary for future planning. The UNDP has noted that the main difficulty in monitoring the impact of Pacific Island government initiatives is the poor quality of available information. This leaves policy makers without critical indicators of development. *(Pacific Human Development Report*

1999: Creating Opportunities, United Nations Development Programme, p. xi).The result is that strategic planning is made difficult or impossible.

Monitoring performance does not require elaborate or expensive processes. The *Sex Discrimination Bill* provides a window on its implementation in two ways. First, the preparation of annual reports by the Sex Discrimination Officer (**Section 17**). Second, an independent evaluation of the statute's effectiveness after it has been in force for three years. (**Section 33**)

Section 17 specifies what the annual report must contain: a summary of the work of the Human Rights Officer including educational work undertaken in the previous year, the number of complaints filed and investigated under the Act, a summary of the salient features of the complaints, as well as other issues of sex discrimination in the Cook Islands whether or not they are covered by the Act. The annual report is provided to the Minister, who in turn is required to make copies available to Members of Parliament and to the public.

The annual report has two purposes. First, by keeping the government and public informed of activities under the legislation it allows evaluation of the effectiveness of the legislation. Second, by providing the Sex Discrimination Officer with a forum to comment on the application of the Act and other sex discrimination issues not covered by the Act there is ongoing consideration of how to improve legislation and policy in this area. The Sex Discrimination Officer is well placed to provide this kind of input.

In addition to the preparation of annual reports, **section 33** of the *Sex Discrimination Bill* requires an independent evaluation of the legislation after it has been in force for three years. The purpose of the evaluation is to assess the degree to which the law has been successful in ameliorating discrimination in employment on the ground of sex, and to suggest legislative changes to further the objectives of the *Bill*.

Costs and Benefits of the *Bill*

Cost estimates, in New Zealand dollars, for the annual operation of the *Sex Discrimination Bill* are provided below.

<u>Core Costs</u>
Salary and Benefits of Sex Discrimination Officer in line with comparable public service positions – $35, 000.
Office and Office Equipment within the Ministry of Internal Affairs and Social Services, Gender and Development Division – $1,000.
Transportation and Lodging for Sex Discrimination Officer to peruse educational initiatives in outer islands (Based on two visits to the Northern Islands, and four visits to the Southern Islands) – $14,000.
Additional costs to Women's Division for support services – $6,000.
Printing costs of promotional and educational materials, and annual report – $1,500.

Total Core Costs $57, 500.

Contingency Fund for Conciliation (based on estimate of three complaints in the fiscal year)
Conciliator fees – $4,500.
Conciliator expenses – $450.

Total Contingency Fund for Conciliations - $4950.

Total Estimated Cost of Sex Discrimination Bill's Implementation – $62,450.

Economic and Social Benefits of Implementation

Although the costs of implementing sex discrimination legislation can be estimated with reasonable accurately, the social and economic benefits of sex discrimination legislation are more difficult to quantify.

The social implications of workplace discrimination go far beyond the workplace. As stated earlier in this Report, discrimination in employment has implications for the victim, for the employer, and for Cook Islands' society.

At the level of the employer, there is no doubt that in a workplace where an employee is being harassed, efficiency is decreased. The costs of staff turnover, lower productivity, and absenteeism are the price the employer pays for failing to ensure a discrimination free workplace. Studies suggest that for large employers these costs may be substantial [61]

The economic cost to society of allowing gender disparities to continue is slower economic growth:

> *"Economies that narrow the gender gap and improve the status of women grow faster".* [62]

This statement is not from a human rights agency but from the World Bank – an organization not always known for its liberal economic policies.

Pacific Island governments do not always see the link between poverty and human rights.[63] Yet it is well documented that gender discrimination is closely associated with

[61] See for example, Philip L. Bartlett, "Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes", 5 NYUJ Legis & Pub. Pol'y 419 (New York: New York University School of Law. 2001) p.6.

[62] As quoted by Gumisai Mutume, "Gender Discrimination Not Good for Growth", TWN Third World Network, March 7, 2001, p.1 Online.

poverty. The gap between men and women in health and education in developed countries is less than in underdeveloped countries, and within countries the gap is greater among the poor. [64]

The *Sex Discrimination Bill* is not a panacea for the complex and interrelated factors contributing to the low status of women. But clearly, it's another step in the right direction. Offering workplaces that are free from discrimination is good for women; and if the World Bank's assessment is correct, what is good for Cook Islands' women is good for all Cook Islanders.

Summary of this Part
This Part of the Report proposed solutions to the problem of Cook Islands' employers being unable to offer workplaces free from discrimination. The best option is the one that most efficiently addresses the factors that underlie the problem: lack of appropriate legislation; a conservative business philosophy; and an ideology that views women as inferior. The experiences of other countries with human rights legislation provide guidance for drafting sex discrimination legislation for the Cook Islands. The *Sex Discrimination Bill* seeks to address the underlying problems of sex discrimination in the workplace in the most cost effective manner. The financial costs of implementing sex discrimination legislation must be weighed against significant economic and social costs of inaction.

Conclusion

The Cook Islands has no legislation prohibiting discrimination against women in employment practices. Although it is illegal in the Cook Islands for an employer to discriminate on the ground of race, employment protections do not extend to discrimination on the ground of sex.

Sex Discrimination in employment has consequences for everyone: the victim, the employer, and the community. Failing to ensure that women are provided with workplaces that are free from sex discrimination including sexual harassment is a reflection of the low status of Cook Islands' women relative to men.

Existing laws do not effectively address sex discrimination in employment. A conservative business culture and traditional gender attitudes provide support for the status quo. The experiences of other jurisdictions with human rights legislation provide valuable insight into the development of law for the Cook Islands but in the final analysis, what is required is a law tailored to the specific needs of Cook Islanders.

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[63] Hope on the Horizon: feminization of Poverty in the Pacific, Pacifica Communication Production, 2004, DVD.
[64] Gumisai Mutume p.1.

The objective of the *Sex Discrimination Bill* is to ensure that all Cook Islanders are offered workplaces free from discrimination. In the most cost-effective manner possible the *Bill* provides a system of complaint resolution through independent conciliators. The *Bill* addresses problematic ideology through education, and provides support for employers to develop non-discriminatory employment practices.

The Cook Islands has made international commitments to eliminate discrimination against women in the area of employment. The *Sex Discrimination Bill* is a practical step in that direction.

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