



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

**THE LAND BELOW HIGH WATER MARK AND LOW  
WATER MARK**

**Consultation Paper**

**October 2009**

## **Solomon Islands Law Reform Commission (LRC)**

The LRC welcomes comments and submissions from the public. You are welcome to have your say about the questions raised in this consultation paper. You can write a submission, send an email or fax, or ring up the LRC and speak to one of our staff.

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This paper is available from our office or our website.

**The deadline for submissions for this reference is 31 May 2010.**

Law reform is process of changing the law that requires public participations. Any comments or submissions received will not be confidential save where expressly required.

## **Terms of Reference**

WHEREAS land in Solomon Islands is a resource of fundamental importance to the life of the people as well as to the Government of Solomon Islands.

AND WHEREAS land in Solomon Islands would include beaches/shores and land under the sea as far as the extremities of the continental shelf.

AND WHEREAS it is in the national interest that the ownership and control of land between mean high water mark and mean low water mark are clearly stated by the law in view of the public interest versus the call for return of such land to customary landowners as the case may be.

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 to the Law Reform Commission the following –

To enquire and report to me on the following –

1. The current legal position regarding the ownership/control of beaches/shores and land below high water mark and low water mark;
2. The true position of ownership of beaches/shores and land below high water mark and low water mark in terms of customary land tenure;
3. Right of use of beaches/shores and land below high water mark and low water mark in custom;
4. The pros and cons pertaining to the current legal position in this regard;
5. Changes in the law to reflect the true aspirations of the people of Solomon Islands.

Dated at Honiara this 1st day of May 1995.

O. ZAPO

Minister of Justice and Legal Affairs

## **About the Solomon Islands Law Reform Commission**

The Solomon Islands Law Reform Commission (LRC) is a statutory body established under the Law Reform Commission Act 1994. The LRC is headed by the Chairman and four part-time Commissioners who are appointed by the Minister for Justice and Legal Affairs.

Currently, the position of Chairman is vacant due to the resignation of Frank Ofagioro Kabui C.S.I, C.M.G, O.B.E following his election by Parliament as Governor General of Solomon Islands.

The part- time Commissioners of the LRC are:

- Mr Waeta Ben Tabusasi C.S.I., S.I.M;
- Mrs Sarah Dyer;
- Rt Reverend Philemon Riti O.B.E; and
- Mr Gabriel Suri.

The LRC's role is to review laws that are referred by the Minister for Justice and Legal Affairs. The LRC reviews those laws to simplify the law, eliminate problems in the law, identify more effective laws and to ensure that laws are fair and reflect the needs of the people of Solomon Islands.

The LRC gathers information about reform of the law from a wide range of resources including developments in other countries and the views of organisations and people in Solomon Islands. Any reform must also consider the Constitution of Solomon Islands and the international obligations of Solomon Islands.

Recommendations for changes to the law are made by the Chairman and the Commissioners on the basis of research, consultation and submissions received by the LRC. Recommendations by the LRC do not affect the law until they are implemented by Parliament passing legislation.

When it carries out a review of the law the LRC can consult with government departments, institutions, civil society organisations, churches and any member of the public. The LRC can also give advice and information to any government department or institution developing legal policy or proposed changes to the law.

The LRC also has a role in educating the community about legal issues so that members of the community, who might not otherwise have a voice in the development of law and government policy, can participate in an informed manner.

### *Staff of the LRC*

The Research Manager/Principal Legal Officer is Kate Halliday. The members of the legal research team are Philip Kanairara, Kathleen Kohata and Daniel Suluia. The administration team consists of Matilda Dani and Hilda Ahika.

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## 1 Introduction

- 1.1 The Solomon Islands Law Reform Commission (LRC) has a reference to review the law that applies to land below high water mark and low water mark. The LRC must enquire and report to the Minister for Justice and Legal Affairs on the following:
- The current legal position regarding the ownership and control of beaches, shores and land below high water mark and low water mark;
  - The true position of ownership of beaches, shores and land below high water mark and low water mark in terms of customary land tenure;
  - Rights of use of beaches, shores and land below high water mark and low water mark in custom;
  - The pros and cons pertaining to the current legal position in this regard; and
  - Changes in the law to reflect the true aspirations of the people of Solomon Islands.
- 1.2 The law that applies to this area of land comes from a range of different sources. They include the Constitution, the Land and Titles Act, other national legislation, provincial ordinances and customary law. Decisions by judges of the High Court of Solomon Islands also contribute to the law that applies in this area.
- 1.3 Before the establishment of the British Protectorate of Solomon Islands access and use of this land was governed by customary law.
- 1.4 After the establishment of the Protectorate and before independence customary ownership and use of reefs was recognised in a number of court decisions.
- 1.5 In 1959 the Land and Titles Ordinance was introduced and declared that land between low water and high water mark was public land.<sup>1</sup> This land could not be public land if it was customary land.<sup>2</sup> The Ordinance was amended in 1964 so that land below the low water mark was also declared public land.<sup>3</sup> However this declaration could not affect any customary land.<sup>4</sup>
- 1.6 In 1968 this legislation was replaced by the Land and Titles Act which is the current legislation that applies to this area of land, as well as customary land more generally.
- 1.7 Decisions made by the High Court about ownership of this area of land since independence have conflicted. On two occasions the court has considered ownership of this area of land under the Land and Titles Act. In the first decision the court decided that land below high water mark (the foreshore) could be customary land, but that land below low water mark (land always

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<sup>1</sup> Land and Titles Ordinance 1959 s 47(1).

<sup>2</sup> Land and Titles Ordinance 1959 s 47(4).

<sup>3</sup> Land and Titles (Amendment) Ordinance 1964 s 13.

<sup>4</sup> Land and Titles (Amendment) Ordinance 1964 s 13.

under the sea) was not customary land.<sup>5</sup> In 1997 in a different case the court decided that land below low water mark could be customary land.<sup>6</sup>

- 1.8 This paper also considers other legislation relevant to this area of land. They include the Constitution, Customary Land Records Act, Fisheries Act, the Environment Act, the Protection of Wrecks and War Relics Act and the Provincial Government Act.
- 1.9 Solomon Islands has made commitments at an international level relevant to this area of land. Solomon Islands has ratified the Convention on Biological Diversity (CBD), the 1982 United Nations Convention on the Law of the Sea (LOSC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.
- 1.10 The paper also considers the law that applies to land below high water mark and low water mark in other countries in the region. In Vanuatu this area of land is customary land. In other countries (such as Samoa, Fiji, Kiribati and Tuvalu) this area of land is public land, or owned by the government.
- 1.11 The paper concludes with some discussion about issues connected to possible law reform in this area, particularly where there is commercial development or government or public use of this land.

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<sup>5</sup> Allardyce Lumber Company v Laore [1990] SBHC 46 <<http://www.paclii.org>>.

<sup>6</sup> Combined Fera Group v Attorney General [1997] SBHC 55 <<http://www.paclii.org>>.

## 2 Past and current law and policy

### *Past Law*

- 2.2 Before the British Government established a Protectorate over Solomon Islands the custom and customary law determined rights over land, including beaches, foreshores, reefs or land below high water mark and low water mark. The legal establishment of the Protectorate by Great Britain did not transfer any rights over land to the Crown that would derogate or take away from the rights of the tribes or people of the Solomon Islands.<sup>7</sup> Unlike other countries in the region where English law was introduced following colonization, in Solomon Islands it appears that ultimate ownership (also called the Crown prerogative) over land, including foreshores and seabed, never vested in the Crown.
- 2.3 Before Independence a combination of English law and ordinances made for the Protectorate were applied when courts had to make a decision about a land dispute. Customary law was also considered.
- 2.4 In 1959 the Land and Titles Ordinance declared that the seashore between the high water mark and low water mark, and land adjoining the sea coast within sixty-six feet of the high water mark was public land and owned by the Land Trust Board.<sup>8</sup>
- 2.5 However this declaration did not affect ‘native customary land’ which was defined in the Ordinance as unregistered land occupied, cultivated or used by a Solomon Islander or group of Solomon Islanders for twenty-five years prior to 1958.<sup>9</sup> The definition of land in the Ordinance also excluded land covered by the sea at mean low water.<sup>10</sup>
- 2.6 In 1964 this Ordinance was amended so that the Commissioner of Lands could register as public land:
- all land below mean low water mark within the territorial limits of the Protectorate;
  - the seashore between the points of mean high water and mean low water; and
  - all land adjoining the sea coast within sixty feet of the mean high water mark.<sup>11</sup>
- 2.7 The Commissioner of Lands could not register the land as public land if the land was native customary land.<sup>12</sup>

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<sup>7</sup> S Farran & D Paterson, *South Pacific Property Law* (2004) 38-39; Collin H. Allan, Report of the Special Land Commission on Customary Land Tenure in the British Solomon Islands Protectorate, 1957, Western Pacific High Commission pp 63-64.

<sup>8</sup> Land and Titles Ordinance 1959 s 47(1).

<sup>9</sup> Land and Titles Ordinance 1959 s 2(1).

<sup>10</sup> Land and Titles Ordinance 1959 s 2(1).

<sup>11</sup> Land and Titles (Amendment) Ordinance 1964 s 13. The amendment also made the Commissioner of Lands the owner of public land instead of the previous Land Trust Board.



2.8 The 1964 amendment also changed the definition of land contained in the Ordinance so it no longer specifically excluded land covered by the sea at the mean low water mark.<sup>13</sup>

**Before Independence the courts in Solomon Islands recognised customary use and ownership over this area of land.**

**In *Hanasiki v O J Symes*<sup>14</sup> the Court decided that fringing reefs could be owned by customary owners and recognised a claim of exclusive rights over the fringing reefs.**

**In this case the customary owners were trying to protect their reef from commercial exploitation by a foreigner.**

**In the *Fanilei Reef* case<sup>15</sup> the Salt Water people claimed that they had an exclusive right to fish on certain reefs adjacent to the Fanilei Island for trochus. They asked the Court to make an order to stop the Bush people from fishing on those reefs for trochus. The Court refused to make the order because the court found that fishing on those reefs for trochus or otherwise was not exclusive to the Salt Water people and that the Bush people shared in the use of the reefs.<sup>16</sup>**

**In 1957, in the *Uru Reef* case, similar findings as in the *Fanilei Reef* case were reached.<sup>17</sup>**

<sup>12</sup> Land and Titles (Amendment) Ordinance 1964 s 13.

<sup>13</sup> Land and Titles (Amendment) Ordinance 1964 ss 2, 13.

<sup>14</sup> This Case was cited by F Kabui in his article 'Crown ownership of foreshores and seabed in Solomon Islands' (1997) 21 *The Journal of Pacific Studies* 123.

<sup>15</sup> Official Report, *British Solomon Islands Protectorate Legislative Council Debates*, Ninth Session, Second Meeting 19<sup>th</sup> November to 4<sup>th</sup> December (1968).

Also found reference in the Collin H. Allan, Report of the Special Land Commission on Customary Land Tenure in the British Solomon Islands Protectorate, 1957, Western Pacific High Commission.

<sup>16</sup> Official Report, *British Solomon Islands Protectorate Legislative Council Debates* Ninth Session, Second Meeting 19<sup>th</sup> November to 4<sup>th</sup> December (1968). Also Collin H. Allan, Report of the Special Land Commission on Customary Land Tenure in the British Solomon Islands Protectorate, 1957, Western Pacific High Commission.

<sup>17</sup> Collin H. Allan, Report of the Special Land Commission on Customary Land Tenure in the British Solomon Islands Protectorate, 1957, Western Pacific High Commission. The facts of the case were not mentioned in the Allan's Report.

*Current law*

- 2.9 In 1968, the Land and Titles Ordinance (including the 1964 amendment) was replaced by the current Land and Titles Act [Cap 133].
- 2.10 Under the Land and Titles Act the Commissioner of Lands can apply to be registered as the owner, on behalf of the government, of the perpetual estate in land below mean low water mark, and between the points of mean high water and mean low water, as long as the Commissioner had gained ownership under the old Land and Titles Ordinance. The Commissioner of Lands could not gain ownership of beaches or land below low water mark under the previous ordinance if it was customary land so customary land was not affected by the new Act.<sup>18</sup>
- 2.11 The Land and Titles Act defines land as including land under water; and customary land as land that is not registered and which is lawfully owned, used or occupied by a person or community in accordance with current customary usage.<sup>19</sup>

**Customary law is part of the law of Solomon Islands. It applies unless it is not consistent with the Constitution, or a written law such as the Land and Titles Act.<sup>20</sup>**

- 2.12 Some uncertainty about ownership and rights over land below high water mark and low water mark came about as a result of the decision by the High Court of Solomon Islands in *Allardyce Lumber Company Ltd v Laore*<sup>21</sup> (the *Allardyce Lumber Company* case). The court decided that the definition of land in the Land and Titles Act did not include land under the sea. This meant that the definition of customary land in the Land and Titles Act did not include land under the sea (land below the low water mark).
- 2.13 In the *Allardyce Lumber Company* case a claim of ownership was made over the foreshore, reefs and seabed. The Court applied different principles to determine ownership of foreshore, reefs and seabed. The Court accepted that the custom of the people of the area allowed for customary ownership over the foreshore, and that the foreshore could be customary land under the Land and Titles Act. However with respect to reefs and seabed the Court decided that the definition of land in the Land and Titles Act did not include the seabed and the Court did not accept the claim of customary ownership over the Lofung

<sup>18</sup> Land and Titles Act s 10(4).

<sup>19</sup> Land and Titles Act s 2.

<sup>20</sup> Constitution s 76 and Schedule 3.

<sup>21</sup> [1990] SBHC 46 <<http://www.pacii.org>>.

reefs, seabed and sea. The Court used English common law to interpret 'land covered by water' in the Land and Titles Act to not include the seabed.

- 2.14 A second case decided by High Court in 1997 reached a different conclusion. The case of *Combined Fera Group v Attorney General*<sup>22</sup> (the Combined Fera case) concerned reclaimed land at Auki. The land was initially acquired by the government under the Land and Titles Act as if it was customary land to build a new wharf and market area. The acquisition was challenged in the Magistrates' Court on the ground that it was not customary land. The Magistrates' Court decided the land belonged to the government and should be transferred to the Province.
- 2.15 Groups of people claiming customary ownership of the land appealed to the High Court. The High Court decided that:
- The land could be customary land. Customary land (as defined in the Land and Titles Act) could include the seabed (land covered by seawater).
  - Customary ownership must be proved by evidence of customary use, ownership or occupation prior to 1st January 1969 (the date of commencement of the Land and Titles Act).
- 2.16 The High Court directed that the case go back to the Magistrates' Court to determine whether the claimants were customary owners.
- 2.17 In July 2009 the Magistrates' Court released its decision about ownership, use and occupation of the land. The Court ruled that there was customary ownership over the Auki foreshore. The Court relied on documentary evidence, previous land case decisions and sworn evidence to come up with its conclusion. The Court identified the landowning groups (and their representatives) who have the right to sell or lease this land.<sup>23</sup>

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<sup>22</sup> [1997] SBHC 55 <<http://www.pacii.org>>.

<sup>23</sup> *Georg Tafisisi & Others v Attorney General* CC. Nos 6, 13, 14, 15, 15A & 22/91 (unreported, Maina CM, 2 July 2009).

*Summary of law relating to land below high water mark and low water mark*

1951 Hanasiki case	Customary ownership recognised over fringing reefs where outsider (foreigner) tried to gather trochus from reef.
1955 Fanilei Reef case	Customary ownership over reefs recognised.
Land and Titles Ordinance 1959	Seashore between the mean high water mark and mean low water mark is public land owned by the Land Trust Board <b>but not</b> customary land. Land includes land covered by water but excludes land under the sea at mean low water mark.
Land and Titles (Amendment) Ordinance 1964	All land below low water mark within the territorial limits of the Protectorate; the seashore between the points of high water mark and low water mark is public land owned by the Commissioner of Lands <b>but not</b> customary land. Land includes land covered by water but does not specifically exclude land under the sea at mean low water mark.
The Land and Titles Act [Cap 133] commenced operation 1 January 1969	Commissioner of Lands could apply for ownership over land below mean low water mark; and between the points of mean high water mark if it was public land under the previous Ordinance. The definition of land includes land covered by water but does not specifically exclude land under the sea at mean low water mark.
Allardyce Lumber Company Ltd v Laore 1990	Recognised customary ownership over the foreshore. No recognition of customary ownership over the reefs and seabed.
1997 Combined Fera Group v Attorney General	Land below high water mark and low water mark can be customary land. Need to prove ownership, use or occupation prior to 1st January 1969.

**The LRC wants to hear views and comments from people about how customary land tenure is now operating over this area of land.**

**Does customary law recognise that individuals can own this area of land? Or is ownership held by tribes or lines only?**

**How far do ownership rights go? Do they extend into the open sea, or only as far as reefs, or within lagoon areas?**

**Is there a right to free passage by others over this area of land in custom?**

**Under customary law can people other than landowners use this area of land, or use resources on this area of land (for example taking sand or gravel from a beach, or fishing)?**

**Does customary law put any limits or restrictions on the use of this land?**

**Under customary law who can make decisions about use of this land? How are those decisions made?**

*Law that applies to customary land*

- 2.18 The law that applies generally to customary land will apply to customary land that is below the high water mark and low water mark. This includes the Constitution, the Land and Titles Act, the Customary Land Records Act [Cap 132] as well as customary law.
- 2.19 Dealings or transactions in customary land, or that affect customary land, have to be done in accordance with the current customary usage.<sup>24</sup>
- 2.20 The Land and Titles Act prohibits non Solomon Islanders getting an interest in customary land.<sup>25</sup>
- 2.21 Customary land has to become registered land under the Land and Titles Act before a non Solomon Islander or corporation can get any interest in the land. The customary owners have to become registered as perpetual estate holders. Under this process customary land tenure must be recorded which involves

<sup>24</sup> Land and Titles Act s 240.

<sup>25</sup> Land and Titles Act s 241. This section also provides for some exceptions.

defining genealogies, land boundaries and resolving any disputes. The land is acquired by the Government, converted to perpetual estate, and handed back to the customary owners.<sup>26</sup> The customary owners who are registered as the owners of the perpetual estate can then lease, or sell their land to an individual or corporation for a commercial purpose. The registered owners of the perpetual title might be individuals, or a legal entity like a company or a trust.

- 2.22 Where there is a dispute about customary land it must be first determined by the relevant chiefs.<sup>27</sup> The Local Court also has the power to make decisions or resolve most disputes about customary land (one exception is where the dispute is whether the land in question is not customary land).<sup>28</sup> Appeals from a decision of the Local Court about customary land are made to the Customary Land Appeal Court (CLAC).<sup>29</sup> The High Court can consider an appeal from the CLAC if the CLAC made a mistake about the law that should be applied in the case or did not comply with the procedure set down in the law.<sup>30</sup>
- 2.23 Research by the Ministry for Justice and Legal Affairs has found there are significant delays in the current system for resolving disputes about customary land and significant frustration with the process and outcomes.<sup>31</sup>
- 2.24 The Ministry of Justice and Legal Affairs has developed the Tribal Land Dispute Resolution Panels Bill to replace the existing system of resolving disputes over customary land. The Ministry is currently doing consultation on this Bill.
- 2.25 Under the Bill a decision making body called a Panel would resolve disputes about rights, interests and use of tribal or customary land. Different Panels would be convened for each dispute. Each Panel is made up by three persons knowledgeable in customary law in the area of the dispute. The Panel has to hold a public meeting where witnesses are given an opportunity to tell their story to the Panel. People cannot have legal representation. The parties are encouraged to come to an agreement. If they can't the Panel makes a final and binding decision over the land according to custom (as long as the decision is not inconsistent with the Constitution or any other written law). A decision by the Panel applies to anyone affected by the decision regardless of whether they have been parties to the dispute. There is limited appeal to the High Court

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<sup>26</sup> Australian Agency for International Development, *Making Land Work: Reconciling customary land and development in the Pacific* (2008) Vol. 1, 40. This process of recording and registration is achieved using the provisions of the Customary Land Records Act and the Land and Titles Act.

<sup>27</sup> Local Courts Act s 12.

<sup>28</sup> Land and Titles Act s 254.

<sup>29</sup> Land and Titles Act s 256(1).

<sup>30</sup> Land and Titles Act s 256(3).

<sup>31</sup> Solomon Islands Government, Ministry of Justice and Legal Affairs, Tribal Lands Dispute Resolution Panels – Information Guide. The Bill is available on <http://www.pacii.org/databases.html#SB>.

from a decision of a Panel on the grounds of denial of natural justice or lack of jurisdiction.

- 2.26 In the Bill tribal land has the same meaning as customary land in the Land and Titles Act and the Customary Land Records Act however the jurisdiction of the Panels only goes to the outer edge of any reef that is adjacent to tribal land.

**Should the proposed Tribal Land Dispute Resolution Panel Bill apply to all disputes about rights, interests and use of customary land below high water mark and low water mark?**

- 2.27 The Customary Land Records Act provides a process for recording primary and secondary interests in customary land. A primary right is a right to carry out an act on the land without reference to any other person. A secondary right is any other right to carry out any act on the land without reference to primary right holders.<sup>32</sup>
- 2.28 Any primary interest recorded under the Customary Land Records Act is exclusive subject to any conditions and restrictions shown on the record.<sup>33</sup> Any customary land holding group whose primary interest has been recorded may apply to the Registrar of Titles to have their primary rights registered.<sup>34</sup> The registered and recorded primary rights give the customary land holding group the right to use, occupy, enjoy and dispose of the land in accordance with current customary usage.<sup>35</sup>
- 2.29 The Customary Land Records Act has never been used, and no land has been formally recorded under the Act. It is understood that this is due to poor understanding of the Act and because the requirements to complete genealogies and document secondary rights are beyond the capacities of most land owning groups.<sup>36</sup>

**Does the Customary Lands Records Act provide a useful process for recording customary interests of ownership and use over beaches, foreshores, reefs, seabed or land below high water mark and low water mark?**

<sup>32</sup> Customary Land Records Act s 2.

<sup>33</sup> Customary Land Records Act s 15.

<sup>34</sup> Customary Land Records Act s 19.

<sup>35</sup> Customary Land Records Act s 20.

<sup>36</sup> M Sullivan, *Recognition of Customary Land in the Solomon Islands: Status, Issues and Options*, in *Resource Management in Asia-Pacific*, Working Paper 66, 2007, Australian National University.

*Acquisition of customary land for government and public use*

- 2.30 Customary land can be purchased or leased by the Commissioner of Lands or Provincial Assembly. It can also be acquired compulsorily when it is needed for a public or community purpose. For compulsory acquisition, the Minister can declare any land is acquired for public purpose, subject to reasonable compensation.<sup>37</sup> The Constitution says that Parliament should provide that where there is compulsory acquisition of customary land there should be prior negotiation, the owners have a right to independent legal advice and so far as practicable the interest acquired should be limited to a fixed-term interest.<sup>38</sup>
- 2.31 It is understood that compulsory acquisition of customary land is not normally used in Solomon Islands and that negotiation with customary landowners is the common way for government to obtain customary land for public use.<sup>39</sup>

*Land administration*

- 2.32 Generally for the purposes of land administration it has been assumed that beaches, foreshores, reefs or land below high water mark and low water mark is customary land. The current practice of the Ministry of Lands is to acknowledge that customary rights of ownership and usage can exist over this area of land.<sup>40</sup> When this area of land is needed for a public purpose the processes for acquiring customary land is used.
- 2.33 This approach appears to have been in place for some time. In 1968 the Commissioner of Lands and Surveys told the Legislative Council that customary rights and usage over this area of land were recognised.<sup>41</sup> In 1990 the Commissioner of Lands gave evidence in the Allardyce Lumber Company case that customary rights over this area of land were recognised.<sup>42</sup>
- 2.34 The Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate gathered some information about customary land tenure over reefs.
- 2.35 According to the Report of the Commission reefs were regarded as part of customary land and that land holding groups held interests in relation to reefs of varying degrees of exclusiveness. The rights held depended on the nature of the use of the reefs, social organization and culture of the communities. Exclusive rights by a line, tribe or individual were generally connected with a

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<sup>37</sup> Land and Titles Act Part V.

<sup>38</sup> Constitution s 112.

<sup>39</sup> Australian Agency for International Development, *Making Land Work: Reconciling customary land and development in the Pacific* (2008) Vol. 1, 66.

<sup>40</sup> Communication with Joseph Pinita, Ministry of Lands, Housing and Survey, Honiara (May 15 2009).

<sup>41</sup> Official Report, *British Solomon Islands Protectorate Legislative Council Debates*, Ninth Session, First Meeting 5<sup>th</sup> to 14<sup>th</sup> June (1968) 151.

<sup>42</sup> *Allardyce Lumber Company Ltd v Laore* [1990] SBHC 46 <<http://www.pacilii.org>>.



particular activity. Activities included using the resources of the reef for commercial purpose (such as gathering trochus shell to sell), different forms of fishing (net, trap, line, spear), gathering things for customary activities or exchange (shell money, ornaments) and spiritual activities.

2.36 The Report noted that not all reefs are subject to primary or exclusive interests and that interests in reefs may be held by both bush and salt water dwellers either jointly or separately. The Report further noted that an exclusive interest in a reef does not necessarily mean that exclusive control has been or is exerted in respect of all resources in the reef.

2.37 Some examples of exclusive interests noted in the Report were:

- Where a chief prohibited fishing over a reef or reefs over a period to build up the supply of fish;
- In Lau, Malaita Province, an individual holding a primary interest over a reef might exclude others from using the reef for some purposes (for example gathering shell for sale) but would not exclude others using the reef to fish.<sup>43</sup>

*Other Solomon Islands law affecting this area of land*

2.38 A number of national and provincial laws recognise or acknowledge customary rights of use or ownership over this area of land, or customary use, control or ownership of resources found in this area of land. They also place restrictions on the types of activities that might take place in this area of land, or the way that customary users or owners might use the area of land or its resources. They include the Fisheries Act 1998, the Environment Act 1998, the Protection of Wrecks and War Relics Act [Cap 150], the Customs Recognition Act 2000 and the Provincial Government Act 1997. The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 is an example of a provincial law that recognizes customary rights over this area of land.<sup>44</sup>

2.39 The Fisheries Act recognises customary fishing rights. Customary fishing rights holders, or people customarily entitled to fish in the sea, can fish, even on commercial basis, without a licence.<sup>45</sup> Anyone else who wants to carry out commercial fishing must get a licence.

2.40 In addition under the Fisheries Act:

- The Minister of Fisheries must have regard to customary rights when exercising his or her powers under the Act.<sup>46</sup>
- The Director of Fisheries must consult with customary groups when preparing the fisheries management and development plans.<sup>47</sup>

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<sup>43</sup> Collin H. Allan, *Report of the Special Land Commission on Customary Land Tenure in the British Solomon Islands Protectorate* (1957) 173-175.

<sup>44</sup> This Ordinance is not gazetted, therefore is not yet a law of Isabel Province.

<sup>45</sup> Fisheries Act 1998 ss 4, 14.

<sup>46</sup> Fisheries Act 1998 s 4.

- Provincial Governments can make laws for registering or recording customary fishing rights.<sup>48</sup>
- Commercial fishing in waters subject to customary fishing rights must be carried out subject to those rights. A court can order compensation for customary fishing rights holders where there is a breach of customary fishing rights.<sup>49</sup>
- Foreign vessels wishing to engage in sport fishing in customary fishing rights waters must have an agreement with the customary fishing rights holders.<sup>50</sup>

2.41 The Environment Act has a broad definition of land that includes land covered by water and territorial sea.<sup>51</sup> The Director of the Environment and Conservation Division must give consent before certain kinds of development can be carried out on land. They include food industries; iron and steel industries; non-metallic industries; leather, paper, textile and wood industries; fishing and marine product industries; chemical industry; tourism industry; agriculture industry; public works sector; and others.<sup>52</sup> Prior to giving consent the Director can ask the developer to provide a public environment report or an environment impact statement.<sup>53</sup> Much reclamation of sea front land for commercial purpose would be development falling into one of these categories and therefore require consent from the Director.

2.42 The Protection of Wrecks and War Relics Act restricts interference with wrecks and war relics. The Minister of Cultural Affairs can make an order restricting interference in an area containing wrecks and war relics. Before making an order the Minister must consult with people claiming rights in or over the relevant land or water, and the Provincial Assembly about the order. The Minister may dispense with the consultation in urgent cases.<sup>54</sup> Once an order is made it is an offence to damage or remove the wreck or war relic without a licence.<sup>55</sup>

2.43 The Customs Recognition Act was passed by Parliament in 2000 but it has not been gazetted and has not come into force.<sup>56</sup> Under this Act custom must be applied by courts unless it would lead to injustice, or is not in public interest, or is inconsistent with the Constitution or legislation.<sup>57</sup> In civil cases, custom that applies to ownership of customary land and ownership rights over or in

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<sup>47</sup> Fisheries Act 1998 s 8(2).

<sup>48</sup> Fisheries Act 1998 s 10.

<sup>49</sup> The Fisheries Act 1998 s 12.

<sup>50</sup> The Fisheries Act 1998 s 22.

<sup>51</sup> Environment Act 1998 s 2.

<sup>52</sup> Environment Act 1998 s 19 and Second Schedule.

<sup>53</sup> Environment Act 1998 s 17.

<sup>54</sup> Protection of Wrecks and War Relics Act s 3.

<sup>55</sup> Protection of Wrecks and War Relics Act s 4.

<sup>56</sup> This Act therefore is not yet law in Solomon Islands.

<sup>57</sup> Custom Recognition Act 2000 s 6.

connection with the sea or a reef, or seabed including rights of fishing may be considered.<sup>58</sup>

- 2.44 The Provincial Government Act 1997 empowers a provincial assembly to make ordinances to govern its province.<sup>59</sup> The geographical extent of each province extends seaward for three nautical miles from the low-water line of each island in a province. If the island is situated on an atoll or has a fringing reef the area of the province includes any area within the atoll or between the island and the reef, and extends seaward for three nautical miles from the low-water line of the atoll or reef.<sup>60</sup> A provincial assembly can only make ordinances in relation to matters within its legislative competence.<sup>61</sup> An ordinance can only apply to the provincial physical jurisdiction. A provincial assembly can make laws about:
- coastal and lagoon shipping;
  - harbours;
  - fresh-water and reef fisheries;
  - codification and amendment of existing customary law about land;
  - registration of customary rights on land including customary fishing rights; and
  - water pollution.<sup>62</sup>
- 2.45 The Isabel Province Natural Resources Management and Environmental Protection Ordinance recognises customary ownership rights, customary use and occupation of reefs and lagoon waters.<sup>63</sup> It allows customary land owning groups to make policies and plans about the use of resources within its land. If the plans and policies are endorsed by the appropriate House of Chiefs they can be registered at the Provincial Assembly Office.<sup>64</sup>
- 2.46 Under the Ordinance the Provincial Executive can make a Resource Management Order to manage and conserve marine, forest, and wildlife resources on customary land. A Resource Management Order can also protect land for spiritual or custom purposes.<sup>65</sup>
- 2.47 Once a Resource Management Order is declared and gazetted it is part of the laws of Isabel Province.<sup>66</sup> Any breach of it is an offence and punishable by a fine up to \$50000 or imprisonment for three months, or both.<sup>67</sup> Customary landowners can also claim compensation under the Ordinance for damage

<sup>58</sup> Custom Recognition Act 2000 s 8.

<sup>59</sup> Provincial Government Act 1997 s 30.

<sup>60</sup> Provincial Government Act 1997 s 3.

<sup>61</sup> Provincial Government Act 1997 s 31.

<sup>62</sup> Provincial Government Act 1997 Schedule 3.

<sup>63</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 4.

<sup>64</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 18.

<sup>65</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 19.

<sup>66</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 21.

<sup>67</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 24(2)(a).

caused to customary land.<sup>68</sup> The compensation is awarded by the court reflecting the value of the resources taken or the damage caused to the resources.<sup>69</sup> But as mentioned earlier this law is not in force as it has not been gazetted.

*International law and obligations*

- 2.48 International law is a law that governs the conduct and relationship between and among different States. Solomon Islands as a State has ratified some international laws (treaties or conventions), which requires Solomon Islands to implement the obligations in those treaties. The Convention on Biological Diversity (CBD), the 1982 United Nations Convention on the Law of the Sea (LOSC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region are international treaties that have some relevance to this area of land.
- 2.49 Solomon Islands Government ratified the CBD in 1995. The CBD requires member countries to preserve practices of the local communities that promote conservation and sustainable use of the biological diversity.<sup>70</sup>
- 2.50 Solomon Islands ratified the LOSC in 1997. Under the Convention States must allow for the innocent passage of ships of all States through its territorial waters.<sup>71</sup> States should also adopt laws and regulations for innocent passage through territorial sea, safety of navigation, protection of navigational aids and installations and the prevention of the infringement of fisheries law.<sup>72</sup>
- 2.51 Solomon Islands has recognized the right to innocent passage for ships over its territorial sea.<sup>73</sup>
- 2.52 Solomon Islands acceded to the ICESCR in 1982. The Covenant recognizes that men and women have the same opportunity to enjoy economic, social and cultural rights.<sup>74</sup> These rights include the right to an adequate standard of living, including adequate food and housing.<sup>75</sup> The Solomon Islands Government has an obligation to take appropriate steps to realize this right. Any law or policy that affects the rights of people to use or rely on this area of

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<sup>68</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 24(2)(b).

<sup>69</sup> The Isabel Province Natural Resources Management and Environmental Protection Ordinance 2006 s 24(2)(b)&(d).

<sup>70</sup> Convention on Biological Diversity Article 8(j).

<sup>71</sup> LOSC Articles 17, 24, 52.

<sup>72</sup> LOSC Article 21.

<sup>73</sup> Delimitation of Marine Waters Act s 10(1).

<sup>74</sup> ICESCR Article 3.

<sup>75</sup> ICESCR Article 11.

land for their living, or any failure by government to take steps to preserve the use of this area of land by people to maintain an adequate standard of living might be inconsistent with the Covenant.

- 2.53 Solomon Islands ratified the CEDAW in 2002. The Convention prohibits all forms of discrimination against women. It requires member countries to take appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. It also requires member countries to take appropriate measures to eliminate discrimination against women in the rural areas in order to ensure equal participation by men and women in rural development, and that benefits from such development are to be distributed fairly.<sup>76</sup> Any law or policy on this area of land should not disadvantage women, and should ensure that women have an equal opportunity to participate in decision making about this area of land, and benefit from the use and development of this area of land.
- 2.54 Solomon Islands ratified the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region in 1982. According to this Convention Solomon Islands should take appropriate measures to prevent, reduce and control environmental damage in particular coastal erosion caused by coastal engineering, mining activities, sand removal, land reclamation and dredging.<sup>77</sup> Any law or policy by the Solomon Islands government over this area of land should be consistent with this Convention. Failure by the government to regulate activities such as sand removal, land reclamation or commercial development over this area of land that cause environmental damage may be inconsistent with the Convention.

*Legal status of this area of land in other countries in the region*

- 2.55 The table below shows how the laws of neighbouring Pacific countries govern this area of land. In a number of countries land below high water and low water mark is public land and cannot be customary land. In other countries, such as Vanuatu and Papua New Guinea land below high water and low water mark can be, or is, customary land.
- 2.56 In Vanuatu specific legislation governs development of the foreshore even though it is customary land.<sup>78</sup> Before there is any development the Minister responsible for Town and Country Planning must give consent.<sup>79</sup> There are no directions in the legislation for when the consent should or should not be given.

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<sup>76</sup> CEDAW Articles 2(f) and 14(b).

<sup>77</sup> The Convention for the Protection of Natural Resources and Environment of the South Pacific Region Article 13.

<sup>78</sup> Foreshore Development Act [Cap 90].

<sup>79</sup> Foreshore Development Act s 2.

<i>Country</i>	<i>Status of land</i>	<i>Legislation and case law</i>
Vanuatu	Customary land. Any development of foreshores requires written consent from the Minister of Town and Country Planning.	Constitution, Articles 73 and 74. Foreshore Development Act [Cap 90] s 2. Browne v Bastien [2002] VUSC 2; <a href="http://www.pacii.org">www.pacii.org</a> .
Papua New Guinea	All land belongs to the State except for customary land; and any estates, rights or interests in force under any law.	Land Act 1996 s 4.
Fiji	Crown ownership subject to private rights that can be proved.	Crown Land Act s 2. Tokyo Corporation v Mago Island Estate Ltd [1992] FJHC 76; <a href="http://www.pacii.org">http://www.pacii.org</a> .
Kiribati	Crown ownership subject to private rights that can be proved.	Foreshore and Land Reclamation Ordinance s 3.
Tuvalu	Crown ownership subject to private rights that can be proved.	Foreshore and Land Reclamation Ordinance s 3.
Samoa	Crown ownership.	Constitution Article 104(1).
New Zealand	Crown ownership subject to customary rights of use that must be recognized by the Maori Land Court or High Court.	Foreshore and Seabed Act 2004 s 13.

### 3 Discussion and Issues

- 3.1 The LRC must enquire and report to the Minister about the pros and cons of the current law that applies to ownership and use of land below high water mark and low water mark, as well as any changes to the law to reflect the true aspirations of people of Solomon Islands.
- 3.2 The following areas need to be considered as part of this investigation:
- Competing interests over this area of land; including the interests of landowners and land users.
  - Protection and assistance for people with customary interests in this land who want to promote commercial development of the land, or resources found in this area of land.

**During the Trade Show in 2008 the LRC asked for views and comments on this reference.**

**There was significant support for the land below high water and low water mark to be governed by customary law. Thirty six out of forty seven responses gave support for this. Thirty one responses out of forty seven supported customary ownership instead of public ownership of this area of land.**

**There was also support for claims over this area for public and commercial use be determined by customary landowners. There was also a preference for governments to negotiate with landowners for the public use of this land.**

**Other consultation by the LRC in provinces indicates that disputes over the use and ownership are a concern. For example there can be conflict between people with customary rights over beaches and foreshores and people who hold interests over adjacent registered land. Another example is where customary landowners seek ‘anchorage fees’ from logging companies using beaches or foreshores to load logs onto ships.**

*Competing interests*

- 3.3 There are a range of competing interests that might arise over this area of land as a result of changing social organisation, population pressures, growing urban areas, opportunities for commercial development, the need and desire for cash and the need to preserve land for subsistence.
- 3.4 Customary land tenure consists of different rights and uses held by lines, land holding groups and in some cases individuals. Sometimes these rights are characterized as primary rights and secondary rights. The Allan Report described primary land interests as interests that can be exercised without seeking permission from anyone else, as long as it does not interfere with primary rights or others; and secondary rights as rights of usage.<sup>80</sup> The Customary Land Records Act also adopts a similar approach to describing different kinds of rights to customary land.<sup>81</sup>
- 3.5 The interests of landowners may not always be the same as the interests of land users, particularly where landowners want to pursue commercial opportunities or development. In this case there is a risk that the rights of land users may be ignored or sacrificed.
- 3.6 Important decisions about commercial use and exploitation of customary land might be made by some people who hold some rights to that land. There is a risk that others with rights to the land, or others who rely on the land and its resources for their living, might not have the same opportunity to participate in discussions and negotiations about customary land.
- 3.7 There are concerns that the interests of women as landowners and land users are not being adequately protected when decisions are made about the commercial use of customary land, and the resources on customary land. In some areas across Solomon Islands customary land ownership is matrilineal. Despite this, the increasing importance of the cash economy, and the use of land as a commodity, has marginalized the interests of women as landowners and users. As a result women have little or no role in making decisions about development of the land, even where the development will have a significant impact on their livelihood. The experience of logging has demonstrated that men dominate decision making, and are more likely to benefit from the commercial development of customary land than women.<sup>82</sup>

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<sup>80</sup> Collin H. Allan, Report of the Special Land Commission on Customary Land Tenure in the British Solomon Islands Protectorate (1957).

<sup>81</sup> Customary Land Records Act [Cap 132] s 2.

<sup>82</sup> Ruth Maetala, Land and Women: The Matrilineal Factor – the Case of Solomon Islands (2008) Pacific Islands Forum Secretariat 49-50. See also S Asker, Research of Aspirations and Perceptions towards inclusive and sustainable natural resource management in the Solomon Islands (2009) Live & Learn Environment Education and IWDA.



- 3.8 Governments, national and provincial, may need to acquire interests over this area of land to build public infrastructure such as a wharf. In this case governments are acting in a broad public interest however landowners might not perceive such development to be in their best interest.
- 3.9 Tourist businesses may need access to this area of land. Commercial tourist operators may need assurance around reliable access to particular areas, and customary landholders and land users may need some protection to ensure that their resource is not damaged by commercial use. The Isabel Province Natural Resources Management and Environmental Protection Ordinance is an example of a law that provides customary landholders with protection from activities that might damage this area of land.
- 3.10 As towns grow this area of land is in demand for commercial development such as hotels. In and around towns the general public also has an important interest in access to beaches and foreshores for recreation. The general public also has an interest in access to beaches and foreshores for maritime transport.
- 3.11 There is also a broad public interest in controlling development over this area of land to prevent erosion, pollution and to protect biological resources. The Environment Act is an example of a law that promotes this public interest. In this case customary landowners also benefit because their resource is protected from activities that might damage the resources they need for their day to day living. However it is not clear how effective this legislation is in protecting this area of land from damage.

**In New Zealand legislation was recently introduced to attempt to balance the interests of the broader public and individuals or groups claiming rights under customary or Maori law over the foreshore and seabed. In 2003 the Court of Appeal recognised customary rights over the foreshore and seabed.<sup>83</sup> The Foreshore and Seabed Act was passed in 2004 and clarified that the foreshore and seabed was public land. It also introduced processes for Maori people and others claiming customary rights to get a customary rights order from a court. The legislation also guarantees public access to this area for recreation and navigation even where a customary rights order is made.<sup>84</sup>**

<sup>83</sup> Attorney-General v Ngati Apa [2003] 3 NZLR 643 (CA) discussed in 'Foreshore and Seabed' <http://www.justice.govt.nz/foreshore/background.html> (Accessed 7 August 2009).

<sup>84</sup> The Foreshore and Seabed Act of New Zealand.

**In Fiji, the land below high and low water mark is vested in the Crown.<sup>85</sup> In 2006 the Qoliqoli Bill was introduced into Parliament to transfer ownership of land under the sea, rivers, stream or wetland to the Qoliqoli owners.<sup>86</sup> Under the Bill the qoliqoli areas would be administered by the Native Land Trust Board and the Qoliqoli Commission.<sup>87</sup>**

**However the rights of Qoliqoli owners would not affect the right of members of public to have free access to the sea for maritime transport, non-commercial recreational activities or the right of free passage recognized under international law.<sup>88</sup> The Bill was abandoned following the coup in Fiji in 2006 and has not become law.**

*Commercial development*

- 3.12 Customary land is governed by customary law and it cannot be sold or leased to non Solomon Islanders. This limits the options that customary landholders have if they want to carry out or encourage commercial development over beaches, foreshores or land below high water mark and low water mark. It might also encourage an informal or black market in customary land, particularly in town areas where there is a high demand for foreshore and reclaimed land. It is understood that informal transfer of customary land does take place and this can be problematic if disputes arise in the future between the parties to the sale, others who subsequently obtain an interest in the land and others who claim to have interests under customary law.
- 3.13 In Vanuatu customary land can be leased to an investor for a period of 75 years. This model allows the landowners to negotiate directly with the investors for the lease of their land to be used for development and commercial purpose.<sup>89</sup> The steps involved in the process are:
- landowner or developer applies to the Lands Department for a lease – once approved a negotiation certificate is given to the applicant;
  - lands Department must confirm that the Landowner is the true custom owner. This can be done after chiefs from the relevant area complete a Custom Owner Identification Form;
  - the land is surveyed;
  - lease agreement is prepared;

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<sup>85</sup> Crown Land Act (Fiji) s 2.

<sup>86</sup> Qoliqoli Bill Clause 4(2).

<sup>87</sup> Qoliqoli Bill Clause 5.

<sup>88</sup> Qoliqoli Bill Clause 8.

<sup>89</sup> Australian Agency for International Development, *Making Land Work: Reconciling customary land and development in the Pacific* (2008) Vol. 1, 48.

- lease Agreement given to Minister for Lands for approval;
  - landowner to pay stamp duty once the Lease Agreement is approved;
  - the Lease is signed by the Minister for Lands;
  - the Lease then must be registered with the Land Record Department.<sup>90</sup>
- 3.14 In Vanuatu development on the foreshore must also be approved by the Minister responsible for Town and Country Planning.<sup>91</sup> The Minister may give consent after looking at the application for the consent and any other representation made to him or her concerning the proposed development.<sup>92</sup>
- 3.15 In Solomon Islands, especially in Honiara, reclamation of land at the sea front is accelerating. Land reclamation over customary land is not regulated in any way, other than by the Environment Act. The foreshore area in and around Honiara is not registered land except for the Ports areas and the Mbokona Patrol Boat base.<sup>93</sup> If reclaimed land is customary land it can only be dealt with according to customary law, unless it becomes registered land. In some cases the developer may be dealing directly with the purported customary landowners to reclaim the land. This practice raises two questions: whether the reclamation is being done with the informed consent of all the relevant landowners, and whether the law would recognise any rights asserted by the developer.
- 3.16 The trend of reclamation of the Honiara sea front land is a concern because good white beaches and reefs are lost for public use and it is possible that customary land owner and user rights are not recognized or taken into account when the developer makes arrangements for reclamation. Land that was accessible to the public (whether landowners and land users) for recreational and other purposes is no longer available for public or customary use.
- 3.17 Landowners and users who want to pursue commercial development over this area of land may need independent advice so that they can make informed decisions about development of customary land. The Landowners' Advocacy and Legal Support Unit (LALSU) within the Public Solicitor's Office was set up recently to assist landowners to this cause. It is understood that the Unit can also provide legal advice to land users and others that may have interest in the land.<sup>94</sup>
- 3.18 The Land Reform Unit in the Ministry of Lands has developed some policy to reform how customary land might be recognized by the written law. This

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<sup>90</sup> See Lease Agreements over customary land <http://legalcentre.vanuatu.usp.ac.fj/> (Accessed 17 July 2009). See also Land Leases Act [Cap 163] and Land Reform Act [Cap 123] of Vanuatu.

<sup>91</sup> Foreshore Development Act s 2.

<sup>92</sup> Foreshore Development Act ss 3, 4.

<sup>93</sup> Information gathered from an oral communication with Joseph Pinita, Jackson Vaikota and Henry Kala of the Ministry of Lands, Housing and Survey (September 11 2009).

<sup>94</sup> Email communication with Constance Hemmer of the LALSU <[chemmer@pso.gov.sb](mailto:chemmer@pso.gov.sb)> September 30 2009.

policy recognizes tribes, not individuals, as the owners of customary land and would require systematic recording of tribes and boundaries. One objective of the policy is to allow a tribe as the owner of customary land to deal directly with investors or developers. Another objective is to discourage individual ownership and registration of customary land.<sup>95</sup> The Unit however does not have any legal framework to further its work aspirations. A Bill was designed in 2006 to provide for the legal framework for the Unit but has not taken any further.<sup>96</sup>

**Is there a need for legislation to regulate how decisions are made about commercial use and development of customary land below high water mark and low water mark?**

**Is the current law protecting this area of land from pollution and degradation adequate? Do there need to be any changes to the law about development that might affect this area of land?**

**Should the law be changed to facilitate commercial development of customary land, including beaches, foreshores, reefs, seabed or land below high water and low water mark? How?**

**Should we have laws to protect and preserve beaches and reefs for public access and for recreational purposes?**

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<sup>95</sup> Oral communication with Hilda Kari, Assistant Director – Customary Land, Land Reform Unit, Ministry of Lands, Housing and Survey, Honiara (September 3 2009).

<sup>96</sup> Tribes and Customary Land and Titles Bill 2006.