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**United Nations Human Rights Council
Universal Periodic Review: Tonga**

Submission of the International Center for Advocates Against Discrimination (ICAAD)
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About ICAAD

ICAAD is a registered 501(c)(3) with special consultative status with the United Nations Economic and Social Council. Established in 2013, ICAAD works at the intersection of legal innovation and human centered design to create evidence based programs with organizations and communities to combat structural discrimination. By taking an integrated approach, we are able to improve resilience, safety, and equity across systems. ICAAD's key activities include:

- Partnering with local NGOs and governments to build capacity while using our expertise and resources as a means of enhancing their advocacy efforts.
- Leveraging legal and policy expertise to advocate and reform discriminatory laws, policies, and cultural norms.
- Exploring how emerging technologies can be effectively integrated into human rights practice.
- Providing data and research to fill gaps in knowledge for judiciaries, NGOs, governments, and other international bodies.

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INTRODUCTION

On January 15, 2022, the catastrophic event of the Hunga Tonga Hunga Ha’apai (HTHH) volcanic eruption and the resulting tsunami took four (4) lives, damaged infrastructure and agriculture, destroyed homes and properties, and displaced residents primarily on the islands of Tongatapu, ‘Eua, and Ha’apai. The severity and unexpectedness of the event, the scale of the damage, and the emotional toll has impacted the country at large with priority now on recovery phase. Following this, Tonga was hit by its first wave of COVID-19, all events seen as a double whammy that has crippled the economy and has caused major economic and social impacts.

The following information is from broader NGO stakeholder conversations and ICAAD’s gender-based violence case law analysis (TrackGBV) in Tonga highlighting progress and remaining concerns around gender-based violence and child protection.

Methodology

1. Key stakeholders advancing the work on gender-based violence were contacted by email and were very responsive to questions related to gender-based violence and child protection. Local advocates were representing the Civil Society Forum, the Fa’anunu and Professional Services (FAPS), government lawyers as well as various human rights advocates who wanted to remain anonymous.
2. **TrackGBV.** With the aim of removing gender bias and discrimination from judicial decision making, ICAAD’s program, TrackGBV is centered on using technology to monitor accountability in gender-based violence cases and supporting judicial policy reform through legal advocacy and training. Our case law analysis highlights, in particular, the role of gender bias/ stereotyping and customary reconciliation practices that result in gender discrimination in judicial decisions in gender-based violence cases. The presence of contentious factors evidencing gender bias in sentencing decisions is a clear violation of international law. By allowing gender bias to play a role in decision-making, judges are creating present and future barriers for women to access justice, privileging the interests of perpetrators over victims/survivors.
 - a. ICAAD uses the definition of “violence against women” provided by the Declaration on the Elimination of Violence against Women: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.¹

- b. Our methodology involves training reviewers who manually review cases and tag corresponding variables. Reviewers are primarily lawyers at our partner law firms including Clifford Chance, Manatt, Phelps, and Phillips, and Linklaters. Our CSO partners, including the Fiji Women’s Rights Movement, also review cases. Applicable cases for review were sentencing decisions in which the actions of the perpetrator included elements of domestic and/ or sexual violence and the victim was identified as female. Those cases are reviewed against 51 variables including the use of contentious factors by the judicial officer and defense and whether they were raised and/ or used to justify a reduction in the sentence. ICAAD’s case law analysis methodology is focused on determining whether or not contentious factors influenced the final sentence received by the perpetrator, resulting in gender discrimination. These contentious factors are categorized by:
- i. **Gender stereotyping:** “Stereotypical attitudes and beliefs regarding gender and the way in which men and women should interact within society... ‘Gender stereotypes’ also includes rape myths: prejudicial, stereotypical or false beliefs regarding rape, and characteristics of rape victims and rapists.”²
 - ii. **Customary practices:** This includes forms of out-of-court justice and reparation including payment of compensation, formal apology, and reconciliation. It also includes where customary practices are used as justification for criminal acts which undermine equal protection under the law for female victims/survivors (eg: accusations of witchcraft, or bride price).³
 - iii. **Other factors:** This includes any other factors which unjustly privilege the interests of the perpetrator over the interests of the victims/survivors. For example, considering the fact that the perpetrator participated in church activities as a mitigating factor.⁴
- c. For more detailed information on the TrackGBV methodology, please refer to our handbook.⁵

GENDER-BASED VIOLENCE: ACCESS TO JUSTICE

General Issue Statement

3. In addition to the insights from the TrackGBV analysis, key local advocates shared that gender-based violence is on the rise,⁶ however, there is also an increasing awareness about gender-based violence generally at all levels. As shared by the Fa’anunu and Professional Services (FAPS), the enactment of the Family Protection Act in 2013, the establishment of the Domestic Violence Unit of the Police in 2016/2017, and

subsequently the Family Protection Legal Aid Centre in 2018 are indicative of the government's positive and improved response to the issue. Ongoing efforts from NGOs including the Women Children and Crisis Centre, Tonga National Centre for Women and Children, Ma'a Fafine moe Famili, the Talitha Project, and emerging NGOs such as the National Rugby League have strengthened the responses for gender-based violence victims/ survivors in Tonga. However, there are still gaps with the Family Protection Act 2013 and improving access for victims/ survivors of gender-based violence still needs to be a priority.

Supporting Examples

4. **There is a strong legal framework that continues to be implemented with the Family Protection Act 2013.** The law provides for protection from domestic violence, including through protection orders; clarifies the duties of police; and promotes the health, safety, and well-being of domestic violence victims. Additionally, there is evidence that the legal framework around gender-based violence, more broadly, namely the Criminal Offenses Act, is being implemented with examples of police investigating reported rape cases and the government prosecuting cases. The police domestic violence unit has a "no-drop" policy in complaints of domestic assault, and once filed, domestic violence cases cannot be withdrawn and must proceed to prosecution in the magistrates' courts.
5. **Several trainings have taken place.** The Ministry of Police, local communities, churches, youth groups, the Women and Children Crisis Center, and other NGOs have conducted training programs for government agencies and civil society groups on matters such as human rights, child abuse, sexual harassment, violence against women, and domestic violence.
6. **Law recognizes spousal rape.** We are encouraged by the progress represented in the Supreme Court case *R v VP (pseudonym) 2020*⁷ in which the judicial officer established a clear precedent around spousal rape. The judicial officer clarified the connection between Section 29 of the Family Protection Act and the Criminal Offenses Act which criminalizes all rape, especially when it also constitutes domestic violence.
7. **Improved reporting around family violence.** Between 2018 and 2022, the Families Free of Violence (FFOV) program has delivered increased use of standard reporting forms by the Tonga Police. The 2021 Case File Review found an increase in the use of the family violence reporting form from 8% in 2019 to 50% in 2021. In 2019, only 5% of cases were referred to a service provider, and that increased to one third of cases in 2021.
8. **The Tonga National Service Delivery Protocol was formally endorsed in 2021 and establishes minimum standards for multi-sectoral responses to family**

violence. The Service Delivery Protocol targets government and non-government efforts to determine a systematic mechanism which empowers consensus and collaboration amongst stakeholders of gender-based violence, to either provide the victims/ survivors with the relevant and quality services according to their needs, or to comprehensively refer them to the appropriate service providers. While this is certainly a positive step for victims/ survivors, there is a lot of work and resourcing needed to support service providers.

9. **The establishment of the Family Protection Legal Aid Centre (FPLAC) in 2018 under the Ministry of Justice increased the access of victims/ survivors to justice.** It was shared by one of the human rights advocates that the mandate of the Centre is to provide free legal assistance to victims/ survivors of gender-based violence with the goal of increasing access of to justice for victims/ survivors. Advocates shared that one of the persistent barriers that exist for women and girls accessing the courts in gender-based violence is the lack of affordability for private lawyers and court fees. While this continues to be a barrier for women and girls to access the courts, the Family Protection Legal Aid Centre has made legal fees less of a barrier. Additionally, one barrier is when the law requires evidence specifically with rape cases. Some cases were dismissed in court due to lack of evidence. One human rights advocate shared, "The impact of women and girls is that they get discouraged from proceeding further with receiving any assistance and often they return to the environment where violence happened and that's when the cycle of violence occurs. The survivor continues to feel hopeless and discouraged."
10. **There is only one safe house in Tonga to accommodate the needs of domestic violence victims/ survivors which is under the Women Children and Crisis Centre.** At times, the police step in to put domestic violence victims/ survivors in hotels when protection orders are issued for their safety when the safe house is full. In recent research by the Tonga Civil Society Forum, interviewees from Kolomotu'a district shared that while there is increased awareness of the Family Protection Act, it has "broken up" a lot of their families. They shared that some guardians/ parents have been sent to court, but the system does not provide a long term safe space for the victims/ survivors nor support the families directly impacted. Some of the guardians who look after the children whose parents have been sent behind bars end up having disagreements. Some of them end up on the streets and turning to harmful things such as illicit drugs.
11. **Persistent gender bias in judicial decision making.** Perpetrators of domestic violence and sexual offences often receive disproportionately low sentences or no custodial sentence at all. The driving force behind this problem is gender discrimination, which can result from: stereotypes, rape myths, and customary reconciliation practices. Tonga has the third highest rate of contentious factors raise in sentencing decisions in the TrackGBV data at 81.8% of cases, falling close behind Papua New Guinea (PNG) and Vanuatu. From the 55 applicable gender-based violence cases reviewed in Tonga from

2000-2021, contentious factors were used to justify a reduction in sentences in 43.6% of cases. In Tonga, gender-based violence perpetrators were given a partially or fully suspended sentence in 63.6% of cases, and perpetrators were unjustifiably granted first time offender status in 24.1% of cases.⁸

VIOLENCE AGAINST CHILDREN

General Issue Statement

12. In the previous UPR cycles there were several recommendations for the state to prioritize legislation and domestic policies aimed at eliminating domestic violence and protecting women and girls rights and gender equality. While progress has been made in this regard, the current legal framework does not protect children sufficiently from corporal punishment, exploitation, trafficking, and child labor.
13. We echo the calls from reports such as the UNICEF Situation analysis of Children in Tonga 2017⁹ that have stated the need for Tonga to create a protective environment “where girls and boys are free from violence, exploitation and unnecessary separation from family; and where laws, services, behaviours and practices minimize children’s vulnerability, address known risk factors, and strengthen children’s own resilience.” The Tonga Multiple Indicator Cluster Survey (MICS) 2019 found that more than 4 in 5 children are subjected to violent discipline by caregivers. This is evidence of the rampant violence that children are facing from home.

Supporting Examples

14. **Lack of a legal framework around child protection.** One of the main barriers in the child protection sector is the complete lack of a child protection legal framework. Children are not protected from corporal punishment at home. There are gaps in the legal framework in relation to protecting children from sexual offences. The minimum age of criminal responsibility (7) is too low. There is also a lack of specialized bodies and institutions to support child-friendly justice and child protection. Further, there is no child-friendly system of justice for children in contact with the law as victims/ survivors or witnesses.
15. **Collaboration between the police and the National Center for Women and Children and with the Women and Children Crisis Center to provide shelter for abused women and for girls and boys younger than age 14 is promising.** With funding assistance by the Australian government, the Women and Children Crisis Center operated a safe house for victims/ survivors until June 2022. In July 2022, the Justice

Department's Family Legal Protection Aid Center launched an online portal to provide anonymous access for victims/ survivors of domestic or gender-based violence to legal information and counsel, without compromising the confidentiality of their cases.

RECOMMENDATIONS

16. **Increase funding for gender-based violence services providers.** Access to justice and services for victims/ survivors of gender-based violence should be a priority. While several institutions have made progress, the government must ensure that service providers are funded to support the ongoing needs of victims/ survivors.
17. **Establish independent referral systems within each Village Officer's Office.** This will allow victims/ survivors referral pathways to service providers and support networks that ensure their privacy.
18. **Increase funding for safe houses and social welfare for gender-based violence and family violence victims/ survivors.** Specifically, additional safe houses must be made available for victims/ survivors and social welfare support increased to reduce barriers for victims/ survivors to seek help and find safety.
19. **Engage with CSOs and faith and community leaders to promote policies against gender-based violence.** Capacity building should support civil society representatives to be reliable and trustworthy sources of information for victims/ survivors, especially in rural areas.
20. **Increase training within the judiciary around gender bias in sentencing.** The case law analysis points to remaining areas for improvement in the judiciary in terms of how gender-based violence cases are treated in sentencing. Training should be offered to ensure the judiciary upholds international best practices.
21. **Develop child protection legislation.** Policy should be developed to ensure children are protected from corporal punishment at home and sexual offences. This legislation should also increase the minimum age of criminal responsibility and establish child-friendly systems of justice for children in contact with the law as victims/ survivors or witnesses.

¹ The Declaration on the Elimination of Violence against Women, UN General Assembly Resolution A/RES/48/104 (1993); UN Women, Gender Equality Glossary, available at: [https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=V&sortkey=&sortorder=.](https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=V&sortkey=&sortorder=)

² Singh, H., Singh, J. and Christie, E., An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region, ICAAD & DLA Piper, 2016, p. 2, available at: <https://icaad.ngo/wp-content/uploads/2015/12/ICAAD-Analysis-of-Judicial-Sentencing-Practices3.pdf>.

³ It is important to note that the use of customary forms of reconciliation (apology, forgiveness, bulubulu, ifoga, ta kabara bure, etc.) in some PICs is mandated by legislation and/or the Constitution. However, for reasons we will discuss shortly, we are advocating against the use of cultural forms of reconciliation as a factor in mitigation because

they function in a discriminatory manner, in the specific context of gender-based violence cases and in contravention of CEDAW.

⁴ *Op. cit.* at en 2, p. 35.

⁵ *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance, 2018.

⁶ See the Tonga Multiple Indicator Cluster Survey (MICS) 2019 carried out by the Tonga Statistics Department (TSD).

⁷ R v VP (pseudonym) - CR 62:20 - Sentencing remarks v2

⁸ ICAAD, TrackGBV Dashboard, <https://icaad.ngo/trackgbv-dashboard/>.

⁹ UNICEF, Situation Analysis of Children 2021, Report.