A study of the Inheritance Rights of Children Affected by HIV & AIDS and other Vulnerable Children
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An Assessment of the Inheritance Rights of Children Affected by HIV and AIDS and other Vulnerable Children

Produced by the Department for Community Development and the Department of Justice and Attorney General

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# ABBREVIATIONS AND ACRONYMS

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<thead>
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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AAA</td>
<td>Assessment, Analysis and Action</td>
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<tr>
<td>AIDS</td>
<td>Acquired Immunodeficiency Syndrome</td>
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<td>CABA</td>
<td>Children affected by AIDS</td>
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<td>CBO</td>
<td>Community-Based Organisation</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRMC</td>
<td>Child Rights Monitoring Committee</td>
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<td>EHP</td>
<td>Eastern Highlands Province</td>
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<td>FSVAC</td>
<td>Family Sexual Violence Action Committee</td>
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<td>HAMP Act</td>
<td>HIV and AIDS Management and Prevention Act</td>
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<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<td>HRBAP</td>
<td>Human Rights Based Approach to Programming</td>
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<td>GoPNG</td>
<td>Government of Papua New Guinea</td>
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<tr>
<td>LRC</td>
<td>Law Reform Commission</td>
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<td>MTDS</td>
<td>Medium Term Development Strategy</td>
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<td>MVC</td>
<td>Most Vulnerable Children</td>
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<td>NACS</td>
<td>National Aids Council and Secretariat</td>
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<td>NDOH</td>
<td>National Department of Health</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>NSP</td>
<td>National Strategic Plan</td>
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<tr>
<td>OVC</td>
<td>Orphans and Vulnerable Children</td>
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<tr>
<td>PACS</td>
<td>Provincial Aids Council and Secretariat</td>
</tr>
<tr>
<td>PNG</td>
<td>Papua New Guinea</td>
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<tr>
<td>RAP</td>
<td>Rapid Assessment Process</td>
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<tr>
<td>UPNG</td>
<td>University of Papua New Guinea</td>
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<tr>
<td>UNAIDS</td>
<td>United Nations Programme on HIV and AIDS</td>
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<tr>
<td>UNGASS</td>
<td>United Nations General Assembly Special Session</td>
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<tr>
<td>UNICEF</td>
<td>United Nations Children's Fund</td>
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<td>WHP</td>
<td>Western Highlands Province</td>
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SUMMARY AND RECOMMENDATIONS

The violation of the inheritance rights of children affected by HIV and AIDS has recently been identified as a concern at an international level. The current assessment seeks to identify how this concern translates into the PNG experience. Specifically, the aim of the research is to identify community concern for inheritance, and the legal and customary mechanisms for dealing with inheritance. Community consultation was conducted to facilitate an understanding of the issues at a grassroots level.

Community consultation took place in the form of focus groups, encompassing a cross section of age and gender within five UNICEF priority provinces: Milne Bay, Bougainville, Eastern Highlands, Simbu and Western Highlands. Due to logistical problems the National Capital District and East Sepik were dropped from the consultation. Given the explicit objective of identifying customary mechanisms of inheritance, focus groups were conducted in rural areas – so attempting to represent the “asset-rich-cash-poor” 85 per cent of the population who live rurally. An exploration of the issues in urban settlements will be covered in the upcoming study on street children.

PNG proves a challenging context for development. With 85 per cent of its 5.3 million population living in rural and relatively isolated communities due to the country’s diverse terrain, service delivery and the implementation and monitoring of projects proves difficult. Isolation is also the cause for PNG’s diversity: over 800 tok ples (indigenous languages) and kastom (customs). This diversity also contributes to the difficulties in rendering institutional or project concerns into understandable or acceptable terms (see McPhearson 2008 for a discussion on misconstrued HIV awareness campaigns). In terms of development, Papua New Guinea ranks 145 of 177 countries on the most recent UNDP Human Development Index and 162 out of 179 (with 179 being most corrupt) on Transparency International’s 2007 assessment of corruption.

In PNG, the concern for children affected by HIV and AIDS and other vulnerable children is growing. At the end of 2006, a cumulative total of 18,484 people were diagnosed with HIV infection, whilst the number of AIDS orphans was estimated at 2,704 in 2005 and 3,730 in 2007. Yet HIV and AIDS awareness and testing is uneven, and was an abstract concern for some assessment participants who were interviewed during the field assessment. Even where children affected by HIV and AIDS were identified as vulnerable, it was found that other vulnerable children occupied an equally, if not more, important and tangible place in the forefront of communities’ concerns.

The Government of Papua New Guinea has adopted a framework for considering Child Protection programming based on international best practice. This situation analysis is built around the eight elements of this framework, entitled the Protective Environment for Children Framework. The Framework is comprised of eight elements and each element is designed to achieve a broad range of results for vulnerable children. A core premise of the Framework is that if all eight elements are in place and connected, children’s development will be unobstructed, resulting in a protected child. This executive summary is structured around this Framework.

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Government commitment and leadership

The fact that this assessment has been conducted is, in itself, evidence of government leadership. The assessment required the investment of time and resources by senior government officials, including the Secretary for Community Development and a team of senior technical specialists from the Department for Community Development, Department of Justice and Attorney General, University of Papua New Guinea, National AIDS Council Secretariat, and Family and Sexual Violence Action Committee.

There is no Government policy that deals directly with the issue of the inheritance rights of children, including those orphaned or otherwise affected by HIV and AIDS. Nevertheless, the terms of certain policies (The GoPNG’s Medium Term Strategy, the National Strategic Plan on HIV/AIDS 2006-2010, and the draft National Strategy for the Protection, Care and Support of Children Vulnerable to Violence, Abuse, Exploitation and Neglect in the Context of the HIV Epidemic in Papua New Guinea (2008 – 2012)) provide the platform for developing appropriate policies, plans and rules in respect to inheritance. An appropriate space for concern with inheritance rights could be built into the Department for Community Development’s Child and Family Welfare Policy, which was planned for development in 2009 as it will include an examination of traditional adoption and fostering practices. There are also a number of authoritative interagency mechanisms in place to support and guide government planning and programming, including the Family and Sexual Violence Action Committee, the Child Welfare Council and National MVC Implementation Committee, which will be established as a sub-committee of the Child Welfare Council.

This assessment also provides an opportunity to identify areas in which greater government attention can be invested. From the community consultations, it was evident that little development or recurrent budget is currently being invested in the promotion and enforcement of the legal and regulatory frameworks and ensuring that vulnerable children have access to advocacy or other supports when claiming their right to inheritance.

<table>
<thead>
<tr>
<th>Key Recommendations:</th>
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<tr>
<td>✓ Create national standards relating to the inheritance rights of children into future revisions to the Medium Term Development Strategy and other major policies.</td>
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<tr>
<td>✓ Prioritise the drafting and resourcing of the National Child and Family Welfare Policy.</td>
</tr>
<tr>
<td>✓ Establish and strengthen the National MVC Implementation Committee by adding ministerial oversight, increasing the size and capacity of the Secretariat and include membership from all key government agencies.</td>
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Legislation and enforcement

The strength of kastom and the country’s social exchange system contributes to a widespread perception that formal laws are of negligible importance to the majority of Papua New Guineans. Despite this, there is also evidence that some Papua New Guineans see a place for a formal legal mechanism to ensure their land or house will be passed on to their children, particularly when custom will either deny children their inheritance rights, or provide others with an opportunity to deny children their inheritance. These customs are described in more detail below, in rights-based culture and custom.

The Wills, Probate and Administration Act 1966 is the most comprehensive Act with respect to inheritance rights. It provides legal protection for those children who have their inheritance rights
enshrined in a written will. The Constitution also enables National Parliament or a Provincial Assembly to make laws pertaining to family matters and the Organic Law empowers provinces to introduce laws at the subnational level. These provisions provide an opportunity to deal with any gaps or difficulties in the *Wills, Probate and Administration Act*. Despite the existence of a vast body of land law, only the *Land Registration Act 1981* mentions the procedure of registering a title to land in regard to children and explicitly names the guardian as the representative of an infant in dealing with all matters of this Act.

Much of the legal framework that governs the inheritance rights of children predates the concern with HIV and AIDS. Exceptions include the *HIV and AIDS Management Prevention Act 2003 (HAMP Act)* and the *Lukautim Pikinini Act 2009 (Lukautim Pikinini Act)*, however neither addresses children’s inheritance rights directly.

The enforcement of the legal and regulatory framework is largely limited to urban settings, where people have basic legal literacy and access to formal courts or dispute resolution mechanisms. Even within these settings, extended families will often choose to make decisions based on customs that may not be rights based and the formal system lacks the resources and legitimacy to fully enforce existing regulatory frameworks. Therefore, amendments to laws can only be one contribution to the solution. Grassroots and localized efforts at incorporating a concern for inheritance rights from the ‘inside out’ will be crucial. The importance of building family and community capacity is discussed in more detail below.

### Key Recommendations:
- Amend the *Wills, Probate and Administration Act* to prioritise the best interests of children.
- Introduce laws at provincial levels under Section 42(1)(x) of the Organic Law to address gaps in existing legislation.
- Amend the *HAMP Act* to proscribe discrimination against children.

### Open discussion

When asked about inheritance, the overwhelming focus of informants was land. Housing and moveable property was consistently a secondary concern. This is both due to the immense cultural importance placed on land in terms of identity and belonging, and the fact that land is used for subsistence agriculture, in addition to cash crops. In contrast to the African experience, cattle are not present with the exception of those introduced as part of development schemes. Few people raised concerns over the inheritance of cash as few had bank accounts, or cash in large quantities. Concern for cash, motorboats, televisions and other property of this nature was regarded as the concern of a minority. Indeed, one informant was clear that the concern for inheritance rights was almost ironic as it assumed that parents necessarily had property or wealth to pass on.

Land in PNG is owned in common by the clan. The very nature of customary land and its inextricable link to family and social organization makes individual ownership of land impossible. Technically, the ownership of customary land is best understood in the sense of corporate or community ownership rather than an individual privilege. As such, it was often voiced that all orphaned children will always be provided for.

Few people interviewed for this assessment raised concerns about inheritance unless probed to consider specific instances in which children might be vulnerable. However, it was clear from the focus group discussions some children are having their inheritance rights denied.
The plight of children who are driven from their land because of stigma, violence or the breakdown of their parents’ marriage, children born outside of marriage and girls who choose not to marry is an indication that the perception of communities of the protection afforded by custom is unrealistic.

Few people (including girls and young women) raised concerns about the capacity of women and girls to claim their inheritance. Girls from patrilineal communities were universally expected to access land through marriage into another clan and were subsequently not entitled to expect land or property to be passed to them in the event of the death of their parents.

These examples suggest that there is considerable scope for additional research to stimulate greater discussion within communities, particularly as a means of identifying vulnerable children and recognising the need for alternative solutions to be found to address instances in which the traditional modes of inheritance are discriminatory or insufficiently protective. The lack of awareness about HIV is also leaving communities unprepared for the additional pressure that the epidemic will place on community coping strategies and mechanisms. As a result, community based solutions are not being discussed and developed.

Key Recommendations:

- Conduct further research on the links between children affected by HIV and AIDS and inheritance rights.
- Conduct research into forms of polygamy, bride price, marriage breakdown, adoption and their relation to inheritance rights.
- Conduct research into how people living in rural areas and settlements can better engage with the formal legal system.
- Distribute the findings of these studies to both professionals and communities.

Rights-based culture and custom

Papua New Guinea is one of the most culturally and linguistically diverse countries in the world. As such, traditions and customs vary between regions, districts and even within single societies. Despite this, some regular themes did emerge in the areas visited for this assessment. Having the capacity to contribute to the cultivation of the land, fulfilling customary obligations, possessing customary knowledge of one’s genealogy, living on the land (or regularly returning to it), and just being male were all linked with an increased likelihood of a child successfully claiming their right to inherit land and property.

Customary practices concerning inheritance and the inheritance rights of children, in particular, are almost invariably influenced by two basic criteria: family organization and type of property. Family organization is either patrilineal or matrilineal, and properties in traditional Papua New Guinea societies are of two types - (customary) land and personal property. It is important to note that what is inherited is not the land in and of itself. Rather it is the right to use the land – and the right to inheritance itself. That is, although many communities spoke in terms of ‘owning’ particular pieces of customary land, what this involved was the right to pass on the use of that land to one’s children.

Patrilineal societies pass land from a father to his sons. In general, it was noted that the first born son would receive the land, claim around half of this land for himself and be responsible for dividing it between the younger sons. Women were expected to marry into another family and would receive access to her husband’s land. In the communities visited, there was almost universal acceptance (by both men and women) that women were expected to marry and that this was their opportunity to receive land. They did not raise a concern that this was discriminatory or places undue pressure on women to marry, although it is inconsistent with the rights of women and girls and the principle of non-discrimination that is contained in the Constitution.
Most communities identified that it was common for extended family to assume the care of orphaned children, and claim their father’s land as compensation for taking on the burden of caring for the child.

The complex social exchange system encourages people to perceive themselves and position their identity within the context of a broader familial network. There is a strong preference to adopt restorative models of conflict resolution and most communities prefer to resolve inheritance disputes through customary mechanisms. As noted elsewhere, those who may wish to pursue legal recourse tend to find it inaccessible. Subsequently, few participants had even considered drafting a will. This assessment found no examples of children accessing village courts, and almost all children stated that they lacked the confidence to approach the village courts (or other community leaders) for assistance when required. Even if they were to access traditional justice mechanisms, evidence of their performance in other areas, and their reported lack of understanding of the Wills, Probate and Administration Act suggests that the capacity of these Courts would need to be strengthened to ensure that they were able to use rights-based principles to guide their decision making.

Key Recommendations:

✓ Train Village Courts in the Wills, Probate and Administration Act and their responsibility to uphold the non-discrimination provision in the Constitution.
✓ Train communities to monitor children’s inheritance rights and act as independent advocates for children.

Children’s life skills, knowledge and participation

The capacity of children to contribute to the development of gardens and contribute to ‘wok’ was often linked with the likelihood that they would receive their inheritance. Many communities noted the importance of remaining on the land, or continuing to contribute to its development by regularly returning to visit their ples. In cases where a child becomes orphaned, it was important for children to return to their land quickly, as this reduced the opportunity for others to make false claims of ownership. For example, community members noted that some extended family members may begin cultivating the land, subsequently demanding compensation when asked to return the land or hand over the gardens. In other cases, neighbouring tribes were reported to encroach upon ambiguous boundaries or borders when land owners were not present to draw attention to their ‘marks’.

It was also noted by many community members that children required knowledge about their land boundaries and family histories. This knowledge allows children to identify their land boundaries and ensures that both their children and their extended family are aware of the verbal contracts that are made between a father and his sons.

Without this knowledge, or the ability to wok, children were considered at risk of being denied their land, or access to resources when their parents died. In particular, young children and those living away from their land were identified to be particularly vulnerable. There were many reasons why some children are absent from their land, or unable to contribute to wok.

Children who are not living on their traditional land: Many children have been forced to leave their land because of marriage breakdown, tribal fighting or sorcery. Children who live with family in urban settings were also unable to contribute to the cultivation of their land, and unless their parents made sufficient financial contributions (or returned occasionally to work in the gardens), these children are often denied the right to inherit their land when their parents die and they return to their ples.

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6 ‘Wok’ involves work on gardens – planting trees, crops, weeding, obligations that entail fulfilling contributions to bride price, compensation, funeral payments, feasts etc
Children with no traditional land: The increase in mixed marriages has created tensions between communities, particularly where land pressures exist. In cases where the father is from a matrilineal community and where the mother’s family is patrilineal, there are no longstanding traditions that account for the allocation of land to their children.

Children who are unable to contribute to wok: Children with serious disabilities were found to be excluded from the allocation of land, because their parents and families considered them unable to use it. In addition, very young children were identified to be at risk of having their land re-distributed to other, older members of the family before they became old enough to wok and claim it as their own.

Children affected by HIV and AIDS: Interestingly, information about HIV remains largely absent in many of the communities included in this assessment, due to a lack of awareness and regular testing facilities. The experience in Western Highlands suggests, however, that the spread of HIV and increased awareness about the virus are likely to exacerbate the risks facing many vulnerable children. For example, children from this district have gone to live with their HIV-positive mother’s family because stigma and discrimination have led to her exile. Others are orphaned, now living in care centres and are no longer welcome to return to their family until they demonstrate that they grow up to be healthy and free of the virus. Encouragingly, the care centres consulted in this assessment reported that they were actively supporting children to return to, and learn about, their land from their uncles and that this was increasing the likelihood that they would be able to claim their land when they were ready to return.

These children require support from government, civil society and their communities to understand their inheritance rights. To do this, those responsible for providing support must have the skills and resources to identify vulnerable children.

Key Recommendations:

- Provide legal and rights based information to vulnerable children.
- Provide paralegal support to children who are at risk of having their inheritance rights denied.
- Support communities to identify and support children who are not connected with their land.
- Support communities to identify and support children who are not passed on customary knowledge.
- Develop ethical guidelines for research involving children in the Papua New Guinea context.

Family and community capacity

As noted above, there is a widespread customary expectation that the extended family will assume the responsibility of children. As virtually no one reported writing a will, the vulnerability of children is inextricably linked with the capacity of their extended family to identify and meet their responsibility to uphold these children’s rights. In many cases, families willingly accept orphaned children into their homes, providing them with care. In most cases, this extended family is also responsible for ensuring that inheritance rights are respected. The assessment also revealed considerable variation in the degree to which families were willing, or able, to provide this care. Subsequently, many children are failing to access their land or other inheritance.

There are a number of factors that contribute to this variation. Many of these, including sex and sibling order, are addressed above in the rights-based culture and custom section of this summary. There are also many enabling factors that appear to increase the likelihood that a family will ensure that children realise their inheritance rights:
Land availability: The population has increased at a rate of 23 per cent since 2000 (one of the highest population growth rates in the Pacific). This is resulting in increased land pressure. Families with ample land appear to have greater capacity to ensure that their biological and adopted children inherit land on which to live and farm. Many communities reported increasing land pressure, due to the growing population. As a result, families who have limited land are forced to choose between dividing the land into small subdivisions for all children, or choosing to give land to some children and find alternatives for the others. Others are informally buying customary land from those within one’s clan, however this may also prove problematic in the future, as the legality of exchange is dubious.

Customary knowledge: Most people interviewed were able to articulate a range of customary measures that could be taken to ensure that children were in position to claim their inheritance (and in particular, land). For boys, this often involves their father showing them their land boundaries and setting ‘marks’ to ensure that they can recognise and lay claim to the land in the event of a dispute. Where entitlements are accepted by custom, this knowledge enables the child to access the traditional courts (Village Courts). As these Courts are often unfamiliar with other relevant legislation, they do not give formal legislation primacy over customary definitions of entitlement.

Some community members also noted that the task of teaching children about their land boundaries can be assumed by uncles and grandfathers, particularly when the father had died. Unfortunately, some women interviewed noted that this support is largely dependent on the availability of land for the extended family and their individual personalities. There were a number of cases identified in which the extended family chose not to inform children of their inherited land to enable them to claim it as their own.

Formal mechanisms: Some community members also noted that they are aware of cases in which children have claimed their inheritance rights because these rights had been enshrined in a will. Similarly, the superannuation funds allow for parents to allocate portions of their entitlements to their children in the event of the parents’ death. This form of protection has limited reach, as an overwhelming majority of people reported that they had never written, or indeed seen, a will. Superannuation funds are used by people in paid employment, which constitutes only a small proportion of the population.

Key Recommendations:

- ✓ Raise awareness in communities of the Wills, Probate and Administration Act.
- ✓ Educate caregivers of vulnerable children about these children’s right to inheritance, and their obligations as caregivers.
- ✓ Reduce incentives for caregivers or extended families of vulnerable children to dispossess these children of their property.
- ✓ Support short-term or day care centres for children that prioritise the maintenance of children’s connections with their land and family.
- ✓ Strengthen the capacity of community leaders to exercise their leadership for the protection of vulnerable children.
- ✓ Include awareness on inheritance into voluntary counselling of people tested for HIV.

Essential services

There are a range of structures in place that are designed to support children to claim their inheritance rights. The Public Curator’s Office within the Department of Justice and Attorney General is responsible for the administration of the Wills, Probate and Administration Act and has established offices in all four regions. Unfortunately, officers have limited capacity to exercise their functions effectively. In Port Moresby, the Deputy Curator noted that they have no funds with which to

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complete outstanding property assessments. Similar resource issues are hampering efforts at the regional level. In addition, the Regional Curator identified a common practice in which families will use threats or intimidation to claim land or property that would otherwise be given to children.

Even if resourced sufficiently, communities invariably expressed a preference for customary mechanisms to resolve any contention or dispute. Formal legal recourse was considered inaccessible and irrelevant and Village Courts almost invariably resolve cases of intestacy according to custom, even when custom is in conflict with the non-discrimination provisions of the Constitution.

Efforts are being made by some civil society groups to develop innovative ways to support children who could otherwise be denied their inheritance rights. For example, a Care Centre in Anglimp South Waghi District in Western Highlands Province accompanies children when they return to their extended family and encourages them to learn about their land boundaries and family histories.

**Key Recommendations:**

- Strengthen security, transport, and staffing capacity of the Public and Regional Curators.
- Train NGOs and CBOs to act as independent advocates for children at risk of having their inheritance rights denied.

**Monitoring, data and oversight**

There are several data collection systems already in place that could be harnessed to gather information on the degree to which children are enjoying their inheritance rights. For example, Village Courts are now completing monthly returns that outline the frequency, nature and outcome of disputes that they are required to resolve (although the current forms do not explicitly require Clerks to identify disputes relating to inheritance). Higher Courts also complete monthly summaries of cases that come before them. Regional Curators become involved in all cases where claimants are seeking the release of money from banks, and Superannuation Funds record the information about payments that they make to families. Ad hoc data collection is also being collated by civil society and faith based groups, including churches and care centres, however there is no centralised mechanism for the collation and analysis of this data. The impending introduction of Lukautim Pikinini Councils also provides a new opportunity to strengthen communities’ capacity to identify and monitor the situation of vulnerable children.

There is a paucity of information regarding children and inheritance in the country. This is perhaps unsurprising, as almost no participants in this assessment identified children’s capacity to claim their right to inheritance as a problem and most people believed that the existing customary practices adequately provide for the interests of children.

Oversight also remains a concern. The traditional and higher courts did not report becoming involved in mediating disputes and the Regional Curator reported being unable to act to prevent families from claiming property that should rightly be provided to children. Many communities suggested that independent advocates for children would be useful.
**Key Recommendations:**

- Strengthen the capacity of the Department for Community Development to coordinate data collection that will provide relevant data on the numbers, location and situation of vulnerable children, including those affected by HIV and AIDS.
- Train Village Courts Inspectors to monitor disputes regarding inheritance that come before village courts.
- Strengthen the capacity of provincial and district Lukautim Pikinini Councils to identify vulnerable children and oversee the distribution of land, property and other inheritance to these children.
1.0 INTRODUCTION

1.1 Background to the assessment

The UNAIDS report 2006 estimates that 13.4 million of the 108 million orphans in the world are orphans due to AIDS-related causes. The focus on the special needs of children affected by HIV and AIDS and other vulnerable children in this context is outlined in UNGASS Declaration of Commitment on HIV/AIDS (2001) and the World Fit for Children Declaration of the UN Special Session on Children (2002). The Framework (UNICEF 2004) and its Companion Paper Enhanced Protection for Children Affected by HIV/AIDS (UNICEF 2006) outlines the remit for attention and action pertaining to children affected by HIV and AIDS and other vulnerable children in terms of prevention, provision and protection as part of a multi-sector response. Focus on property and inheritance rights falls within the area of social protection and support, which falls within the fourth of the ‘4Ps’ strategy.

The spread of HIV has led to a generalised epidemic in Papua New Guinea. By the end of 2006, up to 80,000 people were estimated to be infected with HIV (around 1.68 per cent of the total population), with two thirds of all infections being reported in the rural areas. Some projections suggest that, in the absence of effective interventions, this may rise to over half a million people, or 10 per cent of the adult population, by 2025. The prevalence rate is highest in the 15-39 age group, and in the 15-29 age group, there are significantly more females than males affected. As 70 per cent of pregnant women also fall in this age bracket, the risk of mother to child transmission remains high. The risk of acquiring HIV for women is compounded by the discriminatory social conditions that affect their status and their access to, and control of, resources. Children who are affected by HIV are now recognised as a particularly vulnerable group, as they are more likely to be orphaned, drop out of school, live in child-headed households and experience stigmatisation and discrimination.

In 2005, the Government made an allocation of K2.3 million to HIV and AIDS related activities and there are considerable resources available from international partners including the Australian Government, Global Fund and the United Nations System. Despite these combined efforts, there are a rapidly increasing number of young people living with HIV, an increased rate of HIV amongst women of reproductive age, and an increasing number of children are at risk of mother to child transmission as the infected populations become the next generation of parents.

The high rate of maternal mortality is resulting in many children becoming orphaned. Papua New Guinea has the highest maternal mortality rate in the world (733 per hundred thousand live births). This figure has more than doubled since 2000. Antenatal care attendance has dwindled from about 80 per cent in 1996 to 60 per cent in 2004. Only around 53 per cent of deliveries are supervised.

There is only one major study that examines the situation of children who are orphaned or otherwise affected by HIV and AIDS in Papua New Guinea. This study suggests that 4.2 per cent of children are maternal orphans, 9,400 of which have been orphaned because of HIV and AIDS. Many children

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8 UNAIDS, Unbelievable Stats, 2002
9 The ‘Four Ps’ being: preventing mother-to-child transmission; providing pediatric treatment; preventing infection among adolescents and young people; and protecting and supporting children affected by HIV/AIDS. UNICEF. (2008). Background Paper East Asia and the Pacific Regional Partnership Forum on Children and HIV and AIDS
(around 138,108) are living with parents who are HIV positive and at the time of the study, 10,946 children were living with HIV. A much greater number (approximately 620,585) were at risk of infection. Informal adoption and fostering is commonplace, with around 22.4 per cent of children residing away from their biological parents. Rapid social transition, coupled with the worsening HIV epidemic, is placing additional pressure on traditional community safety nets. Children who rely on these safety nets are subsequently at greater risk of abuse, violence, exploitation and discrimination.15

The vulnerability of children affected by HIV and AIDS has been regularly reported in other regions experiencing an HIV epidemic, such as Africa.16 These studies document how children affected by HIV and AIDS (and other vulnerable children more generally) become vulnerable as their parent(s) grow sick and die. Sources of vulnerability include: low family capacity for care, decreased household economic level, loss of schooling in favour of domestic or other work,17 loss of access to health care, and the psychological and emotional trauma of caring for dying family members. Subsequent to the factors that can compound poverty and its associated problems, children can be forced into sex work and other forms of exploitation and abuse.18 It has also been suggested that there is an increased likelihood of those children raised without good role models to engage in antisocial behaviour, which has negative repercussions for society at large.19

Ensuring the transmission of property to children orphaned by AIDS is a key factor in creating a safety net. Many reports show that single orphans in Africa (children of widows) are vulnerable to land grabs and property loss by relatives or unrelated community members. Double orphans (children who have lost both parents) may be adopted through traditional mechanisms. Yet such coping mechanisms have become strained in the face of the HIV epidemic.20 Reports from elsewhere have also shown that orphans adopted into their extended families have fewer assets and are less likely to receive an equal share of household resources compared to biological children,21 and that such households are more likely to make decisions that benefit biological children.22

The above indicates a lack of effective legal protection in terms of inheritance and preservation of assets for these children. The need to address children’s rights to shelter and parents’ assets (housing, savings, cattle, agricultural land of deceased parents) is clear. The situation is especially pressing as the children affected may be hidden from view due to the stigma surrounding HIV.23 This assessment was designed to address this knowledge gap.

1.2 Assessment objectives

The purpose of the current assessment is to investigate how the issue of the inheritance rights of children affected by HIV and AIDS and other vulnerable children translates into the PNG context. The aims of the research are to identify community concern for inheritance, the legal, policy, institutional and customary mechanisms for dealing with inheritance, and any individual factors that may influence a child’s experience of the above. The assessment framework below provides a visual representation of the three broad assessment areas.

1.2.1 Assessment Framework

1.3 Research design

1.3.1 Aims

To investigate and systematically document:

1) Key areas of legal protection that are most important to children affected by HIV and AIDS and other vulnerable children
   - Guardianship and inheritance laws
   - Laws connected in their ability to reduce their socioeconomic vulnerability that cannot be assured by social assistance alone.
2) Customary practices pertaining to inheritance and the degree to which these offer protection or risks to vulnerable children.

Research was divided into two phases, an initial desk review and fieldwork. The former dealt largely with aim 1, the latter with aim 2.

1.3.2 Methods

Community consultation, in the form of focus groups and interviews, was conducted to facilitate an understanding of the issues at a grassroots level. The three methods used were: the ‘triple A’
(Assessment, Analysis and Action), a Human Rights Based Approach to Programming and Rapid Assessment Process (RAP). The AAA approach stresses the need for open-ended discussion and participation whereby key issues and causality are identified and thought through by the community themselves. In discussing these, community members are given the opportunity to reflect and act upon any identified problems to synthesise a community-based approach to the issue. Similarly, RAP stresses the role of the researcher as empowering community members by allowing them to identify problems and solutions in their own terms. Key to this is not over-determining the context for discussion – participants must frame concerns and issues in their own terms.

Typically, focus groups were introduced to the facilitators and issues at stake. The groups were then split into individual groups of community leaders (including village court magistrates, church leaders, customary chiefs), men (including widowers, polygamously married men, husbands in a mixed marriage, biological fathers, foster fathers), women (including widows, co-wives, wives in a mixed marriage, biological mothers, foster mothers, divorcees), youth boys, youth girls, and children under the age of 12. A facilitator was allocated to each group and guided discussion in order to ascertain:

- indigenous definition of property
- knowledge of and attitude towards HIV and AIDS
- knowledge of, attitude towards and access to formal modes of redress
- customary norms pertaining to inheritance
- influence of individual factors in regards to inheritance.

Having done so, participants were then encouraged to think of possible solutions to any problems identified within their smaller groups. Following from this, the smaller groups reported their discussion and recommendations to the wider group for feedback.

1.3.3 Researchers

Field research was conducted by UNICEF staff, the Chair of the Child Welfare Council, a social researcher from the University of Papua New Guinea, local Papua New Guineans familiar with the AAA approach, and in one consultation, an officer of the Department of Justice and Attorney General. A reference group was established to give feedback on the TORS, methodologies and findings of the research, with representation from Department for Community Development, Department of Justice and Attorney General, Family and Sexual Violence Action Committee, University of Papua New Guinea and National AIDS Council Secretariat.

1.3.4 Geographical Representation

Community consultation took place in the form of focus groups within five UNICEF priority areas: Milne Bay, Eastern Highlands, Simbu and Western Highlands provinces and the Autonomous Region of Bougainville. Given the explicit objective of identifying customary mechanisms of inheritance, focus groups were conducted in rural areas – so attempting to represent the lived experience of that 85 per cent of the population who live rurally. The specific locations are as follows:

- Kiriwina, Kiriwina-Goodenough District, Milne Bay Province
- Arawa, Central Bougainville District, Autonomous Region of Bougainville
- Goroka, Goroka District, Eastern Highlands Province
- Mingendie, Kerowagi District, Simbu Province
- Minj, Anglimp South Waghi District, Western Highlands Province.

1.3.5 Limitations

The limitations of the research were methodological, geographical, and those pertaining to HIV and AIDS. In regards to the first, time constraints (especially in the Highlands region) made it difficult to
visit the necessary centres in addition to conducting focus groups. The quality of local facilitators varied greatly, leading to inconsistency in the methodology, and variation in the composition of focus groups. In relation to the second, the exclusion of the East Sepik (and so the Momase region) due to logistical problems, has led to a partial overview of the cultural diversity of PNG (although it should also be noted that Papua New Guinea is one of the most culturally diverse countries in the world, and this assessment does not seek to provide a comprehensive analysis of the situation of children even within the provinces included in this assessment). Similarly, the cancellation of the focus group in the National Capital District means that a focus on the urban and settlement experience, specifically that where the highest amount of HIV testing is available, is excluded from the current report.

1.4 Overview of Report Structure

This report outlines the context, design, and findings of the community consultations. It is divided into eight main sections:

- overview of the country context
- legal context for the inheritance rights of children affected by HIV and AIDS and other vulnerable children
- policy context for the inheritance rights of children affected by HIV and AIDS and other vulnerable children
- institutional context for the inheritance rights of children affected by HIV and AIDS and other vulnerable children
- customary context and case studies for the inheritance rights of children affected by HIV and AIDS and other vulnerable children
- contradictions between law and custom
- recommendations.
2.0 OVERVIEW OF THE COUNTRY CONTEXT

2.1 General overview of Papua New Guinea

Papua New Guinea (PNG) is located on the eastern half of the New Guinea Island, plus contains a number of other islands and atolls and has four geographic and administrative regions covering twenty provinces. PNG was colonised by Germany in the North and Britain in the South at the end of the nineteenth century. During the First World War, Australia took over the administration of PNG, and PNG achieved independence in 1975. Missionaries, miners, gold prospectors, and government administrators have ensured a long period of contact with ‘Western’ ideas and influences.

Papua New Guinea’s population is estimated to have passed the 6.5 million mark as of the end of 2007 and the population is predominantly based in rural areas (85 per cent). Communities are largely isolated due to the country’s geography, and there are approximately 800 ‘tok ples’ (indigenous languages) and cultures as a result of this. The cultural diversity and physical inaccessibility of locales prove a challenge for development in PNG. Generalising about any aspect of traditional culture, or the impact of education, employment, mobility or contact on a given area is not possible. The impact of this is dependent on both a community’s proximity to and participation in institutions, and the behaviour and standards encouraged by local community leaders. There is a curious disjunction between community localities and ‘government’ in the perception of locals, and a tendency to look to community based solutions and community based reliance.

In terms of development, Papua New Guinea ranks 145 of 177 countries on the UNDP Human Development Index. Literacy levels are low, law and order problems are deemed chronic, and awareness of human rights is low. In comparison to other Pacific countries, most human development indicators are deteriorating. PNG is ranked 162 out of 179 (with 179 being most corrupt) on Transparency International’s 2007 assessment of corruption. The majority of Papua New Guineans are asset-rich-cash-poor rural dwelling people, making ‘poverty’ a somewhat problematic descriptive term. The National Poverty Reduction Strategy defines poverty in PNG as “the lack of access to economic growth opportunities and the inefficient delivery of, and lack of access to basic services.”

2.2 HIV and AIDS in Papua New Guinea

2.2.1 Prevalence of the epidemic

The first reported case of HIV infection in Papua New Guinea (PNG) was diagnosed in 1987. According to the 2008 UNGASS Country Progress Report, PNG has the highest incidence of HIV and AIDS in the Pacific region. A cumulative total of 18,484 people were diagnosed with HIV infection at the end of December 2006: 8,530 (46 per cent) of cases were in males, 8,824 (48 per cent) in females, and 1,130 (6 per cent) of infections were in individuals whose sex was not reported. Diagnoses of HIV have come from every province. 61 per cent of all infections have been reported from the National Capital District, 17 per cent from the Western Highland Province, 6 per cent from Morobe, 4 per cent from the Eastern Highlands Province, and the remaining 12 per cent distributed across all other

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24 Papua New Guinea Year Book 2008
28 Department of National Planning and Monitoring. Medium Term Development Strategy (2005-2010).
provinces. As such, national prevalence was estimated at 1.68 per cent, with 1.38 per cent for urban and 1.65 per cent for rural populations.29

The estimated number of orphans due to AIDS (age 0-17) was 2,704 in 2005 and 3,730 in 2007.30 The trend is considered as ‘rising’, with no figures provided for future years. Nevertheless, without antiretroviral (ART) treatment, the orphan rates will not stabilize until approximately 20 years after HIV prevalence stabilizes due to the lag between infection and death in adults.31

2.2.2. Context of the epidemic

Papua New Guinea is experiencing a generalised epidemic, as infection is spreading beyond traditional (and predominantly urban) high risk groups, placing much of the broader population at risk of infection.32 Factors contributing to the spread of HIV include socio-economic factors, sexual practices and gender inequity. The socio-cultural and economic changes associated with mobility, urbanisation and global flows of images and information33 are particularly noteworthy, whilst unemployment contributes to the sale and exchange of sex for money and goods.34 Sexual practices that increase vulnerability to HIV include: early onset of sexual activity, multiple partners (pre-marital and extra-marital), unprotected anal sex and vaginal sex between men and women, inconsistent condom use, and sexual violence.35 Drug and alcohol use has been linked to both inconsistent condom use and sexual violence.36

Normative gender inequity provides the context for physical and sexual abuse. Gang rape and child abuse and child sexual exploitation are ongoing problems. Diminished power to negotiate condom use in these circumstances heightens the risk of HIV transmission for women, alongside the issues of physical, psychological and emotional trauma.37 Hammar (2008) has suggested that gender imbalance more generally is the underlying and primary cause for the spread of infection, over and above the socio-economic factors listed above.

2.2.3 Limitations in available data

PNG faces many administrative and infrastructural challenges. This results in uneven HIV testing and diagnosis across provinces, and unreliable or incomplete reporting of cases between local, district, provincial and national levels. This makes reliable and accurate data collection challenging. Again, currently there is no formal notification system for AIDS-related deaths (NACS and NDOH, 2006).

2.2.4 National response

The response of the national government is reflected in the creation of the National AIDS Council Act 1997, the National Medium Term Plan 1998-2002, and the PNG National HIV and AIDS Strategic Plan 2006-2010. The latter provides the strategic framework for the national response to the epidemic,
whilst the Government of PNG Medium Term Development Strategy (2005-2010) recognises HIV and AIDS as one of its six main expenditure priorities.

The establishment of the National AIDS Council (NAC) and its secretariat (NACS); the Provincial AIDS Councils (PAC) and their secretariats (PACS); the Special Parliamentary Committee on HIV and AIDS; the NEC Directive – Decision No. 124/2004 – which moved the National AIDS Council to the Prime Minister’s Department; and the endorsement of the HIV and AIDS Management and Prevention Act 2003 (HAMP) (NACS, 2004), are all crucial indicators of the importance being placed in HIV and AIDS at the national level. The National Strategy for the Protection, Care and Support of Children Vulnerable to Violence, Abuse, Exploitation and Neglect in the Context of the HIV Epidemic in Papua New Guinea (2008 – 2012) has been endorsed by several key Government departments. The Strategy makes provisions for the establishment of an interagency National MVC Implementation Committee which will function as a subcommittee of the Child Welfare Council.

Partners in the national response to HIV and AIDS include: national and international NGOs, civil society organizations, faith based organizations, people living with HIV, the government and the private sector and economic enclaves.38

2.2.5 Cultural responses to HIV and AIDS

“HIV/AIDS is a self-inflicted disease…let’s get really hard on those HIV virus carriers. Just stigmatize them like criminals and crush them to death and let the moral people survive… Forget about all those human rights (the Western ideas enforced on us) because our tolerance…is spreading the disease faster. The money, time and other resources that AusAID and other donor agencies are currently spending to advocate for the rights of HIV/AIDS carriers should be better used on building more roads, bridges, schools and other social infrastructure for moral law-abiding citizens”

Jacob Sekewa, letter to the editor of The National September 6, 2004

HIV and AIDS is not merely a biomedical phenomena but a complex biosocial occurrence.39 Cultural diversity and varying degrees of contact with institutions and awareness campaigns in various communities leads to differences in how AIDS is understood, experienced and acted upon. Specifically, the positioning of AIDS in relation to indigenous and evolving conceptions of death, illness, morality and misfortune are important considerations.

Awareness of cultural differences is crucial, as this will inform how information on HIV and AIDS is received. Haley (2008) has demonstrated the complex link between increasing anxiety in the context of AIDS and witchcraft accusations. The Huli and Duna communities share the belief that the fertility of their region is correlated with the morality of the communities. They also share the belief that the state of the body reflects the inner worth and mind of a person.40 This stress on morality has been compounded by some Christian reactions to AIDS (such as the New Ireland Pentecostals that Eves (2008) works with). Indeed, certain community leaders in Tari perceive the impact of HIV and AIDS as a positive development in their area, as the associated threat of stigma and death may convert people to a good Christian life.41 It is likely that a combination of these understandings informs Jacob Sekewa’s letter to the editor quoted from above.

Some have raised a concern that the ABC campaign (abstinence, be faithful, and condoms) reinforces blaming of the infected. The generalized nature of the epidemic means that a depiction of the epidemic in terms of ‘risk groups’ defined by occupation or affiliation is highly problematic. This is especially so in settings where notions of difference or ethnic conflict are marked. At a more general level it also endorses the illusion that AIDS is a disease of ‘other’ marginal or foreign groups.  

Understanding of HIV and AIDS is also mixed with the understandings and ambiguities surrounding modernity. McPhearson (2008) identified the misconstruing of NAC posters in the rural Western New Britain context. Here, the woman on the ‘She’s Perfect’ poster (a photograph of a young, stylish woman with “through no fault of her own she’s...HIV+” and “Always be faithful” underneath) was interpreted to be too Westernised to be moral. This coincides with their understanding of modernity as encapsulating the good health, education, jobs and lifestyle that locals aspire to, yet concomitantly representing the temptations of alcohol misuse, gambling, illicit sexual activity and the dangers of disease and death.

Awareness of HIV and AIDS differs from province to province. Despite this, beliefs such as “condoms are only fifty-fifty reliable”, “HIV can be contracted through kissing, touching clothing”, and “government scheming to infect populations” are widespread. In some districts it was not unusual to be asked in the course of focus groups whether HIV could be transmitted by mosquitoes or sharing a living space. Such misconceptions pertaining to HIV transmission and AIDS contribute to discrimination and stigma towards people living with HIV and AIDS.

2.3 Vulnerable Children in Papua New Guinea

2.3.1 Overview of the situation of children

Forty per cent of PNG’s population is under the age of 18, and 30 per cent of children live in extreme poverty (less than 1USD a day). The infant mortality rate is 51 / 1,000 births, and a further 74 and 94 in every 1,000 children die before their fifth birthday. Common causes of death include low birth-weight, malaria, respiratory infections, diarrhoea, malnutrition, measles and now HIV and AIDS. Birth registration is low, with an estimated 80 per cent of the population being unregistered.

Child abuse is a continuing problem and in almost all its forms, girls are particularly at risk. Around 75 per cent of children report experiencing physical violence and 80 per cent report verbal abuse. Between 827,500 and 1,344,600 children report living in violent homes, with approximately 55 per cent of children experiencing sexual abuse. Nearly half of reported rape survivors are under the age of 15, while 13 per cent are under the age of seven, and even then, most cases are not reported.

Commercial sexual exploitation of children (CSEC) is a problem, with one recent study estimating that approximately 50 per cent of girls are at risk, as a result of a combination of related vulnerabilities. Recent studies suggest that a considerable proportion of sex workers are actually

child victims of commercial sexual exploitation. A 1994 study by the Institute of Medical Research found that 30 per cent of the 350 sex workers they interviewed were between 13 and 19 years of age, and some were as young as 11. World Vision reported similar findings in 2004, where they found 35 per cent sex workers were aged between 14-24. Bride price (the payment by the husband’s family to the wife’s family on the occasion of a marriage) and polygamy are practised in many parts of PNG, and the attitudes towards these practices contribute to the commoditisation of girls and women. Early marriage is also an issue for many girls, with some reports finding girls married as young as 12 years of age.

Violence against women is also a major concern. In the home, around 75 per cent of women and children experience family violence, one of the highest rates in the world. One study in the Highlands found that 55 per cent of women reported having been raped. The same study found 60 per cent of males reported having perpetrated rape. Official police statistics in the 1990s reported that sexual assault was the most commonly reported crime against a person, and it is widely recognised that most cases of sexual assault are not reported to police.

Police violence is common and it is estimated that approximately 75 per cent of children who come into conflict with the law experience police violence in some form. Torture, severe physical abuse, rape and other types of sexual abuse are among the forms of police violence suffered by children. Whilst a majority of the documented cases of police violence involve boys, there is anecdotal evidence to suggest that many girls are also subject to abuse.

2.3.2 National response

The GoPNG signed the Convention on the Rights of the Child (CRC) in 1990 and ratified it in 1993. Taking on board the implications of the ratification took some time. Initially there was ambiguity surrounding the role or direction the GoPNG should take regarding the implementation of the CRC and there was no policy relating to the timing or process of implementing the Convention. The Parliamentary Committee for Monitoring the Situation of Women and Children fell into abeyance shortly after its establishment in 1994. The PNG government established the Child Rights Monitoring Committee (CRMC) in 2000 with the overall responsibility to conduct and monitor the implementation of the Convention. The National Child Welfare Council functioned intermittently and was non-operational in 2003. By this date, the task of coordinating, monitoring and reporting on the implementation of the Convention has passed through three government departments: the International Treaties section of the Department of Foreign Affairs, the Office of Child Welfare in the Department for Community Development and the Department of Justice and Attorney General.

The leadership of the Department for Community Development is reflected in the creation of the Lukautim Pikinini Act 2009 (Lukautim Pikinini Act), the National Early Childhood Care and Development Policy 2007 and the National Strategy for the Protection, Care and Support of Children Vulnerable to Violence, Abuse, Exploitation and Neglect in the Context of the HIV Epidemic in Papua

49 National Sex and Reproduction Research Team (NSRRT) and Jenkins, C., 1994, National Study of Sexual and Reproductive Knowledge and Behaviour in Papua New Guinea, Monograph No. 10. Goroka: Papua New Guinea Institute of Medical Research
50 World Vision 2004a, Demographic and Behavioural Survey of Sex Workers and their Clients in Port Moresby: Survey Report (Unpublished Report by Eunice Bruce)
51 GoPNG & UNICEF. (draft). CSEC and CSA in Papua New Guinea. UNICEF: Port Moresby
54 UNICEF Child Protection SitAn
New Guinea (2008 - 2012). The reinvigoration of the Child Welfare Council and Government’s partnerships with civil society through joint membership on national interagency committees such as the Family and Sexual Violence Action Committee also provides ongoing entry points for monitoring and addressing inheritance rights violations.

Currently, the Child Welfare Branch of the Department for Community Development develops, promotes and delivers community service programs for Integral Human Development. The Branch’s key functions are: child welfare, database and information, Child Welfare Council (in which the National MVC Implementation Committee will be situated), General Welfare Services, Early Childhood Care and Development, and advising and giving technical support to Provincial Welfare Offices. It is also establishing a national database on child protection (currently with inputs from Eastern Highlands, Western Highlands, Simbu, Manus and East Sepik provinces). The Child Welfare Branch also works in partnership with churches and NGOs to implement child protection, adoption, child maintenance policies and processes. It has statutory responsibilities as prescribed by the Lukautim Pikinini Act, related family laws and the UN Convention on the Rights of the Child (CRC) articles. The Department for Community Development plans to develop a Department for Community Development’s Child and Family Welfare Policy in 2010.

Work is underway to roll out the Lukautim Pikinini Act with the development of an operational plan and training resources to support implementation. The National Early Childhood Care and Development Policy 2007 has an implementation strategy in place for 2007-2011. The National Strategy for the Protection, Care and Support of Children Vulnerable to Violence, Abuse, Exploitation and Neglect in the Context of the HIV Epidemic in Papua New Guinea (2008 - 2012) has been endorsed by several government departments. At present, the lack of an established National MVC Implementation Committee (to replace the now defunct National OVC Action Committee) is creating some barriers to the progression of the strategy. Partners in the national response to vulnerable children include national and international NGOs, civil society organizations, faith based organizations and government, all of which share membership in the National Action Committee.

2.3.3 Cultural context

The extended family and informal adoptions are the accepted customary support mechanisms, including accommodating orphans, or caring for those children with disabilities or who are otherwise vulnerable. It is common practice and an estimated 22.4 per cent of children reside away from their biological parents. Orphans tend to live with adopted families rather than on the street. It should be noted that ‘orphan’ was a term that many participants and stakeholders struggled to understand in the context of the extended family. It was viewed negatively – as a stigmatising term to be avoided when possible.

Children who have been informally adopted frequently report differential treatment at the hands of their caregivers. They are often given less food or fed last, subject to physical and emotional abuse, denied schooling or clothing, and made to work extremely hard for the foster family.

In Kiriwina, people cited the need to ‘make the (fostered or adopted) child forget’ their biological (or previous foster) parents as a justification for giving physical beatings. Milne Bay has a strong set of diverse cultural understandings pertaining to forgetting, and it has been suggested that ‘forgetting’ is an active social value and agentic force - a way of clearing space for the future relationships and obligations that are crucial aspects of Papua New Guinean social life. In this case, those relationships

57 Ibid.
that might likely benefit an adopted child might be able to entered for both his or her own benefit and that of his or her adopted family. In Goroka, making adopted children work hard was attributed to an expectation that they are obliged to repay their foster family for their generosity.

Despite the negative aspects of the informal system of adoption (it is impossible to regulate or monitor; it can both hide and create vulnerable children; it is subject to abuse), it is important to recognise its positive aspects. During fieldwork some informally adopted children testified to the good treatment they received, whilst certain caregivers discussed what they did to ensure all children were treated fairly.
3.0 LEGAL CONTEXT FOR THE INHERITANCE RIGHTS OF CHILDREN AFFECTED BY HIV AND AIDS AND OTHER VULNERABLE CHILDREN

Children’s inheritance rights follow the social and legal responsibility parents have to provide for their children and generally maintain them in their early years and throughout their childhood. While the law sets a maximum age beyond which this responsibility ends, the right to inheritance continues even after this period and even outlive their parents’ joint or separate lives.

3.1 Children

3.1.1 Constitutional Framework

The Constitution does not specifically mention children in matters concerning them such as those related to rights in general or inheritance rights in particular. The fact that it does not mention the importance of children’s rights in the context of the Convention on the Rights of the Child (CRC) and the AIDS epidemic is not surprising since its adoption by Parliament preceded them both. Nevertheless, children’s human rights as recognized by the Constitution are implicit in the general provisions of sections 39(d) and (e), 53, and 55.

Section 39(d) and (e) provide that if a question arises as whether a law (including custom), act, matter or thing is “reasonably justifiable in a democratic society” having proper regard to a person’s basic human rights, regard must be had to “the Universal Declaration of Human Rights and any other declaration…of the General Assembly of the United Nations concerning human rights…and any other international conventions, agreements or declarations concerning human rights….”. Indeed, the CRC is a declaration, convention, and agreement both of the UN General Assembly and therefore international. In essence, this means that the rights of children established by the CRC have been part of the Constitution since its ratification in 1993.

Children’s property rights

Under section 53, all citizens have the right to be protected from being unjustly deprived of his or her property. No discrimination whatsoever is to be made in relation to the application of this right. Citizens who are children enjoy the same right, and to the same extent, as their adult counterparts. It follows that a citizen child cannot be deprived of their legitimate right to property, regardless of whether it is acquired through inheritance or by other means. A person who denies a child such a right would be acting unconstitutionally. Furthermore, a person who takes advantage of a child’s vulnerability and denies him or her the right to such property, or limits the right to such property, constitutes both a violation of a citizen child’s rights guaranteed by the Constitution and an act of child violation, abuse and exploitation.

Section 55 prohibits all forms of negative discrimination. It states that all citizens “have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.” Section 55 does not state age as a factor as there is no case law in Papua New Guinea, however, the Government has signed the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination Against Women, both of which preclude discrimination based on age. It is therefore likely that the Section 55 makes any form of discrimination that entails the denial of a child’s right, privilege or opportunity, except in accordance with the Constitution, unconstitutional.

It follows then that any degree of discrimination against children’s inheritance rights which limits or denies them the right to exercise the same rights over property including land, and to the same extent,
as their parents exercised prior to their deaths would offend the clear prescriptions of section 55 and therefore be unconstitutional.

3.1.2 Statutory law

_Lukautim Pikinini Act 2009_

The _Lukautim Pikinini Act_ does not make explicit reference to the challenges children affected by HIV and AIDS, orphans or other vulnerable children face in context of a generalised HIV epidemic. Despite this, children affected by HIV and AIDS and other vulnerable children can be read as included in the legal definition given of “a child in need of protection.”

While no particular provision is made for inheritance rights of children, it nevertheless provides a good framework from which to advocate for the rights of children affected by HIV and AIDS and other vulnerable children. Schedule 1, section 1.1 (f) observes that one of the objectives of the act is “to protect and promote the rights of children” – within which a right to property could be subsumed - and Part II section 5 notes that children “have the right to exercise or demand the exercise of …the rights stated or implied in Schedule 1 of this Act …domestic laws and the Convention on the Rights of the Child.”

In regard to the duty to maintain a child, section 7 (2) asserts that “It shall be the duty of any person having custody of a child to protect the child from discrimination, violence, abuse, neglect, and exploitation”. Although HIV and AIDS are not explicitly mentioned, ‘discrimination’ can encapsulate the discrimination that arises from the stigma of having HIV and AIDS. Again, given that ‘exploitation’ can come as a result of property being taken from children, the act could be read as accommodating for this also.

3.1.3 Customary land ownership

Informal land dealings and transactions are common in Papua New Guinea. Commonly they take the forms of leasing or outright sale of customary land. However, these transactions take place without the presence of a relevant regulatory framework. The National Land Development Taskforce has recognized this as an area of increasing importance, noting that appropriate policies, laws and administrative arrangements are yet to be developed “to complement these practices to facilitate such dealings.”

The absence of a relevant legal and regulatory framework to cover these informal transactions creates an opportunity for extended family or other community members to acquire land that would otherwise have been claimed by children or their caregivers.

There is presently no legal requirement for the registration of customary land. While the conversion of customary land to individual freehold has been a legal possibility since 1963 under the _Land (Tenure Conversion Act)_ 1963 (a vehicle to free up customary land for development purposes), it has generally failed to realize the legislative intent. This Act enables an individual, a ‘land group’ incorporated under the _Land Groups Incorporation Act_, 1974, or ‘business group’ incorporated under the _Business Groups Incorporation Act_ 1974 to apply for the conversion of customary land into non-customary land so that it becomes available for development purposes. None of these efforts have been successful.

Even steps to register customary land without taking it out of the customary domain have been unsuccessful. In 2001, one attempt attracted considerable resistance, and following protests and confrontations with police (that resulted in fatalities), the agenda was abandoned. There was widespread suspicion that it was a government-sponsored disguise to remove land from customary

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landowning groups for development purposes which were not necessarily in the long-term interest interests of the customary landowners.

In 2005, the Government set up the National Land Development Task Force (NLDT) to develop an effective system through which land, including customary land, could be released or accessed so that it becomes available for development purposes without necessarily depriving its nature as customary land.

One of its major recommendations is the strengthening of the Land Groups Incorporation Act to allow incorporated land groups (ILGs) formed under the Act to either release or develop their own customary land. Any portion of the customary land can be made available for this purpose but it must be registered. However, before an ILG can be registered, the names of each member, and their birth certificates, must be recorded (in 2007, only around 75 per cent of people in the National Capital District and less than 10 per cent of the population in most provinces had their births registered).

The register of names will be kept in perpetuity and for as long as the ILG remains a legal entity. Thus, as younger generations are born, their names are added to the ILG’s register of names. This in turn means that any benefits accruing to the ILG to which a person belongs will be paid or directed to them separately and individually. However, a mechanism is yet to be developed to hold benefits accruing to children ‘in trust’ and ensure the child’s best interests remain paramount in any decisions that are made in relation to the use of these benefits. To ensure that children’s inheritance rights are protected, inheritance rules ranking children’s claims above those of other relatives whose names appear of the ILG’s records must be developed and included in the proposed law.

3.2 HIV and AIDS

3.2.1 Constitutional Framework

The Constitution of the Independent State of Papua New Guinea does not mention HIV and AIDS and was drafted before the epidemic. However, as noted above, under section 55 of the Constitution, all forms of negative discrimination are proscribed. In relation to inheritance, a person who denies a child his or her rights to his or her parent’s property after the parent’s death, as prescribed by law and/or custom, would be acting unconstitutionally. Likewise, if a child is denied such rights because they have been affected by HIV or AIDS, such a denial would be unconstitutional.

3.2.2 Statutory law

The HIV and AIDS Management Prevention Act 2003

The HIV and AIDS Management Prevention Act 2003 (HAMP Act) provides the legal framework for protecting HIV and AIDS affected individuals. Although concerned with HIV and AIDS, it does not address children explicitly. Indeed, the definition of a “person…affected by HIV/AIDS” is couched in the present tense as someone “related to or…associated with a person who is, or is presumed to be infected by HIV or has, or is presumed, to have AIDS.” It is therefore possible that this Act could be used to mobilise efforts to support orphans and other children affected by HIV and AIDS.

The HAMP Act does not mention the property or inheritance rights of children. There is, however, potential to mobilise the act in terms of section 6 (1), which states that “it is unlawful to discriminate against a person to the detriment of that person on the grounds that the person is infected or affected by HIV/AIDS”. If it could be claimed that discrimination-motivated property grabs from orphans took place (because it is assumed they are infected and so would die young), this could be relevant. Another potentially relevant clause is that pertaining to accommodation, section 7(f), which may be of relevance to those children affected by HIV and AIDS who are living on the street.
The section pertaining to situations of discrimination (section 7), whilst extensive, does not provide for the situation that many children affected by HIV and AIDS find themselves in. Its focus is on discrimination in places of employment, industrial or professional organisations, education or training, detainees or persons in custody. It does not explicitly accommodate for discrimination within the extended or adoptive family.

It is significant that the Act begins by acknowledging the Basic Rights contained in the Preamble to the Constitution. One of these Basic Rights is a person’s right to “(f) protection for the privacy of their homes and other property and from unjust deprivation of property.” Curiously, however, the Act only acknowledges the right to “protection for the privacy of homes and other property” ((e)). As a result, it does not include the right to protection from unjust deprivation of property. This is likely to have been a deliberate exclusion, for there is otherwise no reason not to have included in the Act the full terms of basic right (f) of the Preamble.

Despite this exclusion, the stated principal purposes of the Act (which include providing for “the management of the lives and protection from discriminatory practices of people living with HIV/AIDS and of people who are affected by or believed to have HIV/AIDS,”) provides an opportunity to create the legal argument that section 7 may extend to include discrimination within the family context, however this position would be open to debate.

It may be possible to revert back to the clearer terms of section 55 of the Constitution. Nevertheless, in order to both clear any doubt in that regard and to anchor the non-discrimination of children more firmly in the HAMP Act, it would be prudent to introduce an amendment to the Act that extends section 7 to include discrimination in the family context. Alternatively, the introduction of a new section that conclusively prescribes discrimination against children affected by HIV or AIDS (including their right to inheritance) would address this gap. Such amendments would assist authorities to enforce children’s inheritance rights under other legislation such as the Wills, Probate and Administration Act and the distribution of moneys available from superannuation schemes.

### 3.3 Inheritance

The main legislation dealing with the issue of inheritance is the Wills, Probate and Administration Act 1970. As regards children, the Act provides the rules to be followed when a parent dies leaving a will, without making a will (intestate), or dies leaving a will that covers only part of his or her estate (partial intestacy).

Generally, no problem would arise if the deceased leaves a will. In that case, the estate would be distributed according to the terms of the will. However, major problems may arise if there is no will or the will covers only part of the deceased’s estate. The most serious problem insofar as children’s inheritance rights are concerned is the tension that will arise between customary rights and the need to protect children from being denied any rights to their parent’s property including land.

#### 3.3.1 Constitutional framework

As discussed above, under section 53, all citizens have the right to be protected from being unjustly deprived of his or her property.

#### 3.3.2 Statutory law

A child’s right to get a share of the deceased parent’s property is managed by the Wills, Probate and Administration Act 1970.

First, if a person dies leaving a will, the deceased person’s property will be distributed in accordance with the terms of the will (section 35F). However, if a child or other dependent family member
believes that the share they received is inadequate, an application may be made to the National Court under section 124 for an adjustment to increase this share. A will can include both personal property and real property, which includes land. However, under section 3, customary land cannot be the subject of a testamentary disposition.

Secondly, and importantly in respect of children’s inheritance rights, section 35D provides that if a person dies intestate,

“the estate of that person shall be distributed in accordance with the custom applicable to that person and in accordance with Section 35E.”

Section 35E provides that

“(1) The person entitled to the estate of a person who dies intestate are the persons certified under Subsection (2) as being so entitled.

(2) A District Officer or other person who, in the opinion of the Public Curator is competent to certify customary entitlements where a person dies intestate, shall certify the persons entitled to the estate of that deceased person.”

These provisions are not sufficiently protective of the rights of children because they do not explicitly address their best interests. Rather, they emphasise the application of customary rules that are based on entitlement. It follows therefore that, if a custom does not recognize children as persons entitled to certain form of inheritance, such property cannot be distributed to them. Of course, if a child is denied inheritance to which he or she is clearly entitled to under custom, such a denial would clearly offend the non-discrimination requirement of section 55 of the Constitution.

There is no case law to clarify which determinations of entitlement are constitutional. Indeed, as this assessment found, traditional entitlement is often affected by factors such as polygamy, adoption, mixed-marriages, illegitimacy, age in relation to other siblings, whether a child is male or female, and whether the society is patrilineal or matrilineal. In many of these situations, some children (such as a girl child in a patrilineal community) are denied any inheritances rights. Likewise, the right of the first son of the first wife in a polygamous marriage in patrilineal societies to inherit from the father would be ranked higher than that of his younger brothers and most certainly ranked higher than the sons of the other wives. Some denials (such as those based on whether a child was born inside or outside of marriage, or based on sex) would be clearly unconstitutional. Other decisions, such as to prioritise an older sibling is unlikely to be recognised as discriminatory by the average Papua New Guinean.

Section 84 deals with the distribution of an intestate’s estate by setting the formula that is to be observed in distributing the deceased’s estate. Under section 84(1)(a), children are mentioned only indirectly to determine the widow’s entitlement. It says that the widow is entitled to one-third share if children are present but fails to state the children’s share. Under section 84(1)(i), the portion that is not already distributed (to the widow) ‘shall be distributed in equal shares among the children of the intestate.’

The difficulty however is how to reconcile 35D, E and F, as discussed earlier, with section 84. Both deal with intestate estates. The former authorizes the distribution to take place in accordance with custom while the latter provides the mechanism for distribution generally. The potential conflict that could arise between distribution according to custom (s35D) and the distribution formula in Section 84 appears to be resolved by section 35B. This provision deals with the application of section 35 and provides that

“The provisions of this Division shall take effect notwithstanding any other provision in this Act or in any other law to the contrary.”
Of course, as noted above, determining the distribution of the intestate’s property according to custom is still subject to the Constitution and must therefore not involve the discrimination of children.

### 3.4 Customary law

Children’s inheritance rights based on custom are equally enforceable in the courts. The Constitutional and legislative framework empowers all courts to enforce such customary rights.

#### 3.4.1 Constitutional framework

Schedule 2.1 to the Constitution provides the constitutional basis for the recognition and application of custom by the courts in the country. By virtue of subsection (1) of Schedule 2.1,

“custom is adopted, and shall be applied and enforced, as part of the underlying law.”

However, not all customs have been recognized by this provision. Thus, a “custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity” is not recognized and therefore will not be applied by the courts.

#### 3.4.2 Statutory law

**Custom Recognition Act 1963**

Section 3 of the Act provides that “custom shall be recognized and enforced by, and may be pleaded in, all courts” unless its recognition or application would, in the opinion of the court, result in injustice, or not be in the public interest or not in the best interests of a child under the age of 16 years.

It is clear that none of the restrictions applying to the application of custom as mentioned above apply to prevent the courts from enforcing children’s inheritance rights under custom.

**Underlying Law Act 2000**

Section 4(1) of the Act adopts customary law as part of the underlying law. However, by subsection (2), it is not adopted if:

“(a) it is inconsistent with a written law; or
(b) its application and enforcement would be contrary to the National Goals and Directive Principles and the Basic Social Obligations established by the Constitution; or
(c) its application and enforcement would be contrary to the basic rights guaranteed by the Division III.3 (Basic Rights) of the Constitution.”

#### Conflict of customs

Situations of conflict of customs may arise in any area of custom including family matters. In relation to the inheritance rights of children, for instance, conflicts may arise if the parents are from different customary groups with different inheritance rules or expectations or if they are from patrilineal and matrilineal societies, respectively. In the latter situation, a conflict may arise if a choice between whether to inherit from the father’s or mother’s side has to be made. However, if they are not required to make that choice and are able to claim through both parents, no such conflict would arise.

Such conflicts must however be sharply distinguished from competing claims that may arise as a result of adoption, polygamy, length of use and occupation of land, and the nature and/or type of property that is the subject of the claims. In this situation, the conflict would not involve making a choice between different customs but rather, who has the greater claim under custom.
Both the *Customs Recognition Act* and the *Underlying Law Act* make provision for the resolution of conflict of customs. Under the former Act, section 7(2) empowers a court to “adopt the [customary] system that it is satisfied the justice of the case requires.” Section 17 deals with the issue of conflict of customs under the *Underlying Law Act*. More significantly, however, in relation to conflicts concerning inheritance/succession, subsection (1)(c) empowers the court to resolve the conflict by reference to the following rule:

“where the matter concerns a question of succession, the customary law of the community to which the deceased belonged, except with regard to interests in land, in which case the customary law of the place where the land is situated shall apply.”

### 3.5 Legislative Framework for Change

Section 100(1) of the Constitution vests the law-making power of the people in the National Parliament. However, under subsection (2), the National Parliament may, by express determination for that purpose, delegate this power to a subordinate authority in respect of certain matters. Under this law, certain matters have been identified in respect of which Provincial Assemblies can make laws over. These areas, which are listed under section 42(1), include family matters. This provides that subject to the Constitution and the Organic Law, “a provincial legislature may make laws [in relation to]

“(x) family law, marriage, adoption and maintenance but not bride or groom wealth.”

To date, no Provincial Legislature has passed a law in relation to any of the matters listed under section 42(1)(x) of the Organic Law. The point of significance, however, is that Provincial Legislatures already have legislative power over family matters which can be used to make laws dealing with matters such as the inheritance rights of children in their Provinces. The power can be effectively utilized to make new laws in these areas or make them to complement existing national laws or fill in existing gaps in these laws in these areas.

In relation to inheritance for instance, a Provincial law may be passed to complement and deal with any existing gaps or difficulties in the *Wills, Probate and Administration Act* while at the same time taking into account customary rules and perceptions relating to children’s inheritance rights. Village and District Courts could then be empowered to enforce these laws to provide greater protection for children in their communities in relation to the distribution of their parents’ property, including land.
4.0 POLICY CONTEXT FOR THE INHERITANCE RIGHTS OF CHILDREN AFFECTED BY HIV AND AIDS AND OTHER VULNERABLE CHILDREN

4.1 Introduction

There is no Government policy that deals directly with the issue of the inheritance rights of children generally. Nevertheless, the terms of certain policies (Medium Term Strategy, the National Strategic Plan on HIV/AIDS 2006-2010, and the Four Year National Strategy for the Protection, Care and Support of Children Vulnerable to Violence, Abuse, Exploitation and Neglect in the Context of the HIV Epidemic in Papua New Guinea) may provide the platform for developing specific policies, plans and rules respecting this matter.

The need for a national child policy and a national family policy, in which the issue of children’s inheritance rights can be addressed, has been raised. To date, however, neither has resulted in any further serious discussion at both the political and executive levels. It was suggested that the drafting of a national children’s policy may be possible after the Department for Community Development research into street children is conducted. Subsequently, this policy is likely to eventuate in 2010.

4.2 The Government of Papua New Guinea’s Medium Term Development Strategy

The GoPNG MTDS (2005-2010) identifies children orphaned by AIDS as a vulnerable group that will “necessitate new policies and regulatory procedures based on the partnership principle” (Section 2.3.6). Yet other than noting the importance that NGOs and community based organizations will play in supporting these groups, and the limited capacity of Government departments to provide direct funding to such initiatives, it makes no further mention of such children. There is, however, the observation that HIV and AIDS is a “wider developmental issue that must be addressed from a multi-sectoral perspective” (Section 2.4). This allows for child centred and legal centred strategies in the face of the AIDS epidemic.

4.3 The National Strategic Plan on HIV/AIDS 2006-2010

The National Strategic Plan (NSP) on HIV/AIDS 2006-2010 has seven focal areas both identifying and providing strategic plans for: 1) Treatment, counselling, care and support, 2) Education and prevention, 3) Epidemiology and surveillance, 4) Social and behavioural change research, 5) Leadership, partnership and coordination, 6) Family and community support, and 7) Monitoring and evaluation. Children, specifically orphans, are considered under focus area 6, objective 4. The goal and objectives of focus 6 in full are:

“Well: To support and sustain a social and cultural environment that will enable families and communities to care for and support people infected and affected by HIV.

- Objective 1: To increase access for people living with HIV throughout PNG to access STI/HIV community based care and support services
- Objective 2: To develop a supportive environment for people living with HIV and their families through the establishment and/or training support and care groups
- Objective 3: To ensure proper full recognition of human rights, including children’s rights, in addressing the HIV epidemic, including respect for confidentiality, reduction of discrimination, and increased access to care and support.
- Objective 4: To build capacity for community based organisations and groups to identify and provide support for orphans and vulnerable children.”
The Four Year National Strategy for the Protection, Care and Support of Children Vulnerable to Violence, Abuse, Exploitation and Neglect in the Context of the HIV Epidemic in PNG was developed by the OVC National Action Committee (a working committee that was co-chaired by the Department for Community Development and the National AIDS Council Secretariat to develop the Strategy). It is explicitly directed towards improving the well being of the most vulnerable children. Its stated goal is to do so “by increasing their access to essential services in the areas of protection, education, and health, and by strengthening family, community, civil society and government, child protection systems.” Its objectives are social protection, legal protection and justice, extended community-care in the community, and human services coordination.

HIV and AIDS is explicitly addressed in the Strategy, with responses for children affected by HIV and AIDS being mainstreamed into a systems approach to child protection. The Strategy has been endorsed by several government departments and civil society partners. The Strategy stipulates a management structure to ensure implementation of key activities, including a National Most Vulnerable Children Implementation Committee that will be established in 2010 to supersede the previous OVC National Action Committee.

Within this Strategy, legal protection and justice is a specific objective broken into five broad outcomes:

1. Women and children’s inheritance rights are protected
2. Vulnerable children have their birth registered
3. Women and children’s rights at the village level are protected
4. The justice system is more child friendly
5. The legislative and policy environment is protective of all children.

As such, explicit reference is made to inheritance rights of children. The strategies given to achieve the protection of women and children’s inheritance rights include: strengthening the capacity of families, increasing Government leadership for protection, and raising awareness to create supportive environments. Although the mobilisation and support of community based responses and ensuring access to essential service are not included, they would arguably be reasonable strategies to adopt.

Also relevant for current purposes, the Strategy has identified the Department for Community Development as the implementing agency for:

- Strengthening family child protection practices through:
  - Producing and distributing rights based Information, education and communication materials and messages for children, their families, civil society and human services on good practices that strengthen family child protection behaviours.
  - Supporting 2,000 ward level leaders to establish and monitor ‘Protective Communities for Children Frameworks’ which include child and parent education on rights, vulnerability mapping, leadership on child protection and referral to formal protection services.

- Ensuring the legislative and policy environment is protective of all children through:
  - Rolling-out the *Lukautim Pikinini Act* to 100 per cent of provinces and aiming for full implementation within 18 months of gazettel.

- Ensuring extended community care is guided by the best interests of the child through:
- Developing a Charter of Rights for Children who are Orphaned, Adopted and Fostered that builds on the strengths of the wantok system and which is based on the best interests of the child (utilising extensive community participation to develop the Charter and to build leadership for its implementation).
- Promoting widely the Charter of Rights of Children who are Orphaned, Adopted and Fostered and seeking to have 25 per cent of clans sign the charter and 75 per cent of village courts commit to its implementation.

- Ensuring that children in extended community care or alternative care have their rights monitored by government and community based monitoring mechanisms through:
  - Building the capacity (knowledge, skills, resources) of both government and civil society to provide support to families who adopt and foster orphans and other vulnerable children and to monitor the rights of children in care.
5.0 INSTITUTIONAL CONTEXT FOR THE INHERITANCE RIGHTS OF CHILDREN AFFECTED BY HIV AND AIDS AND OTHER VULNERABLE CHILDREN

5.1 The court system in PNG

5.1.1 National Court and Supreme Court

The National Court sits in all provincial centres wherever there is a resident judge. Where there is no resident judge, the National Court sits when it makes its circuit to that area from Port Moresby or some other centre. The principal seat of the Supreme Court is at Waigani, Port Moresby, and it sits in the regional centres of Mt Hagen, Lae, and Rabaul.

5.1.2 District Courts

There are 70 District Court establishments and 400 Court Sitting (Circuit Court) locations throughout Papua New Guinea. District courts are mainly located in urban centres. The civil jurisdiction of the District Court is provided under section 21 of the District Courts Act, Ch. 47. Under subsection (1), subject to the uppermost monetary ceiling placed upon it,

“a [District] Court has jurisdiction in all personal actions at law or in equity.”

It is now established that the phrase “all personal actions at law” includes claims based on custom. Under section 21(4)(a), the Act expressly denies the District Court jurisdiction over issues related to wills and testamentary matters. However, the question remains whether it would still have jurisdiction under section 21(1), as discussed above, in respect of disputes relating to a parent’s express wish as to how his or her property (including land) is to be distributed among the children after his or her death. There clearly appears to be nothing in the present legislative regime that denies the District Court such a jurisdiction. Again, under section 35 (2) of the Wills, Probate and Administration Act, District Courts are empowered to settle any dispute relating to customary inheritance entitlements to the estate of a person who dies without making a will.

By an amendment to the Act in 2000, a District Court can also mediate a settlement in respect of any civil matter. Section 22B empowers a magistrate or a person appointed by the District Court to “mediate between the parties in a civil matter at any stage of or before the hearing with a view to the just and amicable settlement of the matter.” Obviously, this procedure could be invoked at great advantage to, and for the benefit of, children who would otherwise be vulnerable to the competing motives of family members in relation to enforcement of their inheritance rights.

5.1.3 Village Courts

There are 1407 Village Courts covering 90 per cent of the country, and they are both the busiest courts and by far the most accessible forum for resolving disputes. The Village Court is not bound by any law that is not expressly applied to it, other than the Constitution and the Village Courts Act 1989 (Village Courts Recognition Act: S 58). A Village Court applies any relevant custom as determined in accordance with sections 2, 3 and 7 of the Customs (Recognition) Act 1963 and irrespective of whether this custom is inconsistent with any Act (such as the Wills, Probation and Administration Act). The

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60 This was clearly established in the case of Aisi v. Hoala ((1981) N136 (M)), a case concerning maintenance. The National Court, sitting as an appeal court, rejected the argument that the phrase ‘at law’ was limited to actions arising out of contract or tort at common law and therefore excluded custom. It concluded instead that the phrase ‘at law’ “means allowed by the law of the land and encompasses common law and also customary law [as recognized by the Constitution].”

Village Courts are bound, however, by the Constitution and must therefore not support any aspects of custom that are unconstitutional.

The Act gives the Court very wide powers over customary matters including the payment of compensation, or damages in relation to bride price, custody of children, and death (sections 45 and 46). However, under section 52, its primary function is to ensure peace and harmony in its community by.

“mediating in, and endeavouring to obtain just and amicable settlement of disputes.”

Under section 35 of the Wills, Probate and Administration Act, Village Courts are empowered to settle any dispute relating to customary inheritance entitlements to the estate of a person who dies without making a will. This provides:

“(1) Where there is a dispute in respect of entitlement to the estate of a person who dies intestate, that dispute shall be dealt with under the Village Courts Act 1989.”

However, if there is no such court in the area, this function can be performed by a District Court.

Under section 57(1) and (2) of the Village Courts Act, in performing its function under section 52, the Court is required to apply custom “as determined in accordance with Sections 2, 3 and 7 of the Customs Recognition Act” regardless of whether or not it is “inconsistent with any Act.” Section 2 deals with proof of custom while section 7 provides the rules for the resolution of conflict of laws situations. Section 3, as was discussed earlier, is the provision giving recognition to custom and empowering all courts to apply custom. Also, under section 58(1),

“a Village Court is not bound by any law (other than the Constitution and this Act) that is not expressly applied to it, but shall, decide all matters before it in accordance with substantial justice.”

The Act does not mention the Underlying Law Act 2000 as it was enacted well before the 2000 law was passed and it does not explicitly state that it applies to Village Courts. Nevertheless, Village Courts use their mediatory function to promote children’s inheritance rights, or settle disputes in a manner that recognizes child rights, which seeks to maximize benefit to them and minimises divisions and tensions between them and the rest of the family upon whom they will ultimately rely on for their continued support into the future.

There is considerable flexibility in the degree to which formal law is considered by Village Courts across the country. Some have argued that ‘kastom’ has been used to discriminate against women and children. It should be noted, however, that this interpretation has been challenged and it has been suggested that the harshness of such rulings came from external pressures on magistrates to apply the law.

5.2 Problems pertaining to the court system

The community based consultations undertaken for this assessment identified certain problems with the institutions of the formal legal system. With the exception of village courts, it was viewed as expensive and bureaucratic, difficult to access, overly rigid, intimidating, unreliable and endorsing values that were contradictory to custom. Courts were unanimously regarded as the last resort for disputes of any nature. Informal family negotiations were the preferred mode of dispute resolution,  

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whilst in Kiriwina and Bougainville people also deferred to their local chiefs to aid in conflict resolution. Although Village Courts proved to be the most accessible mode of redress, village court magistrates were unfamiliar with the relevant statutory law regarding inheritance (*Wills, Probate and Administration Act*). Children consistently identified the fact that they would not approach magistrates by themselves over any issue, inheritance or otherwise.

### 5.3 The Public Curator and Regional Curator

The Public Curator is based in Port Moresby. There are presently four Regional Curators, one for each of the four regions of the country. They are based in Rabaul, Lae, Mt Hagen and Boroko (Port Moresby). The Regional Curators are delegates, and are appointed by the Public Curator to act as his agents in the four regions. The power to appoint Regional Curators is provided by section 35G of the *Wills, Probate and Administration Act*. They perform (under supervision) similar functions as the Public Curator, including the distribution of a deceased’s estate in the region they represent.

The Public Curator also has power under section 98 of the Act to appoint persons to be distributors of small estates. This power has been used by the Public Curator to appoint District Officers. The Public Curator noted that current intestacy law provides a “*broad field of protection for children because powers vested in the Public Curator allows for the flexibility in administration and distribution of estates.*”

### 5.4 Problems facing the Public Curator and Regional Curator

Both the Public Curator and Regional Curators are under resourced, facing a backlog of site visits and properties to value. The complications that result from the lack of capacity is a significant factor in the decision of those better disposed to write a will, not to do so. Other research has found that some people are distrustful of the integrity of the agency that witnesses, stores, and executes the will and the security and safety of the storage system. Additionally, whilst the Public Curator is in support of the intestacy law that is currently in place, he also suggests that legislation could strengthened by ensuring that decisions are consistent with child rights. Particular mention of the rights of children born outside of marriage would be beneficial as the presence of children is rarely brought to his attention by relatives who wish to claim inheritance. The Public Curator also raised a concern that wills remove much of the flexibility that would enable his office to distribute wealth and other inheritance equitably, warning that there is a tendency to leave out children born outside of marriage when formal wills are drafted.

There is currently some conflict between the Public Curator and the banks. In the absence of a legally appointed administrator, the cash in the deceased’s bank account should come under the administration of the Public Curator. It has been observed that banks are demanding that the Public Curator sends a letter of proof in regards to their appointment as legal administrator. Banks use the intervening period to delay the investment or release of the money of the deceased, and keep any profits or interest accrued.

The Public Curator is also attempting to address the illegal transfer of land titles to other persons, particularly houses belonging to deceased persons. When this occurs, the widow and children are often dispossessed of the land and house. The Public Curator has reported that currently there are 10 cases being heard by the Courts at present, and believes that the problem is likely to be occurring throughout the country (although not being reported).  

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65 Personal communication Public Curator to John Luluaki, August 2008.
The Regional Curator based in Mt Hagen cited security concerns and the strength of custom as additional problems faced at a local level. For example, carrying out valuations without an explicit invitation led to physical intimidation by wantoks of the deceased who were staking customary claims to the property. Furthermore, he was aware that even if he should carry out a valuation and endorse the widow and her children to reside in the property, the extended family of the deceased would be likely to physically remove the widow and her children from the premises. Indeed, he noted that most cases pertaining to businesses or property were rarely brought to his notice as kin and wantoks act immediately following the death of an individual to distribute their assets. He acknowledged that most cases do not reach a stage where formal legal recourse is sought, unless the extended family experienced difficulties accessing some of the estate (typically when they sought the release of money from a bank account). In terms of distributing any cash of the deceased, he explained that many members of the family would descend on his office and demand a share of the funds. The Regional Curator was explicit that custom is perceived to be the law and had never once been asked to draft a will. Subsequently, the issue is not merely a question of capacity building. It is a question of attitude, manifested in the predominance and recourse to custom and the lack of perceived relevancy of the formal legal system.

5.5 Mechanisms outlined in the Lukautim Pikinini Act

The Lukautim Pikinini Act provides an institutional framework for protecting children. Specifically, the establishment of the Lukautim Pikinini Council and committees (working at national, provincial and local levels respectively), and the establishment of the Lukautim Pikinini Office and Pikinini Courts.

Section 24 provides authority to Local level Councils to prevent and respond to the violation of protection rights, including:

(a) investigate and inquire into any matters affecting children at the local community or Local Level Government area and to report and advise the Provincial Lukautim Pikinini Council or the Local-Level Government for consideration and report to the appropriate authorities; and

(b) to give advice and guidance in the rationalization and co-operation of services designed to promote the child welfare at the local community or Local Level Government area so as to achieve the most effective utilization of those services.

These Councils provide an avenue for children who have their inheritance rights denied to seek coordinated support. Preparations are currently underway for the official roll out of the Lukautim Pikinini Act, however implementation is not expected to commence until the Act is gazetted in 2009.
6.0 PRIVATE SECTOR CONTEXT FOR THE INHERITANCE RIGHTS OF CHILDREN AFFECTED BY HIV AND AIDS AND OTHER VULNERABLE CHILDREN

6.1 The Superannuation Fund

The Superannuation Funds are autonomous, private sector groups, regulated by the Superannuation (General Provisions) Act 2000. Those in formal employment contribute money to the fund and this is made available on retirement. Under section 94 of the Superannuation (General Provisions) Act 2000, a member of a superannuation fund is required to nominate, on the prescribed form, a person(s) to whom his or her entitlements will be paid, stating what proportion each person is to receive. These nominations may be made in favour of any person, including a biological or adopted child (see section 92). If the nominee is a child, an adult from his or her family may be appointed as a guardian. It can be concluded from the regime adopted by the Act that the nomination form is a partial will and therefore legally enforceable (partial because it only relates to the money in their fund).

Some public servants who are familiar with the alternatives of distributing wealth through superannuation fund payments or a will noted that they were inclined to rely on the superannuation funds, citing bureaucratic delays and difficulties engaging with the Public Curator. As noted above, Public Curator officers at the national and regional levels acknowledged their limited capacity to effectively administer their duties.

6.2 Problems pertaining to the Superannuation Fund

It should be noted that only those in formal employment contribute to this fund, and as such is inapplicable to the majority of Papua New Guineans.

There is also a lack of clarity surrounding how children’s best interests are to be protected when a parent dies before making their nomination, or when they fail to make provisions for their children. Under section 95, if a person dies without nominating someone to receive his or her entitlements or if the nominees have also died, their credit “shall be paid in accordance with –

(a) a process of mediation or allocation conducted by the ASF (authorized superannuation fund) trustee as prescribed by the Regulations; or
(b) a decision by a court of competent jurisdiction in Papua New Guinea.”

It is therefore likely that the Superannuation Fund will have to observe the procedure established by section 95 and section 35E of the Wills, Probate and Administration Act.

The Superannuation (General Provisions) Act is silent on how to address a situation in which a member does not include any or all of his or her children, or actively discriminates against some of the children (such as listing only sons). It will be recalled, however, that under the testator’s family maintenance provisions of the Wills, Probate and Administration Act (section 124), and one can apply to the National Court to increase his or her share if the testator has made inadequate provision for them in his will. The Wills, Probate and Administration Act is a general Act applying to the distribution of a deceased person’s estate, and subsequently also applies to distributions under the Superannuation (General Provisions) Act but only to correct any inequitable or discriminatory distributions of entitlements.

66 The Act does not define the terms ‘child’ in relation to an age limit or ‘minor’. It is therefore not clear if the Act introduces two categories of young persons, ‘child’ and ‘minor’. It is generally accepted, and stated in some statutes, that a minor is a person under the age of 21 while the definition of child varies from statute to statute but generally it must be accepted as meaning a minor under the age of 18 years.
As a result, children may have to compete, at times, with other members of the extended family for a share of the inheritance. It is subsequently possible that the best interests of children may not be prioritised ahead of the claims of other relatives. Of course, it also assumes that the children are aware of, and have capacity to, negotiate their claims in the Court.
7.0 CUSTOMARY CONTEXT AND CASE STUDIES FOR THE INHERITANCE RIGHTS OF CHILDREN AFFECTED BY HIV AND AIDS AND OTHER VULNERABLE CHILDREN

7.1 Introduction

It was consistently voiced that the legal system, with the exception of Village Courts, was either undesirable as a means of recourse or difficult to access. In some cases, the formal system was regarded with scepticism or considered an inappropriate avenue to seek a resolution. This was due to a range of factors, including distrust, inconsistency or the feeling that it was a domain for the rich and educated and subsequently an opportunity for the manipulation of the more vulnerable. As such, the vast majority of those consulted rarely turned to formal modes of legal recourse. This was exemplified by the fact that only one or two cases of courts dealing with inheritance cases surfaced during discussions with communities and District Court Clerks, and few people had heard of (or written) wills.

In terms of ‘rules’, customary practices concerning inheritance and inheritance rights in PNG are invariably influenced by two basic criteria: family organization and type of property. Family organization is either patrilineal or matrilineal. Societies that are patrilineal trace descent through the father. In such societies, inheritance is traced through the father’s side and not that of the mother. Subsequently, inheritance rights are also acquired through the father’s side and generally, only sons can inherit through the father. Daughters are excluded. Societies that are matrilineal trace descent and inheritance through the mother. In the two matrilineal societies visited, there was some variation. In Kiriwina men from the mother’s side of the family retained the decision-making power pertaining to inheritance (in addition to other matters) whereas in Arawa, the decision making power rested with women.

Property in traditional Papua New Guinea societies can be broadly categorised in two types: customary and personal property. The former includes land that is customarily owned and the latter includes items that have been purchased, or customarily deemed to belong to, an individual. Land rights and therefore rights relating to the inheritance of land are traditionally acquired through the father in patrilineal societies, while it is through the mother in matrilineal societies. It is important to note that what is inherited is not the land in and of itself. Rather it is the use rights to the land – and the right to inherit itself. That is, although many participants spoke in terms of ‘owning’ particular pieces of customary land, what this involved was the right to pass on the use of that land to one’s children.

In practice, this is more flexible than it may appear, and factors of significant cultural import play a determining role in regards to inheritance rights. These include ‘hat wok’ (hard work), the necessity to fulfil obligations, marriage and customary knowledge. ‘Wok’ involves work on gardens – planting trees, crops, weeding, obligations entail fulfilling contributions to bride price, compensation, funeral payments, feasts and so forth, and customary knowledge - the ability to trace one’s genealogy and recall one’s ancestors. It is these that complicate, or are used as the rationale in denying, the inheritance rights of some children. Individual factors that influence decisions on inheritance include gender, sibling order and age. For example, custom in some areas of the Highlands Region grants first born sons about half of their father’s land, with the remaining portion to be divided amongst other sons.

Although it was often voiced by adults who were consulted that all children will always be provided for by custom, it was clear from the focus group discussions that this was not always the case. The definition of vulnerable children in regard to inheritance varied. There was common consensus that children affected by HIV and AIDS, children with disabilities, and in some cases ‘orphans’ were vulnerable both generally and in terms of inheritance. Children born outside of marriage, children of broken marriages and children of polygamous marriages were deemed more vulnerable, both generally
and in terms of inheritance, in patrilineal, rather than matrilineal, areas. Children displaced due to tribal fighting were identified as vulnerable in the patrilineal Highland areas. Finally, girl children were significantly disadvantaged in the patrilineal areas, having a right to land through marriage alone. The Autonomous Region of Bougainville also had a unique category of vulnerable child in respect to inheritance. During the Bougainville Crisis, many Bougainvillean children were abducted or kidnapped by mainland Papua New Guinean soldiers. The treatment of such children and their ability to return to the Region to claim inheritance was a matter of great concern.

A growing issue is that of mixed customary marriages whereby neither custom provides for the children of such a marriage as there are no clear or consistent guidelines on the best course of action. Increased land pressure is causing alterations to customary practices and dispossessing even those children with a legitimate claim to land. The increase in informal buying of customary land from those within one’s clan may also prove problematic in the future, as the legality of the agreements (and any documentation that is produced) is questionable. Even without these considerations, disadvantages of customary mechanisms include the fact that they are easily open to abuse and manipulation by more powerful members of the family, are easily open to disputes and conflicts, and create an ambiguous pool of beneficiaries.  

7.2 Milne Bay Province: Kiriwina-Goodenough District, Kiriwina, Oyabeya and Waipipi

Milne Bay is located in the South East of Papua New Guinea and consists of over 600 islands of which only 160 are inhabited. It consists of four districts: Samarai District, Alotau District, Esa'ala District, and Kiriwina-Goodenough District. The total population of Milne Bay Province is 210,412. Kiriwina District is home to 49,966 people divided between 9,945 households. Unlike communities in other districts, very few respondents in Kiriwina-Goodenough identified alcohol or marijuana consumption as a problem. Most communities mentioned that there is a lack of co-operation between community members, especially in relation to community work projects. In general, the population of Milne Bay know that HIV and AIDS is a “killer” disease that has no cure. But people in Kiriwina-Goodenough said that people are ignorant or confused about HIV and AIDS as they have received few awareness initiatives.

7.2.1 Kiriwina: Oyabeya and Waipipi

Kiriwina is a matrilineal society but residence is virilocal (after marriage the woman moves to the husband’s land). Men tend to be the decision makers in the society and chieftainship is traced through the maternal line of men. The vast majority of land is held in common by the clan. There are no cash crops. Most people survive on subsistence agriculture and there is little cash on the island.

HIV and AIDS

HIV testing is limited on Kiriwina, making it impossible to identify children orphaned or affected by HIV and AIDS. Despite some work that has been conducted to raise awareness of HIV and AIDS, there was confusion over their causes and symptoms. Lack of testing contributes to the uncertainty

69 National Census 2000
surrounding the disease. Previous work in the area has suggested that indigenous understanding of *sovasova* has influenced Trobriand Islanders’ engagement with HIV and AIDS.\(^{{71}}\)

*Sovasova* is a chronic illness that is said to be the result of intra-clan sexual relations and shares symptoms with AIDS-related illness: weight loss, nausea, and malaise. Effective herbal treatments and familiarity with *sovasova* has contributed towards an attitude of sexual transgression as safe:

‘[W]e already know this disease [AIDS] through *sovasova*. Because we have the clan system and we follow it in our sexual behaviour and if we don’t follow it we get sick. So maybe people from other places don’t understand about the clan system and they have too much mixing of the same kind and that is how this virus has spread and made so many people sick. But here we know this sickness and we have treatment.’\(^{{72}}\)

Moreover, the cultural acceptance and celebration of sex,\(^{{73}}\) conflicts with the moralistic and prohibitive tone of many awareness campaigns. Despite this, in the case of the one known incidence of a HIV positive woman (who subsequently died of AIDS), fear and stigma proved to be a tremendous issue. Both her husband’s village and that of her matriclan chased her out (her children were adult by this stage and were unharmed).

Those consulted in this assessment suspected that once testing becomes more commonplace, HIV and AIDS will be a tremendous problem. This is due to the presence of factors associated with HIV susceptibility: low levels of condom use, high prevalence of STIs, the rate of acquiring new sexual partners, and the early onset and cultural encouragement of sexual activity. In addition, some of those consulted stated that girls exchange sex for goods (at the request of their mothers) at the wharf, or are taken to hotels for sex with guests.

**Vulnerable children**

Inheritance was not identified as a problem for children in the face of HIV and AIDS, but nevertheless was appreciated as a future concern. Vulnerable children who may have difficulties in accessing land in Kiriwina were identified by the community as those children who have a disability. Orphans of people accused of sorcery were also considered vulnerable children. Sorcery is widely believed in and some informants asserted that they would kill any young orphans of people accused of sorcery. Children born outside of marriage and children of broken marriages were not regarded as particularly vulnerable as they would belong to, and be provided for, by their mother’s clan.

7.2.2 Relationship to the law

Legal protection was regarded as of marginal importance to the communities on Kiriwina. District Courts were reportedly too expensive (a boat or plane ride away) and its personnel are often absent. Village court magistrates have dealt with land disputes informally, but could recall no cases of inheritance disputes being brought to them. Despite the training in women and children’s rights, village court magistrates said that no children had approached them and a few stated that the village courts do not deal with children. Children themselves stated that they would not approach magistrates or courts, if they faced any problems (pertaining to inheritance or otherwise) because they would be too scared to do so. Indeed, speaking ill of one’s parents or caregivers brings shame on the family and this was cited as a crucial factor in preventing children from speaking out if they face problems or


\(^{73}\) This has been widely recognised since Malinowsksi and Weiner’s monographs. See also National AIDS Council, (2005) *Situational Analysis for Strategic Planning at District Level Milne Bay Province Social Mapping Project*, National HIV/AIDS Support Project, Papua New Guinea
suffer abuse at the hands of their natural or adoptive family. There are no organisations providing free legal advice to children in the district. Disputes over ‘moveable property’ were mediated over between persons and families directly, and if this failed cases were taken to the Paramount Chief. Neither the village court magistrates nor the locals had heard of the Wills, Probate and Administration Act. There is little privatisation of property and no one we consulted had written a will.

7.2.3 Custom: inheritance and guardianship

Inheritance

Property was identified as land, trees (coconut and betel nut), cooking utensils, clothes, and gardens (yam and tapioca/kaukau). Both women and men can ‘own’ these. Houses were not included in the definition. This may be because houses are not permanent and must be rebuilt on a regular basis.

Children have rights to their mothers’ land and the vegetation and crops that exist on it, but no rights to their father’s land or naturally occurring fauna. If the father plants trees on his clan’s land for his children, this can be reclaimed by the clan upon his death by giving his children some money and throwing a feast. The child, however, retains usufructory rights over the trees. These arrangements are seen as non-negotiable and impossible for the children to seek redress via informal or formal mechanisms. In these cases, there are no differences between the rights of sons and daughters. There are also no exceptions made for the wives and children of polygamous marriages.

When a father dies, the widow and the children are sent to the widow’s land. The marital house is destroyed and all moveable property goes to the fathers’ kin.

Other than inheritance, it was noted that another way to gain use rights over someone’s possessions is through ‘hard work’ (making gardens, or sending money at feasting time if one is based in an urban centre). This was deemed more important than gender or sibling order in determining entitlements. Despite this, if a woman works hard to care for a dying person, it is more likely that the dying person will leave trees, possessions and gardens to that woman’s children rather than the woman herself.

Guardianship

In terms of guardianship, it is preferred that the mothers’ kin (parents, sisters, or brothers) care for any children that the mother cannot afford to keep. Girls (aged 12-17) who fall pregnant often have their parents raise their children as their own. The father is generally unknown and has no obligations to support the child. Seeking child maintenance from the natural father is considered an insult to custom. If the mothers’ side adopts the child, the child is considered to have the same rights as a biological son or daughter. Even if the child is adopted by the fathers’ kin or lives away from Kiriwina (for example, in Port Moresby), they can return to assert their right to live on the land of their mothers’ kin. This has happened in the past.

If both parents die, it is expected that the children be cared for by kin on the mothers’ side. In reality, the mothers’ kin often cannot afford to keep all these children and the children are subsequently adopted by the fathers’ side. This leads to siblings being separated. In the event that only the father dies, children continue to live with the mother – unless she is unable to provide for them. In some cases the mother is allowed to stay on her deceased husband’s land. If only the mother dies, children can stay with their father or their maternal kin.

7.2.4 Problems regarding inheritance

Personality (and popularity) was regarded as a crucial aspect to how orphaned children would be treated by guardians and whether or not guardians would respect their inheritance rights. The communities consulted also identified children with special needs and those of mixed marriages as vulnerable in terms of inheritance rights. Customary knowledge was considered a problem for
orphans. Some case examples provided below depict the vulnerabilities typically experienced by certain populations of children who are at risk of having their inheritance rights denied.

HIV and AIDS

As aforementioned, HIV testing is extremely limited on Kiriwina making it impossible to locate children orphaned or otherwise affected by the epidemic.

Orphans

Below is a case of a ‘double orphan’, a boy who has lost both his parents.

Peter has lost both his parents and used to wander from village to village. Dorothy, who is in her late 50s or 60s, has five ‘adopted’ children in addition to her own. Three of these are her grandchildren that her son and daughter can no longer provide care for. One of them is Peter to whom she is not related.

After she took him in, she rented land for him from a landowner for K50 a year. She says this was to provide a garden for him so that he could ‘feel like a man’ and eventually marry. The renting of land was agreed upon on a purely verbal basis, and she will return the land to the land owner at the end of this time. She was uncertain about whether he would have to continue to rent land throughout his adult life, or make an arrangement with a future wife’s family, or if his biological kin would provide for him.

Children with special needs

As a baby, Paul seemed to have some kind of learning difficulty and his family quarrelled over what to do with him. His mother escaped with him and returned to her maternal kin. But she was expecting another child and did not care about him (‘worry about him’) and her brothers and sisters all argued because they didn’t want to care for Paul either. He was left under a big tree in village early in the morning, and collected at night to be put to bed. It was like this for 3 years.

Douglas and his wife are childless and went to take him in. Douglas recalls it saying, ‘I said to my missus that this child is malnourished – his hands [arms] and legs are like sticks with this big belly. He looks ready to die. His family said don’t bother with him because he’ll die in a week. He was a little wild. He hid his face when he saw new faces because he was afraid. He was so used to being alone. I had to train him to feel love, and to eat guava, mango.’

At the age of ten, Paul finds it difficult to speak or otherwise communicate with others, and only started to walk at the age of six. Douglas is uncertain about both who will care for Paul when he and his wife pass away, and whether or not he will receive any form of inheritance. Paul’s relatives had told Douglas that ‘he’s yours, not ours any more’ and so Douglas is unsure of whether Paul’s biological family will care for him – even if he tried to leave their house and gardens for him to inherit. They have informally adopted a girl in the hope that she will care for Paul when they pass away – and hope that their relatives will understand that their house and gardens should be left for their two adopted children. They have no will specifying this.

Mixed marriage

Maria is from a patrilineal area of the mainland and her husband, John, is from Kiriwina. They live together with their children in Kiriwina. Maria and her husband discussed the issue of inheritance and land regarding their children as, according to Maria’s custom, they should inherit through their father, but according to John’s custom they should inherit through their mother. To solve the problem, they
have purchased customary land from John’s family. Maria is not sure what would have happened if they were too poor to purchase land. The only possible solution Maria could identify would be for her children to work for their father’s brothers (providing them gifts and working on their gardens) in order to earn inheritance rights and clan membership.

This is an example of a wider problem whereby patrilineal custom requires that the father’s brothers become the protectors of children. In matrilineal custom, the mother’s brothers fulfil this role. Yet in Maria’s case her children have neither. This places them in a vulnerable position in regards to positioning themselves within the extended family and fulfilling their obligations.

Customary Knowledge

Participants acknowledged that there are cases where foster parents try to hide the genealogy of their informally adopted children. If such children are orphans, and if their natural next of kin are not informed, it is possible that they would not know their genealogy, thus, would not be able to make a claim on a property such as land. This could cause problems if the family of the foster parents refuse to acknowledge the adopted child’s rights to their land. In one case, gossip had led to a child finding out about his or her adoption who began asking about his or her genealogy. In the context of the AIDS epidemic, however, this may not be widely possible.

7.3 Autonomous Region of Bougainville: Kieta District; Dota

The Autonomous Region of Bougainville (hereafter referred to as Bougainville) comprises of the islands of Buka, Nissan, Carteret, Bougainville and a number of smaller islands which are divided into: North Bougainville, Central Bougainville and South Bougainville. According to the National Census 2000, the total population of Bougainville is 175,160 and that of Central Bougainville 41,485 divided between 8,517 households. Substance abuse, underage pregnancies and road conditions are causes for concern. Overall, people in Bougainville are aware of HIV and AIDS. Testing for HIV is currently conducted at Buka hospital and in most cases, testing is done for donated blood. Following from this, one key problem in the HIV and AIDS response is coordination of clinical data to determine HIV status, and different figures were given out by different organizations. The general hospital reveals that from 2000 to the end of September 2007, 44 cases of HIV were confirmed in Bougainville.

7.3.1 Kieta

Dota is a matrilineal area and preferred residence after marriage is uxorilocal (the husband moves to the wife’s land), although in reality this is becoming more flexible. Women retain decision-making power and are community Chiefs. The vast majority of land is held in common by the clan. There are cash crops of cocoa and copra. Most people survive on subsistence agriculture and cash obtained from cash crops are put towards other expenses, such as school fees.

HIV and AIDS

During the consultation, most people could only identify around three cases of HIV and AIDS. As such, people were uncertain of how HIV and AIDS would affect the community. Furthermore, despite the awareness campaigns carried out by various organisations there was a general lack of understanding of what HIV and AIDS is. Some members of the community felt that it was not being taken seriously enough and there was continuing resistance among men and boys over the use of

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condoms. The men consulted were adamant that custom would accommodate any HIV positive people and those orphaned by HIV and AIDS. Conversely, women remained sceptical and said that it would be likely that any affected children would be ostracised by the community and their land would be taken from them by their relatives. Children said that although they had heard of HIV and AIDS from the talk of adults, they did not know what it actually was.

Vulnerable Children

The community consulted identified that children abandoned by parents when they fled their villages during the crisis were subsequently taken by soldiers who subsequently returned to the Papua New Guinea mainland. Although such children are no longer resident in Bougainville, they are still a concern for community members who are unsure of how the ‘foreign mainlanders’ who took them are treating them, and whether or how they would return to inherit their land.

The community did not identify orphans of the crisis as vulnerable children, as each had some maternal kin who assumed the responsibility of caring for them. As such, their inheritance would be unaffected. In some occasions the father’s side was noted to take them in – but this is exceptionally rare. Again, children with special needs (there are approximately 50 in the immediate area surrounding Arawa) were not identified as vulnerable children by community members in regard to inheritance, as such children would not marry or reproduce. As such, there would be no need for them to inherit. The director of a centre that cares for children with disabilities noted that although they have rights to land ‘in principle’, these are ignored in practice.

Children of single mothers, or children born outside of marriage, were not considered vulnerable, but it was felt that the increased pressure on land (due to the increasing population) and growing cash economy (due to cash cropping of copra and cocoa) would make them vulnerable in the future.

7.3.2 Relationship to the law

People are still uncertain about the legal system and speak of it as something being imposed upon them. The District Court is still relatively new, overloaded with cases, and the magistrate conducts a circuit to Arawa for only one week in every a month. Village Courts are more accessible, but magistrates were unaware of the Wills, Probate and Administration Act. Furthermore, people were adamant that disputes would preferably be dealt with at the local level through family mediation or formally with their Chiefs. No one consulted had written a will or was aware of the Wills, Probate and Administration Act. Children were unaware of the legal recourse available to them, and if Chiefs are approached, adults always accompany and represent the child. Sister Lorraine (who has a legal background) gives legal advice to children and women pertaining to violence in Buka, and is organising for a lawyer to join her permanently. Whether or not this will be accessible in any form to those in Arawa remains unclear at this stage.

Land disputes are common causes for complaint in communities, resulting from disagreements arising from the sale of customary land within the clan. This process goes through the Council of Elders, who both witness and sign on the transaction. It is not, however, put through the courts and the legality of both transaction and documents is questionable.

77 Reasons cited for the number of single mothers and children born outside of marriage include: men abandoning their wives and children, the widespread occurrence of rape and forced pregnancies during the crisis, girls going to bars at a young age (following the bad example their mothers’ set), and a high number of children being sexually active. This latter was blamed on businessmen paying for sex with girls, pornography and uncensored broadcasting of television programs.
7.3.3 Custom: inheritance and guardianship

Inheritance

The main concern in regard to property was identified as land. People were less concerned with houses and movable property.

Land is inherited from the father’s side and from the mother’s side. Inheritance from the mother’s side is automatic and governed by custom. To inherit from the father’s side, one must throw a feast and kill pigs for the father and his kin – such events can cost between PGK10,000 and 20,000. After the feast, the ownership (i.e. not just usufructory rights) of the land is transferred. There are no differences between the rights of sons and daughters, but it is the women who decide what to do with the land.

Inheriting through the father is becoming more common. People cited increasing pressure on land, and increasing numbers of single fathers caring for children, as reasons for the move towards this form of inheritance. In regard to the former, it is not just the children who will contribute towards the feast and payment, but also the child’s non-paternal kin.

As residence is uxorilocal, when a father dies, the widow and the children remain on their land. As in Kiriwina, if both parents die the children generally live on land belonging to the mothers’ side. In reality, the mothers’ kin cannot often afford to keep all these children and so the fathers’ side adopts them. If only the father dies, children continue to live with the mother – unless she is unable to provide for them. If only the mother dies, the children’s residence is negotiated between their father and their maternal kin.

Guardianship

It is preferred that the mothers’ kin (parents, sisters, or brothers) care for any children that a mother cannot afford to keep. Many young women who have children have their parents raise their children as their own. The father is generally unknown and has no customary obligations to support the child.

If non-kin adopts a child, the child’s natural parents or mothers’ brothers are expected to pay compensation to the caregiver for caring of the child. This is to ensure the non-kin members will pass land onto the adopted child. Other adoptive parents consulted in Arawa stated that they would pass on land to their adoptive child, but recognised that this may not be acceptable to their own kin.

7.3.4 Problems regarding inheritance

The following cases exemplify the challenges facing certain populations of vulnerable children in Kieta District, and specific examples identified by researchers or focus group participants during the field research:

HIV and AIDS

Joshua is the only Bougainvillean to reveal his HIV positive status publicly. Diagnosed in 2006, he waited until June 2007 to reveal his status. On doing so, Joshua was chased out by his community in Buin (one of the few patrilineal areas on Bougainville). When the Provincial Aids Council tried to get involved, the community put up a roadblock to prevent its members from entering.

Joshua has a four-year old child named David, who is not HIV positive. His other son died at the age of four months. David is not aware of his father’s positive status and is too young to know what is going on. But Joshua is certain that his son has suffered from stigma and has seen negative body language and facial expressions directed towards him.
As a father, Joshua is worried about David’s future. He says that he does not have the funds to care for himself, let alone David, stating that he used all his savings and is currently struggling. He has, however, purchased a house in Arawa but has no legal document or will to protect the interests of David in regard to this house. Again, Joshua says has customary land and coca trees that he has planted for David in Buin that his nephew is taking care of. Given the community’s rejection of him, however, he is uncertain of whether David can return or how he will be received if he does return. Although his relatives have assured him that they would care for David, Joshua is sceptical and believes that the relatives will only show support while he is still alive. Joshua would like more to be done to protect David’s future.

Orphans

Below is an example of three single (paternal) orphans that was relayed by their current primary caretaker. It reveals how losing one parent may remove a child from the care of his or her remaining parent.

Ruth’s husband was shot at the Solomon border during the crisis leaving her with three children. Her new husband, an alcoholic, does not care for the children, nor wants to look after them.

Although the children were left the plantations that were the personal property of their natural father, the new father is trying to use it for his own purposes. Mary, (the sister of their natural father), has taken the children into her care as she was concerned about their welfare. She is uncertain about what will happen to the plantations stating that there was no paperwork around the transfer of the plantations, and it would largely depend on whether the mother can stand up to her new husband or not.

Mixed marriage

Children of mixed marriages (those with a mother from a patrilineal and father from a matrilineal area) face some stigma and are often called ‘stranger’ in the local vernacular. With the increasing pressures on land due to population growth and cash cropping, informants fear that overcrowding will push children out – or else require mothers to purchase customary land from their husband’s kin. The maximum amount they would be able to purchase is two pieces of land – so over time, the inheritance rights of their grandchildren may prove problematic. An example of such a transaction is given below:

Julie is from Popondetta (a patrilineal area) and her husband from Saposa, Bougainville (a matrilineal area). They have three sons. In order to secure land from Julie’s husband for their children they conferred with his sisters and the Council of Elders. She and her husband killed a pig in return for the land and this action is understood as binding. Interestingly, Julie states that the real value was in the pig that was killed and not in the cash that she was paid. She stresses that this latter was a token gesture. Nevertheless, just to ensure that there will be no problems after she and her husband pass away, they are having the land surveyed and are considering approaching the formal legal system to ensure their title to the land.

Children born outside of marriage

At present, children born outside of marriage do not seem to face problems with inheriting from matrilineal land. Informants were clear, however, that children born outside of marriage are nevertheless stigmatised and that in time, pressures on land due to population growth and cash cropping may lead to maternal kin rejecting children born outside of marriage. In this case the children would either be told to go to their father’s side, or forced to marry into the clan to secure land.
State owned land

Informants noted that the conflict between the State and persons over ex-plantations would produce a generation of children whose rights to inherit would be put at considerable risk. Those who have settled on this land regard it as their own. They have not made efforts to secure further land elsewhere. If the State were to remove these communities from the land, they would have no other land to pass on to their children.

7.4 Eastern Highlands Province: Goroka District, Goroka

The Eastern Highlands Province is situated in the interior of mainland Papua New Guinea, and is comprised of eight districts: Daulo District, Goroka District, Henganofi District, Kainantu District, Lufa District, Oburra/Wonenara District, Okapa District, Unggai/Bena District. The total population of Eastern Highlands Province was 432,972, and that of Goroka District 71,870 divided between 17,854 households. Awareness and knowledge of HIV and AIDS is uneven throughout districts and provinces. Several regard AIDS in terms of Christian morality and punishment, whilst others feel that the names of the infected people should be announced publicly so that they can be isolated from the rest of the community. In the Goroka District drug and alcohol consumption, gambling, lack of public services, problems with transport, squat settlements, land shortages, domestic violence are among those problems regarded as common.

7.4.1 Goroka

Goroka is patrilineal and preferred residence after marriage is virilocal (the wife moves to the husband’s land). Men, rather than women, are vested with decision-making power. The vast majority of land is held in common by the clan. There are cash crops of coffee. Most people survive on subsistence agriculture and cash obtained from cash crops.

HIV and AIDS

There are no comprehensive statistics on HIV and AIDS. Goroka Hospital has a record of the number of people on ARV, but no numbers of AIDS related deaths or of children affected by HIV and AIDS including orphans. HIV cases still tend to be misdiagnosed. HIV and AIDS related problems include stigma and increased intra-and inter-family tensions as people seek to blame others for bringing it into the family. Concern for orphans centred on their care and the difficulties facing their caregivers’ ability to provide for them. One 12-year-old boy regarded HIV and AIDS as a problem for children, as the infection could be passed onto children through sexual abuse.

Vulnerable Children

Vulnerable children who may have difficulties in accessing property (land) in Goroka include those who are displaced due to mixed or broken marriages, orphans, children of polygamous marriages, or those living with widows, and those who live in settlements, or otherwise living away from their land, or children displaced due to tribal fighting. Inheritance was identified as a problem for children in the context of the spread of HIV and AIDS.

7.4.2 Relationship to the law

Courts tend to be the last port of call for communities in Goroka District. Some male youths expressed scepticism of the Village Court and accused its magistrates of being untrustworthy. In terms of higher

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79 Ibid: pp. 29 and 30
80 Ibid: pp. 21, 23, 25
courts and the law more generally, some felt that law is only accessible and socially relevant for the rich. It was also expressed that educated members of a family can take advantage of uneducated widows and children, manipulating them and the formal system to their advantage. As such, people seek dispute resolution at the local level through family mediation. In these circumstances, children’s interests are represented by their family. Children themselves knew of courts but had little understanding of how they worked or who exactly to approach if they required legal help. There are no organisations that provide free legal advice for children. Children also mentioned that they would not go to the police, teachers or church leaders for fear of being found out and beaten. Neither focus group participants nor Village Court officials had heard of the Wills, Probate and Administration Act and it appears that none had written a formal, legal will. Neither District nor Village Courts reported having dealt with cases of inheritance.

7.4.3 Custom: inheritance and guardianship

Inheritance

Property was taken to be land, cash crops and houses – but the overall emphasis and concern of the people consulted was land. By custom, land is transferred through the father to their sons. Daughters can only access land through marriage. Those consulted regarded this as unproblematic. Neither son nor daughter has a right to their mother’s land. Of greater concern was the inequity that can arise within polygamous families, where land is not split equally between all wives. Land allocation is guided by favouritism and there is ambiguity regarding what children are entitled to inherit.

If a marriage breaks down and bride price has been paid, custom requires that all children should remain with the father and his kin. In reality, girls often return to their mother’s land with their mothers. If women would like to have their sons returned to their care, they must first repay their bride price. If children are born outside of marriage (no bride price has been paid), generally one of two things may happen. First, the father would begin to pay compensation or bride price for the children. If this is not forthcoming, the mother’s parents often care for them and allow them to use their land.

Other than gender, age is an important factor that affects a child’s ability to inherit in Goroka. Specifically, if a boy is bigpela (15 years or above) he will be able to assert his claim to land. If a boy is under this age, custom deems him a ‘child’, lacking the assertiveness and aggressiveness necessary to stand up for his right to land. Without this capacity to assert oneself, it was felt that it would be unlikely that village courts or other officials would listen to claims made on behalf of the child. Following from this, immediacy of action is important. The longer the amount of time between a parent’s death and their son’s claim to the land, the less likely that such a claim will be successful. As such, the younger paternal orphan boys face greater challenges in their capacity to assert their claim. The ability to assert a claim to land also depends on whether or not the boy works on the land or that of his paternal kin.

When a man dies, all his belongings (clothes, personal property, household items) would be brought outside the house and distributed amongst his extended family and the people who had helped him (fulfilled obligations towards him) in life. Anything remaining is burned. All the pigs that belong to the deceased and his wife are killed to distribute the meat. The expectation is that the house is left for the widow and her children, but participants noted that this was not always realised.

Guardianship

In terms of guardianship, it is preferred that the father’s kin act as guardians for paternal or maternal orphans, although exceptions to the rule were identified. Informal adoption was not unusual. In such instances it was felt that inheritance should come through the natural father. In reality, however, it is difficult for boys to return to access their father’s land if the mother’s family has adopted them.
7.4.4 Problems regarding inheritance

Personality was indicated as a crucial factor in determining how children would fare with non-parental caregivers, and whether they would receive property and land when it was distributed. Other challenges facing children affected by HIV and AIDS, children from broken marriages, orphans and children residing in urban areas were also identified:

HIV and AIDS

Johan and Lawrence are twin brothers from the Southern Highlands. They were brought up in the Eastern Highlands where their father owned a lot of property: a real estate business, a bus service and a house. When they were eight years old, both their parents died of AIDS. Although the father’s relatives assumed responsibility for their care, the children were left with no property. A maternal aunt tried to intervene, but was beaten when she tried to point out the injustice of the situation.

Their neighbours brought the twins to Eastern Highlands Family Voice in an attempt to resolve the situation. The NGO staff tried to contact the boys’ relatives, but were also unable to resolve the situation as the relatives who claimed the property became very aggressive.

The boys are now 11 or 12 years old. Although they are emotionally very strong and healthy, they are reportedly still “struggling”. They have discovered that their father had left ‘some paper’ – presumed to be a will of some sort. When they approached the policeman in possession of the alleged document, he refused to give it to them. The policeman is a relative of the boys and is suspected to have his own vested interest in the distribution of the deceased’s properties.

In other cases, children orphaned by HIV and AIDS were reportedly likely to face abuse, gossip, difficulties in finding bride price, a lack of food, clothing, shoes, education and health care. Interestingly, participants reported that the biggest issue for orphans generally appeared to be the need for love, over and above their need for clothes and material property.

Orphans

Rosa is 13 years old and an only child. Her mother and father died a while ago but she cannot really remember them, or when it was that they died. She remembers that she was given some clothes out of the things that they owned – but this was all – and says that some of them are broken now. She recalls how her father’s brothers came when her parents died, and took the house, gardens and land. They told her that they do not belong to her because one day she will go out and marry.

One of her uncles looks after her at the moment, but he has 3 children of his own. She says that she is made to do lots of tasks – weeding gardens, washing plates and clothes, sweeping floors, fetching water and firewood. Although she used to go to school when her parents were alive, now no one will pay her school fees for her. Her guardians often tell her that she will only get food if she completes her tasks well enough.

Sometimes she gets angry with them and tells them that the things they use belonged to her mother and father. When this happens they get upset and chase her out of the house shouting ‘go away and find your own home to stay in’. This makes her sad and Rosa says that she wishes she had things of her own – money and a garden. She says that the only way for her to get these things will be if she marries.
**Broken marriage**

Susan was married, but shortly after she became pregnant with Steven, her husband abandoned her for another woman. Although she remarried, she abandoned her second husband, leaving Steven with him. The stepfather remarried and went on to have 3 children of his own. Steven was denied food, clothing, and schooling and was beaten badly by his stepfather. One day when Steven retaliated, his stepfather physically attacked him, almost killing him.

Steven fled to the Catholic Church in Mt Hagen. After being referred to the Catholic Family Life Coordinator, he was eventually placed with a Community Mission elsewhere, where he was put into school and is being cared for by a priest.

Steven has no land or property of his own, no idea who his natural father is or whether he can claim anything through him. Claiming through his stepfather is not possible. At present, he is working hard at school so that he can support himself with his education, recently giving up rugby so he could focus harder on his studies.

**Urban displacement**

Informants stated that urban displacement contributed to problems in asserting claims to land. Inability to physically access land ‘back home’ meant that some children might not know their land boundaries. Also, if they have been unable to return to work on the land to build gardens or develop it, or fulfil their obligations with their kin, their claim to land becomes more tenuous. Specifically, if children do not return and others, especially uncles, develop the land (first gardens and then trees) compensation would need to be paid to these others in order to reclaim the land. Even if they would be able to return, it may be that the family that is using the land will refuse to assist them to cultivate the land due to resentment.

**Tribal fighting**

The participants in the focus groups reported that many people move to the urban areas because they are forced off their land during tribal fighting. This displacement not only disconnects them from their land, but those that are able to return in the future often find schools, houses, gardens have been burned to the ground, leaving them with no property to inherit.

Informants highlighted the emotional stress of displacement that a child could feel when they do not have land. This stress signified something beyond livelihood and economics, and centred on the critical link between land, identity and selfhood.

**Sorcery**

The following is an example of how fear of sorcery may lead people to make certain decisions that take children away from their land.

David is 18 and the youngest of three. His parents, who are still alive, own a fair amount of land. David and his sister were sent to the settlements by his family because they were worried that the neighbours would get jealous of the amount of land that they owned and send sorcery out to kill one of them.

David is lucky, however, and remains connected to the land. He is able to go back to his own land during the year, helping his brother (who looks after David’s land) and at harvest time. His father has also shown him his ‘markers’ so that he knows his land boundaries, and has spoken to their extended family so that they are all aware of what land should belong to David.
7.5 Simbu Province: Kerowagi District, Mingendie

Simbu Province is situated in the interior of Papua New Guinea mainland and comprises six districts; Kerowagi, Karamui/Nomane, Kundiawa/Gembogl, Gumine, Sinesine/Yongomugl and Chuave. The total population of Simbu Province is 259,703, and that of the Kerowagi District is 54,850 divided between 10,622 households. Awareness and attitudes towards HIV and AIDS vary between and within districts. In all districts ‘misinterpretations’ of the disease have been recorded, such as that HIV and AIDS are a punishment from God on those who sin, it is a disease that affects only prostitutes or those living in towns and cities, leaving those residing living in villages safe. In Kerowagi, drugs and alcohol were mentioned as particular problems in many communities, and were cited as often leading to theft and violence including rape and family violence. Family violence was mentioned as the most common form of violence.

7.5.1 Mingendie

Mingendie is a patrilineal area, and preferred residence after marriage is virilocal (the wife moves to the husband’s land). Men, rather than women, are vested with decision-making power. The vast majority of land is held in common by the clan.

HIV and AIDS

No statistics collected on the ground were readily available for HIV and AIDS. There was mixed awareness regarding HIV and AIDS and a lack of clarity over the actual impact on communities. Informants mentioned how volunteers and others who attended awareness and training do not share the information with others. This may be due to fear of stigmatisation. Many stated that they would be fearful to go near an HIV positive person. Children orphaned by HIV and AIDS were reported to be likely to face abuse, gossip, difficulties in finding bride price, a lack of food, clothing, shoes, education and health care.

Vulnerable Children

Vulnerable children who may have difficulties in accessing property (land) in Mingendie include those who are displaced due to mixed or broken marriages, orphans, children of polygamous marriages, children born outside of marriage, or those living with widows, and those that live in settlements, or are otherwise living away from home, or children displaced due to tribal fighting.

7.5.2 Relationship to the law

As with other areas, courts tend to be the last form of recourse. Access and expense were offered as reasons for not engaging with the formal justice system. Village Courts were the most accessible mode of recourse, but magistrates were unfamiliar with the Wills, Probate and Administration Act. No one consulted had written a formal, legal will. Children’s awareness of courts was low and even in the case of informal help, they stated they would not go to teachers or church leaders. As with other districts, people prefer to seek dispute resolution at the local level, through family mediation. In these circumstances, their older family members represent children’s interests. There are no organisations that provide free legal advice for children.

82 National Census 2000
84 Ibid: 19-22
7.5.3 Custom: inheritance and guardianship

Inheritance

Property was taken to be land, cash crops, houses – but the overall emphasis and concern of the people consulted was land. As with the other patrilineal districts, custom dictates that land is transferred through the father to sons. The eldest son is responsible for caring for the land until his younger brothers are old enough to look after it themselves. Daughters can only access land through marriage. By custom, the expectations of a father (with respect to land distribution following his death) are traditionally passed verbally to his sons, immediate and extended family and deemed to be final. In reality, it was noted that this could lead to ambiguity or contestation following his death. Despite this, no legal documents were deemed desirable or necessary in outlining inheritance.

The payment of bride price results in the allocation of children within the marriage to the husband’s kin. In reality, if a woman is widowed, disputes have been known to arise when the husband’s brothers have many sons already. If the children are sons and bigpela (14 or 15 years of age) they will fight for their father’s land. If they are young, they may be chased out with the mother. It was noted, however, that any sons could return to their father’s land when they are bigpela, although they should able to physically assert their claim. Girls, on the other hand, often return to their mother’s land with their mother, or are married into another clan.

If children are born outside of marriage (no bride price has been paid) and the father is unknown, the maternal grandparents care for them and provide land. Conflict arises when these grandparents have sons with legitimate boy-children. There is a tendency to prioritise these boy-children over the children born outside of marriage in terms of land distribution, health and education. Such children often become scapegoats for any problems that arise in the family. If the father is known, children can be distributed between the father’s and mother’s side, and no distinction is made between boy-children and girl-children. If a man has no children whatsoever, those who support him and care for him (provide food, work his land and help him fulfil his obligations) will be nominated as the man’s heirs.

Traditionally when a man dies, one of his brothers would marry the widow in order to keep all the land and belongings within the family. The breakdown of this custom was cited as a major cause for disputes over the distribution of land and property. Wealth should flow to the eldest son. In the event that there is no son, there is provision for the eldest daughter to assume the wealth, and then pass it to her firstborn son. In reality, the father’s brothers intervene following the father’s death and take the wealth.

As mentioned above, families who have no sons may pass on land and wealth to their daughter. For example, Betty is an only daughter. She married a man from a matrilineal district and had seven children – five girls and two boys. Her children were uncomfortable living in the father’s district so she brought them back to Kup. The children are unable to inherit through the father and so Betty’s parents have given their land over to her. She will distribute this land between her two sons.

Guardianship

As with EHP, the preferred caregivers of a paternal, maternal or double orphan would be the paternal kin – specifically the father’s brothers. These men would also be guardians of any adopted boy child’s land. According to those consulted, the ideal situation is that the guardian would divide land equally between his natural children and his adopted children (nephews). It is not unusual for children to move between different father’s brothers and in reality, there is variation resulting in some relatives honouring their deceased brother’s wishes, whilst other children are denied their land by relatives. By custom, children should offer something to the relatives for organising the funeral feasting and so forth. The fact that young children cannot give anything is the reason given for taking their land / properties.
7.5.4 Problems regarding inheritance

As with EHP, factors pertaining to marriage that affect children’s inheritance rights included broken marriage, mixed parentage and polygamy. In regard to the first, it was understood to be an additional challenge for a son to reclaim land if he is reared away from his father and his father’s land. In regard to the second there was some ambiguity over what would happen if a woman from the highlands were to marry a man from a coastal (matrilineal) district – this is likely to become more of a pressing issue as migration and inter-province marriages increase. In regards to the third, participants reported that ideally, property should be split equally amongst all the wives and boy children. In practice there was a great deal of ambiguity – even husbands with multiple wives expressed uncertainty of what would actually happen after their death. As in EHP, the respective age of their sons would also influence how land distribution would be realised – the older the sons, the more likely that they will retain a stake in the property. Similarly to EHP, urban displacement and tribal fighting were highlighted as issues pertaining to inheritance. In the words of one man in regards to tribal fighting: ‘They don’t have coffee gardens, they only have orphans’. As with all other provinces visited, personality, popularity and favouritism was consistently raised as a key factor in determining how customary norms and rules would be interpreted.

HIV and AIDS

Although people did not give specific examples, and no children orphaned or otherwise affected by HIV were interviewed, members of the focus groups agreed that HIV positive young people often left their homes. Informants claimed, but again without examples, that children orphaned by HIV and AIDS were taken in by relatives and supported, but faced discrimination in the form of stigma, abuse, gossip, difficulties in finding bride price, a lack of food, clothing, shoes, education and health care.

Children with special needs

During an in-depth interview with Callan Services workers, the importance placed on work and marriage in relation to inheritance was clarified. Children who would be able to work on their land or bear children were likely to be able to claim their land. For example, a boy who is blind could marry, his wife can tend to gardens and bear children. Children with intellectual disabilities, however, would be neglected entirely on the understanding that they would be unable to work on the land, fulfil customary obligations, or marry and subsequently have children of their own.

Tribal fighting

James lives away from his village which is ‘over the mountains’ from where we meet him. His father died whilst he was young and his mother fled their home when tribal fighting broke out. She was afraid of the violence and rape that she and her children might be subjected to.

Although James’ mother has remarried, his natural father’s family tell him that they have kept land aside for him. But James is reluctant to go back. He has worked hard on the land where he is now and does not want to lose that hard work. Also, he knows that tribal fighting will break out again and he would lose anything he might build up back on his natural father’s land. He has already lost the semi-permanent house that was his father’s when it was burned down in tribal fighting.

Sorcery

Sorcery appears to be of particular concern in Mingendie. Often sorcery accusations can drive people from their land for decades. Those consulted did not identify any standardised means of determining how communities were to support displaced families (including children) when they were accused of
sorcery. Families that have been accused become ‘homeless’ and can only seek to buy land as a way of re-establishing themselves.

7.5.5 Other

‘Wok’

Work is one of the unspoken cultural ways of staking and retaining a claim and right to land, and a position within one’s family. Even a healthy and otherwise non-vulnerable son can be ‘disinherited’ if he fails to work.

Jonathan is 35 years old and the eldest son in the family. He ran away when he was 14 years old and started drinking and smoking marijuana. Although he visited his family from time to time, he did not work on the land or contribute to their collective endeavours. When he went back 10 years later, at the age of 24, he was told it was too late and all the land had been used up by his younger brothers. He was told that there was no land for him. His only option now is to get a job and then buy some land.

Land pressures and age

Land pressure and age are important factors in affecting boy children born inside of marriage living with both parents. As aforementioned, the eldest sons have priority in inheriting land. If land is scarce, age can be the determining factor in deciding whether or not a child has their land entitlements denied.

Timothy is 15 years old and still at school. Both his parents are still alive, and he has four brothers and three sisters. He is the third born son. As their land is small, his parents have divided the land into two portions – and these have been allocated to the eldest brothers. Timothy and his younger brother do not have any land because there was simply not enough. Instead, he and his younger brother are being sent to school so that they can get an education, a job and subsequently afford to purchase land for themselves. If he cannot find a job, Timothy expects that his elder brothers will let him use their land – but that he could not ‘own’ it. Subsequently, if he were to marry and have children he thinks he could continue to live with his brothers, but does not know where his children would inherit from.

Emotional distress

The emotional distress of returning to land was also cited as a consideration.

Helen has a single son, Kevin. When her marriage broke down she returned to her mother (who is now a widow). Although they care for Kevin together, Helen has six brothers and there is not enough land for Helen’s son. Helen’s brothers often tell Kevin to return to his father’s land. Kevin’s father’s kin would like to give the land to Kevin, however, he wishes to remain with his mother. He feels emotionally disconnected from his father and his kin, and is uncertain of how he will be treated there if he returns.

7.6 Western Highlands Province: Anglimp South Waghi District, Minj

Western Highlands Province is situated in the central parts of Papua New Guinea mainland, and consists of seven districts: South Waghi, Jimi, Tambul Nebilyer, Dei, Mul Baiyer, Hagen Central and North Waghi. According to the 2000 Census, the total population of the province is 440,025. South Waghi District is 95,000 divided in 21,992 households.

Problems faced by communities include

86 Ibid. pp. 11
substance abuse that leads to violence, rape, domestic violence, theft, poor infrastructure and tribal fighting. Overall, awareness of HIV and AIDS is high, but knowledge of this has not motivated behavioural change. One reason suggested for this is the inability to take death by AIDS seriously in the face of the constant fear of tribal fighting. In South Waghi concerns were directed towards the behaviour of young people travelling to town, with people stating that as long as people need money there will be women selling sex and the virus will continue to spread.

7.6.1 Minj

The residents of Minj, Anglimp-South Waghi District are patrilineal, and preferred residence after marriage is virilocal (after marriage the woman moves to the husband’s land). The vast majority of land is held in common by the clan. There are small-scale cash crops of coffee and tea is also grown. Most people interviewed survive on subsistence agriculture, making land the most important form of property.

HIV and AIDS

Everyone consulted was aware of HIV and AIDS. Stigma was reported to be common and whilst Community Based Organisations are endeavouring to decrease stigma, there was a strong sense that HIV positive children would be discriminated against when claiming their inheritance rights. It is recognised that an emerging problem associated with HIV is the increased burden of caring for the sick and orphaned on the extended family. The other problems children orphaned by AIDS were reportedly likely to face included abuse, gossip, difficulties in finding bride price, a lack of food, clothing, shoes, education and health care.

Vulnerable Children

Vulnerable children who may have difficulties in accessing property (land) in Minj were identified as those who are displaced due to mixed or broken marriages, orphans (especially paternal orphans), or cases where fathers remarry and children move to the mother’s father’s land, children of polygamous marriages, children born outside of marriage, or those living with widows, and those who live in settlements, or otherwise living away from home, or children displaced due to tribal fighting.

7.6.2 Relationship to the law

As with other areas, courts tend to be the last port of call in the Anglimp South Waghi district. Difficulties with access and high costs were given as reasons for not engaging with the formal justice system. Children’s awareness of courts was low and even in the case of informal help, they stated they would not go to teachers or church leaders. People prefer to seek dispute resolution at the local level, through family mediation. In these circumstances, children’s interests are represented by their older family members.

In comparison to the other areas visited, there was greater awareness of the formal legal system. Despite this, it was still deemed to be a last resort, and it was clear that people try and resolve all disputes at the local level through recourse to custom and family mediation. Village courts were the most accessible modes of recourse, but magistrates were unfamiliar with the Wills, Probate and Administration Act and no one consulted had written a formal legal will. Courts were deemed

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87 Ibid. pp. 20
88 Ibid. pp. 26-7
89 Ibid. pp. 32
90 In regards to tribal fighting, people were concerned that overpopulation was causing pressure on land, leading to increased tribal fighting. However, they simultaneously emphasised the importance of having a large number of children to provide support in tribal fights (over land) and ensure voters for elections.
intimidating environments for children and there are no organisations that provide free legal advice for children.

Furthermore, the researchers were presented with a case where the formal legal mechanisms had failed to protect children’s inheritance rights. A public servant who had married polygamously left three wives and their children when he died in a car accident. His relatives were paid PGK100,000 in compensation. The husband was registered with a superannuation fund, and put his sons as his legal claimants. However, the deceased’s brothers took all moveable property. The only thing that the brothers could not access was the cash from the superannuation fund. The brothers of the deceased have been reported as trying to kidnap the children. They then offer the children as evidence that they are caring for them, so they could access this money. It should be noted that whilst many found the situation distressing, they focused on the plight of the sons and did not necessarily direct attention towards the wives and daughters.

7.6.3 Custom: inheritance and guardianship

Inheritance

Property was taken to be land. Moveable property was of secondary interest and importance. As with the other patrilineal districts, custom dictates that land is transferred through the father to sons, and when a father dies, his sons have rights over the distribution of the estate and play a strong role in dictating the amount distributed. The eldest son is responsible for dividing the land between his brothers. The eldest will tend to get more, unless there are only two sons in which case the division is equal. Daughters can only access land through marriage (this is exemplified by the case of a man, who, to express his disappointment at the fact he only had daughters, sold most of his good land. His rationale was that he wanted the land to die with him. This is currently causing problems with his extended family who cannot access this land anymore). If the man has only daughters, they can inherit the land to pass on to their sons. If a man has no children whatsoever, those that support him and care for him (provide food, work his land and help him fulfil his obligations) will inherit from him.

Although women may never own the land, they may plant gardens and coffee crops on land owned by men in their family. Technically, children have no right to their maternal grandfather’s land, but sometimes their paternal grandfather will provide for them when other land is not available. No legal documents were deemed desirable or necessary in outlining inheritance – the father’s words to his sons and immediate and extended family are meant to be final. As in other provinces, this often led to problems in reality. It was reported that the father’s brothers often assume the ownership of land and moveable property.

As in Simbu, brothers traditionally marry their deceased brother’s widow (if she is still young) in order to keep all the land and belongings within the family. If this marriage does not take place, there is also a growing trend to allow young widows to stay on their deceased husband’s land only if they are breast-feeding a child which is to be adopted by the father’s extended family, or if she is too old to remarry elsewhere. The breakdown of this custom was implicated as a major cause for disputes over the distribution of land and property.

Guardianship

Maternal, paternal or double orphans of a marriage are cared for by their father’s brothers and sisters. This does not appear to complicate inheritance, but can still leave room for a father’s brothers to prioritise their own children over those they adopt. If they are unable to care for the children, they are transferred to the care of the mother’s extended family. This can make it more challenging, but not impossible, for boy-children to return to their father’s land and assert their claim to it. It is also possible for adopted boys to inherit through their guardians, but this is likely to cause conflict in the future, particularly if land is scarce. Personality, popularity and favouritism were consistently raised as a key factor in determining how customary norms and rules would be interpreted.
7.6.4 Problems regarding inheritance

As with EHP and Simbu, factors pertaining to marriage that affect children’s inheritance rights included HIV and AIDS, broken marriage, mixed parentage and polygamy. Similarly, urban displacement and tribal fighting were highlighted as issues pertaining to inheritance. Funeral arrangements were also included as a concern. As in other areas, informants highlighted the emotional stress of displacement that a child would feel if they have no land. The matter was one beyond livelihood and economics, and centred on the critical link between land, identity and selfhood.

An additional worry was how girls of a broken marriage are put at increased risk of rape. A number of women identified how when a mother moves back to her natal village with her daughter, the local boys know that she is not from there, or a member of their clan, and may attempt to rape her.

**HIV and AIDS**

Mary and James were married with two children – a son and a daughter. James was admitted to hospital with HIV in 1998 and his health slowly deteriorated, dying in 2000. Mary participated in voluntary testing and found herself to be HIV positive.

Mary stayed at her husband’s village for two years after he died. Crying, she describes her decision to leave as based on how there was no love for her there. Their attitude changed as soon as her husband died and Mary became distressed and depressed. She explains that ordinarily, she would be married to one of her deceased husband’s brothers because she is still young. It was her status as an HIV positive woman that meant nobody wanted to marry her and this contributed to her being shunned.

Another reason why she left was because she was consumed with worry about seeing the fight over property and how it was being taken. Her husband’s brothers wanted to take all the property of her son because he was only small. This included a car, permanent house, and large coffee garden. She said she was worried that the stress the conflict was causing would worsen her HIV condition.

Eventually the eldest brother took the car, the coffee garden was taken by another brother, and the large piece of land for her son was significantly reduced to a small area around the house. The house itself was left as her husband’s mother lived in it, holding it for Mary’s son. She is clear that it is not normal for a son to get less land, but the death of her husband meant that they had no authority to prevent his brothers from taking the property.

Mary finally left for her father’s and her brother’s land, with her daughter. She is clear that the land on which her and her daughter now live does not belong to her, and this is a cause for concern for her. It belongs to the sons of her brother (aged 9 and 5) as her brother passed away a year ago. Mary worries about what will happen to her daughter when she dies. When she first moved back to her parents’ village, she had asked some relatives to care for her daughter because she was unable to do so properly. But when she realised that her daughter was being treated badly, she took her back. Even now her daughter is bullied in school and the other children will not go near her because her father died of AIDS and her mother is HIV positive. Her daughter did not go to school for a month until a local leader went to speak with both teachers and students.

Mary is not worried about her son. Now that he is twenty one years old, she has faith that he will be all right – he is old enough to assert his claim for land. He can ‘speak’ and ‘negotiate’ with his father’s brothers. Mary says that the relatives of her husband asked for her son to have an HIV test. He tested

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91 It was indicated in the case of mixed marriages where the mother is from a patrilineal district and the father from a matrilineal district, that local children will look down on children from such marriages as such a family would have no standing in the community.
negative and as a result the relatives are happy to have him back to claim land. Her only concern is that because he went to school and spent time there, he did not plant coffee and work on the land as much as he should or could have done. She is also concerned that education has made him un-learn the aggression that is necessary in asserting his claim to land.

**Orphans**

Below are the stories of two single orphan girls (paternal and maternal):

**Lucy** is thirteen. She is the eldest of two girls. Her mother is the third of five wives and her father has died of AIDS. When he died, her father’s brothers tried to take all his land. Fortunately the first and second wives stepped in and took them to the village court. The first wife has two boys and the second wife has one boy. As a girl, Lucy does not think she will be able to access her father’s land. Even before he died, she had lived on her mother’s father’s land, with her father visiting them. She can use her mother’s father’s land for the moment but does not have a right to it.

**Josephine** is about 10 years old. Her mother died when she was young, leaving her and her younger sister with their father. Her father has since remarried and has two boys from the second marriage. Although Josephine had stayed with their father, when he remarried they were neglected by his new wife. Last year Josephine was adopted by her father’s brother who pays her school fees and looks after her. Although Josephine visits her father’s place, she feels that she has no right to own or use the ground there. She thinks, but is not sure, that she can use her father’s brother’s land but cannot ‘own’ it.

**Broken marriage**

A local public servant has four wives. He abandoned the first wife with a son (in grade three) and a daughter (in kindergarten). The estranged wife took her children back to her parents. The first wife faces problems as her only brother has eight children (one boy and seven girls) making it difficult to look after them all. The brother refuses to give land to his sister’s son because of tribal differences. The wife suspects that her son will also find it difficult to claim land from her husband – and moreover will be unwilling to settle with his father due to his current emotional detachment his paternal family.

**Funeral arrangements**

When a person dies, it is common for compensation payments to be made to the deceased’s maternal uncles. This is based on the belief that the death is an indication that the paternal family did not adequately protect or look after the maternal uncle’s ‘blood’ (which is passed through the maternal line). This is an important consideration as the property of the deceased is then distributed amongst those who contributed to the compensation payment, proportionate to the amount they contributed. Given the widow and children typically cannot contribute to the compensation payment, they are often excluded when property is distributed.
8.0 CONTRADICTIONS BETWEEN LAW AND CUSTOM

There is a fundamental contradiction between the formal law (including the Wills, Probate and Administration Act) that acknowledges children within the context of a nuclear family, and custom which places priority on the siblings of the deceased, the extended family and their respective obligations.

8.1 Children vs. Adults

Most of the consulted community members stated that extended family members who assumed the care of orphans were expected to protect these children. Decisions regarding inheritance, however, tended to favour stronger adult family members over the children they were caring for. This is not consistent with the formal law, which recognises children as the major beneficiaries of their deceased father’s or mother’s property. It should also be noted that whilst discrimination against children, with regard to inheritance, may be justified under custom, it is clearly inconsistent with the prescriptions of the Constitution and other laws that proscribe discrimination against children, and confer on them the right to inherit their parents’ property ahead of other categories of relatives following their deaths.

8.2 Nuclear vs. Extended Family

In the course of an individual’s life in PNG, one becomes obligated to numerous others – in many areas where magic is practised on behalf of a child in utero, this process may start even before birth. Obligations that occur later in life may include providing cash, garden food or pigs to help a kinsman pay for bride price, funerals, feasts and so forth. As such, at the death of an individual, those that contributed to that person’s social endeavours and prestige should (by custom) have that work recognised. In addition, in some patrilineal districts, compensation may be paid by the paternal kin to the maternal kin of the deceased as a way of apologising for failing to take better care of the maternal kin’s blood. Those that contribute to this compensation may then be recognised for this, through the amount that they inherit from the deceased. Often, it is the case that young children are not able to contribute to such causes for their parents. It may also be that, by custom, children are more dependent on their mother’s brothers or father’s brothers for support or social standing than their father or mother respectively. Thus they are often overlooked in the distribution of property at the death of a parent. This is not to denigrate custom, but contextualise and elucidate a possible rationale behind the exclusion of children in certain cases. Similarly, this is not to say that this is a foolproof system – all communities that were consulted made reference to instances in which this system has been open to manipulation.

8.3 Rights vs. Obligations

At a fundamental level the contradiction between the formal legal system and customary system could be couched in terms of the slippage between a Western emphasis on ‘rights’ and Papua New Guinean emphasis on ‘obligations’.

Rights are based on the notion of an individual who ‘owns’ or ‘controls’ him or herself, and can make choices. Such individuals are conceptualized as autonomous and equal irrespective of any natural or cultural factors – such equality is a ‘given’. The concept of an individual person is often easily accepted by Western perceptions and political ideals of personhood. In Papua New Guinea, the complex social exchange system encourages people to perceive themselves and position their identity within the context of a broader familial network.

In PNG, obligations (‘wok’ or work) are of paramount importance. One is not a proper social person if one does not fulfil one’s obligations – placing oneself in a relationship of dependency can be both
desirable and fundamental to personhood. Obligations can include payments in garden food, pigs, or cash (compensation, bride price, or otherwise), helping family members (with school fees, gardens or otherwise), or contributing to feasts (for funerals, marriages, important social gatherings) or other events. The network of obligations that arises is immensely complex and utterly binding. It has been argued that obligations entail a perception of personhood that differs from the autonomous individual of the West. This personhood has been called variously the ‘dividual’ or the ‘partible person.’ In this scenario, persons become related through ‘wok’ and so constitute one another in this way. As such, they have legitimate claims on the actions, resources, and products of others – it could be described as ‘owning’ parts or actions of others. Obligations also mean that everyone is uniquely and particularly positioned within a network of claims and counterclaims that, to some extent, constitute them. This is different from the ‘neutral’ individual who is assumed to be equal to all other individuals. This leads to a discrepancy between the ideals of autonomous individuality, equality and choice that underlie the notion of rights.

8.4 Applicability of law?

The strength of kastom, and the social exchange system contributes to a widespread perception that formal laws are of negligible import to the majority of Papua New Guineans. Despite this, a few people expressed a desire to go through formal legal mechanisms to ensure their land or house will be passed on to their children. For example, one mother reported her desire to ensure that her house remains available for her disabled daughter. Another mother in a mixed marriage noted that custom would not ensure the transmission of land or property from either her side, or that of her husband. In cases such as these, where custom will either deny children their inheritance rights, or provide others with an opportunity to deny children their inheritance, the role of the formal law is likely to become increasingly significant as a protective mechanism for these children.

9.0 RECOMMENDATIONS

9.1 Recommendations from participants

Recommendations from adults
- Introduce ‘foreign’ mediators to support children’s inheritance rights - village court magistrates find it difficult to be objective in many cases because they have relatives in the community, or are influenced by bribes.
- Strengthen existing and traditional support mechanisms - extended family ties.
- Encourage local community leaders to lead by example.
  - To care for any HIV positive person (give food, share a house in the short term) and aid children affected by HIV and AIDS both generally and in regards to inheritance.
  - Mediate with the family to aid reintegration of children who have been living away from their land.
- Train all village court officials, peace officers and land mediators on children’s rights, including their right to inherit.
- Find a way for the government to provide land for those landless families and children, and those living in settlements.
- Find a way for the government to aid parents with a low income and living in an urban environment to return home to reconnect with their land (to ensure that it remains available to their children).
- Raise awareness of the importance of wills and encourage parents with businesses or wealth to write one.
- Ban practices, such as polygamy, that can lead to putting children’s inheritance rights at risk.

Recommendations from children and young people
- Strengthen existing and traditional support mechanisms (extended family ties and Council of Elders) so that these mechanisms can assist them to assert their claims.
- Strengthen and create informal and community based day care centres to ease the strain on extended families who are caring for adopted children.

Recommendations from stakeholders
- Government to set up a trust account for social and legal protection of children.
- Introduce ‘foreign’ mediators to advocate for the best interests of children interests when their parent dies and monitor the decisions of community mediators, including village courts.
- Raise awareness in communities (through peer-to-peer education or the radio) on links between child protection, legal protection and HIV and AIDS.
- Build capacity of volunteers or staff in existing NGOs and CBOs to provide paralegal support.
- Increase staffing of, and funding to, Provincial AIDS Councils to enable them to:
  - Create comprehensive databases of children affected by HIV and AIDS at district levels.
  - Coordinate welfare and legal issues facing children affected by HIV and AIDS.
- Government to provide and train peacemakers to prevent tribal fighting, as this will alleviate the displacement of people to urban settlements.

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93 In this context, study participants were referring to advocates who are independent of the families involved, rather than an expatriate.
9.2 Formal Recommendations: Strengthen national protection systems

In all communities, it was apparent that the formal system was largely considered irrelevant, compared with customary rules and practices in relation to inheritance. Those who wished to engage the protection of the formal system were often confronted with resistance from their community and the limited capacity of the formal service providers to ensure that inheritance rights were protected, particularly in the face of immense community pressure to resolve the matter within the family. Efforts must be made to reconcile child rights, the demands of the formal system and community expectations.

Recommendation 1: Strengthening existing legislation

- Amend the Wills, Probate and Administration Act
  - Review S35D in terms how this may affect children generally and the children of mixed marriages negatively.
  - Clarify the position of S84 vis-à-vis S35D, 35E, 84 in the light of S35B.
  - Include a framework specifically protecting vulnerable children:
    - Children affected by HIV and AIDS
    - Children with disabilities
    - Children born outside of customary or formal marriage
    - Children who are orphaned
    - Children of mixed marriage
    - Children of polygamous marriage
    - Children who have been adopted or fostered (informally or formally).
  - Include a concern for the extended family and those that have worked for the deceased in life in distributing the estate within the Wills, Probate and Administration Act.
    - It may be that people are reluctant to write wills, or adhere to their terms, if they feel that cultural obligations will suffer as a result, or that their children’s relations with the wider family (their traditional support mechanism) will be negatively affected.

Recommendation 2: Address gaps in legislation

- Introduce laws at provincial levels under section 42(1)(x) of the Organic Law in order to:
  - Provide a specific framework for dealing with the inheritance rights of children, with special attention to:
    - Children affected by HIV and AIDS
    - Children with disabilities
    - Children born outside of customary or formal marriage
    - Children who are orphaned
    - Children of mixed marriage
    - Children of polygamous marriage
    - Children who have been adopted or fostered (informally or formally).
  - Take into account customary rules and perceptions relating to children’s inheritance rights.
  - Link the laws to the Acts that cover the Village and District Courts, to enable these courts to enforce these laws.

- Review and amend the HAMP Act to explicitly proscribe discrimination against children, including the denial of their right to inheritance.
Recommendation 3: Review the Superannuation Fund documentation

- Establish a task force between the Law Reform Commission and Superannuation funds to:
  - Clarify whether the Superannuation fund documentation comes under the Wills, Probate and Administration Act
  - Draft guidelines to ensure that Funds encourage individuals to consider all their partners and children (and so avoid situations where the girl-child, or first, second or third wife, or partners in a de facto relationship are excluded).

Recommendation 4: Strengthen the capacity of the Public and Regional Curators

- National Government to strengthen security and transport for, and staffing capacity of, the Public and Regional curators to enable these officers to increase their efficiency.

Recommendation 5: Train Village Courts in the Wills, Probate and Administration Act

- Incorporate the focus on inheritance rights into the existing Village Courts trainings, including inductions, refresher training workshops and the child protection program and ensure that this training also reaches land mediators
- Train Village Courts Inspectors to monitor and report on cases that involve disputes regarding inheritance.

Recommendation 6: Raise awareness of Wills, Probate and Administration Act in communities

- Pursue educational and promotional efforts about the Wills, Probate and Administration Act (once amended) in rural and urban areas. Possible methods may include: posters, pamphlets, brochures, and the radio.
- Use radio as a tool to stimulate discussion at the community level over the wider issues pertaining to inheritance: rights of the girl-child in patrilineal districts, rights of those (including children) in settlements who have not returned home or fulfilled their obligations, rights of children affected by HIV and AIDS or children with special needs who may be unable to work the land, and how best children’s rights can be ensured within the cultural obligations that must be fulfilled and repaid.

Recommendation 7: Incorporate a concern for inheritance into voluntary counselling

- Incorporating discussion about inheritance rights of children of HIV positive people into HIV voluntary counselling sessions. This should include the provision of options for parents, including writing a will, informing children of the Wills, Probate and Administration Act, and re-establishing connections with land and kin if children have been dwelling in urban centres.

Recommendation 8: Provide legal information and paralegal aid to children

- Develop and distribute information materials for children. Examples may include: pamphlets, brochures, or plays.
- Develop and roll out a paralegal support program. This could include a network of mobile legal advisers to travel to schools or community venues, providing basic legal advice to children and youth; creating drop-in centres that provide legal information to children, or integrating trained personnel as part of the Department for Community Development’s Community Learning Development Centres.
Recommendation 9: Improve data management systems

Information pertaining to children affected by HIV and AIDS and other vulnerable children is sporadic and inconsistent, making policy formulation and planning efforts difficult. The Department for Community Development’s efforts to provide a database of vulnerable children should be prioritized.
- Develop a system for recording property disputes involving children, including the efforts taken on behalf of children affected by HIV and AIDS and other vulnerable children to protect their rights, including property rights.

Recommendation 10: Create national standards

- Create national standards through incorporating policy statements on children affected by HIV and AIDS, other vulnerable children and their inheritance rights into national strategies:
  - Incorporate inheritance rights into future revisions to the National Poverty Reduction Strategy.
  - Incorporate inheritance rights of children affected by HIV and AIDS into the upcoming review of the Papua New Guinea National Strategic Plan on HIV and AIDS 2006-2010 and the subsequent development of new Strategic Plan from 2011. Focus Area 6, Goal 1, should be revised to include a framework which enables NACS and PACS to deal specifically with the welfare and legal needs of children affected by HIV and AIDS. This should include obligations to collate and coordinate existing data pertaining to children affected by HIV and AIDS, compile database of NGOS and CBOs working on and with children affected by HIV and AIDS and provide legal and welfare advice and support.


- Whilst the entire strategy will contribute to the protection of vulnerable children, inheritance rights require the prioritisation of the:
  - development of a Charter of Rights for Children who are Orphaned, Adopted and Fostered that builds on the strengths of the wantok system and which is based on the best interests of the child, and include the concern for inheritance within this.
  - implementation of government and community based monitoring mechanisms for children in extended community care or alternative care, and include the concern for inheritance within this.

Recommendation 12: Prioritise the drafting of the Department for Community Development’s Child and Family Welfare Policy

- This policy should identify the relevant duty bearers with the responsibility for addressing inheritance rights violations, particularly in the context of the proposed examination, monitoring and improvement of the informal adoption and fostering practices.

Recommendation 13: Establish and strengthen the National MVC Implementation Committee.

- Strengthening the framework of the governmental body overseeing the protection of vulnerable children should include:
  - Creating a ministerial committee to oversee its progress
  - Increasing the size and capacity of the Secretariat
Include high level technical representation from the Departments of Finance and Treasury to support the Committee to access appropriate budget channels, and oversee the management of these budgets.

9.3 Formal Recommendations: Strengthen capacity of families and communities

Strengthening the formal system is a necessary but not sufficient condition for addressing the disjunction between communities’ organization of inheritance and the protection afforded by the formal legal system. As such, there is need for forging community based solutions and the utilisation of existing community based organizations. As noted above, informants stressed the desire to educate and strengthen families to accommodate and provide for children affected by HIV and AIDS or other vulnerable children. This is in line with Goals 1.5 and 1.6 of the National Goals and Directive Principles (NGDP) where:

(5) ‘the family unit [is] to be recognized as the fundamental basis of our society and for every step to be taken to promote the moral, economic and social standing of the Melanesian family’ and,

(6) ‘development [is] to take place primarily through the use of Papua New Guinean forms of social and political organization.’

Such an approach is also congruent with the Department for Community Development’s Integrated Community Development Policy, which ‘aims to address underlying causes and equip families and communities with the tools for self-reliance and mutual support’. This is based on the understanding that there needs to be greater focus on strengthening communities from the ‘inside-out’ rather than the ‘outside-in’. Policy Principles include: empowerment, self-reliance, sustainable development, holistic approach, recognising diversity, partnership, human rights, and cultural foundations. Incorporating HIV and AIDS into community development work is included in the priority action areas.

Recommendation 14: Strengthen existing support mechanisms in communities

**Extended Family**

- Reduce incentives for caregivers or extended families of children affected by HIV and AIDS or other vulnerable children to exploit these children or dispose of their property. This could include mechanisms to provide psychological and economic support through home visits, skill training programmes, and business grant programmes.

**Informal day care centres**

Informal day care centres for orphans relieve the pressure on extended families to provide for adopted children. A number of informal day care centres operate throughout PNG. These differ in whether they provide accommodation and food, and how often they are open a week. Many community members expressed concerns that separating children from their families too much would jeopardise their social ties and sense of belonging, and create dependency within the community.

- A comprehensive survey should be conducted of informal care centres and the nature and location of centres.
- Provide assistance to these centres to enable them to support families to care for vulnerable children. This should include the provision of material resources (clothes, food, and school fees), care and emotional support, education and the monitoring of their treatment within their homes. In the case of children affected by HIV and AIDS, caregivers should be educated on modes of transmission, treatments options and guidelines for responsible care of the child.
Council of elders, chiefs and community leaders

- Strengthen the capacity of leaders and role models to exercise their leadership for the protection of vulnerable groups. For example:
  - Providing material support or short term accommodation to vulnerable children.
  - Taking responsibility for ensuring that children affected by HIV and AIDS and other vulnerable children are told about customary or other information they may need in order to claim their inheritance.
  - Supporting children who are returning to their land to reintegrate with the community and claim their land.
  - Intervening or providing mediation when the family of an HIV positive parent or a child affected by HIV and AIDS experiences discrimination in the community.

Recommendation 15: Train communities to monitor children’s inheritance rights and act as independent advocates for children

- Train volunteers in CBOs and NGOs to act as independent advocates for orphaned or other vulnerable children. Their roles should include:
  - Assisting the child to identify their inheritance entitlements.
  - Ensuring that young children and their families are informed of the child’s inheritance rights.
  - In respect to the land, returning periodically to ensure that the land is not being cultivated by family members who intend to usurp the land rights on the basis that they have been working on the land.
  - Supporting children in making claims, informally or formally, if required.
  - Obtaining restraining orders to keep relatives from exercising ownership of properties to which they are not entitled.
  - Providing information and preparing, assembling and storing relevant documentation that children will require in asserting their property rights when they grow up, or if formal legal recourse is likely.

- Train Provincial and District Lukautim Pikinini Committees to identify vulnerable children and monitor the distribution of inheritance to which they are entitled.

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94 Nb. Representatives must not be from the community and have no personal interest in the property in question.

95 In the Highlands, it was deemed inappropriate for a boy to be supported by an advocate, as this was considered to represent weakness and a lack of capacity to assert a claim.
9.4 Formal Recommendations: Strengthen evidence building and knowledge management

Recommendation 16: Conduct further research on the links between children affected by HIV and AIDS and inheritance rights

- Support the Institute of Medical Research to develop a long term research agenda on the inheritance rights of children affected by HIV and AIDS and to use social research cadets to implement the research agenda.
- Incorporate an investigation into the inheritance rights of children affected by HIV and AIDS and other vulnerable children (particularly those living in urban areas) into the upcoming Department for Community Development research into street children.
- Incorporate an investigation into the inheritance rights of children affected by HIV and AIDS as a concern into the upcoming Research Advisory Council research agenda on HIV and AIDS.

Recommendation 17: Research into forms of polygamy, bride price, desertion and adoption and their relation to inheritance rights

- Child Welfare Council to lead the development of a national research agenda on child protection issues, including the impact of customary practices such as polygamy, bride price, desertion and adoption on child protection issues generally, and more specifically on inheritance rights.

Writing Wills

In the African context it has been suggested that will writing campaigns should be pursued. In PNG, as things stand now, this may be unwise for the following reasons: the capacity of the Public and Regional Curators, the accessibility of the Public and Regional Curators for the majority of the population, the fact that Village and District Courts can only deal with cases of intestacy, the potential of wills to exclude certain persons (girls, second wives etc), and the strength of custom (including the challenges faced by the Regional Curator in Mt Hagen). Nevertheless, if such an endeavour is to be implemented, pursuing educational and promotional efforts about will writing and the *Wills, Probate and Administration Act* in rural and urban areas may involve posters, pamphlets, brochures, and the radio. These efforts should include:

- information on what a will is
- information on the *Wills, Probate and Administration Act*
- the type of people to consider when drafting a will
- examples of how the legal system can help protect the interests of those kin specified in a will
- examples of how the legal system would act in regards to family members who ignore the will and attempt to grab property for themselves.

Similarly, assistance in will writing should also be provided. In this case, methods to explore how to assist parents living with HIV and AIDS to write wills and prepare property inventories could be negotiated with the Public Curator, NACS Care and Counselling Section, the Poro Sapot team, Sanap Wantaim, Igat Hope and other programmes providing support to people affected by HIV and AIDS. The caution offered by the Public Curator should also be considered – that children born outside of marriage are often excluded when wills are drafted. The promotion of child rights, including non-discrimination, should be encouraged by those supporting the drafting of wills (as well as considered in broader policy and legislative reforms).
Recommendation 18: Conduct research into how people living rurally and in settlements relate to the legal system

Strengthening laws and legal institutions to protect children may be of negligible effect if people do not seek legal recourse, or the manner in which people relate to the law and the legal system is not understood. Understanding people’s perceptions of, and reactions towards, law is crucial in terms of considering legal reform and development issues in regard to inheritance rights and beyond.

- Law Reform Commission to set up a working group to investigate this issue. This could start with social mapping to ascertain awareness, understanding and relevance of ‘law’ across PNG.

9.5 Formal Recommendations: Strengthen research methodologies

No country-specific guidelines exist for researchers conducting research with vulnerable populations in Papua New Guinea. Ratified international instruments, and provisions in the Lukautim Pikinini Act indicates that the Government supports the rights of communities to participate in research that affects them, however no oversight mechanisms are in place to monitor and oversee how research is conducted in the country.

Recommendation 19: Child Welfare Council to draft ethical guidelines for research in Papua New Guinea

- Guidelines should be drafted to ensure that child participation is prioritized in research involving children or on issues facing children. These guidelines should address the protection rights of children, especially vulnerable children.
- Ethical guidelines pertaining to community based research in general would also be advisable. Drawing on the experience of this research, these guidelines should address community concerns about how their contributions are used, timing (particularly when dealing with sensitive issues), research fatigue and how information will be fed back to communities. These guidelines should also cover the selection of researchers, and the specific skills required when dealing with children or other vulnerable groups.
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