

# CRIMINALIZATION AND LAW ENFORCEMENT:

THE PACIFIC'S IMPLEMENTATION OF CHAPTER III  
OF THE UN CONVENTION AGAINST  
CORRUPTION



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# INTRODUCTION



The United Nations Convention against Corruption (UNCAC) is the only legally binding, global anti-corruption instrument. The Convention was adopted by the General Assembly in October 2003 and entered into force in December 2005. As of 1 June 2016, 178 countries plus the European Union have become States parties to UNCAC,<sup>1</sup> representing a groundbreaking commitment to prevent and tackle corruption.

UNCAC is unique in its holistic approach, adopting prevention and enforcement measures, including mandatory requirements for criminalizing corrupt behaviours. The Convention also reflects the transnational nature of corruption, providing an international legal basis for enabling international cooperation and recovering proceeds of corruption (i.e. stolen assets). The important role of government, the private sector and civil society in fighting corruption is also emphasized. The Convention includes an implementation review mechanism (UNCAC Review Mechanism), requiring each State party to be reviewed periodically by two other States parties on its implementation of UNCAC. The Convention also calls on each State party to provide technical assistance and training, and exchange information for the purpose of strengthening implementation.

The aim of this report is to provide an overview of the implementation of UNCAC Chapter III (Criminalization and law enforcement) by States parties under review in the Pacific region until mid-2015 — namely, the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu. It is based on information included in the country review reports of these States.<sup>2</sup>

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<sup>1</sup> By becoming a State party to UNCAC (either through ratification, if the country has signed the treaty in accordance with article 67(1), or accession), the country agrees to become legally bound by the treaty at the international level. Depending on the specific legal system of the country, the Convention may need to be domesticated before it becomes legally binding at the national level.

<sup>2</sup> The information contained in the UNCAC review reports was provided before or during the country visits to the respective countries (see Annex I), which is the reason for why some of the information may be outdated. This report draws only on the information contained in the UNCAC review reports of the States parties in the Pacific region and contains no subsequent updates. The executive summaries are published documents and therefore country-specific details in these summaries are cited in the report. However, information in the UNCAC review reports of countries that have not published their full reports remains confidential; country names have not been used when referring to this information unless the nominated UNCAC Focal Point of the respective country has explicitly agreed.

The UNCAC Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention. The reviews were generally based on a self-assessment checklist, a country visit with all relevant stakeholders in-country and any supplementary information provided to the review team. It should be noted that the review reports are drafted by the experts of the reviewing countries (see Annex I) and facilitated by the UN Office on Drugs and Crime (UNODC). While there is a general consistency across the review reports, the varying information and level of detail contained in the reports made it difficult to easily draw comparisons across jurisdictions.

This report is prepared in order to compile the most common and relevant information on successes, good practices, challenges and observations contained in the review reports, organized by theme. It includes an analysis of related technical assistance needs and additional challenges faced by States parties in implementing the provisions of Chapter III of the Convention.

# OVERVIEW OF PACIFIC STATES PARTIES



Most Pacific States parties have a mixed legal system comprised of Acts of Parliament, common law and customary law. Most legal systems in the Pacific region are influenced by previous colonial eras, such as in Fiji and Vanuatu. For example, Vanuatu's sources of law vary as a result of the joint British-French administration before it gained independence in 1980. The Federated States of Micronesia, Palau and the Republic of the Marshall Islands were formerly part of the Trust Territory of the Pacific Islands; their governing systems are therefore influenced by and modeled after the American and its legal system.






## ***Ratification of the Convention***

State party	Signature	Ratification, Accession (a)	Entry into force
 Cook Islands		17 October 2011 a	16 November 2011
 Federated States of Micronesia		21 March 2012 a	20 April 2012
 Fiji		14 May 2008 a	13 June 2008
 Kiribati		27 September 2013 a	27 October 2013
 Nauru		12 July 2012 a	11 August 2012
 Palau		24 March 2009 a	23 April 2009
 Papua New Guinea	22 December 2004	16 July 2007	15 August 2007
 Republic of the Marshall Islands		17 November 2011 a	17 December 2011
 Solomon Islands		6 January 2012 a	5 February 2012
 Tuvalu <sup>3</sup>		4 September 2015 a	4 October 2015
 Vanuatu		12 July 2011 a	11 August 2011

<sup>3</sup> Tuvalu, having become a State party on 4 September 2015, is undergoing its review in the years 2015-16 and is therefore excluded from this publication.

## **Relevant Laws**

The table below provides a summary of each States parties' relevant laws cited in the UNCAC review reports.




State party	Relevant laws
Cook Islands 	<p>The <i>Constitution</i>; <i>Crimes Act 1969</i>; <i>Criminal Procedure Act 1980-81</i>; <i>Criminal Justice Act</i>; <i>Extradition Act 2003</i>; <i>Financial Transactions Reporting Act 2004</i>; <i>Illegal Contracts Act 1987</i>; <i>Mutual Assistance in Criminal Matters Act 2003</i>; <i>Mutual Assistance in Criminal Matters Amendment Act 2004</i>; <i>Police Act 2012</i>; <i>Proceeds of Crime Act 2003</i>; <i>Proceeds of Crime Amendment Act 2004</i>; and the <i>Secret Commissions Act 1994-95</i>.</p>
Federated States of Micronesia 	<p>The review of the Federated States of Micronesia focused on the national level. Although it was confirmed that the majority of the laws relevant for the implementation of the Convention at the state level were similar to the national level, the conduct of a review at the state level would be beneficial to assess if the provisions have also implemented the Convention.</p> <p>Relevant provisions were found in the <i>Federated States of Micronesia Code</i>. More specifically: Title 11 (<i>Revised Criminal Code Act</i>); Title 12 (<i>Code on Criminal Procedure</i>); Title 52 (<i>National Public Service System Act</i>); and Title 55 (<i>Budget Procedures Act 1981</i>). The Constitution was also cited.</p> <p>A bill to address whistleblower protection was under preparation.</p>
Fiji 	<p>The <i>Crimes Decree 2009</i>, which applies to conduct that occurred after February 2010; <i>Extradition Act 2003</i>; <i>Fiji Independent Commission Against Corruption (FICAC) Promulgation 2007</i>; <i>Financial Transactions Reporting Act 2004</i>; <i>Mutual Legal Assistance in Criminal Matters Act 1997</i> and its 2005 amendment; <i>Penal Code</i> (as amended); <i>Prevention of Bribery Promulgation 2007</i>; and the <i>Proceeds of Crimes Act 1997</i> (as amended in 2004).</p> <p>Other legal instruments relevant for the implementation of the Convention: the <i>Bail Act 2002</i>; <i>Public Service Act 1999</i>, including Public Service Code of Conduct; <i>Sentencing and Penalties Decree 2009</i>; <i>State Services Decree 2009</i>; and the <i>Prisons Act 1996</i>.</p>
Kiribati 	<p>The <i>Constitution</i>; <i>Criminal Procedure Code</i>; <i>Extradition Act</i>; <i>Mutual Assistance in Criminal Matters Act</i>; <i>Penal Code 1977</i>; <i>Proceeds of Crime Act 2003</i>; and the <i>Privileges, Immunities and Powers of the Maneaba Ni Maungatabu Act 1986</i>.</p>
Nauru 	<p>The <i>Anti-Money Laundering Act 2008</i>; <i>Constitution</i>; <i>Criminal Code 1899</i>; <i>Criminal Justice Act 1999</i>; <i>Criminal Procedure Act 1972</i>; <i>Extradition Act 1973</i>; <i>Mutual Assistance in Criminal Matters Act 2004</i>; <i>Proceeds of Crime Act 2004</i>; and the <i>Public Service Act 1998</i>.</p> <p>The <i>Criminal Code</i> was under review at the time of the country visit.</p>






Palau 	The <i>Anti-Money Laundering and Proceeds of Crime Act 2001 (Title 17, Palau National Code)</i> ; <i>Constitution</i> ; <i>Extradition and Transfer Act 2001</i> ; and the <i>Penal Code of Palau 2014 (Title 17, Palau National Code)</i> .
Papua New Guinea 	<p>The primary legal framework is based on the <i>Criminal Code Act 1974</i> and <i>Proceeds of Crimes Act 2005</i>.</p> <p>Other relevant legislation: the <i>Bail Act</i>; <i>Claims By and Against the State Act 1996</i>; <i>Commissions of Inquiry Act</i>; <i>Constitution</i>; <i>Correctional Service Act 1995</i>; <i>Extradition Act 2005</i>; <i>Mutual Assistance in Criminal Matters Act 2005</i>; <i>Organic Law on the Duties and Responsibilities of Leadership (Leadership Law)</i>; <i>Parole Act</i>; <i>Public Prosecutor (Office &amp; Functions) Act 1977</i>; and the <i>Summary Offences Act</i>.</p> <p>There were draft bills pending on the Independent Commission against Corruption and public conduct disclosure in the Corrupt Conduct Disclosure (Protection) Bill 2011.</p>
Republic of the Marshall Islands 	The <i>Banking Act</i> ; <i>Constitution</i> ; <i>Criminal Code</i> ; <i>Criminal Extradition Act</i> ; <i>Ethics in Government Act</i> ; <i>Mutual Assistance in Criminal Matters Act</i> ; <i>Proceeds of Crime Act</i> ; <i>Public Safety Act</i> ; and the <i>Rules of Criminal Procedure</i> .
Solomon Islands 	The <i>Companies Act (Cap 175)</i> ; <i>Constitution</i> ; <i>Correction Services (Amendment) Act 2008</i> ; <i>Criminal Procedure Code (Cap 7)</i> ; <i>Evidence Act 2009</i> ; <i>Extradition Act 2010</i> ; <i>Interpretation and General Provisions Act (Cap 85)</i> ; <i>Leadership Code (Further Provisions) Act 1999</i> ; <i>Money Laundering and Proceeds of Crime (Amendment) Act 2010</i> ; <i>Mutual Assistance in Criminal Matters Act 2002</i> ; <i>Penal Code (Cap 26)</i> ; and the <i>Public Service Commission Regulations 1998</i> .
Vanuatu 	The <i>Constitution</i> ; <i>Correctional Services Act 2006</i> ; <i>Criminal Procedure Code 2003</i> ; <i>Extradition Act 2002</i> ; <i>Financial Transactions Reporting Act 2005</i> ; <i>Government Contracts and Tenders Act 2001</i> ; <i>Interpretation Act 1982</i> ; <i>Leadership Code 1998</i> ; <i>Mutual Assistance in Criminal Matters Act 2005</i> ; <i>Penal Code 1988</i> ; <i>Proceeds of Crime Act 2012</i> ; <i>Public Prosecutor Act 2003</i> ; <i>Public Service Act</i> ; and the <i>Representation of the Peoples Act 1982</i> .

## **Anti-Corruption Bodies**

The table below provides a summary of each Pacific States parties' relevant anti-corruption bodies.

State Party	Key Anti-Corruption Bodies
Cook Islands 	The Cook Islands created a special Anti-Corruption Committee that includes key anti-corruption bodies: <ul style="list-style-type: none"> <li>• The Solicitor-General;</li> <li>• Commissioner of Police;</li> <li>• Head of the Financial Intelligence Unit;</li> <li>• Director of the Cook Islands Audit Office;</li> <li>• Financial Secretary of the Ministry of Finance and Economic Management;</li> <li>• Public Service Commissioner;</li> <li>• Chief of Staff of the Office of the Prime Minister; and</li> <li>• The Ombudsman.</li> </ul>
Federated States of Micronesia 	At the national level: <ul style="list-style-type: none"> <li>• The Department of Justice headed by the Secretary of Justice (otherwise known as the Attorney General);</li> <li>• National Police, including the Financial Intelligence Unit and Transnational Crime Unit; and</li> <li>• The Office of the National Public Auditor.</li> </ul>
Fiji 	<p>The Fiji Independent Commission Against Corruption was established under section 3 of the <i>Fiji Independent Commission Against Corruption Promulgation</i> on 4 April 2007. Its mission is to effectively spearhead the prevention and combating of corruption in order to promote integrity, transparency and accountability for the attainment of zero tolerance of corruption, good governance and sustainable development for the benefit of all citizens of Fiji.</p> <p>Anti-corruption institutions further included:</p> <ul style="list-style-type: none"> <li>• The Office of Public Prosecutions;</li> <li>• Office of the Attorney General;</li> <li>• Office of the Solicitor General;</li> <li>• Office of the Auditor General;</li> <li>• Financial Intelligence Unit; Police;</li> <li>• Public Service Commission;</li> <li>• Government Tender Board; and</li> <li>• The Ministry of Finance.</li> </ul>

There was further mention of the Anti-Money Laundering Council that ensures cooperation between the Director of Public Prosecutions and other relevant stakeholders including the judiciary, Parliamentarians, Independent Legal Services Commission, civil society, private sector and the media.

<p>Kiribati</p> 	<ul style="list-style-type: none"> <li>• The Office of the President;</li> <li>• Office of Attorney General;</li> <li>• Office of the Public Prosecutions;</li> <li>• Office of the Auditor General;</li> <li>• Police;</li> <li>• Financial Intelligence Unit;</li> <li>• Department of Prisons;</li> <li>• Ministry of Foreign Affairs; and</li> <li>• The Ministry of Finance and Economic Development.</li> </ul>
<p>Nauru</p> 	<ul style="list-style-type: none"> <li>• The Ministry for Justice and Border Control;</li> <li>• Office of Public Prosecutions;</li> <li>• Financial Intelligence Unit;</li> <li>• Department of Foreign Affairs and Trade;</li> <li>• National Police;</li> <li>• Nauru Correctional Services;</li> <li>• Audit Office; and</li> <li>• The Nauru Revenue Office/Department of Finance.</li> </ul>
<p>Palau</p> 	<ul style="list-style-type: none"> <li>• The Office of the Attorney General;</li> <li>• Office of the Ombudsman;</li> <li>• Office of the Special Prosecutor and Public Auditor;</li> <li>• Ethics Commission;</li> <li>• Bureau of Public Safety; and</li> <li>• The Financial Intelligence Unit.</li> </ul>

Papua New Guinea 	<ul style="list-style-type: none"> <li>• The Prime Minister and National Executive Council;</li> <li>• Department of Justice and Attorney General;</li> <li>• Department of Foreign Affairs and Trade;</li> <li>• Ombudsman Commission;</li> <li>• Auditor General's Office;</li> <li>• National Fraud and Anti-Corruption Directorate and the Financial Intelligence Unit under the Royal Papua New Guinea Constabulary; and</li> <li>• The Office of the Public Prosecutor.</li> </ul>
<p>The National Anti-Corruption Alliance consisted of all the relevant Government agencies, such as the Department of Justice and Attorney General, Office of the Public Prosecutor, Police, Ombudsman Commission, Prime Minister and National Executive Council, and the Office of the Solicitor General.</p>	
<p>The Independent Commission Against Corruption was approved by Cabinet on 25 August 2011 but was yet to be approved by Parliament. This is to become the principal anti-corruption institution of Papua New Guinea.</p>	
Republic of the Marshall Islands 	<ul style="list-style-type: none"> <li>• The Office of the Attorney General;</li> <li>• Office of the Auditor General;</li> <li>• National Police;</li> <li>• Public Service Commission;</li> <li>• Government Ethics Board; and</li> <li>• The Domestic Financial Intelligence Unit.</li> </ul>
Solomon Islands 	<p>The Solomon Islands created the Integrity Group Forum, which includes key anti-corruption bodies:</p> <ul style="list-style-type: none"> <li>• The Anti-Corruption Unit in the Police Force;</li> <li>• Central Bank of Solomon Islands;</li> <li>• Office of the Director of Public Prosecutions;</li> <li>• Corrections Service, Customs and Excise Division;</li> <li>• Leadership Code Commission;</li> <li>• Inland Revenue Division in the Ministry of Finance and Treasury;</li> <li>• Office of the Attorney General;</li> <li>• Office of the Auditor General; and</li> <li>• The Office of the Ombudsman.</li> </ul>
Vanuatu 	<ul style="list-style-type: none"> <li>• The Office of the Prime Minister;</li> <li>• Office of the Attorney General (State Law);</li> <li>• Office of the Public Prosecutor;</li> <li>• Office of the Ombudsman;</li> <li>• Public Service Commission;</li> <li>• Vanuatu Financial Intelligence Unit; and</li> <li>• The Fraud/Criminal Investigations Department and Transnational Crime Unit in the Vanuatu Police Force.</li> </ul>

# CHAPTER III: CRIMINALIZATION, LAW ENFORCEMENT AND JURISDICTION



Chapter III recognizes the importance of having a means by which to deter and punish corruption. The Convention requires States to establish criminal and other offences to cover corrupt acts, if these are not already crimes under their domestic law. It includes both mandatory provisions and recommendations to be considered by States parties. Chapter III also focuses on the public and private sectors.

This publication considers Chapter III of the Convention in two main sections. The first section focuses on offences that Pacific States parties are required to establish as crimes. These include bribery of national public officials, foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, laundering of proceeds of crime and obstruction of justice.<sup>4</sup> The acts covered by these offences are instrumental to the commission of corrupt acts and the ability of offenders to protect themselves and their illicit gains from law enforcement authorities. Their criminalization therefore constitutes the most urgent and basic part of a global and coordinated effort to counter corrupt practices.<sup>5</sup> The second section outlines the offences that Pacific States parties are required to consider establishing.

It is further to be noted that pursuant to UNCAC article 65(2), “Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption”. Pacific States parties may therefore view the Convention as introducing a minimum standard, but are able to go beyond to “adopt more strict and severe” anti-corruption measures.

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<sup>4</sup> Articles 15, 16(1), 17, 23 and 25.

<sup>5</sup> UNODC, *Legislative Guide for the Implementation of the UN Convention against Corruption* (New York, UN, 2006) p. 59.

## ■ “PUBLIC OFFICIAL”

A cross-cutting issue related to the implementation of UNCAC Chapter III concerns the scope of coverage of the term “public official”. “Public official” is defined in article 2 of the Convention:

“Public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party”.

The definition applies to all government branches, namely the legislative, executive (which the *Travaux Préparatoires* indicates includes the military<sup>6</sup>), administrative and judicial branches, as well as persons who perform a public function and officials of public agencies or enterprises. The officials need not be permanently employed or remunerated in order to fall under the scope of the definition. The Convention does not define the term “public enterprise”, meaning that its interpretation is left to the discretion of each State. It is a semi-autonomous definition in that it defines the notion regardless of domestic law, but allows for the consideration of local definitions.

Pacific States parties define “public official”, or “public servant” in line with the definition in article 2 of the Convention to varying degrees. The Federated States of Micronesia and Palau extends its definition of “public official” to persons who have been elected, appointed, hired or designated to become a public official but do not yet occupy the position. The Federated States of Micronesia further covers persons performing a service or a governmental enterprise if national funds are involved (for example, in the form of subsidies or shares held by the Government); such an extension of the definition was commended by the reviewing experts. The Republic of the Marshall Islands comprehensively defines “public servant” in accordance with article 2. Likewise, in Vanuatu, it was noted that any member of a public body would be widely interpreted to include Members of Parliament. However, the reviewing experts recommended that Vanuatu ensure that the definition of public officer covers the scope defined in article 2(a) of the Convention and includes a person who performs a public function for a public enterprise.

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<sup>6</sup> UNODC, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption*, A/58/422/Add.1, Note 38, 7 October 2003 (New York: UN, 2010), para. 2.

Several Pacific States parties did not define public official comprehensively or did not use consistent terminology when referring to a “public official”. For example, in Fiji, some statutes use interchangeable terminology such as “employed in the public service” and “public servant”. Nauru has neither adopted a comprehensive definition of “public official” nor “public servant” that extends to judicial officers, person performing public functions and other public officials in accordance with UNCAC article 2. The reviewing experts therefore recommended that, for greater legal certainty, Nauru adopt a comprehensive definition of public servants that extends to judicial officers, persons performing public functions and other public officials. Similarly, while Papua New Guinea’s definition covers a wide range of public officials, it was unclear whether unpaid persons, performing a public function, or providing a public service, were covered. It was therefore recommended that Papua New Guinea use express language to cover a comprehensive definition of public officials in legislation. The reviewing experts also recommended that the Solomon Islands consider amending its definition of “person employed in the public service” to include government ministers, consistent with recent case law.

## ■ **BRIBERY OF PUBLIC OFFICIALS**

Article 15 of the Convention requires States parties to criminalize the bribery of public officials. The Convention addresses both active bribery (the offering, giving or promising of an undue advantage) and passive bribery (the acceptance or solicitation of an undue advantage). The provision criminalizing the bribery of national public officials uses strong, binding terms: States parties must adopt legislative measures targeting the supply and demand of bribery. The distinction between the active and passive sides of the offence allows countries to more effectively prosecute corruption attempts and introduces a stronger dissuasive effect.<sup>7</sup>

The offence of bribery contains several elements. The specific actions that are criminalized are the offering, giving, promising, acceptance and solicitation of any “undue advantage.” The Convention does not define “undue advantage”, but it may be something that is tangible or intangible, whether pecuniary or non-pecuniary.<sup>8</sup> In addition, the bribe must be carried out in the individual’s official capacity, that is, “in the exercise of his or her official duties”. The illicit advantage need not be destined to the official, but any third party, whether a person or an entity, such as a family member or an organization of which the official is a member.

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<sup>7</sup> Legislative Guide, *op. cit.*, p. 64.

<sup>8</sup> *Ibid.*, p. 65.

## **Active Bribery**

The Convention requires States parties to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a public official, directly or indirectly, of an undue advantage. This advantage can be for the official him or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.<sup>9</sup>

The required elements of this offence are those of promising, offering or actually giving something to a public official. As stated above, the offence must cover instances where no gift or other tangible item is offered. The undue advantage may be tangible or intangible, whether pecuniary or non-pecuniary and must be linked to the official's duties.

The undue advantage does not have to be given immediately or directly to a public official. It may be promised, offered or given directly or indirectly. For example, the undue advantage may be given to some other person, such as a relative or political organization.

The required mental element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties. Importantly, since the conduct covers instances or the mere offer of a bribe—that is, instances where the bribe was not accepted and could therefore not have affected conduct—the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.<sup>10</sup>

All Pacific States parties have criminalized active bribery of public officials to varying degrees.<sup>11</sup> Gaps in the coverage of the offence of active bribery include:

- Cases involving third party beneficiaries are not clearly regulated;<sup>12</sup>
- For “benefits”, as defined in the law, to be in line with the definition of an “undue advantage”;<sup>13</sup>
- Not all public officials under the Convention are covered;<sup>14</sup> and

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<sup>9</sup> Article 15(a).

<sup>10</sup> In this regard, see article 28 that provides that “Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances”.

<sup>11</sup> Kiribati, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>12</sup> Federated States of Micronesia.

<sup>13</sup> Federated States of Micronesia.

<sup>14</sup> E.g. Nauru.



- The bribery provisions apply different terminology in reference to a bribe (i.e. property or benefit, gratification) which makes it unclear as to whether the definition of a bribe is affected by, among other things, its value and the results of having promised, offered or given it.<sup>15</sup>

Papua New Guinea has a general provision on corruption, but also one that is specific to particular groups that have been deemed more susceptible to corruption, namely those with an interest in contracts, judicial officers, witnesses and other officers involved in the administration of justice.

*The Cook Islands was commended for the criminalization of active and passive bribery of electors or any persons in order to induce such persons to procure or endeavour to procure favourable vote, as a practice conducive to the fight against corruption.*

*The Solomon Islands was commended for the breadth and diversity of its legislative and other measures taken to address bribery by public officials, leaders and customs officers, through criminal provisions as well as administrative bodies.*

*Papua New Guinea's coverage of extortion as a form of corruption was noted as a good practice. It ensures that those working in the public service are caught under one of the categories, plus they can be charged with more than one offence.*

### **Passive Bribery**

States parties must establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage. This advantage can be for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.<sup>16</sup> This offence is the passive version of the first offence.

<sup>15</sup> Papua New Guinea.

<sup>16</sup> Article 15(b).

The required elements are soliciting or accepting the bribe. The link with the influence on official conduct must also be established. As with the active version of the offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary. The mental element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.<sup>17</sup>

Passive bribery has been generally criminalized by Pacific States parties, but with the same limitations as noted above for active bribery. The reviewing experts therefore recommended that the gaps in coverage of bribery of public officials be addressed. For example:

- To include advantages or benefits for “another person or entity” (third-party beneficiaries) in corruption-related offences;<sup>18</sup> and
- Enact a comprehensive bribery offence covering all public officials in line with article 15.<sup>19</sup>

### **Challenges and Technical Assistance**

While four Pacific States parties did not list any challenges to implementing UNCAC article 15, six listed various challenges. For example, four States cited limited capacity and inadequacy of existing normative measures, respectively.

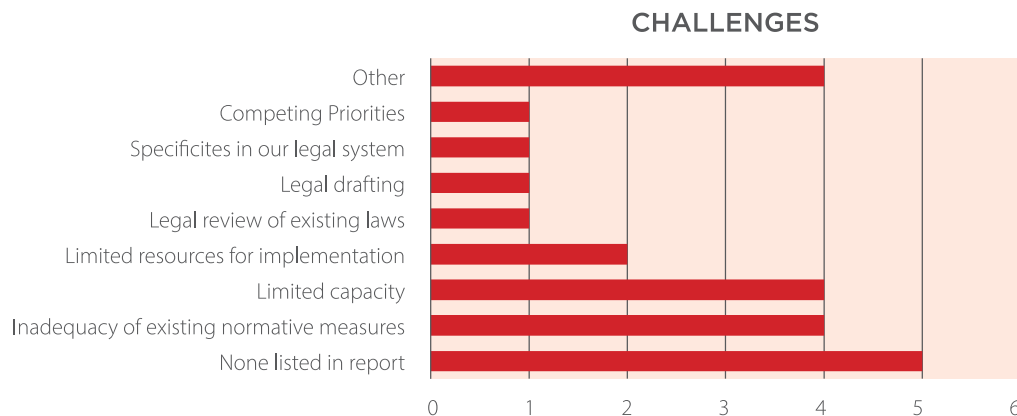
The numbers in the table below highlight the number of States that cited particular challenges to the implementation of this provision. It is to be noted that one State could also have listed more than one challenge.

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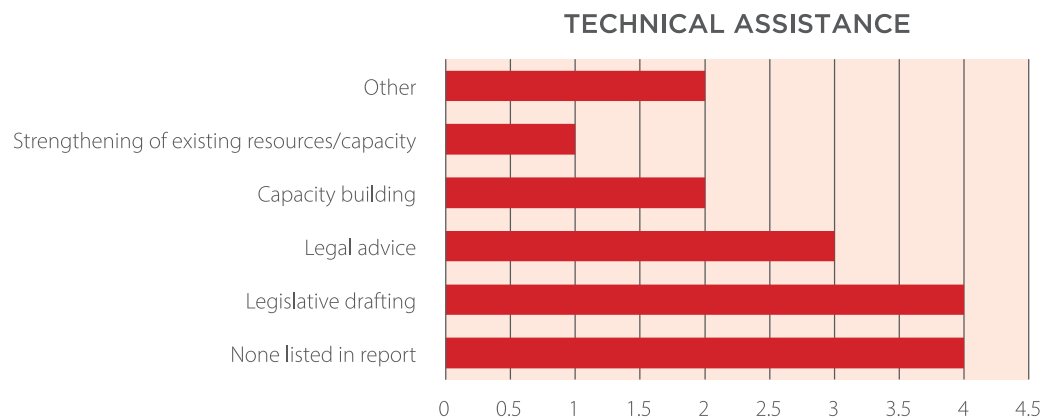
<sup>17</sup> See Article 28.

<sup>18</sup> Federated States of Micronesia.

<sup>19</sup> Nauru.



Four Pacific States parties also did not list any technical assistance requirements. However, four States requested legislative drafting and four States made quite specific requests for assistance including: public awareness raising; anti-corruption educational programmes; and training for investigators and prosecutors. One country indicated that some assistance had been provided.



## ■ **BRIBERY OF FOREIGN PUBLIC OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL ORGANIZATIONS**

Under article 16(1) of the Convention, States parties must establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage. This advantage can be for the official him or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

“Foreign public official” is defined in the Convention as:

“any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise”<sup>20</sup>.

The “foreign country” can be any other country. States parties’ domestic legislation must cover the definition of “foreign public official”. It is not adequate to consider that foreign public officials are public officials as defined under the legislation of the foreign country concerned.<sup>21</sup> An official of a public international organization is defined as “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization”<sup>22</sup>.

This offence mirrors active bribery in article 15. One difference is that it applies to foreign public officials or officials of a public international organization, instead of national public officials. The other difference is that the undue advantage or bribe must be linked to the conduct of international business, which includes the provision of international aid.<sup>23</sup>

While creating the offence of passive bribery by foreign public officials or officials of a public international organization is not mandatory, States must consider adopting such legislation. Further, the provisions of article 16 do not affect any immunities that foreign public officials or officials of public international organizations may enjoy under international law. As the interpretative notes indicates:

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<sup>20</sup> Article 2(b).

<sup>21</sup> Legislative Guide, *op. cit.*, p. 67.

<sup>22</sup> Article 2(c).

<sup>23</sup> Travaux Préparatoires, *op. cit.*, note 25.

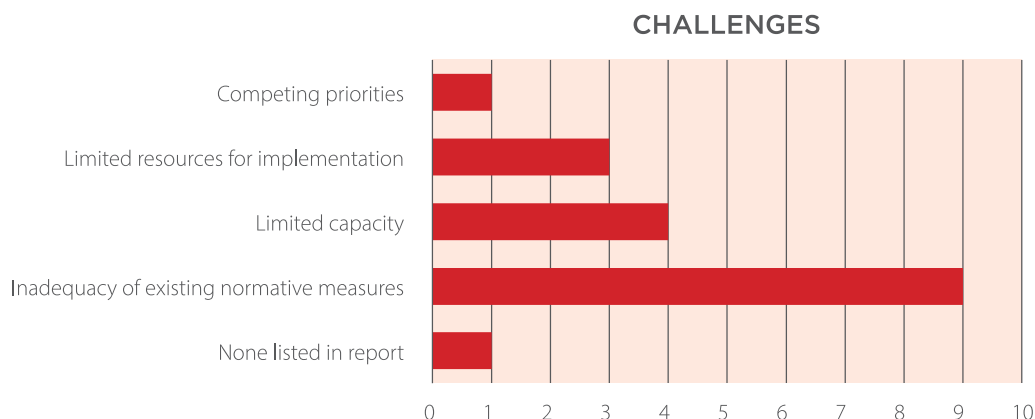
“The States Parties noted the relevance of immunities in this context and encourage public international organisations to waive such immunities in appropriate cases”<sup>24</sup>.

The majority of States parties in the Pacific have not adopted specific measures to criminalize both the active and passive forms of bribery of foreign public officials and officials of public international organizations.<sup>25</sup> Only Fiji and the Republic of the Marshall Islands have criminalized the active form, but not the non-mandatory passive form.

For those countries who have not implemented the provision, the reviewing experts universally recommended that such legislation be adopted to criminalize active bribery of foreign public officials and officials of public international organizations<sup>26</sup> and to consider criminalizing its passive form.<sup>27</sup>

### **Challenges and Technical Assistance**

In relation to UNCAC article 16, all Pacific States parties except the Cook Islands listed inadequacy of existing normative measures as a challenge to implementation.



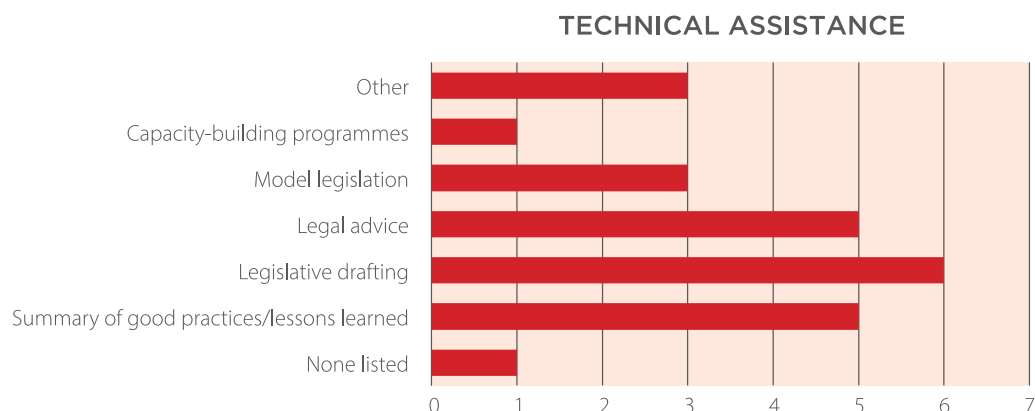
<sup>24</sup> *Ibid.*, para. 23; see also article 30(2) on immunities of national public officials; Legislative Guide, *op. cit.*, p. 68.

<sup>25</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>26</sup> Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>27</sup> Federated States of Micronesia, Kiribati, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

Of the nine Pacific States parties that identified technical assistance needs to support their implementation of article 16, the main types of assistance identified were: legislative drafting; legal advice and a summary of good practices and lessons learned. States had not received any assistance, aside from Palau that had received a copy of the *Malaysian Anti-Corruption Commission Act 2009*, containing a provision that complies with article 16.



## ■ **EMBEZZLEMENT, MISAPPROPRIATION OR OTHER DIVERSION OF PROPERTY BY A PUBLIC OFFICIAL**

Article 17 of the Convention requires States parties to establish the offence of embezzlement, misappropriation or other diversion of property, funds, securities or any other item of value entrusted to a public official in his or her official capacity, for the official's benefit or the benefit of others.<sup>28</sup> The required elements of the offence are embezzlement, misappropriation or other diversion by public officials of items of value entrusted to them by virtue of their position. The offence must cover instances where these acts are for the benefit of the public official, or another person or entity.<sup>29</sup>

<sup>28</sup> Legislative Guide, *op. cit.*, p. 63.

<sup>29</sup> *Ibid.*, p. 69.

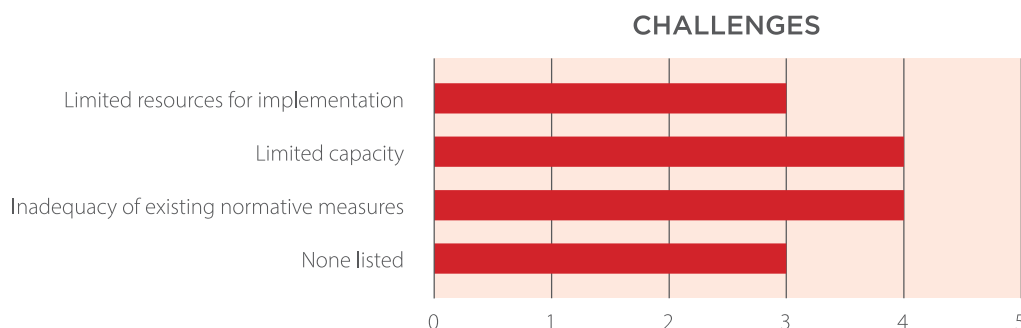
For the most part, States parties have sufficiently adopted criminal offences to address embezzlement, misappropriation or other diversion of property by a public official.<sup>30</sup> While some Pacific States parties' coverage is broad, applying not just to public officials, but to any person as well as company directors, members and officers,<sup>31</sup> others have gaps in the extent of coverage of their legislative provisions. These gaps include:

- Coverage is limited to the embezzlement of certain types of property;<sup>32</sup>
- Theft covers only inanimate and moveable “things” that are the property of “any person”;<sup>33</sup> and
- The term ‘property’ is more narrowly defined than in article 2 of the Convention and could prevent successful prosecutions.<sup>34</sup>

The reviewing experts therefore recommended that these States adopt a comprehensive offence of embezzlement, misappropriation and diversion of property in line with article 17.

### **Challenges and Technical Assistance**

Four Pacific States parties cited limited capacity and inadequacy of existing normative measures as challenges to their implementation of UNCAC article 17, while three States cited limited resources.



<sup>30</sup> Cook Islands (partially), Federated States of Micronesia, Fiji, Kiribati, Nauru (partially), Palau, Papua New Guinea (partially), Republic of the Marshall Islands, Solomon Islands and Vanuatu (partially).

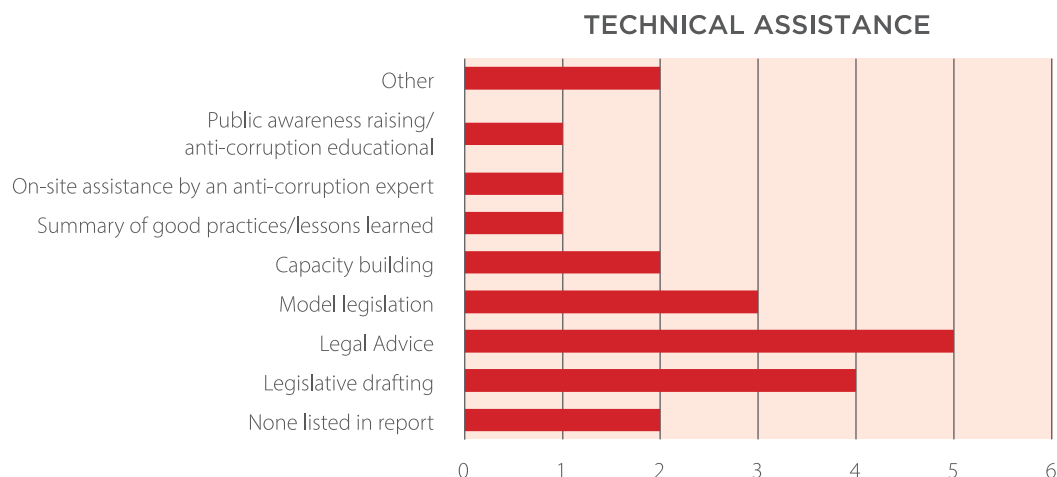
<sup>31</sup> Fiji.

<sup>32</sup> Nauru.

<sup>33</sup> Nauru.

<sup>34</sup> Vanuatu.

Pacific States parties most often requested technical assistance in the form of legal advice and legislative drafting. No State party had received any assistance in relation to this provision.



## ■ **TRADING IN INFLUENCE**

Article 18 of the Convention requires that States parties consider establishing as criminal offences, when committed intentionally:

- The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State party an undue advantage for the original instigator of the act or for any other person (active form); and
- The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State party an undue advantage (passive form).

While the provisions of article 18 mirror article 15, one main difference is that the offence in article 18 involves using one's real or supposed influence to obtain an undue advantage for a third person from an administration or public authority of the State.



For the most part, Pacific States parties have implemented<sup>35</sup> or partially implemented<sup>36</sup> trading in influence. Gaps in the coverage of the offence include:

- Cases of real<sup>37</sup> or supposed influence<sup>38</sup> are not covered;
- Third party beneficiaries;<sup>39</sup>
- Limited to cases of pecuniary benefits rather than any “undue advantage”;<sup>40</sup>
- Do not extend to all public officials;<sup>41</sup>
- Falls short in that the agent or person must have been given valuable consideration for them to show favour or disfavour;<sup>42</sup>
- Uncertainty as to what was understood by an “undue advantage”;<sup>43</sup> and
- No penalty was stated for such an offence.<sup>44</sup>

Notably, trading in influence is not criminalized in the current legislation of the Cook Islands.

The reviewing experts recommended that Pacific States parties that have partially implemented the provision to consider extending their scope relative to trading in influence in line with the Convention.<sup>45</sup> In particular, States were urged to consider adopting or amending legislation that would:

- Criminalize the trading in influence in line with article 18 of the Convention;<sup>46</sup>
- Cover the abuse of supposed influence;<sup>47</sup>
- Criminalize the passive form of trading in influence;<sup>48</sup>
- Allow for the criminalization of trading in influence in a more clear and explicit manner;<sup>49</sup> and
- Extend the criminalization of passive trading in influence to such a solicitation or acceptance, as well as “any other person” and “real or supposed influence”.<sup>50</sup>

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<sup>35</sup> Fiji, Palau and the Republic of the Marshall Islands.

<sup>36</sup> Federated States of Micronesia, Kiribati, Nauru, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>37</sup> Solomon Islands.

<sup>38</sup> Federated States of Micronesia, Kiribati, Nauru and the Solomon Islands.

<sup>39</sup> Federated States of Micronesia.

<sup>40</sup> Federated States of Micronesia.

<sup>41</sup> Nauru and Papua New Guinea (only speaks to agent and a person, but not to public officers).

<sup>42</sup> Papua New Guinea.

<sup>43</sup> Papua New Guinea.

<sup>44</sup> Papua New Guinea.

<sup>45</sup> Federated States of Micronesia, Nauru and Papua New Guinea.

<sup>46</sup> Cook Islands, Federated States of Micronesia, Nauru and Papua New Guinea.

<sup>47</sup> Kiribati.

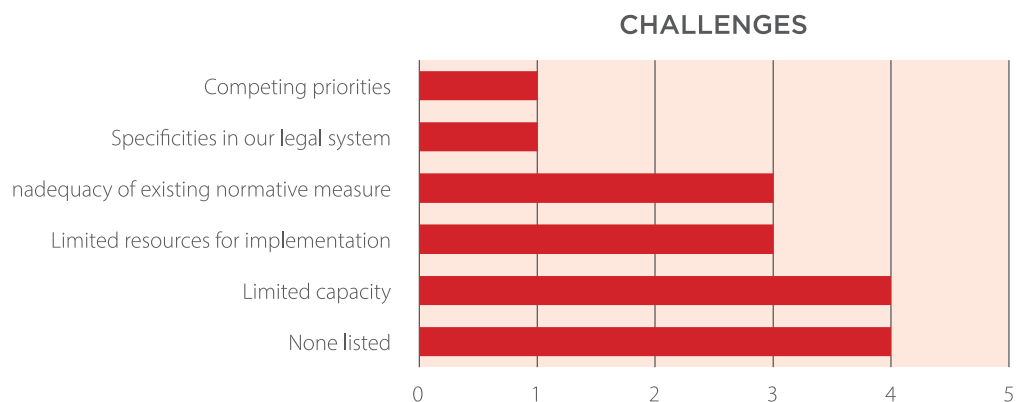
<sup>48</sup> Republic of the Marshall Islands and the Solomon Islands.

<sup>49</sup> Vanuatu.

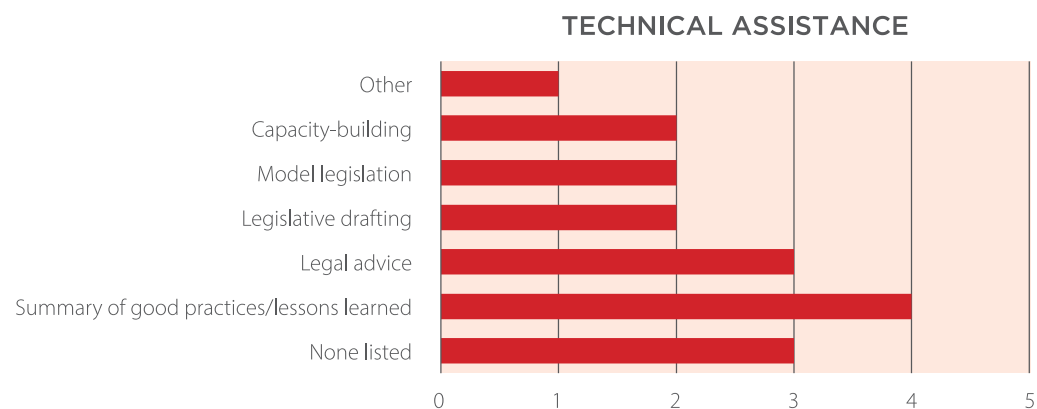
<sup>50</sup> Papua New Guinea.

## **Challenges and Technical Assistance**

The most commonly cited challenges to the implementation of UNCAC article 18 were limited capacity, limited resources for implementation and inadequacy of existing normative measures.



Four States requested technical assistance in the form of a summary of good practices/lessons learned, while three listed legal advice. No assistance had been provided in relation to this provision.



## ■ **ABUSE OF FUNCTIONS**

Article 19 of the Convention requires States parties to consider criminalizing the abuse of functions. This is the performance of or failure to perform an act, in violation of the law, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for him or herself or for another person or entity.<sup>51</sup> This provision encourages the criminalization of public officials who abuse their functions by acting or failing to act in violation of laws to obtain an undue advantage. This offence may encompass various types of conduct, such as improper disclosure by a public official of classified or privileged information.<sup>52</sup>

Implementation of this article varies across Pacific States parties. Several States have implemented article 19,<sup>53</sup> while others have partially implemented the provision.<sup>54</sup> However, many do not have a general, broad provision that criminalizes the abuse of functions. Rather, elements of the offence are found in different legislative provisions. For example, in the Federated States of Micronesia, abuse of functions is criminalized in various sections of the *Federated States of Micronesia Code*, including those relating to conflict of interest, criminalization of speculating or wagering on the basis of official action or information, and the criminalization of breach of post-employment restrictions.

Palau was commended on the breadth of section 3917(a) of Title 17 *Palau National Code*, as it allows for a wide application of the offence of misconduct in public office. Section 3917(a), which criminalizes abuse of functions, provides that a person who, being a public official, does any illegal acts under the colour of office, or who wilfully neglects to perform the duties of his or her office as provided by law, shall be guilty of misconduct in public office.

However, limitations on the coverage of Pacific States parties' offences of abuse of functions include that the offence is limited to: arbitrary acts prejudicial to the rights of another and does not extend to any violation of law committed by a public official in the discharge of official functions;<sup>55</sup> and coverage only extends to leaders not all public officials.<sup>56</sup> Several States were recommended to consider enacting legislative measures that would more comprehensively criminalize abuse of functions in line with UNCAC article 19<sup>57</sup> and to consider criminalizing abuse of function for all public officials (for example, in Vanuatu, only leaders are covered

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<sup>51</sup> Legislative Guide, *op. cit.*, p. 83.

<sup>52</sup> Travaux Préparatoires, *op. cit.*, note 31.

<sup>53</sup> Fiji, Kiribati, Palau, Republic of the Marshall Islands and the Solomon Islands.

<sup>54</sup> Federated States of Micronesia, Nauru, Papua New Guinea and Vanuatu.

<sup>55</sup> Nauru.

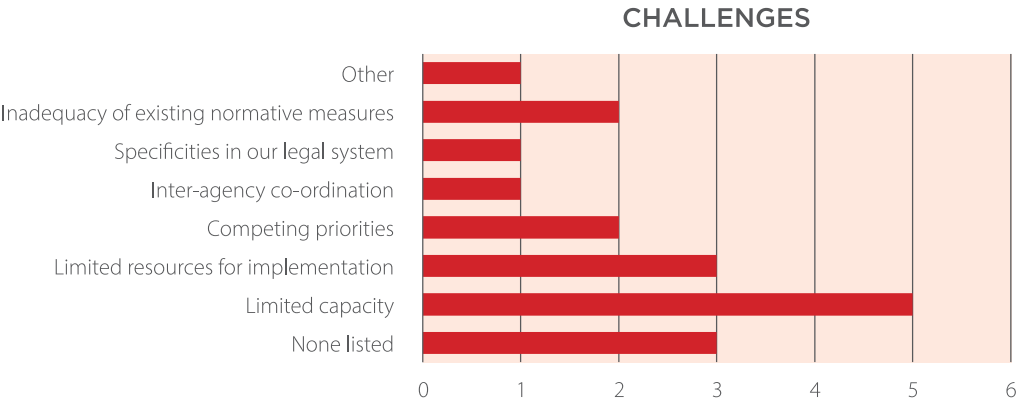
<sup>56</sup> Vanuatu.

<sup>57</sup> Federated States of Micronesia, Nauru and Papua New Guinea.

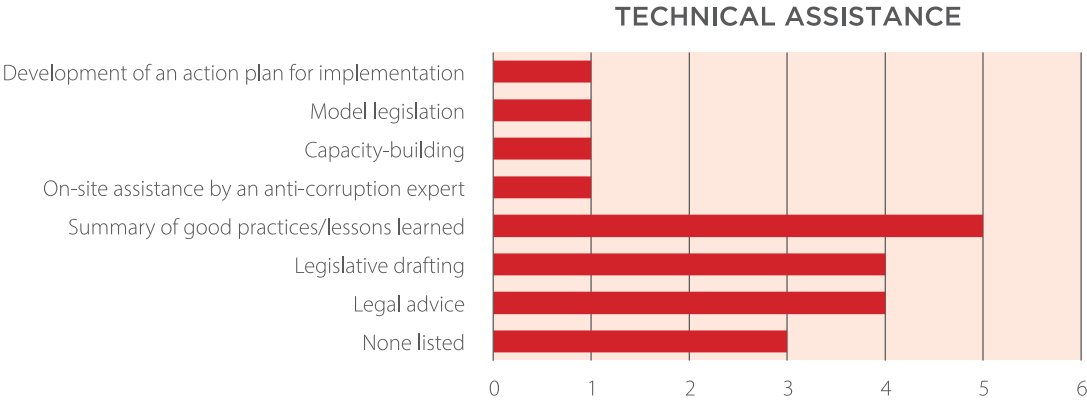
under the *Leadership Code*). The Cook Islands had not implemented this provision. It was therefore recommended that the Cook Islands consider criminalizing abuse of functions as a separate offence in line with article 19 of the Convention.

***Challenges and Technical Assistance***

Limited capacity was the most commonly cited challenge to the implementation of UNCAC article 19.



Pacific States parties commonly requested technical assistance in the form of a summary of good practices/lessons learned, legislative drafting and legal advice. No technical assistance had been provided to States in relation to this provision.



## ■ **ILLICIT ENRICHMENT**

Article 20 of the Convention requires States parties to consider criminalizing illicit enrichment by public officials. This is a significant increase in assets that a public official cannot reasonably explain.

Most Pacific States parties have not made illicit enrichment a criminal offence.<sup>58</sup> However, certain public officials are required to submit declarations of assets and interests,<sup>59</sup> which are generally contained in the Pacific States parties' Leadership Code/Law,<sup>60</sup> or a Code of Conduct.<sup>61</sup> For example, Vanuatu's *Leadership Code* provides for a system of asset declarations (annual returns) for leaders. A leader who does not file a return or files a return knowing that it is false is guilty of breach. It was noted that while declarations have not been made public, the pending Freedom of Information legislation may change this.

In Fiji, section 10 of the *Prevention of Bribery Promulgation* provides that a prescribed officer who maintains a standard of living or is in control of resources or property, which is disproportionate to their emoluments, is guilty of an offence unless a satisfactory explanation can be provided. At the time of the review of Fiji, there had been no cases under this section. While there was no asset and income disclosure regime for elected and public officials in Fiji, Ministers were said to disclose their assets and interests to the Prime Minister, and annual financial disclosures to the Fiji Independent Commission Against Corruption under *Fiji Independent Commission Against Corruption Standing Orders*. Public disclosure had not been contemplated in Fiji at the time of the review. The Republic of the Marshall Islands' *Criminal Code* specifically criminalizes illicit enrichment in a similar fashion to the offence created under Fiji's *Prevention of Bribery Promulgation*.

The reviewing experts recommended that those Pacific States parties that had not done so, consider adopting legislation to make illicit enrichment a criminal offence.<sup>62</sup> The Cook Islands was also recommended to consider introducing a national system of asset and conflict of interest declarations and a means of verification.

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<sup>58</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>59</sup> Papua New Guinea, Solomon Islands and Vanuatu.

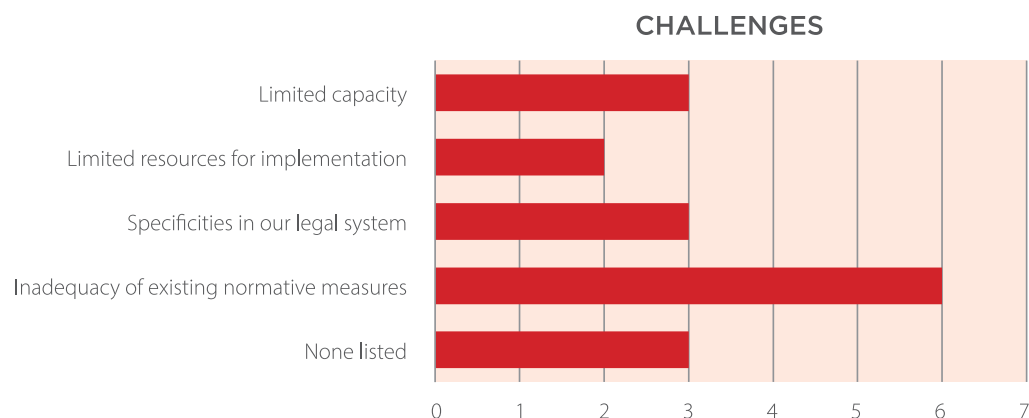
<sup>60</sup> Papua New Guinea, Solomon Islands and Vanuatu.

<sup>61</sup> Nauru.

<sup>62</sup> Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu.

## ***Challenges and Technical Assistance***

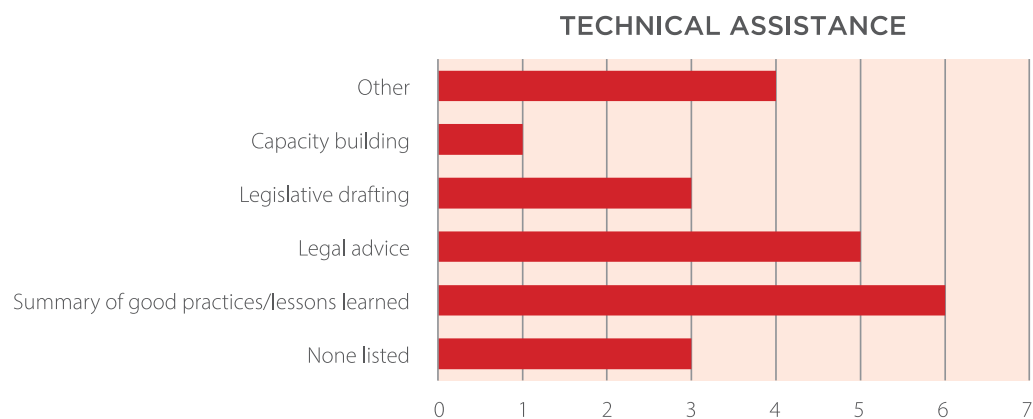
Six Pacific States parties cited inadequacy of existing normative measures as a challenge to implementation of UNCAC article 20.



Pacific States parties most often requested technical assistance in the form of a summary of good practices/lessons learned and legal advice. Other specific requests for assistance included:

- Assistance in developing and implementing an asset and income declaration system for public officials;
- Technical training and capacity building programmes, and an improvement of the content management system;
- Assistance to speed up the law reform process; and
- Transparent filing and publication system of annual returns.

No technical assistance had been provided, but Palau had received section 36 of the Malaysian *Anti-Corruption Commission Act 2009* for its consideration.









# PRIVATE SECTOR OFFENCES

## ■ **BRIBERY AND EMBEZZLEMENT IN THE PRIVATE SECTOR**

Articles 21 and 22 of the Convention mirror the provisions of articles 15 and 17, respectively, and are intended to cover conduct confined entirely to the private sector, where there is no contact with the public sector at all.<sup>63</sup> These two articles of the Convention highlight the importance of requiring integrity and honesty in economic, financial or commercial activities.<sup>64</sup> Both articles are not mandatory.

Article 21 of the Convention requires States parties to consider criminalizing bribery in the private sector. Article 22 requires States parties to consider criminalizing embezzlement of property in the private sector in the course of economic, financial or commercial activities. These are each considered, in turn, below.

## ■ **BRIBERY IN THE PRIVATE SECTOR**

While Fiji and Palau have criminalized bribery in the private sector,<sup>65</sup> most States have not criminalized either the active or passive forms of bribery in the private sector.<sup>66</sup> Accordingly, these States parties were recommended to do so.

Some States were found to have only partially implemented the provision. In the Cook Islands, sections 4 and 5 of its *Secret Commissions Act* criminalize the bribery of agents where such “gifts” are given corruptly and are applicable to bribery in both the public and private sectors. The concept of “agents” is broadly construed and covers both government officials and persons with managerial functions in private sector entities. Although persons with managerial functions are covered as subjects of the offence, the general employees of a private sector entity cannot be prosecuted for similar violations. The reviewing experts

<sup>63</sup> Legislative Guide, *op. cit.*, p. 86.

<sup>64</sup> *Ibid.*, p. 85.

<sup>65</sup> Fiji: section 149(b), *Crimes Decree 2009* and section 9(2), *Prevention of Bribery Promulgation*, but for conduct that occurred before February 2010, section 376, *Penal Code* is relevant; Palau: provisions governing bribery in the private sector were found in section 3000, Title 17, *Palau National Code*.

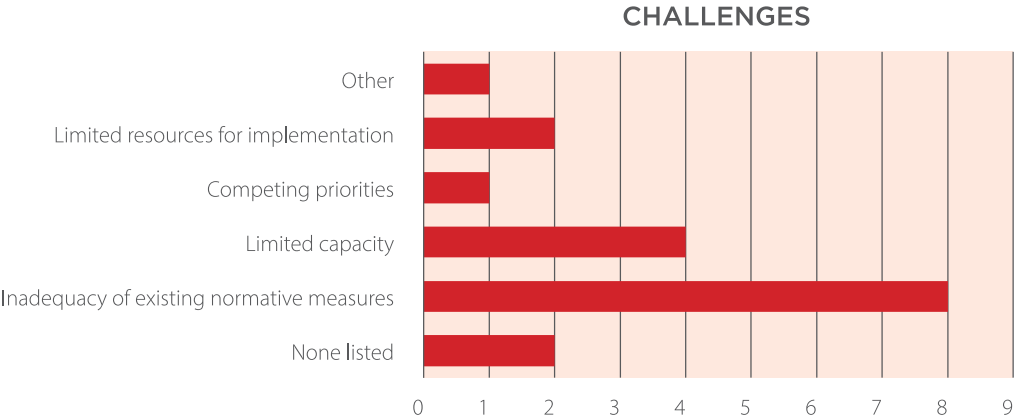
<sup>66</sup> Federated States of Micronesia, Kiribati, Nauru, Papua New Guinea and Vanuatu.

therefore recommended that the Cook Islands consider clearly criminalizing active and passive bribery of any person who works in any capacity for a private sector entity in line with article 21.

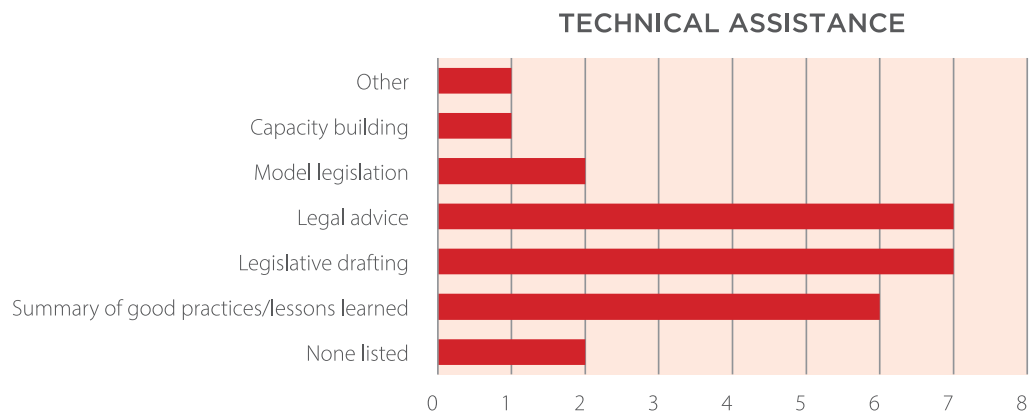
The Republic of the Marshall Islands and the Solomon Islands have also partially implemented the provision. In the Republic of the Marshall Islands, the scope of perpetrators (i.e. trustee, lawyer) is limited and the offence is classified as a misdemeanour. The Republic of the Marshall Islands was recommended to consider adopting legislation to broaden the scope of the law, extending it to any person who directs or works for a private sector entity and to increase the existing penalty of a ‘misdemeanour’ for bribery in the private sector. In the Solomon Islands, the scope of the legislation applies to agency cases exclusively. The reviewing experts noted that it may be beneficial to consider broader legislation to meet the scope of the Convention. It was therefore recommended that the Government consider adopting legislation to broaden the scope of the law making bribery in the private sector a criminal offence, extending to any person who directs or works for a private sector entity.

***Challenges and Technical Assistance***

Eight Pacific States parties cited inadequacy of existing normative measures as their main challenge to implementing UNCAC article 21.



Seven Pacific States parties requested technical assistance in the form of legal advice and legislative drafting. No assistance had been provided in relation to this provision.



## ■ **EMBEZZLEMENT IN THE PRIVATE SECTOR**

In comparison, most Pacific States parties have criminalized embezzlement in the private sector in accordance with article 22 of the Convention.<sup>67</sup> Implementation of the article was generally covered in a number of provisions in Pacific States parties' domestic legislation, although not necessarily as a separate provision specifically addressing embezzlement in the private sector.

For example, in the Federated States of Micronesia, embezzlement in the private sector could be addressed through the provisions on theft and criminal mischief (see UNCAC article 17). In Nauru, a number of provisions were relevant to embezzlement in the private sector, in particular those provisions regarding the fraudulent appropriation of property and false statements by officials of companies. However, the reviewing experts noted the same limitations as in the case of embezzlement in the public sector and therefore recommended that Nauru may wish to expand its offence of embezzlement to fully cover embezzlement in the private sector.

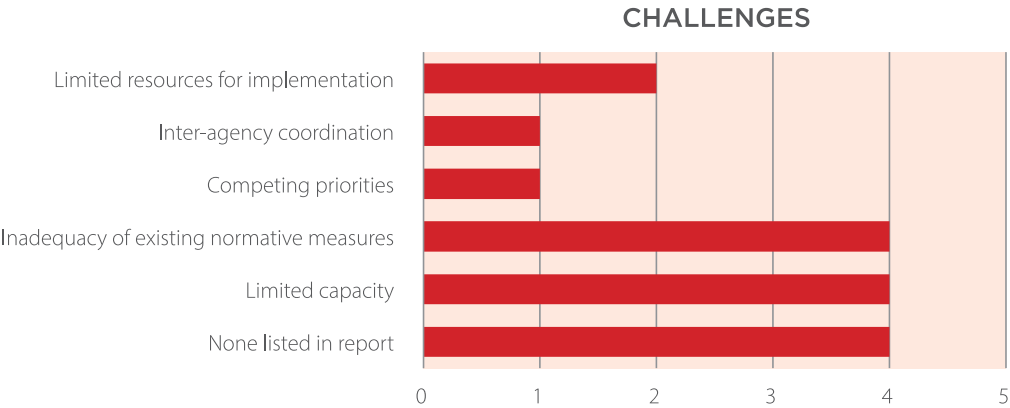
The Republic of the Marshall Islands only partially implemented this provision as its *Criminal Code* only covers "property that has been entrusted to such person as a fiduciary" and the penalty is classified as a misdemeanor. The reviewing experts therefore recommended that the Republic of the Marshall Islands consider adopting legislation to broaden the scope of the law in relation to embezzlement in the private sector in order to cover all private sector bodies. In Vanuatu, the provisions for embezzlement criminalize those acts for "all persons" and therefore include embezzlement and misappropriation in the private sector. However, it was noted that the narrow definition of property could prevent successful prosecutions.

<sup>67</sup> Cook Islands, Fiji, Kiribati, Palau and the Solomon Islands.

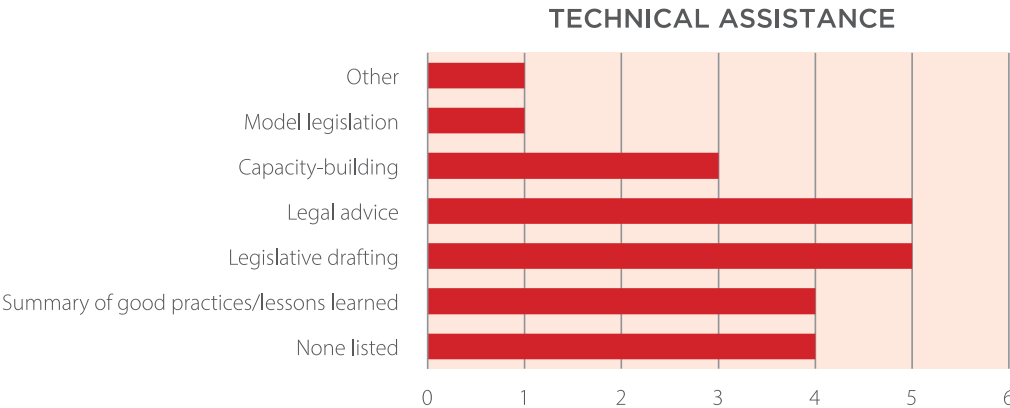
Papua New Guinea had not implemented this provision and was therefore recommended to adopt such legislative and other measures as may be necessary to criminalize embezzlement or other diversion of property in the private sector.

***Challenges and Technical Assistance***

Four Pacific States parties cited inadequacy of existing normative measures and limited capacity as their challenges to implementing UNCAC article 22.



Five Pacific States parties requested legal advice and legislative drafting. No technical assistance had been provided to States in relation to this provision.



# DERIVATIVE OFFENCES



## ■ MONEY-LAUNDERING

Money-laundering is the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence. The social consequences of allowing money to be laundered can be disastrous. Taking the proceeds of crime from corrupt public officials, traffickers and organized criminal groups is considered an effective way to stop their criminal activities.<sup>68</sup>

UNCAC article 23 establishes offences in relation to money-laundering. It is essential that States parties try to make their approaches, standards and legal systems related to this offence compatible, so that they can cooperate with one another in controlling the international laundering of criminal proceeds.<sup>69</sup> The Convention therefore seeks to provide a minimum standard for all States.

In accordance with article 23, States parties must establish the following offences as crimes:

- The conversion or transfer of the proceeds of crime; and
- The concealment or disguise of the nature, source, location, disposition, movement or ownership of the proceeds of crime.

Subject to the basic concepts of their legal system, States must also criminalize:

- The acquisition, possession or use of the proceeds of crime; and
- The participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by article 23.

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<sup>68</sup> UNODC, *Introduction to money-laundering*, <http://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuaside>.

<sup>69</sup> Legislative Guide, *op. cit.*, p. 70.

States parties must also apply these offences to proceeds generated by a wide range of predicate offences. “Predicate offence” is defined as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention”<sup>70</sup>. Article 23 requires that the list of predicate offences include the widest possible range and, at a minimum, the offences established in accordance with the Convention.

Money-laundering offences established in accordance with this article are understood to be independent and autonomous offences. Moreover, a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and, in accordance with article 28, any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances.<sup>71</sup>

Generally, Pacific States parties have legislatively implemented the required elements of the offence of money-laundering as stipulated by article 23.<sup>72</sup> However, there are some gaps in coverage, discussed in detail under the specific provisions below. In addition, there have been limited examples of implementation of the various Pacific States parties’ legislation on money-laundering. However, both Nauru and the Republic of the Marshall Islands each reported the successful prosecution of a money-laundering case.

There were some general overarching recommendations made to Pacific States parties. For example, the reviewing experts noted that in the Federated States of Micronesia, due to incoherent language, some elements of the offence of money-laundering were only comprised in one section or another which may cause gaps and potential challenges in implementation. It was therefore recommended that the Federated States of Micronesia harmonize and consolidate its money-laundering provisions. The reviewing experts also recommended that Nauru monitor the risk of money-laundering going forwards to ensure the effective implementation of its anti-money laundering legislation.

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<sup>70</sup> Article 2(h).

<sup>71</sup> Travaux Préparatoires, *op. cit.*, note 32.

<sup>72</sup> Cook Islands: section 280A, *Crimes Act*; Federated States of Micronesia: sections 903,918, *Federated States of Micronesia Code*; Fiji: *Proceeds of Crimes Act 1997* (as amended) and sections 327-330, *Crimes Decree 2009*; Kiribati: sections 6, 12 and 13, *Proceeds of Crime Act 2003*; Nauru: sections 2 and 3, *Anti-Money Laundering Act*; Palau: section 3301, Title 17 *Palau National Code, Anti-Money Laundering and Proceeds of Crime Act 2001*; Papua New Guinea: *Proceeds of Crime Act*, in particular, section 34 (Money-laundering) and section 35 (possession of property suspected of being proceeds of crime); Republic of the Marshall Islands: *Banking Act*; Solomon Islands: section 17, *Money Laundering and Proceeds of Crimes (Amendment) Act 2010*; Vanuatu: section 11, *Proceeds of Crime Act 2012*.

### **Conversion or Transfer of the Proceeds of Crime**

The first offence under article 23 is the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase real estate. The term “proceeds of crime” means “any property derived from or obtained, directly or indirectly, through the commission of an offence”<sup>73</sup>. The conversion or transfer must be intentional—the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act(s) must be done for the purpose of either concealing or disguising their criminal origin.

Generally, Pacific States parties have criminalized the offence of conversion or transfer of the proceeds of crime.<sup>74</sup> Interestingly, in Nauru, on the conversion or transfer of property, there is no requirement to prove that it is “for the purpose of concealing or disguising the illicit original of the property”.

The Republic of the Marshall Islands only penalizes a person who “renders assistance” to the conversion or transfer of property and to concealing or disguising the true nature, origin, location, disposition, movement or ownership of such property. The reviewing experts therefore recommended the Republic of the Marshall Islands amend its money-laundering provisions to comply with article 23.

### **Concealment or Disguise of the Proceeds of Crime**

The second money-laundering offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of rights with respect to property, knowing that such property is the proceeds of crime.<sup>75</sup> The concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act.

Generally, Pacific States parties have criminalized the offence of concealment or disguise of the proceeds of crime.

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<sup>73</sup> Article 2(e).

<sup>74</sup> See, for example, Cook Islands: section 280A 2(b), Crimes Act.

<sup>75</sup> Article 23(1)(a)(ii).

The Republic of the Marshall Islands noted that its legislation does not penalize a person who is involved in the conversion or transfer of property, or concealment or disguise, only a person who “renders assistance”. The reviewing experts noted that, as provided for in the Mutual Evaluation Report of the Asia/Pacific Group on Money Laundering of 2011, “to “render assistance” is to “aid and abet” which is more of an ancillary offence to money-laundering”<sup>76</sup>. However, there is no definition of “render assistance” in the country’s relevant legislation. It was therefore recommended that the Republic of the Marshall Islands amend its legislation to comply with the provision under review.

### **Acquisition, Possession or Use of the Proceeds of Crime**

The third offence is the acquisition, possession or use of the proceeds of crime knowing, at the time of receipt, that such property is the proceeds of crime.<sup>77</sup>

Pacific States parties have generally implemented this provision, although one State was recommended to consider amending its relevant legislation to include the “use of property” as an instrumentality.

### **Participation and Attempt**

The fourth set of offences involves the participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by article 23.<sup>78</sup>

Pacific States parties have generally implemented this provision. However, the reviewing experts noted that although Nauru has adopted measures that mostly cover the participatory acts outlined in article 23(1)(b)(ii), acts of participation and association do not seem to be specifically covered. The reviewing experts therefore recommended Nauru address participatory acts to money-laundering outlined in article 23(1)(b)(ii).

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<sup>76</sup> Asia/Pacific Group on Money Laundering, *Mutual Evaluation Report of the Republic of the Marshall Islands*, p. 30.

<sup>77</sup> Article 23(1)(b)(i).

<sup>78</sup> Article 23(1)(b)(ii).



## ***Predicate Offences***

Under article 23, States parties must apply these above offences to proceeds generated by “the widest range of predicate offences.”<sup>79</sup> At a minimum, these must include a “comprehensive range of criminal offences established in accordance with this Convention”<sup>80</sup>. Dual criminality is necessary for offences committed in a different national jurisdiction to be considered as predicate offences. The Convention acknowledges that some States do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. In this regard, the Convention allows for the non-application of the money-laundering offences to those who committed the predicate offence.<sup>81</sup>

Pacific States parties adopted a ‘serious offence’<sup>82</sup> or ‘threshold’<sup>83</sup> approach to predicate offences.

Serious offences and the threshold applied to predicate offences by Pacific States parties are those:

- Punishable by imprisonment for a term of more than one year under the law of the Federated States of Micronesia or any of its states or under the law of a foreign State, in relation to acts or omissions, which, had they occurred in Federated States of Micronesia would have constituted such an offence. All Convention offences, as far as they are criminalized in Federated States of Micronesia, constitute serious offences, except obstructing the administration of law or other governmental functions;
- Offences punishable by imprisonment for 12 months or longer or a fine of over AU\$500 in Kiribati. This would exclude some Convention offences that are misdemeanours;
- Where the “maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months” in the Republic of the Marshall Islands, which includes most UNCAC offences;

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<sup>79</sup> Article 23(2)(a).

<sup>80</sup> Article 23(2)(b).

<sup>81</sup> Article 23(2)(e).

<sup>82</sup> Federated States of Micronesia, Fiji, Kiribati, Republic of the Marshall Islands and Vanuatu.

<sup>83</sup> Nauru, Palau and Papua New Guinea.

- Offences against Vanuatu law where the minimum threshold is 12 months imprisonment or where, if the offence were committed overseas, it would have amounted to a minimum of VT 10 million, had the offence occurred in Vanuatu. All corruption-related offences are serious offences according to this definition;
- For which the penalty is not less than 12 months imprisonment or a fine of NZ\$5,000 which covers all the offences established in accordance with the Convention under Cook Islands law;
- That is a felony, or any act committed abroad, which constitutes an offence in that country and could have constituted a felony had it occurred in Palau, that is, a crime with a sentence of a term of imprisonment that is in excess of one year; and
- Crimes that have a penalty from three years' imprisonment to death in Papua New Guinea.

Most Pacific States parties' anti-money laundering laws also apply to conduct occurring outside of the State party. However, in Papua New Guinea, its *Proceeds of Crime Act* does not include any provisions on the extraterritoriality of the underlying offence.

Several Pacific States parties' approach for predicate offences includes most, but not all, UNCAC offences. The reviewing experts therefore recommended that these States ensure that the proceeds and instrumentalities from the widest range of predicate offences, including UNCAC offences, are subject to confiscation, freezing and seizure.<sup>84</sup>

In the Solomon Islands, its relevant domestic legislation does not designate predicate offences, but applies to all proceeds of crime. It is not necessary to prove which crime was committed. The Government reported that this statute also applies to acts or omissions taking place outside of Solomon Islands, so long as the conduct would satisfy the dual criminality requirement. The reviewing experts recommended that the Solomon Islands consider amendments to its legislation to expressly permit jurisdiction in cases where the underlying offence occurred entirely outside the territory of the Solomon Islands.

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<sup>84</sup> E.g. Nauru.

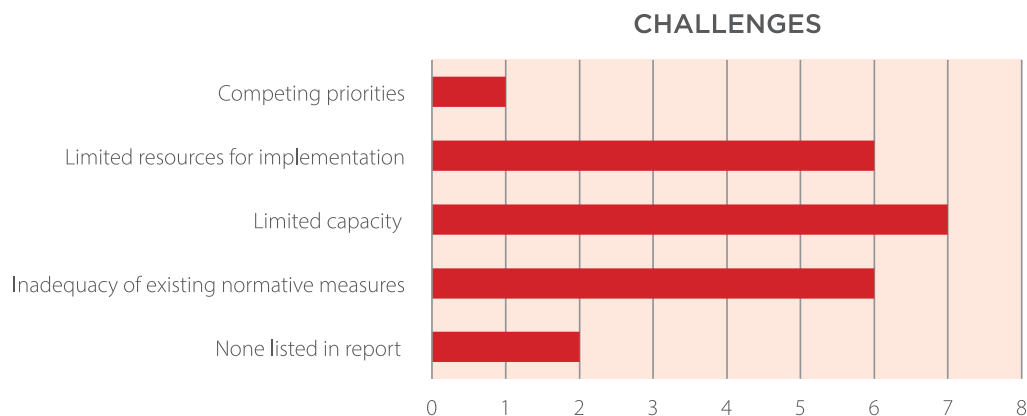
### **Copies of Anti-Money Laundering Laws**

States parties must furnish copies of their laws giving effect to article 23 and of any subsequent changes to such laws to the Secretary-General of the United Nations.<sup>85</sup>

Most Pacific States parties had not provided their anti-money laundering laws to the Secretary General,<sup>86</sup> and it was therefore generally recommended that these States do so.<sup>87</sup> The Solomon Islands noted that it was in the process of officially furnishing copies of its money-laundering legislation to the Secretary-General of the United Nations and Papua New Guinea also noted its intention to do so.

### **Challenges and Technical Assistance**

The most commonly cited challenges in the implementation of UNCAC article 23 were limited capacity, limited resources for implementation and an inadequacy of existing normative measures.



<sup>85</sup> Article 23(2)(d).

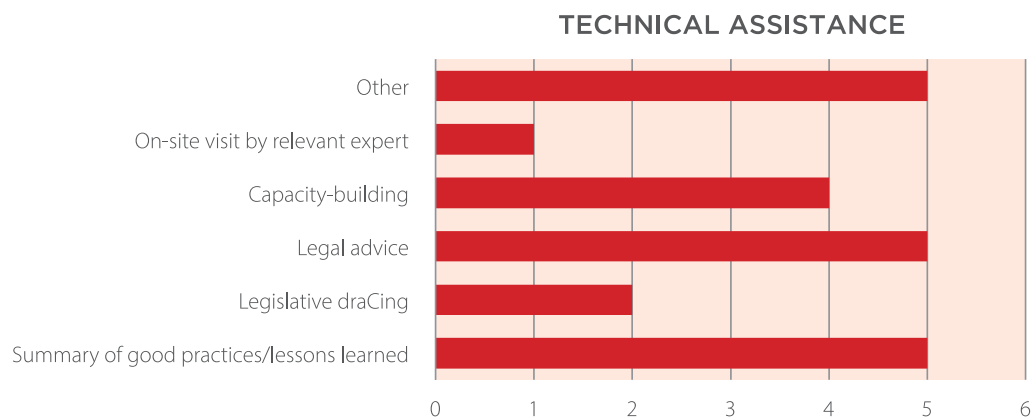
<sup>86</sup> Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>87</sup> Kiribati, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands, Federated States of Micronesia and Vanuatu.

Pacific States parties commonly requested technical assistance in the form of legal advice and a summary of good practices/lessons learned. Other specific requests for assistance included:

- Independent in-country expert assistance working with national counterparts, in particular in investigating money-laundering offences;
- Training for the police, the Financial Intelligence Unit and prosecutors on money-laundering;
- Training for law enforcement officials on how to detect politically exposed persons;
- Information about the procedure for officially furnishing its money-laundering laws to the Secretary-General of the United Nations;
- Forensic accounting; and
- The proper establishment of the Financial Intelligence Unit.

Some forms of technical assistance had been provided to some States, generally in the form of trainings. Those that had received technical assistance noted that an extension and expansion of such assistance would be helpful.



## ■ CONCEALMENT

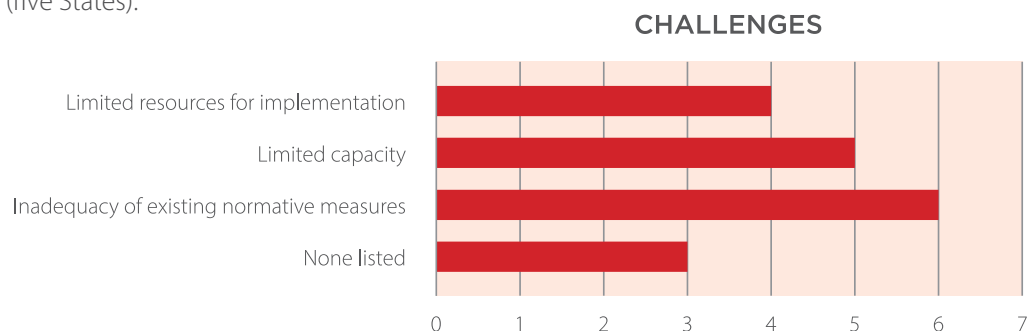
The Convention recommends the criminalization of concealment, which is an offence facilitative of or furthering all other offences established in accordance with the Convention and closely related to the money-laundering provisions of article 23.<sup>88</sup> In other words, States parties should consider establishing as a criminal offence, concealment or continued retention of property in other situations besides those set forth in article 23, where the person knows that the property is the result of any of the offences established in the Convention.

Pacific States parties have either implemented<sup>89</sup> or partially implemented<sup>90</sup> this provision. For those that have partially implemented the provision, the reviewing experts noted the following concerns:

- Concealment is not criminalized separately from the money-laundering provisions;<sup>91</sup> and
- The continued retention of criminal proceeds does not seem to be covered.<sup>92</sup>

### ***Challenges and Technical Assistance***

The main challenges cited by Pacific States parties on the implementation of UNCAC article 24 included an inadequacy of existing normative measures (six States) and limited capacity (five States).



<sup>88</sup> Legislative Guide, *op. cit.*, p. 87.

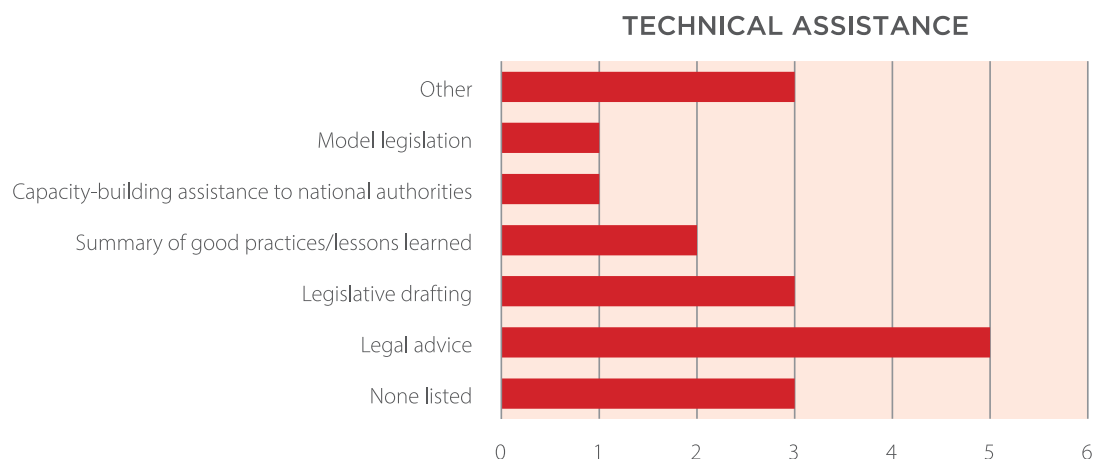
<sup>89</sup> Fiji, Kiribati, Palau, Papua New Guinea, Republic of the Marshall Islands and the Solomon Islands.

<sup>90</sup> Cook Islands (most elements covered); Federated States of Micronesia, Nauru and Vanuatu.

<sup>91</sup> Federated States of Micronesia.

<sup>92</sup> Nauru.

Five Pacific States parties requested technical assistance in the form of legal advice. No technical assistance had been provided in relation to this provision.



## ■ OBSTRUCTION OF JUSTICE

The Convention requires States parties to adopt measures aimed at ensuring the integrity of the justice process. Under UNCAC article 25, States must criminalize the use of inducement, threats or force in order to interfere with witnesses and officials, whose role would be to produce accurate evidence and testimony. This article complements the provisions addressing the related issues on the protection of witnesses, experts and victims<sup>93</sup> and of reporting persons,<sup>94</sup> as well as international cooperation. Specifically, article 25 requires the establishment of two offences.

The first relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. States parties are required to criminalize the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences established in accordance with the Convention.<sup>95</sup> The obligation is to criminalize the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence.

<sup>93</sup> Article 32.

<sup>94</sup> Article 33.

<sup>95</sup> Article 25(a).

The second requires States parties to establish the criminalization of interference with the actions of judicial or law enforcement officials: the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with the Convention.<sup>96</sup>

Most Pacific States parties have criminalized both offences of obstruction of justice under article 25(a)<sup>97</sup> and article 25(b).<sup>98</sup> It was observed that for the Solomon Islands, its domestic legislation may not provide sufficient scope for interference with witnesses. It was also observed that the applicable offence and penalties only rise to the level of a misdemeanour. Therefore, the reviewing experts recommended that the Solomon Islands consider adopting necessary legislative amendments.

In addition, to ensure full coverage of these provisions, the reviewing experts made the following recommendations:

- Adopt legislation addressing obstruction of justice against justice officials, as provided in article 25;<sup>99</sup>
- Amend legislation addressing obstruction of justice to ensure that the related offences are subject to appropriate penalties upon conviction;<sup>100</sup>
- Strengthen measures to criminalize the interference with witnesses who provide evidence or give testimony;<sup>101</sup>
- Explicitly criminalize the use of physical force to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding;
- Criminalize the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice as required by the provision under review;
- Consider more clearly stipulating the elements of the use of physical threats, threats or intimidation or any member of the police; and
- Amend the current law to impose higher penalty requirements.

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<sup>96</sup> Article 25(b); Legislative Guide, *op. cit.*, pp. 75-76.

<sup>97</sup> Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands and Vanuatu.

<sup>98</sup> Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea and the Republic of the Marshall Islands.

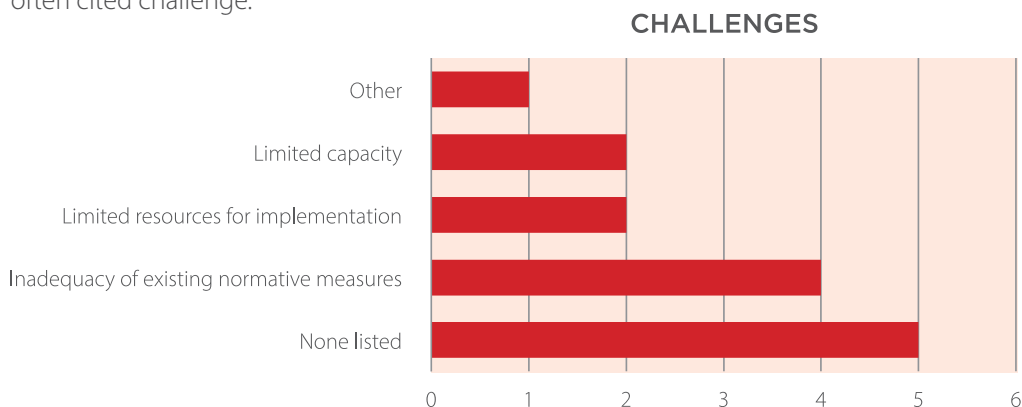
<sup>99</sup> Solomon Islands.

<sup>100</sup> Papua New Guinea and the Solomon Islands.

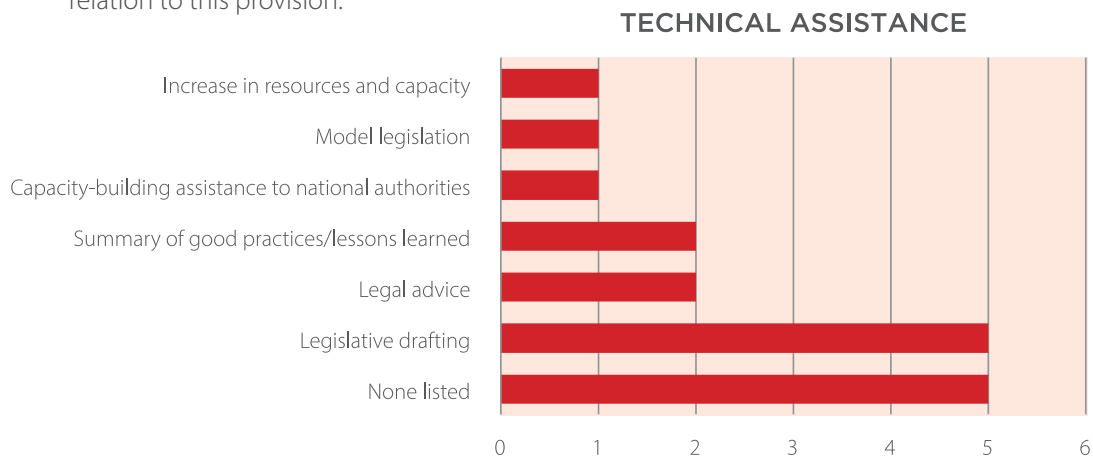
<sup>101</sup> Kiribati.

## ***Challenges and Technical Assistance***

Five Pacific States parties did not cite any challenges to implementation of UNCAC article 25. However, of those that did, an inadequacy of existing normative measures was the most often cited challenge.



Similarly, five Pacific States parties did not list any technical assistance requests. Of those that did, legislative drafting was cited by five States. No technical assistance had been provided in relation to this provision.





## ■ LIABILITY OF LEGAL PERSONS

The Convention requires that the liability for offences be established both for natural and legal persons. UNCAC article 26 requires States parties to take the necessary steps, in accordance with their fundamental legal principles, to provide for the liability of legal persons. This liability can be criminal, civil or administrative, therefore accommodating the various legal systems and approaches.<sup>102</sup> At the same time, the Convention requires that the monetary or other sanctions that will be introduced must be effective, proportionate and dissuasive.<sup>103</sup> This specific provision complements the more general requirement of UNCAC article 30(1) that sanctions must take into account the gravity of the offence.<sup>104</sup>

Most Pacific States parties provide for the criminal liability of legal persons.<sup>105</sup> Criminal liability of legal persons is generally provided through the definition of ‘person’ in Pacific States parties’ Interpretation Act or other domestic legislation.<sup>106</sup>

Several Pacific States parties provided that fines, in addition to or instead of punishment, may be imposed on legal persons.<sup>107</sup> Palau allows for administrative sanctions and can terminate or restrict the business of the person convicted and increase the penalty by one third. Other administrative forms of punishment include deregistration.<sup>108</sup> In Vanuatu, in most cases, the law does not regulate separate penalties for natural and legal persons, except for money-laundering offences under its *Proceeds of Crime Act*. It was noted by several Pacific States parties that the available range of sentences and sanctions do not appear to be effective and sufficiently dissuasive for legal persons. Therefore, several countries were recommended to set forth in legislation effective, proportionate and dissuasive sanctions against persons, including legal persons, for the commission of UNCAC offences<sup>109</sup> and to consider further measures of sanctions such as blacklisting.

There were no examples of implementation provided and therefore the reviewing experts noted it was difficult to test the legislative provisions.

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<sup>102</sup> Legislative Guide, *op. cit.*, p. 91.

<sup>103</sup> *Ibid.*, p. 92.

<sup>104</sup> *Ibid.*, p. 93.

<sup>105</sup> Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Vanuatu.

<sup>106</sup> Cook Islands (*Crimes Act*), Federated States of Micronesia (sections 104(9) and 903(13), *Federated States of Micronesia Code*), Fiji (*Crimes Decree 2009, Penal Code and Prevention of Bribery Promulgation* read together with the *Interpretation Act*), Nauru (*Interpretation Act*), Papua New Guinea (*Interpretation Act 1975*), Vanuatu (*Interpretation Act*, Schedule to section 2), Solomon Islands (*Interpretation and General Provisions Act*), Republic of the Marshall Islands (section 1.13(8), *Criminal Code*).

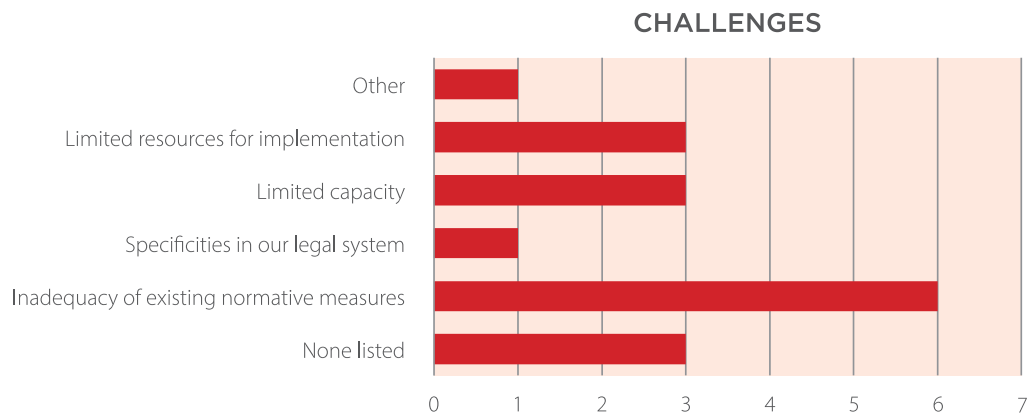
<sup>107</sup> Kiribati and Palau.

<sup>108</sup> Republic of the Marshall Islands and the Solomon Islands.

<sup>109</sup> Federated States of Micronesia, Republic of the Marshall Islands and the Solomon Islands.

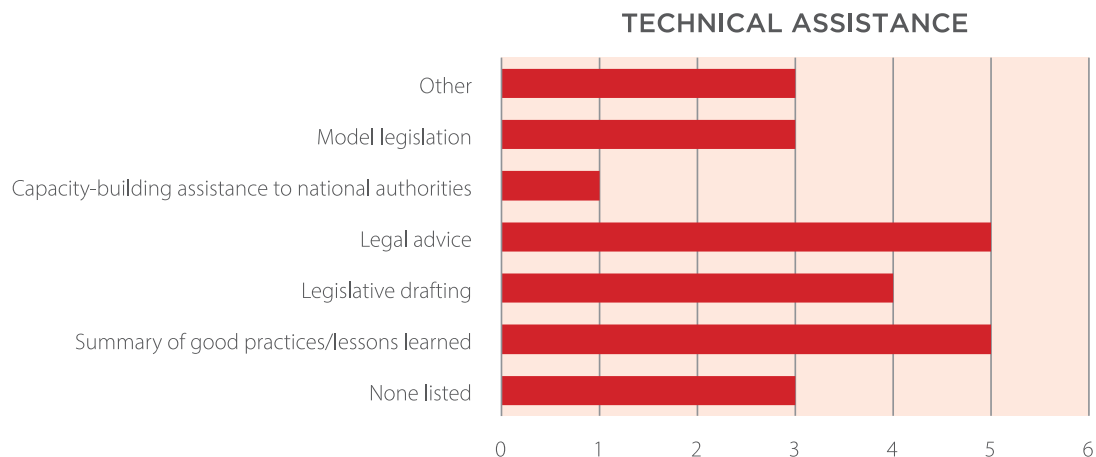
## ***Challenges and Technical Assistance***

Six Pacific States parties cited an inadequacy of existing normative measures as a challenge to their implementation of UNCAC article 26. One other specific challenge cited was the ability to keep legislation up-to-date.



Common requests for technical assistance included legal advice and a summary of good practices/lessons learned by five Pacific States parties. Other specific requests generally referred to assistance in developing legal specifications of fines or clear guidelines to define what sanctions would be applicable to legal persons, ensuring that they are effective, proportionate and proportionate (civil and criminal).

Papua New Guinea had received assistance on legal policy. However, it was noted that an extension or expansion of such assistance would assist in the implementation of this provision.



## ■ **PARTICIPATION AND ATTEMPT**

Article 27 of the Convention requires that States parties establish as a criminal offence, in accordance with their domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention.<sup>110</sup> This article was intended to capture different degrees of participation, but was not intended to create an obligation for States parties to include all of those degrees in their domestic legislation.<sup>111</sup> In addition, States parties may wish to consider the criminalization, consistent with their domestic law, of attempts to commit an offence (article 27(2)) or the preparation of an offence (article 27(3)) established in accordance with the Convention.

Most Pacific States parties have criminalized participation and attempt,<sup>112</sup> but have not fully criminalized the preparation of an offence. While Palau, Papua New Guinea and the Republic of the Marshall Islands have criminalized the preparation of an offence, most Pacific States parties have only partially criminalized this. For example, in the Federated States of Micronesia, some preparatory acts are covered under conspiracy, if any party to the conspiracy commits an overt act in furtherance of the conspiracy. Similarly in Kiribati, preparation is not specifically addressed, but in practice, the act of preparing for an offence would arguably fall under either conspiracy to commit an offence, counselling another to commit an offence or attempt. The Solomon Islands and Vanuatu have not criminalized the preparation of an offence except

<sup>110</sup> Legislative Guide, *op. cit.*, p. 94.

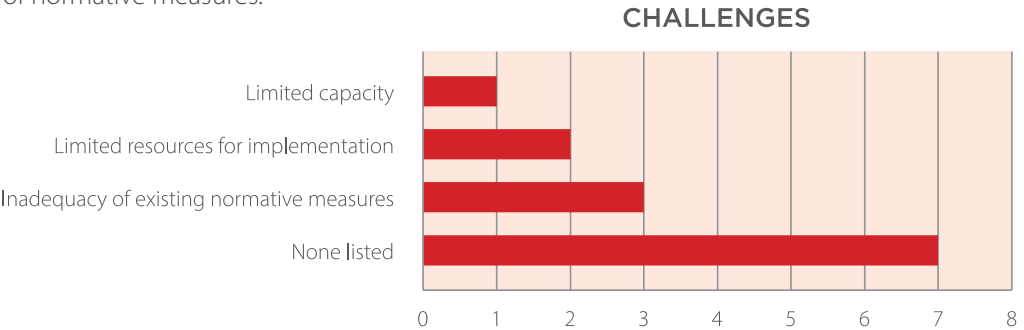
<sup>111</sup> Travaux Préparatoires, *op. cit.*, note 33.

<sup>112</sup> Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

to the extent that it constitutes an attempt. Notably, it is specifically stipulated in Vanuatu's domestic legislation that the "mere preparation of an offence shall not constitute an offence".

***Challenges and Technical Assistance***

Six Pacific States parties did not note challenges with their implementation of UNCAC article 27. The Federated States of Micronesia noted there to be limited resources for implementation, and the Republic of the Marshall Islands and Vanuatu cited an inadequacy of normative measures.



Three Pacific States parties requested technical assistance in the form of legislative drafting, legal advice and a summary of good practices/ lessons learned. No technical assistance had been provided in relation to this provision.



# LAW ENFORCEMENT



The prevention and criminalization of corrupt practices needs to be supported by measures and mechanisms that enable the overall anti-corruption effort, including:

- Evidentiary standards, statutes of limitation and rules for adjudicating corruption-related offences (UNCAC articles 28-30);
- Cooperation between national law enforcement authorities, specialized anti-corruption agencies and the private sector (UNCAC articles 37-39);
- Protection of witnesses, victims and whistleblowers (UNCAC articles 32 and 33);
- The freezing, seizure and confiscation of the proceeds and instrumentalities of corruption (UNCAC article 31);
- Overcoming obstacles that may arise out of the application of bank secrecy laws (UNCAC article 40); and
- Addressing the consequences of acts of corruption (UNCAC article 34), including through compensation for damages caused by corruption (UNCAC article 35).<sup>113</sup>

## ■ STATUTE OF LIMITATIONS

UNCAC article 29 provides that States parties must, where appropriate, establish in their domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with the Convention. They must also establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.<sup>114</sup> The concern underlying this provision is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption-related offences often take a longer time to be discovered and established.<sup>115</sup> In international cases, there is also a need for mutual legal assistance, which may cause additional delays. Article 29 does not require States without statutes of limitation to introduce them.<sup>116</sup>

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<sup>113</sup> Legislative Guide, *op. cit.*, pp. 103-104.

<sup>114</sup> *Ibid.*, p. 108.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, p. 109.

Several Pacific States parties do not provide for statutes of limitations for any criminal offences including corruption-related offences.<sup>117</sup> In Papua New Guinea, there is no statute of limitations applicable to corruption-related offences unless it falls under an exception.

*Kiribati, Nauru and the Solomon Islands were commended on their absence of a statute of limitations in respect of criminal matters.*

A statute of limitations applies to corruption-related offences committed in other States. These are detailed below.

In the Federated States of Micronesia, prosecution of a crime punishable by imprisonment for ten years or more must be commenced within six years after it is committed or within two years after it is discovered, or with reasonable diligence could have been discovered, whichever is the longest. For crimes punishable by imprisonment for five years, the times are diminished to three years after the commission or one year after the discovery, whichever is the longest. Suspension of the statute of limitations period is possible when the accused is absent from the jurisdiction or a prosecution is pending against the accused for the same conduct. The reviewing experts noted that considering the secrecy and complexity of corruption cases, these time limits could pose a challenge to successful prosecutions. The Federated States of Micronesia was therefore recommended to extend its statute of limitations period.

Unless specifically provided for in its legislation, Fiji does not impose any time-limit for commencing prosecutions against offences. Section 31A of the *Prevention of Bribery Promulgation* establishes a two year limitations period from the time when the complaint or information arose for certain enumerated offences and a one year period for others. While the reviewing experts were initially concerned about the relatively short statutes of limitations, they received assurances from all relevant authorities that statutes of limitations do not present impediments to effective and timely prosecutions so far.

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<sup>117</sup> Cook Islands, Kiribati, Nauru and the Solomon Islands.

In Palau, prosecution of most UNCAC offences is to be commenced within either three or five years after commission of the offence.<sup>118</sup> The prosecution of fraud, deception or a breach of a fiduciary obligation can be commenced within three years after the discovery of the offence. The period of limitations can be tolled when the accused is continuously absent from Palau or has no reasonably ascertainable place or abode or work within Palau, but in no case, will the limitations period be extended by more than four years from the expiration of the prescribed period. The same period of limitations applies for forfeiture proceedings. In light of these relatively short limitations periods, Palau was recommended to establish a longer statute of limitations period or provide for the suspension of the statute where the alleged offender has evaded the administration of justice.

In the Republic of the Marshall Islands, for most corruption-related offences, including felonies and misdemeanors, the period of limitations is six years; for “petty misdemeanors”, it is one year. The limitation commences from the date of the commission of the offence. The period of limitations can be tolled when: (a) the accused is continuously absent from the Republic of the Marshall Islands or has no reasonably ascertainable place or abode or work within the Republic, but in no case shall the limitations period be extended by more than three years from the expiration of the prescribed period, or (b) a prosecution against the accused for the same conduct is pending in the Republic.<sup>119</sup> The reviewing experts recommended the Republic of the Marshall Islands consider establishing a longer statute of limitations period in which to commence proceedings for Convention offences.

In Vanuatu, for offences that are punishable by more than ten years’ imprisonment, the limitations period is 20 years; for more than three months but not more than ten years’ imprisonment, the statute of limitations is five years. Therefore, for offences of bribery, money-laundering and obstruction of justice, the statute of limitations would be five years. Vanuatu authorities acknowledged that the time-frames foreseen were relatively short. The reviewing experts therefore recommended that Vanuatu ensure that the statute of limitations is long enough for all corruption-related offences and further ensure that the legislation provides for the suspension of the statute of limitations in prescribed cases and particularly, when the alleged offender has evaded the administration of justice.

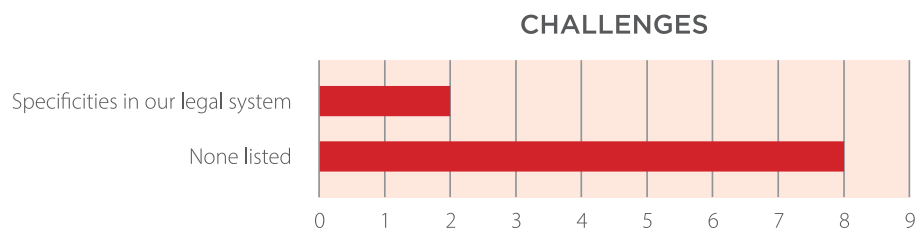
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<sup>118</sup> Title 17 of the *Palau National Code*, section 106.

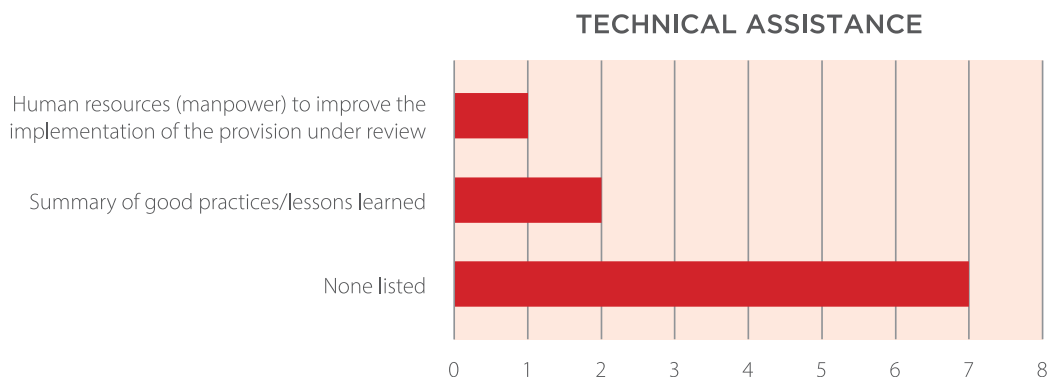
<sup>119</sup> *Criminal Code*, section 1.06(6).

## **Challenges and Technical Assistance**

Seven Pacific States parties did not note any challenges to their implementation of UNCAC article 29. Two States noted specificities in their legal system as a challenge to implementation.



Similarly, three Pacific States parties requested technical assistance. Requests were made for a summary of good practices/lessons learned (two States) and human resources (one State). No assistance had been provided in relation to this provision.





## ■ PROSECUTION/ SANCTIONS

Penalties for similar crimes across different jurisdictions diverge significantly, reflecting different national traditions, priorities and policies. In light of this, it is essential to ensure that a minimum level of deterrence is applied by national authorities to avoid the perception that certain types of crime “pay”, even if the offenders are convicted. In other words, sanctions must clearly outweigh the benefits of the crime.

Article 30 of the Convention addresses this important aspect of the fight against corruption and complements the provisions in relation to the liability of legal persons (UNCAC article 26), the freezing, seizure and confiscation of proceeds of crime (UNCAC article 31) and the recovery of assets (Chapter V). The article requires that States parties give serious consideration to the gravity of the offences established in accordance with the Convention both in domestic law and case law. It also requires that States parties make an effort to ensure that any discretionary powers that they have under domestic law are used to deter these offences. Article 30 further requires that States parties properly balance the immunities that their public official enjoys with their ability to investigate and prosecute corruption-related offences.<sup>120</sup>

### **Range of Penalties**

Across all Pacific States parties, the applicable sanctions generally take into account the gravity of corruption-related offences,<sup>121</sup> with States applying both imprisonment and fines. For example, in the Cook Islands, while corruption-related offences are mostly punished with imprisonment, offences of money-laundering can also be punishable by fines. Fiji’s *Prevention of Bribery Promulgation* provides for fines and imprisonment of up to ten years for corruption-related offences. Similarly, in Palau, most Convention offences are criminalized by a maximum term of imprisonment of five or ten years, and fines ranging from USD 500 to 50,000 or any higher amount equal to double the pecuniary gain from the offence. For example, fines in cases of money-laundering are provided for up to twice the amount laundered or USD 500,000, whichever is the greater. Palau also has a variety of concrete penalties, such as forfeiture of the corporate charter, revocation or restriction of business licenses, and increased penalties in certain cases. The court can further order restitutions for reasonable and verified losses as a result of the offences.

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<sup>120</sup> Legislative Guide, *op. cit.*, p. 110.

<sup>121</sup> Kiribati, Nauru and the Solomon Islands.

In Vanuatu, penalties for most corruption-related offences are imprisonment of up to: seven years for obstruction of justice; ten years for bribery or money-laundering; and twelve years for misappropriation. It is also possible to convert the sentence into the payment of a fine. Vanuatu was recommended by the reviewing experts to establish more effective, proportionate and dissuasive fines and sanctions, including for legal persons.

In the Solomon Islands, the punishment imposed is generally in proportion to the gravity of the offence and the degree of responsibility of the offender. However, the reviewing experts noted that in relation to obstruction of justice, the penalty that could be imposed is only up to three months imprisonment, pursuant to section 121 of the *Penal Code*.

In the Federated States of Micronesia, no minimum penalties are established in relation to UNCAC offences. Most Convention offences are criminalized by a maximum term of imprisonment of five or ten years, convertible to a fine not exceeding USD 50,000 or 100,000. Courts are required to apply individualized sentencing, taking the defendant, the defendant's background and the nature of the offence into account. In addition, the courts are to give due recognition to generally accepted customs and restitution, reparation or service to the victim or to his or her family. The reviewing experts recommended that the Federated States of Micronesia extend the range of (and/or streamline existing) criminal and non-criminal penalties for Convention offences to ensure they are proportionate and dissuasive in regard to legal persons. The Federated States of Micronesia was recommended to also consider further measures to address the consequences of corruption, such as the blacklisting of companies (this is also discussed under the "Liability of Legal Persons"; above).

In Papua New Guinea, the gravity of criminal offences is determined by the class to which it belongs: crimes, misdemeanours or simple offences. Papua New Guinea's *Criminal Code Act* contains corruption-related offences, which tend to fall under "simple offences". The reviewing experts therefore recommended that Papua New Guinea increase the current penalty requirements of corruption-related offences so that the punishment of each offence corresponds to its gravity. Similarly, the Republic of the Marshall Islands was recommended to ensure that sanctions take into account the gravity of that offence. Interestingly, there are currently no prison facilities to house female inmates in the Republic of the Marshall Islands. It was therefore recommended that the Republic provide the necessary facilities for women to serve their prison sentences in accordance with international human rights standards.

Several States do not have sentencing guidelines, which would provide general standards for judges.<sup>122</sup> The reviewing experts therefore recommended that these countries consider adopting such guidelines.<sup>123</sup> One State noted it was currently considering the development and adoption of sentencing guidelines for certain offences.<sup>124</sup> Another State noted it was currently considering the adoption of sentencing guidelines as part of broader criminal justice reform.<sup>125</sup>

### **Immunities and Jurisdictional Privilege**

Article 30(2) of the Convention contemplates that public officials such as investigators, prosecutors and judicial officers may be granted immunity from suit or prosecution for anything done or not done in the course of performing their official functions, in order to ensure that they act independently and impartially. Article 30(2) underlines the balance between immunities or jurisdictional privileges accorded to public officials for the performance of their functions and the effectiveness of the criminal process applied to them.

Generally, Pacific States parties provide for functional immunity, that is, immunity granted to people who perform certain functions of the State. Functional immunity is provided to: Members of Parliament and employees of the Ombudsman's Office in the Cook Islands; public officials in the Federated States of Micronesia; Members of Parliament in civil or criminal proceedings for conduct in the consideration of Parliamentary matters in Nauru; public officials in Palau (referred to as "good faith" immunity); public officials and Nitijela Members (for conduct concerning Nitijela matters)<sup>126</sup> in the Republic of the Marshall Islands; and certain public officials in the Solomon Islands.

The Federated States of Micronesia only provides for functional not for criminal immunities. In comparison, in Fiji, functional immunity is not granted to public and elected officials. However, immunity from prosecution may be granted on a case-by-case basis to further the interests of the prosecution.

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<sup>122</sup> E.g. Cook Islands and Federated States of Micronesia.

<sup>123</sup> Cook Islands and the Federated States of Micronesia.

<sup>124</sup> Solomon Islands.

<sup>125</sup> Cook Islands.

<sup>126</sup> *Constitution*, article IV, section 16: "Members of the Nitijela shall, except in cases of felony, be privileged from arrest during any session of the Nitijela, and in going to or returning from the same".

In Kiribati, the Parliament may determine the privileges and immunities of its Members, who enjoy immunities from arrest and attendance in any civil cause or matter.<sup>127</sup> It was noted that the immunity of Members of Parliament has been lifted.<sup>128</sup> The President does not have immunity in criminal matters. This is the same in Nauru. However, pursuant to the *Parliamentary Powers, Privileges and Immunities Act 1976*, Members of Parliament enjoy such immunity if on parliamentary premises when Parliament is in session; the Speaker's consent is required to lift this immunity to allow for arrest, but no consent is needed for prosecution.

In Palau, the *Constitution* affords judges absolute immunity, as well as Members of Congress during congressional sessions. However, individual waivers of this immunity can and have been executed by the Executive Branch.

In Papua New Guinea, a range of provisions covers immunities and jurisdictional privileges of public officials. For example, section 37 of the *Leadership Law* provides that "a member of the Ombudsman Commission or other authority or an officer or employee of the Commission is not liable for any act or omission done or made bona fide and without negligence under or for the purposes of this law". Moreover, section 16(1) of the *Commissions of Inquiry Act* provides that "a Commissioner has, in the exercise of his duty as a Commissioner, the same protection and immunity as a Judge". The Public Prosecutor has the power to grant immunity from prosecution.<sup>129</sup> The reviewing experts recommended that Papua New Guinea take such measures as may be necessary to further establish or maintain an appropriate balance between immunities or jurisdictional privileges and the possibility of investigating, prosecuting and adjudicating UNCAC offences.

In Vanuatu, articles 27 and 32 of the *Constitution* regulate that no Member of Parliament or of the National Council of Chiefs, respectively, may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him (or her) in the exercise of his (or her) office. Moreover, no Member may, during a session of Parliament/ the Council (or of one of its committees), be arrested or prosecuted for any offence, except with the authorization of Parliament/the Council. Furthermore, the Public Prosecutor may grant indemnity from prosecution for any offence to a person on account of an undertaking given by that person to give evidence in a specified proceeding or an understanding or expectation that the person will give such evidence.<sup>130</sup>

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<sup>127</sup> *Privileges, Immunities and Powers of the Maneaba Ni Maungatabu Act 1986*, section 7.

<sup>128</sup> *Dr. Tetaua Taitai v. Speaker of Parliament*.









<sup>129</sup> *Public Prosecutor (Office and Functions) Act 1977*, section 5.

<sup>130</sup> *Public Prosecutors Act*, section 9.

## ***Discretionary Legal Powers***

Article 30(3) of the Convention aims to ensure that any discretionary powers are reposed in, for example a Public Prosecutor, are exercised in order to maximize the effectiveness of law enforcement measures with the ultimate objective of deterring the commission of corruption-related offences.

Most Pacific States parties follow a system of discretionary prosecution as sampled in the table below. The basis on which this discretion is exercised varies between Pacific States parties.

State party	Discretionary prosecution
 Cook Islands	Yes – by the Commissioner of Police
 Federated States of Micronesia	Yes – Attorney General
 Kiribati	Yes – Attorney General
 Nauru	Yes – Director of Public Prosecutions
 Palau	Yes – Attorney General
 Republic of the Marshall Islands	Yes – Attorney General
 Solomon Islands	Yes – Director of Public Prosecutions
 Vanuatu	Yes – Public Prosecutor

For example, in the Cook Islands, the discretionary legal power to prosecute is an exclusive prerogative of the Commissioner of Police of the Cook Islands. The Crown Law Office provides advice on whether or not there is sufficient evidence to prosecute.

In the Federated States of Micronesia, the Attorney General has a wide discretion to prosecute based on common law principles. Similarly, in Kiribati, the Attorney General enjoys broad prosecutorial discretion. In practice, the discretionary legal powers are often used by the prosecutors, subject to article 42 of the *Constitution*, which addresses the powers and mandate of the Attorney General. Likewise, in Palau, the Attorney General has wide discretionary legal powers to prosecute persons for corruption-related offences,<sup>131</sup> similar to the Office of the Special Prosecutor.

<sup>131</sup> *Executive Order No. 288*, section 1.

The Republic of the Marshall Islands also follows a system of discretionary prosecution. The Attorney General has broad discretion to prosecute.<sup>132</sup> There are several legal safeguards in place that require him or her to exercise this discretion judiciously, in the public interest and based on the sufficiency of evidence. Prosecution decisions are also subject to judicial review, although there have been no such cases.

Nauru also follows a system of discretionary prosecution. While the Director of Public Prosecutions has broad discretion to prosecute, several legal safeguards are in place that requires him or her to exercise this discretion judiciously, in the public interest and based on the sufficiency of evidence. Prosecution decisions by the Director of Public Prosecutions are subject to judicial review, although there have been no such cases. The prosecution guidelines of Australia are currently being used, and independent guidelines for Nauru are under development. Further, steps were taken in 2010 to increase the independence of the Director of Public Prosecutions by making it a constitutional office in the Ministry of Justice.

In Palau, the Offices of the Attorney General and Special Prosecutor have the discretion, when appropriate: to charge a defendant with lesser offences or sentences in exchange for cooperating; or to plea bargain with an accused in exchange for cooperating in investigating and prosecuting other offenders. Transactional or testimonial immunity can be granted with the approval of the Court, and Palau commonly uses the latter.

In Papua New Guinea, the Representative of the Office of the Public Prosecutor clarified the relationship between discretion of Public Prosecutor to give or refuse consent to prosecute an offence and deterring the commission of an offence. Ordinarily, the Office of the Public Prosecutor, because of a public policy reason to deter serious and prevalent crimes, would prosecute a serious and prevalent offence. It was further stated that the Public Prosecutor has never, if not very rarely, refused to give consent to prosecute where his consent is required by law. The reviewing experts therefore recommended that Papua New Guinea amend the law to clearly and expressly provide guidelines for the Public Prosecutor for the granting or refusing consent to prosecute offences.

Vanuatu was recommended to ensure that discretionary powers are exercised with a view to maximizing the effectiveness of law enforcement in regard to corruption-related offences.

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<sup>132</sup> Article VII of the *Constitution*.

### **Release Pending Trial or Appeal**

Pursuant article 30(4) of the Convention, States parties must ensure that pre-trial and pre-appearance release conditions take into account the need for the defendants' presence at criminal proceedings, consistent with domestic law and the rights of the defence.

Most Pacific States parties address conditions on release pending trial or appeal designed to ensure the presence of the defendant at criminal proceedings.<sup>133</sup> For example, the Cook Islands' *Criminal Procedure Act*<sup>134</sup> imposes a condition that a defendant who has been granted bail shall personally attend the hearing. The *Federated States of Micronesia Code* sets forth measures to be taken on the conditional release of persons being prosecuted. Section 604 of the Code specifically mentions that the amount of bail should ensure the presence of the accused in the future, without being excessive.

### **Early Release or Parole**

The Convention also requires that States parties take into account the gravity of the offences when considering early release or parole of convicted persons.<sup>135</sup>

Several countries regulate parole through a parole board and its establishing legislation,<sup>136</sup> while others govern parole and early release from prison under its *Correctional Services Act*.<sup>137</sup>

In the Federated States of Micronesia, parole can be granted after one-third of the sentence has been served or, in case of life sentence or a sentence of thirty or more years, after the said prisoner has served ten years of his or her sentence. In regard to Convention offences, the first rule would apply. The trial justice is required to consider the views of the prosecution, prisoner and victim, among other things, in the decision to grant parole. The possibility to appeal the judge's decision is given on grounds of abuse of discretion.

In Palau, the procedures governing parole, including the terms, recommitment and final unconditional release, are set out in section 667 of Title 17 *Palau National Code*. Prisoners have a constitutional right to request parole after serving one-third of their sentence, at which stage foreigners are often deported to their country of origin.

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<sup>133</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>134</sup> Section 87(3).

<sup>135</sup> Article 30(5).







<sup>136</sup> Cook Islands, Kiribati, Papua New Guinea, Nauru and the Republic of the Marshall Islands

<sup>137</sup> Solomon Islands and Vanuatu.

Each country's respective legislation generally takes into account the gravity of the offences when considering early release or parole of convicted persons; however, there have been limited examples of implementation. For example, in Kiribati, no inmates charged with corruption-related offences have been released on parole in the last five years; in Nauru, since 2010, two persons have been released on parole in relation to corruption-related offences.

### ***Removal, Suspension and Re-assignment***

Article 30 of the Convention mandates that States parties consider or endeavour to establish procedures through which a public official accused of such an offence may be removed, suspended or reassigned.<sup>138</sup> Most States have such procedures established; however, there are few examples of implementation. For example, in Kiribati, accused persons have been suspended from public office pending criminal proceedings. In Nauru, few investigations have been carried out and no charges applied.

State party	Removal, suspension and re-assignment
 Cook Islands	No
 Federated States of Micronesia	Yes
 Kiribati	Yes
 Nauru	Yes
 Palau	Yes
 Papua New Guinea	No
 Republic of the Marshall Islands	Yes
 Solomon Islands	Yes
 Vanuatu	No

No provisions exist in the criminal legislation of the Cook Islands requiring the suspension, removal or reassignment of a public official accused of a corruption-related offence.

<sup>138</sup> Article 30(6).






Vanuatu's *Public Service Act* does not contain any provisions, which foresee the suspension of a public servant or similar measures pending trial. However, a parallel process of disciplinary sanctions would be possible, if the conduct was brought to the attention of the Public Service Commission. The reviewing experts recommended that Vanuatu consider widening the scope of the Public Service Commission to cover all public officials and harmonize the manner in which public officials are dealt with across the existing service commissions in relation to the provisions of the Convention.

The reviewing experts also recommended that Papua New Guinea consider establishing such procedures for the removal, suspension or reassignment of an accused convicted of UNCAC offences.

### **Disqualification**

Article 30(7) of the Convention mandates that States parties consider or endeavour to establish procedures for the disqualification of a person convicted of an offence established in accordance with the Convention from:

- Public office; and
- Office in an enterprise owned in whole or in part by the State.

State party <sup>139</sup>	Disqualification
 Federated States of Micronesia	The commission of or attempt of any material deception or fraud would cause removal and permanent disqualification of appointment from the public service; however, the provisions do not extend to employment in public enterprises.
 Fiji	Persons convicted of corruption-related offences may be disqualified for a period of 10 years from the date of conviction from being elected as Members of Parliament and Cabinet. <sup>140</sup>
 Nauru	The disqualification of accused persons from holding public office is limited due to the lack of a definition of “public official” or “public servant”.

<sup>139</sup> The table contains merely a sample.

<sup>140</sup> Section 33, *Prevention of Bribery Promulgation*.



Vanuatu

Administrative sanctions, such as dismissal and disqualification are provided for in the *Public Service Act*. A person disqualified from holding office as a result of a criminal conviction can only be appointed to the public service at least four years after such a conviction.

In Palau, the application of Chapter 11 of the *Public Service System Rules and Regulations* has led to the removal of an accused from office and prevented the person from applying to public office for the next ten years. Notably, Part 11.5 of Chapter 11 covers “members of any board, public corporation, commission, or other agency or appointed public officials whose appointments are made by the President with the advice and consent of the Senate”. However, due to the size of the population and high number of people employed by the Government, it was decided not to permanently prevent convicted offenders from being considered for public office after a given period of time. In Vanuatu, a person disqualified from holding office as a result of a criminal conviction can only be appointed to the public service four years after such a conviction.

Several Pacific States parties were recommended to consider adopting legislation or procedures to disqualify, for a period of time, a person convicted of a Convention offence from holding public office or an office in any State-owned enterprise or statutory body.<sup>141</sup>

### **Reintegration**

Pacific States parties are also required to consider promoting the reintegration of persons convicted of offences established in accordance with the Convention into society.<sup>142</sup>

Several Pacific States parties cited prisoner reintegration programmes,<sup>143</sup> covering:

- Life skills and vocational training;<sup>144</sup>
- Education for the youth (e.g., math and life skills);<sup>145</sup>
- Counselling and community programmes;<sup>146</sup> and
- Regular family visits.<sup>147</sup>

<sup>141</sup> Cook Islands, Papua New Guinea, Republic of the Marshall Islands and the Solomon Islands.

<sup>142</sup> Article 30(10).

<sup>143</sup> Cook Islands, Kiribati, Nauru, Solomon Islands and Vanuatu.

<sup>144</sup> Kiribati.

<sup>145</sup> Nauru.

<sup>146</sup> Nauru.

<sup>147</sup> Nauru.

*Nauru's efforts to establish and operate the prisoner rehabilitation programme were positively noted. The reviewing experts also noted Vanuatu's establishment and effective functioning of the reintegration programme by Correctional Services.*

Some Pacific States parties pointed to legislative provisions, which highlight that a function of the Correctional Service is "to develop and provide meaningful educational training and rehabilitation programmes for the benefit of detainees"<sup>148</sup>. It was recommended that Papua New Guinea consider implementing this legislative provision.

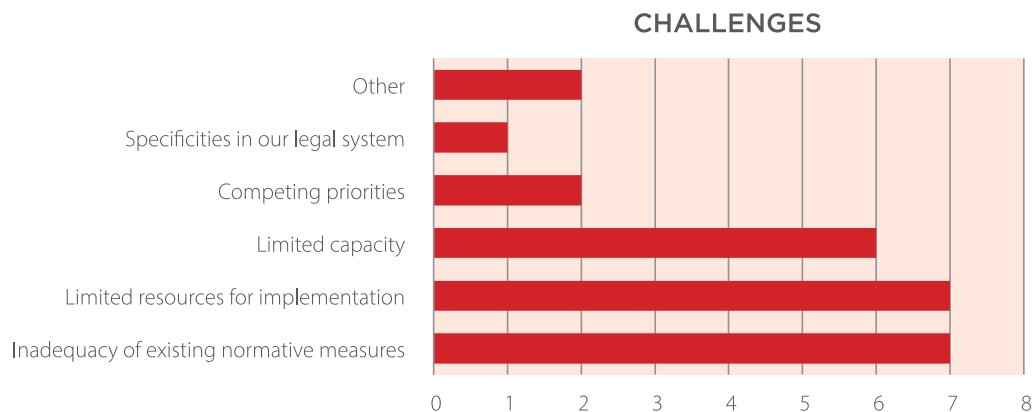
The Republic of the Marshall Islands used to have a prisoner rehabilitation programme; however, it ceased operation in 2013. The reviewing experts therefore recommended the Republic to endeavour to promote the reintegration into society of persons convicted of UNCAC offences. Likewise, Palau was recommended to endeavour to promote the reintegration into society of convicted persons. The reviewing experts also welcomed Kiribati's efforts to strengthen its prisoner reintegration programme.

### **Challenges and Technical Assistance**

Seven Pacific States parties cited limited resources for implementation and an inadequacy of existing normative measures as challenges to their implementation of UNCAC article 30. Other specific challenges included: the staffing of disciplinary tribunals; civil servants not being adequately trained to handle ethics and disciplinary matters; and the frequency at which trained civil servants were reassigned to other functions.

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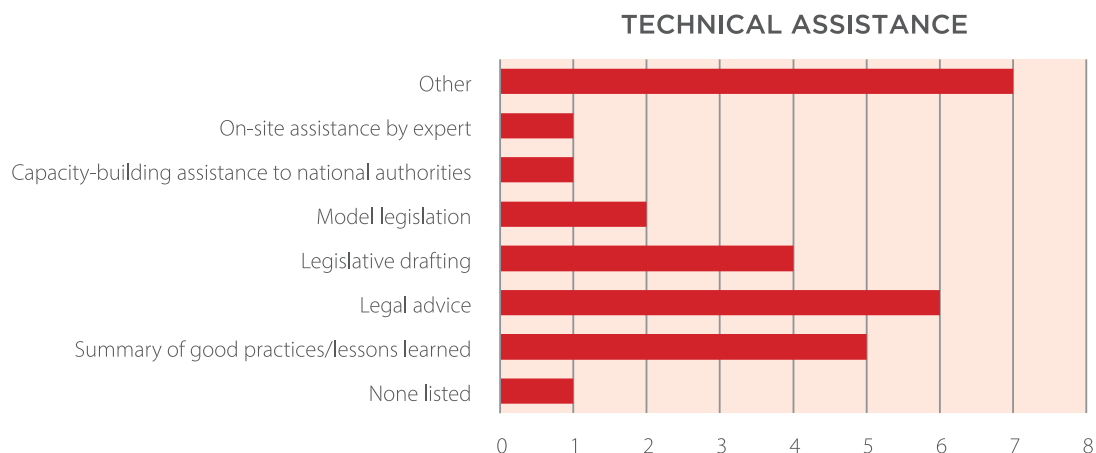
<sup>148</sup> Fiji and Papua New Guinea.



Pacific States parties cited specific requests for technical assistance in relation to article 30, including assistance to:

- Develop a rehabilitation approach to deal with convicted offenders and reintegration measures for prisoners;
- Provide additional resources to prosecute corruption-related matters;
- Develop a simple case management system with the necessary training; and
- Develop a complaints management system.

Two States indicated that some forms of assistance had been provided and that an extension of such assistance would support them in fully implementing the provision.



## ■ **FREEZING, SEIZURE AND CONFISCATION**

Article 31 of the Convention sets out the primary obligations to create powers that enable the confiscation and seizure of the proceeds of crime.<sup>149</sup> Article 31 requires States parties to adopt measures, to the greatest extent possible within their legal system, to enable the confiscation of the proceeds, equivalent value of the proceeds and instrumentalities of offences covered by the Convention, and to regulate the administration of such property.<sup>150</sup> The term “to the greatest extent possible within their domestic legal systems” is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this article.<sup>151</sup>

The substantive obligations to enable confiscation and seizure are found in article 31(1), (3), (4), (5) and (6), while procedural powers to trace, locate, gain access to and administer assets are found in the remaining paragraphs. Special mention is also made of protecting third party rights.<sup>152</sup>

A good practice noted by Palau was the legislation on the disposition of property forfeited as an incentive for law enforcement. The court’s jurisdiction to go after the proceeds of crime irrespective of its location, even those properties placed beyond the jurisdiction of the Court up to the value of the subject property, was also deemed a good practice of Palau.

### **Confiscation of the Proceeds of Crime**

Article 31(1)(a) of the Convention requires that States parties enable the confiscation of the proceeds of crime derived from offences established in accordance with the Convention or property the value of which corresponds to that of such proceeds.<sup>153</sup>

Almost all Pacific States parties provide, in principle, for the confiscation of the proceeds of crime derived from offences. This is generally found in the relevant Pacific States parties’ domestic legislation including: the *Proceeds of Crime Act*;<sup>154</sup> *Anti-Money Laundering Act*;<sup>155</sup> *Money Laundering and Proceeds of Crime Act*;<sup>156</sup> *Banking Act*;<sup>157</sup> *Penal Code*;<sup>158</sup> *Leadership Code*;<sup>159</sup> and the *National Code*.<sup>160</sup>

<sup>149</sup> UNCAC article 55 covers international cooperation, while article 57 provides for asset returns.

<sup>150</sup> Legislative Guide, *op. cit.*, p. 115.

<sup>151</sup> *Ibid.*, p. 116.

<sup>152</sup> *Ibid.*, pp. 116-117.

<sup>153</sup> Legislative Guide, *op. cit.*, p. 117.

<sup>154</sup> Kiribati, Nauru, Papua New Guinea and the Republic of the Marshall Islands.

<sup>155</sup> Nauru.

<sup>156</sup> Solomon Islands.

<sup>157</sup> Republic of the Marshall Islands.

<sup>158</sup> Vanuatu.

<sup>159</sup> Vanuatu.

<sup>160</sup> Federated States of Micronesia and Palau.

These provisions generally allow for the confiscation of equivalent value even where the property has been disposed of, cannot be traced, has been substantially diminished or comingled and cannot be divided without difficulty.<sup>161</sup>

There are two basic systems used to cover proceeds of crime—one property-based and one value-based.<sup>162</sup> In most Pacific States parties, the law provides for a value-based approach,<sup>163</sup> allowing for the confiscation of property of a corresponding value to that of the proceeds of crime or “tainted property” even when it has been converted or intermingled.<sup>164</sup> For example, the Republic of the Marshall Islands allows for conviction-based confiscation. Non-conviction based forfeiture has been considered in the Federated States of Micronesia and is partially addressed covering circumstances where a person dies or absconds. Palau covers non-conviction based, criminal and administrative forms of, forfeiture.

### **Confiscation of Instrumentalities**

Article 31(1)(b) of the Convention requires that States parties enable the confiscation of property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention.<sup>165</sup>

Kiribati, Republic of the Marshall Islands, Papua New Guinea and Vanuatu cover the confiscation of instrumentalities. Some Pacific States parties, however, do not provide for the confiscation of instrumentalities<sup>166</sup> or the manner in which it is covered is confusing. For example, it was recommended that the Federated States of Micronesia consider consolidating the language to include property destined for the use in a corruption-related offence for greater legal certainty. The reviewing experts also recommended that Nauru ensure coverage of instrumentalities “destined for use” in the commission of serious offences under its *Proceeds of Crime Act*.

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<sup>161</sup> See, e.g., Federated States of Micronesia.

<sup>162</sup> Legislative Guide, *op. cit.*, p. 114.

<sup>163</sup> Federated States of Micronesia.

<sup>164</sup> Federated States of Micronesia, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>165</sup> Legislative Guide, *op. cit.*, p. 117.

<sup>166</sup> E.g. Nauru.

## **Administration of Property**

In light of the Convention's overarching asset recovery principle, article 31(3) introduces an obligation on States parties to regulate the administration of frozen, seized or confiscated property covered in paragraphs 1 and 2 of article 31. The administration of seized or confiscated property among Pacific States parties includes:

- The police officer who seized or confiscated the property;<sup>167</sup>
- Investigator;<sup>168</sup>
- Commissioner of Police;<sup>169</sup>
- Attorney General to administer property in accordance with a court order;<sup>170</sup>
- Through the appointment by the Attorney General, a person to administer property forfeited or subject to a restraining order;<sup>171</sup> or
- The court could determine the administrator of the property, pursuant to the law.<sup>172</sup>

## **Identification, Tracing, Freezing and Seizure**

Article 31 of the Convention requires the establishment of a strong confiscation regime, which includes such measures as may be necessary to enable the identification, tracing, freezing, or seizure of the proceeds and instrumentalities for the purpose of eventual confiscation. Specifically, article 31(2) and (7), respectively, requires:

- Such measures as may be necessary to enable the identification, tracing, freezing or seizure of the proceeds or other property; and
- Powers for courts or other competent authorities to order that bank, financial or commercial records be made available or be seized.

Pacific States parties generally regulate the tracing, search and seizure of the proceeds of crime.<sup>173</sup>

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<sup>167</sup> Republic of the Marshall Islands.

<sup>168</sup> Federated States of Micronesia.

<sup>169</sup> Papua New Guinea.

<sup>170</sup> Vanuatu.

<sup>171</sup> Kiribati.

<sup>172</sup> Palau.

<sup>173</sup> However, Kiribati only clearly provides for search and seizure under its *Proceeds of Crime Act*.

### **Scope of Property subject to Freezing, Seizure and Confiscation**

States parties must make sure that their notion of the “proceeds of crime” corresponds to the definition contained in article 2(e) of the Convention, namely “any property derived from or obtained, directly or indirectly, through the commission of an offence”. Furthermore, States must ensure that domestic measures on freezing, seizure and confiscation also extend to situations in which the source of proceeds may not be immediately apparent, that is, to the proceeds of crime that have been transformed or converted into other property (article 31(4)), or have been intermingled with property acquired from legitimate sources (article 31(5)), as well as income or other benefits derived therefrom, in the same manner and to the same extent as the proceeds of crime (article 31(6)).

The terms “property”, “freezing”, “seizure”, and “confiscation” are also defined in article 2 of the Convention. “Property” means assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.

Pacific States parties have adopted different definitions of “tainted property” including:

- Property used in, or in connection with, the commission of a serious offence, or proceeds of crime, including property into which any property derived or realized directly from the offence was later converted, transformed or intermingled property, as well as income, capital or other economic gains derived or realized from such property at any time since the offence. Property designed or intended for use in, or property which is, or has been used as the means of committing a criminal offence;<sup>174</sup>
- Any property obtained in whole or in part from the proceeds of a criminal offence or from the proceeds of money-laundering;<sup>175</sup>
- Property intended for use in, or used in connection with, the commission of the offence, or proceeds of crime;<sup>176</sup> and
- Proceeds from or instrumentalities used in the commission of crime and property of corresponding value. However, it is restricted to property found in the person's possession or under his control.<sup>177</sup>

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<sup>174</sup> Federated States of Micronesia.

<sup>175</sup> Republic of the Marshall Islands.

<sup>176</sup> Vanuatu.

<sup>177</sup> Nauru.



Similarly, Pacific States parties have adopted different definitions of “proceeds of crime” including:

- Property that has been converted, transformed or intermingled on a proportional basis. It also includes any income, capital or economic gain derived from the property;<sup>178</sup>
- Property derived or realized directly or indirectly from a serious offence, and also covers converted or transformed property and income, capital or other economic gains derived or realized from that property. If such property is intermingled with other property, the portion of the whole represented by the original proceeds is taken to be the proceeds of crime;<sup>179</sup> and
- The proceeds of an offence, including that which has been transformed or converted into other property, intermingled, and income or other benefits derived from the proceeds.<sup>180</sup>

In Federated States of Micronesia, property “destined for use in” a corruption-related offence is not clearly covered in Title 11 of the *Federated States of Micronesia Code*. However, Title 12 on search and seizure states that search warrants may be issued for property designed or intended for use in, or property which is, or has been used as the means of committing a criminal offence.

The reviewing experts recommended that the Republic of the Marshall Islands take measures to enable the freezing of an item, including a bank account, by competent authorities for the purpose of eventual confiscation.

### **Bank Records**

Article 31(7) of the Convention sets forth procedural law requirements to facilitate the operation of the other provisions of article 31.<sup>181</sup> It requires States parties to ensure that bank records, financial records (such as those of real estate transactions, shipping lines, freight forwarders and insurers) are subject to compulsory production, for example, through production orders, search and seizure or similar means that ensure their availability to law enforcement officials. The same paragraph establishes that the principle of bank secrecy cannot be raised by States as grounds for not implementing its provisions.<sup>182</sup>

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<sup>178</sup> Solomon Islands.

<sup>179</sup> Vanuatu.

<sup>180</sup> Papua New Guinea.

<sup>181</sup> Also of article 55 on international cooperation for the purposes of confiscation.

<sup>182</sup> Legislative Guide, *op. cit.*, p. 119.

Pacific States parties' legislation generally provide for the obtaining of bank records and other documents.<sup>183</sup>

In the Federated States of Micronesia, any secrecy and confidentiality obligations are overridden by the provisions on money-laundering and proceeds of crime. However, in practice, a narrow interpretation seems to be a challenge as only the bank that sent a suspicious transaction report is required to lift bank secrecy and to provide the requested documentation. Also, the regulation only exists in the chapter on money-laundering, but not in relation to other corruption-related offences. It was therefore recommended that Federated States of Micronesia ensure that sufficient and effective measures are in place to lift bank secrecy from criminal investigations in relation to all corruption-related offences.

In Nauru, a court-issued warrant was required for investigating authorities to access government and financial or commercial records, which led to delays in practice. Nauru was recommended to review available options to: simplify and streamline the procedure for investigating authorities to obtain a court-issued warrant to access government and financial or commercial records, including the possibility for investigating agencies to obtain government records under administrative powers; and strengthen measures on document retention and security.

### **Rights of Bona Fide Third Parties**

Article 31(9) of the Convention requires that the seizure and forfeiture requirements be interpreted as not prejudicing the rights of *bona fide* third parties, which would at a minimum exclude those with no knowledge of the offence or connection with the offender(s). The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, special care must be taken to ensure that the system developed by States maintains the rights of *bona fide* third parties who may have an interest in the property in question.<sup>184</sup>

The rights of *bona fide* third parties were found to be sufficiently protected by Pacific States parties.<sup>185</sup>

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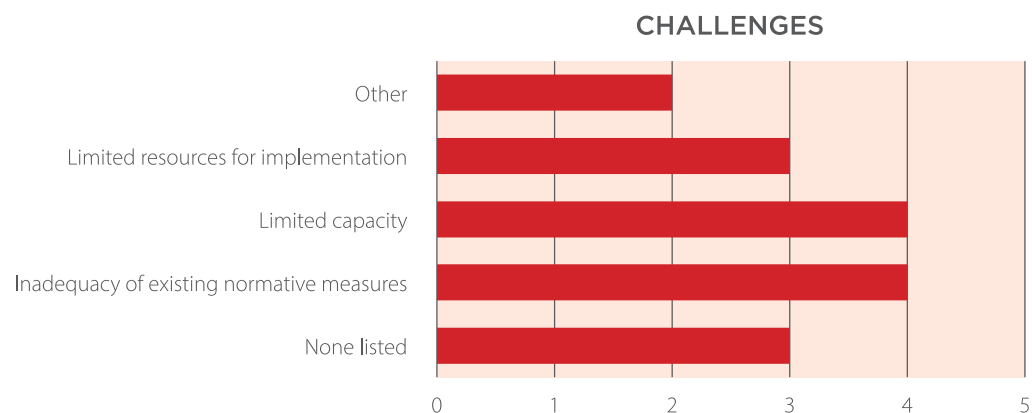
<sup>183</sup> Federated States of Micronesia, Kiribati (the Court has jurisdiction based on the merit of the application), Nauru, Palau (in forfeiture proceedings) and Vanuatu (Financial Intelligence Unit has powers to direct a financial institution to facilitate any investigation).

<sup>184</sup> Legislative Guide, *op. cit.*, p. 119.

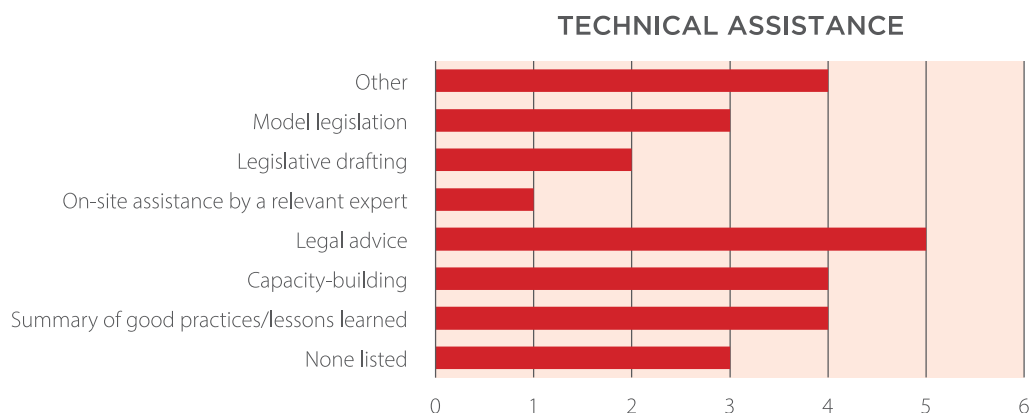
<sup>185</sup> Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

## **Challenges and Technical Assistance**

Four Pacific States parties cited limited capacity and inadequacy of existing normative measures as challenges to their implementation of UNCAC article 31.



Five Pacific States parties requested legal advice as technical assistance. No assistance had been provided to States in relation to this provision.



## ■ **PROTECTION**

UNCAC articles 32, 33 and 35 address the protection of witnesses, therefore complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, as well as cooperation at the national and international levels. The objectives of the Convention could be potentially undermined, unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities.<sup>186</sup>

## ■ **PROTECTION OF WITNESSES, EXPERTS, VICTIMS AND REPORTING PERSONS**

The Convention regards the protection of witnesses, experts and victims as key to successfully fighting corruption. UNCAC article 32(1) requires that each State party take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them.

Protection measures can be classified into two categories:

- First, the procedures for the physical protection of such persons and evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons. This can include permitting testimony to be given through the use of communications technology such as video or other adequate means; and
- Second, and to the extent necessary and feasible, the State should offer longer-term protection up to and during any trial, as well as the possible relocation of witnesses and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons.<sup>187</sup>

UNCAC article 33 is classified as a non-mandatory provision but requires States parties to consider whistleblower protection. This complements the article dealing with the protection of witnesses and experts. Article 33 is intended to cover those individuals who may possess information, which is not of such detail to constitute evidence in the legal sense of the word.<sup>188</sup>

<sup>186</sup> Legislative Guide, *op. cit.*, p. 121.

<sup>187</sup> UNODC and UNICRI, *Technical Guide to the United Nations Convention against Corruption* (New York, UN, 2006) pp. 100-101.

<sup>188</sup> *Ibid.*, p. 105.

Most Pacific States parties do not have any specific protection programmes for witnesses, victims or reporting persons 189 beyond fairly standard obstruction of justice statutes.<sup>190</sup> Limited exceptions include:

- Permitting an initial appearance in preliminary proceedings by video conference;<sup>191</sup>
- Criminalizing the interference with reporting a crime;<sup>192</sup>
- Criminalizing the interference or influence of witnesses, including retaliatory measures;<sup>193</sup>
- Encouraging the reporting of corruption through toll-free hotlines;<sup>194</sup>
- Granting confidentiality to reporting persons<sup>195</sup> protecting their identity<sup>196</sup> and allowing anonymous reporting;<sup>197</sup>
- Protection from liability when reporting on the proceeds of crime;<sup>198</sup>
- Providing that a person performing functions in or for any Ministry or Department must not victimize or discriminate against an employee of the Public Service because that employee has reported breaches or alleged breaches of the tender process;<sup>199</sup>
- Provision for the protection of the identity of witnesses under police protection programmes;<sup>200</sup> and
- Protections, in practice, granted by the police for prosecution witnesses, including the payment of per diems and physical protection.<sup>201</sup>

The absence of such protections has reportedly led to, in Papua New Guinea, many cases being thrown out by the courts because witnesses have feared retaliation and have gone into hiding. One country confirmed that “whistleblower” protection is a serious problem, citing job loss and re-positioning as possible consequences of reporting misconduct.

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<sup>189</sup> Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>190</sup> Fiji.

<sup>191</sup> Republic of the Marshall Islands.

<sup>192</sup> Palau.

<sup>193</sup> Federated States of Micronesia.

<sup>194</sup> E.g. Federated States of Micronesia and the Republic of the Marshall Islands.

<sup>195</sup> Federated States of Micronesia.

<sup>196</sup> Republic of the Marshall Islands – protects informers in relation to their identity when they provide the Auditor General with information.

<sup>197</sup> Fiji.

<sup>198</sup> Papua New Guinea.

<sup>199</sup> Vanuatu.

<sup>200</sup> Cook Islands.

<sup>201</sup> Kiribati.

A number of Pacific States parties have draft bills aimed at affording protection envisaged in articles 32<sup>202</sup> and 33.<sup>203</sup> However, Papua New Guinea's draft bill is aimed at dealing with the protection of disclosures and not witnesses, experts or victims. It was therefore recommended that Papua New Guinea consider amending the bill to take into consideration the broader scope of articles 32 and 33.

Nauru has in place procedural measures to ensure the safety of witnesses. These include the housing of witnesses with police guards in the island's main hotel and the potential to place witnesses in the island's "safe house" (although it has never been used). The court also has at its disposal the ability to use restraining orders or impose bail conditions regarding non-contact with witnesses. While legal measures criminalize actions of those who prevent or attempt to prevent witnesses or persons who provide evidence in court from appearing, other acts of interference that do not cause the witness to be absent are not covered. Limited evidentiary measures to protect witnesses and experts, as well as few protections are in place. There have been no cases of witness protection in corruption-related matters.

In relation to UNCAC article 33, the Federated States of Micronesia encourages the reporting of corruption through a toll-free hotline operated by the National Public Auditor. No provisions on whistleblower protection are in place, except through the efforts to grant confidentiality to reporting persons. A bill to address whistle-blower protection is under preparation. In Palau, although whistleblowers must remain anonymous, unless the complaining person consents in writing, wider protection envisaged is still in draft format. In Papua New Guinea, section 30 of the *Proceeds of Crime Act* offers protection from liability when reporting on the proceeds of crime. Similarly, the Republic of the Marshall Islands legislatively provides for the protection of informers in relation to their identity when they provide the Auditor General with information, which can also be through the toll-free hotline. In Vanuatu, the *Government Contracts and Tenders Act 2001* provides that a person performing functions in or for any Ministry or Department must not victimize or discriminate against an employee of the Public Service because that employee has reported breaches or alleged breaches of the tender process. However, no similar provisions exist to protect all public officials in regard to reporting any allegations of corruption.

The reviewing experts therefore recommended that States either strengthen or adopt legislation or other appropriate measures to provide effective protection (including from potential retaliation or intimidation) for witnesses, victims and experts (and as appropriate, for their relatives and other persons close to them) in accordance with article 32. This includes: possibilities of closed hearings and specific evidentiary rules; physical protection and procedural or evidentiary measures; and to consider entering into relocation agreements.<sup>204</sup>

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<sup>202</sup> Federated States of Micronesia, Palau and Papua New Guinea.

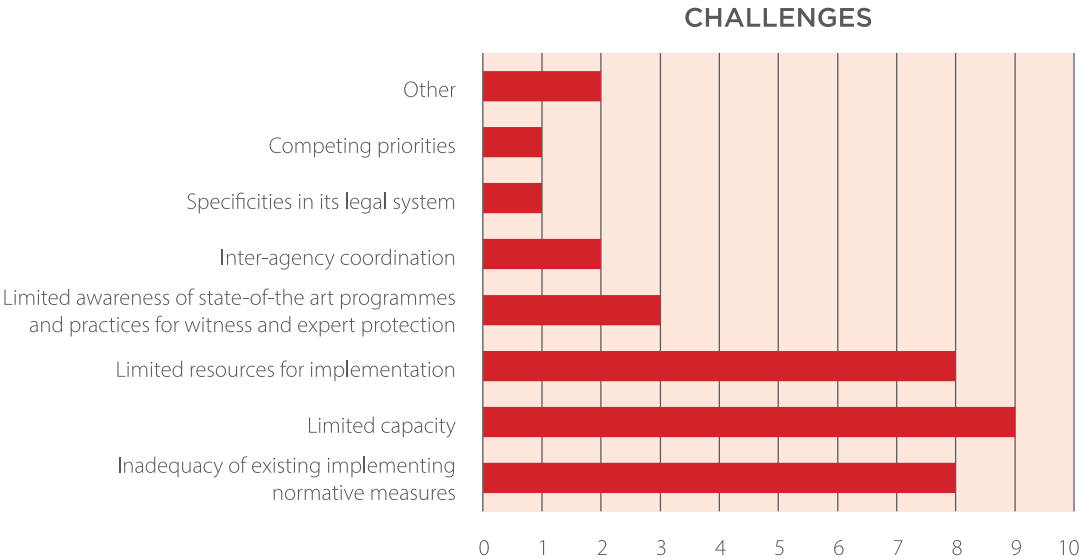
<sup>203</sup> Federated States of Micronesia and Nauru.

<sup>204</sup> Federated States of Micronesia, Kiribati, Nauru, Palau and Vanuatu.

It was also recommended that Pacific States parties continue efforts or consider adopting measures: to protect whistleblowers and provide for their effective enforcement;<sup>205</sup> and to consider adopting appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds instances of corruption, in accordance with article 33.<sup>206</sup>

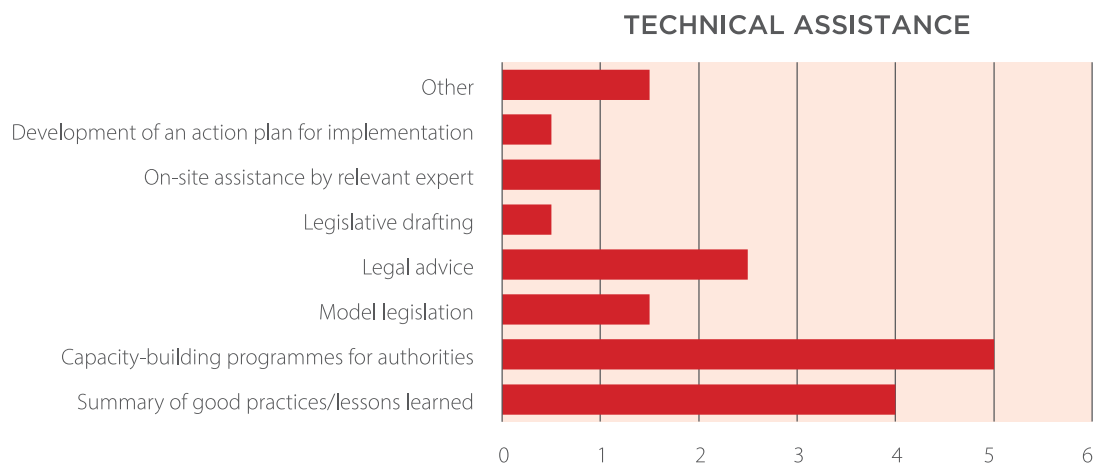
***Challenges and Technical Assistance***

Nine Pacific States parties cited limited capacity as their main challenge to their implementation of UNCAC article 32. Eight States further cited limited resources and an inadequacy of existing implementing normative measures. Other challenges cited included the difficulties in providing such protection on a Small Island State.

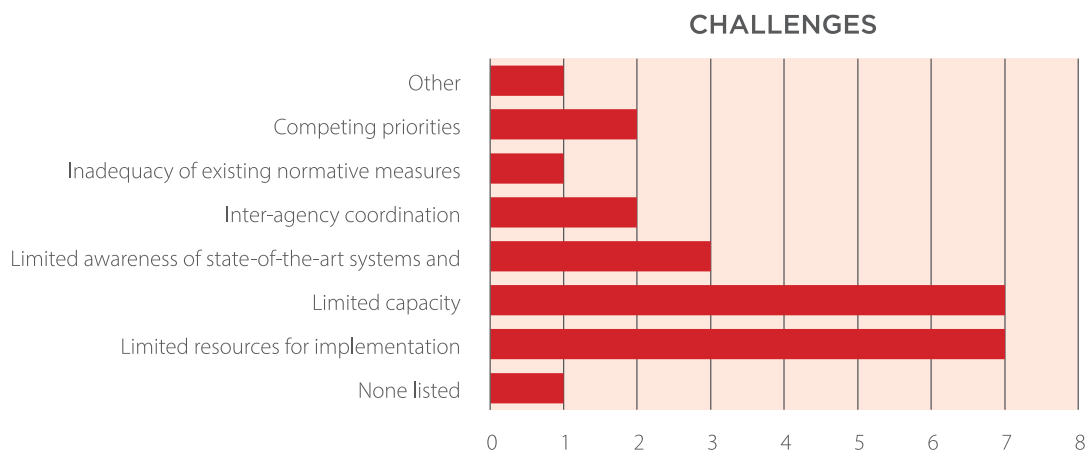


<sup>205</sup> Federated States of Micronesia and Nauru.  
<sup>206</sup> Kiribati, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

All Pacific States parties requested capacity-building programmes for authorities responsible for establishing and managing witness and expert protection programmes. No assistance had been provided to States in relation to this provision.



Seven Pacific States parties cited limited capacity and limited resources as challenges to their implementation of UNCAC article 33.





Pacific States parties most frequently requested capacity-building programmes (eight States) and a summary of good practices/lessons learned (seven States) to assist in implementing this provision. No assistance had been provided to States in relation to this provision.



## ■ **CONSEQUENCES OF ACTS OF CORRUPTION**

Article 34 of the Convention contains a general obligation for States parties to take measures to address the consequences of corruption. These measures must be adopted with due regard to the rights of third parties acquired in good faith and in accordance with the fundamental principles of the domestic law of each State party.<sup>207</sup> In this context, States may wish to consider annulling or rescinding a contract, withdrawing a concession or similar instrument, or taking other remedial action.<sup>208</sup>

<sup>207</sup> Legislative Guide, *op. cit.*, p. 126.

<sup>208</sup> *Ibid.*, p. 106.

While many Pacific States parties have no concrete forms of remedial action.<sup>209</sup> The range of options varied among Pacific States parties who have a range of options to address possible consequences of corruption including:

- Contract rescissions;<sup>210</sup>
- Deeming a contract void or be annulled;<sup>211</sup>
- Revocation of operating licenses;<sup>212</sup>
- Reconsideration of procurement grants;<sup>213</sup>
- Withdrawal of concessions;<sup>214</sup>
- Forfeiture of the corporate charter;<sup>215</sup>
- Revocation or restriction of business licenses;<sup>216</sup> and
- Increased penalties in certain cases.<sup>217</sup>

*A good practice of Fiji was the greater use of standard contractual terms on procurement by Government, designed to allow the Government to rescind contracts, withdraw licenses and take other similar remedies where corruption or criminal conduct has occurred. The reviewing experts observed that further consideration could be given to the more widespread use of contract provisions of this type.*

*Palau was also commended for the court's authority to restrict business when a managerial agent is convicted of money-laundering.*

It was recommended by the reviewing experts for a number of Pacific States parties to take measures to address the consequences of corruption,<sup>218</sup> including the withdrawal of contracts, licenses and other remedial measures, and strengthen their application in practice. For example, the reviewing experts for Fiji noted that an authority to blacklist companies would be useful.

<sup>209</sup> Federated States of Micronesia, Nauru, Papua New Guinea and Vanuatu.

<sup>210</sup> Fiji and the Solomon Islands.

<sup>211</sup> Kiribati and the Solomon Islands.

<sup>212</sup> Federated States of Micronesia.

<sup>213</sup> Republic of the Marshall Islands.

<sup>214</sup> Solomon Islands.

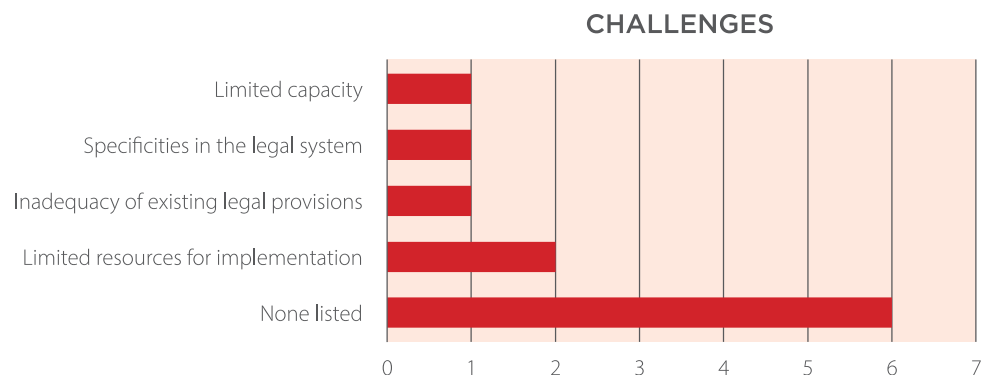
<sup>215</sup> Palau.

<sup>216</sup> Palau.

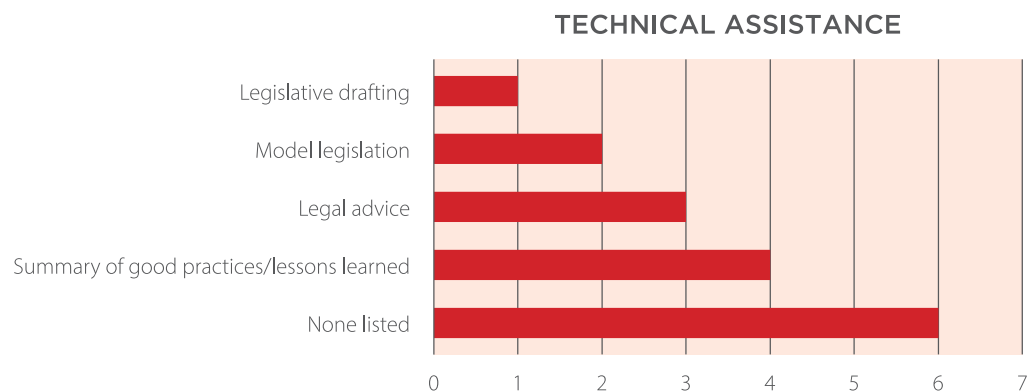
<sup>217</sup> Palau.

<sup>218</sup> Nauru, Papua New Guinea, Republic of the Marshall Islands, Vanuatu.

## ***Challenges and Technical Assistance***



Four Pacific States parties cited challenges to the implementation of UNCAC article 34. Two States cited limited resources for implementation. An inadequacy of existing legal provisions, specificities in the legal system and limited capacity were each cited once.



Four Pacific States parties requested technical assistance. Of those that did, a summary of good practices/lessons learned (four States) was the most frequently requested form of assistance. No assistance had been provided in relation to this provision.

## COMPENSATION FOR DAMAGE

Article 35 of the Convention requires that States parties ensure that entities or individuals<sup>219</sup> who have suffered damages as a result of corruption have the right to initiate legal proceedings to obtain damages from those responsible.<sup>220</sup> While article 35 does not restrict the right of each State to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State in doing so.<sup>221</sup> Further, this does not require that victims should be guaranteed compensation or restitution, but legislative or other measures must provide procedures whereby it can be sought or claimed.<sup>222</sup>

The Cook Islands and Federated States of Micronesia allow for compensation to the victims of offences (including corruption-related offences) in criminal proceedings. The Cook Islands and Kiribati also allow victims to request compensation in civil proceedings.

Orders that the court can make differ across jurisdictions. For example, in the Federated States of Micronesia, in a criminal proceeding, the court can make an order for appropriate restitution, reparation or service to the victim of the crime or to his or her family. In Nauru, the court may award expenses or compensation orders. In Vanuatu, the court can make an order for the payment of costs, damages or compensation, or for the restitution of any property, notwithstanding that the offender is not sentenced on conviction.

A few Pacific States parties noted that there was no specific provision of law or general standing provision that addressed the right of injured persons to initiate legal proceedings. Often, this would occur under principles of civil law and/or common law such as the rules of tort or breach of contract.<sup>223</sup> However, in Vanuatu, for example, details of the applicability of other statutes or principles, which provide for redress under tort or breach of contract, remained unclear.

Palau and the Republic of the Marshall Islands have legislated for the compensation of entities or persons who have suffered damage as a result of an act of corruption.

Only one recommendation was made for Vanuatu to ensure that sufficient measures exist to provide compensation for damages resulting from acts of corruption in line with article 35.

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<sup>219</sup> This includes States as well as legal and natural persons (Interpretative Note (A/58/422/Add.1, paras 37-38).

<sup>220</sup> Legislative Guide, *op. cit.*, p. 106.

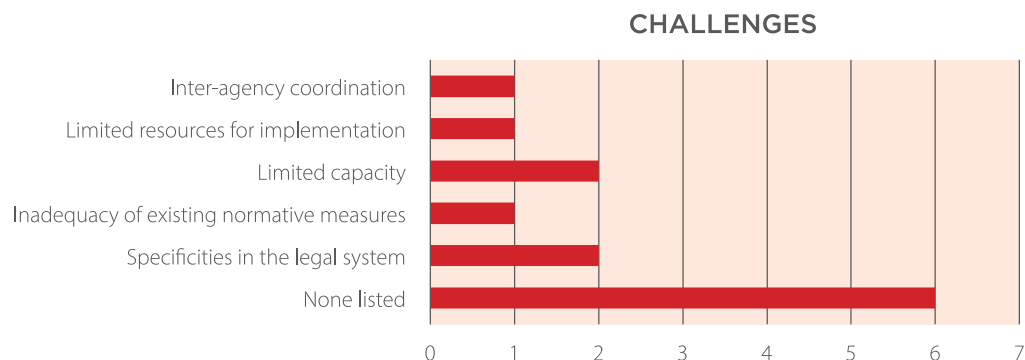
<sup>221</sup> Travaux Préparatoires, *op. cit.*, note 38, paras. 37-38.

<sup>222</sup> Legislative Guide, *op. cit.*, p. 127.

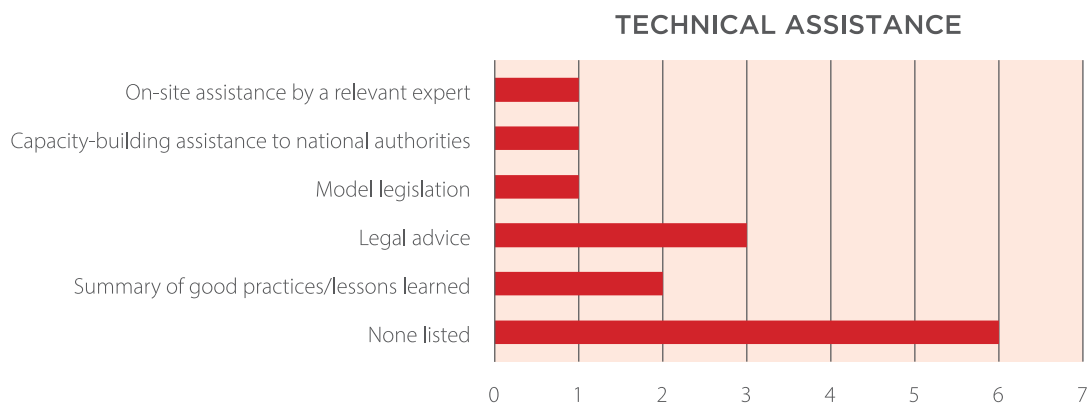
<sup>223</sup> E.g. Fiji, Federated States of Micronesia and the Solomon Islands.

## ***Challenges and Technical Assistance***

In relation to UNCAC article 35, four Pacific States parties listed challenges to implementation or identified areas for technical assistance. Challenges that were mentioned included: specificities in the legal system (two States); limited capacity (two States); and an inadequacy of existing normative measures (one State).



Four Pacific States parties required technical assistance, namely: legal advice (three States); and a summary of good practices/lessons learned (two States). No assistance had been provided to States in relation to this provision.



## ■ SPECIALIZED AUTHORITIES

Article 36 of the Convention lays emphasis on the law enforcement specialization by mandating the need for entities or persons whose core focus is law enforcement. In other words, the provision requires States parties to have persons or institutions with investigative and possible prosecutorial functions. The article does not, however, specify any particular institutional shape, although it raises procedural and resource issues necessary to guide States towards the best institutional approach depending on their specific requirements.<sup>224</sup>

The anti-corruption mandate for most Pacific States parties is spread across several agencies, including:

- The National Police;<sup>225</sup>
- Financial Intelligence Unit;<sup>226</sup>
- National Public Auditor/ Auditor General;<sup>227</sup>
- Public Service Board/Commission;<sup>228</sup>
- Ethics Commission/Board;<sup>229</sup>
- Ombudsman/Ombudsman Commission/ Office;<sup>230</sup>
- Financial Institutions Commission;<sup>231</sup>
- National Fraud and Anti-Corruption Directorate;<sup>232</sup>
- National Anti-Corruption Alliance;<sup>233</sup>
- Anti-Corruption Committee;<sup>234</sup>
- Department/Ministry of Justice;<sup>235</sup>
- Department/Office of Public Prosecutions;<sup>236</sup>
- Solicitor General's Office;<sup>237</sup> and
- The Attorney General's Office.<sup>238</sup>

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<sup>224</sup> Technical Guide, *op. cit.*, p. 113.

<sup>225</sup> Federated States of Micronesia, Kiribati, Nauru, Palau, Republic of the Marshall Islands and Vanuatu.

<sup>226</sup> Federated States of Micronesia, Kiribati, Nauru, Papua New Guinea, Republic of the Marshall Islands and Vanuatu.

<sup>227</sup> Federated States of Micronesia, Nauru, Palau and the Republic of the Marshall Islands.

<sup>228</sup> Nauru, Republic of the Marshall Islands and Vanuatu.

<sup>229</sup> Palau and the Republic of the Marshall Islands.

<sup>230</sup> Palau, Papua New Guinea and Vanuatu.

<sup>231</sup> Palau.

<sup>232</sup> Papua New Guinea.

<sup>233</sup> Papua New Guinea.

<sup>234</sup> Cook Islands.

<sup>235</sup> Federated States of Micronesia and Palau.

<sup>236</sup> Kiribati, Nauru, Papua New Guinea and Vanuatu.

<sup>237</sup> Kiribati.

<sup>238</sup> Kiribati, Republic of the Marshall Islands and Vanuatu.

Fiji is the only Pacific Island country to have established a functioning Independent Commission Against Corruption, with another yet to be approved by Parliament.<sup>239</sup> The Cook Islands is considering the establishment of a specialized anti-corruption authority by giving additional powers to its Ombudsman Office. The reviewing experts recommended that the Cook Islands finalize the process of creating its independent specialized anti-corruption authority.

In addition to encouraging and supporting existing anti-corruption bodies that play a key role in preventing and fighting corruption,<sup>240</sup> several recommendations were made by the reviewing experts in relation to strengthening the capacity and independence of such institutions.

The practical independence of such institutions for some Pacific States parties was questioned by the reviewing experts.<sup>241</sup> These Pacific States parties were therefore recommended to adopt measures to strengthen and ensure the independence<sup>242</sup> and capacity of such institutions<sup>243</sup> by ensuring sufficient and continued resources and trainings are provided for the bodies and persons specialized in combatting corruption.<sup>244</sup> It was also recommended to encourage and support existing anti-corruption bodies through appropriate trainings and resources.<sup>245</sup> In addition, the reviewing experts recommended that the functions of each anti-corruption body in Palau be clearly articulated and for Palau to consider harmonizing functions in order to avoid an overlap of mandates and administrative resources. Such bodies should be granted the necessary independence to carry out their functions effectively and without any undue influence; for example, by granting statutory appointment of the Ombudsman. Vanuatu was recommended to prioritize the investigation and prosecution of corruption-related offences, in particular, to monitor and assess the implementation of the corruption-related offences in order to take the necessary measures to strengthen their implementation.

In addition, the reviewing experts noted that the exchange of further information such as case statistics in the Federated States of Micronesia was weak and noted that plans were underway to strengthen this exchange and data management. It was recommended that the Federated States of Micronesia strengthen the collection and exchange of data, statistics and information in regard to Convention offences comprising at both the State and national levels.

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<sup>239</sup> Papua New Guinea.

<sup>240</sup> E.g. Palau.

<sup>241</sup> E.g. Nauru.

<sup>242</sup> Cook Islands, Kiribati, Nauru, Palau, Papua New Guinea and the Republic of the Marshall Islands.

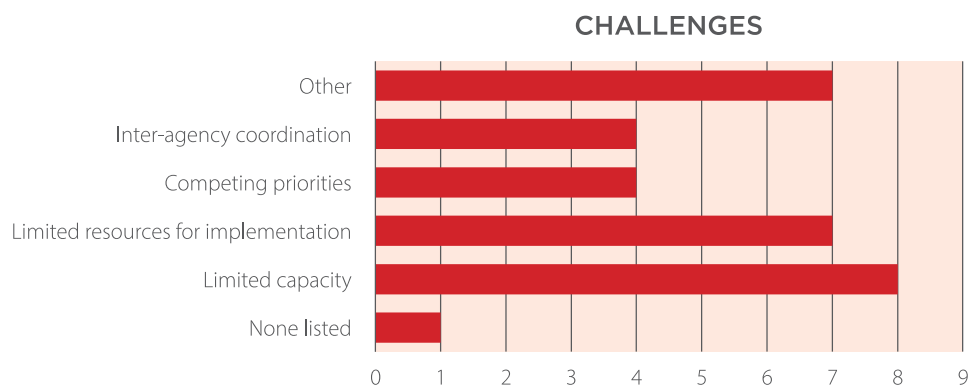
<sup>243</sup> Cook Islands.

<sup>244</sup> Federated States of Micronesia, Kiribati and Nauru.

<sup>245</sup> Kiribati, Palau and Papua New Guinea.

## ***Challenges and Technical Assistance***

Eight Pacific States parties cited limited capacity as the main challenge to their implementation of UNCAC article 36.



Nine Pacific States parties requested technical assistance. Specific types of assistance also including:

- The updating of procurement procedures, consolidation of the existing law which is easily accessible to all (i.e. online contributing to an open government policy) in Palau;
- Coordination process for complex corruption cases in Palau and an inter-agency coordination mechanism that addresses corruption—a holistic anti-corruption policy approach in the Republic of the Marshall Islands;
- Capacity-building programmes,<sup>246</sup> including an attachment and training to another Financial Intelligence Unit (preferably in the Pacific), trainings for the Police Force's Anti-Corruption Unit, anti-corruption training and capacity-building for criminal justice institutions including the judiciary, capacity-building for the Financial Intelligence Unit to receive and analyze suspicious transaction reports, and fraud and corruption-related trainings for the Police;
- Assistance in reviewing the amendments to relevant legislation;<sup>247</sup>
- Establishment of the Financial Intelligence Unit on a permanent basis;<sup>248</sup> and
- A record keeping system for public agencies.<sup>249</sup>

<sup>246</sup> Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>247</sup> Republic of the Marshall Islands.

<sup>248</sup> *Ibid.*

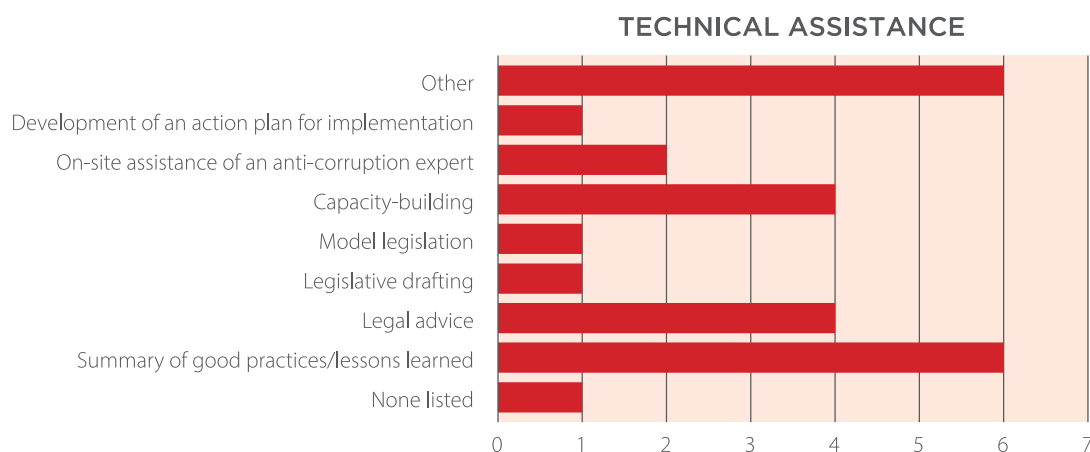
<sup>249</sup> Solomon Islands.



Some countries indicated that assistance had already been provided in the form of trainings, including for:

- The Police Force,<sup>250</sup> including a training on the management of serious crimes;
- Employees of Public Prosecution's Office on anti-money laundering;<sup>251</sup>
- Prosecutors;<sup>252</sup> and
- The Financial Intelligence Unit<sup>253</sup> by the Australian Transaction Reports and Analysis Centre, Anti-Money Laundering Assistance Team, Asia/ Pacific Group on Money Laundering and the World Bank.

States generally indicated that an extension and/or expansion of such assistance would help them adopt the measures described in the article under review.



## ■ COOPERATION WITH LAW ENFORCEMENT AUTHORITIES

Article 37 of the Convention encompasses measures to encourage persons to provide assistance in depriving offenders of the proceeds of crime and in recovering such proceeds.<sup>254</sup> Moreover, article 37(4) obliges States parties to protect such persons, as provided for in UNCAC article 32.

<sup>250</sup> Federated States of Micronesia and the Solomon Islands.

<sup>251</sup> Vanuatu.

<sup>252</sup> Palau and Vanuatu.

<sup>253</sup> Federated States of Micronesia and the Solomon Islands.

<sup>254</sup> Article 37(1); Technical Guide, *op. cit.*, p. 118

The non-mandatory provisions of article 37 encourage States parties to consider providing mitigating punishment or immunity from prosecution of a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with the Convention.<sup>255</sup>

Cooperation with law enforcement agencies across Pacific States parties generally comprises of the following:

- The Attorney General/Director of Public Prosecutions/court has discretionary power to grant immunity from prosecution to cooperating offenders in exchange for testimony and other assistance;<sup>256</sup>
- Cooperation is usually treated as a mitigating factor at sentencing;<sup>257</sup>
- Plea-bargaining;<sup>258</sup>
- Financial incentives to reward individuals for coming forward with concrete information and assistance in response to specific and credible allegations;<sup>259</sup>
- Withdrawal of charges on a case-by-case basis against cooperating participants in corruption-related matters;<sup>260</sup>
- Charges reduced or otherwise modified in appropriate instances of cooperation;<sup>261</sup> and
- Reduced sentences.<sup>262</sup>

Nauru has not established measures to encourage defendants and persons who participated in the commission of offences to cooperate in investigations and prosecutions, or to provide testimony in line with article 37. It was therefore recommended that Nauru adopt measures to encourage the cooperation of offenders in investigations and prosecutions, for example, through the possibility of mitigated punishment, plea-bargaining or immunity from prosecution.

Article 37(5) contains a provision on international support by providing for the possibility of agreements or arrangements between States to extend such incentives to cover cases in which the person who cooperates is in a jurisdiction other than the one where the investigation or adjudication takes place. Most States have not entered into any such

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<sup>255</sup> Article 37(2)(3).

<sup>256</sup> E.g. Federated States of Micronesia, Palau (testimonial and transactional immunity), Papua New Guinea and Vanuatu.

<sup>257</sup> E.g. Federated States of Micronesia and Vanuatu.

<sup>258</sup> E.g. Federated States of Micronesia, Palau and the Republic of the Marshall Islands.

<sup>259</sup> Fiji.

<sup>260</sup> *Ibid.*

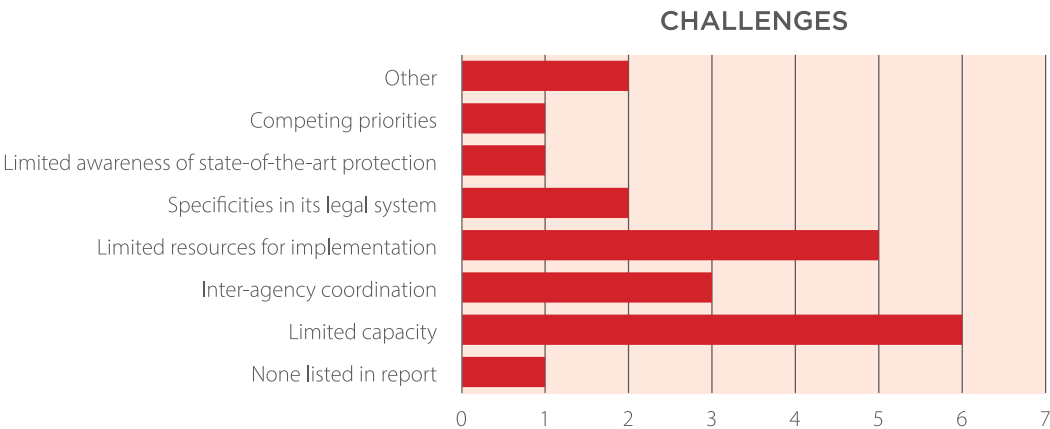
<sup>261</sup> Fiji, Palau and the Republic of the Marshall Islands.

<sup>262</sup> Papua New Guinea and the Republic of the Marshall Islands.

agreements or arrangements, or did so on an informal basis<sup>263</sup>. It was therefore recommended by the reviewing experts that countries consider entering into agreements or arrangement with other States to facilitate assistance of cooperating offenders under this article.<sup>264</sup>

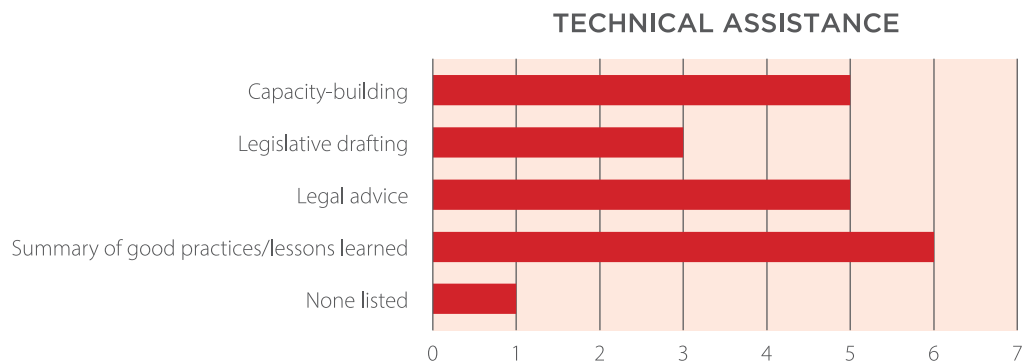
***Challenges and Technical Assistance***

Seven Pacific States parties cited challenges to the implementation of UNCAC article 37, namely limited capacity (six States) and limited resources for implementation (five States).



Eight Pacific States parties requested technical assistance, namely in the form of a summary of good practices/lessons learned (six States), capacity-building assistance (five States) and legal advice (five States). No assistance had been provided to States in relation to this provision.

<sup>263</sup> E.g. Republic of the Marshall Islands.  
<sup>264</sup> E.g. Republic of the Marshall Islands and the Solomon Islands.



## ■ **COOPERATION BETWEEN NATIONAL AUTHORITIES**

The collaboration of officials and agencies with authorities that are in charge of enforcing relevant laws is essential to the overall anti-corruption effort. Consequently, article 38 of the Convention requires States parties to take any necessary measures to encourage, in accordance with their domestic law, cooperation between:

- Their public authorities and public officials; and
- Their authorities responsible for the investigation and prosecution of criminal offences.

Such cooperation may include proactively informing the authorities responsible for investigating and prosecuting criminal offences where there are reasonable grounds to believe that any of the offences established in accordance with UNCAC articles 15, 21 and 23 have been committed. It may also include providing all the necessary information, upon request.

As discussed above, articles 15, 21 and 23 cover bribery of national public officials, bribery in the private sector and laundering the proceeds of crime, respectively. Early notification of any potential offence to those agencies with the powers and expertise to investigate and prosecute such offences is essential to ensure that perpetrators do not flee the jurisdiction or tamper with evidence. Early notification also enables the movement of assets to be prevented or monitored.<sup>265</sup>

<sup>265</sup> Technical Guide, *op. cit.*, p. 122.

Pacific States parties have adopted a variety of different measures and degrees of formality for cooperation between national authorities, including:

- Specialized bodies;<sup>266</sup>
- Memoranda of understanding;<sup>267</sup>
- Secondments;<sup>268</sup>
- Joint trainings and advocacy;<sup>269</sup> and
- Informal cooperation.<sup>270</sup>

For example, the Cook Islands established an Anti-Corruption Committee which comprises of the Solicitor General, Commissioner of Police, Head of the Financial Intelligence Unit, Director of the Cook Islands Audit Office, Financial Secretary of the Ministry of Finance and Economic Management, Public Service Commissioner, Chief of Staff of the Office of the Prime Minister, and the Ombudsman. Information regarding possible corruption-related offences is exchanged between Committee members.

*The Cook Islands was commended on its effective system of sharing operational information within the framework of the Combined Law Agencies Group between the Cook Islands law enforcement authorities.*

Kiribati similarly approved the creation of an anti-corruption committee comprising of the Offices of the President, Director of Public Prosecutions, Customs and Immigration and the Auditor General, and the Police; this was not yet functional. Aside from this committee, Kiribati observed that there were limited measures to encourage cooperation among its national authorities.

In Papua New Guinea, the National Anti-Corruption Alliance consists of all relevant Government agencies, including the Offices of the Prime Minister and the National Executive Council, Public Prosecutor and Solicitor General, Department of Justice and Attorney General, Police and the Ombudsman Commission. It also includes technical people to facilitate the investigation and prosecution of corruption-related offences.

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<sup>266</sup> Cook Islands.

<sup>267</sup> Palau, Republic of the Marshall Islands and Vanuatu.

<sup>268</sup> Palau, Republic of the Marshall Islands.

<sup>269</sup> Palau.

<sup>270</sup> Republic of the Marshall Islands.

*The establishment of Papua New Guinea's National Anti-Corruption Alliance with over ten Government institutions working on cases collaboratively was commended.*

Basic arrangements were in place for cooperation among the authorities in Nauru (such as between the Police, Financial Intelligence Unit, Director of Public Prosecutions and the Nauru Public Service). For example, there is a memoranda of understanding in place between the Nauru Police and Financial Intelligence Unit, as well as between the Nauru Police and Customs Department, the aim of which was to enhance law enforcement coordination. In addition, the Governmental institutions of Nauru are situated in close proximity to each other and it was noted that there is generally close coordination among them.

Palau also noted a number of memoranda of understanding relating to law enforcement with a thematic focus on national cooperation. This includes a national memorandum of understanding between the Bureau of Public Safety, Offices of Customs, Tax, Labor and Immigration, and the Financial Intelligence Unit. Moreover, the Public Auditor's Office signed a memorandum of understanding with the Office of the Special Prosecutor.

The Republic of the Marshall Islands reported on both formal and informal arrangements for cooperation among authorities. Memoranda of understanding exist between compliance authorities and between the National Police and Auditor General's Office, with also another one pending between the Police and Customs Authority. A formal arrangement also focuses on money-laundering (Anti-Money Laundering Taskforce). Otherwise, informal cooperation was commonly used.

*The Republic of the Marshall Islands was commended on its proactive sharing of information between national law enforcement authorities.*

In other Pacific States parties, inter-agency cooperation was regularly relied on but occurred predominantly on an informal basis. For example, in the Federated States of Micronesia, the National Police and Attorney General's Office, at the national level, cooperate closely on a daily basis. In addition, a joint law enforcement agreement exists between the Police at national and State levels; cases are transferred depending on the level of administration involved. The exchange of further information such as case statistics was deemed weak and plans were underway to strengthen this exchange and data management.

*The reviewing experts commended the strong collaboration and knowledge exchange between law enforcement authorities at the national level in the Federated States of Micronesia, in particular between the National Police and Attorney General's Office.*

*The Solomon Islands was commended on the deployment of an expert from the Royal Solomon Islands Police Force into the Financial Intelligence Unit to strengthen investigative capacity and improve coordination.*

The reviewing experts made several recommendations to Pacific States parties. The recommendations included:

- Taking additional steps to strengthen coordination measures among national authorities, for example, to encourage public servants to report information to the relevant authorities and to cooperate in investigations or prosecutions;<sup>271</sup>
- Consider adopting legislative provisions requiring public officials to report suspected instances of corruption to the authorities responsible for law enforcement;<sup>272</sup>
- Taking additional measures to strengthen cooperation and facilitate information-sharing among national authorities in the investigation and prosecution of Convention offences, through trainings, the deployment of personnel and material resources, where necessary and appropriate;<sup>273</sup> and
- Strengthening inter-agency coordination and collaboration, as well as making sufficient resources available for capacity-building and the development of processes to address constraints and backlogs in the investigation, prosecution and adjudication of cases.<sup>274</sup>

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<sup>271</sup> Nauru.

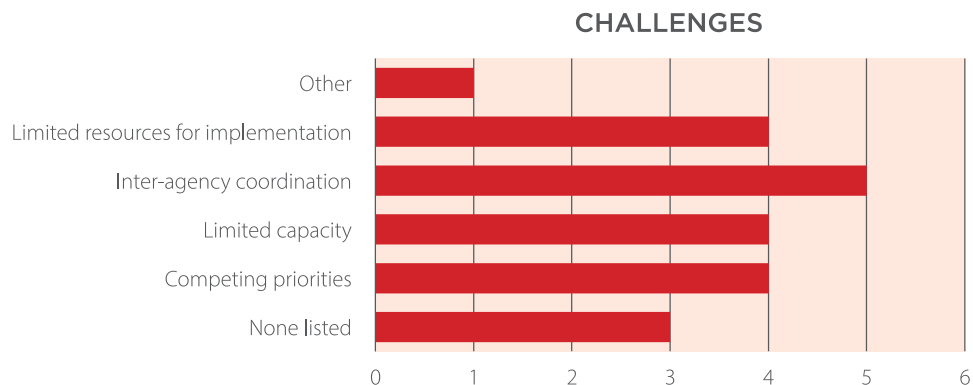
<sup>272</sup> Cook Islands.

<sup>273</sup> Solomon Islands.

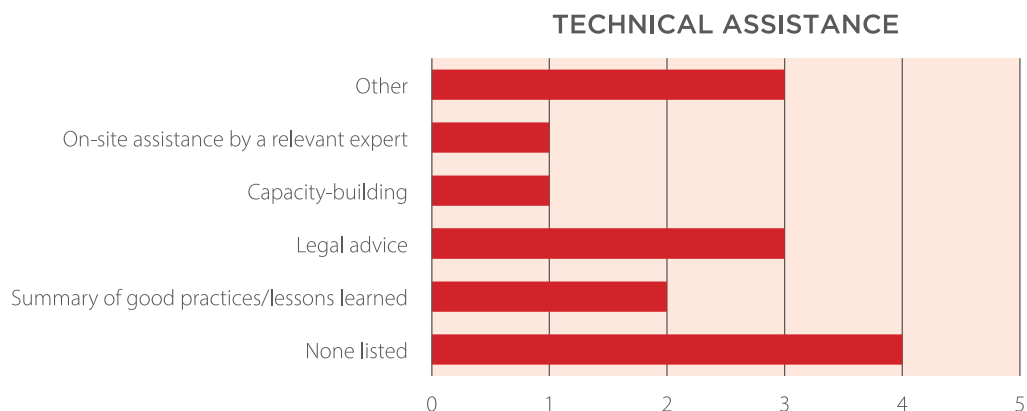
<sup>274</sup> Vanuatu.

## ***Challenges and Technical Assistance***

Six Pacific States parties cited challenges to the implementation of UNCAC article 38, namely inter-agency coordination (five States), limited resources for implementation (four States), competing priorities (four States) and their limited capacity (four States).



While four Pacific States parties did not request technical assistance, legal advice was the most commonly requested (three States). Other specific requests for assistance included investigative training and the development of a case management system. One State indicated that technical assistance had been provided in relation to the implementation of this provision.





## ■ **COOPERATION BETWEEN NATIONAL AUTHORITIES AND THE PRIVATE SECTOR**

The benefits of a corruption-free economic environment are also for the private sector. Nonetheless, the private sector's concrete collaboration with public authorities should be institutionalized and framed properly, such as to avoid cross-jurisdictional or other conflicts that enterprises may face, for example, related to privacy, confidentiality or bank secrecy rules.<sup>275</sup> The Convention recognizes this need and requires States parties to foster a cooperative relationship with the private sector.

Article 39 of the Convention recognizes the importance of the role of the private sector in preventing, detecting and prosecuting actors involved in corrupt practices. It is often private entities that observe irregularities and suspicious transactions in the course of their routine financial and commercial activities.<sup>276</sup> Many corruption-related cases are complex and covert, and will not come to the attention of the relevant authorities or their investigation would be frustrated without the cooperation of private sector entities, especially financial institutions, as well as private citizens. In particular, early notification by relevant private sector bodies or early cooperation with investigative agencies is important to the identification and safeguarding of potential evidence and the initiation of enquiries. Moreover, the role of financial institutions—or those institutions involved in high-value commercial activity—is central to the effective prevention, investigation and prosecution of offences established in accordance with the Convention.<sup>277</sup>

Most Pacific States parties have not formalized cooperation with the private sector<sup>278</sup> and often have a limited number of mechanisms in place to encourage the private sector to report corrupt activity. For example, most Pacific States parties' Financial Intelligence Units receive cash transaction reports or suspicious activity reports from financial institutions and cash dealers.<sup>279</sup> Financial Intelligence Units provide oversight of the private sector,<sup>280</sup> regular trainings to financial institutions, cash dealers and legal practitioners on proper recordkeeping and reporting practices,<sup>281</sup> and provide shareholder and nominee services to domestic and foreign companies.<sup>282</sup>

<sup>275</sup> Legislative Guide, *op. cit.*, p. 131. See also the related protection required under article 33 for persons reporting facts concerning corruption-related offences.

<sup>276</sup> *Ibid.*, p. 131.

<sup>277</sup> Technical Guide, *op. cit.*, p. 123.

<sup>278</sup> E.g. Federated States of Micronesia and the Republic of the Marshall Islands.

<sup>279</sup> E.g. Cook Islands, Federated States of Micronesia, Palau and the Solomon Islands.

<sup>280</sup> E.g. Kiribati.

<sup>281</sup> E.g. Solomon Islands.

<sup>282</sup> E.g. Nauru (through the Financial Intelligence Unit and the Nauru Agency Corporation).

Generally, there is no specific duty to report corruption.<sup>283</sup> However, Pacific States parties encourage reporting through various awareness-raising activities,<sup>284</sup> outreach programs,<sup>285</sup> toll-free hotlines,<sup>286</sup> and other methods of communication.<sup>287</sup> In Vanuatu, free legal advice and assistance is provided to victims and witnesses of corruption. The reviewing experts viewed this as a step prior to the submission of a complaint.

*The reviewing experts acknowledged the efforts of Vanuatu in the area of cooperation with the private sector, in particular with financial institutions. The mutual trainings of financial service institutions by Vanuatu's Financial Intelligence Unit and vice versa were commended. The trainings specifically targeted priority areas, such as awareness-raising about sectors at an increased risk of corruption.*

*The deployment of an expert from the Police Force to the Financial Intelligence Unit to strengthen investigative capacity and improve coordination in the Solomon Islands was also noted as a good practice.*

The Cook Islands was recommended to continue making more targeted efforts to encourage citizens to report on corruption-related offences, as well to raise general awareness of the public on the problem of corruption and powers of relevant anti-corruption authorities in line with article 39(2).

The reviewing experts also recommended that Nauru consider taking measures to encourage or require public officials, nationals and residents to report corruption to the appropriate authorities. While Kiribati was recommended to increase awareness-raising on corruption in the communities. Other recommendations included continuing to strengthen the collaboration of national authorities with the private sector.

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<sup>283</sup> See, e.g., Nauru and the Republic of the Marshall Islands.

<sup>284</sup> Federated States of Micronesia and the Republic of the Marshall Islands.

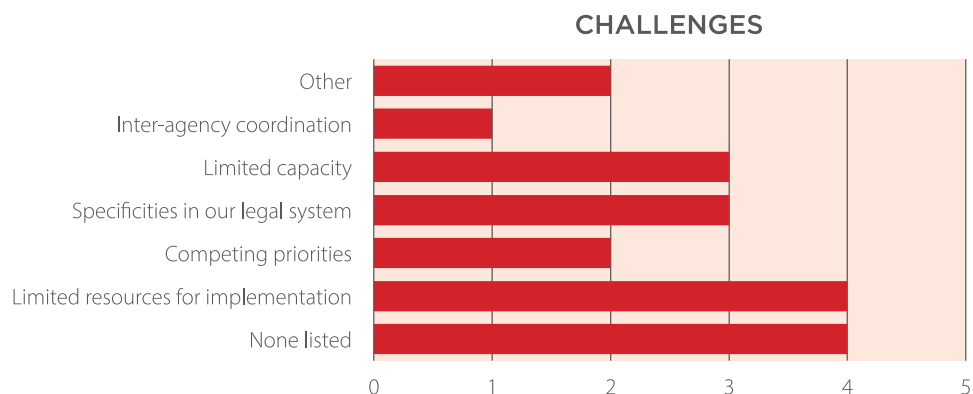
<sup>285</sup> Fiji, Solomon Islands and Vanuatu.

<sup>286</sup> Federated States of Micronesia, Fiji and the Republic of the Marshall Islands.

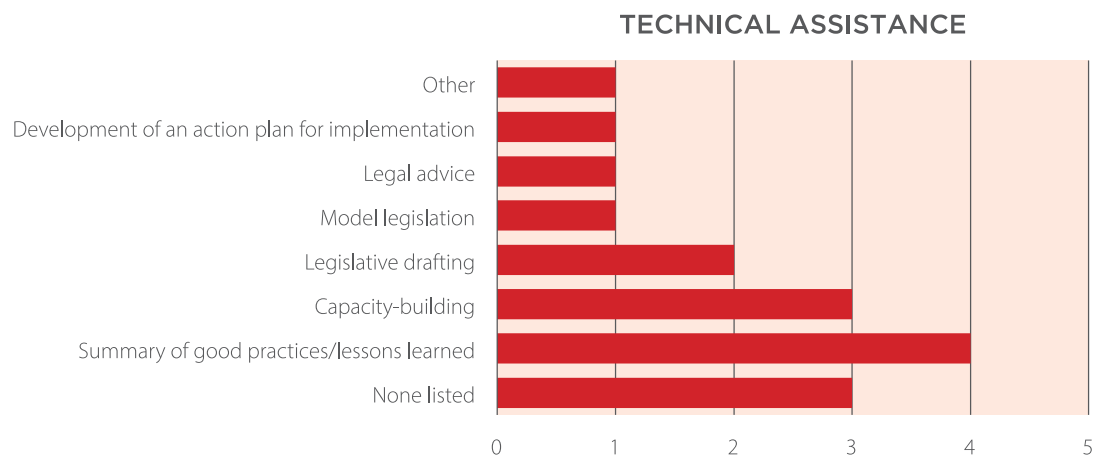
<sup>287</sup> Palau (through telephone, mail, Facebook or in person) and the Republic of the Marshall Islands.

## **Challenges and Technical Assistance**

In relation to UNCAC article 39, five Pacific States parties cited the implementation challenges as being limited resources (four States), limited capacity (three States) and specificities in their legal systems (three States).



Four Pacific States parties requested a summary of good practices/lessons learned as technical assistance. No assistance had been provided to States in relation to this provision.



## ■ **BANK SECRECY**

Bank secrecy rules have often been found to be a major hurdle in the investigation and prosecution of serious crimes with financial aspects. Across the Convention, there are several articles which aim to establish the principle that bank secrecy cannot be used as a reason not to adhere to a provision of the Convention, for example, article 31(7) in relation to the seizure and confiscation of proceeds of crime and article 46(8) in relation to mutual legal assistance.

UNCAC article 40 requires that, in case of domestic investigations of Convention offences, States parties have appropriate mechanisms in their legal system to overcome obstacles that may arise out of the application of bank secrecy laws. This is already acknowledged by the Convention's requirements on suspicious transaction reporting and the recommended establishment of a Financial Intelligence Unit.<sup>288</sup>

Most Pacific States parties have either implemented this provision in full<sup>289</sup> or in part,<sup>290</sup> generally with domestic legislation allowing bank secrecy to be waived or lifted. For example, in the Cook Islands, the *Financial Transactions Reporting Act 2004* gives powers to the Financial Intelligence Unit to request information from financial institutions and share it with law enforcement authorities. In Papua New Guinea, orders under section 154 of its *Proceeds of Crime Act* allow for bank secrecy to be waived with respect to the proceeds of crime.

In the Federated States of Micronesia, a provision is made for money-laundering offences but not for other corruption-related offences. Further, the provision is subject to a narrow interpretation as only the bank that sent a suspicious transaction report is required to lift bank secrecy and to provide the requested documentation. The Federated States of Micronesia was therefore recommended to ensure that sufficient measures be taken to lift bank secrecy for criminal investigations in relation to all corruption-related offences. In Kiribati, limited procedures are available under its *Proceeds of Crime Act* that could be used to lift of bank secrecy. It was therefore recommended that Kiribati strengthen such procedures for the lifting of bank secrecy, including through the adoption of legislative measures.

While some Pacific States parties have legislatively implemented this provision, in practice, there have been procedural delays.

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<sup>288</sup> See articles 14 and 58; Technical Guide, *op. cit.*, p. 125.

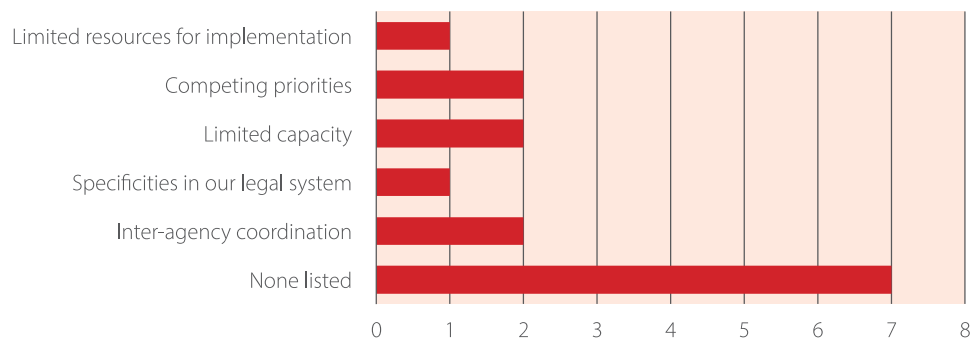
<sup>289</sup> Fiji, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>290</sup> Federated States of Micronesia and Papua New Guinea.

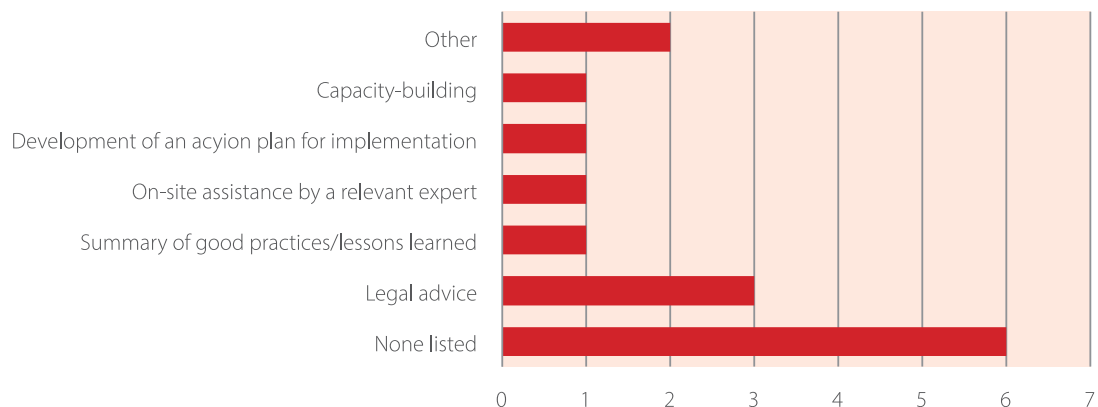
## ***Challenges and Technical Assistance***

In relation to UNCAC article 40, only three Pacific States parties listed challenges and technical assistance needs. No assistance had been provided to States in relation to this provision.

### **CHALLENGES**



### **TECHNICAL ASSISTANCE**



## ■ **CRIMINAL RECORD**

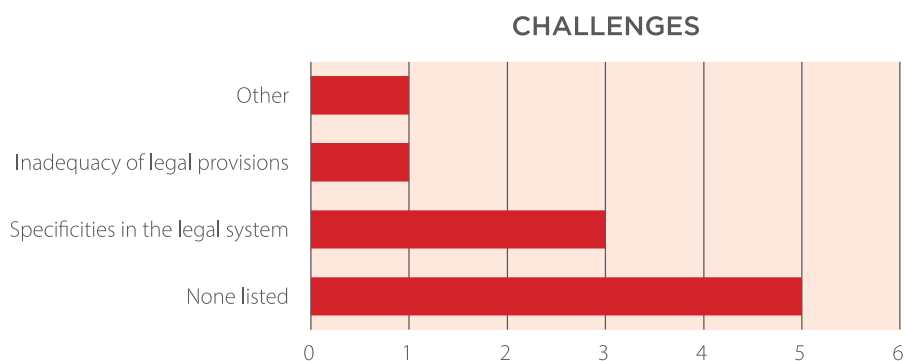
Article 41 of the Convention is a non-mandatory provision that recommends that States parties evaluate whether or not they regard it as appropriate to take into consideration previous convictions (including convictions no longer subject to appeal) from another State.<sup>291</sup>

The majority of Pacific States parties have implemented this provision, allowing for previous convictions, including foreign convictions, to be taken into consideration.<sup>292</sup> Fiji had not implemented this provision and noted that there was no indication of any measures being taken or future plans to implement the provision. In Kiribati, it was unclear on what basis courts might consider previous foreign convictions, as there had been no experience of this.

The Cook Islands does not have specific provisions for taking into consideration any criminal record from abroad. However, in actual court practice, previous convictions were accepted as aggravating factors during sentencing. It was therefore recommended that the Cook Islands consider the need to adopt legislative measures to better implement article 41.

## ■ ***Challenges and Technical Assistance***

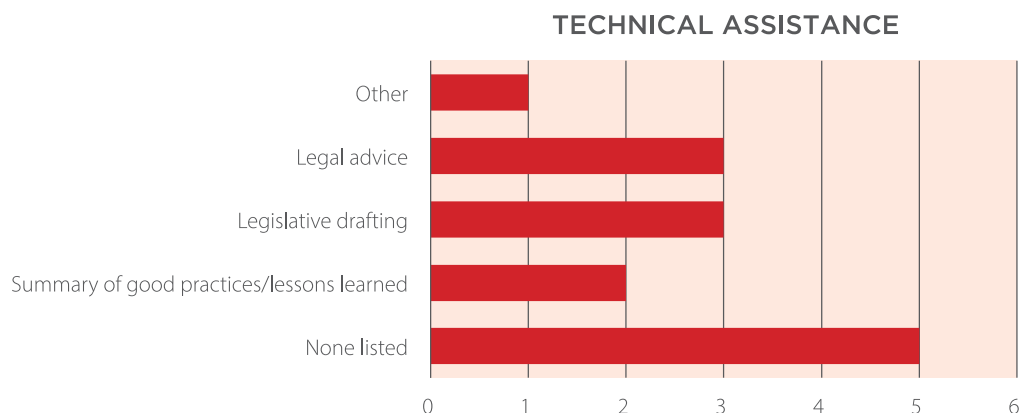
While most Pacific States parties did not cite any challenges to implementing UNCAC article 41, three States listed specificities in their legal system as a challenge to implementation.



<sup>291</sup> Technical Guide, *op. cit.*, p. 130; Travaux Préparatoires, *op. cit.*, note 38, para. 40.

<sup>292</sup> Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

The same Pacific States parties did not list any technical assistance requirements. However, three other States requested legal advice and legislative drafting assistance. No assistance had been provided to States in relation to this provision.



## ■ **JURISDICTION**

Offenders often try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. This is particularly so in cases of serious corruption where the offenders can be very sophisticated and mobile.<sup>293</sup> Jurisdictional gaps need to be reduced or eliminated. In addition, there is a need to ensure that, in cases where a criminal group is active in several States that may have jurisdiction over the conduct of the group, there is a mechanism available for those States to facilitate coordination of their efforts.<sup>294</sup> In addition to UNCAC Chapter IV on international cooperation that provides a framework for cooperation among States parties, article 42 of the Convention addresses the jurisdiction to prosecute and punish such crimes.

Article 42 requires that States parties establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels registered under their laws. States are also required to establish jurisdiction in cases where they cannot extradite a person on grounds of nationality.

<sup>293</sup> Legislative Guide, *op. cit.*, p. 134.

<sup>294</sup> *ibid.*, p. 134.

In addition, States are invited to consider the establishment of jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in their territory, where the offence is linked to money-laundering planned to be committed in their territory, or the offence is committed against the State.<sup>295</sup>

It was recommended by the reviewing experts that those countries that had not established jurisdiction over all UNCAC offences do so.<sup>296</sup> In other words, where necessary: extend the “territoriality principle” to vessels and aircrafts;<sup>297</sup> and consider adopting such measures as may be necessary to establish jurisdiction in relation to the active<sup>298</sup> and passive personality,<sup>299</sup> and State protection principle.<sup>300</sup> These are discussed in detail below.

### **Territorial Jurisdiction**

UNCAC article 42(1) requires that States parties establish jurisdiction according to the “territoriality principle”. That is, States must establish jurisdiction for offences committed:

- In their territory;
- On board a vessel flying the flag of the State; and
- On board an aircraft registered under the law of the State.<sup>301</sup>

The offence may be committed in whole or in part in the territory of the State.<sup>302</sup>

The scope of territorial jurisdiction differs among countries. Most countries have established territorial jurisdiction,<sup>303</sup> including jurisdiction over vessels and aircrafts.<sup>304</sup> For some States, the act or part of the act must have occurred in the State’s territory.<sup>305</sup> The broadest territorial jurisdiction was that of Palau whose territorial jurisdiction extended to circumstances when the conduct or the result of the conduct that is an element of the offence occurs within the State party’s territory.

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<sup>295</sup> Article 42(2).

<sup>296</sup> E.g. Solomon Islands.

<sup>297</sup> Papua New Guinea.

<sup>298</sup> Nauru and the Republic of the Marshall Islands.

<sup>299</sup> Nauru, Papua New Guinea and the Republic of the Marshall Islands.

<sup>300</sup> Nauru, Papua New Guinea and the Republic of the Marshall Islands.

<sup>301</sup> Technical Guide, *op. cit.*, p. 132.

<sup>302</sup> Travaux Préparatoires, *op. cit.*, para.41.

<sup>303</sup> Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>304</sup> Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>305</sup> E.g. Vanuatu.



Papua New Guinea, however, does not extend its jurisdiction to vessels and aircrafts. The reviewing experts therefore recommended that Papua New Guinea take measures to establish jurisdiction over UNCAC offences, namely, to extend the “territoriality principle” to vessels and aircrafts. The reviewing experts also recommended that Kiribati clarify the extraterritorial jurisdiction on board vessels and aircraft where the conduct occurs outside of its territorial boundaries.

### **Active and Passive Personality Principles, and State Protection Principle**

UNCAC article 42(2) includes the non-mandatory requirement that States parties may establish jurisdiction according to the “active or passive personality principles”, namely, jurisdiction for offences committed by or against their nationals respectively. It also includes the non-mandatory requirement for States parties to establish jurisdiction according to the “protection principle”, that is, jurisdiction over offences committed against the State.<sup>306</sup>

Most States have established the active personality principle,<sup>307</sup> but neither the passive personality principle<sup>308</sup> nor the State protection principle.<sup>309</sup>

Of those States that have not established either the active or the passive personality principle,<sup>310</sup> it was recommended that they consider doing so. Those that had not adopted the State protection principle were also recommended to consider adopting that principle.

The Federated States of Micronesia had partially established the active and passive personality principles, focusing on national public servants. In other words, the Federated States of Micronesia may extend its jurisdiction over offences committed against or by national public servants in the course of, or in connection with, their employment or service. The reviewing experts therefore recommended that the Federated States of Micronesia consider extending extraterritorial jurisdiction to crimes committed abroad against, or by, not only a national public official but any national of the Federated States of Micronesia or a stateless person with habitual residence in the Federated States of Micronesia.

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<sup>306</sup> Technical Guide, *op. cit.*, p. 132.

<sup>307</sup> Papua New Guinea. The Republic of the Marshall Islands and the Solomon Islands have not implemented the active personality principle.

<sup>308</sup> Cook Islands, Nauru, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>309</sup> Nauru and the Republic of the Marshall Islands. Implemented by the Federated States of Micronesia and the Solomon Islands.

<sup>310</sup> Kiribati, Nauru and the Republic of the Marshall Islands.

### **Jurisdiction over Preparatory Money-Laundering Offences**

The Convention urges States parties to consider establishing jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the money-laundering offences.<sup>311</sup> This includes even if the participatory act had been committed abroad with a view to committing the main act on the territory of the State. This provision implements the Convention's call for international cooperation in the fight against money-laundering by ensuring jurisdiction without legal lacunas.<sup>312</sup>

This provision was implemented by the Federated States of Micronesia and Nauru. The reviewing experts noted that the coverage was unclear in the Solomon Islands with respect to jurisdiction over cases where the underlying offence is committed outside the country and the money-laundering activity occurs in the territory of the Solomon Islands. It was also not clearly regulated in Vanuatu. In the Cook Islands, in cases of money-laundering committed abroad where offenders are ordinarily residents in the Cook Islands or corporations registered in the Cook Islands, they may be held liable.

### **Nationality Principles**

UNCAC article 42(3) mandates that States parties should establish jurisdiction over corruption-related offences when the alleged offender is present in its territory and it does not extradite such a person solely on the ground that he or she is one of its nationals. This obligatory requirement is linked to the requirement in article 44(11) to initiate domestic prosecutorial processes in lieu of extradition<sup>313</sup> – the principle of *aut dedere aut judicare* (extradite or prosecute).

UNCAC article 42(4) includes the non-mandatory requirement for States parties to establish jurisdiction over corruption-related offences when the alleged offender is present in its territory and it does not extradite him or her on grounds *other* than that of nationality.<sup>314</sup> Generally, there was limited information provided by States on their implementation of this provision. However, it was noted that the Solomon Islands chose not to extend jurisdiction to offences committed against a national, a stateless person, offences committed by a national outside of the territorial jurisdiction or offences committed against the State.

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<sup>311</sup> Article 23(1)((a)(i)(ii) or (b)(i).

<sup>312</sup> Technical Guide, *op. cit.*, p. 135.

<sup>313</sup> *Ibid.*, p. 132.

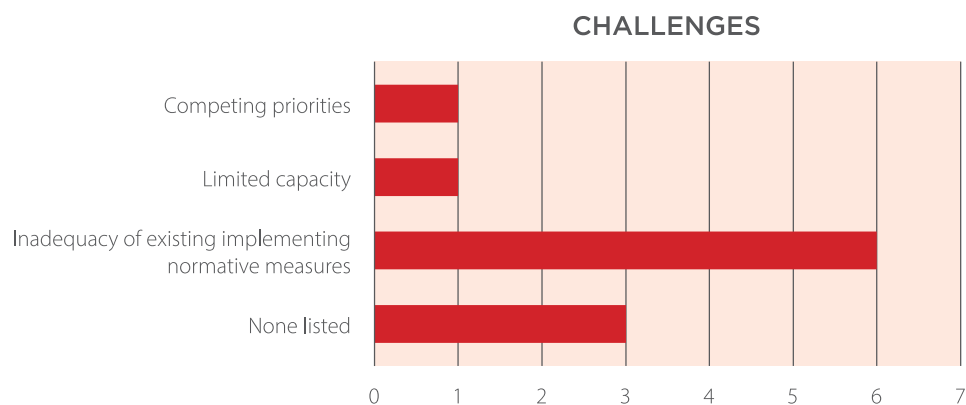
<sup>314</sup> Legislative Guide, *op. cit.*, p. 135.

## **Cooperation**

States are required to consult with other interested States in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions.<sup>315</sup> States also provided limited information on their implementation of this provision. However, the Cook Islands and Palau indicated that, as a matter of practice, they would consult with foreign competent authorities. The Cook Islands and Papua New Guinea were recommended to consider the possibility of including in their domestic legislation the requirement to consult with foreign counterparts as stipulated in article 42(5), in particular, if there were an overlap in conducting an investigation, prosecution or judicial proceedings in respect of the same conduct.

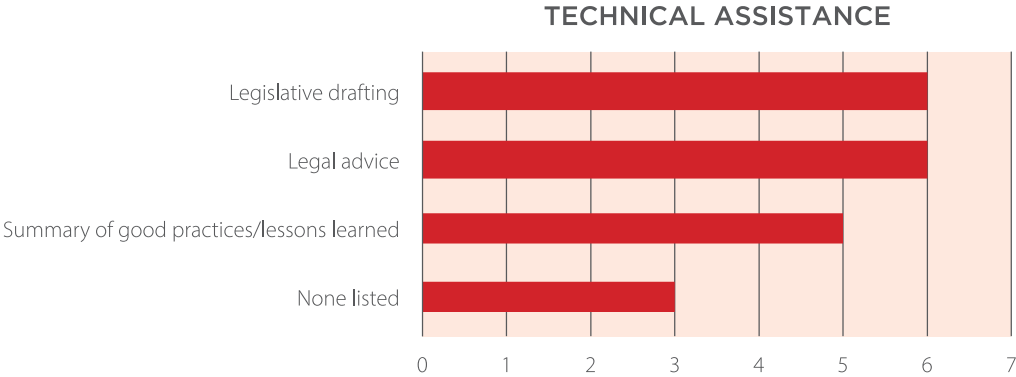
## **Challenges and Technical Assistance**

Six Pacific States parties cited challenges to implementing UNCAC article 42, namely an inadequacy of existing normative measures.



<sup>315</sup> Article 42(5).

Pacific States parties commonly requested technical assistance in the form of legislative drafting (six States) and legal advice (six States). No assistance had been provided to States in relation to this provision.



# CONCLUSION



The implementation of Chapter III of the Convention varies across Pacific States parties. The review process identified a number of good practices, as well as differences and gaps in implementation. While States have generally criminalized active and passive bribery of public officials (article 15), the majority have neither adopted specific measures to criminalize both active and passive bribery of foreign public officials and officials of public international organizations (article 16), nor have States criminalized either active or passive bribery in the private sector (article 21). This is reflected in the challenges and technical assistance needs cited by nine of the ten Pacific States parties in relation to UNCAC article 16. Moreover, regarding UNCAC article 21, seven Pacific States parties requested legal advice and legislative drafting.

For the most part, Pacific States parties have implemented embezzlement, misappropriation or other diversion of property by a public official (article 17). However, while some countries' coverage is broad, others have gaps in the extent of coverage of their legislative provisions. Most States have also criminalized embezzlement in the private sector (article 22).

Pacific States parties have implemented or partially implemented trading in influence (article 18). Many countries also do not have a general, broad provision that criminalizes abuse of functions (article 19). Rather, elements of the offence are found in different legislative provisions. Further, most States have not made illicit enrichment a criminal offence as required by article 20 of the Convention. However, certain public officials are required to submit declarations of assets and interests.

Generally, States have legislatively implemented the required elements of the offence of money-laundering as stipulated by UNCAC article 23; however, there are some gaps in coverage. There have also been limited examples of implementation of the various Pacific States parties' legislation on money-laundering.

Chapter III of the Convention also recognizes that the prevention and criminalization of corrupt practices need to be supported by measures and mechanisms that enable the overall anti-corruption effort. The implementation of these provisions also varies across States. For example, several countries do not provide for statutes of limitations (article 29) for any criminal offences including corruption-related offences, while a statute of limitations applies to such offences in other States. With limited exceptions, most States do not have any specific protection programmes for witnesses, victims or reporting persons (articles 32 and 33) beyond fairly standard obstruction of justice statutes (article 25).

Across all States, the determination of sanctions generally takes into account the gravity of offences (article 30), with countries applying both imprisonment and fines for corruption-related offences and most follow a system of discretionary prosecution, although the basis on which this discretion is exercised varies. Furthermore, most States address conditions on release pending trial or appeal designed to ensure the presence of the defendant at criminal proceedings.

The anti-corruption mandate for most States is spread across several agencies (article 36). Fiji is the only Pacific Island country to have established a central Independent Commission Against Corruption. States adopt a variety of different measures and degrees of formality for cooperation with law enforcement authorities (article 37) and also between national authorities (article 38), including through: specialized bodies; memoranda of understanding; secondments; and informal cooperation. However, most States do not have formalized cooperation with the private sector and have a limited number of mechanisms in place to encourage the private sector to report corrupt activity (article 39).

Overall, the reviewing experts recommended that Pacific States parties adopt (for the mandatory provisions) or consider adopting (for the non-mandatory provisions) legislation to criminalize the offences contained in Chapter III of the Convention or to rectify the gaps in the coverage of offences in line with the provisions contained in this Chapter. On the enforcement of these provisions, there have been some but rather few examples in Pacific States parties. Measures and efforts are further required to ensure implementation in order to more effectively fight corruption in the Pacific region.

## ■ ANNEX I: PACIFIC UNCAC REVIEWS

State party	Year of Completion	Date of the Country Visit	Reviewing Experts
 Cook Islands	2015	10 – 13 November 2014	Belarus and Qatar
 Fiji	2012	11 – 15 July 2011	Bangladesh and the United States of America
 Federated States of Micronesia	2014	24 – 28 March 2014	Republic of Korea and Mongolia
 Kiribati	2015	18 – 20 November 2014	Côte d'Ivoire and Vanuatu
 Nauru	2015	25 – 27 August 2014	Timor Leste and Jamaica
 Palau	2015	15 – 18 September 2014	Cambodia and Malaysia
 Papua New Guinea	2013	5 – 9 March 2012	Malawi and Tajikistan
 Republic of the Marshall Is.	2014	20 – 23 May 2014	Papua New Guinea and the Central African Republic
 Solomon Islands	2014	24 – 27 February 2014	Iraq and the Slovak Republic
 Vanuatu	2013	28 – 30 October 2013	Solomon Islands and India













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