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United Nations Office on Drugs and Crime

Country Review Report of Tuvalu

Review by Afghanistan and Grenada of the implementation by Tuvalu of articles 15 – 42 of Chapter III. “Criminalization and law enforcement” and articles 44 – 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

I. Introduction

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

II. Process

5. The following review of the implementation by the Tuvalu of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Tuvalu, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Afghanistan, Grenada and Tuvalu, by means of telephone conferences and e-mail exchanges and involving Ms. Corinna Ituaso from Tuvalu, Mr. Sayed Jalal Rahmati and Mr. Mohamed Aqil Omar from Afghanistan, and Mr. Robert Branch from Grenada. The staff members of the Secretariat were Ms. Tanja Santucci and Ms. Maria Adomeit.
6. A country visit, agreed to by Tuvalu, was conducted in Funafuti from 25 to 27 January 2017. During the on-site visit, meetings were held with representatives from the Attorney-General's office, the Chief Ombudsman's office, a senior magistrate, the Commissioner of police, the Auditor-General's office, the Central Procurement Unit, the National Bank of Tuvalu, civil society and the private sector.

III. Executive summary

1. Introduction: Overview of the legal and institutional framework of Tuvalu in the context of implementation of the United Nations Convention against Corruption

Tuvalu acceded to the Convention on 4 September 2015 and deposited its instrument of ratification with the Secretary-General on the same date. The Convention entered into force for Tuvalu on 4 October 2015.

Tuvalu gained independence on 1 October 1978. The Constitution, which took effect on 1 October 1978, is the supreme law of Tuvalu and the other laws of the country have effect subject to its provisions. Other sources of law include statutory law, customary law, the common law of Tuvalu, and imperial enactments.

Tuvalu is a constitutional monarchy with a parliamentary democracy. The Head of State is Her Majesty Queen Elizabeth II, who is represented by the Governor-General. The Head of Government is the Prime Minister. The Cabinet is appointed by the Governor-General on the recommendation of the Prime Minister and is collectively responsible to Parliament for the performance of the Executive functions of the state. The judiciary comprises of the Sovereign in Council, the Court of Appeal, the High Court, and such other courts and tribunals as are provided for under Acts of Parliament.

A number of institutions are responsible for the fight against corruption, including the Attorney-General, Police Force, Ombudsman, Auditor-General, Public Service Commission and Central Procurement Unit. Tuvalu's three financial institutions are National Bank of Tuvalu, Tuvalu National Provident Fund and Development Bank of Tuvalu.

Tuvalu became an observer to the Asia-Pacific Group on Money Laundering in 2014. Full membership would be beneficial to enhance the country's implementation of the Convention.

2. Chapter III: Criminalization and law enforcement

The absence of comprehensive case examples and statistics affects the review of the implementation of the chapter by Tuvalu, insofar as it was not possible to reach a determination of the effective application of the legislative framework in practice.

2.1. Observations on the implementation of the articles under review

The term "person employed in the public service" as defined in section 4 of the Penal Code does not cover all categories of public officials enumerated in article 2 of the Convention.

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Section 85 of the Penal Code [Cap 10.20] criminalizes the active and passive bribery of persons employed in the public service; however, it must be done "corruptly". The term "corruptly" is undefined in the Penal Code. Further, section 85 does not refer to acts of indirect bribery, although these are specifically mentioned in other legislation.

Apart from public officials, Section 24 of the Leadership Code Act [Cap 4.12] criminalizes passive bribery by leaders, and offers of bribes by leaders. However, the offence is limited to bribes solicited in order to influence the Leader or another officer "to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business".

Tuvalu has not criminalized bribery of foreign public officials and officials of public international organizations.

Tuvalu relies on the bribery provisions, section 367 of the Penal Code on corrupt practices and provisions in the Leadership Code Act to pursue cases of trading in influence. These provisions do not extend to all public officials, nor is the concept of abuse of "real or supposed influence" clearly covered.

Tuvalu has (partially) criminalized bribery in the private sector (Part XXXVIII, Penal Code). The offence in section 367 of the Penal Code extends to acts or omissions involving agents “in relation to [a] principal’s affairs or business”, which does not cover all private sector actors. The offence is classified as a misdemeanor.

Money-laundering, concealment (arts. 23 and 24)

Money-laundering is criminalized in section 13 of the Proceeds of Crime Act [Cap 10.25] (PCA). However, the offence is limited to certain specified acts or transactions, which do not clearly cover all elements of the Convention.

Money-laundering is limited to the proceeds of a “serious offence”, defined as an offence punishable by 12 months’ imprisonment or longer or, if the offence was committed overseas, it would have reached the 12 month imprisonment threshold (section 4 PCA). This does not clearly cover all Convention offences. Foreign predicate offences are covered, subject to the serious offences threshold.

Participatory acts to money-laundering are partially criminalized through the application of the Penal Code and the PCA. The relevant provisions cover only attempts (Part XXXIX) and conspiracy (Part XL of the Penal Code). The legislation does not address self-laundering.

There has only been one money-laundering investigation, which revealed limited mechanisms in place for detecting money laundering. The absence of an operational financial intelligence unit and specialized training to financial institutions to detect and report suspicious transactions were noted.

The concealment of property reasonably suspected of being proceeds of crime is criminalized (section 14, PCA). Pursuant to section 14(3), a person cannot be convicted of both money-laundering and possession of criminal proceeds because of a single act or omission.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Larceny, embezzlement and conversion by specified persons are criminalized (Part XXVII, Penal Code). In particular, section 266 of the Penal Code criminalizes embezzlement by persons “employed in the public service”. However, only certain types of property are covered (sections 266, 250-251 Penal Code).

Section 90 of the Penal Code criminalizes abuse of office by persons employed in the public service. The offence is limited to “arbitrary acts prejudicial to the rights of another”. The prior sanction of the Attorney-General is required to launch a prosecution for abuse of office. Frauds and breaches of trust are covered (section 121 Penal Code). Specific provisions apply in relation to public procurement officers under the Procurement Code.

Tuvalu has not criminalized illicit enrichment.

Part XXVII of the Penal Code covers larceny, embezzlement and conversion, with the same limitations as for embezzlement in the public sector. Section 252 of the Penal Code further criminalizes stealing and embezzlement by co-partners.

Obstruction of justice (art. 25)

Conspiracy to defeat justice and interference with witnesses is criminalized (section 110 Penal Code). The section also covers acts to dissuade, hinder or prevent witnesses from appearing and giving evidence, and broadly criminalizes the obstruction or interference with any legal process. The use of physical force, threats or intimidation and the bribery of witnesses are not specified. The offence is classified as a misdemeanour.

Section 110 of the Penal Code broadly criminalizes the obstruction or interference with any legal process, civil or criminal. Section 115 creates a number of offences in relation to judicial proceedings, and Tuvalu criminalizes obstruction of court officers (section 120, Penal Code).

Liability of legal persons (art. 26)

Tuvalu's legislation applies equally to legal and natural persons by virtue of provisions in the Interpretation and General Provisions Act [Cap 1.04], the Penal Code, the Companies Act and the PCA. Accordingly, legal persons can be held criminally liable for offences under Tuvalu's legislation. However, the law does not specify the applicable punishments for offences committed by legal persons, except for specific offences such as money-laundering under the PCA.

Participation and attempt (art. 27)

Tuvalu's legislation covers conspiracy and accessories after the fact (Parts XL and XLI Penal Code), as well as soliciting or inciting others to commit offences (section 374 Penal Code), but does not clearly cover other forms of complicity or assistance. The attempt to commit an offence is criminalized (sections 371-373 Penal Code; section 158 Criminal Procedure Code [Cap 10.05] (CPC)). The preparation of an offence is not established as a criminal offence.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Although criminal sanctions generally take into account the gravity of the offences, certain Convention offences are classified as misdemeanors. Further, section 26 of the Penal Code allows for the conversion of a sentence into the payment of a fine. There are no sentencing guidelines in Tuvalu.

There are no criminal immunities accorded to Tuvalu public officials, including the Governor-General. Members of Parliament have functional immunity from civil or criminal suit in the exercise of parliamentary functions, and also enjoy jurisdictional privileges. Other public officials, like the Ombudsman and Commissioners, enjoy functional immunity for bona fide acts or omissions in the course of their duties. The procedure for waiving immunity of Parliamentarians is described in the Parliamentary Rules of Procedures.

The Attorney-General has broad discretion to institute, take over or discontinue prosecutions (article 79, Constitution). The CPC (section 74) and the Police Powers and Duties Act are two laws

which guide the work of the prosecution. However, no prosecution guidelines have been developed. Breaches of the Leadership Code Act are prosecuted by the Ombudsman before the Leadership Tribunal (section 66, Leadership Code).

Bail is regulated (sections 106-116, CPC). The granting of bail takes into account the need to ensure the presence of the defendant at subsequent criminal proceedings.

Provisions on parole are found in the Constitution, articles 102, 22(9) and 80. These measures take into account the gravity of the offences concerned. However, there is no law or regulation on parole.

Public Service Commission Rule 55 provides for the possibility of suspending public officers if disciplinary proceedings for dismissal are being taken or are about to be taken, or if criminal proceedings are to be instituted. The provision only applies where the public official was convicted of a criminal charge. Additional measures on disqualification and suspension from office exist under the Leadership Code Act. Tuvalu has not adopted measures on the reassignment of public officials accused of offences.

A previous criminal conviction does not disqualify an applicant from holding public office, unless the person has served a prison sentence following the conviction (Rule 23(4), Public Service Commission Rules). Disqualification from serving in a public enterprise is established for convicted persons for a term of 2 years or more (section 15, Schedule 3, Public Enterprises (Performance and Accountability) Act, 2009).

Under PSC Rules, the criminal and disciplinary procedures run in parallel. No disciplinary punishment may be imposed until the conclusion of the criminal proceedings and judgment in any appeal has been given (PSC Rule 48).

The Rehabilitation of Offenders Act [Cap 7.56] does not provide any mechanisms which actively promote the reintegration into society of convicted persons.

Tuvalu does not provide immunity from prosecution to cooperating defendants. Plea bargaining and reduced sentences may be applied in specific cases, although there are no regulations in place.

Protection of witnesses and reporting persons (arts. 32 and 33)

Limited provisions to protect witnesses are established (sections 108, 110, Penal Code).

No mechanisms are in place for the protection of reporting persons.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Section 22 of the PCA provides for discretionary confiscation of property in relation to a person's conviction of a "serious offence", defined in section 4 as an offence punishable by a maximum penalty of imprisonment of 12 months or longer, subject to dual criminality when the offence was committed against the law of another country. Section 22 provides for applications for forfeiture orders or pecuniary penalty orders upon conviction. Instruments "used in or destined for use in offences" are covered as "tainted" property subject to confiscation.

Limited measures are in place to enable search and seizure (sections 44, 45 PCA, section 101 CPC). Part 2, Division 2 of the PCA outlines the Transaction Tracking Unit (TTU)'s functions and powers, including to search the premises of financial institutions or cash dealers and to inspect records.

Sections 49 and 50 of the PCA entitle the Commissioner of Police to administer frozen or seized property in accordance with a court order.

Property into which criminal proceeds are converted or transformed, as well as income and other benefits, constitute proceeds of crime (sections 7(1)(a)-(b) PCA). If proceeds of crime are intermingled with other property, that proportion constituting the original proceeds will be taken to be proceeds of crime (section 7(2) PCA).

Section 36(3) of the PCA provides a presumption that property is taken to be tainted property if it is held at the time of, and for a specified period of time prior to, the filing of a pecuniary penalty order, unless the contrary is proven.

Third party rights are protected (sections 29, 27, 32, 46, 53, 58, 62, 71, 75 and 80 PCA).

Tuvalu has not adopted appropriate mechanisms to overcome bank secrecy restrictions.

Statute of limitations; criminal record (arts. 29 and 41)

There is no statute of limitations for criminal offences. However, inordinate delay has been considered a mitigating factor at sentencing (see Crown v Ielemia SM HAC 190/2014).

A previous foreign conviction may be used as prima facie evidence of all facts stated therein (section 125(3) CPC).

Jurisdiction (art. 42)

Section 5 of the Penal Code extends jurisdiction to every place within Tuvalu or its territorial limits, including territorial waters, airspace, and all civil vessels and aircrafts registered in Tuvalu (article 2, Constitution).

Tuvalu has not established the active and passive personality principles or the state protection principle, nor does the legislation clearly regulate jurisdiction over foreign participatory acts to money-laundering.

Tuvalu may assert jurisdiction where the extradition of nationals is refused, subject to the discretion of the Attorney-General (section 58(4), Extradition Act).

There is no mechanism for investigating and judicial authorities to coordinate proceedings with their foreign counterparts.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Regulation 70 of the Public Procurement Regulations allows for suspending of contracts and debarment of bidders by the Central Procurement Unit.

Persons who have suffered damages from corruption may initiate legal proceedings against those responsible under common law principles in order to obtain compensation.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

There is no single anti-corruption institution in Tuvalu. The anti-corruption mandate is spread across several bodies, including the Attorney-General, Police Force, Ombudsman, Auditor-General, Public Service Commission and Central Procurement Unit.

The legal framework concerning appointments, remuneration and oversight of anti-corruption bodies establishes a level of independence of anti-corruption bodies. There is a need for adequate capacity and resources for the specialized law enforcement agencies.

Tuvalu has not adopted measures to encourage cooperation between public officials and investigating and prosecuting authorities.

Part 5 of the PCA outlines the reporting obligations of financial institutions and cash dealers, including customer due diligence (section 99) and reporting suspicious transactions (section 101). Informal coordination mechanisms between national authorities and the private sector are provided through the Tuvalu National Private Sector Organisation.

2.2. Successes and good practices

- *Retroactive application of section 85(a) of the Penal Code to bribes solicited after the fact, once the public official has altered his or her conduct.*
- *The presumption of corrupt practices in section 369 of the Penal Code.*

2.3. Challenges in implementation

It is recommended that Tuvalu:

- *Continue to strengthen its case management systems to allow it to generate statistics on investigations and prosecutions.*
- *Amend the definition of “person employed in the public service” in line with article 2 of the Convention.*
- *With respect to active and passive bribery, remove the additional element that the bribe must have been given or received “corruptly”, explicitly cover acts of indirect bribery, and ensure that active and passive bribery involving Leaders is fully criminalized (art. 15).*
- *Criminalize the bribery of foreign public officials and officials of public international organizations, and consider establishing the passive version of the offence (art. 16).*
- *Adopt a comprehensive offence of embezzlement, misappropriation and diversion of property in line with the Convention (art. 17).*
- *Consider specifically criminalizing trading in influence (art. 18).*

- Consider expanding the offence of abuse of office in line with the Convention, and eliminate the requirement in section 90(2) and other parts of the Penal Code of a prior sanction from the Attorney-General to commence prosecutions (art. 19).
- Consider criminalizing illicit enrichment (art. 20).
- Consider adopting a more comprehensive offence of bribery in the private sector (art. 21).
- Specify its legislation to more clearly cover the elements of article 23(1)(a), eliminate the additional element of a “transaction”, and address the possibility of self-laundering (art. 23(2)(e)).
- Expand its legislation to cover all forms of participation, association, aiding, abetting, facilitating and counselling the commission of money-laundering (art. 23(1)(b)(ii)).
- Amend the PCA to ensure that all Convention offences qualify as predicate offences for money-laundering (art. 23(2)(a)-(b)).
- Enhance verification mechanisms for detecting money-laundering: specifically, enhance specialized capacity of law enforcement authorities to investigate suspicious transactions; operationalize an FIU and consider establishing a permanent, specialized FIU; and provide specialized training to financial institutions to detect and report suspicious transactions (art. 23).
- Swiftly accede to full membership of the Asia-Pacific Group on Money-Laundering (art. 23).
- Consider eliminating the restriction that a person cannot be convicted of both money-laundering and possession of criminal proceeds arising from a single act or omission (art. 24).
- Consider more clearly covering the elements of obstruction of justice to interfere in the giving of testimony or the production of evidence (art. 25(a)).
- Amend its legislation, in particular the Penal Code, to specify punishments for offences committed by legal persons (art. 26).
- Specify its legislation to cover participation in the form of complicity or assistance (art. 27).
- Ensure that criminal penalties take into account the gravity of the offences by: revisiting the classification as misdemeanors of certain offences, like obstruction of justice (section 115 Penal Code) and bribery in the private sector (section 367 Penal Code); eliminating section 26 of the Penal Code, which allows for the imposition of a fine in lieu of imprisonment; and considering the adoption of sentencing guidelines (art. 30(1)).
- Consider adopting prosecution guidelines, for example criteria for withholding prosecutions (art. 30(3)).
- Consider adopting a law on parole (art. 30(5)).
- Consider adopting measures on the removal and reassignment of public officials accused of corruption related offences (art. 30(6)).
- Amend the law to provide for the disqualification of convicted persons from holding public office (art. 30(7)).

- *Strengthen measures to actively promote the reintegration into society of person convicted of offences (art. 30(10)).*
- *Amend its legislation with a view to eliminate the permissive nature of confiscation and ensure that proceeds of crime cover all Convention offences; strengthen measures to identify, trace, freeze and seize property (art. 31(1)-(2)).*
- *Adopt measures, within existing means, to effectively protect witnesses, experts, victims and, as appropriate, their relatives from potential retaliation or intimidation, including to the extent feasible measures to encompass their physical protection and related evidentiary rules, and ensure the adequate enforcement of these measures (art. 32); extend such protections to cooperating defendants (art. 37).*
- *Consider adopting measures and systems for the effective protection of reporting persons (art. 33).*
- *Continue to invest in capacity building and ensure adequate resources for the specialized law enforcement agencies, in particular the police and the Chief Ombudsman's office; ensure that the office of the Commissioner of Police is filled (art. 36).*
- *Strengthen the independence of prosecutions, by separating the office of the Director of Public Prosecutions from the Attorney-General's office; the independence of the TTU should also be ensured (art. 36).*
- *Consider adopting provisions on plea bargaining and strengthening measures to encourage the cooperation of offenders with law enforcement authorities (art. 37).*
- *Adopt measures to strengthen cooperation between public officials and investigating and prosecuting authorities (art. 38).*
- *Adopt appropriate mechanisms to overcome obstacles arising out of the application of bank secrecy laws (art. 40).*
- *Consider establishing the active and passive personality principles (art. 42(2)(a)-(b)), the state protection principle (art. 42(2)(d)) and jurisdiction over foreign participatory acts to money-laundering (art. 42(2)(c)).*
- *Consider extending jurisdiction where the extradition of persons other than nationals is refused (art. 42(4)).*
- *Adopt measures to ensure that investigating and judicial authorities coordinate proceedings with their foreign counterparts (art. 42(5)).*

2.4. Technical assistance needs identified to improve implementation of the Convention

Tuvalu identified a need for model legislation, drafting or advisory support to the Attorney-General's Office and the main stakeholders, as well as civil society. Tuvalu also requested capacity building for the law enforcement authorities and to strengthen its capacity to detect money-laundering.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition (art. 44)

Extradition is governed by the Extradition Act [Cap 7.24], which applies to Commonwealth and treaty countries, as well as any other country certified by the Prime Minister or designated by regulation (section 7). To-date, no countries have been so designated. Tuvalu is party to 37 extradition treaties (Schedule 3) and the London Scheme for Extradition within the Commonwealth. Tuvalu does not make extradition conditional on the existence of a treaty. In principle, Tuvalu could apply the Convention as a legal basis, although it has not done so to-date.

Extradition offences are offences punishable by death or imprisonment for 1 year or more, subject to the dual criminality requirement (section 5). While this includes fiscal offences (section 5(4)), it excludes Convention offences that Tuvalu has not criminalized. The dual criminality requirement is strictly applied for extradition cases.

Tuvalu does not consider Convention offences as political offences (section 4(1)). Extradition proceedings are conducted in the same manner and subject to the same safeguards as criminal proceedings (section 15). The fundamental rights and due process protections enshrined in articles 11 and 22 of the Constitution are also applicable.

Section 6(2) of the Extradition Act provides for an objection to an extradition request made for purposes of discrimination on the grounds of sex, race, religion, nationality, political opinions or for a political offence; ethnic origin is not covered. The issues of fair treatment or discriminatory purpose have not been invoked to-date.

Tuvalu recognizes conditions and grounds for refusal, subject to the terms of its treaties. Section 6 of the Extradition Act outlines grounds upon which Tuvalu may refuse extradition. There is no legislative requirement to consult prior to refusing extradition. Tuvalu has never refused an extradition request to-date.

The Prime Minister is the central authority for extradition. There are no measures in place to simplify and streamline procedures and evidentiary requirements.

Tuvalu does not extradite its citizens (section 58). While Tuvalu would prosecute a national whose extradition is refused (sections 58(3)-(6)), prosecution of nationals is subject to the discretion of the Attorney-General (section 58(4)).

There has only been one extradition case to-date (R. v Starcel Soloseni), involving the successful extradition of a national to Tuvalu in a matter not related to corruption.

Transfer of sentenced persons; transfer of criminal proceedings (arts. 45 and 47)

There is no law or practice on the transfer of sentenced persons, apart from the Scheme for the Transfer of Convicted Offenders with the Commonwealth.

There is no law or practice on the transfer of criminal proceedings.

Mutual legal assistance (art. 46)

Mutual legal assistance (MLA) is governed by the Mutual Assistance in Criminal Matters Act [Cap 7.40] (MACMA), which applies to all foreign countries (section 4). Tuvalu has not entered into any MLA treaties, but is party to the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth. In principle, Tuvalu could use the Convention as a legal basis, although it has not yet done so. Tuvalu requires dual criminality (Parts 4 and 7, MACMA) and the Attorney-General has discretion to refuse assistance where dual criminality is not met (section 12, MACMA).

The Attorney-General is the central authority for MLA. There are no regulations or procedures that guide the execution of MLA requests in a time-bound manner, nor has Tuvalu adopted measures to simplify and streamline procedures and evidentiary requirements. Tuvalu has not notified the United Nations of its central authority or acceptable language(s) for MLA.

Requests must be made in writing (section 8), although Tuvalu would accept an urgent request made orally, through INTERPOL or direct law enforcement communication channels. MACMA does not address the possibility of applying procedures specified by the requesting country. Sections 17 and 55 provide for the use of video link, though there have been no such cases.

There is no law enabling spontaneous information sharing with foreign countries.

MACMA provides discretionary grounds for refusing MLA, including on the basis that the provision of assistance would impose an excessive burden on the country's resources, or taking into account all circumstances of the case (section 12(g) and (h) MACMA). Fiscal matters are not listed as grounds for refusal, although the Attorney-General retains discretion to refuse assistance (section 12, MACMA). Tuvalu has not taken legislative measures to ensure that MLA is not refused on the grounds of bank secrecy.

Tuvalu has never postponed assistance due to an ongoing domestic investigation. The law does not provide that Tuvalu would consult with a requesting State before refusing or postponing assistance, or provide reasons for refusing MLA.

A limitation on the use of information received through MLA is provided (sections 63 and 64, MACMA). However, the law does not specify that the requesting State shall be notified prior to a disclosure of exculpatory information, nor does the law require Tuvalu to inform the requesting State if Tuvalu cannot comply with the requirement of confidentiality.

The temporary transfer of prisoners for MLA is regulated (sections 32-34, MACMA), but not all the conditions of transfer are covered.

The costs of MLA are not addressed in MACMA.

There have been two MLA requests to-date, one incoming and one outgoing (not related to corruption). Tuvalu has not refused an MLA request to-date.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Law enforcement cooperation is carried out through formal agreements or arrangements, and on a case-by-case, informal basis. Tuvalu is an observer member of the Pacific Transnational Crime Network (PTCN), and a member of the Pacific Islands Chiefs of Police and the Pacific Islands Forum Secretariat. Tuvalu cooperates through INTERPOL through the Australian federal police.

Tuvalu is not a member of the Egmont Group or the Pacific Association of FIUs, nor has it signed any cooperation agreements with other FIUs.

Tuvalu's law enforcement authorities engage in the periodic exchange of law enforcement personnel with other countries.

Tuvalu has had no experience in the application of this Convention as a legal basis for law enforcement cooperation.

Tuvalu has not entered into any agreements that provide for joint investigations.

While the police could in principle conduct special investigative techniques, the matter is not spelled out in the Police Act [Cap. 20.24] and there could be challenges to admitting such evidence in court.

3.2. Successes and good practices

- *A failure to comply with the format and content requirements for MLA requests (section 8(2), MACMA) is not a ground for refusing MLA, but for postponement (art. 46(21)).*

3.3. Challenges in implementation

It is recommended that Tuvalu:

- *Criminalize the mandatory offences under this Convention and consider also criminalizing the non-mandatory offences, to satisfy the dual criminality requirement for extradition (art. 44(7)).*
- *Consider adopting measures to simplify and streamline procedures and evidentiary requirements on extradition (such as internal guidelines and/or a request management system) in order to allow extradition requests to be dealt with efficiently and effectively (art. 44(9)).*
- *Amend its legislation to ensure that prosecutorial discretion cannot be exercised to inhibit the domestic prosecution of nationals whose extradition is refused (art. 44(11)).*
- *Include ethnic origin among the discriminatory purposes for which extradition will be refused (art. 44(15)).*
- *Adopt a legislative requirement to consult prior to refusing extradition (art. 44(17)).*
- *Consider simplifying and streamlining procedures and evidentiary requirements in order to allow for MLA to be dealt with efficiently and effectively, and adopt legislative or other procedures that guide the execution of MLA requests in a time-bound manner (art. 46(1) and (24)).*
- *Consider granting explicit legal authority to the competent authorities to proactively transmit information to foreign competent authorities without a prior request, where such*

information could assist in the overseas investigation or prosecution (art. 46(4)-(5)).

- *Introduce legislative provisions that stipulate that Tuvalu will not decline to render MLA on the ground of bank secrecy (art. 46(8)).*
- *Adopt legislative measures to ensure that MLA involving non-coercive measures is provided in the absence of double criminality, and consider alleviating the dual criminality requirement for purposes of MLA (art. 46(9)).*
- *More closely address the conditions of temporary prisoner transfer for purposes of MLA (art. 46(11)-(12)).*
- *Notify the United Nations of its central authority and acceptable language(s) for MLA (art. 46 (13) and (14)).*
- *Consider providing information on Tuvalu's MLA requirements on its website to guide requesting countries (art. 46(15)-(16)).*
- *Consider including a provision in MACMA, to address the possibility of applying procedures specified by the requesting country (art. 46(17)).*
- *Specify in the MACMA that the requesting State shall be notified prior to a disclosure of exculpatory information (art. 46(19)).*
- *Adopt a legislative provision to inform the requesting State if Tuvalu cannot comply with the requirement of confidentiality (art. 46(20)).*
- *Reconsider the discretionary grounds of refusal spelled out in section 12(g) and (h), whereby MLA may be refused if the provision of assistance would impose an excessive burden on the country's resources, or MLA should be refused under all the circumstances of the case (art. 46(21)).*
- *Provide that Tuvalu will not decline to render MLA on the sole ground that the offence is also considered to involve fiscal matters (art. 46(22)).*
- *Specify in MACMA that reasons be given for refusing MLA (art. 46(23)) and that Tuvalu will consult with the requesting State before refusing or postponing MLA (art. 46(26)).*
- *Specify the matter of costs of MLA in line with the Convention (art. 46(28)).*
- *Consider adopting a law on the transfer of criminal proceedings (art. 47).*
- *Continue to strengthen law enforcement cooperation at the international level, including by building out membership in INTERPOL and becoming a full member of the Asia-Pacific Group on Money Laundering and the Egmont Group. Tuvalu should also continue its cooperation with other countries through staff exchanges for training and capacity building (art. 48).*
- *Introduce special investigative techniques, as necessary and within existing resources, including by adopting corresponding legislation, providing the corresponding training to law enforcement personnel and ensuring that evidence derived therefrom is admissible (art. 50).*

IV. Implementation of the Convention

A. Ratification of the Convention

7. Tuvalu acceded to the Convention on 4 September 2015. Tuvalu deposited its instrument of ratification with the Secretary-General on the same date (C.N.476.2015.TREATIES-XVIII.14)¹. The Convention entered into force for Tuvalu on 4 October 2015.
8. The implementing legislation in Tuvalu includes²:
 - Constitution of Tuvalu [Cap 1.02]
 - Criminal Procedure Code [Cap 10.05]
 - Customs Revenue and Border Protection Act 2014
 - Electoral Provisions (Parliament) Act [Cap 4.04]
 - Parliamentary Rules of Procedure [Cap 1.02.3]
 - Penal Code [Cap 10.20]
 - Police Powers and Duties Act 2009
 - Proceeds of Crime Act [Cap 10.25]
 - Public Procurement Act 2013
 - Public Service Commission Rules [Cap 4.24.2]
 - Extradition Act [Cap 7.24]
 - Interpretation and General Provisions Act [Cap 1.04]
 - London Scheme for Extradition within the Commonwealth
 - Mutual Assistance in Criminal Matters Act [Cap 7.40]
 - Leadership Code Act [Cap 4.12]
 - Scheme for the Transfer of Convicted Offenders with the Commonwealth
 - Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth.

B. Legal and Governmental system of Tuvalu

Independence

9. Formerly known as the Ellice Islands, Tuvalu gained independence on 1 October 1978.

Legal System

10. Tuvalu comprises a mixed legal system of Acts of the Tuvalu Parliament, certain English Acts, common law, and customary law. Section 4(2) of the Laws of Tuvalu Act states that, in addition to the Constitution, the laws of Tuvalu comprise every Act, customary law, the common law of Tuvalu, and every applied law—that is, imperial enactments.
11. Tuvalu's Constitution was adopted, and given the force of law on 25 July 1978 and took effect on 1 October 1978. Section 3 of the Constitution and section 4 of the Laws of

¹ <https://treaties.un.org/doc/Publication/CN/2015/CN.476.2015-Eng.pdf>

² Legislation is available from Tuvalu's legislation database: www.tuvalu-legislation.tv; case law is available on PacLii: <http://www.pacii.org> and on Tuvalu government websites.

Tuvalu Act provide that the Constitution is the supreme law of Tuvalu and the other laws comprising the laws of Tuvalu have effect subject to its provisions. To the extent that any other laws are inconsistent with the Constitution, they are declared void. Section 4(3) of the Constitution provides that the Constitution is to be interpreted and applied in such a way as to achieve the aims of fair and democratic government, in the light of reason and experience and of Tuvaluan values.

12. Section 5(1) of the Laws of Tuvalu Act states that “Customary law comprises the customs and usages, existing from time to time, of the natives of Tuvalu.” The Act provides that customary law has effect as part of the law of Tuvalu, except to the extent that it is inconsistent with an Act or any applied law published and subsidiary legislation. Further, the preamble to the Constitution explicitly states that the “life and laws of Tuvalu should therefore be based on respect for human dignity and on the acceptance of Tuvaluan values and culture, and on respect for them” (Principle 6 to the Constitution). Further, the case of *Kaupule of Nukufetau v Lotoala Metia HC Civil Case no: 2/11 11 July 2012* stated that “The Constitution is law for the whole of Tuvalu. It clearly and properly acknowledges the customary role of, and respect for, the falekaupule on each island but, when support for an island's custom and tradition will have a disproportionate effect on the whole country, the island's interests must be subordinated to the national interest.”

National Government

13. Tuvalu is a constitutional monarchy with a parliamentary democracy.
14. The Head of State is Her Majesty Queen Elizabeth II, who is represented by the Governor-General. A constitutional referendum was held on 30 April 2008, with a turnout of approximately 22 percent of the electorate, which returned a result almost 2:1 in favour of remaining a constitutional monarchy rather than becoming a republic.
15. The Head of Government is the Prime Minister who, along with the Deputy Prime Minister, is elected from Members of Parliament. The Cabinet is appointed by the Governor-General on the recommendation of the Prime Minister. The unicameral Parliament or Fale I Fono has 15 seats with members elected by popular vote to serve four-year terms. Parliament is vested with law-making powers. The Cabinet is collectively responsible to Parliament for the performance of the Executive functions of the state. There are no political parties, although the members who do not side with the executive are often called the opposition.
16. Traditional leaders play an important role in the informal political leadership. Traditional leaders include chiefs (aliki), elders (toeaina), and the falekaupule system (the traditional assembly in each island which is composed in accordance with the Aganu (local customs and usages of an island). The falekaupule system exercises a powerful role in the political lives of Tuvaluans. Section 41, together with Schedule 3 of the Falekaupule Act 1997, provides that “[i]t shall be the duty of every Falekaupule and of every Kaupule to use its resources to assist the police in the detection and prevention of crime within the area of its authority.”

Judiciary

17. The judiciary in Tuvalu is constitutionally independent of the executive. It comprises of the Sovereign in Council, the Court of Appeal, the High Court of Tuvalu, and such other courts (e.g., Magistrates Court, Island Court, Lands Court, and Lands Courts Appeal Panel) and tribunals as are provided for or under Acts of Parliament.
18. The High Court is presided over by a Chief Justice appointed by the Governor-General on the Prime Minister's advice and potentially other judges who may be appointed in the same manner; the High Court is expected to sit at least once a year. The High Court has unlimited jurisdiction to try criminal offences and to impose the penalties set out in Part VI of the Penal Code and in other legislation (section 6 of Criminal Procedure Code [Cap 10.05]). The High Court also hears appeals from the Magistrates Court.
19. The jurisdiction of the Magistrates Court is described in Part II of the Criminal Procedure Code; any offence may be tried by the Senior Magistrate's Court where the penalty does not exceed a term of imprisonment for a term of 14 years (s. 4). However, the sentences the Senior Magistrate's Court may impose are limited to imprisonment for a term not exceeding 5 years and a fine not exceeding \$1,000 (section 7 Criminal Procedure Code).
20. Island Courts are subordinate to the magistrate's courts and presided over by island magistrates. Their jurisdiction is limited to the boundaries of the island on which they were established, inland and adjacent waters. They can hear petitions for divorce, claims in contract and tort for amounts not exceeding \$60m maintenance applications and custody applications.

Institutional Framework against Corruption

21. A number of institutions are responsible for the fight against corruption in Tuvalu. These include notably, the Attorney-General, the Police Force, the Ombudsman, the Auditor-General, the Public Service Commission and the Central Procurement Unit. Tuvalu's three financial institutions are National Bank of Tuvalu, Tuvalu National Provident Fund and Development Bank of Tuvalu.
22. A previous assessment of Tuvalu's anti-corruption framework has been conducted by Transparency International, "National Integrity Systems Transparency International Country Study Report, Tuvalu 2004".
23. Tuvalu became an observer to the Asia-Pacific Group on Money Laundering in 2014. Full membership would be beneficial to enhance the country's implementation of the Convention.

C. Implementation of selected articles

Chapter III. Criminalization and law enforcement

24. Regarding technical assistance for the implementation of the chapter, Tuvalu identified a need for model legislative initiatives and measures, as well as drafting or advisory support to the focal point for the review (Office of the Attorney-General) and the main stakeholders listed above, as well as civil society. Tuvalu also requested capacity building

for the law enforcement authorities and to strengthen its capacity to detect money-laundering.

25. The absence of comprehensive case examples and statistics on the implementation of the chapter affects the review of the implementation of the chapter by Tuvalu, insofar as it was not possible to reach a determination of the effective application of the legislative framework in practice. It is recommended that Tuvalu enhance its data collection efforts to more closely track the investigation, prosecution and adjudication of offences under this Convention.

Article 15 Bribery of national public officials

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, 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;

(a) Summary of information relevant to reviewing the implementation of the article

26. There are provisions against bribery of public officials in the *Leadership Code Act* [Cap 4.12], *Penal Code* [Cap 10.20], the *Electoral Provisions (Parliament) Act* [Cap 4.04] and the *Customs Revenue and Border Protection Act 2014*.
27. Section 85(b) of the *Penal Code* criminalizes active bribery. Section 85(b) criminalizes the giving, promising or offering, however it must be done so “corruptly”. The term “corruptly” is undefined in the *Penal Code*.
28. It is a criminal offence to give the bribe to “any other person”. “Person” and other like terms, when used with reference to property, is defined to include corporations of all kinds and any other association of persons capable of owning property (section 4, *Penal Code*).

Penal Code [Cap 10.20]

4 Interpretation

“person” and “owner” and other like terms, when used with reference to property, include corporations of all kinds and any other association of persons capable of owning property, and also when so used include Her Majesty;

“person employed in the public service” means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely —

- (i) any civil office, including the office of Minister the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor-General; or
- (ii) any office to which a person is appointed or nominated by Act or by selection; or

(iii) any civil office, the power of appointing to which or of removing from which is vested in any person or persons holding an office of any kind included in either of the 2 last preceding paragraphs of this section; or

(iv) any office of arbitrator or umpire in any proceeding or matters submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act;

and the said term further includes —

(i) a magistrate;

(ii) a member of a commission of inquiry appointed under or in pursuance of any Act;

(iii) any person employed to execute any process of a court;

(iv) all persons in the employment of any department of the Government;

(v) a person acting as a minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnisation of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;

(vi) a person in the employ of a Kaupule;

85 Official corruption

Any person who —

...

(b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed, is guilty of a felony and shall be liable to imprisonment for 7 years.

26 Fine in addition to, or instead of, imprisonment

A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment:

Provided however that nothing in this section shall apply to any imprisonment sentence of imprisonment for life required to be imposed by section 47, 48, 63 or 193 (relating to the offences of treason, instigating invasion, piracy and murder).

29. Bribery is further covered in the *Leadership Code Act* [Cap 4.12]. Section 24 of the *Leadership Code Act* criminalizes passive bribery (discussed further under article 15(b) of the Convention (passive bribery), below) but also refers to the offering of a bribe by a leader.

Leadership Code Act [Cap 4.12]

24 Bribery

A Leader must not offer, seek, attempt, invite, or accept a bribe, whether directly or indirectly, and whether for himself or herself or for another person, group or organisation.

Section 4(9) of the *Leadership Code Act* defines “**bribe**” to mean “a transaction or agreement in which a person gives or promises any undue payment or other advantage to a Leader, in

order that to influence that Leader or another officer to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business”.

“**Leader**” is defined in section 4(42) of the *Leadership Code Act* to mean “a person who currently holds any one of the following positions —

- (a) Head of State;
- (b) Head of Government;
- (c) Minister;
- (d) Member of Parliament;
- (e) judicial officer;
- (f) member of a Kaupule;
- (g) civil servant employed to give political or policy advice to a Minister;
- (h) holder of any statutory office established by legislation;
- (i) head of a Ministry or Department of the public service;
- (j) director of a corporation who is appointed by the Head of State, the Cabinet, the Head of Government, a Minister, the Parliament, a Kaupule, or other officers or bodies of the Government;
- (k) traditional leader who has ex officio legal powers, functions or recognition;
- (l) any other public servant, or officer of a Government or quasi-Governmental agency, that legislation may declare to be a Leader for the purposes of this Code;
- (m) the position of acting or temporary replacement for, or of permanent deputy to, a Leader; and
- (n) includes also any person holding office of the Ombudsman established under this Code;

Section 66 of the *Leadership Code Act* provides that “The Ombudsman shall prosecute any leader who breaches this Code before the Leadership Tribunal.” Sections 67 and 68 lay out the procedure for criminal-related allegations (see article 30(3) below).

Electoral Provisions (Parliament) Act [Cap 4.04]

41 Corrupt practice

(1) No election shall be valid if any corrupt or illegal practice is committed in connection therewith by the candidate elected or his agent.

(2) Where on an election petition it is shown that corrupt or illegal payments, employments or hiring committed in reference to the election for the purpose of promoting or procuring the election of any person thereat have been so widespread that they may be reasonably supposed to have affected the result, his election, if he has been elected, shall be void and he shall be incapable of being elected to fill the vacancy for which the election was held.

47 Persons to be deemed guilty of treating

(1) The following persons shall be deemed to be guilty of treating within the meaning of this Part of this Act —

(a) any person who corruptly, by himself or by any other person, either before, during or after an election, directly gives, or provides, or pays, or promises to give, provide or pay, wholly or in part, the expenses of giving or providing any food, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person, or any other person to vote or refrain from voting at such election, or on account of that person or any other person having voted or refrained from voting at such election; and

(b) any elector who corruptly accepts or takes any such food, drink, entertainment or provision.

Customs Revenue and Border Protection Act 2014

182 Bribery and Collusion

(1) A person who:

(a) offers or gives, whether directly or indirectly, to the Director, a Customs officer or an authorised person any payment or reward, whether in money or otherwise; or

(b) proposes or enters into any agreement with the Director, Customs officer or an authorised person in order to induce them to do, or abstain from doing, permit or conceal any act intended to defraud the state, or is otherwise unlawful under this Act;

commits an offence, and shall be liable on conviction to a term of imprisonment not exceeding 5 years.

(2) If the Director, or a Customs officer, or an authorised person:

(a) asks for or takes, whether directly or indirectly, any payment or reward, whether in money or otherwise, that is not a payment or reward he or she is lawfully entitled to receive; or

(b) proposes or enters into any agreement, to do, or refrain from doing, permit or conceal any act to defraud or attempt to defraud the state, or which is otherwise unlawful under this Act or any other law;

commits an offence, and shall be liable on conviction to a term of imprisonment not exceeding 5 years.

30. There have been a number of cases alleging corruption in elections (and, in particular, bribery) contrary to section 41 of the *Electoral Provisions (Parliament) Act* [Cap 4.04].

31. In *Iosefa v Ielemia* Case No. 6/06 it was held that a payment made to certain individuals was a payment made under custom to a relative and not in connection with an election. However, as noted by the Chief Justice in this case:

“It is a difficult path to tread in Tuvalu. As was so aptly described by Millhouse CJ in relation to the attendance by candidates at gatherings in Kiribati:

"A candidate is between a rock and a hard place. If he or she does not attend gatherings or at a gathering refuses to bring a gift requested...he or she will lose votes rather than win them. On the other hand if he or she complies then there is the risk of complaints." (*Teiraoui v Tamwi*, 13 February 2003)

That also applies in Tuvalu in respects of customary gifts. There is no real answer. It is no solutions to abandon your customary obligations and give no gifts. Neither is it solved by stating clearly that a gift is nothing to do with the election because that very statement will be taken as inferring that it is. If the candidate says it is for

the family or the children, he is likely to be disbelieved for the same reason. If he says nothing it will still be open to question.”

32. In the case of *Finikaso v Ielemia* HC Civil case no. 5/10, it was alleged that a corrupt practice had taken place in relation to voter registration forms and payment of money to obtain votes and therefore the election was void pursuant to section 41 of the *Electoral Provisions (Parliament) Act*. It was submitted that either of the principal allegations—that the respondent used his official position to his personal advantage in order to obtain the forms before any other candidate was able to do so or that he improperly requested, received and paid the money to gain votes—was a corrupt or illegal practice by the candidate himself. The Court held that this was a borderline case yet dismissed the claim. In particular the judge noted that:

“Tuvalu has reached the stage where some matters of custom and many aspects of long accepted local practice are now conflicting with modern expectations of transparency and integrity in community leaders and, in particular, politicians. Every year, and each election, makes it more difficult to draw the line... I have found this a borderline case. With the continued increase in contact with other countries both politically and commercially, expectations of what constitutes proper conduct in public office will make defence claims, such were made in this case, of a "Tuvaluan way" increasingly difficult to maintain. It will be particularly unfortunate if the failure of this petition is taken as an indication that the manner in which these funds were received and used is acceptable practice in general. The result means only that they did not, in this case, breach the requirements of section 41(1).

There is an urgent need for clear guidelines in the legislation for the conduct of politicians, not just at elections, but in the way they generally conduct themselves as Members of Parliament. The answers by the respondent when confronted with the terms of the Leadership Code Act show the necessity for such legislation to be brought into effect without delay.”

33. Similarly, in *Maatusi v Isaia* HC, Civil case no. 15/11 allegations were raised of bribery contrary to section 41 of the *Electoral Provisions (Parliament) Act*. However, the court held that these payments were made according to custom and not intended to influence voters.

(b) Observations on the implementation of the article

34. Section 85(b) of the *Penal Code* criminalizes the promising, offering or giving of bribes to any person employed in the public service; however, it must be done “corruptly”. The term “corruptly” is undefined in the *Penal Code* and there has been no case law interpreting its meaning. It was explained by the government officials that the term is outdated and the law should be amended to remove this additional element, since the improper purpose of the act, which distinguishes the bribe from other legitimate gifts or customs, is already defined in the law (namely, promising, offering or giving of bribes “on account of” an act or omission by the public official). The reviewers recommend that Tuvalu amend its law accordingly.
35. It is noted that the term “person employed in the public service” as defined in section 4 of the *Penal Code* does not cover all categories of public officials enumerated in article 2 of the Convention, such as elected officials, nor do these appear to be fully covered under the *Leadership Code Act* (which in any event is limited to acts of passive bribery apart from offers committed by Leaders). Although section 85(b) of the *Penal Code* also criminalizes

the active bribery of persons other than public servants, the bribe must still be given “on account of” any act or omission by the public servant.

36. Further to the discussions held during the country visit with officials from Tuvalu, it is recommended that Tuvalu amend the definition of “person employed in the public service” in the Penal Code to cover also elected officials and all categories of public officials enumerated in article 2 of the Convention. This recommendation extends not just to bribery but to all Convention offences involving public officials, such as embezzlement.
37. A further issue that was clarified during the country visit is the application of the active bribery offence in the Penal Code to Leaders. Section 85 of the Penal Code applies to “any person” who bribes a public servant. It was confirmed by the officials that this could also apply to acts of bribery of public officials committed by Leaders, and that these offences would be prosecuted under the Penal Code in the same manner as bribes promised, offered or given by other persons.
38. Section 26 of the Penal Code allows for the imposition of a fine in lieu of imprisonment. It was explained that this provision had been applied previously in an assault case where a fine was applied in lieu of a term of imprisonment, but never in a corruption case. Please see article 30(1) below.
39. It was explained that the police and Attorney General’s office maintain a general crime database, but that the case management system to generate crime statistics on investigations and prosecutions could be improved. It was also confirmed that a case management system is in place in the judiciary and that funds had recently been received to upgrade the system. Accordingly, following discussion with the authorities it is recommended that the Tuvalu continue to strengthen its case management systems to allow it to generate statistics on investigations and prosecutions.
40. Finally, it is noted that section 85 of the *Penal Code* does not refer to acts of indirect bribery (for example via intermediaries), although these are specifically mentioned in other legislation such as Section 24 of the *Leadership Code Act*. It is recommended that Tuvalu amend its legislation to explicitly cover indirect bribery of public officials.

Article 15 Bribery of national public officials

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, 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.

(a) Summary of information relevant to reviewing the implementation of the article

41. Section 85(a) of the *Penal Code* [Cap 10.20] criminalizes passive bribery.

Penal Code [Cap 10.20]

85 Official corruption

Any person who —

- (a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; is guilty of a felony and shall be liable to imprisonment for 7 years.

87 Public officers receiving property to show favour

Any person who, being employed in the public service, receives any property or benefit of any kind for himself or any other person, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or anyone in whom that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or anyone in whom he is interested, and any person employed in the public service, shall be guilty of a misdemeanour and shall be liable to imprisonment for 6 months.

42. In addition, section 24 of the *Leadership Code Act* [Cap 4.12] covers passive bribery.

Leadership Code Act [Cap 4.12]

24 Bribery

A Leader must not offer, seek, attempt, invite, or accept a bribe, whether directly or indirectly, and whether for himself or herself or for another person, group or organisation.

(b) Observations on the implementation of the article and good practice

43. Section 85(a) of the *Penal Code* criminalizes passive bribery by persons employed in the public service.
44. The observations made above regarding the term “corruptly”, as well as the definition of “person employed in the public service” and acts of indirect bribery are also referred to.
45. It is positively noted that section 85(a) not only applies prospectively to bribes solicited to induce the public servant to act or refrain from acting in the exercise of his/her functions, but also to bribes solicited after the fact, once the official has already altered his or her conduct.
46. Section 24 of the *Leadership Code Act* criminalizes passive bribery by leaders, in addition to offers of bribes by leaders. However, due to the limited definition of “bribe” in section 4(9) of the *Leadership Code Act*, the offence is limited to bribes solicited in order to influence the Leader or another officer “to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business”. This would seem to narrow the scope of the offence in relation to the requirements of the Convention. It is recommended that Tuvalu expand the offence of active and passive bribery involving Leaders to correspond to article 15 of the Convention.

Article 16 Bribery of foreign public officials and officials of public international organizations

1. Each State Party shall adopt such legislative and other measures as may be necessary to 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, 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, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, 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.

(a) Summary of information relevant to reviewing the implementation of the article

47. Tuvalu indicated that it has not implemented this article.

48. Section 85 of the *Penal Code* [Cap 10.20] regulates bribery involving public officers. The definition of a “**person employed in the public service**” in section 4 of the *Penal Code* does not expressly refer to foreign public officials and officials of public international organisations. Unfortunately the definition points only to those specified in the interpretation clause under “person employed in the public service”. This covers domestic persons.

Penal Code [Cap 10.20]

4 Interpretation

“**person employed in the public service**” means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely —

(i) any civil office, including the office of Minister the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor-General; or

(ii) any office to which a person is appointed or nominated by Act or by selection; or

(iii) any civil office, the power of appointing to which or of removing from which is vested in any person or persons holding an office of any kind included in either of the 2 last preceding paragraphs of this section; or

(iv) any office of arbitrator or umpire in any proceeding or matters submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act;

and the said term further includes —

(i) a magistrate;

(ii) a member of a commission of inquiry appointed under or in pursuance of any Act;

(iii) any person employed to execute any process of a court;

(iv) all persons in the employment of any department of the Government;

(v) a person acting as a minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnisation of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;

(vi) a person in the employ of a Kaupule;

85 Official corruption

Any person who —

(a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or

(b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed, is guilty of a felony and shall be liable to imprisonment for 7 years.

(b) Observations on the implementation of the article

49. Tuvalu has not criminalized bribery of foreign public officials and officials of public international organizations.

50. It is recommended that Tuvalu criminalize bribery of foreign public officials and officials of public international organizations, and consider establishing the passive version of the offence.

Article 17 Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

51. Larceny, embezzlement and conversion are criminalized under Part XXVII of the *Penal Code* [Cap 10.20]. In particular, section 266 of the *Penal Code* [Cap 10.20] criminalizes embezzlement by those “being employed in the public service of Her Majesty”.

Section 4 of the *Penal Code* [Cap 10.20] defines a “**person employed in the public service**” as any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely —

- (i) any civil office, including the office of Minister the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor- General; or
- (ii) any office to which a person is appointed or nominated by Act or by selection; or
- (iii) any civil office, the power of appointing to which or of removing from which is vested in any person or persons holding an office of any kind included in either of the 2 last preceding paragraphs of this section; or
- (iv) any office of arbitrator or umpire in any proceeding or matters submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act;

and the said term further includes —

- (i) a magistrate;
- (ii) a member of a commission of inquiry appointed under or in pursuance of any Act;
- (iii) any person employed to execute any process of a court;
- (iv) all persons in the employment of any department of the Government;
- (v) a person acting as a minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnisation of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;
- (vi) a person in the employ of a Kaupule;

Penal Code [Cap 10.20]

250 Things capable of being stolen

(1) Every inanimate thing which has value and is the property of any person, and if adhering to the realty then after severance therefrom, is capable of being stolen:

Provided that, save as hereinafter expressly provided with respect to fixtures, growing things, and minerals as defined in the Mineral Development Licensing Act, anything attached to or forming part of the realty is not capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof.

(2) Every tame creature, whether tame by nature or wild by nature and subsequently tamed, which is the property of any person, is capable of being stolen.

(3) Creatures wild by nature, of a kind which is not ordinarily found in a condition of natural liberty in Tuvalu, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement.

(4) Creatures wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Tuvalu, which are the property of any person, are capable of being stolen while they are in confinement, and while they are being actually pursued after escaping from confinement, but not at any other time.

(5) A creature wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or is otherwise so placed that it cannot escape, and that its owner can take possession of it at pleasure.

(6) Wild creatures in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen:

Provided that the carcass of a creature wild by nature and not reduced into possession while living is not capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcass.

(7) Everything produced by or forming part of the body of a creature capable of being stolen is capable of being stolen.

251 Definition of theft

(1) A person steals who, without the consent of the owner fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.

(2)

(a) The expression “takes” includes obtaining the possession —

(i) by any trick;

(ii) by intimidation;

(iii) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or

(iv) by finding, where at the time of finding the finder believes that the owner can be discovered by taking reasonable steps.

(b) The expression “carries away” includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached.

(c) The expression “owner” includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

252 Stealing and embezzlement by co-partners, etc.

If any person, who is a member of any co-partnership or is one of 2 or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners, he is liable to be dealt with, tried and punished as if he had not been or was not a member of such copartnership or one of such beneficial owners.

254 General punishment for theft

(1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for 5 years.

(2) Any person who commits the offence of simple larceny after having been previously convicted of felony shall be liable to imprisonment for 10 years.

(3) Any person who commits the offence of simple larceny, after having been previously convicted of any misdemeanour punishable under this Part or under Part XXXV, shall be liable to imprisonment for 7 years.

260 Embezzlement by officer of post office

Any person who, being an officer of the post office, steals or embezzles a postal packet in the course of transmission by post, is guilty of a felony and shall be liable —

- (a) if the postal packet contains any chattel, money or valuable security, to imprisonment for life; and
- (b) in all other cases to imprisonment for 7 years.

261 Definitions relating to larceny and embezzlement of postal packets

For the purposes of sections 259 and 260 —

- (a) a postal packet shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed;
- (b) the delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post shall be a delivery to a post office; and
- (c) the delivery of a postal packet at the house or office of the person to whom the packet is addressed or to him or to his servant or agent or other person considered to be authorised to receive the packet according to the usual manner of delivering that person's postal packets shall be a delivery to the person addressed.

266 Larceny and embezzlement by clerks or servants

Any person who —

- (a) being a clerk or servant or person employed in the capacity of a clerk or servant —
 - (i) steals any chattel, money or valuable security belonging to or in the possession of his master or employer; or
 - (ii) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer; or
- (b) being employed in the public service of Her Majesty —
 - (i) steals any chattel, money or valuable security belonging to or in the possession of Her Majesty or entrusted to or received or taken into possession by such person by virtue of his employment; or
 - (ii) embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money or valuable security entrusted to or received or taken into possession by him by virtue of his employment; or
- (c) being appointed to any office or service by or under a council established under the Falekaupule Act²¹ or any law or laws repealing and replacing the same, or being appointed to any office or service by or under any other Kaupule or other public body —
 - (i) fraudulently applies or disposes of any chattel, money or valuable security received by him (whilst employed in such office or service) for or on account of any Kaupule or other public body or department, for his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him; or

(ii) fraudulently withholds, retains, or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid,

is guilty of a felony, and shall be liable to imprisonment for 14 years.

271 Conversion

(1) Any person who —

(a) being entrusted either solely or jointly with any other person with any power of attorney for the sale or transfer of any property, fraudulently sells, transfers or otherwise converts the property or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was entrusted; or

(b) being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company; or

(c)

(i) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or

(ii) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit or the use or benefit of any other person, the property or any part thereof or any proceeds thereof,

is guilty of a misdemeanour, and shall be liable to imprisonment for 7 years.

(2) Nothing in paragraph (c) of subsection (1) applies to or affects a trustee under any express trust created by a deed or any will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

52. Property is defined in section 4 of the *Penal Code*:

“**property**” includes any description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise;

Leadership Code Act [Cap 4.12]

26 Misuse of public assets and funds

A Leader must not use any public assets or funds —

(a) for any purpose other than the purpose(s) for which it was appropriated for; or

(b) in a manner that is grossly uneconomic or wasteful.

53. Tuvalu referred to the following case:

Sofeni v Crown [2014] TVHC 4 HC Crim. App. Case 3/13 (21 February 2014).

The appellant was, at the time of this offence, the executive officer of the Office of Parliament. In February 2012 one of the Members of Parliament returned to her some expenses (amounting to \$1,056) to which he was no longer entitled.

The appellant attempted to pay the money into the Treasury. The officer who should have received it was not there. The appellant was requested to hold the money and bring it back again later. The appellant, instead of going back with the money, kept it and used it for her own purposes.

She pleaded guilty to larceny and embezzlement contrary to section 266(b)(ii) of the Penal Code. The learned Senior Magistrate sentenced her to six months imprisonment.

With reference to section 28A of the Penal Code, a suspended sentence is possible; however, this was not a suitable option in this case and a custodial sentence was ordered by the Court.

(b) Observations on the implementation of the article

54. The observations made above regarding the definition of “person employed in the public service” are referred to.

55. Larceny, embezzlement and conversion by certain specified persons are criminalized under Part XXVII of the *Penal Code* [Cap 10.20]. In particular, section 266 of the *Penal Code* [Cap 10.20] criminalizes embezzlement by those “being employed in the public service”. However, only certain types of property are covered (see in particular sections 266 and 250-251 of the *Penal Code*). It is recommended that Tuvalu adopt a comprehensive offence of embezzlement, misappropriation and diversion of property in line with article 17.

Article 18 Trading in influence

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) 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;

(b) 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.

(a) Summary of information relevant to reviewing the implementation of the article

56. Tuvalu indicated that it has partially implemented this article.

57. Some cases of trading in influence could be dealt with under sections 23 or 24 of the *Leadership Code Act* [Cap 4.12] or sections 85 and 367 of the *Penal Code* [Cap 10.20].

Leadership Code Act [Cap 4.12]

7 Offences by other persons

A person other than a Leader who —

- (a) takes part in conduct that breaches this Code;
- (b) obtains a benefit (directly or indirectly) from an act or omission that breaches this Code; or
- (c) exercises undue influence over, or in any other way brings pressure to bear upon, a Leader, so as to influence, or attempt to influence, the Leader to breach this Code,

thereby breaches this Code.

23 Undue influence

(1) A Leader shall not exercise undue influence over, or in any other way bring pressure to bear on —

- (a) another Leader; or
- (b) any other person holding public office, or employed by a Government agency or quasi-Governmental agency so as to influence, or attempt to influence, the person to act in a way that is —
- (c) in breach of this Code; or
- (d) improper; or
- (e) illegal; or
- (f) against the requirements of the legislation under which the person was appointed; or
- (g) contrary in any other way to the requirement of the person's office or position.

(2) A Leader must not influence or attempt to influence or exert pressure or threaten or abuse or interfere with, persons carrying out statutory functions.

24 Bribery

A Leader must not offer, seek, attempt, invite, or accept a bribe, whether directly or indirectly, and whether for himself or herself or for another person, group or organisation.

Penal Code [Cap 10.20]

85 Official corruption

Any person who —

- (a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
 - (b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed,
- is guilty of a felony and shall be liable to imprisonment for 7 years.

366 Interpretation for purposes of sections dealing with corrupt practices etc.

(1) For the purpose of this Part, the expression “consideration” includes valuable consideration of any kind; the expression “agent” includes any person employed by or acting for another; and the expression “principal” includes an employer.

(2) A person serving under the Crown or under any Kaupule or other public body and a member of any such council or other public body, is an agent within the meaning of this Part

367 Corrupt practices

If —

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal’s affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business; or

(b) any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to, his principal’s affairs or business;

(c) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal, he is guilty of a misdemeanour, and shall be liable to imprisonment for 2 years or to a fine of \$600.

368 Secret commission on Government contracts

Any person committing an offence under this Part where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any Government department or Kaupule or other public body, or a sub-contract to execute any work comprised in such contract, shall be liable to imprisonment for 7 years or to a fine of \$10,000.

Electoral Provisions (Parliament) Act [Cap 4.04]

48 Persons to be deemed guilty of undue influence

(1) Any person who directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of, any force, violence, or restraint, or inflicts or threatens to inflict by himself or by any other person, any injury, damage, harm or loss, upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who, by abduction, duress, or any fraudulent contrivances, impedes or prevents the free use of the vote by any elector and thereby compels, induces or prevails upon any elector either to give or refrain from giving his vote at any election, shall be guilty of undue influence within the meaning of this Part of this Act.

58. To date there are no available statistics or reports of suspected trading in influence, except for the case *Maatusi v Isaia* HC, Civil case no. 15/11 which relates more to suspected bribery acts during election time.

(b) Observations on the implementation of the article

59. Tuvalu relies on the general bribery provisions, section 367 of the *Penal Code* [Cap 10.20] on corrupt practices and provisions in the Leadership Code Act to pursue cases of trading in influence. While these provisions could partially cover the relevant conduct, they do not extend to all public officials, nor is the concept of abuse of “real or supposed influence” clearly covered.

60. It is recommended that Tuvalu consider adopting a relevant provision criminalizing trading in influence.

Article 19 Abuse of Functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

(a) Summary of information relevant to reviewing the implementation of the article

61. Section 90 of the *Penal Code* [Cap 10.20] criminalizes abuse of office by persons employed in the public service. Specific provisions apply in relation to public procurement officers.

Penal Code [Cap 10.20]

90 Abuse of office

(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of a misdemeanour. If the act is done or directed to be done for purpose of gain, he shall be guilty of a felony, and shall be liable to imprisonment for 3 years.

(2) A prosecution for any offence under this or either of the 2 last preceding sections shall not be instituted except by or with the sanction of the Attorney-General.

PART XIV – MISCELLANEOUS OFFENCES AGAINST PUBLIC AUTHORITY

121 Frauds and breaches of trust by persons employed in the public service

Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person, shall be guilty of a misdemeanour.

Public Procurement Act 2013

16 Offences and Penalties

(1) All public officers and staff and agents of bidders, potential bidders, suppliers, contractors, non-consulting service providers and consultants shall observe the highest standard of ethics during procurement proceedings and the implementation and management of contracts awarded therefrom.

(2) Any public officer who wilfully engages in corrupt practices in relation to a procurement proceeding shall be prosecuted under Part X and section 367 of the *Penal Code* and in addition to any penalty provided under the *Penal Code* shall upon conviction be liable to a fine of \$10,000.

62. Tuvalu referred to the case of *Crown v Ielemia* SM HAC 190/2014, where the defendant, a member of Parliament and former Prime Minister, was charged under Penal Code section 90 (1) for abuse of office. This is the very first ‘abuse of office’ case and the only corruption case for Tuvalu. The defendant was convicted on all four counts of abuse of office and was sentenced for one year imprisonment, which was converted to weekend detention by the senior magistrate, as provided in section 26A (‘Weekend detention’) of the Penal Code. The conviction was quashed by the High Court on appeal, and was pending final appeal by the Court of Appeal on 21 February 2017 at the time of review.

(b) Observations on the implementation of the article

63. The observations made above regarding the definition of “person employed in the public service” are referred to.

64. Tuvalu’s offence of abuse of office (section 90 of the Penal Code) 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. While frauds and breaches of trust by persons employed in the public service, as well as corrupt practices involving agents, are covered, it is nonetheless recommended that Tuvalu consider expanding the scope of this offence.

65. It is noted that the prior sanction of the Attorney-General is required to launch a prosecution for an offence of abuse of office under section 90(2) of the Penal Code. It was explained that this provision had raised issues in practice, as the absence of a written authorization from the Attorney-General to commence the prosecution was raised as a procedural challenge by the defense. During the country visit, the officials explained that a similar provision was also contained in other parts of the Penal Code and that it should be removed, as the offences are tried like any other offences. The reviewers accordingly recommend that Tuvalu amend its legislation to eliminate this provision.

Article 20 Illicit Enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(a) Summary of information relevant to reviewing the implementation of the article

66. Tuvalu indicated that it has not implemented this article.

67. Tuvalu has not criminalized illicit enrichment. The *Leadership Code Act* [Cap 4.12] provides for a system of an annual statement of interests for Leaders. Statements are not made public but the names of those who have or have not filed their annual statements is to be made public in accordance with section 35 of the *Leadership Code Act* [Cap 4.12].

Leadership Code Act [Cap 4.12]

33 Annual statements of interests

- (1) Every Leader must lodge an annual statement for the preceding year, specifying details of the Leader's assets and liabilities.
- (2) The annual statement for each year must be delivered to the Ombudsman —
 - (a) within two (2) months of the day on which that person became a Leader (whether or not for the first time); or
 - (b) on or before the first day of June next occurring, whichever deadline is later.
- (3) The annual statement must set out details of the assets and liabilities of —
 - (a) the Leader; and
 - (b) any spouse or dependent child of the Leader (if known);
 - (c) any trust of which the Leader, or (if known) any spouse or child of the Leader, is a beneficiary.
- (4) The details to be set out in the annual statement are —
 - (a) all land and other property (except one family home and kaitasi land);
 - (b) all vehicles (except one family vehicle);
 - (c) all shares in companies (public or private);
 - (d) all income;
 - (e) all financial liabilities;
 - (f) all directorships in companies (public or private);
 - (g) all directorships or other offices held in unincorporated bodies;
 - (h) any assets acquired or disposed of during the period covered by the statement;
 - (i) any liabilities acquired or discharged during the period covered by the statement.
- (5) The details must include assets inside and outside Tuvalu.
- (6) However, an annual statement need not include —
 - (a) any liabilities in respect of the family home; or
 - (b) the personal effects of the Leader, or of a spouse or child of the Leader.

35 Names of Leaders published annually

The Ombudsman must ensure that —

- (a) the names and positions of all leaders that have filed their annual statements; and

(b) the names and positions of all Leaders who have not filed their annual statements by the required deadline,

are published in the official gazette, by 15 June in each year.

36 Failure to file annual statement

A Leader who —

(a) has not filed an annual statement by the required deadline, or within fourteen (14) days after the Ombudsman has sent him or her a written notice reminding him or her to do so (whichever is later); or

(b) files a statement knowing that it is false or misleading in any relevant detail,

has breached this Code.

68. In addition, section 20 of the *Leadership Code Act* [Cap 4.12] provides that leaders should disclose gifts received valued at over \$100 to the Ombudsman. However, gifts provided or accepted in accordance with custom are not subject to this rule (section 19 *Leadership Code Act*).

69. Rule 42 of the *Parliamentary Rules of Procedure* [Cap 1.02.03] also requires the disclosure of interests.

42 Disclosure of Interest

(1) In accordance with section 97(1) of the Constitution, and in the absence of an Act of Parliament in relation to this matter, this Rule makes provision requiring the disclosure of interest by a Member who has such an interest in a matter under consideration, either in Parliament or in a Committee of Parliament.

(2) The purpose of this Rule is to prevent Members from exploiting their public positions or Membership whether for private gain or to personal advantage of whatever nature whether direct or indirect, that he may have had, may have or may be expected to have.

(3) For the purpose of this Rule, the word "interest" shall be interpreted in accordance with the purpose for which this Rule is made as in sub-rule (2) above.

(4) In any proceedings of Parliament, or a Committee of Parliament, any Member who has an interest in any matter which is the subject of such proceedings, shall disclose his interest to Parliament, or a Committee of Parliament, as the case may be.

(5) Any Member who has disclosed his interest in any matter before Parliament, or a Committee of Parliament, shall not take part in such proceedings except with the approval of Parliament or a Committee of Parliament.

(6) When a Member has disclosed an interest in a matter before Parliament, or a committee of Parliament, the approval or otherwise of Parliament, or Committee, shall be expressed by the Speaker, or Chairman, as the case may be who shall decide as to whether such Member may take part in such proceedings.

(7) When considering the participation or otherwise of a Member who has disclosed an interest in any proceedings as aforesaid, the Speaker, or Chairman, shall take into account the degree of exploitation of such Member's public position or membership for which private gain or personal advantage may be achieved by his participation in such proceedings.

(8) Any Member who has not received the approval of Parliament, or Committee to take part in any proceedings before Parliament, or Committee, in accordance with sub-rule (5) above, shall forfeit the right to vote in such proceedings.

(9) The deliberate failure of any Member to disclose his interest in any matter before Parliament, or Committee, shall be treated as a breach of this Rule and subject to any extenuating explanations which such Member can raise in defence of such failure, the Speaker, or Chairman, may disallow any remarks or voting made by such Member in the proceedings at which he had failed to disclose his interest, or direct the discontinuation of that Member's further participation on that particular matter then before Parliament, or Committee.

(10) Notwithstanding the foregoing provisions in this Rule, the participation of Members in any proceedings dealing specifically with Members' terms and conditions of pay, allowances and other privileges (whether as Private Members, Ministers or Speaker) in Parliament, or Committee, shall not be regarded as a breach of this Rule, and any voting of Members in any such proceedings shall be valid.

(11) For the purpose of this Rule, a Member's interest in any matter before Parliament, or Committee, shall include the interest of Members of his "immediate family", which term means the spouse, children (including adopted and step children) and parents (whether fosters or step parents).

(12) By way of clarification, it is hereby declared that it is not the intention of Parliament that there should be any provision in this Rule to compel the vacation of a Member's seat in accordance with sections 97(2) and 96(1) (g) of the Constitution.

70. The General Administrative Orders [Cap 4.24.1] also require the disclosure of interests.

71. Annual financial declarations of assets are to be submitted to the Chief Ombudsman by Members of Parliament (MP), leaders and members of the Kaupule and Island courts.

(b) Observations on the implementation of the article

72. It was explained during the country visit that Tuvalu has not formally considered criminalizing illicit enrichment. It is recommended that Tuvalu consider adopting a provision criminalizing illicit enrichment.

Article 21 Bribery in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

(a) Summary of information relevant to reviewing the implementation of the article

73. Tuvalu indicated that it has partially implemented this article.

74. Part XXXVIII of the *Penal Code* [Cap 10.20] covers secret commissions and corrupt practices. In particular, section 367(a) and (b) of the *Penal Code* [Cap 10.20] covers active and passive bribery involving agents. These provisions could extend to the private sector, including bodies corporate.

Penal Code [Cap 10.20]

4 Interpretation

“**person**” and “**owner**” and other like terms, when used with reference to property, include corporations of all kinds and any other association of persons capable of owning property, and also when so used include Her Majesty;

26 Fine in addition to, or instead of, imprisonment

A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment: Provided however that nothing in this section shall apply to any imprisonment sentence of imprisonment for life required to be imposed by section 47, 48, 63 or 193 (relating to the offences of treason, instigating invasion, piracy and murder).

366 Interpretation for purposes of sections dealing with corrupt practices etc.

(1) For the purpose of this Part, the expression “consideration” includes valuable consideration of any kind; the expression “agent” includes any person employed by or acting for another; and the expression “principal” includes an employer.

(2) A person serving under the Crown or under any Kaupule or other public body and a member of any such council or other public body, is an agent within the meaning of this Part.

367 Corrupt practices

If —

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal’s affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business; or

(b) any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to, his principal’s affairs or business;

(c) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,

he is guilty of a misdemeanour, and shall be liable to imprisonment for 2 years or to a fine of \$600.

368 Secret commission on Government contracts

Any person committing an offence under this Part where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any Government department or Kaupule or other public body, or a sub-contract to execute any work comprised in such contract, shall be liable to imprisonment for 7 years or to a fine of \$10,000.

369 Presumption as to corrupt practices

Where in any proceedings against a person for an offence under this Part it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of the Crown or any Government department or Kaupule or other public body, by or from a person or agent of a person holding or seeking to obtain a contract from the Crown or any Government department or Kaupule or other public body, the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in this Part, unless the contrary is proved.

370 Consent to prosecution

A prosecution for an offence under this Part shall not be instituted without the sanction of the Attorney-General.

According to the *Interpretation and General Provisions Act* [Cap 1.04], a “person” includes any public body and any company, and association or body of persons, corporate or unincorporated.

Interpretation and General Provisions Act [Cap 1.04]

10 Meaning of Words in Written laws

(1) In this Act and every other written law, unless the context otherwise requires —

...

“**person**” or any word or expression descriptive of a person includes any public body and any company, and association or body of persons, corporate or unincorporate, and this definition applies notwithstanding that the word “person” occurs in a provision creating or relating to an offence for the recovery of any fine or compensation;

73 Offences by bodies corporate

(1) Where at any time a body corporate commits an offence under a written law (enacted or made after the commencement of this Act) with the consent or connivance of, or because of neglect by, an individual, the individual commits the same offence if at that time —

- (a) he is a director, manager, secretary or similar officer of the body corporate;
- (b) he is purporting to act as such an officer; or
- (c) the body corporate is managed by its members of whom he is one.

(2) Where a body corporate commits an offence against a written law (enacted or made after the commencement of this Act) for which the only penalty prescribed is a term of imprisonment, the body corporate is punishable on conviction by a fine which —

- (a) if the penalty so prescribed is a term of six months or under, does not exceed \$1,000;
- (b) if the penalty so prescribed is over a term of six months but not over a term of two years, does not exceed \$2,000; and
- (c) if the penalty so prescribed is over a term of two years, does not exceed \$3,000.

75. There have been no relevant cases.

(b) Observations on the implementation of the article and good practice

76. Tuvalu has (partially) criminalized bribery in the private sector in Part XXXVIII of the *Penal Code* [Cap 10.20]. The offence in section 367 of the Penal Code extends to acts or omissions involving agents “in relation to [a] principal’s affairs or business”. The expression “agent” as defined includes any person employed by or acting for another, and the expression “principal” includes an employer (section 366 Penal Code). Accordingly, it was confirmed during the country visit, that the provision is limited to employees/employers and agents/principals but does not cover all private sector actors, such as directors and managers of companies. It is recommended that Tuvalu consider adopting a more comprehensive offence of bribery in the private sector, in line with the Convention.

77. The reviewers note that corrupt practices under section 367 of the Penal Code are classified as misdemeanors subject to a fine of \$600 or 2 years’ imprisonment. Please see the observations under article 30(1) below.

78. The reviewers are of the view that the cited provisions of the *Interpretation and General Provisions Act* [Cap 1.04], in particular section 73, extend liability to corporate entities and hold directors, managers and other officers liable for offences committed with their knowledge or consent, but they do not establish an offence of bribery of such persons, as required by this article.

79. The presumption of corrupt practices in section 369 of the Penal Code is positively noted.

Article 22 Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position

(a) Summary of information relevant to reviewing the implementation of the article

80. Tuvalu indicated that it has partially implemented this article.

81. Larceny, embezzlement and conversion by specified persons are criminalized under Part XXVII of the *Penal Code* [Cap 10.20] (cited above).

Penal Code [Cap 10.20]

252 Stealing and embezzlement by co-partners, etc.

If any person, who is a member of any co-partnership or is one of 2 or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners, he is liable to be dealt with, tried and punished as if he had not been or was not a member of such co-partnership or one of such beneficial owners.

82. It was explained during the country visit that there has been one case of embezzlement in the private sector, *R. v. Lavinia Faimasasa* (2015), in which a plea agreement was reached with the defendant on the grounds of her admission and repayment of the full amount of the stolen assets. The defendant was sentenced to a 6-month non-custodial sentence.

(b) Observations on the implementation of the article

83. Larceny, embezzlement and conversion by certain specified persons are criminalized under Part XXVII of the *Penal Code* [Cap 10.20], with the same limitations as in the case of embezzlement in the public sector. Section 252 of the *Penal Code* [Cap 10.20] further criminalizes stealing and embezzlement by co-partners.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) 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;

(a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

84. Tuvalu indicated that it has partially implemented these provisions.

85. The offence in subparagraph 1(a)(i) is criminalized in section 13 of the *Proceeds of Crime Act* [Cap 10.25]. Reference is also made to the definition of “gift” in section 10(1).

86. The offence in subparagraph 1(a)(ii) is criminalized in sections 13(3)(b) and section 14(1) of the *Proceeds of Crime Act* [Cap 10.25]. The term “disguise” is not used in the legislation; however, it may be covered by a broad interpretation of “conceal”.

Proceeds of Crime Act [Cap 10.25]

4 Definitions for Act

“**property**” includes money and all other property, real or personal, including an enforceable right of action and other intangible or incorporeal property;

7 Meaning of proceeds of crime

(1) In this Act:

“**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:

(a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and

(b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

10 Meaning of gift

(1) In this Act:

“gift” includes a transfer (directly or indirectly) of property by 1 person to another for a consideration that is significantly less than the value of the property.

(2) In the circumstances mentioned in subsection (1), sections 11 and 12 apply as if the person had made a gift of as much of the transferred property as bears to the whole property the same proportion as the difference between the value of the property and the value of the consideration.

13 Money-laundering

(1) In this section:

“transaction” includes the receiving or making of a gift.

(2) A person who engages in money-laundering is guilty of an offence punishable by:

(a) if the offender is a natural person — a fine of \$120,000 or imprisonment for 20 years, or both; or

(b) if the offender is a body corporate — a fine of \$600,000.

(3) A person engages in money-laundering only if:

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that the person knows, or ought reasonably to know, to be proceeds of crime; or

(b) the person receives, possesses, conceals, disposes of or brings into Tuvalu money, or other property, that the person knows, or ought reasonably to know, to be proceeds of crime.

14 Possession of property suspected of being proceeds of crime

(1) A person who receives, possesses, conceals, disposes of or brings into Tuvalu money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence punishable by:

(a) if the offender is a natural person — a fine of \$12,000 or imprisonment for 2 years, or both; or

(b) if the offender is a body corporate — a fine of \$60,000.

(2) It is a defence to a prosecution under subsection (1) that the person charged had no reasonable grounds for suspecting that the property mentioned in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

(3) A person is not liable to be convicted of an offence against both section 13 and this section because of 1 act or omission.

87. Tuvalu provided the following illustration.

88. No relevant cases were reported, except for the case of *Crown v Ielemia* SM 190/2014, in which reference was made to four transactions from overseas into the defendant's personal account as being proceeds of crime. However, these transactions were not included in the charges against the defendant, nor did the National Bank of Tuvalu (NBT) report these transactions to the Transaction Tracking Unit (TTU) under section 18 of the Proceeds of Crime Act, for the reasons described below.

89. The NBT reports or flags to the TT Unit any single transaction posted from outside the country which is valued at more than \$10,000. Existing verification mechanisms by the NBT only cover verification, such as checking whether the intended recipient and sender are reflected, where necessary. None of NBT's verification mechanisms goes to the purpose or intention of why the funds were sent and for what reasons (private or public).

90. Notwithstanding the NBT's limited verification mechanisms, a magistrate may issue a warrant for a physical search of premises for a property-tracking document in accordance with **section 94 of the Proceeds of Crime Act**, in the same manner as under section 101 of the Criminal Procedure Code. Further, as per **section 118(c) of the Proceeds of Crime Act**, nothing in the Act limits or restricts any power of search or seizure of property that is exercisable by a police officer apart from the Act. The Criminal Procedure Code and Proceeds of Crime Act provisions go hand in hand in this regard.

Proceeds of Crime Act

118 Operation of certain other laws not affected

Nothing in this Act prejudices, limits or restricts:

- (a) the operation of any other law that provides for the forfeiture of property or the imposition of penalties or fines; or
- (b) the remedies available to the Crown, apart from this Act, for the enforcement of its rights and the protection of its interests; or
- (c) any power of search or any power to seize or detain property that is exercisable by a police officer apart from this Act.

94 Search warrant to facilitate investigation

(1) A police officer may apply to a magistrate for a warrant under subsection (4) to search premises for a document if:

- (a) a person is convicted of a serious offence, and there are reasonable grounds for suspecting that there is on premises a property-tracking document for the offence; or
- (b) there are reasonable grounds for suspecting that a person has committed a serious offence and there is on the premises a property-tracking document for the offence.

(2) If a police officer applies for a warrant under subsection (4) for an offence and includes in an accompanying affidavit a statement to the effect that there are reasonable grounds for believing that:

- (a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from committing the offence; and

(b) property specified in the affidavit is subject to the effective control of the person, the magistrate may treat any document relevant to identifying, locating or quantifying the property as a property-tracking document for the offence for this section.

(3) In deciding whether to treat a document, under subsection (2), as a property-tracking document for an offence, the magistrate may take into account the matters mentioned in subsection 41(2).

(4) Despite any enactment that prohibits disclosure of information, if an application is made under subsection (1) for a warrant to search premises for a property-tracking document:

(a) the magistrate may, if satisfied that there are reasonable grounds for doing so, issue a warrant of that kind in the same way, and subject to the same conditions, as the magistrate could issue a search warrant under section 101 of the Criminal Procedure Code; and

(b) subject to this Division, the warrant may be executed in the same way as if it had been issued under that section.

91. As noted above, Tuvalu has been an observer with the Asia-Pacific Group on Money Laundering since 2014. Full membership would be beneficial to enhance the country's implementation of the Convention.

(b) Observations on the implementation of the article

92. Tuvalu has partially implemented these provisions. Money-laundering is criminalized in section 13 of the Proceeds of Crime Act [Cap 10.25]. However, the offence is limited to certain specified acts or transactions, which do not clearly cover the conversion, transfer or disguise of proceeds of crime. While conceivably these acts could be covered as "transactions" involving criminal proceeds, the provision defining a transaction (section 13) only refers to, inter alia, the receiving or making of gifts, and does not clarify whether acts of conversion, transfer and disguise are covered. Moreover, the offence in section 13 clearly provides that a person engages in money-laundering "only if" he or she commits the specified acts or engages in a transaction, which does not clearly cover the elements of article 23(1)(a).

93. It is recommended that Tuvalu specify its legislation to more clearly cover the elements of article 23(1)(a). Following discussions during the country visit, it is also recommended that Tuvalu eliminate the additional element of a "transaction" from the offence, as this is not defined in the law or practice (see art. 23(1)(b)(i) below).

94. It is further noted that Tuvalu's money-laundering offence is limited to the proceeds of a "serious offence", which is defined in section 4 (quoted below) as an offence punishable by a maximum penalty of imprisonment of 12 months or longer, subject to dual criminality when the offence was committed against the law of another country. Please see article 23(2)(a) and (b) below.

95. During the country visit, the case of *Crown v Ielemia SM HAC 190/2014* was discussed, as the defendant in the case had received four separate transactions in excess of \$5,000 each from overseas into his account. However, these transactions were not reported by the National Bank of Tuvalu (NBT) to the Transaction Tracking Unit (TTU) because each transaction was under the reporting threshold of \$10,000. In this context, Tuvalu noted the

“NBT’s limited verification mechanisms”, because the NBT reviews basic information on the originator of a transaction and conducts only basic customer verification (such as requiring identification and checking records with the Attorney-General’s office) but does not do a fuller transaction analysis. In this particular case, it was concluded that the transactions were legitimate and no money-laundering charges were brought.

96. A further challenge relating to the detection of money-laundering in Tuvalu is the procedure for investigating suspicious transaction reports (STRs). It was explained that suspicious transactions are reported by Tuvalu’s three financial institutions to the police, as the TTU is not operational (section 18(3) of the Proceeds of Crime Act states that reports should be made to the TTU, not the police). The institutional challenge faced by Tuvalu is that the TTU is established under section 18 of the Proceeds of Crime Act [Cap 10.25] (quoted under article 31(7) below) but is not operational and has never been convened to date. It was explained that, should a case arise where the TTU is needed, it would be convened on an ad hoc basis, drawing on investigators from the police and the Ombudsman’s office. These officials are not specialized in financial investigations and have not received technical training, including on issues such as cybercrime.
97. During the country visit, the officials acknowledged that there is a need to follow-up on the STRs that are reported to law enforcement authorities for further investigation, but that Tuvalu lacks specialized capacity in this area. Moreover, there is a need to operationalize a financial intelligence unit (FIU), and it was suggested that Tuvalu should consider establishing an office with a permanent, specialized FIU whose officials would also benefit from technical cooperation with counterpart FIUs overseas. It was reported that to-date, Tuvalu’s police had received about 2 or 3 STRS, none of which had been further investigated due to the lack of capacity in the police, and that over 100 transactions above the \$10,000 reporting threshold had been reported in the last 2-3 years.
98. There is also a need for specialized anti-money-laundering training of financial institutions on detecting and reporting suspicious transactions. None of Tuvalu’s financial institutions have been trained in this regard, apart from a one-time training conducted some years ago by the Cook Islands.
99. Accordingly, the recommendations above are made. The reviewers further encourage Tuvalu’s swift accession to the Asia-Pacific Group on Money Laundering as a full member.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(a) **Summary of information relevant to reviewing the implementation of the article**

100. Tuvalu indicated that it has partially implemented this provision.

101. The offence in subparagraph (1)(b)(i) is criminalized in sections 13(3) and 14(1) of the *Proceeds of Crime Act* [Cap 10.25]. Reference is also made to the Penal Code provisions cited below.

Proceeds of Crime Act [Cap 10.25]

13 Money-laundering

(1) In this section:

“**transaction**” includes the receiving or making of a gift.

(2) A person who engages in money-laundering is guilty of an offence punishable by:

(a) if the offender is a natural person — a fine of \$120,000 or imprisonment for 20 years, or both; or

(b) if the offender is a body corporate — a fine of \$600,000.

(3) A person engages in money-laundering only if:

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that the person knows, or ought reasonably to know, to be proceeds of crime; or

(b) the person receives, possesses, conceals, disposes of or brings into Tuvalu money, or other property, that the person knows, or ought reasonably to know, to be proceeds of crime.

14 Possession of property suspected of being proceeds of crime

(1) A person who receives, possesses, conceals, disposes of or brings into Tuvalu money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence punishable by:

(a) if the offender is a natural person — a fine of \$12,000 or imprisonment for 2 years, or both; or

(b) if the offender is a body corporate — a fine of \$60,000.

(2) It is a defence to a prosecution under subsection (1) that the person charged had no reasonable grounds for suspecting that the property mentioned in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

(3) A person is not liable to be convicted of an offence against both section 13 and this section because of 1 act or omission.

Penal Code [Cap 10.20]

PART XXXIV - RECEIVING PROPERTY STOLEN OR UNLAWFULLY OBTAINED AND LIKE OFFENCES

306 Receiving

(1) Any person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, is

guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable

(a) in the case of felony, to imprisonment for 14 years; and

(b) in the case of misdemeanour, to imprisonment for 7 years.

(2) Any person who receives any mail bag, or any postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling or secreting whereof amounts to a felony or misdemeanour under the Post Office Act²⁴ or this Code, owing the same to have been so feloniously stolen, taken, embezzled or secreted, and to have been sent or to have been intended to be sent by post, is guilty of a felony or misdemeanour as the case may be and shall be liable to the same punishment as if he had stolen, taken, embezzled or secreted the same.

(3) Every such person may be proceeded against on information and convicted, whether the principal offender has or has not been previously convicted, or is or is not amendable to justice.

307 Receiving goods stolen outside Tuvalu

Any person who, without lawful excuse, knowing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in Tuvalu the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside Tuvalu, is guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable to imprisonment for 7 years.

102. No cases have been reported at this time.

(b) Observations on the implementation of the article

103. The money-laundering offence in section 13(3) of the *Proceeds of Crime Act* [Cap 10.25] covers inter alia the receipt and possession of proceeds of crime. The use of such proceeds appears to be criminalized in sub-section 13(3)(a) (engaging, directly or indirectly, in a transaction that involves criminal proceeds).

104. In the absence of any guidance or case law on the meaning of the term “transaction” as used in the Act, it is recommended that Tuvalu eliminate this element.

105. The concealment of criminal proceeds is criminalized in section 14 of the Act (see article 24 below).

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(ii) *Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

(a) Summary of information relevant to reviewing the implementation of the article

106. Tuvalu indicated that it has partially implemented this provision.

107. Part XXXIX of the *Penal Code* [Cap 10.20] covers attempts, while Part XL of the *Penal Code* [Cap 10.20] covers conspiracy.

108. The Penal Code provisions work interactively with the Proceeds of Crime Act, in accordance with section 118 (a) of the Proceeds of Crime Act, which states that “ Nothing in this Act prejudices, limits or restricts: (a) the operation of any other law that provides for the forfeiture of property or the imposition of penalties or fines”.

Penal Code [Cap 10.20]

PART V - PARTIES TO OFFENCES

21 Principal Offences

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;
- (d) any person who counsels or procures any other person to commit the offence.

(2) In the last mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(4) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

22 Offences committed by joint offenders in prosecution of common purpose

When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

23 Counselling another to commit an offence

When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence

actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

If the facts constituting the offence actually committed are not a probable consequence of carrying out the counsel, the person who gave the counsel is not deemed to be responsible.

371 Attempt defined

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

372 Attempts to commit offences

Any person who attempts to commit a felony or misdemeanour is guilty of an offence, which, unless otherwise stated, is a misdemeanour.

373 Punishment of attempts to commit certain felonies

Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of 14 years or upwards, with or without other punishment, is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for 7 years.

374 Soliciting or inciting others to commit offence in Tuvalu or elsewhere

Any person who solicits or incites or attempts to procure another to do any act, or make any omission, whether in Tuvalu or elsewhere, of such a nature that, if the act were done or the omission were made, an offence would thereby be committed, under the laws of Tuvalu or the laws in force in the place where the act or omission is proposed to be done or made, whether by himself or by that other person, is guilty of an offence of the same kind and shall be liable to the same punishment as if he had himself attempted to do the same act or make the same omission in Tuvalu:

Provided that if the act or omission is proposed to be done or made at a place not in Tuvalu, the punishment shall not exceed that which he would have incurred under the laws in force where the act or omission was proposed to be done or made, if he had himself attempted to do the proposed act or make the proposed omission:

Provided also that, in the last-mentioned case, a prosecution shall not be instituted except at the request of the Government of the State having jurisdiction in the place where the act or omission was proposed to be done or made.

375 Neglect to prevent felony

Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanour.

PART XL - CONSPIRACIES

376 Conspiracy to commit felony

Any person who conspires with another to commit any felony, or to do any act in any part of the world, which if done in Tuvalu would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and shall be liable, if no other punishment is provided, to imprisonment for 7 years, or, if the punishment to which a person convicted of the felony in question is liable is less than imprisonment for 7 years, then to such lesser punishment.

377 Conspiracy to commit misdemeanour

Any person who in Tuvalu conspires with another to commit a misdemeanour, or to do any act in any part of the world which if done in Tuvalu would be a misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanour.

378 Other conspiracies

Any person who conspires with another to effect any of the purposes following, that is to say —

- (a) to effect any unlawful purpose; or
- (b) to effect any lawful purpose by any unlawful means,

is guilty of a misdemeanour.

PART XLI - ACCESSORIES AFTER THE FACT

379 Definition of accessories after the fact

(1) A person who receives or assists another who is, to his knowledge, guilty of a felony, in order to enable him to escape punishment, is said to become an accessory after the fact to the felony.

(2) A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; or by receiving or assisting in her husband's presence and by his authority another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment.

380 Punishment of accessories after the fact to felonies

Any person who becomes an accessory after the fact to a felony is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for 3 years.

109. There have been no reported cases.

(b) Observations on the implementation of the article

110. Participatory acts to money-laundering are partially criminalized through the application of the *Penal Code* [Cap 10.20] read together with the Proceeds of Crime Act.

The relevant provisions cover only attempts (Part XXXIX) and conspiracy (Part XL) of the *Penal Code* [Cap 10.20].

111. It is recommended that Tuvalu expand its legislation to cover all forms of participation, association, aiding, abetting, facilitating and counselling the commission of the offence.

Article 23 Laundering of proceeds of crime

Subparagraphs 2 (a) and (b)

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

112. Tuvalu follows the threshold approach to defining predicate offences. A “serious offence” is an offence against Tuvalu law where the minimum threshold is 12 months imprisonment or where, if the offence was committed overseas, it would have reached the 12 month imprisonment threshold.

Proceeds of Crime Act [Cap 10.25]

4 Definitions for Act

“serious offence” means:

- (a) an offence against a law of Tuvalu for which the maximum penalty imprisonment for 12 months or longer; or
- (b) an offence against the law of another country that, if the relevant act or omission had occurred in Tuvalu, would be an offence against the law of Tuvalu for which the maximum penalty is imprisonment for 12 months or longer;

7 Meaning of proceeds of crime

(1) In this Act:

“**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:

- (a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and
- (b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

113. There has been no relevant case law.

(b) Observations on the implementation of the article

114. As noted above, Tuvalu follows a “serious offences” threshold approach to defining predicate offences. Only offences subject to a maximum penalty of 12 months’ imprisonment or more qualify as predicate offences.

115. It is recommended that Tuvalu amend its legislation to ensure that all Convention offences qualify as predicate offences and may constitute proceeds of crime, as required by the definition of “proceeds of crime” in article 2 of the Convention.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (c)

2. For purposes of implementing or applying paragraph 1 of this article:

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(a) Summary of information relevant to reviewing the implementation of the article

116. Section 14(1) of the *Proceeds of Crime Act* [Cap 10.25] (quoted above) refers to money or other property that is received, possessed, concealed or disposed of, or brought into Tuvalu.

117. According to the definitions in section 4 of the *Proceeds of Crime Act* [Cap 10.25] (quoted above), a “serious crime” is an offence against a law of Tuvalu for which the maximum penalty imprisonment for 12 months or longer; or an offence against the law of another country that, if the relevant act or omission had occurred in Tuvalu, would be an offence against the law of Tuvalu for which the maximum penalty is imprisonment for 12 months or longer.

118. There has been no case law or case example involving foreign predicate offences at this time.

119. The TTU is part of the Police Services, whose role is to investigate any suspicious transactions. However, its role is limited in terms of monitoring such transactions.

(b) Observations on the implementation of the article

120. Foreign predicate offences are covered, subject to the serious offences threshold. The observations made under the preceding subparagraphs of this article above are referred to.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (d)

2. For purposes of implementing or applying paragraph 1 of this article:

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(a) Summary of information relevant to reviewing the implementation of the article

121. Tuvalu submitted copies of its anti-money laundering legislation during the course of the review.

(b) Observations on the implementation of the article

122. Tuvalu has implemented this provision.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (e)

2. For purposes of implementing or applying paragraph 1 of this article:

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

(a) Summary of information relevant to reviewing the implementation of the article

123. Tuvalu indicated that it has partially implemented this provision.

124. As noted above, **section 118(c) of the Proceeds of Crime Act** provides that nothing in the Act limits or restricts the operation of any other law that provides for the imposition of penalties.

Proceeds of Crime Act

118 Operation of certain other laws not affected

Nothing in this Act prejudices, limits or restricts:

- (a) the operation of any other law that provides for the forfeiture of property or the imposition of penalties or fines; or
- (b) the remedies available to the Crown, apart from this Act, for the enforcement of its rights and the protection of its interests; or
- (c) any power of search or any power to seize or detain property that is exercisable by a police officer apart from this Act.

(b) Observations on the implementation of the article

125. Tuvalu's legislation does not specify whether a person can be charged both with the predicate crime and the money laundering offence (section 13 of the Proceeds of Crime Act). Is there any restriction or have there been any such cases?

126. In the interest of greater legal certainty, it is recommended that Tuvalu specify its legislation in this regard.

Article 24 Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

127. Concealment is covered under section 14 of the *Proceeds of Crime Act* [Cap 10.25] (quoted above), which criminalizes the receiving, possession, concealment, disposition or bringing into Tuvalu of money or other property that may reasonably be suspected of being proceeds of crime.

128. There have been no examples or cases on concealment or continued retention of property where the person involved knows that such property is the result of an offence.

(b) Observations on the implementation of the article

129. The concealment of property reasonably suspected of being proceeds of crime is criminalized in section 14 of the Act. It is noted that pursuant to sub-section 14(3), a person cannot be convicted of both the offence of money-laundering (section 13) and possession of criminal proceeds (section 14) because of a single act or omission.

130. In light of the complexity of money-laundering transactions, it is recommended that Tuvalu consider eliminating this restriction.

Article 25 Obstruction of Justice

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) 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 a proceeding in relation to the commission of offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

131. Tuvalu indicated that it has partially implemented this provision.

Penal Code

104 Fabricating evidence

Any person who, with intent to mislead any tribunal in any judicial proceeding —

- (a) fabricates evidence by any means other than perjury or subornation of perjury; or
- (b) knowingly makes use of such fabricated evidence, shall be guilty of a misdemeanour, and shall be liable to imprisonment for 7 years.

108 Deceiving witnesses

Any person who practises any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, shall be guilty of a misdemeanour.

110 Conspiracy to defeat justice and interference with witnesses

Any person commits a misdemeanour who —

- (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or
- (b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence or endeavours to do so; or
- (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal.

289 Threatening to publish with intent to extort

Any person who with intent —

- (a) to extort any valuable thing from any person; or
- (b) to induce any person to confer or procure for any person any appointment or office of profit or trust —
 - (i) publishes or threatens to publish any libel upon any other person (whether living or dead); or
 - (ii) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead),

is guilty of a misdemeanour, and shall be liable to imprisonment for 2 years.

132. The applicable punishment is spelled out in section 42 of the Penal Code.

42 General punishment for misdemeanours

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for 2 years and with a fine.

133. There have been no case examples involving obstruction of witnesses or experts in corruption cases.

(b) Observations on the implementation of the article

134. Tuvalu indicated that it has partially implemented this provision.

135. Conspiracy to defeat justice and interference with witnesses is criminalized in section 110 of the Penal Code. While the use of physical force, threats or intimidation and the bribery of witnesses are not specified, the section also covers acts to dissuade, hinder or prevent witnesses from appearing and giving evidence, and broadly criminalizes the obstruction or interference with any legal process. The offence is classified as a misdemeanour.

136. Tuvalu is encouraged to consider specifying its legislation to more clearly cover the elements of the provision under review, and to consider revisiting the applicable penalties for obstruction of justice.

Article 25 Obstruction of Justice

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) 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 this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

(a) Summary of information relevant to reviewing the implementation of the article

137. Tuvalu criminalizes the obstruction of court officers in section 120 of the *Penal Code* [Cap 10.20] and creates a number of offences in relation to the conduct of judicial proceedings (section 115).

Penal Code [Cap 10.20]

4 Interpretation

“**judicial proceeding**” includes any proceeding had or taken in or before any court, tribunal, commission of inquiry or person, in which evidence may be taken on oath;

95 Threat of injury to persons employed in public service

(1) Whoever holds out any threat of injury to any person employed in the public service, or to any person in whom he believes that person employed in the public service to be interested, for the purpose of inducing that person employed in the public service to do any act, or to forbear or delay to do any act connected with the exercise of the public functions of such person employed in the public service, shall be guilty of a misdemeanour.

(2) A prosecution for an offence under this section shall not be instituted except by or with the sanction of the Attorney-General.

109 Destroying evidence

Any person who, knowing that any book, document, or thing of any kind whatsoever is or may be required in evidence in a judicial proceeding, wilfully removes or destroys it or renders it unintelligible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, shall be guilty of a misdemeanour.

110 Conspiracy to defeat justice and interference with witnesses

Any person commits a misdemeanour who —

- (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or
- (b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence or endeavours to do so; or
- (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal.

115 Offences relating to judicial proceedings

(1) Any person who —

- (a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being, had or taken; or
- (b) having been summoned by any court fails without good cause, the proof whereof shall lie on him, to appear on the date and at the time specified in the summons; or
- (c) being present at a judicial proceeding and being called upon to give evidence, refuses to be sworn or to make an affirmation; or
- (d) having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document which it is within his power to produce; or
- (e) having attended a judicial proceeding to give evidence, remains in the room in which such proceeding is being had or taken after the witnesses have been ordered to leave such room; or
- (f) causes an obstruction or disturbance in the course of a judicial proceeding; or
- (g) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or
- (h) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private: or
- (i) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence; or
- (j) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or
- (k) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court; or

(l) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken,

shall be guilty of an offence, and shall be liable to imprisonment for 3 months.

(2) When an offence under paragraph (a), (b), (c), (d), (e), (g) or (l) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognisance of the offence and sentence the offender to a fine of \$40 or in default of payment to imprisonment for 1 month.

(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the High Court to punish for contempt of court.

120 Obstructing court officers

Any person who wilfully obstructs or resists any person lawfully charged with the execution of an order or warrant of any court shall be guilty of a misdemeanour, and shall be liable to imprisonment for 1 year.

138. While there have been some incidents of obstructing police officers during interrogation or when attending to an arrest in drug cases, there have been no such case examples for offences under this Convention.

(b) Observations on the implementation of the article

139. Section 110 of the Penal Code broadly criminalizes the obstruction or interference with any legal process, civil or criminal. Section 115 creates a number of offences in relation to the conduct of judicial proceedings and Tuvalu criminalizes the obstruction of court officers in section 120 of the Penal Code [Cap 10.20].

140. The reviewers note that the applicable punishment under Section 115 seems relatively low (imprisonment for 3 months or 1 month, respectively). Please see the observations under article 30(1) below. It was explained during the country visit that obstruction of justice is not a significant concern in Tuvalu.

Article 26 Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(a) Summary of information relevant to reviewing the implementation of the article

141. Tuvalu indicated that it has partially implemented this article.

142. According to the *Interpretation and General Provisions Act* [Cap 1.04], a “person” includes any public body and any company, and association or body of persons, corporate or unincorporated.

Interpretation and General Provisions Act [Cap 1.04]

10 Meaning of Words in Written laws

(1) In this Act and every other written law, unless the context otherwise requires —

...

“**person**” or any word or expression descriptive of a person includes any public body and any company, and association or body of persons, corporate or unincorporate, and this definition applies notwithstanding that the word “person” occurs in a provision creating or relating to an offence for the recovery of any fine or compensation;

73 Offences by bodies corporate

(1) Where at any time a body corporate commits an offence under a written law (enacted or made after the commencement of this Act) with the consent or connivance of, or because of neglect by, an individual, the individual commits the same offence if at that time —

(a) he is a director, manager, secretary or similar officer of the body corporate;

(b) he is purporting to act as such an officer; or

(c) the body corporate is managed by its members of whom he is one.

(2) Where a body corporate commits an offence against a written law (enacted or made after the commencement of this Act) for which the only penalty prescribed is a term of imprisonment, the body corporate is punishable on conviction by a fine which —

(a) if the penalty so prescribed is a term of six months or under, does not exceed \$1,000;

(b) if the penalty so prescribed is over a term of six months but not over a term of two years, does not exceed \$2,000; and

(c) if the penalty so prescribed is over a term of two years, does not exceed \$3,000.

143. Relevant provisions are also found in the Penal Code and Companies Act as well as the Proceeds of Crime Act.

Penal Code [Cap 10.20]

4 Interpretation

“**person**” and “**owner**” and other like terms, when used with reference to property, include corporations of all kinds and any other association of persons capable of owning property, and also when so used include Her Majesty;

26 Fine in addition to, or instead of, imprisonment

A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment: Provided however that nothing in this section shall apply to any imprisonment sentence of imprisonment for life required to be imposed by section 47, 48, 63 or 193 (relating to the offences of treason, instigating invasion, piracy and murder).

Companies Act

Section 219 Penalties

- (1) A company which commits an offence under this Act is liable on conviction to a fine of up to \$5000.
- (2) A director or officer of a company or any other person who commits an offence under this Act is liable on conviction to a fine of up to \$3000.

Proceeds of Crime Act [Cap 10.25]

13 Money-laundering

- (1) In this section: ...
- (2) A person who engages in money-laundering is guilty of an offence punishable by:
 - (a) if the offender is a natural person — a fine of \$120,000 or imprisonment for 20 years, or both; or
 - (b) if the offender is a body corporate — a fine of \$600,000.

144. There have been no case examples of attributing liability to corporations or legal persons for corruption offences. However, in a case involving illegal fishing licenses, a company was fined \$1 million, in addition to the principals involved.

(b) Observations on the implementation of the article

145. Tuvalu indicated that it has partially implemented this article.
146. Tuvalu's legislation applies equally to legal and natural persons. Accordingly, legal persons can be held criminally liable for offences under Tuvalu's legislation.
147. It is noted, however, that Tuvalu's legislation does not specify the applicable punishments for offences committed by legal persons, except in the case of specific offences such as money-laundering under the Proceeds of Crime Act. While the Penal Code in section 26 provides for the possibility of a fine in lieu of imprisonment, there is no further specification and the applicable fines to be applied for various offences appear to be left to judicial discretion to determine. It is recommended that Tuvalu amend its legislation, in particular the Penal Code, in this regard.

Article 27 Participation and attempt

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

148. Sections 374-380 of the Penal Code [Cap 10.20] legislatively implement the provision under review.

Penal Code [Cap 10.20]

374 Soliciting or inciting others to commit offence in Tuvalu or elsewhere

Any person who solicits or incites or attempts to procure another to do any act, or make any omission, whether in Tuvalu or elsewhere, of such a nature that, if the act were done or the omission were made, an offence would thereby be committed, under the laws of Tuvalu or the laws in force in the place where the act or omission is proposed to be done or made, whether by himself or by that other person, is guilty of an offence of the same kind and shall be liable to the same punishment as if he had himself attempted to do the same act or make the same omission in Tuvalu:

Provided that if the act or omission is proposed to be done or made at a place not in Tuvalu, the punishment shall not exceed that which he would have incurred under the laws in force where the act or omission was proposed to be done or made, if he had himself attempted to do the proposed act or make the proposed omission:

Provided also that, in the last-mentioned case, a prosecution shall not be instituted except at the request of the Government of the State having jurisdiction in the place where the act or omission was proposed to be done or made.

375 Neglect to prevent felony

Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of a misdemeanour.

PART XL - CONSPIRACIES

376 Conspiracy to commit felony

Any person who conspires with another to commit any felony, or to do any act in any part of the world, which if done in Tuvalu would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and shall be liable, if no other punishment is provided, to imprisonment for 7 years, or, if the punishment to which a person convicted of the felony in question is liable is less than imprisonment for 7 years, then to such lesser punishment.

377 Conspiracy to commit misdemeanour

Any person who in Tuvalu conspires with another to commit a misdemeanour, or to do any act in any part of the world which if done in Tuvalu would be a misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanour.

378 Other conspiracies

Any person who conspires with another to effect any of the purposes following, that is to say

- (a) to effect any unlawful purpose; or
- (b) to effect any lawful purpose by any unlawful means,

is guilty of a misdemeanour.

PART XLI - ACCESSORIES AFTER THE FACT

379 Definition of accessories after the fact

(1) A person who receives or assists another who is, to his knowledge, guilty of a felony, in order to enable him to escape punishment, is said to become an accessory after the fact to the felony.

(2) A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; or by receiving or assisting in her husband's presence and by his authority another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment.

380 Punishment of accessories after the fact to felonies

Any person who becomes an accessory after the fact to a felony is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for 3 years.

149. There have been no relevant case examples.

(b) Observations on the implementation of the article

150. Tuvalu's legislation covers conspiracy and accessories after the fact, as well as soliciting or inciting others to commit offences, but does not clearly cover participation in the form of complicity or assistance. Tuvalu is recommended to specify its legislation in this regard.

Article 27 Participation and attempt

Paragraph 2

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

151. The attempt to commit an offence is criminalized according to sections 371-373 of the Penal Code [Cap 10.20] and section 158 of the Criminal Procedure Code [Cap 10.05].

Penal Code [Cap 10.20]

PART XXXIX - ATTEMPTS

371 Attempt defined

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence

372 Attempts to commit offences

Any person who attempts to commit a felony or misdemeanour is guilty of an offence, which, unless otherwise stated, is a misdemeanour.

373 Punishment of attempts to commit certain felonies

Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of 14 years or upwards, with or without other punishment, is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for 7 years.

Criminal Procedure Code [Cap 10.05]

158 Persons charged with any offence may be convicted of attempt

When a person is charged with an offence, he may be convicted of having attempted to commit that offence, although he was not charged with the attempt.

152. There have been no relevant case examples.

(b) Observations on the implementation of the article

153. The provision is legislatively implemented.

Article 27 Participation and attempt

Paragraph 3

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

154. The preparation of an offence is not established as a criminal offence.

(b) Observations on the implementation of the article

155. Tuvalu has not implemented this optional provision.

Article 29 Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and 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.

(a) Summary of information relevant to reviewing the implementation of the article

156. The only reference to the timeliness of proceedings is in article 22(2) of the *Constitution of Tuvalu*.

22. Protection of law

(2) If a person is charged with a criminal offence, unless the charge is withdrawn he shall be given a fair hearing within a reasonable time by an independent and impartial court established by law.

157. Tuvalu provided the following two case examples.

Tetapo Mailemua v R., [2004] TVHC 4, on the issue of reasonable time CJ Ward stated:

“... such matters as the reasons for the delay and whether they were the fault of either party or of the system as administered by the court, any waiver of the time periods and the prejudice to the accused...”

Application for Stay of Proceedings in *Crown v Ielemia SM HAC 190/2014*, on two grounds:

(i) that there has been such an unreasonable delay in bringing the matter before the Court that it violates the defendant’s constitutional right to a ‘fair hearing within a reasonable time’; and

(ii) that prosecutorial misconduct and/or on the basis of undue interference of the prosecution by political process would give rise to an unfair trial.

The application was denied and the court gave direction to have the case file ready for trial as soon as possible.

(b) Observations on the implementation of the article

158. Tuvalu confirmed that there is no statute of limitations for criminal offences in the country. However, inordinate delay has been considered a mitigating factor, due to the length of time to collect evidence in the case (see *Crown v Ielemia SM HAC 190/2014*).

Article 30 Prosecution, adjudication and sanctions

Paragraph 1

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

(a) Summary of information relevant to reviewing the implementation of the article

159. Tuvalu indicated that it has partially implemented this provision.

160. The penalties are provided behind each corruption-related offence in the *Penal Code* [Cap 10.20] or *Proceeds of Crime Act* [Cap 10.25].

161. For example, official corruption under section 85 of the *Penal Code* [Cap 10.20] is a felony punishable with imprisonment for 7 years.

162. Section 26 of the *Penal Code* [Cap 10.20] allows for the conversion of a sentence into the payment of a fine.

Penal Code [Cap 10.20]

26 Fine in addition to, or instead of, imprisonment

A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment:

Provided however that nothing in this section shall apply to any imprisonment sentence of imprisonment for life required to be imposed by section 47, 48, 63 or 193 (relating to the offences of treason, instigating invasion, piracy and murder).

163. Sanctions are imposed at the direction of the Attorney-General. In the recent case of *Crown v Ielemia*, SM HAC 190/2014, abuse of power was found to be an offence that requires the sanction of the Attorney-General.

(b) Observations on the implementation of the article

164. Tuvalu indicated that it has partially implemented this provision.

165. It is recommended that Tuvalu ensure that criminal penalties take into account the gravity of offences, by revisiting the classification as misdemeanors of corruption-related offences like obstruction of justice (section 115 Penal Code) and corrupt practices (section 367 of the Penal Code – applicable to corruption in the private sector, see article 21 of the Convention).

166. Section 26 of the Penal Code allows for the imposition of a fine in lieu of imprisonment. It was explained that this provision had been applied previously in an assault case where a fine was applied in lieu of a term of imprisonment, but never in a corruption case. The reviewers were of the view that this provision could potentially lead to situations of impunity for grave offences in the absence of any further legal clarification. It is recommended that Tuvalu eliminate this provision.

167. The adoption of sentencing guidelines is also considered beneficial for the country.

Article 30 Prosecution, adjudication and sanctions

Paragraph 2

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of

their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

168. Tuvalu indicated that it has partially implemented this provision.

169. Tuvalu does not provide immunities from prosecution for public officials, except as provided for in article 114 of the Constitution of Tuvalu [Cap 1.02] and section 57 of the Leadership Code Act [Cap 4.12].

Constitution of Tuvalu [Cap 1.02]

114 Privileges of Parliament

(1) The purpose of this section is to allow, as is customary in Parliaments —

(a) certain privileges and immunities to be conferred upon Parliament and members of Parliament; and

(b) certain powers to be conferred upon Parliament, in order to facilitate the proper conduct of the business of Parliament, and to prevent improper interference with the conduct of that business.

(2) Subject to subsections (4) and (5), Parliament may provide for —

(a) privileges and immunities of Parliament and members of Parliament; and

(b) powers of Parliament.

(3) Any provision made by Parliament for the purposes of subsection (2) shall be interpreted and applied only in accordance with the purpose of this section as set out in subsection (1).

(4) No civil or criminal proceedings may be instituted against a member of Parliament —

(a) for words spoken in, or included in a report to, Parliament or a committee of Parliament; or

(b) by reason of any matter or thing brought by him in Parliament or a committee of Parliament.

(5) No process issued by a court shall be served or issued within the precincts of Parliament (as defined by or under an Act of Parliament or the Rules of Procedure of Parliament).

Leadership Code Act [Cap 4.12]

57 Immunity for Ombudsman Commissioners

(1) The Ombudsman or any other officer provided under this Code is not personally liable to any civil or criminal proceeding or under any administrative process for an act or omission done or made by him or her while acting in good faith, and without malice or negligence, for the purposes of this Code.

(2) If the preceding subsection prevents a civil liability attaching to any person under section 53(1) of this Code the liability attaches to the national Government instead.

17 General obligations of Leadership

In recognition of the Values and Principles of Good Leadership, the following ethical obligations are to apply to all Leaders and should provide the basis for any specific Codes of Conduct drafted for any sub-group of Leaders.

...

(4) Every Leader therefore —

...

(g) must not misuse any legal immunity or privilege as a cloak or shield for behaviour of a lower ethical standard than that which that Leader or the public would expect of the average citizen.

(b) Observations on the implementation of the article

170. There are no criminal immunities accorded to Tuvalu public officials with respect to the investigation, prosecution or adjudication of offences established in accordance with the Convention. Not even the Governor General (Head of State) of Tuvalu has criminal immunity. Members of Parliament have functional immunity from civil or criminal suit in the exercise of their parliamentary functions, and also enjoy jurisdictional privileges. Other public officials, like the Ombudsman and Commissioners, also enjoy functional immunity for bona fide acts or omissions in the course of their duties.

171. The procedure for waiving immunity of a Parliamentarian is described in the Parliamentary Rules of Procedures: Rule 42 (9) make reference to the procedure to be followed should a Member deliberately failed to disclose his interest.

172. There have been no cases of immunities provided or refused for public officials in corruption matters.

Article 30 Prosecution, adjudication and sanctions

Paragraph 3

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

173. Tuvalu indicated that it has partially implemented this provision.

174. The Criminal Procedure Code (section 74) and the Police Powers and Duties Act are two legislations which guide the work of the prosecution. However, no prosecution guidelines have been developed.

175. The Attorney-General has broad discretion to institute, take over or discontinue prosecutions under the *Constitution*.

Constitution of Tuvalu

79 The Attorney General

(7) Subject to the succeeding provisions of this section, in any case where he considers it desirable to do so the Attorney-General may —

- (a) take criminal proceedings against any person before a court (other than a court-martial or other military tribunal) in respect of an offence; or
- (b) take over and continue any criminal proceedings referred to in paragraph (a) that have been taken by any other person or authority; or
- (c) discontinue, at any stage before judgment is given, any criminal proceedings referred to in paragraph (a) that have been taken by him or by any other person or authority.

...

(13) The functions of the Attorney-General under subsection (7)(c) shall not be exercised in relation to —

- (a) an appeal by a person convicted in any proceedings; or
- (b) a case stated or question of law reserved at the instance of a person convicted in any proceedings; or
- (c) a judicial review of any proceedings.

Criminal Procedure Code

74 Public prosecutors and police officers to be subject to directions of Attorney-General

Every police officer conducting a prosecution under the provisions of section 73, and every public prosecutor, shall be subject to the express directions of the Attorney-General.

Leadership Code Act

66 Breaches of the Code

The Ombudsman shall prosecute any leader who breaches this Code before the Leadership Tribunal.

67 Criminal related allegations

(1) On a criminal related allegation, the Director of Public Prosecution shall:

- (a) consider the Commissioner of Police's report; and
- (b) within 30 days of receiving this report, decide whether to prosecute the leader or his/her associates or refer the report back to the Commissioner of Police for further investigation with copies to the Ombudsman; and
- (c) after receiving the results of the investigation, decide whether there are sufficient grounds to prosecute the leader or any other person.

(2) If, after considering the report under subsection 1(a) or after considering the results of the further investigation under subsection 1(c), the Director of Public Prosecution decides that the report is vexatious, frivolous or trivial, the Director of Public Prosecution may determine not to prosecute a leader or his/her associates.

(3) If the Director of Public Prosecution decides not to prosecute a leader on the grounds provided in subsection 2 above, he must then follow the procedure set out in section 68(3).

(4) Any officer mentioned under this Part shall not act on the provisions of sections 67 and 68 if the allegation are made against him.

68 Prosecution by the Director of Public Prosecution

(1) Where there are sufficient grounds or evidence to support the prosecution under this Code or any other Act, the Director of Public Prosecution must prosecute that prima facie case within 3 months of receiving the Commissioner of Police's report.

(2) The Director of Public Prosecution may decide not to prosecute only on the basis that there is either insufficient grounds or evidence to support a prosecution or that the complaint is vexatious, frivolous or trivial.

(3) If the Director of Public Prosecution decides not to prosecute a leader or any other person, he must —

(a) notify the Ombudsman and the Commissioner of Police of the decision within 7 days of making the decision giving reasons for that decision; or

(b) if the Ombudsman is the subject of the complaint, notify the Prime Minister;

(c) notify parties concerned; and

(d) publish a notice in the Gazette within 14 days of the decision, stating that he has decided not to prosecute and the reasons for such a decision.

(b) Observations on the implementation of the article

176. Tuvalu has partially implemented this provision. In light of the broad discretion afforded the Attorney-General to institute, take over and discontinue prosecutions, it was confirmed during the country visit that the adoption of prosecution guidelines would be a useful measure to establish relevant safeguards in relation to the discretion to prosecute, for example criteria for withholding prosecutions.

Article 30 Prosecution, adjudication and sanctions

Paragraph 4

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

177. Bail is regulated in sections 106 to 116 of the *Criminal Procedure Code* [Cap 10.05]. The granting of bail is discretionary.

Criminal Procedure Code [Cap 10.05]

106 Bail in certain cases

(1) Subject to the provisions of section 23 where any person, other than a person accused of murder or treason, is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may in the discretion of the officer or court be admitted to bail with or without a surety or sureties.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(3) Notwithstanding anything contained in subsection (1), the Senior Magistrate or the High Court, as the case may be, may in any case direct that any person be admitted to bail or that the bail required by a magistrate's court or police officer be reduced.

107 Recognisance of bail

Before any person is released on bail, the court or a police officer, as the case may be, shall take the recognisance of such person and of his surety or sureties, where such is or are required, conditioned for the appearance of such person at the time and place mentioned in the recognisance and such person shall attend at such time and place and shall continue so to attend until otherwise directed by the court or police officer as the case may be.

108 Discharge from custody

(1) As soon as the recognisance with or without sureties, as the case may be, has been entered into the person admitted to bail shall be released and when he is in prison the court admitting him to bail shall issue an order of release to the officer in charge of the prison and such officer on receipt of the order shall release him.

(2) Nothing in this section shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the recognisance was entered into.

109 Deposit instead of recognisance

When any person is required by any court or police officer to enter into a recognisance, with or without sureties, such court or police officer may, except in the case of a recognisance for good behaviour, permit him to deposit a sum of money to such amount as the court or police officer may fix in lieu of executing such a recognisance.

110 Power to order sufficient bail when that first taken is insufficient

If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do may commit him to prison.

113 Persons bound by recognisance absconding may be committed

If it is made to appear to any court, by information on oath, that any person bound by recognisance is about to leave Tuvalu, the court may cause him to be arrested and may commit him to prison until the trial, unless the court shall see fit to admit him to bail upon further recognisance.

Police Powers and Duties Act 2009

88 Arrest without warrant

(1) A police officer, without a warrant, may arrest an adult who the police officer suspects, on reasonable grounds, has committed or is committing an offence, if it is reasonably necessary for 1 or more of the following reasons:

- (a) to prevent the continuation or repetition of an offence, or the commission of another offence;
- (b) to make inquiries to establish the person's identity;
- (c) to ensure the person's appearance before a court;
- (d) to obtain or preserve evidence relating to the offence;
- (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;
- (f) to prevent the fabrication of evidence;
- (g) to preserve the safety or welfare of any person, including the person arrested;
- (h) to prevent a person fleeing from a police officer or the location of an offence;
- (i) because the offence is an offence against section 169 (Offence to assault or obstruct police officer) or 170 (Offence to contravene direction or requirement of police officer);
- (j) because of the nature and seriousness of the offence.

(2) Also, a police officer, without a warrant, may arrest a person who the police officer suspects, on reasonable grounds, is committing or has committed an offence, in order to:

- (a) question the person about the offence; or
- (b) investigate the offence.

(3) A police officer, without a warrant, may arrest a child if the police officer suspects, on reasonable grounds, that the child is committing or has committed an offence.

89 Arrest of person in relation to bail

(1) This section applies if a person has been granted bail for an offence, whether or not the person was arrested for the offence.

(2) A police officer, without a warrant, may arrest the person if the police officer suspects, on reasonable grounds, that:

- (a) the person has left the precincts of the court that granted bail without fulfilling all the conditions that the person must comply with before leaving the precincts of the court; or
- (b) the police officer suspects, on reasonable grounds, that the person is likely to contravene, is contravening, or has contravened, another condition on which the person was granted bail; or
- (c) the police officer suspects, on reasonable grounds, that the person is likely to fail to appear before a court to answer a charge against the person for the offence; or
- (d) the police officer suspects, on reasonable grounds, that the person is directly or indirectly harassing or interfering with a person who may be required to give evidence relating to the offence for which the person has been released on bail; or
- (e) the police officer suspects, on reasonable grounds, that:
 - (i) a surety for the person's appearance is dead; or
 - (ii) for any reason, the security for the person's appearance is no longer adequate; or

(f) a surety has given to a police officer written notice stating that the surety wishes to be relieved of the obligation of being a surety for the person because the surety believes that the person is likely to contravene the condition for the person's appearance before a court.

(3) However, before arresting a child under subsection (2), a police officer must consider whether, in all the circumstances, it would be more appropriate for an application to be made for a variation or revocation of the child's bail.

178. There has been one relevant case in a matter not related to corruption. In *Tangau v Crown, Bail Application*, the accused was, at the first instance remanded on Nui Island in line with an incident by which his wife was murdered and he was the primary and only suspect in this case. Upon arrival on Funafuti, he was further put into police custody and an application for the extension of his detention was filed with the Senior Magistrate which also granted this application. A bail application was also filed by the accused's legal representation from the People's Lawyers office but the same court refused it.

(b) Observations on the implementation of the article

179. Tuvalu has adopted conditions for release pending trial or appeal that take into account the need to ensure the presence of the defendant in criminal proceedings, in sections 106 to 116 of the Criminal Procedure Code [Cap 10.05]. The Police Powers Act contains provisions on arrest of a person without warrant to ensure their appearance before a court and in relation to bail (sections 88 and 89).

180. Tuvalu has implemented the provision.

Article 30 Prosecution, adjudication and sanctions

Paragraph 5

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

181. Provisions on parole are found in the Constitution, articles 102, 22(9) and 80.

Article 102 of the Constitution

102. Calculation of sentences

(1) This section applies to the calculation of the lengths of periods of imprisonment for the purposes of — (a) section 92 (disqualification from registration); and

(b) section 95 (disqualification from election); and

(c) section 98 (vacation of seat on sentence).

(2) For the purposes of the provisions referred to in subsection (1) —

(a) two or more terms of imprisonment that are required to be served consecutively shall be regarded as a single term of the total period; and

(b) no account shall be taken of a sentence of imprisonment imposed in default of payment of a fine; and

(c) “review” includes an administrative or executive review of a sentence.

Article 22(9) of the Constitution

22. Protection of the law-

(9) No-one shall be tried for an offence if he shows that —

(a) he has been pardoned for the offence; and

(b) if the pardon was a conditional pardon, he has complied with the conditions of the pardon.

Article 80 of the Constitution

80. Commutation etc of sentences

(1) The Head of State, acting in accordance with the advice of the Cabinet, may —

(a) grant to a person a pardon, either free or subject to lawful conditions, for an offence; or

(b) relieve a person from any disability imposed by this Constitution or by or under an Act of Parliament because of a conviction under, or a contravention of, or a failure to comply with, a law of a country other than Tuvalu; or

(c) grant to a person a delay, either indefinite or for a specified period, in the enforcement of any penalty imposed on that person for an offence; or

(d) substitute a less severe form of punishment for any punishment imposed on a person for an offence; or

(e) remit the whole or part of —

(i) any punishment imposed on a person for an offence; or

(ii) any penalty, fine or forfeiture otherwise due to the Government on account of an offence.

(b) Observations on the implementation of the article

182. Provisions on pardon and commutation of sentences are found in the Constitution, articles 102, 22(9) and 80.

183. There have been no pardons or remissions of punishment of persons convicted of corruption offences. However, remission of punishment has been applied in the past in a case involving illegal fishing licenses.

184. During the country visit, the officials explained that it would be useful to have a law on parole in Tuvalu. Based on the discussion in the country visit, it is recommended that Tuvalu consider adopting such a law.

Article 30 Prosecution, adjudication and sanctions

Paragraph 6

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

(a) Summary of information relevant to reviewing the implementation of the article

185. Tuvalu indicated that it has partially implemented this provision and cited the following measures.

Public Service Commission Rules [Cap 4.24.2]

44 Disciplinary Offences

An officer commits a disciplinary offence or misconduct for the purposes of disciplinary proceedings who: ...

(o) is convicted of any criminal charge;

50 Punishments

The following are the disciplinary punishments for misconduct which may be ordered as a result of proceedings under these Rules:

(1) Dismissal

...

55 Suspension

(1) Where the Commission considers, in the interests of the public service, that an officer should cease forthwith to exercise the powers and functions of office, it may suspend the officer from the exercise of those powers and functions if disciplinary proceedings for dismissal are being taken or are about to be taken, or if criminal proceedings are to be instituted.

(2) Where in the opinion of a Secretary the interests of the public service require that a junior public officer for whom that Secretary is responsible should be suspended, and the Secretary is also of the opinion that forty-eight hours or more is likely to elapse before the Commission can meet and act under the provisions of paragraph (1), the Secretary may order such junior officer to cease to exercise any powers and functions as a public officer. The power to give such an order shall not be exercised in respect of an officer above level 10.

(3) On giving such an order the Secretary shall forthwith report the action taken to the Secretary to Government who shall transmit all information to the Commission. If the Commission considers that the officer should be suspended from the exercise of any powers and functions it shall inform the officer of the suspension and the suspension shall date from the time of the order given under the provisions of this Rule. If the Commission decides not to exercise such power it shall inform the officer giving the order and the officer to whom the order is addressed that the suspension is cancelled.

(4) Any officer who is suspended shall, subject to the provisions of paragraphs (3) above, and (5) below receive such emoluments being not less than 50% nor more than 75% of the officer's salary as the Commission may decide.

(5) The officer shall be informed of the suspension and the officer's level of emoluments during suspension. The officer shall be informed of the right to make representations to the

Commission through the Secretary of the officer's Ministry on the suspension or level of emoluments. The Commission may vary or confirm its decision in the light of such representations.

(6) Where the accusation of misconduct is the subject of criminal proceedings, no further disciplinary action shall be taken against the officer until the conclusion of those proceedings. If the officer is suspended, the Attorney General and Commissioner of Police shall be made aware of the suspension so that criminal proceedings can be expedited.

(7) Where any disciplinary proceedings initiated under paragraph (1) does not result in the dismissal of the officer or the imposition of any punishment, the whole or any emoluments withheld shall be restored to the officer when the final decision is made. However, where any punishment not amounting to dismissal is imposed there shall be restored to the officer such proportion, if any, of any emoluments withheld as in the opinion of the Commission is justified in the circumstances of the case.

Leadership Code Act [Cap 4.12]

73 Suspension from office

(1) The High Court may, if the Ombudsman so requests, make an order suspending from office a leader who is under suspicion for breach of this Code whilst pending investigations.

(2) A leader who is suspended pursuant to subsection (1) above shall receive 50% of his net salary and shall continue to receive all such allowances, entitlements and privileges.

74 Dismissal from office

(1) Where a leader is convicted of a breach of this Code, the Leadership Tribunal may, if it regards the breach as serious, make an order dismissing the leader from office.

(2) In determining whether a breach is serious, the court may have regard to —

- (a) in the case of a breach involving a financial matter, the amount involved;
- (b) whether the conduct of the leader was significantly below what would be expected of a leader;
- (c) where it is possible to discern, the motives of the leader;
- (d) the extent to which the breach diminished the respect or public confidence in the leader's position; and
- (e) whether the leader has been previously convicted of a breach of this Code.

(3) Any further payment or allowance (including accrual of entitlements to a pension or superannuation) to that leader ceases upon dismissal.

75 Disqualification from office

Where the leader is dismissed from office under section 74, the leader is disqualified from standing for election as, or being appointed as, a leader of any kind for a period of four (4) years from the date of the conviction.

186. There have been no relevant case examples.

(b) Observations on the implementation of the article

187. Tuvalu has partially implemented this provision. Tuvalu's Public Service Commission Rule 55 provides for the possibility of suspending public officers if disciplinary proceedings for dismissal are being taken or are about to be taken, or if criminal proceedings are to be instituted. Although Rule 50 provides for dismissal as a disciplinary punishment for misconduct, the provision is only applicable "as a result of disciplinary proceedings", i.e. where the public official was convicted of a criminal charge (see Rule 44(o) "Disciplinary Offence"). Additional measures are in place providing for the disqualification and suspension from office of leaders, under the Leadership Code Act. However, Tuvalu has not adopted measures on the reassignment of public officials accused of corruption related offences.

188. It is recommended that Tuvalu consider adopting measures on the removal and reassignment of public officials accused of corruption related offences.

Article 30 Prosecution, adjudication and sanctions

Paragraph 7

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(b) Holding office in an enterprise owned in whole or in part by the State.

(a) Summary of information relevant to reviewing the implementation of the article

189. Tuvalu indicated that it has partially implemented this provision.

190. Disciplinary measures are contained in the Constitution of Tuvalu [Cap 1.02], Leadership Code Act [Cap 4.12], Public Service Commission Rules [Cap 4.24.2], and General Administrative Orders [Cap 4.24.1]. In addition, Regulation 16 of the Police Regulations [Cap 20.24.1] outlines disciplinary measures and offences against discipline for members of the police force.

191. Article 162 of the *Constitution* provides that the Secretary to Government, Attorney-General, Auditor-General (see also section 10 *Audit Act*), Commissioner of Police, and members of the Public Service Commission, may only be removed from Office for inability to perform properly the functions of their Office or position (whether arising from infirmity of body or mind, or from some other cause), or for misbehaviour; and in accordance with this section.

192. Article 162(3) of the *Constitution* provides for the establishment of an independent tribunal to investigate the question of removing these officials from office. The tribunal is to consist of a chairman who is qualified for appointment as a Judge of the High Court; and not less than one other member, with qualifications or experience relevant to the particular matter. Article 162(4) contains additional provisions to ensure the independence

of the tribunal. The tribunal is to investigate the question and report on it to the appropriate authority, with its advice whether the person concerned should be removed from office. These officials may be removed from office on the advice of the tribunal. The provisions of Schedule 3 (procedure, etc., of the Public Service Commission and Certain Tribunals) apply to and in respect of the tribunal.

193. These officials may be suspended whilst the Tribunal considers the question of removal (article 163 *Constitution*).

194. In addition, article 164 of the *Constitution* provides that if the holder of an Office or position to which this Division applies is employed in that office or position under a contract (whether with the Government or otherwise); and the contract provides for his removal or suspension from office, nothing in the preceding provisions of this Division prevents his being removed or suspended in accordance with the contract.

195. Part V of the *Public Service Commission Rules* outlines disciplinary measures for public officials, along with the *General Administrative Orders*.

196. Rule 50 of the *Public Service Commission Rules* provides that the following disciplinary punishments for misconduct may be ordered as a result of proceedings under these Rules:

- (1) Dismissal
- (2) Reduction in rank
- (3) Deferment of Increments
- (4) Withholding of Increments
- (5) Reprimand
- (6) Forfeiture of emoluments held during period of suspension
- (7) Withholding of the whole or part of a gratuity if payable

Provided that nothing in this paragraph shall limit any power under these Rules to terminate the appointment of a public officer or any power conferred in these Rules to require an officer to retire from the public service in the public interest.

197. Rule 23 of the *Public Service Commission Rules* further provides as follows:

23 Principles Governing Appointment

...

(4) Previous criminal convictions will not of themselves debar an applicant for public office but will be given such weight as the Commission thinks fit, but no person who has served a prison sentence following a criminal conviction may be considered for appointment to the public service. The Commission shall decide such cases individually based on their merits.

Constitution of Tuvalu [Cap 1.02]

DIVISION 5. - REMOVAL, ETC., OF CERTAIN OFFICIALS

160 Interpretation of Division 5

In this Division —

"the appropriate authority", in relation to an office or position to which this Division applies, means —

- (a) the person or authority having power to make appointments to the office or position, acting in accordance with the prescribed manner of exercise of that power; or
- (b) some other person or authority prescribed for a particular case;

"member of the appropriate authority", in a case where the appropriate authority acts in accordance with the advice of, or after consultation with, any other person or authority, includes —

- (a) that other person or authority; and
- (b) a member of that other authority.

161 Application of Division 5

- (1) This Division applies to the offices of —
 - (a) Secretary to Government; and
 - (b) Attorney-General; and
 - (c) Auditor-General; and
 - (d) Commissioner of Police; and
 - (e) members of the Public Service Commission,

and any other office or position to which this Division is applied by an Act of Parliament.

- (2) The provisions of this Division shall be read subject to section 142 (localization).

162 Removal of prescribed officials from office

- (1) Subject to section 164 (contract employment), the holder of an office or position to which this Division applies may be removed from office only —

- (a) for inability to perform properly the functions of his office or position (whether arising from infirmity of body or mind, or from some other cause), or for misbehaviour; and
- (b) in accordance with this section.

- (2) The holder of an office or position to which this Division applies may be removed from office by the appropriate authority if —

- (a) the question of his removal from office has been referred to a tribunal appointed under subsection (3); and
- (b) the tribunal has advised the appropriate authority that he ought to be removed from office for a reason set out in subsection (1)(a).

- (3) If the Cabinet or the appropriate authority decides that the question of removing from office the holder of an office or position to which this Division applies should be investigated under this section, the Head of State, acting after consultation with the Prime Minister, shall appoint an independent tribunal consisting of —

- (a) a chairman who is qualified for appointment as a Judge of the High Court; and
- (b) not less than one other member, with qualifications or experience relevant to the particular matter.

- (4) A person is not qualified to be appointed under subsection (3)(b) if he —
- (a) is the Governor-General; or
 - (b) is a member of Parliament; or
 - (c) is a member of the appropriate authority in relation to the person concerned; or
 - (d) is, or has been within the preceding 12 months, a subordinate of the person concerned; or
 - (e) has been involved in formulating advice on the question.
- (5) The tribunal shall investigate the question and report on it to the appropriate authority, with its advice whether the person concerned should be removed from office.
- (6) The provisions of Schedule 3 (procedure, etc., of the Public Service Commission and Certain Tribunals) apply to and in respect of the tribunal.

163 Suspension of prescribed officials

- (1) If the question of removing a person from office has been referred to a tribunal under section 162 (removal of prescribed officials from office), the appropriate authority may suspend him from office.
- (2) A suspension under subsection (1) —
- (a) may be lifted at any time by the appropriate authority; and
 - (b) ceases to have effect if the tribunal advises the appropriate authority that the person concerned should not be removed from office.
- (3) A person suspended under this section shall receive remuneration or other entitlements in accordance with the policy in force for the time being in the Public Service and provided for in General Administrative Orders.

164 Contract employment

If —

- (a) the holder of an office or position to which this Division applies is employed in that office or position under a contract (whether with the Government or otherwise); and
- (b) the contract provides for his removal or suspension from office, nothing in the preceding provisions of this Division prevents his being removed or suspended in accordance with the contract.

(b) Observations on the implementation of the article

198. Tuvalu has partially implemented the provision. A previous criminal conviction does not disqualify an applicant from holding public office, unless the person has served a prison sentence following the conviction (see Rule 23(4) of the Public Service Commission Rules). However, there appears to be some discretion, as the Rule provides that a previous criminal conviction “will be given such weight as the Commission thinks fit”. Leaders may also be removed in accordance with the provisions of the *Leadership Code Act* [Cap 4.12]. In the interest of greater legal certainty, given also the possibility of fines being imposed for bribery in lieu of imprisonment, it is recommended that Tuvalu amend its law to provide for the disqualification of persons convicted of offences from holding public office.

199. It was explained that disqualification from serving in a public enterprise is established for convicted persons for a term of 2 years or more (section 15, Schedule 3, Public Enterprises (Performance and Accountability) Act 2009.

200. Tuvalu's Public Enterprises (Performance and Accountability) Act 2009 lists 8 public enterprises in schedule 1:

Schedule 1

PART A-

Public Trading Enterprises:

National Bank of Tuvalu (NBT)

Development Bank of Tuvalu (DBT)

Telecommunications Corporation (TTC)

Vaiaku Lagi Hotel (VLH)

Electricity Corporation (TEC)

Fishing Corporation (NAFICOT)

Philatelic Bureau (TPB)

PART B-

Public Beneficial Enterprises

Maritime Training Institute (TMTI)

Article 30 Prosecution, adjudication and sanctions

Paragraph 8

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

201. The *Public Service Commission Rules* [Cap 4.24.2] detail the overlap of disciplinary proceedings and criminal proceedings.

Public Service Commission Rules [Cap 4.24.2]

45 Officer Liable to Disciplinary Proceedings

An officer who is alleged to have committed a disciplinary offence is liable to disciplinary proceedings in accordance with the procedure prescribed in these Rules.

46 Procedure

(1) All acts of misconduct by public officers shall be dealt with under this Part as soon as possible after the time of their occurrence.

(2) Any case not covered by this Part shall be reported to the Secretary to Government who will advise the Commission and the Commission shall direct as to how the case should be dealt with.

47 Criminal Prosecution

Where after a preliminary enquiry into the misconduct of an officer a Secretary has reason to believe that a criminal offence has been committed the Secretary shall immediately inform the police. On completion of their enquiries, if the police, after consultation with the Attorney General where appropriate, decide not to prosecute, the Secretary shall consider whether disciplinary action should be taken. Charges may be formulated against the officer, if necessary in consultation with the Attorney General, and shall be forwarded by the Secretary to Government for consideration by the Commission.

48 Conclusion of Criminal Proceedings

If criminal proceedings are instituted against an officer, no disciplinary punishment shall be imposed upon the officer on any grounds connected with the criminal charge until the conclusion of the criminal proceedings and judgment in any appeal has been given.

49 Disciplinary Action after Acquittal on Criminal Charge

An officer acquitted of a criminal charge shall not be punished on any such charge, but nothing in this Rule shall prevent the officers being punished on any other charges arising out of the officers conduct unless such charges raise substantially the same issues as those on which the officer appeared before a Court.

58 Criminal Conviction of a Permanent Officer

If a permanent public officer is convicted of a criminal offence in any court, the Secretary of that officer's Ministry shall bring the matter together with any recommendation as to punishment, to the attention of the Secretary to Government. A copy of the charge or charges and of the order (and the findings of the court if available) shall be forwarded to the Secretary to Government by the officer's Secretary. The Commission shall consider the judgment (and findings if available) and if it is of the opinion that the officer should be dismissed or subjected to disciplinary action for the offence for which he has been adjudged guilty, the Commission shall decide as to what punishment should be inflicted following the procedures prescribed in Rule 57.

(b) Observations on the implementation of the article

202. Under PSC Rules, the criminal and disciplinary procedures run in parallel. No disciplinary punishment may be imposed until the conclusion of the criminal proceedings and judgment in any appeal has been given (PSC Rule 48).

Article 30 Prosecution, adjudication and sanctions

Paragraph 10

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

203. Tuvalu indicated that it has partially implemented this provision.

204. The *Rehabilitation of Offenders Act* [Cap 7.56] provides a timeframe under which a person convicted is considered “rehabilitated”. It does not provide any mechanisms which actively promote the reintegration into society of person convicted of offences.

205. There are no reintegration programmes in place at this time, except religious-based groups who encourage ex-convicts to participate in their activities.

(b) Observations on the implementation of the article

206. It is recommended that Tuvalu strengthen measures to actively promote the reintegration into society of person convicted of offences.

Article 31 Freezing, seizure and confiscation

Paragraph 1

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

207. Tuvalu indicated that it has partially implemented this provision.

Sections 22 and 27 of the *Proceeds of Crime Act* [Cap 10.25] regulate forfeiture of tainted property in relation to a serious offence, namely, property used in, or in relation to, the commission of the offence, or proceeds of the offence.

Proceeds of Crime Act [Cap 10.25]

4 Definitions for Act

“**property**” includes money and all other property, real or personal, including an enforceable right of action and other intangible or incorporeal property;

“**serious offence**” means:

(a) an offence against a law of Tuvalu for which the maximum penalty imprisonment for 12 months or longer; or

(b) an offence against the law of another country that, if the relevant act or omission had occurred in Tuvalu, would be an offence against the law of Tuvalu for which the maximum penalty is imprisonment for 12 months or longer;

“**tainted property**” means:

(a) property used in, or in relation to, the commission of the offence; or

(b) proceeds of the offence;

7 Meaning of proceeds of crime

(1) In this Act:

“**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:

(a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and

(b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

8 Meaning of realisable property

(1) In this Act:

“**realisable property**” means any property held by a person:

(a) who has been convicted of, or charged with, a serious offence; or

(b) to whom a person so convicted or charged has directly or indirectly made a gift caught by this Act.

(2) However, property is not realisable property if:

(a) there is in force against the property a forfeiture order under this or another Act; or

(b) a forfeiture order is proposed to be made against the property under this or another Act.

22 Application for forfeiture order or pecuniary penalty order on conviction

(1) If a person is convicted of a serious offence committed after this Act commences, the Attorney-General may apply to the Court for either or both of the following orders:

(a) a forfeiture order against tainted property in relation to the offence;

(b) a pecuniary penalty order against the person for benefits derived by the person from the commission of the offence.

(2) However, the Attorney-General may not make such an application after the end of the relevant application period for the conviction.

(3) A single application under this section may be made about 2 or more serious offences.

(4) After an application under this section is finally determined, no further application for a forfeiture order or a pecuniary penalty order may be made for the offence for which the person was convicted without leave of the Court.

(5) The Court may give leave for a new application only if:

(a) the property or benefit to which the new application relates was identified after the previous application was determined; or

(b) necessary evidence became available only after the previous application was determined; or

(c) it is in the interests of justice that the new application be made.

27 Forfeiture order on conviction

(1) If:

(a) the Attorney-General applies to the Court for a forfeiture order against property in relation to a person's conviction of a serious offence; and

(b) the Court is satisfied that the property is tainted property in relation to the offence,

the Court may order that the property, or so much of the property as is specified by the Court in the order, be forfeited to the Crown.

(2) In deciding whether property is tainted property, the Court may infer:

(a) if the evidence establishes that the property was in the person's possession at the time of, or immediately after, the offence was committed — that the property was used in, or in relation to, committing the offence; and

(b) if the evidence establishes that the property (in particular, money) was found, during investigations before or after the person was arrested for and charged with the offence:

(i) in the person's possession; or

(ii) under the person's control in a building, vehicle, receptacle or place,

that the property was derived, obtained or realised as a result of the person's committing the offence; and

(c) if:

(i) the evidence establishes that the value, after the person committed the offence, of all the person's ascertainable property is more than the value of all the person's ascertainable property before the person committed the offence; and

(ii) the Court is satisfied that the person's income from sources unrelated to criminal activity cannot reasonably account for the increase in value,

that the value of all or part of the increase represents property that the person derived, obtained or realised directly or indirectly from committing the offence.

(3) If the Court orders that property (other than money) be forfeited to the Crown, the Court must specify in the order the amount that it considers to be the value of the property when the order is made.

(4) In considering whether to make a forfeiture order against property, the Court may take into account:

(a) any right or interest of a third party in the property; and

(b) the gravity of the offence concerned; and

(c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

(5) If the Court makes a forfeiture order, the Court may give any directions that are necessary or convenient to give effect to the order.

32 Payment instead of forfeiture order

If the Court is satisfied that a forfeiture order should be made against property of a person, but that the property, or any part of it or interest in it, cannot be made subject to such an order, and, in particular:

- (a) cannot, with the exercise of due diligence, be found; or
 - (b) has been transferred to a third party in circumstances that do not give rise to a reasonable inference that the title or interest was transferred to avoid the forfeiture of the property; or
 - (c) is located outside Tuvalu; or
 - (d) has been mingled with other property that cannot be divided without difficulty,
- the Court may, instead of ordering the property, part or interest to be forfeited, order the person to pay to the Crown an amount equal to the value of the property, part or interest.

Leadership Code Act [Cap 4.12]

69 Forfeiture of gains

(1) If a leader who has been convicted of a breach of this Code has or is believed to have obtained property or any other benefit from such breach, the court shall order that —

- (a) all such properties obtained shall be forfeited to the Government of Tuvalu; or
- (b) he shall pay a pecuniary penalty equivalent to the value of the benefit he obtained; or
- (c) both, but the total amount ordered to be paid must not exceed the value of the property or benefit obtained.

(2) This section shall also apply to any other person other than the leader who has obtained property or a benefit in any way from the conduct that constituted the breach.

(3) The amount ordered to be paid under subsection (1)(b) above shall be paid to the Government of Tuvalu (and may be recovered as a debt due in a court of competent jurisdiction).

208. There have been no examples of forfeiture of property in corruption-related cases.

(b) Observations on the implementation of the article

209. Tuvalu indicated that it has partially implemented this provision.

210. Section 22 of the Proceeds of Crime Act [Cap 10.25] provides for discretionary confiscation of property in relation to a person's conviction of of a "serious offence", which is defined in section 4 as an offence punishable by a maximum penalty of imprisonment of 12 months or longer, subject to dual criminality when the offence was committed against the law of another country. As noted under article 23, it is recommended that Tuvalu amend its legislation to ensure that all Convention offences qualify as offences from which proceeds of crime may originate, as required by the definition of "proceeds of crime" in article 2 of the Convention.

211. Section 22 provides for applications for forfeiture orders or pecuniary penalty orders upon conviction.

212. Tainted property subject to confiscation includes "property used in, or in relation to, the commission of the offence, or proceeds of the offence". It was confirmed that this would cover instruments of crime "used in or destined for use in offences".

213. Nonetheless, it is recommended that Tuvalu amend its legislation with a view to eliminate the permissive nature of confiscation.

214. Tuvalu stated that there have been no examples of forfeiture of property in corruption-related cases. A case example involving the confiscation of a boat and cargo in a fisheries case was given. There are no statistics on property seized by the police or confiscated by the Attorney-General, as there have been no such cases.

Article 31 Freezing, seizure and confiscation

Paragraph 2

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

(a) Summary of information relevant to reviewing the implementation of the article

215. Sections 44 and 45 of the *Proceeds of Crime Act* [Cap 10.25] enable search and seizure.

Proceeds of Crime Act [Cap 10.25]

44 Warrant to search land etc. for tainted property

(1) A police officer may apply to a magistrate, or the Registrar of the Court, for the issue of a warrant to search land or premises for tainted property in the same way as a police officer may apply for the issue of a search warrant under section 101 of the Criminal Procedure Code.

(2) If an application is made under subsection (1) for a warrant, the magistrate or Registrar may issue a warrant of that kind in the same way, and subject to the same conditions, as he or she could issue a search warrant under section 101 of the Criminal Procedure Code, and, subject to this Division, the warrant may be executed in the same way as if it had been issued under that section.

45 Police may seize tainted property

In the course of a search under a warrant issued under section 44, for a thing of a kind specified in the warrant, a police officer finds another thing, the warrant is taken to authorise the police officer to seize the other thing if there are reasonable grounds:

(a) for believing the other thing to be tainted property for a serious offence, or to afford evidence about the commission of a criminal offence in Tuvalu; or

(b) for believing that it is necessary to seize the property or thing to prevent it being concealed, lost or destroyed, or used to commit, continue or repeat the offence or another offence.

46 Return of seized property — general rule

(1) If property has been seized under paragraph 45(a), a person who claims an interest in the property may apply to the Court for an order that the property be returned to the person.

(2) The Court must order the Commissioner of Police to return the property to the person if the Court is satisfied that:

- (a) the person is entitled to possession of the property; and
- (b) the property is not tainted property; and
- (c) the person for whose conviction, charging or proposed charging the property was seized has no interest in the property.

Section 101 of the *Criminal Procedure Code* [Cap 10.05]

101 Power to issue search warrant

Where it is proved on oath to a magistrate or a justice of the peace that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, ship, vehicle, box, receptacle or place, the magistrate or justice of the peace may by warrant (called a search warrant) authorise a police officer or other person therein named to search the building, ship, vehicle, box, receptacle or place (which shall be named or described in the warrant) for any such thing and, if anything searched for be found, or any other thing which there is reasonable cause to suspect to have been stolen or unlawfully obtained be found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law.

216. Part 2, Division 2 of the *Proceeds of Crime Act* [Cap 10.25] outlines the Transaction Tracking Unit's functions and powers (see article 30(7) and article 40 below).

(b) Observations on the implementation of the article

217. The provision is partially implemented.

218. Tuvalu noted the "NBT's limited verification mechanisms" when it referred to the detection of money-laundering (under article 23 above). Tuvalu also noted that it has partially implemented articles 30(7) and 40 of the Convention.

219. In particular, there are limited measures in the Proceeds of Crime Act and the Criminal Procedure Code allowing for search for tainted property and application for a warrant to search premises, but no measures on identification or tracing of non-physical premises such as bank accounts or on the freezing of assets or transactions.

220. It is recommended that Tuvalu strengthen its existing mechanisms to identify, trace, freeze and seize assets. The establishment of a permanent FIU in Tuvalu would help strengthen the implementation of this article.

Article 31 Freezing, seizure and confiscation

Paragraph 3

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

221. Sections 49 and 50 of the *Proceeds of Crime Act* [Cap 10.25] entitle the Commissioner of Police to administer frozen or seized property in accordance with a court order.

Proceeds of Crime Act [Cap 10.25]

49 Retention of seized property if restraining order made

(1) Subsections (2), (3) and (4) apply if:

- (a) property has been seized under paragraph 45(a); and
- (b) a restraining order is made against the property before the Commissioner of Police is required by this Act to return it; and
- (c) the restraining order directs the Administrator to take custody and control of the property.

(2) Despite subsection 47(2) or 48(2), the Commissioner of Police must arrange for the property to be given to the Administrator in accordance with the restraining order.

(3) If when the restraining order is made the property is in the Commissioner of Police's possession, the Commissioner of Police may apply to the Court for an order that the Commissioner of Police keep possession of the property.

(4) If the Court is satisfied that there are reasonable grounds for believing that the property may afford evidence as to the commission of an offence, the Court may order that the Commissioner of Police may retain the property for as long as the property is so required as evidence.

(5) If the Court makes an order under subsection (4) about the property, the Commissioner of Police must arrange for the property to be kept until it is dealt with in accordance with another provision of this Act.

(6) In proceedings for an order under subsection (4), the Court may order that a witness need not:

- (a) answer a specified question; or
- (b) produce a specified document,

if the Court is satisfied that answering the question or producing the document may prejudice the investigation of, or the prosecution of a person for, an offence.

50 How Commissioner of Police must deal with property subject to forfeiture order

(1) Subsection (2) applies if:

- (a) property has been seized under this Division; and
- (b) while the property is in the Commissioner of Police's possession, a forfeiture order is made against the property.

(2) The Commissioner of Police must deal with the property as required by the order.

(b) Observations on the implementation of the article

222. Sections 49 and 50 of the *Proceeds of Crime Act* [Cap 10.25] entitle the Commissioner of Police to administer frozen or seized property in accordance with a court order.

223. Tuvalu stated that there have been no examples of forfeiture of property in corruption-related cases.

Article 31 Freezing, seizure and confiscation

Paragraph 4

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

224. Property “into which any property derived or realised directly from the offence is later successively converted or transformed” can also be seized, frozen or confiscated, according to the definition of “proceeds of crime” in section 7(1)(a) of the *Proceeds of Crime Act* [Cap 10.25].

Proceeds of Crime Act [Cap 10.25]

7 Meaning of proceeds of crime

(1) In this Act:

“**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:

- (a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and
- (b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

8 Meaning of realisable property

(1) In this Act: “realisable property” means any property held by a person:

- (a) who has been convicted of, or charged with, a serious offence; or
- (b) to whom a person so convicted or charged has directly or indirectly made a gift caught by this Act.

(2) However, property is not realisable property if:

- (a) there is in force against the property a forfeiture order under this or another Act; or
- (b) a forfeiture order is proposed to be made against the property under this or another Act.

225. There have been no relevant cases.

(b) Observations on the implementation of the article

226. Property into which criminal proceeds are converted or transformed constitute proceeds of crime which are equally subject to freezing, seizure and confiscation, in accordance with section 7(1)(a) of the *Proceeds of Crime Act* [Cap 10.25].

227. The provision is legislatively implemented.

Article 31 Freezing, seizure and confiscation

Paragraph 5

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

228. Section 7(2) of the *Proceeds of Crime Act* [Cap 10.25] establishes that, in the event that proceeds of crime are intermingled with other property from which they cannot readily be separated, that proportion constituting the original proceeds will be taken to be proceeds of crime.

Proceeds of Crime Act [Cap 10.25]

7 Meaning of proceeds of crime

(1) In this Act:

“**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:

(a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and

(b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

229. There have been no relevant cases.

(b) Observations on the implementation of the article

230. Tuvalu has legislatively implemented the provision in section 7(2) of the *Proceeds of Crime Act* [Cap 10.25].

Article 31 Freezing, seizure and confiscation

Paragraph 6

6. *Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

(a) Summary of information relevant to reviewing the implementation of the article

231. The definition of “proceeds of crime” in section 7(1)(b) of the *Proceeds of Crime Act* [Cap 10.25] implements the provision under review.

Proceeds of Crime Act [Cap 10.25]

7 Meaning of proceeds of crime

(1) In this Act:

“**proceeds of crime**” means property derived or realised directly or indirectly from a serious offence, including:

- (a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and
- (b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime (the original proceeds) is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

232. There have been no relevant cases.

(b) Observations on the implementation of the article

233. Tuvalu has legislatively implemented the provision in section 7(1)(b) of the *Proceeds of Crime Act* [Cap 10.25].

Article 31 Freezing, seizure and confiscation

Paragraph 7

7. *For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*

(a) Summary of information relevant to reviewing the implementation of the article

234. Tuvalu indicated that it has partially implemented this provision.

235. Section 18 of the *Proceeds of Crime Act* [Cap 10.25] provides that the Transaction Tracking Unit may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept for section 104, and ask questions about the record, and make notes and take copies of the whole or any part of the record and may direct any financial institution or cash dealer to take appropriate steps facilitate any investigation foreseen by the Unit.

236. Section 19 provides that the Unit may apply to a magistrate for a warrant to enter premises belonging to, or in the possession or control of, a financial institution or cash dealer, or any officer or employee of the institution or dealer, and to search the premises and remove any document, material or other thing on the premises.

Proceeds of Crime Act [Cap 10.25]

17 Transaction Tracking Unit — establishment

There is established, within the Tuvalu Police Force, the Transaction Tracking Unit.

18 Unit — functions and powers

(1) The functions of the Unit are:

(a) to receive reports of suspicious transactions issued by financial institutions and cash dealers;

(b) to send each report to the Attorney-General, if, having considered it, the Unit decides there are reasonable grounds for suspecting that the transaction is suspicious;

(c) to compile statistics and records, disseminate information within Tuvalu or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney-General;

(d) to create training requirements and provide training for financial institutions about transaction record-keeping and reporting obligations;

(e) to consult with any relevant person, institution or organisation in exercising its powers or duties.

(2) The Commissioner of Police is responsible to the Attorney-General for the due performance of the functions mentioned in subsection (1).

(3) A member of the Unit:

(a) may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept for section 104, and ask questions about the record, and make notes and take copies of the whole or any part of the record; and

(b) must send to the Attorney-General any information derived from an inspection carried out for paragraph (a), if it gives the Unit reasonable grounds for suspecting that a transaction involves proceeds of crime; and

(c) may direct any financial institution or cash dealer to take appropriate steps facilitate any investigation foreseen by the Unit; and

(d) may not conduct any investigation into money-laundering, other than to ensure compliance with this Part by a financial institution.

19 Unit's power to obtain search warrant

(1) The Unit may apply to a magistrate for a warrant to enter premises belonging to, or in the possession or control of, a financial institution or cash dealer, or any officer or employee of the institution or dealer, and to search the premises and remove any document, material or other thing on the premises.

(2) The magistrate must grant the application if he or she is satisfied that there are reasonable grounds for believing that:

(a) the financial institution or cash dealer has failed to keep a transaction record, or report a suspicious transaction, as required by this Act; or

(b) an officer or employee of a financial institution or cash dealer is committing, has committed or is about to commit an offence of money laundering.

20 Unit may apply for production and monitoring orders

(1) To determine whether any property belongs to, or is in the possession or under the control of, a person, the Unit may apply to a magistrate for a production order or a monitoring order.

(2) Division 6 of Part 4 applies to a production order in favour of the Unit.

(3) Division 7 of Part 4 applies to a monitoring order in favour of the Unit.

87 Definition of production order

In this Division:

“production order” includes an order that requires a person to make a document available for inspection.

88 Application for production orders

(1) Subsection (2) applies if:

(a) a person has been convicted of a serious offence and there are reasonable grounds for suspecting that a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence; or

(b) there are reasonable grounds for suspecting that a person has committed a serious offence and that a person has possession or control of a property-tracking document or property-tracking documents in relation to the offence.

(2) A police officer may apply to a magistrate for a production order against the person.

(3) The application:

(a) may be made ex parte; and

(b) must be in writing and must be accompanied by an affidavit.

(4) Subsection (5) applies if a police officer applies for a production order for an offence, and includes in the affidavit a statement to the effect that there are reasonable grounds for believing that:

(a) the person who was convicted of the offence, or who is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence; and

(b) property specified in the affidavit is under the effective control of the person mentioned in paragraph (a).

(5) For this section, the magistrate hearing the application may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document for the offence.

(6) In deciding whether to treat a document as a property-tracking document for an offence, the magistrate may take into account the matters mentioned in subsection 41(2).

89 Production orders

(1) The magistrate may, if satisfied that there are reasonable grounds for doing so, make a production order requiring a person to:

(a) produce to a police officer, at a specified time and place, any documents of the kind mentioned in subsection 88(1) that are in the person's possession or control; or

(b) make available to a police officer for inspection, at a specified time or times and place or places, any documents of that kind that are in the person's possession or control.

(2) The order has effect despite any law that prohibits disclosure of information.

(3) However, a production order under paragraph (1)(a) may not require the production of accounting records used in the ordinary business of banking, including ledgers, day-books, cash books and account books.

(4) If a production order requires a person to produce or make available a document that is a computer file, the order is taken to require the person:

(a) to allow the police officer named in the order, or a person acting under the direction of that officer, to use a computer on which the document is held; and

(b) to give the officer any password necessary to allow the officer to have access to the document; and

(c) to allow the officer to use any computer software necessary to allow the officer to have access to the document.

91 What use can be made of information

(1) If a person produces, or makes available, a document under a production order:

(a) the production or making available of the document; or

(b) any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document, is not admissible against the person in any criminal proceedings except a proceeding for an offence against section 83.

(2) A person required by a production order to produce or make available a document is not excused from doing so on the ground that producing the document or making it available:

(a) might tend to incriminate the person or make the person liable to a penalty; or

(b) would be in breach of an obligation (whether imposed by an Act or otherwise) not to disclose the existence or contents of the document.

104 Financial institutions to retain records

(1) A financial institution or cash dealer must keep, for the minimum retention period applicable to the document, a document that relates to a financial transaction carried out by the institution or dealer in its capacity as a financial institution or cash dealer, including (without limiting the generality of this obligation) a document that relates to a transaction of a kind mentioned in the definition of customer in section 98.

(2) However, subsection (1) does not apply to:

(a) a document that relates to a single deposit, credit, withdrawal, debit or transfer of an amount of up to \$200 (or a higher amount prescribed for this paragraph); or

(b) a document that:

(i) is not a document given to the institution by or for a customer; and

(ii) need not be retained to preserve a record of the financial transaction concerned.

(3) A financial institution or cash dealer required to keep documents under this section must keep them on microfilm or in another way that makes retrieving them, or the information in them, reasonably practicable.

(4) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1) or (3) commits an offence punishable by:

(a) if the offender is a natural person — a fine of \$30,000 or imprisonment for 5 years, or both; or

(b) if the offender is a body corporate — a fine of \$150,000.

(5) This section does not limit any other obligation of a financial institution or cash dealer to retain documents.

237. No information was provided on the number of production orders made and received over the past few years, or whether bank secrecy was used as a ground to refuse production of a document.

(b) Observations on the implementation of the article

238. Tuvalu indicated that it has partially implemented this provision.

239. Although the authorities reported that bank secrecy was never used as a ground to refuse production of a document, it was explained that there was no guarantee that confidentiality restrictions would not be invoked in future cases. In addition, the reviewers recommend that Tuvalu strengthen its powers to identify, trace, freeze and seize assets, in the absence of a functioning FIU (see articles 23 and 31(2) above).

240. The observations under article 40 are referred to.

Article 31 Freezing, seizure and confiscation

Paragraph 8

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

241. Section 36(3) of the *Proceeds of Crime Act* [Cap 10.25] legislatively implements the provision under review.

Proceeds of Crime Act

36 Rules for determining benefit and assessing value

- (1) If a person obtains property as the result of, or in connection with committing, a serious offence, the person's benefit is the value of the property so obtained.
- (2) If a person derives an advantage as the result of, or in connection with committing, a serious offence, the person's advantage is taken to be a sum of money equal to the value of the advantage so derived.
- (3) Unless the contrary is proved:
 - (a) property is taken to be tainted property if it is held by a person on the day when the application is made and at any time:
 - (i) if the offence or earliest offence was committed more than 5 years before the application is made — within 5 years before the application is made; and
 - (ii) in any other case — after the offence or the earliest offence was committed and before the application is made; and
 - (b) any expenditure by the person in the time mentioned in subparagraph (a)(ii) is taken to be expenditure met out of tainted property; and
 - (c) any property received or taken to have been received by the person at any time as a result of, or in connection with, committing the offence or offences is taken to have been received free of any other interests; and
 - (d) if evidence is given at the hearing of the application that the value of the person's property increased after committing an offence, the increase is taken to be part of the person's benefit from the offence.
- (4) If a pecuniary penalty order has previously been made against a person in relation to an offence, any of the person's benefits that are shown to the Court to have been taken into account in determining the amount to be recovered under the earlier order must be disregarded.

37 Statements about benefits from committing serious offences

- (1) If a person has been convicted of a serious offence, the Attorney-General may tender to the Court a statement about any matter relevant to:
 - (a) deciding whether the person has benefited from the offence, or from any other serious offence of which the person is convicted in the same proceedings or that is taken into account in passing sentence on the person; or
 - (b) assessing the value of the person's benefit from the offence or any other serious offence of which the person is so convicted in the same proceedings or that is so taken into account.
- (2) If the Court is satisfied that a copy of the statement has been served on the person, the Court may require the person to indicate:
 - (a) to what extent the person accepts each allegation in the statement; and
 - (b) for each allegation that the person does not accept wholly or in part —
any matters the person proposes to rely on.

(3) If the person accepts to any extent an allegation in the statement, the Court may, in deciding or assessing the matters mentioned in subsection (1), treat the person's acceptance as conclusive of the matters to which it relates.

(4) If a person fails, wholly or in part, to comply with a requirement under subsection (2), the Court may treat the person, for this section, as having accepted every allegation in the statement, other than:

- (a) an allegation for which the person has complied with the requirement; or
- (b) an allegation that the person has benefited from the offence concerned, or that the person obtained any property or advantage as a result of, or in connection with, committing the offence.

(5) An allegation may be accepted, or matter indicated, for this section either:

- (a) orally before the Court; or
- (b) in writing.

(6) An acceptance by a person under this section that the person received any benefits from committing a serious offence is admissible in any proceedings against the person for any offence.

242. There have been no examples of the application of these measures in practice.

(b) Observations on the implementation of the article

243. Section 36(3) of the *Proceeds of Crime Act* [Cap 10.25] legislatively implements the provision under review.

Article 31 Freezing, seizure and confiscation

Paragraph 9

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

244. Third party rights are protected under section 29 of the *Proceeds of Crime Act* [Cap 10.25]. Sections 27, 32, 46, 53, 58, 62, 71, 75 and 80 of the *Proceeds of Crime Act* also legislatively implement the provision under review.

Proceeds of Crime Act [Cap 10.25]

27 Forfeiture order on conviction

...

(4) In considering whether to make a forfeiture order against property, the Court may take into account:

- (a) any right or interest of a third party in the property; and
- (b) the gravity of the offence concerned; and

(c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

29 Protection of third parties

(1) If an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the Court, before the forfeiture order is made, for an order under subsection (2).

(2) If a person applies to the Court for an order about the person's interest in property, the Court must make an order declaring the nature, extent and value (as at the time the order is made) of the person's interest if the Court is satisfied:

(a) that the applicant was not involved in committing an offence in relation to which forfeiture of the property is sought, or a forfeiture order against the property was made; and

(b) if the applicant acquired the interest when, or after, the offence was committed — that the applicant acquired the interest:

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property.

(3) If a forfeiture order has already been made against property, a person who claims an interest in the property may, within 6 months starting on the day when the order is made, apply to the Court for an order under subsection (2).

(4) A person may not make an application under subsection (3), except with the leave of the Court, if the person:

(a) knew about the application for the forfeiture order before the order was made; or

(b) appeared at the hearing of that application.

(5) A person who applies to the Court under subsection (1) or (3) must give reasonable written notice of the application to the Attorney-General.

(6) The Attorney-General:

(a) is a party to the proceedings in an application under subsection (1) or (3); and

(b) may make an application under subsection (1) for a person.

(7) An appeal lies to the Court of Appeal of Tuvalu from an order under subsection (2).

(8) The Administrator must, on application by a person who has obtained an order under subsection (2), if the period or appeals has expired and any appeal from that order has been determined or has lapsed:

(a) return the property, or the part of it to which the interest of the applicant relates, to the applicant; or

(b) pay an amount equal to the value of the interest of the applicant, as declared in the order, to the applicant.

32 Payment instead of forfeiture order

If the Court is satisfied that a forfeiture order should be made against property of a person, but that the property, or any part of it or interest in it, cannot be made subject to such an order, and, in particular:

- (a) cannot, with the exercise of due diligence, be found; or
- (b) has been transferred to a third party in circumstances that do not give rise to a reasonable inference that the title or interest was transferred to avoid the forfeiture of the property; or
- (c) is located outside Tuvalu; or
- (d) has been mingled with other property that cannot be divided without difficulty,

the Court may, instead of ordering the property, part or interest to be forfeited, order the person to pay to the Crown an amount equal to the value of the property, part or interest.

46 Return of seized property — general rule

(1) If property has been seized under paragraph 45(a), a person who claims an interest in the property may apply to the Court for an order that the property be returned to the person.

(2) The Court must order the Commissioner of Police to return the property to the person if the Court is satisfied that:

- (a) the person is entitled to possession of the property; and
- (b) the property is not tainted property; and
- (c) the person for whose conviction, charging or proposed charging the property was seized has no interest in the property.

53 Return of seized property — general rule

(1) If property has been seized under subsection 52(2), a person who claims an interest in the property may apply to the Court for an order that the property be returned to the person.

(2) The Court must order the Commissioner of Police to return the property to the person if the Court is satisfied that:

- (a) the person is entitled to possession of the property; and
- (b) the property is not tainted property; and
- (c) the person who is believed or alleged to have committed the relevant foreign serious offence has no interest in the property.

58 Notice of application for restraining order

(1) Before making a restraining order, the Court:

- (a) must require reasonable written notice to be given to any person who may have an interest in the property; and
- (b) may hear any person to whom notice is given.

(2) However, if the Attorney-General so requests:

- (a) the Court may consider the application without requiring notice to be given in accordance with subsection (1); but
- (b) a restraining order made in reliance on this subsection ceases to have effect after 14 days or a lesser period that the Court specifies in the order.

(3) The Court:

- (a) may, on application by the Attorney-General, extend the period of operation of a restraining order made in reliance on subsection (2); but
- (b) must not consider the application without requiring reasonable written notice to be given to any person who may have an interest in the property.

62 Ancillary orders and further orders

(1) If the Court makes a restraining order, any of the following may apply to the Court for an ancillary order:

- (a) the Attorney-General;
- (b) a person whose property is the subject of the restraining order (the owner);
- (c) if the restraining order directs the Administrator to take custody and control of property — the Administrator;
- (d) with the leave of the Court — any other person.

...

(3) If a person who has an interest in property against which a restraining order is made applies to the Court for a variation of the order to exclude the person's interest from the order, the Court must grant the application if the Court is satisfied that:

- (a) the interest is not tainted property and that it cannot be required to satisfy a pecuniary penalty order; or
- (b) the applicant was not involved in the commission of the offence in relation to which the restraining order was made and, if the applicant acquired the interest at the time of or after the commission (or alleged commission) of the offence, the applicant acquired the interest:
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property; or
- (c) it is in the public interest to do so having regard to all the circumstances, including any financial hardship or other consequence of the interest remaining subject to the order.

71 Notice of application for interim restraining order

(1) Before making an interim restraining order, the Court must require reasonable written notice to be given to, and may hear, any person who may have an interest in the property.

(2) However, if the Attorney-General so requests, the Court must consider the application without requiring notice to be given in accordance with subsection (1), but an interim restraining order made in reliance on this subsection ceases to have effect after 14 days or a lesser period that the Court specifies in the order.

(3) The Court may, on application by the Attorney-General, extend the period of operation of an interim restraining order made in reliance on subsection (2), but must not consider the application without requiring reasonable written notice to be given to any person who may have an interest in the property.

75 Ancillary orders and further orders

(1) If the Court makes an interim restraining order, any of the following may apply to the Court for an ancillary order:

- (a) the Attorney-General;
- (b) a person whose property is the subject of the interim restraining order (the owner);
- (c) with the leave of the Court — any other person.

...

(3) If a person who has an interest in property against which an interim restraining order is made applies to the Court for a variation of the order to exclude the person's interest from the order, the Court must grant the application if the Court is satisfied that:

(a) the applicant was not involved in the commission of the offence in relation to which the order was made and, if the applicant acquired the interest at the time of or after the commission (or alleged commission) of the offence, that the applicant acquired the interest:

- (i) for sufficient consideration; and
- (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property; or

(b) it is in the public interest to do so having regard to all the circumstances, including any financial hardship or other consequence of the interest remaining subject to the order.

80 Registered foreign restraining orders — Court may direct Administrator to take custody and control of property

(1) On application by the Attorney-General the Court may, if satisfied that the circumstances so require, order the Administrator:

- (a) to take custody and control of the property subject to the order; and
- (b) to manage or otherwise deal with the property in accordance with the directions of the Court.

(2) Before making an order under subsection (1), the Court must require reasonable notice to be given to, and may hear, any person who, in the opinion of the Court, may have an interest in the property.

...

245. There have been no examples of the application of these measures in corruption-related cases.

(b) Observations on the implementation of the article

246. Third party rights are protected under section 29 of the *Proceeds of Crime Act* [Cap 10.25]. Sections 27, 32, 46, 53, 58, 62, 71, 75 and 80 of the *Proceeds of Crime Act* also legislatively implement the provision under review.

Article 32 Protection of witnesses, experts and victims

1. Each State Party shall 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 this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

(a) Summary of information relevant to reviewing the implementation of the article

247. Tuvalu indicated that it has partially implemented this article.

248. Provisions in the *Penal Code* [Cap 10.20] provide a level of protection to witnesses.

PART XII - OTHER OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

108 Deceiving witnesses

Any person who practises any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, shall be guilty of a misdemeanour.

110 Conspiracy to defeat justice and interference with witnesses

Any person commits a misdemeanour who —

(a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or

(b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence or endeavours to do so; or

(c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal.

111 Compounding felonies

Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue or delay a prosecution for a felony, or will withhold any evidence thereof, shall be guilty of a misdemeanour.

112 Compounding penal actions

Any person who, having brought, or under pretence of bringing, an action against another person upon a penal Act in order to obtain from him a penalty for any offence committed or alleged to have been committed by him, compounds the action without the order or consent of the court in which the action is brought or is to be brought, shall be guilty of a misdemeanour.

249. There have been no case examples.

(b) Observations on the implementation of the article

250. Limited provisions to protect witnesses are established in sections 108 and 110 of the Penal Code. There are no dedicated institutions charged with witness protection in the country. These functions fall within the mandate of the police, and the prosecuting and judicial authorities. However, effective witness protection remains a challenge, given the small size of the country and the limited resources available.

251. It is recommended that Tuvalu adopt measures, within existing means, to effectively protect witnesses, experts, victims and, as appropriate, their relatives from potential retaliation or intimidation, including to the extent feasible measures to encompass their physical protection and related evidentiary rules, and ensure the adequate enforcement of these measures.

Article 33 Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

252. Tuvalu indicated that it has partially implemented this article.

253. The *Leadership Code Act* [Cap 4.12] provides anonymity for persons bringing complaints of alleged breaches of the Leadership Code.

254. Section 59 of the *Leadership Code Act* [Cap 4.12] mandates that the Ombudsman investigate any complaint against any breach of the Code and by a resident of Tuvalu against the unfairness of a decision or action made by a public office.

255. Section 61 of the *Leadership Code Act* [Cap 4.12] provides that:

If the person bringing the complaint requests in writing that his or her name not be published, then his or her name must not be disclosed to anyone except —

- (i) to the Ombudsman or the Commissioner of Police; or
- (ii) to the Director of Public Prosecution; or
- (iii) as permitted or required by an order of a court.

256. In addition, the *Proceeds of Crime Act* [Cap 10.25] provides protection for financial institutions and cash dealers for reporting suspicious transactions as required under the Act.

Proceeds of Crime Act [Cap 10.25]

106 Protection for financial institutions etc

If a financial institution or cash dealer, or an officer, employee or agent of a financial institution or cash dealer, gives information to a police officer or the Attorney-General under subsection 101(1) as soon as practicable after the grounds for suspicion mentioned in that subsection become known, the institution or dealer is taken, for sections 13 and 14, not to have been in possession of that information at any time.

257. Tuvalu indicated the following regarding the application of these measures in practice. With respect to the Leadership Code provisions, the Office of the Chief Ombudsman ensures that anonymity of the reporting persons is safeguarded. For the year 2015, this office conducted inquiries into two decisions of the Lands Court with names of complainants expressly stated in the report.

258. No existing mechanisms are in place for the protection of reporting persons.

(b) Observations on the implementation of the article

259. It is recommended that Tuvalu consider adopting measures and systems for the effective protection of reporting persons.

Article 34 Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

(a) Summary of information relevant to reviewing the implementation of the article

260. Tuvalu indicated that it has not implemented the article. There have been no cases of possible remedial action, including blacklisting of companies or rescission of contracts.

261. Regulation 70 of the Public Procurement Regulations (promulgated in accordance with the Procurement Act) provides for the possibility of suspension of contracts and

debarment of bidders by the Central Procurement Unit (CPU), once a relevant procedure has been adopted by the CPU.

(b) Observations on the implementation of the article

262. The provision is legislatively implemented, once a relevant procedure is adopted by the CPU.

Article 35 Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

(a) Summary of information relevant to reviewing the implementation of the article

263. Tuvalu indicated that it has partially implemented the article.

264. Section 45 of the *Penal Code* [Cap 10.20] allows the court to order forfeiture to Her Majesty of any property passed in connection with the offence. These offences include official corruption (section 85); extortion by public officers (section 86); public officers receiving property to show favour (section 87); compounding felonies (section 111); compounding penal actions (section 112); and corrupt practices (section 367).

265. The *Penal Code* [Cap 10.20] also provides for compensation for offences committed under section 181 (endangering property with fire, etc) or Part XXXV (offences involving injury to property) of the *Penal Code*.

Penal Code [Cap 10.20]

45 Power of court to order forfeiture, and payment of compensation, in certain cases

When any person is convicted of an offence under any of the following sections, namely sections 85, 86, 87, 111, 112 and 367, the court may, in addition to or in lieu of any penalty which may be imposed, order the forfeiture to Her Majesty of any property which has passed in connection with the commission of the offence or, if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the property; and any property or sum so forfeited shall be dealt with in such manner as the court may direct. Payment of any sum so ordered to be forfeited may be enforced in the same manner and subject to the same incidents as in the case of the payment of a fine.

46 Compensation for personal injury

When any person is convicted of an offence under section 181 or Part XXXV, the court may, in addition to, or in lieu of, any penalty which may be imposed, order him to pay compensation to any person injured by his offence.

85 Official corruption

Any person who —

(a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or

(b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed,

is guilty of a felony and shall be liable to imprisonment for 7 years.

86 Extortion by public officers

Any person who, being employed in the public service, takes or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward, shall be guilty of a misdemeanour, and shall be liable to imprisonment for 3 years.

87 Public officers receiving property to show favour

Any person who, being employed in the public service, receives any property or benefit of any kind for himself or any other person, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or anyone in whom that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or anyone in whom he is interested, and any person employed in the public service, shall be guilty of a misdemeanour and shall be liable to imprisonment for 6 months.

111 Compounding felonies

Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue or delay a prosecution for a felony, or will withhold any evidence thereof, shall be guilty of a misdemeanour.

112 Compounding penal actions

Any person who, having brought, or under pretence of bringing, an action against another person upon a penal Act in order to obtain from him a penalty for any offence committed or alleged to have been committed by him, compounds the action without the order or consent of the court in which the action is brought or is to be brought, shall be guilty of a misdemeanour.

367 Corrupt practices

If —

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal's affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

(b) any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to, his principal's affairs or business;

(c) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,

he is guilty of a misdemeanour, and shall be liable to imprisonment for 2 years or to a fine of \$600.

266. There have been no corruption-related cases where compensation for damages was ordered.

(b) Observations on the implementation of the article

267. While section 45 of the Penal Code allows the court to order forfeiture of property to the government, it was clarified during the country visit that persons who have suffered damages from corruption may initiate legal proceedings against those responsible under common law principles in order to obtain compensation.

Article 36 Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

(a) Summary of information relevant to reviewing the implementation of the article

268. Tuvalu indicated that it has partially implemented the article.

269. There is no single anti-corruption institution in Tuvalu. The anti-corruption mandate in respect of law enforcement and preventive functions is spread across several bodies, including:

- The Ombudsman
- The Leadership Tribunal (not yet established)
- The Auditor-General
- The Public Service Commission
- Central Procurement Unit

270. Bodies that have specialized investigatory/prosecutorial powers, also on corruption-related matters are the following:

- The Attorney-General
- Transaction Tracking Unit
- The Police Commissioner and Police Force

271. See below for description of legal framework, mandate and independence of each body.

272. The legal framework concerning appointments, remuneration and oversight of anti-corruption bodies establishes a level of independence of anti-corruption bodies.

The Ombudsman Commission

273. The Ombudsman Commission is established under section 37 of the *Leadership Code Act* [Cap 4.12]. The *Leadership Code Act* states that the Ombudsman Commission is to comprise a Chief Ombudsman who is to be the Head of the Ombudsman Commission and two other Ombudsman Commissioners. The functions of the Ombudsman are outlined in section 38 of the *Leadership Code Act* as follows:

- (a) to enquire into any complaints or allegation of misconduct on the part of any leader;
- (b) to enquire into any defects in administrative practice appearing from any matter being enquired into;
- (c) to enquire into any case of an alleged or suspected discriminatory practice by a leader;
- (d) to give prior advice on potential breaches of this Code; and
- (e) to investigate and report on any complaints of any alleged breaches of this Code.

274. Pursuant to section 40 of the *Leadership Code Act*, the Chief Ombudsman is to be appointed by the Head of State, acting in accordance with the advice of a committee comprising of the Prime Minister (chairperson), the Speaker, the Chief Justice, the Chairman of the Public Service Commission, and the President of the Ekalesia Kelisiano o Tuvalu, for a period of five years.

275. Pursuant to section 41 of the *Leadership Code Act*, the Ombudsman Commissioners are to be appointed for three years by the Head of State, acting in accordance with the advice of the Public Service Commission given after consultation with the Chief Ombudsman for such period; or in relation to such matters, as is or are specified in the instrument of their appointment. The Ombudsman Commission is to be appointed on a part time basis.

276. Section 42 of the *Leadership Code Act* outlines the qualifications required of the Ombudsman. That is, a person who has knowledge, understanding and appreciation of the culture and values of Tuvalu; is of high integrity and competence; is capable of discharging his functions without fear or favour; and is of high standing in the eyes of the community.

277. A person is disqualified for appointment as an Ombudsman if he is a member of Parliament; holds any other public office; is a person who has been declared bankrupt; has been sentenced for at least a period of 12 months or fined under any other Act during the

last 5 years; or is a person who has been convicted by a court for dishonesty (section 42(2) *Leadership Code Act*).

278. Section 43 of the *Leadership Code Act* outlines grounds for removal which include breach of the *Leadership Code Act*; or inability to perform properly the functions of his or her office or position (whether arising from infirmity of body or mind, or from other cause), or misbehaviour.

279. Section 44 of the *Leadership Code Act* provides for procedures in circumstances where the Chief Ombudsman is on leave or the position is vacant; and where an Ombudsman Commissioner is unable to perform his or her duties.

280. Section 45 of the *Leadership Code Act* outlines the salary and benefits and allowances of the Chief Ombudsman and the Ombudsman Commissioners.

281. Section 47 of the *Leadership Code Act* establishes the independence of the Ombudsman which provides that “The Ombudsman shall comply with directions given or made under this Code, but otherwise is not subject to direction or control by any other person or authority.”

282. Section 66 of the *Leadership Code Act* provides that “The Ombudsman shall prosecute any leader who breaches this Code before the Leadership Tribunal.”

Leadership Code Act [Cap 4.12]

37 Establishment of the Ombudsman Commission

There is established in Tuvalu the office of the Ombudsman Commission which shall consist of:

- (a) A Chief Ombudsman who shall be the head of the Ombudsman Commission; and
- (b) two other Ombudsman Commissioners.

38 Functions of the Ombudsman

The Ombudsman has the following functions:

- (a) to enquire into any complaints or allegation of misconduct on the part of any leader;
- (b) to enquire into any defects in administrative practice appearing from any matter being enquired into;
- (c) to enquire into any case of an alleged or suspected discriminatory practice by a leader;
- (d) to give prior advice on potential breaches of this Code;
- (e) to investigate and report on any complaints of any alleged breaches of this Code.

39 Powers of the Ombudsman

The Ombudsman must perform the functions of his or her office, and exercise the powers relating to the office, as provided by this Code and any other Act.

40 Appointment and term of Chief Ombudsman

The Chief Ombudsman shall be appointed for 5 years, by the Head of State, acting in accordance with the advice of a committee comprising of the Prime Minister (chairperson),

the Speaker, the Chief Justice, the Chairman of the Public Service Commission, and the President of the Ekalesia Kelisiano o Tuvalu.

41 Appointment and terms of Ombudsman Commissioners

(1) The Ombudsman Commissioners shall be appointed for 3 years by the Head of State, acting in accordance with the advice of the Public Service Commission given after consultation with the Chief Ombudsman —

- (a) for such period; or
- (b) in relation to such matters,

as is or are specified in the instrument of their appointment.

(2) The Ombudsman Commission shall be appointed on a part time basis.

42 Ombudsman Qualification

(1) The Ombudsman must be a person who:

- (a) has knowledge, understanding and appreciation of the culture and values of Tuvalu; and
- (b) is of high integrity and competence; and
- (c) is capable of discharging his functions without fear or favour; and
- (d) is of high standing in the eyes of the community.

(2) A person is disqualified for appointment as an Ombudsman if he:

- (a) is a member of Parliament; or
- (b) holds any other public office; or
- (c) is a person who has been declared bankrupt; or
- (d) has been sentenced for at least a period of 12 months or fined under any other Act during the last 5 years; or
- (e) is a person who has been convicted by a court for dishonesty.

43 Removal of Chief Ombudsman

The Chief Ombudsman is removed from office by the Head of State on the recommendation of the committee established under section 40 if —

- (a) he or she breaches any provision of this Code; or
- (b) for inability to perform properly the functions of his or her office or position (whether arising from infirmity of body or mind, or from other cause), or misbehaviour; and
- (c) the committee agrees with the recommendation of an independent assessment convened by itself to assess the suitability of the Chief Ombudsman continuing in his or her position.

45 Salary and benefits

(1) The Chief Ombudsman's salary shall be equivalent to that of a Cabinet Minister's basic salary and exclusive of a Minister's statutory allowances.

(2) The committee established under section 40 shall determine from time to time the benefits or allowances that are appropriate to be accorded to the Chief Ombudsman.

(3) The Ombudsman Commissioners shall be paid allowances as may be prescribed under the instrument of their appointment.

47 Independence of the Ombudsman

The Ombudsman shall comply with directions given or made under this Code, but otherwise is not subject to direction or control by any other person or authority.

66 Breaches of the Code

The Ombudsman shall prosecute any leader who breaches this Code before the Leadership Tribunal.

The Leadership Tribunal

283. Section 48 of the *Leadership Code Act* [Cap 4.12] establishes the Leadership Tribunal. Section 49 of the *Leadership Code Act* outlines the functions of the Leadership Tribunal which is to determine any breach of the Code referred to it by the Ombudsman, and any appeal made against the decision of the Ombudsman.

284. Section 48(3) of the *Leadership Code Act* provides that the judge, and the other two members of the Leadership Tribunal, shall be appointed for a term of two years by the Head of State acting in accordance with the advice of the Public Service Commission after consultation with the Chief Justice. Section 48(4) of the *Leadership Code Act* provides for removal of a member of the Leadership Tribunal if “he is unfit to hold office.” Section 9 of the *Leadership Code Act* defines the circumstances in which an officer is “unfit to hold office” and includes, amongst other things, neglecting to carry out his or her functions adequately; lacks the mental ability or moral character to carry out the functions of the office; or has flagrantly or persistently breached the Code.

285. The Leadership Tribunal is to consist of a person qualified to be appointed as a judge and two other members of good standing in the community, each of whom must be a person who has knowledge, understanding and appreciation of the culture and values of Tuvalu; is of high integrity and competence; is capable of discharging his functions without fear or favour; and is of high standing in the eyes of the community (section 48(2) *Leadership Code Act*).

286. A person is not qualified for appointment as a Judge of the Tribunal unless he is or has been a judge of a court of unlimited jurisdiction in civil and criminal matters in some country that has a legal system similar to that of Tuvalu, or of a court having jurisdiction in appeals from such a court; or has been qualified for at least five years to practise as a barrister or solicitor, or the equivalent, in an equivalent country (section 48(5) *Leadership Code Act*).

287. Section 48(6) of the *Leadership Code Act* and sections 125 and 169 of the *Constitution* provides for remuneration and sitting allowances of judges of the Leadership Tribunal.

288. The Leadership Tribunal has yet to be established.

Leadership Code Act [Cap 4.12]

9 Definition of “unfit to hold office”

(1) A person or body empowered to suspend or remove a particular officer on the ground that such officer is “**unfit to hold office**” may do so if, and only if, that officer either —

(a) in the opinion of that person or body, has refused or neglected to carry out the functions of his or her office adequately; or

(b) in the opinion of that person or body, lacks the minimum physical or mental ability, or the moral character, needed to carry out the functions of that office adequately;

(c) has breached this Code and has done so, in the opinion of that person or body, flagrantly or persistently, or with serious consequences; or

(d) has been absent from duty, without reasonable excuse, for fourteen (14) days consecutively or 28 days cumulatively in any year.

(2) “**Reasonable excuse**” means —

(a) absence on leave granted in advance by written notice from the Head of State or the Head of Government; or

(b) any other unforeseeable or unavoidable circumstances which, in the opinion of that person or body, obstructed that officer from adequately carrying out the functions of his or her office.

48 The Leadership Tribunal

(1) There shall be a Leadership Tribunal.

(2) The Leadership Tribunal consists of a person qualified to be appointed as a judge and two other members of good standing in the community, each of whom must be a person who:

(a) has knowledge, understanding and appreciation of the culture and values of Tuvalu; and

(b) is of high integrity and competence; and

(c) is capable of discharging his functions without fear or favour; and

(d) is of high standing in the eyes of the community

(3) The judge, and the other two members of the Leadership Tribunal shall be appointed for a term of two years by the Head of State acting in accordance with the advice of the Public Service Commission after consultation with the Chief Justice.

(4) A member of the Leadership Tribunal may be removed from the Tribunal if he is unfit to hold office.

(5) A person is not qualified for appointment as a Judge of the Tribunal unless —

(a) he is or has been a judge of a court of unlimited jurisdiction in civil and criminal matters in some country that has a legal system similar to that of Tuvalu, or of a court having jurisdiction in appeals from such a court; or

(b) has been qualified for at least five years to practise as a barrister or solicitor, or the equivalent, in a country referred to in paragraph (a).

(6) The judge’s remuneration shall be subject to section 125 of the Constitution while the other two members of the Leadership Tribunal shall be paid sitting allowances for each sitting.

49 Functions of the Leadership Tribunal

Subject to the provisions of this Code the Leadership Tribunal shall determine:

- (a) any breach of the Code referred to it by the Ombudsman, and
- (b) any appeal made against the decision of the Ombudsman.

Constitution of Tuvalu [Cap 1.02]

125 Remuneration, etc., of Judges

- (1) The salaries or other remuneration and the allowances of the Judges of the High Court are as provided for in section 169 (remuneration of certain officials).
- (2) Subject to this Constitution and to any Act of Parliament, the other conditions of employment of a Judge of the High Court are as agreed between the Judge and the Cabinet.

169 Remuneration of certain officials

- (1) This section applies to the offices of —
 - (a) Governor-General; and
 - (b) Speaker; and
 - (c) Prime Minister and other Ministers; and
 - (d) other members of Parliament; and
 - (e) Judges of the High Court; and
 - (f) Attorney-General; and
 - (g) Auditor-General; and
 - (h) Commissioner of Police; and
 - (i) members of the Public Service Commission.
- (2) Subject to this section, the holders of the offices to which this section applies shall be paid such salaries or other remuneration and such allowances as are specifically prescribed by an Act of Parliament.
- (3) The remuneration and allowances referred to in subsection (2) are charged on and shall be paid out of the Consolidated Fund without appropriation otherwise than by this section.
- (4) Subject to subsections (5) and (6), the remuneration and allowances payable to the holder of an office to which this section applies (other than allowances which are specifically excluded by Act of Parliament from the operation of this subsection) shall not be altered to his disadvantage after his appointment.
- (5) Subsection (4) does not apply in respect of any reduction in remuneration or allowances which is part of a general reduction applied proportionately to —
 - (a) all offices to which this section applies; and
 - (b) all other offices the remuneration of which is specifically prescribed by Act of Parliament.
- (6) For the purposes of subsection (4), where any remuneration or allowance to which that subsection applies is based, whether in law or in practice, on a choice made by the holder of the office in question, the remuneration or allowance which he chooses shall be considered to be more advantageous to him than any other which he might have chosen.

Leaders

289. As holders of any statutory office established by legislation, the above positions fall under the definition of “leader” under the *Leadership Code Act* [Cap 4.12] and are therefore subject to its provisions.

290. Section 4(42) of the *Leadership Code Act* defines a “Leader” as a person who currently holds any one of the following positions —

- (a) Head of State;
- (b) Head of Government;
- (c) Minister;
- (d) Member of Parliament;
- (e) judicial officer;
- (f) member of a Kaupule;
- (g) civil servant employed to give political or policy advice to a Minister;
- (h) holder of any statutory office established by legislation;
- (i) head of a Ministry or Department of the public service;
- (j) director of a corporation who is appointed by the Head of State, the Cabinet, the Head of Government, a Minister, the Parliament, a Kaupule, or other officers or bodies of the Government;
- (k) traditional leader who has ex officio legal powers, functions or recognition;
- (l) any other public servant, or officer of a Government or quasi-Governmental agency, that legislation may declare to be a Leader for the purposes of this Code;
- (m) the position of acting or temporary replacement for, or of permanent deputy to, a Leader; and
- (n) includes also any person holding office of the Ombudsman established under this Code.

291. The purpose of the *Leadership Code Act* is to give effect to the Principles of the Constitution and the commitment of the leaders and the people of Tuvalu to the principles of good governance by providing a Leadership Code to guide and govern the conduct of the leaders of the people of Tuvalu (section 3 *Leadership Code Act*).

292. Section 8 of the *Leadership Code Act* provides for resignations and vacancies generally, in addition to any other conditions specified in relation to particular positions.

Leadership Code Act [Cap 4.12]

3 Purpose

The purpose of this Act is to give effect to the Principles of the Constitution and the commitment of the leaders and the people of Tuvalu to the principles of good governance by providing a Leadership Code to guide and govern the conduct of the leaders of the people of Tuvalu.

8 Resignations and vacancies generally

(1) In addition to any other conditions specified in relation to particular positions, any position established by this Code falls vacant if and once the person holding it —

(a) dies;

(b) resigns, by delivering a written notice of resignation (signed and dated by him or her on the day of delivery) to an officer who is authorised to receive such notices;

(c) disappears in circumstances where it appears certain or likely that he or she has died or been kidnapped; or

(d) becomes, or is found to be, disqualified from being appointed or elected to that position in the first place; or

(e) is declared by a court to be too mentally or intellectually ill or impaired to carry out the functions of that position.

(f) A notice of resignation takes effect as soon as it is delivered to an officer who is authorised to receive such notice.

(g) No officer is authorised —

(i) to receive a notice of resignation from himself or herself; or

(ii) to reject or disallow a notice of resignation that is otherwise in order.

(2) If a person is found to have become disqualified in the past from being appointed or elected to his or her position in the first place, then, unless it would cause hardship to innocent third parties, he or she is deemed to have vacated that position at the time when he or she took office or became disqualified, whichever was later.

(3) A position is also deemed to fall vacant as soon as it is established.

Attorney-General

293. Section 79 of the *Constitution of Tuvalu* [Cap 1.02] establishes the Office of the Attorney-General for Tuvalu, as an office within the Public Service.

294. The Attorney-General is a Constitutional appointment under section 159(4)(a) of the *Constitution* to be appointed by the Head of State acting in accordance with the advice of the Cabinet given after consultation with the Public Service Commission.

295. Section 79(4) of the *Constitution* requires that the individual holding or acting in the office of the Attorney-General must be entitled to practise before the High Court.

296. The Attorney-General is the principal legal adviser to the Government (section 79(3) *Constitution*). Section 79(7) of the *Constitution* provides that the Attorney-General may take criminal proceedings against any person before a court in respect of an offence.

297. The Attorney-General may be suspended or removed from office in accordance with Part VIII, Division 5 of the *Constitution* (section 159(4)(b) *Constitution*).

298. Part VIII, in particular, section 162 of the *Constitution*, provides the grounds for removal for certain prescribed officials, including the Attorney-General. This section provides that the Attorney-General may only be removed from office for inability to perform properly the functions of his office or position (whether arising from infirmity of body or mind, or from some other cause), or for misbehaviour; and in accordance with this

section. Section 162(3) of the *Constitution* provides for the establishment of an independent tribunal to investigate the question of removing the Attorney-General from office. The tribunal is to consist of a chairman who is qualified for appointment as a Judge of the High Court; and not less than one other member, with qualifications or experience relevant to the particular matter. Section 162(4) contains additional provisions to ensure the independence of the tribunal. The tribunal is to investigate the question and report on it to the appropriate authority, with its advice whether the person concerned should be removed from office. The Attorney-General may be removed from office on the advice of the tribunal. The provisions of Schedule 3 (procedure, etc., of the Public Service Commission and Certain Tribunals) apply to and in respect of the tribunal. In addition, the Attorney-General may be suspended whilst the Tribunal considers the question of removal (section 163 *Constitution*).

299. Section 79(11) of the *Constitution* states that “Subject to section 15 (independence) of Schedule 1, in the performance of his functions under subsection (7) the Attorney-General is not subject to the direction or control of any other person or authority.”

300. Section 169 of the Constitution outlines the remuneration for the Attorney-General.

301. The Office of the Attorney-General comprises of six staff – two on study leave, four working in the office and one yet to be appointed.

Constitution of Tuvalu [Cap 1.02]

79 The Attorney-General

(1) An office of Attorney-General for Tuvalu is established as an office in the Public Service.

(2) The Attorney-General shall be appointed in accordance with section 159(4)(a) (which relates to the appointment of the Attorney-General).

(3) The Attorney-General is the principal legal adviser to the Government, and has such other functions as are prescribed.

(4) A person is not qualified to hold or to act in the office of Attorney-General unless he is entitled to practise before the High Court.

(5) Unless he is excused by or under the authority of Parliament, the Attorney-General —

(a) shall attend all meetings of Parliament; and

(b) may take part, in accordance with the Rules of Procedure of Parliament, in the proceedings of Parliament and committees of Parliament (but without a vote).

(6) Unless he is excused by or under the authority of the Prime Minister, the Attorney-General shall attend all meetings of the Cabinet.

(7) Subject to the succeeding provisions of this section, in any case where he considers it desirable to do so the Attorney-General may —

(a) take criminal proceedings against any person before a court (other than a court-martial or other military tribunal) in respect of an offence; or

(b) take over and continue any criminal proceedings referred to in paragraph (a) that have been taken by any other person or authority; or

(c) discontinue, at any stage before judgment is given, any criminal proceedings referred to in paragraph (a) that have been taken by him or by any other person or authority.

(8) Subject to any Act of Parliament, the functions of the Attorney-General may be performed

(a) in person; or

(b) through officers responsible to him, acting in accordance with his general or specific instructions,

and references to the Attorney-General include references to officers so acting.

(9) Where any person or authority other than the Attorney-General has taken any criminal proceedings, nothing in this section prevents the withdrawal, in accordance with law, of those proceedings by any person or authority except where those proceedings have been taken over by the Attorney-General.

(10) Subject to subsections (8) and (9), the powers conferred on the Attorney-General by subsection (7)(b) and (c) are vested in him to the exclusion of any other person or authority.

(11) Subject to section 15 (independence) of Schedule 1, in the performance of his functions under subsection (7) the Attorney-General is not subject to the direction or control of any other person or authority.

(12) Subject to subsection (13), for the purposes of this section —

(a) an appeal from a decision in any proceedings; and

(b) a case stated or question of law reserved for the purpose of any proceedings,

is part of those proceedings.

(13) The functions of the Attorney-General under subsection (7)(c) shall not be exercised in relation to —

(a) an appeal by a person convicted in any proceedings; or

(b) a case stated or question of law reserved at the instance of a person convicted in any proceedings; or

(c) a judicial review of any proceedings.

159 Special cases of appointments

(1) This section shall be read subject to section 142 (localization).

(4) The Attorney-General —

(a) shall be appointed by the Head of State acting in accordance with the advice of the Cabinet given after consultation with the Public Service Commission; and

(b) may be suspended or removed from office in accordance with Division 5 (Removal, etc., of Certain Officials).

162 Removal of prescribed officials from office

(1) Subject to section 164 (contract employment), the holder of an office or position to which this Division applies may be removed from office only —

- (a) for inability to perform properly the functions of his office or position (whether arising from infirmity of body or mind, or from some other cause), or for misbehaviour; and
 - (b) in accordance with this section.
- (2) The holder of an office or position to which this Division applies may be removed from office by the appropriate authority if —
- (a) the question of his removal from office has been referred to a tribunal appointed under subsection (3); and
 - (b) the tribunal has advised the appropriate authority that he ought to be removed from office for a reason set out in subsection (1)(a).
- (3) If the Cabinet or the appropriate authority decides that the question of removing from office the holder of an office or position to which this Division applies should be investigated under this section, the Head of State, acting after consultation with the Prime Minister, shall appoint an independent tribunal consisting of —
- (a) a chairman who is qualified for appointment as a Judge of the High Court; and
 - (b) not less than one other member, with qualifications or experience relevant to the particular matter.
- (4) A person is not qualified to be appointed under subsection (3)(b) if he —
- (a) is the Governor-General; or
 - (b) is a member of Parliament; or
 - (c) is a member of the appropriate authority in relation to the person concerned; or
 - (d) is, or has been within the preceding 12 months, a subordinate of the person concerned; or
 - (e) has been involved in formulating advice on the question.
- (5) The tribunal shall investigate the question and report on it to the appropriate authority, with its advice whether the person concerned should be removed from office.
- (6) The provisions of Schedule 3 (procedure, etc., of the Public Service Commission and Certain Tribunals) apply to and in respect of the tribunal.

163 Suspension of prescribed officials

- (1) If the question of removing a person from office has been referred to a tribunal under section 162 (removal of prescribed officials from office), the appropriate authority may suspend him from office.
- (2) A suspension under subsection (1) —
- (a) may be lifted at any time by the appropriate authority; and
 - (b) ceases to have effect if the tribunal advises the appropriate authority that the person concerned should not be removed from office.
- (3) A person suspended under this section shall receive remuneration or other entitlements in accordance with the policy in force for the time being in the Public Service and provided for in General Administrative Orders.

Schedule 1

15. *Independence*

Where this Constitution provides that any person or authority is not subject to the direction or control of any other person or authority, that provision does not prevent —

- (a) direction or control by a court in the performance of judicial functions conferred on it by law; and
- (b) the regulation, by or under an Act of Parliament, of the performance of the functions of the person or authority.

Public Prosecutors

302. Section 71 of the *Criminal Procedure Code* [Cap 10.05] gives the Attorney-General power to “appoint any advocate or police officer to be a public prosecutor either generally or for the purposes of a particular case.”

303. Section 72 of the *Criminal Procedure Code* outlines the powers of public prosecutors.

Criminal Procedure Code [Cap 10.05]

71 Power to appoint public prosecutors

The Attorney-General may appoint any advocate or police officer to be a public prosecutor either generally or for the purposes of a particular case.

72 Powers of public prosecutors

A public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal; and if any private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution, and the advocate so instructed shall act therein under his directions.

73 Police officers may conduct prosecutions before magistrates’ courts

In any trial or inquiry before a magistrate’s court, if the proceedings have been instituted by a police officer, any police officer may appear and conduct the prosecution notwithstanding the fact that he is not the officer who made the complaint or charge.

74 Public prosecutors and police officers to be subject to directions of Attorney-General

Every police officer conducting a prosecution under the provisions of section 73, and every public prosecutor, shall be subject to the express directions of the Attorney-General.

Auditor-General

304. The legal framework for the Auditor-General comprises the *Constitution of Tuvalu* [Cap 1.02], the *Audit Act* [Cap 32.02] and the *Public Finance Act* [Cap 4.20]. Section 170 of the *Constitution* establishes the office of the Auditor-General for Tuvalu.

305. Section 5 of the *Audit Act* provides that the Auditor-General is to be appointed by the Head of State in accordance with section 159(2)(a) of the *Constitution*. That is, the Auditor-General is to be appointed by the Head of State, acting in accordance with the advice of the Public Service Commission, and with the approval of Parliament signified

by resolution. The requirement of Parliament endorsement of the candidate for the post strengthens their independence.

306. Section 172 of the *Constitution* outlines the functions of the Auditor-General which are to “inspect and audit, and report at least once in every financial year to Parliament on the public accounts of Tuvalu; the control of public money and property of Tuvalu; and all transactions with or concerning public money or property of Tuvalu.” The inspection and audit of accounts includes the accounts, finances and property of each branch, department, agency and instrumentality of the Government; and each body set up by an Act of Parliament, or by executive or administrative act of the Government, for governmental or official purposes. In addition, the Auditor-General may, if he thinks it proper to do so, inspect and audit, and report to Parliament on, any accounts, finances or property of an organization referred to in that subsection so far as they or it relate to, or consist of or are derived from, public money or property of Tuvalu.
307. The *Audit Act* expands on the functions of the Auditor-General in section 3 which include the following:
- (a) to audit the Public Accounts and any other financial reports that the Auditor-General is required or authorised to audit by law;
 - (b) to provide any particular audit or audit-related service to Parliament at the request of Parliament;
 - (c) to provide any particular audit or audit-related service to the Minister of Finance at the request of the Minister of Finance or to any other Minister at the request of that other Minister;
 - (d) to report to Parliament as required or authorised by law;
 - (e) to do anything that is incidental to the exercise of the Auditor-General's functions.
308. Section 3(4) of the *Audit Act* requires the Auditor-General to have regard to recognised professional standards and practices, and; to comply with any relevant requirements imposed by law in exercising his or her functions.
309. Part VI of the *Public Finance Act* also provides for functions and powers of the Auditor-General.
310. Section 171 of the *Constitution* establishes the independence of the Auditor General: “Subject to section 15 (independence) of Schedule 1, in the performance of his functions under this Constitution and any other law the Auditor-General is not subject to the direction or control of any other person or body.” In addition, section 4 of the *Audit Act* reiterates the independence of the Auditor General.
311. There is protection against unfair dismissal in that the Auditor General may only be removed on a limited number of grounds and the case must first be referred to an independent tribunal (section 162 *Constitution*) (as described above).
312. Section 169 of the *Constitution* outlines the remuneration for the Auditor-General.
313. The Office of the Auditor-General comprises seven staff under the supervision of the Auditor-General.

Constitution of Tuvalu [Cap 1.02]

159 Special cases of appointments

- (1) This section shall be read subject to section 142 (localization).
- (2) The Auditor-General —
 - (a) shall be appointed by the Head of State, acting in accordance with the advice of the Public Service Commission, and with the approval of Parliament signified by resolution; and
 - (b) may be suspended or removed from office in accordance with Division 5 (Removal, etc., of Certain Officials).

DIVISION 2. - THE AUDITOR-GENERAL

170 Establishment of the office of Auditor-General

- (1) An office of Auditor-General for Tuvalu is established.
- (2) The Auditor-General shall be appointed in accordance with section 159(2)(a) (which relates to the appointment of the Auditor-General).

171 Independence of the office of Auditor-General

Subject to section 15 (independence) of Schedule 1, in the performance of his functions under this Constitution and any other law the Auditor-General is not subject to the direction or control of any other person or body.

172 Functions of the Auditor-General

- (1) The Auditor-General shall inspect and audit, and report at least once in every financial year to Parliament on —

- (a) the public accounts of Tuvalu; and
- (b) the control of public money and property of Tuvalu; and
- (c) all transactions with or concerning public money or property of Tuvalu,

and has such other functions as are, subject to subsection (4), conferred on him by an Act of Parliament.

- (2) Unless other provision is made by or under an Act of Parliament in respect of the inspection and audit of them, subsection (1) extends to the accounts, finances and property of —

- (a) each branch, department, agency and instrumentality of the Government; and
- (b) each body set up by an Act of Parliament, or by executive or administrative act of the Government, for governmental or official purposes.

- (3) Even if other provision for inspection or audit is made as referred to in subsection (2), the Auditor-General may, if he thinks it proper to do so, inspect and audit, and report to Parliament on, any accounts, finances or property of an organization referred to in that subsection so far as they or it relate to, or consist of or are derived from, public money or property of Tuvalu.

- (4) An Act of Parliament may —

- (a) expand, and provide in more detail for, the functions of the Auditor-General under the preceding provisions of this section; and

(b) confer on the Auditor-General additional functions (including functions of the nature of an efficiency audit or value-for-money audit), not inconsistent with the performance of the functions conferred by those provisions.

(5) Subject to any Act of Parliament, the functions of the Auditor-General may be performed —

(a) in person; or

(b) through officers responsible to him, acting in accordance with his general or specific instructions,

and references to the Auditor-General include references to officers so acting.

Audit Act [Cap 32.02]

3 Auditor-General

(1) There is to be an Auditor-General of Tuvalu.

(2) The Auditor-General has the functions conferred or imposed on the Auditor-General by law.

(3) The Auditor-General's functions include the following:

(a) to audit the Public Accounts and any other financial reports that the Auditor-General is required or authorised to audit by law;

(b) to provide any particular audit or audit-related service to Parliament at the request of Parliament;

(c) to provide any particular audit or audit-related service to the Minister of Finance at the request of the Minister of Finance or to any other Minister at the request of that other Minister;

(d) to report to Parliament as required or authorised by law;

(e) to do anything that is incidental to the exercise of the Auditor-General's functions.

(4) The Auditor-General may exercise his or her functions in such manner as the Auditor-General thinks fit. However, the Auditor-General is required:

(a) to have regard to recognised professional standards and practices, and;

(b) to comply with any relevant requirements imposed by law.

(5) The Auditor-General may, in the exercise of his or her functions have regard to whether there has been:

(a) any waste of public resources, or

(b) any lack of probity or financial prudence in the management or application of public resources.

4 Auditor-General not subject to direction

(1) Subject to section 171 of the Constitution, in the performance of his functions under this Act or any other law the Auditor-General is not subject to direction or control of any other person or body.

5 Appointment of Auditor-General

The Auditor-General is to be appointed by the Head of State in accordance with section 159(2)(a) of the Constitution.

6 Terms of appointment

- (1) The Auditor-General holds office on a full-time basis.
- (2) The salary and allowances of the Auditor-General are payable out of the public accounts, which are appropriated accordingly.

...

10 Suspension and removal

The Auditor General may only be removed or suspended in accordance with section 162 (removal of prescribed officials from office) and section 163 (suspension of prescribed officials) of the Constitution.

...

16 Estimates

- (1) The Auditor-General must prepare, for each financial year, estimates of proposed receipts and expenditure relating to the audit office.
- (2) The Auditor-General must give the estimates to the Permanent Secretary responsible for finance.
- (3) The Permanent Secretary responsible for finance must consult with the Public Accounts Committee in developing the proposed budget of the audit office for each financial year.

...

18 General

- (1) The Auditor-General must, in relation to each financial year, audit —
 - (a) the public accounts; and
 - (b) all public sector entities.
- (2) The Auditor-General must not audit the audit office.

...

23 General

- (1) The Auditor-General may conduct an audit in the way the Auditor-General considers appropriate.
- (2) In determining the appropriate way to conduct an audit, the Auditor-General may have regard to —
 - (a) the character of the relevant internal control system; and
 - (b) recognised standards and practices.
- (3) Subsection (2) does not limit the matters to which the Auditor-General may have regard.
- (4) In the case of the audit of a company, the Auditor-General is not limited to conducting the audit in accordance with the laws that govern the company.

Public Finance Act [Cap 4.20]

PART VI - THE AUDITOR-GENERAL

25 Duty in respect of accounts

In exercising his powers of audit and examination of accounts, the Auditor-General shall satisfy himself —

- (a) that all reasonable precautions have been taken to safeguard the collection and custody of revenue and that the Acts, directions and instructions relating thereto have been duly observed;
- (b) that all moneys which have been appropriated and disbursed have been applied to the purposes for which they were appropriated, and that the expenditure conforms to the authority which governs it;
- (c) that all public moneys other than those which have been appropriated have been dealt with in accordance with proper authority;
- (d) that all reasonable precautions have been taken to safeguard the receipt, custody, issue and proper use of cash, stamps, securities and stores and that the regulations, directions and instructions relating thereto have been duly observed;
- (e) that adequate regulations, directions or instructions exist for the guidance of accounting officers and accountable officers; and
- (f) that expenditure has been incurred with due regard to economy and the avoidance of waste.

Notwithstanding the provisions of this section the Auditor-General shall not be required to examine, inquire into or audit the accounts of any trust or other fund or account not provided for in section 31 unless the officer administering such fund or account has been directed by the Minister as provided in subsection (2)(b) of that section, to prepare, sign and transmit to the Auditor-General an account of such fund or account.

26 Powers of Auditor-General

(1) In the exercise of his duties to audit, inquire into and examine accounts the Auditor-General may —

- (a) call upon any officer for any explanation and information which he may require in order to enable him to discharge his duties;
- (b) authorise any person publicly carrying on the profession of accountant or any public officer to conduct on his behalf any inquiry, examination or audit and such person or officer shall report thereon to the Auditor-General;
- (c) without the payment of any fee cause search to be made in and extracts to be taken from any book, document or record pertaining to matters of finance or accounts in any public office;
- (d) lay before the Attorney-General a case in writing as to any question regarding the interpretation of any Act or regulation concerning the powers of the Auditor-General or the discharge of his duties, and the Attorney-General shall give a written opinion upon such question.

(2) In the exercise of his duties the Auditor-General or any person duly authorised by him in writing shall have access to all records, books, vouchers, and documents pertaining to matters of finance and accounts, and to all cash, stamps, securities, stores or other Government property of any kind whatsoever in the possession of any public officer.

(3) Anything which, under the authority of this Act and any other law for the time being in force, is directed to be done by the Auditor-General other than the certifying of and reporting on accounts, may be done by any person duly authorised by him in writing.

Audit Office

314. Section 11 of the *Audit Act* [Cap 32.02] establishes the National Audit Office which is to consist of auditors appointed in accordance with section 13 of the *Audit Act*. “The Auditor-General is not a member of the Audit Office but is taken, for all purposes, to be the person who exercises the functions of chief executive officer in relation to the Audit Office.”
315. Section 12 of the *Audit Act* provides for the appointment of staff of the audit office who are to be appointed under the *Public Service Act* and must conduct themselves in accordance with the requirements of the Audit Office Code of Conduct. This Code of Conduct is yet to be developed.
316. Section 13 of the *Audit Act* provides that staff of the audit office are subject only to direction of the Auditor-General.
317. As noted above, the Audit Office comprises seven staff under the supervision of the Auditor-General.

Audit Act [Cap 32.02]

11 Audit Office

- (1) An Office called the Tuvalu National Audit Office is established by this Act.
- (2) The Audit Office consists of those auditors who are for the time being appointed in accordance with section 13.
- (3) The Auditor-General is not a member of the Audit Office but is taken, for all purposes, to be the person who exercises the functions of chief executive officer in relation to the Audit Office.

12 Terms of appointment and discipline of staff of the audit office

- (1) Auditors of the Audit Office shall be appointed under the Public Service Act.
- (2) Auditors appointed under subsection (1) must conduct themselves in accordance with the requirements of the Audit Office Code of Conduct.

13 Staff subject only to direction of Auditor-General

- (1) The staff of the audit office are not subject to direction by any person (other than the Auditor-General or a person authorised by the Auditor-General) about —
 - (a) the way in which the Auditor-General's powers in relation to audit are to be exercised; or
 - (b) the priority to be given to audit matters.
- (2) Subsection (1) has effect despite the Public Service Act.

The Office of the Auditor-General maintains a website which publishes audit reports and related information (www.tuvaluaudit.tv). The website publishes Tuvalu “Whole of Government Audit Reports and Financial Statements 2007 to 2014”; for previous years, the Office of the Auditor-General can provide copies. The website also contains:

- Reports of the Auditor General of Tuvalu on the Results of Financial Statement Audits of Public Enterprises and Other Statutory Bodies for the years: 2007-2012;

- Audit reports and financial statements of the Kaupules (the island councils on each of the nine islands of Tuvalu);
- Performance Audits;
- Tuvalu Aviation Investment Audit report;
- Public Accounts Committee reports;
- Budgets and Speeches from 2009 to 2014 for the Tuvalu Government; and
- Taxation circulars and newsletters.

Public Service Commission

318. The legal framework for the Public Service Commission comprises primarily of the *Constitution of Tuvalu*, the *Public Service Act* [Cap 4.24], the *Public Service Commission Rules* [Cap 4.24.2] and the *General Administrative Orders* [Cap 4.24.1]. This is detailed further under the response for article 7.

319. Section 143 of the *Constitution* establishes the Public Service Commission. Section 144 of the *Constitution* provides that the Public Service Commission shall comprise of a Chairman and three other members, appointed by the Head of State, acting in accordance with the advice of the Cabinet (section 145(1) *Constitution*).

320. Section 149 of the *Constitution* provides that the Public Service Commission is responsible for all personnel matters connected with the Public Service and other such prescribed functions.

321. Section 150 of the *Constitution* and section 6 of the *Public Service Commission Rules* outlines the independence of the Public Service Commission.

Constitution of Tuvalu [Cap 1.02]

DIVISION 2. - THE PUBLIC SERVICE COMMISSION

143 Establishment of the Commission

A Public Service Commission is established.

144 Composition of the Commission

The Public Service Commission shall consist of a Chairman and three other members.

145 Appointment of members of the Commission

(1) The members of the Public Service Commission shall be appointed by the Head of State, acting in accordance with the advice of the Cabinet.

(2) A person is not qualified for appointment as a member of the Commission if —

- (a) he is a member of Parliament; or
- (b) he is a candidate for election as a member of Parliament; or
- (c) he is the holder of —
 - (i) any other office or position established by this Constitution; or
 - (ii) an office or position in a State Service; or
 - (iii) any other office or position prescribed for the purposes of this subsection by or under an Act of Parliament.

146 Remuneration, etc., of members of the Commission

(1) The salary or other remuneration of the Chairman and the other members of the Public Service Commission are as provided for in section 169 (remuneration of certain officials).

(2) The other conditions of employment of a member of the Commission are as prescribed by or under an Act of Parliament.

147 Tenure of office of members of the Commission

(1) A member of the Public Service Commission vacates his office or position —

(a) if he is removed from office under Division 5 (Removal etc., of certain officials); or

(b) subject to subsection (2), if he resigns by notice in writing to the Head of State; or

(c) if he ceases to be qualified for appointment by virtue of section 145(2) (which relates to disqualification from appointment); or

(d) at the end of the period of four years after the date of his appointment.

(2) A resignation under subsection (1)(b) takes effect on the date on which it is received by the Head of State, or on such later date as is fixed by agreement between the member and the Minister responsible for Public Service matters.

148 Exclusion of members of the Commission from certain employment

(1) This section does not apply to a person who has been acting temporarily in the office of a member of the Public Service Commission only for a period of less than six consecutive months.

(2) Nothing in this section prevents other or additional disqualifications being imposed by or under an Act of Parliament on —

(a) a member or former member of the Public Service Commission, or

(b) a person referred to in subsection (1),

because of his membership or former membership of the Commission.

(3) A member of the Public Service Commission is not eligible for appointment to any office or position referred to in section 145(2)(c) (which relates to certain offices and positions the holders of which are disqualified from appointment to the Public Service Commission).

149 Functions of the Commission

(1) Subject to this Constitution and in particular to section 150 (independence of the Commission), and to any Act of Parliament, the Public Service Commission is responsible for —

(a) the efficient management and control of the Public Service in relation to matters referred to in paragraphs (a)-(f) of the definition "personnel matters" in section 137 (interpretation of Part VIII); and

(b) all personnel matters connected with the Public Service; and

(c) such matters in relation to the other State Services and the services of other governmental bodies as are prescribed,

and has such other functions as are prescribed.

(2) Subject to section 150 (independence of the Commission), the Public Service Commission —

- (a) may at any time; and
- (b) shall at the request of the Minister responsible for Public Service matters,

inform or advise the Cabinet as to any matter within the functions of the Commission.

150 Independence of the Commission

(1) Subject to section 15 (independence) of Schedule 1, in personnel matters the Public Service Commission shall comply with any general directions as to policy given by the Cabinet, but otherwise is not subject to direction or control by any other person or authority.

(2) A policy direction given under subsection (1) —

- (a) shall be published in any manner prescribed for the publication of subordinate legislation; and
- (b) shall immediately be forwarded by the Minister responsible for Public Service matters to the Speaker, for presentation to Parliament.

(3) Except in relation to personnel matters, the Public Service Commission is responsible to the Cabinet for the performance of its functions.

Public Service Commission Rules [Cap 4.24.2]

5 Functions of the Commission

Subject to the provisions of the Constitution and in particular to section 150 (Independence of the Commission), and to any Act of Parliament, the Public Service Commission is responsible for those matters set out in Divisions 2 and 3 of Part VIII (Public Employment) of the Constitution (sections 143 to 153).

6 Independence of the Commission

The independent operation of the Commission is dealt with in section 150 of the Constitution and section 15 (Independence) of Schedule 1 to the Constitution.

Police Commissioner and Police Force

322. The legal framework for the Police Commissioner and the Tuvalu Police Force comprises the *Constitution of Tuvalu*, the *Police Powers and Duties Act 2009* and the *Police Regulations* [Cap 20.24.1].

323. Section 157 of the *Constitution* establishes the office of Commissioner of Police within the Tuvalu Police.

324. The Commissioner of Police is to be appointed in accordance with section 159(5)(a) of the *Constitution* which provides that the Commissioner is to be appointed by the Head of State, acting in accordance with the advice of the Public Service Commission given after consultation with the Cabinet.

325. The Police Commissioner may be suspended or removed from office in accordance with Part VIII, Division 5 of the *Constitution* (section 159(5)(b) *Constitution*).

326. Section 162 of the *Constitution* provides that the Police Commissioner may only be removed from office for inability to perform properly the functions of his office or position (whether arising from infirmity of body or mind, or from some other cause), or for misbehaviour; and in accordance with this section.

327. Section 162(3) of the *Constitution* provides for the establishment of an independent tribunal to investigate the question of removing the Police Commissioner from office. The tribunal is to consist of a chairman who is qualified for appointment as a Judge of the High Court; and not less than one other member, with qualifications or experience relevant to the particular matter. Section 162(4) contains additional provisions to ensure the independence of the tribunal. The tribunal is to investigate the question and report on it to the appropriate authority, with its advice whether the person concerned should be removed from office. The Police Commissioner may be removed from office on the advice of the tribunal. The provisions of Schedule 3 (procedure, etc., of the Public Service Commission and Certain Tribunals) apply to and in respect of the tribunal.

328. The Police Commissioner may be suspended whilst the Tribunal considers the question of removal (section 163 *Constitution*). (cited above)

Constitution of Tuvalu

157 The Police Force

- (1) An office of Commissioner of Police is established as an office in the Tuvalu Police.
- (2) The Commissioner of Police shall be appointed in accordance with section 159(5)(a) (which relates to the appointment of the Commissioner of Police).
- (3) Excluding the Commissioner of Police, members of the Tuvalu Police of or above the rank of Inspector (or the equivalent rank as defined by or under an Act of Parliament) may be appointed, removed and disciplined in the same manner, with any necessary modifications, as members of the Public Service under section 155 (the Public Service).
- (4) Other members of the Tuvalu Police may be appointed, removed and disciplined by the Commissioner of Police, subject to appeal to the Public Service Commission in the case of removal or disciplinary action.

...

159 Special cases of appointments

- (1) This section shall be read subject to section 142 (localization).
- (5) The Commissioner of Police —
 - (a) shall be appointed by the Head of State, acting in accordance with the advice of the Public Service Commission given after consultation with the Cabinet; and
 - (b) may be suspended or removed from office in accordance with Division 5 (Removal, etc., of Certain Officials).

Police Force

329. Section 157(3) and (4) of the *Constitution* (cited above) provides that members of the Tuvalu Police of or above the rank of Inspector (excluding the Commissioner of Police) may be appointed, removed and disciplined in the same manner, with any necessary modifications, as members of the Public Service under section 155 (the Public Service). Other members of the Tuvalu Police may be appointed, removed and disciplined by the

Commissioner of Police, subject to appeal to the Public Service Commission in the case of removal or disciplinary action (cited above).

330. Regulation 4 of the *Police Regulations* outlines the appointment of members of the Police Force. Regulation 7 of the *Police Regulations* provides that the “pay and allowances of police officers shall be such as may from time to time be approved by the Minister.” Regulation 12 of the *Police Regulations* provides for promotions based on merit:

“Members will be selected for promotion on the basis of official qualifications, experience and merit. In judging merit, due consideration will be given to the general suitability of an officer for the post for which he is being considered.”

331. Regulation 14 of the *Police Regulations* provides for training of police officers. Regulation 22 of the *Police Regulations* applies the *General Administrative Orders* to police officers in terms of retirement on grounds of age.

Constitution of Tuvalu

155 The Public Service

Authority in relation to personnel matters in respect of members of the Public Service shall be vested in the Public Service Commission.

Police Regulations [Cap 20.24.1]

4 Conditions of appointment

(1) No person shall be enrolled in the Force unless he has attained the age of 18 years and is certified by a government medical officer to be physically fit for service in the Force.

(2) Every police officer shall be appointed to serve in the Force for a period of 2 years on probation in the first instance.

(3) After the expiration of the probationary period, if the police officer has given satisfactory service and is, in the opinion of the Commissioner of Police, in every respect suitable for retention in the Force, he shall be confirmed in his appointment, and shall, after such confirmation, serve in the Force subject to the provisions of the Act and of Chapter VIII of the Constitution while of, or over, the rank of Inspector, at the pleasure of the Governor-General, and while of any other rank, at the pleasure of the Commissioner of Police.

(4) The Commissioner of Police may at his discretion —

(a) reduce the period of probation;

(b) dispense with the period of probation if the police officer has previously completed a period of probation during previous service in the Force or in any other force.

7 Rates of pay

The pay and allowances of police officers shall be such as may from time to time be approved by the Minister.

12 Promotions

Members will be selected for promotion on the basis of official qualifications, experience and merit. In judging merit, due consideration will be given to the general suitability of an officer for the post for which he is being considered.

14 Training

The training of the Force shall be in accordance with instructions promulgated by the Commissioner of Police in Orders made by him pursuant to section 8(2).

22 Retirement

The provisions of the General Administration Orders amended from time to time relating to retirement on grounds of age shall apply to the retirement of all members of the Force below the rank of Inspector.

Transaction Tracking Unit

332. The TTU (within the Tuvalu Police Services) receives reports on any suspicious transactions and investigates into such transactions with assistance from the financial institutions in the country and the Bank of Hawaii, which offers assistance in terms of verifying and tracing such suspicious transactions.

333. The relevant provisions are set out below.

Proceeds of Crime Act [Cap 10.25]

17 Transaction Tracking Unit — establishment

There is established, within the Tuvalu Police Force, the Transaction Tracking Unit.

18 Unit — functions and powers

(1) The functions of the Unit are:

(a) to receive reports of suspicious transactions issued by financial institutions and cash dealers;

(b) to send each report to the Attorney-General, if, having considered it, the Unit decides there are reasonable grounds for suspecting that the transaction is suspicious;

(c) to compile statistics and records, disseminate information within Tuvalu or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney-General;

(d) to create training requirements and provide training for financial institutions about transaction record-keeping and reporting obligations;

(e) to consult with any relevant person, institution or organisation in exercising its powers or duties.

(2) The Commissioner of Police is responsible to the Attorney-General for the due performance of the functions mentioned in subsection (1).

(3) A member of the Unit:

(a) may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept for section 104, and ask questions about the record, and make notes and take copies of the whole or any part of the record; and

(b) must send to the Attorney-General any information derived from an inspection carried out for paragraph (a), if it gives the Unit reasonable grounds for suspecting that a transaction involves proceeds of crime; and

(c) may direct any financial institution or cash dealer to take appropriate steps facilitate any investigation foreseen by the Unit; and

(d) may not conduct any investigation into money-laundering, other than to ensure compliance with this Part by a financial institution.

19 Unit's power to obtain search warrant

(1) The Unit may apply to a magistrate for a warrant to enter premises belonging to, or in the possession or control of, a financial institution or cash dealer, or any officer or employee of the institution or dealer, and to search the premises and remove any document, material or other thing on the premises.

(2) The magistrate must grant the application if he or she is satisfied that there are reasonable grounds for believing that:

(a) the financial institution or cash dealer has failed to keep a transaction record, or report a suspicious transaction, as required by this Act; or

(b) an officer or employee of a financial institution or cash dealer is committing, has committed or is about to commit an offence of money laundering.

20 Unit may apply for production and monitoring orders

(1) To determine whether any property belongs to, or is in the possession or under the control of, a person, the Unit may apply to a magistrate for a production order or a monitoring order.

(2) Division 6 of Part 4 applies to a production order in favour of the Unit.

(3) Division 7 of Part 4 applies to a monitoring order in favour of the Unit.

(b) Observations on the implementation of the article

334. Tuvalu indicated that it has partially implemented the article.

335. The observations made under article 23 regarding the TTU are referred to.

336. It is recommended that Tuvalu continue to invest in capacity building and ensure adequate resources for the specialized law enforcement agencies to carry out their functions. In particular, there is a need to build the investigative capacity of the police, and Tuvalu should ensure that the office of the Commissioner of Police is filled, as a lack of capacity and skilled staff were reported to be an obstacle to the detection of money laundering and to financial investigations by the police, in the absence of an operational financial intelligence unit. A need for capacity building in the Office of the Ombudsman was also noted.

337. To strengthen the independence of prosecutions, it was explained that there is a need to separate the prosecution function (office of the Director of Public Prosecutions) from the office of the Attorney-General, which acts as chief legal adviser of the government. The independence of the TTU, once established, should also be ensured.

Article 37 Cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this

Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. *Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

3. *Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

4. *Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*

5. *Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

(a) Summary of information relevant to reviewing the implementation of the article

338. Tuvalu indicated that it has partially implemented the article.

339. Section 106 of the *Proceeds of Crime Act* [Cap 10.25] provides protection for financial institutions that report suspicious transactions pursuant to their obligations under section 101 of the *Proceeds of Crime Act*.

Proceeds of Crime Act [Cap 10.25]

101 Financial institutions and cash dealers to report suspicious transactions

(1) If a financial institution or cash dealer:

(a) is a party to a transaction; and

(b) has reasonable grounds for suspecting that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence;

it must do the things required by subsection (2) as soon as possible but no later than 3 working days after forming that suspicion, and if possible before the transaction is carried out.

106 Protection for financial institutions etc

If a financial institution or cash dealer, or an officer, employee or agent of a financial institution or cash dealer, gives information to a police officer or the Attorney-General under subsection 101(1) as soon as practicable after the grounds for suspicion mentioned in that subsection become known, the institution or dealer is taken, for sections 13 and 14, not to have been in possession of that information at any time.

340. Sections 68 and 69 of the *Criminal Procedure Code* [Cap 10.05] are also referred to.

Criminal Procedure Code [Cap 10.05]

68 Power of Attorney-General to enter nolle prosequi

(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter a *nolle prosequi*, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

(2) If the accused shall not be before the court when such *nolle prosequi* is entered, the registrar or clerk of such court shall forthwith cause notice in writing of the entry of such *nolle prosequi* to be given to the officer in charge of the prison in which such accused may be detained, and also, if the accused person has been committed for trial, to the magistrate by whom he was so committed, and such magistrate shall forthwith cause a similar notice in writing to be given to any witnesses bound over to prosecute and give evidence and to their sureties (if any) and also the accused and his sureties in case he shall have been admitted to bail.

69 Delegation of powers by Attorney-General

(1) The Attorney-General may order in writing that all or any of the powers vested in him under this Code be vested for the time being in any public officer and the exercise of these powers by such public officer shall then operate as if they had been exercised by the Attorney-General:

Provided that the Attorney-General may revoke any order made by him under this section.

(2) The Attorney-General may exercise any powers or perform any duties vested in him under this Code notwithstanding any order made under subsection (1).

(3) The production of a document purporting to be signed by the Attorney-General or of any transcript in official form of any cable, telegraphic or wireless message purporting to have been sent by the Attorney-General and containing any order or revocation made under the provisions of this section shall be prima facie evidence for the purposes of this section of such order or revocation.

341. Tuvalu indicated that a plea agreement was reached in a case involving embezzlement in the private sector, *R. v. Lavinia Faimasasa* (2015) (referred to under article 22 above), in which the defendant was sentenced to a 6-month non-custodial sentence on the grounds of her admission and repayment of the full amount of the stolen assets.

(b) Observations on the implementation of the article

342. Tuvalu indicated that it has partially implemented the article.

343. Tuvalu does not provide immunity from prosecution to cooperating defendants.

344. Plea bargaining and reduced sentences may be applied in specific cases to cooperating witnesses. It was explained by the authorities that regulations on plea bargaining would be helpful. The reviewers encourage the adoption of plea bargaining provisions and the strengthening of measures to encourage the cooperation of offenders with law enforcement authorities.

345. The observations and recommendations under article 32 are also referred to in this context.

Article 38 Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

346. Tuvalu indicated that it has partially implemented the article.

347. So far the only example in terms of corruption was the coordination of reporting and information sharing between the Tuvalu Police Services and the National Bank of Tuvalu in regards to suspicious funds transferred from overseas counterparts.

348. On the initiative of the National Bank of Tuvalu, an Anti-Money Laundering Committee was established. The Committee meets 2-3 times per year to improve cooperation and information exchange in this field. The Committee consists of representatives of the police, Attorney-General's office, Customs & Immigration and the financial institutions.

(b) Observations on the implementation of the article

349. Tuvalu has not implemented the article. There is no duty by public officials to report corruption offences to the law enforcement authorities. Based on the discussions during the country visit, it is recommended that Tuvalu adopt measures to strengthen cooperation between public officials and investigating and prosecuting authorities, such as a duty to report allegations or an obligation to cooperate in investigations and prosecutions.

Article 39 Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

350. Tuvalu indicated that it has partially implemented the article.

351. Part 5 of the *Proceeds of Crime Act* [Cap 10.25] outlines the reporting obligations of financial institutions and cash dealers, including customer due diligence (section 99) and requirements to report suspicious transactions (section 101 *Proceeds of Crime Act* [Cap 10.25]).

352. Informal mechanisms for coordination between national authorities and the private sector are provided through the Tuvalu National Private Sector Organisation (TNPSO), which holds consultations with the Department of Trade on business initiatives, but no direct coordination exists in terms of any reporting obligations of TNPSO and those of Tuvalu's statutory corporations (National Bank of Tuvalu, Development Bank of Tuvalu and Tuvalu National Provident Fund).

Proceeds of Crime Act [Cap 10.25]

101 Financial institutions and cash dealers to report suspicious transactions

(1) If a financial institution or cash dealer:

(a) is a party to a transaction; and

(b) has reasonable grounds for suspecting that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence;

it must do the things required by subsection (2) as soon as possible but no later than 3 working days after forming that suspicion, and if possible before the transaction is carried out.

(2) The things are:

(a) taking reasonable measures to find out the purpose of the transaction, the origin and ultimate destination of the funds involved, and the identity and address of the ultimate beneficiary; and

(b) making a report of the transaction in accordance with subsection (3) to the Unit in writing or in any other way that the Attorney-General from time from time approves.

(3) A report required by paragraph (2)(b) must:

(a) contain the particulars about the transaction mentioned in paragraph (2)(a) and subsection 100(3); and

(b) contain a statement of the grounds on which the financial institution or cash dealer holds the suspicion; and

(c) be signed or otherwise authenticated by the financial institution or cash dealer.

(4) A financial institution or cash dealer that has reported a suspicious transaction in accordance with this Part must, if requested to do so by the Unit, give the Unit any further information that it has about the transaction.

(5) A financial institution or cash dealer that fails, without reasonable excuse, to comply with subsection (1), (2), (3) or (4) commits an offence punishable by:

(a) if the offender is a natural person — a fine of \$30,000 or imprisonment for 5 years, or both; or

(b) if the offender is a body corporate — a fine of \$150,000.

(6) If a financial institution or cash dealer gives information to the Unit about its suspicion about a transaction to which it is a party, the institution or dealer, or an officer, employee or agent of the institution or dealer, must not, unless required to do so under this or another Act, disclose to anyone else:

(a) that the institution or dealer has formed the suspicion; or

(b) that information has been given; or

(c) any other information from which the person to whom the information is disclosed could reasonably be expected to infer that the suspicion had been formed or that the first-mentioned information had been given.

(7) A financial institution or cash dealer, or an officer, employee or agent of such an institution or dealer, who contravenes subsection (4) is guilty of an offence punishable by:

(a) if the offender is a natural person — a fine of \$12,000 or imprisonment for 2 years, or both; or

(b) if the offender is a body corporate — a fine of \$60,000.

106 Protection for financial institutions etc

If a financial institution or cash dealer, or an officer, employee or agent of a financial institution or cash dealer, gives information to a police officer or the Attorney-General under subsection 101(1) as soon as practicable after the grounds for suspicion mentioned in that subsection become known, the institution or dealer is taken, for sections 13 and 14, not to have been in possession of that information at any time.

353. No information was provided on the number of suspicious transaction reports made by financial institutions each year.

(b) Observations on the implementation of the article

354. As noted above, the police have received 2-3 STRs, which have not been further investigated. There is also a need to provide specialized training to financial institutions on detecting and reporting suspicious transactions (see article 23 above).

355. Tuvalu has partially implemented the article.

Article 40 Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(a) Summary of information relevant to reviewing the implementation of the article

356. Tuvalu indicated that it has partially implemented the article.

357. Part 2, Division 2 of the *Proceeds of Crime Act* [Cap 10.25] outlines the Transaction Tracking Unit's functions and powers.

18 Unit — functions and powers

(1) The functions of the Unit are:

- (a) to receive reports of suspicious transactions issued by financial institutions and cash dealers;
- (b) to send each report to the Attorney-General, if, having considered it, the Unit decides there are reasonable grounds for suspecting that the transaction is suspicious;
- (c) to compile statistics and records, disseminate information within Tuvalu or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney-General;
- (d) to create training requirements and provide training for financial institutions about transaction record-keeping and reporting obligations;
- (e) to consult with any relevant person, institution or organisation in exercising its powers or duties.

(2) The Commissioner of Police is responsible to the Attorney-General for the due performance of the functions mentioned in subsection (1).

(3) A member of the Unit:

- (a) may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept for section 104, and ask questions about the record, and make notes and take copies of the whole or any part of the record; and
- (b) must send to the Attorney-General any information derived from an inspection carried out for paragraph (a), if it gives the Unit reasonable grounds for suspecting that a transaction involves proceeds of crime; and
- (c) may direct any financial institution or cash dealer to take appropriate steps facilitate any investigation foreseen by the Unit; and
- (d) may not conduct any investigation into money-laundering, other than to ensure compliance with this Part by a financial institution.

19 Unit's power to obtain search warrant

(1) The Unit may apply to a magistrate for a warrant to enter premises belonging to, or in the possession or control of, a financial institution or cash dealer, or any officer or employee of the institution or dealer, and to search the premises and remove any document, material or other thing on the premises.

(2) The magistrate must grant the application if he or she is satisfied that there are reasonable grounds for believing that:

- (a) the financial institution or cash dealer has failed to keep a transaction record, or report a suspicious transaction, as required by this Act; or
- (b) an officer or employee of a financial institution or cash dealer is committing, has committed or is about to commit an offence of money-laundering.

20 Unit may apply for production and monitoring orders

- (1) To determine whether any property belongs to, or is in the possession or under the control of, a person, the Unit may apply to a magistrate for a production order or a monitoring order.
- (2) Division 6 of Part 4 applies to a production order in favour of the Unit.
- (3) Division 7 of Part 4 applies to a monitoring order in favour of the Unit.

21 Orders to enforce compliance with obligations under this Act

- (1) If a financial institution or cash dealer appears to have failed to comply with an obligation under Part 5, the Unit may apply to the Court for an order against the institution or dealer, or all or any officers or employees, or specified officers or employees, of the institution or dealer, in such terms as the Court thinks necessary to enforce compliance with the obligation.
- (2) In granting the order, the Court may order that, if the financial institution or cash dealer fails, without reasonable excuse, to comply with the order, the institution, dealer, officer or employee must pay a financial penalty of the amount and in the manner directed by the Court.

358. Tuvalu referred to the case of *Crown v. Apisai Ielemia SM HAC 190/2014*, in which the Office of the Attorney-General worked closely with the Commissioner of Police through its TTU and Crime Branch to obtain relevant information from the National Bank of Tuvalu.

(b) Observations on the implementation of the article

359. Although the authorities reported that bank secrecy was never used as a ground to refuse production of a document, it was explained that there was no guarantee that confidentiality restrictions would not be invoked in future cases. As noted above, the reviewers recommend that Tuvalu strengthen its powers to identify, trace, freeze and seize assets, in the absence of a functioning FIU (see articles 23, 31(2) and 31(7) above).
360. Tuvalu has partially implemented the article. It is recommended that Tuvalu adopt appropriate mechanisms in its domestic legal system to overcome obstacles arising out of the application of bank secrecy laws.

Article 41 Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

361. A previous conviction in any place outside Tuvalu may be provided, according to section 125(3) of the *Criminal Procedure Code* [Cap 10.05], and can be used as *prima facie* evidence of all facts stated therein.

Criminal Procedure Code [Cap 10.05]

125 Previous conviction how proved

(1) In any inquiry, trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force —

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which such conviction was had, to be a copy of the sentence or order; or

(b) by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted.

(2) A certificate in the form prescribed by the Minister given under the hand of an officer appointed by the Minister in that behalf, who shall have compared the fingerprints of an accused person with the fingerprints of a person previously convicted, shall be prima facie evidence of all facts therein set forth provided it is produced by the person who took the fingerprints of the accused.

(3) A previous conviction in any place outside Tuvalu may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the fingerprints, or photographs of the fingerprints of the person so convicted, together with evidence that the fingerprints of the person so convicted, together with evidence that the fingerprints of the person so convicted are those of the accused person. Such a certificate as aforesaid shall be prima facie evidence of all facts therein set forth without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.

362. There have been no corruption-related cases where overseas convictions were or were not taken into consideration. However, a foreign conviction was considered in an extradition with New Zealand on charges of rape.

(b) Observations on the implementation of the article

363. Previous foreign convictions are admissible as *prima facie* evidence of all facts stated therein and can be proved, according to section 125 of the *Criminal Procedure Code* [Cap 10.05].

364. The provision is implemented.

Article 42 Jurisdiction

Paragraph 1

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

(a) Summary of information relevant to reviewing the implementation of the article

365. Section 5 of the *Penal Code* [Cap 10.20] extends the jurisdiction of Tuvalu to every place within Tuvalu or its territorial limits. "Territorial limits" is undefined in the *Penal Code* [Cap 10.20] but would extend to territorial waters and airspace, and all civil vessels and aircrafts registered in Tuvalu, as also provided under article 2 of the Constitution.

366. In reference to territorial waters, sections 6 and 10 of the Maritime Zone Act define the limitation of the territory of Tuvalu.

367. The case of *Crown v Ji Heejun* [2011] TVHC 7 Crim Appeal Case 02 of 2011, though not a corruption case, defines what is meant or considered to cover 'territorial limits':

"The Constitution defines it as "a contravention of or a failure to comply with the law of Tuvalu"; Schedule I, section 2(1). The definition under section 10 of the *Interpretation and General Provisions Act* is that it is "a crime, felony, misdemeanour or contravention or other breach of, or failure to comply with, a written law, for which a penalty is provided". Clearly, by the wording of section 13 (6), a failure to comply with the written requirements of the subsection will make the person involved liable to conviction and the penalty prescribed. I am satisfied that section 13(6) creates the offences with which the defendants were charged."

Penal Code [Cap 10.20]

5 Application of Code

Subject to the provisions of this Code, this Code shall apply to every place within Tuvalu or within the territorial limits thereof.

6 Offences committed partly within and partly beyond the jurisdiction

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

Constitution of Tuvalu

2 The area of Tuvalu

(1) Subject to subsections (3) and (4), the area of Tuvalu consists of the land areas referred to in subsection (2), together with —

- (a) the territorial sea and the inland waters as declared by law, the land beneath them, and the air space above; and
- (b) such additional lands and waters as are declared by law to be part of the land area of Tuvalu.

(2) The land areas referred to in subsection (1) consist of all islands, rocks and reefs within the area bounded by —

- (a) the parallel 05°S; and
- (b) the meridian 180°E; and
- (c) the parallel 11°S; and
- (d) the meridian 176°E,

together with all small islands, islets, rocks and reefs depending on them.

(3) For the purpose of implementing any international agreement binding on Tuvalu and approved by Parliament by resolution for the purposes of this section, subsection (2) may be amended by Act of Parliament made in accordance with section 7 (alteration to the Constitution generally), without reference to the requirement of a special majority of votes under section 7(3) (which requires Bills to alter the Constitution to be passed by a two-thirds majority in Parliament).

(4) Nothing in this section prevents a law from proclaiming the jurisdiction of Tuvalu, complete or partial, over any area of land or water or airspace above, or prevents a law from having extra-territorial effect in accordance with section 84 (vesting of the law-making power).

(b) Observations on the implementation of the article

368. The provisions are implemented.

Article 42 Jurisdiction

Subparagraphs 2 (a) and (b)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

369. Tuvalu indicated that it has not implemented the provisions.

370. The *Penal Code* [Cap 10.20] does not cover the active or passive personality principles.

Penal Code [Cap 10.20]

6 Offences committed partly within and partly beyond the jurisdiction

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

(b) Observations on the implementation of the article

371. Tuvalu may wish to amend its legislation to establish the active and passive personality principles.

Article 42 Jurisdiction

Subparagraph 2 (c)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

372. Tuvalu indicated that it has partially implemented the provision.

373. Jurisdiction as foreseen in this optional provision of the Convention, article 42(2)(c) is not clearly regulated in the *Penal Code* [Cap 10.20]. Offences where an element has taken place within the territory of Tuvalu could be covered under section 6 of the *Penal Code*.

(b) Observations on the implementation of the article

374. Tuvalu's legislation does not clearly regulate jurisdiction over participatory acts committed outside the country, though these could possibly be covered where an element has occurred within the territory of Tuvalu (section 6 of the *Penal Code*).

375. Tuvalu may wish to clarify its legislation in this regard.

Article 42 Jurisdiction

Subparagraph 2 (d)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party.

(a) Summary of information relevant to reviewing the implementation of the article

376. Tuvalu indicated that it has not implemented the provision.

(b) Observations on the implementation of the article

377. Tuvalu does not recognize the state protection principle and does not exercise jurisdiction based on an offence being committed against the State.

378. Tuvalu may wish to amend its legislation in this regard.

Article 42 Jurisdiction

Paragraphs 3 and 4

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

(a) Summary of information relevant to reviewing the implementation of the article

379. Tuvalu indicated that it has partially implemented the provisions.

380. Section 58 of the *Extradition Act* [Cap 7.24] allows for the prosecution of its own nationals in the event that Tuvalu would refuse to entertain an extradition request.

Extradition Act [Cap 7.24]

5 Extradition offence

(1) An offence is an extradition offence if:

(a) it is an offence against a law of the requesting country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more; and

(b) the conduct that constitutes the offence, if committed in Tuvalu, would constitute an offence (however described) in Tuvalu for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more.

(2) In determining whether conduct constitutes an offence, regard may be had to only some of the acts and omissions that make up the conduct.

(3) In determining the maximum penalty for an offence for which no statutory penalty is imposed, regard shall be had to the level of penalty that can be imposed by any court in the requesting country for the offence.

(4) An offence may be an extradition offence although:

(a) it is an offence against a law of the requesting country relating to taxation, customs duties or other revenue matters or relating to foreign exchange control; and

(b) Tuvalu does not impose a duty, tax, impost or control of that kind.

6 Extradition objection

There is an extradition objection to a request for the surrender of a person if:

(a) the extradition offence is regarded as a political offence; or

(b) there are substantial grounds for believing that surrender of the person is sought for the purpose of prosecuting or punishing the person because of his or her race, religion, nationality, political opinions, sex or status, or for a political offence in the requesting country; or

(c) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; or

- (d) the offence is an offence under the military law, but not also under the ordinary criminal law, of Tuvalu; or
- (e) final judgement has been given against the person in Tuvalu, or in a third country, for the offence; or
- (f) under the law of the requesting country or Tuvalu, the person has become immune from prosecution or punishment because of lapse of time, amnesty or any other reason; or
- (g) the person has already been acquitted or pardoned in the requesting country or Tuvalu, or punished under the law of that country or Tuvalu, for the offence or another offence constituted by the same conduct as the extradition offence; or
- (h) the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have.

58 Prosecution, instead of extradition, of citizens of Tuvalu

(1) If:

- (a) a country requests the surrender of a person because of conduct the person engaged in outside Tuvalu; and
- (b) the Prime Minister refuses to order the surrender of the person because of a circumstance listed in subsection (2); and
- (c) the person would have committed an offence against a law in force in Tuvalu if the person had engaged in the conduct, or equivalent conduct, in Tuvalu at that time, the person may be prosecuted and punished in Tuvalu for the offence.

(2) The following are the circumstances for the purpose of paragraph (1)(b):

- (a) the person is a citizen of Tuvalu; or
- (b) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; or
- (c) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or
- (d) the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have; or
- (e) the offence for which surrender has been ordered is punishable by death in the requesting country but not in Tuvalu and the requesting country has not given a sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out; or
- (f) the person has been sentenced, or would be liable to be tried or sentenced, in the requesting country by an extraordinary or ad hoc tribunal.

(3) For the purpose of the prosecution, the person is taken to have engaged in the conduct in Tuvalu.

(4) A person shall not be prosecuted unless the Attorney-General:

(a) considers that there is sufficient evidence in Tuvalu to justify prosecuting the person for the offence; and

(b) orders that the person be prosecuted for the offence.

(5) A person may be prosecuted whether the person engaged in the conduct before or after the commencement of this Act.

(6) A person to whom subsection (1) applies may be:

(a) arrested for an offence mentioned in paragraph (1)(c); and

(b) charged with the offence; and

(c) remanded in custody or on bail,

although the Solicitor-General has not made an order under subsection (3).

381. Tuvalu indicated that so far it has not received any request regarding the need to extradite a Tuvalu national to a requesting country. There has been one extradition into Tuvalu involving a Tuvalu national who was residing in New Zealand and Tuvalu was able, with the assistance of the MFAT (New Zealand), to receive this national and prosecute his case in Tuvalu. The processes involved mutual cooperation between the Office of the Attorney-General for both requesting and receiving countries through diplomatic channels usually provided for by both respective Ministry of Foreign Affairs.

(b) Observations on the implementation of the article

382. As noted under article 44(11) below, prosecution of nationals is not mandatory under section 58(1) of the Extradition Act [Cap 7.24]. However, Tuvalu may assert jurisdiction where the extradition of nationals is refused, subject to the discretion of the Attorney-General under section 58(4). The recommendations made under article 44(11) are referred to.

383. Tuvalu may also wish to extend jurisdiction where the extradition of persons other than nationals is refused (art. 42(4)).

Article 42 Jurisdiction

Paragraphs 5 and 6

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

384. Tuvalu indicated that it has partially implemented the provisions.

Extradition Act [Cap 7.24]

57 Taking of evidence at request of another country

- (1) If another country requests Tuvalu to take evidence for the purpose of criminal proceedings in that country, the Prime Minister may authorise a magistrate to do so.
- (2) The magistrate may take the evidence of each witness on oath or affirmation and shall:
 - (a) cause the evidence to be reduced to writing and certify as to the taking of the evidence; and
 - (b) cause the evidence and the certificate to be sent to the Prime Minister.

59 Provision of evidence for prosecution by other countries

If —

- (a) another country has refused to order that a person be surrendered to Tuvalu; but
- (b) the country is prepared to prosecute the person for the offence for which Tuvalu sought surrender of the person,

the Prime Minister shall give the other country all available evidence to enable the other country to prosecute the person.

385. There have been no examples of application, but the Office of the Attorney-General through the Tuvalu Legal Services (Office of the Judiciary, Office of the People's Lawyer, Legal Practitioners and In-house Corporate Lawyers) have agreed on the need to have proper coordination of proceedings, especially in investigations and prosecutions.

(b) Observations on the implementation of the article

386. The cited measures are only partially relevant to the provisions under review.

387. It is recommended that Tuvalu adopt measures to ensure that investigating and judicial authorities coordinate proceedings with their foreign counterparts.

Chapter IV. International cooperation

Article 44 Extradition

Paragraph 1

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

388. Section 4 of the *Extradition Act* [Cap 7.24] defines an “extradition country” as:

- (a) a Commonwealth country (defined in Schedule 1); or
- (b) a Pacific Island country (“a country that is a member of the Pacific Forum; and that is specified in Schedule 2;); or
- (c) a comity country that is declared by the regulations to be an extradition country; or
- (d) a comity country certified by the Prime Minister to be an extradition country for the purpose of a particular extradition request.”

389. Section 5 of the *Extradition Act* establishes the dual criminality rule.

Extradition Act [Cap 7.24]

5 Extradition offence

“(1) An offence is an extradition offence if:

- (a) it is an offence against a law of the requesting country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more; and
- (b) the conduct that constitutes the offence, if committed in Tuvalu, would constitute an offence (however described) in Tuvalu for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more.

(2) In determining whether conduct constitutes an offence, regard may be had to only some of the acts and omissions that make up the conduct.

(3) In determining the maximum penalty for an offence for which no statutory penalty is imposed, regard shall be had to the level of penalty that can be imposed by any court in the requesting country for the offence.

(4) An offence may be an extradition offence although:

- (a) it is an offence against a law of the requesting country relating to taxation, customs duties or other revenue matters or relating to foreign exchange control; and
- (b) Tuvalu does not impose a duty, tax, impost or control of that kind.”

390. Pursuant to the dual criminality rule in section 5, a number of corruption offences would amount to an extradition offence. For example, section 85 of the *Penal Code* [Cap 10.20] establishes the offence of official corruption as a felony punishable by imprisonment for seven years. Extortion by public officers (section 86 *Penal Code*) and

abuse of office (section 90 *Penal Code*) are misdemeanours punishable by imprisonment for three years.

391. Tuvalu, as a Commonwealth country, is bound by the *London Scheme for Extradition within the Commonwealth*, incorporating amendments agreed to in Kingstown in November 2002 (London Scheme for Extradition within the Commonwealth), but has not used this Scheme in practice.

London Scheme for Extradition within the Commonwealth

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.

(2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.

(3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and

(b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding subparagraph.

EXTRADITION OFFENCES AND DUAL CRIMINALITY RULE

2. (1) A person sought will only be extradited for an extradition offence.

(2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.

(3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:

(a) the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.

(4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:

(a) is of a purely fiscal character; or

(b) was committed outside the territory of the requesting country where extradition for such offences is permitted under the law of the requested country.

392. Tuvalu indicated that so far it has not received any request regarding the need to extradite a Tuvalu national to a requesting country. There has been one extradition into Tuvalu involving a Tuvalu national who was residing in New Zealand and Tuvalu was able, with the assistance of the MFAT (New Zealand), to receive this national and

prosecute his case in Tuvalu. The process involved mutual cooperation between the Attorney-General's offices in Tuvalu and New Zealand through diplomatic channels provided by the respective Ministries of Foreign Affairs. Further details of the case are as follows:

In *R. v Starcel Soloseni*, the accused/convict was a Tuvalu national residing on visitor permit in New Zealand, and Tuvalu requested his extradition from New Zealand back to Tuvalu. The matter was a rape case, not related to corruption. The extradition of Mr. Soloseni was executed and he faced trial, was convicted and sentenced to serve an imprisonment sentence of at least 7 years in Tuvalu. As a preliminary step to fulfilling the extradition request, the New Zealand authorities in 2007/2008 also made a formal MLA request for evidence on crime data regarding the defendant, and Tuvalu provided the requested information (see article 46(1) below). The extradition was carried out successfully.

(b) Observations on the implementation of the article

393. Tuvalu indicates that it has partially implemented the provision.

394. Pursuant to the Extradition Act (section 7), Tuvalu can entertain extradition requests with Commonwealth and treaty countries, as well as any other country certified by the Prime Minister or designated by regulation to be an extradition country. During the country visit, the authorities in Tuvalu explained that to date no countries have been designated as extradition countries. Furthermore, the list of 37 extradition treaties in Schedule 3 (quoted under paragraph 5 below) is the complete and up to date list of extradition treaties for Tuvalu. Tuvalu is also party to the London Scheme for Extradition within the Commonwealth.

395. There are no extradition regulations in Tuvalu. Please see article 44(9) below.

396. Furthermore, Tuvalu can extradite persons for offences punishable by death or imprisonment for a period of 1 year or more, subject to the dual criminality requirement. It is noted that extradition is limited to the extent that Tuvalu has not criminalized all offences under this Convention.

397. There has only been one extradition case to date (*R. v Starcel Soloseni*), involving the successful extradition of a national back to Tuvalu in a rape case, not related to corruption.

Article 44 Extradition

Paragraph 2

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

398. Tuvalu has not implemented the provision. There is no exception to the dual criminality requirement for extradition.

(b) Observations on the implementation of the article

399. Tuvalu has shown that it will not grant the extradition of a person for offences that are not punishable under its domestic law. The dual criminality requirement is strictly applied for extradition cases. Tuvalu has not implemented this optional provision.

Article 44 Extradition

Paragraph 3

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

(a) Summary of information relevant to reviewing the implementation of the article

400. The law is silent on the matter of several separate offences. In practice, Tuvalu relies on section 5 of the Extradition Act, which makes reference to any extraditable offence being an offence against the law of a requesting country and/or any offence committed in Tuvalu for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more.

401. For extradition to Tuvalu, the procedure is spelled out under Part 2 of the legislation (sections 7-22) and Part 8 (sections 53-56).

402. Normally incoming requests for extradition of persons from Tuvalu would come through Tuvalu's Foreign Ministry. The Tuvalu Police Services also play a major role through their affiliation with INTERPOL. The Judiciary (Senior Magistrate) provide provisional arrest warrants upon receipt of applications submitted in accordance with the procedures provided under section 7 of the Extradition Act.

(b) Observations on the implementation of the article

403. There have been no requests for extradition of persons for multiple offences.

404. Tuvalu has explained that the law is silent in this case. This indicates that there is no specific law for several separate offences and means that the national law has not been brought into line with the Convention. Requests for extradition of persons from Tuvalu come through Tuvalu's Foreign Ministry.

Article 44 Extradition

Paragraph 4

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

(a) Summary of information relevant to reviewing the implementation of the article

405. Section 6 of the *Extradition Act* [Cap 7.24] provides for objection to extradition if the extradition offence is regarded as a political offence. A political offence is defined in section 4(1) of the *Extradition Act* “in relation to a country”, as “an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include an offence that is constituted by conduct of a kind referred to in a multilateral treaty to which Tuvalu is a party”. Therefore, political offences do not include any of the offences established in accordance with this Convention.

Extradition Act [Cap 7.24]

6 Extradition objection

There is an extradition objection to a request for the surrender of a person if:

(a) the extradition offence is regarded as a political offence;...

406. Section 4 of the *Extradition Act* defines “**political offence**” in relation to a country, as “an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

(a) an offence:

(i) that is constituted by conduct of a kind referred to in a multilateral treaty to which Tuvalu is a party; and

(ii) for which parties have an obligation to extradite or prosecute; or

(b) the offence of genocide; or

(c) an offence of:

(i) murder, kidnapping or other attack on the person or liberty; or

(ii) threatening or attempting to commit, or participating as an accomplice in, murder, kidnapping or other attack on the person or liberty, of the head of State, head of Government or Minister of the Government of the country or a member of his or her immediate family; or

(d) any other offence that Tuvalu and the other country have agreed will not be treated as a political offence for the purposes of extradition.”

407. A political offence exception is also established under section 12 of the *London Scheme for Extradition within the Commonwealth*.

POLITICAL OFFENCE EXCEPTION

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) Sub paragraph (a) shall not apply to:

(i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;

(ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.

(c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

(2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:

(i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),

(ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,

(iii) murder, or any related offence as described above,

(iv) any other offence that a country considers appropriate.

(b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

408. There have been no examples of extradition having been requested or refused involving a political offence, nor examples in case law of an extradition request involving a political offence.

(b) Observations on the implementation of the article

409. Tuvalu indicates that it has implemented the provision but has not implemented the provision in practice. Tuvalu does not consider Convention offences as political offences, in accordance with the definition in section 4(1) of the Extradition Act.

410. As noted below, Tuvalu has not to date used the Convention as a legal basis for extradition, but in principle, could do so in the future.

Article 44 Extradition

Paragraph 5

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

411. Tuvalu does not make extradition conditional on the existence of a treaty.

412. Pursuant to the *Extradition Act* (section 7), Tuvalu can entertain an extradition request with:

- a Commonwealth country—in accordance with Part 3; and
- a treaty country—in accordance with Part 5; and
- any other country other than a Pacific Island country—in accordance with Part 6.

413. The procedure for extradition to a Pacific Island country is in Part 4 of the *Extradition Act*.

414. Section 4(1) of the *Extradition Act* contains relevant definitions:

“**comity country**” means a country other than a Commonwealth country, a Pacific Island country or a treaty country;

“**Commonwealth country**” means a country that is specified in Schedule 1;

“**country**” includes:

- (a) a colony, territory or protectorate of a country; and
- (b) a territory for the international relations of which a country is responsible; and
- (c) a ship or aircraft owned by, or registered in, a country;

“**extradition treaty**”, in relation to a country, means a treaty:

- (a) to which the country and Tuvalu are parties (whether or not any other country is also a party); and
- (b) that relates wholly or partly to the surrender of persons accused or convicted of offences;

“**Pacific Island country**” means a country:

- (a) that is a member of the Pacific Forum; and
- (b) that is specified in Schedule 2;

“**treaty**” includes a convention, protocol, or agreement between 2 or more countries.

“**treaty country**” means a country:

- (a) with which Tuvalu has an extradition treaty; and
- (b) that is specified in Schedule 3;

Schedule 1 - Commonwealth Countries

Anguilla	Malaysia
Antigua and Barbuda	Maldives
Australia	Malta

Bahamas	Mauritius
Bangladesh	Montserrat
Barbados	Mozambique
Belize	Namibia
Bermuda	New Zealand
Botswana	Nigeria
British Antarctic Territory	Pakistan
British Indian Ocean Territory	Pitcairn Islands
British Virgin Islands	St Helena and Dependencies
Brunei Darussalam	St Kitts and Nevis
Cameroon	St Lucia
Canada	St Vincent and the Grenadines
Cayman Islands	Seychelles
Cyprus	Sierra Leone
Cyprus (Sovereign Base Areas of Akrotiri and Dhekelia)	Singapore
Dominica	South Georgia and South Sandwich Islands
Falkland Islands	Sri Lanka
The Gambia	South Africa
Ghana	Sri Lanka
Gibraltar	Swaziland
Grenada	Tanzania
Guyana	Trinidad and Tobago
India	Turks and Caicos Islands
Jamaica	Uganda
Kenya	United Kingdom of Great Britain and Northern Ireland
Lesotho	Zambia
Malawi	Zimbabwe

Schedule 2 – Pacific Island Countries.

Cook Islands	Nauru	Solomon Islands
Federated States of Micronesia	Niue	Tonga
Fiji	Palau	Tuvalu
Kiribati	Papua New Guinea	Vanuatu
Marshall Islands	Western Samoa	

Schedule 3 – Treaty Countries³

Argentina	Luxemburg
Belgium	Mexico
Bosnia and Herzegovina	Monaco
Chile	Nicaragua
Columbian	Norway
Croatia	Panama
Cuba	Paraguay
Denmark	Peru
Ecuador	Portugal
Federal Republic of Yugoslavia	Rumania
Former Yugoslav Republic of Macedonia	San Marino
France	Slovenia
Greece	Spain
Guatemala	Sweden
Haiti	Switzerland
Hungary	Thailand
Iceland	United States of America
Italy	Uruguay
Liberia	

415. To date, Tuvalu has not used the Convention as a legal basis for extradition, but in principle, could do so in the future.

416. As mentioned above, in *R. v Starcel Soloseni*, the accused/convict was a Tuvalu national residing on visitor permit in New Zealand, and Tuvalu requested his extradition from New Zealand back to Tuvalu. The extradition of Mr. Soloseni was executed and he faced trial, was convicted and sentenced to serve an imprisonment sentence of at least 7 years.

(b) Observations on the implementation of the article

417. Tuvalu does not make extradition conditional on the existence of a treaty. Tuvalu has not to date used the Convention as a legal basis for extradition, but could do so in principle.

³ As noted in the Explanatory Memorandum to the Extradition Act, these are countries with which Tuvalu has an inherited extradition treaty.

418. No countries have been designated as extradition countries. The list of 37 treaties in Schedule 3 is the complete and current list of extradition treaties for Tuvalu.

419. As noted in the Explanatory Memorandum to the Extradition Act, the schedules of the Act can be changed by regulation.

Article 44 Extradition

Paragraphs 6 and 7

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

(a) Summary of information relevant to reviewing the implementation of the article

420. Tuvalu indicated that it has partially implemented the provisions.

421. Pursuant to section 7 of the *Extradition Act* [Cap 7.24], extradition is not conditional on the existence of a treaty with Commonwealth, Pacific Island countries and comity countries, but is conditional on the existence of a treaty with other States.

422. Section 4 of the *Extradition Act* defines a treaty country as a country with which Tuvalu has an extradition treaty; and that is specified in Schedule 3 of the *Extradition Act*.

423. In principle, the Convention could be used as a legal basis for extradition, but it has not been used to date.

424. Tuvalu has not notified the Secretary-General of the United Nations as prescribed in article 44(6)(a) because it does not make extradition conditional on the existence of a treaty.

Extradition Act [Cap 7.24]

7 Application of Part 2

(1) This Part sets out the procedure that is to apply to requests for the extradition from Tuvalu to other countries of persons accused or convicted of extradition offences in other countries.

(2) This Part applies to extradition from Tuvalu to another country as follows:

(a) to a Commonwealth country—in accordance with Part 3; and

(b) to a treaty country—in accordance with Part 5; and

(c) to any other country other than a Pacific Island country—in accordance with Part 6.

(3) The procedure for extradition to a Pacific Island country is in Part 4.

Schedule 3 Extradition Act – Treaty Countries

Argentina	Luxemburg
Belgium	Mexico
Bosnia and Herzegovina	Monaco
Chile	Nicaragua
Columbian	Norway
Croatia	Panama
Cuba	Paraguay
Denmark	Peru
Ecuador	Portugal
Federal Republic of Yugoslavia	Rumania
Former Yugoslav Republic of Macedonia	San Marino
France	Slovenia
Greece	Spain
Guatemala	Sweden
Haiti	Switzerland
Hungary	Thailand
Iceland	United States of America
Italy	Uruguay
Liberia	

(b) Observations on the implementation of the article

425. Tuvalu does not make extradition conditional on the existence of a treaty.

426. Tuvalu recognizes Convention offences as extraditable offences, as required by paragraph 7 of article 44. As noted above, extradition offences are those punishable by death or imprisonment for a period of 1 year or more, subject to the dual criminality requirement. However, this excludes offences that Tuvalu has not criminalized. Accordingly it is recommended that Tuvalu criminalize the mandatory offences under this Convention and consider also criminalizing the non-mandatory offences, to satisfy the dual criminality requirement and ensure the full implementation of this article.

Article 44 Extradition

Paragraph 8

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

(a) Summary of information relevant to reviewing the implementation of the article

427. Section 5 of the *Extradition Act* establishes the minimum penalty requirement for extradition. Section 6 of the *Extradition Act* outlines a number of grounds upon which Tuvalu may refuse extradition.

Extradition Act [Cap 7.24]

5 Extradition offence

(1) An offence is an extradition offence if:

- (a) it is an offence against a law of the requesting country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more; and
- (b) the conduct that constitutes the offence, if committed in Tuvalu, would constitute an offence (however described) in Tuvalu for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of 1 year or more.

(2) In determining whether conduct constitutes an offence, regard may be had to only some of the acts and omissions that make up the conduct.

(3) In determining the maximum penalty for an offence for which no statutory penalty is imposed, regard shall be had to the level of penalty that can be imposed by any court in the requesting country for the offence.

(4) An offence may be an extradition offence although:

- (a) it is an offence against a law of the requesting country relating to taxation, customs duties or other revenue matters or relating to foreign exchange control; and
- (b) Tuvalu does not impose a duty, tax, impost or control of that kind.

6 Extradition objection

There is an extradition objection to a request for the surrender of a person if:

- (a) the extradition offence is regarded as a political offence; or
- (b) there are substantial grounds for believing that surrender of the person is sought for the purpose of prosecuting or punishing the person because of his or her race, religion, nationality, political opinions, sex or status, or for a political offence in the requesting country; or
- (c) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; or
- (d) the offence is an offence under the military law, but not also under the ordinary criminal law, of Tuvalu; or
- (e) final judgement has been given against the person in Tuvalu, or in a third country, for the offence; or

(f) under the law of the requesting country or Tuvalu, the person has become immune from prosecution or punishment because of lapse of time, amnesty or any other reason; or

(g) the person has already been acquitted or pardoned in the requesting country or Tuvalu, or punished under the law of that country or Tuvalu, for the offence or another offence constituted by the same conduct as the extradition offence; or

(h) the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have.

11 Authority to proceed

(1) If an extradition request is received, the Prime Minister shall:

(a) consider the request; and

(b) issue an authority to proceed if he or she is satisfied that:

(i) the offence for which extradition is sought is an extradition offence; and

(ii) the requesting country is an extradition country; and

(iii) there is nothing in section 19 or any other law that would preclude surrender of the person; and

(c) give the authority to proceed to a magistrate; and

(d) give a copy of the authority to proceed and the extradition request to the person.

(2) If an authority to proceed is received by a magistrate in relation to a person who has not been arrested under a provisional arrest warrant, the magistrate shall issue a warrant for the person's arrest.

Part 5 Extradition from Tuvalu to Treaty Countries

41 Procedure applying to extradition to treaty countries

The procedures set out in Part 2 apply to the extradition of a person from Tuvalu to a country with which Tuvalu has an extradition treaty.

[NOTE: These countries are listed in Schedule 3.] (cited above)

42 Part 2 applies subject to treaty

However, Part 2 applies subject to:

(a) any limitations, conditions, exceptions or qualifications that are contained in the extradition treaty between Tuvalu and the treaty country; and

(b) any modifications to this Act made by the regulations.

[NOTE: Regulations may make any modifications to this Act necessary to give effect to a treaty - see s. 61.]

(b) Observations on the implementation of the article

428. Section 5 of the Extradition Act establishes the minimum penalty requirement for extradition. Extradition offences are those punishable by death or imprisonment for a period of 1 year or more, subject to the dual criminality requirement. Tuvalu also recognizes conditions and grounds for refusal, subject to the terms of its treaties. Section 6

of the Extradition Act outlines a number of grounds upon which Tuvalu may refuse extradition.

429. Tuvalu has never refused an extradition request to date.

Article 44 Extradition

Paragraph 9

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

430. Tuvalu indicated that it has partially implemented the provision.

431. There are different evidentiary requirements in the *Extradition Act*, depending on the country requesting the extradition.

- In general, Part 2—Extradition from Tuvalu—General Provisions, Division 1—General.
- Commonwealth Countries—Part 3 Extradition from Tuvalu to Commonwealth Countries.
- Pacific Island Countries—Part 4 Extradition from Tuvalu to Pacific Island Countries—Backing of Warrants Procedure.
- Treaty Countries—Part 5 Extradition from Tuvalu to Treaty Countries.
- Comity Countries—Part 6 Extradition from Tuvalu to Comity Countries.
- Extradition to Tuvalu—Part 8 Extradition to Tuvalu.

432. There is no a case management system to track extradition requests (incoming/outgoing), nor are there internal extradition guidelines or manuals.

(b) Observations on the implementation of the article

433. Tuvalu indicates that it has partially implemented the provision. There is no case management system to track extradition requests (incoming/outgoing), nor are there internal extradition guidelines or manuals.

434. Tuvalu explained that normally incoming requests for extradition of persons from Tuvalu would come through Tuvalu's Foreign Ministry. The Tuvalu Police Services also play a major role through their affiliation with INTERPOL. The Judiciary (Senior Magistrate) provide provisional arrest warrants upon receipt of applications submitted in accordance with the procedures provided under section 7 of the Extradition Act.

435. The Prime Minister is the central authority to decide on matters of extradition.

436. Based on a review of the legislation – and the absence of any written extradition regulations or procedures – Tuvalu could consider adopting measures to simplify and streamline procedures and evidentiary requirements on extradition (such as internal

guidelines and/or a request management system) in order to allow for extradition requests to be dealt with efficiently and effectively. The need to ensure that extradition proceedings are carried out expeditiously was confirmed by the authorities during the country visit, based on the case of *R. v Starcel Soloseni*, which took 7 months to complete (there were no appeals in the case).

Article 44 Extradition

Paragraph 10

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

437. Sections 8-12 inclusive of the *Extradition Act* outline the procedures and requirements for the issue of a provisional arrest warrant.

438. Sections 3-6 of the *London Scheme for Extradition within the Commonwealth*, incorporating the amendments agreed at Kingstown in November 2002 deals with warrants, provisional warrants, committal proceedings and optional alternative committal proceedings.

Extradition Act [Cap 7.24]

Part 2 Extradition from Tuvalu—General Provisions

8 Issue of provisional arrest warrant

(1) If:

(a) a country, either directly or through ICPO-Interpol, notifies Tuvalu that:

(i) a person wanted for surrender is, or is believed to be, in or on his or her way to Tuvalu; and

(ii) the requesting country intends to make a formal request for the extradition of the person; and

(b) an application is made to a magistrate for a provisional arrest warrant;

then the magistrate shall issue the provisional arrest warrant for the person if:

(c) the application is supported by the required documents; and

(d) the magistrate is satisfied that the offence is an extradition offence; and

(e) the magistrate is satisfied that the request is made by an extradition country.

(2) The required documents are:

(a) a copy of the warrant for the arrest of the person issued in the requesting country; and

(b) a description of the person sought; and

- (c) a description of the acts and omissions that constitute the offence; and
- (d) the text of the law creating the offence or, if the offence is not created by statute, a statement of the offence; and
- (e) the text of the law of the requesting country that prescribes the penalty or, if the penalty is not prescribed by statute, a statement of the penalty that can be imposed.

9 Arrest and remand on provisional arrest warrant

(1) A person arrested under a provisional arrest warrant shall be brought before a magistrate as soon as practicable.

(2) The magistrate shall:

- (a) remand the person in custody; or
- (b) if the magistrate is satisfied that the person is unlikely to abscond—remand the person on bail;

until the Prime Minister issues an authority to proceed.

(3) A magistrate who remands a person on bail:

- (a) has the same powers in relation to recognisances and reporting conditions as he or she has under the criminal laws of Tuvalu; and
- (b) may order that the person's passport and other travel documents be surrendered to the magistrate until the extradition proceedings in relation to the person are concluded

(4) A person shall not be remanded in custody or on bail for a period longer than 42 days.

(5) As soon as possible after remanding the person, the magistrate shall:

- (a) tell the Prime Minister:
 - (i) that the magistrate has remanded the person; and
 - (ii) the name of the requesting country; and
 - (iii) the offence for which surrender will be sought; and
- (b) give a copy of the authority to proceed, the extradition request and the documents on which the issue of the provisional arrest warrant is based to the Prime Minister and the person.

(6) If the Prime Minister considers that the request for extradition of the person for the offence will not be granted, either because of an extradition objection or because of a matter mentioned in section 16, he or she shall order:

- (a) the person to be released; or
- (b) the discharge of the recognisance on which bail was granted.

10 Release from remand

(1) If:

- (a) a person continues to be on remand (in custody or on bail) either:
 - (i) 42 days after the day on which the person was arrested; or
 - (ii) if the extradition treaty between Tuvalu and the requesting country provides for another period – for that period after the day on which the person was arrested; and
- (b) the Prime Minister has not issued an authority to proceed,

the person shall be brought before a magistrate.

(2) The magistrate may remand the person, in custody or on bail, for a further period of not more than 42 days if the magistrate is satisfied that an authority to proceed will be issued within that period.

(3) If the magistrate is not so satisfied, the magistrate shall order:

- (a) the release of the person from custody; or
- (b) the discharge of the recognisances on which bail was granted.

11 Authority to proceed

(1) If an extradition request is received, the Prime Minister shall:

- (a) consider the request; and
- (b) issue an authority to proceed if he or she is satisfied that:
 - (i) the offence for which extradition is sought is an extradition offence; and
 - (ii) the requesting country is an extradition country; and
 - (iii) there is nothing in section 19 or any other law that would preclude surrender of the person; and
- (c) give the authority to proceed to a magistrate; and
- (d) give a copy of the authority to proceed and the extradition request to the person.

(2) If an authority to proceed is received by a magistrate in relation to a person who has not been arrested under a provisional arrest warrant, the magistrate shall issue a warrant for the person's arrest.

12 Arrest and remand on authority to proceed

(1) A person who is arrested under a warrant issued under section 11 shall be brought before a magistrate as soon as practicable.

(2) The magistrate shall:

- (a) remand the person in custody; or
- (b) if the magistrate is satisfied that the person is unlikely to abscond—remand the person on bail;

for the period that is necessary for proceedings under section 13 (dealing with consent to surrender) or 14 (dealing with extradition proceedings), or both, to be conducted.

(3) A magistrate who remands a person

- (a) has the same powers in relation to recognisances and reporting conditions as he or she has under the criminal laws of Tuvalu; and
- (b) may order that the person's passport and other travel documents be surrendered to the magistrate until the extradition proceedings in relation to the person are concluded.

(4) If a magistrate remands the person in custody after the person has made an application for bail, the person is not entitled to apply to any other magistrate for release on bail during that remand, unless the first magistrate is no longer available.

London Scheme for Extradition within the Commonwealth

WARRANTS, OTHER THAN PROVISIONAL WARRANTS

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either -

(a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or

(b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.

(2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

PROVISIONAL WARRANTS

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.

(2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.

(3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.

(4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

COMMITTAL PROCEEDINGS

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought, as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.

(3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix:

(a) a warrant has not been endorsed or issued in accordance with clause 3(1), or

(b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued,

the competent judicial authority will order the person to be discharged.

(4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if -

(a) such evidence is produced as establishes a prima facie case that the person committed the offence; and

(b) extradition is not precluded by law but, otherwise, will order the person to be discharged.

(5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

OPTIONAL ALTERNATIVE COMMITMENTAL PROCEEDINGS

6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.

(2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if -

(a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and

(b) extradition is not precluded by law, but otherwise will order that the person be discharged.

(3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by -

(a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and

(b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a prosecution.

(4) A record of the case will contain -

(a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;

(b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;

(c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition;

(d) a recital of the evidence acquired to support the request for extradition; and

(e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

439. There have been no examples where persons have been arrested in Tuvalu for extradition.

(b) Observations on the implementation of the article

440. The Extradition Act in sections 8-12 inclusive outlines the procedures and requirements for the issue of a provisional arrest warrant. Tuvalu has legislatively implemented the provision.

Article 44 Extradition

Paragraph 11

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

441. Tuvalu does not extradite its own citizens, pursuant to section 58 (Prosecution, instead of extradition, of citizens of Tuvalu) of the *Extradition Act*. Relevantly, section 58(3) states that “For the purpose of the prosecution, the person is taken to have engaged in the conduct in Tuvalu”.

442. Therefore, if Tuvalu were not to extradite a person and the requesting State were to request that the person be prosecuted, Tuvalu would prosecute (*aut dedere aut judicare*).

443. In addition, a ground for refusing extradition under section 6(h) of the Extradition Act is that “the judgment has been given in the person’s absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have.”

Extradition Act [Cap 7.24]

6 Extradition objection

There is an extradition objection to a request for the surrender of a person if:

...

(h) the judgment has been given in the person’s absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have.

58 Prosecution, instead of extradition, of citizens of Tuvalu

(1) If:

(a) a country requests the surrender of a person because of conduct the person engaged in outside Tuvalu; and

(b) the Prime Minister refuses to order the surrender of the person because of a circumstance listed in subsection (2); and

(c) the person would have committed an offence against a law in force in Tuvalu if the person had engaged in the conduct, or equivalent conduct, in Tuvalu at that time, the person may be prosecuted and punished in Tuvalu for the offence.

(2) The following are the circumstances for the purpose of paragraph (1)(b):

(a) the person is a citizen of Tuvalu; or

(b) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; or

(c) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or

(d) the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have; or

(e) the offence for which surrender has been ordered is punishable by death in the requesting country but not in Tuvalu and the requesting country has not given a sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out; or

(f) the person has been sentenced, or would be liable to be tried or sentenced, in the requesting country by an extraordinary or ad hoc tribunal.

(3) For the purpose of the prosecution, the person is taken to have engaged in the conduct in Tuvalu.

(4) A person shall not be prosecuted unless the Attorney-General:

(a) considers that there is sufficient evidence in Tuvalu to justify prosecuting the person for the offence; and

(b) orders that the person be prosecuted for the offence.

(5) A person may be prosecuted whether the person engaged in the conduct before or after the commencement of this Act.

(6) A person to whom subsection (1) applies may be:

(a) arrested for an offence mentioned in paragraph (1)(c); and

(b) charged with the offence; and

(c) remanded in custody or on bail,

although the Solicitor-General has not made an order under subsection (3).

444. As noted above, Tuvalu has not received any request to extradite a Tuvalu national to a requesting country.

(b) Observations on the implementation of the article

445. Tuvalu does not extradite its citizens, pursuant to section 58 (Prosecution, instead of extradition, of citizens of Tuvalu) of the Extradition Act. Tuvalu would prosecute a national whose extradition is refused under the same circumstances as any other offender, in accordance with sections 58(3) to (6) of the Extradition Act. However, prosecution of nationals is not mandatory under section 58(1), and the matter is subject to the discretion

of the Attorney-General under section 58(4). It is recommended that Tuvalu amend its legislation to ensure that prosecutorial discretion cannot be exercised to inhibit the domestic prosecution of nationals whose extradition is refused.

446. There have been no cases where the extradition of nationals was refused.

Article 44 Extradition

Paragraph 12

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

447. Section 21 of the *Extradition Act* provides for the issue of a temporary surrender warrant, generally, while section 39 of the *Extradition Act* provides for the issue of a temporary surrender warrant specifically to Pacific Island Countries. Where the expression “temporary surrender warrant” is used in Part 2 (Extradition from Tuvalu—General Provisions), the warrant must be in accordance with Form 5 in Schedule 4. Where the expression is used in Part 4 (Extradition from Tuvalu to Pacific Island Countries—Backing of Warrants Procedure), the warrant must be in accordance with Form 6 in Schedule 4 (see definition of “temporary surrender warrant” in section 4 *Extradition Act*).

Extradition Act [Cap 7.24]

4 Interpretation

(1) In this Act, unless the context otherwise requires:

“temporary surrender warrant” means:

- (a) where the expression is used in Part 2—a warrant, in accordance with Form 5 in Schedule 4, issued under section 21; or
- (b) where the expression is used in Part 4—a warrant, in accordance with Form 6 in Schedule 4, issued under section 39;

21 Temporary surrender warrant

(1) The Prime Minister may issue a temporary surrender warrant instead of a surrender warrant if:

- (a) the person is serving a custodial sentence in Tuvalu; and
- (b) surrender is sought for an offence of which the person is accused but of which the person has not been convicted; and
- (c) the Prime Minister is satisfied that the requesting country has given an adequate undertaking that:
 - (i) the person will be given a speedy trial in the requesting country; and

- (ii) the person will be returned to Tuvalu after the trial; and
 - (d) the Prime Minister is satisfied that adequate provision has been made for the travel of the person to the requesting country and for his or her return to Tuvalu.
- (2) The temporary surrender warrant shall:
- (a) be in writing, in accordance with Form 4; and
 - (b) state the offences for which the person is to be surrendered; and
 - (c) require any person who has custody of the person to hand the person over to a police officer; and
 - (d) authorise a police officer to:
 - (i) transport the person from the place where the police officer takes custody of the person to another place within Tuvalu for the purpose of handing the person over to the custody of a foreign escort officer; and
 - (ii) hold the person in custody for so long as is necessary to enable the person to be handed over to the foreign escort officer; and
 - (e) authorise the foreign escort officer to transport the person out of Tuvalu.
- (3) If a person who was the subject of a temporary surrender warrant:
- (a) has been returned to Tuvalu after trial and sentence in the requesting country; and
 - (b) has completed his or her custodial sentence in Tuvalu,
- the Prime Minister shall issue a surrender warrant for the surrender of the person to the requesting country, unless the Prime Minister is satisfied that it would be unjust or oppressive to surrender the person because of changed circumstances in the requesting country.
- (4) Any time the person spends in custody in the requesting country as a result of the temporary surrender is taken to be time spent in custody in Tuvalu for the purpose of completing the sentence for which the person was in custody in Tuvalu.
- (5) If:
- (a) time spent in custody in the requesting country is taken into account as mentioned in subsection (3); and
 - (b) because of this, the person's sentence in Tuvalu is concluded, the Prime Minister shall tell the requesting country that the undertakings given by that country about the speedy trial and return of the person no longer apply.

39 Temporary surrender warrant

- (1) The Prime Minister may issue a temporary surrender warrant instead of a surrender warrant if:
- (a) the person is serving a custodial sentence in Tuvalu; and
 - (b) surrender is sought for an offence of which the person is accused but of which the person has not been convicted; and
 - (c) the Prime Minister is satisfied that the Pacific Island country has given an adequate undertaking that:
 - (i) the person will be given a speedy trial in the Pacific Island country; and
 - (ii) the person will be returned to Tuvalu after the trial; and

(d) the Prime Minister is satisfied that adequate provision has been made for the travel of the person to the Pacific Island country and for his or her return to Tuvalu.

(2) The temporary surrender warrant shall:

(a) be in writing, in accordance with Form 6; and

(b) state the offences for which the person is to be surrendered; and

(c) require any person who has custody of the person to hand the person over to a police officer; and

(d) authorise a police officer to:

(i) transport the person from the place where the police officer takes custody of the person to another place within Tuvalu for the purpose of handing the person over to the custody of a foreign escort officer; and

(ii) hold the person in custody for so long as is necessary to enable the person to be handed over to the foreign escort officer; and

(e) authorise the foreign escort officer to transport the person out of Tuvalu.

(3) If a person who was the subject of a temporary surrender warrant:

(a) has been returned to Tuvalu after trial and sentence in the Pacific Island country; and

(b) has completed his or her custodial sentence in Tuvalu, the Prime Minister shall issue a surrender warrant for the surrender of the person to the Pacific Island country, unless the Prime Minister is satisfied that it would be unjust or oppressive to surrender the person because of changed circumstances in the Pacific Island country.

(4) Any time the person spends in custody in the Pacific Island country as a result of the temporary surrender is taken to be time spent in custody in Tuvalu for the purpose of completing the sentence for which the person was in custody in Tuvalu.

(5) If:

(a) time spent in custody in the Pacific Island country is taken into account as mentioned in subsection (3); and

(b) because of this, the person's sentence in Tuvalu is concluded, the Prime Minister shall tell the Pacific Island country that the undertakings given by that country about the speedy trial and return of the person no longer apply.

(b) Observations on the implementation of the article

448. The provisions on temporary surrender of persons do not seem relevant to this provision, which deals with the conditional surrender of nationals. Tuvalu does not make the extradition of its nationals conditional on their returning to Tuvalu to serve the remainder of their sentence.

Article 44 Extradition

Paragraph 13

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

(a) Summary of information relevant to reviewing the implementation of the article

449. Tuvalu indicated that it has not implemented the provision. There is no law or practice on this issue.

(b) Observations on the implementation of the article

450. During the country visit the authorities explained that Tuvalu could consider enforcing a foreign sentence against a national where his or her extradition is refused, but that it would not be required to do so.

Article 44 Extradition

Paragraph 14

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

(a) Summary of information relevant to reviewing the implementation of the article

451. Tuvalu indicated that it has partially implemented the provision.

452. Section 15 of the *Extradition Act* provides that “extradition proceedings shall be conducted in the same manner as criminal proceedings. In particular, the rules that apply in criminal proceedings to the following matters apply to extradition proceedings”

Extradition Act [Cap 7.24]

15 Conduct of extradition proceedings

(1) Extradition proceedings shall be conducted in the same manner as criminal proceedings. In particular, the rules that apply in criminal proceedings to the following matters apply to extradition proceedings:

- (a) summoning witnesses;
- (b) remanding defendants;
- (c) ordering the production of documents;
- (d) administration of oaths and affirmations;
- (e) payment of witness expenses;
- (f) contempt of court, privilege and other matters relating to the administration of courts;
- (g) the imposition and level of fines for offences.

(2) In the proceedings, the person is not entitled to bring, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which extradition is sought.

453. Articles 11 and 22 of the *Constitution* are also relevant and apply to “every person in Tuvalu”.

Constitution of Tuvalu [Cap 1.02]

11 The fundamental human rights and freedoms

“(1) Every person in Tuvalu is entitled, whatever his race, place of origin, political opinions, colour, religious beliefs or lack of religious beliefs, or sex, to the following fundamental rights and freedoms: — ...

(d) the protection of the law (see section 22)...

22 Protection of law

(2) If a person is charged with an offence, unless the charge is withdrawn he shall be given a fair hearing within a reasonable time by an independent and impartial court established by law.

(3) A person charged with an offence —

(a) subject to subsection (14)(a), shall be presumed to be innocent until —

(i) he is proved guilty; or

(ii) he has pleaded guilty and the plea has been accepted by the court; and

(b) shall be informed as soon as practicable, in detail and in a language that he understands, of the precise nature and particulars of the offence charged, and if the information is not given in writing it shall be confirmed in writing as soon as practicable; and

(c) shall be given adequate time and facilities for the preparation of his defence, including time to study and fully understand the precise charge against him, and its possible consequences; and

(d) shall be given reasonable facilities to consult, at his own expense, a representative of his own choice; and

(e) shall be permitted to defend himself before the court in person or, at his own expense, by a representative of his own choice; and

(f) subject to subsection (14)(b), shall be given adequate facilities —

(i) to examine, in person or by his representative, the witnesses called before the court by the prosecution; and

(ii) to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on conditions no less advantageous than those applying to witnesses called by the prosecution; and

(g) shall be permitted to have without payment the assistance of a competent interpreter, if he cannot adequately understand the language used at the trial or any part of the trial.

(4) Except with his consent, the trial shall not take place in his absence unless —

(a) he behaves in such a way as to make it impracticable or unreasonable to continue the proceedings in his presence; and

(b) the court orders his removal and the continuance of the trial in his absence.

(5) When a person is tried for an offence, the accused person or a person authorized by him for the purpose is entitled, on request and on payment of such reasonable fee (if any) as is prescribed, to be given within a reasonable time after judgment a copy, for the use of the accused person, of any record of the proceedings made by or on behalf of the court.

(6) No-one shall be convicted of an offence on account of an act that was not, at the time of the doing of the act, an offence or a legal element of an offence.

(7) No penalty shall be imposed for an offence that is more severe in amount or in kind than the maximum that might have been imposed for the offence at the time when it was committed.

(8) Subject to subsection (14)(c), no-one who shows that he has been tried for an offence by a competent court and was either —

(a) convicted; or

(b) acquitted,

shall again be tried for —

(c) the same offence; or

(d) any other offence of which he could have been convicted at the trial of that offence,

except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(9) No-one shall be tried for an offence if he shows that —

(a) he has been pardoned for the offence; and

(b) if the pardon was a conditional pardon, he has complied with the conditions of the pardon.

(10) No-one who is tried for an offence shall be compelled to give evidence at the trial.

(11) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be —

(a) established or recognised by law; and

(b) independent and impartial,

and where proceedings for such a determination are instituted by a person before such a court or authority the case shall be given a fair hearing within a reasonable time.

(12) Subject to subsection (13), except with the consent of all the parties to the proceedings —

(a) all proceedings before a court; and

(b) all proceedings before any other adjudicating authority for the determination of the existence or extent of any civil right or obligation,

including the announcement of the decision, shall be held in public.

(13) Subsection (12) does not prevent the court or other authority from excluding from the proceedings persons other than the parties, and the representatives in the proceedings of the parties, to such extent as the court or authority —

- (a) is by law empowered to do so and thinks it necessary or desirable to do so —
 - (i) if publicity would not be in the interests of justice; or
 - (ii) in interlocutory proceedings, that is to say, in proceedings of a kind described in subsection (16); or
 - (iii) in the interests of —
 - (A) decency; or
 - (B) public morality; or
 - (C) the welfare of persons under the age of 18 years; or
 - (D) the protection of the privacy of persons concerned in the proceedings; or
- (b) is by law empowered or required to do so in the interests of —
 - (i) defence; or
 - (ii) public safety; or
 - (iii) public order.

(14) Nothing in or done under a law shall be considered to be inconsistent with —

- (a) subsection (3)(a) - to the extent that the law imposes upon a person charged with an offence the burden of proving or disproving certain facts which are particularly within his knowledge or his capacity to prove or disprove; or
- (b) subsection (3)(f) - to the extent that the law imposes reasonable conditions that must be satisfied if witnesses called on behalf of an accused person are to be paid expenses out of public funds; or
- (c) subsection (8) - subject to subsection (15), to the extent that the law authorizes a court to try a member of a disciplined force even though he has been tried and either —
 - (i) convicted; or
 - (ii) acquitted,

under the disciplinary law of that force.

(15) In a case to which subsection 14(c) applies, the court that tries the member shall, in sentencing him to punishment, take into account any punishment given to him under the disciplinary law.

(16) In subsection (13)(a)(ii), "interlocutory proceedings" refers to any judicial proceedings that —

- (a) occur during or for the purposes of some other legal proceedings (referred to in this subsection as "the principal proceedings"); and
- (b) are incidental to the principal proceedings; and
- (c) do not finally dispose of the principal proceedings.

(b) Observations on the implementation of the article

454. Tuvalu indicates that it has partially implemented the provision. It was confirmed that extradition proceedings are conducted in the same manner and subject to the same safeguards as criminal proceedings. Tuvalu's legislation specifies which rules applicable in criminal proceedings apply to extradition proceedings (section 15 of the Extradition Act). The fundamental rights and due process protections enshrined in articles 11 and 22 of the Constitution are also applicable.

455. There have been no cases where the issue of fair treatment was raised in extradition proceedings.

Article 44 Extradition

Paragraph 15

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

(a) Summary of information relevant to reviewing the implementation of the article

456. Tuvalu indicated that it has partially implemented the provision.

457. Section 6(2) of the Extradition Act provides for an objection to an extradition request on the basis of sex, race, religion, nationality, political opinions or for a political offence. The section does not, however, cover 'ethnic origin'.

458. There is no case law or other guidance as to whether ethnic origin would be covered under section 6(2).

Extradition Act [Cap 7.24]

6 Extradition objection

"There is an extradition objection to a request for the surrender of a person if: ...

(b) there are substantial grounds for believing that surrender of the person is sought for the purpose of prosecuting or punishing the person because of his or her race, religion, nationality, political opinions, sex or status, or for a political offence in the requesting country; or

(c) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status;..."

(b) Observations on the implementation of the article

459. Tuvalu indicates that it has partially implemented the provision. Section 6(2) of the Extradition Act provides for an objection to an extradition request on the basis of discrimination on the grounds of sex, race, religion, nationality, political opinions or for a political offence. However, the section does not cover 'ethnic origin'.

460. The authorities explained that article 11 of the Constitution does not explicitly protect against discrimination on the ground of ethnic origin. In the absence of any legislation, case law or other guidance to protect against discrimination on grounds of ethnic origin, it is recommended that Tuvalu specify the matter in its legislation.

Article 44 Extradition

Paragraph 16

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

461. Section 5(4) of the *Extradition Act* provides that an offence may be an extradition offence even though it is also considered to involve fiscal matters.

Extradition Act [Cap 7.24]

5 Extradition offence

(4) An offence may be an extradition offence although:

- (a) it is an offence against a law of the requesting country relating to taxation, customs duties or other revenue matters or relating to foreign exchange control; and
- (b) Tuvalu does not impose a duty, tax, impost or control of that kind.

(b) Observations on the implementation of the article

462. Tuvalu has legislatively implemented the provision. There have been no requests for extradition of persons in matters involving taxation of fiscal matters.

Article 44 Extradition

Paragraph 17

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(a) Summary of information relevant to reviewing the implementation of the article

463. Tuvalu has not implemented the provision.

464. Sections 16 and 17 of the *Extradition Act* require supporting documentation to be provided to the magistrate to determine whether a person should be extradited. In addition, section 7 of the *London Scheme for Extradition within the Commonwealth* also provides for supplementary information to be provided. However, there is no legislative requirement to consult prior to refusing extradition.

Extradition Act [Cap 7.24]

16 Determination whether person may be surrendered

(1) The magistrate shall not order that a person be held in custody for surrender to the requesting country unless the magistrate is satisfied:

- (a) that the requesting country is an extradition country; and
- (b) that the surrender offence is an extradition offence; and
- (c) as to the identity of the person; and
- (d) that the supporting documents have been produced to the magistrate; and
- (e) that the supporting documents satisfy the requirements of section 17; and
- (f) that surrender should not be refused because the person sought has established an extradition objection.

(2) If the magistrate determines that the person be held in custody for surrender, the magistrate shall:

- (a) issue a warrant, ordering that the person be committed to prison to await the Prime Minister's decision on surrender; and
- (b) tell the person that he or she may, within 15 days after the day on which the order is made, seek a review of the order under subsection 18 (1); and
- (c) record in writing his or her decision and the extradition offence for which the person should be surrendered; and
- (d) give a copy of the record to the person and the Prime Minister

(3) If:

- (a) the magistrate determines that the person be held in custody for surrender for an extradition offence; and
- (b) the requesting country has asked that the person also be surrendered for another offence that is not an extradition offence: the magistrate shall ask the person whether the person also consents to being surrendered for that other offence.

(4) If the magistrate determines that the person should not be surrendered to the requesting country, the magistrate shall:

- (a) order that the person be released; and
- (b) tell the Prime Minister in writing of the order and of the magistrate's reasons for determining that the person should not be surrendered.

17 Supporting documents

(1) In paragraph 16(1)(d), "supporting documents", in relation to an extradition offence, means:

- (a) as accurate a description as possible of the person sought, together with any other information that may help to establish the identity and nationality of the person; and
- (b) the text of the law creating the offence or, if the offence is not created by statute, a statement of the offence; and
- (c) the text of the law of the requesting country that prescribes the penalty or, if the penalty is not prescribed by statute, a statement of the penalty that can be imposed; and
- (d) a statement of the acts and omissions that constitute the offence, and details of the time and place the offence was committed; and
- (e) if the person is accused of the offence — a duly authenticated warrant issued by the requesting country for the arrest of the person for the offence, or a duly authenticated copy of the warrant; and
- (f) if the person has been convicted of the offence — duly authenticated documents that provide evidence of:
 - (i) the conviction; and
 - (ii) the sentence imposed or intended to be imposed; and
 - (iii) whether the sentence imposed has been carried out; and
 - (iv) whether the sentence is immediately enforceable.

(2) If:

- (a) a document relevant to the proceedings contains a deficiency; and
 - (b) the magistrate considers the deficiency to be minor, the magistrate shall adjourn the proceedings for a reasonable period to allow the deficiency to be remedied.
- (3) Any document that is duly authenticated is admissible in the proceedings.
- (4) A document that is sought by or on behalf of the requesting country to be admitted in the proceedings is duly authenticated if:
- (a) it purports to be signed or certified by a judge, magistrate or officer in or of the requesting country; and
 - (b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal:
 - (i) in any case—of the requesting country or of a Minister, Department of State or Department or officer of the Government of that country; or
 - (ii) if the extradition country is a colony, territory or protectorate—of the person administering the Government of that country or of any person administering a Department of the Government of that country.

(5) Nothing in this section prevents the proof of any matter or the admission of any document in the proceedings in accordance with any other law of Tuvalu.

London Scheme for Extradition within the Commonwealth

SUPPLEMENTARY INFORMATION

7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.

(2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

(b) Observations on the implementation of the article

465. Tuvalu has not implemented the provision. It is explained that there is no legislative requirement to consult prior to refusing extradition.

466. The reviewers recommend that Tuvalu adopt a corresponding provision in its legislation.

Article 44 Extradition

Paragraph 18

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

467. No information was provided by Tuvalu as to its treaty partner countries.

(b) Observations on the implementation of the article

468. It was confirmed by the authorities during the country visit that the list of 37 treaties in Schedule 3 (quoted under paragraph 5 of article 44 above) is the complete and current list of extradition treaties for Tuvalu.

Article 45 Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

(a) Summary of information relevant to reviewing the implementation of the article

469. Tuvalu indicated that it has partially implemented the article.

470. The *Scheme for the Transfer of Convicted Offenders with the Commonwealth* applies to Commonwealth countries.

471. Section 60 of the *Extradition Act* permits surrender of a person for the purposes of trial only. Section 60 is limited in its breadth as it only applies “for the purpose of being tried in the requesting country for the offence for which extradition is sought”.

Extradition Act [Cap 7.24]

60 Surrender for purposes of trial only

“(1) If:

(a) Tuvalu refuses to surrender a person because:

(i) the person is a citizen of Tuvalu; or

(ii) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or

(b) a magistrate determines under section 36 that a person should not be surrendered because the prison conditions in the requesting country are not substantially equivalent to the minimum standards for imprisonment in Tuvalu,

and the requesting country asks that the person be surrendered for the purposes of trial only, Tuvalu may surrender the person to the other country for the purpose of being tried in the requesting country for the offence for which extradition is sought if:

(c) the law of the requesting country permits the transfer of convicted offenders to Tuvalu; and

(d) Tuvalu is satisfied that if the person is convicted the person will be returned to Tuvalu to serve the sentence imposed; and

(e) Tuvalu is satisfied that there is no likelihood that the person will be subjected to torture or cruel, inhuman or degrading treatment or punishment.”

472. No case examples were provided.

(b) Observations on the implementation of the article

473. Tuvalu has partially implemented the article. There is no law or practice on the transfer of sentenced persons apart from the prisoner transfer scheme among Commonwealth countries.

474. It was confirmed during the country visit that there have been no cases of prisoner transfer to or from Tuvalu. However, a case was pending at the time of the visit, in which two prisoners of Fijian nationality requested their transfer to Fiji.

Article 46 Mutual legal assistance

Paragraph 1

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

475. The objects of the *Mutual Assistance in Criminal Matters Act* are listed in section 3 of the Act.

Mutual Assistance in Criminal Matters Act [Cap 7.40] (MACMA)

3 Objects of Act

The objects of this Act are:

- (a) to regulate the provision by Tuvalu of international assistance in criminal matters when a request is made by a foreign country for any of the following:
 - (i) the taking of evidence, or the production of a document or other article, for a proceeding in the foreign country;
 - (ii) the issue of a search warrant and seizure of any thing relevant to a proceeding or investigation in the foreign country;
 - (iii) the forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country;
 - (iv) the restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country; and
- (b) to facilitate Tuvalu providing international assistance in criminal matters when a request is made by a foreign country to make arrangements for a person who is in Tuvalu to travel to the foreign country:
 - (i) to give evidence in a proceeding; or
 - (ii) to give assistance for an investigation; and
- (c) to facilitate Tuvalu obtaining similar international assistance in criminal matters.

4 Application

This Act applies for all foreign countries.

6 Act not to limit other provision of assistance

This Act does not limit the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under this Act.

476. Section 5 of the *Mutual Assistance in Criminal Matters Act* defines the following terms:

“authorised officer”, for a provision of this Act, means a person, or a person in a class of persons, designated in writing as an authorised person for the provision;

“criminal matter” includes a matter (whether arising under Tuvalu law or a law of another country) relating to:

- (a) the forfeiture or confiscation of property for an offence; or
- (b) the restraining of dealings in property that may be forfeited or confiscated for an offence;

“serious offence” has the same meaning as in the *Proceeds of Crime Act*. Section 4 of the *Proceeds of Crime Act* provides the following definition:

“serious offence” means:

- (a) an offence against a law of Tuvalu for which the maximum penalty imprisonment for 12 months or longer; or
- (b) an offence against the law of another country that, if the relevant act or omission had occurred in Tuvalu, would be an offence against the law of Tuvalu for which the maximum penalty is imprisonment for 12 months or longer;

Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in

- a) identifying and locating persons;
- b) serving documents;
- c) examining witnesses;
- d) search and seizure;
- e) obtaining evidence;
- f) facilitating the personal appearance of witnesses;
- g) effecting a temporary transfer of persons in custody to appear as a witness;
- h) obtaining production of judicial or official records;
- i) tracing, seizing and confiscating the proceeds or instrumentalities of crime; and
- j) preserving computer data.

477. Two cases of mutual legal assistance requests, to and from Tuvalu respectively, were provided. As noted above, in the case *R. v Starcel Soloseni*, the accused/convict, a Tuvalu national, was extradited from New Zealand on a request for his extradition back to Tuvalu. The New Zealand authorities also made a request for assistance, which was executed by Tuvalu under the provisions of the Mutual Assistance in Criminal Matters Act [Cap 7.40]. The second case of *R. v. Nelson*, in which Tuvalu requested assistance from New Zealand, is also referred to.

478. There has been no application by Tuvalu of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth*.

(b) Observations on the implementation of the article

479. Pursuant to the Mutual Assistance in Criminal Matters Act [Cap 7.40] (MACMA) and the Commonwealth Scheme, Tuvalu can provide a range of mutual legal assistance (MLA) to Commonwealth and other foreign countries. Tuvalu has not entered into any MLA treaties.

480. There are no regulations or procedures (legislative or otherwise) that guide the execution of mutual legal assistance requests in a time-bound manner. It is recommended that Tuvalu consider adopting relevant regulations.

481. It was explained during the country visit that there have been two MLA requests to-date:

1) *R. v. Nelson*: In 2016, Tuvalu requested previous conviction data from New Zealand through mutual legal assistance.

2) In the extradition case *R. v Starcel Soloseni* referred to under article 44(1) above, following an extradition request by Tuvalu for the extradition of a Tuvalu citizen, the New Zealand authorities in 2007/2008 made a formal MLA request for evidence on crime data regarding the defendant. The matter was a rape case, not related to corruption, and Tuvalu provided the requested information and the extradition was carried out successfully.

Article 46 Mutual legal assistance

Paragraph 2

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

482. Section 10(1) of the *Interpretation and General Provisions Act* [Cap 1.04] provides that the word “‘person’ or any word or expression descriptive of a person includes any public body and any company, and association or body of persons, corporate or unincorporate, and this definition applies notwithstanding that the word “person” occurs in a provision creating or relating to an offence for the recovery of any fine or compensation.”

483. Sections 7-9 of the *Mutual Assistance in Criminal Matters Act* [Cap 7.40] cover requests by Tuvalu and by foreign countries for assistance in “a criminal matter.”

Mutual Assistance in Criminal Matters Act [Cap 7.40]

PART 2 - REQUESTS FOR ASSISTANCE GENERALLY

7 Requests by Tuvalu for assistance generally

A request for international assistance in a criminal matter that Tuvalu is authorised to make under this Act may be made only by the Attorney-General.

8 Request by foreign countries for assistance generally

(1) A request under this Act by a foreign country for international assistance in a criminal matter must be made to the Attorney-General or a person authorised by the Attorney-General to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include the following information:

- (a) the name of the authority concerned with the criminal matter to which the request relates;
- (b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
- (c) a description of the purpose of the request and of the nature of the assistance being sought;
- (d) any information that may assist in giving effect to the request.

(3) Failure to comply with subsection (2) is not a ground for refusing the request, but the Attorney-General is not obliged to consider the request until the subsection is complied with.

(4) If a foreign country makes a request to a person authorised under subsection (1), the request is taken, for this Act, to have been made to the Attorney-General.

(5) If a foreign country makes a request to the Court for international assistance in a criminal matter:

- (a) the Court must refer the request to the Attorney-General; and
- (b) the request is then taken, for this Act, to have been made to the Attorney-General.

9 Assistance may be provided subject to conditions

Assistance under this Act may be provided to a foreign country subject to any conditions that the Attorney-General determines.

484. Further, the *Mutual Assistance in Criminal Matters Act* provides:

6 Act not to limit other provision of assistance

This Act does not limit the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under this Act.

(b) Observations on the implementation of the article

485. As noted under article 26 above, Tuvalu recognizes the criminal liability of legal persons. Thus, in principle there are no legal obstacles to the ability of Tuvalu's authorities to render assistance in criminal matters for offences involving legal persons.

486. There have been no requests for mutual legal assistance involving companies or other legal entities.

Article 46 Mutual legal assistance

Paragraph 3

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;*

(b) *Effecting service of judicial documents;*

(c) *Executing searches and seizures, and freezing;*

(d) *Examining objects and sites;*

(e) *Providing information, evidentiary items and expert evaluations;*

(f) *Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*

(g) *Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*

(h) *Facilitating the voluntary appearance of persons in the requesting State Party;*

(i) *Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

(j) *Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*

(k) *The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

(a) Summary of information relevant to reviewing the implementation of the article

487. In relation to (a) taking evidence or statements from persons, the relevant sections are sections 13(1)(a), 14(1)(a) and 15 of the *Mutual Assistance in Criminal Matters Act*.

488. In relation to (b) effecting service of judicial documents, the relevant sections are sections 13(1)(b), 14(1)(b) and 16 of the *Mutual Assistance in Criminal Matters Act*, and the broad definition of “document”.

489. In relation to (c) executing searches and seizures, and freezing, the relevant Part is Part 4 of the *Mutual Assistance in Criminal Matters Act*.

490. In relation to (d) examining objects and sites, relevant sections include sections 13(1)(b) and 14(1)(b) of the *Mutual Assistance in Criminal Matters Act*.

491. In relation to (e) providing information, evidentiary items and expert evaluations, relevant sections include sections 13(1)(a), 14(1)(a) and 15 of the *Mutual Assistance in Criminal Matters Act*.

492. In relation to (f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records, the relevant sections include sections 13(1)(a), 14(1)(a), 15 and 16 of the *Mutual Assistance in Criminal Matters Act*.

493. In relation to (g) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes, the relevant Part of the *Mutual Assistance in Criminal Matters Act* includes Part 4 which covers assistance for search and seizure.

494. In relation to (h) facilitating the voluntary appearance of persons in the requesting State Party, relevant sections include section 24 of the *Mutual Assistance in Criminal Matters Act*.

495. Section 3 of the *Mutual Assistance in Criminal Matters Act* outlines the objects of the Act.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

3 Objects of Act

The objects of this Act are:

(a) to regulate the provision by Tuvalu of international assistance in criminal matters when a request is made by a foreign country for any of the following:

(i) the taking of evidence, or the production of a document or other article, for a proceeding in the foreign country;

(ii) the issue of a search warrant and seizure of any thing relevant to a proceeding or investigation in the foreign country;

(iii) the forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country;

(iv) the restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country; and

(b) to facilitate Tuvalu providing international assistance in criminal matters when a request is made by a foreign country to make arrangements for a person who is in Tuvalu to travel to the foreign country:

(i) to give evidence in a proceeding; or

(ii) to give assistance for an investigation; and

(c) to facilitate Tuvalu obtaining similar international assistance in criminal matters.

496. **Part 3 of the Mutual Assistance in Criminal Matters Act** covers assistance in taking evidence and production of documents or other articles.

13 Requests by Tuvalu for assistance with evidence

(1) The Attorney-General may request the appropriate authority of a foreign country to arrange, for a proceeding or investigation in a criminal matter in Tuvalu, for:

(a) evidence to be taken in the foreign country under the law of that country; or

(b) a document or other article in the foreign country to be produced under the law of that country.

(2) When making a request under subsection (1), the Attorney-General may also request that an opportunity be given for the person giving the evidence, or producing the document or other article, to be examined or cross-examined, through a video or internet link, from Tuvalu by:

(a) a party to the proceeding, or the party's legal representative; or

(b) a person being investigated, or the person's legal representative.

14 Requests by foreign countries for assistance with evidence

(1) If a foreign country asks that evidence be taken in Tuvalu for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Attorney-General may authorise:

- (a) the taking of the evidence; and
- (b) the transmission of the evidence to the requesting country.

(2) If a foreign country asks that a document or other article in Tuvalu be produced for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Attorney-General may authorise:

- (a) the production of the documents or articles; and
- (b) their transmission to the requesting country.

15 Taking evidence

(1) If the Attorney-General authorises the taking of evidence under section 14, the Court may take, on oath, the evidence of each witness in the matter, and the Court that takes any such evidence must:

- (a) cause the evidence to be put in writing and certify that the Court took the evidence; and
- (b) send the evidence and certificate to the Attorney-General.

(2) The certificate must state whether, when the evidence was taken, any of the following persons were present:

- (a) the person to whom the proceeding in the requesting country relates or his or her legal representative (if any) ;
- (b) any other person giving evidence or his or her legal representative (if any) ;
- (c) a legal representative of the requesting country.

16 Production

(1) If the Attorney-General authorises the production of a document under section 14, the Court:

- (a) may order the document to be produced to the Court; and
- (b) if it is produced, must send it, or a copy of it certified by the Court to be a true copy, to the Attorney-General.

(2) If the Attorney-General authorises the production of an article (other than a document) under section 14, the Court:

- (a) may order it to be produced to the Court; and
- (b) if it is produced, must send it to the Attorney-General.

“Document” is defined in section 5 to have the same meaning as in the *Proceeds of Crime Act*. Section 4 of the *Proceeds of Crime Act* defines “document” as

“a record of information in any form, including:

- (a) a written or printed thing, including a map, plan, graph or drawing;

- (b) a computer file, including a record that is kept in electronic form and can be accessed in Tuvalu;
- (c) a photograph;
- (d) a disk, tape, film sound-track or other thing in which sound or other data is embodied;
- (e) a film, negative, tape or other thing in which a visual image is embodied;”

This would be wide enough to cover “*government, bank, financial, corporate or business records.*”

497. **Part 4 of the Mutual Assistance in Criminal Matters Act** covers assistance for search and seizure.

20 Requests by Tuvalu for search and seizure

(1) This section applies if:

- (a) a proceeding or investigation for a criminal matter involving a serious offence against the law of Tuvalu has commenced; and
- (b) the Attorney-General believes, on reasonable grounds, that a thing relevant to the proceeding or investigation may be located in a foreign country.

(2) The Attorney-General may request the appropriate authority of the foreign country to obtain a warrant or other instrument that, under the law of the foreign country, authorises:

- (a) a search for a thing relevant to the proceeding or investigation; and
- (b) the seizure of the thing or any other thing that is or may be relevant to the proceeding or investigation and is found as a result of the search.

(3) A thing may be admissible in evidence in the proceeding or used in the investigation, despite having been obtained otherwise than in accordance with the request, if it:

- (a) is relevant to the proceeding or investigation; and
- (b) has been obtained by the appropriate authority of the foreign country by a process authorised by the law of that country other than the issue (as requested by Tuvalu) of a warrant or other instrument authorising the seizure of the thing.

21 Requests by foreign countries for search and seizure

(1) The Attorney-General may direct an authorised officer to apply to a magistrate for a search warrant if:

- (a) a proceeding for, or investigation of, a criminal matter involving a serious offence has commenced in a foreign country; and
- (b) the Attorney-General believes, on reasonable grounds, that a thing relevant to the investigation or proceeding is located in Tuvalu; and
- (c) the foreign country requests the Attorney-General to arrange for the issue of a search warrant for that thing.

(2) The authorised officer must apply to a magistrate, or the Registrar of the Court, for the issue of a warrant to search land or premises in the same way as a police officer may apply for the issue of a search warrant under section 101 of the Criminal Procedure Code.s

(3) If an application is made under subsection (2) for a warrant, the magistrate or Registrar may issue a warrant of that kind in the same way, and subject to the same conditions, as he or

she could issue a search warrant under section 101 of the Criminal Procedure Code, and, subject to this Division, the warrant may be executed in the same way as if it had been issued under that section.

22 Search warrants

(1) If an application is made under section 21 for a warrant for a thing relevant to an investigation or proceeding in a foreign country, the magistrate may issue the warrant authorising the authorised officer, with such assistance and by such force as is necessary and reasonable:

- (a) to enter the land or premises; and
- (b) to search the land or premises for the thing and to seize it.

(2) If, in the course of searching under a warrant issued under this section for a thing of a kind specified in the warrant, an authorised officer finds another thing, the warrant is taken to authorise the authorised officer to seize the other thing if the officer believes, on reasonable grounds, the other thing:

- (a) to be relevant to the proceeding or investigation in the foreign country or to provide evidence about the commission of a criminal offence in Tuvalu; and
- (b) to be likely to be concealed, lost or destroyed if it is not seized.

498. **Part 5 of the Mutual Assistance in Criminal Matters Act** covers arrangements for persons to give evidence or assist investigations.

24 Requests for removal of certain persons to Tuvalu

(1) The Attorney-General may request a foreign country to authorise the attendance at a hearing, for a proceeding that has commenced in Tuvalu, of a person who is in the foreign country if:

- (a) the proceeding relates to a criminal matter; and
- (b) the Attorney-General is of the opinion that the person:
 - (i) is a foreign prisoner; and
 - (ii) is capable of giving evidence relevant to the proceeding; and
 - (iii) has consented to being removed to Tuvalu to give evidence in the proceeding.

(2) The Attorney-General may request a foreign country to authorise the removal of a person who is in the foreign country to Tuvalu to give assistance in an investigation that has commenced in Tuvalu if:

- (a) the investigation relates to a criminal matter; and
- (b) the Attorney-General is of the opinion that the person:
 - (i) is a foreign prisoner; and
 - (ii) is capable of giving assistance in the investigation; and
 - (iii) has consented to being removed to Tuvalu to give assistance in the investigation.

(3) If the Attorney-General makes a request under subsection (1) or (2), the Attorney-General may arrange with an appropriate authority of the foreign country for:

- (a) the removal of the person to Tuvalu; and

- (b) the custody of the person while in Tuvalu; and
- (c) the return of the person to the foreign country; and
- (d) other relevant matters.

499. **Part 7 of the *Mutual Assistance in Criminal Matters Act*** covers assistance regarding proceeds of crime.

500. Section 5 of the *Mutual Assistance in Criminal Matters Act* refers to the *Proceeds of Crime Act* for the following definitions: “proceedings”; “proceeds”; “property”; “property-tracking document”.

501. Section 4 of the *Proceeds of Crime Act* provides:

“**proceedings**” includes any procedure (including an inquiry, investigation, or preliminary or final determination of facts) conducted by or under the supervision of a Judge or judicial officer for:

- (a) an alleged or proven offence; or
- (b) property derived from such an offence;

“**proceeds of crime**” has the meaning given by section 7;

“**property**” includes money and all other property, real or personal, including an enforceable right of action and other intangible or incorporeal property;

“**property-tracking document, for an offence**” , means a document relevant to:

- (a) identifying, locating or quantifying property of a person who committed the offence; or
- (b) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or
- (c) identifying, locating or quantifying tainted property in relation to the offence; or
- (d) identifying or locating any document necessary for the transfer of tainted property in relation to the offence;

502. Section 7 of the *Proceeds of Crime Act* defines “**proceeds of crime**” as property derived or realised directly or indirectly from a serious offence, including:

- (a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and
- (b) income, capital or other economic gains derived or realised from that property since the offence.

(b) Observations on the implementation of the article

503. Tuvalu may provide a wide range of assistance as described in the cited provisions of the Act.

Article 46 Mutual legal assistance

Paragraphs 4 and 5

4. *Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*

5. *The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

(a) Summary of information relevant to reviewing the implementation of the article

504. Tuvalu indicated that it has not implemented the provisions.

505. Tuvalu requires a mutual legal assistance request before transmitting information. Legislation requires this request to be in writing. There is no legislative provision for the proactive transmission of information.

506. No information was provided on whether, in practice, Tuvalu proactively transmits information relating to a criminal matter to an overseas authority where Tuvalu believes that such information could assist in undertaking inquiries into criminal proceedings.

507. There were no case examples where the issue of confidentiality of requests for mutual legal assistance has arisen in practice.

508. While Tuvalu does not legislatively provide that information may be disclosed that is exculpatory to an accused person, the Attorney-General retains discretion to do so.

(b) Observations on the implementation of the article

509. Tuvalu indicates that it has not implemented the provision and there is no legislative provision for the proactive transmission of information. While it is noted that there is no law enabling Tuvalu to spontaneously share information with foreign countries, it was explained during the country visit that there is no restriction to doing so and that Tuvalu's law enforcement authorities do this in practice. A case example was given in which the Customs authorities spontaneously shared information with their immigration counterparts overseas.

510. There were no case examples where the issue of confidentiality of requests for mutual legal assistance has arisen in practice.

511. It is recommended that Tuvalu consider granting explicit legal authority to the competent authorities to proactively transmit information to foreign competent authorities without a prior request, where such information could assist in the investigation and prosecution of offences.

Article 46 Mutual legal assistance

Paragraph 8

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

512. Tuvalu indicated that it has partially implemented the provision.

513. Bank secrecy is not listed as a ground for refusal under section 10—Refusal of assistance generally of the *Mutual Assistance in Criminal Matters Act*. However, Tuvalu has not taken legislative measures to ensure that mutual legal assistance is not refused on the grounds of bank secrecy.

(b) Observations on the implementation of the article

514. Tuvalu indicates that it has partially implemented the provision and shall not refuse assistance on the ground of bank secrecy. There have been no cases where Tuvalu provided bank or financial records to a foreign requesting country.

515. It is recommended that Tuvalu introduce legislative provisions that stipulate that Tuvalu will not decline to render MLA on the ground of bank secrecy.

Article 46 Mutual legal assistance

Paragraph 9

(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(a) Summary of information relevant to reviewing the implementation of the article

516. Tuvalu indicated that it has partially implemented the provisions.

517. According to the *Mutual Assistance in Criminal Matters Act*, there is a threshold requirement of dual criminality in the definition of “serious offence” (as defined in section 4 of the *Proceeds of Crime Act*).

518. Section 3 “Objects of the Act” provides:

The objects of this Act are:

(a) to regulate the provision by Tuvalu of international assistance in criminal matters when a request is made by a foreign country for any of the following:

(iii) the forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country;

(iv) the restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country; ...”

519. Section 5 of the *Mutual Assistance in Criminal Matters Act* applies the definition of serious offence as in the *Proceeds of Crime Act*. Pursuant to the *Proceeds of Crime Act*, “**serious offence**” means:

(a) an offence against a law of Tuvalu for which the maximum penalty imprisonment for 12 months or longer; or

(b) an offence against the law of another country that, if the relevant act or omission had occurred in Tuvalu, would be an offence against the law of Tuvalu for which the maximum penalty is imprisonment for 12 months or longer;

520. Tuvalu requires dual criminality under Parts 4 and Part 7 of the *Mutual Assistance in Criminal Matters Act*.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

Part 4 Assistance for Search and Seizure

20 Requests by Tuvalu for search and seizure

“(1) This section applies if:

(a) a proceeding or investigation for a criminal matter involving a serious offence against the law of Tuvalu has commenced; and

(b) the Attorney-General believes, on reasonable grounds, that a thing relevant to the proceeding or investigation may be located in a foreign country.”

Part 7 Assistance Regarding Proceeds of Crime

40 Requests for issue of orders in foreign countries

If a proceeding or investigation has commenced in Tuvalu for a serious offence, the Attorney-General may ask an appropriate authority of a foreign country for the issue, in relation to the offence, of an instrument similar in nature to any of the following instruments under the *Proceeds of Crime Act*:

(a) a search warrant for tainted property;

(b) a restraining order;

(c) a production order for a property-tracking document;

(d) a search warrant for a property-tracking document.

521. For other parts of the Act, arguably Tuvalu does not require dual criminality.

522. Section 12 of the *Mutual Assistance in Criminal Matters Act* provides the Attorney-General with discretionary refusal.

12 Refusal of assistance - Attorney-General's discretion

A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General:

- (a) the request relates to the prosecution or punishment of a person for an act or omission that would not have constituted an offence against Tuvalu law if it had occurred in Tuvalu; or
- (b) the request relates to the prosecution or punishment of a person:
 - (i) for an act or omission that occurred, or is alleged to have occurred, outside the foreign country; and
 - (ii) if a similar act or omission occurring outside Tuvalu in similar circumstances would not have constituted an offence against Tuvalu law; or
- (c) the request relates to the prosecution or punishment of a person for an act or omission if the person responsible could no longer be prosecuted because of lapse of time or any other reason if:
 - (i) it had occurred in Tuvalu at the same time; and
 - (ii) it had constituted an offence against Tuvalu law; or
- (d) providing the assistance could prejudice an investigation or proceeding for a criminal matter in Tuvalu; or
- (e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Tuvalu) ; or
- (f) the provision of the assistance would result in manifest unfairness or a denial of human rights; or
- (g) the provision of the assistance would impose an excessive burden on the resources of the Crown; or
- (h) it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

523. Pursuant to the wording of 'may' used in section 12 of the *Mutual Assistance in Criminal Matters Act*, the double criminality requirement arguably is not to be strictly interpreted in relation to mutual legal assistance. The Attorney General could exercise his or her discretion even in the absence of this requirement to ensure that mutual legal assistance involving non-coercive measures is afforded, in line with sub-paragraph 9(b) of article 46 of the Convention. However, this has not been applied or tested in practice.

(b) Observations on the implementation of the article

524. Tuvalu indicates that it has partially implemented the provision.

525. Tuvalu requires dual criminality under Parts 4 and 7 of the *Mutual Assistance in Criminal Matters Act*, for Assistance relating to search and seizure and for assistance regarding proceeds of crime. In addition, under section 12 of the Act, the Attorney-

General may on a discretionary basis refuse assistance where the offence does not satisfy the dual criminality requirement. While it is stated that this discretion could be applied to provide non-coercive assistance in the absence of dual criminality, there is no obligation to provide non-coercive assistance, as required under sub-paragraph 9(b) of article 46 of the Convention. In principle, such non-coercive assistance could also be refused in the exercise of discretion.

526. Accordingly, it is recommended that Tuvalu take such legislative measures as may be necessary to ensure that MLA involving non-coercive measures is afforded in the absence of double criminality, in line with article 46(9)(b).

527. Moreover, as discussed during the country visit, it is recommended that Tuvalu more generally consider alleviating the dual criminality requirement for purposes of MLA.

Article 46 Mutual legal assistance

Paragraph 10

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

(a) Summary of information relevant to reviewing the implementation of the article

528. Part 5—Arrangements for Persons to Give Evidence or Assist Investigations of the *Mutual Assistance in Criminal Matters Act* covers the requirements of article 46(10).

529. Sections 25-27 of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* also apply. Relevant sections are cited below.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

24 Requests for removal of certain persons to Tuvalu

(1) The Attorney-General may request a foreign country to authorise the attendance at a hearing, for a proceeding that has commenced in Tuvalu, of a person who is in the foreign country if:

(a) the proceeding relates to a criminal matter; and

(b) the Attorney-General is of the opinion that the person:

(i) is a foreign prisoner; and

(ii) is capable of giving evidence relevant to the proceeding; and

(iii) has consented to being removed to Tuvalu to give evidence in the proceeding.

(2) The Attorney-General may request a foreign country to authorise the removal of a person who is in the foreign country to Tuvalu to give assistance in an investigation that has commenced in Tuvalu if:

- (a) the investigation relates to a criminal matter; and
- (b) the Attorney-General is of the opinion that the person:
 - (i) is a foreign prisoner; and
 - (ii) is capable of giving assistance in the investigation; and
 - (iii) has consented to being removed to Tuvalu to give assistance in the investigation.

(3) If the Attorney-General makes a request under subsection (1) or (2), the Attorney-General may arrange with an appropriate authority of the foreign country for:

- (a) the removal of the person to Tuvalu; and
- (b) the custody of the person while in Tuvalu; and
- (c) the return of the person to the foreign country; and
- (d) other relevant matters.

25 Custody of certain persons

(1) This section applies:

- (a) to a person who is to be brought to Tuvalu from a foreign country in response to a request under section 24; and
- (b) if the foreign country requests that the person be kept in custody while he or she is in Tuvalu.

(2) The person must be kept in such custody as the Attorney-General directs in writing while the person is in Tuvalu, or travelling to or from Tuvalu, under the request.

DIVISION 2 - REQUESTS BY FOREIGN COUNTRIES

32 Requests for certain persons to give evidence or assistance in foreign countries

This Division applies if:

- (a) a proceeding or an investigation about a criminal matter has commenced in a foreign country; and
- (b) the foreign country requests the removal of a prisoner who is in Tuvalu (whether or not in custody) to the foreign country to attend at the proceeding or to assist in the investigation; and
- (c) the Attorney-General believes, on reasonable grounds, that the prisoner is capable of giving evidence relevant to the proceeding or assistance relevant to the investigation; and
- (d) the Attorney-General is satisfied that:
 - (i) the prisoner has consented to giving evidence or assistance in the foreign country; and
 - (ii) the foreign country has given adequate (whether or not unqualified) undertakings about the matters mentioned in section 34.

33 Travel of prisoner or person

- (1) If the prisoner is being held in custody, the Attorney-General may:
 - (a) direct that the prisoner be released from prison to travel to the foreign country to give evidence at the proceeding or assistance in the investigation; and
 - (b) subject to the making or giving of any necessary directions or approvals for the release of the prisoner — arrange for the prisoner to travel to the foreign country in the custody of a police or prison officer appointed by the Attorney-General for the purpose.
- (2) If the prisoner has been released from custody on a parole or other order or licence to be at large, the Attorney-General may:
 - (a) approve the travel of the prisoner to the foreign country to give evidence or assistance and obtain any necessary approvals, authorities, permissions or variations to the order or licence; and
 - (b) subject to obtaining the approvals, authorities, permissions or variations, arrange for the prisoner to travel to the foreign country.
- (3) The Attorney-General may arrange for a person (other than a prisoner) who is in Tuvalu to travel to a foreign country if:
 - (a) a proceeding or an investigation about a criminal matter has commenced in the foreign country; and
 - (b) the foreign country requests that the person travel to the foreign country to give evidence at the proceeding or assistance at the investigation; and
 - (c) the Attorney-General believes, on reasonable grounds, that the person is capable of giving evidence relevant to the proceeding or assistance relevant to the investigation; and
 - (d) the Attorney-General is satisfied that:
 - (i) the person has consented to travel to the foreign country to give evidence or assistance; and
 - (ii) the foreign country has given adequate (whether or not unqualified) undertakings about the matters mentioned in section 34.

34 Undertakings to be given

- (1) For subparagraph 32 (d) (ii) and subparagraph 33 (3) (d) (ii), this section sets out the matters about which undertakings are to be given.
- (2) The person will not:
 - (a) be detained, prosecuted or punished for an offence against the law of the foreign country committed, or alleged to have been committed, before the person's departure from Tuvalu; or
 - (b) be subjected to civil suit (to which the person could not be subjected if the person were not in the foreign country) for an act or omission of the person that occurred, or is alleged to have occurred, before the person's departure from Tuvalu; or
 - (c) be required to give evidence in a proceeding in the foreign country other than:
 - (i) the proceeding to which the request relates; or
 - (ii) a proceeding for an offence that the person is alleged to have committed after the person's departure from Tuvalu.
- (3) Subsection (2) does not apply if:

- (a) the person has left the foreign country; or
 - (b) the person has had the opportunity of leaving the foreign country and has remained in that country for a purpose other than giving evidence in the proceeding to which the request relates.
- (4) Evidence given by the person in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign country other than for perjury in giving that evidence.
- (5) The person will be returned to Tuvalu under arrangements agreed in writing by the Attorney-General.
- (6) If the person is being held in custody in Tuvalu and the Attorney-General requests the foreign country to make arrangements to keep the person in custody while the person is in the foreign country:
- (a) appropriate arrangements will be made for that purpose; and
 - (b) the person will not be released from custody in the foreign country unless the Attorney-General gives written notice to an appropriate authority of the foreign country that the person is entitled to be released from custody under Tuvalu law; and
 - (c) if the person is released in the foreign country after notice by the Attorney-General under paragraph (b) , the foreign country will pay for the person's accommodation and expenses pending the completion of the investigation or proceeding to which the request relates.
- (7) The Attorney-General may require undertakings about any other matters that he or she thinks appropriate.

Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

25. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.
- (2) The request shall specify
- (a) the subject matter upon which it is desired to examine the witnesses;
 - (b) the reasons for which the personal appearance of the witnesses is required; and
 - (c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.
- (3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and
- (a) ask whether they agree to appear;
 - (b) inform the Central Authority of the requesting country of their answer; and
 - (c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.
- (4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

26. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required.

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

(6) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody; and

(b) the dates by which the requested country requires the return of the persons and shall notify any variations in such dates.

(7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub-paragraph (6).

(8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

IMMUNITY OF PERSONS APPEARING

27. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an

opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

(b) Observations on the implementation of the article

530. The provision is legislatively implemented. There have been no cases of prisoner transfer through MLA for purposes of providing testimony or evidence.

Article 46 Mutual legal assistance

Paragraph 11

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

531. Section 34 of the *Mutual Assistance in Criminal Matters Act* outlines the undertakings to be given for the transfer of persons in accordance with article 46(10). While the specific requirements of article 46(11) are not contained in section 34, section 34(7) provides the Attorney-General with a discretion to require further undertakings about any other matters that he or she thinks appropriate.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

34 Undertakings to be given

(1) For subparagraph 32 (d) (ii) and subparagraph 33 (3) (d) (ii), this section sets out the matters about which undertakings are to be given.

(2) The person will not:

(a) be detained, prosecuted or punished for an offence against the law of the foreign country committed, or alleged to have been committed, before the person's departure from Tuvalu; or

(b) be subjected to civil suit (to which the person could not be subjected if the person were not in the foreign country) for an act or omission of the person that occurred, or is alleged to have occurred, before the person's departure from Tuvalu; or

(c) be required to give evidence in a proceeding in the foreign country other than:

(i) the proceeding to which the request relates; or

(ii) a proceeding for an offence that the person is alleged to have committed after the person's departure from Tuvalu.

(3) Subsection (2) does not apply if:

(a) the person has left the foreign country; or

(b) the person has had the opportunity of leaving the foreign country and has remained in that country for a purpose other than giving evidence in the proceeding to which the request relates.

(4) Evidence given by the person in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign country other than for perjury in giving that evidence.

(5) The person will be returned to Tuvalu under arrangements agreed in writing by the Attorney-General.

(6) If the person is being held in custody in Tuvalu and the Attorney-General requests the foreign country to make arrangements to keep the person in custody while the person is in the foreign country:

(a) appropriate arrangements will be made for that purpose; and

(b) the person will not be released from custody in the foreign country unless the Attorney-General gives written notice to an appropriate authority of the foreign country that the person is entitled to be released from custody under Tuvalu law; and

(c) if the person is released in the foreign country after notice by the Attorney-General under paragraph (b), the foreign country will pay for the person's accommodation and expenses pending the completion of the investigation or proceeding to which the request relates.

(7) The Attorney-General may require undertakings about any other matters that he or she thinks appropriate.

(b) Observations on the implementation of the article

532. Although additional undertakings may be required by the Attorney-General covering the matters in this provision, it is recommended that Tuvalu more closely address the conditions of temporary prisoner transfer for purposes of MLA, as outlined in paragraph 11 of article 46, in its domestic law.

Article 46 Mutual legal assistance

Paragraph 12

12. *Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

(a) Summary of information relevant to reviewing the implementation of the article

533. Tuvalu indicated that it has partially implemented the provision.

534. Section 34 *Mutual Assistance in Criminal Matters Act* requires an undertaking that a person will not be detained, prosecuted or punished for an offence. It is unclear whether this covers “any other restriction of his or her personal liberty” as required by article 46(12). Arguably, this would be covered by the Attorney-General’s discretion under section 34(7) of the Act.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

34 Undertakings to be given

(1) For subparagraph 32 (d) (ii) and subparagraph 33 (3) (d) (ii), this section sets out the matters about which undertakings are to be given.

(2) The person will not:

(a) be detained, prosecuted or punished for an offence against the law of the foreign country committed, or alleged to have been committed, before the person’s departure from Tuvalu; or

(b) be subjected to civil suit (to which the person could not be subjected if the person were not in the foreign country) for an act or omission of the person that occurred, or is alleged to have occurred, before the person’s departure from Tuvalu;

...

(b) Observations on the implementation of the article

535. Tuvalu indicates that it has partially implemented the provision. The observations made above are referred to. It is recommended that Tuvalu more closely address the conditions of temporary prisoner transfer for purposes of MLA, as outlined in paragraph 12 of article 46, in its domestic law.

Article 46 Mutual legal assistance

Paragraph 13

13. *Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage*

the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

(a) Summary of information relevant to reviewing the implementation of the article

536. Tuvalu indicated that it has partially implemented the provision.

537. The Attorney-General deals with mutual legal assistance requests as the central authority.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

7 Requests by Tuvalu for assistance generally

A request for international assistance in a criminal matter that Tuvalu is authorised to make under this Act may be made only by the Attorney-General.

8 Request by foreign countries for assistance generally

(1) A request under this Act by a foreign country for international assistance in a criminal matter must be made to the Attorney-General or a person authorised by the Attorney-General to receive requests by foreign countries under this Act.

...

(4) If a foreign country makes a request to a person authorised under subsection (1), the request is taken, for this Act, to have been made to the Attorney-General.

(5) If a foreign country makes a request to the Court for international assistance in a criminal matter:

(a) the Court must refer the request to the Attorney-General; and

(b) the request is then taken, for this Act, to have been made to the Attorney-General.

538. The Secretary General of the United Nations has not been notified of Tuvalu's central authority for mutual legal assistance.

(b) Observations on the implementation of the article

539. Tuvalu indicates that it has partially implemented the provision.

540. There are no guidelines or regulations on MLA (legislative or otherwise) that spell out procedures or timeframes for handling MLA requests.

541. It is recommended that Tuvalu notify the United Nations of its central authority and acceptable language(s) for purposes of MLA (art. 46 (13) and (14)).

Article 46 Mutual legal assistance

Paragraph 14

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

(a) Summary of information relevant to reviewing the implementation of the article

542. Tuvalu indicated that it has partially implemented the provision.

543. Section 8 of the *Mutual Assistance in Criminal Matters Act* requires requests to be made in writing. Tuvalu did not indicate whether in practice it would accept an urgent request that is made orally if confirmed in writing later.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

8 Request by foreign countries for assistance generally

(2) A request must be in writing and must include the following information:

- (a) the name of the authority concerned with the criminal matter to which the request relates;
- (b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
- (c) a description of the purpose of the request and of the nature of the assistance being sought;
- (d) any information that may assist in giving effect to the request.

(3) Failure to comply with subsection (2) is not a ground for refusing the request, but the Attorney-General is not obliged to consider the request until the subsection is complied with.

(4) If a foreign country makes a request to a person authorised under subsection (1), the request is taken, for this Act, to have been made to the Attorney-General.

(5) If a foreign country makes a request to the Court for international assistance in a criminal matter:

- (a) the Court must refer the request to the Attorney-General; and
- (b) the request is then taken, for this Act, to have been made to the Attorney-General.

544. Section 14(2) of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* provides that “A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.”

545. Tuvalu did not indicate what the acceptable language is for MLA requests.

546. The Secretary General of the United Nations has not been notified that Tuvalu accepts MLA requests in English.

(b) Observations on the implementation of the article

547. Tuvalu indicates that it has partially implemented the provision.

548. During the country visit the authorities confirmed that Tuvalu would in practice accept an urgent request that is made orally or by telephone, if confirmed in writing later, including through INTERPOL or direct law enforcement communication channels.

549. As noted above, it is recommended that Tuvalu notify the United Nations of its acceptable language(s) for purposes of MLA (art. 46 (14)).

Article 46 Mutual legal assistance

Paragraphs 15 and 16

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

(a) Summary of information relevant to reviewing the implementation of the article

550. Tuvalu indicated that it has partially implemented the provisions.

551. Section 8(2) of the *Mutual Assistance in Criminal Matters Act* requires the following information to be provided in any request for assistance.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

8 Request by foreign countries for assistance generally

(2) A request must be in writing and must include the following information:

(a) the name of the authority concerned with the criminal matter to which the request relates;

(b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) a description of the purpose of the request and of the nature of the assistance being sought;

(d) any information that may assist in giving effect to the request.

(3) Failure to comply with subsection (2) is not a ground for refusing the request, but the Attorney-General is not obliged to consider the request until the subsection is complied with.

552. As to the identity, location and nationality of any person concerned, this may be covered by section 8(2)(d) “any information that may assist in giving effect to the request”.

Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth.

14. (1) Except in the case of a request for the preservation of computer data under Article 1 (3) (j) of this Scheme, a request under the Scheme shall:

(a) specify the nature of the assistance requested;

(b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;

(c) indicate any time-limit within which compliance with the request is desired, stating reasons;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the nature of the criminal matter; and

(iii) whether or not criminal proceedings have been instituted.

(e) where criminal proceedings have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offences of which he stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings; and

(v) any date fixed for further stages in the proceedings.

(f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.

(b) Observations on the implementation of the article

553. Tuvalu indicates that it has partially implemented the provisions.

554. There are no guidelines on MLA for requesting countries. The AG’s office could consider providing information on Tuvalu’s MLA requirements on its website.

Article 46 Mutual legal assistance

Paragraph 17

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

(a) Summary of information relevant to reviewing the implementation of the article

555. Tuvalu indicated that it has partially implemented the provision in sections 7-9 of the *Mutual Assistance in Criminal Matters Act*.

556. The Attorney-General has discretion under section 12 of the *Mutual Assistance in Criminal Matters Act* to refuse assistance on the grounds cited above. There are no internal procedures in place for guiding such discretion. There are also no internal procedures in place to guide any conditions, such as those spelled out in section 9 of the Act (Assistance may be provided subject to conditions).

Mutual Assistance in Criminal Matters Act [Cap 7.40]

7 Requests by Tuvalu for assistance generally

A request for international assistance in a criminal matter that Tuvalu is authorised to make under this Act may be made only by the Attorney-General.

8 Request by foreign countries for assistance generally

(1) A request under this Act by a foreign country for international assistance in a criminal matter must be made to the Attorney-General or a person authorised by the Attorney-General to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include the following information:

- (a) the name of the authority concerned with the criminal matter to which the request relates;
- (b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
- (c) a description of the purpose of the request and of the nature of the assistance being sought;
- (d) any information that may assist in giving effect to the request.

(3) Failure to comply with subsection (2) is not a ground for refusing the request, but the Attorney-General is not obliged to consider the request until the subsection is complied with.

(4) If a foreign country makes a request to a person authorised under subsection (1), the request is taken, for this Act, to have been made to the Attorney-General.

(5) If a foreign country makes a request to the Court for international assistance in a criminal matter:

- (a) the Court must refer the request to the Attorney-General; and
- (b) the request is then taken, for this Act, to have been made to the Attorney-General.

9 Assistance may be provided subject to conditions

Assistance under this Act may be provided to a foreign country subject to any conditions that the Attorney-General determines.

12 Refusal of assistance - Attorney-General's discretion

A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General:

- (a) the request relates to the prosecution or punishment of a person for an act or omission that would not have constituted an offence against Tuvalu law if it had occurred in Tuvalu; or
- (b) the request relates to the prosecution or punishment of a person:
 - (i) for an act or omission that occurred, or is alleged to have occurred, outside the foreign country; and
 - (ii) if a similar act or omission occurring outside Tuvalu in similar circumstances would not have constituted an offence against Tuvalu law; or
- (c) the request relates to the prosecution or punishment of a person for an act or omission if the person responsible could no longer be prosecuted because of lapse of time or any other reason if:
 - (i) it had occurred in Tuvalu at the same time; and
 - (ii) it had constituted an offence against Tuvalu law; or
- (d) providing the assistance could prejudice an investigation or proceeding for a criminal matter in Tuvalu; or
- (e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Tuvalu) ; or
- (f) the provision of the assistance would result in manifest unfairness or a denial of human rights; or
- (g) the provision of the assistance would impose an excessive burden on the resources of the Crown; or
- (h) it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

(b) Observations on the implementation of the article

557. Tuvalu indicates that it has partially implemented the provision.

558. The matter is not spelled out in the MACMA, and there are no internal procedures in place for guiding the discretion of the Attorney-General to refuse assistance on the grounds cited in the Act. Tuvalu could consider including an appropriate provision in section 8 of the Act, to address the possibility of applying procedures specified by the requesting country.

Article 46 Mutual legal assistance

Paragraph 18

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other,

permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

559. Sections 17 and 55 of the *Mutual Assistance in Criminal Matters Act* provide for the use of video link.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

17 Conduct of proceedings

(1) The Court conducting a proceeding under section 15 or 16 may permit any of the following to have legal representation at the proceeding:

- (a) the person to whom the proceeding in the requesting country relates; and
- (b) any other person giving evidence or producing a document or other article at the proceeding before the Court; and
- (c) the requesting country.

(2) The Court may take evidence or order production of a document or other article in the presence or absence of the person to whom the proceeding in the requesting country relates or of his or her legal representative (if any).

(3) The Court may, at the request of the requesting country, permit examination or cross-examination, through a video or internet link with the requesting country, of any person giving evidence or producing a document or other article at the proceeding.

(4) The examination or cross-examination may be conducted by:

- (a) any person to whom the proceeding in the requesting country relates, or that person's legal representative; or
- (b) the legal representative of the requesting country.

55 Form of testimony

(1) The testimony may be recorded in any of the following ways:

- (a) in writing;
- (b) on audio tape;
- (c) on video tape.

(2) The testimony need not:

- (a) be in the form of an affidavit; or
- (b) constitute a transcript of a proceeding in a foreign court.

(3) The testimony must be endorsed with, or be accompanied by, a certificate to the effect that:

- (a) it is an accurate record of the evidence given; and
- (b) it was taken in the manner required by section 54.

(4) The certificate must:

(a) purport to be signed or certified by a judge, magistrate or court officer of the foreign country to which the request was made; and

(b) purport to bear an official or public seal of:

(i) the country; or

(ii) an authority of the country responsible for matters relating to justice (that is, a Minister of State, a Ministry or Department of Government, or an officer of the Government).

(b) Observations on the implementation of the article

560. The provision is legislatively implemented. There have been no cases involving hearings by videoconference or at the request of a foreign judicial authority.

Article 46 Mutual legal assistance

Paragraph 19

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

561. Tuvalu indicated that it has partially implemented the provision in sections 63 and 64 of the *Mutual Assistance in Criminal Matters Act* and section 12 of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth*.

562. While Tuvalu does not legislatively provide that information may be disclosed that is exculpatory to an accused person, the Attorney-General retains discretion to do so.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

63 Restriction on use of information etc.

(1) A person must not, without the approval of the Attorney-General, intentionally use requested material for a purpose other than that for which it was requested.

(2) Requested material is inadmissible in evidence in any proceeding other than the proceeding for which it was obtained unless the Attorney-General approves its use for that other proceeding.

(3) A person must not intentionally use any information, document, article or thing obtained directly or indirectly by making use of requested material in breach of subsection (1) for a purpose other than that for which the requested material was requested.

(4) The information, document, article or thing mentioned in subsection (3) is inadmissible in evidence in any proceeding, and may not be used in any investigation, other than that for which the requested material was requested.

(5) A person who contravenes subsection (1) or (3) is guilty of an offence punishable by:

(a) if the person is a natural person — a fine of \$10,000 or imprisonment for 2 years, or both; or

(b) if the person is a body corporate — a fine of \$50,000.

(6) For this section, disclosure of any material is taken to be a use of that material.

(7) In this section:

“requested material” means material (whether it is evidence, a document, an article or a thing) that is sent to Tuvalu by a foreign country:

(a) because of a request made by the Attorney-General under this Act; and

(b) for a proceeding or investigation in a criminal matter;

64 Requests for international assistance not to be disclosed

(1) Subsection (2) applies to a person who, because of his or her office or employment, has knowledge of:

(a) the contents of a request for international assistance made by a foreign country to Tuvalu under this Act; or

(b) the fact that such a request has been made; or

(c) the fact that such a request has been granted or refused.

(2) The person must not intentionally disclose those contents or that fact unless:

(a) it is necessary to do so in the performance of his or her duties; or

(b) the Attorney-General has given his or her approval to the disclosure of those contents or that fact.

(3) A person who contravenes subsection (2) is guilty of an offence punishable by:

(a) if the person is a natural person — a fine of \$10,000 or imprisonment for 2 years, or both; or

(b) if the person is a body corporate — a fine of \$60,000.

Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

LIMITATION OF USE OF INFORMATION OR EVIDENCE

12. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

(b) Observations on the implementation of the article

563. Tuvalu indicated that it has partially implemented the provision. A limitation on the use of information received through MLA is provided in the cited sections of the Act. However, the law does not specify that the requesting State shall be notified prior to a

disclosure of exculpatory information. It is recommended that Tuvalu include this in its legislation.

Article 46 Mutual legal assistance

Paragraph 20

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

564. Section 64 of the *Mutual Assistance in Criminal Matters Act* provides that requests for international assistance are not to be disclosed. However, there is no legislative provision that if Tuvalu cannot comply with the requirement of confidentiality, it will inform the requesting State Party, although this may occur in practice.

565. Section 11 of the *Scheme Relating to Mutual Assistance in Criminal Matters in the Commonwealth* contains a similar provision.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

64 Requests for international assistance not to be disclosed

(1) Subsection (2) applies to a person who, because of his or her office or employment, has knowledge of:

- (a) the contents of a request for international assistance made by a foreign country to Tuvalu under this Act; or
- (b) the fact that such a request has been made; or
- (c) the fact that such a request has been granted or refused.

(2) The person must not intentionally disclose those contents or that fact unless:

- (a) it is necessary to do so in the performance of his or her duties; or
- (b) the Attorney-General has given his or her approval to the disclosure of those contents or that fact.

(3) A person who contravenes subsection (2) is guilty of an offence punishable by:

- (a) if the person is a natural person — a fine of \$10,000 or imprisonment for 2 years, or both; or
- (b) if the person is a body corporate — a fine of \$60,000.

Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth

CONFIDENTIALITY

11. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in

criminal proceedings and where otherwise authorised by the Central Authority of the other country.

566. There were no case examples where the issue of confidentiality of requests for mutual legal assistance has arisen in practice.

(b) Observations on the implementation of the article

567. It is recommended that Tuvalu adopt a legislative provision to inform the requesting State if Tuvalu cannot comply with the requirement of confidentiality.

Article 46 Mutual legal assistance

Paragraph 21

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

(a) Summary of information relevant to reviewing the implementation of the article

568. Tuvalu indicated that it has partially implemented the provision.

569. The *Mutual Assistance in Criminal Matters Act* outlines a number of circumstances whereby assistance may be refused. A request which is not in conformity with this article is not a ground for refusing the request, but the Attorney-General is not obliged to consider the request (section 8 *Mutual Assistance in Criminal Matters Act*).

Mutual Assistance in Criminal Matters Act [Cap 7.40]

8 Request by foreign countries for assistance generally

(1) A request under this Act by a foreign country for international assistance in a criminal matter must be made to the Attorney-General or a person authorised by the Attorney-General to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include the following information:

(a) the name of the authority concerned with the criminal matter to which the request relates;

(b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) a description of the purpose of the request and of the nature of the assistance being sought;

(d) any information that may assist in giving effect to the request.

(3) Failure to comply with subsection (2) is not a ground for refusing the request, but the Attorney-General is not obliged to consider the request until the subsection is complied with.

10 Refusal of assistance generally

(1) A request by a foreign country for assistance under this Act must be refused if, in the opinion of the Attorney-General:

(a) the request relates to an investigation of, or a proceeding for, a political offence; or

(b) there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for a political offence; or

(c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions; or

(d) providing the assistance would prejudice the sovereignty, security or national interest of Tuvalu; or

(e) the request relates to an investigation of, or proceeding for, an offence for which the person concerned has been acquitted or pardoned by a competent tribunal or authority in the foreign country or has undergone the punishment provided by the law of that country.

(2) In this section:

“political offence”, for a country, means an offence against the law of the country that is of a political character:

(a) because of the circumstances in which it is committed or for any other reason; and

(b) whether or not there are competing political parties in the country.

(3) However, none of the following is a political offence:

(a) an offence that is constituted by conduct of a kind referred to in:

(i) Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; or

(ii) Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; or

(iii) paragraph 1 of Article 2 of the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, opened for signature at New York on 14 December 1973; or

(iv) Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly of the United Nations at Paris on 9 December 1948; or

(v) Article 1 of the International Convention against the Taking of Hostages, being the convention of that title that was adopted by the General Assembly of the United Nations on 17 December 1979; or

- (vi) Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, being the convention of that title that was adopted by the General Assembly of the United Nations on 10 December 1984; or
 - (vii) Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988; or
 - (viii) Article 2 of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; or
 - (ix) a prescribed provision of an international instrument;
- (b) an offence:
- (i) constituted by conduct that, by an extradition treaty (other than a bilateral treaty) for the country or any country, is required to be treated as an offence for which a person may be surrendered or tried; and
 - (ii) declared by regulations for this paragraph not to be a political offence for the country or all countries;
- (c) an offence, declared by regulations for this paragraph not to be a political offence for the country, against the head of state or head of government of the country or a member of the family of either of those persons, constituted by:
- (i) murder, kidnapping or other attack on the person or the person's liberty; or
 - (ii) a threat or attempt to commit, or participation as an accomplice in, a murder, kidnapping or other attack on the person or liberty;
- (d) an offence constituted by taking or endangering, attempting to take or endanger, or participating in the taking or endangering of, the life of a person, being an offence:
- (i) committed in circumstances in which such conduct creates a collective danger, whether direct or indirect, to the lives of other persons; and
 - (ii) declared by regulations for this paragraph not to be a political offence for the country.

11 Refusal of assistance - death penalty

- (1) A request by a foreign country for assistance under this Act must be refused if:
- (a) it relates to an investigation of, or a proceeding for, an offence for which the death penalty may be imposed in the foreign country; and
 - (b) the Attorney-General is not of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.
- (2) A request by a foreign country for assistance under this Act may be refused if the Attorney-General is of the opinion that:
- (a) the provision of the assistance may result in the death penalty being imposed on a person; and
 - (b) after taking into consideration the interests of international cooperation in criminal law enforcement, in the circumstances of the case the request should not be granted.

12 Refusal of assistance - Attorney-General's discretion

A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General:

(a) the request relates to the prosecution or punishment of a person for an act or omission that would not have constituted an offence against Tuvalu law if it had occurred in Tuvalu; or

(b) the request relates to the prosecution or punishment of a person:

(i) for an act or omission that occurred, or is alleged to have occurred, outside the foreign country; and

(ii) if a similar act or omission occurring outside Tuvalu in similar circumstances would not have constituted an offence against Tuvalu law; or

(c) the request relates to the prosecution or punishment of a person for an act or omission if the person responsible could no longer be prosecuted because of lapse of time or any other reason if:

(i) it had occurred in Tuvalu at the same time; and

(ii) it had constituted an offence against Tuvalu law; or

(d) providing the assistance could prejudice an investigation or proceeding for a criminal matter in Tuvalu; or

(e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Tuvalu); or

(f) the provision of the assistance would result in manifest unfairness or a denial of human rights; or

(g) the provision of the assistance would impose an excessive burden on the resources of the Crown; or

(h) it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

(b) Observations on the implementation of the article and good practice

570. As noted above, there has only been one incoming MLA request to Tuvalu to date (*R. v Starcel Soloseni*), which Tuvalu complied with. Tuvalu has never refused an MLA request to date.

571. As noted above, it is recommended that Tuvalu consider alleviating the dual criminality requirement for purposes of MLA.

572. It is further recommended that Tuvalu reconsider the discretionary grounds of refusal spelled out in subsections (g) and (h), whereby MLA may be refused if the provision of the assistance would impose an excessive burden on the resources of the Crown, or it would be appropriate that the assistance be refused under all the circumstances of the case.

573. It is positively noted that a failure to comply with section 8(2) on the format and content of the request is not a ground for refusing MLA, but for postponement until the subsection is complied with.

Article 46 Mutual legal assistance

Paragraph 22

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

574. Tuvalu indicated that it has not implemented the provision.

575. Fiscal matters are not listed as a ground for refusal under the *Mutual Assistance in Criminal Matters Act*. However, the Attorney-General retains discretion to refuse assistance under section 12 of the Act (cited above).

(b) Observations on the implementation of the article

576. Tuvalu indicated that it has not implemented the provision.

577. Tuvalu has never refused an MLA request involving fiscal or any other offences to date.

578. It is recommended that Tuvalu introduce legislative provisions that stipulate that Tuvalu will not decline to render MLA on the sole ground that the offence is also considered to involve fiscal matters.

Article 46 Mutual legal assistance

Paragraph 23

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

579. Tuvalu indicated that it has not implemented the provision. No specific legal provision requires reasons to be given for refusal of mutual legal assistance. No information was provided on whether this occurs in practice.

580. Section 31 of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* also only requires consultations, not reasons for refusal to be given.

(b) Observations on the implementation of the article

581. Tuvalu indicated that it has not implemented the provision. It is recommended that Tuvalu specify in its legislation that reasons to be given for refusal of mutual legal assistance.

Article 46 Mutual legal assistance

Paragraph 24

24. *The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

(a) Summary of information relevant to reviewing the implementation of the article

582. Tuvalu indicated that it has not implemented the provision.

583. No procedures exist (legislatively or otherwise) that guide the execution of mutual legal assistance requests in a time-bound manner, nor for providing requesting States with information on the status and progress on the measures being undertaken. No information was provided on whether this occurs in practice.

(b) Observations on the implementation of the article

584. Tuvalu indicated that it has not implemented the provision. It is recommended that Tuvalu consider simplifying and streamlining procedures and evidentiary requirements in order to allow for MLA to be dealt with efficiently and effectively.

585. It is further recommended that Tuvalu adopt legislative or other procedures that guide the execution of mutual legal assistance requests in a time-bound manner.

Article 46 Mutual legal assistance

Paragraph 25

25. *Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

(a) Summary of information relevant to reviewing the implementation of the article

586. Section 12(d) of the *Mutual Assistance in Criminal Matters Act* provides for the refusal, rather than the postponement of such assistance.

Mutual Assistance in Criminal Matters Act [Cap 7.40]

12 Refusal of assistance - Attorney-General's discretion

A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General:

...

(d) providing the assistance could prejudice an investigation or proceeding for a criminal matter in Tuvalu;

(b) Observations on the implementation of the article

587. The provision is legislatively implemented. Tuvalu has never postponed assistance due to an ongoing domestic investigation.

Article 46 Mutual legal assistance

Paragraph 26

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

(a) Summary of information relevant to reviewing the implementation of the article

588. Tuvalu indicated that it has not implemented the provision.

589. There are no legislative provisions for such consultations to take place. No information was provided on whether this occurs in practice.

590. However, section 31 of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* provides for consultation upon request.

Consultation

31. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.

(b) Observations on the implementation of the article

591. Tuvalu indicated that it has not implemented the provision. The matter is not specified in Tuvalu's legislation. It is recommended that Tuvalu amend its law accordingly.

Article 46 Mutual legal assistance

Paragraph 27

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

(a) Summary of information relevant to reviewing the implementation of the article

592. Tuvalu indicated that it has partially implemented the provision in section 34(2) of the *Mutual Assistance in Criminal Matters Act*, which applies to requests for the temporary transfer of a person (other than a prisoner) for purposes of MLA under section 33(3)(d).

Mutual Assistance in Criminal Matters Act [Cap 7.40]

34 Undertakings to be given

(2) The person will not:

- (a) be detained, prosecuted or punished for an offence against the law of the foreign country committed, or alleged to have been committed, before the person's departure from Tuvalu; or
- (b) be subjected to civil suit (to which the person could not be subjected if the person were not in the foreign country) for an act or omission of the person that occurred, or is alleged to have occurred, before the person's departure from Tuvalu; or
- (c) be required to give evidence in a proceeding in the foreign country other than:
 - (i) the proceeding to which the request relates; or
 - (ii) a proceeding for an offence that the person is alleged to have committed after the person's departure from Tuvalu.

(b) Observations on the implementation of the article

593. Tuvalu indicated that it has partially implemented the provision. The observations made under paragraph 12 of this article are referred to.

Article 46 Mutual legal assistance

Paragraph 28

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

(a) Summary of information relevant to reviewing the implementation of the article

594. Tuvalu indicated that it has not implemented the provision.

595. Expenses are not covered by the *Mutual Assistance in Criminal Matters Act*. No information was provided on how they are dealt with in practice.

596. However, it is a ground for refusal under section 12(g) of the Act if, in the opinion of the Attorney-General "the provision of the assistance would impose an excessive burden on the resources of the Crown".

597. Section 13 of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* covers “expenses for compliance”. This has restricted scope.

13. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.

(2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.

(3) If in the opinion of the requested country, the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

(b) Observations on the implementation of the article

598. Tuvalu indicated that it has not implemented the provision. It is recommended that Tuvalu specify the matter of costs of MLA in line with the provision of the Convention.

599. As noted above, it is further recommended that Tuvalu reconsider the discretionary grounds of refusal spelled out in section 12(g).

Article 46 Mutual legal assistance

Paragraph 29

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

(a) Summary of information relevant to reviewing the implementation of the article

600. There does not appear to be any limitation on the types of documents that can be provided and the *Mutual Assistance in Criminal Matters Act* contains a broad definition of “document” (cited above).

Mutual Assistance in Criminal Matters Act [Cap 7.40]

14 Requests by foreign countries for assistance with evidence

(1) If a foreign country asks that evidence be taken in Tuvalu for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Attorney-General may authorise:

(a) the taking of the evidence; and

(b) the transmission of the evidence to the requesting country.

(2) If a foreign country asks that a document or other article in Tuvalu be produced for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Attorney-General may authorise:

(a) the production of the documents or articles; and

(b) their transmission to the requesting country.

...

16 Production

(1) If the Attorney-General authorises the production of a document under section 14, the Court:

(a) may order the document to be produced to the Court; and

(b) if it is produced, must send it, or a copy of it certified by the Court to be a true copy, to the Attorney-General.

(2) If the Attorney-General authorises the production of an article (other than a document) under section 14, the Court:

(a) may order it to be produced to the Court; and

(b) if it is produced, must send it to the Attorney-General.

(b) Observations on the implementation of the article

601. There is no restriction in the legislation and Tuvalu would consider a request to provide non-public government records to a requesting country on a case-by-cases basis.

Article 46 Mutual legal assistance

Paragraph 30

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

(a) Summary of information relevant to reviewing the implementation of the article

602. Tuvalu is party to the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth*.

(b) Observations on the implementation of the article

603. Tuvalu has not entered into any MLA treaties but is party to the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth*.

Article 47 Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

604. Tuvalu indicated that it has not implemented the article.

605. Normally the matter is dealt with by application to the appropriate court for transfer.

Magistrate Court Act

35 Transfer of cases by the Senior Magistrate

(1) The Senior Magistrate's Court may at any time and at any stage thereof before judgment transfer any civil cause or matter before a magistrate's court to any other magistrate's court or to the Senior Magistrate's Court, and such cause may be transferred either entirely or in respect of any part thereof or procedure required to be taken therein.

(2) The power of transfer shall be exercised by means of an order under the hand of the Senior Magistrate, and may apply either to any particular cause or causes, matter or matters in dependence either entirely or in respect of any part thereof or procedure required to be taken therein, or generally to all such causes and matters as may be described in such order, and in the latter case may extend to future causes or matters as well as to such as may at the time of making such order be in dependence.

(3) The Senior Magistrate's Court may at all times cancel, alter, add to or amend any order under the preceding subsection.

(4) The Senior Magistrate's Court may, if it appear expedient, in the first instance cause the contents of any such order to be telegraphed, and any such telegram shall, until receipt of the said order have the same validity and effect as if it were the said order.

36 Effect of an order of transfer

(1) Every order of transfer shall operate as a stay of proceedings in the magistrate's court to which it may be addressed in any cause or matter to which the order extends or is applicable, and the process and proceedings in every such cause or matter, and an attested copy of all entries in the books of such court relative thereto, shall be transmitted to the court to which the same shall be transferred and thenceforth all proceedings in the cause or matter shall be taken in such court as if the cause or matter had been commenced therein.

(2) An order given under section 34 or section 35 shall not be subject to appeal.

(b) Observations on the implementation of the article

606. Tuvalu indicated that it has not implemented the article. The cited provisions apply to domestic not foreign transfers.

607. The article is not implemented. There is no law or practice on the matter. Tuvalu could consider adopting a law on the transfer of criminal proceedings.

Article 48 Law enforcement cooperation

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

(a) Summary of information relevant to reviewing the implementation of the article

608. Tuvalu has partially implemented the article.

609. Law enforcement cooperation is carried out through formal agreements or arrangements, and on a case-by-case/ ad-hoc / informal basis.

610. Tuvalu is an observer member of the Pacific Transnational Crime Network (PTCN). PTCN is an important network that enhances law enforcement cooperation. It was established in July 2002 by the Pacific Islands Chiefs of Police and is supported by the Australian Federal Police (AFP), New Zealand Police (NZP) and United States Joint Interagency Taskforce West (JIATFW). It provides an interconnected, proactive criminal

intelligence and investigative capability to combat transnational crime in the Pacific through a multi-agency and regional approach.

611. Tuvalu is also a member of the Pacific Islands Chiefs of Police and the Pacific Islands Forum Secretariat.
612. Tuvalu became an observer to the Asia-Pacific Group on Money Laundering in 2014.
613. Tuvalu is not a member of the Egmont Group of FIUs or the Pacific Association of FIUs. Tuvalu has not signed any cooperation agreements/Memoranda of Understanding with other FIUs, as the Transaction Tracking Unit is not yet operational.
614. Tuvalu's law enforcement authorities participated in the Regional Assistance Mission for the Solomon Islands (RAMSI).
615. Tuvalu has had no experience in the application of this Convention as a legal basis for law enforcement cooperation.
616. Regarding the exchange of law enforcement personnel with other countries, it was explained that Tuvalu sends investigators to the Australian police force for training on basic policing and other investigative skills on an annual basis. The Cook Islands have also trained Tuvalu's financial institutions on the reporting of suspicious transactions. Cooperation among customs authorities in Tuvalu and New Zealand also happens on a regular basis.

(b) Observations on the implementation of the article

617. Tuvalu indicates that it has partially implemented the article.
618. It was explained during the country visit that law enforcement cooperation is carried out through formal agreements or arrangements, and on an informal case-by-case basis.
619. It was also explained that Tuvalu does not cooperate through INTERPOL directly but through the Australian federal police.
620. Tuvalu engages in period exchanges of law enforcement personnel with other countries.
621. Although Tuvalu has had no experience in the application of this Convention as a legal basis for law enforcement cooperation, it was explained that it could cooperate in principle on the basis of this Convention.
622. Based on the above, it is recommended that Tuvalu continue to strengthen law enforcement cooperation at the international level, including by building out its membership in INTERPOL and becoming a full member of the Asia-Pacific Group on Money Laundering and the Egmont Group. Tuvalu should also continue its cooperation with other countries through staff exchanges for training and capacity building.

Article 49 Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

(a) Summary of information relevant to reviewing the implementation of the article

623. Tuvalu has not entered into any agreements that provide for joint investigations.

(b) Observations on the implementation of the article

624. It was explained during the country visit that there been no joint investigations with other countries to date.

Article 50 Special investigative techniques

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

(a) Summary of information relevant to reviewing the implementation of the article

625. Tuvalu indicated that it has not implemented the article. Tuvalu's legislation does not regulate the use of special investigative techniques, such as electronic surveillance, undercover operations and controlled delivery.

626. The general powers and duties of police officers are spelled out in section 21 of the Police Act [Cap. 20.24].

(b) Observations on the implementation of the article

627. Tuvalu indicated that it has not implemented the article.

628. Tuvalu has not previously conducted any special investigative techniques, such as electronic surveillance, undercover operations and controlled delivery. It was explained that the police could in principle conduct such investigative techniques as part of its general powers and duties, but that the matter is not spelled out in the Police Act [Cap. 20.24].

629. There could also be challenges to admitting such evidence in court, as the issue is not addressed in the legislation.

630. It is recommended that Tuvalu introduce special investigative techniques, as may be necessary and within existing resources, including by adopting corresponding legislation, providing the corresponding training to law enforcement personnel and ensuring that evidence derived from such techniques is admissible in court.