



**THE LAW REFORM COMMISSION
HONIARA, SOLOMON ISLANDS**

MARRIAGE AND DIVORCE LAWS

Consultation Paper

2022

Call for Submissions

The Law Reform Commission (LRC) invites your comments and submissions on this consultation paper. A submission is your views, opinions, or options about how the law should be or how it should be changed. A submission can be written, such as a letter or email, or verbal, such as telephone conversation or a face to face meeting. A submission can be short or long, it can be formal or informal such as dot points or notes.

How to make a Submission

You can write a submission, send an email or fax, or ring up the LRC or come to our Office and talk with any of our staff. You can also come to our consultation meetings and express your views.

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A copy of this paper can be obtained from our Office. You can also access it from our website.

The deadline for submissions for this project is 30th November 2024.

Law Reform is a process of changing the law that requires public participation. Comments and submissions sent to the LRC will not be confidential unless you request that the information you provided be kept confidential.

Terms of Reference

WHEREAS the Islanders Marriage Act and Islanders Divorce Act are in need of reform after many years of operation in Solomon Islands.

NOW THEREFORE in exercise of the powers conferred by section 5(1) of the Law Reform Commission Act, 1994, I OLIVER ZAPO, Minister of Justice and Legal Affairs hereby refer the Law Reform Commission the following –

To enquire and report to me on –

A.

1. The need to have one single civil marriage law for all persons resident in Solomon Islands.
2. The recognition of marriage conducted according to custom in Solomon Islands.
3. The need for registration of customary marriages for the purposes of proof in Court etc.
4. Reforms that may be necessary to meet the aspiration of the people of Solomon Islands.

B

1. The review of law relating to divorce in Solomon Islands.
2. Reforms as may be necessary bearing in mind the aspirations of the people of Solomon Islands in the context of Solomon Islands circumstances.

Dated at Honiara 1st of May 1995

NB: Explanation: There are three systems in the law for marrying, namely, marriage under custom, marriage under the Islander's Marriage Act (Cap.47) and marriage under the Pacific Islands Civil Marriages Order of 1907. Not only are these systems discriminatory in some ways but they are apart from customary marriage, confusing also. It is therefore necessary to review the present marriage law with the view of having one marriage law for every one apart from customary marriage in Solomon Islands.

The law relating to divorce in Solomon Islands is based upon the English divorce law. However, the concept which forms the basis of the English divorce law has undergone some fundamental changes over the years. These changes have come about as a result of social and economic circumstances in England and elsewhere within the

Commonwealth. It is therefore necessary to look again at the divorce system in Solomon Islands in the light of these changes with the hope that Solomon Islands' divorce system benefits from useful changes in these other countries through their experiences over the years. However, whatever these changes may be, must be acceptable to the people of Solomon Islands.

Terms of Reference

WHEREAS the Islanders' Marriage Act has been in force for many years of operation since it was commenced on 31st of October 1945.

AND WHEREAS the Government of Solomon Islands has ratified the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, a review of the Islanders' Marriage Act is required to determine whether it is consistent with the provisions of these human rights conventions.

NOW THEREFORE in the exercise of the powers conferred by section 5(1) of the Law Reform Commission Act 1994, I DERRICK MANUARI, Minister for Justice and Legal Affairs hereby refer to the Law Reform Commission the following –

To enquire and report to me on the following –

Whether the Islanders' Marriage Act is consistent with the protection of human rights and the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

Whether the current provisions of the Islanders' Marriage Act in relation to the age of marriage and consent that were enacted in 1945 are appropriate in the current circumstances.

The benefits and challenges of amending the current law to comply with human rights obligations and the best interests of the families, communities and parties of the marriage.

Recommendations for changes to the law to strengthen and protect the sanctity of marriage and the rights of the parties to the marriage.

Dated at Honiara this 7th day of December 2018

DERRICK MANU'ARI

Minister of Justice and Legal Affairs.

The Law Reform Commission

The Law Reform Commission (LRC) is a statutory body established under the *Law Reform Act 1994* [Cap 15]. The LRC is headed by the Chairman, appointed by the Judicial and Legal Service Commission on the recommendation of the Minister for Justice, and has four part-time Commissioners who are appointed by the Minister for Justice and Legal Affairs.

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Abbreviations

SDA- Seventh Day Adventist

PNG- Papua New Guinea

UK- United Kingdom

SBHC- High Court of Solomon Islands

SILRC- Solomon Islands Law Reform Commission

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OVERVIEW OF THE CONSULTATION PAPER

This consultation paper is on the marriage and divorce laws of Solomon Islands. It has two parts. Part 1 is on the marriage laws and it has six chapters. Chapter 1 is a brief introduction of the different laws governing marriage. Chapter 2 addresses what marriage is and what makes a marriage valid. Chapter 3 outlines the requirements before a marriage should take place, and chapter 4 covers the requirements of marriage registration. The last two chapters cover general provisions and the other relevant marriage laws.

Part 2 of the paper is on the divorce laws of Solomon Islands. This part has seven chapters. Chapter 1 introduces the divorce part of the paper and the *Islanders' Divorce Act* [Cap 170]. Chapter 2 is on the preliminary matters of *the Islanders' Divorce Act*. Chapter 3 covers the grounds for divorce and chapter 4 looks at the process for divorce. The final three chapters are on nullity of marriage, judicial separation, and general provisions.

PART 1: MARRIAGE LAWS

CHAPTER 1: INTRODUCTION

- 1.2 Solomon Islands has three regimes of administering marriage: They are:
 - I. religious marriage;
 - II. civil marriage; and
 - III. customary marriage.
- 1.3 The main legislation governing marriage laws in the Solomon Islands is the *Islanders' Marriage Act* [Cap 171]. The Act has 24 sections and three main parts. Part I is on Marriage; Part II is on the Registration of Marriage; and Part III contains the general provisions covering fees and rules.
- 1.4 The Act has two schedules. The first Schedule has Forms A to F which are on, notice, attestation, declaration, certificate of marriage, District Marriage Register, and, declaration by persons married in accordance with custom of Islanders'. The second Schedule, contains the fees.
- 1.5 The other marriage law is the *Pacific Island Civil Marriage Order in Council 1907*]. Marriages under this Order are recognized under the *Islanders' Marriage Act*. A couple can be married under the *Pacific Islands Civil Marriages Order 1907* if the husband or wife is a foreigner and holds a foreign passport. The forms and other information sheet are provided at the Central Magistrate Court or the other Magistrates in the other districts out in the provinces. Only the Court can provide these forms.
- 1.6 Another marriage law is the *Marriage of British Subjects (Facilities) Act* [Cap 172]. This Act provides for the issuing of certificate for marriage where British subject resident in Solomon Islands is to be married in United Kingdom. A Registrar of Marriages appointed under the Pacific Islands Civil Marriages Order in Council 1907 may issue a certificate for marriage in Solomon Islands.
- 1.7 The marriage part of the consultation paper has 6 chapters;
 - i. Chapter 1: Introduction
 - ii. Chapter 2: Marriage
 - iii. Chapter 3: Marriage Requirements
 - iv. Chapter 4: Registration of Marriage
 - v. Chapter 5: General Provisions
 - vi. Chapter 6: Other Laws Relevant to Marriage

CHAPTER 2: MARRIAGE

Interpretation

Current law

1.8 Section 2 is the interpretation section of the *Islanders' Marriage Act* which defines the 'District Registrar' and the 'Minister of Religion'. The "District Registrar" is defined as the District Officer or other person duly authorized to perform the duties of District Registrar under the Act. The "Minister of Religion" is defined as a Minister of Religion, priest and other person who is registered under the *Births, Marriages and Deaths Registration Act* [Cap 169].

Laws from other jurisdictions

1.9 Marriages in Vanuatu are regulated under the *Marriage Act* [Chapter 60].¹ Part 1 of the Act is the same as section 1 and section 2 of the Solomon Islands *Islanders' Marriage Act* but it is simplified and organized to cover each provision under its own section. Compared to the *Islanders' Marriage Act* sections 1 and 2, the Vanuatu *Marriage Act* Part 1 is organized differently. Section 1 provides for the persons who can celebrate marriage; section 2 is on the appointments of the district registrars; and section 3 is on the registrations of ministers responsible for celebrating marriages.

1.10 In Fiji, the *Marriage Act* [Cap 50] Part I covers the preliminary sections of the Act and section 2 is the interpretation. The interpretation section includes district, district registrars, magistrates, marriage officer, minister of religion and minor. Another interpretation under the Act is in section 15, which defines marriage in Fiji to be the voluntary union of one man to one woman.²

Questions for consideration

1. Should the revised law for marriage have a broad interpretation section, including other words, terms, or phrases?
2. Should the term 'child' be defined in the revised legislation?
3. Should the revised law define the term 'marriage'?
4. Should the phrase 'Minister of Religion' be amended to "Ministers of Religion and marriage officers"?
5. Should the 'Churches' be amended to "Churches and other religions"?

¹ Vanuatu *Marriage Act* [Cap 60] <http://www.paclii.org>.

² Fiji *Marriage Act* [Cap 50] <http://www.paclii.org>.

Appointment of District Registrars

Current law

1.11 Section 3 is on the appointment of District Registrars. Magistrates of the Districts can be District Registrars. Where there is no Magistrate, the Minister of Home Affairs shall in writing appoint a fit and proper person to be a District Registrar.

Laws from other jurisdictions

1.12 The Vanuatu *Marriage Act* [Cap 60] section 2 outlines the process for the appointment of a District Registrar. Similar to the *Islanders' Marriage Act* the District Registrar shall be appointed by the Minister responsible for Home Affairs. The section also specifies that the instrument of appointment must declare the district where he or she can celebrate marriages.

1.13 In Fiji, the *Marriage Act* [Cap 50] in section 3 provides that a district registrar may conduct a marriage within the limits of his district. The Act further specifies under section 22(2) that only a Registrar-General or the district registrar within the limits of the district assigned to him or her has to solemnize a marriage.

Questions for consideration

1. Should there be a clear criteria and process in the revised law to guide how the Minister of Home Affairs or the relevant Minister appoints a District Registrar where there are no Magistrates in the District?
2. What should be the test for a 'fit and proper person' to be appointed as a District Registrar by the Minister of Home Affairs?
3. Should Local Court Justices be empowered by the revised legislation to have the same authority and responsibilities as Magistrates to be District Registrars to celebrate marriages?

Valid Marriage

Current law

1.14 Section 4 of the *Islanders' Marriage Act* explicitly provides that only marriages celebrated under the Act, or under the *Pacific Islands Civil Marriage Order in Council 1907*; or, in accordance with the custom of Islanders' are valid marriages. The Act further provides that any marriages performed under the *Islanders'*

Marriage Act, must be conducted before a Minister of Religion; or, a District Registrar.

- 1.15 The Act does not define the word islander. However, the *Interpretation and General Provisions* [Cap 85] defines that word. The word 'islander' is defined in the *Interpretation and General Provisions Act* to mean a person whose parents are or were members of a group, line or tribe indigenous to Solomon Islands. It also include any person who at least one of his or her parent or ancestor was a member of a race, group, and tribe or line indigenous to any island in Melanesia, Micronesia or Polynesia who lives in Solomon Islands in the customary mode of life to such group, race, tribe or line.³
- 1.16 The word islander was an issue of contest in the High Court case of *Kevisi v Mergozzi*.⁴ The High Court has interpreted the word 'islander' for the purpose of the *Islanders Marriage Act* to mean a person domicile in Solomon Islands. In the case, the respondent argued that he and the applicant are 'islanders' within the meaning of the *Islanders' Marriage Act*. In the case, the Court was asked to consider whether the respondent, an Australian citizen, is an 'islander' for the purpose of the *Islanders' Marriage Act*. In considering the issue, 'the judge cited the Solomon Islands High Court case of *Luaseuta v. Luaseuta*.⁵ In that case, the meaning of 'islander' in the context of *Islanders' Divorce Act* was stated by Chief Justice D. R. Davis to mean anyone who is domiciled in Solomon Islands. The Judge in *Kevisi v Mergozzi* case followed that reasoning to be equally applicable to the 'Islanders' in the context of the *Islanders' Marriage Act*. However, this case did not consider the *Interpretation and General Provisions Act*. The ruling could have been different had the counsels for the parties assisted the Court with the meaning of the term Islander under the *Interpretation and General Provisions Act* [Cap 85]. The Act defines an islander to mean any person whose both parents are or were members of a group, tribe or line indigenous to Solomon Islands. It also include any person who at least one parent or ancestor was a member of a race, group, tribe or line indigenous to any island in Melanesia, Micronesia or Polynesia and who is living in Solomon Islands in the customary mode of such group.⁶

³ *Interpretation and General Provisions Act* [Cap 85], s17.

⁴ *Kevisi v Mergozzi* [2008] SBHC 13.

⁵ *Luaseuta v. Luaseuta* CC 34/78 (unreported).

⁶ *Interpretation and General Provisions Act* [Cap 85], s17.

Laws from other jurisdictions

- 1.17 The marriage laws of Fiji and Vanuatu are similar to the Solomon Islands marriage law as they only recognize places for a marriage to be conducted in a Church and the marriage must be conducted by a Minister of Religion or by a District Registrar or Registrar-General. However, the Vanuatu *Marriage Act* recognizes customary marriage to be performed in a place according to the form laid down by local custom'.⁷
- 1.18 In Fiji's *Marriage Act*, under Part II, the marriage officers⁸ and ministers of religion are the ones to administer marriage. Ministers of religion administer marriage related to Christianity organisation he or she attaches too while marriage officers deal with the rest of civil marriage. Section 5 provides for the Registrar-General to register marriage officer. However, the Registrar-General has the discretion to decide on such applications if he or she is satisfied that there is a need for a marriage officer of that religion and register such person as a marriage officer for solemnizing marriages in Fiji.⁹ It is a mandatory requirement under the Act that the Registrar General annually publishes in the Gazette a list of names, addresses, designations and denomination of all marriage officers.¹⁰ Section 10 provides that the Registrar-General can cancel a marriage officers' registration at any time and then he must publish the cancellation in the Gazette.

⁷ Vanuatu *Marriage Act* [Cap 60], s 10.

⁸ See section 2 of the Act include the Registrar-General, district registrar, and marriage officers.

⁹ Fiji *Marriage Act* [Cap 50] Part II, ss 3 – 5.

¹⁰ Fiji *Marriage Act* [Cap 50] s 8.

Questions for consideration

1. Should the term 'Islander' be replaced with 'persons' in the new revised marriage law?
2. Should there be a definition of 'custom'? If so, what should be the definition?
3. Can an islander marry a non-islander under custom?
4. Should the term 'marriage officers' be used in the revised Marriage Act?
5. Should there be a provision similar to section 8 of Fijian *Marriage Act* [Cap 50] which requires the publication of the Gazette list of names, addresses, designations and denominations of all marriage officers annually?
6. Should there be a provision to make it mandatory for annual publication of names of the Ministers of Religion or those administering marriage in Solomon Islands?

Bigamy

Current law

- 1.19 Bigamy is the act of marrying to another person when the person still has a subsisting marriage. Section 14 of the *Islanders' Marriage Act* prohibits bigamy. It is an offence for a person who is in a registered marriage under the Act, marry another in a religious or civil marriage without divorcing his or her earlier spouse. The penalty for bigamy is five years imprisonment.
- 1.20 Bigamy is also an offence under the *Penal Code*. Section 170 (1) of the *Penal Code* states that any person who had been previously married, with a living spouse and is not divorced or has not lived continuously apart from the wife or husband for seven years, goes through a ceremony of marriage with another is guilty of a felony (bigamy) and is liable to seven years' imprisonment. However, there are two instances when this offence will not apply under section 170(2) of the *Penal Code* [Cap 26]. Firstly, the offence of bigamy will not apply to a person whose marriage was declared void by a court of a competent jurisdiction. Secondly, the offence will not apply to any person who contracts a marriage during the lifetime of a former spouse, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive

within that time. In 1998 the *Islanders' Divorce (Amendment) Act 1998* provided a new ground for divorce that only requires living apart for 5 years. However, the required time of separation is two years less than the seven years of continual absence exception to the bigamy offence to not apply under section 170(1) of the *Penal Code* [Cap 26].

- 1.21 The difference between the *Islanders' Marriage Act* and the *Penal Code* is that the *Penal Code* gives an additional exclusionary ground and the imprisonment is seven years whereas in the Act it is five years. Similar to the Act, the *Penal Code* section 170 (2) does not recognise a later marriage as bigamous if the previous marriage was celebrated under customary law and was unregistered.
- 1.22 An issue with the offence of bigamy is the non-recognition of customary marriage recognised as a valid form of marriage when it comes to bigamy. This is inconsistent with other areas of law where marriage under custom is recognised as a valid form of marriage. There may be some issues in assessing when a marriage under customary law has been dissolved because the *Islanders Divorce Act* does not apply to marriage that is not registered, and the rules for dissolving a marriage under custom may be different from region to region.¹¹
- 1.23 An example of the inconsistency for the recognition of customary marriage as a valid form of marriage is found in the *Balou v Kokosi*¹² case. The case was an appeal case from the Magistrate Court. The Court ruled that the custom marriage was valid and the wife is covered under the definition of spouse under the *Affiliation, Separation and Maintenance Act 1971*. The main issue the Court had to address was whether or not a woman married under custom qualifies to the legal definition of spouse in the *Affiliation, Separation and Maintenance Act 1971* section 10. The judge of the case held that section 10 of the *Affiliation, Separation and Maintenance Act 1971* meant that the words 'married woman' does include a woman validly married in custom. The judge went further to highlight that in any event Schedule 3(3) of the *Constitution* required the court to apply customary law and therefore where an Act refers to 'marriage' it must also refer to a marriage valid in customary law. Therefore, the appeal was dismissed.¹³

¹¹ Solomon Islands Law Reform Commission 'Review of Penal Code and Criminal Procedure Code Issue Paper 1' 2008, page 158 <http://www.paclii.org>.

¹² *Balou v Kokosi* [1982] SBHC 6; [1982] SILR 94.

¹³ *Balou v Kokosi* [1982] SBHC 6; [1982] SILR 94.

Laws from other jurisdictions

- 1.24 Under the Kiribati *Marriage Ordinance* [Cap 54]¹⁴ bigamy is an offence but it does not use the term bigamy. Section 6 of the Ordinance restricts a marriage between persons where one of the parties still is in a valid marriage. Any such marriage shall be void. In Kiribati bigamy is considered a felony and the penalty is seven years imprisonment¹⁵.
- 1.25 In Fiji's *Marriage Act* [Cap 50] section 15 prohibits plurality of marriage. The law states that marriages in Fiji shall be the voluntary union of one man to one woman to the exclusion of all others.¹⁶ The offence of bigamy is provided in the *Fiji Crimes Decree 2009* section 204 where states a person commits the offence of bigamy if he or she, having a husband or a wife living, goes through another ceremony of marriage which will be void. The penalty is five years imprisonment. The exception is if such a person remarries after the earlier spouse has been continually absent from such person for at least seven years and is presumed dead in that period.

Questions for consideration

1. What law should have the offence of bigamy? Should it be retained in the Penal Code or in the revised marriage legislation?
2. What should be the penalty of the offence of bigamy?
3. Should the offence of bigamy also apply to customary unregistered marriage?

¹⁴ Kiribati *Marriage Ordinance* [Cap 54].

¹⁵ Kiribati *Penal Code* [Cap 67] s 163.

¹⁶ Fiji *Marriage Act* [Cap 50] s 15.

CHAPTER 3: MARRIAGE REQUIREMENTS

1.26 The *Islanders' Marriage Act* sets very strict and rigid requirements before, during, and after a marriage ceremony is conducted. Failure to follow the procedural requirements will result in the Courts declaring the marriage null and void.

3.1 Marriage Before a Minister of Religion

1.27 Under the *Islanders' Marriage Act*, the time and place for either a religious or civil marriage is very strict and rigid. Any marriage ceremony held outside of the specified places and time under the Act will result in a null and void marriage.

Notice

Current law

1.28 Besides customary marriage, the other two forms of legally recognized marriages are marriages conducted before either a minister of religion or a district registrar.¹⁷ Under section 5 (1) before a Minister of Religion can conduct a marriage ceremony, there must be a written notice stating the intended marriage and the date it will take place. The requirements for the notice are:

- a) the notice must be written in the language spoken by the parties to be married, signed by the minister in charge of the church, and posted on a notice board outside of the church;
- b) the notice will be posted for at least three weeks before the date of the intended marriage and the notice must remain on the board until the marriage is celebrated or until three months from the date of the notice.

1.29 Every Minister of Religion shall keep a register where they keep records of the names, dates of when the notice was given and particulars of the parties for whom the notice was made. If no marriage is celebrated when the notice expired in three months, a new notice must be made and posted before any valid marriage celebration can take place.

Laws from other jurisdictions

1.30 In Vanuatu, a marriage before a minister for celebrating marriages has the same requirements as the Solomon Islands *Islanders' Marriage Act* section 5(1). The minister must ensure that: a notice must be posted at least three weeks before the marriage and the notice must remain posted until three months has passed then it will expire.¹⁸ However, if the notice is not required when the banns of

¹⁷ Solomon Islands *Islanders' Marriage Act* [Cap 171], s 4.

¹⁸ Vanuatu *Marriage Act* [Cap 60], s 3.

marriage is called on three successive Sundays or Sabbaths during public service of worship, in the regular place of worship or either or both parties to the intended marriage and that the place is the intended place for the marriage to be performed.¹⁹ The banns will include announcement of the time that the wedding will be held in that church or place of worship.

- 1.31 The marriage law of Vanuatu goes further to specify that a religious marriage may be conducted in the form practiced by his denomination and there must be a clear expression by the parties to give their consent for the union.

Questions for consideration

1. Should the law prescribe a check list for a Minister of Religion or a marriage officer to ensure all the procedures are satisfied before the marriage is celebrated?
2. Should the law be amended to include reading of wedding banns for at least three successive Sundays or Sabbaths publicly after a service in the intended place of worship to be used for the wedding?
3. Is the three months too long for a notice to be posted up?
4. Should there be penalties including disqualification for a Minister of Religion who do not comply with the strict requirements to conduct marriage ceremonies?

Place and Time

Current law

- 1.32 Under the current law in section 8 of the Act, a marriage before a Minister of Religion must take place in the church which the notice of marriage was posted and the marriage celebration shall take place between 6:00am and 6:30pm. The Ministry of Home Affairs is very flexible with the use of a church building to hold a religious wedding because there are some new churches that do not have proper church buildings. In these cases, a church or place of worship will be where the congregation regularly hold their Sunday or Sabbath services.²⁰

¹⁹ Vanuatu *Marriage Act* [Cap 60] s 6.

²⁰ Interview with William Misibini from the Civil Division, Ministry of Home Affairs 31/08/2021. While this is inconsistent with the law, it is a discretionary authority exercised by the Ministry of Home Affairs.

- 1.33 However, if a religious wedding is held by a Minister of Religion outside of a church building or the place of regular worship then it shall be deemed a null and void marriage. This was held in the case of *Salumata v Kelly*²¹ where the couple were married by their local Seventh Day Adventist (SDA) pastor at the home of the petitioner's parents in Malakera village in 1980. This happened because the wife was pregnant at the time so they were not able to marry in the SDA church. Everything went on well until 1996 when the marriage broke down and the petitioner filed for divorce. Even though the couple had evidence of a valid marriage with the certificate of marriage, duly signed by two witnesses, the Courts found procedural issues too hard to ignore. Firstly, the Petitioner's family deny that there was any notice published and posted for the marriage by the Pastor who performed as the Minister of Religion, nor did the Pastor inform them beforehand a notice was required. The Court found that there were three things wrong with the validity of that marriage: first, no notice of the marriage was ever published in a Church under the requirements of section 5, second, there was no declaration before the marriage in the prescribed form as required by section 6, and finally, the marriage was not celebrated in a Church as required under section 8 of the *Islanders' Marriage Act*. This means that the marriage was not celebrated in due form. The Judge proclaimed a decree of nullity, meaning there was never a marriage between the couple in 1980 because it was not legally carried out.
- 1.34 Another example is the earlier mentioned case of *Kevisi v Mergozzi* [2008],²² where the respondent applies to have the marriage declared a nullity and to have the petition struck out. The main ground was that both parties did not meet the requirement under section 8 of the *Islanders' Marriage Act* by having their wedding officiated by a minister of religion on a jetty at the Sanbis Resort on Mbabanga Island in the Western Province. The presiding judge ruled that the two key requirements under section 5(1) and section 8 of the Act were not met because there was no posting of a notice for the marriage in a church, and that the marriage was not celebrated in a church. This means the marriage was not lawfully performed in accordance with the due form. The Court ruled that the marriage celebration was invalid.
- 1.35 The most recent decision on the strict requirements was in contradictory to the two decisions discussed above. In the case of *Lilly D. Ramo v Simon Mannie*,²³ the

²¹ *Salumata v Kelly* [1999] SBHC 129; HC-CC 344 of 1999 <http://pacific.org>

²² *Kevisi v Mergozzi* [2008] SBHC 13.

²³ HC-SI CC No. 137 of 2018 (date of decision 29th July 2022).

petitioner (a private legal practitioner) seek the court to divorce her marriage because: the marriage was not celebrated in due form as the written notice required under section 5 of the *Islanders Marriage Act* has not been complied with, and that the marriage was not celebrated in Church as required by section 8 of the *Islanders Marriage Act*. Although these are not grounds for divorce, the Court stated that the petitioner was not sincere to allege and rely on these grounds to divorce her husband because the petitioner is a lawyer, an intelligent person, who knows what she was doing; getting married at that time. The Court further stated that ignorance of the law is not an excuse. The Court considers the marriage to be a valid marriage and agrees to terminate the marriage on the ground of irretrievable breakdown because they were living apart for more than five years and thus pronounces a decree of divorce.

Laws from other jurisdictions

- 1.36 In the *Vanuatu Marriage Act* [Cap 60] it is clear that a marriage intended to be celebrated in a church must be celebrated in a church where the notice was posted or where the banns were called. Moreover, the Act provides an exception if one of the parties intending to marry are in extremis, or in the final stage of illness before death or on their death bed, or in any other case where the circumstance requires. Section 12 provides that a District Registrar or minister for celebrating marriages may celebrate a marriage in a place other than those prescribed in the laws of Vanuatu due to the circumstance.²⁴
- 1.37 The *Fijian Marriage Act* does not make it clear about the place a religious marriage can be celebrated. However, all marriages by a marriage officer must be sent to either the Registrar-General or the district registrar to be registered.²⁵

²⁴ *Vanuatu Marriage Act* [Cap 60] s 12.

²⁵ *Fijian Marriage Act* [Cap 50] s 34.

Questions for consideration

1. Should the time to hold marriage be revised to anytime the marriage party chooses?
2. Should section 8 be revised to explicitly include all places of worship?
3. Should the rules regarding the place be removed?
4. If yes, then can Place be any 'a place of worship', OR any place a couple chooses to celebrate their wedding as long as a registered Minister of Religion or a Marriage Officer is present?
5. Should the revised law provide for circumstances where a marriage can be conducted or celebrated at any place apart from in a church?
6. Should we have different categories of marriage, such as covenant marriage and conventional marriage? Covenant marriage must keep to the church or place of worship while conventional marriage just anywhere chosen by the parties to marry so long as administered by a marriage administrator or officer.

3.2 Marriage Before a District Registrar

Notice

Current law

- 1.38 Section 5(2) of the *Islanders' Marriage Act* requires one of the parties (who are Islanders') to the intending marriage to sign and give to the Registrar a notice in Form A under the First Schedule of the Act if they wish for the marriage to be administered by a District Registrar. It is sufficient for that party to make a mark or cross in Form B where he or she is unable to write in English. This must be done in the presence of a literate person who shall attest to the mark or cross.
- 1.39 Once that notice is received by the District Registrar, he or she will put the particulars into the 'Islanders'' Marriage Notice Book. The notice will be published, posted in a place on the outer wall of the District Registrar's Office

until the marriage is celebrated. The District Registrar may celebrate the marriage at any time between twenty-one days and three months after the notice.

- 1.40 The notice is void if the marriage is not celebrated within three months of the date of the notice. In such situation a fresh notice is required to be published or posted before the parties can lawfully marry.

Laws from other jurisdictions

- 1.41 In Fiji if the marriage will be celebrated in Suva the notice must be given to the Registrar-General, or to the district registrar from their district if they live in the same district or to their respective district registrars if they live in separate districts. The notice must be served to the district registrar of their respective districts if seven days before giving the notice the if the parties live in separate districts.²⁶ The notice must be filled and posted for twenty-one consecutive days before the wedding can be celebrated. The notice is valid for three months.²⁷ After twenty-one days if there is no reason why the wedding cannot be continued, the Registrar-General and district registrar will issue the marriage party a certificate in the prescribed form stating that the notice was duly given and twenty-one days has lapsed. The *Fiji Marriage Act* sets a strict requirement that without the certificate the marriage of the person shall be null and void.²⁸

Questions for consideration

1. Should the requirement for a notice outside of the doors of the District Registrar be amended or revised?
2. Is twenty-one days waiting period before the celebration of the marriage adequate? If not, what should be the period?
3. Is the three months expiry date of the Notice fair? If not, what should be the period?
4. Should there be a special licence granted to any party who want to marry as soon as possible without the waiting period for notices?

Time and Place

²⁶ *Fiji Marriage Act* [Cap 50], s16.

²⁷ *Fiji Marriage Act* [Cap 50], s17.

²⁸ *Fiji Marriage Act* [Cap 50], s19

Current law

1.42 Section 9 of the *Islanders' Marriage Act* stipulates that a marriage before a District Registrar can only happen within the premise of the District Registrar's office from 10:00am – 4:30pm. The District Registrar must be satisfied that the formalities before the marriage as prescribed in the Act have been complied with and he or she shall ask "Do I understand that you A.B. and you C.D., have come here for the purpose of being made man and wife?". If he receives a positive response, then he shall proceed with the ceremony.

Law from another jurisdiction

1.43 In Kiribati the *Marriage Ordinance* [Cap 54] has some different requirements for a marriage before a registrar including the time from 8:00am – 4:30pm. An additional requirement is that the registrar must satisfy about is that the intending parties to the marriage are entering into the marriage freely and voluntarily.

Questions for consideration

1. Should the time to conduct marriage by the District Registrar follow the SIG working hours time, 8:00am – 4:30pm?
2. If there is no District Registrar available, can Local Court Justices be empowered by law to conduct civil marriages?
3. Should there be a strict requirement that the District Registrar must ensure that the parties intending to marry are doing so freely and willingly?

Declaration Before a Marriage

Current law

1.44 Under section 6 of the *Islanders' Marriage Act*, no marriage will be celebrated by a Minister of Religion or a District Registrar until each party have made and signed a declaration in Form C. This must be done before the Minister of Religion or District Registrar who will be celebrating the marriage. If a declarant is unable to write, he or she may put a mark or cross instead.

1.45 When a marriage is celebrated by a Minister of Religion, the declaration needs to be attached with a glued post stamp valued at twenty cents, thereafter the Minister of Religion shall forward it to the District Registrar.

Laws from other jurisdictions

- 1.46 In Vanuatu the *Marriage Act* [Cap 60] section 7 provides that no marriage shall be celebrated by either a minister or a district registrar until each of the parties to the intending marriage make and sign a prescribed declaration form under the *Civil Status Act* [Cap 61]. The declaration must be forwarded to the District Registrar together with the marriage certificate.
- 1.47 In Fiji the *Marriage Act* [Cap 50] provides a different form for the declaration of marriage. Section 23 of the Act states that in every case of solemnizing of a marriage under the Act, the marriage officer shall require each party in some part of the ceremony in his presence and in the presence of the officiating marriage officer and witnesses to say “I call upon these people here to present to witness that I, A.B, do take you, C.D, to be my lawfully wedded wife (or husband)”, or words similar to the these as the circumstance will permit.²⁹

Question for consideration

Should we still keep the requirement of the glue post stamp?

Witnesses Required

Current law

- 1.48 Section 7 of the *Islanders' Marriage Act* requires at least two witnesses to sign the marriage certificate along with the marriage parties before the Minister of Religion or a District Registrar.

Laws from other jurisdictions

- 1.49 The legal requirements for witnesses required for a marriage ceremony under the *Fijian Marriage Act* [Cap 50] is the same as in Solomon Islands, two witnesses to sign the certificate.³⁰ The *Vanuatu Marriage Act* [Cap 60] also requires at least two witnesses but they must be over 21 years old before the celebration of every marriage before either a District Registrar or minister for celebrating marriages.

Questions for consideration

²⁹ Fiji *Marriage Act* [Cap 50], s23.

³⁰Fiji *Marriage Act* [Cap 60], s25.

1. Should there be a minimum age requirement for the witnesses?
2. If yes, what should be the age, 18 years or 21 years?

Age of Marriage

Current law

- 1.50 In the current *Islanders' Marriage Act* the minimum age of marriage is 15 years. Section 10 states any Islander (not being a widower or widow) under the age of 18 years may be married with the written consent of the father, or mother, or if both are dead or of unsound mind or absent from the district. A judge or magistrate may give such consent if satisfied after due inquiry that the application to marry is a proper one where the Islander has no father, mother, or guardian.
- 1.51 However, this is only applicable to marriages before a Minister of Religion or a District Registrar. The Act does not set any minimum age for customary marriages.
- 1.52 It is an offence for any party who knowingly contracts a marriage or persons under 15 years of age or for any authorized Minister of Religion or District Registrar to celebrate the marriage of an Islander knowing one of the parties is under the age of 15 years. The offence is punishable by up to a \$100.00 fine or six months' imprisonment.³¹

Laws from another jurisdiction

- 1.53 The marriageable age for a valid marriage in Fiji is 18 years for males and 16 years for females.³² Any marriage conducted for those under 21 years of age regarded as marriage between minors.³³ Such marriage will require the prior consent of the father, or if the father is deceased or incapable or unable to give such consent then the consent of the mother, or if the same for the mother then in the absent of the parents then the prior consent of the Commissioner or a magistrate.³⁴
- 1.54 However, it is an offence in the *Marriage Act* of Fiji in section 31 for every person who wilfully and unlawfully marries a person under the age of 21 years, who

³¹ Solomon Islands *Islanders' Marriage Act* [Cap 171], s10(2).

³² Fiji *Marriage Act* [Cap 50], s12.

³³ Fiji *Marriage Act* [Cap 50], s2.

³⁴ Fiji *Marriage Act* [Cap 50], s 13.

have not been previously married, without having previously obtained the consent required under section 13. Any person who abets or assists such a person will also be guilty. The penalty of the offence of marrying minors without consent is a fine not more than \$200.00 FJD or no more than two years imprisonment.

- 1.55 In Vanuatu the age of marriage is regulated under the *Control of Marriage Act* [Cap 45]. This Act under section 2 states that minimum age for marriage in Vanuatu is 16 years for a female, and 18 years for a male.³⁵ It is also a statutory requirement under section 3 of the Act that the consent of a father unless he is dead or incapable of giving his consent, then the consent of the mother. However, if both parties are dead or neither can agree to give their consent then the parties must obtain the consent of the district magistrate.³⁶ If any person acts in contravention of the provisions of sections 2 and 3 he or she shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 20,000.³⁷
- 1.56 Section 4 requires that the before celebration of a marriage the principal celebrant must ensure the parties meet the age requirement under section 2, and if they are under 21 years then there must be parental consent. No marriage shall be valid unless the intending marriage parties have expressed their consent before at least two witnesses or before the District Commissioner or the District where they reside.³⁸ If any person acts in contravention of the provisions of section 4 he or she shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 50,000.³⁹
- 1.57 The Act also prohibits forced marriages under section 5. If any person acts in contravention of the provisions of section 5 he or she shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 100,000, or to a term of imprisonment not exceeding two years, or to both such fine and imprisonment.⁴⁰

Issues and questions for consideration

ISSUES

³⁵ Vanuatu *Control of Marriage Act* [Cap 45], s 2.

³⁶ Vanuatu *Control of Marriage Act* [Cap 45], s 3.

³⁷ Vanuatu *Control of Marriage Act* [Cap 45], s 7(1).

³⁸ Vanuatu *Control of Marriage Act* [Cap 45], s 6.

³⁹ Vanuatu *Control of Marriage Act* [Cap 45], s 7(2).

⁴⁰ Vanuatu *Control of Marriage Act* [Cap 45], s 7(3).

1. Over the years a reoccurring issue was the marriage age, which allows for boys and girls 15 years to 18 years to be able to marry with parental or guardian consent. This allows for child marriages and possible child exploitation by parents or guardians because under the Child and Family Welfare Act 2017 a child is anyone under the age of 18.
2. The Act allows marriage of a person between 15 and 17 years of age, where consent is given by a parent or guardian. However, the Act is silent on the issue of the young person's consent, and so it is possible that a young person could be married under this provision if their parent/guardian consents, but the young person does not want to be married. In this way, there is a clear inconsistency with the key principle of the CRC that in all actions taken in respect of a child, the primary consideration should be the best interests of the child (Article 3 CRC).
3. There is no requirement to provide birth certificates in order to confirm the ages of the marriageable parties, which means that if the parties have the physical appearance of adults they can easily marry.

QUESTIONS

1. Should the minimum age of marriage be increased? If so, to what age?
2. Should the raised age of marriage also apply to customary marriages?
3. Should there be a requirement for the Minister of Religion or District Registrar to be given any document to prove the parties' age prior to the marriage celebration?
4. Should the revised law provide for the need of consent from the persons intending to marry?
5. Should parental or guardian consent still be required if the minimum age of marriage is increased? For example, in Fiji anyone under 21 years who wants to marry must provide the marriage officer proof of parental consent before the marriage officer can marry the parties to the intending marriage. It is an offence if a marriage officer marries the minors without evidence of parental consent.
6. Should the penalty increase for administering any marriage ceremony if one or both parties are under the age of marriage?

Objection

Current law

- 1.58 Section 11 states anyone who knows of any reasons why the marriage should not take place can give notice, either orally or in writing, to the Minister of Religion or the District Registrar. He or she has to state the reasons for objecting the marriage.
- 1.59 Once the Minister of Religion or District Registrar receives the notice, he or she should enter the word “forbidden” in the register or Islanders’ marriage notice book. He or she will make full inquiry as to the objection to the marriage. If the Minister of Religion or District Registrar is satisfied that the objection is not substantiated, he or she shall cancel the word “forbidden” and the marriage celebration will continue. If the objection is valid, it shall be recorded, duly signed and entered into the register or the Islanders’ Marriage Notice Book. The marriage will not be celebrated.
- 1.60 It is an offence for any person to give an objection without sufficient and proper cause. The person can be liable to a \$20.00 fine and in default of payment, two months’ imprisonment.
- 1.61 There are rarely cases of objection but the few inferences to raising objections were from administration of deceased property cases. For example, in the case of *Taneko v Taneko*,⁴¹ the son objected to the claimed of the deceased’s second wife to the husband’s property stating that she was not the legal wife because the deceased was still legally married to the deceased’s first wife (the objector’s mother). A proper challenge to nullify the marriage as alleged by the objector should have been brought during the deceased’s life time, under *Islanders Divorce Act* (Cap 170), or better still objection raised at the time of celebration of this marriage, under Section 11 (1) of the *Islanders Marriage Act* (Cap 171). The Objector alleged that in 2001, deceased’s wife from Bougainville (his mother from deceased’s first marriage) was still alive at the time deceased celebrated his second marriage with the applicant. The marriage should be declared a nullity by this Court, because the marriage was void.⁴² But the Court refused to agree to the objector’s argument because such argument should have been raised during the time of the celebration of the marriage. And attempt to challenge the validity of the marriage some 5 years after the deceased had died and some 16 years after

⁴¹ *Taneko v Taneko* [2017] SBHC 85.

⁴² Solomon Islands *Islanders’ Divorce Act* [Cap 170], s 12(a).

the marriage was celebrated cannot be accepted by the Court. The Court therefore grants letters of administration to the second wife.

Laws from other jurisdictions

1.62 In Kiribati the *Marriage Ordinance* in section 12 provides the same provision as section 11 of the *Islanders' Marriage Act*. However, the Ordinance penalty for any person who without sufficient and proper cause wilfully gives notice of objection to a marriage shall be liable to a fine of \$50, and, in default of payment, to imprisonment for three months.⁴³

Questions for consideration

1. Should this provision for objection be kept or repealed?
2. Is the penalty fine of \$20 or two months imprisonment is sufficient for the offence?
3. Should the penalty be increased?

Penalty for celebrating marriage without being authorized

Current laws

1.63 Section 12 of the *Islanders' Marriage Act* prohibits an unauthorised person to celebrate any marriage. The penalty for the offence is \$100.00 fine and in default an imprisonment term of six months.

Laws from other jurisdictions

1.64 The Vanuatu *Marriage Act* also prohibits an unauthorized person to celebrate marriage. The offence is punishable to a fine not more than VT50,000 or no more than six months imprisonment. In such a case the marriage shall be void.⁴⁴

1.65 In Fiji there are two separate offences for celebrating a marriage without being authorized. The first one is, that every marriage officer who solemnizes any marriage knowing that his name, designation or usual residence was not registered under the *Marriage Act* [Cap 50]. Such a person will be guilty of an offence and liable to a fine no more than \$100.00 FJD and his registration as a marriage officer will be cancelled.⁴⁵ The second offence occurs when a person

⁴³ Kiribati *Marriage Ordinance* [Cap 54], s 12.

⁴⁴ Vanuatu *Marriage Act* [Cap 60], s 18.

⁴⁵ Fiji *Marriage Act* [Cap 50], s 33.

knowingly and wilfully pretends to be a marriage officer and solemnizes any marriage, shall be guilty and liable on conviction to imprisonment for any term not more than seven years.⁴⁶

Questions for consideration

1. Should the penalty for unauthorized person administering a marriage be increased?
2. Should the revised law on marriage require the publication of registered ministers of religion or marriage officiant names in the newspaper or form of public publication to make the public aware?
3. Should list of marriage administrators be published to the public to know regularly? Once a year or once in two years?

Evidence of Marriage

Current law

1.66 Section 13 of the *Islanders' Marriage Act* requires the evidence of marriage. This is simply a marriage certificate which is valid if it is duly filed. A copy of a certificate of marriage is to be signed and certified as a true copy by a District Registrar. Every entry in any District Marriage Register or a copy of that entry which is signed and certified is admissible in any Court as evidence of the marriage.

Law from another jurisdiction

1.67 In Vanuatu a certified marriage certificate can only be admissible in any court as sufficient evidence of the marriage if it is certified by a District Registrar of Civil Status or by the Registrar-General. Any person who falsifies a copy of a marriage certificate either by addition, alteration or omission shall be guilty of an offence and liable to a fine no more than VT 50,000, or six months imprisonment, or both.⁴⁷

Question for consideration

⁴⁶ Fiji *Marriage Act* [Cap 50], s 35.

⁴⁷ Vanuatu *Marriage Act* [Cap 60], s 17.

Should there be a provision that makes it offence for anyone who falsifies a marriage certificate? Or should we leave the provision to the forgery offence under the *Penal Code*?

CHAPTER 4: REGISTRATION OF MARRIAGE

4.1 Religious Marriage Celebration

Registration of Marriage Before a Minister of Religion

Current law

1.68 Section 15 of the *Islanders' Marriage Act* has strict requirements that any Minister of Religion who celebrated a marriage must within one month of the marriage, transmits the second copy of the certificate to the District Registrar of the District in which the marriage was celebrated. When the District Registrar receives the certificate, he or she should enter the particulars into a book to be kept for the purpose to be called "The District Marriage Register", it must be in the prescribed Form E in the First Schedule and he or she shall file the certificate.

Laws from other jurisdictions

1.69 In Fiji there are two statutory requirements for the registration of marriages officiated by a marriage officer. The first requires the marriage officer who solemnizes the marriage to deliver the signed original of the marriage certificate to the district registrar of the district the marriage was held within seven days. The second requirement is for every end of a quarter: last day of March, June, September and December in each year or as soon as possibly practicable transmit to the Registrar-General in the prescribed form all the particulars and details of all the marriages solemnized by him during the preceding three months.⁴⁸

1.70 In Vanuatu there is no time period for the registration of a marriage officiated by a minister for celebrating marriage or a custom marriage. The *Marriage Act* [Cap 60] only states that either the person who performed the religious marriage, or in the case of custom marriage either the bridegroom or the head of his family or the head of the bride's family or the chief of the village of either parties or an assessor who was present at the marriage, shall on the first occasion forward to the District Registrar a notice under the prescribed form in the Act.⁴⁹

Question for consideration

Should the current one-month time period adequate or be extended to every three month or more?

⁴⁸ Fiji *Marriage Act* [Cap 50], s 25.

⁴⁹ Vanuatu *Marriage Act* [Cap 60], s 15(2).

Penalty for failure to forward certificate for registration

Current law

1.71 Under section 16 of the *Islanders' Marriage Act*, any Minister of Religion who fails to forward the certificate of marriage to the District Registrar within the time prescribed under section 15, shall be guilty of an offence. Upon conviction the offender shall be liable to a fine of \$50.00.

Laws from another jurisdiction

1.72 Under the *Fiji Marriage Act* [Cap 50] section 34, any marriage officer or other person who fails to comply with the Act or fails to transmit the marriage certificate to the Registrar-General or the district registrar shall be guilty of an offence and shall be liable on conviction to a fine not more than \$100.00 Fijian dollars.⁵⁰

Questions for consideration

1. Should the offence of late forwarding of a marriage certificate for registration be retained?
2. Has any Minister of Religion been prosecuted for this failure?
3. If the offence is amended, should the Minister of Religion's failure to fulfil his or her duties under the Act be a ground for removal from being a registered Minister of Religion?

4.2 Civil Marriage Celebration

Registration of a Marriage Before a District Registrar

Current law

1.73 Under section 17 of the *Islanders' Marriage Act*, when a District Registrar celebrates a marriage, the particulars will be entered into the District Marriage Register, file the second copy of the certificate referred to in section 7 of the Act.

Laws from another jurisdiction

1.74 In *Vanuatu Marriage Act* [Cap 50] section 15(1) requires that immediately upon the celebration of any civil, religious or custom marriage shall be registered in conformity with the provision of the *Civil Status Act* [Cap 61].

⁵⁰ *Fiji Marriage Act* [Cap 50], s 34.

Central Registrar

Current law

1.75 Under section 20 of the *Islanders' Marriage Act*, at the end of every quarter, every District Registrar shall forward to the Minister of Home Affairs a return of the particulars of all marriages registered by him/her during that quarter. The Minister of Home Affairs will then forward the particulars to be entered in a Central Register.

Laws from other jurisdictions

1.76 The laws of Fiji give the same requirement that at the end of every quarter every marriage officer must send all the particulars, details and evidence of the marriages in the preceding three months. However, the *Marriage Act* [Cap 50] section 25(3) goes further to specify the dates, these are the last day of March, June, September and December every year.

1.77 In Vanuatu the requirements are more open to interpretation, however section 15(3) states that when the marriage certificate or notice is completed, the parties to the marriage shall be issued by the Registrar-General with a certified copy of the page of the Central Registrar relating to their marriage.⁵¹

Questions for consideration

1. Should this provision be amended to a provision similar to the Vanuatu *Marriage Act* [Cap 60] section 15(3)? The provision states that Registrar-General will issue the couple with a certified copy of the page of the Central Registrar relating to their marriage registration.
2. Should there be a specific date for the submissions each quarter like in Fiji?

Search for Marriage Registrar

Current law

1.78 Under section 21, during office hours at all times, the District Registrar shall allow the District Marriage Register to be searched. Given that the prescribed fee is paid and the certified copy of the receipt is presented.

⁵¹ Vanuatu *Marriage Act* [Cap 60].

4.3 Custom Marriage

Voluntary registration of marriage in accordance with custom

Current law

1.79 Pursuant to section 18 of the *Islanders' Marriage Act*, any Islander who had married according to custom may apply to the District Registrar to have the marriage registered under this Act. Each party shall make a declaration before the District Registrar in Form F. After the declaration is made, the District Registrar shall register the marriage.

Laws from other jurisdictions

1.80 Section 15 of *Vanuatu Marriage Act* [Cap 60] requires registration of custom marriages either by the groom, or the head of either the groom's family or bride's family or the chief of the village of either parties or an assessor present at the marriage. This is a mandatory requirement, however, the responsibility to register the marriage varies. The priest or pastor will register the marriage if there is a religious service linked to the customary marriage; or in some cases the responsibility is on the village chief's secretary, or the secretary to the Chief's or village council in the groom's village.⁵² Consequently, as has been observed, an issue arising from the situation in Vanuatu that sometimes, persons carrying the responsibility fail to register the marriage.

1.81 However, section 40 of the *Civil Registration Act*, requires that all marriages that takes place in the country must be registered.⁵³ But section 39 of the *PNG Civil Registration Act (Amendment) 2014* states that this requirement is voluntary but it provides the procedure and the required information for the registration of customary marriage. One of the main reasons for not making customary marriage registration mandatory is because of the lack of facilities available to do so, despite the willingness of the parties to register their customary marriage.⁵⁴

⁵² Corrin Care, *Law and Family in the South Pacific*, page 92.

⁵³ *Papua New Guinea Civil Registration Act* [Chapter No. 304], s 40.

⁵⁴ *Customary Marriage Laws in the Commonwealth*, John Luluaki, page 25.

Issue and questions for consideration

ISSUE

1. Registration is not mandatory for all forms of marriage, and it is only on voluntary basis. The issues with non-registration of customary marriages are the exclusion of the crime of bigamy, and as well as the difficulty for women to access maintenance without the proof of marriage. The CEDAW convention also has the obligation on its State Parties to ensure that all forms of marriage are registered.

QUESTIONS

1. Should customary marriage registration be mandatory?
2. If so, could registration be made easier other than going to the District Registrar?
3. If the provision is amended to make registration mandatory, how practicable is that for people who live in rural areas with little to no access to the registration services?

Effect of voluntary registration

Current law

- 1.82 Section 19 of the *Islanders' Marriage Act* provides that once a customary marriage is registered, the divorce law will apply to customary marriages registered under section 18 of the *Islanders' Marriage Act*.
- 1.83 If during the continuance of such marriage either party thereto shall contract another marriage, whether under this Act or under the *Pacific Islands Civil Marriages Order in Council 1907* or according to the custom of Islanders, such party shall be guilty of bigamy and liable to punishment.
- 1.84 One of the main effects of voluntary registration of a customary marriage is that either spouse can file for divorce under the *Islanders' Divorce Act* [Cap 170] and have the law of that Act applicable to them.

Laws from another jurisdiction

- 1.85 In Papua New Guinea (PNG) there is no legal provision for voluntary registration of customary marriage. However, the *Marriage Law 1963* [Chapter 280] section 3 recognizes customary marriage without any statutory requirements. There is no requirement for the registration of a customary

marriage⁵⁵. The only requirement is that the formation and recognition of the customary marriage is in accordance with the custom prevailing in the tribe or group to which the parties to the marriage or either of them belong or belongs. As a result, a customary marriage is valid and effectual for all purposes.⁵⁶ Any divorce or dissolution of such marriage must be in accordance of the tribal custom(s) of the parties.

1.86 Moreover, the PNG *Civil Registration (Amendment) Act 2014* in section 43A provides an avenue for the dissolution of customary marriages. The statutory requirements a District Court shall, on application by a person married under custom, and on being satisfied that the marriage has been dissolved in accordance with custom, grant him a certificate that the marriage has been so dissolved. A District Court will then issue a certificate granting the dissolution which will then be submitted to the Registrar-General. The Registrar-General shall enter the particulars of the parties to the customary divorce in the registrar and thereafter issue a certificate of dissolution of customary marriage. The dissolution of a customary marriage is valid and effectual for all purposes.⁵⁷

⁵⁵ Papua New Guinea *Marriage Law 1963* [Chapter 280], s 3(2).

⁵⁶ Papua New Guinea *Marriage Law 1963* [Chapter 280], s 3.

⁵⁷ Papua New Guinea *Civil Registration (Amendment) Act 2014*, s 43A.

Issues and questions for consideration

ISSUES

1. Marriage in accordance to the custom of the Islanders under section 4 of the *Islanders' Marriage Act* is recognized as a valid form of marriage. The *Constitution* recognizes customary law as an applicable law in the any area of the Solomon Islands under section 144(1). The exclusion of the offence of bigamy both under the *Islanders' Marriage Act* and the *Penal Code* for unregistered customary marriage can be argued as inconsistent with section 4 of the *Islanders' Marriage Act* which recognizes custom marriage as valid marriage.
2. The accessibility to the registration services is an issue in rural areas and hence a reason for not requiring mandatory registering of customary marriages. The registrations only happen when a couple will need to make some formal declarations which require proof of marriage. It is important that the registration of customary marriage be made accessible and easy to everyone.

QUESTION

Should the Solomon Islands adopt a system for the recognition of customary marriage and the dissolution of customary marriage similar to the Papua New Guinea *Marriage Act 1968*. Whereby a Magistrate Court will be able to receive applications for the dissolution of a customary marriage and issue a certificate declaring that the marriage has been dissolved, on being satisfied that the marriage has been dissolved in accordance with custom?

CHAPTER 5: GENERAL PROVISIONS

Current law

- 1.87 Section 22 of the *Islanders' Marriage Act* prohibits making any false declarations for the purpose of the Act. The offence carries a maximum of fine of \$100.00 or imprisonment of six months.
- 1.88 Section 23 of the Act empowers the Minister of Home Affairs to prescribe the fees to be paid under the Act. The Minister in 1998 through the *The Islanders' Marriage (Fees) (Amendment) Rules 1998* amended the Third Schedule Fees⁵⁸ for the following:
- I. Filing Notice - \$10.00
 - II. Issuing Certificate - \$10.00
 - III. Certifying any extract from a Marriage Register - \$15.00
- 1.89 The last section of the *Islanders' Marriage Act* section 24 gives the Minister of Home Affairs additional powers to make such rules as maybe necessary for carrying out the purposes of this Act.

Questions for consideration

1. Should the penalty for making false declarations under section 22 be increased? If so, what should the appropriate penalty?
2. Should the fees be increased? If so, what should the appropriate fees?

⁵⁸ These are still the current fees.

CHAPTER 6: OTHER LAWS RELEVANT TO MARRIAGE

6.1 *Pacific Islands Civil Marriages Order In Council 1907*

Current law

- 1.90 This Order was made by the High Commissioner for the West Pacific. Article 3 of the Order divides the Protectorate into districts for the purpose of Marriage Districts. Under Order 2(a) the order includes “the Solomon Islands Marriage District comprising the whole of the Solomon Islands British Protectorate”. The Order also enables the High Commissioner from time to time by Order could alter the Marriage Districts either by alteration of the boundaries or by union or subdivision of districts or by the formation of new districts.
- 1.91 In 1978 the Minister of Home Affairs issued the *Civil Marriages (Constitution of Marriage Districts) Order 1978* which established the following Marriage Districts: the Western Marriage District, the Malaita Marriage District, the Central Marriage District, and, the Eastern Marriage District. This Order regulates marriages between a Solomon Islands citizen and a foreign passport holder who may be a non-Islander or is a Solomon Islander by decent but holds a foreign passport and citizenship.

Questions for consideration

1. Should this Order be replaced and incorporated relevant provisions of the Order into the revised law governing marriage?
2. Should there still be a distinction in the type of marriage certificate issued between two citizens and a citizen marrying a non-citizen?

6.2 *Marriage of British Subjects (Facilities) Act [Cap 172]*

Current law

- 1.92 This Act provides for the issuing of the certificate for marriage to a British subject resident in Solomon Islands or when one of the two British subjects is residing in the United Kingdom, and the party to the intending marriage wish to marry in the Solomon Islands. The marriage certificate will then be issued in the Solomon Islands by a Registrar of Marriages appointed under the *Pacific Islands Civil Marriages Order in Council 1907*.

Question for consideration

Is this Act still relevant to the Solomon Islands? If so, should the relevant provisions of the Act be incorporated in the revised marriage law?

6.3 Penal Code [Cap 26]

1.93 The current *Penal Code* of the Solomon Islands has three criminal offences relating to marriage under Part XVII. Section 169 of the Code is on fraudulent pretence of marriage; section 170 is on bigamy; and, section 171 on a marriage ceremony fraudulently gone through without lawful marriage.

Fraudulent Marriage

Current law

1.94 It is an offence to fraudulently cause a woman to believe that she is married and to cohabit or have a sexual relationship. The offence is a felony which attracts a penalty of ten years imprisonment.⁵⁹ It is also an offence to dishonestly or fraudulently go through marriage ceremony knowing it is not lawful with a penalty of imprisonment for five years.⁶⁰ These offences are directed to prevent sham or pretend marriages. It is not clear whether these offences apply to all marriages, including custom marriages.⁶¹

Laws from another jurisdiction

1.95 In the *Fiji Crimes Decree 2009* the same offences are addressed under Part 11 Sub-Division J. Under section 203 the offence of fraudulent pretence of marriage wilfully and with fraudulent intentions to cause any person who is not married to him or her to believe that he or she is lawfully married to cohabit or have sexual intercourse in that belief. The penalty is ten years imprisonment.

1.96 The *Fiji Crimes Decree 2009* section 205 makes it an offence for any person who dishonestly or with fraudulent intention goes through a ceremony of marriage knowingly that he or she is not thereby lawfully married. The penalty is five years imprisonment. This provision is the same as section 171 of the Solomon Islands *Penal Code* [Cap 26].

Questions for consideration

1. Are the offences still necessary?
2. If these offences are retained in the *Penal Code* should the offences be drafted in a gender-neutral language where should apply to both women and men?
3. Should the offences apply to customary marriage as well?

⁵⁹ Solomon Islands *Penal Code* [Cap 26], s 169.

⁶⁰ Solomon Islands *Penal Code* [Cap 26], s171.

⁶¹ SILRC 'Review of Penal Code and Criminal Procedure Code Issue Paper 1' 2008 p158.

6.4 Covenant Marriage and Conventional Marriage

- 1.97 The current statutory marriage requirements in the *Islanders' Marriage Act* follow the traditional Christianity marriage requirements in which it covers the formation for a marriage to take place, and the same applies to the divorce law in the *Islanders' Divorce Act*. In some jurisdictions, there are different categories of marriage. For example, in the State of Louisiana⁶² of the United States of America which has two avenues for a couple to get married and through which divorce cases will be determined. These two avenues differ in terms of the requirements for divorce.
- 1.98 The provision for two types of marriage is a compromise struck to accommodate for the two main views on divorce. The covenant marriage is the reflection of the Christianity position to protect the marriage as much as possible while the conventional marriage is a reflection on the contemporary view that when the couple decides to separate - there should not be any difficulty in facilitating their wishes.

Covenant Marriage

- 1.99 This type of marriage is the one reflected in the *Islanders' Marriage Act*. This type of marriage recognises a spouse has to commit a fault in order for a divorce petition can be filed. In the State of Louisiana, a couple can choose the main requirement for a party intending to marry to attend pre-marital counselling on the commitments, purposes and responsibilities of marriage. The parties will recite and sign a declaration of intent to acknowledge that marriage will be a lifelong relationship and pledge to take all reasonable efforts to preserve their marriage. This puts the couple under a legal obligation to get counselling when they experience marital difficulties before filing for a divorce. This avenue adopts a fault-based system.
- 1.100 In the State of Louisiana, under the avenue of covenant marriages, marriage can only be dissolved by proving martial fault or a two-year separation. The grounds for a divorce petition include: (a) adultery, (b) physical abuse, (c) desertion for one year or (d) a felony conviction for which the sentence is death or hard labour.⁶³

⁶² *Louisiana Laws Revised Statutes* TITLE 9 – Civil code-ancillaries RS 9:237.

⁶³ Ian Smith, *Going Separate Ways? Recent Divorce Reforms in the United States and England and Wales*.

Conventional Marriage

1.101 The conventional marriage in the State of Louisiana allows for a marriage to be dissolved unilaterally. This means that a party can file for a petition for divorce and is granted automatically after the lapse of six months, if the parties or the spouses are living separately during that six-month period. This is not a fault-based system as it is an automatic divorce system without the requirements of the grounds provided in fault-based system.

1.102 The current English divorce law in the *Family Law Act 1996* is a non-fault-based system. The Act allows a divorcing spouse to file a divorce petition without fault or without the consent of the other spouse. Upon petition, a decree is issued either after a one-year waiting period or after eighteen months in cases where there is a child of the family under the age of 16 or if one party opposes the divorce. The procedures provided by the Act also emphasize mediation as a substantive stage of the divorce process, which is done during a waiting period during which matrimonial disputes are intended to be resolved.⁶⁴

Question for consideration

Should the revised law on marriage provide for two types of marriage, i.e covenant marriage and conventional marriage?

⁶⁴ Ian Smith, *Going Separate Ways? Recent Divorce Reforms in the United States and England and Wales*.

PART 2: DIVORCE LAW

CHAPTER 1: INTRODUCTION TO THE ISLANDERS DIVORCE ACT [CAP 170]

- 2.1 The Act has 24 sections and five parts: Part I covers the preliminary matters. Part II is on divorce. Part III is on the nullity of marriage. Part IV is on judicial separation; and Part V contains some general provisions.
- 2.2 The Act has two schedules. The first schedule contains the approved forms and the second schedule provides for the fees. The *Islanders' Divorce Act* was amended in 1998 by Parliament through *The Islanders' Divorce (Amendment) Act 1998*. The amendment provides for the ground of irretrievably broken down of marriage due to living apart for five years.⁶⁵
- 2.3 The divorce part of the consultation paper has 7 chapters;
- i. Chapter 1: Introduction to the *Islanders Divorce Act* [Cap 170]
 - ii. Chapter 2: Preliminary Matters
 - iii. Chapter 3: Grounds for Divorce
 - iv. Chapter 4: Divorce Process
 - v. Chapter 5: Nullity of Marriage
 - vi. Chapter 6: Judicial Separation
 - vii. Chapter 7: General Provisions

⁶⁵ Solomon Islands *Islanders Divorce (Amendment) Act 1998*.

CHAPTER 2: PRELIMINARY MATTERS

Current Laws

- 2.4 Section 1 of the *Islanders' Divorce Act* [Cap 170] contains the short title of the Act.⁶⁶
- 2.5 Section 2 contains the interpretation which provides for the definition of the 'Court' and 'District Registrar'. The 'Court' is defined to mean the High Court. The 'District Registrar' is defined to mean the Magistrate of a District under the *Magistrates Courts Act* or other person performing the duties of the District Registrar under the *Islanders' Marriage Act*.⁶⁷
- 2.6 Section 3 is the application of the Act. The Act applies to marriages between two islanders marrying:
- by a Minister of Religion or a District Registrar; or, under the provisions of the *Pacific Islands Civil Marriages Order in Council 1907*; or
 - by the custom of Islanders and it was registered in accordance with section 18 of the *Islanders' Marriage Act*; and
 - Where the husband is an islander domiciled in Solomon Islands.⁶⁸ In such cases the marriage may only be dissolved, annulled or judicial separation ordered by the Court.
- 2.7 Section 4 provides that unregistered customary marriage can only be dissolved, annulled or separated in accordance with the custom of the Islanders.⁶⁹
- 2.8 Furthermore, the term 'islander' is defined in the *Interpretation and General Provisions Act* [Cap 85] as:
- Any person whose both parents are and were members of a group, tribe or line indigenous to Solomon Islands; or
 - Any person whose parents or ancestors was at least a member of a race, group, tribe or line indigenous to any island in Melanesia, Micronesia or

⁶⁶ Solomon Islands *Islanders Divorce Act* [Cap 170], s 1.

⁶⁷ Solomon Islands *Islanders Divorce Act* [Cap 170], s 2.

⁶⁸ Solomon Islands *Islanders Divorce Act* [Cap 170], s 3.

⁶⁹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 4.

Polynesia and who is living in Solomon Islands in the customary mode of life of any race, group, tribe or line.⁷⁰

Laws in other jurisdiction

- 2.9 The preliminary provisions under the *Native Divorce Ordinance* of Kiribati contains the short title, the application of the Act and the Interpretation provision.⁷¹ The Ordinance define the terms 'Court' and 'island'. The Act shall be applied within the jurisdiction of the Magistrates Court and the Court has the power to hear and adjudicate upon petitions for dissolution of marriage between natives when both petitioner and respondent are domiciled in the Gilbert Islands and the petitioner is an ordinary resident within the jurisdiction of such Court.⁷²
- 2.10 The preliminary provisions of the *Divorce and Matrimonial Causes Ordinance 1961* of Samoa defines the term 'Court' to mean the Supreme Court and 'registrar' means a Registrar of the Court including a Deputy and Assistant Registrar. The Supreme Court has jurisdiction over divorce and matrimonial matters and may be exercised by the judge. Any act or power under the Ordinance, it can be exercised by the Registrar in circumstances as provided in the Ordinance.⁷³ The layout of the preliminary provisions are similar to the *Islanders Divorce Act* [Cap 170].
- 2.11 With regards to the divorce for customary marriages, Papua New Guinea under the *Customs Recognition Act* section 5(f) recognizes dissolution of customary marriage subject to the exceptions set out under section 3. Section 3 provides that custom shall be recognised and enforced and pleaded in all courts except in cases or context where: the Court thinks it's recognition or enforcement would cause injustice and not in the interest of the public and in cases where the recognition or enforcement of the custom would not be in the best interest of the child under the age of 16.⁷⁴ However, the Act does not state the process and requirements of customary divorce. The *Village Court Act 1989* of PNG allows the Court to deal with custody of children or guardianship of a child who is born illegitimate or whose parents were married in customary law. However, the Village Courts have no power to grant divorce.⁷⁵

⁷⁰ Solomon Islands *Interpretation and General Provisions Act* [Cap 85], s 17.

⁷¹ Kiribati *Native Divorce Ordinance* (1977), ss 1-3.

⁷² Kiribati *Magistrates Courts Ordinance* (1977), s 2 and s 5.

⁷³ Samoa *Divorce and Matrimonial Causes Ordinance 1961*, ss 1-3.

⁷⁴ Papua New Guinea *Customs Recognition Act 1963*, s 3.

⁷⁵ Papua New Guinea *Village Courts Act 1989*, s 47.

2.12 The *Matrimonial Causes Act* of Vanuatu also recognizes dissolution, annulment or separation of customary marriage according with custom.⁷⁶ However does not state the processes and requirements for a customary divorce which is the same as Solomon Islands and Papua New Guinea.

2.13 In relation to the definition of marriage, the *Fiji Marriage Act* [Cap 50]⁷⁷ defines 'marriage' as a voluntary union of one man and woman to the exclusion of all others. The *Islanders Marriage Act* refers to a marriage as between 'islanders',⁷⁸ the *Islanders Divorce Act* refers to marriage as 'between two islanders'.⁷⁹ On the other hand, the *Matrimonial Causes Act* of Vanuatu refers to marriage as between 'two persons'.⁸⁰

Issues and Questions for consideration

ISSUE 1: Section 3

Section 3 states that the Act shall only apply to marriages between 'two islanders'. The term 'two islanders' may be subject to different interpretations. The term to describe the union of marriage in other countries like Fiji is straight forward as it refers to marriage as a union between a man and a woman. Similarly, the term for marriage under the *Islanders Marriage Act* and the *Islanders Divorce Act* should be clear and consistent.

Question

1. Should the term 'two islanders' be removed and replaced and define marriage in the revised legislation as a union between a 'man and woman'?

ISSUE 2: Section 3

Section 3 of the *Islanders' Divorce Act* provides for where the 'husband' is an islander domiciled in Solomon Islands, what about situations where the 'wife' is an islander domiciled in Solomon Islands? This Act is also the divorce law for couples who marry under the *Pacific Islands Civil Marriages Order 1907* so it will make it harder for wives who want a divorce from a husband who lives overseas

⁷⁶ Vanuatu *Matrimonial Causes Act*, s 4.

⁷⁷ *Fiji Marriage Act* [Cap 50].

⁷⁸ Solomon Islands *Islanders Marriage Act* [Cap 170], s 4.

⁷⁹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 3.

⁸⁰ Vanuatu *Matrimonial Causes Act*, s 4.

with no intention of returning or cannot return due to some immigration issues. Laws enacted must be gender neutral. But in the case of wives domicile in Solomon Islands could they rely on the five years irretrievable marriage breakdown (living separately for five years) as a ground for divorce?

Question

1. Should the term 'domiciled' be removed from the Act to make the situation easier for a wife who wants to divorce husband who lives overseas?

ISSUE 3: Section 4

Under this section, women are more at risk to be discriminated against due to the type of custom, which will be applied for their divorce. However, the courts so far applied the Common Law and Equity principles when it comes to custody settlements and as well as maintenances for wives.

Questions

1. Should the court, local court, be explicitly empowered to hear customary dissolutions of marriage that are discriminatory to women?
2. How is customary marriage dissolved in your custom?
3. Should the law prohibit customary dissolutions of marriages that are discriminatory?
4. Should the revised law explicitly provide for the local courts to deal with customary dissolution of marriages?

CHAPTER 3: GROUNDS FOR DIVORCE

Current Laws

2.14 Section 5 is provided under Part II of the *Islanders Divorce Act* [Cap 170], however section 5 will be covered in this chapter while the rest of the provisions in Part II will be captured later in Chapter 4.

2.15 Section 5 of the *Islanders' Divorce Act* [Cap 170] provides for the grounds for divorce. The provision states that either the husband or the wife can present a petition for divorce to the High Court. The grounds for divorce are:

- adultery, or
- desertion of the petitioner without reason for at least three years; or
- cruelty; or
- continuous separation for at least five years;⁸¹
- unsound mind and has continuously been under care and treatment for at least five years;
- and petition can be made by wife on the ground that the husband has been guilty of rape, or sodomy, or bestiality.⁸²

Laws in other Jurisdictions

2.16 In Samoa, application for divorce made under the *Divorce and Matrimonial Causes Ordinance 1961* must be based on the ground that the marriage has broken down irretrievably. The parties must prove that they have lived separately for a period not less than two years. Where the Court is satisfied that a party to the marriage is subject to domestic violence, Court may also hold that the marriage has been broken down irretrievably, even if the parties are living together for a continuous period of two years. However, a decree of divorce will not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.⁸³

2.17 In Tokelau, there are only three grounds for the dissolution of marriage: adultery, cruelty, and living apart for three years.⁸⁴ Cook Islands on the other

⁸¹ Solomon Islands *The Islanders' Divorce (Amendment) Act 1998*.

⁸² Solomon Islands *Islanders Divorce Act* [Cap 170], s 5(1)(a-d).

⁸³ Samoa *Divorce and Matrimonial Causes Ordinance 1961*, s 7(4).

⁸⁴ Tokelau *Divorce Regulations 1987*, s 3.

hand has fifteen grounds for divorce. The grounds includes; adultery, artificial insemination by a man or woman other than husband, wilful desertion without just cause, failure to comply with a decree of conjugal restitution for more than three years, habitual drunkenness or drug addiction combined with neglect or cruelty on part of the husband and failure to carry out her domestic duties on the part of the wife, conviction for a serious criminal offence including rape, sodomy, murder, incest and under-age sexual intercourse, insanity and separation.⁸⁵

- 2.18 Similar to Samoa, the *Family Law Act 2003* of Fiji has the no fault based system to dissolution of marriage.⁸⁶ However, for no fault based system, the applicant must also prove that the marriage has been broken down irretrievably and that the parties can no longer live together as husband and wife.⁸⁷ Section 30(2) of the Fiji *Family Law Act 2003* provides that states that a ground for divorce will be held to have been established, and an order for dissolution of marriage must be made only if the court is satisfied that the parties have been separated or have lived separately and apart for a continuous period of not less than twelve months preceding the date when the application for divorce was filed.⁸⁸ Moreover, the dissolution of marriage will not be granted by the Court if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed.⁸⁹

⁸⁵ New Zealand *Matrimonial Proceedings Act 1963*.

⁸⁶ Fiji *Family Law Act 2003*, s 30.

⁸⁷ Sue Farran, *Law and the Family in the South Pacific*, 2011, p.130.

⁸⁸ Fiji *Family Law Act 2003*, s 30(2).

⁸⁹ Fiji *Family Law Act 2003*, s 30(3).

Questions and Issues for consideration

Issue 4: Section 5

The restrictive time period and grounds for divorce makes obtaining a divorce a lengthy and difficult process which makes it inconvenient for couples who wish for a quick divorce. It is understandable that the Courts will try to save the sanctity of marriage, however there are circumstances which a quick divorce is necessary.

Questions

1. Should the law allow for those who wish to divorce to divorce freely so long as they live apart for one year or two years without cohabitation? If yes, should this only apply to conventional marriages?
2. Should we still retain the fault-based system to divorce for covenant marriage?
3. In non-fault-based jurisdictions, what are the grounds for divorce?

ISSUE 5: Section 5 (Criminal Convictions)

Criminal conviction is a ground for divorce under the *Islanders Divorce Act* [Cap 170] but is not equally applied to both spouses, only a respondent husband can be guilty of rape, sodomy or bestiality and sued for divorce by his wife. This provision reflected the old definition of rape where only men can commit rape on a woman or girl without her consent. However under the *Penal Code (Amendment)(Sexual Offences) Act 2016*⁹⁰ rape is now referred to as a person committing sexual intercourse with another person. This is a gender-neutral offence which can be committed by both males and females.

Question

1. Should the last paragraph in section 5(d) where a wife can apply for divorce on the grounds that the husband is guilty of rape, sodomy and bestiality be reformed to be gender neutral?

⁹⁰ Solomon Islands *Penal Code (Amendment) (Sexual Offences) Act 2016*, s 13F.

CHAPTER 4: DIVORCE PROCESS

Current laws

2.19 Part II of the *Islanders Divorce Act* comprises of sections 5 to 11. However, section 5 which is on the grounds for divorce is captured under Chapter 3. Thus, this chapter will only cover sections 6 – 11 which is on the duty of the court and other procedural requirement for petition.

Form of petition

2.20 Section 6 provides for Form A as the required form for petition. Form A is provided under the First Schedule and shall be verified by the petitioner by a sworn statement or affidavit in the Form B.⁹¹

Affidavit of service of petition

2.21 For procedural purposes, a copy of the petition shall be served personally to the respondent and co-respondent (if any) unless the court directs otherwise. Such service shall be verified by a sworn statement in the Form C of the First Schedule.⁹²

Adulterers to be made co-respondents

2.22 Section 7 provides for the adulterers can be made co-respondents in cases where adultery is alleged in the petition.⁹³

Duty of the Court on presentation of petition for divorce

2.23 Section 8(1) provides that it is the duty of the Court to enquire into the alleged facts and check whether there has been any connivance or condonation on the part of the petitioner; and also, whether there exists any collusion between the parties and to enquire about any counter-charge made against the petitioner.⁹⁴

2.24 In the event that the court is satisfied on the evidence that: (i) *the case for the petitioner has been proved; (ii) where the ground of petition is adultery and the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petitioner is cruelty; the petitioner has not in any manner condoned the cruelty and (iii) the petition is not presented or prosecuted in collusion*

⁹¹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 6.

⁹² Solomon Islands *Islanders Divorce Act* [Cap 170], s 6(2).

⁹³ Solomon Islands *Islanders Divorce Act* [Cap 170], s 7.

⁹⁴ Solomon Islands *Islanders Divorce Act* [Cap 170], s 8(1).

with the respondent or either of the respondent. The court shall pronounce a decree of divorce.

- 2.25 The Court shall pronounce a decree of divorce, declaring that marriage shall be dissolved upon the expiration of the period specified in and the issue of the notice in Form D as provided in section 11.⁹⁵
- 2.26 Furthermore, the Court shall dismiss the petition if it finds that the petitioner has been guilty of adultery during the time of the marriage, also if in the opinion of the Court the petitioner is guilty of:
- (a) Unreasonable delay in presenting or prosecuting the petition; or
 - (b) Cruelty towards the other party to the marriage; or
 - (c) Where the ground for petition is adultery or cruelty, or desertion or wilful separation without reasonable excuse before the adultery or cruelty complain was made; or
 - (d) Where the ground of the petition is adultery or unsoundness of mind, or desertion of such wilful neglect or misconduct as has conducted to the adultery or unsoundness of mind or desertion.⁹⁶

Dismissal of respondent or co-respondents from proceedings

- 2.27 On the petition of a husband for divorce, the alleged adulterer is made a co-respondent, and on the petition of a wife for divorce, the person with whom the husband is alleged to have committed adultery is made a respondent. The Court will close the evidence on the part of the petitioner and may direct the co-respondent or respondent, to be dismissed from the proceedings if the Court thinks that there is not sufficient evidence against him or her.⁹⁷

Relief to respondent on petition for divorce

- 2.28 If the respondent opposes the relief sought, the Court may give to the respondent the same relief which he would have been entitled if he had presented a petition seeking such relief.⁹⁸

⁹⁵ Solomon Islands *Islanders Divorce Act* [Cap 170], s 8.

⁹⁶ Solomon Islands *Islanders Divorce Act* [Cap 170], s 8.

⁹⁷ Solomon Islands *Islanders Divorce Act* [Cap 170], s 9.

⁹⁸ Solomon Islands *Islanders Marriage Act* [Cap 170], s 10.

Re-marriage of divorced persons

2.29 Section 11 of the *Islanders' Divorce Act* allows for the petitioner, subject to any appeal, to re-marry after three months of the dissolution of marriage by the Courts. The Court shall issue a notice in the Form D as provided under the First Schedule where the parties may remarry again as if the prior marriage has been dissolved by death.⁹⁹

Laws in other Jurisdictions

2.30 The *Matrimonial Causes Act 1973* of Vanuatu provides for similar provision in relation to the duty of the court to enquire into the alleged facts by the petitioner. If the Court is satisfied with the evidence given and that the marriage has been irretrievably broken down the court will first declare a decree nisi. The decree nisi shall not be absolute before the expiration of 6 months from its grant unless the High Court through general order from time to time fixes a shorter period, or unless any particular case the court in which the proceedings are for the time being pending from time to time by special order fixes a shorter period otherwise applicable for the time being by virtue of this subsection.¹⁰⁰

2.31 In Samoa, the *Divorce and Matrimonial Causes Ordinances* in Part 4 provides the procedural requirements such as; affidavit to verify the petition, serving petition, mode of taking evidence, enforcement orders, costs, fees to name a few.¹⁰¹ However, in Solomon Islands the costs, damages and fees are provided in the general section of the *Islanders Divorce Act* [cap 170]. The duty of the court in relation to divorce proceedings are captured under divorce sections which is similar to Solomon Islands.

⁹⁹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 11.

¹⁰⁰ United Kingdom *Matrimonial Causes Act 1973* (for Vanuatu), s 1(3-5).

¹⁰¹ Samoa *Divorce and Matrimonial Causes Ordinance*, ss 27-38.

Questions and issues for consideration

ISSUE 6: Section 7

Section 7 is an old and out-dated provision which only seeks to put and make another person to share the blame for the eventual breakdown of a marriage.

Questions

1. Should this section be retained or removed?
2. Should we remove the law that requires the other adulterer to be the co-respondent? If not, why should we maintain such law?

ISSUE 7: Section 8

The Court has the discretion to reject petition based on connivance or condonation by the petitioner and collusion between the parties. While this may help the parties to reconcile and protect the sanctity of marriage, but it is a hindrance to parties who would want a quick divorce despite past actions.

Questions

1. Under section 8(2) (iii) is five years reasonable time or should it be reduced to two years or even one year?
2. What court should hear petitions for divorces? High Court? Magistrate Courts? Local Courts?

ISSUE 8: Section 9

Section 9 provides for dismissal of respondent or co-respondent from the proceedings. On the petition of a husband for divorce, the alleged adulterer can be made a co-respondent or on the petition of a wife for divorce, the person whom the husband is alleged to have committed adultery is made a respondent. After the close of evidence, they Court may direct the co-respondent or respondent to be dismissed from the proceeding providing that there is not sufficient evidence against him or her.

Questions

1. Should section 9 be retained, if so, should there be compensation for a respondent or co-respondent who was dismissed from the proceedings?

ISSUE 9: section 10

Section 10 is on relief to respondent on petition for divorce. If the respondent opposes the relief that was sought during the proceedings for divorce, the Court may give to the respondent the same relief he would have been entitled to if he had presented a petition seeking for such relief.

This provision is discriminatory because it only rewards a husband when he is the aggrieved party but not the wife when she is the aggrieved party in a divorce proceeding on the grounds of adultery.

Question

1. Should section 10 be drafted in a gender-neutral manner?

ISSUE 10: section 11

Section 11 provides for the re-marriage of divorced persons. The provision states after three months of the dissolution of marriage by the Court and subject to an appeal, if there's any, having terminated in favour of the petitioner, the Court shall issue a notice in Form D where the parties to the marriage may remarry as if the first marriage had been dissolved by death.

Questions

1. Should this section 11 be retained?
2. If so, is the three months period after a divorce is finalised too long or too short for parties if they want to re-marry? If too long, what should be the waiting period?

CHAPTER 5: NULLITY OF MARRIAGE

Current laws

2.32 Section 12 of the *Islanders' Divorce Act* provides for the decree of nullity in respect of void marriage. The Court can pronounce a decree of nullity for a void marriage if it satisfies any of the following:

- a) one of the parties was already married and that earlier marriage was still in existence; or
- b) marriage was induced by duress or mistake; or
- c) one of the parties had been certified as an insane person under the *Mental Treatment Act* or that such party, though not so certified under MTA was of reason of unsoundness of mind incapable of understanding the nature of the ceremony; or
- d) parties were within the prohibited degrees of consanguinity or affinity; or
- e) Subject to the provisions of section 8 of the *Births, Marriages and Deaths Registration Act*, the marriage was not celebrated in due form.¹⁰²

2.33 Section 13 of the Act provides the decree of nullity in respect of voidable marriage. The Court shall pronounce a decree of nullity if it is proven that:

- a) Marriage was not consummated due to the incapacity or wilful refusal of the respondent to consummate.
- b) that either party to the marriage was, at the time of the marriage, a person of unsound mind within the meaning of the *Mental Treatment Act*, or subject to recurrent fits of insanity or epilepsy; or
- c) that the respondent was, at the time of the marriage, suffering from venereal disease (sexually transmitted disease) in a communicable form; or
- d) that the respondent was, at the time of her marriage, pregnant by another person than the petitioner:

¹⁰² Solomon Islands *Births, Marriages and Deaths Registration Act* [Cap 169], s 8.

Provided that in the cases specified in paragraphs (b), (c) and (d), the Court shall not grant a decree unless it is satisfied –

- i. that the petitioner was, at the time of the marriage, ignorant of the facts alleged;
- ii. that proceedings were instituted within a year of the date of the marriage; and
- iii. that sexual intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of grounds for a decree.

(2) Any child born of a marriage avoided in pursuance of paragraphs (b), (c) and (d) of the last foregoing subsection shall be a legitimate child of the parties notwithstanding that the marriage is so avoided.

(3) Nothing in this section shall be construed as validating any marriage which is by law void but with respect to which a decree of nullity has not been granted.

2.34 Section 14 provides for the following:

- i. Every petition for nullity of marriage shall state shortly the material facts relied upon and shall be in the Form E in the First Schedule.
- ii. Every such petition shall be verified by affidavit in the Form F in the First Schedule.
- iii. A copy of the petition shall be served upon the respondent personally unless the Court shall otherwise direct. Such service shall be verified by affidavit in Form G in the First Schedule.

2.35 Section 15 provides for evidence hearing for nullity of marriage proceeding on the question of sexual capacity be heard in camera (closed court) unless the Court is satisfied that for the interest of justice the evidence can be heard in an open Court.

Case Laws

- 2.36 In *Salumata v Kelly*¹⁰³ the facts of the case show that the petitioner and respondent got married in a family home because the petitioner was pregnant and was not able to marry in the SDA Church. It was held that the marriage of the petitioner and the respondent was not celebrated according to the procedures or requirements to a valid marriage as prescribed by the *Islanders' Marriage Act*, sections 5(a) (b) (c) and section 8. The requirements are; a written notice must be posted at least three weeks before the date of the intended marriage, notice to remain until celebration of the marriage and minister of religion to keep a register or records of the marriage information.¹⁰⁴ The marriage must be celebrated in the church between 6am to 6:30pm (time and place of marriage before a minister of religion).¹⁰⁵ Therefore, the Court declared a decree of nullity for the marriage as there was never a marriage between the petitioner and the respondent due to the reasons mentioned above.
- 2.37 In *K.H v K.K*,¹⁰⁶ the petitioner filed a petition seeking a decree of nullity of marriage based on the ground that the respondent had always refused to consummate the marriage. The Petitioner provided that that Respondent had not shown any interest in her as his wife. No act of sexual intercourse had taken place during the three years of living together. The Petitioner had made attempts to consummate the marriage, she went and seek help from Church and also medical assistance but medical evidence shows nothing was wrong with the respondent. Therefore, the Court pronounce a decree of nullity in their marriage.

Laws in other Jurisdictions

- 2.38 The grounds for nullity of void marriage under the *Divorce and Matrimonial Causes Ordinance 1961* of Samoa are similar to the ones for Solomon Islands except that in Samoa, the issue where the parties were within the same consanguinity or affinity is not a ground to nullify a void marriage. Furthermore, Samoa only has two grounds to nullify a voidable marriage; that of unsound mind or where either party was a mentally defective person.
- 2.39 In Fiji, an application for nullity of marriage can only be made based on the ground that the marriage is void. In order for a marriage to be void, the *Family*

¹⁰³*Salumata v Kelly* [1999] SBHC 129; HC-CC344 OF 1999 (5 November 1999).

¹⁰⁴ Solomon Islands *Islanders Marriage Act* [Cap 171], s 5.

¹⁰⁵ Solomon Islands *Islanders Marriage Act* [Cap 171], s 8.

¹⁰⁶ *K.H v K.K* [2003] SBHC 143; HCSI-CC257 of 2002.

Law Act provides five of the following grounds; (a) either of the parties at the time of the marriage is lawfully married to some or other person; (b) parties are within a prohibited relationship, (c) marriage is not valid under the law or failure to comply with marriage requirements. (d) Consent obtained by duress or fraud, party is mistaken as to the identity of the other party/nature of the ceremony performed/party is incapable of understanding the nature and effect of marriage ceremony and (e) either of the parties is not of marriageable age.¹⁰⁷

Questions and issues for consideration

ISSUE 11: Section 12(a)

Section 12(a) states, at the time of the marriage ceremony, one of the parties was already married. This amounts to the offence of bigamy. The offence of bigamy in the *Penal Code* carries a maximum penalty of seven years imprisonment, whilst bigamy under the *Islanders Marriage Act* carries a maximum penalty of five years imprisonment.

Questions

1. Should the penalty of the offence be revised to mirror the corresponding section in the Penal Code?
2. Should we just include the conviction of the offence of bigamy be a ground for the Court to declare a decree nisi for the marriage?

ISSUE 12: Section 12(d)

Section 12(d) will come in conflict with certain customs that allow for relatives to marry. For example, in some parts of Solomon Islands, cousins up to first cousins (given they are born into different tribes) can marry each other.

Question

1. Should we retain section 12(d)? If so, should there be an exception to this provision to cater for customary practices in some parts of Solomon Islands?

ISSUE 13: Section 13

The four grounds for a decree of nullity should be expanded. The provisions should be gender neutral. For example, section 13 (1) (d) should also recognise a husband having gotten another woman pregnant. This may be covered under adultery but if such a provision is to be retained then it must contain gender neutral language to apply to both husband and wife.

Questions

1. Should the provision in section 13(1) (d) be gender neutral (both male and female)?

¹⁰⁷ Fiji *Family Law Act 2003*, s 32.

2. What happens in the case where the marriage was conducted according to custom but there was a break down in that relationship and that the marriage was never dissolved in custom due to discriminatory custom practice or one party's refusal?
3. Could the re-marrying of either party be regarded as a ground for nullity of the marriage?

ISSUE 14: section 15

This section gives an exception to the manner evidence in a sexual capacity in nullity proceedings can be given in camera, but the Court has the discretion to instruct otherwise. However, sensitive and traumatic experiences like domestic violence evidence should also be included under the exception.

Question

1. Should hearing to obtain evidence in domestic violence cases be held in camera in marriage nullity proceedings?

CHAPTER 6: JUDICIAL SEPARATION

Current laws

- 2.40 Section 16 of the *Islanders Divorce Act* states a petition for judicial separation may be presented to the Court by any of the parties to the marriage based on the grounds for divorce such as adultery and cruelty as specified under section 5.¹⁰⁸
- 2.41 Section 16(2) provides that where a judicial separation is granted, the petitioner shall not be obliged to cohabit with the respondent. Furthermore, the party against whom a decree of judicial separation was made can apply to the court to reverse the decree on the ground that the decree was obtained in his or her absence, or, if desertion was the ground of decree, that he or she has a reasonable cause for the alleged desertion. The Court may reverse the judicial separation after being satisfied that the allegations contain in the petition are true.¹⁰⁹
- 2.42 The First Schedule of the Act provides for Form A, B and C to be used to present the petition for judicial separation with which such modifications as the context requires.¹¹⁰
- 2.43 Section 17 of the Act provides for divorce proceedings after grant of judicial separation. The provision states that the decree of judicial separation does not prevent a decree of divorce being granted on the same or substantially the same facts.¹¹¹
- 2.44 Furthermore, on any petition for divorce, the Court may treat the decree of judicial separation as sufficient proof of the adultery, desertion or other grounds that was granted. However, the decree of divorce shall not be pronounced by the Court if the Court does not receive evidence from the petitioner. Thus, for the purposes of such petition for divorce, the period of desertion before the proceedings for a decree of judicial separation shall occur, if the parties have not resumed cohabitation and the decree has been continuously in force since it was granted. For such case, the proceeding will immediately proceed to the presentation of the petition for divorce.
- 2.45 Judicial separation is rarely used because people prefer to go straight for a divorce application.¹¹²

¹⁰⁸ Solomon Islands *Islanders Divorce Act* [Cap 170], s 5.

¹⁰⁹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 16(2)(3).

¹¹⁰ Solomon Islands *Islanders Divorce Act* [Cap 170], s 16(4).

¹¹¹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 17.

¹¹² Andrew Bosa & Kathleen Kohata, Family Unit at the Public Solicitor's Office (23rd September 2020).

Laws in another Jurisdiction

2.46 In Samoa the petition for judicial separation can be presented either by the 'wife or husband' which is similarly worded as the *Islanders Divorce Act* [Cap 170].¹¹³ Likewise the decree for judicial separation may be reversed on similar grounds as provided under the *Islanders Divorce Act* [Cap 170]. Furthermore, in Samoa a later provision provides that if the decree for judicial separation is reversed, the reversal does not affect the rights and remedies which any person would have had if the decree was not reversed in respect of debts, contracts or acts of the wife incurred, entered into or done between the date of the decree and the time the decree was reversed. A right appeal against this matter is allowed as long as it is made within a timeframe of six weeks.¹¹⁴

Question for consideration

Question

Should we retain judicial separation? If so, should the judicial separation be only for a period less than one year?

¹¹³ Samoa *Divorce and Matrimonial Causes Ordinance 1961*, s 4.

¹¹⁴ Samoa *Divorce and Matrimonial Causes Ordinance 1961*, s 36.

CHAPTER 7: PART V- GENERAL

Current Laws

- 2.47 Section 18 of the *Islanders' Divorce Act* contains the provisions on damages. On the petition for divorce or judicial separation, a husband may claim for damages from any person on the ground of adultery with the wife (respondent) of the petitioner. The Court may direct in what manner the damages recovered are to be paid or applied.¹¹⁵
- 2.48 Section 19 further provides for the Court to commit a person for non-payment of damages to the Correctional Centre for a period of not more than 6 months.¹¹⁶
- 2.49 Section 20 states, in any proceedings for divorce, nullity of marriage or judicial separation taken pursuant to this Act, the Court may make such orders as to the payment of costs as it thinks fit.¹¹⁷
- 2.50 Section 21 contains the custody and maintenance of children and maintenance of wife. It was stated that in any proceedings for divorce, nullity and judicial separation, the Court may make such orders as appear just and necessary with respect to the custody, maintenance and education of children, the marriage of whose parents is the subject of the proceedings and the maintenance of the wife.¹¹⁸
- 2.51 Section 22 is on proof of service in absence of party. The Court shall not in the absence of a respondent or co-respondent proceed to hear any evidence in proof of the grounds of a petition until proof of service of such petition is first given to the Court.¹¹⁹
- 2.52 Section 23 contains the provision that make reference to the fees contained in the Second Schedule of the Act. It further states that the fees provided shall be the prescribed fees to be paid under this Act until altered, revoked, amended or added by noted by the Minister with the assent of the Chief Justice.¹²⁰

¹¹⁵ Solomon Islands *Islanders Divorce Act* [Cap 170], s 18.

¹¹⁶ Solomon Islands *Islanders Divorce Act* [Cap 170], s 19.

¹¹⁷ Solomon Islands *Islanders Divorce Act* [Cap 170], s 20.

¹¹⁸ Solomon Islands *Islanders Divorce Act* [Cap 170], s 21.

¹¹⁹ Solomon Islands *Islanders Divorce Act* [Cap 170], s 22.

¹²⁰ Solomon Islands *Islanders Divorce Act* [Cap 170], s 23.

2.53 Section 24 contains the rules which empowers the Minister with the assent of the Chief Justice may make such rules as may be necessary to carry out the purposes of this Act.¹²¹

Laws in other jurisdictions

2.54 In Tonga the petitioner may also claim for damages to any sum not more than \$1000 from any person on the ground of adultery of that person with the wife or husband of the petitioner or respondent.¹²² However, the position in Solomon Islands only allows for husbands to claim for damages.

2.55 In Kiribati only non-I-Kiribati can claim for damages for adultery under the *Matrimonial Causes Act* that governs non-I-Kiribati divorce.¹²³

2.56 The *Divorce and Matrimonial Causes Ordinance* of PNG also has provisions for remedies against adulterers. Either party to the marriage may claim damages from any person on the ground of adultery.¹²⁴ Moreover, under the *Adultery and Enticement Act 1988*, there are provisions relating to payment of compensation for the act of adultery. The Court may order payment of compensation against all or any defendants. There are specific amounts to be paid for different types of compensation.¹²⁵

Questions and issues for consideration

Question

1. Should the claim for damage be gender neutral, allowing both spouses to claim for damage?

ISSUE 15: section 19

The section provides the Court statutory powers to make order for the imprisonment of a person ordered to pay damages under section 18 for failing to pay the damages under section 18. This section reinforces the biasedness of section 18, and gives the warning of prison time if there is non-payment.

¹²¹ Solomon Islands *Islanders Divorce Act [Cap 170]*, s 24.

¹²² A petitioner on a petition for divorce may claim any sum not more than \$1000 as damages from any person on the ground of adultery of that person with the wife or husband of the petitioner or respondent as the case may be.

¹²³ United Kingdom *Matrimonial Causes Act 1950*, s 30.

¹²⁴ Papua New Guinea *Divorce and Matrimonial Causes Ordinance*, s 28.

¹²⁵ Papua New Guinea *Adultery & Enticement Act 1988*, ss 12-14.

Question

1. Should the Court order for non-payment of damage for the period up to 6 months be still maintained? If so, should the period be revised?

ISSUE 16: section 21

The section only addresses maintenance of a wife, so does discriminate towards men.

Questions

1. What about women married under custom and the marriage is unregistered?
2. Should the provision for maintenance be gender neutral?
3. Why should a husband maintain a wife? If it is for the children, should we remove maintenance for the wife and retain maintenance for children?
4. Does the law capture maintenance of adopted children?

Question: Fees

- 1 Can the fees provided under the Second Schedule of this *Islanders Divorce Act* be revised? If so, what should be the appropriate fees?