

# GENDER EQUITY IN SAMOAN LAWS: PROGRESS VS CONTRADICTIONS

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## INTRODUCTION

National laws in Samoa have potentially supported abused women in seeking legal redress. Concerted efforts to remove direct gender discrimination from Samoan domestic laws has led to the development of laws including the Family Safety Act (2013) to protect women, children and our vulnerable communities from gender based violence (**GBV**) and sexual crimes. The subsequent development of legal frameworks to protect women against violence is a progressive step but the enforcement of new laws and law reform has been slow and warrants further attention.

Whilst the inclusion of our *fa'afafine* (gay), *fa'afatama* (lesbian) and Lesbian Gay Bisexual Transgender Queer Intersex (**LGBTQI**) communities are largely underrepresented in this dialogue, this research paper briefly captures and reviews the background to gender equity codification in Samoan laws. It explores the equitable provisions in law and questions whether subsequent law reforms have led to progress or prevailing contradictions.

## Background

The Constitution of the Independent State of Samoa 1960 upholds equality and human rights. The Government of Samoa (GoS) has been a signatory to a range international conventions and treaties: such as Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) (1992), Convention on the Rights of the Child (1994), International Covenant on Civil and Political Rights (2008), Convention on the Rights of Persons with Disabilities (2014).<sup>1</sup> Reported milestones of key progress was evident in legislative compliance with CEDAW as reflected, especially, in the Crimes Act 2013, Family Safety Act 2013 and the Labour and

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<sup>1</sup> UNFPA. 2015. *Samoa Sexual and Reproductive Health Rights Needs Assessment*. <http://pacific.unfpa.org/sites/default/files/pub-pdf/2.SamoSexualandReproductiveHealthRightsNeedsAssessmentReportLRv1.pdf>

Employment Relations Act 2013. Also in 2013, the constitutional change established the parliamentary quota of 10% women. However, further analysis will measure progress following an audit and review of relevant laws as to whether celebrated changes on paper with minimal enforcement are stalling progress and highlighting prevailing contradictions; or furthering the process of individualisation of the *Fa'asamoa*. It may also be argued that the traditional gender roles in Samoa is the root of some of the prevailing discriminatory practices in some villages placing gender restrictions.

- In 2013, the GoS established the National Human Rights Institution of Samoa to investigate and respond to national issues, legislation and practices that impact on human rights; and following the 1995 Beijing Declaration and Platform for Action, gender mainstreaming has been in development in all sectors, policies, and strategies. In 2015, a review by the Secretariat of the Pacific Community (**SPC**) found both progress and room for improvement, indicating not all sector plans incorporate sex disaggregated data to assist policy development, implementation and monitoring.<sup>2</sup> In 2015, the gender inequality index in Samoa was noted at 0.439 with minimal improvement from 2000 at 0.496. Globally, Samoa is ranked at 97.<sup>3</sup>
- The GoS published its first State of Human Rights Report in 2015, which reported evidence and highlighted the need for better safeguards to enhance equality and respect for *fa'afafine*, LGBTQI community, women and children.<sup>4</sup> The high incidence of reported male to female domestic violence<sup>5</sup> further corroborates the findings of the 2<sup>nd</sup> Samoa Family Safety Study 2017. Married or de-facto women living in partnership with men from a different rural village who live with their spouse/partner's family, the in-laws (**nofotane**) are more susceptible to domestic violence whilst being treated as servants. However, this dynamic is not as common for married women in the urban or

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<sup>2</sup> United Nations. 1995. *Beijing Declaration and Platform for Action*. New York; Secretariat of the Pacific Community. 2015. *Stocktake of the gender mainstreaming capacity of Pacific Island governments: Samoa*. Noumea.

<sup>3</sup> UNICEF. 2018. *Global databases (based on Demographic and Health Surveys, Multiple Indicator Cluster Surveys, and other nationally representative surveys.)* <http://evaw-global-database.unwomen.org/en/countries/oceania/samoa>  
<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>

<sup>4</sup> Government of Samoa. 2015. *State of Human Rights Report*. Apia.

<sup>5</sup> Secretariat of the Pacific, 2006. *The Samoa Family Health and Safety Study*. Noumea.

town areas. In response, the GoS invited a United Nations Human Rights panel of experts in 2017 which reported and confirmed the deeply entrenched roots of gender discrimination in Samoa.<sup>6</sup> GoS also supports training of *fa'afafine* to implement the Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific.<sup>7</sup> As a result, an association called *Mothers of Fa'afafine Advocacy* was specifically developed for the protection of *fa'afafine* from sexual abuse.

- The Ministry for Women, Community and Social Development (**MWCSD**) is mandated to act as the catalyst for gender equity in Samoa and lead the National Strategy and Action Plan on Gender Equality 2016-2020<sup>8</sup>; the National Policy for Children of Samoa 2010-2015 and the Child Care and Protection Bill 2016.<sup>9</sup> National policies for people living with disability were first developed in 2009<sup>10</sup> followed by a Samoa National Policy for Persons with Disabilities 2011- 2016 reflecting the 2006 UN Convention on the Rights of Persons with Disabilities GoS ratified in 2016, a 2017 Inclusive Education Policy for Students Living with Disability, and a designated position for GoS disability cross-sectoral coordination.<sup>11</sup> The Samoa Disability Program is managed and coordinated by the MWCSD and funded by the Australian Government.<sup>12</sup>
- The GoS Samoa Education Sector Plan 2013-2018 supports improved access to

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<sup>6</sup> United Nations. 2017. *Human Rights Expert Panel Conclusions on Samoa*. Office of the High Commissioner. Geneva.

<sup>7</sup> UNDP et al. 2015. *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific*. <https://www.healthpolicyproject.com/index.cfm?id=publications&get=pubID&pubID=484>

<sup>8</sup> Government of Samoa. 2016. *National Strategy and Action Plan on Gender Equality 2016-2020*. Apia.

<sup>9</sup> Follow-up Consultation with ACEO Ministry of Women, Community and Social Development Samoa) (Level 1-Tooa Salamasina Community Center Building, Sogi, Samoa, (20 August 2017) noting the Child Care and Protection Bill 2016 is currently awaiting certificate of confirmation by the Attorney-General of Samoa indicating it has been vetted and cleared by his Office.

<sup>10</sup> United Nations. 1981. *Convention on the Elimination of All Forms of Discrimination against Women*. New York; United Nations. 1990. *Convention on the Rights of the Child*. New York; Government of Samoa. *National Policy for Children of Samoa 2010-2015*. Apia; Government of Samoa. 2009. *Policy for Persons with Disabilities*. Apia; and Footnote 2.

<sup>11</sup> Government of Samoa. 2011. *National Policy for Persons with Disabilities 2011- 2016*. Apia; Government of Samoa. 2017. *Inclusive Education Policy for Students Living with Disability*. Apia. [http://www.samoaobserver.ws/en/29\\_03\\_2018/local/31634/MOU-promotes-inclusive-education.htm](http://www.samoaobserver.ws/en/29_03_2018/local/31634/MOU-promotes-inclusive-education.htm)

<sup>12</sup> <http://www.mwcspd.gov.ws/images/stories/PUBLICATIONS%20WEBSITE/2015/Disability/200215/BACKGROUND%20PAPER%20-%20FINAL.pdf>

education, equity for all, and high quality education opportunities. The 2013 Samoa Education Statistical Digest has sex disaggregated and gender related data, and includes an analysis of school enrolment.<sup>13</sup>

- GoS is also finalizing the National Non-Communicable Disease Policy 2018-2023 and the associated National Strategic Action Plan 2018-2023. These GoS initiatives and others in collaboration with Development Partners, and the current Constitutional Review, demonstrate GoS commitment to gender equity and equality for all.<sup>14</sup> This is further highlighted by the reported findings from the 2017 ADB-funded cross-sectoral training on gender equity in health and statistics.<sup>15</sup> It indicates that achieving gender equity requires sustained, long term investment, effective cross-sectoral implementation and strategic capacity building. This includes the need for socio-economic issues to be analysed in detail to better understand gender dynamics and how to effectively mainstream those especially in areas pertaining to *fa'afafine* and LGBTQI.

## **Gender classification in Samoa**

### *(a) Progress*

The Samoa Bureau of Statistics reflects the standard statistical reporting of sex disaggregated data across the private and public sectors of Samoa – that is the female and male.<sup>16</sup> The Office of the Ombudsman's first National State of Human Rights Report, released in August 2015, acknowledged on record the status of *fa'afafine* as “the third gender that has always existed in Samoa” and noted “their hard work and dedication to the family in carrying out both roles and responsibilities for men and women”.<sup>17</sup> This reflects the work of the Samoa *Fa'afafine* Association Inc. (SFA) having mobilized both national and international support for the recognition of the third

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<sup>13</sup> Government of Samoa. 2016. *Education Statistical Digest*. Apia.

<sup>14</sup> Government of Samoa. 2016. *Strategy for the Development of Samoa 2016-2020*. Apia; and Footnotes 1 Asian Development Bank. n.d. *Samoa: Economy*. Manila. <https://www.adb.org/countries/samoa/economy#tabs-0-0> and 8. <http://www.everyculture.com/No-Sa/Samoa.html#ixzz5GyNcQiC3>

<sup>15</sup> Asian Development Bank. 2017. *Gender and Health Statistics Training Workshop (11-13<sup>th</sup> October, 2017)*. Apia (led by Ms Jessica Gardner (ADB Consultant, Gender Statistics and Capacity Development Specialist) and Ms Bridget Crichton (ADB Consultant)).

<sup>16</sup> Government of Samoa. 2016. 2016 Census Brief No 1. Apia.

<sup>17</sup> Government of Samoa. 2015. State of Human Rights Report. Apia; p9.

gender: i.e., *fa'afafine* and *fa'afatama* (gay and lesbian, respectively).<sup>18</sup> An estimated 3,000 people identify as *fa'afafine* in Samoa.<sup>19</sup>

(b) *Contradiction*

The misguided reference to transgender communities was reinforced in the State of the Human Rights (**Report**) with its noted definition of *fa'afafine*:<sup>20</sup> which literally means men who act in the manner of women. SFA report that *fa'afafine* and *fa'afatama* are not all transgender; whilst acknowledging that some are as “exceptions to the rule”. The SFA have also argued that the Report did not fully acknowledge *fa'afafine* and *fa'afatama* as a marginalized sector of the community: “boxing our issues together with transgender issues under the LGBTIQ framework ignores our culture’s connection or “*fa’asinomaga*” which is the essence at the heart of every Samoan”.<sup>21</sup> The SFA challenges the perception that *fa'afafine* and *fa'afatama* are all transgender for the sake of conveniently being boxed into the LGBTIQ framework; whilst aiming to raise public awareness of societal acceptance and elimination of all discrimination based on sexual orientation and gender identity (SOGIE).

**Gender equity**

(a) *Progress*

- As an integral part of Samoan culture or *Fa’asamoa*, the well-being of the community or collective often takes precedence over that of individuals. The allocation of different responsibilities and roles according to sex as opposed to gender, may create tensions between rights entrenched in the formal legal system and customary law which are safeguarded by the Constitution.<sup>22</sup> Cultural standards and norms have historically defined distinct roles for men, women and children in the Samoan society. The core social unit is the *aiga* or extended family headed by at least a *Matai*, a chiefly title held

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<sup>18</sup> Universal Periodic Review Samoa, Samoa Faafafine Association Inc. Civil Society and Other Submissions. Session 25, 03 May 2016 session. UN's Office of the High Commissioner of Human Rights. <https://www.upr-info.org/en/review/Samoa/Session-25--May-2016/Civil-society-and-other-submissions> : p1.

<sup>19</sup> UNDP et al. 2016. *Pacific Multi-country Mapping and Behavioural Study 2016*. Suva, Fiji.

<sup>20</sup> Ibid; p9.

<sup>21</sup> Universal Periodic Review Samoa, Samoa Faafafine Association Inc. Civil Society and Other Submissions. Session 25, 03 May 2016 session. UN's Office of the High Commissioner of Human Rights. <https://www.upr-info.org/en/review/Samoa/Session-25--May-2016/Civil-society-and-other-submissions> : p1.

<sup>22</sup> There is some protection from discrimination caused by customary practices articulated in Article 15 (4) of the Constitution. It allows the state to remove discriminatory practices including those of customs and traditions. Challenging customary practice takes time and resources unavailable to many women who may be disadvantaged by harmful cultural stereotypes and practices.

primarily by men. In 2015, of the 240 traditional villages, 151 (63%) have women matai titles and in 115 villages (48%) women *matai* are not permitted to participate in village councils.<sup>23</sup> However, part of the *Fa'asamoa* culture is not necessarily rooted in western views of superiority or inferiority of either men or women, but represent the broader context necessitating the allocation of responsibilities as determined by chiefly title status, village, family, gender, age. Such roles play a part in conceptualizing the *Fa'asamoa* identity and sense of belonging. Arguably, the elimination of the different roles may in fact contravene the principles of *Fa'asamoa*.

- Legal and regulatory reforms increase opportunities for women to be economically active in the private sector.

**Table 1: The number of women and men represented on boards of SOEs and Private<sup>24</sup>**

Shareholder	2012	2013	2014	2015	2016
Female	1069	1139	1260	1355	1414
Increase in year	70	121	95	59	
Male	1736	1879	2095	2250	2351
Increase in year	143	216	155	101	

  

Director	2012	2013	2014	2015	2016
Female	797	845	920	996	1075
Increase in year	48	75	76	79	
Male	1727	1801	2026	2209	2333
Increase in year	74	225	183	124	

Source: Ministry of Commerce, Industry and Labour (August 2017).

### (b) Contradictions

Whilst strong cultural traditions may contribute to community and family stability, they also restrict equal access to leadership and development opportunities<sup>25</sup> and create contradictions and discriminatory flow on effects between cultural and international indicators of women's status.<sup>26</sup> In 2013 the CEDAW committee in its concluding

<sup>23</sup> Government of Samoa and Pacific Island Forum Secretariat. 2015. *Women: Matai and Leadership Survey*. Apia.

<sup>24</sup> Preliminary Consultation with ACEO of MCIL Samoa (Level 3 - ACC Building, Savalalo, Samoa, (22 August 2017).

<sup>25</sup> Australian Department of Foreign Affairs and Trade. 2015. Support for the Government of Samoa's Gender Objectives (under the Community Development Sector Plan 2016-2020). Component of Samoa Women Shaping Development Program.

<sup>26</sup> The CEDAW committee has identified contradictions evident in the juxtaposition of Samoa's Constitutional Amendment that sets a 10% quota for women in parliament and customary laws that restrict women's access to chiefly (Matai) titles which often influence women's success as formal political candidates. <http://www.nus.edu.ws/s/index.php/87-nus/news-events/301-cultural-factors-continue-to-be-a-challenge-for-samoan-women-to-become-leaders>

observations on Samoa's 2009 CEDAW report expressed concern about stereotypes and harmful practices associated with the cultural status of women.<sup>27</sup> The Committee's report recognized the rich culture and traditions of Samoa and their importance in daily life. However it expressed concern about stereotypes related to women's and men's roles and responsibilities, and how these inhibit women from accessing opportunities to participate fully in development. The Committee's concerns are echoed in the Samoa State of Human Rights report by GoS. The report includes a detailed analysis of how the Samoan culture and class system can exacerbate gender inequality and create inequalities between different groups of women.<sup>28</sup>

The SFA report states that *fa'afafine* is not strictly about sexuality and is commonly acknowledged as a separate gender in Samoan society. Inclusion and visibility in statistics and policies is an issue for the *fa'afafine* community. There was a call for the national statistics office to look into how to address this in regularly produced official statistics as well as developing surveys on issues specific to *fa'afafine* and *fa'afatama*, not just in the context of health but also with regard to their social and economic activity and contribution. Also, SFA requested that MWCSD consider explicit interventions in respect of *fa'afafine* in policies such as the Domestic Violence Policy.<sup>29</sup>

- The local media reports on gender equity issues centre on the widespread condemnation in 2016 of the front-page reporting on the death of a *fa'afafine* woman that included an uncensored photo and mis-gendered language.<sup>30</sup> This is further evidence that *fa'afafine* experience violence<sup>31</sup> and evidence of different forms of domestic violence (physical, sexual or emotional) experienced by women.<sup>32</sup> However, reporting on local or global LBGTQI community in the Samoan media is often discouraged. Traditionally perceived as a contentious or grey area, changing public

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<sup>27</sup> United Nations Office of the High Commissioner for Human Rights 2012. CEDAW Committee Concluding Observations. [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fWSM%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fWSM%2fCO%2f4-5&Lang=en)

<sup>28</sup> Government of Samoa, Office of the Ombudsman and National Human Rights Institution. 2015. State of Human Rights Report "By Samoa for Samoa," <http://www.palemene.ws/new/wp-content/uploads/05.Annual%20Reports/OOTO/OO-NHRI-State-of-Human-Rights-Report-2015-Eng.pdf>

<sup>29</sup> Asian Development Bank. 2017. *Gender and Health Statistics Training Workshop (11-13<sup>th</sup> October, 2017)*. Apia (led by Ms Jessica Gardner (ADB Consultant, Gender Statistics and Capacity Development Specialist) and Ms Bridget Crichton (ADB Consultant)).

<sup>30</sup> Lepu, Vicky. Report Department of media and communication, National University of Samoa, 12 July 2018 Apia, Samoa. <http://www.pireport.org/articles/2016/06/20/suicide-photo-cover-samoan-newspaper-brings-condemnation> ; <https://www.youtube.com/watch?v=OwzETR35cPc>.

<sup>31</sup> UNDP et al. 2016. *Pacific Multi-country Mapping and Behavioural Study 2016*. Suva

<sup>32</sup> Secretariat of the Pacific, 2006. *The Samoa Family Health and Safety Study*. Noumea.

societal attitudes linked to sustained awareness raising efforts, has seen the use of specialists to ensure local reporting is adequate. The Commission of Inquiry into domestic violence is finalising its report to be tabled in Parliament by the end of 2018<sup>33</sup> which captures this ongoing dialogue and changing attitudes.<sup>34</sup>

## **Legal framework**

In Samoa, the Crimes Act (2013) provides protections related to sexual offenses. It has also increased maximum penalties for perpetrators. The Act also now makes no distinction between rape within or outside of marriage. The Family Safety Act (2013) provides definitions of, and protections against, domestic violence for women and children and provision of protection orders. It also specifically designates the Samoa Police Service as the agency responsible to investigate and act on domestic violence complaints. The Police Domestic Violence Unit has a mandate to support increased reporting through the No Drop Policy, providing referrals for domestic violence matters to reduce feelings of intimidation for victims.<sup>35</sup>

Development of legislation to protect women is a major step. These are steps taken by other Pacific countries that have contributed to the implementation of gender equity legislation. Planning, funding for implementation, and capacity development for effective use of new laws, are critical to accelerating intervention and response efforts to end violence against vulnerable communities. Capacity development includes increased training, coaching, peer education, and mentoring of traditional and religious leaders, judiciary, police, health and social welfare professionals.

The policy environment can also be enhanced through development of formalized integrated service protocols. Such protocols support harmonized prevention and response procedures across multiple sectors including police, health, education and disaster response and management.

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<sup>33</sup> Samoa Observer. 24 May 2018. [http://www.samoaobserver.ws/en/24\\_05\\_2018/frontpage/33394/front-page-24-May-2018.htm](http://www.samoaobserver.ws/en/24_05_2018/frontpage/33394/front-page-24-May-2018.htm)

<sup>34</sup> Government of Samoa. 2017. *Family First Safety Study*. Apia.

<sup>35</sup> UNWomen. EVAW Global Database Webpage. <http://evaw-global-database.unwomen.org/en/countries/oceania/samoa/2009/updating-the-crimes-ordinance-1961-act-to-penalize-violence-against-women>

The 2015 Samoa Human Rights Report identified Violence against Women and Girls (**VAWG**) as a critical concern and recognized that it is an indicator of gender inequality. This Report also notes that social and cultural norms can perpetuate VAWG. Further, the report highlights that government needs to do more to protect women's human rights to live free from violence. Recommendations include i) provision of dedicated funding to civil society partners to prevent violence and protect families against the destructive impacts of VAWG, ii) provision of more services for victims, including shelters and counseling services, and iii) improved collection of information on domestic and sexual violence 'disaggregated by sex, age, region (urban/rural), and relationship between victim and perpetrator, to be reported on a quarterly basis directly to Human Rights Institute.' The report stipulates that this work should be coordinated through the National Human Rights Institute and the Samoa Police Force Domestic Violence Unit.<sup>36</sup>

### **Gender equity provisions in Samoan laws**

- The role of vulnerable communities in Samoa, including people living with disability, *fa'afafine*, women and children is often the entry point to equity concerns.<sup>37</sup> A number of legal instruments support gender equity in Samoa. Given the breadth of this area, only laws pertaining to political participation, harassment in the workplace and family violence will be discussed here.

### **Constitution of the Independent State of Samoa 1960 (Samoa)**

#### *(a) Progress*

As the Constitution is stated to be the supreme law of Samoa, all legislation in Samoa is required to be consistent with the Constitution, which protects against direct and indirect discrimination, and is able to be enforced through the courts. However, the Constitution does not provide a definition for direct or indirect discrimination. Article

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<sup>36</sup> Government of Samoa, Office of the Ombudsman and National Human Rights Institution. 2015. State of Human Rights Report "By Samoa for Samoa," [http://www.palemene.ws/new/wp-content/uploads/05\\_Annual%20Reports/OOTO/OO-NHRI-State-of-Human-Rights-Report-2015-Eng.pdf](http://www.palemene.ws/new/wp-content/uploads/05_Annual%20Reports/OOTO/OO-NHRI-State-of-Human-Rights-Report-2015-Eng.pdf)

<sup>37</sup> Samuels, A.J. *Fa'afafines: The Third Gender in Samoa.* <https://theculturetrip.com/pacific/samoa/articles/fa-afafines-the-third-gender/>

15 of the Constitution of Samoa explicitly acknowledges freedom from discrimination as a fundamental right, and mandates the State to progressively remove any discriminatory laws; as reflected in Court decisions highlighting the tension between customary laws and contemporary laws.

The Constitutional Amendment Act (2013) established special measures to support women participation in political leadership through a 10% quota for women's representation in Parliament. Five women were elected in the 2016, following the amendment and a female Deputy Prime Minister was appointed. There are 12 Cabinet members (10 men: 2 women) in addition to the Prime Minister and 13 associate ministers (13 men: 0 women).

*(b) Contradictions*

Whist taking into consideration the cultural context, the Constitution safeguards customs and traditions but does not articulate how laws may facilitate special measures to guarantee gender equity or substantive equality. No constitutional protection is provided from discrimination on the basis of disability or sexual orientation.<sup>38</sup> Article 15(4) of the Constitution, indicates the limitation of Article 15, as the right to equality and does not infringe upon any laws that existed prior to the enactment of the Constitution.

**Table 2: Gender representation: Progress vs Contradictions**

LAW	PROGRESS	CONTRADICTIONS
<b>Constitution</b>	Article 44(1B)(b) introduced the new Parliamentary quota system requiring that 10% of seats be reserved for women and coincided with the 2016 National Elections. This boosted the number of women running for Parliament to 25 with 5 women successful, and 1 on account of	This may be considered a special temporary measure in an aim to increase representation of women in Parliament. Although the enactment of legislation itself may appear concrete, the quota system may be discontinued by way of

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<sup>38</sup> Government of Samoa. *Constitution of the Independent State of Samoa (1962, as amended)*. Apia.

	the quota.	<p>legislative enactment when its desired results have been achieved. One of the biggest restrictions on women's participation in the national political sphere is that much fewer women hold a <i>matai</i> title, than men. Despite equality under the law, women's political representation remains low. Samoa was ranked among the lowest in the world (131 out of 139) for women's political participation and since independence in 1962, women have remained below 10% of Samoa's parliamentarians. To address these cultural perceptions which are one of the most significant barriers to participation of women in politics, non-legislative measures may be more appropriate. This should include public awareness, education campaigns, and programmes focussed on enhancing the roles of women and changing mindsets of men and women of women's roles in the village. Legislative interventions in this regard, may be viewed as too intrusive into the affairs of the Village <i>Fono</i>.</p>
	Article 15 provides for freedom from discriminatory legislation and even clarifies that nothing in the Article prevents making laws for the protection or advancement of women.	The Constitution also lacks any protections for LGBTI people. The fundamental protections and freedoms of the people of Samoa are enshrined in Part II of the Constitution. Article 15 within Part II specifically deals with equality of persons before the law and equal protection under the law, and sets out a number of non-discrimination grounds (Art 15(2)). However, sexual

		orientation, gender identity and intersex status are notably absent from this list of prohibited grounds of discrimination.
<b>Crimes Act 2013</b>	Repealed discriminatory provisions from the previous Crimes Ordinance 1961 which criminalised males impersonating females in a public place, effectively targeting transgender women and gender-diverse persons.	<p>Continues to criminalise consensual sex between men through its prohibition on “sodomy” (s67)</p> <p>It also punishes “keeping [a] place of resort for homosexual acts”. (s71) Since “place of resort” is not defined, this provision can potentially be used to criminalise same-sex couples living together, as well as their landlords or real estate agents.</p> <p>It has removed provisions in the previous Crimes Ordinance 1961 which criminalised “indecent acts between males” (s58D). While this has potentially narrowed the scope of criminalisation of consensual sex between men, the continued prohibition of “sodomy” and on “keeping [a] place of resort for homosexual acts” means that Samoa’s criminal laws can be used to target gay and bisexual men, and potentially transgender and intersex persons.</p>

The absence of comprehensive anti-discrimination laws or policies creates an environment that facilitates discrimination against LGBTI persons, including Samoa’s traditional *fa’afafine* and *fa’afatama* community.<sup>39</sup> Further constitutional amendments and amendment to provisions in the Crimes Act 2013 that criminalise consensual sexual activity between persons of the same sex are required in line with recommendations

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<sup>39</sup> *Samoa Party v Attorney General* [2010] WSCA 4, at [27]).

from SFA and the CEDAW Report.<sup>40</sup>

### *1. Workplace harassment*

Employment in the private sector is regulated under the Labour and Employment Relations Act 2013 (**LERA**) which provides some protection against harassment. The LERA defines harassment as:

- Any unwelcome and offensive conduct that includes the fear of harm or serious disturbance to a fellow employee and includes the conduct of a sexual nature;
- An offensive joke or name calling;
- Physical assault or threat;
- Intimidation;
- Ridicule or mockery;
- Insult;
- Offensive object or picture;
- Interference with work performance

An employee's service can be terminated for sexual or other physical, verbal or mental harassment of employees or the employers (s 57(1) LERA). Alternatively, an employee can cease working without notice where he or she is subject to harassment by the employer (s 57(2) LERA). If this occurs, the employer must pay the employees earned wages (s 57(3) LERA).

- Employment in the public service is regulated under the Public Service Act 2004 (**PSA**). Employees are required to comply with a code of conduct that includes a requirement to treat everyone with respect and courtesy and without coercion and harassment. However, there is no current policy on sexual harassment at Samoa's

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<sup>40</sup> Universal Periodic Review Samoa, Samoa Faafafine Association Inc. Civil Society and Other Submissions. Session 25, 03 May 2016 session. UN's Office of the High Commissioner of Human Rights. <https://www.upr-info.org/en/review/Samoa/Session-25---May-2016/Civil-society-and-other-submissions>; United Nations Office of the High Commissioner for Human Rights 2012. CEDAW Committee Concluding Observations. [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fWSM%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fWSM%2fCO%2f4-5&Lang=en)

Public Service Commission (PSC), but future intent to develop it. Employers are also required to provide a safe working environment (s18 PSA). Employees have access to a grievance system under the PSA, with grievance procedures provided in the PSC Discipline Manual (see Part X Public Service Regulation 2008).

- By 2008, Samoa ratified eight conventions and joined the International Labor Organization in 2005. The *Labour and Employment Relations Regulations* 2016 provides some guidance to conditions for employed women.<sup>41</sup> The absence of policy or specific laws on sexual harassment in the workplace or gender-specific policies for the private sector warrants immediate attention. As such, there is future indication of collaboration between GoS and development partners with the intent to achieve gender equity through cross-sectoral collective ownership in line with the mandated focuses of organisations. Data on wage discrimination does not exist<sup>42</sup> and by 2017, sex-disaggregated data on employee grievances was released indicating more grievances lodged by males (81) in comparison to females (64).

**Table 3: Workplace harassment: Progress vs Contradictions**

LAW	PROGRESS	CONTRADICTIONS
LERA	<p><b>SECTOR: PRIVATE</b></p> <p>Section 20(2) prohibits both direct and indirect discrimination on the basis of sexual orientation against an employee or applicant for employment in any employment policies, procedure or practices.</p> <p>Section s57(1) provides that an employee's service can be terminated for sexual or other physical, verbal or mental harassment of employees or the employe/rs. An employee can cease working without notice where he or she is subject to harassment by the employer (s57(2)). If this occurs, the employer must pay the employees earned wages</p>	While some legal protection against sexual harassment is provided, the Act does not provide any redress for an employee who has been subject to harassment by their employer, nor does it authorise an employee to take direct action against another employee for harassment.

<sup>41</sup> Government of Samoa. 2013. *Labour Relations Empoyment Act and its 2016 Regulations*, Part 7. Apia

<sup>42</sup> Government of Samoa, Ministry of Commerce, Industry and Labour. Letter to ADB consultant team for this analysis. 11 July 2018.

	(s57(3)).	
<b>LAW</b>	<b>PROGRESS</b>	<b>CONTRADICTIONS</b>
	<b>SECTOR: CROSS SECTORAL</b>	
<b>Ombudsman Act 1988/2013</b>	Section 63 provides recourse to lodge a formal complaint if a person has been victimized. Section 33b provides that ‘victimisation’ includes ‘being harassed’ or where there has been a violation of their human rights. The Office of the Ombudsman also provides particular functions to monitor CEDAW compliance, discussed under Article 3	Part 4 of the Ombudsman Act 2013 provides that unless such discrimination is part of the subject of an official inquiry or systemic abuse of human rights is widespread, there are no specific provisions for complaints of discrimination against private actors.
<b>LAW</b>	<b>PROGRESS</b>	<b>CONTRADICTIONS</b>
	<b>SECTOR: PUBLIC</b>	
<b>Public Service Act 2004</b>	Section 19 provides that employees are required to comply with a code of conduct that includes a requirement to treat everyone with respect and courtesy and without coercion and harassment; while employers are also required to provide a safe working environment. Employees have access to a grievance system under that Act, with grievance procedures provided in the Public Service Commission (PSC) Discipline Manual.	PSC has no policy on sexual harassment and is currently developing a policy and action plan to mainstream gender and vulnerable groups’ needs into all 19 public sector organisational Human Resource policies and practices. However, appropriate policies on sexual harassment and gender mainstreaming should be developed and applied giving broad practical effect to these legislative provisions.
<b>Education Act 2009</b>	This Act makes it mandatory for schools to provide a safe teaching and learning environment, in light of the high incidence of reported sexual abuse experienced by victims, predominantly girls, including harassment by teachers.	The National Violence Free policy on harassment in schools was established but it is not prohibited in other settings such as family, and still widely used in traditional schools by caregivers due to attitudes on disciplinary measures; and is not clearly prohibited under other laws including the Family Safety Act 2013.

## 2. Family violence

- The high social costs of GBV on health care has impacted the justice system, the

economy and vulnerable communities.<sup>43</sup> Family violence experienced by young children links to psychological problems such as post-traumatic stress disorder from an early age through dysregulated aggression often contributing to an ongoing cycle of abuse.<sup>44</sup> Reports from Samoa's National Enquiry into Family Violence catalogue the experience of victims having experienced physical disabilities, inability to create sustainable relationships, chronic health problems, limited finances, and mental illness.

- Preliminary findings from a study explore how churches act as a significant contributing factor in family violence by reinforcing the traditional patriarchal and often misogynistic attitudes of men in power in the churches and indifference by others. This project aims to improve the role of churches in GBV prevention whilst creating a safe space and network of support for survivors.<sup>45</sup> In 2017 there was a 16-day national, high profile activism event on ending GBV in Samoa. In 2018, the 25<sup>th</sup> day of each month is designated as 'orange day' (wearing of orange) aligning with the United Nations Secretary-General's Campaign UNiTE to End Violence Against Women.<sup>46</sup>
- There has been a significant amount of legislative reform to strengthen safeguards and remedies in the area of Family violence:

**Table 4: Family Violence: Progress vs Contradictions**

LAW	PROGRESS	CONTRADICTIONS
<b>Family Safety Act 2013</b>	The Act which introduced protection orders ( <b>POs</b> ) which victims can apply for against perpetrators of violence. Section 2 widened the definition of family violence to extending violence committed by perpetrators in intimate relationships to violence	Allows interim POs but does not fully address the need for adequate legislation to mandate the speedy prosecution of perpetrators of family violence. The lack of a comprehensive definition of family violence in the Act does not cover

<sup>43</sup> UN. 1981. *Convention on the Elimination of All forms of Discrimination against Women*. New York; UN. 1989. *Convention on the Rights of the Child*. New York.

<sup>44</sup> *Commission of Inquiry Finds Family Violence Normalized in Samoa*. Wellington. Radio New Zealand International. 2017. *Samoa Family violence inquiry chair labels attitudes cowardly*. Wellington.

<sup>45</sup> Tombs, D. et al. 2018. *Fola le ta'uia le Atua: Rolling Out the Mat of Scripture: Church Responses to Gender-Based Violence Against Women in Samoa: Supporting Church Capacity for Transformative Social Leadership*. New Zealand.

<http://www.samoaplanet.com/gender-based-violence-samoa-pacific-project-looks-churches/>

<sup>46</sup> <http://www.un.org/en/women/endviolence/> and Samoa Observer. 29 November 2018 <http://www.ws.undp.org/content/samoa/en/home/presscenter/articles/2017/11/29/samoa-taking-action-to-achieve-zero-tolerance-for-gender-based-violence.html>

	committed within the family unit.	economic or financial abuse. The findings of the 2nd Samoa Family Safety Study 2017 confirms that 78% of victims experienced emotional abuse. Applications for POs should also extend protection to the significant others (close family or friends) reporting family violence.
<b>Village Fono Act 1990 (2017 Amendment)</b>	The development of bylaws to help enforce POs; and establishing guidelines imposing a positive duty on the Village Council to deal appropriately with perpetrators and encourage reporting of violence to the Police.	Factors such as Village <i>Fono</i> or customary governance whereby complaints are reported in the first instance to the Village <i>Fono</i> and not the Police, delays the full course of justice from working to full effect. The <i>fono</i> may result in biased decisions, while excluding voices of the victim, and deterring the laying of complaints, particularly in instances where the alleged perpetrator is a Village <i>fono</i> member which may result in a matter not being officially reported to the Police.

## Conclusion

Whilst creation of legal frameworks acknowledging gender equity and the protection of vulnerable communities is a major step, implementation of the new laws has been slow and requires further investment. Samoa has worked to remove direct and indirect discrimination from laws related to economic empowerment of women, *fa'afafine*, and LGBTQI communities. However, notwithstanding recent legislative reforms, a number of constraints still exist: comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of sexual orientation, gender identity and intersex status in all areas of public life, including employment, health, education and access to goods and services, remains to be enacted; amendments to the Constitution to include sexual orientation, gender identity and intersex status as prohibited grounds of discrimination in the Constitution, remain to be passed; positive steps to counter stigma, stereotypes and prejudice against LGBTQI people, including through public education initiatives,

remain to be taken; and the effectiveness of such legislative developments to codify gender equity in Samoans laws must always involve ongoing dialogue with women, *fa'afafine* and LGBTQI communities in Samoa.