Pacific Perspectives

Convention on the Rights of Persons with Disabilities:
Overview of Compliance in Pacific Islands Legislation
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SUMMARY

This issue of Pacific Perspectives is an abridged version of a regional report commissioned by United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) in 2020 on legislative compliance with the Convention on the Rights of Persons with Disabilities (CRPD) in the Pacific. The issue is intended for the wider public to better understand the nature and extent of discrimination against persons with disabilities that currently exists in constitutional and legislative frameworks in the Pacific as well as the opportunities and options for reforms to address it.

Discrimination is found across all Pacific jurisdictions reviewed, ranging from the use of discriminatory language that perpetuates stereotypes and stigma, to direct discrimination by exclusion, restrictions or denial of fundamental rights and freedoms, discrimination by omission when sectoral laws are not disability inclusive as well as indirect discrimination when seemingly neutral laws have a negative impact on persons with disabilities. Many compliance issues are identified across multiple and diverse areas of law, including the lack of accessibility requirements as well as reasonable and procedural accommodation requirements, and denial of legal capacity. Women and girls with disabilities are particularly susceptible to discrimination due to the intersectional vulnerability related to their gender and disability.

However, progress has been made in the region, not least with most countries ratifying the Convention, and thus being obliged to ensure and promote the full realization of human rights and fundamental freedoms for persons with disabilities without discrimination of any kind (Article 4). These obligations include "modify[ing] and abolish[ing] existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities" and "adopt[ing] all appropriate legislative ... measures for the implementation of the rights recognized" under the Convention. Opportunities and pathways exist for all countries, regardless of the extent of non-compliance in current legislative frameworks. They can consider enacting a standalone disability law, mainstreaming disability across the entire legislative framework, or doing both by following a twin-track approach. Whichever option countries choose, reforms are urgently needed and can be a powerful tool to begin the process of eliminating the deep-rooted and longstanding discrimination that has been inflicted on persons with disabilities in the region.
I. INTRODUCTION
The first human rights Convention of the twenty-first century, the Convention on the Rights of Persons with Disabilities (CRPD, or Convention) represents a critical paradigm shift in disability from care, charity and protection to rights and equality. It reafirms the fact that persons with disabilities are entitled to all human rights and fundamental freedoms on an equal basis with other persons. In the Pacific region, all countries have signed and most have ratified the CRPD, signalling a strong commitment to disability rights.

The Convention includes more than 30 substantive rights-related Articles that cover specific rights (civil, political, economic and social), enabling measures, international cooperation, national implementation and monitoring. Article 4 of the Convention outlines the general obligations for States parties to ensure and promote the full realization of all human rights for persons with disabilities. The actions to be taken include "modify[ing] or abolish[ing] existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities," and "adopt[ing] all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention". Among other things, this means undertaking a comprehensive review of their domestic laws, developing a national disability policy or plan, and enacting new legislation to implement all CRPD rights. Article 5 is also a key in this context as it prohibits discrimination against all persons with disabilities and obliges States parties to enact laws to ensure that persons with disabilities receive equal protection under the law.

Pacific countries are at different stages of implementing the CRPD, including the general obligations under Article 4. At their request, technical assistance was provided by ESCAP and partners to Pacific national and state Governments between 2015 and 2020 to conduct comprehensive reviews of domestic laws for CRPD compliance. Reviews involved in-depth legal research and comprehensive analysis of national and state laws (with a focus on primary legislation and Constitutions) as well as extensive consultations and site visits. The reviews focused on eliminating disability-based discrimination in the law, protecting the rights of all persons with disabilities, and promoting disability mainstreaming across constitutional and legislative frameworks. Comments were also offered on compliance issues related to other human rights treaties and international standards, including the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). A total of nine reviews were conducted,1 led by ESCAP in collaboration with the Pacific Islands Forum Secretariat and with the support from the Pacific Disability Forum. The reviews were supported by the United Nations Partnership on the Rights of Persons with Disability through the Pacific Enable project involving several United Nations agencies, including the International Labour Organization (ILO), Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations Children’s Fund (UNICEF), and the World Health Organization (WHO).

In 2020, ESCAP commissioned a regional legislative review of CRPD compliance in the Pacific, building on the nine completed legislative reviews in order to provide a comparative analysis.2 Additional legal research was undertaken to identify significant changes to legislation since the national and state reviews, including repealed provisions, and to review newly enacted laws that have implications for disability rights and CRPD compliance. Assessments and recommendations were guided by CRPD Committee jurisprudence, including general comments, concluding observations and recommendations to countries in the Pacific.

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1 Seven national reviews (Nauru, Republic of Marshall Islands, Federated States of Micronesia, Solomon Islands, Tonga, Tuvalu and Vanuatu) and two State reviews (Kosrae State and Pohnpei State of the Federated States of Micronesia).

2 ESCAP, 2021, "Inequality, discrimination and exclusion: Assessing CRPD compliance in Pacific Island legislation" by Atu Emberson-Bain, October 2021, Bangkok.
This issue of Pacific Perspectives is an abridged version of the regional report. Prepared for the wider public, it looks at key compliance issues found in legal frameworks in the Pacific, and then outlines the legislative options and opportunities that countries wishing to undertake reforms can consider. The issue uses selected examples from countries in the region to illustrate both existing issues in, and ongoing efforts towards better alignment and harmonization with the CRPD. A more detailed analysis and tailor-made recommendations for each country are available in the regional report as well as individual country and state reviews.

**CRPD Committee Oversight and Jurisprudence**

The CRPD does not contain a judicial enforcement system. However, Article 34 establishes a committee of experts — the Committee on the Rights of Persons with Disabilities (CRPD Committee) — to monitor implementation progress by States parties. The CRPD Committee is made up of members elected by States parties and nearly all of whom are persons with disabilities. The Committee provides expertise, advice and authoritative guidance on how to implement the Convention effectively, including through national disability policies and legislation. State parties to the CRPD are required to submit regular reports to the Committee on how the rights are being implemented. After examining each report, the Committee issues its “concluding observations (observations and recommendations).

CRPD Committee jurisprudence is comprised of different components. Of particular importance, under the Optional Protocol, the Committee may consider individual communications (complaints) alleging violations or on its own initiative initiate inquiries if it has received reliable information containing well-founded indications of serious or systematic violations of the Convention. The Committee has adopted 37 views (decisions) on individual communications (complaints), addressing a wide range of procedural and substantive issues.

The CRPD Committee, like other United Nations Human Rights Treaty Committees, also publish their interpretation of the CRPD provisions. Known as General Comments, these statements unpack selected Articles for comprehensive interpretation of substantive rights and obligations. In addition, they clarify the reporting requirements of States parties and suggest approaches for implementation with regard to certain provisions. The CRPD Committee has published seven General Comments on the following issues:

- General Comment No. 1 on Article 12: Equal recognition before the law;
- General Comment No. 2 on Article 9: Accessibility;
- General Comment No. 3 on Article 6: Women and girls with disabilities;
- General Comment No. 4 on Article 24: Right to inclusive education;
- General Comment No. 5 on Article 19: Right to independent living;
- General Comment No. 6 on Article 5: Equality and non-discrimination;
- General Comment No. 7 on Article 4.3 and 33.3: Participation with persons with disabilities in the implementation and monitoring of the Convention.
II. KEY COMPLIANCE ISSUES
This section discusses key issues of CRPD compliance arising across the nine Pacific jurisdictions reviewed, starting with a brief assessment of constitutional frameworks. It then examines specific rights violations that arise under different areas of law or in relation to cross-cutting concepts such as accessibility, reasonable accommodation, procedural accommodation and legal capacity. Discriminatory language and stereotypes are another form of non-compliance that features prominently in legislative frameworks throughout the region. The section also explores the intersection between gender and disability, looking at areas such as family-based violence and sexual violence, where women and girls with disabilities are particularly susceptible to discrimination. Finally, it spotlights two key sectors that have the potential to bring about society-wide transformation if the barriers of disability-based discrimination and exclusion are dismantled, i.e., education and employment.

A. Constitutions

There are numerous aspects of Pacific constitutions that are inconsistent with international human rights standards, including those established under the CRPD. Common examples in the region include: (a) failure to expressly prohibit discrimination on the basis of disability; (b) omission of economic and social rights (such as education, economic participation, health, housing and social security) from the Bill of Rights; (c) absence of positive measures (i.e., affirmative action) to achieve de facto equality for persons with disabilities; (d) the absence of a non-derogability rule with regard to certain rights (i.e., rights that cannot be suspended even in an emergency); and (e) non-recognition of sign language as an official language. Discriminatory restrictions and the exclusion of persons with disabilities are commonly found in areas such as political rights (e.g., voting, standing for election and holding public office) and property rights. Discrimination is particularly severe for persons with intellectual and/or psychosocial disabilities.

There are some positive examples in the region. Article 26(3) of the 2013 Constitution of Fiji expressly proscribes disability-based discrimination: "A person must not be unfairly discriminated against, directly or indirectly, on the grounds of his or her — (a) actual or supposed personal characteristics or circumstances, including ... disability". Vanuatu makes provision for positive measures (Chapter 2, s.5(1)(k)) although not in regard of disability, and sign language has recently been recognized as one of Papua New Guinea’s official languages.

B. Language and stereotypes

Negative social attitudes and prejudice underlie discrimination against persons with disabilities. These attitudes are socially constructed and arise from superstition, ignorance, misconceptions and myths about disability. They breed harmful stereotypes and stigma, and can give rise to social exclusion, marginalization and discrimination. Negative attitudes about disability are routinely projected into policy and law, which, in turn, further reinforces and institutionalises stigma and prejudice, creating a vicious cycle.

Persons with disabilities, particularly those with intellectual and psychosocial disabilities, are stereotyped as “imperfect” beings, weak, needy, feebleminded and “childlike”, lacking capacity or incapable of making decisions about matters that concern them, earning a living, having full and active lives, and meaningfully contributing to society. They are also deemed unworthy or incapable of marriage or sexual intimacy, and as a general burden on families and society. These damaging misconceptions create barriers and translate into a widespread denial of legal rights. Across the Pacific, this is particularly evident in areas concerning sexual and reproductive rights, marriage and family life, employment, political participation (notably voting and standing for office), contractual relations and health services. At the family and community level, stigma and stereotypes can result in neglect, isolation, rejection, teasing, bullying and harassment, physical and psychological violence, and sexual abuse.

Ignorance about mental illness, intellectual and psychosocial disability, or disability in general, fosters misunderstandings and unfounded fears. As a result, different yet essentially harmless behaviour of persons with disabilities becomes quickly cast as “crazy”
or “threatening”. A typical characterization of persons with intellectual or psychosocial disabilities is that they are unruly, disruptive, violent, threatening and a danger to the public. These unfounded and stereotyped views render them susceptible to arbitrary detention, coercive medical interventions and other denial of rights, all of which are inconsistent with international human rights standards.

Discriminatory practices in the Pacific arise prominently in the areas of mental health and criminal law, including court powers of committal or forced medical treatment, prison regulations – for example, with regard to the criteria for parole, and police powers of arrest even when a person is simply found “wandering at large”. Discrimination is also a feature of immigration law, weapons control legislation and security protocols in civil aviation law. Children and youths deemed to be “depraved or unruly character” – a classification likely to be disproportionately applied to young persons with mental health conditions or psychosocial disabilities – can be held on remand indefinitely or otherwise detained under legislation regulating children in conflict with the law.

Women with disabilities, particularly those with intellectual or psychosocial disabilities, are subject to other stereotypes, reflective of the intersectionality of disability and gender whereby they are portrayed as asexual or hypersexual, incapable of consent or lacking control, or unlikely to have parenting skills. Such discriminatory views hinder the ability of women with disabilities to enjoy sexual and reproductive health rights, including within marriage, on an equal basis with other women. They also underlie and legitimize coercive practices and medical interventions such as forced contraception, forced sterilization, and forced abortion. Such practices are acts of violence against women and girls with disabilities and violate CRPD Article 5 (non-discrimination), Article 6 (women with disabilities), Article 12 (legal capacity), Article 15 (cruel, inhuman or degrading treatment), Article 17 (integrity of the person), Article 23 (home and family) and Article 25 (health).

Despite some shift in social thinking and policy, there is still considerable stigma associated with disability. Such stigma is reflected in derogatory language, which can cement social prejudice, perpetuate stereotypes and promote inequalities. Words that denigrate, pity or deny value sustain a system that asserts the right to manage the lives of those considered less “able” or “competent”, or that denies rights on the basis of perceived or actual impairments. There is an abundance of outdated and disrespectful terms describing persons with learning and mental health disabilities in Pacific legislations and constitutions like “idiot”, “feebleminded”, “imbecile”, “mentally defective”, “mental retardation”, “mental disorder”, “unsound mind”, “insane/insanity”, “dumb”, “unruly” and “depraved”.

Sometimes stigma is concealed by seemingly neutral language. For example, immigration rights can be denied on the ground of “a serious health concern” when a person has “a physical or psychological condition that poses a serious threat to the health or safety of the community.” Such broad and ambiguous phrasing (“physical or psychological condition”) is open to discretionary and discriminatory application. Other commonly used terms and concepts that appear neutral include “(in)capacity” and “(in)competence”, “able-bodied/disabled” and “(not a) fit and proper person”. As these terms are traditionally associated with disability, and are likely to disproportionately affect persons with disabilities, they can pave the way for disqualifications or exclusions based on disability, contrary to Articles 5 and 27. The concept of “special needs” is also inconsistent with the CRPD, in particular the

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3 Research findings in Canada, for example, indicate that persons with mental health disabilities are no more likely to engage in violent behaviour than the general population. Paradoxically, they are more likely to be victims of violence themselves than the general population. See for example a discussion paper by the Canadian Mental Health Association, Ontario, September 2011, Violence and Mental Health: Unpacking a Complex Issue.

4 Children on the autism spectrum or with intellectual disability are among other persons with intellectual or psychosocial disabilities prone to wandering for various reasons, including communication problems or difficulties understanding safety issues.

5 Solomon Islands Immigration Act ss 21 and 24.
general principles in Article 3 that highlight the “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.” Respecting difference and diversity rejects any notion of a rational and able-bodied norm and, in turn, any implication that a person who falls short of this norm is defective, as implied by “the special needs concept.”

The CRPD recognizes the importance of eliminating negative attitudes, assumptions and stereotypes about disability, and of fostering greater respect for the dignity and rights of persons with disabilities. Article 8 requires the adoption of remedial measures that are “immediate, effective and appropriate . . .”. While much of this work necessarily involves education and awareness-raising, law reform can lay the legal foundations for a more inclusive and respectful culture towards persons with disabilities. Just as language can be a potent force for entrenching discrimination, so too can it be used to help overturn discriminatory norms. As a start, Pacific countries are urged to revise their laws to also replace prejudiced terms with gender-neutral language that is consistent with the CRPD.

C. Accessibility

Accessibility is one of the pivotal features of the CRPD, and States parties are obliged under Article 9 to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”. What is meant by “take appropriate measures” is not specified and should be determined in the context in which accessibility arises, such as the right to education (Article 24), health (Article 25) or employment (Article 27).

Multiple sectors in Pacific legislation do not stipulate accessibility requirements. This is particularly apparent in infrastructure, traffic, climate change and disaster management, and information, communication and technology (ICT), as discussed below. Legislating for accessibility deserves to be a priority for reform as it is a “precondition for persons with disabilities to live independently and participate fully and equally in society”.

Public procurement can be used to promote accessibility. As in other areas of policy and legislation development, it is imperative that community, national and regional stakeholder organizations are properly consulted and engaged from the outset.

Infrastructure (buildings, roads, transport)

Despite some evidence of efforts to improve accessibility in Pacific countries, there is still a conspicuous absence of accessible public buildings, workplaces, places of learning and recreation, hospitals, public roads, walkways and transport across the region. Existing building codes and legislation governing roads and transport, including air and maritime transport, are often silent on accessibility requirements or lack express provision for accessibility. Audits conducted on a number of countries by the Pacific Region Infrastructure Facility provide detailed insight into the many shortcomings in physical and transport infrastructure. Steps taken to dismantle barriers and create more accessible environments are often discretionary, ad hoc or slow to implement.

Typical examples of non-compliance are Vanuatu’s Building Act 2013 and Tonga’s Building Control and Standards Act, both of which do not include accessibility requirements in building permit applications by potential developers. To be CRPD-compliant, legislation should mandate accessibility as a condition for building permits, specify CRPD-aligned accessibility standards – including

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6 CRPD Committee General Comment No. 2. (2014) on accessibility CRPD/C/GC/2 para. [1].
universal design for all new public buildings and facilities – and establish accessibility requirements for existing buildings. Efforts are also needed to improve awareness and technical knowledge of key personnel. The Marshall Islands exemplifies good regional practice for legislating accessibility rights and obligations, including training requirements for persons working in areas such as construction and planning, mandatory adjustments to existing buildings, and enforcement provisions (adjustment orders).\(^8\)

**Accessibility and universal design**

Accessibility and universal design are distinct, albeit interrelated, concepts. Universal design requires environments, goods and services to be designed and constructed in an inclusive manner from the outset, to allow use by everyone without the need for adaptation or specific design to meet individual needs. It reflects the general principle of ‘universalism’, which is a fundamental tenet of the CRPD, and which requires the modification of social norms to better reflect human diversity for a more inclusive outcome rather than focusing on ‘fixing’ the individual to fit in to some narrow, idealised and exclusive norm.

With regard to road legislation, a positive example of CRPD-aligned accessibility reform can be found in the Marshall Islands’ Rights of Persons with Disabilities Act 2015 (RPD Act), which dedicates a section to the “construction of roads and footpaths” (s.1126), requiring all public roads, footpaths and intermediate points, such as vehicle crossings, crossroads or pedestrian crossings, to be accessible. Road planning across the Pacific requires the construction of ramps for wheelchair users, accessible footpath entry and exit points, and other devices for blind or visually impaired, and deaf or hearing-impaired persons, including Braille signposts and audible signage, tactile paving and parallel walk crossings. Accessibility is also critical in the area of public transport. It should be legislated as a mandatory requirement of all new public transport, while existing transport should be subject to modification guidelines and a timeframe and/or temporary accessibility measures. Personal assistants travelling with persons with disabilities should be exempted from charges for the use of public transport and allowance made for a person who is blind to enter public transport with a guide dog.

For civil aviation legislation, current gaps can be rectified by incorporating statutory obligations to ensure accessibility of air travel at all stages, supported by disability-specific measures. Such measures should include accessible aircraft and airline services, support on boarding, mobility aids, assistant animals, in-flight duties of crew members, accessible security information using alternative formats and modes of communication, and accessible inflight emergency protocols. It is necessary for the provision of assistance for travellers with disabilities to be expressly mandated, with specific regulations governing the transportation of wheelchairs, other mobility aids and support animals, such as guide dogs. Proposed measures should be developed by way of collaboration between airline and airport operators, other service providers, and disabled persons organizations. The development of such measures could be guided by the Accessibility Features in Audited Aviation Infrastructure by the Pacific Regional Infrastructure Facility. Regional maritime transport, likewise, can benefit from these comprehensive guidelines. Besides accessibility provisions, any form of disability-

\(^8\) The Marshall Islands Rights of Persons with Disabilities Act 2015. See in particular ss. 1121 (participation in political and public life), 1136 (training), 1145 (adjustment orders), 1146 (adjustment orders against government bodies), and 1158 (guidelines and standards).
based discrimination, including refusing services to persons with disabilities, is not compliant with Article 9 and the CRPD general principles (Article 3) and should be expressly prohibited. Where there is a passenger fare, one possible positive measure is a fare waiver for travel companions of persons with disabilities, such as for personal assistants.

The need exists in other sectoral legislation to comply with Article 9, for example, the business sector. A general provision should be introduced in legislation to establish accessibility requirements – including both physical structures information and communications systems and technology – for all businesses open to, or offering services to the public. Enforceability could be achieved by making accessibility a prerequisite for obtaining a licence. Other areas to promote accessibility include legislation governing urban planning and local government.

**Traffic**

Regional traffic laws are discriminatory in a number of ways. First, they commonly disqualify persons with psychosocial or intellectual disabilities from holding a driver’s licence, manifesting a discriminatory assumption that having a disability makes it inherently unsafe to drive. The Vanuatu Road Traffic Control Act (s. 44) does not permit persons with disabilities to acquire a driving licence, (i.e., those who “suffer from any disease or physical disability of such a nature to render their driving of a vehicle a source of danger to the public”). Similar exclusionary standards are applied in the Marshall Islands, the Federated States of Micronesia, Kosrae and Pohnpei States, Solomon Islands, Tonga and Tuvalu.

In some instances, there are discriminatory requirements for driving tests or examinations including theory tests. While there is an occasional provision for a class of vehicle suitable for a person with disability (Solomon Islands and Tonga), accessibility requirements for public transportation and parking, such as through adjusted or adapted vehicles, do not appear to be prescribed anywhere except the Marshall Islands.

CRPD compliance would require removing outright prohibitions. The law can instead establish an obligation to provide positive accessibility measures and reasonable accommodation for persons with disabilities who wish to drive and are capable of driving safely with reasonable accommodation (e.g., by means of a new class of vehicle – adjusted or adapted vehicles). Licence restrictions should only be contemplated in cases where a person is unable to safely drive a vehicle, once adjusted.

**Climate change, disaster management and other emergencies**

The CRPD Committee has cautioned that persons with disabilities “are often at most risk of all forms of discrimination and exclusion, and... ‘the first to be forgotten and the last to be remembered’ of all marginalized groups”. Article 11 of the CRPD obliges States parties to take all necessary measures in accordance with their obligations under international law – including international humanitarian law and international human rights law – to ensure the protection and safety of persons with disabilities in situations of risk, including armed conflict, humanitarian emergencies and natural disasters. The right to safety is further bolstered by the general accessibility obligations under Article 9.

Pacific disaster and climate legislation typically fails to attend to the needs and rights of persons with disabilities by being silent on the needs of persons with disabilities and not including them in Boards and Committees (e.g., the Marshall Islands, the Federated States of Micronesia, Solomon Islands, Tonga and Tuvalu). This is especially disconcerting given the growing frequency and intensity of disasters in the region, the toll they take on people, their homes and livelihoods, and the disproportionate effects disasters are known to have on persons with disabilities. New and amended provisions are therefore needed to ensure greater disability inclusion, so that disability organizations are represented on decision-making bodies, and the needs and rights of persons with disabilities, including

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9 Statement on disability inclusion issued by CRPD Committee (September 2014) prior to the 2015 Third World Conference on Disaster Risk Reduction in Sendai, Japan.
women and children with disabilities, are systematically incorporated into all aspects of disaster management, planning and response, including prevention, training, emergency protocols, and relief measures. For example, emergency communication can be made more accessible by recruiting sign language interpreters among humanitarian staff, and by issuing emergency messages in formats such as sign language and Easy Read. Prescribed items for relief under statutory provisions, normally limited to food, clothing, shelter, medical supplies and building materials, can be broadened to incorporate items for the relief, rehabilitation, health and mobility of persons with disabilities, including mobility aids and other assistive devices, equipment and technologies.

Nauru is a notable exception in the region and has taken a commendable first step towards law reform in disaster preparedness and response. Its National Disaster Risk Management Act 2016 breaks the silence on disability with two references. Section 45 establishes non-discriminatory principles for international disaster assistance, and includes disability as one of the status categories expressly protected from “any adverse distinctions, exclusions or preferences”. Of significance is the provision for representation of a disabled persons organization on the National Disaster Risk Management Council (s.16(3)).

Information, communications and technology

Alongside Article 9, which recognizes multiple dimensions of accessibility, two other CRPD Articles are particularly relevant in the ICT context: Article 21 on access to information; and Article 30 on access to television programmes and films in accessible formats to enable persons with disabilities to participate in cultural life, recreation and leisure on an equal basis with others.

Telecommunications legislation such as Telecommunications Acts, Television Acts, and Broadcasting Acts across the Pacific generally makes no provision for accessibility requirements of persons with disabilities. A positive attempt toward inclusion can be found in Vanuatu’s Right to Information Act, Section 28(7) which states: “If an applicant is prevented by a disability from reading, viewing or listening to the information concerned in the form or manner in which it is held, the Right to Information Officer must, if the applicant so requests, take reasonable steps to make the information available in a form in which it is capable of being read, viewed or heard by the applicant.”

A comprehensively inclusive and non-discriminatory approach is needed across the region. This could be reflected in the guiding principles set for service providers, thereby laying the foundation for practical measures that ensure access to all broadcast content regarding information, current affairs, education, culture, sport and entertainment for persons with disabilities, especially those with sensory disabilities. One solution would be to provide content in accessible formats and technologies. For example, sign language interpretation (insets) or subtitles could be standardized in television for persons who are deaf or hearing impaired. Legislation that incorporates licensing, including grounds for granting, renewing, suspending or cancelling broadcast licences, should be amended to stipulate accessibility as a condition of a licence, with legal sanctions for non-compliance.

When issuing its General Comment No. 2 on accessibility, the CRPD Committee recommended that States parties review relevant recommendations of the International Telecommunications Union (ITU) as a basis for strengthening national legislative frameworks. In particular, in 2004 ITU issued a Model ICT Accessibility Policy Report to assist national policymakers and regulators develop and implement ICT accessibility policy frameworks across different aspects, including mobile communications, television and video programming, and public procurement of accessible ICTs.  

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Public procurement

Public procurement has the potential to be a powerful tool for promoting accessibility and universal design. Arguably, there is a moral imperative for ensuring that public procurement systems are CRPD compliant and disability inclusive, given the substantial public funds expended through procurement.11 In its General Comment No. 2 on accessibility, the CRPD Committee insists that States parties need to "ensure that all newly procured goods and services are fully accessible for persons with disabilities."12

There is some procurement legislation in the Pacific, such as in the Federated States of Micronesia, Nauru, Tonga and Vanuatu. However, none of them is designed to ensure that persons with disabilities benefit on an equal basis with others. Amendments are therefore needed to ensure compliance with the CRPD accessibility and equality obligations, and specifically to establish public procurement systems that are disability inclusive, accessible and non-discriminatory. There should ideally be provisions that expressly prohibit discrimination on the basis of disability, so that persons with disabilities are "not excluded or restricted from benefitting from procurement processes and outcomes on an equal basis with others."13

Disability inclusive procurement is typically found in two forms: (a) preferential contracting (i.e., contracts awarded to organizations that employ persons with disabilities); and (b) procurement to promote accessibility and universal design (i.e., contracts awarded on the basis of compliance with specified accessibility criteria).14 Accessibility can be promoted in all phases of the procurement process, beginning with identifying accessibility needs of the procurer in respect of particular products, goods and services. This is followed by: (a) calling tenders to supply required products, goods and services that have mandatory accessibility criteria; (b) evaluating tenders to assess compliance with accessibility criteria; and (c) selecting one tender and awarding procurement contracts to the chosen supplier. The last phase deals with contract management, which includes ensuring the usability of the procured items by persons with disabilities.15 Importantly, the tender process (including advertising, bidding and awarding contracts) needs to make provision for alternative and accessible formats.16 Moreover, legislation should stipulate technical requirements and standards for accessibility that are consistent with international standards.

D. Reasonable and procedural accommodation

Reasonable accommodation refers to the "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2). Unlike universal design and accessibility, it is specifically designed to meet the particular needs of an individual. Accommodation is required as and when needs arise in any social environment, so long as they do not inflict a disproportionate or undue burden. Social environments include schools and training institutions, workplaces, courts and prisons.

Failure or refusal to provide reasonable accommodation amounts to an act of discrimination (Articles 2 and 5). As reasonable accommodation is assessed on a case-by-case basis, States have some discretion to determine whether a particular case constitutes undue hardship. However, no decision should be arbitrary or amount to denial of justice. In

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12 CRPD Committee General Comment No. 2 (2014) on accessibility, CRPD/C/GC/2 para. [30].
13 International Disability Alliance, 2015, op. cit. 12.
15 Ibid, 25. See figure 8 for more details.
16 International Disability Alliance, 2015, op cit. 13.
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General Comment No. 6, the CRPD Committee explains this important concept in some detail, providing interpretation of terms like “reasonable”, and “disproportionate or undue burden”, and guidance on the duties implied.17

Procedural accommodation is similarly linked to the right to equality and non-discrimination, but in a narrower context of access to justice. Article 13 obliges States to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodation. Without individual adjustments, a person with sensory, intellectual, psychosocial disability may be unable to initiate or defend proceedings, give evidence, make a statement, or perform any other act necessary to participate in proceedings on an equal basis with others.

Procedural accommodation therefore may assume very different forms in court. For example: relaxing rules related to court attire; allowing a person to testify in private through a video link or in the judge’s chambers; allowing extra time for testimony; permitting extra or frequent breaks; allowing personal assistance; producing easy-to-read summaries of proceedings; or providing interpretation and/or explanation. Accessibility measures include modifying courtrooms for physical accessibility and using accessible information and communication formats. All of this can be done without jeopardising the due process of law. Supported decision-making – helping the accused, witness or victim to make decisions – could also be applied as a form of procedural accommodation; for example, when a person must decide about entering a plea and needs support to make that decision.18 Unlike reasonable accommodation, procedural accommodation is not limited by evidence of a “disproportionate or undue burden”. The Marshall Islands has incorporated both these key concepts into its Rights of Persons with Disabilities Act 2015. Fiji has followed suit with the Rights of Persons with Disabilities Act 2018. However, there is otherwise a general absence of both reasonable and procedural accommodation requirements in Pacific legislation. The need to mandate reasonable accommodation cuts across most areas of law, but is especially relevant to sectors such as employment, education and prisons.

Procedural accommodation requirements should be incorporated into legislation that governs evidence, civil and criminal procedures, extradition proceedings, courts, appeals, jury service, commissions of enquiry and the ombudsman’s office. For example, procedural accommodation provisions should be put in place for prisoners with disabilities when raising complaints on rights violations or preparing a defence in disciplinary proceedings, procedures that exist in most Pacific legislation. Vanuatu’s Correctional Services Act 2006 takes a step in this direction by stating that “a detainee charged with an offence against discipline must be provided with all reasonable means to prepare his or her defence, including translation or interpretation services, as may be required” (s.31). For most countries in the Pacific, correctional facilities are not mandated to provide reasonable accommodation or accessibility for prisoners with disabilities.

When embarking on reform, countries are encouraged to consult the 2020 International Principles and Guidelines on Access to Justice for Persons with Disabilities, which provides a long list of prescribed measures under Principle 3 (the right to appropriate procedural accommodations). Attention should also be given to cultural norms, gender dynamics and/or power relations that create additional barriers for women and girls with disabilities to access justice on an equal basis with men.

Jury service

Jury service is an important civic duty and enables direct participation in the system of justice. However, it is common for persons with disabilities to be prevented from performing jury duty on the basis of their disability, as they may be considered “incapable of serving”

17 CRPD General Comment No. 6 (equality and non-discrimination), 2018. CRPD/C/GC/6 paras [23-27].
18 See further discussion on supported decision-making in the Legal Capacity section of this report.
or “incompetent to serve” due to “blindness, deafness or any other permanent physical infirmity”, “mental or physical infirmities”, “unsoundness of mind” or if “unable to read, write, speak and understand” the language. Literacy-based disqualifications amount to indirect discrimination as they are likely to disproportionately affect persons with intellectual, learning and sensory disabilities. For CRPD harmonisation, and to facilitate full and equal participation of persons with disabilities in jury service, disability-based exclusions should be expressly prohibited and reasonable accommodation provisions stipulated. Literacy requirements have been abandoned in many countries. Legislation can shift the focus to communication abilities instead, taking into account the use of accessible formats (e.g., Braille, Easy Read, large print and sign language).

Evidence

It is not unusual for States to disregard testimony given by persons with intellectual and/or psychosocial disabilities in legal proceedings. For example, Tonga’s Evidence Act allows the court to determine the competency of a person to give evidence. Specifically, the court can disqualify “mentally deficient” persons from testifying if it considers that they are “prevented from understanding the questions put to them or from giving rational answers to those questions by reason of … disease whether of body or mind” (s.118). This type of provision invokes discrimination on the basis of disability, in contravention of Article 5, and implies a denial both of legal capacity, contrary to Article 12 and Article 13 (right to access justice).

Testifying in court can be intimidating for anyone unfamiliar with legal proceedings, and the pressure can be exacerbated for persons with intellectual, psychosocial or developmental disabilities, such as those in the autism spectrum. Since general procedures could result in indirect discrimination if applied without exception, the courts and other tribunals should be directed to make appropriate adjustments (procedural accommodation) so that persons with disabilities are able to give evidence or otherwise participate effectively in proceedings. In line with Article 13(2), training should be provided to judges and magistrates on their duty to ensure full participation by persons with disabilities.

Solomon Islands provides a good regional example, demonstrating a legislative sensitivity to the rights and dignity of persons with disabilities, even though it falls short of compliance. Under the Evidence Act 2009, courts are given some discretion to receive unsworn evidence, use communication assistance, and make special arrangements for taking evidence from vulnerable witnesses, including persons with disabilities. Communications assistance is broadly defined in section 2 to include “an interpreter, sign language interpreter or other person or device which assists the court to understand the evidence given by the witness or the accused.” Section 70 also enables hearing-and speech-impaired witnesses to give evidence “in any appropriate way” or “by any appropriate means.” Furthermore, section 41 allows for special arrangements to be made in the interests of justice and at the request of vulnerable witnesses, including “persons with a mental or physical disability, illness or impairment” (section 41(2)(d)). The Solomon Islands provisions fall short of the CRPD standards as the accommodations are discretionary, whereas procedural accommodation is a mandatory requirement under the Convention.

E. Legal capacity

One prominent stereotype about persons with disabilities is that they lack the capacity to make decisions about matters that concern them, and therefore need other people to make decisions for them (substitute decision-making). In particular, those with intellectual or psychosocial disabilities remain a group whose legal capacity is most commonly denied in legal systems worldwide, because they are considered to be “mentally incompetent”. Due to the intersectionality of gender and disability,
women with disabilities are particularly susceptible to restrictions on their legal capacity, especially in the area of sexual and reproductive health and rights.\textsuperscript{20}

Legal capacity has two elements: (a) a person’s legal standing or legal personality – which recognizes the person as the holder of rights; and (b) a person’s legal agency, i.e., having the power to act on legal standing or ability to exercise those rights. The capacity to act and to make one’s own decisions in life is essential to exercising other human rights, such as the right to vote, marry or have a family, or to own property. For this reason, legal capacity is considered to be a portal to other rights. Under Article 12, the human rights-based model of disability recognizes the legal capacity of persons with disabilities in all aspects of life and on an equal basis with others. It also lays the foundation for supported decision-making systems that recognize their rights, will and preferences, and require supportive measures to help exercise their legal capacity. The lack of mental capacity, typically referred to “unsoundness of mind” and generally used in reference to persons with intellectual or psychosocial disabilities, is not legitimate grounds for denying legal capacity.\textsuperscript{21}

\subsection*{Mental capacity and legal capacity}

Mental capacity and legal capacity are distinct concepts and should not be conflated. Mental capacity refers to the decision-making skills, competence or ability of a person, which varies from one person to another, and depends on a variety of environmental, social and other factors. Legal capacity, on the other hand, refers to capacity under the law, both to have legal standing and to enjoy legal agency. The CRPD Committee observed in its General Comment No. 1 that the concept of mental capacity itself is “highly controversial”, and is “not, as is commonly presented, an objective, scientific and naturally occurring phenomenon [but] contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.”\textsuperscript{22}

Numerous rights associated with legal capacity are currently denied to persons with disabilities under Pacific laws, based on a perceived lack of mental capacity. These include the right to engage in business and enter contracts, transfer or acquire property, make a will, do jury service and be criminally responsible. Other rights stemming from the right to legal capacity, such as the rights to marry, vote, work, consent (e.g., to intimate relations and medical treatment or hospitalization) and participate in public life, are also restricted or denied outright.

The following subsections illustrate some of the many violations that stem from the failure to recognize the right of persons with disabilities to legal capacity. Given the importance of legal capacity to the dignity and rights of persons with disabilities, and the far-reaching and detrimental effects of its denial, Pacific countries are urged to embark on a comprehensive two-stage process of law reform in line with repeated calls by the CRPD Committee, i.e., “(a) Repeal and amend, without delay, all legal provisions that restrict the legal capacity of persons with disabilities on the basis of impairment; (b) Replace all substituted decision-making regimes with supported decision-making regimes that respect the autonomy of persons with disabilities, and increase awareness among persons with disabilities, their families and relevant officials, including the judiciary, about the rights of persons with disabilities, particularly the right to equal recognition before the law.”\textsuperscript{23}

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\textsuperscript{20} See Intersection of disability and gender section in this report for more detailed discussion.
\textsuperscript{21} CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1.
\textsuperscript{22} CRPD General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1 [13-14].
\textsuperscript{23} CRPD Committee concluding observations on the initial report of Vanuatu (2019) CRPD/C/VUT/CO/1 para [23].
\end{small}
Guardianship, contract, wills and probate

Guardianship laws that are designed for adults with intellectual and/or psychosocial disabilities raise significant human rights concerns. While purporting to have a protective purpose, they effectively set up substitute decision-making regimes that strip persons of their autonomy and legal capacity on the basis of perceived or actual disability, in contravention of Article 12. Adult guardianship laws in the Pacific typically fall within this orbit. The Kosrae State Code, for example, establishes the procedure for appointing a guardian of an "incapacitated person" by the court, where a "guardian" is a person appointed to oversee the personal, financial and/or business affairs of a person who is "impaired by reason of mental illness, mental deficiency, physical illness or disability ... or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning one's person."24 Similar approaches exist in the Federated States of Micronesia, the Marshall Islands, Solomon Islands and Nauru.

Discriminatory guardianship provisions can be found across different areas of law, especially law governing land and other property, company, estate management, trusts and taxation.25 These types of guardianship arrangements should be replaced by support measures that do not compromise the legal capacity of any person requiring support.

Article 12 lays the foundation for supported decision-making systems that respect the inherent right of persons with disabilities to legal capacity, irrespective of any perceived or actual difficulty they may have in making decisions. States parties are obligated to provide whatever support or assistance is required, including supported decision-making and reasonable and/or procedural accommodation, to enable persons with intellectual, cognitive or psychosocial disabilities to exercise legal capacity and make their own decisions, including in cases where the impairment is severe. Supported decision-making measures must ensure respect for the autonomy, will and preferences of the person, and include safeguards to prevent abuse or undue influence by the support provider.

Sale of goods legislation in some countries incorporate longstanding norms embedded in the common law which deny persons with intellectual or psychosocial disabilities the right to contract. In Tonga, the Bills of Exchange Act prevents anyone from entering a contract (i.e., being a party to a Bill of Exchange) if they lack the "capacity to contract". This principle is reflected across multiple sections. Tuvalu and the Marshall Islands also place restrictions on persons considered "incompetent to contract" by virtue of "mental incapacity."26 It is not discriminatory per se to impose restrictions on entering contracts, so long as those restrictions do not limit the rights of a protected category of rights holder or – in relation to the CRPD – discriminate either directly or indirectly against persons with disabilities. However, the concept of "capacity to contract" traditionally disqualifies persons deemed to be "mentally incompetent" or "of unsound mind" from entering legally binding agreements. Any provisions that declare a person incompetent to contract based on "mental incapacity", or any

24 Kosrae State Code Title 6, Chapter 37, ss.6.3701-8.
25 See, for example, Marshall Islands Guardianship Act 1984 and Trust Act of 1994; Nauru Lands Act 1976 (ss. 6 and 15) and Trusts Act 2018; Solomon Islands Mental Treatment Act and Public Trustee Act; Tonga Land Act (s.149(1)(c); and Revenue Services Administration Act; Tuvalu’s Cooperative Societies Act, Companies Act and Income Tax Act, ss.33 and 35; and Vanuatu’s Expropriation for Public Utility Act (s.12).
general reference to a person lacking capacity to contract, should therefore be removed or amended to ensure that they cannot be construed as applying to an adult on the basis of an intellectual or cognitive disability. Instead, persons with disabilities can be assisted to make decisions that have legal effect, such as entering contracts, through mechanisms such as a nominated representative or power of attorney. The CRPD Committee indicates what this legislation might look like in its General Comment No. 1 on Article 12.27

Provisions denying legal capacity of persons with disabilities are also prevalent in the law relating to wills and probate, which uses a test of mental capacity to determine legal capacity. Vanuatu’s Wills Act typifies this non-compliant model, expressly denying a person who is “not of sound mind” the right to make a will to dispose of property after death (s.2); witness a will (s.6); and be appointed an executor (s.9). Comparable stipulations are found in Tonga, Marshall Islands, Solomon Islands, Pohnpei State and Kosrae State.28 Legislation in Nauru also allows a court to appoint a personal representative for a beneficiary who is “mentally disordered” or “under disability by reason of mental or physical incapacity.”29 For CRPD compliance, it is important that legislation is reviewed to remove any provisions that deprive persons with intellectual and/or psychosocial disabilities of their decision-making power and vest this in another entity or person. All persons with disabilities must be able to dispose of their property by a will and be given any support they require to make will-related decisions in line with Article 12.

**Marriage and divorce**

Restrictions on the right to intimate relationships and marriage of persons with disabilities are common across Pacific legislation. Provisions vary but have the same discriminatory effect, consistently implying demeaning and erroneous stereotypes about their unfitness and unworthiness for marriage or having a family. Restrictions usually target persons with intellectual and/or psychosocial disabilities but sometimes extend to persons with physical disabilities. In Tonga, granting a marriage licence to any person deemed to be "insane" is prohibited, and a solemnized marriage can be invalidated by reason of "incapacity to marry"30. Similar provisions are found in Vanuatu and Nauru.31 The grounds for divorce reveal the same pattern of discrimination across the region. Tuvalu, Tonga, Solomon Islands, Vanuatu, the Federated States of Micronesia, Pohnpei State and Kosrae State all make provision for the dissolution of marriage of a person with physical or mental disability.32

Any prohibition of marriage for a person with an intellectual or psychosocial disability ("unsoundness of mind" or "insanity") violates rights under Article 23 (respect for home and the family). Invalidating a marriage on the ground that one of the parties is considered to be lacking in mental capacity is also in breach of Article 12. These provisions therefore need to be amended to ensure that there is no disability-based impediment to adults with disabilities entering marriage on an equal basis with others. The reform of marriage and divorce legislation for compliance with the CRPD should simultaneously incorporate other international human rights standards, notably CEDAW. In particular, fault-based divorce should be removed altogether. Outdated traditional grounds for divorce such as adultery, desertion, cruelty and unsound mind should be replaced with just irretrievable or irreversible breakdown of marriage.

27 CRPD General Comment No. 1 on equal recognition before the law, CRPD/C/GC/1, paras [16-17].
28 Tonga Probate Act; Marshall Islands Probate Code; Solomon Islands Wills, Probate and Administration Act; State of Pohnpei, Title 4, Chapter 2 Wills; State of Kosrae, Title 16, Chapter 2 Wills.
29 Nauru Succession, Probate and Administration Act 1976.
30 Tonga Births, Deaths and Marriages Registration Act, s.6, s.17.
31 Vanuatu Matrimonial Causes Act, ss. 1 and 2; Nauru Matrimonial Causes Act 1973, s.22.
32 See Tuvalu Matrimonial Proceedings Act; Tonga Divorce Act; Solomon Islands Islanders’ Divorce Act; Vanuatu Matrimonial Causes Act (s.5); Federated States of Micronesia National Code Title 6, Chapter 6; Pohnpei State Code Title 51 Domestic Relations, Chapter 3, Kosrae State Code Title 6, Chapter 32.

Overview of CRPD Compliance in Pacific Islands Legislation
Adoption

The principle of the “best interests” of the child lies at the heart of prescribed international standards and safeguards for national adoptions, notably under the CRC. It is intended to guide the implementation of all rights of the child under the CRC and other relevant international instruments, and not a pretext for overriding any of these rights. The principle is expressly recognised in the CRPD: Article 23 applies the principle to specific family relationships including adoption, and Article 7 places it firmly in the context of the rights of a child with a disability, including the right to be consulted on all matters affecting that child on an equal basis with any other child.

From the CRPD perspective, there are a number of issues regarding adoption legislation in the Pacific. Of gravest concern is a general tendency to dispense with consent requirements for a parent with a psychosocial or intellectual disability. This implied denial of legal capacity is contrary to Article 12. For example, Tonga’s Maintenance of Illegitimate Children Act (s.15(2)) expressly allows the consent of a mother to be waived for an ex-nuptial child on the grounds of neglect, persistent ill treatment, abandonment and disability (“incapable of giving her consent” or “unreasonably withholds her consent”). The right to parental consent is likewise waived in Solomon Islands, State of Pohnpei, Nauru and the Marshall Islands on the grounds of being “incapable” or “incompetent” to consent.

Amendments are therefore needed to ensure that the right to consent to an adoption is not denied on the basis of disability. Under CRPD, the State has an obligation to: (a) provide reasonable accommodation and support, including supported decision-making, if required by a parent with disability; and (b) provide procedural accommodation for any parent or child with disability who is party to adoption proceedings. During the reform process, provisions that do not comply with other international instruments could also be reviewed. For example, the legal category of an “illegitimate child” is not consistent with Article 2 of the CRC, which most Pacific countries have ratified. Separate classification and subordinate rights for “illegitimate children” also contravene CEDAW (Articles 1 and 16).

Electoral law

The CRPD requires States parties to guarantee political rights to all persons with disabilities, including the rights to vote, stand for elections, hold office, and perform all public functions at all levels of government like anyone else (Article 29). It does not contain any exceptions to justify the exclusion, disqualification or restriction of rights on the basis of disability, including intellectual or psychosocial disability. An “inextricable link” lies between political rights under Article 29 and the right to legal capacity under Article 12.33 Registration on an electoral role, for example, requires being recognized as a legal person before the law. Article 9 (accessibility) is also particularly relevant in this context. Under its General Comment No. 2 on accessibility, the CRPD Committee highlights the importance of accessible voting procedures, facilities and materials, accessible political meetings and materials of candidates and political parties, and accessibility measures for persons with disabilities elected to public office.

The disenfranchisement of persons with intellectual or psychosocial disabilities is common in the Pacific, both with regard to voting and standing for election. Under Tuvalu’s Electoral Provisions (Parliament) Act 1980 (amended 2019) and Falekaupule Act, for example, a person “certified to be insane or otherwise adjudged to be of unsound mind” is not entitled to vote for any parliamentary election or election of Kaupule (island council), or to be a member of parliament and Kaupule.34 Similar disqualifications exist in the Federated States of Micronesia, Pohnpei and Kosrae States, Solomon Islands, Tonga and

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33 CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1.
34 Tuvalu – Electoral Provisions (Parliament) Act 1980, ss.5 and 9; Falekaupule Act, s.9(2)(d) and s.15(1)(b).
Vanuatu. In some respects, Nauru’s electoral law is similar to that of other Pacific countries, but recent electoral reforms demonstrate modest improvements in voting rights and some divergence from the regional trend. Until 2016, one of the two exceptions to being registered and having the right to vote was a person “of unsound mind”. The Electoral Act 2016 removed this disqualification and made wholesale provision for automatic voter registration at the age of 20 based on a person’s name being entered in the Register for Births.

Realising full and equal participation in political life for persons with disabilities requires both the removal of legal barriers and the adoption of a range of accessibility and other measures. The Nauru Electoral Act 2016 has two distinguishing provisions for assisted voting and mobile polling stations. First, section 63 of the Act makes provision for establishing mobile polling stations in hospitals, care facilities, detention centres and correctional facilities. Although falling short of an express inclusion of disability, the references to “reason of illness or infirmity” in section 79 likely cover voters with disabilities. Second, unlike the more common Pacific practice of assistance from a polling agent or presiding officer (Fiji, Solomon Islands and Tuvalu), the Nauru Act allows any voter who is “illiterate or incapacitated by blindness or other physical reason and is unable to vote in the (prescribed) manner” to nominate a support person (s.77). This represents a positive shift towards the CRPD requirement of a person of choice (not an electoral official, police officer or designated family member), with whom there is an established relationship of trust, which helps to guarantee “the free expression of the will… as electors.”

Proxy voting is another potential avenue for ensuring indirect electoral participation of persons with disabilities, although as the provision currently stands in Nauru, it is only open to voters unable to be in the country on polling day. Absentee ballots are a preferred measure and are part of the electoral law of the Federated States of Micronesia, Pohnpei State and Kosrae State. In all three jurisdictions, legislation outlines the circumstances in which registered voters can cast absentee ballots including where voters are unable to attend a polling place due to being “confined to home or hospital by reason of illness or physical disability…”. The reference to “physical disability” should be replaced with “disability” to extend the option of absentee voting to registered voters with non-physical (sensory, intellectual or psychosocial) disabilities.

**Mental health**

Discrimination on the basis of disability is conspicuous in the area of mental health. At its ideological base are entrenched community attitudes towards intellectual and psychosocial disability, stigma against mental illness, inadequacy of health services and expertise, paltry budgetary allocations and antiquated laws. Having a child with disability can be a sense of shame and superstition and it is not uncommon for the child and, in turn, adult, to experience neglect, abuse and rejection.

As a general rule, mental health law in the Pacific is a product of the colonial past and the obsolete medical model of disability. It remains largely intact despite growing awareness that it gives rise to serious human rights violations. The main purpose of the law is to authorize and regulate involuntary hospital admissions, psychiatric interventions, and medical treatment for persons with psychiatric diagnoses. These actions are usually justified when a person has a mental impairment or disability, and/or poses a risk of harm to self or others. Tuvalu’s Mental Treatment

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35 FSM National Code Title 9, Chapters 1 and 2; Pohnpei State Code Title 10, Chapter 4; Kosrae State Code Title 3, Chapter 1; Solomon Islands Electoral Act 2018, Tonga Electoral Act and Legislative Assembly Act; Vanuatu Municipalities (Statutory Orders) Act and Representation of the People Act.

36 Nauru Electoral Ordinance 1965, s 8(2)(a).

37 Nauru Electoral Act 2016, s.39.


39 Nauru Electoral Act 2016, s.78.

40 Federated States of Micronesia National Code Title 9, Chapter 6, s.601(2)(a); Pohnpei State Code Title 10, Chapter 6, ss.6-113 and 6-115; Kosrae State Code Title 3, Chapter 16, s.3.1601.

41 See discussion in Language and stereotypes section of this report.
Act deals with the involuntary committal to mental health facility of persons with mental illness or psychosocial disabilities, and the detention of prisoners of “unsound mind” awaiting trial, or persons found to be guilty but “insane”, or “insane” on arraignment (ss.7-21). There are sweeping powers for arrest and detention on the basis of disability. Legislative provisions in the Marshall Islands, Nauru, Pohnpei and Kosrae States, the Federated States of Micronesia, Solomon Islands and Vanuatu may differ, but all reproduce the same coercive and paternalistic approaches typical of the old medical model, typified by forced psychiatric treatment and detention, the use of restraints and seclusion, and substitute decision-making. These laws contravene several CRPD rights and core principles, including prohibition of discrimination, the rights to health, legal capacity, liberty and freedom from cruel or degrading treatment like torture. The CRPD Committee has been consistently critical of mental health law that sanctions forced psychiatric treatment and detention which cause needless suffering and are generally ineffective. Abolishing all legislative provisions that perpetuate forced hospitalization and medical treatment as well as restrictive practices, including the use of mechanical and chemical restraints, is a matter of urgency.

A few Pacific countries have attempted or are attempting reform in this area. Tonga’s Mental Health Act establishes mechanisms that enable service users and those that are subject to involuntary interventions to challenge the basis for involuntary treatment and detention, including making complaints and appointing representatives (Part X). It is generally in step with the mental health laws of countries such as India, New Zealand, Canada and the United Kingdom. It restricts certain rights, but does so with consideration to the proportionality of the intervention. For example, restrictions on the right to liberty are weighed against the right to life. It is advisable that Pacific countries comply with the CRPD benchmark and explore community-based options, including the independent living model that respect the human rights and dignity of persons with psychosocial and mental disabilities.

In particular, priority should be given to supported decision-making (not substitute decision-making) and a “rights, will and preference” standard, as opposed to the “best interests” approach. At times when a person’s will and preferences are unclear, the focus can be on the “best interpretation of the person’s will and preferences” in accordance with guidelines under General Comment No. 1 of the CRPD Committee.

The independent living model would comply with Article 19 and may be a fitting alternative in a region where cultural norms still place importance on family and community, and where institutional facilities for those with mental illness or psychosocial disabilities are uncommon. Legislative protection for the right to independent living in the community would recognise the full legal capacity of persons with disabilities and their right to access all mainstream community services and facilities including schools, public transport and employment, together with community-based habilitation and rehabilitation services, and individualised support, including personal assistance where necessary. Any legislative scheme would need to establish clear benchmarks and timelines for implementation with adequate resources, and guarantee that support measures are consensual and at the request of persons with disabilities themselves.

**Criminal procedure**

A key compliance issue arising in criminal procedure is the denial of criminal responsibility on the basis of disability. This lies at the foundation of what are commonly known as the “special defences” (“unfitness to stand trial” doctrine and “insanity” defence). It is a highly-
contested area that requires substantial reform in order to recognize a range of pivotal rights under the CRPD, including non-discrimination (Article 5), the right to legal capacity (Article 12), the right to access justice (Article 13), and the right to liberty and security of person (Article 14).

Under the Criminal Procedure Code of Solomon Islands, the court can conduct an inquiry and is required to postpone proceedings if the inquiry finds that the accused is incapable of making a defence due to being of “unsound mind” (s.144). The Governor-General may then direct that the accused be detained in a mental hospital or “other suitable place of custody” until another order is made or the court finds the accused capable of making a defence (ss.147-148). Similar terms and processes associated with the doctrine of unfitness to stand trial are also found in Tuvalu, the Federated States of Micronesia and Vanuatu.44

Common law countries have contended that “special defences” like the “unfitness to stand trial” rules and the “insanity defence” improve fairness for the person concerned, since a trial and conviction are avoided and there is scope for a court to order treatment and rehabilitation.45 From a CRPD perspective, this is a contentious claim because the defences are premised on an unacceptable denial of legal capacity due to mental impairment or incapacity, and typically involve alternative procedures with fewer or no due process rights or safeguards. In particular, a person is denied the right to plead guilty and to test the evidence against him or her with access to the full range of defences. Equally concerning is the fact that persons found unfit to stand trial can be detained indefinitely.

The CRPD Committee has argued that decisions about a person’s capacity to stand trial are not driven by humanitarian considerations, but by discriminatory social perceptions and stereotypes, and a preoccupation with risk and court efficiency, with courts showing a preference for diverting the person to community or prison-based services.46 Defendants with psychosocial disabilities or “mental disorders” are likely to be perceived as posing an unquantifiable danger, which leads to a disproportionate focus on risk management. Of particular concern is an underlying assumption that a person will eventually become fit to plead or stand trial, which can be used to justify lifelong incarceration of persons who have permanent mental illness or psychosocial disability. The Committee has further asserted that detaining a person on the basis of a disability amounts to an arbitrary deprivation of liberty47 and has expressed concern about laws that permit the by-passing of a trial – usually owing to unfitness to plead – and that order the incarceration of persons with cognitive and/or psychosocial disabilities, often for indeterminate periods, without any review mechanism. Solomon Islands provides an example of legislation that does have a mandatory review process.48

The so-called insanity defence is another archaic area of law that employs derogatory terms like “insane” and “criminal lunatic”. If it is found that the person committed the offending act (actus reus) for which he or she is charged, but without the required criminal intent (mens rea), the person has the prospect of an acquittal and avoiding conviction. However, contrary to popular opinion and idealised representations as being advantageous, the insanity defence infringes on the most basic principles of criminal law, including the presumption of innocence, the right to a proper defence (including examining witnesses) and the right to a fair trial. Similar to the “unfitness” doctrine, the defence rests on denying legal capacity due to an intellectual or psychosocial disability, implying that such a person is incapable of criminal liability.

44 Tuvalu Criminal Procedure Code (ss.144, 246); FSM National Code Title 11, Chapter 3, s.314(2); Vanuatu Penal Code (s.13).
47 CRPD General Comment No. 1 (2014) on equal recognition under the law CRPD/C/GC/1 paras. [40 and 41].
48 Solomon Islands Criminal Procedure Code s.146.
The insanity defence may also lead to a violation of the right to liberty (Article 14) since an acquittal where the defence succeeds can paradoxically result in the defendant being held in custody (e.g., in a mental hospital or prison) indefinitely. No provisions in Pacific legislation set out a timeframe for detention in cases of “insanity” or “unsoundness of mind”. Moreover, as discussed above, the deprivation of liberty or “confinement” is disability-based and arbitrary, determined without any of the rights and procedural safeguards guaranteed to others.

The criminal justice system can respond in non-discriminatory ways to specific situations in which a person is unable to take part independently in criminal proceedings, or is found to have committed a crime without criminal intent or knowledge due to mental impairment. It is imperative that persons with disabilities have the same rights as other accused persons, including the right to stand trial (with support), a range of defences, capacity to test and cross-examine evidence, and dispositions that order definitive sentencing following conviction, rather than arbitrary and indefinite detention as is currently the case. All non CRPD-compliant provisions should be repealed, and persons currently detained based on the basis of “insanity” and “unfitness to plead” or “stand trial” should have their cases reviewed with urgency. This is a challenging but neglected area of law for CRPD harmonisation, and Pacific Governments are encouraged to seek guidance from the CRPD Committee and United Nations agencies during the reform process.

**Prisons**

Reference to the conditions or rights of prisoners with disabilities are commonly absent from prison legislation in the Pacific. CRPD compliance would be improved by establishing hard obligations on all prisons or correctional facilities to provide appropriate measures. Any form of discriminatory conduct towards a prisoner with disability, including refusal to provide reasonable accommodation, should be considered a disciplinary offence by prison officers, in addition to the more typical offences of striking or assaulting, harassing or bullying a prisoner. Solomon Islands and Vanuatu have both attempted to be more inclusive of disability and to improve alignment of their laws with international standards. Under Vanuatu’s Correctional Services (Amendment) Act 2019, the correctional centre manager is directed to ensure that there is provision for the “special needs” of detainees who are minors, women – particularly pregnant or nursing mothers – and persons with disabilities, including intellectual and psychosocial disabilities (s.21(2)).

Another example can be found in section 23(3), where the correctional centre manager “must, in directing or arranging for any particular work to be performed by a detainee, have regard to the age and the physical and mental health of the detainee, and any skills or work experience of the detainee, including whether the detainee is a person with disability.”

Many other compliance issues arise in relation to prisons and correctional facilities. Prisoners with disabilities, especially those with intellectual and/or psychosocial disabilities, are especially vulnerable in prison settings. They may be more susceptible to disciplinary sanction or punishment on account of negative stereotypes associated with disability and mental illness and the lack of understanding of symptomatic behaviour. Their language and conduct may be considered “disruptive”, “abusive”, “offensive” or “indecent” and could be wrongly cast as dangerous, threatening or insubordinate. The use of force, restraints and disciplinary measures may have harmful psychological and even physiological effects. The United Nations Special Rapporteur on Torture has further clarified that imposing solitary confinement of any duration on persons with psychosocial and mental disabilities constitutes cruel, inhuman or degrading treatment, noting that it “often results in severe exacerbation of a previously existing mental condition” and that “(p) risoners with mental health issues deteriorate dramatically in isolation.”

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49 The phrase “detainees with mental impairment” is used in the Correctional Services Act 2006 (s.21(2)(c)). It was replaced by “detainees with psychosocial disabilities and intellectual disability” in the Correctional Services (Amendment) Act 2019.

50 A/66/268, paras. [68, 78].
behaviour linked to a disability can be grounds for a breach of discipline and that disciplinary measures should never diminish or violate the fundamental rights of detainees, including their right to health. The use of solitary confinement, separation or seclusion, or physical, chemical or mechanical restraints on prisoners with disabilities, particularly psychosocial disabilities, should be expressly prohibited.

A number of Pacific countries subject prisoners to mandatory medical examinations or treatment in their laws.\(^5^1\) It is common practice for detainees with psychosocial disabilities to be given medical treatment without their consent.\(^5^2\) Forced medical treatment contravenes Article 12 (equal recognition before the law), Article 14 (liberty and security of person), Article 15 (freedom from torture, inhuman, cruel or degrading treatment or punishment), Article 16 (freedom from exploitation, violence and abuse) and Article 17 (protecting the integrity of the person) and should not be administered under any circumstances.\(^5^3\) Pacific countries are urged to make every effort to respect the physical and mental integrity of all prisoners and to eradicate coercive and inhumane environments and treatment approaches that are likely to provoke or exacerbate aggressive or recalcitrant behaviour which, in turn, can become a pretext for punitive responses, restrictions and restraint. A key reform component is human rights training for prison officers, including training on the CRPD, as required under Article 13 (access to justice).

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UN Standard Minimum Rules for the Treatment of Prisoners

The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) were adopted by the United Nations General Assembly on 17 December 2017. While not legally binding, unlike ratified Conventions, they are nevertheless an international standard that “set(s) out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.” They can therefore be used as guidance alongside the CRPD requirements for prison reform in Pacific legislation.

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F. Intersection of disability and gender

As noted previously, women and girls with disabilities in the Pacific are particularly susceptible to multiple and intersectional discrimination. A prevailing view is that they cannot or should not enjoy sexual intimacy or relationships including marriage, or have children, on account of their disabilities, whether physical, sensory, intellectual or psychosocial.\(^5^4\) Across the region, women and girls with disabilities also have to contend with higher risks of isolation, family-based violence, sexual assault and other forms of violence.\(^5^5\) Women with sensory and psychosocial disabilities are particularly vulnerable to sexual abuse, which is exacerbated by communication and attitudinal barriers that can hinder their access to justice. Women with intellectual or psychosocial disabilities face major challenges in exercising their legal capacity, as exemplified in the area of reproductive health and rights, where they can be subject to forced medical interventions like sterilization and abortion.

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51 Solomon Islands – Correctional Services Act 2007, s.41; Tonga – Prisons Act 2010, s.21; Tuvalu – Prisons Act, Schedule 2.
53 CRPD/C/BEL/CO/1.
55 See Solomon Islands initial to third State report to the CEDAW Committee 30 January 2013 CEDAW/C/SOL/3-3 for anecdotal evidence of stigma, prejudice and discrimination. In Vanuatu, there is evidence of forced sterilization (CRPD Committee concluding observations on initial report of Vanuatu (2019) paras. [30 and 31]), and in Tuvalu of “all forms of abuse, teasing, bullying, harassment, including sexual abuse.” (Tavola, H. (2018) Tuvalu study on people with disability, DFAT/Pacific Women Shaping Pacific Development, xiii)
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Criminal law

Human trafficking

Persons with disabilities, especially children and women, are at risk of falling victim to violent crimes, including human trafficking.56 Globally, this is still an invisible and under-addressed issue.57 Although an increasing number of Pacific Island States have anti-trafficking legislation (Tuvalu, Tonga, Vanuatu, the Federated States of Micronesia, Pohnpei State, Kosrae State, Nauru and the Marshall Islands), they usually do not consider the rights and needs of victims with disabilities. Given the heightened vulnerability of persons with disabilities, it is important that regional human trafficking laws become more disability-inclusive. The definition of “trafficking in persons” could be expanded to reference persons with disabilities. The definition of exploitation could be broadened so that where the subject is a person with disability, exploitation includes forced prostitution or forced sexual services, forced begging, forced marriage and unpaid housework, discriminatory wages and inferior employment conditions.

Consideration could also be given to recognizing disability as an aggravating factor. The Federated States of Micronesia is a rare exception to the general trend, as it establishes an offence of aggravated human trafficking where an aggravated element arises in a range of circumstances including a victim who is “physically or mentally handicapped.”58 Restitution or compensation provisions present another window for disability inclusion. In Pohnpei State, a person convicted of a trafficking violation is obligated to pay “mandatory restitution” to the victim.59 Items catering to the needs of trafficking victims with disabilities, such as mobility aids, could be included in the list of items prescribed in any restitution scheme.

Abortion

Three key issues for CEDAW and CRPD compliance arise in the context of abortion: (a) the criminalization of abortion (CEDAW, CRPD); (b) the legalization of non-consensual abortion on the basis of a cognitive or psychosocial disability (CRPD); and (c) the right to terminate a pregnancy where there is a known or anticipated foetal impairment or “deformity” (CRPD).

In most Pacific Island jurisdictions, abortion is generally illegal, although there are sometimes exceptions, most commonly to preserve the life of the mother.60 While abortion may not sit comfortably alongside contemporary religious norms in the Pacific, there is longstanding evidence of its social acceptability as a means of terminating an unwanted pregnancy, as reflected in the persistent use of traditional methods to induce an abortion despite their illegality and health risks. Globally, most deaths from unsafe abortions occur in countries where abortion is severely restricted by law.61 This raises important medical and ethical considerations. International, regional and national human rights commitments, particularly with regard to gender equality and non-discrimination, also call for the recognition of women’s sexual and reproductive health rights, including the rights of women with disabilities.

The criminalization of abortion and the harsh sentences applied are not consistent with CEDAW, a treaty ratified by most Pacific Island States, as they are “forms of gender-based violence that […] may amount to torture or cruel, inhuman or degrading treatment.”62

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56 As documented in Belgium (http://www.traffickingproject.org/2010/09/forgotten-people-of-modern-day-slavery.html) and China CRPD Committee concluding observations on the initial report of China (2012) CRPD/C/CHN/CO/1, para [29].
57 The UN Convention against Transnational Organised Crime and its protocols make no reference to the situation of persons with disabilities, and only a modest number of countries in the world have legislated to protect them against organized crime.
58 Federated States of Micronesia National Code Title 11, Chapter 6, s. 617. The term “handicapped” is outdated and should be avoided.
59 Pohnpei State Code Title 61, Chapter 8A: Human Trafficking and Criminal Exploitation, s. 8A-106(1).
60 For example, Kosrae State Code Title 13, Chapter 5, s. 13.501 and Chapter 12, s. 13.1201; Nauru Crimes Act 2016, s. 63 and s. 68; Solomon Islands Penal Code, s. 158; Tonga Criminal Offences Act, s. 104; Tuvalu’s Penal Code, s. 151; and Vanuatu Penal Code, s. 117.
62 See CEDAW Committee General Recommendation No. 24 (1999), paras. 11 and 14, CEDAW Committee General Recommendation No. 35 (2017), updating general recommendation 19, para. 18.
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This position has also been highlighted in the 2017 report of the UN Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment. It is also consistent with the Beijing Declaration and Platform for Action, which in 1995 called upon governments to re-examine restrictive abortion laws that punish women. In relation to CRPD, there are compliance issues under Article 25 (right to health) and Article 23 (respect for home and the family) when women and girls with disabilities are denied access to sexual and reproductive health services and information, including information about contraceptives, family planning, sexually transmitted infections, safe abortion and post-abortion care.

Another violation of the CRPD can be found in legislation that permits forced abortions on women and girls with intellectual or psychosocial disabilities. The 2017 report of the United Nations Special Rapporteur on the rights of persons with disabilities notes that women and girls with disabilities “face significant challenges in making autonomous decisions with regard to their reproductive and sexual health, and are regularly exposed to violence, abuse and harmful practices, including forced sterilization, forced abortion and forced contraception.” In this context, two pieces of legislation in Nauru violate multiple rights under CEDAW and CRPD. The Mentally-disordered Persons (Amendment) Act 2016 allows the court to order “a surgical operation to treat and detain a psychosocial disability treated and detained under the Act” (s.6A). The Crimes Act 2016 permits a forced abortion to be conducted on a pregnant woman who “suffers a severe developmental impairment” (ss.63 and 68).

As a general rule, abortion on the grounds of foetal impairment is not expressly permitted in Pacific legislation; but neither is it prohibited. This is a more contested area in human rights discourse with varying positions taken by the Human Rights Committee, the CEDAW Committee and the CRPD Committee. From a CRPD perspective, treating foetal impairment as a legitimate ground for abortion is discriminatory as it directly conflicts with the principles of equality and non-discrimination (Article 5) and denies the dignity inherent to every human being (Article 8). Similarly, disability-selective antenatal screening policies that pave the way for aborting foetuses with known or suspected impairments (e.g., Down’s Syndrome or spina bifida) serve to validate and perpetuate social prejudice. This includes harmful stereotypes about children and, in turn, adults with disabilities as incapable of living meaningful lives and/or being less worthy, even unworthy, of protection and life.

It is recommended that Pacific States consider decriminalizing abortion and establishing a regulatory framework that enables all women to access safe and legal abortion and post-abortion health-care services. Most modern approaches give women the right to terminate an abortion up to a designated number of weeks (usually 20-24 weeks) and then require authorization from a medical practitioner after that window. The approach most in line with CEDAW gives women autonomy over their bodies and the right to request a termination throughout their pregnancies. At the very least, decriminalization should apply in cases where pregnancy results from rape, sexual abuse or incest, or where the pregnancy endangers the life or health, including mental health, of a woman. For CRPD compliance, any law that authorizes or promotes disability-based terminations, whether a forced abortion on a woman with disability or a consensual termination due to a known or suspected foetal impairment, should be repealed.

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63 A/HRC/31/57, para. 44.
65 CRPD General Comment No. 3 (2016) on women and girls with disabilities CRPD/C/GC/3. Ibid. para. 40.
66 A/72/133, para. 3.

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Family-based violence and sexual violence

Empirical studies across countries have demonstrated that persons with disabilities are at higher risk of violence, neglect and abuse. The situation is even more precarious for women and children with disabilities who can be subjected to multiple and intersectional forms of discrimination by virtue of their gender, age, disability, ethnicity and other identities.68 The Pacific is no exception, although due to the stigma associated with disability, violence against persons with disabilities is often invisible, both in the home as well as in residential care facilities. Anecdotal evidence points to the difficulty of escaping such violence or reporting incidents of abuse. This is particularly the case for women with disabilities who are dependent on their offenders for shelter, food, and support.69 The invisibility of this form of violence makes it especially important for the law to ensure that all violations are accurately identified and comprehensively addressed.

Domestic violence

The criminalization of domestic violence across the Pacific has been a welcome development during the past decade. It provides tangible recognition of the human rights of women and children, breaking with traditional notions of the family as an untouchable, private domain. Family protection legislation in the region seeks to protect persons in domestic relationships from violence, and to this end establishes protective mechanisms such as protection orders. It also clarifies police powers and duties, addresses the health and safety needs of victims of domestic violence, and prescribes a range of offences and penalties.

However, the definition of a “domestic relationship” in Pacific legislation can be narrowly focused on conventional family relationships (marital, relatives and family members) and settings like home. More comprehensive definitions are required to extend protection to persons with disabilities under the care of a non-family member in a home setting or by either family or professional staff in a residential or other institutional facility. A positive example can be found in Nauru’s Domestic Violence and Family Protection Act 2017 where a “domestic relationship” arises when a person “is dependent on the other person for regular support because of disability, illness, or impairment.” Tuvalu perhaps provides the best regional example in this context. A core principle of its Family Protection and Domestic Violence Act 2014 is ensuring the safety and well-being of vulnerable persons in a domestic relationship (s.4). A vulnerable person is defined as “a person who is vulnerable by reason of age, physical or mental disability.” (s.3) In turn, “domestic relationship” includes a person “who is wholly or partially dependent upon ongoing care in the same household” or “who is a household helper in the same household.” (s.3(f)-(g)).

Prevailing definitions of domestic violence do not appear to do justice for persons with disabilities and the unique vulnerabilities of women and girls with disabilities within the family. In Tonga’s Family Protection Act 2013 (s.4), for example, “domestic violence” refers simply to physical abuse, sexual abuse or mental abuse, or when the perpetrator “otherwise harms or endangers the health, safety or well-being of the victim or other person at risk.” Broader definitions of domestic violence and, in turn, domestic violence offences, are needed to cover the multiple ways in which violence, exploitation and/or abuse against persons with disabilities, especially women and girls with disabilities, can be perpetrated in violation of Article 16.70 They should include neglect, economic and psychological abuse, social isolation, segregation and exclusion, and other restrictions on freedom of movement as well as more egregious acts of violence, such as forced pregnancy termination, forced birth control, forced sterilization, forced electroshock therapy, the use of chemical, physical, and sexual violence, and the denial of medical and other forms of assistance.

68 CRPD Committee General Comment No. 3 (2016) on women and girls with disabilities CRPD/C/GC/3 para. [29].
69 Mission visits to Vaiola Hospital and Women and Children Crisis Centre, Nuku’alofa, June 2017.
70 See CRPD Committee General Comment No. 3.
physical or mechanical restraints, forced detention in a residential care, psychiatric or other institutional facility, and other non-consensual intervention.\(^{71}\) All these acts typically take place with the consent and/or support of family caregivers.

Legislation generally lacks provisions that facilitate complaints and investigations for persons with disabilities, and thus potentially undermines prosecutions and access to justice. For compliance with Article 13 (access to justice), complainants with disabilities should be assured of procedural accommodation in all pre-trial and trial proceedings. Tuvalu illustrates a good practice by making provision for a range of persons other than the complainant to apply for a protection order if the latter “is unable to apply personally due to physical incapacity, fear of harm or for any other sufficient cause.”\(^ {72}\) This anticipates the difficulties that women with disabilities or older women might face when applying to the court for a protection order. Importantly, surrogate applications require the oral or written consent of the complainant, which respects the autonomy and legal capacity of a complainant with disability (s.8(2)). This contrasts with Tonga’s non-compliant provisions, which allow applications to be made without consent on behalf of complainants with “mental or physical incapacity or disability.”\(^ {73}\)

Vanuatu, Solomon Islands, Tuvalu, and Tonga\(^ {74}\) are among those countries that make provision for the payment of compensation in cases where there is personal injury, property damage or financial loss as a result of an act of domestic violence or a breach of a protection order. It is recommended that restitution or compensation orders take into account additional expenses related to disability, such as: supplementary costs of replacing damaged mobility aids or other assistive devices; personal injury to a personal assistant; or the cost of moving to new accommodation, including any accessibility adjustments. For countries that have family protection bodies, such as Nauru, Solomon Islands and Tonga, it is necessary to ensure representation of women with disabilities either directly or through their organizations, to improve disability inclusion and compliance with Article 4(3).

**Sexual offences**

Three issues of relevance to persons with disabilities arise with regards to sexual offenses: the denial of legal capacity; sexual and reproductive health and rights; and marital rape. They highlight the multiple and intersectional forms of discrimination faced by women and girls with disabilities.

- Denial of legal capacity

The right to legal capacity is an issue in countries that establish the offence of defilement, sexual assault, or rape of a person with disability, in particular a person deemed to be an “idiot”, “imbecile”, “feeble minded”, “insane” or “mentally incapable”, of giving or refusing consent. The intention may be to protect a woman with intellectual or psychosocial disability from sexual violence, but a blanket determination that she is incapable of giving or refusing consent denies her sexual agency, autonomy and legal capacity, including her right to engage in consensual sexual relationships and control her sexual and reproductive decision-making.\(^ {75}\) The implied criminalization of consensual sexual relations with a woman with psychosocial and/or intellectual disability also violates her rights to privacy (Article 22) and respect for home and family (Article 23), and compromises her right to health (Article 25), including the right to sexual and reproductive services. Last, the requirement of force or the threat of force (“subjects another person”) as implied in the

72 Tuvalu Family Protection and Domestic Violence Act 2014, s.8(2).
73 Tonga Family Protection Act 2013, s. 9(3).
74 Vanuatu Family Protection Act 2008, s. 22; Solomon Islands Family Protection Act 2014, s. 63; Tuvalu Family Protection and Domestic Violence Act 2014, s. 41; and Tonga Family Protection Act 2013, s. 30.
75 Also see discussion in the Language and stereotypes and Legal capacity sections of this report.
Pohnpeian and Kosrae State provisions, does not recognize the inherent power imbalance between men and women and the non-violent ways in which women are coerced into sexual relations. This imbalance is likely to be heightened for women with disabilities. Other Pacific jurisdictions like Solomon Islands and Tonga have no requirements for force in sexual offences, only absence of consent, in line with CEDAW Committee guidelines.

This is a complex area of human rights law and there is a delicate balance between recognizing the right of persons and women with disabilities to enter consensual sexual relations and to have a private life, and the duty to protect them from all forms of sexual and physical violence. Recent reform in Solomon Islands seems to provide a positive step in achieving this balance. The Penal Code Amendment (Sexual Offences) Act 2016 replaces the old offence of defilement with a new offence of rape or indecent assault of a person with a significant disability. The underlying rationale appears to be the need to protect a person with a “significant disability” from unconscionable conduct by another person, i.e., the exploitation of the disability to secure acquiescence to engage in sexual intercourse. It does not necessarily imply a denial of capacity to consent to sexual relations. Section 138A of the Amendment Act clarifies the meaning of “significant disability” as well as the elements of rape and an indecent act where these offences involve a person with a significant disability, and their corresponding penalties.

- Sexual and reproductive health and rights

Pacific legislative frameworks do not protect persons with disabilities, particularly women and girls with disabilities, from a range of violent non-consensual medical procedures that usually involve families as substitute decision-makers. The Marshall Islands is pioneering reform through amendments to its Criminal Procedure Code 2011, which broaden the list of sexual offences to capture several areas that have an impact on the sexual and reproductive health and rights of women and girls with disabilities, such as forced abortion and forced sterilization.

- Marital rape

With a few notable exceptions like Nauru and Solomon Islands, Pacific countries generally fail to comply with the requirement of international human rights law to criminalize rape within marriage, which has been a concern for the CEDAW Committee. The lawfulness of marital rape tends to have a greater adverse impact on women with disabilities as they are more likely to be dependent on their partners for care and support and/or find it more difficult to leave an abusive situation. It is therefore important that legislation guarantees them protection from the physical and mental trauma of rape and sexual assault by their intimate partners. The sexual abuse of children should be criminalized without exception, including in those cases where child marriage is permitted, contrary to international law. The UN Declaration on the Elimination of Violence against Women defines violence against women to encompass both marital rape and the “sexual abuse of female children in the household.”

Disability as an aggravating factor in sentencing

Not only are persons with disabilities at higher risk of violence and abuse, violence and abuse against them often result in a much greater level of harm. However, it is not an established

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76 Pohnpei State Code Title 61, Chapter 5, s.5-141, Kosrae State Code Title 13, Chapter 3, s.13.311.
77 See CEDAW Committee General Recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation 19.
79 CRPD Committee concluding observations on the initial report of Cook Islands (2015) paras. [35 and 36] and on the initial report of Vanuatu (2019) paras. [30 and 31].
81 Nauru Crimes Act 2016, s. 104 and Solomon Islands Penal Code (Amendment) (Sexual Offences) Act 2016, s. 136F (2). The same rule applies to an indecent act (s.138(2)), and rape or indecent act – person with significant disability (s.138A(4)).
82 See, for example, CEDAW Committee concluding observations on the combined third and fourth periodic reports of Tuvalu (2015) CEDAW/C/TUV/CO/3-4, para [21].

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practice in Pacific jurisdictions to regard disability as an aggravating factor in sentencing. There are a few exceptions with respect to domestic violence, notably in Solomon Islands, Nauru and Tonga.⁸⁴ Solomon Islands provides the most comprehensive response in its Family Protection Act 2014, where it applies an aggravating factor not only to a domestic violence offence but also to any breach of a police safety notice or protection order (s. 62(b)). For sexual assault, Papua New Guinea has taken commendable steps to develop a framework that recognizes the greater harm inflicted by “circumstances of aggravation,” which include where “the complainant has a serious physical or mental disability”.⁸⁵ To treat an offence perpetrated against a person with disability as aggravated, and therefore liable to more severe penalties, is consistent with CEDAW Committee General Recommendation 35 and the obligations under Article 16 of the CRPD.

### G. Equality and inclusion in education and employment

Education and employment are typical areas for exclusion on the basis of disability. Children with disabilities generally have much less access to education than other children. Multiple barriers exist, such as lack of appropriately trained teachers, inaccessible school environments and transport, social prejudice and parental anxiety, and shame and overprotection, all of which contribute to poor attendance and retention rates. Although no comprehensive data are available for the Pacific, numbers from Kiribati, Palau and Samoa show significant gaps in school attendance and the highest level of education achieved between population with and without disabilities.⁸⁶ Lack of access to quality education, in turn, contributes to exclusion from the labour market, which is already plagued with discriminatory conditions and practices against persons with disabilities, including lack of accessibility, reasonable accommodation and rehabilitation services. Available data from several Pacific countries show that persons with disabilities are less likely to be economically active, less likely to be employed, and when employed less likely to have paid jobs.⁸⁷ Inclusion in education and employment not only realizes these fundamental rights for persons with disabilities, but also benefits the whole society. Mixed environments diversify the pool of talent, skill and experience, and they are also crucial to breaking down stereotypes and stigma.

#### Education

Global education systems have historically adopted three different models towards persons with disabilities: exclusion, segregation and integration. Exclusion arises when a student is kept away from school on the basis of an existing impairment. Segregation occurs when the student is sent to a school designed for children with the same or similar impairments, usually within a “special education” school system. Finally, integration takes place when the student is placed in a mainstream school so long as he or she can adjust to its standards. Specific support might be given to these students, but if they cannot fulfil the regular requirements, they are relocated or returned to segregated education or “special schools”. A combination of models may occur in the same country. The CRPD moves away from all these approaches and enshrines the right to inclusive education which must take place in mainstream schools and be guided by principles of accessibility, support, and reasonable accommodation. Inclusive education appears to enjoy a high-level regional mandate and could be a low-lying fruit for law reform.

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⁸⁴ Solomon Islands Family Protection Act 2014; Nauru Domestic Violence and Family Protection Act 2017, s.37; Tonga Family Protection Act 2013.
⁸⁵ Papua New Guinea Criminal Code 1974 ss.349, 349A.
Inclusive education

Inclusive education is about transforming the whole culture, policies and practice of mainstream schools and other educational settings, so that the needs of all students, including those with disabilities, are accommodated in a mixed learning environment. Inclusive education is expected to nurture values of equality and non-discrimination, celebrate diversity, and provide a healthy and sustainable foundation for challenging stigma, prejudice and misconceptions about disability, thereby promoting transformation. As the CRPD Committee has noted in its General Comment No. 4 on Article 24 (education) society, as a whole, benefits from this approach.

In Pacific legislation, there is sometimes a failure to recognize the educational rights and needs of children with disabilities, such as in Solomon Islands and Tuvalu; a failure to explicitly prohibit discrimination or exclusion on the basis of disability; or an endorsement of disability-based exclusion, whether expressed or implied. The rules governing compulsory education in Pohnpei State permit the exclusion of a child with disability from a mainstream school "where the minor is physically or mentally unable to attend school, of which fact the certificate of a duly licensed physician or medical officer shall be sufficient evidence." Similar provisions can be found in the national codes of the Federated States of Micronesia and Tuvalu.

There are a few welcome exceptions to this general pattern. First, Nauru’s Education Act 2011 expressly states that “[a] school-age child with a disability must not be excluded from access to free primary and secondary education on the basis of the disability.” Vanuatu provides another positive example in the area of university education. Section 35 of the National University of Vanuatu Act 2019 expressly prohibits discrimination in admission or treatment at the university “on the basis of gender, religion, nationality, race, language or disability”; and section 34(c) requires priority to be given to the National Gender Equality Policy and National Disability Inclusive TVET Policy.

Another conspicuous feature of Pacific education policy and legislation is the continued use of “special schools” or “special education”. The Federated States of Micronesia is one of several countries with an established “special education” system, which is “specifically designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” (s.102(21)). While they may be well-intentioned, such measures segregate children on the basis of disability and therefore fall short of the transformative approach. In order to comply with Article 24, there needs to be a comprehensive inclusive education system without exception.

Some countries have an overarching framework of inclusive education, but there are anomalies in its definition and/or scope. As a result, “inclusive education” systems lack many of the necessary features and measures such as: (a) placement in regular schools with accessible buildings, classrooms, facilities, devices, equipment, educational materials, computer software and curricula; (b) alternative modes and technologies of instruction and learning, including sign language and Braille; (c) personal learning support and reasonable accommodation, including for exams; (d) accessible transport; (e) teacher training; and (f) representation of persons with disabilities and/or inclusive education experts on all boards, committees and review panels where

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88 Solomon Islands Education Act; Tuvalu Education Act, Education (Compulsory Education) Order, 5(c)).
89 Pohnpei State Code Title 18, Chapter 1, s.1-111(2).
90 Federated States of Micronesia National Code Title 40 Chapter 1, s.104(1) and (2), Tuvalu Education Act, Education (Compulsory Education) Order, 5(c).
91 Nauru Education Act 2011, s.95(1).
92 Federated States of Micronesia National Code Title 40 Chapter 2, Subchapter III.
appropriate. Nauru’s Education Act is an example of the Pacific hybrid, essentially an integrationist approach. On the one hand, the Act incorporates a non-rejection provision and establishes a duty to implement the principle of inclusive education, provide reasonable accommodation, and offer support, including individualised support measures, to students with disabilities within the general education system (s.95(2)). However, elsewhere, it is mainly concerned with provisions related to “special education”, creating the perception that “special education” and “inclusive education” are compatible, even synonymous.

The Marshall Islands has made commendable efforts to address many issues for the transition to inclusive education in its Rights of Persons with Disabilities Act 2015. The Act (a) recognises the right of persons with disabilities to quality and inclusive education without discrimination; (b) expressly prohibits any denial of admission to any public or private school on the basis of “an actual or perceived physical, sensory, mental, intellectual or psychosocial impairment”; and (c) lists a range of mandatory requirements to enhance accessibility, reasonable accommodation and support for students with disabilities.

Labour and employment

While law reform will not solve all the problems in this area, it can help to eliminate some of the institutional barriers to employment and decent work as well as promote a more inclusive labour market. The right to work and employment, established under Article 27, is both a right in itself and an important means of achieving independence, autonomy and self-determination (Article 3). It applies both to persons with existing disabilities and those that acquire a disability during the course of employment. The latter should have access to measures such as “vocational and professional rehabilitation, job retention and return-to-work programmes.” Habilitation and rehabilitation obligations are also the subject of Article 26.

Non-discrimination principles

Non-discrimination provisions are mostly missing from Pacific employment legislation. For CRPD compliance, it is important that national employment policy and legal frameworks expressly prohibit disability-based discrimination in all aspects of the employment process, including recruitment, hiring, terms and conditions of employment, continuance of employment, career advancement, and safe and healthy working conditions. Other obligations should include reasonable accommodation, accessible workplaces and any other measures necessary for improving access of persons with disabilities to employment and decent work, and strengthening protection from any forms of exploitation or discrimination. The definition of discrimination should cover (a) multiple and intersectional discrimination (such as that based on gender and disability); (b) discrimination by association (discrimination against a person associated with a person with disability); and (c) the denial of reasonable accommodation, in line with Article 2.

Despite some inconsistencies, Tuvalu provides a good regional standard. Among the exemplary features of the Labour and Employment Relations Act 2017 is the prohibition of discrimination with respect to numerous identities at risk of workplace discrimination and exclusion including age, state of health, HIV/AIDS status, ethnicity, trade union membership and disability (s.50). This interdiction covers all areas of employment and applies to both direct and indirect discrimination (ss.(3)); there is also an implied duty to provide reasonable accommodation to enable an employee or prospective employee “to perform the inherent requirements of a particular position” (s.51(2)). The Act also includes numerous provisions that promote gender equality, including: the prohibition of gender-based discrimination (s.50(2)(b)) the obligation on every employer to pay equal remuneration for work of equal value (s.54) and
the prohibition of sexual harassment (s.53), all of which are consistent with Article 6 (women with disabilities).

Unfitness or incapacity for employment

Across the Pacific, it is common to find legislation that denies employment or terminates the services of a person on the basis of disability in both public and private sectors, including positions of high office. Sometimes, disability is expressly identified as the basis for the discriminatory treatment. Under Tonga’s Ports Authority Act, a Board Director may be removed due to a “disability”. However, more often the denial of employment or removal from a position is based on perceptions of “physical or mental incapacity”, “lack of physical or mentally fitness”, “being of unsound mind” or not being “a fit and proper person”. Nine Pacific jurisdictions together have more than 100 pieces of legislation that authorise disability-based discrimination on the pretext of “incapacity” and similar grounds.94 Such forms of indirect discrimination are sometimes justified by reference to a physical examination or medical test, for example in Pohnpeian State with regard to the employment of police and security officers.95

Any blanket decision by the court or other authority to remove a person from a position of employment on the basis of perceived or actual disability or “incapacity” contravenes Article 27 (work and employment), Article 29 (participation in public life), Article 26 (habilitation and rehabilitation), Article 12 (equal recognition before the law) and Article 9 (accessibility). It is also inconsistent with Article 5 (non-discrimination), regardless of whether the act of discrimination is direct (“unsoundness of mind”) or indirect (“incapacity” or “lack of physical or mental fitness”), as these terms and concepts disproportionately affect persons with disabilities. Denial or termination of employment should only be contemplated if the person is unable to perform the inherent or core requirements of the position after receiving reasonable accommodation and any other required accessibility and support measures. Inherent requirements need to be distinguished from secondary (non-essential) requirements, so that any test of ability to perform (with reasonable accommodation etc.) is applied only to core duties.

Wage discrimination

Wage discrimination is closely associated with the practice of sheltered employment where persons with disabilities, especially intellectual disabilities, are placed in separate settings from others, with atypical and substandard working conditions, such as lower wages. Sheltered employment promotes segregation and exclusion, and infringe on the rights of persons with disabilities to access a freely-chosen and accessible workplace in the open market.96 In the Pacific, the Solomon Islands Labour Act empowers the Commissioner of Labour to issue permits for the employment of persons with disabilities for wages below the minimum wage. Both Pohnpeian State and Vanuatu prohibit wage discrimination, but the prohibited grounds do not include disability. For CRPD compliance (Article 27), there must be no disability-based discrimination in respect of minimum wage levels. Where prohibition on wage discrimination exists in legislation, the prohibited grounds can be extended to cover disability, including intellectual or psychosocial disability.

Reasonable accommodation and accessible workplaces

With the exception of Tuvalu (as noted above), Pacific employment legislation typically lacks any requirement for reasonable accommodation in the workplace. For compliance with Article 27(1), legislation should establish an express obligation on employers to provide reasonable accommodation for any employee, and to ensure that all workplaces are accessible and inclusive. Reasonable accommodation in the workplace could take various forms, such as:

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94 See the accompanying technical regional review, Annex 2: Employment discrimination in Pacific legislation.
95 Pohnpeian State Code Title 16, Chapter 1, s.106(1)(e).
(a) modified working hours (to accommodate those needing frequent breaks, flexible working hours or reduced working hours); (b) provision of a computer with a Braille reader; (c) assignment of a job coach (for persons with an intellectual or mental health disability); (d) provision of a sign language interpreter for a job applicant or employee who is deaf; and (e) the removal of certain tasks from a job if an employee is unable to complete the assigned tasks due to his or her impairment. Reasonable accommodation should be provided in the workplace as a matter of course, without unreasonable requests for employees to demonstrate the need. The burden of proof lies with the employer when accommodation is denied on the grounds of undue hardship.

**Positive measures (employment quotas)**

Pacific countries can consider introducing positive measures to promote employment opportunities for persons with disabilities in the open market. One possible measure is an employment quota, which would set aside a certain number or proportion of positions for persons with disabilities. Other measures could be considered to promote self-employment opportunities. For example, the CRPD Committee has proposed the exemption of business licence fees for persons with disabilities in Vanuatu.\(^97\)

The CRPD does not specifically mention quota systems, and they are arguably of symbolic value only as they do not have the capacity to resolve chronic unemployment or address the underlying causes of discrimination. However, quotas have proved to be an effective mechanism in some countries for increasing employment opportunities for persons with disabilities. Success is likely to be contingent on them being mandatory and supported by effective enforcement mechanisms, such as a penalty for non-compliant employers.\(^98\) It is crucial that the quota applies to all types of impairments in order to cover persons who require more intense forms of support in the workplace. This is aimed at minimizing the risk of the system being abused by only hiring persons with mild disabilities who may be able to find employment without reasonable accommodation or a quota system. Fiji’s employment quota (2%) applies to employers who have more than 50 employees. It is discretionary and only applies to “physically disabled persons.”\(^99\) The lack of effective enforcement has been identified as a main reason that the quota is not being filled.\(^100\)

**Worker compensation, rehabilitation and retirement on medical grounds**

As a colonial legacy, workers’ compensation legislation is fairly common in the Pacific. For example, Worker Compensation Acts in Nauru, Tuvalu and Vanuatu provide for compensation to be paid by an employer to an employee for work-related injury, disease or death. While financial compensation is an important and necessary response, rehabilitation is currently absent among the mandated responsibilities of employers. For CRPD compliance (Articles 26 and 27), habilitation and rehabilitation programs therefore need to be put in place to enable persons with disabilities to continue performing their assigned tasks or to resume them in time, retaining rather than relinquishing their employment. Schedules to the Acts could be reviewed to expand the list of compensable injuries to cover mental health conditions, brain injuries and any other non-physical injuries, diseases or disabilities if acquired at or as a result of work. The review process would require detailed stakeholder consultations with disabled persons organisations, trade unions, employers, and other civil society organisations; it should take into account good global practices in compensation and rehabilitation law.\(^101\)

Worker compensation legislation overlaps with an aspect of social security legislation, i.e., the medical grounds for retirement. Provisions

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\(^{97}\) CRPD Committee concluding observations on the initial report of Vanuatu (2019) CRPD/C/VUT/CO/1, para. [45(e)].


\(^{99}\) Fiji, Employment Relations Promulgation 2007, s 84(4).

\(^{100}\) Fiji, National Employment Policy 2018, Priority 8.

Overview of CRPD Compliance in Pacific Islands Legislation

For medical retirement can be problematic, especially when they prescribe mandatory retirement or involuntary discharge, but also where they imply voluntary retirement without making available the option of continued employment. It is important in this context that legislation protects the right of any person with disability to enjoy continuance of employment with reasonable accommodation and other support measures as relevant.

**Employment, anti-discrimination and workers’ compensation laws**

Employment, anti-discrimination and workers’ compensation laws play distinct but overlapping roles in the promotion of employment rights for persons with disabilities. Anti-discrimination law and/or employment law can establish obligations to provide reasonable accommodation in the workplace, since this is required for all workers, irrespective of whether or not a disability results from a workplace accident or illness. If both reasonable accommodation and accessibility are mandated, an employee who acquires a disability following an accident or illness can be more easily supported and rehabilitated for a return to work because there are minimal to no environmental and attitudinal barriers. By contrast, rehabilitation obligations would be better established under a workers’ compensation law in order to improve the prospects of a return to work following a workplace accident or contraction of an occupational illness.

**Public service**

Public sector employment is primarily governed by public service legislation in the Pacific, and CRPD transgressions generally mirror those identified in the employment legislation discussed above. Anti-discrimination provisions have been adopted in Tonga, Tuvalu, the Federated States of Micronesia, Nauru and Solomon Islands, but they are not a consistent feature of public service legislation. Disability is typically excluded or recognized very narrowly. In the Codes of the Federated States of Micronesia and Kosrae State, for example, merit principles recognise the right to equal opportunity and non-discrimination in public service irrespective of sex, marital status, race, religious or political preference or affiliation, place of origin or ancestry. However, there is no reference to disability. A welcome contrast can be found in Solomon Islands’ Public Service Code of Conduct, which expressly prohibits discrimination on the basis of disability. Besides legislating non-discrimination and reasonable accommodation obligations, Pacific Island States are encouraged to ensure that all public service offices and facilities are accessible make provision for human rights training, including on the CRPD, for all officers (consistent with the general obligation under Article 4(1)(i)); and promote a culture of inclusive employment.

102 Federated States of Micronesia National Code Title S2, Chapter 1, s.113(1) and s.116.; Kosrae Code Title 18. Chapter 1, s.18.103(1) and s.18.106.
III. CONCLUSION
Pacific countries considering how best to fulfil their law reform obligations under the CRPD can follow guidance from Article 4 (general obligations) and Article 5 (equality and non-discrimination) of the Convention as well as General Comment No. 6 (on Article 5). The Committee has also identified priority areas for law reform in its concluding observations to States as well as in multiple General Comments: (a) guardianship laws and other rules infringing upon the right to legal capacity; (b) mental health laws that legitimize forced institutionalization and forced treatment; (c) non-consensual sterilization of women and girls with disabilities; (d) inaccessible housing and institutionalization policy; (e) segregated education laws and policies; and (f) election laws that disenfranchise persons with disabilities. As discussed above, these areas also constitute the most serious infringements found in Pacific jurisdictions. While law reform cannot be expected to overturn decades of inequality, exclusion and discrimination on its own, it can be a powerful instrument of positive change and development.

Law reform obligations can be fulfilled by a variety of approaches or methods. Different pathways to reform are not mutually exclusive; in fact, a combination of actions can be effective. Pacific countries can consider enacting standalone disability laws, mainstreaming disability across the entire legislative framework or adopting a twin-track approach combining the two.

A standalone disability law, if enacted, should incorporate the rights and obligations under the Convention. It should specifically provide legal protection against disability-based discrimination, including the multiple and intersectional forms of discrimination, and incorporate an express prohibition of discrimination on the basis of disability. The organic provisions contained in Article 33, comprising national implementation mechanisms, independent monitoring mechanisms and specific mechanisms for the active involvement and full participation of organisations of persons with disabilities in the monitoring process, should also be incorporated.

A standalone law can give greater visibility to disability issues, and the human rights model of disability highlights the obligations of Governments, clarify the roles of the implementing agency or agencies, and promote consistency and coherence in the cross-sectoral response to disability. This approach also has some practical advantages. In particular, it offers a concise and efficient way of legislating cross-cutting principles and key concepts such as disability, legal capacity, accessibility, reasonable accommodation and procedural accommodation that are likely to be relevant to various sectors and areas of law. For example, legislating an obligation to provide procedural accommodation under a general disability law or an anti-discrimination law would circumvent the need to replicate the same or similar provision under multiple pieces of legislation, regulations and rules related to administrative proceedings in civil and criminal law.

An alternative approach is to integrate disability across the entire legislative framework, including all relevant sectors. Disability mainstreaming, if done comprehensively, would directly address the obligations under Article 4, in particular “to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.” It can also improve the understanding of the CRPD across all government departments, generate a broader sense of ownership and give weight to a whole-of-government approach to disability inclusive development. To complement disability mainstreaming, a general anti-discrimination law that incorporates other treaty obligations, such as those arising under CRC and CEDAW, could be considered.

In view of the relative merits of both legislative approaches and their limitations when pursued alone, it is recommended that
Pacific Governments consider a twin-track approach, combining a standalone disability law or laws with disability mainstreaming. This approach is being pioneered in the Pacific by the Marshall Islands with its Rights of Persons with Disabilities Act 2015 (RPD Act) and a comprehensive omnibus Bill, the Rights of Persons with Disabilities (Consequential Amendments) Bill 2019, that proposes reform and CRPD alignment to more than 100 statutes.

**Legislative reform for CRPD compliance in the Marshall Islands**

The RPD Act came into force in October 2016 and gave legal effect to the CRPD. The Act incorporates all substantive rights and obligations under the Convention, declaring equal rights and freedoms of all persons with disabilities and providing for their protection, promotion and enforcement. It makes specific provision for rights such as education, employment, health, accessibility, voting and holding of political and public office, and includes CRPD-aligned definitions of key concepts such as “persons with disabilities”, “discrimination on the basis of disability”, “reasonable accommodation” and “procedural accommodation”. The RPD Act also establishes government machinery and enforcement provisions, including a mechanism for the settlement of complaints and the offence of discrimination on the basis of disability. The Act ascribes responsibility for implementation of the CRPD to the Ministry for Internal Affairs, and gives the Ministry specific duties in areas such as disability data collection and complaints. The Minister is authorized to prescribe standards of accessibility to the physical environment, transportation, information and communication, and other facilities and services open to the public, and to issue adjustment notices for inaccessible buildings. The Act does not, however, rely on an independent monitoring mechanism as required by Article 33(2).

The RPD (Consequential Amendments) Bill 2019 is the product of a detailed review of approximately 300 statutes that comprise the Marshall Islands Revised Code as of January 2018. More than 100 statutes across 41 Titles were identified as requiring amendment for harmonization with the RPD Act and the CRPD. The proposed amendments seek to remove all non-compliant provisions and establish disability rights across the full spectrum of sectoral laws. Wherever possible, they address multiple and intersecting forms of discrimination, and endeavour to give voice and representation to persons with disabilities in all relevant processes. Although dealing with disparate subject matters and organized into individual schedules, the statutes are bundled together into an omnibus Bill because they are implicitly linked to the RPD Act. Notably, there are recurring areas of non-compliance that the Bill addresses, such as discriminatory language, the denial of legal capacity, barriers to accessibility, the absence of any provisions for reasonable accommodation and procedural accommodation, and the lack of inclusion of persons with disabilities in decision-making bodies.

Whatever approach is adopted, Pacific Governments are urged to closely consult and actively involve persons with disabilities and their representative organisations, in accordance with Article 4(3). At the heart of the CRPD, and instrumental to its implementation, is the full and effective participation of persons with disabilities, inclusive of women with disabilities, children, young and older persons with disabilities, and persons with intellectual or psychosocial disabilities. Indeed, “nothing about us without us” continues to be the concise guiding principle for realizing fundamental rights and freedoms under the CRPD.
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