

Samoa law reform and recognition of *fa'atama*: A *Talanoa* approach

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Talanoa approach**

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ABSTRACT

The thesis attempts to address significant gaps in current knowledge on law reform, gender responsive law making and gender discriminatory practices in the legally pluralistic nations of the Pacific, more specifically, in Samoa, where the majority of *fa'atama*¹ reside. This thesis adopts a critical *talanoa* approach to understanding the gender discriminatory practices embedded in Samoa customs (*tu ma aga*), traditions and law, from the perspective and lived experience of *fa'atama*, as they navigate their journeys, to enable the process of their recognition, through the proposed legislative and non-legislative reform of Samoa customs, traditions, and laws.

This is a thesis by manuscripts and is based on four research papers (Chapters 2-5) and one empirical research paper (Chapter 6). This thesis is presented as a successive progression of research in a series of seven chapters (Table 1). Each chapter, while related, function as standalone papers. A preface is provided at the start of each chapter, to demonstrate the sequential and cohesive progression of the research, most of which have been submitted to targeted journals and are papers under review. Chapters 1 (Introduction) and 2 (Literature Review) provide the justification for the research, positionality of the researcher, while the reviewed literature provides a critical lens to the laws, customs, traditions, and gender norms impacting the recognition of *fa'atama* in Samoa. The critical gaps of understanding from the reviewed literature, led to the framing of key research questions exploring the factors, tensions and challenges at the interface between laws, customs, and gender discriminatory practices which cross-cuts across all papers of the thesis. Chapter 3 explores the *talanoa* methodology adopted in the empirical chapter and three of the four research papers.

Paper 1 (Chapter 2), is a comprehensive review of relevant literature, from books, laws, court judgments to research papers, dated 1970-2020, resulting in the emergence of core themes, based on the critical gaps presented in the review: the language of sexuality and gender discourse in Samoa; the sociocultural construction of *fa'atama* in the context of femininity and masculinity in Samoa's customary and legal context; the role of gender equity and gender status in Samoa law reform from historical origins to the modern day

¹ *Fa'atama* (Samoa) – a gender identity term adopted in this thesis to refer to 'in a manner of men' and 'transmen', a collectively agreed definition submitted by *fa'atama* during the data collection phase of my study.

context; and lastly, an examination of gender discriminatory practices in the context of Samoa *fa'atama* and SOGIEC recognition in the criminal and family law context of Samoa. This review then proposes ways to reimagine some of the legislative and non-legislative challenges ahead for *fa'atama* and SOGIE members who do not fit into the cultural gender binary construct embedded in Samoa's Gender Framework, or the recognized legal and sex categories of Samoa.

Building on Paper 1, *talanoa* methodology, law reform processes at customary and national level and the theory on the customary rule of recognition are explored in Papers 1-4 (Chapters 2-6). Finally, the purpose of the final chapter (Chapter 7) is to bring together all the findings and recommendations, research limitations, the implications for the wider *fa'atama* and SOGIEC communities. Any supplementary information not provided in each thesis chapter will be included in the Appendix.

The thesis used a critical *talanoa* methodological approach, underpinned by the *va* (a Pasifika relational approach) reflected in the multiple, multi-dimensional diversity, dignity, and truths. The focus group *talanoa* and the face to face (semi structured) interview *talanoa* were the main methods of enquiry adopted for the study. Participants (respondents) in Auckland, New Zealand and Apia, Samoa were carefully selected by the principal *fa'atama* advisor engaged for the study.

The thematic analysis from the *talanoa* data found that both international *fa'atama* (i.e., *fa'atama* residing outside Samoa) and Samoa, are generally not accepted as *fa'atama* by family, church and the wider community (village); that *fa'atama* experience gender discrimination in their families, village and church community more in Samoa compared to *fa'atama* outside Samoa; that *fa'atama* are not free to express themselves in how they dress and who they choose to love; that *fa'atama* marriage and adoption of children is currently illegal in Samoa; that *fa'atama* are vastly under-represented in *matai* leadership and thus, are not actively involved in significant decisions impacting their families, churches, village community and more importantly, law reform. Consequently, this infringed upon their access to education, health, and law, impacting their legal status and more significantly, their recognition as a whole, which were far more urgent than is currently recognised by the community and government. This is fundamental to individual empowerment and dignity in Pacific contexts, in the absence of finance,

employment opportunities, cultural status, and class power. The urgency for recognition as a way to combat gender discriminatory practices was indeed pressing for both *fa'atama* respondents in Samoa and New Zealand. Comparatively, *fa'afafine*, unlike *fa'atama*, were able to enjoy secure recognition in local laws, not based on need, but because customs and tradition favoured men for leadership roles as a whole.

The overarching aim of this research is to critically assess and understand the key challenges to proposed reform of the status quo, which is the lack of collective recognition and acceptance of *fa'atama* in village governance, local customs, and laws. While identifying the key risks in the context of how they might operate in practice, I examine the feasibility of such proposals being adopted, wholly or in part, by the current government. More importantly, proposals with an emphasis to review and reform the current village governance practices, structures, institutions, and laws of Samoa. In this way, it is intended that an original contribution to the study of customs and gender responsive law making can be made in Samoa and the wider Pacific region.

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ATTESTATION OF AUTHORSHIP

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

I also declare that I am the principal author of all authored manuscripts listed in the table below. Chapters 2-6 have been submitted (or have been prepared as separate papers for publication in peer-reviewed journals) therefore, some inherent repetition of information occurs. Each of these separate papers was conceived by the candidate. Accordingly, I led the initial write up of all drafts, data collection, *talanoa* analysis, and subsequent submission of all manuscripts to targeted journal articles. Following this, *talanoa* data analysis and the results from data collection were confirmed by both Supervisors. I acknowledge the guidance of the Supervisory team in the research design and review of the manuscripts. However, they agreed to not claim any percentage contribution for all the manuscripts/papers provided in the table below.

Table 1: List of the papers

No.	Title of Manuscript/Paper	Name of the Journal/Publisher (Under review at/In preparation for submission)	Author Contribution
1	Critical review of <i>fa'atama</i> and SOGIEC recognition in Samoa laws: Challenges to recognition and law reform	<i>In preparation for submission to:</i> Transgender Studies Quarterly	Fa'amatuainu, B. (100%)
2	Samoa law reform and legal pluralism: Critical challenges to achieving legal recognition of <i>fa'atama</i> and SOGIEC	Canterbury Law Review	Fa'amatuainu, B. (100%)

3	<i>Talanoa</i> methodology in Samoa law and gender research: The case for a Samoan critical legal theory and gender methodology	Pacific Dynamics: Journal of Interdisciplinary Research	Fa'amatuainu, B. (100%)
4	Critique of Hart's <i>Concept of Law</i> in Samoa	Canterbury Law Review	Fa'amatuainu, B. (100%)
5	Reframing gender and development in law reform: the case of <i>fa'atama</i> advocates in Samoa	Palgrave Macmillan Singapore	Fa'amatuainu, B. (100%)

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For Meafou Fa'amatuainu (Amiatu) and Fa'amatuainu Mata'afa Fa'afetai Tu'i

PREFACE

I was born and raised in South Auckland, specifically Mangere, where my parents bought their first home. Most of my cousins and extended family are spread across Auckland. My parents left their villages of Lufilufi and Leulumoega Tuai in 1969 and we returned as a family to live in Apia where my late father was appointed to work as a University academic. As such, I only lived permanently in my ancestral homeland of Samoa for less than 10 years, from childhood and when I returned again to work in the law and justice sector, also as an academic, following in the footsteps of my late father.

Like many children of Samoan parents, I was largely influenced by their *talanoa* (meaningful conversation), retelling their journey to New Zealand, their hopes for a better future and how faith in God, hard work plus a good education are the pillars to success.

I recognised the sensitivity of this subject before embarking on this doctorate journey and my background in health equity research and the law equipped me well for the challenges ahead. As I reflect on my own understanding about what lies at the core of my identity, I understand that my gender identity and sexual orientation forms a constituent part of who I am, but it does not define “who I am” at my core. I did not experience *coming out* as do others who are part of the queer community. Although I do not self-identify as *fa’atama* (“In the manner of men” is the literal translation of the Samoan word ‘*fa’atama*’ or ‘like’ (fa’a), a ‘man’ (tama)), I understand the stigma and shame attached to *fa’atama* from my time as a child and adult living in Samoa.

Spending most of my formative years in New Zealand, I often reflect back, and now realise that I did not see the hidden value in the freedoms, rights, and privileges I had until I returned to Samoa. It was there that I recognised how strongly I felt about gender discrimination in the context of law reform and human rights. Though my journey of self-discovery served as the initial catalyst to pursue a doctorate, it was the countless *talanoa* sessions spanning over ten years prior which inspired me, at dinner tables, living rooms, garages, factory floors, church halls, village *fale* (house), buses

and trains, libraries, café's, parks, cars, carparks, offices, hallways, lecture theatres, seminar rooms, conferences, virtual sessions, boardrooms and courtrooms, coupled with random *talanoa* with street buskers, people at the local pub, street market and supermarket, thus connecting me to people from all walks of life, up to the present day. This, coupled with my personal journey through the New Zealand formal education system, from studying as an undergraduate health science and law conjoint student, to studying international relations and human rights as a masters student, and further on to studying gender and law as a PhD candidate, not only reaffirms my commitment to lifelong learning, but it also provides the fortitude, grounding, and resilience to move through the peaks and troughs of life. The privilege of learning and working in Samoa, as well, has provoked a deeper understanding of customs and laws, where I was able to confront and critically self-reflect on my own personal prejudices, while building connections to Samoa's land and titles court, law reform commission, legal academia, legal practice and specialists in gender development and law consulting fields. My connection to family living in the village, the *fa'atama* community, experienced academics as well as gender, law, and development practitioners, provided a more contextual, nuanced, and multi-layered understanding to gender norms, laws, customary practices, and traditions in Samoa.

Accordingly, there are no issues of any potential conflict of interest to declare in this study. The *talanoa* data reaffirms the status of *fa'atama* and the forgotten aspects of the *fa'asamoa* (the Samoan way of life, or Samoan culture), which is virtually non-existent today in village governance, to law reform practices adopted at national level. Post colonisation, given the lack of recognition of non-heteronormative communities and *fa'atama*, it is difficult to establish whether *fa'atama* and SOGIEC recognition existed pre-colonisation due to the lack of empirical research and evidence to support this proposition. Assumably, if *fa'atama* and SOGIEC recognition existed pre-colonisation, it would be reasonable to assert that this social practice was collectively recognised and should have remained after colonisation. If this social practice did not continue, the resulting disempowerment, political disenfranchisement, and marginalization of the *fa'atama* community was intentional because the intention was to explicitly exclude, dismiss and even outlaw this social practice. Some would even argue that the motive was to drive out a community into cultural extinction. Such oppressive aspects to *fa'asamoa* as evident in gender discriminatory practices, to

exclude *fa'atama* and other members of the SOGIEC community which became a prominent feature as a result of the influence of colonisation and Christianity. However, the exclusion of a once widely recognized social practice is not beyond repair where sociocultural norms are constantly evolving due to other influences including climate change and migration.. Thus, the unravelling and retelling of pre-historical customs, traditions, and law in Samoa as it concerns gender relations and human rights is indeed telling. The transformative nature of *fa'asamoa* enables critical reflexive pathways forward and backward, where history and modernity intertwine, sustained through the traditional art of oral storytelling, a practice which has continued into our present day. The legislative and non-legislative measures outlined in the *talanoa* data emphasise a story of hope which lies at the core of our shared humanity, fostering a space to break the silence on gender discriminatory practices, and how *fa'atama* make sense of their existence and experience in Samoa customs, traditions and laws relating to their own recognition and status as a community, thus bringing justice to the resilient voices once silenced.

CHAPTER ONE – INTRODUCTION

1.0 Rationale and Significance of the Study

This thesis examines why Samoa's *fa'atama* (masculine women who are “like men”) community remain largely underrepresented in Samoa's customary laws, state laws and in wider local discourse (i.e., legal, customary and in academia). As South Pacific law reform frameworks adopt heteronormative categories of ‘sex’ and ‘gender’ which fundamentally excludes the recognition of gender diversity, this one size fits all approach is inadequate to the Samoa context. While this thesis considers the implications of gender-responsive law-making embedded in law reform frameworks across the South Pacific region, adopting gender-neutral or gender-sensitive language in the law, the focus here is not so much the development of gender-responsive frameworks but on documenting the lived experience of *fa'atama* through *talanoa* (meaningful conversation). Foregrounding this in their understanding of the tensions and inadequacies in customs, traditions and laws, demands a more rigorous and structural approach to how gender is considered in Samoa's customs, traditions, and law reform process. This approach seeks to reduce gender discriminatory practices in order to: 1. recognise the status of Samoa's *fa'atama* and wider SOGIEC² community, and 2. bring *fa'atama* and SOGIEC within the protection and scope of Samoa customs and laws. It considers the implications of such proposed legislative and non-legislative reforms from the perspective of *fa'atama* and critically assesses the extent to which such reforms are required.

It also discusses the combined legacy of colonial and Christian influences in Samoa. This colonial legacy underscores the struggle to deal with competing legal systems, as Samoa continues to prioritise a post-colonial approach to law reform without taking bijuralism (i.e., two legal systems operating in co-existence: customary law

² For this article, any reference to “customary law” is used interchangeably with Samoa “customs”, “customary legal system” and “customary practices”; any reference to “gender equity” is used interchangeably with Samoa all Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and diverse Sexual Orientation, Gender Identity Expression and Sex Characteristics (“SOGIEC”) and “gender diversity”; and lastly, any reference to “bijural” is used interchangeably with “legal pluralism”. I also note this article is thematically incomplete. Given the word constraints I explore this further in a separate article, see Bridget Fa'amatua'inu “Samoa *fa'atama* and lived experiences: legal recognition in law reform” (2023) 30 Canterbury Law Review 97-122.

and state law) into consideration, thus resulting in laws and customary practices that are not adequately reflective of the local needs and reality of the country.³ In the same way, the local customs adopted in Samoa's customary context do not reflect the laws used in modern Samoa.

Bijuralism differs to legal pluralism, in that it is the legal co-existence of two legal systems, whereas legal pluralism promotes the idea that indigenous law operates within a colonial system of law.

Moreover, this research reviews the response of the *fa'atama* to their circumstances; how they have fared in their endeavours under the oversight of village governance, the wider community, and the current government; the influence of Christianity and colonisation and, lastly, the sociocultural factors, regarding customs and laws which might have affected them. This suggests the deeper oppressive practices at play in power and gender relations at multi-faceted levels.

Finally, this research presents a series of proposed legislative and non-legislative reforms. It proposes how legislative amendments and reform to existing customary and policy practices may enhance the gender-responsiveness of the legislative and regulatory framework. These frameworks are influential as they govern Samoa laws, customs, and traditions. Thus, the design and implementation of these frameworks could ultimately impede or benefit the aspirations of Samoa *fa'atama* and SOGIEC communities, their aiga and their villages.

³ Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa ("Mulitalo") *Law Reform in Plural Societies* (Springer, Cham, Switzerland, 2018).

2.0 Research contribution

Accordingly, the current thesis aims to contribute to building evidence and knowledge in the following areas:

2.1 Empowering the voices of fa'atama and SOGIEC experiences

As an under-researched area, there is a paucity of knowledge about *fa'atama* and SOGIEC experiences, as individuals and as a community. The thesis contributes knowledge to build evidence, from the voices of *fa'atama* and SOGIEC communities.

2.2 Empowering the voices of fa'atama on experiences in customs and laws

The focus on *fa'atama* perceptions of customs and law reform, highlights the absence of research on their customary and legal interests and the effect of their gender identity on those interests. This thesis would provide one vehicle to make their interests and aspirations in - gender development, human rights, customary and law reform more visible.

2.3 Indigenous Pacific gender methodology and critical legal theory

From the methodological perspective, the thesis contributes a critical lens, to the design and development of indigenous methodology, addressing power relations, legal pluralism, and challenging the legitimacy of gender norms, customs, and laws. The remarkable part of this thesis journey suggests that “gender recognition” was not as important to *fa'atama* as the general acceptance they sought from family and the wider community. This learning transformed the trajectory of the thesis away from a purely feminist gender lens to one driven by the voice of *fa'atama*. The underlying dynamics, tensions and challenges that are critical to the construction of a pragmatic inclusive methodology warrants attention. If applied correctly, it could empower and transform

the lived reality of *fa'atama* and SOGIEC communities in Samoa and across the Pacific region.

3.0 Chapters Overview

Chapter One sets out the rationale and significance of the study, research background, positionality of the researcher, as well as outlining the key issues under examination, methodology adopted and ethical considerations.

Chapter Two (see Paper 1) discusses the body and scope of relevant literature written primarily by Samoan and Pasifika specialists in anthropology, history, gender development, law, philosophy, politics as well as international specialists in the areas mentioned earlier with a focus on the South Pacific region. The chapter discusses the importance of instituting gender responsive reforms across the customary, community and national settings, especially for the *fa'atama* and SOGIEC communities facing gender discrimination. The review also considers influences from Christianity, colonisation, and sexuality in the pursuit of gender equity in the law.

Chapter Three (see Paper 2) provides a discussion on the methodology adopted for this study and presents critiques to western and Pacific-specific methodologies. This chapter concludes with critical challenges to address, informed by relevant literature (see Paper 1) and empirical responses from the *talanoa* data (see Chapter 4, Paper 3).

Chapter Four (see Paper 3) presents discussions on findings from the two countries, Samoa first, followed by New Zealand. For each country the major emergent themes identified through *talanoa* thematic analysis are organized around the core questions under investigation. This chapter concludes with a discussion on what *fa'atama* seek to achieve in the context of law reform in Samoa's customary and state laws.

Chapter Five (see Paper 4) discusses Samoa's legal system, examining the value in Samoa's state and customary law context.

Chapter Six (see Paper 5) examines how the goals identified in Chapter four (see Paper 3) may best be achieved in light of Samoa's legal system (see Chapter five, Paper 4).

Chapter Seven summarises all the key elements of the thesis and provides some concluding remarks about the study limitations, recommendations for the pathway to reform, future research, and potential policy changes to enhance the proposed reforms.

Following this, I briefly discuss the significance of the geographical context. I will then discuss the influence of gender, law reform and legal pluralism concerning *fa'atama*; the aims of this study, and clarification around terms and definitions. Finally, I provide my positionality and justification for this research. All these issues will be expanded in the literature review, research chapters, and in the empirical findings chapter. In the final part of the Chapter, I provide an overview of the thesis chapters.

4.0 Geographical context

While Samoa is the primary focus for this thesis, Samoa and New Zealand were carefully selected by the *fa'atama* advisor engaged for this study, based on the large proportion of *fa'atama* residents in each geographical location. The impact of the COVID pandemic, prompted the use of *talanoa* online, using zoom to connect *fa'atama* in parts of New Zealand (Auckland and Wellington), American Samoa as well as the United States (Washington D.C.) to the study and the researcher. To emphasise and expand on a point, I draw on examples from other Pacific countries, where recommendations may also be transferrable, on the basis of the commonalities to Samoa, in terms of their shared legally pluralistic realities, their colonial legacy as well as socio-cultural and political contexts. Focusing on only one separate jurisdiction, rather than more legally plural Pacific nations, avoids the complexities in the state recognition of customs and gender variance or recognition in law.

Consequently, it enables a more thorough and robust investigation, leading to more meaningful and authentic recommendations.⁴

Samoa is a legally pluralistic nation, bijural by nature, with a customary law and state law system, operated by a population of predominantly indigenous Samoans (See Chapters 2-3, Papers 1-2 for more background information on Samoa concerning socio-cultural and political context to adequate law reform). More than 80% of the population lives in rural areas, where land and life in general is primarily governed by customary law.⁵ Samoa's economy is based on subsistence and exports that include agriculture, fishery, and forestry products.⁶ This suggests the heavy reliance and dependency on natural resources under governance of the customary law rather than state law system. Tourism has also been a growing industry, although this was disrupted by COVID-19. Livelihoods are therefore heavily dependent on the abundant natural resources. Further research shows that gender-based inequality is deeper in the urban areas compared to the rural areas, partly reflecting wage inequality. Research also shows a strong correlation between gender, level of education, and poverty.⁷

In Samoa, gender intersects with rank, kinship relations, social status, level of formal education, and access to resources including land to shape the responses of women – and indeed all people – to development opportunities.⁸ Village councils (*fono*) play a considerable role in the provision of health and education services, water supply, agricultural development, land use, business operations, and the maintenance of law and order.⁹

⁴ Campbell McLachlan “State recognition of customary law in the South Pacific” (PhD thesis, University of London, 1988) at 336.

⁵ ADB and Government of Samoa (MWCSD) *Samoa Country Gender Profile (Draft)* (2021) at 2. The author served as ADB Samoa Gender Consultant on this Project.

⁶ At 129.

⁷ UNDP and Government of Samoa (MWCSD) *Samoa Hardship and Poverty Report: Analysis of the 2013/2014 Household Income and Expenditure Survey* (2016); UNDP and Government of Samoa (MWCSD).

⁸ Rochelle Stewart-Withers “Contesting a Third World Development Category: Female-headed households in Samoa” (2011) 34 *Women’s Studies International Forum* 171.

⁹ National University of Samoa *Political Representation and Women’s Empowerment in Samoa Volume 1: Findings and Recommendations* (Centre for Samoan Studies, National University of Samoa 2015).

Education can be a powerful catalyst for gender equality by assisting the overcoming of discriminatory norms, and strengthening knowledge, skills and capacity.¹⁰ The expectation that boys will become *matai* (chief) may lead to priority being given to informal education and cultural knowledge, perhaps at the expense of formal schooling, and a greater reluctance to ask for assistance, which may be perceived as a sign of weakness.¹¹

While competition in the telecommunications sector led to the marked increase of access to modern information and communications technology (ICT), such as internet access, across Samoa, it has not significantly translated into increased access to law reform and state law initiatives.¹²

Fa'asamoa extends to Samoan diasporic communities living outside the Samoan islands, who are seen as part of a borderless, global Samoan nation. Samoa's Second Voluntary National Review on the SDGS noted that Samoans are a communal people, who take responsibility for each other, their *aiga* (family, kin group), villages, communities, and country. Life in villages, including urban villages, is governed by the customs, usage and history of those villages as interpreted by the village *fono* (meetings), comprised of *matai* (Chiefs), under the Village Fono Act 1990. While modernisation and urbanisation are influencing the custom and the social fabric of village life, Samoan culture can be flexible, resilient, and accommodating of change.¹³

4.1 International and Regional frameworks

Since 1976, Samoa has been a member of the United Nations. As a signatory to the Universal Declaration of Human Rights, Samoa has ratified six international Human Rights Conventions, excluding the International Covenant on Economic, Social and Cultural Rights (CESCR). However, apart from the *Conventions on the Rights of the*

¹⁰ UNESCO *Education and Gender Equality* (2019).

¹¹ Peggy Fairbairn-Dunlop "He's Won, But He's Lost It': Applying a Samoa Gender Lens to Education Outcomes" (2010) 6 *AlterNative* 143.

¹² Bridget Crichton and Folutoto Seve Seve Tuipe'a Aloimaina "Telecommunications reform in Samoa: The introduction of Competition law - Preliminary findings from the Telecommunications Project" (2018) 8 *International Journal of Advances in Computer Science and Its Applications* 31.

¹³ Ramona Boodoosingh "Bartering in Samoa during COVID-19" (30 June 2020) <<https://devpolicy.org>>.

Child (CRC)¹⁴, the remaining conventions were ratified, without their optional protocols or associated procedures for various reasons, most of which point to the lack of institutional independent mechanisms in place for monitoring and implementation:

- Accession in 1992, *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)
- Signature in 1990 and Ratification in 1994, *Conventions on the Rights of the Child* (CRC)
- Accession in 2008, *International Covenant on Civil and Political Rights* (ICCPR)
- Signature in 2007 and Ratification in 2012, *Convention for the Protection of All Persons from Enforced Disappearance* (CED)
- Signature in 2014 and Ratification in 2016, *Convention on the Rights of Persons with Disabilities* (CRPD)
- Accession in 2019, *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (CAT)

The recommendation from the 2021 Samoa Fa'afafine Association (SFA) Inc Joint Stakeholder Submission for the Universal Periodic Review (UPR) was that Samoa ratify the three remaining core International Human Rights Conventions:¹⁵

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- International Covenant on Economic, Social and Cultural Rights (CESCR)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their (CMW).

While not highlighted in the 2021 SFA UPR submissions, the *Beijing Declaration and Platform for Action* and *Pacific Leaders' Gender Equality Declaration* note key progress from the temporary special measure to introduce the 10% quota enhancing the representation of women parliamentarians, as well as more women in public

¹⁴ Signature in 1990 and Ratification in 1994.

¹⁵ Universal Periodic Review of Samoa Fa'afafine Association Inc Joint Stakeholder Submission (21 September 2021).

sector senior management.¹⁶ In the same way, to fulfil Samoa’s CEDAW obligations in line with Article 44 of Samoa’s Constitution, it should also give due consideration to *fa’afafine* and *fa’atama* representation, thus “allowing [a] constitutionally guaranteed percentage of the seats”.¹⁷ It was further reported that the Joint United Nations Programme on HIV/AIDS (UNAIDS), UN Women and general UN experts are all supporters of SFA vis-à-vis Samoa’s LGBTQI/SOGIEC community.¹⁸

5.0 Overview: Gender, Law Reform and Legal Pluralism in Samoa

In *fa’asamoa*, there are clearly defined roles for different people, both titled (i.e., conferred *matai*) and untitled (i.e., without *matai* titles). There are strong expectations as to gender roles, and how people should behave in relation to social constructs of masculinity and femininity.¹⁹ All members of society carry distinct roles as determined by village, family, age, gender, and title (*matai*) status.²⁰

A 2016 Law Reform Commission report on legislative compliance with the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) stated that the roles allocated to different members of the village form an essential part of the Samoan identity and belonging. The report noted that while eliminating differences in gender roles altogether may not be appropriate in the Samoan context, the government may be obliged under CEDAW to implement measures to ensure *de facto* gender equality. The report also identifies potential pathways for doing this.²¹

¹⁶ United Nations Women “Beijing Declaration and Platform for Action Turns 20” (2020) UN Women <<https://beijing20.unwomen.org/en>>; Pacific Islands Forum “Pacific Leaders Gender Equality Declaration Independent Review. Final Report 1971-2021” (2021) PIF <https://www.forumsec.org/wp-content/uploads/2022/06/PLGED-Review-Report-FINAL_11.6.22-1.pdf>

¹⁷ UN Women “Beijing Declaration and Platform for Action Turns 20”; PIF “Pacific Leaders Gender Equality Declaration Independent Review. Final Report 1971-2021”.

¹⁸ Consultation with Alexander Su’a, Samoa Fa’afafine Association/Samoa Law Society, 16 March 2023, zoom.

¹⁹ Ministry of Women, Community and Social Development *Women: Matai and Leadership Survey* (Ministry of Women, Community and Social Development 2015); Samoa Law Reform Commission *Samoa’s Legislative Compliance with the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)* (Government of Samoa 2016).

²⁰ Peggy Fairbairn-Dunlop *Tama’ita’i, Samoa* (Institute of Pacific Studies, Suva, Fiji, 1996); National University of Samoa, above n 9.

²¹ Samoa Law Reform Commission, above n 19.

Commentators on Samoan culture and the allocation of gender roles often refer to a sacred covenant known as *o le va tapuia*, the sacred space of respect between men and women. The Samoan village comprises the “village of men” and the “village of women”, with a strong division of labour that informs traditional institutions. The relationship between brothers and sisters is particularly important, and governed by the *feagaiga*, known as the brother and sister covenant.²² This brother and sister covenant emphasises that the brother leads the family, and is expected to provide for his sisters, as well as respect and protect the honour of his female siblings. The sister carries the *mamalu* or dignity of the family, and her role is to provide advice and act as a caregiver and mediator for the family.²³ Women have traditionally had status associated with *feagaiga*, and the Second Voluntary National Review on the Sustainable Development Goals states that the government has drawn on this concept to promote respect for and empowerment of women.²⁴ While *fa’atama* do not identify as women, the focus on the male-female and brother-sister binary is embedded in the sociocultural fabric of Samoan society. This carries problematic implications in customs and laws, which will be explored further throughout the thesis.

In a family with no males and no brothers, or a family comprised of males only and no sisters, Samoan society is hierarchical by nature and reverts to rank according to birth order status. The first born is traditionally positioned to be the future successor and so on.

A 2016 Law Reform Commission report on Samoa’s legislative compliance with CEDAW referred to three distinct roles for women within the village: the *auluma* comprising unmarried, divorced or widowed women who are born into the village and who have the highest status a woman can hold; the *faletua* or *tausi* who are the wives of the *matai* and married into the village; and the *ava a taulelea*, the wives of

²² Latu Latai “Changing Covenants in Samoa? From Brothers and Sisters to Husbands and Wives?” (2015) 85 Oceania 92.

²³ Ministry of Women, Community and Social Development, above n 19.

²⁴ Government of Samoa. 2020. Samoa’s Second Voluntary National Review on the Implementation of the Sustainable Development Goals. Apia. <https://samoa.un.org/en/52796-samoas-second-voluntary-national-review-implementation-sustainable-development-goals>.

untitled men with the lowest rank in the village.²⁵ The term *aualuma* has a number of meanings, and may also refer to all women within the village (including the *tausi* or *faletua*) within the context of a village ceremonial function. Historically, the *faletua ma tausi* and *ava a taulelea* were responsible for domestic tasks and expected to serve their husband's family and sisters (who were born into the village). A woman who marries and moves to her husband's village²⁶ is also referred to as *nofotane* and has less status in her husband's family and on his family land than she does within her own village (where she will be *aualuma*, a daughter of the village).²⁷

In Samoa, the customary legal system (which comprises of a network of decentralised village councils holding powers of judicial enforcement and law making)²⁸ co-exists with the state legal system. It will be argued that, fundamentally, legal pluralism in this thesis is the co-existence of more than one legal order in the overall legal system, in one jurisdiction, where one legal order may also manifest legal pluralism, which serves as the legal framework for this thesis. However, legal pluralism manifests in customary legal systems as each of the 200 plus villages operate general customary rules across all the villages (*aganu'u*) and customary rules more specific to each village (*agaifanua*).²⁹ While it is not the aim of this thesis to explore village legal orders against each other or the state, the focus is on the implications from the bijural system (see Chapter 4, Paper 3, which discusses the empirical findings and future recommendations; see Chapter 5, Paper 4 which provides a deeper analysis of the subject).

This thesis discusses the impact of legal pluralism in the context of gender discrimination and human rights. Some of these issues are elaborated further in Chapter 4 (see Paper 3), which examines the impact of merging Christianity and the culture from the perspective of *fa'atama* respondents, and the combined influence it has on gender practices in Samoa; Chapter 5 (see Paper 4), which discusses legal pluralism; and, Chapter 6 (see Paper 5), which examines the customary rule of recognition and state

²⁵ Samoa Law Reform Commission, above n 19; Penelope Schoeffel "The Samoan concept of feagaiga and its transformation" in Judith Huntsman (ed) *Tonga and Samoa* (Macmillan Brown Centre for Pacific Studies, University of Canterbury, Christchurch, 1995) 85.

²⁶ Samoa Bureau of Statistics *Population and Housing Census* (2001).

²⁷ Fairbairn-Dunlop, above n 20; Samoa Law Reform Commission, above n 19.

²⁸ Mulitalo, above n 3, at 5.

²⁹ Samoa Bureau of Statistics, above n 26.

focused law reform to accommodate legal pluralism and customs. All of these tensions and challenges lie within a legal framework that is growing increasingly responsive to *fa'asamoa* values. While the pace of such reforms may be considered frustratingly glacial, contrasted with the successes and failures of overseas legal frameworks, the present progress with customary laws and state laws cannot be underestimated.

In summary, the focus of this research is whether the current customary and legal system governing *fa'atama* might have impeded their recognition in the *fa'asamoa* law reform context. This thesis examines the relationship of gender discriminatory practices in law reform and social practices governing recognition in laws and customs, guided by the lived experience and critical reflections from Samoan *fa'atama* living in Samoa and outside Samoa. It will be argued that the proposed legislative reforms, in the absence of adequate gender-responsive customs and laws, would help progress *fa'atama* recognition in Samoa.- I note that non-legislative reforms were also proposed in the *talanoa*.

6.0 Research questions

In exploring these issues, this thesis was based on four core research questions, which emerged as a result of the gaps identified from the literature review on understandings concerning law reform, gender norms and gender discriminatory practices embedded in customs, traditions and laws impacting *fa'atama*:

1. What are the historical, cultural, and legal challenges that prevent *fa'atama* from being recognised by local customs and laws?
2. How do we legally address gender discriminatory practices impacting *fa'atama* in Samoa?
3. How do Samoa's colonial, Christian and cultural beliefs inform Samoa's village governance and law reform process?
4. How much agency do *fa'atama* have in participating in and facilitating the process of their legal recognition?

While the core questions above provide scope to the thesis, the principal question under investigation was What gender discriminatory practices faced by *fa'atama*

influence their low recognition in Samoa's law reform process and village governance?

The literature from the Pacific shows the reality that men continue to dominate decision making in church, family and village settings, and that women and *fa'atama* were less recognised in customs, traditions and laws of Samoa compared to men and *fa'afafine*. Are all *fa'atama* excluded from Samoa's social order and village governance? What differences are there in the experiences of *fa'atama* living in Samoa and abroad, or living in urban and rural areas? Are all SOGIEC or *fa'atama* actively involved in Samoa's law reform process? What legal and regulatory frameworks are in place to address gender discriminatory practices in Samoa? The above issues will be examined further in this thesis.

7.0 The critical voice of the researcher: Positionality

The researcher has been immersed in Samoan gender development and the law for over a decade, as a student, a researcher, a lawyer, and an academic. Research interests in human rights and law reform is grounded in the researcher's cultural identity as a Samoan, raised in New Zealand and Samoa. The researcher brings a unique critical position to this thesis, as a daughter of Samoan parents, one of whom was a high Chief, both rooted in Christian values and raised in villages which continue to prohibit bestowing chiefly titles on women and in some instances, have proceeded to enforce penalties on *fa'afafine* and *fa'atama* for dressing outside of the cultural gender binary construct.

With an interdisciplinary professional background, the researcher has proven experience in health equity research focussed on marginalized and vulnerable communities, covering a variety of sensitive subjects including access to health, problem gambling, to more general specialist areas of pacific health law, human rights, bioethics in decision making, law reform and gender development. For a Pasifika student, researcher and academic, it is a privilege to advocate for the recognition and protection of minority interests in the context of gender development, human rights, and the law. Where this research yields personal satisfaction, lies in the practical scholarship lens it entails, particularly with respect to gender equity

rights in law, advancing the agenda on meaningful access to justice, with an emphasis on empowerment, and the elimination of overall disparities through meaningful law reform.

Conversely, I draw attention to the subjectivity of the expert (key informant) voices dominant in gender and law reform discourse. Their collective professional background from cultural heritage, gender development, history, human rights, and the law may interconnect with their personal engagements. As Samoa is a small country, the resulting overlap may be more pronounced. It is an inevitable part of the *talanoa* process where some key informants may be considerably biased, perpetuate their own self-interests as well as the best interests of the agency they represent, at the expense of the wider constituency they seek to represent. Their perspective is worthy of consideration, although in some instances, quite restricted by limited knowledge on the operation of Samoa's bijural system or of gender discrimination generally. However, what this reveals is the space for debate, negotiation, critical examination and ideally, some form of resolution that will yield direct benefits to the *fa'atama*, their *aiga* (family), *nu'u* (village) and wider SOGIEC community, who continue to carry the challenge of recognition in Samoa customs and laws.

8.0 Clarifications of common terms and definitions

- **Custom** – used interchangeably with customary which refers to the customary practices and protocols; social practices, *fa'asamoa* traditional values, lores, all of which are unique to and forms part of the collective indigenous identity.³⁰
- ***Fa'atama* (Samoan)** – for the purposes of this thesis, these terms refer to a person born a female but whose gender identity is 'female to male'. Thus, the term 'trans man' is used in the global literature for someone who is born female and identifies as male. A trans man may describe himself as 'FtM', or 'F2M' or simply male. *Fa'atama* respondents in this study self- identified as *fa'atama* and trans men.

³⁰ Unasa Va'a "Samoan Custom and Human Rights: An Indigenous View" (2009) 40 Victoria University of Wellington Law Review 237; Malama Meleisea and Penelope Schoeffel "Sāmoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court" [2022] The Journal of Pacific History.

- **Gender** is the umbrella term used in the literature to refer to the socially constructed norms and roles, which may vary according to society, culture and so on. For example, female, trans man, *fa'atama* and *fa'afafine*.³¹
- **Gender equity** is defined as the process to ensure fairness to all gender groups. Fairness is strategically prioritized and actioned through specific measures, laws, strategies, and policies put in place to compensate for the epistemic and structural disadvantages that would otherwise hinder the different genders from achieving equality.³²
- **Pacific or Pasifika:** While this thesis is not necessarily focused on the New Zealand diasporic Samoan context, I engage directly with Pacific and Pasifika worldviews as a comparative tool to engage with and highlight the broader Pacific indigenous collective, outside Samoa.
- **Samoan language** – all Samoan words are spelled in the way they are said, verbatim, whether colloquial or formal. In this way, diacritics is applicable insofar as necessary to the context, meaning and interpretation.³³
- **SOGIEC** refers to Sexual Orientation, Gender Identity Expression and Sex Characteristics, which is the commonly adopted terminology used in reference to the diverse SOGIE community in Samoa government and policy concerning inclusive reporting.³⁴
- **Talanoa:** The rationale behind this style of communication is not a means to an end, but rather a form of dialogue which values respectful reciprocal relationships between the parties over the knowledge imparted from the exchange. Thus, releasing the pressures associated with time constrained communication, while affirming the sacred

³¹ Tamasailau M Suaalii “Samoans and Gender: Some Reflections on Male, Female and Fa’afafine Gender Identities” in Cluny Macpherson, Paul Spoonley and Melani Anae (eds) *Tangata o te moana nui* (Dunmore Press, Palmerston North, 2001) 60.

³² Bridget Crichton, ‘Gender Equity in Samoan Laws: Progress vs Contradictions.’ (2018) *Journal of South Pacific Law* 125–42.

³³ Eseta Magaui Tualalelei, Fepuleai Lasei John Mayer and Galumalemana A Hunkin “Diacritical Marks and the Samoan Language” (2015) 27 *The Contemporary Pacific* 183.

³⁴ ADB and Government of Samoa, above n 5; Samoa’s Ministry of Women, Community and Social Development. (2021). *National Gender Policy on Inclusive Governance 2021 – 2031*. Government of Samoa. Apia, Samoa, p10 .

space of the communication between each participating party. This definition is expanded on further in the Methodology chapter (see Chapter 4, Paper 3).

- **Vā:** Foregrounded on Pasifika understandings in terms of how the world is seen and viewed, while acknowledging the sacredness governing the space between two parties.

9.0 Out of Scope

The following populations and matters are outside the scope of the research:

- Non-indigenous whether *fa'atama*, *fa'afafine*, women, men and so on.
- Gender variance recognition frameworks adopted outside the South Pacific region.

10.0 Respondents

Samoa and New Zealand were carefully selected by the *fa'atama* advisor engaged for this study based on the large proportion of *fa'atama* residents in each geographical location. Respondents were recruited based on referrals approved by the *fa'atama* advisor for the study.³⁵ Following this, I proceeded to engage and, where appropriate, invite people to participate.

From Samoa, for the *fa'atama* interview *talanoa*, there were 2 *fa'atama* (self-identified), for the *fa'atama* focus group *talanoa*, there were 5 *fa'atama* (self-identified), 4 women (2 Government women representatives; 2 Government CEOs), and 1 *fa'afafine* (Government CEO), with a total of 12 respondents (7 *fa'atama* self-identified; 5 experts (key informants)).

In New Zealand, for the *fa'atama* interview *talanoa*, there were 3 *fa'atama* (self-identified), for the *fa'atama* focus group *talanoa*, there were 4 *fa'atama* (self-identified), with a total of 7 respondents (7 *fa'atama* self-identified).

³⁵ Jean Faugier and Mary Sargeant "Sampling hard to reach populations" (1997) 26 Journal of advanced nursing 790.

Across both countries, 14 *fa'atama* participated (about 74% from the total number of research respondents) and 5 key informants with a background in gender development, law, and human rights. In total, 19 respondents participated in this study.

The majority of *fa'atama* respondents were between the ages of 40-49 years comprised of *fa'atama* living outside Samoa, followed by *fa'atama* respondents between the ages of 20-29 years most of which were living in Samoa; the rest were older and living in Samoa. Another key feature is that the majority of respondents chose to participate in a focus group *talanoa* rather than an interview *talanoa*. However, the individuals who proceeded to an interview *talanoa* preferred the option of being interviewed as part of a group, much like the focus group *talanoa* sessions. More detail will be provided in Chapter 4 (see Paper 3) on respondents.

The findings showed that while there were similarities between the views of *fa'atama* in Samoa and New Zealand, there were also significant differences rooted in cultural protocols and traditional gender-based roles. There were also differences between women in terms of their views about women and men's authority in gender equality. These and other key findings will be discussed in full in Chapter 4 (see Paper 3).

10.1 Respondent profile

The tables below show a snapshot of respondent characteristics which helps to ease the synthesis of data gathered from the findings. The disclosure of the respondents personal information was voluntary and the following tables serve as the baseline indicator of the *fa'atama* cohort and key informant cohort (research cohorts) involved in this study. I have structured the tables according to focus group and interview *talanoa* with a further breakdown into key categories to indicate the scope of representation and to ease the process of thematic analysis.

Table 2: Respondent Profile
1. Interview Talanoa: Samoa
Village and Community

Fa'atama Representatives

Participant Identifier	Ethnicity	Identity/Party	Age Group	Date/Location
V&C_IT_FR1_SAM	Samoa	Fa'atama	50+	13 July, 2022 in Apia, Samoa
V&C_IT_FR2_SAM	Samoa	Fa'atama	20-29	13 July, 2022 in Apia, Samoa

NOTE: Both interview respondents preferred to be interviewed together.

Government Women Representatives

Participant Identifier	Ethnicity	Identity/Party	Date/Location
Dionne Fonoti V&C GWRI	Samoa	NUS	27 June, 2022 (zoom)
Penelope Schoeffel	Samoa	NUS	7 July, 2022 in Apia, Samoa

NOTE: I had a follow-up meeting in-person with Dionne in Apia, Samoa on 19 July.

Government CEOs

Participant Identifier	Ethnicity	Identity/Party	Date/Location
Leilua Mema Motusaga S CEO	Samoa	MWCSD	13 July, 2022 in Apia, Samoa
Alexander Su'a S LP	Samoa	SLS, SFA	18 July, 2022 in Apia, Samoa
Sheliza Tapuai S ACEO	Samoa	SLRC	22 July, 2022 (zoom)

NOTE: The initial meeting with Leilua took place in Apia, Samoa on 8 July. We met again on 13 July for the full consultation.

Having contracted COVID in Samoa, I had to reschedule the in-person meeting with Sheliza originally set down for 19 July. We proceeded to a zoom meeting but met in person on 25 July in Apia, Samoa.

2. Interview Talanoa: New Zealand *Village and Community*

Participant Identifier	Ethnicity	Identity/Party	Age Group	Date/Location
V&C_IT_FR1_NZ/I2	Samoa	Fa'atama	40-49	24 June, 2022 in Auckland
V&C_IT_FR2_NZ	Samoa	Fa'atama	40-49	24 June, 2022 in Auckland
V&C_IT_FR3_NZ	Samoa	Fa'atama	20-29	24 June, 2022 in Auckland

NOTE: All three interview respondents preferred to be interviewed together.

3. Focus Group Talanoa: Samoa *Village and Community*

Village Fa'atama

2 July, 2022 in Apia, Samoa

Participant Identifier	Ethnicity	Identity/Party	Age Group
V&C_FGT_VF3_SAM	Samoa	Fa'atama	20-29
V&C_FGT_VF4_SAM	Samoa	Fa'atama	20-29

Community Fa'atama

2 July, 2022 in Apia, Samoa

Participant Identifier	Ethnicity	Identity/Party	Age Group
V&C_FGT_VF1_SAM	Samoa	Fa'atama	40-49
V&C_FGT_VF2_SAM	Samoa	Fa'atama	50+
V&C_FGT_VF5_SAM/II	Samoa	Fa'atama	40-49

Focus Group Talanoa: New Zealand *Private*

Town Representatives
28 June, 2022 (zoom)

Participant Identifier	Ethnicity	Identity/Party	Age Group
P_FGT_TRF1_NZ	Samoa	Fa'atama	50+
P_FGT_TRF2_NZ	Samoa	Fa'atama	40-49
P_FGT_TRF3_NZ	Samoa	Fa'atama	40-49
P_FGT_TRF4_NZ	Samoa	Fa'atama	20-29

NOTE: The international fa'atama focus group was not part of the original schedule but welcomed, nevertheless. The fa'atama advisor I consulted had organised this focus group alongside the other fa'atama interview and focus groups for various reasons: 1. The removal of the "Members of the Judiciary group" following email correspondence on 10/06 from the CJ Associate, stating that the CJ views the issues under investigation as matters for Judges to explore and discuss in their judicial decisions, based on evidence which should not be the subject of extra judicial comment, lest they be accused of bias one way or the other; and 2. Declined invitations from the Office of the Ombudsman, Office of the Attorney General and the Ministry of Prime Minister & Cabinet. The total number of scheduled participants were substantially reduced from the original envisioned amount of 35 to 19, due to the lack of availability from both fa'atama and the general pool of targeted participants. The recruitment period of June to July 2022 was sufficient. The fa'atama advisor had anticipated the general lack of interest or aversion to the topic in Samoa due to the strong influence of traditional Christian norms. However, he suggested the prevailing attitudes would mostly likely be overcome by continued commitment to education and awareness raising, sector-wide, and in the long term.

11.0 Research methodology

To conduct a critical examination from a *fa'atama* perspective while adopting a *talanoa* approach on whether the gender discriminatory practices faced by *fa'atama* influence their low customary and legal recognition in Samoa's law reform process and village governance, the research methodology incorporates three phases:

1. The first phase of the research involved an in-depth examination of literature, both primary and secondary material from historical records, along with more contemporary academic peer-reviewed journal articles, legal commentary, and books, covering critical aspects of village governance, law reform and gender relations, the majority of which are publicly available. The exhaustive literature review (see Chapter 2, Paper 1), I undertook, encompasses both Samoan and English sources on Samoa history, customs and laws governing gender development and human rights followed by doctrinal analysis of relevant primary and secondary material, including statutes, court judgments, Hansard debate records, national reports and local newspaper articles.³⁶ The assessment of this material involved a combination of approaches, most of which were critical and socio-cultural, to allow for the identification of key themes relevant to customary recognition of social practices, law reform, human rights, sociocultural, historical and political drivers with respect to Samoa customs and laws.

2. The *Talanoa* was critical to the second phase of the research. This phase involved face-to-face contact with respondents via focus group *talanoa* (FGT) followed by in-depth semi-structured interview *talanoa* (IT). Thus, a series of IT were conducted with key informants comprised of selected *fa'atama* individuals and key informants who included *fa'atama* advocates, CEOs involved in gender development, law reform and legal practice from government officials and academics of cultural heritage, history, anthropology, and gender development.

The indicative questions and prompts used during the FGT and IT were guided by the emergent themes from the literature review and doctrinal analysis (the first phase).

³⁶ Sue Wilkinson "Analysing focus group data" in David Silverman (ed) *Qualitative research* (4th ed, Sage Publications, Thousand Oaks, CA, 2016).

The respondents (n=19) included representatives from the village, public sector, and private sector. The key respondents (FGT and IT) were then invited to share their views, reflect on their own cultural journey according to their lived experience, in a non-threatening and empowering safe space where they felt comfortable to participate.³⁷ While *talanoa* is commonly adopted as an oral cultural practice, the *talanoa* was essentially focussed on building and creating relational narrative inquiry, dialogue and discussion which is not exclusively oral. *Talanoa* may also be written, prefaced by an initial *talanoa* in person or online.³⁸ As such, the *Talanoa* is not merely the act of talking or discussing but a complex multi-layered dialogue from free-flowing *talanoa* to critical *talanoa* conducted in the language of the respondent, whether Samoan, English or both.³⁹

The *Talanoa* data analysis commenced after the completion of transcriptions and translations of the FGT and IT data, after which point, I led the coding of identified emerging themes and sub-themes in line with the research questions. This enabled a thorough, coherent, and consistent comparative analysis between findings from the FGT and IT concerning perceptions and experiences from the respondents as grounded in their own words (both oral *talanoa* and written *talanoa*) as contextualized to their local realities. The process of shared information exchange between both respondent and researcher was governed by values of respect and reciprocity and, as such, it required a continuous challenge of legitimization of the validity and invalidity of shared information and stories.⁴⁰ The analysis was further developed to identify the broader socio-cultural factors, the unique compositions and limitations, institutional challenges or successes to recognition of *fa'atama* in the development of effective reform of customs and laws in Samoa.⁴¹ The purpose of the

³⁷Tevita O Ka'ili "Tauhi vā: Nurturing Tongan socio-spatial ties in Maui and beyond" (2005) 17 *The Contemporary Pacific* 83; Semisi M Prescott "Pacific business sustainability in New Zealand: A study of Tongan experiences" (PhD thesis, Auckland University of Technology, 2009).

³⁸Sereana Naepi and others "The Pakaru 'Pipeline': Māori and Pasifika Pathways Within the Academy" (2020) 24 *The New Zealand Annual Review of Education* 142; Patrick Thomsen and others "In our own Words: Pacific Early Career Academics (PECA) and Pacific Knowledges in Higher Education Pedagogical Praxis" (2021) 40 *Higher Education Research & Development* 49.

³⁹Timote Vaioleti "Talanoa, manulua and founa ako: Frameworks using enduring Tongan educational ideas for education in Aotearoa/New Zealand" ((Unpublished PhD Thesis), University of Waikato, New Zealand, 2011).

⁴⁰Timote Vaioleti "Talanoa research methodology: a developing position on Pacific research" (2006) 12 *Waikato J Edu* 25; Steinar Kvale and Svend Brinkmann *Interviews - learning the craft of qualitative research interviewing 2nd ed* (Sage Publications, US, 2009).

⁴¹Mulitalo, above n 3.

reflective and reflexive analysis is to capture aspirations, professional experiences and viewpoints from the respondents, in addition to the observations noted by the researcher.⁴² This allowed further scrutinization of what is possible within institutional spaces, ways in which the existing law reform-making process may be deficient or whether there is room to explore other law-making models where customs and gender considerations are embedded into the law reform process of Samoa. As foreshadowed, the information from the IT is complemented by an examination of a wide range of primary and secondary sources (the first phase), along with an analysis of the relevance of the findings that may need to be considered in the development of research conclusions.

3. The third phase involved the development of new policies or strategies based on the ideas generated from phase one and findings of empirical inquiry from phase two of the research. This allows generating new knowledge and creating the evidence-base for the development of a toolkit or guide to help gender development and law practitioners to facilitate policies and (state and customary) laws that recognise *fa'atama* and gender diverse SOGIEC communities in Samoa.

Attendance at various *fono*, seminars, workshops and conferences associated with Samoa, law reform, customs, and gender development as well as guest lectures, has enabled the researcher to relate theoretical and conceptual aspects of the research to actual events experienced. This has enabled the researcher, who was once a law reformer and judges' clerk in Samoa's land and titles court, to evaluate the key emergent themes and viewpoints more critically, from an insider perspective, including those of direct personal relevance.

⁴² Graham Gibbs *Analyzing qualitative data* (Sage Publications, London, UK, 2007).

12.0 Ethical considerations

The key ethical considerations focused primarily on two main issues – the *talanoa* process, and confidentiality (which is part of the *talanoa* process but will be discussed separately).

12.1 *The talanoa process: focus group and interviews*

Dr Melani Anae’s *teu le va*⁴³ and the implications of the *va* (respectful relationships) in the gender and law space (see Chapter 3, Paper 2) is fundamental across intrapersonal and interpersonal levels of relationship building, at the institutional level, between researcher and supervisor, across agencies, between the researcher, university, and government agencies and more importantly, between the researcher and respondent. The *va* emphasizes safety and protection of respondents, ensuring conduct is appropriate and respectful, while all the while, upholding the integrity of the research, before and after data collection, *at all times*.

The *talanoa* process was vital to the assessment of the impacts of current and proposed customary practices and laws. The *talanoa* helped to facilitate an inclusive forum of acceptance, safety, and protection, which empowered the sharing of the most sensitive knowledge. On this view, it elevated the perspective of both *fa’atama* respondents and the very practitioners (key informants/experts) who deal with aspects of gender development, law reform and human rights. The FGT and IT provided invaluable and unfiltered insights into the full gamut of challenges, tensions, and experiences of *fa’atama*, *fa’atama* allies and key informants, as they sought to grapple with the historical, legal, political, and sociocultural impediments inherent in Samoa customary law and state law reform. The FGT and IT were critical in connecting and intersecting the overlapping and overarching views on gender development, human rights, customary law, and state law reform with the ways that gender development and law reform practitioners applied those perspectives in practice.

⁴³ Melani Anae “Teu le va: ‘New’ directions in thinking about doing pacific health research in New Zealand” (Pacific Scholars Postgraduate Seminar Series, Auckland: Centre for Pacific Studies, University of Auckland, 2005) at 1, 4; Melani Anae “Research for Better Pacific Schooling in New Zealand: Teu Le Va—A Samoan Perspective” (2010) 1 MAI Review 1.

The process followed for the overall *talanoa* was:

(a) Acknowledgement first, Consent second: Prior to obtaining the informed and voluntary consent of all respondents, I expressed gratitude to the potential *talanoa* respondent(s) for their time, thus, acknowledging their presence, their expertise, and in some cases, shared genealogy. This cultural introductory protocol re-affirms the *va* in respectful research engagements and the spirit of Pasifika values of respect, reciprocity, and service. I also encouraged them to ask questions at any point or to suggest ideas for the use of the thesis. I then proceeded to explain the objective of the research, guide them through the consent form, information sheet, while highlighting the significance of requesting their personal contact details and recordings of all *talanoa*. For all *fa'atama talanoa*, I acknowledge the expertise and support of the *fa'atama* advisor, for his patience and generosity.

(b) *Talanoa* data processing: The *fa'atama* advisor played a vital role in the design of the enquiry framework, based around the four principal questions of enquiry used in all *talanoa* (see more in-depth coverage below in (e) *Feedback mechanism*). Other related indicative questions and prompts on the research topic, and responses from respondents must be foregrounded in the *va* (see (a) *Acknowledgement first, Consent second* above), thus, earning the trust of the respondents, ensuring their care (see (f) below) and cultural safety (see (g) below), equips the researcher for unanticipated issues during the *talanoa* exchange. Some *fa'atama* focus group *talanoa* became emotionally charged as individual respondents recalled oppressive practices at work in their family, church and village setting, while others openly objected to respondents who chose to wear more feminine clothing to church and village activities, viewing them as cowards, while the overall majority of *fa'atama* shared a sense of resilience and fortitude against the ongoing challenges they face because of their choice to live authentically and fearlessly as who they are. In this way, their masculine clothing is a collective symbol of *fa'atama* self-identity and solidarity. These unanticipated exchanges provided the researcher insight into feelings evoked during the emotional exchange, personal feelings of the researcher as well as feelings expressed by the respondents, lessons on how to approach future *talanoa*, recurring themes to be translated into the next *talanoa* and further insights to the broader factors

affecting access to law reform, participation in church and village decisions making, all of which were made possible due to the semi-structured nature of the *talanoa*.

(c) Maintaining the protection and integrity of the *talanoa* data records (Recordings, Transcriptions and Translations): All *talanoa* were (audio/video (zoom)) recorded, transcribed verbatim and finally, translated verbatim (into English, if the *talanoa* was partly or wholly conducted in Samoan). While the researcher was present at all *talanoa*, not all *talanoa* were led by the researcher. In co-led *talanoa*, the researcher was able to observe expressions, listen intently to *talanoa*, actively note take and highlight gaps in the questioning, thus prompting follow-up questions during the *talanoa*. This was only possible because of the contributions of the *fa'atama* advisor and Samoan based researcher who co-led the *fa'atama talanoa* (focus group and interviews) as well as selected key informant interview *talanoa*. Thankfully, I also engaged Samoan-based support, comprised of an ICT facilitator who assisted with all online *talanoa* sessions and a female *matai*/researcher who transcribed and translated all *fa'atama talanoa* over a six-month period. The researcher transcribed all key informant interview *talanoa* with the support of transcription software, OtterAi. Nevertheless, the researcher was tasked with reviewing all completed transcripts and translations to ensure they remained accurate and true to the *talanoa* recordings. Finally, I emailed all drafts to the transcribed scripts to all *talanoa* respondents with a listed e-mail address with the additional proviso that feedback or comments were welcome for up to one month. But after the month had expired, I submitted the transcripts for *talanoa* analysis, at which point, I assumed the respondents were satisfied, unless they stated otherwise.

(d) The transcripts were integrated with notes made by the researcher which then gave a descriptive record of the interview to be analysed and interpreted. Where a face-to-face *talanoa* was not possible, as some respondents were outside of both Samoa and Auckland, New Zealand as in one case, the *talanoa* had to be rescheduled after the researcher had contracted covid during the data collection period in Samoa, where *talanoa* on zoom was arranged instead.

(e) Feedback mechanism: The researcher was fortunate to be guided by a leading *fa'atama* advisor who acted as the principal focal point of contact for the scheduling

of all *fa'atama* respondents involved in either the focus group or interview *talanoa* in Samoa and New Zealand. Importantly, the *fa'atama* advisor was also consulted on all significant aspects to ensure consistency between the method and methodology adopted for the thesis, formal introductions between the *fa'atama* respondents and researcher, consultation in the design and development of the final *talanoa* questions, and contributions to the analysis of *talanoa* findings. Additionally, his approval of the other members of the research team based in Samoa (co-facilitator for *talanoa*, transcriber, translator, and ICT facilitator for all online zoom sessions) was just as vital.

(f) Care of respondents: The research logistics from the *talanoa* venue used to the *mea'alofo* (gifts, travel allowance, refreshments or in some cases, breakfast/lunch/dinner meals) arranged for all *talanoa* respondents were approved by the *fa'atama* advisor. The expression of hospitality and reciprocal values embedded in all *talanoa* is an acknowledgement of the *va* in *fa'asamoa*. The majority of *talanoa* respondents were happy to participate without the expectation of receiving a *mea'alofo* in return.

(g) Cultural safety: All respondents entrusted their personal life experiences, perspectives and reflections to the researcher which demands a reciprocal degree of safety in return. While the *talanoa* helped to facilitate and accommodate the *va* in the construction of ideas and issues raised, not all *fa'atama* respondents requested an interview *talanoa* to share personal accounts of gender-based violence from family, having opted for *talanoa* within a focus group setting instead, even despite opening themselves to the vulnerability and challenge from other respondents, as is welcomed in the *talanoa* encounter. The nuances and dynamics of *talanoa*, including consensus building, are not the primary focus of this thesis, however, it is worth noting that the researcher was not responsible for assessing the legitimacy of information disclosed during *talanoa*. While research integrity and researcher accountability are important, at times, the researcher was led to rephrase questions when faced with inaccurate information, from a legal perspective.

(h) *Talanoa* data analysis: Essentially, the researcher adopted thematic analysis which the researcher has re-deployed, re-imagined, and re-named “*talanoa* analysis”

for the purposes of this thesis. As such, the researcher interpreted findings after reviewing all the transcribed *talanoa* data and re-listening to the *talanoa* recordings for accuracy. As a whole, observations based on the researchers notes collected during the co-led *talanoa* and during *talanoa* combined with content analysis (see Chapter 3, Paper 2), led to the identification of the key emergent themes and meanings behind those themes, based on the recurring prevalence and frequency of the commonly identified issues and experiences.⁴⁴ NVivo was used. As coding focussed on core research question responses, it provided the structure for the writing of the empirical findings chapter (see Chapter 4, Paper 3). While NVivo is branded as a computer software for qualitative data analysis, the researcher used NVivo to structure and reorganize themes identified by the researcher, only after analysing all transcripts according to country, gender identification, in line with the parent nodes, as in the four core research questions, used in the coding hierarchy.⁴⁵ The researcher used a combination of both NVivo and manual coding, due to time constraints, as themes cross-cut between *fa'atama* respondents and the key informants with respect to perceptions on gender, sex, SOGIEC, and comparisons to the *fa'atama* community, while other themes generated, were outside of the parent nodes of coding yet provided an invaluable source for future research and recommendations.⁴⁶ All identified emergent themes were listed, codified, and synthesised further to facilitate talanoa analysis. Once the talanoa analysis was validated by the *fa'atama* advisor for the study, the conclusions, implications, and future recommendations could be developed.

12.2 Confidentiality

I placed emphasis on the verbal and written assurance that all personal data would remain protected and strictly confidential. Entrusting the recruitment and referral methods to the *fa'atama* advisor meant that others outside of the research and supervisory team were aware of the study. Respondents were advised that their identity and personal information would not be used in the research without their authorization. Although efforts were made to ensure each *fa'atama* respondent was

⁴⁴ Dennis Howitt and Duncan Cramer *Introduction to research methods in psychology* (3rd ed ed, Prentice Hall, London, 2011).

⁴⁵ Gibbs, above n 41.

⁴⁶ Elaine Welsh “Dealing with Data: Using NVivo in the Qualitative Data Analysis Process” (2002) 3 Forum.

anonymized, their real names and pseudo identities were known to the researcher and supervisory team, as well as the other respondents participating in the same *talanoa*, or as permitted by the respondents. For this reason, only limited confidentiality could be offered to those interviewed. It is recognised by the researcher that the research could lead to findings that are potentially controversial, as the topic involves a ‘critical examination’ of current and proposed customary and legal reforms from the perspective of *fa’atama*. Confidentiality was particularly important for the public servants across gender development, law reform apart from the academics involved in the study, partly due to their understanding of academic freedom. Accordingly, pseudonyms were used in the thesis when quoting them or generic descriptions about their area of expertise.

A purposive sample of at least ten respondents were initially approved by the *fa’atama* advisor. Inevitably, it was considered that the findings might in some way be critical of the former Government and current Government. Given the nature of the *talanoa*, several negative views expressed during the *talanoa* process might be considered controversial, yet, the researcher deems all views expressed, including the provocative views, as well as their associated key findings, to be at the discretion of the research team, to ensure it remained within the research scope. A separate category for provocative controversial views may not be explored further in this thesis which means that the amendment or exclusion of such views were not actioned in this research.

CHAPTER TWO – LITERATURE REVIEW

Critical review of *fa'atama* and SOGIEC recognition in Samoa laws: Challenges to recognition and law reform

1.0 Introduction

There is a critical gap in empirical research and understandings with respect to the implications of the law, customary practices and law reform processes on *fa'atama* and SOGIEC communities in Samoa. This article provides a critical review of literature to not only raise awareness but to challenge the common misconceptions about the interface between law, custom, non-heteronormative genders and sexualities, specifically in non-Western cultures. Thus, I focus exclusively on one under-represented gender identity and sexual orientation group, *fa'atama*, (“In the manner of men” is the literal translation of the Samoan word ‘*fa'atama*’ or ‘like’ (fa’a), a ‘man’ (tama)). The rationale is to better understand Samoa’s socio-cultural and legal context through which *fa'atama* construct and maintain their identities. However, the problem remains: *fa'atama* who identify as transmen and not women continue to be treated as women in the law against their wishes. This infringes upon their freedom of expression and other fundamental human rights. Consequently, there is a lack of understanding about why this is the case and whether there is sufficient evidence to inform and guide policy and law making at customary and state level. The framing of adequate responses to the wider Sexual Orientation, Gender Identity Expression and Sex Characteristics (SOGIEC) community must adequately reflect the evolving cultural and societal norms, practices and nuances in Samoa.⁴⁷ One possible pathway through which to correct this injustice would be to focus law reform on anti-discrimination laws to expand the scope to include Samoa’s SOGIEC community.⁴⁸

⁴⁷ Ralf Michaels “Global legal pluralism” (2009) 5 *Annu Rev Law Soc Sci*; Mulitalo, above n 3.

⁴⁸ For this article, any reference to “gender equity” is used interchangeable with Samoa “SOGIEC”, “LGBTQIA” and “gender diversity”. I also note this article is thematically incomplete. Given the word constraints I explore this further in separate article, see Bridget Fa’amatuaunu “Samoa *fa'atama* and lived experiences: legal recognition in law reform” (forthcoming).

In Part One I examine the sexual and gender minority terminology adopted in Samoa sexuality and gender discourse. In Part Two I investigate the sociocultural construction of femininity and masculinity of Samoa's *fa'atama* and framing within the legal context. In Part Three I inquire into the role of gender equity in Samoa laws from the historical origins to modern developments and attempts to reconcile the legal recognition of gender status in the law. Finally, in Part Four I explore how Samoa's family law and criminal law have not responded adequately to *fa'atama* and SOGIEC recognition in the law. I argue that Samoa's cultural practices and laws are driven by the Christian ideology and local contradictory paradoxes that continue to prohibit the full recognition and status of *fa'atama*. I further argue for a complete review and reform with respect to the very principles, values and practices that contribute to the embodiment of Samoa's gender framework and propose modern law and customary reform that is more in line with the *fa'asamoa* principles.

2.0 Part One: Sexuality and Gender in Samoa

Before I examine Samoa's state and customary legal system, law reform process, and legal pluralism (in Chapter 5), in this Part, I briefly discuss Samoa's history of sexuality and gender as this provides a clearer idea of the status of *fa'atama* in Samoan culture and the law.

2.1 Patriarchy

It is well known in the literature that unequal power relations exist between men and women. This is often embedded in terms such as "patriarchy" and "gender inequality".⁴⁹ Even when taking cultural and institutional variation into consideration, patriarchal structures exist in social systems characterised by male dominance or control over females and other genders. The imposition of colonial and Christian values, with a built-in patriarchal system, has had detrimental impacts on Pacific cultures with matrilineal economic and political structures, or in some aspects, land inheritance which could be traced through the matrilineal as opposed to

⁴⁹ Pamela Paxton and Melanie Hughes *Women, Politics and Power* (Sage Publications, California, 2007).

patrilineal line.⁵⁰ The rights of indigenous women to land, decision-making and economic exchange were further undermined after colonisation, when colonial governments established institutions and legal systems that reflected patriarchal and religious ideals of their own societies which no doubt impacted political and legal thought on democracy and justice.⁵¹

2.2 *Universal human rights*

The universalism and internationalisation of human rights pertaining to changed perceptions in gender identity and sexual orientation are a strong reflection of societal change and shifting attitudes.⁵² On this view, it disrupted the traditional notion that only binary or heterosexual partners are afforded equal protection, non-discrimination and legal rights in formal marriages. While change is slow, it is important to note that most commonwealth states in the Pacific have adopted legislation introduced by the colonial administration – in the case of Samoa, the body of laws included the general principles of common law and equity which were modelled on laws directly from New Zealand, most of which remain in force unless incompatible with local customs or as new circumstances arise or replaced by national legislation. This may direct the Courts and legislators to appeal to non-legal, political values to fill gaps in the law.

2.3 *Lack of research on fa'atama in comparison to fa'afafine*

Unlike the ever expanding *fa'afafine* (literal translation is “in the manner of” or “like” (*fa'a*) a woman)⁵³ research, the limited research, and data about the lived experiences

⁵⁰ Martha Macintyre and Carolyn Brewer “Gender Violence in Melanesia and the Problem of Millennium Development Goal No. 3” in Margaret Jolly and Christine Stewart (eds) *Engendering Violence in Papua New Guinea* (ANU Press, Canberra, 2012); and Meta Motusaga “Women in decision making in Samoa” (PhD thesis, Victoria University, Victoria, 2017).

⁵¹ Elise Huffer “Desk Review of the Factors which Enable and Constrain the Advancement of Women's Political Representation in Forum Island Countries” in *A Woman's Place is in the House – the House of Parliament: Research to Advance Women's Political Representation in Forum Island Countries* (Pacific Islands Forum Secretariat, Suva, 2006).

⁵² Sue Farran “Pacific Perspectives: *Fa'afafine* and Fakaleiti in Samoa and Tonga: People Between Worlds” (2010) 31 *Liverpool Law Rev* 13.

⁵³ Johanna M Schmidt *Migrating Genders* (Ashgate, Surrey, 2010); Lanna J Petterson, Barnaby J Dixson and others “Reconsidering male bisexuality: Sexual activity role and sexual attraction in Samoan men who engage in sexual interactions with fa'afafine” (2016) 3 *Psychology of Sexual Orientation and Gender Diversity* 11 at 12. I refer to *fa'atama* interview *talanoa* and focus group *talanoa* data (“Empirical data 2022”) collected as part of the Auckland University of Technology Ethics Committee approved PhD data collection in Samoa in June-July 2022;

of *fa'atama* is disappointing. While it is conceptually unsound to position *fa'atama* in comparison to *fa'afafine*, thus, unpacking gaps in Samoa's *fa'afafine* research as a way to critique and better understand why the *fa'atama* and SOGIEC community are under-represented in academic and legal discourse may in fact contribute to essentializing and homogenizing the *fa'atama* community. Arguably, the term *fa'atama* does not claim a sexual orientation. Instead, *fa'atama* claim a gender identity which is similar to *fa'afafine* who also claim a gender identity rather than a sexual orientation.⁵⁴ In accordance with the *talanoa* data, what this suggests is that in Samoan cultural contexts, there is a compatibility between *fa'atama* masculinity and *fa'atama* transmen.

There are no studies exploring Samoa's *fa'atama* from an evolutionary psychological perspective or studies using the Kinsey scale to assess the sexual orientation of *fa'atama*. However, one study explored the causal correlation between androphilia (sexual attraction to men) and femininity, and found that "*fa'afafine* tend, on average, to be more feminine than their gynephilic counterparts".⁵⁵ While researchers continue to view *fa'afafine* and their sexual partners as "androphilic" homosexual men⁵⁶ according to fifteen *fa'afafine* respondents interviewed by Schmidt in Samoa and Aotearoa, they refer to their masculine sexual partners as "straight" in line with Samoa's sexual schema.⁵⁷ Such analysis may help inform empirical research into the lived experiences of *fa'atama*.

This anthropological review reveals the depth and context to challenges that lie ahead in pursuing stronger recognition and protection of Samoa's *fa'atama* status in

Penelope Schoeffel "Representing *Fa'afafine*: Sex, Socialization, and Gender Identity in Samoa" in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge Transgender, Gay, and Other Pacific Islanders* (University of Hawaii Press, Honolulu, 2014) 7.

⁵⁴ Empirical data 2022, above n 52.

⁵⁵ Petterson, Barnaby J Dixon, above n 52, at 12.

⁵⁶ Doug P Vanderlaan, Lanna J Petterson and others "Elevated kin-directed altruism emerges in childhood and is linked to feminine gender expression in Samoan *fa'afafine*: A retrospective study" (2017) 46 Archives of Sexual Behavior 95; Doug P Vanderlaan and Paul L Vasey "Relationship status and elevated avuncularity in Samoan *fa'afafine*" (2012) 19 Personal Relationships 326; Paul L Vasey and Doug P Vanderlaan "An adaptive cognitive dissociation between willingness to help kin and nonkin in Samoan *fa'afafine*" (2010) 21 Psychological Science 292; Paul L Vasey and Doug P Vanderlaan "Monetary exchanges with nieces and nephews: A comparison of Samoan men, women, and *fa'afafine*" (2010) 31 Evolution and Human Behavior 373.

⁵⁷ Johanna M Schmidt "Migrant Bodies: Embodiment of Identity Amongst Samoan *Fa'afafine* in New Zealand" (2002) 17 New Zealand Sociology 179; Johanna M Schmidt "Paradise Lost: Social Change and *Fa'afafine* in Samoa" in Ulrike Schuerkens (ed) *Global Forces and Local Life-worlds* (Sage, London, 2004); Schmidt, above n 52.

customs and the law. Tupuola, Taouma, Suaalii and other Samoan gender experts argue that what is missing from this narrative is the inclusion of the voices of Samoans themselves in response to these arguments, public discussions about the subject or even academic literature written by Samoans about gender and sexuality.⁵⁸

2.4 *Fa'atama in western sexuality and gender discourse*

“In the manner of men” is the literal translation of the Samoan word *fa'atama* or ‘like’ (fa’a), a ‘man’ (tama). Sexological discourses may restrict the scope of understanding *fa'atama* whilst limiting the potential to understand the comprehensive scope of their actual lived experiences. The conceptualisation of the non-binary or non-heteronormative gender and sexuality embody contradictions of a contemporary social order which provoked a re-thinking of agency, morality and what acceptance means.⁵⁹ It exists in several forms such as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual (LGBTQIA) or sexual orientation, gender identity expression and sex characteristics (SOGIE) groups commonly used by the United Nations and adopted recently in Samoa. This does not absolve the terminology from wider scrutiny as such terms are considered contextually unstable especially when contested.⁶⁰

The SOGIEC non-heteronormative or non-binary concept or term is not problematic in the Pacific, insofar as there is an understanding of the specificities and particularity to the cultural and political context to which it is applicable. The use of terms and labels to define *fa'atama* may be incompatible with their overriding identity when contextualised to their traditional role and status in the home, family, village and community. When comparing *fa'atama* to accepted perceptions and sociocultural understandings of masculinity, some *fa'atama* may choose to distance their gender

⁵⁸ Anne-Marie Tupuola “Raising research consciousness the Fa’asamoa Way” (1993) 3 NZ Annu Rev Edu 175; Anne-Marie Tupuola “Adolescence: Myth or Reality for Samoan Women? Beyond the Stage-like Toward the Shifting Boundaries and Identities” (PhD thesis, Victoria University of Wellington, 1998); Tamasailau M Suaalii “Deconstructing the ‘Exotic’ Female Beauty of the Pacific Islands” in Alison Jones, Phyllis Herda and others (eds) *Bittersweet* (University of Otago Press, Dunedin, 1990); Lisa Taouma “Re-Picturing Paradise: Myths of the Dusky Maiden” (MFA thesis, University of Auckland, 1998); Suaalii, above n 31.

⁵⁹ Niko Besnier “The Social Production of Abjection: Desire and Silencing among Transgender Tongans” (2004) 1 *Social Anthropology* at 301–323

⁶⁰ Kalissa Alexeyeff and Niko Besnier “Gender on the edge: Identities, politics, transformations” in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge Transgender, Gay, and Other Pacific Islanders* (Honolulu, University of Hawaii Press, 2014).

identity and sexual orientation from how they are generally perceived which also highlights the danger of fitting *fa'atama* under broader SOGIE and LGBTQIA+ terminology. For example, non-heteronormative males in Samoa who identify as gay may reject the term “*fa'afafine*” (literally translated as “in the manner of women”) as it prefaces a sexual persona, to which they seek to not be associated.⁶¹ Similarly, non-heteronormative females in Samoa may reject the term “*fa'atama*” and not subscribe to sexological gender and legal discourse. Based on data from the author’s research in Samoa, some respondents are unaware of this movement or choose not to identify with it at all. The reasons are varied and some perceive their gender identity as an individual decision separate to their role in the family, the church and wider village community; other respondents are concerned with the more immediate aspects of their daily life such as responsibilities to their family, village, church and community. In short, their gender identity and sexual orientation is not a core aspect of their life but considered when they are denied legal protection and access to employment opportunities, health care and justice.

2.5 Non-heteronormative and non-binary recognition in the law

Although legal claims to relationship property rights and family law rights are highly recognised in developed countries irrespective of the gender and sex of the claimants, the challenge for Pacific countries is to consider whether universal human rights and developments concerning SOGIEC recognition should be introduced into their laws or on the law reform agenda. As a matter of respect for differences and diversity, the rationale for this should be driven by the Pacific countries as opposed to a neo-colonial agenda. This agenda is reflected by the least developed nations such as Samoa (under the continued influence of the more developed nations (or in most cases, their former colonial powers) even after the formal end of colonisation. Arguably, the aspiration to recognise non-heteronormative marriage, transgender recognition or consensual homosexual and non-heteronormative intercourse is riddled with challenges. Some argue that these challenges may be imposed by the neo-colonial economic, social, political and cultural imperialistic influence of the former colonial powers.⁶²

⁶¹ Alexeyeff and Besnier, above n 59.

⁶² Farran, above n 51; See Farran’s discussion on Colonialism and Neo-Colonialism.

2.6 *Liminality and legalising liminality in common law*

2.6.1 *Pre-colonial Samoa*

In pre-colonial Samoa, it could be argued that gender diversity was a collectively recognised form of social or cultural practice in accordance with customary law. This supports the earlier works of Mead, James and Besnier in that the *socially recognised* presence of transgender groups was not a modern development as visiting mariners had consorted with *fa'afafine*.⁶³

Against this pre-colonial historical backdrop, Anglo-American culture had considerable influence in gender identity politics, building on influences from Europe, as evidenced in the progression in the arts and sciences, church and state, and work and home.⁶⁴ Besnier referred to the expression of a *gender liminal person* or *gender liminality* as a neutral label which captured intermediate-gender status individuals evident in the Pacific.⁶⁵

2.6.2 *Post-colonial Samoa*

But in post-colonial Samoa, following independence, the continued practice and role of customary law became increasingly limited in scope and status within the formalised legal system. On this view, it could be argued that gender identity and sexual orientation did not feature as significant in the daily aspects of *fa'asamoa*. Though this is not the place to explore the issue, I agree that until 2020, the introduction of the three newly enacted *controversial* laws in Samoa leading to amendment to the election criteria and composition of Samoa's judiciary, land and titles court and Samoa's constitution, helped revive the status of customary law in contemporary Samoa.⁶⁶

⁶³ Margaret Mead *Coming of Age in Samoa* (Penguin, London, 1928); Kerry James "Effeminate males and changes in the construction of gender in Tonga" (1994) 17 *Pacific Studies* 39; Niko Besnier "Polynesian gender liminality" in Gilbert Herdt (ed) *Third sex, third gender* (Zone Books, New York, 1996).

⁶⁴ Ruth Bloch *Gender and morality in Anglo-American culture, 1650-1800* (University of California Press, Berkeley, 2003); Mary Beard *Women and Power* (Liveright, London, New York, 2017).

⁶⁵ Besnier, above n 58.

⁶⁶ Meleisea and Schoeffel, above n 30.

Under introduced English common law from New Zealand (former colonial administrator of Samoa), a key feature built into this law was the fundamental heteronormative distinction and gender norm that people were biologically classed as male or female.⁶⁷ The difficulty is to strictly define transgender groups in Samoa and across the Pacific. For instance, there are considerable differences between *fa'atama* in Samoa and *fakatangata* (like a man) in Tonga, and diasporic Samoan and Tongan, younger and older, urban and rural. As such, there is no F (*fa'atama*) and F (*fakatangata*) in LGBTQI+ and there is no synonym for either F in Lesbian, Gay, Bisexual, Transgender, Queer, Intersex or in the generic '+' which would render local diverse terms invisible. The identity political categories that privilege the LGBTQI+ acronym derive from the socio-cultural norms, and traditions of the US combined with the influence of Western European laws. Critics challenge the imposition of such influences embodied in the acronym that erased diverse local gender and sexual formations. Thus, the neo-colonial framework of the acronym continued the positioning of these universal categories from which all other diversity was shoe-horned. In the words of Farran, "This is a very real risk if the specific cultural, historical and social context is ignored or suppressed, and the emphasis is solely on sexual orientation or gender manifestation".⁶⁸ Consequently, this left no scope to accommodate SOGIEC people, more specifically *fa'atama*, who were recognised (although not historically labelled) as a distinct gender group in Samoa.

Irrespective of nuances and distinctions between diasporic *fa'atama* and Samoa *fa'atama*, town *fa'atama* and village *fa'atama*, older *fa'atama* or younger *fa'atama*, the indisputable problem is that gender liminal groups fall outside of Samoa laws.

The colonial legacy is still reflected in the laws even after the 'cut off' dates were imposed (usually at independence). The cut off dates specified the period that, theoretically, new judicial decisions from English common law and equity will not form part of Samoan common law.⁶⁹ Samoa did not apply cut off dates and continued to refer to English common law and equity as it currently exists provided

⁶⁷ Farran, above n 51.

⁶⁸ Farran, above n 51, at 4.

⁶⁹ Kenneth Roberts-Wray. *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) 545; No cut off dates apply to Samoa, see Art 111(1) Samoa's Constitution.

they are not excluded from laws in Samoa. These laws are considered draconian in the country of origin (from where the legal transplants took place) and yet are still in application in the host country where they were introduced. This is evident in the outdated retention of sodomy laws and the heteronormative functionalist approach to sex in Samoa's constitution and national laws.

2.7 Samoan Gender Framework

In this part, I briefly discuss some of the Samoan gender frameworks as they intersect with Samoa transgender discourses. I discuss Bradd Shore's *Samoa Gender Framework* ("SGF") followed by Johanna Schmidt's *Samoa Model of Gender*.⁷⁰ Shore argued that Samoan society had adopted a complex system of gender and sexuality norms and behaviours.⁷¹ In line with this thesis, Shore recorded a complex system of heteronormative gender norms and behaviours that fit within what he recognised as the masculine and feminine behaviour and ideals upheld within the SGF.⁷² The problem here is that Shore adopted a functionalist approach to the SGF to fit neatly within a cultural binary construct.

Noted academics, Schmidt⁷³ and Schoeffel acknowledge the functionalist explanations in support of the cultural institution of *fa'afafine* as evident in Bradd Shore's analysis of the SGF.⁷⁴ Although Shore referenced *fa'afafine*, in relation to the SGF, insofar as it reinforced his functionalist agenda that *fa'afafine men* acted as symbols of unacceptable masculine behaviour, – it was, in Shore's opinion, a shame to focus on the more traditional feminine activities such as the light domestic labour as opposed to the more heavy dirty labour which deemed *fa'afafine* behaviour as *unacceptable*.⁷⁵

⁷⁰ Bradd Shore "Sexuality and Gender in Samoa: Conceptions and Missed Conceptions" in Sherry B Ortner and Harriet Whitehead (eds) *Sexual Meanings* (Cambridge University Press, New York, 1981) 192; Johanna M Schmidt "Migrating genders: Westernisation, migration, and Samoan *fa'afafine*" (PhD thesis, University of Auckland, 2005); Schmidt, above n 52.

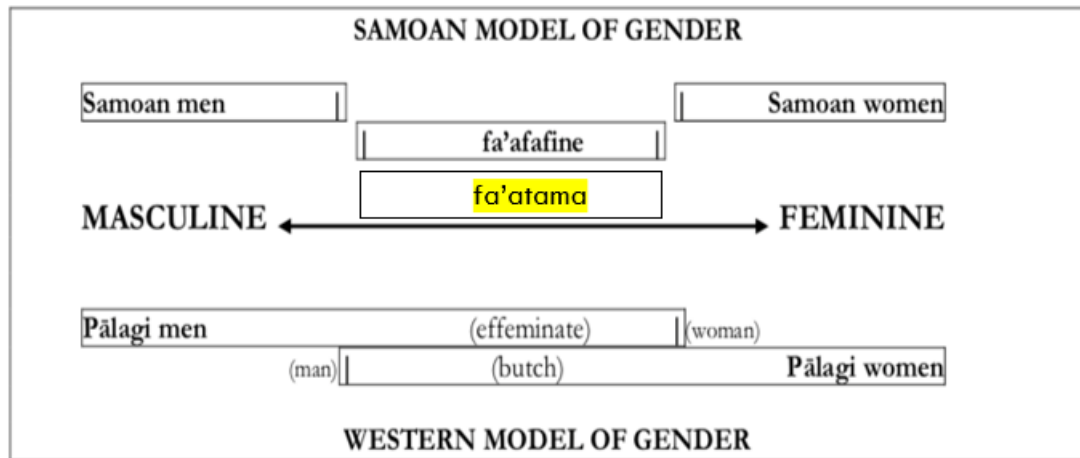
⁷¹ Besnier, above n 58.

⁷² Shore, above n 69.

⁷³ Schmidt, above n 52; Schoeffel, above n 52.

⁷⁴ Shore, above n 69.

⁷⁵ Shore, above n 69.

Fig. 1: Samoan Model of Gender

Source: Joanna M. Schmidt *Migrating genders: Westernisation, migration, and Samoan fa'afafine*. (PhD Thesis, University of Auckland, 2005).

Schmidt developed the *Samoan Model of Gender* (see Fig. 1 above) to highlight the distinction between boundaries of gender in Samoan and non-Samoan contexts.⁷⁶ This model pointed to what is deemed as the appropriate levels of masculinity and femininity which was dependent on whether those levels or boundaries were breached, to determine whether one would still be considered male or female. It captured the rigidity in the enactment of gender not apparent in practice whilst demonstrating how gender 'deviance' is understood from a Samoan perspective. Schmidt cited the works of Besnier as a reflection of a more neo-liberal attitude towards gender, prevalent in feminist and queer literature.

Schmidt also captured the continual tension and ambiguity that *fa'afafine* may experience: on the one hand, *fa'afafine* cannot be encompassed within the rigid boundaries of western or non-Samoan discourses on gender, sex or sexuality, while on the other hand, *fa'afafine* are not an anomaly outside of the Samoan cultural context.⁷⁷ *Fa'afafine* have individual expressions of gender and are considered a Samoan cultural phenomenon. *Fa'afafine* may straddle between the normative gender boundaries of men and women. But according to Schmidt's *Samoan Model of Gender* the experience of *fa'afafine* further highlights the rigidity to normative gender

⁷⁶ Schmidt, above n 56. I have revised Schmidt's model by highlighting the presence of *fa'atama*.

⁷⁷ Schmidt, above n 52.

boundaries in Samoa. Unlike contemporary Western contexts, Samoan hegemonic masculinity is more constrained and inflexible. In this regard, Samoa gender frameworks adopt a range of normatively appropriate gender behaviours within a cultural binary construct of male/female and masculine/feminine. Any movement outside the rigid boundaries of male and female behaviour is considered *not male* and *not female* (i.e., the *distinction between boundaries of gender*).

3.0 Part Two: Femininity and Masculinity

3.1 *Fa'atama*

In Samoa sex and gender discourse, *fa'atama* are recognised as a biological female sex. Although varied cultural and social meanings are attached to the body, those meanings do not strictly impose femininity on *fa'atama* who are undeniably biological females in Samoa.⁷⁸ This would further suggest the unspoken 'other' embedded in the *fa'atama* identity would involve feminine expressions of *woman*, *female*, *femininity* – which is a consequential component of *fa'atama*.⁷⁹ In relation to their gender identity, to varying degrees, masculinity is one of the defining features of the *fa'atama* to which they are also recognised. Building on the account of *fa'afafine*, a complementary account of *fa'atama* would suggest that *fa'atama* are like men but not men. The personal account of some of Samoa's *fa'atama*, echoed the *talanoa* of *fa'atama* interviewed in a 2020 documentary and much earlier, from Besnier's 1996 research, where they share their stories about childhood play, their enjoyment in the more traditional masculine activities, such as the heavy dirty work, commonly in the plantations, rather than engaging in the more traditional feminine activities, such as light work in the home.⁸⁰ These accounts affirm the complexity to the *fa'atama* identity: (1) *fa'atama* self-identify as both biologically female and transgender, and (2) *fa'atama* identify more with their gender identity, as masculine, transmen rather than their female biological sex.

⁷⁸ Lois McNay "Gender, Habitus and the Field: Pierre Bourdieu and the Limits of Reflexivity" (1999) 16 *Theory Culture and Society* 95.

⁷⁹ Schmidt, above n 52; Schmidt, above n 56.

⁸⁰ Empirical data 2022, above n 52; see "The Rogers of Samoa" (youtube video, 7 March 2020) <www.youtube.com>; Besnier, above n 58.

Further to the Samoa gender models discussed above, accordingly, sex and gender constitute two separate and distinct constructs. The rigidity lies in the boundaries between sex and gender. The concept of homosexuality is not recognized even if same-sex partners are sexually intimate. Most *fa'atama* interviewed by the author self-identified as *gynephilic* – sexually attracted to females. This is because the *fa'atama* interviewed by the author self-identify as transmen rather than homosexual and they also view their sexual partners as heterosexual women, which emphasizes the fluid nature of gender frameworks in Samoa.⁸¹

While the sociological, cultural or historical considerations are important to note in gender identity and sexual orientation, I turn to some of the legal challenges posed by *fa'atama* and SOGIE members who do not fit into accepted legal categories and the extent to which non-legal considerations may impact how the law has developed to respond to this.

4.0 Part Three: Role of gender equity in Samoan law

4.1 Historical Developments

4.1.2 Neo-colonialism: Critique to western construction of sexuality and gender

Samoa is characterised by familial and gendered inequalities, patriarchal structures, and traditional systems reflective of other Pacific societies.⁸² Arguably, the traditional gender roles in Samoa were neither matrilineal nor patrilineal.⁸³ Samoan research has documented the persistence of Samoa customs and traditions post-colonisation.

⁸¹ Empirical data 2022, above n 52.; see Jeannette Marie Mageo Mageo “Male transvestism and cultural change in Samoa” (1992) 19 *American Ethnologist* 443; Jeannette Marie Mageo Mageo “Samoa, on the Wilde side: Male transvestism, Oscar Wilde, and liminality in making gender” (1996) 24 *Ethos* 588; Jeannette Marie Mageo Mageo *Theorizing self in Samoa* (University of Michigan Press, Ann Arbor, 1998); Dennis TP Keene “Houses without walls: Samoan social control” (PhD, University of Hawaii, 1978); Nancy H Bartlett and Vasey L Paul “A retrospective study of childhood gender-atypical behavior in Samoan *fa'afafine*” (2006) 35 *Archives of Sexual Behavior* 659.

⁸² Sue Farran “Outwith the Law in Samoa and Tonga” in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge* (Hong Kong University Press, Hong Kong, 2014) 347.

⁸³ Aiono Le Tagaloa *O le Faasinomaga* (Lolomi e le Lamepa Press, Alafua, Samoa, 1997); Fairbairn-Dunlop, above n 20.

Historically, Va'a⁸⁴ and Motusaga⁸⁵ assert that universal human rights and gender rights are not new concepts to Samoa and were not incompatible with Samoan customs. Again, Va'a⁸⁶ and Motusaga⁸⁷ argue that gender inequality did not exist in pre-colonial Samoa and claim it was misconstrued by the ideology that Samoan women were oppressed.

4.1.1 *Colonialism: Introduction of common law and Christianity*

Samoa was the first Pacific nation with a written constitution which enumerates fundamental human rights and continues to adopt English common law since gaining independence in 1962. Samoa has a bijural system (i.e., customary legal system and state legal system) which operates alongside village councils.⁸⁸ This legacy remains after colonialism which is largely indicative of a common law shared across countries with similar post-colonial history.⁸⁹ In the case of Samoa, about 220 listed villages are governed under separate legal orders, some of which conflict or complement the overriding bijural system.⁹⁰

4.1.3 *Feagaiga*

The prospect of change to dismantle male-dominated political structures favouring men, particularly reflected in European positivistic models⁹¹ made room to explore other models taking gender equity and the status of women into consideration.⁹²

⁸⁴ Va'a, above n 30.

⁸⁵ Motusaga, above n 49.

⁸⁶ Va'a, above n 30.

⁸⁷ Motusaga, above n 49, at 129.

⁸⁸ Masaji Chiba *Asian indigenous law* (KPI, New York, 1986); Lynn D Wardle "Same-Sex Marriage and the Limits of Legal Pluralism" in John Eekelaar and Thandabantu Nhlapo (eds) *The Changing Family International Perspectives on the Family and Family Law* (Bloomsbury, 1998) 381; Brian Z Tamanaha "A proposal for the development of a system of indigenous jurisprudence in the Federated States of Micronesia" (1989–1990) 13 *Hastings Int Comp Law Rev* 72.

⁸⁹ New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (Study Paper 17 New Zealand Law Commission 2006).

⁹⁰ Mulitalo, above n 3.

⁹¹ Marc Galanter "Justice in many rooms: courts private ordering and indigenous Law" (1981) 19 *J Leg Pluralism Unofficial Law* 36; Griffiths, above n 681; Upendra Baxi "Disciplines, repression and legal pluralism" (1986) VII *Legal pluralism*, proceedings of the Canberra law workshop 51.

⁹² Huffer, above n 50; Elise Huffer and Ropate Qalo "Have We Been Thinking Upside-Down? The Contemporary Emergence of Pacific Theoretical Thought" (2004) 16 *The Contemporary Pacific* 87; Paxton and Hughes, above n 48; Heather Wallace "Paddling the Canoe on One Side: Women in decision making in Vanuatu and the Solomon Islands" (2011) 54 *Development*; Diane Zetlin "Women in parliaments in the Pacific region" (2014) 49 *Australian Journal of Political Science* 252.

It is argued that colonisation threatened to diminish a well-established pre-colonial construct, the “sacred covenant” (*feagaiga*), upon which Samoan females were traditionally ascribed high status.⁹³ The *feagaiga* bound the brother and sister in a sacred covenant, and based on the *feagaiga*, the brother is bound to serve and protect his sister for life. The *feagaiga* guaranteed sisters had equal rights and status with their brothers.⁹⁴ More specifically, the *feagaiga* imposed a duty on the brother to protect his sister’s chastity against sexual indiscretions with young men before marriage, given the pressure imposed on young Samoan women, particularly *taupou* (daughters of high *matai* (chief)) to uphold conservative Christian standards and remain virgins without children before marriage.⁹⁵ Ironically, the same standards were not extended to young Samoan men as they cannot get pregnant and give birth. This encompassed the sexual double standard in Samoa’s femininity and masculinity as echoed by Sua’ali’i affirming the rigid gender boundaries adopted in Samoa’s existing sex and gender discourse – a critical gap area which needs to be addressed.⁹⁶

Admittedly, brothers had to protect bloodlines, gain political status via “service” (*tautua*) or financial contributions to family and village; and constrain the sexual activities of their sisters or overt displays of sexuality that would result in embarrassment to their family.⁹⁷ In short, it follows that the *feagaiga* is exclusive to *male* and *female* siblings in one family predicated on the assumption that all Samoan families have at least one male and one female child. Historically, it is largely dependent on the “male” brother and directed from the brother to his sister (and not vice versa) – thus, this is where the power and protection in the *feagaiga* has derived.

Research in the past 20 years has reported that the *feagaiga* right is not extended to *fa’afafine*. This is explained by the fact that *fa’afafine* cannot biologically reproduce children and therefore, there is no risk of children as a result of sexual relations between men and *fa’afafine*, which consequently resulted in the *feagaiga* not

⁹³ Le Tagaloa, above n 85; Fairbairn-Dunlop, above n 20.

⁹³ Suaalii, above n 31.

⁹⁴ Le Tagaloa, above n 85; Fairbairn-Dunlop, above n 20.

⁹⁵ Suaalii, above n 31.

⁹⁶ Suaalii, above n 31. I expand this analysis to include *fa’atama* and generally, Samoan people and biological females who choose to not have children. This analysis makes no claim about those who are struggling with fertility which is an issue the researcher continues to face.

⁹⁷ Suaalii, above n 31; Johanna M Schmidt “Being ‘Like a Woman’: *Fa’afafine* and Samoan Masculinity” (2016) 17 *The Asia Pacific Journal of Anthropology* 287; Schoeffel, above n 64.

observed between *fa'afafine* and their brothers.⁹⁸ Ironically, the *feagaiga* will not extend to a Samoan ascribed the female sex at birth, with no brothers or male siblings in the family, with no children (by choice) or who may not be biologically inclined to reproduce children.

4.2 Modern Developments

4.2.1 *Recognition of non-binary, non-heteronormative genders in the law*

Modern Samoa is characterised by real and perceived conflicting tensions, between culture, tradition, western influence and the broader context of conservative Christian idealism. Since the 1960s, Samoans have constituted a proportion of the Pacific diasporic populations in Australia, New Zealand and the United States of America. They form part of the wider global community of diasporic Samoans endeavouring to maintain continued links to island-based Samoans.

The concerns of SOGIEC are articulated well from Samoa's diasporic communities and those within Samoa. As alluded to earlier, it revealed division within Samoa's SOGIEC community and elsewhere (i.e., Pacific region in addition to New Zealand and Australia). It also served as a reminder that Samoa's SOGIEC communities are not a homogeneous group. I further argue that recent empirical research has confirmed that *fa'atama* have married men and given birth to children and continue to do so in contemporary Samoa or in diasporic Samoan communities.⁹⁹ There is also recent evidence that some of Samoa's *fa'atama* have sexual relations exclusively with feminine women, some of whom simultaneously adopt the lesbian woman identity alongside the *fa'atama* identity or reject the *fa'atama* identity and exclusively identify as lesbian Samoan women.¹⁰⁰

Internationally, new developments in the legal recognition of LGBTQIA or SOGIEC people, reflect the shifting boundaries of inclusive or exclusive laws, some of which have been brought within the law and given legal status. Such developments enable

⁹⁸ Sue Farran and Alexander Su'a "Criminal Law and *Fa'afafine* and Fakaleiti in the South Pacific" (2005) 31 Commonwealth Law Bulletin 19; Besnier, above n 58; Schoeffel, above n 64.

⁹⁹ Empirical data 2022, above n 52.

¹⁰⁰ Empirical data 2022, above n 52.

a shift from away from sexual functionality (based on physiological factors) towards gender identification and sexual orientation (based on social phenomenon and psychological factors). The changing perceptions to laws concerning adoption, succession and marriage have captured the shifts from how the law defines ‘male’ and ‘female’ and what the recognition of non-binary gender status in the law means alongside issues about whether, for example, the traditional principle of marriage is exclusively a heterosexual union.¹⁰¹

It is also worth noting that matters of intersectionality and gender discrimination, are considered more modern developments and may not always be adequately framed or contextualised to the historical, social and cultural realities or lived experience of Samoans at the time.

4.2.2 *Gender neutral language in law reform*

With respect to law reform in Samoa, prior to a Bill being submitted for Cabinet endorsement in Samoa, all draft laws must undergo customary compliance review or analysis, procedural vetting for constitutional compliance and gender neutrality in accordance with Samoa’s Legislative Drafting Handbook.¹⁰² This involves the removal of all references in the laws of Samoa to the masculine gender only (i.e., *he, him, his* used without reference to the female counterpart) which were effectively rendered in gender neutral terms (i.e., *he* was made *he or she*, *him* was made *him or her*). Section 5 of the *Acts Interpretation Act 2015* and Samoa’s Constitution have gone through procedural vetting for gender neutrality. In Samoa’s state laws “a word that denotes masculine gender to male includes female”¹⁰³ and “a word that denotes feminine gender to female includes male”.¹⁰⁴

Article 15 of Samoa’s Constitution refers to the word *sex* once, which is omitted from Samoa’s Act Interpretation Act 2015. The word *gender* is not explicitly referenced in Samoa’s Constitution. Article 15 further states that nothing shall prevent the

¹⁰¹ Principle 24 “The Right to Found a Family” (November 2006) <<<https://yogyakartaprinciples.org>>>.

¹⁰² Mulitalo, above n 3; Office of the Attorney-General (Samoa) *Legislative Drafting Handbook* (Government of Samoa 2014).

¹⁰³ Acts Interpretation Act s5(b) (Samoa 2015)

¹⁰⁴ Acts Interpretation Act s5(c) (Samoa 2015)

making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons. The existing approach of gender-neutrality embedded in Samoa's law reform process is too narrow, inadequate and requires a more rigorous approach to gender-responsive law making. As law reform frameworks in the Pacific region adopt heteronormative categories of sex and gender, it has largely dismissed *fa'atama* and SOGIEC recognition who are effectively excluded from this framework or are beyond the scope of such legal protection. This problem remains and needs to be addressed.

Despite Samoans being the dominant ethnic group, the legacy of the colonial past continues to be reflected in customary practices and, this combined dynamic, contributes to Samoan perceptions of customs, gender norms, human rights, law and widely recognised social practices. When individuals are placed in legal categories it may or may not give rise to specific legal consequences, such as in how the law attributes legal status to individuals based on characteristics such as *parent* or *child*. Similarly, as in the past, being born with a disability was once seen as a misfortune, but today it may entitle an individual to government protection of rights relating to one's characteristics and, consequently, welfare and benefits in fulfilment of those rights. In other commonwealth legal systems, individuals that do not fit in the law as a recognised legal category, such as homosexuals, transsexuals, same-sex couples, have experienced improved legal status through a range of legal reforms, innovative judicial reasoning, enactment of laws such as Australia's Commonwealth laws include the Civil Partnership Act 2008 and Legislation (Gay, Lesbian, Transgender) Act 2003; and New Zealand's Civil Union Act 2004 and Marriage (Definition of Marriage) Amendment Act 2013. Gender-neutral language is adopted to facilitate changes to remove traditional notions of gender identification and sexual orientation in the law, such as sexual offences in criminal law involving male-on-female crimes (i.e., crimes committed by males against females, such as gender-based violence). Specific dynamics connected to status, family and social structures remain central to Pacific cultures less dependent on state intervention, which means that the rights and protections afforded to *fa'atama*, will be determined almost outside the formal structures of state laws. This further suggests that *fa'atama*- do not fit neatly into recognised legal categories.

In this regard, while Samoa laws are silent on discrimination on the grounds of an individual's sexual orientation or gender identification, there is still scope for judges to bring *fa'atama* within the law to influence constitutional interpretations of Article 15 for example, provided the relevant case, comes before the Court (which is emphatically one of the many limits of the common law). On this view, judges could impact specific domestic laws that adversely impact non heteronormative and transgender people in Samoa and other Pacific nations. This will be discussed in turn by considering aspects of family law (with an emphasis on marriage law) and criminal law in Samoa.

5.0 Part Four: The Family Law and Criminal Law Context

In line with the *talanoa* data, I draw on two principal parts of law in Samoa, to highlight the areas that law reform and gender experts point out as critical areas that demand SOGIEC recognition. I examine each in turn.

5.1 Family Law

In the Pacific, the enactment of family law legislation is slow, largely because customary law is considered the best avenue to deal with family matters. The full extent to which exclusion of *fa'atama* status in Samoa's family law and the potential adverse impacts are empirically examined in the author's recent interview *talanoa* and focus group *talanoa* in Samoa. That data indicates that an alternative lifestyle is offered outside of Samoa, where the pursuit of personal expression of gender identity and sexuality choices are not in violation of criminal laws nor does it welcome immediate cultural or family condemnation.¹⁰⁵

In most Pacific cultures, a Christian marriage remains a fundamental institution which enhances and contributes to social stability and ongoing connections between families and villages. Children born because of infidelity or extramarital sex is problematic in Samoa, which is largely guided by fundamental Christian and cultural ideals of

¹⁰⁵ Besnier, above n 58, at 301; Serge Tchekézo "Transgender in Samoa: The cultural production of gender inequality" in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the edge* (University of Hawaii Press, Honolulu, 2014) 115.

heteronormative marital unions, for instance, adultery is a criminal offence in Samoa.¹⁰⁶

SOGIEC people have no doubt been influenced by advances in sciences, identity politics, gender rights movements. Complementing this, are the shifts in juridical attitude and attention marked by growing awareness, such as in marriage, with the inclusion of sexual orientation and gender identification, recognition of individual rights and fundamental shifts from traditional understandings of marriage, as a means for legitimate procreation (with potential grounds for annulment for failure to consummate the marriage) as opposed to a companionship based on mutual support.¹⁰⁷

Here, I argue why the inclusion of *fa'atama* within the ambit of Article 15 could result in *fa'atama* being able to enjoy marriage equality and gender equity in terms of legal entitlement to the full suite of rights, including marriage rights, family rights, relationship property rights and formal adoption of children rights. Consequently, this would bring about reforms in law, policy and influence judicial decisions to achieve timely equality and recognition of *fa'atama* gender rights in future laws and customary practices.

Family law is an area of law where the legacy of colonial and post-colonial influence is strong. The overlaps between introduced law reflected in state law as well as customary law has led to conflicts between the two. In this regard, the heteronormative institution of marriage is still driven by the influence of English case law, Christian principles and the overall presumption that the sanctity of marriage is therefore monogamous, based on male and female parties of the opposite sex. Ironically, the customary law recognition of customary marriage including polygamous marriage is still recognised as valid by Samoa's courts according to

¹⁰⁶ Julie Park and Carolyn Morris "Reproducing Samoans in Auckland 'in different times': Can habitus help" (2004) 113 *Journal of the Polynesian Society* 227.

¹⁰⁷ Divorce and Matrimonial Causes Ordinance ss 9 and 37 (1961).

Samoan custom: *Samoan Public Trustee v Annie Collins & Ors* (Samoa 1961); *Tautalafua v Public Trustee* (Samoa 2010).¹⁰⁸

5.1.1 *The role of the Church*

The influence of the Church and Christianity in Samoa is inextricably connected to Samoa's customs and traditions. Since 1830, the first missionaries arrived in Samoa, and over time, this led to conversion to Christianity which is evident in modern Samoa, with Article 1(3) of Samoa's Constitution stating that "Samoa is a Christian nation founded on God the Father, the Son and the Holy Spirit".¹⁰⁹ The Constitution refers to God as "Almighty", "Omnipresent" and to "Christian principles" alongside "Samoan custom and tradition".¹¹⁰ Even the physical influence of the church and ongoing observation of religious holidays remain. Christianity is heavily integrated into Samoa social order and the customary village context, where 84% of the population, according to the 2021 Census, identify as Christian.¹¹¹

The church played a critical role in the development of common law and recognition of *fa'afafine* in Samoa society.¹¹² Christian principles featured prominently in common law and with the influence of the Church, as a powerful institution, common law was introduced to the family law context of Samoa. For example, condemnation against Christian taboos of incest and adultery were strengthened in the law¹¹³, and the cultural practices of public defloration ceremonies, polygamy and consanguine marriages evolved into cultural taboos, given the role of the church, and later eradicated altogether. Mageo claims that Christianity enforced reform to the cultural practice of *ula* (necklace) exchange, which was the traditional form of Samoan entertainment used when hosting ceremonies, before missionaries arrived in

¹⁰⁸ *Samoan Public Trustee v Annie Collins & Ors* [1961] WSLR 52 applied in *Tautalafua v Public Trustee* [2010] WSSC 182; see commentary on precedents for the Pacific in common law, Australasian law from Sue Farran "Transsexuals, Fa'afafine, Fakaleiti and Marriage Law in the Pacific: Considerations for the Future" (2004) 113 *Journal of the Polynesian Society* 119–142; see commentary on the common law and legal liminality from Farran, above n 51, at 13–28; see commentary on *Quilter v Attorney-General* [1998] 1 NZLR 523; *Ministry of Health v Atkinson* [2012] NZCA 184, [2013] 3 NZLR 546 at [55] – test for identify discrimination; see *Air New Zealand Ltd v McAlister* [2009] NZSC 78.

¹⁰⁹ Constitution of the Independent State of Samoa (Samoa 1962).

¹¹⁰ Constitution of the Independent State of Samoa (Samoa 1962).

¹¹¹ Samoa Bureau of Statistics *Population and Housing Census* (2021). 26.9%, or the majority of the population are members of the Congregation Christian Church of Samoa (CCCS) denomination.

¹¹² Farran, above n 51.

¹¹³ Crimes Act Samoa sections 5, 6, 55 (Samoa 2013); Marriage Ordinance section 7 (Samoa 1961).

Samoa.¹¹⁴ The role of village girls in this cultural practice involved the exchange of puns with sexual overtone which was frowned upon and later removed, due to the “reforming influence of Christianity”¹¹⁵. As a compromise, the village girls were then replaced by *fa’afafine* in the *ula* exchange preserving both Christian principles and customary traditions.¹¹⁶

The role of the Church is influential and goes beyond the private domain to informing the views of the Village Council, Parliament and the Judiciary.¹¹⁷ For instance, in October 2020, a papal statement was released by Pope Francis in support of legal protection for all civil unions and same-sex couples, which was strongly opposed by Samoa’s Prime Minister¹¹⁸ and President of the Samoa *Fa’afafine* Association (SFA) at the time.¹¹⁹ It was asserted that the Pope’s comments were *miscommunicated* and essentially a plea to put an end to discriminatory behaviour directed to homosexual people.¹²⁰ Samoa’s former Prime Minister served as the Patron of the SFA and publicised his opposition to same-sex marriage in Samoa. In line with this view, SFA released a public statement that it was “a necessary compromise by the association to ensure that Samoa’s progression toward marriage equality followed a cautious and steady path”.¹²¹ The basis for their statement was that same-sex marriage was not on the agenda of Samoa’s *fa’afafine* and that same-sex marriage was perceived as a *palagi* (white people) problem rather than a Samoan problem.¹²²

Ironically, if *fa’atama* actively engage in cultural, religious and social practices - duties and obligations owed to the Church in the form of “financial obligations” (*fa’alavelave*) for church or village events – it would lead to acceptance and elevated

¹¹⁴ Mageo, above n 80, 443–459; Missionary, John Williams reported on this, see Richard Moyle. *The Samoan Journals of John Williams, 1830 and 1832*. (Canberra, Australian National University Press, 1984).

¹¹⁵ Farran, above n 108 at 17.

¹¹⁶ At 19, 20.

¹¹⁷ Johanna M Schmidt “Redefining *fa’afafine*: Western discourses and the construction of transgenderism in Samoa” [2001] *Intersections* 6.

¹¹⁸ Editorial Board “Pope Francis starts a most unlikely debate” *Samoa Observer* (Apia, 23 October 2020).

¹¹⁹ PacificEyeWitness “*Fa’afafine* Say No to Same Sex Marriage” *PacificEyeWitness* (Apia, 11 August 2012).

¹²⁰ Harriet Sherwood “Pope Francis backs same-sex civil unions” *The Guardian* (London, 21 October 2020).

¹²¹ Asia Pacific Transgender Network and My Girls Club *Peer-led study on the rights and social experiences of trans and gender diverse people in Samoa* (APTAN 2020); See Bridget Fa’amatuainu “Samoa law reform and legal pluralism: Critical challenges to achieving legal recognition of *fa’atama* and SOGIEC representation in the law” (2023, forthcoming) *Canterbury Law Review*; Carmel Peteru “The gay life” *Pacific Islands Monthly* (1996).

¹²² Talaia Mika “*Fa’afafine* Association responds to Pope Francis” *Samoa Observer* (Apia, 26 October 2020).

recognition, thus diverting attention away from their SOGIEC status.¹²³ Sua'ali'i asserted this as the *sexual double standard*¹²⁴ but I argue that this is a continuous contradictory paradox.¹²⁵ I assert that *fa'atama* are not an anomaly in need of justification. If *fa'atama* are not recognised in Samoan society, it would be quite contradictory to accept any contribution from *fa'atama*. In the Samoan context, *fa'atama* may offer financial donations to the Church. Ironically, the Church is the very institution that condoned the continued adoption of exclusively heteronormative partnerships and norms within the law.¹²⁶ This is further highlighted by the non-legal obstacles (political and sociocultural) which are just as prominent as the legal mechanisms opposed to recognising to *fa'atama*.¹²⁷

The Church has accepted and integrated *fa'afafine* into the life of the Church, and in the same token, some would argue that *fa'atama* are also afforded the same privileges.¹²⁸ One pathway to achieve recognition is through fulfilling the duties and obligations imposed on active members of the Church, such as through acts of service, participation in church activities, community projects and financial obligations to church ministers. By fulfilling their duties and obligations to the Church, the idea that attention is diverted away from the sexuality and gender of *fa'atama* is still debateable. To sum up, Farran argues that:¹²⁹

There is no perceived inconsistency in berating the sins of sodomy from the pulpit and accepting the financial and other donations of *fa'afafine*...at the altar.

Empirical data collected in 2022, for this study, would disagree with the above assessment, as the *fa'atama* respondents claim to have either walked out during church sermons or stopped church attendance altogether, due to discriminative sermons and dress code restrictions in Churches and villages.¹³⁰ Females are required

¹²³ Farran, above n 51.

¹²⁴ Suaalii, above n 31.

¹²⁵ Empirical data 2022, above n 52.; Peteru, above n 121; Farran, above n 51.

¹²⁶ Peteru, above n 121.

¹²⁷ Farran, above n 51.

¹²⁸ Farran, above n 51.

¹²⁹ Farran, above n 51 at 24; Peteru, above n 121.

¹³⁰ Empirical data 2022, above n 52.

to wear traditional feminine clothing at the church, village and schools in Samoa, at all times.¹³¹

5.1.2 *Marriage law*

Samoa's principal law relating to marriage, the Marriage Ordinance 1961 (the Act), does not explicitly state that the *persons named in the notice* of marriage,¹³² must be a man and a woman. Here, it could be argued that the sexual orientation and gender identity is not required nor inferred in the *persons named*. As Samoa adopted New Zealand's Marriage Act 1955, it was implicit that marriage was the union between one woman and one man.¹³³ Further to this point, the only other relevant prohibition on marriage is contained in the First Schedule that outlined the list of persons within the degrees of affinity (or a *relationship by marriage*).¹³⁴ Here, it is stated that: (1) *A man may not marry his: (1) Grandmother (2) Grandfather's wife...* and (2) *A woman may not marry her: (1) Grandfather (2) Grandmother's husband....*¹³⁵ The Schedule contains the prohibitions to marriage but does not explicitly rule out marriage between *fa'atama* and women, *fa'afafine* and men, nor does it rule out marriage between a woman and her grandmother, a man and his grandfather, and so on.¹³⁶ In short, while the Act does mention a *man* and *woman* in the First Schedule, it is further contradicted by the missing reference to *sex* in section 15, although it is implicitly interpreted as the heteronormative union in the Act. Thus, while the explicit prohibition of same sex marriage or non-heteronormative partnerships is debateable, what is clear is the Christianisation of Samoa's Constitution which prohibits the formalisation of nonheteronormative partnerships in Samoa.

5.1.3 *Non-binary, non-heteronormative marriage cases*

At present, there have been no cases before the Supreme Court of Samoa where a member of the *fa'atama* and SOGIEC community have petitioned the Court for marriage equality rights in the law, nor any cases brought on the grounds of

¹³¹ Empirical data 2022, above n 52.

¹³² Marriage Ordinance section 15 (Samoa 1961)

¹³³ Farran, above n 51 at 20.

¹³⁴ Marriage Ordinance ss 2, 15 (Samoa 1961)

¹³⁵ Marriage Ordinance ss 7, 15 (Samoa 1961)

¹³⁶ See section 7 in Part 2 ("Restrictions of Marriage") of the Marriage Ordinance 1961.

discrimination owing to their gender status. Only one interviewed *fa'atama* respondent reportedly married his Samoan female partner in New Zealand which enabled them to formally adopt children from Samoa.¹³⁷ Evidently, the gender recognition laws outside of Samoa had made this possible. And only one reported case in Samoa has touched on matters of intersectionality with respect to discrimination on the basis of ethnicity and sexual orientation.¹³⁸

In the 1970s, a married couple was enrolled on the Individual Voters Roll reserved for part-European Samoans and non-Samoan citizens. After the husband accepted a Matai title he re-registered to vote as a matai in the electoral constituency where his Matai title derived. This a common practice under matai suffrage. In accordance with Samoan custom, his wife lost her status to vote on the Individual Voters Roll. Based on her part European ancestry, she then petitioned the court to have her right reinstated which the Supreme Court later upheld.

5.2 Criminal law

In Samoa, the Crimes Act 2013 has continued to criminalise consensual sex between males, in addition to crimes of sodomy (section 67 – does not adopt gender-neutral language and is restricted to acts of crimes committed on a female or a male with no mention of other genders); and keeping a place of resort for homosexual acts (Section 71).¹³⁹ While homosexual acts are criminalised and prosecuted in lower level courts (District Court of Samoa) it does not mean that they do not occur, because they are not prosecuted at the higher Supreme Court level, which is binding on the District Court decisions.¹⁴⁰ There is no legal definition of *place of resort* carved out in the Crimes Act, which would, if enforced, criminalise homosexual couples and by default their landlords and property managers.¹⁴¹ Also, *fa'atama* and their female partners living together would be deemed as a *same-sex couple* in the law – *fa'atama* hold

¹³⁷ Empirical data 2022, above n 52.

¹³⁸ Asofou So'o *Universal Suffrage in Western Sāmoa: The 1991 General Elections* (Discussion Paper no 10 Department of Political and Social Change, Research School of Pacific Studies, The Australian National University 1993).

¹³⁹ Crichton, above n 32. The anti-sodomy provisions in the Crimes Act 2013 is silent in relation to the crime of consensual sex between females.

¹⁴⁰ Empirical data 2022, above n 52.

¹⁴¹ Crichton, above n 32.

no legal status as *transmen* in Samoa and are still considered female in the law and the wider community.¹⁴²

6.0 Critical gaps to address

6.1 Lack of status and recognition in law and customs

The legal status of *fa'atama* in Samoa has not attracted much legal attention and even if the common law outside Samoa is converged to recognise rights across the legal and political spectrum, the Samoan local context will be the determining factor in whether the legal principles developed elsewhere are deemed appropriate.¹⁴³ Thus, the blurring of gender boundaries in Samoa is not unknown which challenges common law notions of the clearly defined demarcation between women and men, and as such, whether *fa'atama* may fit into this rigid construct to achieve *legal status*.

6.2 Lack of general acceptance of *fa'atama* in Samoa

The extent to which *fa'atama* are accepted in their own communities is debateable due to the in-built sexual double standards and continued contradictory paradox at play in their own communities – some are recognised and accepted, while others are subjected to abuse and discrimination in both public and private domains.¹⁴⁴

Although Schmidt focused exclusively on the *fa'afafine* gender in her research, it is useful to my research on *fa'atama* as it recognised that the presence of *fa'afafine* in Samoa is more likely to imply a greater rigidity to gender boundaries. Further to this, the more feminine *fa'atama*, may add a layer of complexity, when they also identify as lesbian women in line with more western gender sociocultural discourse, evidenced in the complex and contradictory intersection of females, women or the complementary *not women, not men and like men*. While Samoa now recognises a 'third gender', as in *fa'afafine* and *fa'atama*, this assertion is rejected by one leading gender expert on the basis that *fa'atama* and similarly *fa'afafine* "lie across" the rigid female/male binary boundary entrenched in Samoa's gender framework, which

¹⁴² Empirical data 2022, above n 52.

¹⁴³ *R v Harris and McGuiness* (1988); *Secretary, Department of Social Security v SRA* (1993); *Corbett v Corbett* (1970)

¹⁴⁴ Suaalii, above n 31, 57; Empirical data 2022, above n 52.; Farran, above n 51; Farran and Su'a, above n 97.

embodies both femininity and masculinity.¹⁴⁵ On this view, there is no ‘third gender’, which appears to be contradictory and ambiguous because it affirms the rigid gender boundaries in place (in addition to other influences) to maintain the construction of normative gender roles – whether altered or embodied in both masculine and feminine aspects. In a way, this enhances the role of *fa’atama* as a “third gender” in disrupting the construction and maintenance of the hegemonic femininity in Samoa, while at the same time, rejecting the recognition of as *fa’atama* as a “third gender”.

6.3 Multiple expressions of *fa’atama*

With respect to *fa’atama*, the *talanoa* findings (see Chapter 4) show *fa’atama* are not an homogeneous group. The data points to diverse expressions of *fa’atama*, as some *fa’atama* with children of their own, while also highlighting that some *fa’atama* have married men and had children with men from their past, in some cases, as a result of rape or in others cases, they have adopted the children of their female partner.¹⁴⁶ Thus, some respondents described instances of *fa’atama* who *abandoned* their *fa’atama* identity altogether in order to integrate back into society as *women* in order to have families with men, while others remained *fa’atama* even after having children while married to men.¹⁴⁷ This highlights the importance of research that represents *fa’atama* in the light of their multi-layered lived reality.

I argue that modern *fa’atama* in Samoa have moved away from traditional notions underpinning the *feagaiga*. *Fa’atama* have reportedly exercised discretion in the enactment of their multidimensional identity, largely driven by the conditions of the context in question, having enacted masculinity in private contexts in continuing the more heavy dirty *masculine* labour outside the home, whilst preserving their femininity in more public facing and political contexts, through active involvement in church and cultural activities.¹⁴⁸ (Similar accounts were echoed in the work of Schoeffel and Shore).¹⁴⁹ Thus, I argue that this line of reasoning is positioned within

¹⁴⁵ Johanna M Schmidt “Translating transgender: Using western discourses to understand Samoan *fa’afāfine*” [2017] *Sociol 1*; Penelope Schoeffel “Daughters of Sina: A study of gender, status and power in Western Samoa” (PhD, Australian National University, 1979); Besnier, above n 58.

¹⁴⁶ Empirical data 2022, above n 52.

¹⁴⁷ Empirical data 2022, above n 52.

¹⁴⁸ Empirical data 2022, above n 52.

¹⁴⁹ Schoeffel, above n 73; Schoeffel, above n 64; Shore, above n 69.

fa'asamoa and reject the argument that *fa'atama* are rendered with no agency or capacity to construct their masculinity due to limitations imposed by western understandings of gender and sexuality, or further limitations imposed in association to the sexual and reproductive relationship with a man.

6.4 Pursuit of marriage

I agree with Shore and Schmidt's proposition that *fa'afafine* pursued marriage to heterosexual women, relying on their normative masculinity, as a means to an end. The basis for marriage served as the means through which they could gain access to political power enabled through *matai* (Chief) status.¹⁵⁰ In the same token, it could be argued whether this proposition is what drove *fa'atama* to marry men and conceal their true gender identity.

Besnier provided that no legal benefits or entitlements derived from marriage are entitled to individuals prohibited from marriage;¹⁵¹ if children are adopted by way of customary adoption (*Fa'afafine* invest in childcare and "customary adoptions" (*vae tama*)) not recognised in the law¹⁵²; no legal status is attached to the family unit if the relationship is not legally recognised and lastly, intimate and sexual relationships may be criminalised.

6.5 Criminalisation of consensual sex involving *fa'atama*

As it stands, the criminalisation of consensual sex of *fa'atama*, the spectrum of the SOGIEC community and their partners (some who identify as heterosexual) is permitted in the law. This is problematic and disturbing because the criminal laws are discriminatory (and effectively contravene Article 15 of Samoa's Constitution). Thus, it has weaponised the Government and wider society to normalise the continued oppression of Samoa's SOGIEC community while misusing the law to advance the oppressive agenda of a nation driven still by draconian Christian principles.¹⁵³

¹⁵⁰ Shore, above n 69; Schmidt, above n 56.

¹⁵¹ Besnier, above n 58.

¹⁵² Doug P Vanderlaan, Lanna J Petterson and others "(Trans)gender role expectations and child care in Samoa" (2015) 52 *Journal of Sex Research* 710; See *Re AMM* [2010] NZFLR 629.

¹⁵³ Crichton, above n 32.

6.6 Gender neutral language adopted laws are inadequate

Between 1962 and 2018, the 16 amendments to the *Constitution to the Independent State of Samoa 1960* (Samoa's Constitution) have undergone *general amendments on gender neutral terms*, with references to *person* or designation of office being used instead of binary references to the male and female gender.¹⁵⁴ This blanket approach is insufficient to adequately respond to the prevailing gender inequity practices and constitutional violations prevalent in Samoa's customs and laws.

6.7 Lack of theoretical underpinning to justify the collective recognition of a historical social practice to determine the standard of criteria for laws

There is a theoretical gap underpinning the issues under investigation which relies on a firm understanding of Samoan society, the nature of acceptance and what customary social practices were collectively recognised, prior to colonisation. Once understanding this, it will help determine the standard for determining whether a practice, be it social or customary, was then recognised as legally valid or not.

7.0 Conclusion

The status of Samoa's *fa'atama* and the wider SOGIEC community needs immediate attention. If times were simpler, the acceptance of a collectively recognised practice would not be determined by a numerical metric system or a representative democracy driven by an oppressive agenda but by what the recognition will make possible for the wider society. Thus, the task is not to define the language of the law but to examine what language of the law makes possible which challenges us to "go deeper than the skin of the law in order to explain, justify and properly critique what is found there".¹⁵⁵

In light of the stance of the church against homosexuality and the general repeal of sodomy provisions in the law, it is doubtful that courts, parliament, the church and

¹⁵⁴ Constitution of the Independent State of Samoa, above n 109; Mulitalo, above n 3.

¹⁵⁵ Allan Beever *Law's Reality* (Edward Elgar Publishing, UK, 2021) at 49.

wider community, are prepared to be subjected to moral, religious and social scrutiny, by bringing *fa'atama* into the scope of existing laws. It is questionable also how democratic and representative the judges, parliamentarians and *matai* in the village *fono* are and whether they are prepared to part ways from their personal beliefs, taking into consideration their own moral and religious perspective on sexuality and gender. Thus, the influence of church and Christian principles are not restricted to the ordinary citizens of Samoa, as it clearly shapes the perception of *matai* in village *fono*, members of parliament and the judiciary before decisions are made on reform or the general making, amending and repealing of laws.¹⁵⁶

¹⁵⁶ Schmidt, above n 52, 56.

CHAPTER THREE – METHODOLOGY

Talanoa methodology in Samoa law and gender research

1.0 Introduction

Within the field of law, there is a growing diversity of methodology employed in legal and gender research which often revolves around the three common methods: doctrinal, socio-legal and critical.¹⁵⁷ Alongside this are the common types of legal understandings of the law which often falls into two categories: Descriptive or Normative.¹⁵⁸ Over the last two decades there has been a significant rise in decolonial research in the academic fields of law and gender.¹⁵⁹ This is often attached to the grounded theory and ethnography methodologies as both are widely adopted in indigenous research.

This chapter examines some of the Pacific research methodology to consider, and the most appropriate models to adopt, in order to resolve tensions in indigenous and Pacific (or Pacific-specific) issues, and their application within the gender and law context. It points to key learnings from numerous studies that have applied the techniques and summarises their potential for future gender and law research involving indigenous communities. This chapter further explores the socio-legal and critical methodology pathways,¹⁶⁰ whilst highlighting the paucity of data and research exploring Samoa's *fa'atama* (masculine women who are "like men"). "In the manner of men" is the literal translation of the Samoan word *fa'atama* or 'like' (*fa'a*), a 'man'

¹⁵⁷ Wilkinson, above n 35, at 20; Guy Powles "The challenge of law reform in Pacific Island states" in Brian Opeskin and David Weisbrot (eds) *The promise of law reform* (Federation Press, Sydney, 2005) 404; Ian Davis "Targeted consultations" in Brian Opeskin and David Weisbrot (eds) *The promise of law reform* (Federation Press, Sydney, 2005) 148; Marise Payne "Law reform and the legislature" in Brian Opeskin and David Weisbrot (eds) *The promise of law reform* (Federation Press, Sydney, 2005) 302; Terry Hutchinson and Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 Deakin LR 113; Chris Dent "A Law Student-Oriented Taxonomy for Research in Law" (2017) 48(2) Victoria U Wellington L Rev 371-388.

¹⁵⁸ Allan Beever "Legal theory and legal research" in Mary-Rose Russell (ed) *Legal Research in New Zealand* (LexisNexis, Wellington, New Zealand, 2015).

¹⁵⁹ Sherna B Gluck and Daphne Patai *Women's Words* (Routledge, Chapman & Hall Inc, UK, 1991); Tupuola, above n 57; Tarcisius Kabutaulaka "Re-Presenting Melanesia: Ignoble Savages and Melanesian Alter-Natives" (2015) 27 The Contemporary Pacific 110; Farran, above n 51; Mulitalo, above n 3.

¹⁶⁰ Bridget Fa'amatuainu "Critical reflections on teaching pedagogies adopted in law teaching in Aotearoa: Case for Pacific pedagogies in law teaching" (NZLLA, paper presented to New Zealand Law Librarians Association (NZLLA) Conference, 23rd – 27th August 2021 Waiho i te toipoto, kua i te toiroa – Stronger together, Virtual, 2021) at 20.

(*tama*). According to the empirical data collected in this research, all *fa'atama* identified as transmen.

2.0 Inquiry in this study and the critical researcher

The aim of this chapter is to provide an overview of the process involved in carefully selecting the most appropriate methodology for research on Samoa law reform and recognition of *fa'atama* in Samoa. It further captures some of the challenges at the interface between law, gender and indigenous communities. I also examine how traditionally dominant notions and understandings of legal philosophy may help facilitate and enrich aspects of research where guidance from indigenous research in law and gender is scant.

The inclusion of *fa'atama* in Samoa gender methodology prompted the researcher to consider research with Pacific transmen and whether it fit within critical feminist and Pacific indigenous theories. Briefly, I begin first with a review of relevant literature. Queer, is an umbrella term used to encompass the spectrum of non-heteronormative sexual identities, inclusive of bisexual, homosexual, intersex, lesbian and transgender. Here, Marcus provides that sexual identity is central to analysis.¹⁶¹ Queer Theory emerged to address the silenced voices of the homosexual community. While historically focussed on elevating the voice of the homosexual community rather than other non-heteronormative sexual identities, including transgender,¹⁶² Queer Theory was inspired by the feminist movement as well as the philosophical contribution of Michael Foucault on power in institutions.¹⁶³ According to Sumeo, Pacific critical scholars such as Melani Anae reflected on the work of Foucault “which made visible the domains of power and unequal power relations within institutions, which affected the way individuals in those institutions saw themselves and their identities”.¹⁶⁴ On this view, while historically focussed on elevating the

¹⁶¹ Sharon Marcus “Queer Theory for Everyone: A Review Essay” (2005) 31 *Signs* 191.

¹⁶² Ki Namaste “The politics of inside/out: Queer theory, poststructuralism, and a sociological approach to sexuality” (1994) 12 *Sociological Theory* 220.

¹⁶³ April Scarlette Callis “Playing with Butler and Foucault: Bisexuality and Queer Theory” in Jonathan Alexander and Serena Anderlini-D’Onofrio (eds) *Bisexuality and Queer Theory Intersections, Connections and Challenges* (Routledge, Oxfordshire, 2012) 21; Marcus, above n 161.

¹⁶⁴ Saunoamaali’i Karanina Sumeo “Land rights and empowerment of urban women, fa’afafine and fakaleiti in Samoa and Tonga” (PhD thesis, Auckland University of Technology, 2017) at 70-71.

silenced voices of women, the feminist movement was inspired by Queer Theory to include the voice of other genders, thus shifting focus beyond the exclusive realm of women.¹⁶⁵ In the same rhetoric, the Queer Theory shifted beyond homosexual voices to include the voices of other sexual identities.¹⁶⁶ Such developments spurred other Queer Theories, including the Queer of Colour.¹⁶⁷

This body of knowledge has advanced the position of the non-heteronormative community, thus elevating their voice, their lived experience and human rights considerations. The literature on Queer research has led to studies investigating the relationship between sexual identity and other factors including social justice, construction of race, nationality and others.¹⁶⁸ A fundamental critique of Queer Theory is its preoccupation with sexuality as opposed to gender, thus, this critique is that Queer Theory does not critically engage with other factors (which may be more significant or relevant), such as the impact of climate change, class and race.¹⁶⁹

In investigating a suitable methodology for Samoa's *fa'atama* and SOGIEC communities, the above discussion must be kept in mind. As evident in the empirical findings chapter (Chapter 4, Paper 3), the respondents valued: 1. Collective acceptance based on how they self-identified as *fa'atama*, and inclusion as part of the general community, and 2. Collective recognition of their gender identity and status in Samoa customs and laws, as a legitimate pathway to enable them to live authentically as *fa'atama* in society. Accordingly, the *talanoa* data informed the most appropriate methodology to adopt, which did not necessitate a critical gender lens, but one which reaffirms the needs of *fa'atama*, facilitates meaningful engagement, based on common Pasifika values of humility (*loto maualalo*), reciprocity (*tausi le va*), respect (*fa'aaloalo*), governing appropriate conduct, language and etiquette from informal *talanoa* to formal *talanoa*, in addition to multifaceted layers of understandings across the different levels (individual, community, village, system), considers the sociocultural and political context of *fa'atama* living in Samoa (village and urban), diasporic *fa'atama* living in New Zealand and abroad, incorporates

¹⁶⁵ Marcus, above n 161.

¹⁶⁶ Namaste, above n 162.

¹⁶⁷ Roderick Ferguson *Aberrations in Black* (University of Minnesota Press, Minneapolis, MN, 2004).

¹⁶⁸ Marcus, above n 161.

¹⁶⁹ Callis, above n 163.

multidimensional diversity amongst *fa'atama* (age, education) and critiques to oppressive practices, such as dominant perspectives focussed on heteronormative and binary norms embedded in customs and laws.

3.0 Establishment of a research question

The *Talanoa* serves as the main theoretical and analytical framework guiding this socio-legal and qualitative research¹⁷⁰ whilst adopting an exploratory constructivist approach.¹⁷¹

As mentioned earlier in Chapter 1 (Introduction), the principal research question under investigation is: What gender discriminatory practices faced by *fa'atama* influence their low recognition in Samoa's law reform process and village governance?

The secondary research questions are as follows:

1. What are the historical, cultural and legal challenges that prevent *fa'atama* from being recognised by local customs and laws?
2. How do we legally address gender discriminatory practices impacting *fa'atama* in Samoa?
3. How do Samoa's colonial, Christian and cultural beliefs inform Samoa's village governance and law reform process?
4. How much agency do *fa'atama* have in participating in and facilitating the process of their legal recognition?

4.0 Methodologies: Indigenous and Pacific

The involvement of cultural competence in methodologies plays a constituent role in the design, management and execution of decolonial research.¹⁷² It resonates well

¹⁷⁰ Lesa Faafetai "The impact of Samoan christian churches on Samoan language competency and cultural identity" (PhD thesis, University of Hawaii, 2009); Vaioleti, above n 39; Kvale and Brinkmann, above n 39; Mulitalo, above n 3.

¹⁷¹ Prance Liamputtong and Douglas Ezzy *Qualitative research methods* (Oxford University Press, New York, 2005).

¹⁷² Marcelle Burns, Anita Lee Hong and Asmi Wood *Indigenous Cultural Competency for Legal Academics Program: Final Report* (Australian Government Department of Education and Training 2019).

with the “by Pacific, for Pacific” approach as it pertains to the design of methodologies conducted by Pacific and indigenous researchers. This approach may also help guide non-Indigenous researchers interested in research focused on Pacific and indigenous communities. The research on Samoa law reform and recognition of *fa’atama* was conducted in the Pacific Islands, specifically, Samoa. I adopted the *Talanoa* methodology (discussed below) where the appropriate selection and use of methodology must be contextually appropriate to the local realities as well as the social and cultural challenges that impact law reform and gender diverse communities in Samoa. The studies on postcolonial and other Pacific methodologies will be discussed to illuminate the potential for use in future gender and law research involving Pacific communities. We now examine these in turn.

4.1 Talanoa methodology

In the past Samoans have been at a disadvantage because literature, although written about us, appears collated and written in a form that “appeals only to a small, educated elite...firmly confined to the Universities” (Watt 1985: 286). Many of the theories and models used within the social sciences to analyse Polynesian societies have been loaded with Western language and structures to describe our behaviour (Ralston, 1988)...When Samoans have been studied, some have not had the power to choose what is said, how it is expressed and how their words should be written because that control seems to be exercised by the “all-knowing author”.¹⁷³

Before delving further into a proposed blueprint for the Samoa critical theory and Samoa gender methodology, it is instructive to offer a brief outline of the core values of *fa’asamoa* (The Samoan way or essence of being Samoan) as it applies here.¹⁷⁴ *Fa’asamoa* underpinning social action and the ethic of care are *usitai* (obedience), *fa’aaloalo* (respect), *alofa* (love) and *tautua* (service).¹⁷⁵ It is important to note that the expression of *fa’asamoa* may not always be explainable and may often lack

¹⁷³ Tupuola, above n 57, at 183.

¹⁷⁴ Pio Mailo *Palefuiono* (Tofa Enterprises, Pago Pago, American Samoa, 1992); Va’a, above n 30.

¹⁷⁵ Anae, Coxon and others, above n 209; Richard P Gilson *Samoa 1830 to 1900* (Oxford University Press, Melbourne, 1970); Mailo, above n 254; Meleisea, above n 185.

uniformity across different *nu'u fa'avae* in Samoa.¹⁷⁶ These relational values served as principles of law which pre-dated colonisation in Samoa.

It is important to point out that adopting *fa'asamoa* principles in indigenous gender and law research in Samoa does not require the researcher to share the religious and cultural beliefs of the Samoan people.

The *Talanoa* is a pan-Pacific approach to holding an inclusive, participatory and transparent dialogue, it means to have a 'meaningful conversation'. The *Talanoa* research method complements the ethics, philosophies, local realities and values of the Samoan culture. The free translation of *talanoa* means to tell (*tala*) and without boundary (*noa*) which is often associated with the free and less inhibited rules of exchange, in terms of social structure and linguistics, without any formal expectation for an agenda and dialogue without any form of restrictions.¹⁷⁷ The *Talanoa* aligns with the relational and hierarchical aspects embedded in Samoan culture, which captures the deeper social, spiritual and cultural components reflected in the "phenomenological research family".¹⁷⁸

*Upega i Filiga*¹⁷⁹ should be embedded into the design of any research methodology to enhance the process. Metaphorically, it describes the difficult process of using a net to catch pigeons, which is likened to the process a researcher undergoes when deciding on the appropriate conceptual framework and method to use for research. Unlike the *Talanoa* methodology (see above), *Upega I filiga* is not a qualitative method as such but rather a self-critical evaluative or reweaving process. This is required when reflecting upon the appropriate methodological tools to use to enable questions under investigation to be explored and effectively answered.

¹⁷⁶ Leilani Tuala-Warren *A Study in Ifoga: Samoa's Answer to Dispute Healing* (2002).

¹⁷⁷ Faafetai, above n 170.

¹⁷⁸ Vaioteleti, above n 38, at 25; Suaalii-Sauni and others, above n 198 cited Mulitalo, above n 3, at 42.

¹⁷⁹ Motusaga, above n 49.

4.2 Contextualising the Talanoa Methodology

The *Talanoa* methodology is guided by Samoan cultural values to support the qualitative methods being used in this research. As the principal framework of theoretical and research analysis for the study, the *Talanoa* approach was in qualitative interviews and focus groups to explore aspects of reflexivity that are critical for self-reflection, that are historically part and parcel of the Samoan culture.¹⁸⁰

While *Talanoa* is commonly adopted as an oral cultural practice, the *Talanoa* is focussed on building and creating relational narrative inquiry, dialogue and discussion which is not exclusively oral but also written, often prefaced by an initial *talanoa* in person or online.¹⁸¹ As such, the *Talanoa* is not merely the act of talking or discussing but a complex and multi-layered dialogue from free-flowing *talanoa* to critical *talanoa* conducted in the language of the respondent, whether Samoan, English or both.¹⁸²

Talanoa is critical to the second phase of this research. This phase involved face-to-face contact with respondents via focus group *talanoa* (FGT) followed by in-depth semi-structured interview *talanoa* (IT). The indicative questions and prompts used during the FGT and IT was guided by the emergent themes from the literature review and doctrinal analysis (the first phase). The respondents included representatives from the village, public sector and private sector. The FGTs took place first followed by the ITs to allow for gaining a better understanding of the respondents attitudes, beliefs and experiences which is not always feasible within a FGT. The key respondents (FGT and IT) were then invited to share their views, reflect on their own cultural journey whilst providing a non-threatening and empowering safe space where they feel comfortable to participate.¹⁸³

¹⁸⁰ Ka'ili, above n 36; Prescott, above n 36; Naepi and others, above n 37; Thomsen and others, above n 37; Vaioleti, above n 39.

¹⁸¹ Naepi and others, above n 37; Patrick Thomsen "Transnational Interest Convergence and Global Korea at the Edge of Race and Queer Experiences: A Talanoa with gay men in Seoul" [2020] Du Bois Review 1; Marcia Leenen-Young and others "'Pillars of the colonial institution are like a knowledge prison': the significance of decolonizing knowledge and pedagogical practice for Pacific early" [2021] Teaching in Higher Education.

¹⁸² Vaioleti, above n 39.

¹⁸³ Ka'ili, above n 36; Prescott, above n 36.

An ethical guideline of responsible research was adopted in the appropriate selection of a purposive sample of targeted individuals from (as it this guideline was co-designed in collaboration with my *Fa'atama* advisor, which obtained final approval from the Auckland University of Technology Ethics Committee (AUTEC)): respected Village experts (i.e., government women representatives, village mayors, village council members); respected State experts (i.e., members of parliament, judiciary, government lawyers, government chief executives); respected Private sector experts (i.e., business community, non-government organisations) and FGT comprised of up to 10 individual experts. The ethics application was sought from the AUTEC and granted on 24 August 2021. Data collection was interrupted due to the impact of COVID-19 amongst other factors.

4.3 Limitations to Talanoa Methodology

There are several critiques to the *Talanoa* methodology which may emerge from the above discussions. For the purpose of this study, I focus on two main critiques. Firstly, the proposition is that it dismisses the traditional positivist notions which are central to scientific empirical research, value-free objectivity and validity. It could also be submitted that the *talanoa* itself is not academic and robust enough to fit the requirements of a critical methodology. The *talanoa* methodology has the appearance of objectivity in so far as it detaches the participants from a predetermined research agenda. The point of critique occurs before the actual research, as in before the actual *talanoa* takes place. Here, a joint sense of belonging is cultivated, at which point, the research agenda is determined jointly by the participants.¹⁸⁴ Building rapport and trust between participant and researcher is fundamental to strengthening a meaningful research relationship, based on mutual respect, empathetic engagement, reciprocal obligations and even emotion.¹⁸⁵ Consequently, this runs contrary to scientific empirical research principles of value-free objectivity and validity. It does, however, meet the interpretivist notions which are central to qualitative social research, which

¹⁸⁴ Sitiveni Halapua. "Talanoa process: the case of Fiji". (2008). unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN022610.pdf.

¹⁸⁵ Unaisi et al., above n 210; Trisia Farrell and Unaisi Nabobo-Baba "Talanoa as empathic apprenticeship" (2014) 55 Asia Pac Viewp 319-330. <https://doi.org/10.1111/apv.12060>.

accommodates aspects of subjectivity.¹⁸⁶ Secondly, the *talanoa* methodology lacks a critical lens.¹⁸⁷ Critical inquiry is required to examine knowledge production at the intersection between power relations and inequities, to draw out the visibility of indigenous and marginalised voices often silenced and dismissed in dominant discourse. In Pacific societies, some women object to critical feminist thought and may even object to the proposition that women are oppressed or marginalised based on their gender.¹⁸⁸ To unpack the different layers of oppression and to critique power relations between gender and the systemic oppressive practices of the status quo (in dominant ideological foundations), is critical to gender and law research methodology on indigenous societies.¹⁸⁹

4.4 Response to critiques to *Talanoa Methodology*

For this study, I have selected the methodological principles which align with my personal principles, as a researcher, about dignity and respect for all, irrespective of gender, class, ethnicity and background.

Arguably, the transformative nature of the *talanoa* facilitates further debate about the legitimacy of deeper issues at the interface between representation, recognition and power dynamics in between and amongst the same gendered non-binary groups. What this highlights is not necessarily the absence of a critical gender lens to power relationships, but the inability to understand the premise of the *talanoa* approach. Thus, part of the “epistemological task” is to persistently interrogate the very norms of our institutional practices which are complicit in the social reproduction of structural injustices.¹⁹⁰ Indeed, the task ahead is not to limit the scope of enquiry to debates on how to define the *talanoa* or what it lacks, but rather to examine what the *talanoa* makes possible.

¹⁸⁶ Chilisa, above n 173; Sanga, above n 196; Suaali-Sauni and others, above n 198; Du Plessis and Fairbairn-Dunlop, above n 181, at 109-114. <https://doi.org/10.1111/j.1468-2451.2009.01704.x>; Donna M. Mertens *Research and evaluation in education and psychology* (3rd ed., Thousand Oaks, CA, Sage, 2010).

¹⁸⁷ Joyce M. O’Mahony and Tam T. Donnelly “A postcolonial feminist perspective inquiry into immigrant women’s mental health care experiences” (2010) 31 *Issues in Mental Health Nursing* 440-449.

¹⁸⁸ Vanessa Griffen. *Women, development and empowerment: A Pacific feminist perspective*. (Kuala Lumpur, Asian and Pacific Development Centre (Organisation), 1989); Motusaga, above n 49; Va’a, above n 30, at 237.

¹⁸⁹ Griffen, above n 234.

¹⁹⁰ Foluke Adebisi “Should We Rethink the Purposes of the Law School? A Case for Decolonial Thought in Legal Pedagogy” (2021) 2 *Amicus Curiae* 428.

In light of the above discussions, the *talanoa* approach is more appropriate to diverse power relationships which makes it more inclusive to the experience of SOGIEC of Samoa (see Table 1). Given the reflective nature of gender and law research in Samoa, the *Talanoa* is the most culturally appropriate research tool (See Table 1). This is also due to the sensitivity of investigating gender discriminatory practices experienced by gender diverse groups (*fa'atama* and lesbian) in Samoa. As bijuralism (or co-existence of the customary legal system and the state legal system) is adopted in Samoa, the *Talanoa* process will help facilitate discussions in this complex and often undocumented area. The Village Fono Act 1990, governing village policy (Faiga fa'avae) and village bylaws, do not impose any mandatory requirement on villages to register their village bylaws, policy and village fono decisions, which makes this area largely “undocumented”. However, the customary law decisions from the Land and Titles Court, as well as the appeal decisions (including those prior to the LTC restructure), are filed in the Ministry of Justice and Courts Administration records registry.

I argue that in order for researchers to address shortcomings prevalent in gender and law research methodology, the researchers may wish to engage in alternative ontologies (both western and non-western) to the existing system (see section 4.8 “Critique to Indigenous Methodologies, below) as echoed earlier by Suaalii-Sauni and Fulu-Aiolupotea.¹⁹¹

In a Pacific context, communication and transmission of knowledge is encompassed “through the senses”.¹⁹² Thus, it is critical that researchers, both Pacific and non-Pacific are knowledgeable in Pacific autonomous contexts. In a Samoan context, it is imperative that one is experienced in *Teu le vā*, Anae’s *Teu le vā* paradigm governs the expression of *fa'asamoa* values and beliefs in practice and ‘in any context, [whereby] respectful and polite communication is adhered to by all’.¹⁹³ On this view, Fa'avae cautioned that the depth of respectful relationships between respondents and

¹⁹¹ Suaalii-Sauni and Fulu-Aiolupotea, above n 179, at 336.

¹⁹² Vaiioleti, above n 38, at 32.

¹⁹³ Ponton, above n 219.

researcher should not be overlooked.¹⁹⁴ This is echoed by Anae.¹⁹⁵ Thus, the *talanoa* relationship is inextricably contextualised to Pacific ontological, social and spiritual understandings.

Therefore, it is instructive that in its design, construction, and delivery, Samoan gender and law methodology should not only complement the principles of *Teu le vā* but also be applied by experienced practitioners capable of working in cross-cultural and inter-disciplinary contexts. Consequently, the theorising generated from knowledge production runs the risk of being poor quality and misleading if a researcher is an inexperienced *Talanoa* or *Teu le vā* practitioner.

Critics argue that Pacific epistemology has different origins to non-Pacific epistemology. To understand the specific peculiarities and depth of knowledge unique to the lived reality of the Pacific context is predicated on the assumption that only Pacific people can provide solutions for their respective communities.¹⁹⁶ While there is merit to this argument, I argue that if the “*talanoa*” originated in Pacific epistemology and not dominant Western epistemologies, the reasoning would follow that the *talanoa* was not originally positioned as a research methodology, method or tool to facilitate knowledge production and generate theory. Thus, it is questionable whether the adoption of non-Pacific research methodologies, methods, instruments and knowledge, more reflective of, for instance, the dominant hegemonic ideologies for that culture, could be used alongside another set of dominant hegemonic ideologies which originate in Pacific epistemology, that makes it: (1) problematic, in itself, or (2) it is the extent to which the mixing of methodologies makes it problematic. For example, some would argue that the *talanoa* was shaped by western epistemologies to be recognised as “academic”. As such, the *talanoa* has been deliberately reframed into the more recognised research methods of “focus group”, “interview”. This may also be dependent on other factors, including the methodology criteria set by the funding body.¹⁹⁷ Thus, to retain the *agaga* (spirit) of the *talanoa* is

¹⁹⁴ David Fa’avae, Alison Jones and Linita Manu’atu “Talanoa’i ‘a e talanoa – talking about talanoa: Some dilemmas of a novice researcher” (2016) 12 *AlterNative* 139.

¹⁹⁵ Anae, above n 42.

¹⁹⁶ Vaiioleti, above n 38.

¹⁹⁷ Helen Gremillion, Jason Hallie & Falaniko Tominiko. (2021). “The Scope of Talanoa Research Methodology: The place of research methods that are not rooted in Pasifika traditions”. In Evangelina Papoutsaki and Marie

largely dependent on understanding the context to which it is applied.¹⁹⁸ In the words of Suaalii-Sauni and Fulu-Aiolupotea:¹⁹⁹

academic researchers who work with Pacific peoples benefit most, in our experience, when there is deliberate and mutual sharing and probing of Pacific and Western epistemologies inherent in contemporary Pacific research.

I view this as a powerful argument.

In the Hon. Prime Minister, Afioga Fiame Naomi Mataafa’s, inaugural address at Auckland University of Technology, she shared some insight about her path to becoming Samoa’s first female Prime Minister.²⁰⁰ In her address, she raised some plausible explanations about the conceptualisation of the *talanoa* in practice in modern Samoa. She described her recollection of the General Election campaigning having joined the Fa‘atuatua I le Atua Samoa ua Tasi (FAST) political party initially as a special guest on their roadshow. In her words, “The FAST roadshow was about walking to the people”.²⁰¹ When she discussed public forums they held, she described them as “*talanoa* sessions” in the context of election campaigning in modern Samoa as a way to appeal to the broader cohort. In this context, Afioga Fiame suggested “no food, just water” which was an uncommon break from traditional customary norms, where cultural giftings, a large scale banquet, requiring extensive planning and monetary contributions from the community, would be the usual practice. When asked what does the “*vā*” mean to you? Afioga Fiame replied:²⁰²

We never talk about *vā* in Samoa...I’m fascinated by all the discourse in Aotearoa. We practice it. My own understanding is the *vā fealoai*, respectful relationships with people and environment. In the *palagi* [Western] context, people talk about respect having to be earned, my take from the Samoan context

Shannon (Eds.), *Unitec Research Symposium Proceedings 2020* (pp. 39–53). Auckland, New Zealand: ePress, Unitec New Zealand.

¹⁹⁸ Vaiioleti, above n 38

¹⁹⁹ Suaalii-Sauni and Fulu-Aiolupotea, above n 179, at 332.

²⁰⁰ Afioga Fiamē Naomi Mata’afa “Fiamē joins AUT’s Assistant Vice-Chancellor Pacific Advancement and South Campus, Walter Fraser, to share her insight into Samoa, leadership, the Pacific and the world” (at South Campus, Auckland University of Technology, 13 June 2022).

²⁰¹ Mata’afa, above n 279.

²⁰² Mata’afa, above n 279.

of respect, for us, it's a given, you can only lose it. The expectation is that it is there, something automatic. Unfortunately, I think we're losing that in many ways, not just in relationships between people, you see it mostly in the environment. How much that whole idea has been lost. We have traditional practices, rarely practiced but ...now because of the discourse and diaspora and academic circles, why are we talking about adaptation etc when we've been doing all this stewardship "taking care" of...very happy with this discourse in Aotearoa, multi-cultural and there are cultural lenses in how people talk to each other. No simple answers...

In short, the *talanoa* is more than a "superficial cultural ritual"²⁰³ This is echoed by Adebisi that "...decolonising knowledge is more fundamental and intricate than ticking a box".²⁰⁴ To enact Pacific decolonial methodology such as embedding *Talanoa* and *Teu le vā* actively engages respondents to disrupting the system by enabling other expressions of knowing (pluriversities).²⁰⁵

It further highlights the need to develop a uniquely Samoan critical theory and gender methodology that engages well with *fa'asamoa* principles.

4.5 Postcolonial methodologies

Postcolonial methodologies are considered an alternative to the status quo (i.e., methodologies adopting western research paradigms) built on indigenous approaches and methods. As a more recent phenomenon, in the 2000s, more research on indigenous studies focused on decolonising or unpacking the longstanding dominant tradition of oppressive colonial research and thus, it became widely known as "postcolonial indigenous research".²⁰⁶ This is premised on the emancipatory perspectives and assumptions of the colonised, through critical self-reflection as a means to understand their own perspectives and assumptions of the world.

²⁰³ Fa'avae, Jones and Manu'atu, above n 241, at 142.

²⁰⁴ Foluke Adebisi "Decolonising the law school: presences, absences, silences... and hope" (2020) 54 *The Law Teacher* 471 at 472.

²⁰⁵ Ramón Grosfoguel "The Structure of Knowledge in Westernised Universities: Epistemic Racism/Sexism and the Four Genocides/Epistemicides" (2013) 11 *Human Architecture* 73.

²⁰⁶ Bagele Chilisa *Indigenous research methodologies*. (Sage Publications, Los Angeles, 2012); Mulitalo, above n 3.

There are numerous studies conducted by and on indigenous communities from which to draw meaningful insights. The core theme emanating from countries such as Aotearoa,²⁰⁷ India²⁰⁸ and South Africa²⁰⁹ with a strong colonial legacy are the shared experience of core challenges in the development of uniquely indigenous methodologies. On the whole, their contribution to critical indigenous inquiry focus on the need to adopt critical²¹⁰ and culturally appropriate methodology based on respecting the ethical principles, traditions and knowledge of the indigenous from within those communities to which they will be most applicable.²¹¹ This requires a conscious shift away from the oppressive aspects of the dominant colonial perspective whilst retaining aspects that may still be of value.

In this research, I focus on the Samoan law and gender context, therefore this research is informed by the relationship between relational ontology (philosophies underpinning the social realities of Samoan people in relation to the internal-external, physical-metaphysical and current-past), axiology (ethics and values systems or value of the individual research participant (or “respondent”) to the research as a beneficiary, contributor or respondent) and epistemology (Samoan ways of knowing – embodied in storytelling, *tatau* (tattooing), *nu’u fa’avae* (traditional villages), and so on.²¹²

²⁰⁷ Russell Bishop “Te Kotahitanga – Kaupapa Maori in mainstream classrooms” in Norman Denzin, Yvonna Lincoln and Linda Tuhiwai Smith (eds) *Handbook of critical and indigenous methodologies* (Sage Publications, US, 2008) 439.

²⁰⁸ Elizabeth Cook-Lynn, “History, myth and identity in the New India story” in Norman Denzin, Yvonna Lincoln and Linda Tuhiwai Smith (eds) *Handbook of critical and indigenous methodologies* (Sage Publications, US, 2008) at 329.

²⁰⁹ Antjie Krog, Nosisi Mpolweni-Zantasi and Kopano Ratele “The South African truth and reconciliation commission (TRC): ways of knowing Mrs Konile” in Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith (eds) *Handbook of critical and indigenous methodologies* (Sage Publications, US, 2008) 531.

²¹⁰ Cook-Lynn, above n 190, at 329.

²¹¹ Elsa MG González and Yvonna S Lincoln “Decolonizing qualitative research: non-traditional reporting forms in the Academy” (2006) 7 *Forum Qual Soc Res* 1; Yvonna S Lincoln and Norman K Denzin “The lions speak” in Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith (eds) *Handbook of critical and indigenous methodologies* (Sage Publications, US, 2008) 563.

²¹² Koya Vaka’uta “Tapa mo Tatau: An exploration of Pacific conceptions of ESD through a study of Samoan and Tongan heritage arts” (PhD thesis, University of the South Pacific, 2013); Karlene Mamea, Julia Ioane and Peter Slater “A Samoan sense of self: an exploration Ata (Porirua, NZ)” (2018) 22 *Journal of psychotherapy Aotearoa New Zealand* 103; Mulitalo, above n 3; John Creswell *Qualitative inquiry and social research* (Sage Publications, London, UK, 1997).

4.6 Pacific-specific methodologies

As a relatively new phenomenon, the debate on Pacific-research methodologies has been around since the early 1990s and homegrown here in Aotearoa.²¹³ In Aotearoa, Tuhiwai Smith wrote the leading text on decolonising methodologies.²¹⁴ It proposed the use of a Kaupapa Māori approach alongside seven ethical principles: 1. *Aroha ki te tangata* (a respect for people), 2. *Kanohi kitea* (the seen fact, that is present yourself to people face to face), 3. *Titiro, whararongo...korero* (look, listen...speak), 4. *Manaaki ki te tangata* (share and host people, be generous), 5. *Kia tupato* (be cautious), 6. *Kaua e takahia te mana o te tangata* (do not trample over the *mana* (pervasive power) of people), 7. *Kaua e mahaki* (don't flaunt your knowledge)²¹⁵ for research by and for Māori people which placed a high trust on respect towards Māori *mana* and research outputs that benefit Māori communities. Similarly, Anae's Samoan *Teu le vā* methodology applied in education research as highlighted in the *Pasifika education research guidelines* had influenced the development of Pacific-specific methodologies and the need for more culturally appropriate methodologies to be applied when undertaking research by and for Pacific communities.²¹⁶ This reflects the multi-dimensional, multi-cultural and gender diverse make up of Pacific communities which lends support to the use of interview methods conducted in the Pacific Islands.²¹⁷ Tuhiwai Smith's seven ethical principles are similar to the original eight ethical research principles of "respect, cultural competency, meaningful engagement, reciprocity, utility, rights, balance and protection"²¹⁸ adopted by the Health Research Council in 2005 which was later revised in 2014 to four ethical

²¹³ Tupuola, above n 57; Melani Anae "Inside out: methodological issues on being a 'native' researcher" (1998) 5 *Pac Health Dialog* 273; Kiwi Tamasese and others *O le taeao afua, the new morning: A qualitative investigation into Samoan perspectives on mental health and culturally appropriate services* (Health Research Council of New Zealand 1997).

²¹⁴ Linda Tuhiwai Smith *Decolonizing methodologies, research and indigenous peoples* (University of Otago, Dunedin, Otago, 1999).

²¹⁵ At 120.

²¹⁶ Melani Anae, Eve Coxon and others *Pasifika Education Research Guidelines: Report to the Ministry of Education* (UniServices Limited 2001).

²¹⁷ Williams Unaisi and others *Researching Pacific and indigenous peoples: issues and perspectives* (University of Auckland 2004).

²¹⁸ Mulitalo, above n 3, at 38.

research principles of communal relationships, reciprocity, holism and respect.²¹⁹ The rationale for the reduction in principles was unclear from my review of the document, however, it is clear that methodology conducted in Pacific communities must be responsive to Pacific cultures and thus, sensitive to the cultural protocols governing relationships between Pacific peoples.

The development of other Pacific methodologies by Pacific researchers – including the *Kakala* framework (Tongan) offer alternative methodologies to conduct research in indigenous communities.²²⁰ The *Teu le va* will be discussed next before I discuss the main methodology adopted in all empirical focus groups and one-to-one interviews, conducted virtually and in-country, which informed the overall findings of the study.

4.7 *Teu le va*

In terms of the appropriate methodology to adopt for this research I also reviewed the merits of Anae's *Teu le vā* paradigm which was originally adopted in education research and uniquely Samoan in scope which has also gained credibility in general health and gender research.

It is worth mentioning that Anae's *Teu le va* complements *Upega I filiga* (mentioned above) as she asserts “[f]or some it is a need to unlearn Western philosophies in order to re-learn and embrace one’s spirit as a “native”...So, presenting both the context of the community as well as one’s own positioning (in regard to that context) is extremely important in qualitative work”²²¹. It further complements intersectional spaces as it relates to power relations and knowledge creation which aligns with critical feminist methodology.

With respect to *Teu le vā*, it is based on three concepts which govern how relational connections to the *vā* (relationship) are defined and expressed. First, there is *vā*

²¹⁹ Health Research Council of New Zealand *Pacific Health Research Guidelines 2014 (Second edition)* (Health Research Council of New Zealand 2014).

²²⁰ Thaman, above n 202; Filipo Katavake-McGrath “Their Lived Experience and Their Navigation of Sexual Orientation related Legislative Change” (PhD thesis, Auckland University of Technology, 2021).

²²¹ Anae, above n 42.

fealoa'I, defined as ‘spaces between relational arrangements’,²²² which are both ‘physical and metaphysical’²²³. Secondly, there is *vā tapuia*, defined as the ‘relationship of respect’²²⁴, or ‘sacred spaces of relationship arrangements’²²⁵. The onus is on the *Teu le vā* practitioner (or facilitator adopting *Teu le vā* traditionally in focus groups, *fono* [meetings], or interviews, within a Samoan context), to understand and to be aware of such relational connections, which are inextricably tied to how they behave or approach others.²²⁶ The *teu le vā* practitioner’s gender, status, or relationship to others is vital to strengthening a relationship with *tapu* dimensions, which helps to enrich the *vā tapuia* between brothers and sisters, mothers and fathers and so forth. Thirdly, there is *Teu le vā* itself, defined as ‘to value, nurture, look after, if necessary to tidy up the *vā* (the relationship)’²²⁷. It acknowledges the special connections and principles required to maintain authentic and respectful methods of communication within and outside the Samoan community. Therefore, the *Teu le vā* paradigm is holistic, not exclusive to Samoan contexts, as it broadly adopts a pan-Pacific, cross-cultural, cross-disciplinary approach, whilst governing familial and non-familial contexts.

At the risk of oversimplifying, to use the *Teu le vā* paradigm is to facilitate interactions in the *talanoa* that enable the use of the senses. Importantly, understanding the *agaga* (spirit, essence) beneath the skin of the *talanoa* encounter must be foregrounded in core Pacific values, principles, expressions and emotions to bring out the respondents truth. Consequently, it is at the core of quality Pacific research and enriches research knowledge privileging relationality and maintenance of the *vā* (relational space).²²⁸

²²² Anae, Coxon and others, above n 209.

²²³ Anae, above n 42.

²²⁴ Ellie Meleisea Meleisea, Leasiolagi Malama Meleisea and Penelope Schoeffel *Samoa’s Journey 1962-2012* (Victoria University Press, Wellington, 2012).

²²⁵ Anae, Coxon and others, above n 209.

²²⁶ Vaoiva Ponton “Utilizing Pacific Methodologies as Inclusive Practice” [2018] SAGE Open 1.

²²⁷ Anae, above n 42; Melani Anae and Karlo Mila-Schaaf *Teu Le Vā—Relationships across research and policy in Pasifika education: A collective approach to knowledge generation & policy development for action towards Pasifika education success* (2010).

²²⁸ Jacoba Matapo and Tim Baice “The art of Wayfinding Pasifika Success” (2020) 9 MAI Journal 26; Raewynn Siilata, Tanya Wendt Samu and Alexis Siteine “The Va ‘Atele Framework: Redefining and Transforming Pasifika Education” in Elizabeth McKinley and Linda Tuhiwai Smith (eds) *Handbook of Indigenous Education* (Springer, Singapore, 2017) 1.

Like *Teu le vā*, the *talanoa* process does not have a gender lens but may be adapted to engage in critical discourse, which will be examined in more detail in the section below. In the words of Sumeo:²²⁹

One could argue that at a strategic level, *talanoa* and *noa* are unquestioned domains for male discourse. This then resembles the situation that spurred feminist methodology in order to make visible women's voices and causes in western settings politics, and research.

4.8 Critique to Indigenous Methodologies

4.8.1 *Ontology*

Ontology, more specifically, “relational ontology”²³⁰ is the assumption that social reality to the world, environment, the living and the dead is understood through those relational connections between people, the environment, the spirit world as well as other factors, including laws and climate change. Consequently, this collectively impacts the perception of social reality. Collective responsibility, spirituality, community cohesion and principles of social justice are implicit in Pacific relational ontology.²³¹ In Pacific indigenous contexts, pluralism exists in knowledge systems, in colonised and formerly colonised contexts, to which recognition of their diverse experiences, including the names and concepts they adopt to describe their lived reality, is accommodating to aspects of subjectivity based on values, time and context.²³²

Adopting a Samoan indigenous reference recognises the sacred position matai hold, for example, as leaders ordained by God, in deciding on matters of spiritual and earthly significance. For example, violations of decisions made by matai concerning

²²⁹ Sumeo, above n 164, at 67–70.

²³⁰ Chilisa, above n 173.

²³¹ Rosemary Du Plessis and Peggy Fairbairn-Dunlop. “The ethics of knowledge production – Pacific challenges” (2009) 60 *International Social Science Journal* 109-114. <https://doi.org/10.1111/j.1468-2451.2009.01704.x>; Kabini Sanga. “Making philosophical sense of Indigenous Pacific research” in Williams Unaisi, Tupeni Baba, Okusitino Mahina, Nuhisifa Williams and Unaisi Nabobo Baba, eds. *Researching Pacific and indigenous peoples: issues and perspectives* (University of Auckland 2004).

²³² Sanga, above n 196.

the recognition of *fa'atama* in customary practices would activate divine justice, if disobeyed, such as death or illness.²³³

Talanoa is implicit in indigenous relational ontology as it draws out pluralistic, multi layered expressions of lived experiences related to collectivity, spirituality, social justice, amongst others.

4.8.2 Epistemology

Indigenous knowledge in Pacific contexts, constitutes a relational concept, built on relational ontology (as described above), which is context specific, determined in a process of community collective engagement, based on references to metaphors, names and in some cases, genealogical connections.²³⁴ The composition of those who are involved in the process of knowledge creation is significant in terms concerning claims to ownership.²³⁵ They act as guardians and protectors of indigenous knowledge, who then decide on appropriate protocol for dissemination of knowledge, in addition to how and what knowledge is then validated as truth.²³⁶

The *talanoa* methodology can only aspire to fulfil indigenous epistemology as the researcher seeks to cultivate a forum of empowerment and psychological safety to elevate the voice of the oppressed or marginalised. This may involve empathetic engagement of participants and carefully selecting methods to collect indigenous knowledge which support inclusivity. While active steps are made to ensure informed consent, confidentiality and privacy, in practice, there may be more immediate considerations at play. Some participants are more concerned about being heard and contributing their ideas, where non-maleficence (no harm) may not be their immediate concern. In matters of confidentiality and privacy, some participants are well aware, particularly in small Pacific communities, that their involvement is anonymous, although the influence of the researcher would encourage some to

²³³ Tamasailau Suaalii-Sauni, I'uogaga Tuagalu, Tofilau Kirifi-Alai and Naomi Fuamatu *Su'esu'e Manogi, in search of fragrance, Tui Atua Tupua Tamasese Ta'isi and the Samoan indigenous reference* (2009). Centre for Samoan Studies, National University of Samoa. Apia, Samoa.

²³⁴ David Gegeo and Karen Watson-Gegeo "How we know: Kwara'ae rural villagers doing indigenous epistemology" (2001) 13 *Contemporary Pacific* 55.

²³⁵ Sanga, above n 196; Gegeo and Watson-Gegeo, above n 199.

²³⁶ Gegeo and Watson-Gegeo, above n 199.

volunteer their involvement in the study to others. The sad reality also is that the participants, from where the ideas originate, are not fully acknowledged as the owners of the ideas, because the academic researcher often takes the recognition as the author of their ideas, after the study has concluded, in publications and conferences.

According to Pacific scholars, they assert that better quality research outcomes is the result of research on indigenous people conducted by indigenous researchers, trained in both western and indigenous methodologies and epistemologies, which should not be understated.²³⁷

4.8.3 *Axiology*

Chilisa indicates that relational axiology is based on relational accountability, respectful representation, reciprocal appropriation and lastly, rights and obligations.²³⁸ “Relational” axiology is research which emphasises the high value placed on relationships upholding principles of harmony and peace.²³⁹ Thus, the quality of meaningful and reciprocal relationships in *talanoa* determine the values integral to the integrity of the research, quality of data and use to the indigenous communities. Any disharmony or disruption to these values, must be adequately addressed, even if the action was unintentional, and resolved. Such disharmony may be linked to the unethical publishing of material that is exploitative to the participants and their communities, at which point, the researcher or research institution must seek to resolve this breach of values, to restore peace and harmony to the participants.²⁴⁰

²³⁷ Vaiioleti, above n 38, at 25; Konai H Thaman “Decolonising Pacific studies: indigenous perspectives, knowledge and wisdom in higher education.” (2003) 15 *Contemp Pac* 10.

²³⁸ Chilisa, above n 173, at 20-22.

²³⁹ Sumeo, above n 164.

²⁴⁰ Sumeo, above n 164.

5.0 Western legal methodology

In this research, the first phase involved an exhaustive literature review followed by doctrinal analysis of relevant primary and secondary material, including statutes, court judgments, Hansard debate records, national reports and local newspaper articles²⁴¹ in line with both a descriptive and normative approach to law.

In terms of the different types of legal understandings adopted, this research also explores the descriptive and normative approaches (prescriptive and interpretive) in contrast to each other.²⁴²

A descriptive analysis of the law simply describes what the law is, as likened to a form of journalism, where it serves to provide information (i.e., legislation or case law) without much analysis.²⁴³ However, there are areas where more descriptive analysis is warranted such as in legal history and in comparative law. Legal history is a form of analysis used to “tell a ‘story’ about certain events in the past, examine the background to an important case or piece of legislation in order to reveal why it took precisely the form that it has”.²⁴⁴

Another kind of descriptive analysis is comparative law. Building on the legal history as a form of descriptive analysis discussed above, also cross-cuts with comparative law elements as it pertains to this research.

The normative approach generally adopts two forms – the prescriptive and interpretive. Firstly, the prescriptive approach is focused on what the law ought to be. In terms of legal analysis, prescriptive analysis is about reforming law in line with how it should be.

²⁴¹ Wilkinson, above n 35; Powles, above n 157; Davis, above n 157; Payne, above n 157; Hutchinson and Duncan, above n 157.

²⁴² Beever, above n 158.

²⁴³ Beever, above n 158.

²⁴⁴ At 32.

6.0 Critique of Western legal methodology

*The legal scholar must go deeper than the skin of the law in order to explain, justify and properly critique what is found there.*²⁴⁵

For the purposes of this research, I critique some of the different approaches to legal understandings to help facilitate areas with critical indigenous knowledge gaps where the use of normative approaches may address limitations to descriptive approaches. The descriptive analysis of the law complements the *talanoa* method (discussed above) and research process which is useful when seeking to unpack the impact of colonial laws, the nature of laws and the relationship between the law and implications on society - a feature indicative of a common law worldview specific to developing countries with similar post-colonial history to Samoa.²⁴⁶

Moreover, in terms of comparative law, the legacy from the ‘colonial’ era links to the history of the German administration in 1900, followed by the New Zealand administration in 1914 to when Samoa became a United Nations trust territory in 1946.²⁴⁷ This research also critiques the legal environment for the recognition of non-heteronormative people in domestic laws by casting the net much wider (*Upega i fili* – discussed above in the *Talanoa* methodology section) to comparative legal developments in the Pacific region to learn from their successes and failures.²⁴⁸

The limitation in the prescriptive aspect of the normative approach lies in the lack of suitable legal training, intellectual rigour or tools in place to adequately guide lawyers to offer solutions to legal problems. The status quo is to focus only on legal aspects of prescriptive analysis or arguably, “gut feelings or personal political preferences”²⁴⁹ as opposed to critical engagement with more sophisticated disciplines (such as moral philosophy, legal philosophy or economics) that embed prescriptive elements and tools to help analysts analyse the impact of law or determine recommended areas for law reform. Similarly, in terms of interpretive analysis, the limitation lies in the

²⁴⁵ Beever, above n 158, at 44.

²⁴⁶ Mulitalo, above n 3.

²⁴⁷ Malama Meleisea *The making of modern Samoa: traditional authority and colonial administration in the history of Western Samoa* (University of the South Pacific, Fiji, 1987)

²⁴⁸ Motusaga, above n 49.

²⁴⁹ Beever, above n 158, at 34.

“interpretive” limitation embedded into the role of Courts in interpreting the rule of law, which may not always be complementary to grass roots understandings of the law at the customary level, or may not be represented of the smaller disenfranchised members of society.

More recently, some criticisms from the “defenders of science” point to the lack of scientific and empirical evidence employed in indigenous science or *Matauranga Maori*.²⁵⁰ They argue that criticisms levied against the merits of indigenous research may not be entirely without foundation:²⁵¹

Science is universal, not especially Western European. It has origins in ancient Egypt, Mesopotamia, ancient Greece and later India, with significant contributions in mathematics, astronomy and physics from mediaeval Islam, before developing in Europe and later the US, with a strong presence across Asia.

Science itself does not colonise. It has been used to aid colonisation, as have literature and art.

...Indigenous knowledge is critical for the preservation and perpetuation of culture and local practices and plays key roles in management and policy. However, in the discovery of empirical, universal truths, it falls far short of what we can define as science itself.

To accept it as the equivalent of science is to patronise and fail indigenous populations; better to ensure that everyone participates in the world’s scientific enterprises. Indigenous knowledge may indeed help advance scientific knowledge in some ways, but it is not science.

²⁵⁰ Kendall Clements, Garth Cooper, Michael Corballis, Douglas Elliffe, Robert Nola, Elizabeth Rata & John Werry. (2021, 31 July). In defence of science. *Listener*, 4; See also criticisms to the “Defenders of Science”: Georgina Tuari Stewart “Defending science from what?” [2021] *Educational Philosophy and Theory*; Stephen May “Dismissing mātauranga Māori: Racism and arrogance in academia” *Newsroom* (11 August 2021) <www.newsroom.co.nz>.

²⁵¹ Clements et al., above n 174, at 4.

Other criticisms point to the presumption of adopting an “anything goes” type approach in grounded theory, based on the lack of theoretical sophistication employed in analysis with an overemphasis on conducting interviews guided by purposive sampling.²⁵² Similarly, ethnography is criticised largely due to the emphasis on snapshot or ad hoc observations with limited genuine participatory engagement.²⁵³

The mix and match of Pacific and Western methods is not uncommon in Pacific research contexts. This is echoed by Suaalii-Sauni and Fulu-Aiolupotea:²⁵⁴ “a research process that always keeps at the forefront a respect for cultural context and meaning, no matter what the research”. Here, they argue that indigenous researchers have the discretion to adopt methodological autonomy. Thus, *talanoa* methodology (discussed later in the article) may be compatible with western research methods (in modified form) provided the cultural context, decolonising effects, meanings and values remain at the forefront of the research process. This way, the integrity of the research is not compromised and the *vā* between researcher and respondents is upheld. The ‘Otupuku Project is an example of this as focus groups were adopted using a *Talanoa* methodology which enabled longer time frames for focus groups.²⁵⁵

²⁵² Barney G Glaser *Basics of Grounded Theory Analysis: Emergence v Forcing* (The Sociology Press, Mill Valley, CA, 1992); Karen Locke “Rewriting the discovery of grounded theory after 25 years?” (1996) 5 *Journal of Management Inquiry* 239.

²⁵³ Christina Goulding, Avi Shankar and Richard Elliott “Working weeks, rave weekends: identity fragmentation and the emergence of new communities” (2002) 5 *Consumption, Markets and Culture* 261.

²⁵⁴ Tamasailau Suaalii-Sauni and Saunimaa Ma Fulu-Aiolupotea “Decolonising Pacific research, building Pacific research communities and developing Pacific research tools: The case of the *talanoa* and the *faafaletui* in Samoa” 55 *Asia Pacific Viewpoint* 331 at 336.

²⁵⁵ Moale ‘Otunuku “*Talanoa*: How can it be used effectively as an Indigenous research methodology with Tongan people?” (2011) 23 *Pacific-Asian Education Journal* 43.

7.0 Critical gaps to address

7.1 To develop a Samoa gender methodology and critical legal theory guided by fa'asamoa principles

While not the original intention of this chapter, this research reinforced the frustrations I encountered due to the non-existence of Samoan critical legal theories and gender methodologies and as such, I attempt to address why this is the case and how we may navigate our way in this uncharted space. Insights are also drawn from my engagement with a number of interdisciplinary law, public health and gender research projects in the South Pacific region.

It puts forward a case for the development of a uniquely Samoan gender methodology and critical legal theory drawing on *fa'asamoa* principles to critically address the experiences of Samoa's Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual (LGBTQIA) and Sexual Orientation, Gender Identity Expression and Sex Characteristics (SOGIEC) people.²⁵⁶

And although this chapter does not address why there is an emerging need to develop our own critical legal theories and methodologies in response inadequate multi-dimensional issues connected to the law and justice system pertaining to gender equity and human rights, what is clear is that this development should not be exclusive to scholars, the academic community or indigenous researchers only.

There is no explicit Samoa gender methodology and Samoa critical legal theory in existence. In light of the challenges (noted earlier), it would be instructive to not draft a blueprint that is then presented to the local community or academic community as this merely reinforcing the exclusive and one-dimensional use of the “master’s

²⁵⁶ Bridget Fa'amatuainu “Critical reflections on comparative legal developments in gender equity and legal education: Call for recognition of the indigenous perspective” (Gender & Diversity Research Group, AUT, paper presented to Pasifika Voices: Stories, issues, reflections and experiences seminar, Auckland, 2020); Bridget Fa'amatuainu “A Critical Legal Theory Perspective on Samoa law reform and recognition of non-binary genders: The case of Fa'afatama and Lesbian gender identification” (Gender & Diversity Research Group, AUT, paper presented to Postgraduate Student Research Symposium, Auckland, 2020); Fa'amatuainu, above n 221.

tools”.²⁵⁷ While this is bold it is quite problematic because in the true spirit of authentic Pacific engagement, this process should begin with a *talanoa* in the community we seek to serve. Tupuola captures this well: “Every culture is different and it is therefore imperative for “others” to read or examine our culture only within our worldview. Therefore, some academics may be culturally insensitive when they compare our experiences with other cultures without allowing our stories and truths to stand on their own first”.²⁵⁸

7.2 Criticisms of *fa’asamoa* principles

What is often missing is a critique of the settled *fa’asamoa* principles. *Fa’asamoa* principles are historically entrenched and practised for centuries prior to colonisation.²⁵⁹ Taking other factors into consideration, post-colonisation, legal pluralism, the impact of climate change, diasporic Samoans – an examination into whether *fa’asamoa* principles are merely abstract values, whether these principles have modern pragmatic significance and how *fa’asamoa* principles are applicable in the context of indigenous law and gender contexts.

7.3 Criticisms of Pacific-specific research methodologies

This chapter outlines key limitations to *talanoa* (see “Limitations to *Talanoa* Methodology”) which should be examined in detail, alongside the response to these limitations (see “Response to critiques to *Talanoa* Methodology”) In line with indigenous cultural competency, Pacific indigenous methodologies with an emphasis on gender and laws, were given priority to other dominant gender and law methodologies, in this study.²⁶⁰ This highlights the demand for qualitative

²⁵⁷ Audre Lorde “The Master’s Tools Will Never Dismantle the Master’s House” in Cherrie Moraga and Gloria Anzaldúa (eds) *This Bridge Called My Back: Writings by Radical Women of Color* (Kitchen Table, Women of Color Press, New York, 1983).

²⁵⁸ Tupuola, above n 57, at 185–186.

²⁵⁹ Va’a, above n 30; Motusaga, above n 49.

²⁶⁰ Burns, Lee Hong and Wood, above n 172; 'Otunuku, above n 180, at 43; Chilisa, above n 173; Bridget Fa’amatuainu “Innovative methodology or re-affirming principles of *fa’asamoa*? Exploring *fa’asamoa* principles adopted in indigenous gender and law research” (University of Kent, paper presented to Gender, Work & Organization 11th Biennial International Interdisciplinary Conference 30 June – 2 July 2021 Transforming Contexts, Transforming Selves: Gender in New Times Stream 34 (The answer lies in our humanity: research and methodologies that facilitate healing and hope), Virtual, 2021); Konai H Thaman “Decolonising Pacific studies:

methodologies in law and gender research applied in their most appropriate and truest context to yield powerful insights that are valid, credible and may aid in building a knowledge base to support the development of theory, policy, laws and evidence-based decision making.

8.0 Conclusion

*There is not merely one appropriate methodology, nor one type of research project, that all scholars should rush to duplicate. No blanket prescription will help us, we need, rather, to engage in self-critical examination of our practices and to go on to develop a range of models from which to select our procedures according to the needs of specific, and often unique, research situations.*²⁶¹

While I critically discuss the merits of the *talanoa* methodology adopted in this study, I also draw on key lessons from numerous studies that have adopted indigenous and Pacific-specific methodologies. I also rely on legal understandings of research to address key gap areas of indigenous research, while not fundamentally in opposition to the decolonial, socio-legal and critical approaches to research, it does enrich the scope of this research inquiry.

This calls for a more comprehensive approach to law and gender research by and for indigenous communities in the Pacific region and a wider range of legal analytical methods, including extensive fieldwork informed by an appropriately designed methodology developed in consultation with the local community. Such approaches would be more likely to generate the information regarding power dynamics and socio-cultural relations that is essential for an authentic, culturally sensitive and non-exploitative Samoa gender methodology and critical theory. As such, the pursuit of this is not necessarily “innovative” at all but rather a reflection of the “communication style of Samoan people and the nature of *fa’asamoa*”.²⁶²

indigenous perspectives, knowledge and wisdom in higher education” (2003) 15 *Contemp Pac* 10.; Rebecca Monson, Keith Camacho and Joseph Foukona “Re-Storying Law and Development in Oceania” in Sundhya Pahuja, Luis Eslava and Ruth Buchanan (eds) *Oxford Handbook of International Law and Development* (Oxford University Press, Oxford, 2022); Tupuola, above n 57.

²⁶¹ Gluck and Patai, above n 159, at 222.

²⁶² At 182.

CHAPTER FOUR – RESEARCH FINDINGS

Samoa *fa'atama* and lived experiences: Journey to recognition in customs and laws

1.0 Introduction

There are few law reform centric studies on gender discrimination that explore the impacts of current and proposed laws by the agents of law reform (discussed in detail in Chapter 5), on customs and gender recognition, since 2021, which have analysed not only the deleterious effects of the laws, but also its potential reform capabilities. Put simply, the international literature signals vital lessons about the relationship between law reform, gender discrimination and the related impacts on Samoa customs, traditions and laws. This chapter looks more in depth into the relationship between law reform and recognition based on focus group *talanoa* and interview *talanoa* with *fa'atama* in New Zealand and Samoa, with additional insights from key informant experts involved in the cultural heritage, history, gender development and law fields in Samoa.

The findings point to multi-dimensional and nuanced understandings from the perspective of *fa'atama* in Samoa, as they share their account of gender discrimination embedded in a complex weave of oppressive customary and religious practices. This chapter provides a summary of the grassroots and expert perspectives on Samoa's legal system, gender discrimination, law reform and their relevance to everyday sociocultural practices, according to each of the four core research questions under investigation. The respondents quotes from the *talanoa* are weaved throughout this chapter which gives voice to their perspective informed by their lived experience.²⁶³

There is overwhelming consensus from the majority of respondents that there are multiple conflicting and contradictory philosophical ideologies underpinning Samoa's legal system: Christianity and *fa'asamoa*, formal laws and customs, individual rights and collective rights. All of this is reflected in the role the state and village councils play in law reform concerning *fa'atama* and SOGIEC recognition as well as the most suitable structures which give validity to these laws. As it stands,

²⁶³ Due to word constraints, only the translated versions of the respondents' quotes are used.

both state and village councils play a powerful role in bringing attention to the importance of formal laws, law reform and customary practices that do not threaten the existence of Samoa's *fa'atama* and SOGIEC community.

The *talanoa* data echoes the hindered efforts of the state to promote law reform. The state is focused on “individual” rights, punishing “individual” wrongdoers, advocating equality and protection, as well as secular foreign values and beliefs. In comparison, the villages are focused on restoring harmony and peace, hierarchy in customary practices making village councils more authoritative than parliament, extending punishment of the individual offender to the whole family, Christian values and principles of love, humbleness and respect. The core difference between the state and state and customary context in the villages is that the state is not effective in promoting law reform in the villages due to the powerful influence of customary practices. The *talanoa* data acknowledges these conflicting differences, identifies these complexities, explores the misunderstandings in state and customary law, and seeks to develop useful strategies to resolve these conflicts as a way to progress towards the recognition of *fa'atama* in law and customary reform (which will be discussed in more detail in Chapter 5).

2.0 Background

2.1 *Fa'atama* existed in Samoa pre-Christianity

There are historical accounts which point to the existence of SOGIEC across the Pacific region. According to the perspective of a leading *fa'atama* and human rights advocate, the evidence used to support the existence and recognition of SOGIEC in Samoa, predates the introduction of Christianity and colonisation. Some of the evidence is inspired from the paintings of artists such as Paul Gauguin and the books of Dr Augustin Krämer:²⁶⁴

²⁶⁴ Talanoa with V&C_IT_FR3_NZ on 24 June 2022. Interview respondent, V&C_IT_FR2_NZ agrees with this view. Krämer, Naval Surgeon (Physician) of the German Navy, Naturalist and later, a noted Pacific Ethnologist, had travelled in many expeditions throughout the Pacific (1893-1911) and completed two volumes of detailed research, “The Samoa Islands” (1889-1901) documenting Samoan anthropological traditions ranging from botany, culture, genealogy, herbal medicines, language and history. Eugène Henri Paul Gauguin, is remembered as a post-impressionist artist and pioneer of modernist art, widely known for producing “primitive” art and symbolism inspired from his time in Tahiti, French Polynesia.

there's proof fa'afafine...before Christianity, because...they got...the portrait of fa'afafine in the 1800.

No...I'm talking from what I know...I went through a lot of...books, because I love reading ...Dr. Kramer about the Samoan islands...That's the truth there. Because he was talking about 1700 1600s...recorded in that books, you know, all the gafa, the genealogy of all the Samoan chiefs. And what happened before Christianity.

From the museum...the painting from Paul Gauguin...he was the artist in Tahiti in the 1800. ... I think um he's one of us, like he's fa'afa [trans], but...no one can tell but you, you can tell by the way he was painting...his paintings that he's...in our community...and that's why this fa'afafine artist...she picked Paul Gauguin's painting...for our filming that day. And it's really nice. That's the other way of recognition.

Prior to the introduction of Christianity to Samoa, *Nafanua*, the God of War, was commonly referenced as the historical evidence that *fa'atama* and locals cite, to support the historical existence of *fa'atama* in Samoa:²⁶⁵

Another perspective on this is the story about the Goddess warrior name Nafanua. To me Nafanua is a *fa'atama* because she fought like a male throughout the civil wars in Samoa. Since you also asked about before Christianity arrived was there *fa'atama* in Samoa before that, my answer is yes, it was Nafanua.

It is worth noting that the general attitude towards Samoan goddesses and gods may not be reflected in social attitudes towards people, particularly, *fa'atama*.

In a separate *fa'atama* interview *talanoa*, he supported the above comment, while appealing to the same well-known story about Nafanua, to justify the existence of *fa'atama* pre-Christianity:²⁶⁶

Okay here are my evidence, you know the story of Nafanua and she is the God of Wars that was hidden under the soil. That is where her name comes from. So, the evidence is that in the civil war, what happened is that she killed most of them with the strength of a man. So that is the evidence. Before Christianity, *fa'atama* already existed.

Interviewed *fa'atama* respondents claim that before Christianity, Samoa embraced gender diversity and did not discriminate on the basis of gender identity and sexual

²⁶⁵ Talanoa with I1, 2 July 2022; for a historical account of Nafanua see Penelope Schoeffel "Rank, gender and politics in ancient Samoa: The genealogy of Salamāsina O Le Tafaifa" (1987) 22 *The Journal of Pacific History* 174 at 181–182; Lisa P MacQuoid "The Women's Mau: Female peace warriors in Western Samoa" (Master of Arts in Pacific Studies, University of Hawaii, 1995) at 4–8.

²⁶⁶ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

orientation (see Table 3 for a full definition of gender based on *talanoa* data).²⁶⁷ Talanoa with Samoan gender, cultural heritage and history experts support this view in that gender diversity was collectively recognised as part of the status quo and not cast into the category of special status.²⁶⁸ In short, the more pressing or immediate day to day matters were prioritised over issues concerning the complexity of gender and sexuality.

Further to the above, a *fa'atama* interview respondent argues that there was no historical record of punishment or offence committed in Samoa for identifying as *fa'atama* and *fa'afafine*:²⁶⁹

We accept any genders, that's what I believe...before...Christianity.
 ... yeah because...I keep asking Samoa...during our...workshops if there's any taboo about you know us "e i ai se, e i ai se um fa'alavelave i Samoa ga fai" [was there a specific way] in the history of Samoa, "e i ai se...tulafono a *fa'atama* oe e" disown [was there a law to disown you if you identified as *fa'atama*], "a *fa'atama* oe fasioti" [if you're *fa'atama* you are put to death]. The only thing I know is "ae pepelo ae fa'akaukau oe e okayi" [if you lied you were executed] if you lie or you kill someone. "E e sa fai le kaukoga e okayi I Samoa" [there was an edict to put you to death] in the history, in those days before Christianity.
 So, to me, if we are born as a *fa'atama* or *fa'afafine* they should have killed us before Christianity arrived? no, no, but there is no law about human right.

Consequently, the emergence of derogatory references in Samoan society were attached to individuals and groups who were largely uncategorised and fell outside of the gender binary norm:²⁷⁰

But Christianity came to Samoa in 1830...I think they were only recognise the men and the women....They never...have any category for us to fall down... They think we're sinners...and they translate the Bible and everything into our language ah and makes everything worse...Because...when I read the Bible, in the Samoan Bible and I read that *Palagi* [white/English] Bible, there's a big difference there...and I know for sure none of any Samoan was there for the translation...because I know they brainwash a lot of the...Pacific Islands...when the white men came. I'm not talking about, you know...as a racist person.

²⁶⁷ Talanoa with V&C_IT_FR1_NZ, V&C_IT_FR2_NZ and V&C_IT_FR3_NZ on 24 June 2022.

²⁶⁸ Talanoa with V&C_GWR1, 27 June 2022; Talanoa with Professor Penelope Schoeffel, (Centre for Samoan Studies, National University of Samoa, Apia, Samoa, 7 July 2022); See Chapter 2 (see Chapter 1, "Literature Review"); See Schoeffel, above n 266, at 181-182; See MacQuoid, above n 266, at 4-8.

²⁶⁹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

²⁷⁰ Talanoa with V&C_IT_FR3_NZ on 24 June 2022. Interview respondent, V&C_IT_FR2_NZ agrees with this view.

But...coming back to the colonisation...that's what I believe...without the colonisation, we will never have barriers in our lives. Yes, because that's why...we've been fighting...this battle, because...we never recognise...during the colonisation. They were putting us aside and...all of a sudden, because...I went to a lot of the workshops, and I heard them. They said they were label us under disabilities in mental...

Thus, if there was no law or known customary offences in place, it adds legitimacy to the claim that Samoa did not discriminate against *fa'atama* as *fa'atama* was a collectively recognised social practice. Based on *talanoa* with a *fa'atama* advocate, he asserts that post colonisation, we started to see evidence of Christian influence. The exclusive and discriminatory attitude towards members of the SOGIEC community, was primarily reflected in the mistranslation of the Bible from English to Samoan, thus, perpetuating a gender binary construct, focussed exclusively on men and women, where historically, it did not exist.²⁷¹

2.2 History of *fa'atama* in Samoa

In the words of Vanila (Ice) Heather, leading *fa'atama* and human rights advocate, the development of *fa'atama* advocacy work began as early as 2013 in Samoa:²⁷²

...let me shed some light on how *fa'atama* came about. I started working with *fa'afafine* in 2013 and I would tag along with other *fa'afafine* to their outreaches programme because one day, I had a vision of creating our own *fa'atama* group. Also this was the only space that I could be myself and feel more *fa'atama*. So, in 2015, when the human rights forum had completed in Tonga, I was then approached by To'oto'oalii o Roger Stanley to seriously consider work on *fa'atama* which I did and we had networks such as the PSGGN based in Fiji in 2015 and it was also the time I started dating Mari. In 2016, we tried our best but most *fa'atama* were afraid of being kicked out by their families. So in 2017 October, we established *fa'atama* club in Samoa under the SFA. After three months of establishing this, Roger passed away. Before Roger passed away, he dared me to get married to Mari in New Zealand which we did. We are now discussing the development of an international group called the Rogers International *Fa'atama* Group so everyone could be part of us. This idea started from an app called Tik Tok so we could bring all *fa'atama* around the world together.

²⁷¹ Talanoa with I1, 2 July 2022.

²⁷² Talanoa with I1, 2 July 2022.

One *fa'atama* respondent asserts that, according to Samoan mythology, "...Samoan people were immortal and when we're born into this world, we appeared naked..."²⁷³ This view resonates with the perspective of a leading culture heritage expert in Samoa. The claim here is that pre-contact, gender was not the focus of Samoa's origin stories, which adds to the legitimacy that gender fluidity was not ruled out as a widely recognised collective practice. The irony is that in contemporary Samoa, the *fa'afafine* community are thriving in Samoa in ways the *fa'atama* community are not, which is quite contradictory.²⁷⁴ This statement was corroborated by *fa'atama* during the *talanoa*, which re-affirms the patriarchal ideals, influence of Christianity and inequities in power dynamics. On this view, *fa'afafine* are largely recognised by their ascribed male sex at birth, which is compatible with privileging male discourse, male decision-making in the village *fono* and parliament (comprised of predominantly male *matai*) and in law reform consultations where *fa'atama* are often under-represented. This also suggests that unstable oppressive conditions were not uncommon in the Pacific and existed prior to colonisation as a result of continuous migration and resettlement due to land wars for power, which left *fa'atama* and many communities vulnerable.²⁷⁵ Consequently, the reinforcement of pre-colonial oppressive conditions by those in power in Samoa were not uncommon. Such conditions were exacerbated and reinforced together with the tools of colonisation and Christianity to further oppress and subject *fa'atama*, *fa'afafine*, women, and other vulnerable communities according to the agenda of those in power. The assumption which underlies the position that oppressive conditions did not exist in Samoa and the wider Pacific until colonisation occurred is a fundamental problem, one which is, at times, unacknowledged and explicitly avoided in the decolonial approach.

²⁷³ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

²⁷⁴ Talanoa with V&C_GWR1, 27 June 2022.

²⁷⁵ Meleisea, above n 185; Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (Intersentia Ltd, Cambridge, 2017, 4th ed) at 323-324; Peter France *The charter of the land: custom and colonization in Fiji* (Oxford University Press, Oxford, 1969); Pole Atanraoi "Customary land and development in an Atoll Nation - the case of Kiribati" in R Crocombe (ed) *Customary land tenure and sustainable development: complementary or conflict?* (South Pacific Commission, Noumea, New Caledonia, 1995) at 63.

3.0 Research Question 1:

What are the historical, cultural and legal challenges that prevent fa'atama from being recognised by local customs and laws?

In this part, I build on the *talanoa* data to explicate and contextualise the five key challenges at the interface between *fa'atama* recognition in Samoa customs and laws. I begin with an examination of some of the critical aspects at play in the context of legal pluralism (i.e., the idea that a legal system is comprised of non-state legal orders that positions non-judicial, cultural and religious systems as “subservient to the state system”).²⁷⁶ The legacy of legacy pluralism is reflected in Samoa’s legal system, laws and customs, thus, carrying strong undercurrents of traditional Christian and Western influences which continue to this day. This feature is reflective of developing countries with similar post-colonial history to Samoa.²⁷⁷ Legal dualism, commonly referred to as bijuralism, encompasses the idea of the legal coexistence of “two legal traditions within a single state”.²⁷⁸ In Samoa, it operates a bijural state with two levels of government: national governance and local village governance based on Samoa customs and traditions.

Neo-colonial influence with respect to the claim of “universality”²⁷⁹ is also important to discuss. Here, it is discussed in the light of historical continuity to the exotic/erotic paradigm in more modern contexts.²⁸⁰ This is evident in research on non-western non-heteronormative cultural acceptance and accommodation of contemporary Western transgender and homosexual gender identities.²⁸¹ For instance, the claim that the *fa'atama* community in Samoa should identify with the lesbian and SOGIEC community in the global north. The idea here is that it would serve some aspect in society which inherently dismisses any form of agency.²⁸² I disagree with the premise of this approach as it effectively dismisses the lived experience of *fa'atama* and

²⁷⁶ Jacinta Ruru and others *Inspiring national indigenous legal education for Aotearoa New Zealand's Bachelor of Laws Degree: Phase One* (University of Otago/Michael and Suzanne Borrin Foundation (Nga Pae o Te Maramatanga), Phase One Report, August 2020) at 37.

²⁷⁷ Mulitalo, above n 3.

²⁷⁸ Lloyd Brown-John and Howard Powley *When Legal Systems Meet: Bijuralism in the Canadian Federal System* (Institut de Ciències Polítiques i Socials, Barcelona, 2004) at 3.

²⁷⁹ Alexeyeff and Besnier, above n 59.

²⁸⁰ Schmidt, above n 145, at 6.

²⁸¹ Besnier, above n 62.

²⁸² See Schmidt, above n 145, at 1-17.

diverse SOGIEC people in Samoa, which will be unravelled here as they construct, maintain and transform their identities as agents of a particular cultural and gender context.²⁸³ To romanticise the state of nature position of *fa'atama* to advance the “primal sexuality” narrative, presumably interrupted due to the imposition of colonial and Christian ideologies, is neither credible nor used as evidence in support of the universality of specific sexual orientation or gender identities.

3.1. Legal challenges

3.1.1 Excluded from legal adoption and marriage

One *fa'atama* in the focus group *talanoa*, rationalised that if *fa'atama* are included as part of the population’s census data, it should follow that *fa'atama* are legally entitled to adoption and marriage in Samoa.²⁸⁴ And if God serves as the foundation of Samoa, thus, legal adoption and marriage should be afforded to all. The specific context to warrant adoption may be tied to unforeseeable circumstances within the family, highlighting the need to step in and assist siblings who are no longer capable of providing for their own children:²⁸⁵

...my point of view is that if we are included and counted in the population and statistical data for Samoa then yes, I would agree with legalizing adoption and marriage for us, *fa'atama*. In the case of adoption, we should allow that in Samoa, in case our brother or sister cannot provide for their many children and we *fa'atama* can step in to adopt some of them so that their child won't suffer. Also, if we are founded on God then we are free to adopt and get married in this country.

3.1.2 Contrasting example: A *fa'atama* married couple adopted children from Samoa while living in New Zealand

²⁸³ At 1-17.

²⁸⁴ See Chapter 2 (“Literature Review”) for discussion on why adoption and marriage is prohibited in Samoa.

²⁸⁵ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

As put by one *fa'atama* respondent, the legal restrictions imposed on *fa'atama* marriage and adoption in Samoa did not prevent him from realising this overseas:²⁸⁶

...as for me yes it is a must to legalize same sex marriage in Samoa now so we could be recognized by the community...
 ...As for adoption, I also feel that they should allow it. I adopted our children from Samoa, and everything process, and documents were done in Samoa however I am counted as a father or father figure in New Zealand but not in Samoa.

3.1.3 Constitution

As the leading gender expert in Samoa argued, one starting point for robust discussion is to examine the Constitution of Samoa:²⁸⁷

...We have tried to look at our legislation, but, you know, it will have to change the...*Tulafono fa'avae* [the Constitution]...you then have to look at your Constitution...because everything is clearly defined in the Constitution. I think for Samoa is a unique case where it will take years and years...There's...a wisdom by our forefathers that you know, these are the untouched...areas.

Further to the above comment, a leading *fa'atama* and human rights advocate argues that the Constitution must be amended to include all genders, while emphasising that *fa'atama* representation is not reflected in the current Constitution:²⁸⁸

...yes, they should amend the Constitution...to include every genders...yes and...treat everyone equally, normally, you know...They should...think of that...it's better to include us in in the Constitution...more better than fighting over the lands and everything in Samoa...

Similarly, another *fa'atama* respondent agrees that there should be an amendment "...because we not did anything wrong...".²⁸⁹ This view echoes with the above *fa'atama* respondent, "...we know things that they don't know...what I mean...we all got talents, we all got gifted from, you know, from God...we're not bad people, bottom line."²⁹⁰

²⁸⁶ Talanoa with I1, 2 July 2022. This respondent had also married his wife in New Zealand and is the only openly *fa'atama* couple to do so from Samoa. He and his wife, Mari, also adopted children born in Samoa from New Zealand; See Chapter 2, above n 65.

²⁸⁷ Talanoa with S_CEO, 13 July 2022.

²⁸⁸ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

²⁸⁹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

²⁹⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022. Respondent, V&C_IT_FR2_NZ agreed with the views shared by this respondent.

3.1.4 *Anti-sodomy law change*

There were significant challenges to the famous sodomy provision which still exists in Samoa's Crimes Act. As the *fa'afafine* community do not identify as gay and are strongly affiliated with Christian beliefs, the majority of local *fa'afafine* and the wider Church community, objected to repealing the sodomy provisions. *Fa'afafine* did not consider the sodomy provisions applied to their lived experience as *fa'afafine* in Samoa. *Fa'afafine* do not identify as homosexual and so are not threatened by the sodomy provisions in the law, even despite the fact that Samoan laws recognise *fa'afafine* as homosexual.²⁹¹

In fact, the push to repeal the sodomy provision was largely driven by diasporic Samoans and gender activists outside Samoa. There is no dilemma here, as such, as the only confusion and contradiction lies with the original intention behind such a provision, for reasons examined further below:²⁹²

...we've had so many interesting experiences with you know, one day when the *Fa'afafine* Society was trying to...get rid of those laws couple years ago with the sodomy and the cross dressing and all that stuff. And then you have people coming out and saying, Well, no, *e sa'o*, we shouldn't be doing those things, because we're good Christians. But that's because I don't think they cared...or realized that a sodomy or anti sodomy law is actually targeting them as *Fa'afafine*, because they don't think they're gay. You know what I mean? It's that kind of funny. Kind of like you don't, you're not threatened by them, because by those laws, because you don't think it applies to you. But the West clearly thought that that would apply to them, you know, which is how I think those laws came about in the first place.

While the sodomy provision explicitly targets *male homosexual* activity, it carries useful lessons for future law reform and gender development practitioners focussed on *fa'atama* recognition. Ironically, *fa'atama* are exempt from the sodomy provisions and some may argue that the provisions protect *fa'atama*. *Fa'atama* and females are invisible in the sodomy provisions. As *fa'atama* are regarded as women in the law they are not subject to the sodomy provisions in the law which target only "males". This highlights that the existing laws are riddled with inconsistencies, where

²⁹¹ Talanoa with S_LP, 18 July 2022.

²⁹² Talanoa with V&C_GWR1, 27 June 2022. Interview talanoa respondent V&C_GWR2 on 7 July 2022, advised the researcher to look into reasons why there are still sodomy laws in Samoa.

men are arguably unfairly targeted in gender discriminatory provisions while, in other parts, their status is officially recognised.

3.1.5 *Temporary Special Measure*

The same respondent summarises her position on the western imposition on Samoan notions of gender by re-telling a story about an interview she conducted with Aiono Dr Fana'afi Le Tagaloa, a noted Samoan scholar of Samoa. This position is rather an appeal to the often-forgotten traditional customary values embedded in Samoa's original human rights framework, prior to colonisation:²⁹³

But she said...I don't think we need that law. Because I don't believe that we should be dominated...prescribe to the militant feminism of the West. And she just went into this whole thing in her own very Fana'afi, brilliant mind, about...what we would need to do to understand how to elevate women in 2020, or whatever the year is...to understand the...so called traditional roles that existed before we were kind of borrowing these new ways of life...and whatever...but I have never forgotten that.

What this story points to is the cautionary yet incremental approach we need to take when considering whether to adopt gender laws in Samoa, primarily influenced from the feminism ideals of the West, which must not then undermine the Samoan traditional understandings of gender roles which existed before colonisation.

3.2 *Cultural challenges*

3.2.1 **Culture v Christianity**

While culture is regarded as the impediment to law reform and participation in public consultations on law reform, it also points to the costs required to cover the expenses for consultations in the village, which may overburden the state (see Chapter 3 regarding cultural protocol). The majority of *fa'atama* respondents identify the two main barriers to gender expression in Samoa as Christianity and the culture. The claim is that culture permitted diversity and inclusion in gender expression including *fa'atama* recognition. Some respondents point out that after the introduction of

²⁹³ Talanoa with V&C_GWR1, 27 June 2022.

Christianity, the two barriers merged together, which resulted in the overriding gender binary norm, excluding *fa'atama* recognition:²⁹⁴

And also, there are two barriers that we're facing in Samoa...the Christianity and the culture why? because I don't know why our Samoan...merged the culture and religion...at the same time because what I believe, culture was there way before Christianity...and then Christianity came...and they only recognise two genders, just like male and female and they um left us...behind...

The above comment was reinforced in another *fa'atama talanoa* focus groups (see Table 4: Definition of sex), thus highlighting the view that merging Christianity with a pre-existing Samoan culture was fundamentally oppressive. As put by one *fa'atama* respondent, "...I am not talking bad about the churches here. We are talking about Christianity which counts all so they are the ones who came in and wipe out *fa'atama* in Samoa".²⁹⁵ One *fa'atama* respondent shares a story about his experience at the Christian school he attended, where he challenged his Church Minister's patriarchal interpretation of the Bible as well as its credibility especially if he felt prejudice towards *fa'atama*.²⁹⁶ This echoed the view of another *fa'atama* respondent who indicated that the combined influence of culture and Christianity are the key challenges hindering *fa'atama* marriage to women in Samoa:²⁹⁷

...as for me yes it is a must to legalize same sex marriage in Samoa now so we could be recognized by the community.

We cannot introduce same marriage just like that because it is against our culture and there will be barriers which are culture and Christianity we will be facing...To my view, people merge the Christianity and culture, so this is where all the issues came about. It should be independent similar to the courts and how they are separate from the parliament and the government of Samoa.

The view that Samoan culture was based on love and acceptance was a core theme emerging from the *talanoa*:²⁹⁸

...as I mentioned before...like...the culture, it's not supposed to merge...with Christianity, because what I know, this is from my own perspective, what I

²⁹⁴ Talanoa with V&C_IT_FR3_NZ, 24 June 2022. Interview respondent, V&C_IT_FR2_NZ agrees with this view as well as interview respondent, P_FGT_TRF2_NZ interviewed on 28 June 2022: "...it's a really big problem there because I don't why they never leave the culture alone because there is a love there, their love in our culture...".

²⁹⁵ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

²⁹⁶ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

²⁹⁷ Talanoa with I1, 2 July 2022.

²⁹⁸ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

know is that...we were born as Samoans and be raised by our family, our parents...there's loving in there. There's love in there...

The expression of love is deeply entrenched into the understanding of Samoan culture. In one *talanoa*, the respondent claims that Samoan culture and Christianity is inextricably linked.²⁹⁹ The conflicting tension arises with the parents' understanding of the relationship between the church, and culture, which lies at the heart of the matter concerning the general lack of acceptance of *fa'atama* in Samoan society.³⁰⁰

They should come up with those...clear mindset about how we live in Samoa... Yes and the *va tapuia* and the *va nonofo*, the *va talanoa* [reciprocal relationship or obligations or responsibility between a chief and a chief, between a chief and his/her family and between a chief and his/her peers] and...the love of our parents to us will never change. It will never change. That's what I mean, without the Christianity...They always bring up the Bible and whatever the *faifeau* [Church Minister] was saying on Sunday...but deep down, they love us. We are their children. We are their gift from God. If they believe in God, the only way they forget about God when they kick us out from...our places...

Religion was also identified as an avenue to influence the status and recognition of *fa'atama*:³⁰¹

Another problem which influences the low recognition of *fa'atama* in Samoa's law reform and processes are religion. Religion plays a huge role in defining of us, *fa'atama*, in the society.

The Christian principles heavily influenced the *fa'asamoa* (the Samoan way). The influence of Christianity has led to village rules enforced by village matai holding respected status, having influenced the collective recognition of *fa'atama* as a wrongful or unlawful social practice:³⁰²

Yeah, those are the two main barriers.

As I said...because it's really weird in Samoa. When they merge the culture together with Christianity...But when they merged the culture together with the Christianity and that will be a different story there and that's what I meant. Some of the *fa'atama* they live under the village rules, they live under the matai

²⁹⁹ Talanoa with S_LP, 18 July 2022.

³⁰⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022. Interview respondent, Talanoa with V&C_IT_FR2_NZ describes this as the conflicting tension.

³⁰¹ Talanoa with I1, 2 July 2022.

³⁰² Talanoa with P_FGT_TRF2_NZ, 28 June 2022. Interview respondent, P_FGT_TRF1_NZ agrees with this view.

rules. They never brave enough to come out as who they are because they live under the rules.

That's what I mean because they merged the culture together with Christianity. They feel the love, but they cannot do anything based on the bible...their pride and everything about the church and stuff. Because the bible said it's wrong and that's why they changed everything in the culture because they merged it together and I don't know why.

This view resonated with other *fa'atama* respondents for different reasons. The issue here becomes dependent on multiple factors, specific to a certain context. One *fa'atama* respondent asserts that the responsibility is not borne by the culture alone, owing to his understanding of the situation in American Samoa.³⁰³ He claims that parents are just as culpable in terms of exacerbating the problem and enabling stigma against *fa'atama*. On this view, some parents feel pressured to disown their *fa'atama* children in order to protect their reputation, the reputation of their family, or in some instances, the reputation of the Pastor, holding respected status, in the family:³⁰⁴

...in Pago it's a whole different. I mean we still have culture and Christianity. But over there it's not really culture but it's really on family and there are some like half family half Christianity. Like some of the friends I know, their families disown them and because their parents are pastors so that's like maybe 40% of the problem. But mostly, the problem is the pride of the parents. That's why they disown the kind of people we are. Just the main problem there but other than the culture, it's not really the culture in American Samoa...

According to one *fa'atama* respondent, the lack of social recognition and acceptance of his preferred choice of clothing, has caused him to withdraw from participating in family and village activities. His participation is largely dependent on whether his community will fully accept him as a *fa'atama* and how he chooses to express himself in the way he dresses:³⁰⁵

Okay let's take for example the different kinds of place and events I attend. In church, I cannot wear girls *pule'asi* because I need to wear what I am comfortable in, such as the shirt and male *lavalava* or *ie faitaga*. If they see me rocking up with my choice of outfit, they always turn a blind eye and look disgusted towards the way I dress. It is the same during our family activities. I would rather wear a t-shirt and a lavalava and shift the boxes of tin fish and cows' legs and do all the male tasks instead of wearing a girls *pule'asi*. For me

³⁰³ American Samoa is often confused as Samoa when it is a completely separate jurisdiction which form a U.S territory, though comprised of predominantly U.S nationals of Samoan descent. American Samoa was where Margaret Mead conducted her anthropological research on Samoan adolescents.

³⁰⁴ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

³⁰⁵ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

personally, I would strongly engage and go back to village and family activities if they accept the kind of person I am...

The personal perspective of the Samoa law reform expert sheds light on some of the deeper issues at play. The law reform expert further highlights that the positive impact of colonisation and Christianity lies in defining who we are in Samoa with respect to constructing a Samoan national identity reflected in personhood, customs, and gender norms:³⁰⁶

...the perspective that Christianity has created all these problems...my personal view as a Samoan and a Christian...I don't think that's the issue...I don't think Christianity is what's creating the issues...for Samoa...our constitution says that Samoa was a Christian nation founded on God and our Christian beliefs...many would say, okay, they're from ah times of colonisation, but um Christianity and our culture...they are who we are. It's the identity of the Samoans from our customs. And granted, not all of our um *fa'asamoa* maybe good, you know, there are some ah practices that...may need to change, but...we do have good customs that have helped Samoa to stay in order...all these years. And the principles of Christianity I believe, have also helped and that's what...guides the development of the laws of Samoa...I know that's weird, like it flows from...the Christian belief is that creation, just to...two genders, two sexual orientations are male and female. And that's where our laws have come from and developed from...and that's also how the Law Reform Commission would take forward our reviews and reform projects.

Further to the above, this highlights the key factors that influence the drafting of gender norms in laws are a combination of factors, from political will, to influences from the West. However, the most significant factors are also the two barriers noted by the majority of *fa'atama* respondents – culture and Christianity. As such, the Samoa law reform process does not appear to be as gender responsive as it claims:³⁰⁷

... It would be ah you know, political will? And also...we do have laws that were...transplanted or introduced from overseas that helped Samoa to develop its...legal framework. But after independence, yes, our parliament started...enacting our own laws. And yes, it's, I would say, from the Samoa Law Reform Commission, yes, we can...bring laws or ...have our laws be inspired or...guided by laws from overseas countries or from the west. But as a independent and...sovereign country, you know...our parliament, we are able to legislate...in a way...that is, in line with our Samoan Constitution, to legislate...overseas, and Western laws can influence. But at the end of the day, our laws should be made according to... the context and the setting of Samoa. And yes, it's been 60 years and for...the development of laws...I know Samoa

³⁰⁶ Talanoa with S_ACEO, 22 July 2022.

³⁰⁷ Talanoa with S_ACEO, 22 July 2022.

was developing its laws...the best that...our parliament thinks would best serve our people...in line with our Christian beliefs, and recognizing our customs and traditions, because that is who we are, and as Samoans. And so... I believe that those are the factors that influence how laws are made in Samoa, our Christian beliefs, our culture and customs. And yes...we look to Western countries...but at the end of the day, Samoa legislates for itself as a sovereign nation. So it's the direction that we take would be...as our parliament, as our government's...wishes or directs...and from the Law Reform Commission...our recommendations of any reforms would be based on our findings and what the people would say...what people would put in from our consultations. And that's what I believe would...from the Samoa Law Reform Commission, would influence the direction of any recommendations or any draft laws in Samoa going forward.

3.3 Internal challenges

3.3.1 Lack of unity amongst *fa'atama*

As in every community, there is a degree of disunity and difference, as well as conditions that exacerbate these differences (see Table 5: Perception of *Fa'atama* in Samoa and Table 6: Perception of *Fa'atama* outside Samoa). In the *fa'atama* community, one *fa'atama* respondent reflects on the challenges that hinder *fa'atama* progress in the long term, with respect to achieving full recognition in Samoa customs and laws:³⁰⁸

Yes, there is no commitment, and it cannot be happened if there is no commitment from all *fa'atama*, because they are still hiding especially towards participation of *fa'atama* only aside from *fa'afafine*.

The main issue is no commitment from the *fa'atama*.

As put by another *fa'atama* respondent:³⁰⁹

...Now how do we expect to bring in the idea of same sex marriage when we cannot come together as a club? Some *fa'atama* are still hiding in the closet and prefer to be private about them being *fa'atama*, now how can we address that issue first?

Even the SOGIEC pioneers in Samoa have had their fair share of differences within their respective community. But it is even more alarming to hear that the *fa'afafine* community are not united in supporting *fa'atama* advocacy in Samoa:³¹⁰

³⁰⁸ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³⁰⁹ Talanoa with I1, 2 July 2022.

³¹⁰ Talanoa with S_LP, 18 July 2022.

...there is now the fa'afafine community...even within our own fa'afafine community, there were ah divisive school of thoughts. There were others who say, why do we have to link up with the *fa'atama* community? There were others were also saying no, we have to, I think I was one of those people who were more supportive of them...and we're pushing...for them...

3.3.2 *Defensive to constructive feedback and mentoring*

In the words of one *fa'atama* respondent, he highlights the generational differences between some of the younger *fa'atama* and older *fa'atama*, where the younger *fa'atama* were regarded as more independent, progressive, risk averse and less inclined to take advice from the older *fa'atama*, who were regarded as mature, cautious and conservative.³¹¹ This position resonates well with the *talanoa* feedback from a leading *fa'afafine* and law expert. It also demonstrates a lack of interest in mentoring and the importance of being open to constructive guidance from those with proven experience (though ironically, respectful engagement is a cultural norm), wisdom and the resilience to continue in spite of the adverse challenges ahead:³¹²

...it's good in a way...The *fa'atama* community have to take it constructively. And I hate to say that the *fa'atama* community has to go through the process, the *fa'afafine* community came about too but 30 or 20 years ago...and this is where the fa'afafine community comes in. We are now pushing the *fa'atama* community, we also feel like, we're not pushing them beyond their comfort zone. Because...we went through so much it got us here. For the *fa'atama* community they've just started. And while we are pushing them, we also want to be sure that we that they're properly nurtured, you know...that they are properly prepared mentally, psychologically, spiritually, you know, throughout the...adversity of their advocacy ah?

I will say it's not giving in so soon. They had to go through what the *fa'afafine* community went through. And I must tell you now, there's a very weak representation of the *Fa'atama* community in SFA, because we always push for them to be part...they just not comfortable or upfront...to be part of this.

³¹¹ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³¹² Talanoa with S_LP, 18 July 2022.

3.4 Sociocultural challenges

3.4.1 Ignorance and prejudicial attitudes

The general ignorance about *fa'atama* is a disturbing reflection of the deep-seated prejudice that boxes *fa'atama* as lesbian or gay.³¹³ In Samoa, *fa'atama* are still considered female and sex between two “females” is regarded a sinful violation of the Sodom and Gomorrah kind. Consequently, the way *fa'atama* are mistreated and excluded from recognition in Samoa customs and laws, is largely a reflection of the combined influence of Christianity and prejudice.³¹⁴

The *talanoa* with a culture heritage expert in Samoa is indeed telling in this regard:³¹⁵

...the being locked into this gay category...then being locked...into...that group of people that Samoans think are no good...I think if...people decide to get over that and be okay with the fact that...lesbians, I mean, I think if people started to kind of broaden their minds...about the *fa'atama*, you know...and not see them purely as this...and allow them the latitude to be, you know, whatever it is that they want it to be...then I think that we would probably have a change in the way people see them and the way that people treat them....

I guess my point is that I think the challenges will be the challenges for them, I think are overcoming the already very short-sighted kind of attitudes that Samoans have locally about gender, right, because I think...that we already have that issue here with the way people see gender...because they're not exposed to all the kinds of, you know, things that they could be exposed to out outside...

3.4.2 Lack of formal education and employment

The *talanoa* data (see Table 8) shows that in comparison to *fa'afafine*, the public perception towards *fa'atama* is not positive. This perspective is driven by the fact that they are regarded as less educated and less employed, even amongst *fa'atama* themselves.

More specifically, their lack of formal education is believed by some respondents to account for the limited ownership of and participation in law reform.³¹⁶ The reasons

³¹³ Talanoa with V&C_GWR1, 27 June 2022.

³¹⁴ Talanoa with II, 2 July 2022.

³¹⁵ Talanoa with V&C_GWR1, 27 June 2022.

³¹⁶ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.; Talanoa with V&C_FGT_VF4_SAM, 2 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022; Leading law and *fa'afafine* advocate, respondent Talanoa with S_LP, 18 July 2022, indicated that the “...high rate of dropouts, school dropout...” amongst the *fa'atama* community based on data collected for a project.

for the lack of formal education and employment were explored further in the *talanoa*, which was believed to be a result of multiple factors, including bullying and dress codes at School.³¹⁷ Some *fa'atama* respondents challenge this stigma and believe that being immersed in village activities, such as *siapo* making, weave making³¹⁸ (see Table 7) and investment in *fa'asinomaga* (cultural identity)³¹⁹ including village and family genealogies (see Table 6), should not be considered any less important³²⁰ in comparison to achieving formal education and formal employment.

3.5 Historical challenges

3.5.1 Western influence and reproduction of borrowed Western ideas in Samoa

What is also telling, as discussed in the earlier *talanoa*, are the issues that come with reproducing borrowed ideas from the West concerning the global human rights agenda on SOGIE and the need to localise and fully adopt the very western ideas and constructs in Samoa, without much robust thought as to the legitimacy and consequences of their actions.

The oversight of socio-political impacts assisting in the reproduction of gender and other disparities often leads to harmful consequences.³²¹ This links to the views from *talanoa* with a *fa'afafine* and law advocate in terms of how borrowed ideas from the West, ironically make sense academically while not practically:³²² “academic wise, it’s very good arguments for *fa'afafine* community...practically, it would be, I think it would be challenge.” Or as put so eloquently by a leading gender practitioner, the intention of people introducing ideas to Samoa are often a combination of “personal agendas” and “personal ego” thus, causing more problems than resolving them:³²³

³¹⁷ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022; Talanoa with V&C_FGT_VF4_SAM, 2 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022;

³¹⁸ Empirical data 2022, above n 52.

³¹⁹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

³²⁰ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.; Talanoa with V&C_FGT_VF4_SAM, 2 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022;

³²¹ Talanoa with V&C_GWR1, 27 June 2022; see Adebisi, above n 236, at 433, 440.

³²² Talanoa with S_LP, 18 July 2022.

³²³ Talanoa with S_CEO, 13 July 2022; See Dylan Asafo and Litia Tuiburelevu “Finding Our Way to the Island: Critical Reflections from Two Emerging Pacific Legal Academics in Aotearoa” [2021] *Journal of New Zealand Studies* NS33 55.

You're looking at people where they come in and...personal agendas ah, it's personal ego. They come in, they want to change the world...so they want to ah legislate things ah.

...but you will find that the majority is just personal egos you know wanting to change things...and it's causing a lot of, instead of helping, it's causing a lot of, it's chaos. It's causing a lot of troubles...within communities.

3.5.2 In the light of these challenges, how do we adequately address some gender discriminatory practices impacting *fa'atama* in Samoa?

There is a paucity of literature exploring the unique historical and contemporary challenges Samoa's gender diverse indigenous communities face whilst drawing attention to other factors and the emergence of new understandings constituted by reference to customs in the laws.

3.5.3 Remove legal restrictions and legalise *fa'atama* marriage in Samoa

As emphasised by the majority of *fa'atama* respondents in one focus group *talanoa*, they strongly support the view that *fa'atama* marriage should be legalised in Samoa.³²⁴ The depth and diversity of reasons differ across the *talanoa*, with some *fa'atama* leaning more towards a human rights centred approach where people should not judge others for their personal decisions “based on their free will and choice”³²⁵ coupled with the view that *fa'atama* are entitled to their “right and freedom of choice”³²⁶; while another *fa'atama* respondent pointed out that *fa'atama* marriage is legal overseas and yet still illegal in Samoa because Samoa is a Christian nation.³²⁷ This captures the position of a *fa'atama* respondent during the New Zealand interview *talanoa*, “...I mean how come other countries can change it while in Samoa we cannot do so?”.³²⁸

As agreed by other *fa'atama* respondents:³²⁹ “If we want to go overseas, and get married to a palagi, or a Samoan or whoever we want, we can. Everything is okay

³²⁴ Talanoa with V&C_FGT_VF1_SAM, V&C_FGT_VF2_SAM, V&C_FGT_VF3_SAM and V&C_FGT_VF4_SAM on 2 July 2022.

³²⁵ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

³²⁶ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

³²⁷ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³²⁸ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

³²⁹ Talanoa with V&C_FGT_VF2_SAM and V&C_FGT1_VF2_SAM on 2 July 2022 shared the same argument that *fa'atama* are married overseas and their hope is to experience the same legal entitlement in Samoa.

and we wish it is allowed in Samoa”. The law, however, did not prevent one marriage celebrant from officiating a *fa’atama* wedding ceremony in Samoa.³³⁰

3.5.4 Petitioning the government for support to legalise same-sex marriage

It was suggested that *fa’atama* respondents write a letter to petition the Honourable Prime Minister, Fiame and Parliament to legalise “same sex marriage in Samoa”.³³¹ While this served as a minor theme from the focus group *talanoa*, it was not opposed.

3.5.5 Same-sex marriage is not a priority for the SFA

In comparison to the *talanoa* data raised earlier, the Samoan Fa’afafine Association have prioritised access to health issues with *fa’atama* over the same-sex marriage agenda for both *fa’afafine* and *fa’atama*. The problem is that *fa’atama* during the *talanoa* were in favour of same-sex marriage and for SFA to set the agenda for *fa’atama* interests effectively undermines what *fa’atama* want.³³² Thus, a leading *fa’afafine* and law expert argued that advocacy work involving community dialogue is a powerful way to challenge the discriminatory laws that adversely impact and criminalise *fa’afafine* and the *fa’atama* community.³³³ According to the same expert, during the interview *talanoa*, it was highlighted that while the law acts as the “starting point”, it must work alongside adequate advocacy work which primarily serves as the voice of the community or it runs the risk of being ineffective.³³⁴

So, coming back to the question about *fa’atama*, I think I have to say, there is no better option because then to work with the community, especially with civil society and with the likes of SFA and its partnership um, I think this is where their contribution will be an contribution in form of what issues, how can we advocate and address the issues ah, these issues for them and for their benefit? Because as I told you, this is ah a survey that was done about ah 2 no a month ago.

³³⁰ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³³¹ Talanoa with V&C_FGT_VF2_SAM and V&C_FGT1_VF2_SAM on 2 July 2022 recommend writing a formal letter to Parliament to support the legalisation of same sex marriage in Samoa.

³³² Talanoa with V&C_FGT_VF2_SAM and V&C_FGT1_VF2_SAM on 2 July 2022. However, in the validation community workshop held at SFA HQ on 24 March, 2023, in Apia, Samoa the Fa’atama advisor confirmed that same-sex marriage is no longer on the agenda for *fa’atama* in Samoa.

³³³ Talanoa with S_LP, 18 July 2022.

³³⁴ Talanoa with S_LP, 18 July 2022.

3.5.6 *Best approach to adopt*

This theme was quite repetitive in the same respondents interview *talanoa*, which highlights the significance of collaboration and partnerships within the community, as a way to stay connected to the voice of the community while also effectively advocating for their best interests:³³⁵

But it also basically this, they have to achieve certain privileges...to come out, as you know, as *fa'atama* publicly right, and to be seen visibly as that...

Based on the above comment, it would appear that future partnerships with civil society and the advocacy work of SFA could help enhance the visibility of *fa'atama* while at the same time, *fa'atama* participation in the life of the village and church community. Furthermore, this echoed the view of a law reform expert during her interview *talanoa*, "...for *fa'atama*...get involved in the village governance...in the village...setting, they do have the *Aualuma* and the Women's Committee..."³³⁶

On this view, the experts involved in the interview *talanoa* assert that any project focussed on law reform in Samoa would be most effective if designed for the Samoan context, specifically, responsive to the local realities. The best approach is two-fold: Primarily, it would involve building public support and awareness through raising the visibility of the cause. This would entail some aspect of education, possibly in the form of advocacy and community awareness outreach projects to ensure the public are adequately consulted and well informed to form an opinion and understanding about the cause at hand; and secondly, only after establishing community buy-in and support, seeking further government support on the ways to best achieve this in Samoa. As articulated by one interviewed culture heritage expert, this approach has served her well in the work she does in heritage management, largely inspired by the advice and work of other pioneering advocates in Samoa:³³⁷

I think...the first kind of steps and this is a kind of the same issues that we have with heritage management...we're now doing everything we can to support the writing of legislation. So, I think in the same kind of vein of the battles that we have to fight in Samoa to get any kind of support, you know...I think visibility has to be built...for the *fa'atama* community. I think...there has to be a kind

³³⁵ Talanoa with S_LP, 18 July 2022.

³³⁶ Talanoa with S_ACEO, 22 July 2022.

³³⁷ Talanoa with V&C_GWR1, 27 June 2022.

of...greater presence and awareness...of who they are and what they're going through...and I know that that's not easy, because it's Samoa and not everything is...very clear on these...on those fronts anyway...but what I have found that works for us in heritage, which is very different. But you know...education is a big thing, making sure people understand the situation that we're in and the challenges that we're facing, and then presenting ideas to the Samoan public, and even to the government, on the ways forward.

I remember years ago, I was talking with Fiame about this way before she was Prime Minister...I remember her telling me, it's not the job of government to come up with these ideas. You have to tell the government what you want. And then the government has to make laws to then support what it is that you want. But if people don't tell government what they want, then it's never going to change. And totally taken that, you know, as a motivation for... the kind of public facing...programming that we have to do at the CSS [Centre for Samoan Studies] and NUS...which I think is very, very good advice for how you deal with things in Samoa, and a small country like this.

...because I don't think it's also it's not just that we're a small country...you're also having to challenge the very deep-rooted Christian ethic of gayness and queerness, which is very misguided, and very, I think, poorly dealt with...not to like critique... [name removed] and the Fa'afafine Association and all of the amazing work they do. But I also think... there can always be more done to kind of build out your visibility, and to make people aware of how, why you need their support...and then I think pushing for legislation and for policies...government sponsored bodies that oversee this type of work...

I think people like [name removed] and [name removed] you know...they've been really pushing, trying to get it done for years...But what I think hasn't happened for them is...you know, I mean, we have a fucking Samoa Rugby Union, they don't win. Like why do we have a Samoa Rugby Union, then? You know...why don't we have a proper national body that looks after these people or the interests of these special groups?...and I think that's the way that you have to go in Samoa because in my experience with the work I do, it's about public support and public awareness. And then government support, and government, you know, actually putting their money where their mouths are...and supporting us in real ways....That's kind of the route that I think you have to go in this country to get anything done...and that's a start.

The above comment echoed the thoughts of a gender practitioner expert, having adopted a development approach in her advocacy work. She indicated that the social benefits and changes we seek in the laws are riddled in a “tricky” web of challenges, thus, the complex act of balancing many competing considerations often takes a long time to fully unravel and transform. Some of the biggest challenges faced in advocacy work, involves the interpretation of language used in the laws compounded with attempts to analyse as well as extract biblical understandings to resolve social dilemmas, some of which are driven by personal agendas:³³⁸

³³⁸ Talanoa with S_CEO, 13 July 2022.

We are trying from the development perspective...We are trying from our development...approach where you know, in terms of programmes to ensure that the social benefits and that they are included in terms of programming, that our policies and legislations are there to protect and to ensure that their fundamental rights are being taken care of. I mean that, but we are of the understanding that it will take years and years of trying to...you know change our Constitution and change...the laws of the land and the laws of God. And so, you're looking at, the advocacy has been looked at, you know, from the perspective of...interpreting the, the Bible...but you will find that even that is a bit tricky and complicated where people have tried to...analyse...the biblical understanding in the books in order...to suit...their personal agendas. So, this, it's the biggest fear and the biggest challenge.

3.5.7 Samoa Law Reform Commission

The Samoa Law Reform Commission (SLRC) is guided by their law reform processes to address any gender discriminatory practices in Samoa.³³⁹ Unless self initiated by SLRC, the Terms of Reference (TOR) generally outlines the recommendation for the review, reform or development of laws, which is then referred to SLRC as a cabinet directive or directly as a referral from the Office of the Attorney General or the Office of the Ombudsman:³⁴⁰

...from the Samoa Law Reform Commission view, how we can address that...we would be guided by...if...such a review would be carried out...we would follow our six step process and any recommendations on how to address that would be based on any findings or research that we would...do here in Samoa...in the Pacific or other...overseas countries, and according to any findings that we would collect from the general public, on moving forward...with such reforms to our laws and that's as far as the Samoa Law Reform Commission would act...on this subject...

...while the Attorney General's office would be...if there is any bill that is drafted resulting from a reform or review project of the Commission...the Attorney General is, as the principal legal adviser and drafter for governance, any bill would have to be vetted by them. And so that's where they would go through and have their checks...in that line, you know, to go ah through the bills. And the Ombudsman would contribute...through our consultations, or it would be by direct invitation, if we see, you know, that they're one of the main stakeholders under a law that's being reviewed, then we would invite comments from them or invite them to public consultations...also, that the discussion paper does get published and that's an opportunity for any government ministry to, you know, provide their comments. And even with our final reports, they can contribute either during consultations, or when a bill is with... Parliament,

³³⁹ Talanoa with S_ACEO, 22 July 2022.

³⁴⁰ Talanoa with S_ACEO, 22 July 2022.

you know, when they call government bodies to come and appear before Parliament committees. So that's where they would also be involved in bringing their input.

3.5.8 Involvement of the Office of the Attorney General and Office of the Ombudsman of Samoa (National Human Rights Institute)

In work involving Samoa law reform and recognition of *fa'atama* and SOGIEC people, a leading Samoa law reform advocate confirmed that agencies such as the Office of the Ombudsman and Office of the Attorney General should be involved particularly as it relates to the laws.³⁴¹

4.0 Research Question 2:

How do we legally address gender discriminatory practices impacting *fa'atama* in Samoa?

4.1 Gender discrimination problem: How to solve it

The idea of forming a strong *fa'atama* group at local, national and international level, to address the gender discrimination problem, resonated well with the *fa'atama* respondents. Their long-term plan is to cultivate a sense of community, in advocacy work that also helps to raise their level of visibility and collective recognition, at multiple levels:³⁴²

Contribute to the community like the SFA...

I think the more they see the more we can be able to fight back...

...they see you contribute to the community in Samoa, the more they go, "oh, then why are we mocking them? They are doing the right thing and day by, hour by hour, year by year, month by month, they were working" so yeah, they are doing what they are doing right, you know, in the long run maybe ten years from one. Well, I don't know but that's the best answer, it's community like us, like international *fa'atama*.

³⁴¹ Talanoa with S_ACEO, 22 July 2022; I note during my data collection in Samoa, on 14 July 2022, I was advised by the Private Secretary of the Attorney General of Samoa (AG) by phone, that the AG wished to express her apologies for the delay in getting back to me. (I had sought an interview with the AG since 3 June 2022). Unfortunately, after reading the participant information sheet provided, the AG regretted to inform me that she could not participate in the research. As the topic is focussed on law reform, she recommended I approach the SLRC and for all matters regarding human rights discrimination, she recommended I discuss this matter with the lawyers at the Office of the Ombudsman. However, Samoa's Ombudsman had earlier declined the invitation to be consulted via email on 27 June 2022, citing the Samoa Fa'afafine Association as the best agency to approach for more information. It appears that both agency's flagged by the SLRC had both declined their invitations to be consulted. Similarly, I was unsuccessful in securing an interview with the Honourable Prime Minister of Samoa and the Honourable Minister of Women, Community and Social Development.

³⁴² Talanoa with P_FGT_TRF1_NZ, 28 June 2022. Respondent, P_FGT_TRF2_NZ agrees with his position.

There is a sense of frustration and disillusion when discussing how to coordinate a more uniform, coordinated group in public which adds visibility and a sense of belonging especially when there is no shared vision across *fa'atama* in Samoa. “Yes we do have a group chat but the issue is, they are hiding and they all have different perspectives and opinion on things”.³⁴³

4.2 Samoa legal or human rights framework, protecting fa'atama, as guided by Samoan principles

Based on the *talanoa* data in New Zealand, there was consensus that a human rights or legal framework (anti-discrimination mechanism), guided by Samoan principles, one which would effectively protect *fa'atama*, is not achievable in Samoa.³⁴⁴ The rationale is that the barriers from the culture and religion is what makes an anti-discrimination mechanism virtually impossible in Samoa. While the proposed idea is ruled out in Samoa “...because of the culture and religion, it will never work...”,³⁴⁵ the alternative view is that it is achievable only in Australia, New Zealand or the United States.

Comparatively, the above perspective was not echoed by the *fa'atama* respondents in Samoa. The argument is that a separate law on *fa'atama* or legal recognition of *fa'atama* status in the law would help facilitate the collective recognition and general acceptance of *fa'atama* in the wider community. Further to this, their independent status and identity as *fa'atama*, should remove them from the remit of the SFA.³⁴⁶

Yes, but there should a law of *fa'atama* because we are under the SFA. Yes, there should be a law.

...we will have our own...individual group to remove us from SFA and it will be very good, and others will join and work together. Right now, there is only a few of us *fa'atama* and we cannot bring them because they have a lot of issues and also low self-confidence to speak to their families regarding their situation.

³⁴³ Talanoa with V&C_IT_FR1_SAM, 13 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

³⁴⁴ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

³⁴⁵ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

³⁴⁶ Talanoa with V&C_IT_FR1_SAM, 13 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

Being counted as part of the official census statistics stocktake compounded with legal status, in the form of legal registration, would then entitle *fa'atama* to marry and adopt children, as well as gain collective recognition in the wider community:³⁴⁷

Exactly my point of view, we *fa'atama* must do something and it is a must to have us legally registered and we are also counted in the statistics.

...the only reason why we are under SFA because we are outnumbered... We should clear us from the government and so forth so we could develop *fa'atama* and allow us in this community. Perhaps we should propose for marriages, adoption and be accepted in the community. There is no rule of a *fa'atama* and *fa'afafine*. There is only law to guide us all.

As it stands, *fa'atama* are not legally recognised in the language of the law which adopts gender binary heteronormative norms of male and female only, which aligns with Christian principles.³⁴⁸ One problem from legal recognition in the law, in terms of explicit gender reference to *fa'atama* or more gender responsive language in the law, is that *fa'atama* are then answerable to the law along with all its exceptional circumstances, as put by one *fa'atama* respondent:³⁴⁹

I think for girls' families who we date that don't like us, most likely will sue us. ...I also understand what happened to me and there was no law about providing penalty against us *fa'atama*.

No, they didn't charge me they said there is no law about such kind of offense.

In questioning whether the current system in place to address gender discrimination is adequate, some *fa'atama* respondents indicated their awareness of the Office of the Ombudsman and how to lodge a formal complaint against gender discrimination; the Domestic Violence unit in Samoa Police and the Samoa Victim Support Group were also mentioned.³⁵⁰ When prompted to consider what agency was adequate or helpful in dealing with gender discrimination, the response was telling, "...the Police they don't care...sorry to say it...unless you...knocking on their desk everyday...".³⁵¹

While there have been notable amendments to legal frameworks in order to advance gender equality, many gaps remain. The Family Safety Act 2013 has criminalised domestic violence and the Crimes Act 2013 has criminalised rape within marriage.

³⁴⁷ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

³⁴⁸ Talanoa with V&C_IT_FR1_SAM, 13 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

³⁴⁹ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

³⁵⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

³⁵¹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

However, direct or indirect gender discrimination is not defined by law.³⁵² While *fa'afafine* have been acknowledged as a gender in Samoa by the National Human Rights Institute, *fa'atama* were not recognised until late 2016, due to differences in status, attached to historical, social and customary norms. Thus, there are no laws or guidelines to protect *fa'atama* and *fa'afafine* rights, or those of people with diverse gender identity and expression more broadly.

In one moving story, a *fa'atama* respondent shared a positive experience about how the law was used to successfully protect his right as a *fa'atama* in Samoa, being a beneficiary in his grandmother's will, meant that his uncle had no legitimate right to have him removed from the family estate, on the basis of his sexual orientation:³⁵³

...I won four court cases with my Uncle because he was discriminated my rights to be in my family home.

...he discriminated me because of my sexuality...I won all four cases...

...I ended up of going to my grandpas lawyer and seeing what is in my grandmas will and I'm in the will as well...I am one of the beneficiaries in the will and then I took the copy to the court and everything...dismiss because my grandma mentioned in the will that...I have the right to be in the decision making of whoever becomes the title for my family because I'm the first grandchild. I have the that right to live in my grandparents' house.

I'm so grateful for my grandma to put me in that will so it's like something that protects me around my family and no one can ever do anything without letting me know, you know.

...yep...true...it's my shield. As I said before, my grandparents they were my big supporters because they...brought me up and they were always there for me and...they also...never take anything or any stupid saying from nobody about myself because they know, I'm their right hand and I always there for them and that's my reward from my grandma.

Article 15 of Samoa's Constitution does not prohibit discrimination on the grounds of sexual orientation or gender identification, nor does it make gender discriminatory practises illegal, mostly due to the fact that in 1962, the inclusion of SOGIEC was not on the agenda when the Constitution was first drafted. This is unsurprising given the Christianising of Samoa's Constitution to reflect Christianity as the official state religion. Arguably, the real concern is that there have been no subsequent amendments due to Christian influence.

³⁵² Crichton, above n 32.

³⁵³ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

Okay I'll make it short and straight to the point, the discriminative practices towards *fa'atama* is that if you came from a family that did not mark you nor discriminate you then that is what matters but if anyone else is discriminating us *fa'atama*, oh I don't care and I don't give a fuck about it and sorry about the language. I am honest about what I just said, so sorry but this is fucking unfair and we were not born to impress anyone because if I hear anyone making such discriminative attitude towards us *fa'atama*, oh I will just pull down my pants and show my ass to them...³⁵⁴

This quotation reflects the frustration and resilience to explicit discrimination against *fa'atama* according to one interviewed *fa'atama* respondent which also resonates widely in the themes coming through both focus group and interview *talanoa*.³⁵⁵

4.3 Law reform

According to a leading Samoa law reform expert, *fa'atama* alongside all other members of the public, are not discriminated or excluded from participating in the law reform process and are thus, treated with the same respect and equality extended to everyone else:³⁵⁶

...from the Samoa Law Reform Commission...I can't state what goes on in the homes, in the villages but strictly speaking from the Samoa Law Reform Commission...there's no exclusion...from our process. In the workplace...there's no discriminatory practice against any...persons of those classes...who may walk into the office seeking services or even who would be part of our law reform...process, they're treated equally as everyone else who would...turn up or take part in our law reform process.

In the following *talanoa* responses below, *fa'atama* present specific contexts, where law reform and legislation could effectively be used to address gender discriminatory practices:

4.3.1 Gender based violence

Some of the intimate relationships involving *fa'atama* in Samoa, have been marked by gender-based violence in the form physical and psychological abuse. Consequently, violence and harassment, after a relationship has ended has thus led to

³⁵⁴ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

³⁵⁵ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

³⁵⁶ Talanoa with S_ACEO, 22 July 2022.

domestic violence charges and unfortunate interactions with the police and court system:³⁵⁷

...in terms of discrimination, for example, I have been through so much and especially relationship and abusive violent relationship. I have been in four relationships and all did not work and my family did not support the idea of dating girls because of previous fail and heartbroken relationships.

I also advise *fa'atama* not to harm or harass their ex-girlfriends because of anger and that they will be tied up under the law and it will be hard to integrate back into our community if *fa'atama* has a record due to violence. I also encourage them to move on with their lives because the moment they place their hands on them then there will be issues with the court.

4.3.2 *Wrongfully accused of committing criminal offences*

One *fa'atama* respondent in the *talanoa* shared a story about his experience with Samoa Police after being accused of unlawful sex with a young woman:³⁵⁸

I also want to share what happened to me which highlights the gender discriminatory practices that I encounter. So, there was a school girl who went to Leifiifi College and she lived at Matautu where Palolo Deep is located. An incident occurred to me and that's why I have a black mark at the police station. The girl's family took me to the police stations and blamed me for forcing the girl over to my place...She is only 17 years old and attended Leifiifi College at the time... Her mother accused me of unlawfully sleeping with her daughter. I told her and the police that I didn't do anything wrong and that I did not kiss or touch her last night. At the end of the investigation, it was confirmed that I was clear and yet we wanted to sue her. My father was not happy and wanted to push through our case against her mother...

4.3.3 *Verbal harassment*

As one of the leading causes noted by a *fa'atama* respondent, verbal harassment has caused some to self-isolate and become anti-social:³⁵⁹

...the other thing is more mocking...whenever we go they mock us, and it makes us feel less likely to participate. Like myself back in the days, I couldn't wear, that time I was hiding...I didn't come out but as much as I want to wear this but if I'm going to wear, its either I'm going to be mocked or you know what I mean...

³⁵⁷ Talanoa with I1, 2 July 2022. Gender based violence committed by *fa'atama* is beyond the scope of this research, but it is worth documenting in the light of emergent themes emanating from the talanoa.

³⁵⁸ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022.

³⁵⁹ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

One *fa'atama* expert shared several stories capturing some of the moments of discrimination he experienced while at Church with his wife.³⁶⁰

4.3.4 *Discrimination if unemployed*

In the *talanoa*, one *fa'atama* respondent highlighted the predicament experienced by some *fa'atama*, where they are embraced for their capacity to provide for others while at the same time mistreated for not having the means to provide:³⁶¹

...there is still discriminative practices especially towards *fa'atama* and that girls always use us because of our money. They do not come to us because of our love but they love coming to us because of our money. Some of them discriminate us because we don't have any job so we cannot provide for their needs or wants...

As one law and *fa'afafine* advocate reported "...from what we've gathered...there's a very high rate of unemployment among the *fa'atama* communities...".³⁶² This finding was corroborated by the majority of *fa'atama* respondents.

4.3.5 *Village bylaws prohibit fa'atama*

There are explicit discriminatory village bylaws which target *fa'atama* living in the village and thus, fines are imposed on families for supporting *fa'atama*, "My village as I explained before that they do not accept *fa'atama* and that they don't support us...".³⁶³

As clarified by another *fa'atama* respondent, *fa'atama* must comply with the dress code or be subject to hefty village penalties, "...mainly for the dress code, there is dress code for *fa'atama* in church, village and family obligations".³⁶⁴

In the words of an interviewed gender expert in Samoa, she clarifies the contradiction and contrast between what is contextualised as cultural taboos and village bylaws, within the context of a village setting, which prohibit *fa'atama* from wearing traditionally male clothing or their "brother's clothes", and how this cultural taboo

³⁶⁰ Talanoa with I1, 2 July 2022.

³⁶¹ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³⁶² Talanoa with S_LP, 18 July 2022; Corresponds with Consultation with Alexander Su'a, above n 18.

³⁶³ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³⁶⁴ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

has been translated as a form of gender discrimination and human rights violation in the eyes of the law:³⁶⁵

But our laws...if I can recall correctly, there has been a lot of reforms ah around...with our law's ah on this, the way they dress. I think there was a lot of...discrimination around our laws ah, not only...towards the fa'afafine's but also towards the fa'afatamas [sic] ah and something that's the Law Reform Commission and government ministries like the Ministry of Women and the Ministry of Justice, through their advocacy work and into the work on the...domesticating ah...CEDAW and CRC... also under CRPD...But I need to revisit that but I think it's something that [name removed]...will need to have a look at the legal aspect...discriminating at the village level, obviously the bylaws. Bylaws were...this is tabooed in the village. I think that's...the common...discrimination that's happening at the village level where you're not allowed to wear pule tasi or where...if I'm a *fa'atama*, I'm not allowed to wear my brother's clothes...and in some villages they have bylaws...that legislate and in ah view of law, the view from a human rights defender, that's a form of discrimination.

5.0 Research Question 3:

How do Samoa's colonial, Christian and cultural beliefs inform Samoa's village governance and law reform process?

5.1 Factors influencing gender and law reform – fa'atama in Samoa

According to Samoa's Regulations Ordinance (1953), Law reform is defined as the reform of state laws through Acts of Parliament, and through subsidiary legislation made by the Head of State on the advice of the executive. This is inclusive of judicial precedents of the courts.³⁶⁶ The Samoa law reform process is the process by which changes to state laws are initiated and developed by the constitutional offices (Parliament, judiciary, executive). In Samoa, the SLRC, the Office of the Attorney-General and its legislative drafters, and other agents including the Office of the Ombudsman (Samoa's National Human Rights Institute) have principal mandates to undertake law reform functions by virtue of empowering or enabling.³⁶⁷ The issue with the law reform process, whereby the laws and legal systems are either

³⁶⁵ Talanoa with S_CEO, 13 July 2022. In the talanoa, the interview respondent confirmed that both the Ministry of Women, Community and Social Development, and the Ministry of Justice and Court Administration hold records of all registered bylaws in Samoa including the village bylaws on dress codes banning *fa'atama* from wearing traditionally male clothing or having their hair cut short similar to most males in the village.

³⁶⁶ See Mulitalo, above n 3.

³⁶⁷ See Mulitalo, above n 3.

involuntarily or voluntarily imposed on traditional customary law systems, links to problems of legal transplants (i.e., the uncertainty as to what form laws take in the host country).³⁶⁸ This is also linked to Samoa adopting a constitution that is largely reflective of the Westminster system of Government.

In order to assess whether there are gender discriminatory practices embedded in Samoa's law reform and village governance process and what contributing factors impact the low recognition of *fa'atama*, a multi-step approach is required. Firstly, contextualising *fa'atama* within the human rights framework embedded in the *Constitution to the Independent State of Samoa 1960* ('Samoa's Constitution') alongside Schmidt's *Samoa Model of Gender* frameworks.³⁶⁹ Secondly, reviewing the particular laws that are framed to disadvantage *fa'atama* and lesbians using the Gender Legislative Index (GLI) as a guide.³⁷⁰ The GLI is a global tool based on the seven common overarching standards and criteria derived from international law, in particular the 37 General Recommendations issued by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) between 1986 and 2018.³⁷¹ The GLI provides benchmarks to assess legislation from gender-regressive (or gender-blind) to gender-responsive legislation, thus providing standards for non-discrimination and inclusion (which might be extended to other marginalised groups, lesbian groups, indigenous groups) and initiating a legislative process of "reducing gender disparities and embedding a rights-based response in the legal foundations".³⁷² Thirdly, examining some of the key drivers for change that have succeeded elsewhere to assess the feasibility of whether such legal developments could be adopted in Samoa in the light of the current socio-political and cultural context.

³⁶⁸ Given the word constraints I explore this further in another article..

³⁶⁹ See Schmidt, above n 52, 56.

³⁷⁰ Gender Legislative Index "Benchmarking" <<https://www.genderlawindex.org/benchmarks>>.

³⁷¹ Ramona Vijeyarasa "Making the law work for women: Standard-setting through a new Gender Legislative Index" (2019) 44(4) *Alternative Law Journal* at 275-280.

³⁷² At 280.

5.1.2 *Christian*

5.1.2.1 *Patriarchy in village governance and matai representation*

In a village context, a *fa'atama* is identified by their ascribed sex at birth, female. In the same vein, *fa'afafine* are identified by their ascribed sex at birth, male. Thus, male privilege enables more *fa'afafine* than *fa'atama* access to *matai* titles (i.e., conferment process discussed in detail in Chapter 5) and recognition in Samoa. This is largely a perpetuation of the patriarchal ideals, Christian principles and power imbalances embedded in village *fono* decision making (also discussed in detail in Chapter 5) which often privileges men to women. Consequently, *fa'atama* are often excluded in village councils and are less likely to participate in the law reform process, as alluded to earlier. On this view, a *fa'afafine* and law advocate reported:³⁷³

For the *fa'atama* community...I think this is where we it's very obvious how male domineering our culture is because there are some villages that still don't allow women *matais*.

...for *fa'afafine* yes, they do have...that male privilege because...you can sit in...the village council meeting, because it's a *matai* and no one can question it. It doesn't matter if you're, you know...effeminate *fa'afafine* or not or one who wears a *pule tasi* or female attire to enforce it, it doesn't matter. Everyone knows that you're *fa'afafine*, yes you are, you can sit in that...seating ah but for *fa'atama*, imagine um in a village...I know some villages for example, Malie, they have a *fa'afafine* who sits in the village council, the most vocal in the village.

However, the same respondent highlighted this conflicting tension when associated with the narrative that transwomen are dominating in fields predominantly associated with women:³⁷⁴

...I've been told that from a feminist point of view...with the trans women...advocating and taking over the space of women. There's an argument against that's your male privilege. You're dominating or domineering, our space. And that's where the *fa'afafine*...for us the *fa'afafine* community, that's where we say, this is where our cultural identity comes in. We know our place. We don't take over the girls ah. Even if you're a *fa'afafine* or that any *fa'afafine* you ask about. They know this is the relationship between him or me and my sister, I can't intercept, or I can't...manoeuvre, I respect that...

³⁷³ Talanoa with S_LP, 18 July 2022.

³⁷⁴ Talanoa with S_LP, 18 July 2022.

5.2 Cultural

5.2.1 Not gender discrimination

As summarised by a leading law reform expert in Samoa, the prohibition on women to hold matai titles in some villages is not a form of discriminatory practice but rather part of village policy and thus, it should not restrict *fa'atama* participation in other ways that directly influence village governance such as participation in the women's committee:³⁷⁵

... And I know that yes, some villages do not allow ...women to have matai titles...I wouldn't say that's a discriminatory practice...because villages...have their own faiga fa'avae [policy]...that they follow and it's...not so much a limitation or restriction to *fa'atama* too that they cannot hold titles. It's just a practice in the village that, you know, any women but...*fa'atama* and women in general, they're able to contribute and be involved in village governance through their women's committee...and any other...structure of the village that they have in, you know, their families...

Based on *talanoa* data, most *fa'atama* respondents disagree with the above comment. Most *fa'atama* do not identify as women and disagree with the view that *fa'atama* should not hold matai titles or only participate in village governance as a *woman*, in the women's committee, when *fa'atama* do not identify as women – in essence, it is this very level of unconscious bias which *fa'atama* find deeply offensive and discriminatory. What is more striking is that this forms the principal view of the independent constitutional authority mandated to reform, review and develop the laws of Samoa.

5.2.2 Best approach: community first, nation second

One interview respondent and cultural heritage expert used her background in archaeological heritage projects and advocacy work to inform her experience about the factors that play a role in village governance and law reform. Simply put, it required resilience, vision and many years of hard work in the villages. This involved establishing links, building rapport and trust within the village network, first, while at the same time, empowering and equipping the villages to continue the work without

³⁷⁵ Talanoa with S_ACEO, 22 July 2022.

overstepping village protocol and boundaries. Secondly, building on those village and community links to branch out at the national level towards government.³⁷⁶

...part of the kind of...beauty and the curse of Samoa, right, is that we have a national government, but we also have 350, small governments, also known as villages...but having said that, there are ways that the government that individual villages are linked, right, so that's why we have the Ministry of Women's...Corporate Services...So there are ways in which the national government is linked, despite the fact that we're broken up into hundreds of villages ...that network is something that I think can be tapped into. We do it with our work. So, I know it can be done in terms of tapping into that network, that is the village network that...comes together under the umbrella of the entire government um. But I would think...like many other things in Samoa, though, the kind of way that you would...deal with an issue like a gender issue like this...is, you know, these are individuals, who I think maybe we should start with working within their own villages, and then branch out into districts and then branch out even bigger, you know what I mean. And that's something that I know works to some degree with some of the stuff we do at the university...but I also know some of the...*fa'atama*'s that I know...have left their villages and come into town...and again, that's because of the support and the camaraderie they they're experiencing in town as opposed to *ku'a* [rural areas]...

And I think, you know, not everybody's willing to...fight that battle, I guess. But I think if you want to affect change in the ways that you think you should, if you have a clearer idea of how you're going to affect change, that's the realities of living and working in Samoa is that you have to figure out the channels that you have to go through...and for us, like with...our work, again, it's very different, but that's the only thing I can kind of base this off of...it's exhausting,, but it is about going into villages, building those relationships, getting their trust, and then letting them do the work that we do. And we do this all over the place...And then, you know, you're just hoping that you can kind of work it into villages, where it becomes, it has a national or appeal, you know. And I mean, I've been doing this...archaeological heritage stuff now, since 2012, yeah about 10 years now and we're only now realizing the fruits of that, because now people recognize that, that we're...not here to measure your land or take your land, we're not here to threaten your existence or anything that you're used to having...in your life and we're not changing any of the things that you're entitled to. We're simply here to record things.

Again, that's a very different battle from people who are fighting the battle that *fa'atama* are fighting. But I mean, I think you have to find ways to change things from the inside, at least, that's the way I approach it and I think that means...building those bridges within villages, hoping to kind of expand on those things to a more national level. And I mean...it might not be the way that it would work for them but it's...what I know works for us. Again, it's very different. So yeah.

³⁷⁶ Talanoa with V&C_GWR1, 27 June 2022.

One gender practitioner cautioned others to self-reflect on their own actions before pursuing changes in law and law reform practices that are no longer working in the village. While some pursue changes to maintain the peace and harmony in the village, it is not always driven by pure intentions. She claims that the personal agenda and egos (as alluded to earlier) of the majority of stakeholders may cause more irreparable damage than good.³⁷⁷

...this is...my personal view. I do not intend to speak for the others. This is my own personal view...what are the foundational factors...When they want to do changes...they try and tap into the legislation side of things...to keep the peace and...unity and to ensure that the villages are protected. That's one of the reasons why...people are looking at...legislation and law reform within the village...just to keep the peace and harmony because there is a difference ...This is not the Samoa of 40, 50 years ago. You are seeing ah you know, a lot of changes. And so, with some villages they are wanting to ah reform some...not so good practices, according to their views ah. Over the years, it's trying to ensure that there's social stability that ...whatever that is in place is for the benefit of everybody...

5.2.3 *Active tautua (service) and involvement in the family and village community*

As reinforced by interviewed *fa'atama*, one critical factor is that active *tautua* to their family and village community is the most powerful pathway to acceptance and recognition as *fa'atama*.³⁷⁸

As put by one *fa'atama* respondent, he pointed out that:³⁷⁹

My grandmother was a representative of the village to the government, and she specifically stated that we cannot be accepted in the village governance if we don't participate and also contribute to all village activities. My grandmother became an important person in the village because my grandfather was the main orator of the village therefore, I can be able to be part of the village governance as a *fa'atama*.

Similarly, another *fa'atama* respondent agreed:³⁸⁰ “Yes this is very important especially in the village because your service to the village and the family make them accept you as the person you are”.

³⁷⁷ Talanoa with S_CEO, 13 July 2022.

³⁷⁸ Talanoa with V&C_IT_FR1_NZ and V&C_IT_FR2_NZ on 24 June 2022.

³⁷⁹ Talanoa with V&C_IT_FR1_NZ, 24 June 2022.

³⁸⁰ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

This suggests that *fa'atama* access to their rights in customary laws and state laws encompasses the view that it is conditional and therefore, must be explicitly earned by exercising *tautua*. Comparatively, men and *fa'afafine* have easier pathways of access, irrespective of birth order, genealogy or matai status. This implies that *fa'atama* do not share equal or automatic rights in customs and laws which is problematic as it infringes upon their ability to fully enjoy the freedoms and privileges they are constitutionally entitled to.

Further to this, it was highlighted that one *fa'atama* holds a *matai* title, which he acknowledged as a sort of anomaly in comparison to the experience of most *fa'atama* respondents:³⁸¹

The thing is others are not Chief and others don't have any brothers... because I am now a chief and this is where I am different from other *fa'atama* and I must serve my brother... I serve as a Chief, as a member of the women's committee and also the whole village governance despite being a *fa'atama* and it is here that built my confidence. It is different from other *fa'atama* who are drinking alcohol on a daily basis, and some cannot come out of the blue because their families are not happy about them being *fa'atama*.

This view aligns with respecting village protocol and the hierarchal social order entrenched in Samoan culture.

6.0 Research Question 3:

How much agency do *fa'atama* have in participating in and facilitating the process of their legal recognition?

As international law is one of the sources of law in Samoa, it followed that only once international human rights law was formally incorporated into domestic/national law by Acts of Parliament (or integrated into the legal system via international customary law), principles of international law continued to influence debates on law reform, human rights and non-discrimination. However, the extent to which international law becomes a source of law in the Pacific varies according to each state. As alluded to earlier in terms of legal transplants, recall, at pre-independence, international treaties, conventions and obligations were inherited while at post-independence, the

³⁸¹ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

international laws adopted at pre-independence were then ratified and integrated into the legal system, some of which added new or additional obligations.

In the uptake of the CEDAW, it sparked debate on the need to eradicate gender inequalities and gender discrimination as demonstrated by global advocacy in international law and human rights discourse. In the Pacific, ratification of the CEDAW and compliance to CEDAW law reform was slow including the consideration of bringing non heteronormative and transgender people within the scope of the law.³⁸²

While it is also instructive to acknowledge that in state intervention, the law or legal mechanisms are not the only mechanism required to deal with the *fa'asamoa* as indeed, many go about their business in non-legal, socio-political domains without resorting to the law to resolve issues such as in private disputes in the Church. The unresolved issue is that a democratic state with laws and law making processes that do not recognise *fa'atama* whilst at the same time, not offering any legal recourse for redress, is in contravention of fundamental rights, which according to one gender expert, are the fundamental rights entrenched in Part II of Samoa's Constitution, as in Remedies for enforcement of rights, Right to life, Right to personal liberty, Freedom from inhuman treatment, Freedom from forced labour, Right to a fair trial, Rights concerning criminal law, Freedom of religion, Rights concerning religious instruction, Rights regarding freedom of speech, assembly, association, movement and residence, Rights regarding property and Freedom from discriminatory legislation.³⁸³ One leading argument for this serves to elevate the ideologies and philosophies espoused by the former colonial powers. This would undermine the best interests of the people who are constitutionally entitled to legal protection in the law. On this view, such undemocratic law-making processes has led to advocacy groups in the Pacific rallying for legal change to protect victims from human rights violations and discriminatory practices.

³⁸² Sue Farran *Human rights in the South Pacific: Challenges and changes* (Routledge Cavendish, London, 2009); See Farran, above n 84, at 347–370.

³⁸³ Talanoa with S_CEO, 13 July 2022.

6.1 *If you have lived in Samoa or the Pacific, are human rights or gender rights considered new concepts in Samoa*

The majority of interviewed *fa'atama* respondents in Samoa emphasised *fa'atama* rights within the context of human rights and gender rights in Samoa. The reasons in support of this argument vary according to each individual *fa'atama* context. One *fa'atama* respondent argues that “*fa'atama* existed long time ago...before the missionaries came...and I also had an Aunty who is a *fa'atama*”³⁸⁴. The fact that an older relative was a *fa'atama* had strengthened his understanding that the notion of *fa'atama* rights is not a new concept to Samoa, as it had existed before him.

In another *talanoa*, he clarified that, while *fa'atama* rights are not a new concept to him, he pointed out that his understanding differs from his biological mother's understanding of *fa'atama* rights. Consequently, his biological mother would consider *fa'atama* rights as a new concept because no one in the family had identified as *fa'atama*.³⁸⁵

6.2 *Legal and regulatory frameworks are in place to address gender discriminatory practices in Samoa*

In Samoa, the *fa'atama* interview respondents claim that “there is no regulatory legal framework which protects us as *fa'atama* from these discriminative action towards us”.³⁸⁶ Further to this point, the need for the government to include *fa'atama* in the national census, in addition to the Constitution, led to some in depth discussion about whether it was even possible to amend the Constitution:³⁸⁷

...but the first thing the government should have included *fa'atama* during the time of census counting of Samoa's population.

No, I have a right to say this because if the constitution included everyone then everything will be smooth. We are not protected then if we are not included in the constitution.

Well, we all know we cannot change it, but we need to add in a few things or amendment it. It is already fixed so we can't change it.

From the perspective of a *fa'atama* human rights advocate reinforced the view that the onus is on *fa'atama* to build a case based on their experiences with gender

³⁸⁴ Talanoa with V&C_IT_FR1_SAM on 13 July 2022.

³⁸⁵ Talanoa with V&C_IT_FR2_SAM on 13 July 2022.

³⁸⁶ Talanoa with V&C_IT_FR1_SAM and V&C_IT_FR2_SAM on 13 July 2022.

³⁸⁷ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

discrimination in Samoa, followed by lodging an official complaint with the Office of the Ombudsman, at which point, they would assess whether the matter should be pursued further in the court of law or in the area of law reform:³⁸⁸

...this is what the Ombudsman was telling us in one of our workshops...the more the *fa'atama* come up with their stories about ah the discrimination of themselves in their own environment...that's when they starting...put through the court and stuff in process. Yeah so everything, it's through the Ombudsman, yes. That's where they...take into the legislative...

7.0 Research Question 4:

Does SOGIEC or *fa'atama* play a role in Samoa's law reform process?

Would the open and explicit reference to gender communities, outside of the current scope of Samoan laws and customs, face challenges?

The majority of *fa'atama* respondents interviewed in New Zealand, agree that the open and explicit references to gender communities, within this context, references to *fa'atama* and SOGIEC (see Table 7: Perception of SOGIEC), would consequently cause significant challenges within the home.³⁸⁹ As summarised by one *fa'atama* interview respondent, the level of transparency in the form of legal recognition and recognition in official census reporting, would subject some members of the community to stigmatisation by their own family and community, largely unaware of their true gender identity:³⁹⁰

Yes, a big challenge...like because there's a lot of LGBTQI people living in their closets till now, so once they come out...in chapters that...they choose their gender on the chapter, if it's... legalised already in Samoa and then...if the census come and they mention ah the gender status and they...interview everyone in the family, that's when the *misa* [grievance] will start yeah... because the Samoan family, they` all sit like this and when this lady was asking you...oh ok your name, your gender status and then you have to look at them first, yeah, that's the only problem. It's gonna be a big challenge for people in the closets...and...the non-binary ones, you know what I mean? The people that they not identify themselves...as who they are? nah, it's a big question to them...

³⁸⁸ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

³⁸⁹ Talanoa with V&C_IT_FR2_NZ and V&C_IT_FR3_NZ on 24 June 2022, showed consensus to the argument that challenges will come from explicit references to *fa'atama* and other SOGIEC members in Samoa laws and customs.

³⁹⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

In line with the above comment, according to the perspective of a leading *fa'afafine* and law advocate, the irony in arguments favouring the explicit reference to gender communities in Samoa laws and customs, is that it provides very good arguments “academic wise” but not in a pragmatic sense.³⁹¹ The challenge is in finding the right balance where *fa'afafine* and *fa'atama* inclusion is permitted. Thus, the form must be more generic in context rather than too specific to the point of causing offence. SFA have collaborated with Samoa’s Bureau of Statistics to design census questions that capture the spirit of the issues concerning gender identity and sexual orientation.³⁹²

Practically, it would be, I think it would be a challenge...I think the challenge would really come about with how...the statistics ministry will have to sort that out...in their data. Because I think one of...the the issues that when we had our consultation, SFA submitted a few questions to be set out in their...census questions...and even I think we had about four or five questions. And even those four or five questions, they even came across difficulties, but difficulties that they addressed with us. And we thought, yeah, we agree with them that there are some challenges to it. Because again, it came down with the idea of it was very hard for the respondents...to clarify on, for example, the issue, *e iai se* [is there a] you know, *e iai se fa'afafine* [is there a *fa'afafine*] in your family...yeah, in your household so...I think the response they gave was that some people find it offensive. Some people find it, it's a very odd question...it's also...almost, well...to an extent, offensive questions to others... that even though they know that there is a *fa'afafine* in the family, they would conceal or...suppress...the information. So, I think how...the questions were then formulated somehow reduce the questions from five to three or two, where the questions were asked general, not so much *fa'afafine*, but asking...in a general way that can capture...the issues of gender identity and sexual expression. So those are some of...the challenges that, you know...it will come across...our advocacy...

...But I think there were other ways that we looked at, and I don't think it was working, which is why...we raised five questions. But the gist of it...they realize it's not really working...according to the experience, and the questions were then reduced from five to three, but...was also rephrased in such a way, it's not too obvious that this is...to capture the *fa'afafine* and *fa'atama* community.

³⁹¹Talanoa with S_LP, 18 July 2022.

³⁹²Talanoa with S_LP, 18 July 2022.

7.1 Views on law reform – limited understanding of laws and law reform

To be fully informed of what the state legal and customary legal system offers in terms of the benefits for future law making and law reform, effective participation in consultations will improve public appreciation and respect for the law and enhance the legitimacy of those laws. The *talanoa* data (see Table 7) revealed that there is generally little value placed on law reform (state and customary law) and little value placed on attending or participating in law reform consultations organised by the state.³⁹³ Arguably, the perception that the public lacks appreciation and ownership of laws on account of the low response to law reform consultations often ignores the hierarchical nature embedded in *fa'asamoa* customary practices. Village protocol in some of the villages have influenced the participation in law reform public consultations. Customs may permit only *matai* to speak as the official representative of the *nu'u* (village) and *aiga* (family), while other customs may permit hierarchical structures where only specific *matai* may act as spokesperson for the *nu'u* and more higher ranked *matai* may approach the village *fono* for authorisation to attend the law reform consultation. Non-compliance with customary protocol could be damaging and create a hinderance to effective participation in law reform consultations. On the whole, this fundamental aspect should not be overlooked and suggests that the public would regard law making and law reform as official matters reserved for prominent people holding high status or rank – *Matai*, Church ministers, Parliamentarians, Judges and general Professionals.

7.2 Language barrier

For this study, to overcome the language barrier, a Samoan female *matai* was engaged to co-facilitate *talanoa* with *fa'atama* respondents. There was an overwhelming appreciation of her presence as it helped to overcome one of the leading impediments to effective law reform participation – the lack of appreciation and command of the Samoan language alongside the stigma attached to those who are not fluent in the English language.³⁹⁴ The demand for cultural protocols and the Samoan language should not be understated as it encourages public participation, particularly from the *fa'atama* community.³⁹⁵ Unfortunately, in practice, the majority of law reformers or members of the legal profession involved in law reform consultations are not as

³⁹³ Talanoa with S_CEO, 13 July 2022; Talanoa with S_ACEO, 22 July 2022.

³⁹⁴ Empirical data 2022, above n 52.

³⁹⁵ Talanoa with V&C_IT_FR1_SAM, 13 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

competent in Samoan language and protocol as most members of the public who reside in the villages, under the authority of the *matai*, where most *fa'atama* reside.³⁹⁶

7.3 Pioneering *fa'atama* advocates: Mari and Vanila (Ice) Heather

In one focus group *talanoa* in Samoa the *fa'atama* respondents unanimously applauded the work of Mari and Vanila (Ice) Heather in *fa'atama* advocacy.³⁹⁷ Similarly, another *fa'atama* respondent agreed that "...Ice and Mari are still progressing well with the development of *fa'atama* in Samoa".³⁹⁸ More specifically:³⁹⁹

I would like to acknowledge Ice and his wife Mari for clearing the pathway for us. It wasn't an easy journey, but you and your wife laid a solid foundation for all of us *fa'atama*. Now, in terms of advocating for human rights, it is hard because most of us are still in the closet and are hiding. Now how can we move forward and encourage one another if most of the *fa'atama* are hiding. There were a lot of projects led by Mari and Ice which also includes the spotlights, and I was part of it.

The above comment resonated well throughout the *talanoa* which encouraged others to share their experiences with Mari and Ice:⁴⁰⁰

I would like to say thank you to Ice and his wife for the continuation of their love towards *fa'atama*. I recall I was working at a rental place and Ice would come over with Mari to rent a car providing transportation for *fa'atama* and taking them from one place to another or workshops and so forth...Thank you also to the brothers for being here and supporting our *fa'atama* crew.

7.4 Lack of influence without commitment in numbers

The influence of *fa'atama* advocacy in human rights is still in its early stages in comparison to *fa'afafine* advocacy, as summarised by one *fa'atama* respondent.⁴⁰¹ While critically reflecting on his comment, the *fa'atama* respondent stated that in "...two workshops with the Ombudsman...they said...they can't even make the move related...with the law reform...they can never do anything from our side unless we

³⁹⁶ Mulitalo, above n 3.

³⁹⁷ Talanoa with V&C_FGT_VF1_SAM, V&C_FGT_VF2_SAM, V&C_FGT_VF3_SAM and V&C_FGT_VF4_SAM on 2 July 2022.

³⁹⁸ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

³⁹⁹ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁴⁰⁰ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022.

⁴⁰¹ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

have the number”⁴⁰². This suggests that *fa’atama* commitment would enable their recognition in the community, particularly if they go independent to SFA. However, other avenues should also be considered, as told by one *fa’atama* respondent:⁴⁰³

I think if we build a strong community as *fa’atama* and contribute like...what I said before, for them to recognize us and then we can go independently by ourselves, not under the SFA you know.

Yep, there’s a lot of ways to it. I’m thinking too here in my side there is always people that I can go, you know, the upper people that will...in LGTB I can talk to them about finance and all that helping us, the *fa’atama*. Yep...I am praying to God to help us you know.

In the *talanoa*, there was a strong emphasis on the need for commitment and strength in numbers as the most sustainable pathway forward to advance *fa’atama* advocacy in the long term. In one emotionally charged *fa’atama* focus group *talanoa*, their frustration to gain momentum was evident:⁴⁰⁴

...I agree with brothers that we all need to work together to build up our society...we cannot build a house if we are not together. Leave those who are doubting behind, we only need people who are willing to stand together, having one voice and one mindset standing together as one and God will also help us. That is from the bottom of my heart, and it was not easy going through a difficult journey but thank you brothers for sharing your stories.

The above comment resonated well with a *fa’atama* interview respondent in Samoa, encouraging *fa’atama* to stand up and advocate for *fa’atama* rights despite of the challenging mindsets of people in Samoa:⁴⁰⁵

...If we are *fa’atama* then we must promote *fa’atama* and fight for it. We should stand up and fight for our right.

We understand...Samoa is a very small country, but its people are the most difficult hot headed I know in this world.

7.5 Still at the early stages of growth

Fa’atama is still developing as a collective and slowly building recognition in the community. While some progress has been made in advocacy and public awareness, *fa’atama* are faced with many challenges, both within the community and outside it.

⁴⁰² Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁰³ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

⁴⁰⁴ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁴⁰⁵ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

As summarised by one *fa'atama* respondent, he compared the *fa'atama* community to the *fa'afafine* community:⁴⁰⁶

Unlike *fa'afafine*...they are yeah ua leva ga build up *fa'afafine* but for us we are still small. *Fa'atama* is just like a toddler yeah at the moment, and we are trying to build up that body so we can make more influence to advocate...for human rights.

One leading Samoa gender expert agreed with the above comment, during our *talanoa*, thus, emphasising the trailblazing work of the *fa'afafine* community, in terms of human rights advocacy, focussed primarily on their community first followed by law reform. By comparison, the respondent suggested that the *fa'atama* community are the “new bee on the block” and may need to re-prioritise their human rights agenda, primarily, on advocating for better access to health care, education and employment rather than efforts to reform customary laws (see Table 8: Perception of *Fa'atama* in comparison to *Fa'afafine*):⁴⁰⁷

I think *Fa'afatama* [sic] community...it's like a new bee on the block ah compared to the *Fa'afafine*'s. If you ask me about the *fa'afa-fa'afafine*'s[sic] contribution to human rights in general, they have done a lot ah. So, I think when ah *fa'atama* community has to have realized ...a lot of the work has been done by the *fa'afafine* communities in terms of domesticating the CRC which is looking at the human rights of children...domesticating the CEDAW ah looking at the rights of women...ending violence and...ensuring that, you know, the allocation of finances are equally distributed...and also ensuring that the laws...are um gender responsive ah and so...in the villages customary law...I would say that the *Fa'atama* community is still at its baby steps, not yet to the...stage where they want to advocate...to change the customary laws. I think...they are still building their capacity...just to ensure that they do a lot of the advocacy work around, you know, community in general, ensuring that they...access basic health care for them and that's their communities are...educated and they have equal rights to...gaining a job and all of that, but, in terms of customary law, yeah, long way away.

⁴⁰⁶ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁰⁷ Talanoa with S_CEO, 13 July 2022.

8.0 Next steps

8.1 *Forming an independent Fa'atama Association in Samoa*

In the words of the *fa'atama* representative on the SFA, pragmatic steps to ensure *fa'atama* independence from SFA is most certainly an option that is possible, however, the challenge is the lack of commitment and numbers required to register an official group in Samoa.⁴⁰⁸

There is a certainly a level of frustration from being under the remit of SFA. The issue is largely due to the lack of funding to support *fa'atama* advocacy work.⁴⁰⁹ Similarly, another *fa'atama* interview respondent agrees that *fa'atama* are multi-talented but the issue remains, the lack of funding commitment to support them in *fa'atama*-related activities. This includes activities in education, arts and crafts, community advocacy and the like.⁴¹⁰

8.2 *Raising community awareness*

It was highlighted by *fa'atama* respondents and *fa'atama* allies that advocacy work in the community is vital to build recognition and strengthen support in Samoa. As one leading *fa'afafine* and law advocate reported in the interview *talanoa*:⁴¹¹

...I think the moment there is some light to be shone on them...you know that...video, there was a ...video of an Ice...yeah the Rogers...I think there was a very strong...celebration of that ...among the community ah...Yeah, I've heard a lot of good feedback compared to the other videos with the *fa'afafine*'s...so that's the difference...and that's why I'm saying that I think there will be more support of the *fa'atama* community...strengthened representation in the advocacy.

Similarly, a *fa'atama* respondent agreed that building recognition in the community is synonymous with exploring innovative pathways to share their stories:⁴¹²

These are the kinds of platforms that we need to showcase our beliefs, share our stories and also our voices so that they are heard so the community will see and recognise us.

⁴⁰⁸ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁰⁹ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴¹⁰ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴¹¹ Talanoa with S_LP, 18 July 2022.

⁴¹² Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

Finally, strategically prioritizing adequate resources to ensure the ongoing community awareness of laws and *fa'atama*-specific matters contributes to building a better informed and more educated public. These active steps must be performed before any reform can be realized. As *fa'atama* matters arise, it is vital that programmes and awareness raising initiatives be developed in parallel with reforms initiated by the state, thus involving a broader cohort of interested parties to potential law reforms before the actual law reform process is initiated at the state level. Building strategic networks with the principal state agency's responsible for villages and human rights is crucial to help draw political support and endorsement of these awareness initiatives.

8.3 Seeking Samoan solutions to Samoan problems

It was suggested in one interview *talanoa* that *fa'atama* will be more influential in Samoa if they activate their Samoan-ness. As put by a leading culture heritage expert:⁴¹³

I think the way to fight these battles...is to fight it as a Samoan...I think the knowing the culture well enough to know the ways...to work your way through it...I think...that's probably a way that I think they can do it....

Being active and contributing to their family, village, church while aspiring to be a *matai* in order to sit at the village council and participate in village governance, and so on are possible avenues that *fa'atama* may explore to gain the respect, acceptance and recognition in their community. More specifically:⁴¹⁴

Go get a matai title...be active in your village...be active in your family. There are ways for people to have a voice even when they're there. I mean, even the most *kuluku* [crooked] people can be at matai and sit in a village council, rapists you know, like in incestual old men ...they can be forgiven, *ifogas* can be done and they can be part of...the fabric of...their village, despite their personal shortcomings, but...who you sleep with, shouldn't matter with people are fucking 10-year-olds, you know what I mean? Like, get over it.

In the interview *talanoa*, the expert failed to appreciate the challenges *fa'atama* experience in the pursuit of a *matai* title (see Chapter 5 for more detail on the *matai* conferment process). However, the respondent shared the story of a well-respected

⁴¹³ Talanoa with V&C_GWR1, 27 June 2022.

⁴¹⁴ Talanoa with V&C_GWR1, 27 June 2022.

fa'afafine advocate who understood that power and influence is found in leadership, within the Samoan context:⁴¹⁵

...I think to some degree, part of the responsibility might be to find ways to, to work the culture, work the inroads that we know work for you to have authority, get them a *matai* title, like [name removed]...to me is the perfect example of this...his father was a high chief of Vaiala...went and got titles, several titles, sits on village council...openly lives as a *fa'afafine* man, in terms of his passion...his kind of, you know, characteristics and stuff like that. He doesn't change who he is and has garnered the respect of his village and our district. I say that because we're in the same district and...our kind of wider village families because of the fact that...he has followed I think the path to power that Samoans are familiar with, you know, and that is getting a title *kaukua le aiga* ah sit in those stupid village football meetings, be heard...and even if you end up being an asshole half the time, people, you know, for the most part, in some way, will forgive you...

This is no doubt a heavy task but not impossible:⁴¹⁶

And it's just takes that perseverance...I don't think it's impossible. I think it's difficult...but I think finding Samoan solutions to it is definitely possible.

9.0 Conclusion

The findings provide the evidence and insight into the multifaceted ways in which *fa'atama* have experienced integration and marginalisation in Samoa, through their account of gender discrimination. The insights gained from documenting their authentic voice and lived experience, has illuminated the deeper and broader issues beneath the skin of customs, social practices, and laws. The findings highlight consensus building, the complex conditions impeding the freedom of gender expression as well as areas of inconsistencies. Additionally, the *talanoa* data shows that the majority of respondents strongly self-identify as transmen and Christian, even despite their objections to the merging of Christianity and culture, fundamentally serving as one of the historical reference points, where the social practice of *fa'atama* and non-binary exclusion began. Consequently, the enforcement of the cultural binary construct is reflected and maintained in the language of the law, embedded in the law, the labelling and the symbolism, thus giving rising to the ascribed status and recognition reserved for women and men.

⁴¹⁵ Talanoa with V&C_GWR1, 27 June 2022.

⁴¹⁶ Talanoa with V&C_GWR1, 27 June 2022.

The respondents provide mixed experiences to the epistemic injustices faced in the village setting, compared to the urban setting. The experience of *fa'atama* is different in the urban town area. The majority of respondents and key informants identified the urban setting as more accepting of *fa'atama*, as it falls outside of the customary legal system, although the urban town area did not provide adequate safeguards against gender-based violence and the prejudice they continue to experience from members of their family, their church, the general public, medical staff at the Hospital and even Samoa Police.

The socio-legal environment shaped by the influence of Christianity and neo-colonial forces, has no doubt threatened *fa'atama* identity. It is against this very context that questions concerning the legality of *fa'atama* should be considered. However, not all conduct attracts consequences with legal implications but in the case of a victim of gender discrimination, if such rights are not recognised in law, it effectively undermines the very values and principles of democracy (see Chapter 6 for a discussion on the rule of recognition and limitations to the theory of representative democracy).

The majority of *fa'atama* respondents are in favour of same sex marriage and adoption privileges in Samoa. The respondents do not identify as women but understand that they are commonly misperceived as women and identified according to their biological sex as opposed to their gender identity. As such, they collectively understand the institutional and cultural implications behind the concept of “same sex” marriage. This is an issue that they seek to rectify through targeted community advocacy, education and awareness raising projects. Further to this, based on the account of some interviewed respondents, the identification of gender allies and advocates holding respected status, particularly in the village community, had helped to ease their overall social acceptance into the village community. The overall resilience of respondents conveys a powerful message about the dominance of Samoa customary norms and practice, based on the overall consensus in the shared belief that adequate safeguards exist in the customary system. Ironically, this firm belief emerged as a major theme, even despite the oppressive practices adopted in some villages to penalise and punish *fa'atama* expression in the way they dress and who they choose to love. Most *fa'atama* in the study experienced this form of

discrimination in the village setting. The fundamental safeguards include the *suli* and *feagaiga* (see Chapter 4 and Chapter 5 for further insights). Thus, affirming the existence of a pre-colonial human rights framework, which highlights the non-legal mechanisms to effect change include strategically aiming to increase *fa'atama matai* representation as a key avenue to directly influence and actively participate in decision making. Similarly, the majority of respondents identified the act of *tautua* as another strategic avenue to counteract stigma attached to *fa'atama*. The *tautua* was another non-legal mechanism identified to fully realise *fa'atama* pathways to *matai* leadership and overall acceptance as *fa'atama*. The combined influence of family acceptance, the endorsement of individuals holding respected status, the customary avenues of *suli* (heir), *feagaiga* (brother-sister covenant) and *tautua* (contributions, service) further enables the acceptance of *fa'atama*, whilst creating a robust case to support *fa'atama* recognition in future Samoa customary law and state law reform.

10.0 Tables referred to in the above analysis:

Table 3: Definition of gender

Talanoa data	Core themes
Fa'atama focus group and interviews	<p>Christian worldview Majority of respondents factor in their Christian worldview, which they assert adds legitimacy to the belief that God created <i>fa'atama</i> – a divine act not subject to debate.⁴¹⁷</p> <p>Fa'atama with children Based on numerous accounts of sexual relations with men, some consensual and non-consensual, invariably led to children and subsequent grandchildren. Consequently, it did not restrict <i>fa'atama</i> from self-identifying as <i>fa'atama</i>, men and transmen.⁴¹⁸</p> <p>Gender and sex is not the same thing Principally based on the perception that gender links to identity, as in “who you are” which is multifaceted and encompasses the cultural, psychological and social aspects, of expression, roles, expectations, stereotypes. <i>Fa'atama</i> identify according to their biological sex ascribed at birth, female. Separate to this, <i>fa'atama</i> base their sexual orientation based on who they are sexually attracted to. For instance, “...it's like us, you can be a girl and want a girl, you can be a girl, like the normal, and want a guy so I don't think it's the same thing”.⁴¹⁹ This difference was noted by another <i>fa'atama</i> respondent, “different for me... There is a difference because some of them were born with male parts and they are gender, male, yet I was born a female, but I have male feelings”.⁴²⁰ In the same vein, this was summarised quite well by a Samoa <i>fa'atama</i> advocate interviewed in New Zealand.⁴²¹ What this suggests is that the concepts of</p>

⁴¹⁷ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴¹⁸ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴¹⁹ Talanoa with V&C_IT_FR1_NZ, 24 July 2022.

⁴²⁰ Talanoa with V&C_IT_FR2_NZ, 24 July 2022.

⁴²¹ Talanoa with V&C_IT_FR3_NZ, 24 July 2022.

	<p>gender and sex are complex and diverse. Also, that <i>fa'atama</i> experience their own unique expressions of gender, sex and sexual attraction.</p> <p>Issues with the English language</p> <p>The dominance of the English language in the expression of terms, <i>sex</i> and <i>gender</i>, did not resonate as well as the expression of <i>identification</i>.⁴²² Similarly, the term <i>discriminative</i> was also highlighted as quite contentious. As put by one respondent, it “means colouring of people, but the term <i>discriminative</i> to <i>fa'atama</i> does not match”⁴²³. His argument is that the term <i>discriminative</i> is not appropriate to the context of <i>fa'atama</i> in Samoa who do not relate to it based on the origin of the word itself. In fact, it is considered to be quite a derogatory term and offensive to be associated with it. The suggestion is that the term <i>identification</i> be used instead as it is more applicable to the <i>fa'atama</i> experience in Samoa. As pointed out by one <i>fa'atama</i> respondent, the origin of the word <i>discriminative</i> is “...from overseas and it is a western term...more applicable to the Africans and other people but not us <i>fa'atama</i>”.⁴²⁴ It becomes problematic when the word <i>discriminative</i> is translated into the Samoan language, which is quite limited in scope, because it does not provide an equivalent term to what is described in the English language. Once translated, the inference is that <i>fa'atama</i> are treated differently to others in the law. But according to their understanding of the law, this is not the case.⁴²⁵ This is a narrow interpretation of the law based on the understanding that the law treats females the same as <i>fa'atama</i> and does not distinguish between the two.</p> <p>Changing name not sex on official documents</p> <p>The impact of the legal name change on one's birth certificate is one pragmatic step towards recognising one's identity. Changing a <i>fa'atama</i>'s feminine name to reflect their name of choice, whether it is gender neutral, masculine and so on, carries as much impact, with respect to their identity, as changing one's gender on their birth certificate.⁴²⁶ One <i>fa'atama</i> respondent disagreed with the above claim and asserts that changing one's name and sex on their birth certificate is illegal, given his own experience. He argued that there is sufficient evidence (i.e., birth certificate, drivers licence) they can use against <i>fa'atama</i> to reveal their ascribed sex at birth is <i>female</i>. A leading <i>fa'afafine</i> and law advocate disagrees with this claim. He asserts the true legal position and confirms that official name changes on the birth certificate in Samoa is legal, however, changing your sex is not.⁴²⁷ An earlier interview <i>talanoa</i> with a <i>fa'atama</i> respondent in New Zealand, corroborates this position while also emphasising that both name and gender changes are legal in New Zealand but not Samoa.⁴²⁸ This, then, confirms that their sex (female) rather than gender (<i>fa'atama</i>) will remain on all official documents of personal identification in Samoa.⁴²⁹</p>
Experts	<p>Issues with the English language</p> <p>One leading Samoa law reform expert lends support to this argument. The process concerning how a Bill undergoes procedural vetting for both constitutional compliance and gender neutrality, all of which is carved into the law reform process, consequently, enables all genders to be recognised in gender neutral, inclusive language.⁴³⁰</p>

⁴²² Talanoa with V&C_IT_FR1_SAM, 13 July 2022. In my field notes, I stated that the talanoa respondent did not clarify why he preferred *identification to sex* and *gender* although, as the talanoa progressed, it became evident that his views were influenced by a UN project he was connected to, which discussed the issue of gender identification.

⁴²³ Talanoa with V&C_IT_FR2_SAM and V&C_IT_FR2_SAM on 13 July 2022, both agree with the argument about the misuse of the word *discriminative* within the *fa'atama* context.

⁴²⁴ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴²⁵ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴²⁶ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴²⁷ Talanoa with S_LP, 18 July 2022.

⁴²⁸ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁴²⁹ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴³⁰ Talanoa with S_ACEO, 22 July 2022.

Table 4: Definition of sex

Talanoa data	Core themes
Fa'atama focus group and interviews	<p>Earliest age and recollection of gender recognition</p> <p>In terms of sex, the majority of <i>fa'atama</i> focus group and interviewed respondents identify as female, having acknowledged the sex assigned at birth as <i>female</i>, while also acknowledging the <i>natural</i> or <i>original</i> parts of their body as <i>female</i>.⁴³¹ In comparison to sexual orientation, in the <i>talanoa</i>, interviewed <i>fa'atama</i> respondents reported feeling different from as young as the age of 13 or 14 years old “I think on the 3rd or 4th grade I started having feelings like in my own girls in my class and I was like why am I different...”.⁴³²</p> <p>a. Feeling like a man – one of the indicators or markers of sexual orientation rather than sex</p> <p>The distinction between sex and sexual orientation was not clear at the outset as there was some confusion over sex and sexual orientation which the experts (below) could clarify with ease. However, over the course of the <i>talanoa</i>, it became clearer that a significant proportion of respondents indicated that they felt remarkably different to most girls and most were able to clearly distinguish their sexual orientation as their feelings developed - at which point most of the respondents felt masculine “like a man”.⁴³³ or <i>fa'atama</i>.</p> <p>Their female body parts are considered a limitation to full fa'atama recognition</p> <p>During the <i>talanoa</i> on the topic of sex, <i>fa'atama</i> reported feeling less respected than females as well as <i>fa'afafine</i> in the context of legal status and legal recognition in Samoa.⁴³⁴ The core issue at the heart of the matter lies in the different perceptions attached to the sexual heteronormative binary roles one is expected to perform in Samoa's social order, which often aligns to one's physical body. In comparison to <i>fa'atama</i>, both women and <i>fa'afafine</i> are generally perceived as more respected due to their public facing, visible, community work in diverse areas from creative pursuits, to securing funding for projects, and so on. The rationale here is dualistic and binary in nature, where the “inner girl” complements the more feminine creative pursuits, while the “inner boy” complements the roles that are more masculine. In terms of sexual orientation and gender identity, <i>fa'atama</i> identify with the “inner boy” although in terms of sex, physically and biologically, their body parts are female. The irony is that, in principle, <i>fa'afafine</i> are not subjected to this standard as they are biologically male. As such, they are afforded more privilege and entitlements in Samoan society to gender fluidity than <i>fa'atama</i>. Consequently, this creates a complex situation where <i>fa'atama</i> are still building up their respect and confidence in the community through strategic networks with SFA, to effectively overcome these imposed gender stereotypes, such as the expectation they must exercise their “inner girl” and excel in creative pursuits.⁴³⁵</p>
Experts	<p>Sex</p> <p>a. Biologically determined</p> <p>Similar to the definition of sex provided by one of Samoa's leading gender experts⁴³⁶, it was similar to the response provided by a Samoan cultural heritage academic, trained in anthropology, who rationalised sex on the basis of one's biological make up.⁴³⁷ This</p>

⁴³¹ Talanoa with P_FGT_TRF1_NZ, 28 June 2022; Talanoa with P_FGT_TRF2_N, 28 June 2022; Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁴³² Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

⁴³³ Talanoa with P_FGT_TRF1_NZ, 28 June 2022; Talanoa with P_FGT_TRF2_N, 28 June 2022; Talanoa with P_FGT_TRF3_NZ, 28 June 2022, respectively. Each paragraphed quote cited represents a different interviewed *fa'atama* respondent.

⁴³⁴ Talanoa with P_FGT_TRF1_NZ, 28 June 2022; Talanoa with P_FGT_TRF2_N, 28 June 2022; Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁴³⁵ Talanoa with PI, 28 June 2022.

⁴³⁶ Talanoa with S_CEO, 13 July 2022.

⁴³⁷ Talanoa with V&C_GWR1, 27 June 2022.

	<p>echoed the response from another interviewed respondent, specialising in law reform, “I would think that...sex is your biological...build...”.⁴³⁸ Ironically, the same respondent clarified her comment by stating that there is no distinction between the definition of sex and the definition of gender in Samoa, “...sex and gender...would be defined the same. I would say, male and female, men and women...”.⁴³⁹</p> <p>b. Sex differs from Sexual orientation in Samoa on the basis of family and communal responsibilities that were cultivated from birth</p> <p>In Samoa, more emphasis on individual sexuality would detract sociocentric focus on gendered expressions through labour and service (<i>tautua</i>) to family and community.⁴⁴⁰ This summarises the approach in the definition of sex according to a leading Samoa gender expert.⁴⁴¹</p> <p>c. Physical attraction</p> <p>As summarised by one interviewed <i>fa’afafine</i> and leading law practitioner respondent, sexual orientation from a Samoan perspective is not strictly <i>sexual</i>, as the “...the sexual part should not overwhelm that physical attraction”.⁴⁴² In terms of sex, this comment points to the distinction between boundaries of sexual attraction and physical attraction. Physical attraction is not strictly sexual in nature. The example provided during the <i>talanoa</i> was of a married cis-male who was physically attracted to a <i>fa’afafine</i> given their feminine attributes yet maintained his sexual orientation as a cis-male by not engaging in sex with <i>fa’afafine</i>. Again, this affirms Schmidt’s “Samoan Model of Gender” which highlights the experience of <i>fa’afafine</i> in terms of the rigidity of normative gender boundaries in Samoa.⁴⁴³ Unlike contemporary Western contexts, Samoan hegemonic masculinity is more constrained and inflexible. In this regard, Samoa gender frameworks adopt a range of normatively appropriate gender behaviours within a cultural binary construct of male/female and masculine/feminine. Any movement outside the rigid boundaries of male and female behaviour is considered “not male” and “not female” (i.e., the “distinction between boundaries” of gender).</p>
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Table 5: Perception of Fa’atama in Samoa

Talanoa data	Core themes
Fa’atama focus group and interviews	<p>Is the subject of gender part of your family conversations (talanoa)</p> <p>The <i>fa’atama</i> interview respondents indicated that in <i>talanoa</i> with family, friends and the wider community, they are generally accepted as <i>fa’atama</i>, while not expanding into deeper dialogue about how, why and in what context the subject is raised.⁴⁴⁴ It should also be noted that throughout the <i>talanoa</i>, they described instances where family members as well as the wider church and village community, enforced dress codes, effectively excluding them from participating in cultural or religious activities.⁴⁴⁵ One reasonable inference from the above <i>talanoa</i> is that gender features in family <i>talanoa</i> as a way to reinforce an existing social practice that is widely recognised and thus acceptable, according to certain individuals holding respected status in Samoan society - matai and church ministers.</p> <p>Feelings linked to gender identity recognition.</p> <p>In one focus group, the majority of <i>fa’atama</i> respondents had rationalised that their feelings were similar to feeling like a man. A common example and indicator of this rationalisation pointed to their romantic feelings towards women. Consequently, the</p>

⁴³⁸ Talanoa with S_ACEO, 22 July 2022.

⁴³⁹ Talanoa with S_ACEO, 22 July 2022.

⁴⁴⁰ See Schmidt, above n11, at 1-17

⁴⁴¹ Talanoa with S_CEO, 13 July 2022.

⁴⁴² Talanoa with S_LP, 18 July 2022.

⁴⁴³ See Schmidt, above n61.

⁴⁴⁴ Talanoa with V&C_IT_FR1_SAM, 13 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴⁴⁵ Talanoa with V&C_IT_FR1_SAM, 13 July 2022; Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

	<p>construction and recognition of their gender identity as <i>fa'atama</i> was affirmed by these indicators.⁴⁴⁶</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>One focus group <i>fa'atama</i> respondent in New Zealand supported the rationalisation of his male feelings to highlight his affirmed gender identity as a <i>fa'atama</i> while also pointing to the differences in how <i>fa'atama</i> are perceived in Samoa and New Zealand.⁴⁴⁷</p> <p>Dependent on your individual context</p> <p><i>Fa'atama</i> interviewed shared some positive experiences about acceptance by family and community alike.⁴⁴⁸ As put by one <i>fa'atama</i> respondent it is important to highlight that “everyone is different” and may not share the same story.⁴⁴⁹ To this end, each individual, family, community and village adopts a different approach to the expression of <i>fa'asamoa</i> which is reflective of their context and thus, a “one size fits all” approach is not advisable.</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>Upon further reflection, some <i>fa'atama</i> respondents outside Samoa suggested it is largely contextual, thus, driven by their environment and whether one is accepted by their own family.⁴⁵⁰ In the same <i>fa'atama</i> focus group, another respondent agreed with this position.⁴⁵¹</p> <p>Against gender affirming (genital) surgery</p> <p>Samoa <i>fa'atama</i> respondents assert that it is against the Samoan culture which is opposed to such medical procedures being administered in Samoa. This then argues that culture much rather affirms the love and acceptance of one’s body as it is, in its current state and thus, to alter or add onto what God had originally designed is disruptive to Christian principles. While this widely held cultural and religious norm was recognised as the common perception in Samoa, there was no further discussion as to whether any challenges presented to the status quo from members of the <i>fa'atama</i> community in Samoa or the diasporic community overseas would be deemed as less Samoan or even less <i>fa'atama</i>.</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>One <i>fa'atama</i> focus group respondent was strongly opposed to gender affirming surgery in Samoa, citing cultural and religious reasons.⁴⁵²</p> <p>Lack of acceptance in family and church</p> <p>One <i>fa'atama</i> respondent noted that, “...All issue arises because family do not understand”.⁴⁵³</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>One courageous <i>fa'atama</i> respondent shared his story about trauma, thus, painting a very grim account of the explicit discrimination and prejudice he experienced from the very family and church community who refused to accept him as <i>fa'atama</i> in Samoa.⁴⁵⁴ While this is considered a common response to <i>fa'atama</i> prejudice and discrimination by family, church and the wider community in Samoa, it does not overshadow nor does it undermine the acceptance of others in full support of <i>fa'atama</i>. Also alluded to earlier by other <i>fa'atama</i> respondents in the same focus group <i>talanoa</i> comprised of international <i>fa'atama</i>, “...as for me, we have a lot of family members who are Christians and serves the church. They are not happy with the situation I am in”.⁴⁵⁵</p> <p>Lack of acceptance by the village and church community</p>
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⁴⁴⁶ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴⁴⁷ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

⁴⁴⁸ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴⁴⁹ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴⁵⁰ Talanoa with P_FGT_TRF1_NZ, 28 June 2022; Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁵¹ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁵² Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁵³ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴⁵⁴ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁴⁵⁵ Talanoa with P_FGT_TRF3_NZ, 28 June 2022; also, Talanoa with P_FGT_TRF1_NZ, 28 June 2022 and P_FGT_TRF2_NZ, 28 June 2022 shared positive *fa'atama* experiences within their respective family and church community.

	<p>One respondent indicated the stigma and prejudice towards <i>fa'atama</i> could be counteracted by more visibility and active involvement in the life of the village and church community:⁴⁵⁶</p> <p>...I participate in the women's committee activities and some <i>fa'atama</i> are not comfortable joining in these groups...I believe that this is one of the reasons why people point their fingers to us if we don't contribute into the village activities.</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>Even despite awareness of <i>fa'atama</i>, the primary issue is rejection of <i>fa'atama</i> as an acceptable gender in Samoa.⁴⁵⁷</p> <p>Attempted suicide</p> <p>Numerous reports of attempted suicide following the end of relationships, had emerged as a core theme in one <i>fa'atama</i> focus group <i>talanoa</i> in Samoa.⁴⁵⁸</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>One <i>fa'atama</i> respondent had attempted suicide after being driven out of his family home because of the heavy village fines imposed and shame it brought to his family.⁴⁵⁹</p> <p>If you have lived in Samoa or the Pacific, are human rights or gender rights considered new concepts in Samoa</p> <p>The majority of <i>fa'atama</i> respondents claim that Samoa had a pre-existing system of rights, embedded in customs and practices.⁴⁶⁰ On the other hand, gender rights, as a concept is also considered <i>new</i> based on the view it was introduced to Samoa from the West and attached to the influence of Europeans.⁴⁶¹</p> <p>Dress code enforced in Schools.</p> <p>One <i>fa'atama</i> interview respondent shares a story about his experience with the school dress code, with girls required to wear skirts as part of their school uniform. In response, he changed Schools and remained at the School which welcomed his creativity to wear a <i>sulu</i> (a skirt traditionally worn by males) instead of a skirt, he made out of the same school uniform material.⁴⁶²</p> <p>Irony – double-standards</p> <p>a. Conditional acceptance</p> <p>The conditional acceptance of some <i>fa'atama</i> in Samoa highlights the beauty and irony of Samoan culture, where even family who are not accepting of <i>fa'atama</i> siblings and children, also seek contributions from them for family, cultural and religious activities.⁴⁶³ This finding supports the perception of some <i>fa'atama</i> respondents based in New Zealand, who express resentment towards family, the church and wider community because they feel pressured to earn their way to general acceptance, either through <i>tautua</i> or by living a double life – concealing their <i>fa'atama</i> identity for the sake of the greater good.</p> <p><i>Similarities to perception of fa'atama outside Samoa</i></p> <p>This echoes the experience of international <i>fa'atama</i> respondents⁴⁶⁴</p> <p>Clothing considered more masculine than feminine.</p> <p>For the majority of respondents, the recognition of <i>fa'atama</i> status amongst <i>fa'atama</i> and to others is inextricably linked to their style of clothing. As such, the act of wearing the <i>sulu</i> (traditional lavalava predominantly worn by Samoan males) as opposed to the <i>pule tasi</i> (traditional dress predominantly worn by Samoan females) and the</p>
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⁴⁵⁶ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022. Similar to a response from another *fa'atama* respondent, V&C_FGT_VF1_SAM on 2 July 2022.

⁴⁵⁷ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁴⁵⁸ Talanoa with V&C_FGT_VF2_SAM and V&C_FGT_VF4_SAM shared similar stories to V&C_FGT_VF1_SAM on 2 July 2022. Respondent, V&C_FGT_VF1_SAM, also shared a story about being wrongfully accused of committing underage sex with a young teenager which consequently led to the breakdown of his relationship and first suicide attempt. This ties into the lack of mental health support offered to *fa'atama* in Samoa according to expert reports (see Talanoa with S_CEO, 13 July 2022 and S_LP, 18 July 2022).

⁴⁵⁹ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁴⁶⁰ Talanoa with V&C_IT_FR1_SAM, V&C_IT_FR2_SAM and V&C_IT_FR3_SAM on 13 July 2022.

⁴⁶¹ Talanoa with V&C_IT_FR1_SAM, V&C_IT_FR2_SAM and V&C_IT_FR3_SAM on 13 July 2022.

⁴⁶² Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴⁶³ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴⁶⁴ Talanoa with P_FGT_TRF2_NZ and P_FGT_TRF3_NZ on 28 June 2022.

	<p>symbolism it engenders, has no doubt disrupted traditional gender norms, Christian ideals, customary protocol and social order. The explicit assertion and recognition of this social practice, builds a sense of belonging amongst the <i>fa'atama</i> community, in the face of cultural and religious bigotry.⁴⁶⁵</p> <p>I dress up like a guy most of the time and now I grow up they have no issue at all with the way I dress and how I look. Even if I go to church, I don't like dress or skirts or any girl outfits, so I always wear my button shirt and an <i>ie lavalava</i> or <i>sulu</i> to church.</p> <p>Terminology – gender labelling</p> <p>The term “tomboy” was often used to describe females who behaved traditionally masculine or dressed like most Samoan males.⁴⁶⁶ Another <i>fa'atama</i> respondent described the way he dressed was likened to a “tomboy” as a child.⁴⁶⁷</p> <p>According to perspective of a culture heritage expert, she identifies as a woman but also identified as a tomboy as a child and recognised that she could still be described as a tomboy even as an adult woman. However, she clarified that, on the basis of her understanding of the different gender terms, that there is a difference between being described as a tomboy as an adult woman which is separate to identifying as a lesbian, or as a <i>fa'atama</i>. This links to an understanding of the specific peculiarities and multi layers attached to the cultural and political context framed to the lived reality of <i>fa'atama</i> in Samoa.⁴⁶⁸</p> <p>Gender allies</p> <p>Most of the <i>fa'atama</i> respondents identified members of their family who accepted, understood and nurtured their journey as proud members of the <i>fa'atama</i> community:⁴⁶⁹</p> <p>I was raised by my grandmother, and she is the only person that fully understands me and have fully accept me as a <i>fa'atama</i>. This is also the only person that I allow to guide me because my real parents did not raise nor understand me and my wants.</p> <p>My grandmother always loves taking me to participate in village activities for recognition and for people to see that a <i>fa'atama</i> is supporting village and customary activities.</p> <p>Another <i>fa'atama</i> respondent described the significant influence of his grandmother in affirming his identity as a <i>fa'atama</i>:⁴⁷⁰</p> <p>I had a boy cousin and we were raised together and every time my grandma would buy them boys toys like cars, guns and so forth. I never got a barbie doll or any girl toy when I was young. So yes, I was exposed to gender at a very young age...</p> <p>Familiarity with the term “SOGIEC”</p> <p>The majority of <i>fa'atama</i> respondents understood the term <i>SOGIEC</i> was similar to the more familiar term of LGBTQI+.⁴⁷¹ While another interview <i>fa'atama</i> respondent indicated he was not familiar with the term, after I explained it to him, he understood it to mean “how we behave”⁴⁷², while another <i>fa'atama</i> interview respondent was very familiar with SOGIEC:⁴⁷³</p> <p>...that's um, sexual orientation um gender identity and um...expression characteristic...</p> <p>Yeah, um in families...some mothers that have short hair ah and they dress up like, you know, they dress up normal <i>fafine</i> [women]...but they still um straight...as well as us, so we include in families...our dress up to express who we are...we identify as <i>fa'atama</i> and this is how we dress up.</p> <p>Your gender expression.</p>
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⁴⁶⁵ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

⁴⁶⁶ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

⁴⁶⁷ Talanoa with I1, 2 July 2022.

⁴⁶⁸ Vaiioleti, above n 39.

⁴⁶⁹ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁴⁷⁰ Talanoa with I1, 2 July 2022.

⁴⁷¹ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴⁷² Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴⁷³ Talanoa with V&C_IT_FR3_SAM, 13 July 2022.

	<p>The word LGBT is commonly used in Samoa in reference to members of the <i>fa'atama</i> and <i>fa'afafine</i> community. One <i>fa'atama</i> interview respondent emphasised the influence of SFA in raising awareness about the use of gender terminology:⁴⁷⁴</p> <p>...because there is another branch here in Samoa, that's why we do the community of SFA and that's the only umbrella we are under but LGBT is the common one and we know this.</p> <p>...they now know that it's spreading to the community and...for us under the SFA is the LGBT and now they use SOCIEG because people now understand and are aware of the <i>fa'atama</i> etc.</p> <p>Lack of acceptance by family</p> <p>For the majority of respondents, their self-identification as <i>fa'atama</i> has come at a cost. Some of their family have joined in their public ostracism at church or village events, and in other cases, there have been reports of physical and emotional abuse by close members in their household. "The only person that is having difficulty with accepting me as a <i>fa'atama</i> is my father".⁴⁷⁵</p> <p>Self-perception as <i>fa'atama</i></p> <p>a. Shame</p> <p>Some <i>fa'atama</i> respondents talked about the emotional toll, shame and stigma attached to family when a <i>fa'atama</i> chooses to express their identity. The culture and church are of paramount consideration in this decision. All things considered, the backlash from the church, subjecting their family to village fines imposed by the village council, amongst other factors, have caused many <i>fa'atama</i> to remain in hiding, thus, concealing their identity as <i>fa'atama</i>.⁴⁷⁶ It was further suggested by one <i>fa'atama</i> respondent that <i>fa'atama</i> should be permitted in Samoa to enable more <i>fa'atama</i> to live freely and marry whomever they choose, without fear of retribution or punishment.⁴⁷⁷ Or as summarised by another <i>fa'atama</i> respondent, they may even resort to concealing their <i>fa'atama</i> identity and live in fear to avoid becoming a problem.⁴⁷⁸</p> <p>b. Different to bisexuality</p> <p>With respect to bisexuality in Samoa, the <i>fa'atama</i> in the study did not identify as bisexual while some <i>fa'atama</i> have reported close bisexual friends working in government.⁴⁷⁹</p> <p><i>Similarities to perception of <i>fa'atama</i> outside Samoa</i></p> <p>Some <i>fa'atama</i> respondents indicated they have close friends in Samoa who identify as bisexual.⁴⁸⁰</p> <p>c. <i>Fa'atama</i> with children</p> <p>Without factoring in the reasons for children, <i>fa'atama</i> with children continue to self-identify as <i>fa'atama</i>, men or transmen.⁴⁸¹</p> <p><i>Similarities to perception of <i>fa'atama</i> outside Samoa</i></p>
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⁴⁷⁴ Talanoa with V&C_IT_FR2_SAM, 13 July 2022. At the time of the interview talanoa, a *fa'atama* representative sat in the executive committee of the Samoa *Fa'afafine* Association. The *fa'atama* (also referred to as "The Rogers") members were welcome to join the SFA, Samoa's largest SOGIEC association. Since the interview talanoa, a new independent *Fa'atama* Association was established in Samoa.

⁴⁷⁵ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

⁴⁷⁶ Talanoa with V&C_IT_FR2_SAM, 13 July 2022. The same *fa'atama* respondent claims that "...each village, has a *fa'a-fa'atama* or *fa'afafine* but they hide...there are many *fa'a-fa'atama* and *fa'afafine* hiding in the bush..." which indicates the gravity of stigma attached to those, particularly in the village setting which is known to impose hefty fines on the families of those who identify as *fa'atama* and *fa'afafine*.

⁴⁷⁷ Talanoa with V&C_IT_FR2_SAM, 13 July 2022.

⁴⁷⁸ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

⁴⁷⁹ Talanoa with V&C_IT_FR2_SAM, 13 July 2022 reported "...I know some in government, I meet and talk with them, but I can't open and tell you their names..."

⁴⁸⁰ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁸¹ Talanoa with V&C_IT_FR1_SAM, 13 July 2022.

	<p>The international <i>fa'atama</i> respondents provided in depth responses as to why <i>fa'atama</i> have children, consequently linked to marriage, or a result of horrific accounts of rape. Nonetheless, they continued to self-identify as <i>fa'atama</i>.⁴⁸²</p> <p>d. Role of fa'atama</p> <p>With respect to roles and obligations in accordance with traditional Samoan social order, the primary role of <i>fa'atama</i> complements the more traditional masculine gender activities which often revolves around work outside the home, "...I always do male chores...I can do anything I want, even build a house. I can build a home similar to what men can do".⁴⁸³</p>
Experts	<p>Self-perception as fa'atama</p> <p>a. Different to lesbian</p> <p>A leading cultural heritage expert in Samoa believes that <i>fa'atama</i> as well as <i>fa'afafine</i> are considered as "gay" but <i>fa'atama</i> are "lesbian" gay which is contrary to how <i>fa'atama</i> in the interview and focus group <i>talanoa</i> perceive themselves.⁴⁸⁴ <i>Fa'atama</i> do not identify as lesbian.</p> <p>A leading law and <i>fa'afafine</i> expert confirmed that the lesbian and bisexual community in Samoa does not participate at all in SFA and prefer remaining separate.⁴⁸⁵</p> <p>b. Different perception between rural Samoa and urban Samoa</p> <p>As clearly articulated by a leading law and <i>fa'afafine</i> expert in one <i>talanoa</i>, the perception <i>fa'atama</i> in rural and urban areas are different but not remarkably different, as the sense of disapproval still crosses over in both areas.⁴⁸⁶ In the rural context, less <i>fa'atama</i> identify openly as <i>fa'atama</i> as less dress in traditional masculine clothes, while in the urban context, the observation is quite the opposite: <i>fa'atama</i> are more inclined to dress in traditional masculine clothes and openly identify as <i>fa'atama</i>. The urban <i>fa'atama</i> are not subjected to village bylaws which generally issues village penalties to <i>fa'atama</i> who breach the village dress code whereas in the urban context, <i>fa'atama</i> are not recognised in state laws and are not punished for openly identifying as <i>fa'atama</i>.</p> <p>c. Comparison of fa'atama to fa'afafine perceptions</p> <p>In the words of a leading gender practitioner in Samoa (as alluded to earlier in the <i>fa'afafine</i> perceptions section of d. How are people from the SOGIEC community perceived in Samoa?) <i>fa'atama</i> are struggling to be accepted in comparison to <i>fa'afafine</i>.⁴⁸⁷</p> <p>As put by one leading cultural heritage expert she asserts that the general perception of <i>fa'afafine</i> is better than <i>fa'atama</i>.⁴⁸⁸</p> <p>d. Challenges to the argument that gender disparity and gender equality exists in Samoa.</p> <p>As put by a leading Samoan gender expert:⁴⁸⁹</p> <p>And so, I think in our context...if we know the boundaries of all...we shouldn't be in too much conflict with the other side of the family and our...maternal health...and so, yeah, so gender in Samoan...I have written about this topic and if you read...my writings I've spoken about that there is...no such thing as gender disparity or gender inequality in a Samoan context that...I have equal footing equal rights...equal access with my brother to ...both ends of the coins, both in my paternal and my maternal links. And so I am just as entitled to having a matai title...as my brother...I mean, I have equal rights to owning lands...equal responsibility to you know ensuring that the welfare of my family has been looked after that ... my brother will have to build buildings, build houses ensure that we have canoes for...fishing and you know travelling and I'm responsible for the internal you know, in the Samoan context "<i>o le a nu'u</i></p>

⁴⁸² Talanoa with P_FGT_TRF1_NZ, P_FGT_TRF2_NZ and P_FGT_TRF3_NZ on 28 June 2022.

⁴⁸³ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022.

⁴⁸⁴ Talanoa with V&C_GWR1, 27 June 2022.

⁴⁸⁵ Talanoa with S_LP, 18 July 2022.

⁴⁸⁶ Talanoa with S_LP, 18 July 2022.

⁴⁸⁷ Talanoa with S_CEO, 13 July 2022.

⁴⁸⁸ Talanoa with V&C_GWR1, 27 June 2022; see discussion on *fa'afafine* in Chapter 2 (see Chapter 1, "Literature Review"); see Mageo, above n 80.

⁴⁸⁹ Talanoa with S_CEO, 13 July 2022.

	<p><i>fale</i>". I looked after the inside of the house and I make sure that ...I'm producing the wealth...just to sustain...my linkages...with all my families. And so, if you have a chance to read my thesis, I'm the unpopular one amongst...the feminist movement because I speak a lot to my culture and the argument that in the <i>fa'asamoa</i>, there is no gender ...inequality...</p> <p>This affirms the distinct roles in Samoa traditionally ascribed between males and females. As such, it highlights that one is well equipped to navigate their way through any conflicting situation by maintaining relational linkages to the family and community, to ensure no boundaries are breached. It could also be inferred from the above comment that unlike generating wealth for individual gain, that wealth, in this context, has a communal focus – to mobilise and sustain family and community linkages. Thus, income from employment or the running of a commercial enterprise, and so on, if earned or generated by an untitled female member as opposed to a titled male member of the household, supports the view that there is no gender disparity in Samoa.</p> <p>Further this point, the interviewed respondent added:⁴⁹⁰</p> <p>If you look at it from the cultural perspective, now, wearing my other hat is now the Lead, the main character for...the picture, and doing the gender equality...working in Samoa where everything else is...determined by...looking at the statistics...or looking at the social problems that are happening right now. And so, in terms of statistics, if you look at...for instance, the...women in parliament, there's that huge gap...where at the moment, we only have seven women...the rest being men. Now, I think our argument here is you need to really look at what is the principle understanding and what is the...underlying principle and the core foundation of our gender...</p> <p>Language was a powerful tool in the construction of gender in Samoa laws and its parliamentary system. This is problematic as it is heavily influenced by western notions of gender. What is missing is a much deeper and robust examination into the customary principles which underpin gender equality in Samoa, as put so eloquently by one interviewed Samoan gender expert:⁴⁹¹</p> <p>...I will be presenting a chapter tomorrow about...this case. It's an ANU [Australian National University] conference where I'm looking at...gender from the perspective of a Samoan woman, where language has contributed a lot to the construct of gender...my position in this chapter that I'm presenting...is what is the context, the Samoan context...for gender equality if our ideology or health if the philosophical underpinning in Samoan context for gender equality is that me and my brother...have equal footing and have equal access...then why do I have to take up that Chiefly title. What's happening to my <i>sa'o tamaitai</i> title which the Samoans referred to as the equivalent of the Chiefly title so it's just a matter of someone's waking up perhaps looking closely to the south to maintain my title as if I want to get in Parliament and if we're really serious about Samoan's, there is no inequality in Samoa then we really have to consider hat...</p>
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Table 6: Perception of Fa'atama outside Samoa

Talanoa data	Core themes
Fa'atama focus group and interviews	<p>Sinners</p> <p>In the <i>talanoa</i>, a <i>fa'atama</i> focus group respondent in New Zealand indicated that <i>fa'atama</i> are perceived as sinners more by the public rather than their family.⁴⁹² The majority of the respondents, claim that people generally consider <i>fa'atama</i> as "sinners" in Samoa as well as New Zealand:⁴⁹³</p> <p>We all know that some people see us as sinners saying that we are not doing what we supposed to do. As for me, we all go to church, and we are Christians. From the beginning it is stated that God created two kinds of people. One day a lay</p>

⁴⁹⁰ Talanoa with S_CEO, 13 July 2022.

⁴⁹¹ Talanoa with S_CEO, 13 July 2022.

⁴⁹² Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁴⁹³ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022; Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

preacher from the village of Falealili states that God created people but there are different stages or different kind of people he created...In my village, there are customary laws that guide the village, and I am the only *fa'atama* compared to the number of *fa'afafine* in my village...My response to the question is that although God created two kind of people but he also created another two which is us *fa'atama* and *fa'afafine*.

General perception of *fa'atama*

Based on the *talanoa* data, the most dominant perception regarding genders and/or references to gender communities in Samoa, was heavily influenced by the *fa'atama* respondents lived experience, within each of their respective contexts – family, community and so on. For one Samoan *fa'atama* respondent, born and raised in New Zealand, he explicitly listed the following genders - female, transgender, queer and *fa'afafine* sisters as the main genders recognised by Samoan communities in New Zealand.⁴⁹⁴ He emphasised that "...if they did recognize us...this would have been done a long time ago"⁴⁹⁵ as in, *fa'atama* recognition would not be considered an anomaly in Samoa. In comparison to the *talanoa* with other *fa'atama* respondents born and raised in Samoa, the genders recognised were "...*fa'atama*, the gays, the girls, the boys, the men and the women, old lady and old man".⁴⁹⁶ Similarly, another *fa'atama* interview respondent highlighted that the "Samoan community recognize the men...the female, male...*fa'afafine*, *fa'atama*...they just recognized us, but they never accept us".⁴⁹⁷ His response complemented a story shared by a *fa'atama* respondent in New Zealand, who reflected on his experience as a *fa'atama* in Samoa. At this point, it became vividly clear that the issue is not necessarily the recognition of their *fa'atama* identity within the family context, as it is about the acceptance they seek from their family, as *fa'atama*. It is established that at the core of *fa'atama* recognition are the conditions of safety and security required to enable *fa'atama* to freely express who they are to self-identity as *fa'atama* but also feel a sense of acceptance as *fa'atama* by the wider community, starting first within their family.⁴⁹⁸

Based on the *talanoa* data, one diasporic Samoan *fa'atama* was born and raised in New Zealand. His perspective about life as a *fa'atama* in New Zealand was discussed in contrast to *fa'atama* from Samoa, American Samoa and the United States. The reason he argues that his experience is different, is supported by the argument that New Zealand laws promote protection and human rights, while encouraging freedom of expression, gender diversity, and so on.⁴⁹⁹ Although he emphasises that the Samoan culture is less strong in New Zealand, he rationalises the similarity is when one is still living with parents and thus, to live under their rules, is a barrier. He clarifies this point by stating that his experience is less harsh than if he lived as a *fa'atama* in Samoa, though he has not lived in Samoa. By providing an example of New Zealand Schools, he emphasised that they encourage students to explore their sexuality and gender, an approach he see as different to the Schools in Samoa.⁵⁰⁰

In New Zealand, he agreed that the Church is equivalent to a Samoan village. Consequently, his experience in the Church, is that they are not embracing of the SOGIEC community, or *fa'atama* as a whole. He claims that they only accept him because of what he contributes to the church, which undermines whether his Church community accept him for him or only on the basis of his musical leadership talents.⁵⁰¹

Accordingly, a leading *fa'atama* advocate in Samoa, challenged why the Samoan Church community in New Zealand are trying to replicate and hold onto the same cultural

⁴⁹⁴ Talanoa with V&C_IT_FR1_NZ, 24 June 2022.

⁴⁹⁵ Talanoa with V&C_IT_FR1_NZ, 24 June 2022.

⁴⁹⁶ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁴⁹⁷ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁴⁹⁸ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁴⁹⁹ Talanoa with P_FGT_TRF4_NZ, 28 June 2022.

⁵⁰⁰ Talanoa with V&C_IT_FR1_NZ, 24 June 2022.

⁵⁰¹ Talanoa with V&C_IT_FR1_NZ, 24 June 2022. I note, during the talanoa, he also emphasised his relational connection to the Pastor of the Church where he leads the Music Ministry, who he indicated was his father. His comments echoed with comments about *fa'afafine* in Samoa as shared by a leading *fa'afafine* and law advocate, S_LP, 18 July 2022, talanoa on 18 July 2022.

	<p>structures and values from Samoa, as it contradicts New Zealand’s human rights agenda:⁵⁰²</p> <p>This is um so weird to me because New Zealand um prioritise the human rights. And um...I don’t accept that. You know, and I never expect that thing happen in um whatever in Samoan community in New Zealand. They live in New Zealand. New Zealand has the right.</p> <p>But ah why they bring in the Samoan culture here. Why they bringing, it’s like they um cross those paths. This is Maorian land. Yeah. Hey, I related to this land, too....Yes, um what I know now, for Samoan people and all the Islanders...they live in New Zealand. It’s like they bringing their culture here and ah New Zealand has their own culture...</p> <p>a. Is the subject of gender part of your family conversations (talanoa)</p> <p>According to the New Zealand Samoan <i>fa’atama</i> respondent, what prompts family <i>talanoa</i> on gender usually revolves around religion and what features on television or social media, particularly as it relates to SOGIEC. This, then, encourages his family to discuss gender with him as a way to stay informed, raise their level of awareness and understanding about people who identify as <i>fa’atama</i> like him; as well as emphasising the role of religion which is often opposed to gender diversity.⁵⁰³</p> <p>Or as summarised by one <i>fa’atama</i> interview respondent, “Yeah, it’s like a daily issue to every family...”⁵⁰⁴</p> <p>a. How is gender perceived in your family?</p> <p>The role of religion plays a significant role in the perception of gender in the family environment. Similar to the Samoa context, marked by hierarchy, status and obligations performed in distinct roles, it follows that the recognition ascribed to individual <i>fa’atama</i> in their respective family and village contexts, supports the view that those who collectively recognise and accept this social practice, as in individuals who self-identify as <i>fa’atama</i>, must also hold a respected status in Samoan society. (This will be discussed further in the chapter on <i>Theory</i>). Some clear roles with respected status are gender allies, including grandparents as mentioned in <i>talanoa</i> data, as well as the chiefs, parents, church ministers, and so on.⁵⁰⁵ Comparatively, <i>fa’afafine</i> contexts, as established in the <i>talanoa</i> data, what elevated their status of respect in Samoan society is the perception that they hold status due to their many talents according to members of Samoan society holding respected status, particularly in religious and customary contexts – <i>Faifeau</i> (Church Ministers) and Chief (<i>Matai</i>).⁵⁰⁶ As a whole, it provides a deeper context and much needed insight to the broader picture, as illustrated by one interview <i>fa’atama</i> respondent in New Zealand.⁵⁰⁷</p> <p>As reported by one <i>fa’atama</i> interview respondent, the older members of his family hold respected status, i.e., his aunts and uncles.⁵⁰⁸ They were collectively recognised by the family as <i>fa’afafine</i> and <i>fa’atama</i> respectively. What he highlighted here was the social practice to which certain people, in this case, his grandparents, are recognised as holding respected status and as such, they recognised his <i>fa’atama</i> identity as being acceptable alongside other members of the family who identified as <i>fa’atama</i> and/or <i>fa’afafine</i>. His grandma was an <i>Alii Matai</i> (High Chief) of her family and thus, it establishes her respected status as a Chief.⁵⁰⁹ On this view, the acceptance from his grandparents most certainly justifies this rare phenomenon, or perhaps, it pathed the way for an unusually high incidence of <i>fa’atama</i> and <i>fa’afafine</i> representation within one family and village, particularly in a village context, where most SOGIE members</p>
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⁵⁰² Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁰³ Talanoa with V&C_IT_FR1_NZ, 24 June 2022.

⁵⁰⁴ Talanoa with V&C_IT_FR3_NZ, 24 June 2022. Another interview respondent, V&C_IT_FR2_NZ, 24 June 2022, agreed with this comment.

⁵⁰⁵ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁰⁶ Talanoa with S_LP, 18 July 2022.

⁵⁰⁷ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁰⁸ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁰⁹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022 where his grandma is from, nu’u Suatia and Vaie’e – this is one family. While *fa’atama* and *fa’afafine* are generally accepted, there are still some reservations held against *fa’afafine* participation in the aualuma [young untitled women] and *fa’atama* participation in the taulealea [young untitled men].

	<p>are reportedly in hiding, fined or banished.⁵¹⁰ Upon further reflection, he shared a story about how he learnt how to dress from observing his grandpa and how his grandma's status as a high chief, protected him against the judgment of matai who questioned how he dressed as a man during a family meeting in the village.⁵¹¹</p> <p>b. Lack of acceptance by family</p> <p>In terms of the position that gender discrimination is built into the culture, it was suggested that the real heart of the problem lies within the family. In some cases, the family cultivated an unsafe atmosphere which enabled a certain degree of gender discriminatory behaviour in the form of physical and emotional abuse towards members who self-identified as <i>fa'atama</i>.⁵¹²</p> <p>Well in Pago, I don't know because where I grew up you know, culture is not really the problem in Pago or gender is not the real problem nor culture is not the real problem. The problem of us as <i>fa'atama</i> is within our families. Some of us brothers, their parents disown them and...they had to stand by themselves in order to fight for who they are, but the culture is not really the problem.</p> <p>c. Lack of acceptance by village and church community</p> <p>In the context of what is deemed as acceptable social practice, there is a certain level of awareness of <i>fa'atama</i> which is often dismissed as unacceptable.⁵¹³</p> <p><i>Similarities to perception of fa'atama in Samoa</i></p> <p>One of the key drivers for active involvement and visibility is to counteract stigma attached to <i>fa'atama</i>.⁵¹⁴</p> <p>Irony – double-standards</p> <p>a. Conditional acceptance</p> <p>The sad reality for this <i>fa'atama</i> respondent is that his family disowned him for being <i>fa'atama</i> while also refusing to acknowledge or come to his aid as he faced ongoing persecution from the church and village. Ironically, his family still felt a sense of entitlement when seeking contributions from him to support family, church or village financial commitments.⁵¹⁵</p> <p>This respondent reflected further on his above comment. The sense of freedom he now experiences in New Zealand, highlights the stark contrast between the anti-discrimination protection and human rights safeguards provided by the New Zealand legal system compared to the influence of the church and village governance, which is what he endured in Samoa, “ Now that I am in New Zealand, and under the law and regulations of New Zealand I will make my own decisions and I will also be responsible for what's good and what's bad”.⁵¹⁶</p> <p>Another <i>fa'atama</i> respondent with a more positive coming out experience, agrees with the above comment raised in the <i>talanoa</i>.⁵¹⁷ There are some families and communities that recognise <i>fa'atama</i> participation and service to the community. However, once a <i>fa'atama</i> invites their partner along to family and village events, this level of visibility is considered offensive and in some cases, they are ordered to leave.⁵¹⁸</p> <p>How is gender perceived by friends?</p> <p>The majority of interview <i>talanoa</i> respondents shared the view that their friends in New Zealand accepted them as <i>fa'atama</i>⁵¹⁹, but some were not accepted by family and friends in Samoa.⁵²⁰ Thus, the perception of friends is not as important. Rather, the social practice whereby certain people in Samoan society are recognised by other</p>
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⁵¹⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022. Faleasiu is the name of the village mentioned in the talanoa with a large number of *fa'atama*.

⁵¹¹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022

⁵¹² Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

⁵¹³ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁵¹⁴ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022. Similar to a response from another *fa'atama* respondent, V&C_FGT_VF1_SAM on 2 July 2022.

⁵¹⁵ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁵¹⁶ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁵¹⁷ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵¹⁸ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵¹⁹ Talanoa with V&C_IT_FR1_NZ, V&C_IT_FR2_NZ and V&C_IT_FR3_NZ on 24 June 2022.

⁵²⁰ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

	<p>people as holding respected status to accept social practices, thus, gives status to those who are accepted. Consequently, friends do not hold such respected status in comparison to grandparents in Samoan society.</p> <p>Common perception of gender amongst the Samoan community</p> <p>The <i>talanoa</i> data captures how gender is commonly perceived while demonstrating the varied opinions and interpretations this question evoked across the interviewed <i>fa'atama</i> respondents. Thus, the act of giving unsolicited advice emerged as some respondents assert how others felt obliged to impose their perception about how <i>fa'atama</i> should live and behave. This view was not restricted to the Samoan community in New Zealand, as it is a strongly held perception in Samoa, too.⁵²¹</p> <p>Similarly, an interview <i>fa'atama</i> respondent reflected on the opinions of others concerning his gender identity as a <i>fa'atama</i>, when contextualised to other more pressing matters, to which he attached more priority, such as providing for his family and parents.⁵²²</p> <p>In one <i>talanoa</i> interview, the <i>fa'atama</i> respondent shared his story about introducing himself as a “married transman” at an outreach in the village of Falealili.⁵²³ During his introduction, he was challenged by the Village Mayors (<i>Pule Nu'u</i>) who showed their obvious disdain to his public declaration as a <i>fa'atama</i>. But rather than showing any fear, he relied heavily on his knowledge of family history and genealogy which connected him to the village, specifically to the titles of the paramount chiefs. A bold act which resonated well with the Village Mayors. Although his story highlights the importance of being prepared with a defence in the face of public opposition, for <i>fa'atama</i> to cultivate an understanding about their cultural identity and family history. A doctoral researcher describes <i>fa'asinomaga</i> as “...a concept that encompasses identification with a specific place, kinship ties, belonging, genealogy, family legacy, and identity”⁵²⁴ for example, <i>fanua Samoa</i> (customary land) is considered an asset that was earned through the hard work of ancestors. The doctoral researcher referred to earlier identified <i>fa'afafine</i>, as a group, facing potential vulnerability in the context of land tenure, while noting one <i>fa'afafine</i> respondent who stated that matai commonly allocate customary land in the village to support married couples starting new families, a practice not readily done for <i>fa'afafine</i>.⁵²⁵ In this context, to determine the extent of similar experiences experienced by <i>fa'atama</i> is required to avoid essentialist and homogenous understandings of diverse gender identity.</p> <p>As one interviewed <i>fa'atama</i> respondent asserts, knowledge of <i>fa'asinomaga</i>, in the context of <i>matai</i> titles and land titles, serves as a powerful tool to break down the oppressive religious and cultural barriers, particularly in the village setting, where even the most vocal objectors are open to reason. His story, mentioned earlier, further emphasises, the reliance placed on members of Samoan society with respected status, in this case, the Village Mayors recognition of him as a <i>fa'atama</i>, which potentially facilitated <i>fa'atama</i> recognition, throughout the village, which also comprised of members of the <i>fa'afafine</i> community, as a widely acceptable form of social practice.⁵²⁶</p> <p>Factors that impact the perception of gender in Samoa</p> <p>There is a myriad of factors which contribute to the perception of gender. In each <i>talanoa</i>, the <i>fa'atama</i> respondents explore the principal factors which impact gender perceptions, most of which pose some unique challenges. The <i>talanoa</i> data highlights the cultural principles and practices governing interpersonal relationships and human-environment relationships. What is intriguing is the most common feature of <i>alofa</i> (love), commonly expressed in respectful reciprocal relationships in Samoa, is not always the most obvious, in the context of gender discrimination.⁵²⁷</p>
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⁵²¹ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵²² Talanoa with V&C_IT_FR3_NZ on 24 June 2022. Interview respondent, V&C_IT_FR2_NZ agrees with this view.

⁵²³ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵²⁴ Sumeo, above n 164, at 155.

⁵²⁵ At 155.

⁵²⁶ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵²⁷ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

	<p>...we grew up with the culture in Samoa. In the culture...we have this saying in Samoa, the <i>va tapuia</i> [sacred space] (bilingual) um it's like a respectful way between you and your brother, between you and your parents, between you and other people...so for me, there's ah <i>alofa</i> [love], there's love between us...in our environment in Samoa, especially...with our families.</p> <p>But um there's a pride there and um I know our families love us...but...they're so <i>fia kagaga</i> (high minded) (bilingual)...in other words. Yeah.</p> <p>Samoa's history is marked by the influence of colonisation. As noted by one <i>fa'atama</i> respondent, he argued the different perceptions to gender, when comparing perceptions before colonisation and post colonisation.⁵²⁸ This comment is supported by another <i>fa'atama</i> interview respondent, thus highlighting the oppressive influence of Christianity in multiple contexts – family, church, village – consequently, leading to the ostracism and exclusion of <i>fa'atama</i>.⁵²⁹</p> <p>The above <i>fa'atama</i> respondent, demonstrated his negative experience in one Church, but it did not undermine the experience he shared in his previous Church where he was actively involved in the youth group and felt accepted by the Pastor who held respected status in the Church.⁵³⁰ Ironically, the double-standards and disrespect experienced by some of the <i>fa'atama</i> respondents directly undermines the <i>va tapuia</i> at the core of Samoan relationships.⁵³¹</p> <p>The influence of Christianity is entrenched in the binary and heteronormative gender norms adopted as a prerequisite to participation in church, family and cultural activities. Consequently, the impact on the perception of gender is oppressive to the non-conforming individuals. While there are <i>fa'atama</i> who are accepted by their church, family and village community, there is still an overwhelming consensus that <i>fa'atama</i> reflect their identity in the way they dress and their style of hair, which does not comply with the dress code enforced in most villages. In this regard, the dress code imposes a traditional style of conservative dress for females and males. The dress code prohibits females from cutting their hair short and wearing clothes commonly worn by males.</p> <p><i>Similarities to perception of fa'atama in Samoa</i></p> <p>However, <i>fa'atama</i> predominantly express their identity through cutting their hair short and wearing clothes commonly worn by males, a form of social practice widely recognised amongst the <i>fa'atama</i> community, but largely frowned upon in Samoan society.⁵³²</p> <p>Family violence in the home is often ignored to prioritise cultural obligations</p> <p>The sad reality faced by some <i>fa'atama</i> in Samoa are disturbing reports of gender-based violence in the home which, as reported in some cases, is overlooked as other cultural obligations take first priority.⁵³³ Similarly, another respondent reflected on some of his traumatic childhood experiences in the home where he survived physical abuse on a daily basis from family who would not accept him as <i>fa'atama</i>.⁵³⁴</p> <p>Existing data shows that rates of gender-based violence are high, the 2nd Family Safety Study was carried out in 2017 and the Office of the Ombudsman carried out a national inquiry on family violence in 2018, and the Domestic Violence module was carried out as part of the DHS/MIC survey in 2019.⁵³⁵ There have been numerous steps to strengthen legislation, awareness campaigns and support services, however there</p>
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⁵²⁸ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵²⁹ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵³⁰ Talanoa with V&C_IT_FR2_NZ, 24 June 2022. He praised the Ekalesia Faapotopotoga Kerisiano (EFKS)/ Congregational Christian Church Samoa in Samoa for promoting inclusion and gender diversity.

⁵³¹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵³² Talanoa with V&C_IT_FR3_SAM, 13 July 2022.

⁵³³ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵³⁴ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵³⁵ Ministry of Women, Community and Social Development. (2017). 2017 Samoa family safety study. Sogi: MWCSO; Government of Samoa, Office of the Ombudsman/National Human Rights Institution. 2018. National Public Inquiry into Family Violence in Samoa. Apia. https://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf; Multiple Indicator Cluster Survey. 2020. Fact Sheet – Samoa DHS – MICS 2019-2020 (Preliminary Results – July 2020) Apia.

	<p>continue to be few integrated protocols between police, health, and education for early identification and support. The available data in Samoa shows that violence against women 15-49 is most commonly perpetrated by – in order of reported prevalence – a mother or step-mother (65.9%), father or step-father (53.7%), husband or partner (37.5%), or teacher (17%).⁵³⁶ This differs from the more common patterns of violence in the Pacific and also in Asia, where women are more likely to have experienced intimate partner violence. In Samoa, as in Cook Islands and Tonga, women are far more likely to have experienced physical violence perpetrated by people other than partners, notably parents or parents-in-law and particularly women. This highlights the urgency of a GTA to gender-based violence, which does not treat women as a homogenous category but seeks to uncover and challenge the norms underpinning a variety of power relations.</p> <p>Church – prohibit freedom of expression in clothing.</p> <p>There is much emphasis on the Church, being an institutional construct of colonisation, having influenced the dress code policy which is widely enforced in the church and village context. Thus, prohibiting <i>fa'atama</i> from freely expressing their identity in the way they dress.⁵³⁷</p> <p>Another <i>fa'atama</i> respondent supports the comment above, having refrained from participation in his Church youth group because of his refusal to wear “ladies’ attire” because he preferred to “wear men’s clothes”.⁵³⁸ His firm decision to not comply, was conflicting, as it caused his parents to think that he had no respect for them.⁵³⁹ As mentioned earlier, parents hold respected status in Samoan society and thus, their status determines whether their child may continue to self-identify as <i>fa'atama</i> or not. This form of social practice, enabling discrimination against <i>fa'atama</i>, is a social practice which gained recognition first within the family. According to one <i>fa'atama</i> respondent, his experience empowered him to exercise his right to speak up against any form of discriminative treatment targeting his identity as a <i>fa'atama</i>. He also sheds light on raising public awareness and educating people about the best way to address <i>fa'atama</i>, if ever in doubt.⁵⁴⁰</p> <p>Cultural obligations prioritised first.</p> <p>Cultural obligations (<i>fa'alavelave</i>) to the wider family, church and village, in this context, often takes precedence over the safety and wellbeing of their own children. The added pressure to contribute or serve (<i>tautua</i>) to such commitments in the form of financial or material gifts is likened to the act of tithing in Churches.⁵⁴¹</p> <p>In comparison, the <i>fa'atama</i> respondents highlighted the contributions of the <i>fa'afafine</i> community, which invariably elevated their status, as well as their recognition and acceptance as <i>fa'afafine</i>.⁵⁴²</p> <p>Self-identification as <i>fa'atama</i></p> <p>The <i>fa'atama</i> interviewed in New Zealand first identified as <i>fa'atama</i> at School, at “12 years old or 11”⁵⁴³, while one <i>fa'atama</i> respondent born and raised in New Zealand “always knew”⁵⁴⁴. Or as put by one leading <i>fa'atama</i> advocate, he acknowledges the oral recognition of <i>fa'atama</i> as a cultural identity and term established by <i>fa'atama</i> for <i>fa'atama</i>. Thus, he also promotes the role of law reform in advancing the official written recognition of <i>fa'atama</i> status in the laws alongside other genders.⁵⁴⁵</p> <p>Well, <i>fa'atama</i> is um a manner of a man, <i>fa'atama</i>...</p> <p>So, they will never label us, but we're so thankful that ah we came up with a term, terminology, <i>fa'atama</i>...that's our cultural identity. We have the cultural identity. See?... <i>fa'atama</i> and <i>fa'afafine</i>. So, in Samoa...I think...the only</p>
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⁵³⁶ Multiple Indicator Cluster Survey. 2020. Fact Sheet – Samoa DHS – MICS 2019-2020 (Preliminary Results – July 2020) Apia.

⁵³⁷ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵³⁸ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵³⁹ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵⁴⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁴¹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁴² Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁴³ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵⁴⁴ Talanoa with V&C_IT_FR1_NZ, 24 June 2022.

⁵⁴⁵ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

	<p>problem is...because we're not having...anything to help us through that law reform...thing to...to make us recognize in chapters, not only verbal but...put us there...like <i>fa'atama</i>, <i>fa'afafine</i>, <i>tama</i>, <i>teine</i>, <i>ali'i</i>, <i>tamaitai</i>...</p> <p>By redefining and reappropriating a historical construct of colonisation, in this context, Church and Christian ideology, this <i>fa'atama</i> respondent reflects on what believing in God fully represents. By deploying his understanding about Christian ideology, rather as an instrument of inclusion and acceptance, consequently, this forms the legitimate basis and thus, defence, to his rightful claim of self-identification as a <i>fa'atama</i>.⁵⁴⁶</p> <p>a. Different to lesbian</p> <p><i>Fa'atama</i> respondents' self-perception is vital in this context. In the words of one respondent, he described who he is based on the role he performs which he distinguished from his perception towards the lesbian community.⁵⁴⁷ Another <i>fa'atama</i> respondent agreed with the above comment from the same focus group <i>talanoa</i> and added that <i>fa'atama</i> is a Samoan cultural phenomenon, unique to Samoa. Thus, he distinguishes <i>fa'atama</i> to diasporic <i>fa'atama</i>, subsumed as members of the lesbian community which often lacks a culturally equivalent Samoan term.⁵⁴⁸</p> <p>Our New Zealand <i>talanoa</i> data from <i>fa'atama</i> indicate the belief that lesbians are not in Samoa or have not publicly identified as lesbian.⁵⁴⁹ A leading gender expert in Samoa claims that lesbians are extended "...the same...perspective, same treatment and the same reaction" as <i>fa'atama</i>.⁵⁵⁰</p> <p>b. Transman vs Man</p> <p>As one <i>fa'atama</i> respondent put it, "Yes, we are transman...in a manner of a man".^{170F212F}⁵⁵¹ Another <i>fa'atama</i> respondent defined <i>fa'atama</i> as a boy as opposed to transman in the same focus group, "<i>Fa'atama</i> means boy...".⁵⁵²</p> <p>c. No to childbirth not children</p> <p>However, in the same focus group <i>talanoa</i>, another <i>fa'atama</i> respondent distinguished <i>fa'atama</i> from lesbian based on the choice to pro-create. <i>Fa'atama</i> predominantly choose to not bear children while by comparison, it is speculated that lesbians are more likely to consider the option of childbirth.⁵⁵³ One <i>fa'atama</i> respondent made it explicitly clear that he also chose to not give birth to children although he has legally adopted children of his own.⁵⁵⁴ But the added pressure to conform and have children is exacerbated from family who may genuinely not realise the insensitive nature or gravity of their comments.⁵⁵⁵</p> <p>d. Fa'atama with children</p> <p>One <i>fa'atama</i> respondent raised an interesting open question in one focus group <i>talanoa</i>, thus, seeking clarification from other <i>fa'atama</i> present about what appears to be the inclusion/exclusion criteria or legitimacy to whether <i>fa'atama</i> with children would still be considered <i>fa'atama</i> or lesbian.⁵⁵⁶ In response, one <i>fa'atama</i> respondent adopted an inclusive approach while acknowledging that there are many reasons as to why a <i>fa'atama</i> has chosen to have children, some of which are driven by genuine convictions while in some cases, <i>fa'atama</i> were raped and thus, chose to still give birth. Despite a <i>fa'atama</i>'s reason for children, it should not restrict their ability to exercise their right to feel and self-identify as <i>fa'atama</i>.⁵⁵⁷</p>
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⁵⁴⁶Talanoa with V&C_IT_FR3_NZ, 24 June 2022; see Kabutaulaka, above n 159, at 110.

⁵⁴⁷ Talanoa with P_FGT_TRF4_NZ, 28 June 2022; P_FGT_TRF1_NZ, 28 June 2022 also agreed to the difference between *fa'atama* and lesbian.

⁵⁴⁸ Talanoa with P_FGT_TRF2_NZ, 28 June 2022; both P_FGT_TRF4_NZ and P_FGT_TRF1_NZ also agreed with P_FGT_TRF2_NZ in the same *talanoa* focus group.

⁵⁴⁹ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵⁵⁰ Talanoa with S_CEO, 13 July 2022.

⁵⁵¹ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵⁵² Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁵⁵³ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁵⁵⁴ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵⁵⁵ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

⁵⁵⁶ Talanoa with P_FGT_TRF1_NZ, 28 June 2022; This is not a question I put forward to the focus group *talanoa* but raised by one of the *fa'atama* focus group respondents'.

⁵⁵⁷ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

	<p>Now this response encouraged the rest of the <i>fa'atama</i> respondents to share more stories about the <i>fa'atama</i> who married men and had children.⁵⁵⁸ The added pressure to conform and have children is exacerbated from family.⁵⁵⁹</p> <p>e. Role of <i>fa'atama</i></p> <p>The role of <i>fa'atama</i>, in the words of one <i>fa'atama</i> expert is “God appointed” and ties to <i>tautua</i> (service) to the family, village and church they serve.⁵⁶⁰ Accordingly, he highlights that no specific roles are assigned to <i>fa'atama</i>, while emphasising the flexibility and freedom he has to “play two roles”, participating in traditionally male dominated village activities through the <i>taulealea</i>, and “doing the men’s job” preparing the <i>umu</i>; or choosing much rather to participate in the traditionally female dominated village activities in the through the <i>aualuma</i>:⁵⁶¹</p> <p>...what I know...is that...we’re not specifically have our own roles to play, you know ah, Samoan life but for me...we can still...active...help out um in whatever, like <i>taulealea</i> [young untitled men] and <i>aualuma</i> [young untitled women]. We can be <i>taulealea</i> [young untitled men], we can be <i>aualuma</i> [young untitled women], because we can...be ah like in other words...we can flex it in...in <i>taulealea</i> [young untitled men] side and <i>aualuma</i> [young untitled women] side.</p> <p>But...what we’re doing in our own families in villages back in Samoa, from my own side...I do the men’s job. Yes...I can take care of my own Dad and my own Mum. I can be a man, I can be a woman, you know, I can take care, my Dad is, and he also...comfortable with me when he’s sick because...he already knew that I’m a <i>fa'atama</i>. So, I can play two roles, like, in my own family. I can take care of my Mum; I can take care of my Dad...</p> <p>But, um yeah <i>fa'atama</i>, it’s a manner of man and...we do mens chore. We can make <i>umu</i> [stove underground] for the family, we can...mingle together with the <i>taulealea</i> [young untitled men] doing the...village <i>feaus</i> [chores], like making <i>umu</i> [stove underground] for the <i>matais</i> [chiefs], you know, things like that...</p> <p>The above comment echoed with another <i>fa'atama</i> respondent who reinforces that <i>fa'atama</i> can perform and function across both female and male contexts, preparing the <i>umu</i>, a role traditionally reserved for men, as well as some of the daily chores inside the home:⁵⁶²</p> <p><i>Fa'atama</i> is more like a male who serves and does all the task of a male in the family. For <i>fa'atama</i> they both do female and male tasks. When I was in Samoa, I am the one to gathers the coconuts, husks the coconuts, and prepare the ‘<i>umu</i>’ or the hot stove underground food preparation my family while my brother is still sleeping.</p> <p>I also clear the grass and assist my mother with the chores inside the house. The only chores I cannot do is the laundry because my sisters are responsible for it. But overall, because I am the eldest in the family, it was my duty of care to complete all the tasks in my family.</p> <p>This supports the view of the New Zealand based <i>fa'atama</i> respondents, that <i>fa'atama</i> are not strictly assigned any roles in Samoan society, while also noting the flexibility to participate in traditionally masculine roles or the more feminine roles; or participate in either the <i>aualuma</i> or <i>taulealea</i>.⁵⁶³</p> <p>f. Against gender affirming (genital) surgery</p> <p>One <i>fa'atama</i> respondent is strongly opposed to gender affirming (genital) surgery without clarifying whether this is a widely held position in the <i>fa'atama</i> community or whether, the <i>fa'atama</i> members who decide to undergo surgery will jeopardise their status as <i>fa'atama</i>.⁵⁶⁴</p>
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⁵⁵⁸ Talanoa with P_FGT_TRF3_NZ, 28 June 2022.

⁵⁵⁹ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵⁶⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁶¹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁶² Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵⁶³ Talanoa with V&C_IT_FR3_NZ, 24 June 2022. Perhaps this view should be subject to the disclaimer that it varies depending on context – church, family, village and so on.

⁵⁶⁴ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

	<p>g. Tautua: Human rights advocacy in the community</p> <p>The <i>fa'atama</i> respondent adopts the same approach, as alluded to earlier, to legitimise their right to live freely as <i>fa'atama</i>. As <i>fa'atama tautua</i> to the village in the form of contributions (altruistic service, financial and material gifting), on the basis of their <i>tautua</i>, a widely recognised social practice, respectful and reciprocal obligations are imposed upon <i>fa'atama</i> status should, thus, be elevated and recognised. This resonates with the opinion put forward by a gender expert in Samoa (which will be discussed later in <i>xiii Challenges to the argument that gender disparity and gender equality exists in Samoa</i>), that reliance on contributions help to sustain family and community linkages.⁵⁶⁵</p> <p>However, in applying a deeper cultural understanding to the <i>fa'atama</i> human rights context, there are cultural nuances tied to matai leadership that are not always apparent at face value. This includes giving priority to the older members of the family first to take up matai titles; and in most cases, you cannot take up the same title as your father and must wait until he has passed away, after which a future successor is elected; or in some cases, a village <i>faiga fa'avae</i> permits bestowing <i>matai</i> titles to men only, excluding women, <i>fa'atama</i> and <i>fa'afafine</i>.⁵⁶⁶</p> <p>It is a tragic dilemma, indeed, when <i>fa'atama tautua</i> to their family, their contributions are not reciprocated when their family do not accept them as <i>fa'atama</i>. According to a <i>fa'atama</i> respondent:⁵⁶⁷</p> <p style="padding-left: 40px;">I also work hard and provide for my family, and no matter how tired I am, I still work to ensure that food is on the table but still I cannot be accepted by my family especially my brother in our family.</p> <p style="padding-left: 40px;">Given all the good hard work, I will never be accepted because I am a <i>fa'atama</i>.</p> <p style="padding-left: 40px;">I am also my father's right hand for his chores, but the only issue is being a <i>fa'atama</i>.</p> <p>h. Prison reform</p> <p>During an interview <i>talanoa</i>, a <i>fa'atama</i> human rights advocate discussed his experience with respect to a workshop that he attended which was hosted by the Samoa Ministry of Police and Prisons. During the workshop, he reflected on a story he shared (below) to raise Police awareness about some of the problems faced by <i>fa'atama</i> sharing prison cells with women in prison. In response, the Police laughed at his proposal to place <i>fa'atama</i> inmates in separate cells to the female inmates to ensure <i>fa'atama</i> inmates are not subjected to physical harm from female inmates in the same cell, some of which are either against their sexual activity with the other female inmates or in some cases, jealous lovers.⁵⁶⁸</p> <p>i. If you have lived in Samoa or the Pacific, are human rights or gender rights considered new concepts in Samoa</p> <p>The majority of <i>fa'atama</i> respondents agree that human rights, as a concept, is new:⁵⁶⁹</p> <p style="padding-left: 40px;">...we just knew human rights and plus...I don't even know if we have the gender rights, not yet...</p> <p style="padding-left: 40px;">...human rights in Samoa...I think it's new...</p> <p>Further to the above, he undermined his response, by claiming that he was unsure about whether Samoa has gender rights.⁵⁷⁰</p>
Experts	<p>Perception of fa'atama</p> <p>a. Tautua: Human rights advocacy in the community</p> <p>The <i>fa'atama</i> respondent adopts the same approach, as alluded to earlier, to legitimise their right to live freely as <i>fa'atama</i>. As <i>fa'atama tautua</i> to the village in the form of contributions (altruistic service, financial and material gifting), on the basis of their <i>tautua</i>, a widely recognised social practice, respectful and reciprocal obligations are imposed upon <i>fa'atama</i> status should, thus, be elevated and recognised. This resonates with the opinion put forward by a gender expert in Samoa (which will be discussed later in <i>xiii Challenges to the argument that gender disparity and gender equality exists</i></p>

⁵⁶⁵ Talanoa with S_CEO, 13 July 2022.

⁵⁶⁶ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁶⁷ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵⁶⁸ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁶⁹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁷⁰ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

	<p><i>in Samoa</i>), that reliance on contributions help to sustain family and community linkages.⁵⁷¹ The human rights advocacy work in the village community helps to raise awareness and educate <i>Pule Nu'u</i> about the rights of <i>fa'atama</i>⁵⁷², while also being mindful of village protocol and the understanding that each village council has the power by law to develop policies that are best suited to their village context.⁵⁷³ As summarised by one <i>fa'atama</i> human rights advocate:⁵⁷⁴</p> <p>...those are the only <i>fa'atama</i> I've been trying so hard to bring them out...they say, oh, I have to inform...their parents and their <i>pule nu'u</i> [village mayor] and whatever, because this is what I know in Samoa ah rolling with the <i>fa'afafine</i>'s...when we have funds, we can always have workshops with the <i>pule nu'u</i>'s and all the um <i>taitai aualuma</i> [leader of aualuma], yeah ... we've been trying to educate them. We've been trying to make them um treat the <i>fa'atama</i>, normally, you know, as how they treat the <i>keiges</i> [females] and they have to respect what the <i>fa'atama</i> likes, or the <i>fa'atama</i> likes to pee with the <i>taulealea</i> [young untitled men]. They should be happy with that. What's wrong with that? As long as we...<i>tautua</i> [service], we do something for the village.</p> <p>As the famous Samoan proverb goes, "<i>O le ala ile pule o le tautua</i>", which means the pathway to leadership is through service. Thus, as reported by a leading cultural heritage expert in Samoa, the way to advocate effectively for <i>fa'atama</i> rights is to advocate as a Samoan. To understand intimately the cultural nuances and distinct aspects to the culture which could then be activated to advance your cause, is an approach worth considering. Primarily, the starting point is to consider taking up a matai title.⁵⁷⁵</p> <p>b. Lack of acceptance by the village and church community</p> <p>Samoa is a nation driven by strong Christian ideology and customs. Thus, the ignorance and the general lack of awareness of <i>fa'atama</i>.⁵⁷⁶ In the words of a <i>fa'afafine</i> and law advocate "...there's still a very strong sense of ignorance towards the <i>Fa'atama</i> community and that..."⁵⁷⁷.</p>
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Table 7: Perception of SOGIEC

Talanoa data	Core themes
Fa'atama focus group and interviews	<p>Varies depending on village rules and personal experiences in the urban areas</p> <p>The majority of respondents expressed the view that the SOGIEC community are generally ridiculed and publicly ostracised in Samoa.⁵⁷⁸ This view was echoed by one Samoan born <i>fa'atama</i> respondent residing in New Zealand.⁵⁷⁹ However, the experiences vary for <i>fa'atama</i> respondents from the rural areas residing in the village compared to those living in the urban town area, with some citing invariably more positive experiences in the village compared to the town area or vice versa.⁵⁸⁰</p> <p>Some <i>fa'atama</i> respondents have migrated from rural areas to the town area to avoid any hefty penalties on account of their choice to wear traditionally masculine clothing and</p>

⁵⁷¹ Talanoa with S_CEO, 13 July 2022.

⁵⁷² Talanoa with S_CEO, 13 July 2022.

⁵⁷³ Talanoa with S_ACEO, 22 July 2022.

⁵⁷⁴ Talanoa with S_CEO, 13 July 2022.

⁵⁷⁵ Talanoa with V&C_GWR1, 27 June 2022.

⁵⁷⁶ Talanoa with S_LP, 18 July 2022.

⁵⁷⁷ Talanoa with S_LP, 18 July 2022.

⁵⁷⁸ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022; Talanoa with V&C_FGT_VF2_SAM, 2 July 2022; Talanoa with V&C_FGT_VF3_SAM, 2 July 2022; Talanoa with V&C_FGT_VF4_SAM, 2 July 2022; Talanoa with P_FGT_TRF2_NZ, 28 June 2022; Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁷⁹ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁵⁸⁰ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022; Talanoa with V&C_FGT_VF3_SAM, 2 July 2022; Talanoa with Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

	<p>self-identify as <i>fa'atama</i> rather than women.⁵⁸¹ This echoed the view of one <i>fa'atama</i> respondent from the village area who now resides in the urban area of Vaitoloa.⁵⁸²</p> <p>While rural to urban migration requires enormous resilience and courage, the appeal will understandably be more beneficial for <i>fa'atama</i> in terms of freedom of expression, to dress the way they feel, as an explicit marker of their gender identity, without the oppressive oversight of the village <i>fono</i>. It has not, however, progressed to the point where they are firmly guaranteed protection from gender discrimination and continued stigmatisation in the town areas.⁵⁸³ One focus group <i>fa'atama</i> respondent described his positive experience of life in the village of Leauva'a compared to the stigmatisation he experienced in the town areas,⁵⁸⁴ whereas another <i>fa'atama</i> respondent, from the same focus group disagreed, on the basis of his own lived experience in the village of Siumu.⁵⁸⁵ On the whole, most of the interviewed respondents comprised of experts from gender, development, cultural heritage and law backgrounds, confirmed the negative stigma attached to members of the SOGIEC community in Samoa.⁵⁸⁶</p> <p>Challenging the dress code policy instituted in villages as an act of solidarity against gender discrimination.</p> <p>One <i>fa'atama</i> respondent is a matai in the village of Fagasa, Savaii.⁵⁸⁷ He willingly complies with the village rules to dress in the traditional Samoan dress for women (<i>pule tasi</i>) when attending village <i>fono</i> meetings as a sign of respect for the village customs, "I do not wear my boys outfit in the village council meeting because I respect them and I respect our culture".⁵⁸⁸</p> <p>In the same <i>talanoa</i>, another <i>fa'atama</i> respondent objected to the above comment with respect to complying with the dress code in villages imposed on <i>fa'atama</i> because he firmly believed it enabled more stigmatisation against <i>fa'atama</i> who choose to not comply with the dress code.⁵⁸⁹</p> <p>A <i>fa'atama</i> story of courtship in modern Samoa</p> <p>One <i>fa'atama</i> respondent interviewed in Aotearoa shared his story of courtship in Samoa. The respondent reflected on his love journey with a Samoan woman which paints a picture of hope and resilience, in the face of opposition. He criticised the role of the Church in perpetuating the negative perception towards intimate <i>fa'atama</i> relationships.⁵⁹⁰</p> <p>Intersex</p> <p>There are intersex individuals in Samoa, based on data collection from SFA and Samoa's leading <i>fa'atama</i> advocate. Most decide on their gender at the age of 13 or 14 years.⁵⁹¹</p>
Experts	<p>Transgender</p> <p>The clear distinction in how transgender is constructed from a Samoan perspective, disrupts the western construction of gender because it moves beyond gender identity and sexual orientation. <i>Fa'afafine</i> and <i>Fa'atama</i> is a Samoan cultural phenomenon which is determined by one's indigenous cultural identity as a Samoan. As reported by one <i>Fa'afafine</i> and law advocate:⁵⁹²</p> <p>"...transgender community that's where <i>fa'afafine</i>, fall in also, the distinction there is that transgender...is a Western term that defines...the identity, the gender identity...but with a <i>fa'afafine</i> and <i>fa'atama</i>, I think there's...a cultural element to</p>

⁵⁸¹ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022; Talanoa with V&C_FGT_VF4_SAM; Talanoa with S_CEO, 13 July 2022.

⁵⁸² Talanoa with V&C_FGT_VF2_SAM, 2 July 2022. *Fa'atama* respondent, P_FGT_TRF2_NZ, 28 June 2022 agreed with this position.

⁵⁸³ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

⁵⁸⁴ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022; *Fa'atama* respondent, V&C_FGT_VF4_SAM, from the same focus group, shared a similar perspective.

⁵⁸⁵ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022; *Fa'atama* respondent, V&C_FGT_VF1_SAM, also from the same focus group, shared a similar story, as the village bylaws from his mother's village of Aleipata have banned any SOGIEC members, specifically, *fa'atama* and *fa'afafine* alike.

⁵⁸⁶ Talanoa with V&C_GWR1, 27 June 2022; Talanoa with S_CEO, 13 July 2022.

⁵⁸⁷ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022.

⁵⁸⁸ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022.

⁵⁸⁹ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

⁵⁹⁰ Talanoa with V&C_IT_FR2_NZ, 24 June 2022.

⁵⁹¹ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁵⁹² Talanoa with S_LP, 18 July 2022

	<p>it. And that element...is the most...overwhelming feature that should define <i>fa'afafine</i> and <i>fa'atama</i>. Because for us, we...as a community as SFA and as a person, I would strongly object to a <i>palagi</i> (lit. white person) coming in and saying <i>e ma fa'afafine</i> [we are <i>fa'afafine</i>] because you're not Samoan, you know, you're not Samoan. And in order for you to be a <i>fa'afafine</i> you must be Samoan and you must be, doesn't matter where you live, whether New Zealand, Australia, what, you know, it's your cultural identity, because you are heirs to lands, your customary lands, you are heir to <i>matai</i> titles...and you have a say you can sit in the seating of your <i>aiga</i> to discuss, you know, when you say something as a <i>fa'afafine</i> or a <i>fa'atama</i>, you're not saying oh, I'm <i>fa'afafine</i>, I'm <i>fa'atama</i>, yeah therefore I need to know, no, you're saying it <i>because i lo'u kama i ai ma ai ma ai</i> [my father is this and so on and so on], I have a right to say this and object to this. It's not because of your identity. It's...gender identity, it's your cultural identity. And that's something that distinguishes that indigenous...cultural identity from being transgender or the ...gender identity. And of course, gender identity is a part of that. Sexual...orientation is a part of that. But it's not the overwhelming factor for <i>fa'afafine</i> and <i>fa'atama</i>".</p> <p>Samoa Fa'afafine Association</p> <p>Samoa's leading <i>fa'afafine</i> advocate, Alexander Su'a, serves as President the Samoa Fa'afafine Association (SFA) as well as the Samoa Law Society. In our interview <i>talanoa</i>, he outlined SFA's perspective on SOGIE in Samoa:⁵⁹³</p> <p>"...when you mentioned that, the acronym, SOGIE...the first people that usually come to mind, especially in the space that we always...advocate on as...the Samoa Fa'afafine Association, the first people that always come to mind are the gays and the lesbians, that immediately the response...But for SFA, I mean, with our line of advocacy, personally, whenever we speak about SOGIE, we are not just speaking about...a label identity of people or a group of people. We're just talking generally, that's what we always try to emphasize. We're just talking generally and SOGIE is not just about the LGBTIQ community, right? Or it's not always about the <i>Fa'afafine</i> and the <i>Fa'atama</i> community. SOGIE is where the focus is on...the concept, which is...sexual orientation, gender identity...expression. So, every everyone has that...a sexual identity, a gender expression, and that's how we always try to whenever...we're discussing that. We're saying, well, we're not just talking about...whether you're labelled as a lesbian, as...a gay man, as a transgender person, no we're talking about issues that you know, everyone has in relation to his or her sexual orientation and gender identity expression. But, of course, the focus should be on these...not so normal...issues, and that's...where we have the LGBTIQ community, that's where we have a further discussion on the sexual orientation and</p> <p>...gender identity in the context of men who have sex with men, or women who have sex with women, and so forth, so that the issue is not focused on the label, but rather...it's a concept and whether you're practicing it or not, is not really the issue. But...what's the cost? And what are the implications...when you fall within...that group...of people? So, I guess...whenever we have that discussion...that's what we always try...to push and advocate for."</p> <p>In reflection, another respondent commended the advocacy work of the Samoa Fa'afafine Association (SFA) in the rural villages, particularly in the Aleipata district, to address gender discrimination, prejudice as well as raise awareness, thus bringing together <i>fa'afafine</i> and <i>fa'atama</i> advocates alike.⁵⁹⁴</p> <p>Fa'afafine</p> <p>Another interviewed respondent, agreed with the above comment, by drawing on her background in cultural heritage⁵⁹⁵ which echoed the response of a leading gender practitioner.⁵⁹⁶</p> <p>According to the perspective of a leading <i>fa'afafine</i> and law advocate, self-identification as a <i>fa'afafine</i> or <i>fa'atama</i> has a "cultural element" to it, in terms of the <i>feagaiga</i> and <i>vā</i></p>
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⁵⁹³ Talanoa with S_LP, 18 July 2022.

⁵⁹⁴ Talanoa with V&C_GWR1, 27 June 2022.

⁵⁹⁵ Talanoa with V&C_GWR1, 27 June 2022.

⁵⁹⁶ Talanoa with S_CEO, 13 July 2022

	<p><i>feloai</i>. This serves as a filter to understand the scope and depth of boundaries to which fa’afafine may explore their obligations, duties and responsibilities within the context of transgender issues in Samoan society.⁵⁹⁷ But to a larger extent, it requires claiming your “subjective identity”.⁵⁹⁸ Separate to the SFA position on SOGIE, the interviewed <i>fa’afafine</i> respondent described the varied position of fa’afafine in the context of SOGIE. While most fa’afafine are accepted in the village community, in terms of their extensive contributions to the life of the Church, the hard line against sexual relations between fa’afafine and heterosexual men is not accepted according to the <i>fa’asamoa</i> principles of which complement the Christian principles.⁵⁹⁹</p> <p>a. Funding</p> <p>The work of SFA not only involves securing funds for inclusive SOGIE projects, SFA work closely with <i>fa’atama</i> members. Mentoring <i>fa’atama</i> was built into the design of a recent SFA project in order to strengthen <i>fa’atama</i> collaboration, capacity building as well as advocacy work in the community.⁶⁰⁰</p> <p>Fa’atama</p> <p>In a separate interview <i>talanoa</i>, one respondent indicated that in comparison to the widely accepted <i>fa’afafine</i> community, <i>fa’atama</i> and all other gender groups would be categorised as “gay” and indeed a gender construct from the west, in need of justification.³² Further to this, another interviewed respondent critically reflected on <i>fa’atama</i> perceptions in her work as a gender practitioner in Samoa, thus, highlighting that in comparison to fa’afafine advocacy work, <i>fa’atama</i> are “struggling a bit”.⁶⁰¹</p> <p>According to the opinion of one of Samoa’s leading <i>fa’afafine</i> and law advocates, who self-identifies as <i>fa’afafine</i>, who recognises how <i>fa’atama</i> are perceived with respect to the SOGIEC community, thus highlighting some of the ignorance of the general community or some cases, willful rejection of the <i>fa’atama</i> community as a collective.⁶⁰²</p> <p>It is important to note that the <i>talanoa</i> data with some of the key experts paints a different story according to the experience of <i>fa’atama</i> focus group and interview respondents in Samoa and overseas. The <i>talanoa</i> data further reveals the resilience of <i>fa’atama</i>, gaining progress in recognition in other largely unrecognised areas such as creative arts and crafts (<i>siapo</i> making, weaving mats).⁶⁰³</p> <p>Comparative analysis of Samoa’s fa’atama and fa’afafine community to other Pacific Islands</p> <p>As reinforced by a leading Samoa gender expert, generally the treatment and perception of Samoa’s <i>fa’atama</i> and fa’afafine community is much better in comparison to Fiji and Tonga’s <i>fakaleiti</i>’s. While her explanation is noted, it did not expand on clear examples within the context of Samoa’s <i>fa’atama</i> community as emphasis was on the <i>fa’afafine</i> community.⁶⁰⁴</p> <p>Gay and lesbian</p> <p>An interviewed respondent explored the recognition of <i>fa’afafine</i> as a uniquely Samoan construct, upon which, by comparison, all other genders such as gay, lesbian, transgender men and women, were rendered outside the status or the “gay” category – this respondent rationalised this tension as the influence from the west for which more <i>talanoa</i> is warranted.⁶⁰⁵</p> <p>As put by one leading culture heritage expert, the term <i>lesbian</i> is not adopted or mentioned in local Samoa dialect, but rather the term <i>gay</i> has been adopted as the all-encompassing reference to the <i>lesbian</i> community (as opposed to the <i>fa’afafine</i> community).⁶⁰⁶</p> <p>Varies depending on village rules and personal experiences in the urban areas At the same time, the <i>talanoa</i> data presented some contradictions to others who had recognised they were being treated more favourably as reported in one <i>talanoa</i> with a leading</p>
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⁵⁹⁷ Talanoa with S_LP, 18 July 2022.

⁵⁹⁸ Talanoa with S_LP, 18 July 2022.

⁵⁹⁹ Talanoa with S_LP, 18 July 2022.

⁶⁰⁰ Talanoa with S_LP, 18 July 2022.

⁶⁰¹ Talanoa with S_CEO, 13 July 2022.

⁶⁰² Talanoa with S_LP, 18 July 2022.

⁶⁰³ Empirical data 2022, above n 52.

⁶⁰⁴ Talanoa with S_CEO, 13 July 2022.

⁶⁰⁵ Talanoa with V&C_GWR1, 27 June 2022.

⁶⁰⁶ Talanoa with V&C_GWR1, 27 June 2022.

	<p>fa'afafine and law advocate.⁶⁰⁷ According to the same fa'afafine advocate, the perception towards members of the <i>fa'atama</i>, gay and lesbian community in the village setting are still frowned upon.⁶⁰⁸</p> <p>Now with respect to sexual relations between a <i>fa'afafine</i> and heterosexual man in the village, for which a fine would most likely be imposed, ironically, the restriction is lifted only once the village fines are paid.⁶⁰⁹ What this means is that an LGBT+ couple must pay a village fine in order to live freely as a LGBT+ according to the village practice in Faleaumua i Aleipata. As mentioned earlier, there is no standardized village bylaw system across each village and each village has the option of registering their village bylaws, penalties and decisions with the Ministry of Women, Community and Social Development. What is unclear are the specific details governing the nature and frequency of this fine. As mentioned earlier, a fine is paid once to settle the issue of an LGBT couple living together in the village. In contrast, the experience of <i>fa'afafine</i> living together with their partners in the town area is less restrictive.⁶¹⁰</p> <p>Mythologies</p> <p>As one cultural heritage academic noted, Samoa's customs and traditions pre-contact did not engage in gender constructs as evidenced by Samoa's mythologies and creation story, which focused primarily on the creation of man rather than the binary gender construct perpetuated from Christian creation stories from the west:⁶¹¹To my knowledge...let me say this...There are no mythologies that support the emergence of gender. Right, in my opinion. So mythologically, if we were to take from a heritage perspective and from a, you know, kind of looking at the past as looking at oral traditions and markers, you know, those, those sort of ways of expressing culture, as the basis for how we determine some of the social kind of constructs that we support today. Um I think an argument can be made for gender be not be something that Samoans pre-contact prescribe to in the ways that we did that we do now. So, because if you take it back to stories, like the story of <i>Tagaloa</i> and the creation of hu- of Samoans um you know, Tagaloa creates the Nine Heavens, He creates the the islands or he pulls up certain type, sets of islands, he sends forth a creeping vine. The creeping vine is imbued with a <i>fatu magava</i> or a spirit, and from, from there, come forth the Samoans. And the Samoans are not created in the same sort of Adam and Eve binary that the West prescribes to in terms of a creation, right. So Samoan culture is grounded in a very um very clear origin story that is not about migration but is about the kind of creation Genesis from a God being <i>Tagaloa</i>. Now, I think my point in bringing that up is that you, I think you would be hard pressed to find a myth, a myth or a legend or a story that has the same power as that story, you know, to be able to justify saying, there were men that were women, and there were nothing else, you know, there was, you know, or to, to justify the ruling out of a third gender, because technically, you could say, Samoans believed that they were first created with no gender.</p> <p>Cultural and spiritual factors are factored into the human rights framework in Samoa</p> <p>As reported by a leading gender practitioner in Samoa, in terms of advocacy for SOGIEC:⁶¹²</p> <p>“...you know, a lot of our work around ensuring that we include the vulnerable communities and these minority groups...But I would say that Samoa is unique that...we have our own, you know, guiding principles...If we look at it culturally and spiritually, from a human rights perspective, it's ensuring that they get the support that they need.”</p> <p>Intersex</p> <p>It was reported that Samoa's intersex are either heterosexual or not and none identify as <i>fa'afafine</i> and <i>fa'atama</i>:⁶¹³</p> <p>“...all these individuals I'm talking about, they all somehow come under...the umbrella of SOGIE. So, if the intersex community is...I think, ah even SFA is quite ignorant about that in in Samoa, because we're not very much aware of...you</p>
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⁶⁰⁷ Talanoa with S_LP, 18 July 2022.

⁶⁰⁸ Talanoa with S_LP, 18 July 2022.

⁶⁰⁹ Talanoa with S_LP, 18 July 2022. This was reported in the village of Faleaumua i Aleipata.

⁶¹⁰ Talanoa with S_LP, 18 July 2022.

⁶¹¹ Talanoa with V&C_GWR1, 27 June 2022; see Schoeffel, above n 266, at 181–182; MacQuoid, above n 266, at 4–8.

⁶¹² Talanoa with V&C_GWR1, 27 June 2022.

⁶¹³ Talanoa with S_LP, 18 July 2022.

	<p>know, of those individuals. But we are aware that...they're very much invisible. And I think invisible, not only ah because of the families, you know, they really conceal or suppress...that identity of who they are. Or the person is not comfortable...to come forward...and most of those intersex persons I know or I'm aware of, I've been informed of are not fa'afafine. They're either women, or men. And they're either heterosexual or not. They're not always <i>fa'afafine</i> or <i>fa'atama</i>."</p>
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Table 8: Perception of Fa'atama in comparison to Fa'afafine

Talanoa data	Core themes
Fa'atama focus group and interviews	<p>Fa'afafine are well respected.</p> <p>Overall, as reinforced in earlier <i>talanoa</i> comments above, <i>fa'afafine</i> are generally recognised and more visibly active participants in the community in employment, education, the village <i>fono</i>, church community, and so on.⁶¹⁴ However, it was further pointed out that this was not always the case in the past while emphasising the importance of effective communication with others as a sign of respect and gaining respect.⁶¹⁵ Another <i>fa'atama</i> recollected a moment in Samoa's history when fa'afafine stood united in a strike against the government.⁶¹⁶</p> <p>Other <i>fa'atama</i> respondents agree that fa'afafine are "more sociable, work together as a team"⁶¹⁷, and "smart...more educated and reliable as well as credible"⁶¹⁸, while "...some are working in the office"⁶¹⁹.</p> <p>Fa'atama are not as respected.</p> <p>In comparison to fa'afafine, as put by one <i>fa'atama</i> respondent, "Yes, because it seems like...they recognized the fa'afafine and they respect the fa'afafine more than us".⁶²⁰ Another <i>fa'atama</i> respondent further implied that <i>fa'atama</i> are comparatively less educated and less literate, "...It is not because fa'afafine are more educated just like what I1 mentioned and our kind has low level of literacy...".⁶²¹</p> <p>In terms of education and the reported incidence of higher <i>fa'atama</i> school leavers, some <i>fa'atama</i> respondents explored some of the reasons for this trend such as, bullying in the school and the enforcement of compulsory school uniforms for girls.⁶²² Consequently, <i>fa'atama</i> should not be considered any less intelligent, however, this stigma is quite pervasive.⁶²³</p> <p>There is a difference worth noting in how <i>fa'atama</i> are treated and perceived in the rural area compared to the town area, where the latter affords more freedom and entitlements to their expression which is largely restricted in the rural area.⁶²⁴</p> <p>As noted by one <i>fa'atama</i> respondent in New Zealand, <i>fa'atama</i> will gain more recognition and acceptance if they succeeded in education, thus elevating their status of acceptance within the family and community alike, "...I think they are more acceptable with us as long as you get a better education, or perform well and a family, community and you will be accepted".⁶²⁵ Similarly, as summarised by another</p>

⁶¹⁴ Talanoa with I1, 2 July 2022.

⁶¹⁵ Talanoa with I1, 2 July 2022.

⁶¹⁶ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

⁶¹⁷ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

⁶¹⁸ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

⁶¹⁹ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022. This view also highlighted by one fa'atama respondent, P_FGT_TRF2_NZ from the international fa'atama focus group talanoa on 28 June 2022.

⁶²⁰ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

⁶²¹ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁶²² Talanoa with V&C_IT_FR2_SAM, 13 July 2022; Leading law and fa'afafine advocate, respondent Talanoa with S_LP, 18 July 2022, indicated that the "...high rate of dropouts, school dropout..." amongst the fa'atama community based on data collected for a project.

⁶²³ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁶²⁴ Talanoa with I1, 2 July 2022.

⁶²⁵ Talanoa with P_FGT_TRF1_NZ, 28 June 2022.

	<p><i>fa'atama</i> respondent, the perception that <i>fa'atama</i> are females and yet choose to not dress in the school uniform assigned to girls (i.e., the skirts) has led to bullying in the school and others leaving school altogether.⁶²⁶ This affirms the comments raised by a leading <i>fa'atama</i> advocate in Samoa, that bullies are at Schools and the very people who bully at Schools also bully <i>fa'atama</i>. In his words, “you have to teach them...to educate people and even in schools as well, to stop bullying at school...”⁶²⁷</p> <p>Fa'atama do not work well together.</p> <p>The difference between <i>fa'afafine</i> and <i>fa'atama</i> is “big”, as reported by one <i>fa'atama</i> respondent, “...unlike our kind I mean some of them not all of us. They don't get along with each other, they prefer running their own show, they prefer to do whatever they want to do”.⁶²⁸ Another <i>fa'atama</i> respondent added that he works well with his <i>fa'afafine</i> sibling to manage the responsibilities attached to their family and village community.⁶²⁹</p> <p>Fa'atama are multi-skilled in hard labour outside and household chores, handicrafts and naturally intelligent.</p> <p><i>Fa'atama</i> are reportedly underestimated in comparison to <i>fa'afafine</i>, although many <i>fa'atama</i> are naturally intelligent, versatile and have acquired a diverse range of skill set which is often overlooked by most. <i>Fa'atama</i> demonstrate their skills in many specialist areas, including weaving mats, handicrafts, making <i>siapo</i> (Samoan material mat), household chores as well as hard labour.⁶³⁰</p> <p>The above <i>fa'atama</i> respondent expressed his reservations against the question because it inferred rather a preferential bias towards <i>fa'afafine</i> “...to show that <i>fa'afafine</i> are more acceptable than us <i>fa'atama</i>...”.⁶³¹ Another issue raised was the use of the term “discriminative” because “...this term, discriminative...is very hard, as it implies to different situations and case scenarios especially with our <i>fa'atama</i> attitude and behaviour”⁶³².</p> <p>Similar to this response, the interviewed <i>fa'atama</i> respondent stated: “I don't like that word discriminative because it belongs to the western side which they brought it to Samoa, and I am unhappy about it and I am angry about you and how read that question”.⁶³³</p> <p>Though it was not the researcher's intention to cause offence, as all questions were vetted by the <i>fa'atama</i> expert engaged for the project, it no doubt provided the researcher with further insight for future focus group <i>talanoa</i>.</p> <p>Fa'afafine and fa'atama are equal with no preference to either.</p> <p>One <i>fa'atama</i> respondent appealed to the attributes and values that bind both <i>fa'afafine</i> and <i>fa'atama</i> together as equals – their shared vision to serve their families and church community.⁶³⁴</p>
Experts	<p>Fa'afafine and fa'atama are equal with no preference to either.</p> <p>One leading Samoa law reform expert shared an inclination towards the above comment shared by a <i>fa'atama</i> respondent which was further contradicted in preference towards <i>fa'afafine</i> on the basis of their visibility in the community in comparison to <i>fa'atama</i>.⁶³⁵</p> <p>Debateable</p> <p>Samoa is a Christian nation with gender norms reflecting the heteronormative binary as explicitly referenced in the laws of Samoa. By contrast, whether <i>fa'afafine</i> are considered more acceptable than <i>fa'atama</i> in Samoa is indeed a moot point. Perhaps, the real question is whether Samoa, a conservative Christian nation, influenced by the Christian principles introduced from the former colonial administrators, is still pervasive in Samoa. Samoa is unquestionably influenced by the adopted common law</p>

⁶²⁶ Talanoa with P_FGT_TRF2_NZ, 28 June 2022.

⁶²⁷ Talanoa with V&C_IT_FR3_NZ, 24 June 2022.

⁶²⁸ Talanoa with V&C_FGT_VF2_SAM, 2 July 2022.

⁶²⁹ Talanoa with V&C_FGT_VF3_SAM, 2 July 2022.

⁶³⁰ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁶³¹ Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁶³² Talanoa with V&C_FGT_VF4_SAM, 2 July 2022.

⁶³³ Talanoa with V&C_IT_FR1_SAM, 13 July 2022

⁶³⁴ Talanoa with V&C_FGT_VF1_SAM, 2 July 2022.

⁶³⁵ Talanoa with S_ACEO, 22 July 2022.

	and legal system which originated outside Samoa and is reflected in a customary system closely resembling this draconian institutional construct, which, on the whole, is less accommodating to the SOGIEC community outside of the normative hegemonic binary construct. ⁶³⁶
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⁶³⁶ Talanoa with S_CEO, 13 July 2022.

CHAPTER FIVE – THE VALUE OF SAMOA’S LEGAL SYSTEM: STATE LAW AND CUSTOMARY LAW

1.0 Introduction

In this chapter, I discuss why an understanding as to the weak and strong aspects of legal pluralism is vital to understanding Samoa’s bijural state and customary law systems. Given the history of the Pacific, there are key features of colonial and post-colonial legal pluralism that complement the sociocultural realities and experiences of former colonial societies, straddling with two or more legal systems.⁶³⁷ Thus, we build on the goals identified by *fa’atama* (in Chapter 4) and how they will be best achieved in light of the above discussion in Chapter 6 (next).

Samoa is a legally pluralistic nation, bijural by nature, where both customary law and state law co-exist, operated by a population of predominantly indigenous Samoans (See Chapters 1-2, for more background information on Samoa concerning socio-cultural and political context to adequate law reform).⁶³⁸ Samoa has a population of 200,010 people with English and Samoan as the official languages. The *fa’amatai* (Chiefly system) acts as the main source of Samoa’s customary law and is enforced in varying degrees across Samoa’s 220 traditional villages (*nu’u fa’avae*) governed according to each village council (*fono*) and customary practices.⁶³⁹ Village council law making,⁶⁴⁰ executive functions and enforcement functions⁶⁴¹ form part of Samoa’s customary legal system.

The value of Samoa’s bijural systems is in the aspiration that *fa’atama* are better protected in the scope of the law. In this study, customary law is treated as “law” as

⁶³⁷ Galanter, above n 90, at 36; Griffiths, above n 90, at 1; Brian Tamanaha “Understanding legal pluralism: past and present, local to global” (2008) 30 *Sydn Law Rev* 378; Sally Engle Merry “Legal pluralism” (1988) 22(5) *Law Soc Rev* 869–896; Chiba, above n 81; Sally Falk Moore “Law and social change: the semi-autonomous field as an appropriate subject of study” (1973) 7(4) *Law Soc Rev* 720.

⁶³⁸ For this article, any reference to “customary law” is used interchangeably with Samoa “customs”, “customary legal system” and “customary practices”; any reference to “gender equity” is used interchangeably with Samoa all Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual (“LGBTQIA”) and diverse Sexual Orientation, Gender Identity Expression and Sex Characteristics (“SOGIEC”) and “gender diversity”; and lastly, any reference to “bijural” is used interchangeably with “legal pluralism”.

⁶³⁹ Jennifer Corrin “Land, Law and the Fa’a Samoa” (49–50) 46 *Lawasia Journal*; Gilson, above n 255.

⁶⁴⁰ Suaalii-Sauni and others, above n 198, at 165.

⁶⁴¹ Aiono Le Tagaloa “The Samoan culture and governance” in Ron Crocombe, Uentabo Neemia and others (eds) *Culture and democracy in the South Pacific* (University of the South Pacific, Institute of Pacific Studies Publication, Suva, 1992) 117 at 117, 121.

recognised in Samoa's Constitution.⁶⁴² This study also seeks to understand the challenges to reforming Samoa's customary legal system, with an emphasis on meeting the demands of a legally pluralistic society, which is inseparable from the operation of the state legal system – which also forms part of Samoa's bijural system. Thus, if customary laws formed the basis or became an operative part of Samoa's primary laws and legal system, then a critical review of existing evidence is required to understand what this means in a law reform context.

Where modern demands (including access to formal education, health, technology, human rights) cannot be met by the customary legal system, the state holds the responsibility to ensure central public infrastructure, including any law-making process, must satisfy the demands of a gender diverse and legally plural society. State intervention occurs when customary law fails, and this approach is worth exploring within the context of law reform alongside the role of traditional authorities in customary law.⁶⁴³ Therefore, the onus is on the state to implement recommendations put forward in this study which then requires considerable focus on the state responsibilities for more responsive law reform and whether the state fulfils its responsibilities to ensure the customary legal system is adequately supported.

Thus, in the next section, we explore why the interdependent relationship between the state law and customary law is significant with respect to the sociocultural challenges for more responsive law reform in Samoa.

2.0 Legal pluralism

I now turn to a brief discussion of legal pluralism, which became prominent more than fifty years ago. This emerging development highlighted the complexities around the operation of laws and legal systems of legally pluralistic nations. It is here that we come to appreciate how and why we need to understand the growing significance of legal pluralism in the law reform process.

⁶⁴² Constitution of the Independent State of Samoa (Samoa 1962).

⁶⁴³ McLachlan, above n 4, at 336.

In this section, I discuss what makes Samoa customs, law and legal systems unique and why legal pluralism plays a significant role in any proposed law reform process.⁶⁴⁴ In order to deconstruct and unpack this, it is necessary to provide some background to the weak and strong aspects of legal pluralism, to draw out the value in both customary law and state laws of Samoa.

2.1 Weak and Strong Pluralism

The distinction between weak and strong pluralism is captured further in the research of Griffith⁶⁴⁵ given the lack of consensus on the definition of legal pluralism.⁶⁴⁶ Weak pluralism (based on colonial and postcolonial perspectives) exists where “differences” between the customary legal system and state legal system are managed by the dominant hegemonic political order. In this study, the state legal system is more dominant than the customary legal system and the differences between them allows for some recognition of customary law, only to the extent that it does not subvert the doctrine of centralism fully effected in dominant state law. What this demonstrates is the continuation of the standard of colonial hegemonic practices and customary law, which is weakly recognised to achieve some legal status, within the rigid framework of colonial recognition. The separate and distinct status weak pluralism brings to state law is recognised where the parameters and scope of customary law defined by state law makes it problematic. Weak pluralism is evident in the lack of recognition to customs and usages found in the different Pacific state constitutions and laws.

On the other hand, strong pluralism (based on postmodern perspectives) enables the differences in laws is not then reduced to a singular form of state authority. Strong pluralism fosters legal pluralism and respects the bijural relationship between customary law and state law whilst promoting the most ideal conditions for effective law reform. This position is reflected in the Pacific where most of the private sphere (customary legal frameworks) are independent of the state and as such, it is not reliant

⁶⁴⁴ See Mulitalo, above n 3.

⁶⁴⁵ Anne Griffiths “Legal pluralism” in Reza Banakar and Max Travers (eds) *An introduction to law and social theory* (Hart, 2002) at 289, 298.

⁶⁴⁶ See Craig Land “One Boat, Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights” (2021) 52 VUWLR 537 at 507–540.

on the state to give it legal validity and recognition. In this regard, Woodman argues that strong legal pluralism exists where customs may operate autonomously from state laws.⁶⁴⁷ As such, strong legal pluralism is practised widely and respected in Samoan villages.⁶⁴⁸ This may be an accurate reflection across Pacific pluralistic societies where customs are viewed as laws irrespective of their formal status.⁶⁴⁹

3.0 Customary law

In this section, I examine Samoa's customary law system and how customs may evolve or undergo reform, to seek better recognition of *fa'atama* at community and village level. As a starting point, the historical understanding of customary law reveals some of the key challenges faced by legal pluralism. This effectively reveals why a critique of both historical and common understandings of customary law has emerged in modern Samoa, which will also be discussed in turn. While there is no general consensus on the definition of customary law or whether it exists, some of the common features applied in commonwealth Pacific nations comprise a set of rules based on local customs and usages, traditionally passed down by oral culture.⁶⁵⁰ In the Samoan context, customary law is based on customs, practices or rules of conduct, formally prescribed and recognised as binding or enforced by a competent controlling authority or multi-dimensional traditional authority (for example, the Land and Titles Court or Village *Fono*).⁶⁵¹

Before I present arguments against customary law, I begin with an overview of Samoa's village governance system. This is based on traditional structures. As is the case in many villages, women matai are not expressly forbidden to sit in the village council but are discouraged from doing so by informal conventions. All traditional villages have a resident pastor who is male and equal rights are often opposed on the

⁶⁴⁷ Gordon Woodman "Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law" [2011] *Acta Juridica* 35 at 39.

⁶⁴⁸ See Mulitalo, above n 3.

⁶⁴⁹ New Zealand Law Commission, above n 82, at 41.

⁶⁵⁰ Bernard Narokobi, 'Lo Bilong Yumi Yet: Law and Custom in Melanesia' (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific 1989) 4; Constitution of the Independent State of Samoa (Samoa 1962); Johnathan Aleck, 'Introduction: Custom is Law in Papua New Guinea' in Johnathan Aleck and Jackson Rannells (eds), *Custom at the crossroads* (University of Papua New Guinea 1995) 3.

⁶⁵¹ Meleisea and Schoeffel, above n 30, at 3.

grounds that it would undermine the traditions, customs and values that underpin them.

In the Pacific, indigenous origin stories of creation were transmitted traditionally in oral histories of myths and legends which presented unique challenges to the incorporation and recognition of customary codes, traditions and usages in formal laws (most of which will be explored further in the next section).⁶⁵² Samoa's formal political structures include a system of local government based on the villages and the chiefly system (*fa'amatai*). The key governing legislation is the Village Fono Act 1990 and the Internal Affairs Act 1995. There are about 220 traditional villages in the rural areas, which comprise a group of extended families within a traditional territory. There are also non-traditional villages in the urban town areas, which include new settlements, large residential compounds, and suburban areas.

If customary laws originated from local oral customs and traditions, which evolve according to the values of those subject to them⁶⁵³, one of the issues confronting the incorporation of these evolving customs is its impact on power and gender relations.⁶⁵⁴ Prior to Samoa gaining independence in 1962 and after independence, customary law and the use of customs and traditions remained in force alongside the introduced written laws and case law from Samoa's former colonial administrators (New Zealand). In Article 111(1) of Samoa's Constitution, it states that law includes "any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction". Samoa's Land and Titles Court (LTC) "shall apply: (a) custom and usage; (b) the law relating to custom and usage; (c) this Act, and any other enactment expressed to apply to the Court"⁶⁵⁵. In other words, Samoa's LTC holds supreme authority over the subject matter of Samoan customs and usages.

⁶⁵² Motusaga, above n 49; Thomas William Bennett and Thuys Vermeulen "Codification of customary law" (1980) 24(2) *J Afr Law* 206.

⁶⁵³ Mulitalo, above n 3.

⁶⁵⁴ Jean Drage "The exception, not the rule: a comparative analysis of women's political activity in Pacific island countries" (1995) 18(4) *Pacific Studies* at 61-93.

⁶⁵⁵ Land and Titles Act 1981, section 37(1)(a)-(c).

3.1 Key features of customary law to consider in future law reform

3.1.1 Village *fono*

In Samoa, *matai* titles are traditional chiefly titles that hold customary and social value. The *fa'amatai* conferment process in the village and family context, runs parallel to the formal registration context. At the village *fono* and family level, each step of the process is deeply entrenched in *fa'asamoa* customs and traditions. In line with customs, a *fono* is convened, comprised of predominantly *matai* holders, to discuss potential *matai* appointees against criteria including, status in the community, *tautua*, age, and so on. After careful deliberation and consensus amongst mainly the *matai* of the family, the appointed candidate undergoes a *Saofa'i*, a formal ceremony, to be bestowed the *matai* title. After the *saofa'i* administratively, the *matai sa'o* or *suli* (*fa'apogai*) who bestows the title to the appointed candidate, may give notice to the Registrar to enact the formal legal registration part of the *fa'amatai* conferment process. As such, the *matai* bestowal confirmation (*pepa saofai*) form (must be correctly filled in and lodged within the Ministry of Justice and Courts Administration (where the Land and Titles Court is based), Registration Division). This is accompanied by payment of the prescribed fee and extra for the issuance of the *matai* certificate, after which point, the appointed candidate's *matai* title is put on the *Savali* Newspaper, where the Registrar ensures the notice outlines the time limitation of four (4) months in which local objections must be filed to challenge the legitimacy of the *matai* holder.⁶⁵⁶ This may lead to a lengthy appeal process, where legal registration may be revoked.

While the theme of solidarity resonates across all *fa'atama talanoa*, with interviewees challenging the dress code by continuing to dress in clothes traditionally worn by Samoan men, thus subjecting themselves to village fines, or alternatively, migrating to the urban town areas or choosing to leave

⁶⁵⁶ Land and Titles Act 2020, s18.

Samoa altogether⁶⁵⁷ the reality is that only *matai* in the village *fono* may actively contribute to decision making processes and procedures in the village. According to Samoa's 2020 Second Voluntary National Review on the Implementation of the Sustainable Development Goals, only 22% of women are registered *matai*.⁶⁵⁸ And 21 *nu'u* in Samoa continue to prohibit women *matai*.⁶⁵⁹ Accordingly, the number of *fa'atama matai* is unknown. At the state level, *fa'atama* may participate in consultations on law reform, although most are unaware of public consultations or may choose to not participate. Nevertheless, the non-legislative mechanisms highlighted the powerful influence of the village *fono* and the adequate safeguards found within the customary norms of *feagaiga* ("brother-sister covenant"), *suli* ("heir") and *tautua* ("contributions, service").⁶⁶⁰ As a result, the potential reform pathways through which to elevate the status of LGBT+ people in customary law and state law, has the capacity to influence all of government priorities in future policies and strategies of development.⁶⁶¹

In the rural area, customary villages are governed by the village *fono*, comprised of *matai*, whereas in the town area, freehold land or leased property are not governed according to village *fono* rules. Each of Samoa's 220 villages ("nu'u") are governed by a village *fono* which runs alongside Samoa's state or national legal system. Each village *fono* therefore elects a village men representative ("Sui o le Nu'u"), village women or youth committee representative ("Sui Tama'ita'i o Nu'u") and Government village representative ("Sui o le Malo") – commonly men but may also include women, to liaise with the national government. Customary law forms part of Samoa's village governance system and the Village Fono Act 1990 ("VFA 1990") legally empowers the village *fono* to impose village fines in accordance with 'custom and usage of their villages'.⁶⁶² In this regard, the

⁶⁵⁷ Empirical data 2022, above n 52.

⁶⁵⁸ Government of Samoa. 2020, above n 24.

⁶⁵⁹ National University of Samoa, above n 9.

⁶⁶⁰ Empirical data 2022, above n 52.

⁶⁶¹ Empirical data 2022, above n 52.

⁶⁶² Jennifer Corrin. 2008. 'Resolving Land Disputes in Samoa' *Making Land Work Volume 2: Case Studies* Department of Foreign Affairs and Trade, Canberra, https://www.dfat.gov.au/sites/default/files/MLW_VolumeTwo_CaseStudy_10.pdf

village *fono* may impose punishments in accordance with the custom and usage of the village. These may include fines of money, mats, animals, food, or work on village land.

The amended VFA came into effect in 2017 and recommended transparency and accountability with respect to promoting village governance based on principles of natural justice and fairness. The expansion of the section 5 provisions extended the powers of the village *fono* to impose village banishment, curfews, as required and the classification of village offences and penalties. This supports the recommendations of the Samoa Law Reform Commission, Village Fono Report in 2012, that villages maintain a written and registered record of all village *fono* bylaws, fines and penalties imposed to be assessed for constitutional compliance, to ensure standardization of the same penalties for the same offence across the different villages, while also avoiding abuse of village *fono* power.⁶⁶³ However, the reality is that the registration of village bylaws and decisions are voluntary. Village *fono* decisions are also appealable to the Land and Titles Court (“LTC”), which may allow an appeal, dismiss it, or refer it back to the village *fono* to reconsider. The LTC may not substitute its own decision for that of the village *fono*, or entertain a further appeal.⁶⁶⁴ Thus, criminal matters may be directly reported to the Police, although most choose to comply with village bylaws.

3.1.2 *Application of human rights context*

Human rights refer to the fundamental rights that every human being is entitled to, such as the right to life, freedom of speech, and freedom from discrimination which are entrenched in Part II of Samoa’s Constitution. These rights are recognised and protected by law and society. On the other hand, fundamental rights often get confused as responsibilities and obligations which refer to the duties that individuals and institutions have towards themselves, others, and society. These duties include obeying the law, contributing to society, and treating others with respect and

⁶⁶³ Samoa Law Reform Commission 2012. Village Fono Act Report 9. Apia, Samoa: Samoa Law Reform Commission.

⁶⁶⁴ Empirical data 2022, above n 52.

consideration. The key difference between human rights and responsibilities and obligations is that human rights are protected by law and are considered inherent to every individual, while responsibilities and obligations are imposed on individuals by society and laws. In other words, fundamental human rights are entitlements, whereas responsibilities and obligations are the duties imposed by society and law on individuals.

Based on Va'a's indigenous Samoan analysis, human rights are framed as duties rather than entitlements, held in common by all on the basis of being human.⁶⁶⁵ Further to his indigenous view, Va'a makes the contradictory assertion that the basis of human rights differs between Western Euro-centric cultures and Samoan culture, but the overall understanding is not different. Arguably, Va'a is wrong to assert that this system of duties, obligations and responsibilities form part of the system of human rights or that the West did not have a system of this kind in place, as this is a fundamental aspect for which most societies could not exist. However, the rationale behind Va'a's claim links to his argument about the evolution of human rights in Samoa which is evident in the two sets of codes – the traditional notions expressed in reciprocal and interpersonal responsibilities and obligations to family, community and others. The other is Western – influenced by “western notions of human rights, such as those based on the philosophical principles of natural justice and divine law”⁶⁶⁶ in Ancient Greece Thomas Aquinas' theory of natural rights, Christian principles, and so on. In Samoa, the equivalent ideas are sourced from custom.

Va'a states that the Samoan notions of human rights that are spelt out in *suli* and *feagaiga* suggest Samoa had pre-existing human rights before colonisation.⁶⁶⁷ Firstly, the *suli* is the right of the heir belonging to a kinship group/ family who holds one or several Chiefly titles in a village, as determined by blood connections. As Samoan custom dictates, all Samoans can trace their genealogy to the *Atua* (Supreme God/Creator), *Tagaloalagi*, and by virtue of their ancestry, all Samoans accord respect and dignity for individual life irrespective of gender. Secondly, the *feagaiga* system is likened to a social contract between two parties: sister-brother, female

⁶⁶⁵ Va'a, above n 30.

⁶⁶⁶ At 245.

⁶⁶⁷ At 246.

descendant of a Chiefly title (*tama fafine* – male descendant of a Chiefly title (*tama tane*)): ⁶⁶⁸

For instance, A (female) marries B (male) and their children are C (female) and D (male). C is *tama fafine* in this particular family, and D is *tama tane*. C and D are *feagaiga*.

While multiple relational arrangements and other considerations factor into this, such as status ascribed to each party, this system is meant to be complementary or harmonious.

Further to this point, Va'a asserts that human rights is equated to custom (and vice versa), in a Samoan context and embedded in the rights of *feagaiga* and the rights of a *suli*. He considered the *feagaiga* as “special rights which function to maintain a balanced relationship between the genders”. ⁶⁶⁹ The rights of a *suli* are universal rights which include “the right to live and survive so as to serve the kin group and community”. ⁶⁷⁰ On this view, Samoan people and other indigenous communities view human rights through the lens of custom. Thus, the core values and beliefs that underpin the customary obligations and hierarchal status embedded in the *fa'amatai* (Chiefly) system and in *fa'asamoa* (the Samoan way) are inextricably linked to Samoan notions of human rights.

Most Samoan political academics interviewed in a 2009 study on “Samoanizing” human rights had affirmed that human rights is part of the *fa'asamoa*. ⁶⁷¹ However, the lack of education on human rights, generational differences and conflicting notions between individual rights and Samoan communal values within the *fa'asamoa* add to the obstacles facing the full realisation of human rights in contemporary Samoa. While it is quite a different claim, it is worth noting that Samoan political historian Professor Meleisea contends that “individual” human rights are not incompatible with traditional communal Samoan values of equality,

⁶⁶⁸ At 242.

⁶⁶⁹ Va'a, above n 30.

⁶⁷⁰ At 245.

⁶⁷¹ Margaret Smith 'Samoanizing' *Human Rights: A Generational Comparative of Views on Human Rights in Contemporary Samoa* (635 2009).

protection, respect and dignity. He contends that the demystified dichotomy between Samoan notions of human rights and Western notions of human rights is based on the wrongful assertion of Samoan customary values. The protection of the individual means the protection of the community, as a whole. On this view, the 2015 State of Human Rights Report also highlighted that human rights are deeply rooted in *fa'asamoa* values and are not foreign ideals or incompatible, as both ideals create a more harmonious Samoa.⁶⁷² Here, essential Samoan values cross over and emphasise mutual compatibility or harmonisation in relation to the promotion of universal human rights protection.⁶⁷³

4.0 State Law

Given the history of the Pacific, as discussed earlier, there are key features of colonial and post-colonial legal pluralism that complement the sociocultural realities and experiences of former colonial societies, straddling with two or more legal systems.⁶⁷⁴ As such, the development of state laws as contextualised to Samoa's socio-cultural and political context is riddled with challenges. I now turn to examine what makes Samoa customs, law and legal systems unique and why legal pluralism plays a significant role in any proposed law reform process.⁶⁷⁵ In order to deconstruct and unpack this, it is necessary to focus on the agents of law reform in Samoa's state legal system.

4.1 State focused law reform: Accommodates pluralism and customs

In this section, it is important to note that the theorising aforementioned and issues covered later are not compatible with most of the colonial institutional and legal constructs established to administer the development, reform and review of the law in Samoa. However, it is important to provide a brief background first to the development of the Samoa Law Reform Commission, the law reform process and other law reform agents.

⁶⁷² Government of Samoa "State of Human Rights Report" (8 November 2015) Office of the Ombudsman (Samoa) <<https://ombudsman.gov.ws>>.

⁶⁷³ Government of Samoa "State of Human Rights Report", above n 724.

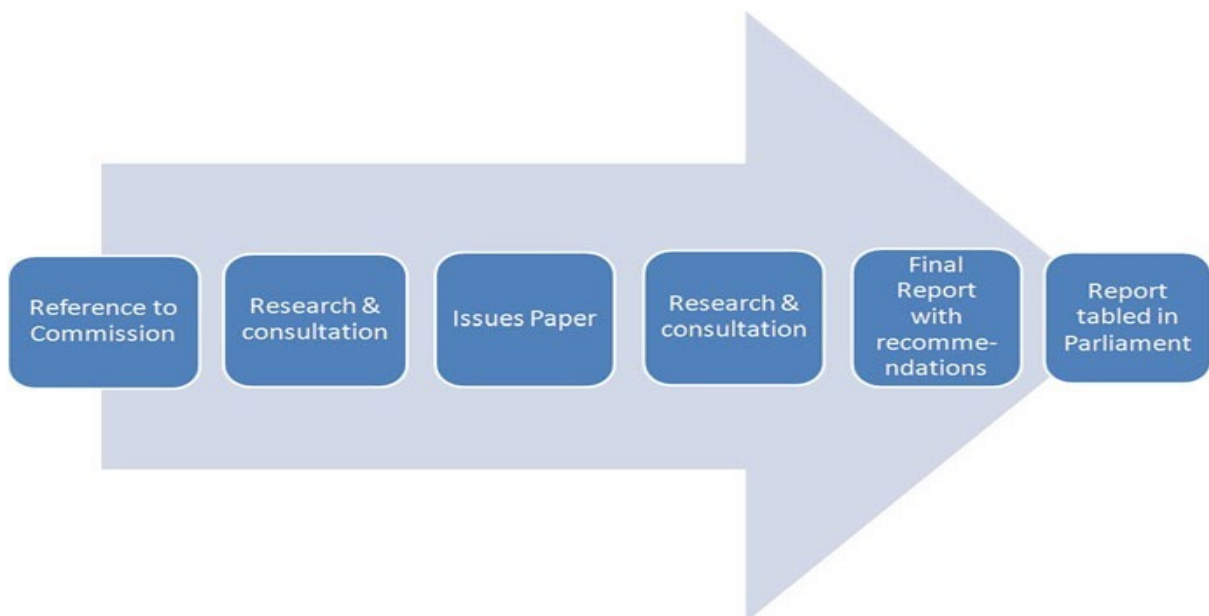
⁶⁷⁶ See Mulitalo, above n 3.

⁶⁷⁶ See Mulitalo, above n 3.

4.1.1 Law Reform

According to Samoa's Regulations Ordinance (1953), "Law reform "is defined as the reform of state laws through Acts of Parliament, and through subsidiary legislation made by the Head of State on the advice of the executive. This is inclusive of judicial precedents of the courts.⁶⁷⁶ The Samoa law reform process (Fig. 2: Samoa Law Reform Process) is the process by which changes to state laws are initiated and developed by the constitutional offices (Parliament, judiciary, executive). In Samoa, the Samoa Law Reform Commission, the Office of the Attorney-General and its legislative drafters, and other agents including the Office of the Ombudsman (Samoa's National Human Rights Institute) have principal mandates to undertake law reform functions by virtue of empowering or enabling.⁶⁷⁷ The issue with the law reform process, whereby the laws and legal systems are either involuntarily or voluntarily imposed on traditional customary law systems, links to legal transplantation problems (i.e., the uncertainty as to what form laws take in the host country). This is also linked to Samoa adopting a constitution that is largely reflective of the Westminster system of Government.

Fig. 2: Law Reform Process



(Source: Samoa Law Reform Commission, Apia, Samoa, 2018)

⁶⁷⁶ See Mulitalo, above n 3.

⁶⁷⁷ See Mulitalo, above n 3, at 6.

4.2 *Agents of Law Reform*

4.2.1 *Samoa Law Reform Commission*

Since the establishment of the Samoa Law Reform Commission (SLRC) [Law Reform Commission Act 2008 (Samoa)] it has been tasked with developing law reforms that uphold the Constitution whilst striving to uphold Samoa's customs in line with international standards of best practice. In 2017, the appointment of Telei'ai Dr. Lalotoa Mulitalo Seumanutafa as Executive Director has led to significant reform within SLRC in terms of its revamped focus and direction. The visibility of SLRC in the public has elevated its profile through public awareness programmes and position on matters of national and global interest – Samoa's General Elections in 2021 and the passing of the three controversial Acts – Constitution Amendment Bill 2020, Judicature Bill 2020, and Lands and Titles Bill 2020. As Samoa society is based on customs embedded in a hierarchical *fa'amatai* system entrenched in village customs and customary protocols, the reciprocal cultural exchange of *mea'alofo* in the form of food, monetary donations to the village or travel reimbursement for members of the public who travel from distant rural villages to engage in public consultations (most of which are based in urban Apia) is a costly endeavour. This points to the need for substantial funding and ongoing resource commitments (technological support, office equipment) for capacity building (professional development training) and to ensure adequate consultations on law reform are carried out. Such strategic linkages between the state and the general population are vital for any harmonious relationship. In this regard, villages are involved in the law reform process and may see the value and relevance of incorporating customs in formal laws. Building on data from Mulitalo's research, the researcher also points to conflicting views such as the need for better coordinated communication between the village and state; mistrust over whether data from consultations is used or merely a ticking box bureaucratic exercise; while others question the value in contributing to law reform if the laws under reform are irrelevant to the local realities and customary practices experienced in the villages. To enable a continuous, constructive and meaningful dialogue with villages and the general population in Samoa would also require that western trained law reformers have a good grasp of the Samoan language and understand customary law as well as genealogical, oratorical and village protocol.

4.2.2 *Law Reform Process*

SLRC is a not customary or traditional institution.⁶⁷⁸ SLRC is an example of a legal transplant which becomes a challenge because its principal mandate involves developing modern state laws whilst at the same time, it continues to receive overseas assistance and initial guidance on institutional law reform and development from outside Samoa. SLRC's law reform legislation is modelled on legislation from Australia and Canada and SLRC's law reform process adopts the same six stages as the Australian Law Reform Commission: the initial research and consultation; preparing the Issues Paper and inviting submissions on the Issues Paper; reviewing the submissions and carrying out further consultation; preparing the Discussion Paper and inviting submissions on it; reviewing the submissions and carrying out further consultation; and preparing the final report.⁶⁷⁹ The danger of adopting overseas law reform frameworks is that the models were developed in different "more modern" contexts with different legal systems, larger populations and may not explicitly accommodate legal pluralism and customary laws. However, Aotearoa⁶⁸⁰ and Papua New Guinea⁶⁸¹ are examples of overseas countries with more modern law reform frameworks. Although law reform may have little impact on society⁶⁸², the challenge for SLRC (and other Pacific law reform commissions) is to develop a suitable law reform approach contextualised to the local and customary circumstances that also acknowledges the challenges of legal pluralism. While SLRC does play a role in reforming Samoan customary law, its scope is ultimately driven by Government agenda, followed by findings from consultations, alongside principles of Christianity and *fa'asamoa*.⁶⁸³

4.2.3 *Draft Bill process*

⁶⁷⁸ See Mulitalo, above n 3.

⁶⁷⁹ Australian Law Reform Commission "Law Reform Process" <<http://www.alrc.gov.au/law-reform-process>>

⁶⁸⁰ Law Commission Act 1985 (New Zealand), s 5.

⁶⁸¹ Constitutional and Law Reform Commission Act 2004 (Papua New Guinea), s 12.

⁶⁸² David M Trubek and Marc Galanter "Law and society, scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States" (1974) *Wisconsin Law Rev* 1062, 1083.

⁶⁸³ Talanoa with S_ACEO, 22 July 2022.

In Samoa's draft bill process, a Bill undergoes procedural vetting for both constitutional compliance and gender neutrality – which is carved out into the law reform process.⁶⁸⁴ Indeed, the language of the law is gender neutral and Article 15 of Samoa's constitution provides that all persons are equal before the law. Chapter 6 will explain the inadequacies in this claim. Thus, I propose the development of a tool similar to the Gender Legislative Index which provides a benchmark to assess legislation from gender-regressive (or gender-blind) to gender-responsive legislation (to resolve some of the problems facing *fa'atama* and SOGIEC recognition in the law, as mentioned at the start), thus providing standards for non-discrimination and inclusion.⁶⁸⁵ The current vetting process is inadequate and the recommendation for express provisions in the law to resolve this issue aligns with the researcher's data from *talanoa* focus group and interviews conducted in Samoa recently (see Chapter 4).⁶⁸⁶ Notably, Samoa's constitution provides no mechanism to reconcile this tension. At the Supreme Court level, Samoa's highest Court, this matter has not been adequately addressed. Needless to say, the constitutional challenges expressed in the women's gender quota cases (explored in Chapter 6) did not cast any consideration to the collective recognition of social practices which do not fit neatly into Samoa customary values and the law.

4.2.4 Samoa Parliament

Samoa's Parliament does not provide adequate professional development training in law making and law reform. Although it is not the traditional function of Parliament, the agenda to address the limited training, relate to the impact of legal pluralism in the legal profession, the critical need for a balanced perspective on the conflict between customary values and law reform philosophies concerning individual rights as well as modern law making which takes into consideration Samoa's customary context.⁶⁸⁷ This presents obstacles to the effectiveness of parliamentarians to adequately represent the best interests of the constituents they are elected to serve.

⁶⁸⁴ Mulitalo, above n 3, at 162, 175.

⁶⁸⁵ Vijayarasa, above n 371, at 275–80.

⁶⁸⁶ Empirical data 2022, above n 52.

⁶⁸⁷ See Mulitalo, above n 3. This is particularly apparent in the Samoa's: Law Society, Office of the Ombudsman, Parliament, and the Judiciary.

As such, they are mandated to develop and advocate for laws to uphold individual constitutional rights and communal values. Samoa's Parliament is comprised of predominantly traditional Samoan *matai* with a lack of understanding about how to introduce Private Members Bills (PMBs) or engage in parliamentary debate about policies and laws impacting their constituencies, most of which apply customary law. Although all bills and manuals are translated in both Samoan and English, the lack of confidence in formal parliamentary procedures and the Western set up of parliament impose additional challenges to their overall duty and performance as parliamentarians. Thus, the requirement that all laws and new bills must take into account Samoan customs and customary law, is not a strictly enforced function of Parliament.

All members of Samoa's executive are equipped with manuals in the form of the Cabinet handbook and the Legislative drafting handbook.⁶⁸⁸ While both handbooks do not explicitly express legal pluralism or any regard to consider customary law, this limitation hampers the effectiveness of any state policy or law making. A modification to the handbooks to filter customary considerations to ensure Ministries develop state-based policies and Legislative drafters (and law reformers) develop state focused laws contextualised to Samoa's economic, sociocultural and political environment.

There are other statutory offices that hold law reform functions (Samoa Law Society (SLS), the Commissions of Inquiry (COI)) however, I will focus on two – Office of the Ombudsman and Non-Government Organisations. I will discuss each in turn.

4.2.5 Samoa Ombudsman

Samoa's Ombudsman (also known as Samoa's National Human Rights Institution) is a constitutional authority empowered under the Ombudsman (*Komesina o Sulufaiga*) Act 2013 (Samoa) to investigate complaints independent of state intervention. While not a principal function of the Office of the Ombudsman, it may invoke statutory powers to bring attention to customary consideration in law reform at the conclusion

⁶⁸⁸ See Mulitalo, above n 3.

of investigations.⁶⁸⁹ The additional powers in the Act enable the Ombudsman to recommend the legal reform of laws that are discriminatory to redress any violation of fundamental rights.⁶⁹⁰ This may be in the form of written submissions/legal opinions with evidence-based reasons submitted to the relevant state organisation or Ministry.⁶⁹¹ Given the lack of recommendations for law reform to investigate cases that violate human rights within a customary context due to the lack of resources, funding or technical capacity⁶⁹² – this option still warrants further exploration as recommendations for law reform highlight the urgency in addressing issues of legal pluralism and the prevailing tension between Samoa customs and laws. Land states that Samoa’s constitution provides no mechanism to reconcile this tension.⁶⁹³ However, the legal pluralism is noted in the explanatory memorandum accompanying Samoa’s Constitution Amendment Bill 2020.⁶⁹⁴ And by strategically directing a liaison staff lawyer to monitor whether the law reform functions are met under their empowering Act is also worth noting.

In 2018, Samoa’s Ombudsman and the SFA developed a national action plan to advance the human rights of the *fa’afafine* and *fa’atama* communities in Samoa and recommended the development of guidelines and standards by law enforcement agencies. The national action plan identified two overarching goals: (1) to strengthen the rights to health of *fa’afafine* and *fa’atama* communities and (2) to build the institutional capacity of NHRI staff to promote and protect the human rights of SOGIEC/LGBTI people particularly through capacity building and sensitisation activities.⁶⁹⁵ The SFA’s human rights advocacy is planned to include submissions to the review of the Births Registration legislation to enable recognition and ability to change their official sex ascribed at birth to recognise their gender identity.⁶⁹⁶ It is also important to note that a representative from Samoa’s SOGIEC community is part of Samoa’s Human Rights Council of the Office of the Ombudsman. This is Samoa’s

⁶⁸⁹ Komesina o Sulufaiga (Ombudsman) Act 1988 (Samoa), s 19(3)(e); Ombudsman (Komesina o Sulufaiga) Act 2013 (Samoa), s 28(2)(e).

⁶⁹⁰ Section 40(1)(a)(i).

⁶⁹¹ See Mulitalo, above n 3.

⁶⁹² Ombudsman (Komesina o Sulufaiga) Act 2013 (Samoa), s 33(a).

⁶⁹³ Land, above n 688, at 507–540.

⁶⁹⁴ Constitution Amendment Bill 2020 (explanatory memorandum) at [1.4].

⁶⁹⁵ Commonwealth Forum of National Human Rights Institutions *NHRI Samoa: A Case Study on Sexual Orientation and Gender Identity Rights* (2019).

⁶⁹⁶ Consultation with Alexander Su’a, above n 18.

National Human Rights Office and thus, Samoa’s inclusion of “SOGIEC” in the Samoa Ministry of Women Community and Social Development was approved in the recent *National Policy on Inclusive Governance 2021 – 2031* which forms part of the gender transformative approach adopted in the baseline data used to support this Policy.⁶⁹⁷

When the Parliamentary Select Committee was receiving public submissions for the legal reform of Samoa’s Crimes Ordinance 1961 (explored more in Chapter 6), the Office of the Ombudsman extended an invitation to SFA to present to parliamentarians, most of which comprised of members from the Financial Parliamentary Select Committee. SFA presented on issues concerning general misconceptions on the rights of *fa’afafine/fa’atama* and SFA broke down what the terms of LGBT and SOGIE stand for.⁶⁹⁸ Most of the terms were genuinely not understood by parliamentarians. This high-level dialogue with Parliamentary Select Committee took place in 2022. SFA dispelled myths relating to *fa’afafine* and corrected misconceptions. SFA also set their agenda and sought support from the Government to realise those priorities. Thus, SFA made it clear that same-sex marriage is not a key priority for SFA, as respect of culture and Christianity, means respect for the Samoan community.⁶⁹⁹ Despite these initial shortcomings, it was reported that the parliamentarians expressed *alofa* (“love”) and genuine commitment to understanding LGBT concerns especially when presented from the SFA perspective.

To mainstream the human rights-based agenda is part of the strategic priorities of Samoa’s Ombudsman.⁷⁰⁰ The State of Human rights reports are updated on an annual basis. The recent consultations were undertaken in early March 2023. SFA were included, alongside the community, schools and *fa’afafine* children. The focus for 2023, however, is children and youth.

⁶⁹⁷ ADB and Government of Samoa, above n 5, pp 13, 16, 17.

⁶⁹⁸ Consultation with Alexander Su’a, above n 18; Consultation with Loukinikini Vili-Lewaravu, Office of the Ombudsman, 27 March 2023, Apia.

⁶⁹⁹ Consultation with Loukinikini Vili-Lewaravu, above n 796.

⁷⁰⁰ Consultation with Loukinikini Vili-Lewaravu, above n 796.

In 2018/2019, Samoa's intersex and lesbian community were involved in pre-dialogue leading to the Asia Pacific Forum on National Human Rights Institutions ("APF") funded project. The Law Enforcement project is related to Police and Prison enforcement. The objective is to develop guidelines for Police and Prison officers working with the SOGIEC community. Phase 1 was carried out and focused on raising awareness of SOGIEC but NHRI is still waiting for Phase 2 funds to come in to assist in raising awareness to issues relevant to law enforcement – Police and Prisons. Samoa's Ombudsman has noted that donor priorities are not as flexible as they should be, given the local realities in Samoa, which does not align well with donor priorities – the difficulty often lies in implementation.

Currently, Samoa's Ombudsman has no official complaints or record of complaints from members of the SOGIEC community. There are official complaints lodged in terms of "good governance" and the administration of good governance. Issues are generally focused on the unreasonable decisions imposed by the Government and State-Owned Enterprises (SOEs) – however, in the Samoa's Ombudsman's Human rights division (comprised of a team of three investigators), it does not investigate individual or public complaints, and currently has only one staff member as the other two have recently resigned.⁷⁰¹

4.2.6 Samoa NGOs

Samoa Umbrella Non-Government Organisation (SUNGO) is Samoa's largest NGO. By 2020, SUNGO membership had a total of 205 members comprised of 54 NGOs, 141 Community based organisations and 10 trusts.⁷⁰² The role of SUNGO is significant in terms of providing input to government on policy and laws that promote customs and grassroots interests, given its capacity as the largest NGO membership body in Samoa.⁷⁰³ SUNGO is also tasked with coordinating evidence-based research and effective data collection to ensure quality services amongst civil societies and with Samoa's local communities.⁷⁰⁴ Samoa Fa'afafine Association (SFA) is Samoa's

⁷⁰¹ Consultation with Loukinikini Vili-Lewaravu, above n 796.

⁷⁰² Samoa Umbrella for Non-Governmental Organisations Incorporated "SUNGO Annual Report for the Year Ended 30 June 2020" (17 January 2021) SUNGO.

⁷⁰³ See <<http://www.sungo.ws>>

⁷⁰⁴ Samoa Umbrella For Non-Governmental Organisations Incorporated "Constitution of Samoa Umbrella For Non-Governmental Organisations, Incorporated" <<http://www.sungo.ws>>

largest SOGIEC NGO in Samoa and “The Rogers”⁷⁰⁵ is the only NGO focused exclusively on advocating for *fa’atama* rights in Samoa which sits as a network branch under SFA structure which also includes a *Fa’atama* Representative in SFA’s executive.

SUNGO has gained the confidence of both public and private sectors in advocating for law reforms in matters they believe are opposed to including submissions against the Casino Bill 2008⁷⁰⁶, Road Transport Reform Bill 2009, membership of Samoa’s Commission of Inquiry⁷⁰⁷, even filing court proceedings against the State to declare a bill as unconstitutional.⁷⁰⁸ Building on the lessons from SUNGO in influencing law reform, any potential collaboration between SFA and The Rogers could effectively better inform and promote the rights of SOGIEC community’s in law reform.

However, there are considerable challenges that need to be considered. The need to better understand Samoa state laws and customary laws, and how they operate in Samoa’s bijural system could be overcome by employing or retaining in-house legal counsel to offer principal advice on law reform. This avoids the risk of misinterpreting proposed law reforms or pursuing legal action against the State in court (to save costs and time) whilst enhancing the overall effectiveness of NGOs in influencing law reform.

5.0 Law Reform Processes

5.1 Attempts to recognise customs and reform in state laws

There are three main approaches to the formal recognition and promotion customary law reform in state laws. Each will be discussed in turn.

⁷⁰⁵ Named after the late To’oto’oali’i “Roger” Stanley, leading *fa’afafine* advocate, who advocated for the establishment of Samoa’s first *fa’atama* collective.

⁷⁰⁶ Casino Gambling and Control Act 2010 (Samoa).

⁷⁰⁷ Radio NZ Pacific “Samoa NGO criticises govt’s commission of inquiry choice” (24 March 2010) RNZ Pacific <<https://www.rnz.co.nz/international/pacific-news/189389/samoa-ngo-criticises-govt-s-commission-of-inquiry-choice>>

⁷⁰⁸ *Jackson v Attorney-General* (Unreported, Supreme Court of Samoa, Nelson J, 28 August 2009).

5.1.1 Codification

Salman defines codification in the context of customary laws as “collected, collated and reduced into writing in the form of a statute or code having the stamp of law”.⁷⁰⁹ As discussed later in this section, some issues arise that necessitate going beyond the codes. However, I will first discuss some of the key advantages to the use of codification, followed by some of the key disadvantages. One advantage is that it systematically irons out any inadequacies and inconsistencies which is vital to any reliable legal system.⁷¹⁰ One essential feature to prevent them from becoming rigid is that they must stipulate a clear provision stating that the code is not fixed but subject to the evolving social and cultural realities to which customary laws are applied.⁷¹¹

There are more disadvantages which lie in the interpretation of the language to capture the local customs, oral traditions and customary practices, thus reinforcing the challenges of incompatibility to the introduced practice of drafting written codes into customary law.⁷¹²

Another consideration is whether legislators and drafters of the code adopt similar values or understand the sociocultural context of the recipient users to whom the code will be enforced.⁷¹³ In the application of abstract codes, the customary context to which it applies is just as significant – the institutional and cultural factors (including the attitude of judicial and legal personnel involved in this process, customary procedures and techniques adopted) contributes to the overall objective of achieving social cohesion and harmony.⁷¹⁴

As observed in other indigenous contexts, the primary objection those opposed to codification is their lack of involvement in the interpretation of customary laws or

⁷⁰⁹ Raheem Salman “Codification and restatement of customary law in Africa: the journey so far” in Andrew A Borokini (ed) *Kogi Reading in law* (Stebak Books & Publishers, Akure, 2006) at 13.

⁷¹⁰ David Field “Codification” (1866) 20 *Am Law Rev* at 1; Reginald A Onuoha “Discriminatory property inheritance under customary law in Nigeria: NGOs to the rescue” (2008) 10 *Int J Not-for-Profit Law* at 2.

⁷¹¹ Roberto Danino “Customary law systems as vehicles for providing equitable access to justice for the poor and local governance, the Peruvian experience” (paper presented at Leadership dialogue with traditional authorities, Kumasi, Ghana, 5 December 2005) at 5.

⁷¹² Thomas William Bennett and Thuys Vermeulen “Codification of customary law” (1980) 24(2) *J Afr Law* 206.

⁷¹³ Obied Hag Ali, 'The Conversion of Customary Law to Written Law' in Alison Dundes Renteln and Alan Dundes (eds) *Folk Law* (University of Wisconsin Press: USA) at 1.

⁷¹⁴ See Danino, above n12, at 5.

application of customary law as it undergoes change or adaptation.⁷¹⁵ The state, delegated authority or professional regulatory body is responsible for performing this function.⁷¹⁶ And herein lies the dilemma. Customary law is codified or reduced into writing by embedding it in legal language. This effectively removes the customary, flexible and living character of customary norms.⁷¹⁷ A code of customary law adopts specific conceptual legal language and grammar based on uniformity and certainty which may not always satisfy or adequately reflect the interests of the people to whom it is applied.⁷¹⁸ In light of the nature of customary law, when applied in court, it becomes subject to changes which runs the risk of misinterpretation, misapplication or a fundamental disregard of to the codified customary law.⁷¹⁹ This captures the experience from the women's gender quota cases (discussed more in the case study in Chapter 6).

5.1.2 *Restatement of customary laws*

Salmon asserts that restatement is a useful alternative to codification.⁷²⁰ In this regard, Allot and Cotran description of restatement is complementary as it “brings together, clarifies, connects, re-arranges in a more logical comprehensive way, previous expressions of the law on a particular topic”.⁷²¹ In this regard, restatement trumps codification when taking the form of manuals (that embed recordings of customary law), guidelines⁷²² and combining primary material (including legal commentary, legal textbooks) serves to achieve more objectivity and flexibility than its codification counterpart.⁷²³

⁷¹⁵ See Danino, above n12, at 5.

⁷¹⁶ Australian Law Reform Commission *Recognition of Aboriginal Customary Laws* (ALRC Report 31, 1986) at 122.

⁷¹⁷ Obied Hag Ali, 'The Conversion of Customary Law to Written Law' in Alison Dundes Renteln and Alan Dundes (eds) *Folk Law* (University of Wisconsin Press: USA) at 1.

⁷¹⁸ Jeremy Webber “The grammar of customary law” (2009) 41(579) *McGill Law J* at 624; Thomas William Bennett and Thuys Vermeulen “Codification of customary law” (1980) 24(2) *J Afr Law* 206.

⁷¹⁹ Thomas William Bennett and Thuys Vermeulen “Codification of customary law” (1980) 24(2) *J Afr Law* 206.

⁷²⁰ See Salman, above n10, at 13.

⁷²¹ Antony N Allot and Eugene Cotran “A background paper on restatement of laws in Africa: the need, value and methods of such restatement” in Antony N Allot (ed) *Integration of customary and modern legal system in Africa* (Africana Publishers Corporation, New York, 1971) at 18.

⁷²² William Twining (1963) “The restatement of African customary law: a comment” (1963) 1(2) *J Mod Am Stud* at 221.

⁷²³ Azinge Epiphany “Codification of customary law: a mission impossible?” in Yemi Osinbajo and Awa U Kalu (eds) *Towards a restatement of customary law* (Federal Ministry of Justice, Lagos, 1991) at 289.

By learning from the experience of France⁷²⁴ and Kenya⁷²⁵ with restatement of customary laws, the following considerations are worth noting: the best method to employ in recordings of customary law must be flexible and complementary to the social context to which it is applicable; restatement must enable progressive development and avoid the risk of being obsolete and lacking the capacity for changes as evidenced in some judges referencing dated customary laws.

Additional learnings from Namibia⁷²⁶ and Nigeria⁷²⁷ in the ascertainment of customary laws provides guidance to other developing post-colonial Pacific nations including Samoa. Based on lessons from other jurisdictions with larger population size, one approach for Samoa to consider is a constitutional review to reaffirm and restate the status of customary law and recording customary law in the form of manuals and reference guides to customary practices for institutions and structures such as Samoa's parliament, executive, judiciary and key agents of Samoa's law and justice system to support this constitutional review project.⁷²⁸ However, this would also require a periodic review of guidelines to avoid the pitfalls of customary law codification.

5.1.3 *Incorporation by reference*

The third category is incorporation by reference which is the most common approach applied in the Pacific region. Moore and Woodman argue that the 'specific' or 'general forms' of 'incorporation by reference' approach excludes any specific meanings, terms or concepts of customary laws.⁷²⁹ This approach, as adopted in Samoa, is applicable due to the restricted recognition and scope of customs incorporated by reference in law. Unlike specificity in gender and sexuality discourses, a lack of specificity is permitted in customary law incorporation by

⁷²⁴ Jacques Vanderlinden "The recording of customary law in France during the fifteenth and sixteenth centuries and in recording of African customary law" (1959) 3(3) J Afr Customary Law at 165, 168.

⁷²⁵ See Ali, above n14, at 359; Simon Roberts (ed) *The recording of customary law: some problems of method, folk law: essays in the theory and practice of Lex Non Scripta* (University of Wisconsin Press, USA, 1971) at 12-21; See Epiphany, above n24, at 289.

⁷²⁶ Manfred O Hinz "Traditional authorities, custodians of customary law development?" in Jeanmarie Fenrich, Paolo Galizzi and others (eds) *The future of African customary law*. (Cambridge University Press, 2011) at 153, 155, 167-8.

⁷²⁷ At 153, 155, 167-8.

⁷²⁸ See Twining, above n23, at 221.

⁷²⁹ Bradford W Morse and Gordon R Woodman "Introductory essay: the state's options" in Bradford W Morse and Gordon R Woodman (eds) *Indigenous law and the state* (Foris Publications, Dordrecht, 1988) at 13.

reference to preserve the ‘general form’ of customs and the flexible or living character of customary law. This is evidenced in Samoa’s Village Fono Act 1990 where the incorporation of the reference to ‘village service requirements’⁷³⁰ does not specify the definition of the term and preserves the flexibility of the unique village requirement practices adopted across Samoa. This approach is also adopted in a variety of Pacific constitutions⁷³¹ – applicable where recognition of customary law is not incompatible to formal written laws and the Constitution⁷³² - and recommended in the adoption of customary rules referenced in formal laws to accommodate customary penalties, customary marriages and customary adoptions.⁷³³

The adoption of this approach is not a sustainable practice. This is explained more in depth in Chapter 6, where I examine women’s gender quota cases.

6.0 Conclusion

The absence of comprehensive anti-discriminatory laws and policies enables a discriminatory culture against SOGIEC people.⁷³⁴ In this regard, the challenge derives from local populations who demand this change, as well as relevant institutions mandated with principal functions to enable it, which continue to experience considerable setback due to the absence of institutional policies and government directives (i.e., adequate mechanisms to ensure law reforms undergo a customs analysis and public consultation). Moreover, to resolve the tension in the structural division between custom and fundamental rights, Samoa can carve out customary exceptions to constitutional human rights’ provisions.⁷³⁵ Thus, the

⁷³⁰ Village Fono Act 1990 (Samoa), s 8.

⁷³¹ Constitution of Papua New Guinea (Papua New Guinea), sch 2.1; Constitution of Solomon Islands (Solomon Islands), sch 3(2); Constitution of the Republic of Vanuatu (Vanuatu), s 95(3); Constitution of the Federated States of Micronesia (Federated States of Micronesia), art V.1.

⁷³² At sch 2.1; sch 3(2); see Constitution of the Independent State of Samoa (Samoa), art 111; Underlying Law Act 2000 (Papua New Guinea); Customs Recognition Act (Papua New Guinea), ch 19; Customs Recognition Act 2000 (Solomon Islands).

⁷³³ Village Fono Act 1990 (Samoa), s 8.

⁷³⁴ *Samoa Party v Attorney General* 4 (Samoa 2010).

⁷³⁵ Constitution of the Independent State of Papua New Guinea s art 53(5)(d) (Papua New Guinea 1975); Constitution of Solomon Islands s art 15(5)(d) (Solomon Islands 1978); Constitution of the Independent State of Samoa; International Council of Human Rights Policy, ‘Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary’ (Versoix 1999)

carving out of customary exceptions to constitutional human rights provisions is contrary to the principle of universality, “that rights belong to us all” by virtue of being human.

In the absence of specificity in customary exceptions, a custom may prevail in cases of religious and gender discrimination, as experienced in Tuvalu and Samoa, to name a few.⁷³⁶ Similarly, Samoa has exercised this exception to preserve communal services (*tautua*) embedded in Samoa’s *matai* system against the right to forced labour. Ironically, in the spirit of cultural relativism, this complements the United Nations Human Rights Council vision “that human rights should adapt to the local context” but the customary exceptions are incompatible with the principle of universality.⁷³⁷

Now Va’a, in his research paper on human rights (mentioned above in the “Customary Law” section), asserts that prior to colonisation, Samoa had existing notions underpinning human rights that were expressed in interpersonal relations with individuals and others. Va’a also argues that the source of human rights in Samoa is custom. Underpinning both codes of human rights practices in Samoa are the core values and beliefs that drive social action. Some of these include *tautua* (altruistic and voluntary service to others) and *fa’aaloalo* (respect to others in action, speech and body language). This gives rise to a corpus of Samoan human rights embedded in social expectations and action as extended to all relationships, fundamentally serving as principles of law, which pre-dates colonisation.⁷³⁸

One problem is that, in accordance with Samoan custom which informs human rights protection, *fa’atama* gender identification and sexual orientation is not a socially and widely recognised collective practice. The majority of the *fa’atama* interviewed in the study generally do not hold the required status connected to leadership, as most are not *matai*, or education and employment, as most were either school leavers or unemployed, to justify the customary rule of recognition;. The fundamental problem

⁷³⁶Dejo Olowu “When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v Pule O Kaupule & Another*” (2005) 9 *Journal of South Pacific Law*; Mancur D Olson “Articulating Custom The Politics and Poetics of Social Transformations in Samoa” (2000) 45 *Journal of Legal Pluralism & Unofficial Law* 19.

⁷³⁷ Land, above n 687, at 539; Olson, above n 848, at 36–37.

⁷³⁸ See Va’a, above n 30, at 237-250 for a more comprehensive analysis of Samoa customs and human rights.

remains: *fa'atama* who do not identify as women continue to be treated as women in the law against their wishes. This infringes upon their freedom of expression and other fundamental human rights. Most *fa'atama* interviewed by the author wore formal *lavalava* (*Ie Faitaga*) worn traditionally by men, used the male toilet in public facilities, were charged with indecent activity with females in cases where the lack of consent was at issue, to name a few. However, by exercising and claiming legal status as *fa'atama* in the law may also serve to exclude them further from other transnational groups with concerns that cross-cut in some but not all areas, or even being socially excluded or outcast from within their own family, village and community.

It could also be argued that these conditions are oppressive and exacerbated more so in persons from the SOGIEC community in Samoa. For instance, if a *fa'atama* holds a matai title (one which is endorsed and approved by his brother and matai of the family) and he decides to honour the cultural obligations towards his female partner's family, such actions may either be permitted, dismissed or challenged by his partner's family, village or community. With the existing exclusionary practices in place prohibiting women from being bestowed matai titles which is represented by less than ten percent of women in villages holding matai titles, it is likely that *fa'atama* who reside in rural villages and identify as "transmen" will no doubt be susceptible to some form of gender discrimination by their immediate family, village in addition to their partner's family. It is important to note that this is not the experience for all, in line with the author's interview *talanoa* and focus group *talanoa* data.

Similar to other post-colonial experiences, the lesson learnt is that they lack the modern socio-economic features (such as, the educational, legal and regulatory infrastructure, access to internet in rural Samoa, and so on) to support successful legal transplants in which customary laws become the basis of primary laws.⁷³⁹ However, Samoa's legal system continues to address these limitations by exploring ways to accommodate modern features into the structures of its customary legal system. Based on the recent interviews conducted by the author, the conflicting views

⁷³⁹ Abdulmumini A Oba "The future of customary law in Africa" in Jeanmarie Fenrich, Paolo Galizzi and others (eds) *The future of African customary law* (Cambridge University Press, 2011) at 69; Michael Ntuny "The dreams of a Melanesian jurisprudence: the purpose and limits of law reform" in Jonathan Aleck and Ranells Jackson (eds) *Customs at the crossroads*. (Melanesia Law Publishers, Papua New Guinea, 1995) at 11.

promote law reform in favour of preserving only the existing customs and traditions in Samoa's formal state laws if compatible with recognition of *fa'atama* and SOGIEC rights through a more inclusive and equitable law reform process.

The process of codifying customs was highlighted as the best pathway to achieve this. In contrast, the more modern view was to explore how Samoa's bijural system can uphold the Constitution. Other critics suggest that to achieve an effective law reform process it would require an incremental and cautious approach, thus involving public consultations and submissions from the general population.⁷⁴⁰

What is missing in the above analysis is an inclusive framework to tie together all the learnings from the critiques to legal pluralism and Samoa's law reform process, alluded to earlier, to effectively guide the reform of customs and laws. In the next section, I present some of the key learnings from the analysis and critical review of the rules of recognition and the theory of representative democracy. It provides an appealing framework towards adapting a customary rule of recognition, appropriate to the context of Samoa. Consequently, enabling the legitimate pathway for reform and recognition of *fa'atama* in Samoa's customs and laws.

The above discussion on customary law and state law is critical to understanding the most effective law reform processes to develop to achieve recognition of *fa'atama* in Samoa customs and laws. More specifically, we examine some of the ways to address the key challenges concerning Samoa's law reform process in response to *fa'atama* and SOGIEC considerations.⁷⁴¹ Also, building on the case study exploring women's gender quota cases, we examine how the judiciary applied caution in an effort to resolve tension (discussed next in Chapter 6) to accommodate customary norms with modern western norms in the constitution alongside other, and often competing considerations – legal pluralism, the interpretation of language in the law, the intention of Parliament, the context of customs and traditions.

⁷⁴⁰See Mulitalo, above n 3.

⁷⁴¹*In re the Constitution, Mulitalo v Attorney-General* 8 (Samoa 2001); *Electoral Commissioner v FAST Party*, WSCA 3, at 10. at 10.

CHAPTER SIX – MOVING TOWARDS A MORE RESPONSIVE LAW REFORM PROCESS FOR SAMOA

1.0 Introduction

In light of the critical challenges identified in Chapters 4 and 5, this chapter examines how these challenges may be: 1. Effectively addressed, and 2. Effectively achieved, in Samoa's legal system (i.e., customary and state legal system). This discussion acknowledges that for any sustainable and responsive law reform framework to succeed in Samoa, the onus is on the State to fulfil its responsibilities in law reform, while supporting village responsibilities in law reform at the customary level. These include building and strengthening collaborative partnerships in the existing legal system as informed by evidence from relevant literature and empirical data (see Chapter 4) to: 1. determine the credibility of the critical challenges raised to address these issues, and 2. encourage law reform that gives balanced consideration to what is relevant and suitable in Samoa, taking into account both local and global contexts.

2.0 Summary of goals determined by *fa'atama*

Based on the *talanoa* data (in Chapter 4), several key themes have emerged to support what *fa'atama* want, in the context of law reform and legal recognition in Samoa customs and laws:

- Some of the major themes are that *fa'atama* should be legally entitled to adopt and marry in Samoa and to petition the Government for this. For adoption, the justification was to step in and adopt during unforeseen circumstances in order to assist siblings who were no longer in a position to care for their own children. For marriage, the justification was simply to make this social practice more visible to enable collective recognition by the wider community.
- Another theme included the need to amend the Constitution to ensure all genders, including *fa'atama*, are included and treated equally. In terms of law reform, lessons from the Anti-Sodomy law change and Temporary Special Measure to Samoa's Constitution highlights the need to take a cautionary incremental approach to law reform in Samoa, to allow for adequate consultation with the community and a critical understanding primarily grounded in the traditional gender roles of Samoa before being influenced by ideas originating outside Samoa.
- There is a strong argument raised by *fa'atama*, which challenges why the *fa'asamoa* culture and Christianity has merged together because, this powerful combination alone has been argued by *fa'atama* as the principal challenge to *fa'atama* recognition. They argue that *fa'asamoa* culture and Christianity should be

independent of each other, similar to the concept of separation of powers underpinned by the rule of law, where the Executive is separate from both Parliament and the Judiciary, and Parliament is separate to both the Executive and Judiciary, and so on.

- In terms of the status, social practice and legitimacy of *fa'atama*, *fa'atama* interviewed assert that the justification is based on the belief that, one, God had created *fa'atama* alongside all the other genders, and two, *Nafanua*, Samoa's first warrior Goddess, was a *fa'atama*, which adds more legitimacy to the claim that *fa'atama* were validated, firstly, as God's creation and secondly, in *fa'asamoa* culture and historically through *Nafanua*, before colonisation. Therefore, the inclusion of *fa'atama* in official statistical reporting, formal state laws, customary laws, policies and every day discourse is long overdue and should be widely recognised.
- The *fa'atama* respondents expressed the view that all *fa'atama* are different. There are multiple expressions of *fa'atama*, dependent on one's lived reality and context. *Fa'atama* do not identify as bisexual and lesbian in Samoa or according to the *fa'atama* respondents outside Samoa. Some *fa'atama* are with children and others with no children. There are also *fa'atama* who are pro-marriage and some who are anti-marriage. On the topic of gender affirming (genital) surgery, the majority of *fa'atama* in the research were opposed to it because it is considered as inconsistent with Christian and *fa'asamoa* principles.
- While one path to legal recognition of *fa'atama* is available through an official name change, changing's one's feminine name at birth to one that is more befitting to their identity as a *fa'atama*, what is not available in Samoa is a change to sex ascribed at birth, which remains recorded on the birth certificate. According to *fa'atama* respondents, this is inadequate because they would prefer changing the sex recorded on their birth certificate from female to *fa'atama*.
- Most *fa'atama* respondents self-identified as *fa'atama* which they claim is their preferred gender identity and sexual orientation, while also acknowledging that this simultaneously differs from their sex ascribed at birth. *Fa'atama* in this research identify both as *fa'atama* in terms of gender, and female in terms of sex. In line with Samoa's gender framework, sex and sexual orientation is incompatible with gender identity. Samoa's public and private sector only recognise sex in official documents and forms requiring personal identification. However, *fa'atama* view their sex in the context of their biological and physical body parts. On the other hand, in Samoa, gender identity is determined on the basis of family and communal service, duties and obligations which were cultivated from birth. Also, *fa'atama* viewed their gender based on how they self-identified, as *fa'atama*, coupled with their sexual attraction to cis-females. To identify as *fa'atama*, one has to self-identify as Samoan as it is tied to one's cultural identity as a Samoan, irrespective of whether you are living in Samoa or overseas.
- The need for acceptance as *fa'atama* in the family, the church and village would allow them to live openly and freely as *fa'atama* with respect to who they choose to engage with sexually, how they dress and behave, without hiding who they are and living in fear of punishment (village fines), stigmatisation, shame, discrimination (enforced dress codes at church, school, village), prejudice or judgment from their family, church, village and the wider community. On this view, *fa'atama* demand the inclusion of *fa'atama* acceptance in Schools in the form of raising awareness about *fa'atama* as a gender identity in Samoa, removing dress code restrictions if a student identifies as *fa'atama* from a young age.

- One key identifier/marker of progress would be when the discussion of gender and acceptance of *fa'atama* would not be deemed as an uncomfortable topic during family *talanoa* in Samoa. However, the *talanoa* data confirms that the topic of gender is discussed more freely in family *talanoa* overseas compared to Samoa. Overseas based *fa'atama* claim that family in Samoa exploit them for financial assistance for church, family and village obligations though explicitly opposed to their self-identity as *fa'atama*, and even at times, their family are responsible for committing domestic violence, emotional and physical abuse against *fa'atama*. The *fa'atama* respondents further claim that addressing domestic violence in the home often takes less priority to *fa'alavelave* (cultural or financial obligations).
- More commitment and unity amongst *fa'atama* was highlighted as the solution to long term sustainability to achieving full recognition in Samoa. The lack of commitment, thus far, reveals generational differences, differences in opinion amongst *fa'atama*, stronger *fa'atama* representation in SFA, amongst other factors. In comparison to *fa'afafine*, *fa'atama* are less accepted, less recognised and less visible in Samoan society.
- *Fa'atama* in Samoa and overseas do not share consensus on the idea that a Samoa legal and human rights framework guided by Samoan principles, to protect Samoa, is achievable. There is more support for a separate law to recognise the legal status of *fa'atama* from *fa'atama* living in Samoa rather than overseas based/ diasporic Samoan *fa'atama* residing overseas. The culture and religion were identified as barriers by overseas based *fa'atama*, to the development of a *fa'atama* law and human rights framework in Samoa. Further to this, overseas based *fa'atama* identified Australia, New Zealand and the United States as the nations where this would be most achievable as they are more secular and progressive.
- Cultural and customary reform (as alluded to in Chapter 5) is what *fa'atama* demand, where members of Samoan society, holding respected status, including elders, parents, church ministers, matai, would offer their support to *fa'atama* and their way of life, similar to the *fa'afafine* community, as a *fa'asamoa* way of customary recognition. In a similar vein, *fa'atama* should feel free to *tautua* their church, family and village based on their terms and not be prohibited from consideration with respect to the bestowing of matai titles, as any member of the community who demonstrates *tautua*. *Fa'atama* should be free to participate in their family, church, village and wider community as *fa'atama* and not feel compelled to only join the women's committees. One *fa'atama* respondent even proposed the idea that a village set up exclusively for *fa'atama* where *fa'atama* were free to do as they please would be considered quite revolutionary and worth considering.
- *Fa'atama* demand better access to adequate health care, justice, education and employment. In terms of health care, healthcare professionals should be educated about *fa'atama* and how they prefer to be treated. In terms of access to justice, most *fa'atama* refused to be treated as women in the law when they self-identify as "fa'atama" and as such, *fa'atama* demand that their gender be recorded on charging documents and that they be placed in separate cells in prison for *fa'atama*. The respondents also emphasised the need for more information about how to access legal aid. Programmes and apprenticeships to enable *fa'atama* to gain entry to viable education and employment pathways are needed. This will help to address the reportedly low number of *fa'atama* in employment and the high number of *fa'atama* school leavers. In terms of alternative education and employment

pathways, building on existing skills such as in arts and crafts, in particular, would be useful to *fa'atama* based on the *talanoa* data.

- While SFA's commitment to community advocacy and collaborative partnerships have continued to inspire *fa'atama* to remain committed, the respondents highlight the need to explore innovative and creative options for *fa'atama* to share their stories. Tiktok, programming on television, children's books, youtube channels, documentaries are some of the kinds of platforms needed to showcase *fa'atama* talent, to raise awareness about *fa'atama* and to encourage the public to view *fa'atama* in the light of who they are.
- *Fa'atama* also aspire to form an independent association similar to SFA. The issue that they face is the lack of *fa'atama* committed to this as well as the lack of funding and technical knowledge about how to access the grants or funds required to keep a *fa'atama* association sustainable.

3.0 Problems facing *fa'atama* and SOGIEC recognition in Samoa customs and laws

In accordance with Samoan custom which informs human rights protection, *fa'atama* gender identification and sexual orientation is not a socially recognised practice and, hence, does not have the full status or recognition to justify a Samoan customary rule of recognition. The perceptions of transgender and non-heteronormative people in the law are also reflected in judicial attitudes towards marriage. The role of the courts, the legal system, parliamentary processes and social media all play a significant role, in varying degrees. This points to the vital role of Samoa's law and justice sector – the parliamentarians, the judiciary, the legal profession involved in aspects of law reform, including village mayors in customary contexts – and the required training and legislative support required to influence the extent to which legal developments and advocacy for law change are relevant to *fa'atama*.

In Samoa, to bring *fa'atama* within the law would be met with challenges from the present framework, heavily influenced by the imposition of introduced common law and the Christian patriarchal principles strongly embedded in Samoa's prevailing customs, traditions and values. The fundamental problem remains:⁷⁴² *fa'atama* who do not identify as women continue to be treated as women in the law against their wishes. Based on the *talanoa* (see Chapter 4), all *fa'atama* participants identify as transmen. The problem is that *fa'atama* who identify as transmen do not fit into the traditional sex categories and may continue to be ignored because it is primarily

⁷⁴² Empirical data 2022, above n 52.

beyond the scope of the law. This infringes upon their freedom of expression and other fundamental human rights.

Further to this are the layers of complexity to *fa'atama* self-identification. The reasons were varied as to why some perceive their gender identity as an individual decision separate to their role in the family, the church and wider village community; other participants were concerned with the more immediate aspects of their daily life such as responsibilities to their family, village, church and community (see Chapter 4). Most *fa'atama* in the study asserted that they wore formal lavalava (that is, *faitaga*) worn traditionally by men, used the male toilet in public facilities, were charged with indecent activity with females in cases where consent was not an issue, to name a few.⁷⁴³ Thus, by exercising and claiming legal status as *fa'atama* in the law may also serve to exclude them further and in most cases, socially exclude or outcast them from their own family, village and community. In short, their gender identity and sexual orientation does not play a central function in their life unless they are explicitly denied legal protection and access to employment opportunities, education, health care and justice.

While the experiences of *fa'afafine* dominate Samoa's SOGIEC literature, the experiences of Samoa's SOGIEC community are not homogeneous, and the emphasis on *fa'afafine* could effectively render the experiences of other members of the SOGIEC community invisible in official data reporting. The Samoa Fa'afafine Association (SFA) also observed that, while both *fa'afafine* and *fa'atama* members continue to face numerous challenges, *fa'atama* are much more vulnerable to discrimination, stigmatisation and are invisible in official data and policies.⁷⁴⁴ Unlike *fa'atama*, there is a large body of anthropological literature on *fa'afafine*, but very limited research regarding their human rights concerns.⁷⁴⁵ There is no formal statistical data and estimates of the number of people identifying as *fa'afafine* and *fa'atama* vary. There is a lack of scholarly or applied policy literature on *fa'atama*, and no corresponding non-government organisation to the SFA. *Fa'atama* members

⁷⁴³ Empirical data 2022, above n 52.

⁷⁴⁴ (20 October 2020).

⁷⁴⁵ Sumeo, above n 164.

sit within the SFA. This is problematic and, over time, *fa'atama* are likely to organise a separate and independent NGO driven specifically by *fa'atama*-framed ideals.

Based on *talanoa* with *fa'atama* in Samoa (see Chapter 4), one of the key problems that *fa'atama* highlighted is the lack of gender-responsive legislation in Samoa.⁷⁴⁶ Without appropriate legislation that considers the specific needs and concerns of *fa'atama*, they may experience various problems when it comes to accessing their rights and participating fully in society. Some of these problems are summarised below:⁷⁴⁷

- a) Customary and legal recognition of *fa'atama* status: *Fa'atama* are underrepresented in political and decision-making positions, as there are no specific laws, customary laws or policies that promote pathways to increase *fa'atama* representation as *matai* while frameworks to enhance gender equity generally avoid *fa'atama* in these areas.
- b) Access to justice: *Fa'atama* who experience violence or discrimination also face obstacles in accessing justice, as there are no specific legal frameworks in place that legally recognise the constitutional status of *fa'atama* sexual orientation or gender identification in laws and customs. This means no constitutional protection under the law.
- c) Economic opportunities: *Fa'atama* face discrimination in the workplace based on their sexual orientation compounded by limited access to resources and opportunities that could help them to become economically empowered.
- d) Access to education: *Fa'atama* face barriers to education, such as bullying in schools and compulsory dress codes requiring *fa'atama* to wear female uniforms or be subject to suspension with no specific policies or laws in place that promote equal access for *fa'atama* to education.

4.0 Potential solutions

To address these problems in line with the goals set by *fa'atama* (in Chapter 4), there is a need for gender-responsive legislation that promotes gender equality and addresses the specific needs and concerns of *fa'atama* in Samoa.⁷⁴⁸ This could include laws and policies that promote equal representation of *fa'atama* in decision-making positions, address gender-based violence and discrimination, and promote equal access to education and economic opportunities. Overall, the lack of gender-responsive legislation in Samoa poses significant challenges for *fa'atama* and their ability to fully participate in society. Addressing these issues will require a

⁷⁴⁶ Empirical data 2022, above n 52.

⁷⁴⁷ Empirical data 2022, above n 52.

⁷⁴⁸ Empirical data 2022, above n 52.

commitment from policymakers and civil society organizations to promote gender equality and ensure that *fa'atama*'s rights are equally protected and promoted.

4.1 *Social media*

During the in-country validation workshop in March 2023, the findings were presented to the core *fa'atama* collective in Samoa, under the guidance of the *fa'atama* advisor, and subsequently approved, after careful deliberation and *talanoa*. Some of the additional views expressed in the validation workshop was that social media has allowed more members from the SOGIEC community in Samoa to express who they are should not be understated. The influence of social media goes hand in hand with the advancement of Information and Communications Technology (ICT) which has caused ripple effects, both positive and negative. Some of the positive effects of social media include disrupting notions of socioeconomic privilege while promoting an equal level playing field where access to current information is available to all, irrespective of socioeconomic background, status and so on. Consequently, the common expression that knowledge is power is no longer reserved for the privileged, as ICT enables access to a shared platform of equality where dissemination of information reaches even the most remote areas. Social media also enables active participation in online community and global dialogue, thus connecting local Samoans to diasporic Samoans and global events concerning current SOGIEC movements:⁷⁴⁹

Now they're a lot more expressive on social media via video's post, photos and people talking about their lives and identity about who they are. Samoan people are learning a lot about the exposure, the good and bad learnings from it...because of the exposure, they're a lot more aware of what is happening...same time it's the same channel that is also allowing LGBTIQ to voice and express ideas, issues and concerns as well. Like a tug of war, always a clash of these issues. I think our people are a lot more aware though not always receptive. They understand these things but keep to themselves. I also feel that this is progress from the last 10, 15 years where these things were rarely addressed because social media was not available to all – only expressed in very high-level publications, newspapers, only available to the privileged...

⁷⁴⁹ Consultation with Alexander Su'a, above n 18 and 24 March 2023, Apia; Consultation with Vanila (Ice) Heather, Fa'atama ("The Rogers"), Samoa Fa'afafine Association Executive, 24 March 2023, Apia and representatives from The Rogers.

What is critical is that social media is identified as a powerful platform which enables (and at times, scrutinises) individuality, self-expression and autonomy which is less emphasised in the village setting of Samoa. The village setting is under the watchful oversight of the village *fono* comprised of *matai*. Further to this, the influence of the broader cultural, traditional and social context, reflective of Christian ideology, emphasises the dominant patriarchal and gender binary norms often deeply entrenched in legally pluralistic nations with a strong post-colonial legacy.

4.2 Gender-responsive law reform

As of 3rd of March 2021, Samoa had a total of 268 laws.⁷⁵⁰ To ensure the UN references to gender neutral and inclusive language are adopted in Samoa laws, it is envisioned that a gender transformative approach (GTA) be adopted, where ‘sexual orientation and gender identity’ are included, where relevant, in any proposed legislative amendment, reform, repeal or review. A GTA is foregrounded in the ideology that recognises gender as a social construct, that inequalities lie at the intersection of power relations and that imbalances in the perception of gender norms and practices, lead to the reproduction of gender inequities, within social and cultural relations. The GTA is best positioned as the most culturally competent approach to examine gender discriminatory practices in Samoa, because it is transformative. On this view, the GTA seeks to examine the system as a whole, by addressing the root cause of inequality, while disrupting the rigid heteronormative notions of sex and gender in Samoa. The comprehensive application of the GTA was accompanied by extensive data collection, consistent with the *Talanoa* methodology, to generate the most effective response in terms of addressing imbalances in power dynamics as well as social and cultural relations.

As Samoa laws must be consistent with the Constitution, Article 15(2) must primarily be amended to substitute references to sex with ‘sexual orientation’ and ‘gender identity’.⁷⁵¹ Now let us explore Samoa’s Constitution in more depth. According to Article 15 it states:⁷⁵²

⁷⁵⁰ Talanoa with S_ACEO, 22 July 2022; Empirical data 2022, above n 52.

⁷⁵¹ Samoa Faafafine Association Inc. Civil Society and Other Submissions. 2016. *Universal Periodic Review Samoa submitted to Session 25 at the United Nations Office of the High Commissioner for Human Rights*. Geneva. 3 May.

⁷⁵² Constitution of the Independent State of Samoa.

- (1) All persons are equal before the law and entitled to equal protection under the law.
- (2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.

It is worth noting that this Article is dated. The last time it was amended was in 1960. The Preamble of Samoa's Constitution references Samoan customs and traditions, and Christian principles, as well as fundamental freedoms, however: "Sexual orientation and gender identity are notably absent from this list of prohibited grounds of discrimination".⁷⁵³ While this is common in Constitutions and even some UN treaties, they interpret sexual orientation and gender identity into the law. This practice is not common in Samoa, which is why this practice must be prioritised.

Consequently, Article 15(4) permits the enforcement of provisions that existed prior to the enactment of Samoa's Constitution. This removes any protection from discrimination on the basis of disability, gender identification and sexual orientation. It safeguards existing customs and usages but did not clearly articulate how laws facilitate special measures to guarantee substantive equality until recently. The discriminatory sodomy provisions still remain in Samoa's Crimes Act 2013, criminalising consensual sex between men only. It could also be used to criminalise persons ascribed the male sex at birth, such as *fa'afafine*. Thus, there is limited scope to bring *fa'atama* (often misgendered as lesbians) within Samoan laws with Samoa's Constitution serving as the starting point.

The reality of legal protection to a full suite of fundamental rights as enshrined in constitutions is an entitlement not yet afforded to *fa'atama*. Insofar as Samoa's laws and Constitution does not prohibit discrimination on the basis of sexual orientation and gender identification, it also does not make it illegal. Arguably, shoehorning *fa'atama* and SOGIEC members into recognised gender binary norms in the law is also not ideal. As evident in the women's gender quota cases (below), caution needs to be taken when adopting inclusive legal language such as "sexual orientation",

⁷⁵³ Crichton, above n 32, at 125–42.

“gender” and whether inclusiveness of *fa’atama* and lesbian people may dismiss any significant feature they seek to preserve.

More importantly, before considering any proposed law reform and legal transplant, it must be driven by what *fa’atama* want. If diverse SOGIEC people in Samoa seek to act as agents to influence legal change to recognise their legal status within the law or to drive more meaningful and appropriate models for law reform, the power to influence this change invariably lies with *fa’atama* themselves.⁷⁵⁴ Their lived experience determines how they construct and maintain their identities within the wider context of the influences from globalisation, Westernisation, migration and Samoa’s shifting political economy. This, then, is a matter within the scope of SLRC’s mandate which is guided by the Law Reform Commission Act 2008. Thus, any review or reform must promote the Samoan customs, enhancing the development of Samoa and ensure all laws are in accordance with the Constitution and meets the needs of the Government and the people. As a recommendation, community village outreach, involving village mayors, education awareness campaigns are a few ways to enable input from the *fa’atama* community as noted during both interview and focus group *talanoa*.⁷⁵⁵

To understand the depth of reality to laws and customary practices in Samoa, without paying attention to the lived experience of Samoan *fa’atama* and SOGIEC people, is unjust. In Samoa, *fa’atama* are still denied the common legal protections and human rights afforded to heteronormative individuals. It reflects a legally pluralistic legacy where historical association of legal status is closely aligned to the binary, biological and universal notions of female and male. Even in contemporary Samoa, the SOGIEC community, specifically *fa’atama*, are underrepresented in local Samoan discourse.⁷⁵⁶

SOGIEC non-heteronormative or non-binary concept or term is not problematic in the Pacific, insofar as there is an understanding of the specificities and particularity to the cultural and political context to which it is applicable. The use of terms and

⁷⁵⁴ Empirical data 2022, above n 52.

⁷⁵⁵ Empirical data 2022, above n 52.

⁷⁵⁶ Farran, above n 84, at 347–370.

labels to define *fa'atama* may be incompatible with their overriding identity when contextualised to their traditional role and status in the home, family, village and community. When comparing *fa'atama* to accepted perceptions and sociocultural understandings of masculinity, some *fa'atama* may choose to distance their gender identity and sexual orientation from how they are generally perceived, which also highlights the danger of fitting *fa'atama* under broader gender-inclusive terminology. For example, non-heteronormative males in Samoa who identify as gay may reject the term "*fa'afafine*" (literally translated as "in the manner of women") as it prefaces a sexual persona, to which they seek to not be associated.⁷⁵⁷ Similarly, non-heteronormative females in Samoa may reject the term "*fa'atama*" and not subscribe to sexological gender and legal discourse.

In line with Samoan and Christian principles, art 15 of Samoa's Constitution adopts a functionalist interpretation of "sex" (sexual orientation) and makes no explicit reference to "gender" (gender identity). Therefore, it does not prohibit discrimination on the grounds of sexual orientation or gender identification, nor does it make gender discriminatory practises illegal. This is why the repeal of all gender discriminatory laws and provisions (embedded in Samoa's civil and criminal codes which discriminate on the basis of SOGIESC status) is on SFA's agenda. By drawing on lessons from other repeals such as the Crimes Act 2013 in relation to the decriminalisation of female impersonation and the Mental Health Act 2007 removal of sexual preference or sexual orientation from the statutory definition of "mental disorder" (where "a person is not considered mentally ill" if "the person expresses or refuses or fails to express a particular sexual preference or sexual orientation"). Further to this, the development of special mechanisms (administrative, legal, policy) that adequately address gender-based violence (and social stigma, stereotyping) against Samoa's SOGIEC community and, finally, consideration as to the most appropriate approach to adopt (which could form a combination of approaches), whether it be calling a public referendum, seeking judicial interpretation, advocating for a Member of Parliament to move a private member's bill or even seeking an explicit repeal of art 15 of Samoa's Constitution, may be met with more problems than solutions.

⁷⁵⁷ Alexeyeff and Besnier, above n 59.

According to the *talanoa* data, customary law reform demands immediate attention and should be prioritised, alongside some of the other relevant laws which also require immediate amendment, which include (but are not limited to) the following:⁷⁵⁸

- Sections 67-68 and 71 (crimes of “sodomy” referred to in Chapter 2) be repealed as they undermine Sections 49 and 50 of the Crimes Act 2013 (which refers to the statutory definitions of “sexual violation” and “sexual connection” respectively), which legitimises and contradicts the ‘sodomy’, ‘attempts to commit sodomy’ and ‘homosexual acts’ provisions
- UN references of ‘sexual orientation’ and ‘gender identity’ be included in the Births, Deaths and Marriages Registration Act 2002 (BDMRA 2002) (for reasons mentioned earlier), the Film Control Act 1978, Indecent Publications Ordinance 1960, Marriage Ordinance 1961 and Labour and Employment Relations Act 2013 (LERA 2013) which are all silent on general LGBT+ concerns, which subjects it to discriminatory decision-making void of LGBT+ interests. More specifically, sections 43-46 of LERA 2013 must be repealed to ensure that parents, including “adoptive parents” are also comprehensively covered and protected in the maternity leave and paternity leave provisions.

4.3 State Gender-responsive budgets

In terms of gender-responsive budgeting, the adoption of the Gender Responsive Budgeting Training Manual by each Government Ministry ensures a gender perspective at all stages of the budget process, while actively contributing to Samoa’s Pathway for the Development of Samoa and creating equal opportunities across the board.⁷⁵⁹ Alongside this are commitments to building robust gender-disaggregated data, including Samoa’s *fa’afafine* and *fa’atama*. More specifically, that the Government supports a budget to enhance the work of SFA as Samoa’s longest standing resource on *fa’afafine* and *fa’atama* advocacy.

⁷⁵⁸ Samoa Faafafine Association Inc. Civil Society and Other Submissions. 2016. *Universal Periodic Review Samoa submitted to Session 25 at the United Nations Office of the High Commissioner for Human Rights*. Geneva. 3 May.

⁷⁵⁹ UNDP Spotlight Initiative. 2022. *Gender Responsive Budgeting Training Manual*. UNDP, Apia. https://www.undp.org/sites/g/files/zskgke326/files/2023-01/spotlight_samoa_grb_manual_publication_2022.pdf; see, Verena Linneweber. (June 30, 2022). Op-Ed: Gender-Responsive Budgeting – The Way Forward. UNDP Samoa. <https://www.undp.org/samoa/speeches/op-ed-gender-responsive-budgeting-%E2%80%93-way-forward>; see Ministry of Finance. (2022). *Pathway for the Development of Samoa FY2021/22 - FY2025/26*. Government of Samoa. Apia, Samoa.

4.4 Gender-responsive policies

Some of the relevant policies in Samoa which require immediate amendment include (but are not limited to) the following:⁷⁶⁰

- Samoa's Ministry of Health include *fa'afafine* and *fa'atama* vis-à-vis SOGIEC community in its Sector and Implementation plans while also adopting a trans-centred approach to health care services. Thus, providing hormonal therapy treatments to transgender communities was highlighted by the SOGIEC community.
- Samoa's Ministry of Works, Transport and Infrastructure, Building Division, review or reform of the National Building Code, mentioned earlier, for mandatory provision of unisex or transgender public toilet facilities.

4.5 Laws aimed to protect SOGIEC people and vulnerable groups from hate crime

Apart from hate crime constituting an aggravating factor for sentencing, the development of a law specific to hate crime has not been prioritised in Samoa's law and justice sector.⁷⁶¹ In *Police v Wilson* [2016] WSSC 83, Sapolu CJ stated in para [32], that "hate crime" is "...where the attack is inspired by racism, homophobia or hostility to any other group, that may also constitute an additional aggravating factor. Section 9(1)(h) of the Sentencing Act applies." Similarly, in *Fetua'o v National Prosecution Office* [2016] WSCA 10, "...hate crimes against specific ethnic, religious or sexual groups may well warrant specific mention in the guidelines as a factor increasing seriousness...because these matters can be a factor in sexual crime and are recognised in s 9(1)(h) of the Sentencing Act as an aggravating factor."

Also in 2016, the Samoa Observer's unethical reporting of Jeanine Tuivaiki's death, a *fa'afafine* from Samoa, had resulted in the publication of an uncensored graphic photo on the front page, of her hanging from the ceiling of a Catholic church, which no doubt led to immediate local and global backlash.⁷⁶² Before the pathologist coroner's report confirmed her death by suicide, it was alleged that her unfortunate death was linked to hate crime. Consequently, this resulted in law changes including

⁷⁶⁰ Samoa Faafafine Association Inc. Civil Society and Other Submissions. 2016. *Universal Periodic Review Samoa submitted to Session 25 at the United Nations Office of the High Commissioner for Human Rights*. Geneva. 3 May.

⁷⁶¹ Consultation with Loukinikini Vili-Lewaravu, above n 796.

⁷⁶² Adam Taylor. (June 20, 2016). A newspaper published an uncensored photo of a dead transgender woman on its front page. The Washington Post. <https://www.washingtonpost.com/news/worldviews/wp/2016/06/20/a-newspaper-published-an-uncensored-photo-of-a-dead-transgender-woman-on-its-front-page/>

the repeal of Samoa's Coroner's Ordinance 1959 (now Samoa's Coroner's Act 2017) and the establishment of Samoa's first Media Council and Media Code of Ethics.⁷⁶³ Further to this, the unofficial accounts of homosexual and transphobic hate crime, targeting Samoa's *fa'afafine* and *fa'atama* community, has remained largely unreported, yet widely recognised.⁷⁶⁴

There are no anti-discrimination laws as in Australia and New Zealand. However, the principles of equality and non-discrimination were highlighted by SFA during the 2021 UPR submissions.⁷⁶⁵

The principles of equality and non-discrimination must prevail over cultural or traditional practices that adversely affect ALL citizen's lives, and Samoa must be engaged in the process of combating negative practices and social attitudes.

Samoa must address cultural obstacles to equitable treatment of citizens rather than relying on culture as an excuse for lack of progress. We respect our Fa'asamoa. We are shielded by our Fa'asamoa. But when our Fa'asamoa is used to discriminate against us, then we must rely on the international community to intervene on our behalf.

Nevertheless, Samoa's LERA 2013 prohibits direct/indirect discrimination on the basis of sexual orientation. In addition, the Mental Health Act 2007 has removed sexual orientation or preference as a mental illness. Thus, the removal of sexual preference or sexual orientation from the statutory definition of "mental disorder" (where "a person is not considered mentally ill" if "the person expresses or refuses or fails to express a particular sexual preference or sexual orientation").⁷⁶⁶ Such forms of discrimination would satisfy the criteria for homophobic and transphobic "hate crime".⁷⁶⁷

While enforcement is not always litigated or argued in court, it tends to feature more in policy drafting. Samoa's *National Policy on Gender and Rights of Women and*

⁷⁶³ Ilia L. Likou. (23 February, 2017). Media Code of Ethics adopted. Samoa Observer. <https://www.samoaoobserver.ws/category/samoa/8804>

⁷⁶⁴ Empirical data 2022, above n 52.

⁷⁶⁵ Consultation with Alexander Su'a, above n 18. This consultation with MPs was corroborated in another consultation with Loukinikini Vili-Lewaravu, above n 796.

⁷⁶⁶ Empirical data 2022, above n 52.

⁷⁶⁷ Consultation with Sala Sapolu Margraff, above n 716 – Sala does not deal with substantive legal matters and instead referred the author to the Samoa Law Reform Commission for guidance as they did a review of the Crimes Ordinance 1961. This is the only Report Sala highlighted during the full consultation.

*Girls*⁷⁶⁸ makes reference to legislation. However, one leading gender and law expert, Alexander Su'a, had represented a client who experienced employment discrimination, who relied on the anti-discrimination provision set out in Samoa's LERA 2013.⁷⁶⁹

4.6 Case Study: Women's Gender Quota cases – possible solutions

In the light of the development of Samoan human rights and customary norms, the doctrinal approach continues to be employed by the judiciary in understanding the language of the law. Arguably, the Samoan customary norms and non-legal aspects were not significantly considered, as evident in the examination of women's gender quota cases (discussed next). Although *fa'atama* do not identify as women, it helps to explore some of the judicial reasoning around the women's gender quota cases reasons to better understand what potential legal challenges lie ahead for *fa'atama* seeking to achieve recognition in Samoa laws and customs, which will be discussed in more detail next.

The more purposive approach adopted in *re the Constitution, Mulitalo v Attorney-General* [2001] and more recently, the *Electoral Commissioner v FAST Party* [2021] would suggest that not all hope is lost.⁷⁷⁰ Some of the critical lessons we can take is: the Court's plea for more thorough drafting, which should ideally be a pragmatic comprehensive process of constitutional reform "free from the furnace of partisan politics"⁷⁷¹; an independent judiciary that defends the Constitution and rule of law, even despite significant political pressure or otherwise; but, more importantly, the judicial interpretation of law that takes into consideration the promotion of human rights practices in an increasingly egalitarian Samoan society. In the words of the SC: "The whole raison d'être of Independence was for Samoa to free itself from its colonial shackles retaining only those institutions and practices it considered

⁷⁶⁸ Samoa's Ministry of Women, Community and Social Development. (2021). *National Policy on Gender Equality and Rights of Women and Girls*. Government of Samoa. Apia, Samoa

⁷⁶⁹ Consultation with Alexander Su'a, above n 18; This consultation with MPs was corroborated in another consultation with Loukinikini Vili-Lewaravu, above n 796.

⁷⁷⁰ *In re the Constitution, Mulitalo v Attorney-General*, WSCA 8 at 8; *Electoral Commissioner v FAST Party*, WSCA 3, at 10. at 10.

⁷⁷¹ *FAST Party v Electoral Commissioner* 75 (samoa 2021).

worthwhile”.⁷⁷² Thus, embedded in the “more purposive approach” is the promotion of human rights and considerable attention to the primary intention behind specific language in the law. I view this as a powerful mechanism that would enrich any future judicial decisions especially as it relates to *fa’atama* and SOGIEC matters in the law, although the courts may only act on cases before them. This, then, limits the power of the Courts to act as a force for judicial reform.

Whether an individual claimant is politically motivated or not, strategic litigation is generally discouraged by local lawyers.⁷⁷³ Although many are familiar with Article 15 (of Samoa’s Constitution) and grounds to question the constitutionality of laws, it is not encouraged unless necessary. In a way, this process is initiated and dependent on the client’s wishes. The President of Samoa Law Society prefers to allow due process to run its course. Where SOGIEC matters are concerned, the preferred legal approach is to refer these matters for review or reform through Samoa’s law reform process. However, the SFA approach is community based advocacy to change people’s attitudes first followed by changing the laws. SFA recognise that focusing on changing laws does not always yield the best results. Thus, the understanding is that law changes or the push for law reform does not immediately change people’s attitude. Thus, a prime example of this is when SFA participated in law reform submissions to remove the criminal offence of a male impersonating a female. Prior to submissions for law reform and subsequent law change, SFA had done the initial ground work which enabled a cultural appreciation of *fa’afafine* as the community widely accepted and embraced *fa’afafine*. Thus, the effect of SFA’s commitment to community advocacy, primarily to change people’s attitudes first through community advocacy, consequently led to law reform with ease.

Land further asserts that “reform should seek to promote a sense of Samoan “ownership”⁷⁷⁴ over Samoan law. Land also argues that law reform should not be “a contest between custom and human rights when both are plainly important and bring satisfaction to large numbers of people”.⁷⁷⁵ Although anecdotal, because there are

⁷⁷² *FAST Party v Attorney General* 91 (Samoa 2021).

⁷⁷³ Consultation with Alexander Su’a, Samoa Fa’afafine Association/Samoa Law Society, 16 March 2023, zoom.

⁷⁷⁴ Land, above n 687, at 539.

⁷⁷⁵ New Zealand Law Commission, above n 82, at 41.

no official records detailing the number of *fa'atama* in Samoa, “anecdotally”, if there is one individual who identifies as *fa'atama* in each village, it is reasonable to assume that there are more than 200 *fa'atama* in Samoa.⁷⁷⁶ On this view, it would be fair to say the majority of *fa'atama* live in rural Samoa, where most land is under customary laws and governance of the village *fono*. Consequently, Samoa's *fa'atama* and SOGIEC community (while not wholly representative of all legal pluralism and customary considerations), may continue to advocate for effective gender equity considerations in the law reform process in a variety of ways.

According to the SLRC law reform process, there are general announcements to the public to participate in *talanoa* consultations where they are invited to attend or provide submissions and comments to any issues they wish to address with respect to any review undertaken by the SLRC.⁷⁷⁷ However, the logistical challenges are worth noting. To address the resource and capacity limitations, SLRC use social media to raise their awareness of law reform in addition to inviting the general public to input and complete questionnaires online. SLRC have also gone to the rural villages if they are unable to attend the public consultations in Apia. Extensions to submission deadlines are often granted to ensure all input is included. Consultations are also dependent on many factors, such as available funds and the nature of the law review where a more targeted approach may be considered. For instance, a family law review may require specific consultations with a certain class of persons commonly referred to as minority groups in Samoa, such as *fa'afafine* and persons with disabilities. As such, the law reform process does not seek to exclude any minority group or class of persons in the general call for consultations. SLRC view the consultations as the evidence-base to better inform the findings that are considered when providing recommendations on any law reforms to Parliament. Therefore, it is vital that *fa'atama* and the SOGIEC community actively participate in SLRC consultations as the findings from the consultations influence the direction of any draft laws in Samoa.

⁷⁷⁶ Empirical data, above n 52.

⁷⁷⁷ Empirical data, above n 52.

Similar to other post-colonial experiences, there is a lack of modern socio-economic features to support successful legal transplants in which customary laws become the basis of primary laws.⁷⁷⁸ Samoa's legal system continues to address these limitations by exploring ways to accommodate modern features into the structures of its customary legal system. Based on recent interview *talanoa* conducted by the author, conflicting views promote law reform in favour of preserving only the existing customs and traditions in Samoa's formal state laws, only if compatible with recognition of *fa'atama* and SOGIEC rights through a more inclusive and equitable law reform process.⁷⁷⁹ The process of codifying customs was highlighted as the best pathway to achieve this. In contrast, the more modern view was to explore how Samoa's bijural system can uphold the Constitution. Other critics suggest that to achieve an effective law reform process would require an incremental and cautious approach, thus involving public consultations and submissions from the general population.⁷⁸⁰

The absence of comprehensive anti-discrimination laws and policies enables a discriminative culture against SOGIEC people.⁷⁸¹ Moreover, to resolve the tension in the structural division between custom and fundamental rights, Samoa can carve out customary exceptions to constitutional human rights' provisions.⁷⁸² In the absence of specificity in customary exceptions, a custom may prevail in cases of religious and gender discrimination, as experienced in Tuvalu and Samoa, to name a few.⁷⁸³ Similarly, Samoa has exercised this exception to preserve communal services (*tautua*) embedded in Samoa's *matai* system against the right to forced labour. This complements the United Nations vision "that human rights should adapt to the local context".⁷⁸⁴

⁷⁷⁸ Oba, above n 764, at 69; Ntummy, above n 764, at 11.

⁷⁷⁹ Empirical data 2022, above n 52.

⁷⁸⁰ Mulitalo, above n 3, at 61, 81.

⁷⁸¹ *Samoa Party v Attorney General* 4 (Samoa 2010).

⁷⁸² Constitution of the Independent State of Papua New Guinea s art 53(5)(d) (Papua New Guinea 1975); Constitution of Solomon Islands s art 15(5)(d) (Solomon Islands 1978); Constitution of the Independent State of Samoa; International Council of Human Rights Policy, 'Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary' (Versoix 1999).

⁷⁸³ Olowu, above n 761; Olson, above n 848, at 36–37.

⁷⁸⁴ Land, above n 687, at 539; Olson, above n 848, at 36–37.

The development of state laws as contextualised to Samoa's socio-cultural and political context is riddled with challenges. In this regard, the challenge derives from local populations who demand this change, as well as relevant institutions mandated with principal functions to enable it, which continue to experience considerable setback due to the absence of institutional polices and government directives (i.e., adequate mechanisms to ensure law reforms undergo a customs analysis and public consultation).

5.0 *Fa'atama* and SOGIEC Recognition

As demonstrated in the approach adopted by Samoan Courts in cases involving constitutional interpretation (see Chapter 5), the pathway to progressive recognition of *fa'atama* in Samoa's Constitution and customary practices is riddled with many challenges. In proposing a more inclusive and meaningful law reform process that recognises *fa'atama* and members of the SOGIEC community, we need to understand the context to which it is applied to particular cases. This will yield a comprehensive understanding about the scope of the law reform task ahead and what is problematic about it. Importantly, building on the understanding of the Court's approach outlined in the women's gender quota cases (above) has provided some critical lessons.

For any robust Samoa law making and reform, it begins primarily with a *talanoa* with the people to whom it will serve, in line with well-established customary protocol. As alluded to earlier (see Chapter 4), this is the empirical approach adopted by the author having recently collected interview *talanoa* and focus group *talanoa* data in Samoa.⁷⁸⁵

6.0 Exploring a new methodology and legal theory: Samoa gender methodology and critical legal theory

The self-determining quote (below) put forward by Professor Albert Wendt and other Samoan post-colonial scholars is a call for emancipation from the shackles of

⁷⁸⁵ Empirical data 2022, above n 52.

colonialism.⁷⁸⁶ It is a call for self-critical reflection, innovation and a new freedom from the oppression of coloniality and the inferiority complex.

Our quest should not be for a revival of our past cultures, but for the creation of new cultures, which are free of the taint of colonialism and based firmly on our own pasts. The quest should be for a new Oceania.

While transgenderism in non-western cultures may be cited in feminist and queer literature as evidence of a liberal attitude towards gender,⁷⁸⁷ the treatment of *fa'atama* in Samoa is more likely to imply a greater rigidity to the boundaries of gender.⁷⁸⁸ In the 2016 submission to the United Nations Human Rights Council periodic review on human rights, the Samoa Fa'afafine Association (SFA) questioned whether the National Human Rights Institution (NHRI, Samoa Office of the Ombudsman) had adequately reported on *fa'afafine* and *fa'atama* as a marginalized sector of the community.⁷⁸⁹ The SFA submission also emphasized that most *fa'afafines* and *fa'atamas* are not transgender, and that addressing their concerns under the LGBTIQ framework ignores their connection to culture.⁷⁹⁰ It further highlights the need for innovation and development of a new Samoan gender methodology and critical legal theory scholarship to adequately address the lack of critical scholarship and praxis of *fa'atama* work experiences in Samoa. In short, a proposed Samoa critical legal theory and gender methodology must be inclusive enough to undergo a comprehensive unpacking and deconstructing exercise where a fundamentally collective and individualistic community may be brought together to critique, develop and understand the character, rationale, purpose and scope of Samoan gender methodology and critical legal theory. For the purposes of this study, components from the *talanoa* and *teu le va*, has inspired the development of a Samoa gender methodology in line with the GTA (discussed earlier) with a critical gender lens, that adequately addresses the causes in power imbalances that promote gender inequities

⁷⁸⁶ Albert Wendt "Towards a New Oceania" in Guy Amirthanayagam (ed) *Writers in East-West Encounter, New Cultural Bearings* (Macmillan, London, 1982) 206 at 206, 215.

⁷⁸⁷ Besnier, above n 58, at 316–317.

⁷⁸⁸ Schmidt, above n 52, 56.

⁷⁸⁹ SFA Inc Civil Society and Other Submissions *Universal Periodic Review Samoa submitted to Session 25 at the United Nations Office of the High Commissioner for Human Rights* (2016).

⁷⁹⁰ SFA Inc Civil Society and Other Submissions *Universal Periodic Review Samoa submitted to Session 25 at the United Nations Office of the High Commissioner for Human Rights* (2016).

in socio-cultural relations, accompanied and enriched alongside extensive data collection or empirical field work.

6.1 Empowerment of *fa'atama* in Samoa

The premise of the *talanoa* is to bring forward critical dialogue from *fa'atama* respondents and key informant experts, riddled in the historical context of oppression and legal pluralism. Certainly, implicit in the Samoan context, is the relational ontology, axiology and epistemology (see Table 1) which points to the value that the relationship between respondent and researcher is vital to achieving high quality research outcomes which must be established before the actual *talanoa*. This collaborative process of empathetic engagement usually takes place prior to the official point at which the *talanoa* occurs for the purpose of the study. The expectation is that the researcher(s) is established and has proven experience, credibility and extensive networks in the field. The focal contact or advisor from the research participants should ideally be involved as a member of the project team, in the design of research questions, methodology or in some cases (due to research constraints, including funding or logistics), at a later stage, the revision of research questions, methodology, prior to the actual *talanoa* with the research participants. As notions of restoration and social justice are integral to the *talanoa*, the *talanoa* provides the inclusive space for respondents to engage in thematic discussion about injustice, disharmony, and discrimination. Components from *teu le va* and more particular to this study, the *talanoa*, leads to the emergence of a Samoa gender methodology, where the role of the researcher is significant to overall success to: 1. establish rapport with participants prior to the *talanoa*, and 2. draw out critical dialogue to the research questions under investigation. Thus, the real success lies in empowering the research participants, as in this study, *fa'atama* and key informant experts, to engage in critical *talanoa* reflective of their lived experience, which emphasises the unique understandings and factors specific to gender, and the intersection between gender and those factors.

6.2 Empowerment of diasporic *fa'atama*

The growing diasporic Pacific global community residing outside of the ancestral homelands of the Pacific are afforded more human rights and legal protection of their gender rights.⁷⁹¹ In stark contrast, the vast majority of *fa'atama* in Samoa and the wider Pacific region are still explicitly marginalised by oppressive draconian laws and policies.⁷⁹² Similar to developments of critical thinker communities and academic scholarship driven and led by other marginalised communities, enabled increasingly by social media with the rise in organised dialogues, protests, and scholarship as evident in the black lives matter movement during COVID-19 global pandemic, it is imperative that critical scholars represented across the multidimensional understandings build their own gender methodology and critical theories.

While it is suggested that Samoa driven critical legal theory scholarship and a gender methodology is driven and determined by the local Samoan community, it must also be inclusive of the diasporic Samoan and wider Pacific community outside Samoa. On this rhetoric, critical legal theory and gender methodology that adequately responds to Samoa's *fa'atama* and SOGIEC community is a vital area that demands immediate attention. In light of the obvious institutional and systemic barriers faced by navigators in the development of a critical Samoa movement in both gender and law, such as the lack of Samoan gender and legal scholars and the overall underrepresentation within the wider Pacific community, we can turn to resilient examples evident in Melanesian communities which have re-appropriated colonial terms such as Melanesia, historically deployed to invoke "blackness". It has since been transformed and deployed as vital tool of empowerment, progression and self-determination with Arts and Music festivals.⁷⁹³ In the spirit of Wendt's enduring message, turning what was once derogatory and oppressive into a source of pride and hope.

⁷⁹¹ Farran, above n 84.

⁷⁹² Crichton, above n 32.

⁷⁹³ Kabutaulaka, above n 159.

6.3 Critical analysis – draw out connections between gender, law and power relations in those relationships

Implicit in the *talanoa* are respectful relationships between the research participants and respondents, in the context of Pacific relational ontological, axiological and epistemological understandings (see Table 1 in Chapter 3). In Samoa, power relations, status, responsibilities are important to the *va*, such as *suli* (heir) to *aiga* (family), *matai* to *aiga*, *matai* to *nu'u matai* to God, and so on. *Talanoa* analysis helps to bring out those meaningful connections.

6.4 Critical analysis – draw out insight of customary and legal processes in the context of gender

While *teu le va* allows for the reciprocal relationships, shared responsibilities between the state law and customary law, validation of those authorities in the law, the *talanoa* allows for the framing of those relationships, responsibilities and validation. On this view, it provides the avenue to critique the effect of those existing relationships, customs and factors, and explores whether they are worth preserving.

What the above methodology aspires to address (below) while ambitious in scope, it also resembles what is needed for a Samoan critical legal theory to:⁷⁹⁴

- Provide a research foundation informed by Pacific relational ontology, axiology and epistemology understandings, which allow for meaningful engagement and critical dialogue with Pacific non-binary and binary people, *fa'atama* and women
- Consider the diasporic contexts of Pacific people outside of Samoa and the Pacific, as well as the more modern urban contexts of Pacific people in the Pacific, outside of the customary village context
- Include an inclusive critical lens to examine the diversity between gender, sexuality, power within, between and across gender groups or multiple gender groups
- Critique marginalisation, oppression and the dominant hegemony embedded in customs in the Pacific and ideologies which have survived, from outside the Pacific
- Facilitate systems level understanding at multiple levels – individual, community, institutional
- Assume the role of researcher-participant, rather than merely data collector and silent note taker

⁷⁹⁴ Informed by Empirical data 2022, above n 52.

7.0 Conclusion

From the above discussion, this Chapter proposes how to minimise conflicts between the customary and state legal system of Samoa. This includes raising public awareness with an emphasis on formal education. On this view, it helps to raise awareness about understandings on Samoa's legal system and laws. This awareness will not only notify the public about upcoming law reform consultations, but encourage contribution or participation from members of the public that are under-represented in consultations, specifically *fa'atama*. Consequently, this awareness should serve to support better understandings about the process of law reform and state laws as well as individual rights, with an emphasis on *fa'atama* recognition and gender diversity in the customary and state legal context. In turn, this all supports the very mechanisms that ensure access to justice, education, employment and health. Court procedures and professional ethics training for members of the judiciary must be developed with reference to Samoa's gender diverse and customary context, to foster a deeper understanding of the evolving sociocultural environment they operate in and how their decisions must give due consideration to changes in the local and global context. Similarly, professional training is required for both parliamentarians and members of the legal profession.

For the parliamentarians, due consideration must be given to the customary environment of law making, duties to the village or constituencies they represent and how to introduce private members bill. They must work closely with law reformers or legislative drafters as required. This will ensure that parliamentarians understand how to propose legislative or constitutional amendments to outdated ideas such as those that promote gender discrimination in the state and customary legal context.

For the legal profession, suitable training about the value of Samoan custom, gender, tradition, protocol and language must be provided to lawyers involved in some aspect of law reform, while engagement and participation in quality research and conferences are necessary as they relate to work on law reform.

For the customary law context, village mayors should be encouraged to understand modern state laws and principles of human rights in the context of gender diversity and individual rights, then to examine the suitability of those laws and principles in the village context. Further, training for village mayors is critical in the development of villages rules and bylaws according to Samoa's constitution. The involvement of villages in law reform achieves several goals: 1. by contributing to the law reform process, it empowers the community to have a sense of shared ownership of the laws and customary reform, 2. it manages budget constraints by reducing consultation project costs, and 3. it widens the reach of village participation to include members of the *fa'atama* community, which enriches the quality of the responses.

On the whole, this chapter inspired the re-examination of the most culturally suitable methodology and critical legal theory (see Chapter 3) to support gender and law research, with an emphasis on law reform and *fa'atama* recognition in the context of Samoa customs and laws. This was informed by the evidence from relevant literature (see Chapter 2) and empirical data (see Chapter 4). The judicial guidance from the women's gender quota cases has given shape to the framing of *fa'atama* and SOGIEC recognition in state law which highlights the potential challenges to law making and law reform in the customary legal context.

CHAPTER SEVEN – CONCLUSION / DISCUSSION/ IMPLICATIONS

In this final chapter, I present key conclusions from the study. I also discuss and reflect on the study's limitations, methodology and future recommendations.

To genuinely envision transformative change in Samoa, the high-level findings listed below are set out under each of the four research questions for this thesis:

1. What are the historical, cultural, and legal challenges that prevent *fa'atama* from being recognised by local customs and laws?

1.1 *Gender and Meaningful Access to Laws*

The different levels of gender equity and inequity experienced between *fa'atama* and in comparison to *fa'afafine* highlights and emphasizes the cultural nuances and multidimensional layers of understanding about Samoa's social order. Comparatively, *fa'afafine* are commonly perceived as privileged males above women and *fa'atama*, and their access to rights in customary laws and state laws remain unchanged. While additional factors such as socioeconomic status posed challenges to overseas based *fa'atama* accessing their rights and laws, it did not overwhelm or diminish their perception of this shared understanding, that the Samoan culture fundamentally privileges males to all other genders. In some respondents *talanoa*, they would highlight the *feagaiga* as a protective safeguard, exercised by their male siblings to ensure their access to rights and privileges in the law and overall representation in customary contexts (including family meetings, church events, and so on).

Most of the *fa'atama* respondents agreed that customs and laws are gender-neutral at its core. On this view, the respondents claim is that the laws are too generic and lack specificity. Though they acknowledge their status as “women” in customs and laws, they deem this to be problematic, while also factoring in their Christian beliefs and knowledge of the *fa'asamoa*. As a whole, a strict heteronormative binary approach in customs and laws, effectively undermines their self-identification as *fa'atama*, while further infringing upon their access to fundamental rights and freedoms which should

be extended to all democratic citizens in Samoa. The nuanced and multi-layered understanding of access to rights and laws, were uncovered as respondents discussed specific contexts and situations where they felt alienated because they did not consistently *tautua* to their family, church or village, particularly if *fa'atama* were based outside their natal village or living overseas. Adding to this stigma, non-*matai fa'atama* in a family, church and village are further disadvantaged compared to untitled men and *fa'afafine* during *matai fono*, family and church deliberations.

Fa'atama could be unique in this regard as the majority of respondents claim that their sexual orientation and gender identity affect their access to rights in customs, laws and participation in reforms. However, through exploration of the factors that play a role in Samoa's village governance and law reform process, and the challenges impeding their full *fa'atama* recognition, what the main themes suggest is telling. The oppressive practices embedded in Samoa's *fa'amatai* system and village governance structures, were identified, as well as the harmful effects associated with the reproduction of Christian ideology and power imbalances adopted in the Churches, thus perpetuating patriarchal standards of male privilege, gender binary norms and gender inequality as institutional relics from introduced colonial laws.

The inequalities between *fa'atama* were multiple and varied, partially owing to the lack of consensus across both countries on the significance of gender equality, concerning gender recognition of *fa'atama*, customary law and state law reform or general human rights.

The findings emphasise the need for more community advocacy and education to disrupt and trouble settled understandings about gender roles in Samoan society, political leadership and Christian contexts. This places education as a powerful catalyst for changing gender norms, by equipping students to understand, examine and question the gendered world around them. While women and girls outperform men and boys in overall educational participation and attainment, women have lower economic participation in formal employment. There is also a lack of data on the experiences of *fa'atama* in the education system. The absence of data on *fa'atama* and SOGIEC gender identities renders the experiences of people of diverse gender identity invisible

in official data. This highlights the need to strengthen the collection and disaggregation of data (health, education and so on) by sex and gender, including data on *fa'atama*.

Rather than focusing on advancing gender mainstreaming, which promotes more of a superficial, ticking box, one-size fits all approach, this study aligns with a more critical gender transformative approach (GTA), which challenges an “add *fa'atama* and stir” approach into existing power relations without seeking to question them, thus without leading to meaningful gender equality. The GTA goes beyond identifying and addressing symptoms of gender inequality, to analysing and addressing the underlying root cause of inequality, such as socially constructed norms, attitudes, stigmas and gender power relations that may disadvantage Samoan *fa'atama*, women, and in some instances *fa'afafine* and men.

In summary, the findings showed different levels of vulnerability associated with being denied access (informal or customary) to laws:

2. How do we legally address gender discriminatory practices impacting *fa'atama* in Samoa?

2.1 Strategies to improve access and rights to customary and state law reform

The commitment to improve access to rights in the law was related to the researcher's background, having experienced the hostility of family members based in the village, who are threatened by women and *fa'atama* gaining equal access and rights in the law.

The study found no evidence of developed government strategies in Samoa to support and improve access, human rights and general rights to customary laws and state laws for *fa'atamai*.

In light of limited employment opportunities, limited income earning capacity and sources, the high costs (by local wage standards) of living, was an impediment to realizing their rights to participate in reforms of customs and laws.

The research found evidence that power lies in the village governance structures of the customary legal system. The majority of respondents experienced a complex relationship with village governance, which they view as an integral part to addressing their concerns about human rights. As a way forward, in terms of capacity and institutional strengthening of Samoa's legal frameworks, this study does not propose legislation for *fa'atama's* equal customary entitlements to rights in customary laws and state laws (access to natal customary lands, and *matai* titles connected to those lands) as a way to protect their rights while elevating their status for social acceptance and collective recognition. While it is highly recommended in most contexts, that action must be taken to stop enabling and protecting male privilege as it perpetuates disadvantages and stigmatizes for *fa'atama*, it does not corroborate the findings of the study.

2.2 Gender based violence

The consideration of GBV was considered but featured as a minor theme according to the *talanoa* data. All the respondents in the study who experienced family violence, confirmed that their sense of vulnerability and disempowerment was exacerbated in the village context only, which led most of them to relocate to the urban areas or in some cases, overseas, to live abroad in New Zealand, American Samoa and the United States. As such, the *fa'atama* victims of family violence in the study did not remain trapped in a cycle of repeated abuse as the literature suggests for women who are victims of family violence. This highlights a significant departure in experience between *fa'atama* and women victims of family violence. It should be noted, however, that this data, may not be representative of all *fa'atama* in Samoa (as there are circumstances whereby a victim or survivor of GBV cannot leave), and so should be interpreted within the context of this study.

At the end of intimate partner relationships one respondent reported abusing his ex-partner and dealing with the legal consequences, while more respondents reported attempts of suicide. Thus, the need for mental health support to assist *fa'atama* overall health and wellbeing was suggested by one of the key informants, as one vital area for improvement. *Fa'atama* respondents in the study were aware of the support structures in place such as the Samoa Victim Support Group and the Domestic violence unit at

Samoa Police. However, their mixed perception led to their mistrust of the Police. Some respondents shared insights into their direct experience with the Police, where they were charged for crimes they did not commit based on false reporting, and instances where they asserted their rights to be identified as *fa'atama* as opposed to women in the law. Only the respondents in the urban contexts and living abroad, had an intimate understanding of the laws and justice system, coupled with direct access to legal representation. Some of these respondents represented in this aspect had migrated from the rural areas to the urban areas in order to live openly as *fa'atama*.

3. How do Samoa's colonial, Christian and cultural beliefs inform Samoa's village governance and law reform process?

The research findings claim that *fa'atama's* sense of entitlement in customary and state law contexts, is intertwined with and cannot be dissociated from their perception concerning their role and place in relation to men, as a continuation of ideals from colonisation, even after introduced laws. As most respondents are practicing Christians, they factor in their Christian beliefs in the most vital areas affecting their livelihood and wellbeing, while still retaining a firm belief that men are naturally inclined to lead and dominate.

Some of the gaps in this part suggest a strengthening of Samoa legal frameworks to:

- Undertake a gender audit of existing legislation, including with respect to the impact upon people of diverse sexual orientation, and to incorporate gendered definitions of direct and indirect discrimination. This is consistent with the *talanoa* findings and the 2021 Universal Periodic Review of Samoa Fa'afafine Association Inc Joint Stakeholder submission.
- Broaden the legislative definition of gender-based violence to include emotional and financial abuse, and a comprehensive review of and prioritisation of gender-based violence protection orders, to enable speedy prosecution.
- Prioritise the advancement of the Community Law Centre to improve access to legal services and provide legal assistance to people who cannot afford a private lawyer.

4. How much agency do *fa'atama* have in participating in and facilitating the process of their legal recognition?

4.1 Significance of participating in public/private consultations and submissions for customary and state law reform

The findings show that all respondents identified the powerful influence that comes with active participation in decision making at customary and state level, with respect to matters impacting their overall livelihood and wellbeing. The emphasis on the existing role of *suli*, *feagaiga* and *tautua* as non-legislative mechanisms to justify and enhance their cultural right to self-identify as *fa'atama* should not be understated. *Fa'atama* (and key informants) who were parents or the primary caregivers of immediate and extended family, understood the significance of sustaining and cultivating important relationships with individuals holding respected status as an alternative avenue to realizing *matai* representation, while fostering social acceptance within the family and wider community, thus legitimizing their status and capacity to achieve recognition in customs and laws. This emerged as one of the shared common aspirations in *talanoa* data, moving beyond aspirations of self-empowerment to one more focussed on legacy building for future generations of *fa'atama*.

The urban based and diasporic *fa'atama* respondents, identified the significance of customary law. Though largely inapplicable to the urban contexts and overseas western countries insofar as jurisdictional matters are concerned, nevertheless, customary law continues to be acknowledged as a powerful and influential mechanism, shaping Samoa's sociocultural and political contexts.

It is worth noting that some respondents sense of empowerment was not always framed around or congruent with their aspirations for customary and legal recognition, nor was their sense of fulfilment based on the customs, traditions and laws alone. The combined influence of the broader sociocultural and political context, limited employment opportunities and involvement in church, family or village activities due to gender discrimination, coupled with limited access to education, health and the justice system, drove some respondents to seek opportunities outside Samoa. However, in some cases, the respondents chose to impose self-restrictions, or avoid social contact altogether due to the toll of gender discrimination they experienced in schools, the church and village setting, hospitals and the police.

The reality is that *fa'atama* continue to feel alienated from active involvement in decisions concerning customary laws and state laws for a number of reasons. The lack of access and awareness of public consultations regarding law changes and gender

discrimination exercised by church, family, urban based *matai*, or village's *matai* in terms of withholding information, the enforcement of village fines for *fa'atama* who are not dressed according to the village dress code, all of which contribute to why some urban and overseas based respondents prefer living outside of the oppressive customary context, where they feel a stronger sense of control over their lives.

5.0 Limitations of the Study

As no research is conducted without limitations, a researcher is tasked with mitigation strategies and inclusion/exclusion criteria to control the inevitable. Nevertheless, I summarise the most significant limitations to the study:

- The fieldwork was conducted in the urban area of Apia, Samoa. While some of the respondents lived in the rural areas, it did not diminish the relevance of the findings to the situation of *fa'atama* in rural areas or those who are based overseas.
- The sample size became smaller not due to limited resources and technical knowledge, but the lack of interest in the study expressed by *fa'atama* as well as key informants selected by my *fa'atama* advisor, for reasons to be explored further in future research.
- The findings from Samoa may not be as relevant to diasporic Samoan, Pasifika and indigenous communities living abroad.
- My inability to speak formal Samoan and being untitled (non-*matai*), posed a significant disadvantage, which was only resolved by the fact that I am a Samoan, so the contextual understanding and interpretation of the Samoan context were not that of a non-Samoan. The co-*talanoa* facilitator who supported data collection in Samoa was a women *matai* and independent researcher. We worked on previous projects in Samoa which assisted in contextual multi-layered understandings of the *talanoa* data which came through in the analysis.
- Covid and Time – the depth of *talanoa* engagement, respondent selection and contracting covid impacted the research. In some cases, it led to the loss of potential respondents and loss of interest in the follow-up process.

6.0 Topics for Further Research

A number of critical gaps in the study, became more apparent during the data collection.

I give full credit to the *fa'atama* advocates for the inspiration.

The following recommendations are designed to be practical, implementable and appropriate to the context of Samoa. As emphasized in the *talanoa* data, political support, community buy-in, combined with adequate resources in time, technical capacity and funding, will need to be factored into future projects. In this study, the researcher was fortunate enough to use university funds to cover all research related expenditure including payment for technical expertise from provided by the *fa'atama* advisor, research support and all related logistics.

More importantly, each recommendation provides a potential entry point to future possibilities. The following are research avenues to explore further:

6.1 Empowering the voice of fa'atama as an inclusive practice in future critical legal and gender scholarship

This study acknowledges the important place of *fa'atama* in Samoa in their families, their churches, their community, which elevates their views on custom and law reform based on their understanding and perception of gender discrimination.

Further to this, this study explored how the law and customary law can be refined to support *fa'atama* and SOGIEC recognition at customary and state level, while elevating their autonomy and *mana* in decision making in all areas that affect their wellbeing. This research is designed to be a resource for individuals and organisations interested in navigating their way through challenging environments inherent in Samoa law and customary law reform. Government and non-governmental agencies may also consider this research of assistance when informing their own reviews of legislative and regulatory frameworks concerning gender variance recognition of *fa'atama* and SOGIEC communities in Samoa and abroad.

6.2 Constitutional Review

The findings from this research would necessitate a full review of the Constitution of Samoa. With a clearly structured and developed terms of reference, free of the influence of legal and political interference, emphasis must be placed on gaining adequate community buy in, village cooperation and extensively conducted *talanoa*. The Constitution must reflect the democratic interests of all people in Samoa, irrespective of hierarchy, status, rank and privilege. The institutional agents are from

the judiciary, law reformers, legislative drafters, members of the legal profession and parliamentarians, must also see the value in demanding a Constitution where customary values and gender diverse recognition are considered when drafting and passing laws. Where statutory obligations are in place to promote Samoa customs and traditions in the development of reforms, there is also a place for consideration to recognise gender diversity of *fa'atama* and the wider SOGIEC community, in a country that is becoming increasingly pluralistic.

6.3 Pacific Island Specific Research

The findings and conclusions achieved in this study may be of value to nations with similar customary and historical backgrounds but does not necessarily need to be located in the Pacific region. Research tasked to understand the challenges and responses framed to the specific nuances of each Pacific Island should be treated as developing the baseline data or evidence to reflect the specificity of issues (see Literature Review in Chapter 2, Paper 1). As the experience of *fa'atama* demonstrates, there are multi-layered perspectives on law reform, gender and sex which should not be overlooked and understated.

6.4 Follow up research on how Samoan villages develop rules and how other systems influence law reform

Further research is needed to address how Samoan villages develop policies, rules, mechanisms for dispute resolution. While this research does not explore the Village Fono Act 1990 in depth, the *talanoa* data emphasises the autonomy of each Samoan village to develop its own separate law-making frameworks that are constitutionally compliant. As alluded to at the start (see Chapter 1, Introduction), Samoa villages are pluralistic by nature and the extent to which each village develops village bylaws (rules) warrants further attention as it could potentially act as the most powerful ally in the development of legal frameworks that legitimise the status and recognition of *fa'atama* and other non-binary, non-heteronormative communities outside the scope of the law.

Similarly, a focussed examination on the legal implications associated with other influential systems, particularly the functioning of the Church as an organised structure and part of Samoa's social fabric. The powerful influence of the Church enhances its

position to function as a standalone system or alongside other influential systems, thus impacting law reform and the overall legal system of Samoa.

6.5 Auditing existing Pacific Research Methodologies, identifying gaps and exploring new innovative methodologies to reflect an evolving society

Building on the Methodology (see Chapter 3, Paper 2) adopted for this study discussed earlier, this research illuminates why re-examination and re-interrogation of the premise behind research methodology and what it makes possible is just as significant as understanding the scope of research methodology. Primarily, this study adopted a methodology that most studies would not consider robust in the fields of law and gender. Crucially, more research on the rationale behind research methods deployed in Pacific-specific islands warrants attention, particularly when contextualised to research understanding what impacts gender recognition in customs and laws as well as legal pluralism and law reform.

6.6. Professional Training for Gender development and Law specialists

This research recommends that all future gender development and legal professionals undergo adequate training specific to the “local” context, while at the same time, (1) committing to and addressing oppressive gender norms and customary practices, (2) identifying the challenges and pursuing potential responses to those challenges, (3) exploring ways to collaborate and work alongside overseas trainers on similar struggles across indigenous communities concerning inadequacies in power relationships is encouraged, (4) the development of training which considers legally pluralistic nations with pluralistic societies, as in Samoa, which is a useful entry point of reform for customary laws, state laws, legal systems and justice systems.

Additionally, the design and development of customary law and gender law courses across the Pacific universities in the region as well as in Australia and New Zealand, and the accessibility of adequate legal research databases to ensure knowledge is up to date, in the Samoan language (if possible), and readily available to the public such as court decisions, Parliamentary laws and so on.

Finally, the Samoa NGOs reported in their shadow report to the United Nations Human Rights Council in 2018 that the government aimed to appoint gender specialists to key government agencies such as the justice system, to ensure gender considerations are incorporated into all policy and planning initiatives.⁷⁹⁵ Gender specialists should be individuals with an in-depth understanding of gender theories and methods, which may be achieved through academic training and/or lived experience in these fields of expertise. It is often incorrectly assumed that people can “do gender” simply because they are a woman, a gender champion, or a “gender focal point”. Strong gender analysis involves the critical examination of taken-for-granted assumptions about development through a gender lens, and it is grounded in specific training and experience in a variety of gender analytical approaches.⁷⁹⁶

⁷⁹⁵ Samoa Umbrella Organisation for NGOs (SUNGO) 2018. *NGO CEDAW Shadow Report for Samoa*. 6th Periodic Report. Geneva, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/WSM/INT_CEDAW_CSS_WSM_32610_E.pdf

⁷⁹⁶ Ritu Verma. 2013. *Gender transformative change in the Hindu Kush Himalayas: ICIMOD's Approach to Gender Equity and Analysis 2013-2017*. Kathmandu, Nepal. International Centre for Integrated Mountain Development; Lucy Ferguson. 2015. “This is Our Gender Person’: the messy business of working as a gender expert in international development’ *International Journal of Feminist Politics* 17(3): 380-397

APPENDICES

1.0 Appendix A: Glossary

- Aiga – family, kin, larger extended family
- Aganu’u – Culture, Villages
- Alofa – love
- Fa'aaloalo – respect
- Fa’asamoa – the Samoan way, essence of being Samoan
- Fa’asinomaga – a person’s designation, identity as located within the heart, mind and soul of a person and gives meaning and belonging
- Faifeau – Church minister, Pastor, respected elder
- Faletua – Women with high ranking/wives of Matai or Faifeau
- Fanua – Lands
- Matai – Chief(s)
- Tautua – Service
- Teu le vā – Maintaining the sacred space between people
- Tu ma aga - customs
- vā – relationships based on respect

2.0 Appendix B: AUT Ethics Approval



Auckland University of Technology Ethics Committee (AUTEC)

Auckland University of Technology
 D-88, Private Bag 92006, Auckland 1142, NZ
 T: +64 9 921 9999 ext. 8316
 E: ethics@aut.ac.nz
www.aut.ac.nz/researchethics

8 April 2022

Allan Beever
 Faculty of Business Economics and Law

Dear Allan

Re: Ethics Application: 21/267 Samoa law reform and recognition of fa'atama: A Talanoa approach

Thank you for your request for approval of an amendment to your ethics application.

The change of applicant and primary supervisor from Natalie Szablewska to Professor Allan Beever has been noted.

Non-Standard Conditions of Approval

1. Please ensure that the public facing documents are updated to reflect this change.

Non-standard conditions must be completed before commencing your study. Non-standard conditions do not need to be submitted to or reviewed by AUTEC before commencing your study.

Standard Conditions of Approval.

1. The research is to be undertaken in accordance with the [Auckland University of Technology Code of Conduct for Research](#) and as approved by AUTEC in this application.
2. A progress report is due annually on the anniversary of the approval date, using the EA2 form.
3. A final report is due at the expiration of the approval period, or, upon completion of project, using the EA3 form.
4. Any amendments to the project must be approved by AUTEC prior to being implemented. Amendments can be requested using the EA2 form.
5. Any serious or unexpected adverse events must be reported to AUTEC Secretariat as a matter of priority.
6. Any unforeseen events that might affect continued ethical acceptability of the project should also be reported to the AUTEC Secretariat as a matter of priority.
7. It is your responsibility to ensure that the spelling and grammar of documents being provided to participants or external organisations is of a high standard.
8. AUTEC grants ethical approval only. You are responsible for obtaining management approval for access for your research from any institution or organisation at which your research is being conducted. When the research is undertaken outside New Zealand, you need to meet all ethical, legal, and locality obligations or requirements for those jurisdictions.

Please quote the application number and title on all future correspondence related to this project.

For any enquiries please contact ethics@aut.ac.nz. The forms mentioned above are available online through <http://www.aut.ac.nz/research/researchethics>

(This is a computer-generated letter for which no signature is required)

The AUTEC Secretariat
 Auckland University of Technology Ethics Committee

Cc: Bridget.Feamstusinu@aut.ac.nz; guy.charlton@aut.ac.nz

3.0 Appendix C: AUT Ethics Confirmation of Completion



Auckland University of Technology Ethics Committee (AUTEC)

26 June 2023

Allan Beever
Faculty of Business Economics and Law

Dear Allan

Ethics Application: **21/267 Samoa law reform and recognition of fa'atama: A Talanoa approach**

At their meeting of 12 June 2023, the Auckland University of Technology Ethics Committee (AUTEC) received the report on your ethics application. AUTEC noted your report and asked us to thank you.

On behalf of AUTEC, we congratulate the researchers on the successful completion of the project.

When communicating with us about this application, we ask that you use the application number and study title to enable us to provide you with prompt service. Should you have any further enquiries regarding this matter, you are welcome to contact me by email at ethics@aut.ac.nz or by telephone on 921 9999 at extension 6038.

(This is a computer-generated letter for which no signature is required)

The AUTEC Secretariat

Auckland University of Technology Ethics Committee

Cc: Bridget.Faamatuainu@aut.ac.nz; guy.charlton@aut.ac.nz

4.0 Appendix D: Approval Letter from the Ministry of the Prime Minister and Cabinet



Government of Samoa

MINISTRY OF THE PRIME MINISTER AND CABINET

www.mpmc.gov.ws, Telefoni: (685) 25013/ 22940/ 63222 Fax: (685) 21339 P.O. Box L1861, APIA, SAMOA

Our Ref:
Your Ref:
Please address all
correspondence to:
The Chief Executive Officer

21st April 2022

Bridget Faamatuainu Crichton
PHD Student - AUT
Auckland, New Zealand

Re: - Research Permit/Visa Approval

Talofa Bridget. Reference is made to your request for approval to conduct your research in Samoa via Zoom, as per your email correspondence of 11th April 2022.

As requested, the process with regards to Research Visa in the Samoa Immigration Act 2020, stipulates the following for your information.

1. As a Samoan Citizen by descent, you do not need to apply for a Temporary resident Visa for Conduct of Research. The Temporary Resident Visa for research is only for a non Samoan citizen, who wishes to travel, enter and reside in Samoa for such period required to conduct a research; and will leave Samoa upon completion.
2. Therefore, an endorsement from the Government of Samoa through the Immigration Act 2020 is not mandatory for you to conduct research in Samoa.

Nevertheless, given the mode of communication to be used and challenges of these unprecedented times, we advise that you confirm and secure approval of the respective ministries or organizations and research subjects that will be involved in your study, as mentioned in your proposal.

We wish you all the best with your research.

Ma le faaaloalo,

Nanai Sovala Agaiava
ACTING CHIEF EXECUTIVE OFFICER

5.0 Appendix E: Participant Information Sheet - Interview and Focus Group



Participant Information Sheet

Interview Talanoa

Date Information Sheet Produced:

12.07.2021

Project Title

Samoa law reform and recognition of fa'atama: A Talanoa approach

An Invitation

Malo le soifua maua ma le lagi e mama. My name is Bridget Fa'amatuainu. I was born and raised in Auckland by my Father, Fa'amatuainu Mata'afa Fa'afetai Tu'i and my mother, Meafou Fa'amatuainu (nee Amiatu). Fa'amatuainu was born in Lufilufi where his parents ministered for the Lufilufi Methodist Church. Meafou was born in Leulumoega Tuai; all from the island of Upolu. I live in Auckland, New Zealand. I am inviting you to participate in my Doctor of Philosophy research by sharing your perceptions and/or professional experiences about gender discriminatory practices faced by fa'atama (masculine women who are "like men") and whether it impacts their low recognition in Samoa's law reform and village governance process. Your participation is voluntary and you can withdraw at any time during the research.

What is the purpose of this research?

There is little research about gender discriminatory practices faced by Samoa's fa'atama and lesbian community as they remain underrepresented in Samoa's customary laws, state laws and in wider academic research. This study, therefore, aims to fill this gap, document and produce evidence-based knowledge about the experiences of fa'atama as well as the professional perceptions from those involved in some aspect of gender, law, justice, academia and human rights development. As a result of this thesis, I will gain a Doctor of Philosophy (PhD) qualification and the findings will be accessible to the fa'atama communities, advocates, groups and individuals who are working to advance gender equity, reduce gender discriminatory practices and improve full recognition of fa'atama in Samoa. I hope to present the findings of the research in conference papers, other academic publications and future research.

How was I identified and why am I being invited to participate in this research?

I respectfully invite you to participate in this study based on the nomination of your referrer. Your professional and/or personal background was highlighted to be valuable to this research and your referrer provided us your details on the understanding that you are not obligated to participate. In total, there will be 15 interview talanoa with individuals who self-identify as fa'atama as well as individuals who are involved in some aspect of gender, law, justice, academia or human rights development that will form the basis of the study.

It is important to note that the Researcher's family are excluded from participating in this research and Samoan translations of the documents (Information sheet and Consent form) are available upon request.

How do I agree to participate in this research?

If you would like to be a part of this research, please contact me using the details below. Should you be interested in participating in this interview talanoa, we therefore seek your humble assistance with the dissemination of this information sheet to other potential participants who may then contact me directly.

Your data will not be shared with third parties in future research collaboration or for future research purposes, unless you give your consent to participate. If you do consent, your data will be de-identified and aggregated in a way that protects your privacy and confidentiality against future harm. Despite the utmost precautions being taken, participants must be aware that there is a possibility of their being identified through being seen participating in this research.

You are able to withdraw from the study at any time. If you choose to withdraw from the study, then while it may not be possible to destroy all records of the interview talanoa you participate in, you will be offered the choice



between having any data that is identifiable as belonging to you removed or allowing it to continue to be used. However, once the findings have been produced, removal of your data may not be possible.

What will happen in this research?

The interview talanoa will take approximately 1 to 1 ½ hour of your time at a confirmed talanoa venue excluding private residence such as your home. You may need to travel to the venue where your interview talanoa will take place. If travel cost is a barrier for you, arrangements will be made to assist. The Interview Talanoa will focus on issues related to faatama in achieving full recognition of rights and legal protection in Samoa's village governance and law reform process. You will be given a consent form to read and sign prior to the Interview talanoa and your verbal consent to participate in the study will be recorded on audio-tape. In light of the Covid19 situation, with your consent, this interview talanoa will be conducted via Zoom and recorded digitally for the purpose of this study. An experienced Talanoa co-facilitator, Gus Crichton, will co-assist by explaining this process and running the Interview Talanoa (via Zoom) with the Researcher present via an online live feed arranged by in-country IT support.

What are the discomforts and risks?

Given the relatively small number of participants taking part in this study, most of which are involved in your community or professional line of work, the risk is that your identity may be revealed due to the sensitive nature of the study, in talking about your perceptions and experiences about fa'atama in Samoa, there is also a chance you may feel uncomfortable with some of the questions.

How will these discomforts and risks be alleviated?

Risks will be managed in the final write up and analysis of the data and by removing your personal details such as your name or any identifiable social and professional groups you belong to such as the church you attend or the aiga (family/clan) or nu'u (village) you associate with.

If during the Interview talanoa you feel uncomfortable with answering any question, you can decline to answer the question/s or withdraw from the Interview talanoa at any time.

What are the benefits?

This research will contribute to broadening the depth of evidence and knowledge base to help better inform the community, Samoa national policy and legislative planning and add to the international research base on fa'atama recognition in law reform and village governance processes amongst Samoa communities. In addition, this study will better inform and raise awareness for the Samoan community and the wider Pacific community about adequate legal protection, law reform and village governance processes involving gender diverse communities, the severity of gender discriminatory practices and the development of gender discriminatory behaviours.

Finally, the data will not only help me obtain a Doctor of Philosophy qualification but will contribute to the future research development of ethnic-specific research to deepen and enrich the evidence base to understand why and how Samoans perceive fa'atama and gender diverse communities in Samoa.

How will my privacy be protected?

Your privacy will be protected by excluding any mention of your name and any association with church, family, village, workplace, industry, or social groups from this study. I will also not engage in casual conversation while conducting the interview talanoa to ensure it is not overheard or repeated by others.

Your given name, address, contact details that have been gathered outside of public records for this study will remain confidential. They will not be published. In published findings of your research for current and future use, your data will be represented by a chosen pseudonym that we will agree on when you give your consent to participate in this study. This pseudonym will not be linked to your given name in any record that will be publicly available.

Only members of the PhD Supervisory Team (Researcher, Supervisors and in-country Research Assistant) will have access to your data for the purpose of this research and for post-data analysis (excluding in-country Research Assistant).

What are the costs of participating in this research?

The cost of your participation in this study will be your time of up to 1 – 1 ½ hours.

What opportunity do I have to consider this invitation?

Once you receive the participant information sheet via email or given to you in hard copy, you will have the opportunity (in both rounds of recruitment), to contact me in more than 1 week's time to confirm if you agree to participate in the research. During this time, you are advised to contact the Researcher (using the phone number or email address given under the heading "Researcher Contact Details" below) to confirm your participation. However, the researcher will contact you in 2 week's after you received this information sheet to confirm your participation if you have not made contact.

Will I receive feedback on the results of this research?

Following your interview talanoa, it will be transcribed. You may wish to review your transcribed notes for accuracy, in which case it will be sent to you. Once you have finished reviewing your interview talanoa transcript (transcript), you will have two weeks to respond to directly to the Researcher. Your feedback may be sent to the Researcher by phone, e-mail or other means available to you. If your feedback leads to changes, the appropriate changes will be made to your original transcript and the amended transcript will then be submitted for research analysis. If you wish, the amended transcript version may be sent to you and you will not be required to return it. However, if I do not receive any feedback from you, within the two weeks from you receiving a copy of your original transcript, I will assume that you are satisfied with the transcript content. It will then be submitted for research analysis.

The summary findings will be given to you after the research data has been collected, analysed and summarised, in order for you to comment on the summary findings.

What do I do if I have concerns about this research?

Any concerns regarding the nature of this project should be notified in the first instance to the Project Supervisor, Professor Allan Beever, allan.beever@aut.ac.nz, (09) 921 9999 ext. 6413.

Concerns regarding the conduct of the research should be notified to the Executive Secretary of AUTEK, ethics@aut.ac.nz, 921 9999 ext. 6038.

Whom do I contact for further information about this research?

Please keep this Information Sheet and a copy of the Consent Form for your future reference. You are also able to contact the PhD Supervisory Team as follows:

Researcher Contact Details:

Researcher Contact Details: Bridget Fa'amatuaunu

P: +64211180950

E: bridget.faamatuaunu@aut.ac.nz

Project Supervisor Contact Details:

Project Supervisor Contact Details: Professor Allan Beever School of Law

P: +649 921 9999 ext. 6413

E: allan.beever@aut.ac.nz



Participant Information Sheet

Focus Group Talanoa

Date Information Sheet Produced:

12.07.2021

Project Title

Samoa law reform and recognition of fa'atama: A Talanoa approach

An Invitation

Malo le soifua maua ma le lagi e mama. My name is Bridget Fa'amatuainu. I was born and raised in Auckland by my Father, Fa'amatuainu Mata'afa Fa'afetai Tu'i and my mother, Meafou Fa'amatuainu (nee Amiatu). Fa'amatuainu was born in Lufilufi where his parents ministered for the Lufilufi Methodist Church. Meafou was born in Leulumoega Tuai; all from the island of Upolu. I live in Auckland, New Zealand. I am inviting you to participate in my Doctor of Philosophy research by sharing your perceptions and/or professional experiences about gender discriminatory practices faced by fa'atama (masculine women who are "like men") and whether it impacts their low recognition in Samoa's law reform and village governance process. Your participation is voluntary and you can withdraw at any time during the research.

What is the purpose of this research?

There is little research about gender discriminatory practices faced by Samoa's fa'atama and lesbian community as they remain underrepresented in Samoa's customary laws, state laws and in wider academic research. This study, therefore, aims to fill this gap, document and produce evidence-based knowledge about the experiences of fa'atama as well as the professional perceptions from those involved in some aspect of gender, law, justice, academia and human rights development. As a result of this thesis, I will gain a Doctor of Philosophy (PhD) qualification and the findings will be accessible to the fa'atama communities, advocates, groups and individuals who are working to advance gender equity, reduce gender discriminatory practices and improve full recognition of fa'atama in Samoa. I hope to present the findings of the research in conference papers, other academic publications and future research.

How was I identified and why am I being invited to participate in this research?

I respectfully invite you to participate in this study based on the nomination of your referrer. Your professional and/or personal background was considered to be valuable to this research and your referrer provided us your details on the understanding that you are not obligated to participate. In total, there will be 3 focus group talanoa comprised of individuals from the village and community who self-identify as fa'atama as well as individuals who are involved in some aspect of gender, law, justice, academia or human rights.

It is important to note that the Researcher's family are excluded from participating in this research and Samoan translations of the documents (Information sheet and Consent form) are available upon request.

How do I agree to participate in this research?

If you would like to be a part of this research, please contact me using the details below. Should you be interested in participating in this focus group talanoa, we therefore seek your humble assistance with the dissemination of this information sheet to other potential participants who may then contact me directly.

Your participation in this research is voluntary (it is your choice), and whether or not you choose to participate will neither advantage nor disadvantage you.

Your data will not be shared with third parties in future research collaboration or for future research purposes, unless you give your consent to participate. If you do consent, your data will be de-identified and aggregated in a way that protects your privacy and confidentiality against future harm. Despite the utmost precautions being taken, participants must be aware that there is a possibility of their being identified through being seen participating in this research.



You are able to withdraw from the study at any time. If you choose to withdraw from the study, then while it may not be possible to destroy all records of the focus group talanoa you participate in, you will be offered the choice between having any data that is identifiable as belonging to you removed or allowing it to continue to be used. However, once the findings have been produced, removal of your data may not be possible.

What will happen in this research?

The focus group talanoa will take approximately 1 to 1 ½ hour of your time at a confirmed talanoa venue excluding private residence such as your home. You may need to travel to the venue where your focus group talanoa will take place. If travel cost is a barrier for you, arrangements will be made to assist. The focus group talanoa will focus on issues related to faatama in achieving full recognition of rights and legal protection in Samoa's village governance and law reform process. You will be given a consent form to read and sign prior to the focus group talanoa and your verbal consent to participate in the study will be recorded on audio-tape. In light of the Covid19 situation, with your consent, this focus group talanoa will be conducted via Zoom and recorded digitally for the purpose of this study. An experienced Talanoa co-facilitator, Gus Crichton, will co-assist by explaining this process and running the Focus Group Talanoa (via Zoom) with the Researcher present via an online live feed arranged by in-country IT support.

What are the discomforts and risks?

Given the relatively small number of participants taking part in this study, most of which are involved in your community or professional line of work, the risk is that your identity may be revealed. Due to the group nature of focus group talanoa, your confidentiality cannot be completely assured. Due to the sensitive nature of the study, in talking about your perceptions and experiences about fa'atama in Samoa, there is a chance you may feel uncomfortable with some of the questions.

How will these discomforts and risks be alleviated?

Your privacy and confidentiality will be managed in the final write up and analysis of the data and by removing your personal details such as your name or any identifiable social and professional groups you belong to such as the church you attend or the aiga (family/clan) or nu'u (village) you associate with. During the focus group talanoa, participants will be reminded that information shared in the session should remain confidential to the group.

If during the focus group talanoa you feel uncomfortable with answering any question, you can decline to answer the question/s or withdraw from the focus group talanoa at any time.

What are the benefits?

Your participation will contribute to a broadening of the depth of evidence and knowledge base to help better inform the community, Samoa national policy and legislative planning and add to the international research base on fa'atama recognition in law reform and village governance processes amongst Samoa communities. In addition, this study will better inform and raise awareness for the Samoan community and the wider Pacific community about adequate legal protection, law reform and village governance processes involving gender diverse communities, the severity of gender discriminatory practices and the development of gender discriminatory behaviours.

Finally, the data will not only help me obtain a Doctor of Philosophy qualification but will contribute to the future research development of ethnic-specific research to deepen and enrich the evidence base to understand why and how Samoans perceive fa'atama and gender diverse communities in Samoa.

How will my privacy be protected?

Your privacy will be protected by excluding any mention of your name and any association with church, family, village, workplace, industry, or social groups from this study. I will also not engage in casual conversation while conducting the focus group talanoa to ensure it is not overheard or repeated by others.

Your given name, address, contact details that have been gathered outside of public records for this study will remain confidential. They will not be published. In published findings of your research for current and future use, your data will be represented by a chosen pseudonym that we will agree on when you give your consent to participate in this study. This pseudonym will not be linked to your given name in any record that will be publicly available.



Only members of the PhD Supervisory Team (Researcher, Supervisors and in-country Research Assistant) will have access to your data for the purpose of this research and for post-data analysis (excluding in-country Research Assistant).

What are the costs of participating in this research?

The cost of your participation in this study will be your time of 1-1 ½ hours.

What opportunity do I have to consider this invitation?

Once you receive the participant information sheet, you will have the opportunity to contact me in 2 week's time to confirm if you agree to participate in the research.

Will I receive feedback on the results of this research?

Following your focus group talanoa, it will be transcribed and submitted for research analysis.

The summary findings will be given to you after the research data has been collected, analysed and summarised, in order for you to comment on the summary findings.

What do I do if I have concerns about this research?

Any concerns regarding the nature of this project should be notified in the first instance to the Project Supervisor, Professor Allan Beever, allan.beever@aut.ac.nz, (09) 921 9999 ext. 6413.

Concerns regarding the conduct of the research should be notified to the Executive Secretary of AUTEK, ethics@aut.ac.nz, 921 9999 ext. 6038.

Whom do I contact for further information about this research?

Please keep this Information Sheet and a copy of the Consent Form for your future reference. You are also able to contact the PhD Supervisory Team as follows:

Researcher Contact Details:

Researcher Contact Details: Bridget Fa'amatuaunu
 P: +64211180950
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Project Supervisor Contact Details:

Project Supervisor Contact Details: Professor Allan Beever School of Law
 P: +649 921 9999 ext. 6413
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6.0 Appendix F: Indicative Questions - Interview and Focus Group



TE WĀNANGA ARONUI
O TĀMAKI MAKĀU RAU

Indicative questions and prompts for Interview Talanoa*

1. How do you define gender?
2. How do you define sex?
3. Is gender and sex the same thing?
 - a. If answered 'yes', why? Please explain and give some examples?
 - b. If answered 'no', why not? Please explain and give some examples?
4. Please describe any common or perceived genders and/or references to gender communities? *For example, male.*
 - a. Is your description to genders or references to gender communities recognised by Samoan communities? It depends on the context? If so, explain
 - i. Is this perception shared in Samoa? It depends on the context? If so, explain
5. Is the subject of 'gender' part of your family conversations, and if so, in what context and what exactly?
6. How is gender perceived in your family?
7. How is gender perceived amongst your peers/friends?
8. What do you think is the common perception of gender amongst the Samoan community? Why? Please explain and give some examples?
 - a. Is this common perception similar to your family perception?
 - i. If answered 'yes', why? Please explain and give some examples?
 - ii. If answered 'no', why not? Please explain and give some examples?
 - b. Is this common perception similar to your peers/friends perception?
 - i. If answered 'yes', why? Please explain and give some examples?
 - ii. If answered 'no', why not? Please explain and give some examples?
9. Do you think that all Samoans share this perception of gender? Including Samoans born outside of Samoa and/or residing outside of Samoa?
 - a. If answered 'yes', why? Please explain and give some examples?
 - b. If answered 'no', why not? Please explain and give some examples?
10. What factors do you think have impacted the perception of gender in Samoa? Please explain and give some examples? (e.g., colonisation, Christianity, culture, history, legal)
11. Are you familiar with the term "SOGIEC"?
 - a. If answered 'yes', what do you think "SOGIEC" means or stands for?
 - i. Now, can you think of some examples of "SOGIEC" in Samoan families?
 1. Or Samoan communities?
 2. Or Samoan villages?
 3. Now, how about some examples of "SOGIEC" in Samoan communities outside of Samoa?
 - a. Are there similarities or differences in their perception?

- i. If answered 'yes', why? Please explain and give some examples?
 - ii. If answered 'no', why not? Please explain and give some examples?
- 12. Now can you tell me what you know about fa'atama? What is the role of Fa'atama in Samoa's social order and village governance? Do you think that fa'atama plays a significant role in Samoa's social order and village governance?
 - a. If answered 'yes', can you think of some examples? Please explain and give some examples?
 - b. If answered 'no', why not? Please explain and give some examples?
- 13. If you have lived in Samoa or the Pacific, are human rights or gender rights considered new concepts in Samoa?
 - a. If answered 'yes', Please explain and give some examples?
 - b. If answered 'no', Please explain and give some examples?
 - i. Are gender rights in agreement with Samoan customs?
 - 1. If answered 'yes', Please explain and give some examples?
 - 2. If answered 'no', Please explain and give some examples?
 - a. How do we address gender discriminatory practices in villages? At a local level? At a national level?
- 14. If you have not lived in Samoa or the Pacific, are human rights and gender rights considered to be new concepts by Samoan communities?
 - a. If answered 'yes', Please explain and give some examples?
 - b. If answered 'no', Please explain and give some examples?
 - i. Are gender rights in agreement with Samoan customs?
 - 1. If answered 'yes', Please explain and give some examples?
 - 2. If answered 'no', Please explain and give some examples?
 - a. How do we address gender discriminatory practices in villages?
 - i. At a local level? Please explain and give some examples?
 - ii. At a national level? Please explain and give some examples?
- 15. Does SOGIEC or fa'atama play a role in Samoa's law reform process?
 - a. If answered 'yes', Please explain and give some examples?
 - b. If answered 'no', Please explain and give some examples?
- 16. What legal and regulatory frameworks are in place to address gender discriminatory practices in Samoa? *Please explain and provide some examples or information on relevant policy, laws, customs, practices or international conventions ratified or new developments.*



- a. Is the current system of addressing gender discrimination in Samoa adequate?
 - i. If answered 'yes', Please explain and give some examples?
 - ii. If answered 'no', Please explain and give some examples?
 - b. Should the Constitution be amended to empower the Courts and Law makers to consider both customs and gender considerations?
 - i. If answered 'yes', Please explain and give some examples?
 - ii. If answered 'no', Please explain and give some examples?
 - c. Should all laws adopting gender discriminatory provisions be amended or repealed?
 - i. If answered 'yes', Please explain and give some examples?
 - ii. If answered 'no', Please explain and give some examples?
17. In your view, would the open and explicit reference to gender communities, outside of the current scope of Samoan laws and customs, face challenges?
- i. If answered 'yes', Please explain and give some examples?
 - ii. If answered 'no', Please explain and give some examples?

*Questions are subject to change and the number of core questions and follow-up prompts may also be reduced, depending on the emergent themes and sub-themes from the focus group talanoa.

NOTE

- The numbered questions are the core questions which are open-ended while the follow up questions are prompts. The responses may/ may not require follow-up prompts.
- All Interview talanoa participants are given the same core questions and follow-up prompts.



Indicative questions and prompts for Focus Group Talanoa

1. As a Samoan, how would you define gender?
2. As a Samoan, how would you define sex?
3. How are people from the SOGIEC community perceived in Samoa?
 - a. Why?
 - b. Are there differences in the perception of SOGIEC communities from those who live in the village compared to those who live in the town area?
 - i. If so, why? If not, why not?
4. In Samoa, how are people who identify as fa'atama perceived?
 - a. How about people who are from the lesbian community?
5. Are people who identify as fa'afafine considered more acceptable to people who identify as fa'atama?
 - a. If so, why? If not, why not?
6. What gender discriminative practices faced by fa'atama influence their low recognition in Samoa's law reform process and village governance?
7. Can you describe some of the key challenges that prevent fa'atama from achieving full recognition in Samoa customs and laws?
8. Considering the challenges, you noted (above), how do we adequately address some gender discriminatory practices (e.g., restricting marriage and adoption to men and women (only)) impacting fa'atama in Samoa?
9. What are the contributing factors that play a role in Samoa's village governance and law reform process?
10. How much influence do fa'atama have in advocating for human rights and more recognition in the law and/or customary law?

NOTE

- The numbered questions are the core questions which are open-ended while the follow up questions are prompts. The responses may/ may not require follow-up prompts.
- All focus group talanoa participants are given the same core questions and follow-up prompts.
- The emergent themes and sub-themes from the focus group talanoa may lead to an amendment to core questions and follow-up prompts used to guide the Interview Talanoa.

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