INEQUALITY, DISCRIMINATION AND EXCLUSION:
Assessing CRPD Compliance in Pacific Island Legislation

October 2021

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### Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>CPPED</td>
<td>Convention for the Protection of All Persons from Enforced Disappearance</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
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<td>CRP D</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>DHS</td>
<td>Demographic and Health Survey</td>
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<tr>
<td>DPAA</td>
<td>Disability Promotion and Advocacy Association, Vanuatu</td>
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<td>DPL</td>
<td>Disabled Passenger Lift</td>
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<td>DPO</td>
<td>Disabled Persons Organisations</td>
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<td>ESCAP</td>
<td>United Nations Economic and Social Commission for Asia and the Pacific</td>
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<td>FSM</td>
<td>Federated States of Micronesia</td>
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<td>HIES</td>
<td>Household Income and Expenditure Survey</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICPPED</td>
<td>International Convention for the Protection of All Persons from Enforced Disappearance</td>
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<tr>
<td>ICT</td>
<td>Information and Communication Technology</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<td>ITU</td>
<td>International Telecommunications Union</td>
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<td>MHMS</td>
<td>Ministry of Health and Medical Services, Solomon Islands</td>
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<td>MIDPO</td>
<td>Marshall Islands Disabled Persons Organisation</td>
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<td>MIRC</td>
<td>Marshall Islands Revised Code</td>
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<td>NATA</td>
<td>Naunau ‘o e Alamaite Tonga Association</td>
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<td>NCDs</td>
<td>Non-communicable Diseases</td>
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<td>NDS</td>
<td>National Development Strategy</td>
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<td>NPDID</td>
<td>National Policy on Disability Inclusive Development, Republic of Marshall Islands</td>
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<tr>
<td>OHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
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<td>OTA</td>
<td>Ofa Tui mo e ‘Amanaki Centre, Tonga</td>
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<td>PDF</td>
<td>Pacific Disability Forum</td>
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<td>PIFS</td>
<td>Pacific Islands Forum Secretariat</td>
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<td>PFRPD</td>
<td>Pacific Framework for the Rights of Persons with Disabilities</td>
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<td>PNG</td>
<td>Papua New Guinea</td>
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<tr>
<td>PRIF</td>
<td>Pacific Region Infrastructure Facility</td>
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<td>PRSD</td>
<td>Pacific Regional Strategy on Disability</td>
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<td>PWDSI</td>
<td>People with Disabilities Solomon Islands</td>
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<td>RMI</td>
<td>Republic of Marshall Islands</td>
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<td>RPD</td>
<td>Rights of Persons with Disabilities Act, Republic of Marshall Islands</td>
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<td>SIDA</td>
<td>Solomon Islands Deaf Association</td>
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<td>SDGs</td>
<td>Sustainable Development Goals</td>
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Introduction

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was the first international human rights treaty of the 21st century. Its adoption was a major milestone for human rights development and for the 650 million persons with disabilities around the world.

According to the World Health Organization (WHO), approximately 15 per cent of the world’s population – over one billion people – experience some form of disability. Over 80 per cent of persons with disabilities worldwide are living in low- and middle-income countries. Despite the existence of core international human rights treaties, persons with disabilities have remained invisible and subject to general neglect, stigma and discrimination. They suffer higher rates of unemployment and illiteracy and are typically not considered by state agencies or communities to be holders of basic human rights.

A total of 13 Pacific island states have either signed or ratified the CRPD. Most (11) of them have ratified the Convention. In chronological order of ratification, the countries are:

- Vanuatu (23 Oct 2008)
- Cook Islands (8 May 2009)
- Nauru (27 Jun 2012)
- Palau (11 Jun 2013)
- Papua New Guinea; PNG (26 Sep 2013)
- Kiribati (27 Sep 2013)
- Tuvalu (18 Dec 2013)
- Republic of Marshall Islands; RMI (17 Mar 2015)
- Samoa (2 Dec 2016)
- Federated States of Micronesia; FSM (7 Dec 2016)
- Fiji (5 Jun 2017)

Tonga and Solomon Islands were early signatories but have yet to ratify the Convention:

- Tonga (15 Nov 2007)
- Solomon Islands (23 Sep 2008)

States parties to the CRPD are legally bound by the terms of the Convention. Under general obligations set out in Article 4(1), they are required to:

- adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention;
- modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- refrain from engaging in any act or practice that is inconsistent with the Convention and ensure that public authorities and institutions comply with the Convention;
- take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise; and
- promote the development, availability and use of universally designed goods, services, equipment, facilities, standards, and guidelines.

A number of other global and regional frameworks and commitments also require Pacific countries to adopt measures, including legislative measures, to promote and protect

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1 Around 795,000,000 persons (15.6 per cent according to the World Health Survey) and 975,000,000 persons (19.4 per cent according to the Global Burden of Disease) 15 years and older are living with disability. World Report on Disability (2011), 44.
3 Status on CRPD Ratification in the Pacific, 25 November 2020, OHCHR Pacific Office.
the rights of persons with disabilities. Importantly, equality and non-discrimination are fundamental human rights principles so the rights of persons with disabilities cut across all international human rights treaties, most of which have been ratified or signed by a significant (and growing) number of Pacific island states. These treaties comprise: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The 2030 Agenda for Sustainable Development provides another important global framework that promotes the rights of persons with disabilities in the broader development context of addressing inequalities, discrimination and exclusion, and ensuring that no one is left behind. Goal 10.3 of Sustainable Development Goals (SDGs) specifically recognizes the need to eliminate discriminatory laws:

Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.

At the regional level, high level political support for disability inclusion and non-discrimination has been articulated for nearly two decades (since 2003). In 2012, Pacific Islands Forum Disability Ministers recommended “promoting and ratifying the Convention on the Rights of Persons with Disabilities and developing and implementing national policies and legislation consistent with the Convention.” This recommendation was endorsed in 2013 by Forum Leaders who also identified women with disabilities as a priority area for the implementation of the Pacific Leaders’ Gender Equality Declaration. The Pacific Framework for the Rights of Persons with Disabilities 2016 – 2025 (PFRPD), endorsed by Forum leaders in 2016, recognizes the importance of enabling legal frameworks to promote, protect and fulfil the rights of persons with disabilities. Goal 3 of the PFRPD highlights the development of CRPD-aligned legal frameworks, including the review of domestic laws to eliminate disability-based discrimination and guarantee all fundamental rights and freedoms for persons with disabilities.

In addition, Pacific island states have endorsed two key Asia-Pacific regional frameworks: the Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-based Society for Persons with Disabilities in Asia and the Pacific 2003-2012 (Biwako Millennium Framework) and the Incheon

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4 In its General Comment No. 6 (2018) on equality and non-discrimination, the CRPD Committee clarifies that: “Equality and non-discrimination are at the core of all human rights treaties. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination on an open list of grounds, from which article 5 of the Convention originated. All of the thematic United Nations human rights conventions aim to establish equality and eliminate discrimination, and contain provisions on equality and non-discrimination. The Convention on the Rights of Persons with Disabilities has taken into account the experiences offered by the other conventions, and its equality and non-discrimination principles represent the evolution of the United Nations tradition and approach.” CRPD/C/GC/6 para. [5].

5 For example, CRC has full coverage and CEDAW near full coverage in the Pacific; CAT has been ratified by six countries - Vanuatu (2011), Nauru (2012), Fiji (2016), RMI (2019), Samoa (2019), Kiribati (2019), and signed by one (Palau); ICCPR has been ratified by five countries – Samoa (2008), PNG (2008), Vanuatu (2008), RMI (2018), Fiji (2018) – and signed by two (Nauru and Palau); and ICESCR has been ratified by four countries – Solomon Islands (1982), PNG (2008), RMI (2018), Fiji (2018) – and signed by two (Nauru and Palau); and ICESCR has been ratified by four countries – Solomon Islands (1982), PNG (2008), RMI (2018), Fiji (2018) – and signed by one (Palau). See Status on Human Rights Treaties Ratification in the Pacific, 25 November 2020, OHCHR Pacific Office.

6 Forum Communiqué, 44th Pacific Islands Forum, Majuro, 3-5 September 2013, paras. [5, 27].
Strategy to “Make the Right Real” for Persons with Disabilities in Asia and the Pacific (Incheon Strategy). The Incheon Strategy builds on the Biwako Millenium Framework as a detailed plan of action to improve the lives and uphold the rights of persons with disabilities in the Asia-Pacific region. Goal 9 calls upon United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) member states to:

accelerate the ratification and implementation of the CRPD and the harmonization of national legislation with the Convention.

Target 9B goes further to require that member states:

enact national laws which include anti-discrimination provisions, technical standards and other measures to uphold and protect the rights of persons with disabilities and amend or nullify national laws that directly or indirectly discriminate against persons with disabilities, with a view to harmonizing national legislation with the Convention.

Methodology

As a first step towards disability law reform in the Pacific, a selection of legislative reviews were undertaken for seven countries covering nine jurisdictions (RMI, Vanuatu, Nauru, Solomon Islands, Tonga, FSM, Pohnpei State, Kosrae State, Tuvalu). In view of the federal system of government in FSM, where the four states have their own constitutional governments including legislative and judicial branches, it was necessary to undertake three separate reviews of the national (FSM) Code and two state (Pohnpei and Kosrae) Codes. The process for RMI was a little different with the review of legislation forming part of the development and drafting of legislation. With the exception of Tonga and Solomon Islands, all countries had already ratified the CRPD and wished to begin the process of harmonizing their national legal frameworks.

The legislative review series was led by ESCAP under the Pacific Enable Project Phases I and II in collaboration with the Pacific Islands Forum Secretariat and support of the Pacific Disability Forum. Both phases of the project were funded under the UN Partnership to Promote the Rights of Persons with Disabilities (UNPRPD) and involved the partnership of a number of UN agencies who led activities in selected areas. In Phase I, activities were undertaken in the areas of statistics by United Nations Children’s Fund (UNICEF) and WHO, employment by WHO and International Labour Organization (ILO), legislation and policy by ESCAP and Pacific Islands Forum Secretariat (PIFS), and early child identification by UNICEF. Under Phase II activity areas, legislation was led by ESCAP and PIFS and CRPD reporting was led by OHCHR and Pacific Disability Forum (PDF).

All reviews were conducted under technical assistance requested by the respective governments. The review process involved in-depth legal research and analysis of the full complement of national and state laws (with the focus on primary legislation and Constitutions). In all cases, there were one or more country missions, site inspections (schools, hospitals, mental health facilities, polling stations, correctional facilities, police holding cells), stakeholder consultations within government and with civil society organisations and disabled persons organisations (DPOs), and discussions with senior practitioners in the legal fraternity, law enforcement, and health systems including prosecutors, public defenders, legal aid lawyers, Ombudsmen, police and prison officers, health practitioners including persons working in mental health.

The purpose of the technical assistance was to conduct comprehensive reviews of all domestic laws for CRPD compliance. The reviews focused on eliminating disability-based discrimination in the law, protecting the rights of all persons with disabilities, and promoting disability mainstreaming across the constitutional and legislative frameworks.
Tailor-made recommendations were made for each country to guide the amendment of non-compliant laws and help shape the development of new disability legislation. While the CRPD was the main benchmark, comments were offered on compliance issues relating to the CRC, CEDAW and other international standards, wherever possible. All review processes benefited enormously from the support of the governments and other national stakeholders.

The nine legislative reviews provide the main substance for this regional report. However, in view of the time lapse since the review process began in 2015, fresh legal research had to be undertaken for a number of countries. The purpose of this was to identify any significant changes to legislation, including any obsolete (repealed) provisions, and to review any fresh laws that had been enacted and that had implications for disability rights and CRPD compliance. In a few countries, positive changes to national legislation appeared to have been made in the wake of the review.

This report addresses critical questions of inequality, discrimination and exclusion as they affect persons with disabilities in selected countries in the Pacific region, focusing on constitutional and legislative frameworks in the seven Pacific island states identified above. It takes a thematic approach, examining common infringements as well as positive examples under selected areas of law that typically arise across Pacific island jurisdictions. The report is structured around seven Parts.

Parts I and II are essentially background. Part I provides an overview of the CRPD, including its human rights model of disability, and serves as a benchmark for the analysis of legislation that follows. Part II offers a snapshot of the regional and national contexts of disability, as a prelude to discussions on the law. The main part of the report is found in Parts III to Part VII where comments on the Constitutions (Part III) are followed by discussions on key compliance issues arising under more than 20 areas of law.

These areas of law are organized under three clusters of CRPD articles – Articles 1-10 (Part IV), Articles 11-20 (Part V), and Articles 21-31 (Part VI). The concluding section (Part VII) deals with the importance of law reform as a means to promote equality, non-discrimination and inclusion for persons with disabilities. It outlines a number of legislative options and opportunities for Pacific countries, highlights some of the more serious rights violations in the region that require urgent attention, and features a few good global and regional practices.
Part I. Convention on the Rights of Persons with Disabilities

A. BACKGROUND

Adoption of the CRPD:
The adoption of the CRPD represented a critical paradigm shift: from care, charity and protection to rights and equality. Of three models associated with disability⁷, two models predate the human rights or social model embodied in the CRPD. They are:

i. the model of complete exclusion, where disability is regarded as a purely negative phenomenon, associated with a punishment or divine curse, and efforts focus on the elimination or concealment of the disability and disabled persons as well as abandonment and isolation; and

ii. the so-called medical approach where disability is regarded as an illness or a medical abnormality, and efforts focus on normalising, rehabilitating and integrating those who deviate from the prescribed standard or norm.

From around 1980, there was a growing awareness globally about the need to change the policy approach to disability. However, for a long time persons with disabilities continued to be viewed primarily as objects of welfare, medical treatment or ‘protection’, resulting in their continued marginalization, discrimination and inequality. In particular, the continuing failure to recognize disability as a human rights issue meant that they faced huge challenges in being able to exercise their rights under core international human rights treaties⁸.

At its 56th session, the UN General Assembly adopted Resolution 56/162, which established an Ad-Hoc Committee on a Comprehensive and Integral International Convention Protecting the Rights and Dignity of Persons with Disabilities. The mandate of the Committee was to develop the text for a Convention that would ensure full and effective enjoyment of all existing human rights for persons with disabilities, while negotiating no new rights. Adopted in 2006, the CRPD was thus designed to inject a disability perspective into rights and freedoms already recognized in core human rights treaties. It clarified the duties of States parties to recognise and ensure the enjoyment of all human rights by all persons with disabilities on an equal basis of others⁹.


⁸ The core human rights treaties comprise: the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), and the International Convention for the Protection of All Persons from Enforced Disappearance.

disabilities on an equal basis of others. The third (CRPD) model of disability is therefore:

iii. the human rights model, which takes a completely different approach to disabled persons and disability in general. To start with, differences in physical or mental makeup are seen as part of the diversity intrinsic to the human condition, not as illnesses or abnormalities that need normalizing or ‘fixing’. Persons with disabilities are also no longer seen as “objects” in need of charity, medical treatment and social protection, but as “subjects” with rights, who are entitled to be full and equal members of society; to control their own lives; and to make their own decisions.

Under the human rights model, disability is regarded as a relational concept. It is not caused by the impairment itself but the inter-relationship (or rather mismatch) between individuals with long term physical, sensory, intellectual and psychosocial (mental) impairments and the inhospitable social environment in which they live, in particular the attitudinal, social, physical, environmental and institutional barriers they face in daily life. These barriers can take various forms including negative stereotypes, social prejudice, overprotection by families, discriminatory laws and policies, inaccessible buildings, transport, technologies, health and rehabilitation services. Such barriers lead to exclusion for persons with impairments; hinder their full and effective participation in society; and deny them their fundamental rights and freedoms.

The CRPD sets out to dismantle these barriers, eliminate exclusion and discrimination, and ensure equality of opportunity for all persons with disabilities. From the CRPD perspective, society (state policy and community initiatives) is responsible for ensuring inclusion and accessibility; i.e. it is not the individual person who must adjust for integration but society that should create the conditions for inclusion. Moreover, it is the failure to construct inclusive societies that leads to inaccessible physical and social environments, and in turn exclusion.

Uniquely, the CRPD bridges the divide between civil and political rights such as political participation and freedom from arbitrary detention, and social and economic (development) rights such as the rights to education and employment. As such, it is regarded as both a human rights treaty and an instrument for inclusive development, which is especially relevant in the context of the 2030 Sustainable Development Agenda. These are the full range of rights for persons with disabilities under the Convention:

• The right to life;
• Equal recognition before the law;
• Full legal capacity including the right to own and inherit property and enjoy equal access to financial credit;
• Full access to justice, including access to the courts and to the legal process;
• Liberty and security of the person;
• Freedom from torture or from cruel or degrading treatment or punishment, including medical experimentation;
• Freedom from exploitation, violence or abuse; The right to personal integrity;
• The right to liberty of movement, including the right to possess a nationality;
• The right of all children to be registered at birth and to have a name;
• The right to live in the community and to live independently;
• Personal mobility including access to appropriate mobility aids and technology;
• Freedom of expression and opinion;
• The right to personal privacy;


11 General principle (d) in Article 3 of the CRPD.
• Respect for the home and for the family including the right to marry and to found a family, and the equal right of children with disabilities to have a family life;
• The right to education and to enjoy inclusive education with others in the community;
• The right to enjoy the highest attainable standard of health without discrimination;
• The provision of habilitation and rehabilitation services;
• The right to work on an equal basis with others, including equal remuneration for work of equal value;
• The right to an adequate standard of living and social protection; and
• The right to participate in public and political life, including the right to vote and to stand for public office.

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 at the international level. The CRPD Committee is made up of members elected by States parties and nearly all of them are persons with disabilities. It is a meaningful conduit through which the views of persons with disabilities can engage with and help shape international human rights law. The Committee provides expertise, advice, and authoritative guidance on how to implement the Convention effectively, including through national disability policies and legislation.

The CRPD has an Optional Protocol, which can be signed and ratified separately by States that have signed or ratified the Convention. This legal instrument establishes two (complaints and inquiry) procedures. The complaints procedure enables persons with disabilities to seek redress from an independent international body if they believe there has been a breach of rights under the Convention, and national remedies have been exhausted. The inquiry procedure is an investigation by the Committee into grave or systematic violations of the Convention.

B. KEY PRINCIPLES, CONCEPTS AND ARTICLES

General principles

The CRPD is the first human rights treaty to explicitly include general principles in its text (Article 3). These eight principles are intended to guide the interpretation of the Convention and should govern all legislation and disability policies of States parties. They are closely interconnected and crosscutting, evocatively described as “the founding roots that spread through all the convention’s provisions and connect the various branches.”12 The general principles are as follows:

• respect for inherent dignity, individual autonomy, including the freedom to make one’s own choices, and independence of persons;
• non-discrimination;
• full and effective participation and inclusion in society;
• respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
• equality of opportunity;
• accessibility;
• equality between men and women;
• respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Due to its overarching effect, it is worth

considering the principle of respect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons. As noted above, persons with disabilities have historically been denied the right to have control over their own lives and, rather than being “subjects” of rights, they have been considered “objects” of charity, care and ‘protection’. The principle of autonomy and self-determination is a driving force of the paradigm shift from a medical to a human rights-based model of disability.

The principle of non–discrimination should be crosscutting through the entire legislative framework. Discrimination can take multiple or intersectional forms, for example where a woman experiences discrimination on the grounds of her gender, age, and disability. In addition, while purposeful or intentional discrimination constitutes direct discrimination, some social norms that appear to be neutral at face value are discriminatory in effect and have a disproportionate negative effect on persons with disabilities (indirect discrimination). A law that prohibits persons with intellectual or psychosocial disabilities from voting or a policy that bans children with hearing impairments from attending mainstream schools are examples of direct discrimination; while a rule that obliges employees to attend workplace meetings on the second floor of a building that has no elevator or a school that is technically open to all children but does not provide books in Easy Read format indirectly discriminate against employees with restricted mobility and children with intellectual disabilities respectively. Sometimes the lack of positive measures to create equality can also result in discrimination such as the failure to provide assistance in polling booths to enable persons with disabilities to exercise their right to vote under the law.

**Full and effective participation and inclusion in society** is a fundamental principle that also captures the paradigm shift. It enables persons with disabilities to be involved in all aspects of life and to potentially influence the way social, cultural and political institutions are shaped.

It is not uncommon for national disability policies to be crafted as if they were health policies. While health is an important right for persons with disabilities, national disability policy should not be reduced to health issues. **Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity** emphasizes the fact that persons with disabilities are not to be equated with persons who are ill or in need of being cured or normalized. Persons with disabilities are what they are and their differences need to be respected. Indeed, the acknowledgement of difference and diversity rejects the idea of a rational and able-bodied norm (and in turn the implication that anybody who falls short of this norm is defective).

**Accessibility** has no precedent as a principle in human rights treaties. It appears as both a principle that governs all other rights and a standalone article in the CRPD, and reflects the paradigm shift. Accessibility is multidimensional because it requires the removal of physical, communication, institutional, and social barriers as well as the provision of accessibility measures such as ramps for wheelchair users, voting options for blind citizens, and plain language materials for persons with cognitive impairments. Accessibility is a foundational principle of the Convention and should be understood as pivotal to achieving many of its rights. Its importance is demonstrated in the fact that it is the subject of one of the first General Comments produced by the CRPD Committee.13

**Women with disabilities** face multiple forms of discrimination. During the development of the CRPD, this issue was given special attention by States parties and civil society. It was decided

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13 CRPD Committee General Comment No. 2 (2014) on accessibility CRPD/C/GC/2.
to consider equality between men and women as both a general principle and a standalone Article. The obligations towards women with disabilities should therefore be considered crosscutting in all areas of the CRPD. The Convention adopts a twin track approach to matters related to gender equality and the situation of women with disabilities.

A similar situation applies to children with disabilities. The CRPD makes specific reference to their situation with special emphasis on the need to respect the evolving capacities of children with disabilities and their right to preserve their identities.

**Key CRPD concepts**

There are a number of key concepts that are consistently used in the Convention and which are directly relevant to this comparative analysis of Pacific legislation.

During the negotiations, several countries proposed different definitions of disability. None of them proved to be satisfactory to States parties and disabled persons organizations so the Convention offers no definition of disability as such; instead, it uses an open-ended ‘definition’ that recognizes disability an evolving concept.¹⁴ This ‘non-definition’ does not preclude the possibility that different definitions might apply for different purposes at the state level, for example for the national census, transport, personal assistance, or pensions.

Article 1 ‘defines’ persons with disabilities as:

> includ(ing) those who have long-term physical, mental (psychosocial), intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This relational concept of disability relieves persons with disabilities of the burden of integration. Responsibility is placed on society as a whole, and emphasis is given to promoting social inclusion in the belief that social environments should be constructed for everyone. The CRPD does not make any distinction between disabilities, or establish exceptions according to the ‘degree’ of disability. Section(j) of the Preamble recognizes “the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.”

Article 2 clarifies the language used in the body of the Convention. It makes specific reference to the concepts of communication, language, discrimination on the basis of disability, reasonable accommodation, and universal design. The term communication should be understood to comprise languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology (ICT). Language includes spoken and sign languages and other forms of non-spoken languages that recognize the linguistic identity of deaf persons.

**Discrimination on the basis of disability** (Articles 2 and 5) is broadly defined to mean:

> any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of all human rights and fundamental freedoms, on an equal basis with others, in the political, economic, social, cultural, civil or any other field… (Article 2)

The obligation to prohibit all discrimination includes all forms of discrimination. In particular, this means prohibiting both direct

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¹⁴ CRPD Preamble (e).
and indirect discrimination, denial of reasonable accommodation, and any form of harassment including bullying and other forms of intimidating, degrading, humiliating words or actions and other disability-based violence such as rape, exploitation and acts of cruelty like beatings.  

The “denial of reasonable accommodation” constitutes discrimination where adjustments that do not impose a “disproportionate or undue burden” are necessary to ensure enjoyment of a fundamental right or freedom on an equal basis with others. One example of a denial of reasonable accommodation would be to refuse to accept an accompanying (support) person.

Discrimination can be based on a single characteristic such as disability or gender, or multiple or intersecting characteristics. Multiple discrimination arises where a person experiences discrimination on two or several grounds say gender and disability i.e. the discrimination is “compounded or aggravated.” Intersectional discrimination occurs where a person with a disability (or associated with a person with disability) experiences discrimination on the basis of disability combined with another status such as gender, ethnicity or religion, and the “several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination.”

Discrimination “on the basis of disability” is wide in scope: it “can be against persons who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as well as those who are associated with a person with a disability.” The latter is known as “discrimination by association.” Importantly, discrimination does not include positive measures, described as “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities” (Article 5(4)).

Accessibility, reasonable accommodation and universal design are distinct, albeit interrelated, concepts. Article 9 (accessibility) requires States parties to:

- take appropriate measures to ensure persons with disabilities have 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 it means to “take appropriate measures” to ensure accessibility is not defined and should be determined in the context it arises such as the right to education (Article 24), health (Article 25) or employment (Article 27). Accessibility measures include specific adaptations for persons with disabilities.

Universal design requires environments, goods and services to be designed and constructed inclusively 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, idealized and exclusive norm.

Reasonable accommodation is a pivotal concept applicable to all areas of life. It refers to:

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15 CRPD Committee General Comment No.6 (2018) on equality and non-discrimination CRPD/C/GC/6 para [18].
16 Ibid.
17 Ibid. para [19].
18 Ibid.
19 Ibid. para [20].
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 the concepts of universal design and accessibility, reasonable accommodation is specifically designed to meet the particular needs of an individual in any area of life. The tailor-made adjustments are mandatory unless they inflict undue hardship, for example if an adjustment is disproportionately costly, extensive, substantial, or disruptive, or would fundamentally alter the nature of a business establishment or entity.

To illustrate this with an example from the world of work, suppose a large employer refuses to employ a person who uses a wheelchair because there is no accessible toilet in the workplace. Where an anti-discrimination law includes an obligation to provide reasonable accommodation, as is required under the CRPD, any large employer would be expected to make at least one toilet accessible. This is because altering one toilet is a necessary and appropriate modification that would not impose a disproportionate or undue burden on that employer. In such circumstances, the failure to provide a single accessible toilet would constitute an act of discrimination.

Reasonable accommodation should be assessed on a case-by-case basis. States have some discretionary scope to determine whether reasonable accommodation in any particular case constitutes undue hardship. However, no decision should be arbitrary or amount to a denial or justice. In General Comment No. 6, the CRPD Committee unpacks this important concept in some detail, providing interpretation of terms like “reasonable”, and “disproportionate or undue burden”, and guidance on the duties implied.

**Procedural accommodation** is mentioned in Article 13 (access to justice) although it is not specifically defined. It can perhaps best be understood as a form of reasonable accommodation in the area of judicial, legal or administrative procedures including investigations of any kind. All procedures must comply with the general obligations of accessibility and universal design, and provide appropriate and individually tailored adjustments according to the specific requirements of a person with disability. Procedural accommodation is critical to ensuring that persons with disabilities are able to participate directly and indirectly in legal and other proceedings, including as witnesses, on an equal basis with others, and in turn achieve access to justice (Article 13).

Unlike reasonable accommodation, procedural accommodation is not limited by the proportionality test (‘disproportionate burden or undue hardship’). The CRPD Committee has also stressed that the duty to provide procedural accommodation is an immediate obligation and its denial should be viewed as discrimination as this could lead to denial of justice, lack of effective remedies, and overall lack of protection of rights.

Procedural accommodation could comprise a range of positive measures including: additional breaks, a slower pace, interpretation and/or

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20 In a case against Sweden under the Optional Protocol, the CRPD Committee determined that the failure of the State to provide adjustments to a city development plan to enable a woman with disability to build a hydrotherapy pool in order to alleviate the pain caused by her disability constituted denial of reasonable accommodation. See CRPD/C/7/D/3/2011 para. [8.5]. In a different case, also against Sweden, the Committee concluded that making adjustments to the entire computer system of a public institution in order to enable a blind woman to be employed constituted undue hardship. See CRPD/C/12/D/5/2011 para. [10.5]. This was a divided decision. Six CRPD experts voted against it.

21 CRPD General Comment No 6 (equality and non-discrimination) (2018) CRPD/C/GC/6 paras [23-27].

22 Ibid. para [25(d)].

23 This reflects the position of the OHCHR that “the right of access to justice acts as the guarantor for the effective enjoyment and exercise of all rights” A/HR/34/26, para [35].
explanation, and accessible modes of communication, for court proceedings; the use of support persons; Easy Read summaries of proceedings at the end of each court day; video testimony for a person who finds the courtroom environment distressing or confusing; educational sessions or programmes; and modified court rooms for improved accessibility.

**Spotlight on two Articles**

There are over 30 substantive rights-related Articles in the Convention. These cover a wide range of areas. Apart from the general principles (Article 3) noted above, there are:

- general obligations (Article 4)
- equality and non-discrimination (Article 5)
- women with disabilities (Article 6)
- children with disabilities (Article 7)
- awareness-raising (Article 8)
- accessibility (Article 9)
- right to life (Article 10)
- situations of risk and humanitarian emergencies (Article 11)
- access to justice (Article 13)
- equal recognition before law (Article 12)
- access to justice (Article 13)
- liberty and security of person (Article 14)
- freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15)
- freedom from exploitation, violence and abuse (Article 16)
- protecting the integrity of the person (Article 17)
- liberty of movement and nationality (Article 18)
- living independently and being included in the community (Article 19)
- personal mobility (Article 20)
- freedom of expression and opinion, and access to information (Article 21)
- respect for privacy (Article 22)
- respect for home and family (Article 23)
- education (Article 24)
- health (Article 25)
- habilitation and rehabilitation (Article 26)
- work and employment (Article 27)
- adequate standard of living and social protection (Article 28)
- participation in political and public life (Article 29)
- participation in cultural life, recreation, leisure and sport (Article 30)
- statistics and data collection (Article 31)
- international cooperation (Article 32)
- national implementation and monitoring (Article 33)
- reporting (Article 35)

While all Articles under CRPD are important, there are two in particular – Article 12 and Article 19 – that are ground-breaking. It is these Articles that crystallize the whole model and capture the essence of the paradigm shift.

- Article 12 - Equal recognition before the law including legal capacity

Legal capacity is a universal attribute inherent in all persons by virtue of their humanity. However, it has been prejudicially denied to many groups throughout history including women (particularly upon marriage), ethnic minorities, and colonised indigenous communities. Persons with disabilities, particular those with intellectual or psychosocial disabilities, remain a group whose legal capacity is most commonly denied in legal systems worldwide today, depriving them of the right to have control over their lives and to make their own decisions. Given 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.

The human rights-based model of disability recognises the capacity to act and to make one’s own decisions as a precondition for the exercise of other fundamental human rights. Article 12(2) states that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” Legal capacity has two limbs: a person’s legal
standing or legal personality (which recognizes the person as the holder of rights) and a person’s legal agency (where there is a power to act on legal standing i.e. an ability to exercise those rights). The capacity to act and to make one’s own decisions in life is essential to exercising other important human rights such as the right to vote or to marry or have a family, or to own property. For this reason, it has been said that legal capacity is a portal to other rights.

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. Supported decision-making recognizes the rights, will and preferences of a person with disability as paramount. It demands that States “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity” (Article 12(3)). Measures must “ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property” (Article 12(5)).

Contrary to Article 12, the substitute decision-making model continues to prevail in most legal systems around the world including in the Pacific. At its core is the view that persons with intellectual or psychosocial disabilities do not have the ability to make decisions for themselves (exercise legal capacity) because they are ‘mentally incompetent’. They are therefore subject to different substitute decision-making systems such as guardianship or curatorship, or mental health laws, which amongst other things authorize non-consensual treatment and hospital admission.

The lack of mental capacity, typically referred to as ‘unsoundness of mind’ but generally referring to persons with intellectual or psychosocial disabilities, is not a legitimate ground for denying legal capacity (either legal standing or legal agency). However, this has been common practice and has resulted in persons with disabilities being deprived of many fundamental rights including the right to vote, the right to marry and found a family, the right to give consent for intimate relationships and medical treatment, reproductive rights, parental rights, and the right to liberty.24

As the CRPD Committee has made clear, these are in fact quite distinct concepts and should not be conflated. Mental capacity refers to the decision-making skills, competence or ability of a person, which varies by person, 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 enjoy legal agency. Article 12 guarantees legal capacity for everyone by virtue of being human, regardless of a person’s mental capacity or decision-making ability (“universal legal capacity”), and a person cannot under any circumstances be denied legal capacity on the basis of disability i.e. a lack of mental capacity. There are no exceptions.25 Instead, a person deemed to be mentally “incompetent or incapable” should be assisted to exercise his or her legal capacity (Article 12(3)) and there must be appropriate safeguards against abuse of this support (Article 12(4)). The concept of mental capacity, the Committee has observed, is itself “highly controversial”, “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.”26

The Committee also made clear that the following are not to be construed as mental incapacity:

- Article 19 – Living independently and being included in the community

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24 CRPD Committee General Comment No.1 (2014) on equal recognition before the law CRPD/C/GC/1 [13-14].
25 CRPD General Comment No. 1 (2014) on equal
26 Ibid.
Historically, persons with disabilities, particularly those with intellectual or psychosocial disabilities, have been presumed to be unable to live independently, and so have tended to be subject to overprotective regulation. These 'protective' measures have had many negative effects and have deprived persons with disabilities of many basic rights including the right to choose where and with whom to live.

Enshrined in Article 19 is the right to live independently and be included in the community, with choices like others. Exercising this right implies that persons with disabilities should be able to make their own choices and to live in enabling and accessible environments. Article 19 is aimed at preventing abandonment, institutionalization and segregation in domestic settings, and abolishing legal provisions that deprive persons with disabilities of choice and force them to live in institutions or other segregated settings. In order to ensure that persons with disabilities can enjoy this important right, policies need to be put in place to guarantee both targeted support services (in-home support services such as assistance with self-care and housekeeping) and access to community services and facilities available to the general population including transport system, public buildings and services, and private facilities and services open to the public.

C. OBLIGATIONS IN RELATION TO LAW REFORM

The general obligations outlined in Article 4 require States parties to ensure and promote the full realization of all human rights and fundamental freedoms for persons with disabilities without discrimination of any kind. Amongst the specific actions that should be taken to comply with this obligation are to "modify and abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities." The CRPD Committee has been very clear about the kinds of laws that are particularly problematic and require such modification or repeal. They include guardianship laws and other laws infringing on the right to legal capacity, mental health laws, laws which permit forced sterilization of women and girls with disabilities, laws that promote segregated education, and election laws that disenfranchise persons with disabilities.

Article 4 legal obligations also require States to "adopt all appropriate legislative … measures for the implementation of the rights recognized in the present Convention." Amongst 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 (see also Article 5(2) below). In addition, disability must be mainstreamed through all policies and programmes, and States should "take all appropriate measures" to ensure that all companies, organizations, and private individuals do not engage in any activity that amounts to exclusion or disability-based discrimination.

Other obligations under Article 4 have law reform implications: the requirements to immediately implement all civil and political rights in accordance with international law; and to take all measures, based on available resources and drawing on international support, to progressively achieve those rights of persons with disabilities which are considered economic, social and cultural rights.

Article 5 is another key article as it prohibits discrimination against persons with disabilities
and obliges States parties to enact laws to ensure that persons with disabilities receive equal protection under the law. Article 5 states:

(1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
(2) State Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
(3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
(4) Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

In its General Comment No. 6, the CRPD Committee clarifies the obligations regarding equality and non-discrimination arising under Article 5. For example, the reference to “equal protection of the law” in paragraph (1) demands that “national legislatures refrain from maintaining or establishing discrimination against persons with disabilities when enacting laws and policies.” Alongside this, the distinct concept of “equal benefit of the law” is aimed at ensuring equal opportunity for persons with disabilities. It requires that States “eliminate barriers to gaining access to all of the protections of the law and the benefits of equal access to the law and justice to assert rights.”

In respect of paragraph (2), the Committee has clarified that “equal and effective legal protection against discrimination” means that States parties:

have positive obligations to protect persons with disabilities from discrimination, with an obligation to enact specific and comprehensive anti-discrimination legislation. The explicit legal prohibition of disability-based and other discrimination against persons with disabilities in legislation should be accompanied by the provision of appropriate and effective legal remedies and sanctions in relation to intersectional discrimination in civil, administrative and criminal proceedings. (emphasis added)

The reference to discrimination “on all grounds” under paragraph (2) requires then that all possible and intersecting grounds must be taken into account and that laws should expressly prohibit discrimination on multiple grounds to ensure remedies can be obtained where intersectional discrimination occurs. Paragraph (3) makes it clear that laws prohibiting discrimination on the ground of disability must include reasonable accommodation. According to the CRPD Committee, this “imposes a positive legal obligation” to provide the necessary adjustments or modifications required in a particular case as well as a duty that such adjustments do not impose a disproportionate or undue burden on the duty bearer. Finally, paragraph (4) promotes positive measures to accelerate or achieve substantive (de facto) equality of persons with disabilities. Positive measures are sometimes needed to overcome chronic or institutionalized disadvantage. The concept of equality does not only rely on equal treatment. In fact, equal treatment of persons in unequal situations can, paradoxically, help to perpetuate or reinforce existing inequalities rather than eliminate or reduce them.

35 CRPD Committee General Comment No 6 (equality and non-discrimination) (2018) CRPD/C/GC/6 para [16].
36 Ibid.
37 Ibid. para [22].
38 Ibid. para [25].
Part II. Disability at a Glance in the Pacific

A. REGIONAL OVERVIEW

An estimated 17 per cent of Pacific populations (including Australia and New Zealand) have some form of disability. This is consistent with WHO and World Bank global estimates of 11-18 per cent of the population. In some Pacific island states, significant prevalence rates are being recorded, in particular Solomon Islands (14 per cent), Fiji (13.7 per cent), Papua New Guinea (13.4 per cent), Tuvalu (13.2 per cent), Vanuatu (12 per cent) and RMI (11.7 per cent). It should be noted that regional disability data has been traditionally unreliable and is probably under-reported. There is also considerable disparity across the region, one reason for which is the lack of internationally comparable data due to differences in definition and methodology for measuring purposes. This issue has been addressed in recent years by the United Nations Washington Group on Disability Statistics.

Commendably, the use of a standardised international methodology (short set of six questions relating to functional difficulties) has gained currency across the region, in large part a result of continuous calls for better data and advocacy by national disabled persons organisations and the Pacific Disability Forum (PDF). Since 2015, all Pacific countries undertaking their national census have used the short set of Washington Group questions: Kiribati and Palau (2015), Tonga, Samoa and Niue (2016), Fiji and Tuvalu (2017), Solomon Islands (2019), and Vanuatu (2020). In addition, a growing number of disability monographs has been produced. These provide a valuable source of disaggregated census data for cross tabulation and analysis that can deepen understanding of the barriers facing persons with disabilities; help shape appropriate policy interventions in key sectors like education and employment; and inform the design of disability-inclusive and/or disability-specific services. Monographs have so far been produced for Kiribati, Palau, Samoa, Tonga, Fiji (draft), Tuvalu (draft) and Nauru – marking a successful collaboration between national statistics offices, the Secretariat of the Pacific Community (SPC), UNICEF, and PDF.

A significant ratification rate for the CRPD is another positive development. There is now near complete ratification coverage in the region with just two Pacific island countries (Solomon Islands and Tonga) left to ratify. No country in the region has entered a reservation against the Convention. Initial reports – a requirement under Article 35 - have been submitted by Vanuatu, Cook Islands, Tuvalu, RMI, Palau and Kiribati, and there has been some progress with CRPD implementation (see

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41 Details provided by Pacific Disability Forum, Suva, January 2021.
42 Ibid.
country profiles). Most countries have national disability policies and active national disabled persons organisations (DPO). There are now 40 DPO across the Pacific (including Australia and New Zealand), all of them affiliates of PDF. Their activities have steadily expanded from awareness raising and advocacy for CRPD ratification to more diverse advocacy targeting national budgets, social protection schemes, community-based rehabilitation, disaster management and climate change, and law reform for CRPD harmonization. In line with Article 4(3) obligations, DPO are being consulted by governments, for example on national sustainable development strategies; are being given greater representation on government committees; and are enjoying opportunities for stronger participation in “policy spaces and dialogues to influence policy change.”

PDF has played a crucial leadership role for its member organisations (DPO) as well as successfully forging strategic partnerships with regional intergovernmental organisations (PIFS and SPC), various United Nations bodies, and other development partners. Apart from its work in promoting disability data collection and analysis, PDF has spearheaded the development of disability inclusive emergency responses by governments, civil society, and development partners across the region (“Pacific Disability Inclusive Preparedness for Response Strategy”) and the development of regional accessibility standards for the built environment, transport and ICT. An important feature of the latter has been capacity building for national DPO so that they are able to conduct access audits of infrastructure and respond to requests from governments and development partners for advice on accessibility measures. To date, PDF has conducted training in access audits in five countries – Fiji, Solomon Islands, Samoa, Kiribati and Tuvalu.

Despite these positive developments, persons with disabilities in the Pacific are likely to be amongst the poorest and most marginalised members of society, effectively excluded or isolated from the mainstream of society. They face many attitudinal and environmental barriers that prevent meaningful inclusion in community life and participation in public office and decision-making bodies including local and national government. In most countries health services are modest, especially for those living in the outer islands and for those with psychosocial (mental) disabilities whose growing numbers are placing pressure on available facilities. Although Pacific cultural norms dictate that they should be (and to some extent are) cared for by their families, this can lead to overprotection, dependency and confinement. It also fuels the misconception that persons with disabilities lack the capacity (or should not be permitted) to make their own decisions and choices.

The lives of Pacific islanders with disabilities are also subject to social prejudice, discrimination, neglect, abuse, violence and even outright rejection, particularly for those who are mentally ill. While opportunities for education and employment, and to participate in cultural, recreational and public life, are slowly improving they are still very limited, making it difficult for persons with disabilities to earn an income, make a living, support a family, and live a full and independent life. Globally, the rate of unemployment is substantially higher (two or three times higher) than for the rest of the population. This structural inequality is mirrored in Tuvalu for example where, according to the 2017 census, 8.1 per cent of persons with disabilities were in paid employment compared to 34.6 per cent of

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43 Ibid.
46 National DPO have conducted access audits or provided accessibility advice in relation to the national airport in countries – Fiji, Solomon Islands, Samoa, Kiribati and Tuvalu.
47 Details provided by PDF, Suva, January 2021.
48 See for example Tuvalu CRPD initial report to the Committee on the Rights of Persons with Disabilities, 7 March 2019, CRPD/C/TUV/1, para. [108, 131].

Tuvalu, the national parliament in Samoa, the Santo market in Vanuatu, and government buildings in Kiribati.
persons without disabilities.\(^{49}\) Men with disabilities were four times more likely to be employed than women with disabilities.\(^{50}\) Not surprisingly, the barriers to paid work and employment make persons with disabilities more susceptible to material hardship and poverty.

Another pervasive and persistent environmental barrier is the general lack of accessibility to public buildings and services including schools, workplaces, hospitals, courts, public housing, roads and pathways, wharves and jetties, markets, community halls, supermarkets, banking and postal facilities, ICT and transport (aviation, maritime and road), and a lack of connectivity to enable movement around in villages and towns. The lack of accessible modes of communication or formats in public buildings, street signage, education and information materials are common place.

Disability-based discrimination is embedded in the law, whether directly or indirectly, including through the sparsity of provisions upholding rights guaranteed in the CRPD and the limited application of a disability inclusive approach to mainstream national policy, programming and development activity. With rare exceptions (e.g. Fiji), persons with disabilities do not usually enjoy express constitutional protection from discrimination or equal recognition before the law and legal capacity (see Parts III-VI).

**Persons with intellectual and psychosocial disabilities**

Across the region, mental illness continues to be shrouded in stigma, superstition and shame, and persons with intellectual (cognitive) and/or psychosocial disabilities (persons typically referred to as “mentally incompetent”, “of unsound mind”, or “insane”) are amongst those worst affected by rights violations. These violations include disqualification from voting or standing for public office; arbitrary arrest and detention; and medical treatment without consent. In FSM, there is no psychiatrist in Kosrae State; nor a psychiatric ward or proper out-patients facility in either Pohnpei State or Kosrae State; and persons with psychosocial disabilities can be routinely detained in prison for indefinite periods by court order. Medical interventions are typically non-consensual. The medication regime in Pohnpei relies on the use of older antipsychotic drugs dating back to the 1950s, which can have serious side effects.\(^{51}\) In Tuvalu, the Princess Margaret Hospital in Funafuti does not house a proper psychiatric ward, or have a qualified psychiatrist on staff, so diagnosis and treatment are in the hands of ordinary clinicians.\(^{52}\) Persons with psychosocial disabilities routinely “roam around” the island, until picked up by police, often at the request of family members.\(^{53}\) They may be restrained by police for the purpose of administering medical treatment (“injections”), by doctors’ request.\(^{54}\)

The picture in other Pacific countries is not very different and living conditions for mental health patients can be grim. In Tonga, overcrowding in the psychiatric unit at Vaiola Hospital in Nuku’alofa has required a number of male patients to be accommodated in the prison complex. This arrangement creates a potentially risky and stressful environment for persons with mental illness or psychosocial disability, and it does not comply with international human rights standards including those under the CRPD.\(^{55}\)


\(^{50}\) Ibid.

\(^{51}\) Mission visit, Pohnpei State Department of Health, Behaviour Health and Wellness Program, 7.4.19.

\(^{52}\) Mission visit, Princess Margaret Hospital Funafuti, 15.8.18.

\(^{53}\) Ibid.

\(^{54}\) Mission visit, Ministry of Police, Funafuti 15.8.18.

\(^{55}\) In 2018, the 26-bed psychiatric unit at Vaiola Hospital in Nuku’alofa averaged 40 patients and several male patients considered too dangerous for the ward were kept in a small single room structure within the prison complex at Ha’utototilo under the care of a live-in prisoner. While there are plans to build a larger psychiatric facility, it is understood that this will be constructed adjacent to the prison, i.e. within the main prison boundaries. Mission discussions at Vaiola Hospital (8.6.17) and site visit to Ha’utototilo Prison, 12.6.17.
**Women with disabilities**

Women and girls with disabilities in the Pacific are susceptible to multiple and intersectional discrimination on account of their gender, disability and other identities. In Solomon Islands, there is anecdotal evidence to suggest that they experience more community stigma and prejudice, more discrimination within the family, and are less able to access health care (including reproductive health services), education, employment, and community life. A prevailing view is that women with disabilities (whether physical, sensory, intellectual or psychosocial) cannot or should not enjoy sexual intimacy or relationships including marriage or childbearing, on account of their disabilities.

Across the Pacific, women and girls with disabilities also have to contend with higher risks of isolation, family-based violence, sexual assault, and other forms of family and community-based violence including non-consensual medical treatment or interventions. In both Vanuatu and Tuvalu, there is evidence of forced sterilization, and in Tuvalu of “all forms of abuse, teasing, bullying, harassment, including sexual abuse.” Women with sensory and psychosocial disabilities are particularly susceptible to sexual abuse, and this is exacerbated by communication and attitudinal barriers that can hinder their access to justice. As the Government of Tuvalu has acknowledged, women with hearing impairments are “less able to report abuse” and women with psychosocial disabilities are “less likely to be believed.”

**Children with disabilities**

Children with disabilities are a vulnerable group of children. One area of extreme disadvantage is education. Many Pacific Island children with disabilities do not attend school due to physical and attitudinal barriers including parental anxiety (about exposure to teasing, bullying etc.), shame, and overprotection, community prejudice, poorly trained teachers, a lack of accessibility to transport and school buildings, and a lack of educational materials in accessible formats and assistive devices. In Solomon Islands, only a tiny proportion (1-2 per cent of children with disabilities) is believed to attend primary, junior secondary and secondary school and those who do attend usually stay for just a few years. A similar token representation (2 per cent) in the mainstream educational system has been recorded in Nauru. Three special education centres in Solomon Islands cater for persons with disabilities but they cannot accommodate everyone, which leaves many at home, unable to access any form of education.

Across the region, there are insufficient teachers trained in inclusive education (including sign language and Braille) with acute shortages evident in Solomon Islands, Tonga, etc., shame, and overprotection, community prejudice, poorly trained teachers, a lack of accessibility to transport and school buildings, and a lack of educational materials in accessible formats and assistive devices. In Solomon Islands, only a tiny proportion (1-2 per cent of children with disabilities) is believed to attend primary, junior secondary and secondary school and those who do attend usually stay for just a few years. A similar token representation (2 per cent) in the mainstream educational system has been recorded in Nauru. Three special education centres in Solomon Islands cater for persons with disabilities but they cannot accommodate everyone, which leaves many at home, unable to access any form of education.

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Tuvalu, FSM, Vanuatu and Nauru. The situation is typically worse in the rural areas or outer islands where children with disabilities are unlikely to attend school at all on account of the long distances, mobility challenges for wheelchair users in difficult terrain, and the general lack of accessible schools. In Solomon Islands, children with intellectual or serious physical disabilities are especially disadvantaged, as there are typically no facilities for them.

Tonga has taken significant steps towards an accessible and inclusive education system. However, the transformation has been slow and the situation on the ground is not dissimilar to other countries like Solomon Islands, Tuvalu, Vanuatu and Nauru where most children remain effectively excluded from the mainstream educational system. “Special education” facilities like the ‘Ofa Tui mo e ‘Amanaki (OTA) Centre do their best with limited resources to offer a rudimentary education and basic training in life skills. However, the few children who manage the transition from special education facilities to regular schools can often end up with little more than a place in the classroom i.e. facilities to regular schools can often end up with little more than a place in the classroom i.e. unable to participate effectively as the schools are not sufficiently equipped or resourced to give them the professional attention and quality of teaching available to other children. School curricula, teaching/communication formats, and assessment criteria are yet to be adjusted comprehensively, and few if any schools are equipped with assistive devices and technologies such as screen readers and Braille machines. As a result, students with disabilities are likely to drop out and/or revert to a special education facility.

In Tuvalu, robust policy and legal frameworks are similarly lacking, with the result that children tend to be “neglected” in the school system. Despite the Government’s commitment to inclusive education, a system of separate education persists which relies on a single, privately run “special needs” school (Fusi Alofa). The attendance of children with disabilities at mainstream schools is hampered by the lack of teachers trained in inclusive education including alternative communication modes such as sign language; the inaccessibility of school buildings and facilities; the lack of accessible transport; and small budgetary allocations. The net outcome is a “significant disparity” in respect of educational opportunities for persons with disabilities who, according to the 2017 national population census, are six times more likely to have no education or to not attend school than persons without disabilities. Disparities are particularly high at secondary school level and for girls/young women with disabilities. The Committee on the Rights of the Child (CRC) has recently expressed concern about this situation.
B. COUNTRY SNAPSHOTs

Solomon Islands

Disability statistics

There are an estimated 72,467 persons with disabilities in Solomon Islands, with a fairly even distribution between men and women (36,389 male, 36,078 female). Based on the 2009 population census of 515,870 persons, this gives a disability prevalence of 14 per cent, which is close to the WHO global estimate of 15 per cent. Prevalence is slightly higher for women (14.4 per cent) than for men (13.8 per cent) and numbers of persons with disabilities steadily rises from 40 years of age, peaking at 74.2 per cent for the 65 and over age group.

More recent data drawn from the 2015 national Demographic and Health Survey (DHS) shows that disability prevalence continues to be highest in the functional areas of seeing, remembering and concentrating, followed by walking and hearing, then self-care and communication. The DHS also reveals higher numbers for those aged 60 years and above than for those aged 5-59 years, and for rural populations as opposed to urban populations. Approximately 16 per cent of males and 17 per cent of females aged 5 years and older have a mild to severe disability.

The rise in non-communicable diseases (NCDs) and the projected growth in the number of older persons (aged 60 and over) over the next 15 years are expected to result in higher prevalence rates for disability.71

CRPD ratification and reporting

Solomon Islands is just one of two Pacific island states yet to ratify the CRPD. The country signed the Convention on 23 September 2008, followed by the Optional Protocol on 24 September 2009. Its current status means that it does not have the same legal obligations as a State party. However, as a signatory it has indicated its intention to be bound by the CRPD at a future date and it is obligated to refrain from any act that would defeat the object and purpose of the Convention.

Ratification has been under serious consideration for some time. Following its second Universal Periodic Review by the United Nations Human Rights Council in January 2016, the Solomon Islands Government supported recommendations to ratify the Convention and to take further measures to guarantee the enjoyment of rights by persons with disabilities.72 In 2017, a briefing paper and draft Cabinet paper on ratification were prepared by ESCAP at the request of the Ministry of Health and Medical Services (MHMS). Following a joint ESCAP-PDF country mission and stakeholder consultations, final drafts were submitted to MHMS and the Ministry of Foreign Affairs in February 2018. Solomon Islands underwent its third UPR in May 2021.

Highlights of CRPD implementation

Even in the absence of CRPD ratification, Solomon Islands has made some progress with the implementation of disability rights. Two national disability policies have been developed to date – National Policy on Disability 2005 – 2010 and National Policy on Disability Inclusive Development 2013-2018. Both policies have been aligned to key rights-based international and/or regional frameworks based on principles of inclusion and non-discrimination, the latter specifically to the CRPD. In addition, numerous national and sectoral policy initiatives explicitly target disability and/or promote disability mainstreaming within a rights-based and inclusive development framework. These include the National Development Strategy.

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71 Unfortunately, data from the 2019 national population census is not yet available.

72 See recommendations 100.24, 100.25, 100.26, 100.27, 100.28.
(NDS) 2011-2020, the National Inclusive Education Policy 2016-2020 (a milestone in the educational system that seeks to systematically address the problems of exclusion and discrimination), and the National Gender Equality and Women’s Development Policy 2016-2020 (which expressly recognises the rights of women and girls with disabilities and the intersectional discrimination they face, including high rates of violence).

The barriers to public buildings and services, housing and transportation, are being addressed through interagency collaboration. There has been some ramp construction, for example at Gizo Hospital, and a national accessibility audit of the built environment and transportation infrastructure has been undertaken by the Ministry of Infrastructure with support from the Pacific Region Infrastructure Facility (PRIF). Work on inclusive elections is being undertaken by UNDP in collaboration with People with Disabilities Solomon Islands (PWDSI).

Solomon Islands has two disabled persons organisations (DPO) – PWDSI and Solomon Islands Deaf Association (SIDA).

**CRPD legislative compliance review**

A CRPD legislative compliance review was completed for Solomon Islands in November 2019 at the request of the Ministry of Health and Medical Services. It involved critical assessment of both the Constitution and the new draft Federal Constitution, over 200 statutes, two Bills, and a selection of subsidiary legislation, against the Articles of the CRPD. Significant compliance gaps were identified in the Constitution and draft Federal Constitution, approximately 50 statutes, the Mental Health Bill 2016, and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Bill 2006. Two joint ESCAP-PIFS missions were conducted between 2017 and 2018. The team consulted with a wide range of government and non-government stakeholders including the Ministry of Justice and Legal Affairs (Attorney-General’s Chambers and Legal Policy Unity), the Law Reform Commission, and the national disabled persons organisation (People with Disabilities Solomon Islands). A number of site visits were also made in Honiara, in particular to the National Referral Hospital (Mental Health Unit), the Rove Correctional Centre, the Central Police Station (holding cells), the National Parliament, and the High Court. The final 148-page report incorporates recommendations for the amendment or repeal of all non-compliant provisions, and provides a detailed critique on the Mental Health Bill 2016.

**Tonga**

**Disability statistics**

According to Tonga’s 2016 population census, an estimated 10.6 per cent of the population reported a disability. This reflected a range of functional difficulties and represented an increase of 2.6 per cent and 5.6 per cent respectively from the 2011 and 2006 censuses. The 2016 figures bring Tonga closer to WHO’s global WHO estimate of 15 per cent.73

No significant gender difference was evident in either the 2016 or 2011 census estimates, but there was a clear link between disability and age. In 2016, the most common disabilities reported were for self-care (34.2 per cent), mobility (walking and climbing) (21.6 per cent), and communication (19.2 per cent), followed by memory, seeing and hearing. This contrasted with the 2011 pattern where the most common disabilities related to vision followed by difficulties with walking, hearing and remembering and/or concentrating.

with disabilities and persons without disabilities (aged 15 years and over) in a range of activities including "community activities (75.4 per cent compared to 17.2 per cent); employment (75.0 per cent compared to 5.9 per cent); education (41.4 per cent compared to 2.5 per cent); household decision making (32.4 per cent compared to 11.8 per cent), other activities (69.3 per cent compared to 2.4 per cent) and all forms of transport (land, sea, air and private)."

As elsewhere in the Pacific, the prevalence of disability is expected to continue to grow due to the high and rising incidence of non-communicable diseases (NCDs), especially diabetes, which are resulting in amputations, strokes, and visual impairments. Demographic change is another contributing factor, in particular population ageing, which is boosted by high levels of out migration. In 2011, some 52 per cent of functional disabilities were found in the 60 and over age group.

**CRPD ratification and reporting**

Tonga signed the CRPD on 15 November 2007 but is one of the two remaining Pacific island states yet to ratify. While it does not have the same legal obligations as a State party, it is obliged as a signatory to refrain from any act that would defeat the object and purpose of the Convention. It is also expected to ratify in the near future having already indicated its intention to do so.

Public consultations on ratification have been conducted throughout Tonga including the outer islands. There is strong support from disabled persons organisations for ratification as well as some general community support. The Ministry of Internal Affairs has conducted community discussions on the option of ratification with reservations in respect of Article 29 (right to vote) and Article 23 (right to marry).

Following a joint ESCAP-PIFS mission to Tonga in 2017, a briefing paper and draft Cabinet paper on ratification were prepared at the request of Tonga’s Ministry of Internal Affairs. Final drafts were submitted to the Ministry and the Attorney General’s Office in late 2018.

**Highlights of CRPD implementation**

Although Tonga has not yet ratified the CRPD, the Government has taken a number of important steps to promote and protect the rights of persons with disabilities in the country. Numerous national and sectoral policy initiatives specifically target disability and/or promote disability mainstreaming within a rights-based and inclusive development framework. They include the *Tonga Strategic Development Framework 2015-2025*, the *National Policy on Disability Inclusive Development 2013-2018*, the *National Health Strategic Plan 2015-2020*, the *National Inclusive Education Policy*, the *Revised National Policy on Gender and Development*, and the national accessibility audit of the built environment and transport infrastructure undertaken in 2016 with support from the *Pacific Region Infrastructure Facility (PRIF)*.

Tonga has established a designated disability focal point (Social Protection and Disability Division) within the Ministry of Internal Affairs, as required under Article 33 (1) of the CRPD. There is also some representation of disabled persons organisations on government committees in line with Article 4(3) which obliges States parties to “closely consult with and actively involve” persons with disabilities through their representative organisations in all decision-making processes relating to them.

Tonga has three DPOs – *Naunau o e Alamaite Tonga Association* (NATA), *Tonga National Disability Congress* (TNDC), and the *Tonga National Visual Impairment Association* (TNVIA).

**CRPD legislative compliance review**

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A CRPD review of Tonga’s legislation was undertaken at the request of the Ministry of Internal Affairs and the Attorney General’s Office on behalf of the Government of Tonga. Two ESCAP-PIFS missions were conducted between 2017 and 2018 when the team consulted with a wide range of government and non-government stakeholders including the key disabled persons organisations – NATA, TNDP, and TNVIA. A number of site visits were made to service providers, as well as the psychiatric unit of the Vaiola Hospital and He’utolitoli Prison. The review provided a CRPD analysis of Tonga’s Constitution, over 200 statutes, and a selection of regulations (as in force in August 2018). Compliance shortfalls were identified in all three categories, including 63 statutes. The final 223-page report incorporates recommendations for the amendment or repeal of all non-compliant provisions.

Tuvalu

Disability statistics

In 2017, only 72 persons with disabilities in Tuvalu were registered with the National DPO, the Fusi Alofa Association. However, a national disability survey undertaken in the same year identified 466 persons with disabilities across nine islands, representing around 4.5 per cent of Tuvalu’s population. As expected, disability was more common amongst older persons above 60 years (58.8 per cent) followed by adults between 21 and 60 years (32 per cent).

The latest (2017) national population census incorporated the short set (6) of disability questions developed by the Washington Group on Disability Statistics for use in census and surveys. A significant 13.2 per cent of Tuvalu’s population aged five years and above (1,233) was identified as having “some disability” in at least one of the six functional areas (seeing, hearing, mobility, memory/cognition, self-care, and communication). This proportion fell to three per cent (282) if disability was based on a person having “a lot of difficulty” with one or more of these areas, and further to 0.8 per cent if the person was unable to perform the function to any extent (“cannot do at all”).

The Washington Group recommends basing disability prevalence on two more severe classifications (“a lot of difficulties” and “cannot do at all”). Using this conservative measure, Tuvalu’s prevalence rate for the population aged five years and above would be just three per cent (282), similar to Kiribati (3.1 per cent). By contrast, the 13.2 per cent prevalence rate for persons experiencing “some disability” is much closer to the WHO global estimate (15 per cent). It is also similar to Fiji’s prevalence rate (13.7 per cent) for persons aged three years and above at the last (2017) census.

Disability prevalence was higher in rural areas. Vision impairments (seeing) predominated (6.1 per cent) in respect of the lowest degree of difficulty (“some difficulty”), followed by walking (5.1 per cent) and hearing (2.8 per cent). However, walking impairments exceeded other impairments when higher severity levels were assessed. Tuvaluan women on average experienced higher prevalence rates in all functional areas as found in the national disability survey. The gender disparity in the census was particularly marked in respect of walking, remembering and self-care.

CRPD ratification and reporting

Tuvalu acceded to the CRPD without reservation on 18 December 2013. In March 2019, the Government submitted Tuvalu’s initial report under Article 35. This followed nationwide consultations including in the outer

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77 Ibid. 9.
78 2017 census results released by the Fiji Bureau of Statistics in early 2018 stated that “3.7 per cent of population aged three and above reported at least one functioning challenge (disability)”, corresponding to 113, 595 persons. https://www.fiji.gov.fj/Media-Centre/News/Fiji-Bureau-of-Statistics-Releases-2017-Census-Res
islands, which were conducted by the Office of the Attorney General in partnership with the Fusi Alofa Association. Tuvalu has yet to ratify the Optional Protocol. Tuvalu submitted its initial report to the CRPD in March 2018.80

**Highlights of CRPD implementation**

Disability has been incorporated into various national policies. In particular, the *Tuvalu National Human Rights Action Plan 2016-2020* seeks to ensure the recognition of human rights (including disability rights) in Tuvalu’s development priorities; the *Tuvalu National Gender Development Policy 2014-2016* includes targeted interventions to address the needs and rights of women with disabilities in a rights-based framework for promoting gender equality and women’s empowerment; the *Tuvalu National Youth Policy 2015-2019* recognises the support needs of youth with disabilities and includes them as a key target group; and the *Education Strategic Plan III 2016- 2020* highlights disability inclusion in the area of education. The draft *National Disability Policy 2017-2020* is aligned to the CRPD, and includes 12 priority areas (including legislation) that are supported by an implementation plan.

In 2014, the National Disability Coordinating Committee was established by the Tuvalu Government. The Committee has significant cross sectoral government and non-government representation and has amongst its core functions to recommend and coordinate legislative, policy, and administrative measures for effective implementation of the Convention and promotion of the human rights of persons with disabilities. A National Human Rights Institution has also been established, which includes a complaints mechanism for human rights violations including those relating to disability.

Tuvalu has one disabled persons organization – *Fusi Alofa Association* – which was established in 2009.

**CRPD legislative compliance review**

A CRPD review of Tuvalu’s legislation was undertaken at the request of the Attorney General’s Office. It was completed in 2019 following a joint ESCAP-PIFS mission in 2018, which included wide stakeholder consultations in Funafuti and site visits to Nauti Primary School, Princess Margaret Hospital, Fusi Alofa Special School, the High Court, police holding cells, and Funafuti Prison. More than 230 laws, comprising the Constitution, 172 primary legislation, and 64 regulations were reviewed. Of these, about 76 statutes and 17 regulations were found to fall short of CRPD compliance. The final 200-page report includes recommendations for the amendment or repeal of all non-compliant provisions. A comprehensive CRPD submission on the Tuvalu Constitution was also submitted by ESCAP to the National Constitutional Review Committee in 2018.

**Vanuatu**

**Disability Statistics**

Under the 2009 National Population and Housing Census, approximately 12 per cent of Vanuatu’s population reported having a disability. Washington Group questions in four functional areas (seeing, hearing, walking and remembering or concentrating) revealed the highest prevalence in vision impairment (7.5 per cent) followed by difficulty with walking (5.4 per cent), remembering or concentrating (4 per cent) and hearing impairment (3.3 per cent).81 Disability prevalence was slightly higher for females and increased with age - rising to 50 per cent for persons 60 years and over.82

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80 Tuvalu initial report to the Committee on the Rights of Persons with Disabilities, 7 March 2019, CRPD/C/TUV/1.  
81 Vanuatu initial report to the Committee on the Rights of Persons with Disabilities, 18 August 2015, CRPD/C/VUT/1 para [185].  
82 Ibid. para [187].
CRPD ratification and reporting

The Republic of Vanuatu signed the CRPD in 2007 and ratified in 2008, the first Pacific island state to do so. It did not enter any reservations to the Convention. Vanuatu submitted its initial report to the CRPD Committee in August 2015.83

Highlights of CRPD implementation

Vanuatu has adopted a number of measures to develop a legislative and policy framework consistent with the CRPD and to advance its implementation. Prominent amongst these initiatives are: the National disability-inclusive development policy (2018–2025); the National Disability Inclusion Policy for the Technical and Vocational Education And Training Sector (2016–2020); the National Sustainable Development Plan (2016–2030), which includes provision of accessible government services and buildings, and employment opportunities for persons with disabilities; the Community-Based Rehabilitation Action Plan (2014–2024); the National Building Code in 2013; the Inclusive Education Policy and Strategic Plan (2010–2020); the Mental Health Policy and Plan (2009–2015); and the Education Policy and Gender Equity in Education Policy (2005–2015), which ensures that women and girls with disabilities have equal rights to those of men and boys.

The CRPD Committee has welcomed these measures in its 2018 concluding observations84 but expressed concern about the delays in repealing and amending non-compliant legislation and developing specific anti-discrimination disability law, following the 2016 legislative review.85

Vanuatu has one national DPO, the Vanuatu Disability Promotion and Advocacy Association (DPAA). In addition, there is a network of disability organisations, primarily service providers (Vanuatu Civil Society Disability Network). Its members include the Vanuatu Society for Persons with Disabilities (VSDP), the Vanuatu Paralympic Committee (VPC), and a parents and caregivers association. Established in 2009, the Rainbow Disability Theatre Group is an inspiring and vibrant disability outreach group of the well-respected Wan Smol Bag Theatre.

CRPD legislative compliance review

A CRPD review of Vanuatu’s legislation was undertaken at the request of the Ministry of Justice. The review was finalized in August 2016 following two joint ESCAP-PIFS missions that year. The team conducted wide government and non-government stakeholder consultations including with member organisations of the Vanuatu Civil Society Disability Network and DPO (Vanuatu Disability Promotion and Advocacy Association). The team also made site visits to the Vanuatu Correctional Facilities (low risk, medium risk and high risk), the Vanuatu Women’s Correctional Facility, and the Mind Care Unit, Central Hospital in Port Vila. Approximately 300 domestic laws including the Constitution were reviewed, one third of which (102) was found to be non-compliant. The 163-page report was submitted to the Ministry of Justice in August 2016 and included recommendations to amend or repeal all non-compliant provisions.

Nauru

Disability Statistics

Based on the 2011 census, the total population of Nauru was 10,084 (5,105 males and 4,979 females). The census asked a range of questions relating to difficulty or inability to perform certain activities (lower limb mobility, movement, speaking, visual recognition, learning, hearing and ability to grasp objects with upper limbs). The results indicated that just over five per cent of the population had difficulty

83 Ibid. CRPD/C/VUT/1.
84 CRPD Committee concluding observations on the initial
85 Ibid. paras [6 & 7].
or could not do one or more of these activities. The most common types of disability were in the areas of mobility, movement and sight. There was virtual gender parity, but disability prevalence rates were much higher for older persons (particular 40-60 years). It is therefore expected that given Nauru’s ageing population there will be higher disability prevalence in the future.86

**CRPD ratification and reporting**

Nauru acceded to the CRPD on 27 June 2012, the third Pacific island state to do so. It did not enter any reservation to the Convention.

**Highlights of CRPD implementation**

Nauru has developed a National Policy on Disability-inclusive Development 2015-2019 with technical assistance from PIFS and PDF. Legislation is one of a number of priority areas. The policy recognises the role legislation plays as a pathway to eliminating disability-based discrimination and protecting the fundamental rights and freedoms of persons with disabilities. It expresses a commitment to developing legislation that is compliant with the principles and standards contained in the CRPD.

Nauru was one of the first Pacific countries (2008) to develop any form of social security for persons with disabilities (disability benefit scheme). It has a single disabled persons organisation - the Nauru Disabled People’s Association which was established in 1988.

**CRPD legislative compliance review**

Nauru’s legislative review was one of the first undertaken by ESCAP and PIFS. Undertaken at the request of the Nauru Ministry of Justice, it was submitted in December 2016 following a joint mission in 2015 during which there were consultations with government departments and civil society organisations including the Nauru Disabled People’s Association.

The 85-page review involved a CRPD analysis of the Constitution together with approximately 160 domestic laws in force in mid-2015. Over one-third of these laws (61) together with the Constitution were found to be non-compliant. The review also included recommendations for amending and repealing non-compliant provisions.

**Republic of Marshall Islands**

**Disability statistics**

The most recent available data on disability for the Republic of Marshall Islands (RMI) can be sourced from the 2011 national census.87 The census used a variation of the Washington Group short list of questions for the purpose of obtaining national disability data disaggregated by gender and age. Four questions relating to four types of difficulty were investigated: seeing (even wearing glasses), hearing (even with use of hearing aid), walking/climbing steps or use of the arms, and remembering or concentrating. Disability was defined as “any restriction or lack of ability (resulting from an impairment) to perform an activity in the manner or within the range considered normal for a human being.”

Based on these questions, 6,210 persons or 11.7 per cent of the population reported having some form of disability. Highest prevalence rates were found in respect of seeing difficulties over all age groups (7.6 per cent) followed by difficulties with memory or concentration (5.7 per cent), difficulties walking (4.9 per cent) and hearing (4.1 per cent). As to be expected, disability prevalence increased with age. For example, there was a steep increase in older persons reporting seeing difficulties. While these difficulties affected just three out of 10 persons in the 50–59 age group, this rose to more than half the population in the 80 years and over age group.

There was a modest but noteworthy gender differential overall (12 per cent of females

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compared to 11.3 per cent males). However, while the gender gap was negligible in respect of persons with one disability (6.3 per cent males compared to 6.1 per cent females), it widened where persons were reporting more than one disability. For example, 3.1 per cent of females compared to 2.8 per cent of males reported having two disabilities. There were also higher prevalence rates for females for all difficulties and across all age groups with the exception of persons 80 years and over.

Both the 2020 national census and the 2019 Household Income and Expenditure Survey (HIES) are scheduled to include the full short list of Washington Group questions on disabilities.

**CRPD legislative compliance review**

During the process of technical assistance to RMI for CRPD ratification and the development of disability legislation, approximately 300 pieces of legislation under the Marshall Islands Revised Code (MIRC) were reviewed. In 2017, the development of consequential amendments to over 100 public laws got underway with the intention of harmonizing the entire MIRC with the *Rights of Persons with Disabilities Act 2015* and the CRPD. The numerous amendments proposed for each non-compliant statute form the basis of the *Rights of Persons with Disabilities (Consequential Amendments) Bill 2019*. This is a large omnibus bill which, once enacted, will provide significant CRPD harmonisation. The Bill is currently undergoing public consultations following its first reading in the Nitijela. The Bill represents the first attempt in the Pacific to mainstream disability across the entire legal framework.

**Federated States of Micronesia**

**Disability statistics**

Based on global estimates, it is likely that at least 10,000-16,000 people in the Federated States of Micronesia (FSM), corresponding to 10-16 per cent of the population, have some form of disability. While data from the 2020 census is not yet available, according to the 2010 census, an estimated 11,363 persons reported having a disability or 11 per cent of the population. If adjustment is made to reflect the WHO estimate of global disability prevalence (15 per cent), the total number of persons with disabilities across the country would more likely be around 15,740.

Regional demographic trends, in particular the ageing of populations and the NCD crisis, is expected to accelerate growth in the numbers of persons acquiring disabilities during their lifetime in FSM, just as other Pacific island states.
Pohnpei State: The 2010 census states that out of the estimated 11,363 persons who reported having a disability or 11 per cent of the FSM population, there were at least 3,004 persons in the State of Pohnpei. The ratification resolution in the Pohnpei State Legislature in 2016 confirmed this figure, but noted the likelihood of more persons not accounted for in the census.88

Kosrae State: The estimated 11,363 persons with disabilities under the 2010 census include 603 persons in the State of Kosrae.

CRPD ratification and reporting

FSM signed the CRPD on 23 September 2011 and ratified on 7 December 2016. Ratification followed resolutions passed unanimously in the legislatures of all four states – Pohnpei, Kosrae, Chuuk and Yap. The CRPD is the third international human rights convention that FSM has ratified, following the Convention on the Rights of the Child (CRC) in 1993 and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 2004. FSM is also a signatory to two Optional Protocols of the CRC (2015).89

In April 2016, a background paper on CRPD ratification was prepared by ESCAP for the FSM national government. Technical input was also provided to the drafting of the congressional resolution on ratification.

Kosrae State: A resolution to support CRPD ratification was passed unanimously in the Kosrae State Legislature early in April 2015. This preceded by over a year the congressional resolution of December 2016.

Pohnpei State: A resolution in support of ratification was passed by the Ninth Pohnpei Legislature, First Special Session, on 18 March 2016.90 The resolution stated that “the leadership of Pohnpei recognizes the inalienable rights of all people as the foundation of freedom, justice and peace in the world and acknowledges the need to promote the human rights of all persons with disabilities.” It also “recognizes the obligation of our nation and our state to provide free access and special services to persons with disabilities in public and private areas.”91

CRPD ratification was achieved with the active support and engagement of civil society, spearheaded by the FSM National Disabled Persons Organization and the Pohnpei Consumer Organization, who also conducted training to raise awareness about the Convention in all states.

Highlights of CRPD implementation

There has been some tangible progress with CRPD implementation including the development of the National Policy on Disability 2009-2016 (aligned to the Biwako Millennium Framework), the Special Education Program, and the Children with Special Health Care Needs Program. The FSM Strategic Development Plan 2004-2023 specifically addresses the special economic, legal, political and social needs of persons with disabilities (Chapter 10, Strategic Goal 9). A few states (Kosrae, Pohnpei, Yap) have also enacted some form of disability Legislation.92 FSM participated in the development of the CRPD aligned Pacific Regional Strategy on Disability 2010-2015 (PRSD) and hosted the Pacific Forum Disability Ministerial Meeting in October 2014. The Pohnpei Consumer Organisation is the main disabled persons organization.

CRPD legislative compliance review

88 Ninth Pohnpei Legislature First Special Session, 2016, L.R. No. 07-16, 2.
89 Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC); and the Involvement of Children in Armed Conflict (OP-CRC-AC).
90 Ninth Pohnpei Legislature First Special Session, 2016, L.R. No. 07-16, 1.
91 Ninth Pohnpei Legislature First Special Session, 2016, L.R. No. 07-16, 2.
92 CRC Committee concluding observations on the second periodic report of the Federated States of Micronesia, 5 March 2020, CRC/C/FSM/CO/2.
Three separate legislative reviews were undertaken for FSM. These focused on the constitutional and legislative frameworks in force in mid-2019 for FSM and two of its constituent states - Pohnpei State and Kosrae State. Overall, a total of 149 Titles were reviewed for the three (national and state) jurisdictions. Approximately half of these Titles (73), covering 165 Chapters, contain legislative provisions that require amendment or repeal. Each review provided separate recommendations on how non-compliant legislative provisions could be amended for CRPD harmonization.

In respect of the FSM National Code, a total of 58 Titles as well as the national Constitution were reviewed. Of these, 24 comprising 56 Chapters, and the Constitution were found to be non-compliant. The analysis of the Pohnpei Code found compliance issues in 64 Chapters across 32 Titles as well as in the State Constitution. The Kosrae review examined 20 Titles in the State Code, as well as the Constitution and one Bill. A lack of compliance was identified in 45 Chapters across 17 Titles.
Part III. Constitutional Frameworks

Numerous aspects of Pacific constitutions require attention for compliance with international human rights law, including CRPD. The following is a selection of some of the common concerns across the region. More detailed analysis referred to in Part II can be found in the individual country reviews of domestic laws for CRPD harmonization undertaken by ESCAP with support from PIFS and PDF.

Economic and social rights

Most Pacific constitutions contain a Bill of Rights which protects many fundamental civil and political rights including the rights to life, personal liberty, equal protection of the law, property, freedom from slavery and forced labour, freedom of assembly, movement and expression, and freedom from discrimination.93 Not all constitutions (e.g. Tonga) recognize the rights to life and freedom from torture, or prohibit discrimination.94 A notable omission from most countries is the protection of economic and social rights. While the national Constitution of FSM along with State Constitutions for Pohnpei and Kosrae recognize state responsibilities to provide educational and health services, this does not amount to explicit protection of the full range of economic and social rights.95

Pacific countries are urged to broaden the scope of recognized rights to include rights such as education, economic participation, work and a just minimum wage, housing and sanitation, food and water, transportation health and social security, as established under the 2013 Constitution of Fiji. This would comply with Article 4(2) of the CRPD which specifically prescribes duties in respect of economic, social and cultural rights, obligating every State party “to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.” Giving constitutional recognition to these rights would also be consistent with other key international human rights instruments like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Disability as a prohibited ground

The lack of an express prohibition of disability-based discrimination is an anomaly common to most Pacific constitutions. While Solomon Islands establishes principles of equality and non-discrimination based on race, colour, place of origin, political opinions, creed and sex, it is silent on disability as a prohibited ground of discrimination.96

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94 Tonga Constitution Declaration of Rights.
95 FSM Constitution Article XIII, s. 1, Pohnpei State Constitution VII, ss. 3 & 4, Kosrae State Constitution Article XII, s.1.
96 Solomon Islands Constitution Chapter II, s. 3
The Constitutions of Vanuatu97, Tuvalu,98 FSM99, Pohnpei State100 and Kosrae State101 are similarly silent as is Tonga, as noted above. In Tuvalu’s case, the omission is in respect of two complementary elements – the failure to recognize persons with disabilities as a protected category (under s.11) and the lack of an express prohibition of disability-based discrimination (under s.27).

Pacific countries are encouraged to amend their constitutions to expressly proscribe disability-based discrimination. This would be consistent with Article 4(1) of the CRPD, which requires that States parties “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”; Article 12, which recognizes the right of persons with disabilities to equal recognition before the law; and Article 5, which upholds their right to equal protection and equal benefit of the law, without discrimination. It would also be consistent with the 2030 Sustainable Development Agenda and the global commitment to “leaving no-one behind.”

The 2013 Constitution of Fiji provides a positive regional example. Article 26(3) states that “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.” For full human rights compliance, countries might also extend the prohibited grounds for discrimination to include health, personal appearance, gender identity, age, religion, sexual orientation, social status or any other ground that violates human dignity and has the purpose or effect of undermining fundamental rights and personal liberties.

Positive measures

With the notable exception of Vanuatu, Pacific constitutions do not as a general rule include a legal obligation to provide positive measures or affirmative action. Vanuatu establishes equal treatment under the law or administrative action as a fundamental right with the important proviso that no law which makes provision for “the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.”102 As these positive measures are aimed at achieving de facto equality, it is recommended that this provision be amended to expressly include persons with disabilities amongst the marginalized groups entitled to benefit from such measures.

The use of positive measures is desirable to address the historic disadvantages, inequality, exclusion and discrimination faced by persons with disabilities and to ensure that they are able to realise their right to equality. It is also consistent with Article 5(4) of the CRPD, which makes clear that “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities” do not constitute discrimination. It is recommended that Pacific constitutions that do not expressly provide for positive measures are amended to establish an obligation to take specific measures to achieve or accelerate substantive equality for persons with disabilities, including for women, children and older persons with disabilities who are susceptible to multiple and intersecting forms of discrimination. Section 54(2) of the Constitution of Kenya (2010) demonstrates how this can be done in respect of one sector:

The State shall ensure the progressive implementation of the principle that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities.

97 Vanuatu Constitution Chapter 2, s. 5(1).
98 Tuvalu Constitution ss. 11 & 27.
99 FSM Constitution, s.107.
100 State of Pohnpei Constitution, Article IV, s3
101 State of Kosrae Constitution, Article II, s.(1)(c).
102 Vanuatu Constitution, Chapter 2, s.5(1)(k).
Non-derogable rights

Another concern is that Pacific constitutions do not as a rule establish the non-derogability of certain rights i.e. rights that cannot be suspended even in an emergency. The Constitutions of Tuvalu, FSM, Pohnpei, and Kosrae, for example, make express provision for the restriction of certain rights and freedoms in times of emergency. In the case of Tuvalu, these rights include the right to life (section 16), freedom of belief (section 23), and freedom from discrimination (section 27). In FSM (like Pohnpei and Kosrae), derogation applies to all civil rights recognized in the Constitution which extend more broadly to include the right to life (section 3), equal protection of the law (section 4), and the prohibition of capital punishment (section 9), slavery and involuntary servitude (section 10), and cruel and unusual punishment (section 8). Vanuatu again provides an exception here, with Article 71(1)(a) of the Constitution stating that even in the context of an emergency, no regulation “shall … derogate from the right to life and the freedom from inhuman treatment and forced labour.”

Article 4(2) of the ICCPR provides that no derogation is permitted for:

- right to life (Article 6)
- freedom from torture or cruel, inhuman and degrading treatment or punishment
- freedom from medical or scientific experimentation without consent (Article 7)
- freedom from slavery and servitude (Article 8(1) and (2))
- freedom from imprisonment for inability to fulfil a contractual obligation (Article 11)
- prohibition against the retroactive application of criminal laws (Article 15)
- right to recognition before law (Article 16)
- freedom of thought, conscience and religion (Article 18).

Although only a handful of Pacific countries have signed or ratified the ICCPR (Nauru, Palau, PNG, Samoa, Fiji), the non-derogable rights of the Covenant are carried through to the CRPD, which reinterprets existing human rights for the specific situation of persons with disabilities, and which all Pacific countries apart from Tonga and Solomon Islands have ratified. Importantly, the UDHR and other international human rights instruments including the ICCPR and the CRPD all specify that the right to equal recognition before the law must operate everywhere, which is particularly relevant in this context since many governments enact laws to establish disability-based restrictions on a person’s legal capacity, for example, in the areas of mental health law, criminal law, and succession law (see discussion in Part V). Article 12(1) of the CRPD directs “States Parties [to] reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.” Further, the CRPD Committee has clarified that:

“There are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited. This is reinforced by Article 4, paragraph 2, of the International Covenant on Civil and Political Rights [ICCPR], which allows no derogation from this right, even in times of public emergency.”

It is therefore recommended that Pacific constitutions be amended to insert a list of non-derogable rights, including the right to equal recognition before the law/right to legal capacity as specified under Article 4(2) of the ICCPR.

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103 Tuvalu Constitution, s.36.
104 FSM Constitution, Article X, s.9.
105 Pohnpei State Constitution, Article XIII, s.9.
106 Kosrae State Constitution, Article V, s.13.
107 FSM Constitution, Article IV.
108 CRPD General Comment No. 1 (2014) on equal recognition before the law, CRPD/C/GC/2.
In the case of Vanuatu, it is recommended that a constitutional amendment be considered for the purpose of recognising legal capacity as an additional non-derogable right under Article 71(1)(a).

Political rights

The recognition of political rights is one of the cornerstones of the paradigm shift enshrined in the CRPD. Previously, under the ICCPR, mental incapacity was regarded as a legitimate ground for denying a person the right to vote or hold office.109 However, Article 29 of the CRPD guarantees persons with disabilities the right to participate in political and public life, and the opportunity to enjoy this right on an equal basis with others, either directly or through freely chosen representatives. Article 29(a)(ii) directs states to enable all persons with disabilities “to stand for elections, to effectively hold office and perform all public functions at all levels of government.” They must therefore be given the right and opportunity to vote, to be elected, and to hold office on an equal basis with others, without any curtailment of rights based on mental capacity. There are no exceptions.

Until recently, many countries around the world prohibited persons with intellectual (cognitive) and/or psychosocial disabilities from standing for election to Parliament, and even prevented such persons from voting in elections. A good number of countries are now repealing these outdated and discriminatory restrictions in order to enable all persons with disabilities to stand for political office and to vote in elections. Tonga, Tuvalu, Solomon Islands and RMI are amongst those Pacific island states whose Constitutions (and electoral laws110) continue to deny persons with intellectual and/or psychosocial disabilities the right to participate in political life on an equal basis with others in contravention of Article 29.

Tonga’s Constitution stands out for both its discriminatory content and demeaning language. Clause 64 deals with the qualification of electors and disqualifies any person deemed to be “insane” or an “imbecile” from voting. Clause 65 establishes that representatives can only be those “qualified to be an elector.” These provisions discriminate against commoner Tongan subjects with psychosocial or intellectual disabilities by denying them the right to vote and stand in national elections, and in turn disqualifying them from serving as members in the Legislative Assembly.

Two provisions under the Constitution of Solomon Islands demonstrate a similar denial of political rights on the basis of disability. These provisions deal with eligibility requirements for standing for election and registration as an elector. Section 49(1)(d) in Chapter VI lists as one of the grounds for disqualifying a person from standing for election, a person who is “certified to be insane or otherwise adjudged to be of unsound mind.” Section 55(3)(b) invokes the same “insanity” ground to disqualify a person from registering as an elector.

Contraventions of Article 29 can also be found in the Constitutions of Tuvalu, FSM and RMI. In Tuvalu, sections 92 and 95 of the Constitution disqualify a person from voting or standing for election if “certified to be insane, or otherwise adjudged to be of unsound mind.” In RMI, Article IV, section 3(2) disenfranchises a person “certified to be insane who in turn becomes disqualified from standing for election to the Nitijela” (Article IV s.4(1)) and the Council of Iroj (Article III, s.8(1)(c)). The Constitution of FSM authorizes Congress to “prescribe a minimum period of local residence and provide for voter registration, disqualification for conviction of crime, and disqualification for mental incompetence or insanity” (Article VI, s.1). This

109 ICCPR General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, para [4].
110 See discussion in Part VI.
discriminatory provision is reproduced in Article III (s.1) of the Constitution of the State of Kosrae.

All these constitutional provisions should be repealed to ensure compliance with the CRPD. As well as violating Article 29, they are inconsistent with Article 3 (general principles), Article 5 (non-discrimination) and Article 12 (legal capacity).

In addition, attention is drawn to section 90(3) of Tuvalu’s Constitution which states that: “A person is not entitled to vote in an election if... he is for any reason unable to attend in person at the place and time fixed for the polling.” Although seemingly neutral, this provision is likely to have a disproportionate impact on voters with disabilities unless there are guarantees that all polling stations, voting processes and voting materials are fully accessible to voters with disabilities. Under Article 29, the right to participate in public and political life includes ensuring that persons with disabilities have the opportunity to exercise or enjoy their political rights on an equal basis with others. Amongst other things, this requires that voting procedures, facilities and materials are “appropriate, accessible and easy to understand and use”; the secrecy of the ballot is protected; and voters are allowed to be assisted by persons of choice. There should also be an express provision establishing the right to reasonable accommodation. Section 90(3) should be amended accordingly and to incorporate alternative voting options and other recommendations for electoral reform outlined in Part VII.

Public office

Pacific constitutions impose discriminatory restrictions on persons aspiring to or holding high public office. Whether it is persons of high rank (royalty or nobility) in Tonga, the President in Vanuatu, the Governor in Pohnpei and Kosrae States, the judiciary in Solomon Islands, Vanuatu and FSM, the Prime Minister and members of parliament in Tuvalu, or the Ombudsman in Solomon Islands, all constitutions contain provisions allowing for the disqualification of a person or removal of an incumbent on the basis of disability.

In Tonga, the denial of succession rights to persons with intellectual, cognitive or psychosocial (mental health) disabilities is categorically stated.

Clause 35 states:

**Idiot not to succeed**

No person shall succeed to the Crown of Tonga who has been found guilty of an offence punishable by imprisonment for more than two years or who is insane or imbecile.

Clause 63 states:

**Qualification of nobles**

(1) No person shall succeed to the position of a noble who is insane or imbecile or who is disabled by the twenty-third clause…

Neither of these provisions complies with Article 29 of the CRPD which guarantees for all persons with disabilities the right to serve in public office, including the highest positions of government. The Convention does not prohibit all restrictions on succession rights; only those that violate human rights, and particularly those based on disability. Gross misconduct, for example, would be a non-discriminatory basis for restricting or denying succession rights. The language of imbecility and idiocy also contravene Article 8 which obliges States parties to “adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.”

Other Pacific jurisdictions use terms that may be less demeaning. However, the provisions are just as discriminatory in substance and effect. In Tuvalu for example, “incapacity”
Incapacity is an open-ended concept that is typically equated with disability particularly an intellectual or psychosocial (mental) disability. The label has long been a source of discrimination and stigma. It implies a denial of legal capacity contrary to Article 12 and in this context violates the right to be appointed to public office (Article 29). Importantly, Article 27 make clear that persons with disabilities have the right to work on an equal basis with others, including those who acquire a disability during the course of employment. It prohibits discrimination on the basis of disability including with regard to continuance of employment; requires State parties to employ persons with disabilities in the public sector; and establishes an obligation to provide reasonable accommodation in the workplace. The denial of reasonable accommodation is expressly identified as a form of discrimination under Article 2. Persons with disabilities are also entitled to rehabilitation if they experience accidents in the workplace.

Another variation in terminology can be found in Solomon Islands. A perceived inability to perform the functions of office due to “infirmity of body or mind” constitutes grounds for the removal from office of an Ombudsman, Commissioner or judge of the High Court or Court of Appeal. These provisions would justify removal on the basis of a physical, sensory, intellectual or mental disability contrary to Article 27. As in the cases cited above, compliance with the CRPD requires not only the removal of the phrase “infirmity of body or mind” but a new provision to establish an obligation to provide reasonable accommodation for any judge, Ombudsman or other public officer holder who has or acquires a disability. Removal from office should only be contemplated if an incumbent with disability is unable to perform the core duties with reasonable accommodation, support and/or rehabilitation.

**Property rights**

The Constitutions of Tuvalu and Solomon Islands both have provisions that protect individuals from unjust deprivation of property. However, “persons of unsound mind” are expressly denied these rights. Under section 20(9)(b)(ii) of the Tuvalu Constitution and section 8(2)(b)(ii) of the Solomon Islands Constitution, the possession or acquisition of property belonging to “a person of unsound mind” is permitted for the purpose of its administration. This violates the right to equality before the law and legal capacity (Article 12). Under Article 12(5), States are obligated to adopt measures to ensure the equal right of persons with disabilities to own or inherit property; control their own financial affairs; have equal access to bank loans, mortgages and other forms of financial credit; and not be arbitrarily deprived of their property. They are under a positive obligation to provide support for persons with disabilities to exercise their rights as property owners. At a minimum, these constitutional provisions should be amended to remove the discriminatory exclusion of persons with intellectual and/or psychosocial disabilities (“persons of unsound mind”) from property ownership rights.

**Sign language**

Language is of utmost importance for the interaction of human beings. Every aspect of
the human condition is mediated by language, and international human rights law has recognized the use of language for different communities as a fundamental human right. The CRPD gives sign language the same status as other languages. In Article 2, the definition of language includes “spoken and signed languages and other forms of non-spoken languages.” Sign language is also mentioned in several other parts of the Convention because of its importance as a means of protecting the human rights of the deaf community. In the context of accessibility - a key principle of the CRPD - sign language is recognized as an accessibility tool - Article 9(2)(e). It is also crucial to exercising the right of deaf persons to education - Article 24(4); freedom of expression and access to information - Article 21(b) and (e); and promoting the linguistic identity of the deaf community - Articles 24(3)(b) and 30(4).

Some States parties to the CRPD have recognized sign language as one of their official languages. New Zealand is one such example, recognizing New Zealand Sign Language as an official language in its Constitution, alongside English and Maori. More recently, sign language has been recognized as one of PNG’s official languages. It is recommended that other countries in the region follow suit. It is estimated that there are approximately 65,000 deaf (including hard of hearing) children and adults living in Pacific island countries.115

Part IV. Legislative Frameworks
[CRPD Articles 1-10]

LANGUAGE AND STEREOTYPES

Negative social attitudes and prejudice towards persons with disabilities are an important underlying cause of discrimination on the basis of disability. These attitudes are typically a product of social norms including superstition, ignorance, misconceptions and myths about disability. They are therefore a fertile breeding ground for harmful stereotypes and stigma; and can give rise to social exclusion, marginalization, and discrimination. Negative attitudes about disability are routinely projected into the substance of policy and law which in turn further cements and fuels the stigma and prejudice. A cyclical trap.

Amongst the prevalent stereotypes about persons with disabilities, particularly intellectual and psychosocial disabilities, are that they are “imperfect” beings, weak, needy, feebleminded and “childlike”, lacking in capacity or incapable of making decisions about matters that concern them, earning a living, having full and active lives, and contributing meaningfully to society; unworthy of marriage or sexual intimacy; and 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 evident in areas concerning sexual and reproductive health, marriage and family life, employment, political participation (voting and standing for office), contractual relations, health services, and other areas of law and policy that deny legal capacity and promote substitute decision-making. At the family and community level, the stigma and stereotypes can result in anti-social behavior: neglect, isolation, rejection, teasing and bullying, harassment, physical and psychological violence, and sexual abuse.

Behaviour that deviates from the norm or considered “abnormal” can be symptomatic of a mental illness or an intellectual or psychosocial disability. However, ignorance about the illness and disability and how it can affect behaviour or communication fosters misunderstandings and unfounded fears. As a result, essentially harmless behavior that is different or “odd” becomes cast as “crazy” or “threatening.” Not surprisingly, 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 stereotypical views make them susceptible to arbitrary detention. They also open the door to coercive medical interventions and other denial of rights that are not consistent with international human rights standards.

Such discriminatory practices in the Pacific arise especially in the area of mental health and criminal law (including court powers of committal or forced medical treatment, prison
regulations - for example in respect of the criteria for parole, and police powers of arrest even where a person is simply found “wandering at large”\textsuperscript{118}. However, they are also a feature of immigration and weapons control legislation and civil aviation law (security protocols). Children and youth deemed to be “depraved or unruly a character” - a classification likely to be disproportionately applied to young persons with mental health problems or psychosocial disabilities - can be held on remand indefinitely or otherwise detained under legislation regulating children in conflict with the law.\textsuperscript{119}

For women with disabilities, particularly intellectual or psychosocial disabilities, other stereotypes due to intersectionality of disability and gender and portray them as asexual or hypersexual, incapable of consent or lacking control, or unlikely to have parenting skills. Such views hinder their ability to enjoy their sexual and reproductive health and rights like other women including within marriage. They also underlie (and legitimize) coercive practices and medical interventions such as forced contraceptives, forced sterilization, and forced abortion. Such practices are acts of violence against women and girls with disabilities and they violate 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 relating to disability, and the transformative shift from the medical model to a human rights model of disability, there is still a large amount of stigma associated with disability. The CRPD Committee has observed with concern how little has been achieved both in respect of laws and policies that “still approach disability through charity and/or medical models, despite the incompatibility of those models with the Convention.” The Committee has also noted that “the efforts by States parties to overcome attitudinal barriers to disability have been insufficient. Examples include enduring and humiliating stereotypes, and stigma of and prejudices against persons with disabilities as being a burden on society.”\textsuperscript{120}

The stigma associated with disability is reflected in derogatory language. Language is a powerful tool that shape attitudes and behaviour. It cements social prejudice, perpetuate stereotypes, and promote social inequalities. Words that denigrate, pity, or deny value help to 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 to describe persons with learning and mental health disabilities, and Pacific legislation and constitutions are littered with words like “idiot”, “feebleminded”, “imbecile”, “dumb”, “mentally defective”, “mental retardation”, “mental disorder”, “unsound mind”, “insane/insanity”, “unruly” and “depraved.”

Sometimes stigma is concealed by misleadingly neutral language. For example, the Solomon Islands Immigration Act allows for a visa to be cancelled if there was “a serious health concern about the holder within the meaning of section 24” (s.21(1)(d)). Under section 24, a serious health concern arises when a person is certified by a government medical officer to be “suffering from a physical or psychological condition that poses a serious

\textsuperscript{118} Children with autism spectrum disorder or an intellectual disability are amongst other persons with intellectual or psychosocial disabilities prone to wandering for various reasons including communication problems or difficulties understanding safety issues.

\textsuperscript{119} See for example, Solomon Islands Juvenile Offenders Act, s.8, and s.6 relating to arrest and custodial powers of the police. Also see Fiji’s Juveniles Act, ss. 5, 6, 30. Under RMI’s Juvenile Procedure Act, the definition of a “delinquent child” includes any child “(b) who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient; (c) who is a habitual truant from home or school; or (d) who departs himself so as to injure or endanger the morals or health of himself or others.” (s.303).

\textsuperscript{120} CRPD Committee General Comment No.6 (2018) on equality and non-discrimination CRPD/C/GC/6 para [2].
threat to the health or safety of the community.” This broad and ambiguous phrasing is open to discriminatory application because of the reference to “a physical or psychological condition.” A “serious health concern” might include a contagious disease that could quite conceivably pose a serious health risk to the community. In this situation, the cancellation of a visa may be warranted. However, it could also be construed to apply to persons with psychosocial and/or intellectual disabilities who are assumed to be a threat to the community. In this situation, visa cancellation would be an act of discrimination and in violation of Article 18 (liberty of movement).

There are a few other terms that are commonly used in Pacific legislation and appear neutral. The terms “able-bodied/disabled”, concepts of “(in)capacity” and “(in)competence”, and the phrase “(not a) fit and proper person”, are problematic from a CRPD perspective due to the traditional association with disability and likelihood of disproportionately affecting persons with disabilities. Contrary to Articles 5 and 27, they pave a way for disqualifications or exclusions based on disability (physical or psychosocial). The seemingly neutral concept of “special needs” is also inconsistent with the CRPD, in particular the general principles laid down in Article 3 which highlight the “respect of inherent dignity” and “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); but the latter is what is implied by the concept of “special needs”, even if unintended.

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 obliges States parties to “adopt immediate, effective and appropriate measures … (t)o combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life…” While much of the work to achieve this necessarily involves education and awareness raising, law reform can lay the legal foundations for a rights-based approach to disability and a more inclusive and respectful culture towards persons with disabilities. Just as discriminatory language can be potent force for entrenching discrimination, so too it can it be used to help overturn discriminatory norms. As a start, Pacific countries are urged to revise their laws to remove such terms and to replace them with language that is consistent with the CRPD as well as gender neutral.121 The use of positive and respectful language in Pacific constitutions and legislation could potentially be a powerful driver of change in attitudes and behaviour. A selection of inappropriate terms and phrases used across Pacific island jurisdictions can be found at Annex 1.

INFRASTRUCTURE (BUILDINGS, ROADS, TRANSPORT)

Inaccessible environments are inherently discriminatory, so failing to provide access to public spaces and public buildings discriminates against persons with disabilities. 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.” Such measures include “the identification and elimination of obstacles and barriers to accessibility.

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121 Tonga has made provision for changing any words or names of statutory offices “to make them gender neutral” in its forthcoming revised edition of laws (Laws Consolidation Act 2018). In RMI, the practice of using exclusively male nouns and pronouns is being reviewed following the enactment of its CEDAW aligned Gender Equality Act 2019.
While there is 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. Audits conducted on a number of Pacific countries by the Pacific Region Infrastructure Facility provide detailed insight into the many shortcomings across physical and transport infrastructure. Audits conducted on a number of Pacific countries by the Pacific Region Infrastructure Facility provide detailed insight into the many shortcomings across physical and transport infrastructure. Where steps are being taken to dismantle barriers and create more accessible environments, these are often discretionary, undertaken on an ad hoc basis or slow to implement.

Accessible buildings

Accessibility requirements tend to be silent on or nonexistent in building codes (e.g. Vanuatu, Tonga, RMI). In its concluding observations for Vanuatu in 2019, the CRPD Committee noted with concern that buildings were “still not accessible for persons with disabilities despite the adoption of the National Building Code in 2013.” More generally, the Committee criticized inadequate remedies available to persons with disabilities and the absence of any legal sanctions for non-compliance with accessibility standards and guidelines, including in infrastructural projects using foreign investment.

Two typical examples of non-compliance are Vanuatu’s Building Act 2013 and Tonga’s Building Control and Standards Act (including the Building Code Regulations and Building Control and Standards Regulations) which are all silent on accessibility requirements for building permit applications by potential developers.

There are no technical standards, only a general reference to the building code. While the Vanuatu Act is understood to incorporate Australian accessibility standards, it is over 20 years old. For CRPD compliance, the legislation in both jurisdictions should be comprehensively amended to require all new buildings to be constructed in ways that make them accessible to persons with disabilities. Accessibility should be a condition for building permits and CRPD-aligned accessibility standards should be specified in building codes including universal design for all new public buildings and facilities. Accessibility training should be mandated for architects, builders, engineers and other relevant persons. Since the legislation focusses on new buildings, additional provisions are needed to establish accessibility requirements for existing buildings.

The CRPD Committee has recognized that one of the reasons for the lack of accessible buildings is the insufficient awareness and technical knowledge of key personnel. It therefore places importance on training. Article 9 specifically requires States parties to provide training on accessibility for persons with disabilities to all stakeholders who include “authorities that issue building permits, broadcasting boards and ICT licences, engineers, designers, architects, urban planners …” As the Committee states in its General Comment No. 2 on accessibility: “Ultimately, it is the builders on the construction site who will determine whether a building is accessible or not. It is therefore important to put in place training and monitoring systems for all relevant personnel to ensure the application of CRPD compliant accessibility standards.”

123 CRPD Committee concluding observations on the initial report of Vanuatu (2019) CRPD/C/VUT/CO/1, para [18].
124 Ibid. In the Cook Islands, the Committee has also expressed concern that a compliance review of its Building Code has yet to be conducted and there had been limited progress on “accessibility to existing public buildings and services, footpaths and street signage, information and communication, public service provision, air and sea transport.” CRPD Committee concluding observations on the initial report of Cook Islands (2015) CRPD/C/COK/CO/1, para. [19].
125 CRPD Committee General Comment No. 2 (2014) on accessibility CRPD/C/GC/2, para [19].
RMI exemplifies good regional practice for legislating accessibility rights and obligations, including training requirements for persons working in areas like construction and planning, mandatory adjustments to existing buildings, and enforcement provisions (adjustment orders). Although implementation remains a challenge, and subsidiary legislation to deal with technical standards and other operational guidelines is still awaited, the Rights of Persons with Disabilities Act 2015 lays some important foundational ground rules on accessibility consistent with the CRPD (see Part VII for more details). The State of Kosrae should also be commended for introducing an accessibility standard into legislation and seeking to promote a culture of accessibility in line with Article 9. However, as it currently stands, the Accessibility Bill of 2003 is narrow in scope, focusing on access to just government buildings and parking, and considering only the accessibility needs of persons with physical or mobility disabilities. The CRPD requires accessibility to multiple domains including ICT and transport, and caters to the needs of all persons with disabilities.

Accessible roads

Road legislation in Nauru, Tonga and Vanuatu typify the continued lack of attention to the road use needs of persons with disabilities. In particular, there is a complete absence of statutory requirements designed to ensure the accessibility of public roads for wheelchair users and persons with hearing or visual impairments. Exemplifying this, the Naoero Roads Act 2017 is silent on disability accessibility requirements despite its detailed sections on public roads (Part 3); loading zones (s.22); parking spaces (s.23); and tracks, common driveways or access ways (Part 6). All of these areas could be regulated for harmonisation with the CRPD.

Under Vanuatu’s Public Roads Act 2013, there is no mention of accessibility in Division 3 or Division 4 which deal with strategic planning and policies for public roads, and road design standards, respectively. A more disability inclusive approach could be achieved by adding a new subsection to section 7 to specify accessibility requirements for persons with disabilities. This approach should also be reflected in the objectives of the Act (s.2) and in the context of design standards under section 8 where there is scope to promote universal design principles. Technical guidance for the construction of pedestrian crossings under Vanuatu’s Pedestrian Crossing Act could also be amended to mainstream the needs of persons with disabilities. This might require the construction of ramps for the use of wheelchair users and other devices for the use of blind and deaf persons including Braille signposts and audible signage.

Like other Pacific island jurisdictions, Tonga should consider legislating accessibility measures for persons who are blind or visually impaired and deaf or hearing impaired. These measures could include audible and tactile devices, tactile paving, and parallel walk crossings. Planning for accessibility should consider road usage by persons who use wheelchairs including the need to construct ramps and accessible footpath entry and exit points. Although the Roads Act has now been repealed and replaced by the Roads Act 2020, the shortcomings with respect to the CRPD remain. The Roads Act 2020 acknowledges the rights of road users (s.7); includes stringent provisions for the regulation of permits (s.10); and prohibits unauthorised acts that cause obstruction or encroachment on roads (s.11). It is therefore well-placed to incorporate accessibility requirements, for example in the sections dealing with the purpose of public roads (s.3) and the terms and conditions of permits (s.10).

\[\text{126} \text{ RMI Rights of Persons with Disabilities Act 2015. See in particular ss. 1121 (participation in political and public life), 1136 (training), 1145 (adjustment orders), 1146 (adjustment orders against government bodies), 1158 (guidelines and standards).}\]
A positive example of CRPD-aligned reforms can be found in RMI’s *Rights of Persons with Disabilities Act 2015* (RPD Act) which includes a dedicated section on the “Construction of roads and footpaths” (s.1126). This states that:

1. All public roads and footpaths, whether constructed before or after the commencement of this Act, must be accessible to persons with disabilities, and in particular to persons using a wheelchairs or other mobility or assistive devices.

2. For the purposes of subsection (1), any intermediate point in any road or footpath, including vehicle crossings, crossroads, or pedestrian crossings, must also be accessible to persons with disabilities.

RMI now has under consideration draft amendments to the *Road Trust Fund Act of 1999*. The proposed amendments require the accessibility requirements under the RPD Act to be factored into the cost estimates for road maintenance.\(^{127}\)

**Accessible transport (road, air, sea)**

- **Road transport**

  In its General Comment No. 2 on accessibility, the CRPD Committee targets public transport as one of the critical areas that need to be made accessible in order to enable persons with disabilities to live independently and participate fully and equally in society. Article 9 of the Convention obliges States parties to ensure that persons with disabilities have access to transportation on an equal basis with others.

  Several Pacific countries have legislation to regulate the transport sector including Tonga and Vanuatu. Tonga’s *Transport Services Act* is a lean piece of legislation that provides for the integration and management of the land, sea and air transport sectors. Section 9 gives the Minister power to take various actions for the regulation of these sectors including the provision of safe transport services. Accessibility is not mentioned as a requirement. By contrast, Vanuatu’s *Public Land Transport Act 2015* makes one mention of disability under regulations. However, CRPD aligned requirements for accessible transport cannot be inferred from this given the overall thrust of the legislation. Section 44(2)(a) merely empowers the Minister to “prescribe matters necessary to regulate the use of a public land transport vehicle by persons with special disabilities, including old people.” This should be amended to make express provision for accessibility as recommended below.

  Amendments for disability inclusion should also be made to Vanuatu’s *Taxis Act*. In particular, consideration should be given to stipulating that a percentage of vehicles be adjusted to meet the needs of persons with motor disabilities (wheelchair accessible). Some countries encourage taxi companies to dedicate a percentage of their vehicles for this purpose. For new vehicles, however, it would be preferable to require universal design. The United Kingdom has a universal design policy for taxi vehicles in London. The additional costs of purchasing accessible taxis could potentially be subsidized through some kind of public-private partnership or other scheme. There should be no additional charges levied on users.

  Importantly, transport legislation in the Pacific should establish express *ex ante* general obligations to ensure that all public transport is accessible for persons with disabilities. The lack of accessible transportation is an ongoing concern for the CRPD Committee as evidenced in concluding observations for Vanuatu (2019). For CRPD compliance, private persons who intend to use their own vehicles for the purpose of providing public transport must ensure that they are accessible. Accessibility directives

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\(^{127}\) RMI Rights of Persons with Disabilities (Consequential Amendments) Bill 2018 Schedule 10.
should apply to both new public transport where accessibility should be mandatory, and transport that already exists which should be subject to modification guidelines and a timeframe and/or temporary accessibility measures. Details for both categories could be provided in regulations, for example section 44 of the Public Land Transport Act 2015 (Vanuatu), and section 11 of the Transport Services Act (Tonga). Consideration should also be given to ensuring that personal assistants travelling with persons with disabilities are not charged for the use of public transport, and blind persons are able to enter public transport with guide dogs.

- Air transport

Both air and maritime transportation are important in the Pacific due to geographic remoteness and the vast expanse of ocean that separates sea locked small island states. Maritime transport is the backbone of regional trade and commerce and domestic inter-island transport. However, the predominant form of transportation across the region for passengers, (social) connectivity, and tourism is air transport.

Globally, air travel can be one of the most inhospitable environments for persons with disabilities and they often fall victim to discrimination. Refusing boarding is common practice for a range of reasons including the person not being permitted to travel unaccompanied; not giving prior notice; or traveling with special mobility equipment or aids such as a wheelchair or a guide dog. Persons with disabilities face attitudinal barriers and social prejudice on a daily basis. This is particularly true of persons with psychosocial disabilities who are frequently labelled as unpredictable or dangerous to themselves or others. Sometimes they behave in ways that are unorthodox or unconventional, but they do not pose a threat to others. The possibility of overreacting to behaviour that is not considered “normal” can lead to discriminatory practices in the civil aviation sector, which is why Article 8 of the CRPD establishes a duty to avoid stereotyping persons with disabilities.

Under Article 9, States parties are obliged to ensure that persons with disabilities have access to transportation on an equal basis with others. This includes air travel and transportation. Article 9(1) makes it clear that States are required to “…take appropriate measures to ensure to persons with disabilities access, on an equal basis with others … to transportation…” The General Comment on accessibility by the CRPD Committee has stressed the need to mainstream accessibility standards for air travel. This obligation not only entails eliminating barriers in the physical environment but also training personnel to remove attitudinal barriers that may hinder the right of persons with disabilities to air travel.128

Civil aviation legislation is found across the Pacific including in Nauru129, Vanuatu130, Tuvalu131, Tonga132, Solomon Islands133 and RMI.134 One of the more prominent omissions is the lack of accessibility requirements for air transportation whether at airports, during boarding, during flight, and at disembarkation. These gaps can be rectified by incorporating statutory obligations to ensure accessibility of air travel at all stages, supported by positive (disability-specific) measures. In Tonga, for example, the Civil Aviation Act of Tonga and its regulations should be amended to establish accessibility requirements for aircraft including by giving the Minister power under section 31 to develop CRPD-aligned rules for the air transportation of persons with disabilities. Similarly, in Tuvalu, section 8 of the Civil Aviation Act could be amended to direct the Minister to develop regulations for the transportation of persons with disabilities.

128 CRPD General Comment No 2 (2014) on accessibility CRPD/C/GC/2.
129 Nauru – Civil Aviation Act 2011.
130 Vanuatu – Civil Aviation Act.
131 Tuvalu – Civil Aviation Act.
132 Tonga – Civil Aviation Act.
133 Solomon Islands – Civil Aviation Act.
In all Pacific jurisdictions, any form of disability-based discrimination including refusing services to persons with disabilities should be expressly prohibited. All countries would benefit from amending their legislation to make provision for accessibility requirements (positive measures) to comply with Article 9 and the general principles (Article 3) of the CRPD. Such measures could include accessible aircraft and airline services, support on boarding, mobility aids, assistant animals, in-flight duties of crew members, accessible security information (alternative formats and modes of communication), and accessible inflight emergency protocols. It is important that the provision of assistance for travelers with disabilities be expressly mandated and that there be specific regulations governing the transportation of wheelchairs and other mobility aids or animal support. Wheelchairs should not be considered as part of a passenger’s baggage allowance and no additional fees or taxes should be charged for the transportation of mobility devices required by a traveler with disability. The legislation should also make provision for the transportation of guide dogs for blind persons. No fee or tax should be imposed on any person requiring this service, and guide dogs should be allowed to travel in the aircraft.

These proposed measures should be developed by way of collaboration between airline and airport operators, other service providers, and disabled persons organisations. They could be guided by the Accessibility Features in Audited Aviation Infrastructure that form part of a research study conducted by the Pacific Regional Infrastructure Facility (PRIF). The PRIF study, which included Tuvalu, Tonga and Solomon Islands, is aimed at improving accessibility in road, aviation and maritime transportation infrastructure for persons with disabilities in the Pacific. In respect of aviation transportation, it notes that:

more consideration needs to be given to ensuring that people with disabilities are able to safely board and disembark aircraft. Most countries lack the provision of a Disabled Passenger Lift (DPL) or aisle chairs to fit smaller planes, resulting in a situation whereby people who are unable to climb the stairs have to be physically carried up by the ground crew. The Solomon Islands is the only country visited that deployed a DPL and, although it was available in Fiji, it was not used.135

Another area where civil aviation legislation requires attention for CRPD harmonisation is in the security related provisions that sanction unruly or disruptive behaviour. The relevant provisions are found in Part XIV of Tonga’s Civil Aviation Act which deals with ‘Security Offences’, and Part XV which covers ‘Unruly Passenger Offences’. Of particular relevance are section 203, (‘Disruptive or alarming conduct at an airport’), section 219 (‘Disruptive conduct towards crew member’) and section 223 (‘Offensive behaviour or words’) in Part XV. Section 38 of Tuvalu’s Civil Aviation Act establishes various offences including assault, intimidation or threats against a passenger or crew member, whether physical or verbal, and refusal to follow a lawful instruction. Another example can be found in Solomon Islands’ Civil Aviation Act which criminalises various behaviours considered to endanger aircraft and airports. Disruptive conduct at an airport (s.205), to a crew member (s.222), or on an aircraft (s.226) identifies insulting, threatening, offensive, interfering or alarming behaviour, words or gestures as constituting an offence under the Act.

While it is important to ensure that security procedures are in place for the safety of air travelers and that the safety of aircraft, crew and passengers is not endangered at any time, any safety procedures need to comply with international human rights standards. Open-ended characterisations of intimidating or threatening behaviour, including threats to

135 Pacific Region Infrastructure Facility (PRIF) (2018) op.cit.12
aviation security or other behaviour not consistent with the “good order and discipline on board the aircraft” are historically associated with prejudiced perceptions about persons with psychosocial disabilities, whose behaviour might be unusual or unconventional but does not necessarily imply harm, and persons with intellectual disabilities or sensory disabilities who might have cognitive impairments or communication difficulties. Precautions (including training of crew) should therefore be taken to ensure that any unorthodox behaviour by persons with intellectual, psychosocial or other disabilities is not mistaken for intimidating or threatening conduct, or a refusal to follow a lawful instruction.

In view of this, any provisions in Pacific legislation along the lines of Part XIV and Part XV of Tonga’s Civil Aviation Act should be amended to clarify that any unorthodox behaviour (as reflected in gestures, language etc.) of a person with disability cannot be construed as “disruptive or alarming conduct” or “offensive behaviour or words.” A new provision should expressly state that security procedures, including behavioural assessments by crew, must be undertaken in accordance with the principles of non-discrimination. For Tuvalu’s Civil Aviation Act this could take the form of a stipulation that any assessments of passenger behaviour for the purpose of prosecution under section 38 (or any other relevant section under Part VII) must comply with strict criteria consistent with non-discrimination principles. Any provision along these lines would be aimed at eliminating the risk of action being taken against a person on the basis of disability, which would contravene Article 5 and Article 8 of the CRPD. The Solomon Islands Civil Aviation Act (Part XV) should also be amended along these lines to achieve the same purpose. A general anti-discrimination provision would strengthen the reforms in all cases and create a general standard that discourages this type of bias.

Sea transport

A silence on accessibility requirements also marks regional legislation in the area of maritime transport. One example to illustrate this general pattern can be found in Kosrae State where legislation regulating sea transportation and the Port Authority which is vested with a range of powers and duties, does not establish any accessibility measures to accommodate the needs of travelers with disabilities. A new chapter under Title 14 is proposed to ensure that any maritime transport available to the public complies with the requirements of accessibility. In addition, a new duty should be established for the Port Authority to ensure the accessibility of sea transportation. Accessibility measures should be guided by the PRIF guidelines discussed in the context of air transportation. These guidelines are comprehensive and include recommendations for the regulation of wayfinding and signage, terminal buildings, embarking and disembarking vessels, washroom facilities, seating areas, ramps, and many other aspects of sea and air transportation.

A positive measure that could be considered by all countries is a waiver of passenger fares for travel companions of persons with disabilities (personal assistants). RMI is considering such a provision as an amendment to its Marshall Islands Shipping Corporation Act 2004.

Mainstreaming accessibility obligations

Opportunities exist in other sectoral legislation to comply with Article 9, in particular the obligation to adopt all necessary measures to make public spaces fully accessible. The business sector is one example. The CRPD Committee’s General Comment No. 2 clarifies:

The focus is no longer … in the public or private nature of those who own

136 Kosrae State Code Title 14 (Sea and transportation).
137 Kosrae State Code Title 7, Chapter 6.
138 Kosrae State Code Title 7, Chapter 3, s. 7.602.
139 Pacific Region Infrastructure Facility (PRIF) (2018) op.cit.
buildings, transport infrastructure, vehicles, services and information and communication. As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or private enterprise. Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effectiveness and equal access and respects their dignity.

It is clear from this that in order to comply with the accessibility obligations under the CRPD, States parties must ensure that private entities that have facilities open to the public or offer services to the public take into account all aspects of accessibility for persons with disabilities. In order to comply with this duty, a general provision can be introduced in legislation to establish accessibility requirements for all businesses. Enforceability can be achieved by making accessibility a condition of obtaining a licence. These provisions should be introduced into all Pacific legislation that regulates business activity and licensing, and where there are often discretionary powers to impose conditions on any business licence, for example Vanuatu’s Business License Act and Nauru’s Business Licenses Act 2017. Accessibility requirements should be consistent with the general principles and Article 9 of the CRPD, and therefore understood in their broadest sense - including both physical structures and information and communications systems and technology. Where applicable, businesses should be required to make signage in Braille and in easy to read and understand formats (Article 9(2)(d)).

Two other obvious areas to promote accessibility are in legislation governing urban planning and local government. Tonga’s National Spatial Planning and Management Act provides a framework for planning the use, development, management and protection of land in the public interest and for related purposes. The Act is silent on the needs of persons with disabilities. While this may be acceptable in respect of certain matters such as sustainable land use or resource conservation, there are other areas like urban development where accessibility issues most certainly arise for persons with disabilities. For example, an accessibility requirement could be stipulated for transportation, creation, employment and other areas under section 4 which sets out the objectives of the Act. In addition, the functions of the National Spatial Planning Authority which include communication and awareness raising around urban planning issues (s.5(h)) could be broadened to add awareness raising about the accessibility needs of persons with disabilities, and to promote universal design principles.

In Vanuatu, the Municipalities Act and the Physical Planning Act provide good scope for promoting accessibility in urban and peri-urban/rural planning. Municipal councils are appropriate authorities to prescribe accessibility guidelines and to broaden the reach of accessibility principles beyond urban areas. Accordingly, sections 35 and 36 of the Municipalities Act (which gives councils the power to make traffic guidelines and by-laws) should be amended to ensure that prescribed measures include accessibility guidelines in all areas including with respect to traffic and public buildings like schools and health centres in non-urban areas. Under section 32, the Council of Roads should be mandated to draft accessibility guidelines for urban planning of streets, roads, and, in general, spaces open to the public. Guidelines should include technical requirements for street levels, pavements, ramp construction, audio signs for deaf persons and road signage for blind persons, amongst others.

Under the Physical Planning Act, section 7 grants powers to municipal or local government councils to deal with development applications. This could be amended to stipulate accessibility as a condition for planning permission and for
any development involving buildings or facilities open to the public.

A definition of accessibility that meets the requirements of Article 9, including its interpretation by the CRPD Committee in General Comment No. 2, should be provided in the interpretation section.

Local government legislation in Pohnpei State provides an opportunity to include accessibility as an additional factor for consideration in development plans.141 As is the case with other proposed interventions, this would comply with Article 9 which recognizes the importance of ensuring that persons with disabilities are able to live independently and participate fully in all aspects of life, and to this end requires States parties 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 ... and to other facilities and services open or provided to the public, both in urban and in rural areas.”

“Extensive public hearings” are required for the review of every plan in Pohnpei. In order to ensure the effective participation of persons with disabilities, all hearings should be accessible. This includes ensuring the accessibility of each designated location, any information and documentation provided to the public for deliberations, and the mode of communication for example by providing sign language interpretation for deaf participants and documentation in large print/Easy Read and/or Braille, if required by persons who are blind or visually impaired. Such measures would also be consistent with Article 9, whose expansive approach to accessibility, as noted above, covers information and communications, including ICT.

Draft amendments to RMI’s Planning and Zoning Act 1987 demonstrate positive steps to improve CRPD alignment in infrastructural design, planning and construction. The amendments include obligations that local government Councils must provide for the accessibility requirements of persons with disabilities in all infrastructure (houses, hospitals, health clinics, schools, etc.), including the adoption of universal design principles, and in zoning principles. Accessibility is also a proposed requirement of the Marshall Islands Building Code.142

TRAFFIC

Traffic laws in the region are discriminatory in a number of ways. Firstly, they commonly disqualify persons with psychosocial or intellectual disabilities from holding a driver’s license (Vanuatu, RMI, Tuvalu, Tonga, Solomon Islands, Kosrae and Pohnpei States, FSM). In addition, there are sometimes discriminatory requirements for driving tests or examinations including theory tests (Tonga). While there is an occasional provision for a class of vehicle suitable for a person with disability (Solomon Islands, Tonga), accessibility requirements for public transportation, such as adjusted or adapted vehicles, are not prescribed anywhere except RMI. Statutory requirements for accessible parking are rare (RMI).

The Vanuatu Road Traffic Control Act (s.44) does not permit persons with disabilities to acquire a driving license 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.” Similarly, Tuvalu’s Traffic Act (s.16) empowers a licensing officer to refuse to issue or renew a licence for a person who “suffers from disease or disability which would make it unsafe for him to drive the class of vehicle for which he applies for a licence”143 or who is not considered to be “a fit and proper person” to drive a public service vehicle. Underpinning both these provisions is

141 Pohnpei State Code Title 6, Chapter 2, s.2-102.
142 RMI Rights of Persons with Disabilities (Consequential Amendments) Bill 2018, Schedule 9

143 Tuvalu Traffic Act s. 16(2)(a).
a discriminatory assumption that having a disability makes it inherently unsafe to drive. The phrase “fit and proper person” typically includes any history of mental or physical ill-health and is likely to disproportionately affect persons with disabilities (indirect discrimination) including their right to employment on an equal basis with others (Article 27) since “fit and proper” is a requirement for driving a public service vehicle.

RMI’s Motor Traffic Act 1986 applies a similar standard, albeit with more demeaning language. Section 113 disqualifies a person “who has been previously adjudged insane or an idiot, imbecile, epileptic or feeble-minded” or “is afflicted with or suffering from such physical or mental disability or disease as to prevent such person from exercising ordinary control over a motor vehicle while operating the same.” Tonga’s Traffic Act similarly denies a licence to a person who is “mentally defective”, “physically handicapped”, “has defective eyesight”, or “is completely deaf”, and the theory test states: “Is a mentally defective, physically handicapped, partially blind person or deaf person permitted to drive a motor vehicle on a road?” Answer: “No.” Persons “previously adjudged insane or an idiot, imbecile, epileptic or feebleminded” are amongst disability-based disqualifications from driving in Pohnpei State.

None of these restrictions comply with the CRPD. Outright prohibitions are contrary to CRPD Article 3 (general principles), Article 5 (equality and non-discrimination), and Article 9 (accessibility) and amount to discrimination on the basis of disability. The use of derogatory and disempowering language is also inconsistent with Article 8, which requires States parties to “adopt immediate, effective and appropriate measures … (b) to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.”

For CRPD compliance, the restrictions should be removed and the law should 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). License restrictions should only be contemplated in those cases where a person is unable to safely drive a vehicle, once adjusted; and the adaptation of vehicles should be considered as a condition of a licensing. This would comply with Article 9, which requires States parties to take appropriate measures to ensure that persons with disabilities are able to access all facilities and services open or provided to the public, including public transport.

Proposed amendments currently under consideration by the RMI Parliament (Nitijela), are moving the law towards greater CRPD compliance. In particular, they expressly prohibit the denial of a licence on the basis of disability and recognize the right of a person with disability to reasonable accommodation and other support measures including an adapted vehicle. There is already a statutory obligation on owners of public vehicles to adapt them for transporting persons with disabilities, and every public parking lot is expected to have at least three parking spaces designated for their use. A person who contravenes any of the provisions under section 1127 commits an offence.
Part V. Legislative Frameworks [CRPD Articles 11-20]

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 are often ‘the first to be forgotten and the last to be remembered’ of all marginalized groups.”

From the perspective of CRPD compliance, there are two conspicuous lacunae in Pacific disaster, climate change and emergency legislation. Both reflect an institutional failure to be inclusive of persons with disabilities:

- silence on the needs of persons with disabilities (Tuvalu, Tonga, RMI, FSM, Solomon Islands)
- lack of representation of persons with disabilities on Boards and Committees (Tuvalu, Tonga, Solomon Islands, Vanuatu, RMI)

In both areas, Nauru is the notable exception.

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 situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. No other core human rights treaty refers to “situations of risk”, save Article 38 of the CRC, which covers children in armed conflict.

The obligation to take all necessary measures under Article 11 includes legislative measures and protocols required to deal with natural disasters and other risk situations. This is bolstered by the general accessibility obligations under Article 9, which are cross-cutting and also make specific reference to emergency services (Article 9(1)(b)). In addition, Article 4(1) requires States “[t]o promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.”

Pacific disaster and climate legislation typically fail to give any attention to the needs and rights of persons with disabilities. 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 that disasters are known to have on persons with disabilities.

The following regional laws exclude disability:

- Vanuatu – National Disaster Act
- Tuvalu – Emergencies and Threatened Emergencies (Special Powers) Act, Climate Change and Disaster Survival Fund Act 2015, National Disaster Management Act, Metereology,

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150 Statement on disability inclusion issued by CRPD Committee (Sept 2014) prior to the 2015 Third World Conference on Disaster Risk Reduction in Sendai, Japan.
It is imperative that these laws are amended to comply with the obligations arising under Articles 9 and Article 11. In addition, new provisions are needed to ensure that there is representation of disability organisations on decision making bodies, and that the needs and rights of persons with disabilities, including 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 etc. Plans at all levels should be comprehensively inclusive, targeting persons with disabilities as well as other vulnerable groups such as older persons, pregnant women, and children. Importantly, persons with disabilities should be actively involved in the planning process as required under Article 4(3).

Humanitarian staff recruitment should include sign language interpreters; and training should equip all personnel including emergency service providers to be able to respond to disability specific needs, including alternative communication needs. Persons assisting persons with disabilities in emergency situations must be fully competent to ensure their protection, and emergency services must be fully accessible to comply with Articles 9 and 11. Accessible ICT is especially critical in emergency or risk situations so emergency messages must be communicated in accessible formats such as sign language and Easy Read. Statutory provision for relief funds should also be reviewed for greater disability inclusion. In particular, prescribed items for relief should not be limited to food, clothing, shelter, medical supplies and building materials, as is the case in the national Disaster Relief Fund of the FSM National Code, but should be broadened to include items needed for the relief, rehabilitation, health and mobility of persons with disabilities including mobility aids and other assistive devices, equipment and technologies. In its General Comment No. 2 on accessibility, the CRPD Committee has specifically warned that:

In situations of risk, natural disasters and armed conflict, the emergency services must be accessible to persons with disabilities, or their lives cannot be saved or their well-being protected (art. 11). Accessibility must be incorporated as a priority in post-disaster reconstruction efforts. Therefore, disaster risk reduction must be accessible and disability inclusive.\textsuperscript{153}

More specifically for the Pacific region, the Committee noted in its 2019 concluding observations for Vanuatu that persons with disabilities in the country were “not sufficiently involved in disaster risk reduction plans at the national, provincial and community levels.” It also expressed concern that “some persons with disabilities were left behind during the evacuation from Ambae Island in 2018 and that there have been no unified measures taken to establish an emergency notification system that is accessible for all persons with disabilities regardless of the type of impairment.”\textsuperscript{154} The

\textsuperscript{151} FSM National Code Title 41, Chapter 7
\textsuperscript{152} Title 55 Government Finance and Contracts, Chapter 6, Subchapter II Disability Relief Fund.
\textsuperscript{153} CRPD General Comment No. 2 on accessibility (2014)
\textsuperscript{154} CRPD Committee concluding observations on the initial report of Vanuatu, 13 May 2019, CRPD/C/VUT/CO/1.
Committee recommended that the accessibility of warning information for persons with all types of impairment be improved, especially for those with visual, hearing and intellectual impairments; and that persons with disabilities be closely consulted through representative organisations on "design and implementation of all disaster risk reduction plans at national, provincial and community levels."\(^{155}\)

Nauru has taken a commendable first step towards law reform in this area. 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 particular significance is the provision for representation of a disabled persons organization on the National Disaster Risk Management Council (s.16(3)). Amongst other things, the Council is responsible for disaster management and emergency responses; policy formulation on disaster risk reduction and disaster management; oversight of the disaster risk management plan; and coordination of activities to mitigate, prepare for, respond to and recover from disasters. Representation on this body thus offers an ongoing opportunity to inform, advise and advocate on matters of importance to persons with disabilities at each stage of the disaster management and emergency cycles.

Proposed amendments to RMI’s *Disaster Assistance Act 1987* similarly include disability representation on the Disaster Committee, and require the Chief Secretary to seek advice and assistance from women’s organisations and organisations representing persons with disabilities when preparing the disaster plan.\(^{156}\) But the amendment Bill goes further to expand the duties of the Committee to ensure that: disaster preparedness and responses, including evacuation plans, training, public information and communication protocols, recovery and relief efforts, are disability inclusive and comprehensively address the specific needs of persons with disabilities, including:

(i) any accessibility requirements;
(ii) any support needs, including personal assistance or equipment; and
(iii) any protective measures to ensure safety and to mitigate risks of harm, including risks of physical or sexual violence, against women and girls with disabilities.

Positive measures provide a good example for the rest of the region and signal a disability inclusive approach that is needed now more than ever given the current global emergency. The COVID-19 pandemic is having a devastating and disproportionate impact on persons with disabilities and is expected to deepen the social and economic inequalities, discrimination and exclusion that already feature so prominently in their lives. A disability inclusive response is imperative. As the CRPD Committee has stated:

> COVID-19 pandemic highlights that protection, response and recovery efforts will not be effective unless everyone is equally valued and included. Critical and urgent action is required to ensure that those most at risk, including persons with disabilities are explicitly included in public emergency planning and health response and recovery efforts.\(^{157}\)

**GUARDIANSHIP**

Guardianship laws that are designed for adults with intellectual, cognitive and/or psychosocial...
disabilities raise significant human rights concerns. Though purporting a protective purpose, guardianship laws in the Pacific effectively set up substitute decision making regimes that strip persons with intellectual, cognitive and/or psychosocial disabilities of their autonomy and legal capacity on the basis of perceived or actual disabilities.

In its General Comment No. 1, the CRPD Committee has called for an end to such regimes. In particular, it makes clear that they contravene Article 12 because they take decision-making out of the hands of persons with intellectual and/or psychosocial disabilities and vest in a guardian the authority to make decisions on their behalf (substitute decision-making):

Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

States parties’ obligation to replace substitute decision-making regimes by supported decision making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention. A supported decision-making regime comprises various support options that give primacy to a person’s will and preferences and respect human rights norms. It should provide protection for all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill treatment (right to life, right to physical integrity, etc.). Furthermore, systems of supported decision-making should not overregulate the lives of persons with disabilities.158

Adult guardianship laws in the Pacific typically fall within the orbit of substitute decision-making laws that deny persons with intellectual and psychosocial disabilities of their legal capacity and place them under guardianship as “incapacitated persons” in violation of Article 12. Examples include Kosrae State, FSM, RMI, Solomon Islands and Nauru. While these jurisdictions use different labelling as the pretext for guardianship, the basic approach is the same. The Kosrae State Code for example establishes the procedure for the appointment of 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, advanced age, chronic use of drugs, chronic intoxication, minority or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning one’s person.”159

Guardianship in RMI on the other hand hinges on an adult person being adjudged by the court

158 CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1 paras. [27]–[29].
159 Kosrae State Code Title 6, Chapter 37, ss 6.3701-8.
to be “mentally or physically incompetent.” The *Marshall Islands Guardianship Act 1984* allows a person to petition the court for appointment as guardian of an “incompetent” person or the person’s property or both (s.207). An “incompetent” refers to “a person who, because of minority, mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other physical or mental incapacity, is incapable of either managing his property or caring for himself, or both.”

The Solomon Islands High Court is empowered under the *Mental Treatment Act* to make orders concerning the guardianship and management of estates for, persons declared to be “of unsound mind” or “suffering from mental disorder or mental defect.” In the event that there is no relative or suitable person, the Court may order the Public Trustee to be appointed guardian and manager of the estate.

Denial of legal capacity based on assumptions of mental incapacity is a recurring violation of Article 12, and discriminatory guardianship provisions can be found across different areas of law, especially law governing land and property, and financial management. What the provisions have in common is a substitute decision-making arrangement that effectively disenfranchises an adult with intellectual or psychosocial disability.

In respect of land legislation, examples include: Tonga’s *Land Act* (s.149(1)(c), where a trustee is appointed on behalf of a Tongan commoner entitled to inherit a piece of land but who is “by reason of mental infirmity incapable of managing his affairs for the purpose of protecting and managing such land…”; Vanuatu’s *Expropriation for Public Utility Act* (s.12), which vests decision making power to authorize disposal of property belonging to a person “under judicial disability” or “incapable of acting” in a legal guardian; and Nauru’s *Lands Act 1976* (ss. 6 and 15), which authorizes a public officer to override the refusal of a landowner with disability to grant a lease, easement or other right or license over land required for a public purpose where the refusal or failure to execute the instrument is deemed to be “unreasonable.” Vanuatu’s *Land Leases Act* also incorporates a number of non-compliant provisions, one of which mandates the Director to refuse registration of an instrument of a person the Director believes to be “incapable by reason of mental infirmity of acting” unless the instrument is signed or approved in writing by that person’s guardian (s.81).

Tuvalu’s *Cooperative Societies Act and Companies Act* exemplify the substitute decision-making approach in law that deals with other property, in breach of Article 12. Section 54(2)(m) of the *Cooperative Societies Act* makes provision for the discriminatory appropriation and transfer of an interest of “a member who has become of unsound mind and incapable of managing himself or his affairs.” In turn, Regulations under the Act are mandated to “provide for the mode in which the value of the interest of a member who has become of unsound mind and incapable of managing himself or his affairs shall be ascertained and for the nomination of any person to whom such interest may be paid or transferred.”

Under section 91(3) of the *Companies Act*, shares or debentures can be transferred by a receiver or other person appointed by the Court to administer the estate of a “person of unsound mind.” Section 5(2)(c) expressly authorizes a company Director to refuse to register the transfer of a share to a person “of unsound mind.” All these provisions emphatically contravene Article 12, including Article 12(5) which obliges states to respect the equal right of persons with disabilities “to own or inherit property, to control their own financial affairs…. and [to] not [be] arbitrarily deprived of their property.”

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161 Solomon Islands Mental Treatment Act, s.41.
162 Tuvalu Co-operative Societies Regulations, reg. 54.
163 Tuvalu’s *Companies Act* contains several other infringements of Article 5 (non-discrimination), Article 12.
Similar breaches are found in Tonga’s Revenue Services Administration Act, which delegates financial decision-making of a person “under legal disability” to a representative, and in the trust law of other Pacific countries. RMI’s Trust Act of 1994 disallows the transfer or disposal of property to a trust by a person who is not of “sound mind”, and under Nauru’s Trusts Act 2018, a registrable trust is wound up where any beneficiaries “lacks capacity” (s.22(1)(b)(i)). Solomon Islands’ Public Trustee Act enables the Public Trustee to receive and control any legacy, gift or share of assets intended for a “person of unsound mind” (s.23). Other non-compliant provisions are found under Solomon Islands’ Mental Treatment Act where the High Court is empowered to make orders concerning the management of estates and the full or partial guardianship of persons with intellectual and/or psychological disabilities (s.41).

Taxation law is another area where persons with psychosocial and/or intellectual disabilities are denied the right to manage their own affairs on an equal basis with others, and authority for these matters and related decision-making are vested in a legal guardian. Both Tuvalu and Kosrae State have taxation legislation that assigns representational duties for taxation matters to a legal guardian when a person is “under a legal disability” (Kosrae) or “incapacitated” (Tuvalu).165

All laws that take away from adult persons with disabilities control over their own tax and other financial affairs or that deny persons with disabilities the right to make their own decisions and to control their own affairs, including land and property matters, do not comply with the CRPD. Guardianship arrangements should therefore be removed and replaced by support measures that do not compromise the legal capacity of any person requiring support. In this way, persons with intellectual and/or psychosocial disabilities are able to make their own decisions with assistance (supported-decision making). As required by Article 12(4), support measures must be subject to safeguards in order to ensure that they are consistent with the rights, will and preferences of the persons being assisted, and are free of any conflict of interest, undue influence, or other abuse.

In a growing number of countries, guardianship laws are being amended to move away from traditional substitute decision-making regions to models of supported decision-making, where persons with disabilities are assisted to make decisions (exercise their own legal capacity) in accordance with their own will, rights, and preferences. Reforms to accomplish this objective in the Pacific could be guided by legal capacity reforms undertaken by Peru as part of updating its Civil Code and Civil Procedure Code in 2018. A landmark achievement, the reforms have removed all restrictions on legal capacity based on disability, including in guardianship laws. They demonstrate how laws can be changed to overturn longstanding and entrenched institutional discrimination and to recognize the right of persons with disabilities to legal capacity. In developing a supported decision-making regime, Pacific countries are urged to be guided by Peru’s exemplary reforms. In particular they should:

i. establish that there is no restriction on (legal) capacity on the basis of disability. For example, “all persons with disabilities have full capacity to exercise their rights on an equal basis with others and in all aspects of life”;  
ii. develop a model of support for the exercise of legal capacity by persons with disabilities. This needs to be flexible and shaped directly by persons who require support. Support should be defined (as in the Peru reforms) as:

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165 Kosrae State Code Title 9, Chapter 1 Revenue Administration Act.
166 Tuvalu Income Tax Act, ss 33 and 35.
“forms of assistance freely chosen by a person of age to facilitate the exercise of their rights, including support in communication or in understanding legal acts and their effects, and the manifestation and interpretation of the will of the supported person”;

iii. establish that when a supporter needs to interpret the will of the supported person, the supporter should consider “the life story of the individual, his preferences, the previous declarations of will in similar contexts, the information that the persons in which he trusts may have, and any other considerations which are appropriate for the particular case.”166

Ireland’s Assisted Decision-Making (Capacity) Act 2015 might be another point of reference. The Act provides a modern statutory framework to support decision-making by adults with capacity-related difficulties. The new system, instead of a guardianship model, creates a number of different support options (decision-making assistants, co-decision-makers or decision-making representatives). Importantly, under the Act, a decision-making representative is required to “ascertain the will and preferences of the relevant person … and assist the relevant person with communicating such will and preferences” (s.41(1)). There are also eligibility criteria for appointing a decision-making assistant and corresponding grounds for disqualification (ss. 11 and 13).

CONTRACT LAW

Sale of goods legislation in Tuvalu, Tonga and RMI incorporate longstanding norms embedded in the common law which deny persons with intellectual or psychosocial disabilities the capacity to contract. Tuvalu’s Sale of Goods Act expressly states that the capacity to buy and sell is regulated by the general (common) law relating to the capacity to contract and to transfer and acquire property (s.4(1)). Specifically, “a person who by reason of mental incapacity or drunkenness is incompetent to contract” is shielded from unreasonable prices for the necessaries of life (s.4(2). RMI has virtually identical provisions to Tuvalu in its Sale of Goods Act 1986 (s.104). In Tonga, the Bills of Exchange Act prevents anyone from entering a contract (being a party to a bill of exchange) if lacking the “capacity to contract.” This principle is reflected across multiple sections.167

It is not discriminatory per se to impose restrictions on entering contracts, so long as those restrictions do not restrict the rights of a protected category of rights holders — or, in relation to the CRPD, so long as they do not discriminate either directly or indirectly against persons with disabilities. However, the concept of capacity to contract under the common law traditionally disqualifies persons deemed to be “mentally incompetent” or “of unsound mind” from entering legally binding agreements. This typically reflects misguided and discriminatory perceptions about the legal capacity of persons with intellectual, cognitive and/or psychosocial disabilities based on their purportedly diminished mental capacity.

Article 12 requires States parties to refrain from restricting the legal capacity of a person based on his or her mental incapacity and instead provide the support necessary for a person to exercise their legal capacity, including entering contracts. The implied denial of legal capacity (or legal competence) on the basis of an assumed lack of mental capacity (or mental competence) under the sale of goods legislation is therefore in direct breach of Article 12, which guarantees the legal capacity of all persons (universal legal capacity) irrespective of their mental capacity (or incapacity). Of particular relevance in this context, Article 12(5) specifically recognizes the rights of persons

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167 The issue of contractual capacity arises in ss. 5(2), 22, 41(2), 50(2), 54, 55, and 91 of the Act.
with disabilities to own property and manage their own financial affairs.

Any provisions declaring a person incompetent to contract based on “mental incapacity” (as in Tuvalu and RMI), or any general reference to a person lacking capacity to contract (as in Tonga) should be removed, or otherwise amended to ensure that they cannot be construed to apply to an adult person on the basis of an intellectual or cognitive disability. Instead, persons with disabilities should be entitled to assistance with making decisions that have legal effect such as entering contracts. This would be consistent with Article 12(3). Any system of support must be subject to “appropriate and effective safeguards” including protection from abuse. The main purpose of these safeguards is “to ensure the respect of the persons’ rights, will and preferences” (Article 12(4)).

RMI’s Rights of Persons with Disabilities (Consequential Amendments) Bill 2019 contains draft amendments to the Sale of Goods Act 1986 for CRPD compliance. Specifically, the Bill proposes removing the reference to mental incapacity and the provision of support to a person with disability who purchases or receives delivery of necessaries. While this would dispense with the discriminatory content of the Act itself, there is a need to eliminate more comprehensively the discriminatory norms governing this aspect of contractual agreements under the common law. More substantial law reform would also provide an opportunity to extend the scope of reform to a set of formal (and informal) support arrangements for persons with disabilities and other persons with legal capacity support needs. Such legal mechanisms (e.g. a nominated representative or power of attorney) would help them enter contracts and make other decisions that have legal effect i.e. exercise their legal capacity. The CRPD Committee indicates what this legislation might look like in its General Comment No.1 on Article 12.

The Assisted Decision-Making (Capacity) Act 2015 of Ireland provides an interesting example of reform in this area. The Act creates new categories of support; namely, a “decision-making support agreement” in which a supporter helps a person to understand, appreciate and communicate decisions, and a “co-decision-making agreement”, which includes protection for persons with disabilities and others who may be exploited in contractual arrangements. Significantly, the safeguards included in co-decision-making agreements do not refer to the mental capacity of a person, but are intended to incorporate the legal principles relating to unfair and unconscionable contracts, undue influence and misrepresentation.

The Australian Law Reform Commission has examined the issue of “incapacity to contract” and its observations may assist Pacific governments when they review their sale of goods legislation. In a 2014 report, the Commission rejected the suggestion that there needed to be a new test of mental capacity incorporated into contract law, instead noting the merits of abolishing the common law on contractual incapacity:

introducing any new functional test of decision-making ability [which, again refers to an assessment of ‘mental capacity’] ... into contract law may be counterproductive— it would not necessarily assist people, and may deprive them of the ability to contract, or make contracting so risky for the other party, that they will refuse to enter into contractual relations.

Arguably, abolishing the common law relating to contractual incapacity in its

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168 RMI Rights of Persons with Disabilities (Consequential Amendments) Bill 2018, Schedule 21, s. 61.
169 CRPD General Comment No. 1 on equal recognition before the law, CRPD/C/GC/1, paras [16-17].
170 See for example, Australia Law Reform Commission Equality, Capacity and Disability in Commonwealth Laws (2014) [11.9].
entirety would have no adverse consequences, as questions about the validity of a contract could be dealt with satisfactorily by the laws relating to unfair and unconscionable contracts, undue influence and misrepresentation. (emphasis added)\textsuperscript{171}

The Commission suggested that the focus should be on the quality of the agreement between two parties rather than the apparent incapacity of one person to contract. The law has several ways of determining whether the rights of both parties are sufficiently protected (quality of agreement), including whether there is evidence of undue influence or misrepresentation. These matters remain the subject of ongoing deliberation globally.\textsuperscript{172}

**WILLS AND PROBATE**

In accordance with the human rights-based model that underlies the CRPD, the capacity to act and to make one’s own decisions is a precondition for the exercise of other fundamental human rights. Article 12 puts forward a ground-breaking conceptualization of legal capacity as comprising both legal standing (holding rights) and legal agency (exercising those rights or having the power or capacity to act). Article 12 is unequivocal about the right of persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life and to receive any support they may require to exercise it. As noted in the previous section, States parties are also specifically instructed to ensure that persons with disabilities are able to own or inherit property, control their own financial affairs, and not be arbitrarily deprived of their property (Article 12(5)).

Most Pacific states that have ratified the CRPD continue to maintain a discriminatory (pre-CRPD) model of legal capacity that restricts the rights of persons with disabilities. This is well demonstrated in the law relating to wills and probate which uses a test of mental capacity to deny legal capacity. Vanuatu’s Wills Act typifies this non-compliant model by restricting the ability of persons with intellectual and/or psychosocial disabilities to make their own choices and to act with autonomy, an important crosscutting principle under the CRPD which includes the freedom to make one’s own choices. In particular, a person who is “not of sound mind” is expressly denied the right to make a will for the purpose of disposing of property after death (s. 2); to witness a will (s. 6); and to be appointed an executor (s.9).

Likewise, Tonga’s Probate Act stipulates that for a will to be valid, the testator must be “of sound disposing mind”, and RMI’s Probate Code also establishes a “sound mind” as a prerequisite for making a will. In the same vein, Pohnpei State\textsuperscript{173} and Kosrae State\textsuperscript{174} prevent persons from making a will if not of “sound mind” for the purpose of disposing of property after death; and like Vanuatu, Pohnpei’s legislation prevents a person deemed not to be “competent” from witnessing a will.\textsuperscript{175}

In addition to prohibiting will-making based on a disability, Nauru and Solomon Islands raise other compliance flags. The Succession, Probate and Administration Act 1976 of Nauru, for example, allows the court to appoint one or more personal representatives during the incapacity of a beneficiary who is “mentally disordered” (s.27(2)). A provision for supported decision-making should replace this substitute decision-making mechanism. Solomon Islands has a wide range of discriminatory provisions in its Wills, Probate and Administration Act. These:

- deny a person who is not “of sound mind” the right to make a will for the purpose of disposing of property after death (s.4(1))

\textsuperscript{171} Ibid.
\textsuperscript{173} State of Pohnpei, Title 4, Chapter 2 Wills, s.2-102.
\textsuperscript{174} State of Kosrae, Title 16, Chapter 2 Wills, s. 16-201.
\textsuperscript{175} State of Pohnpei, Title 49, Chapter 2 Wills, s.2-103.
disqualify a person “under disability” from being granted administration in circumstances of spes successionis (s.36(a));

deny “a person who is under a disability by reason of mental or physical incapacity” the right to be sole executor of a will, requiring instead the appointment of a guardian by the court (s.39);

grant probate to a person without a disability in preference to “a person under disability by reason of mental or physical incapacity” where there are two or more executors (s.40);

require only the consent of “any person not under a disability” who would be prejudiced in respect of admitting a non-cupative will (s.52); and

specify that the consent requirements in respect of powers granted to personal administrators to appropriate property do not apply to “a person of unsound mind or a defective person incapable of managing and administering his property and affairs” (s.81(4) and (6)).

All these provisions require amendment or repeal. For CRPD compliance, it is important that legislation is reviewed with the objective of removing any provisions that strip persons with intellectual and/or psychosocial disabilities of their decision-making power and vest this in another entity or person. Persons with intellectual and/or psychosocial disabilities must be able to dispose of their property by will and given any support they may require to make their will-related decisions, protected in the process from any unconscionable conduct, undue influence, or any other form of abuse or exploitation by a support provider, in line with Article 12(3) and(4).

The legislative changes required by Article 12 are being progressively made across the world. Some countries are beginning to establish models of supported decision-making where persons with intellectual and/or psychosocial disabilities are assisted to make decisions in accordance with their will, rights and preferences. In hard cases, where communication is difficult or impossible, or it is otherwise difficult to determine the will and preferences of an individual, the CRPD Committee has urged that the “best preference” standard (i.e. the “best interpretation of will and preferences”) should apply in place of the “best interests” principle.176

MENTAL HEALTH

Discrimination on the basis of disability is conspicuous in the area of mental health. At its ideological base are entrenched community attitudes toward intellectual and psychosocial disability, the stigma of mental illness, the inadequacy of health services and expertise, the paltry budgetary allocations, and the antiquated laws. The stigma of mental illness is reflected in the derogatory terms used to describe persons with intellectual or psychosocial disabilities. In Tonga, for example, the words faha, fakasesele, and taimi oma in the vernacular correspond to the English words “imbecile”, “insane”, “lunatic” and “mentally retarded.” 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 the product of the colonial past and pre-CRPD 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 on the grounds that a person has a mental impairment or disability, and/or he or she poses

176 CRPD General Comment No.1 on equal recognition before the law (2014) CRPD/C/GC/1, para [21].
a risk of harm to self or others. However, they contravene several CRPD rights and core principles, including the rights to health, legal capacity, liberty, and freedom from cruel or degrading treatment (torture). CRPD prohibits any discrimination on the basis of disability (Article 5) and emphatically states that “the existence of a disability shall in no case justify a deprivation of liberty” (Article 14(1). The Convention also upholds the right to physical and mental integrity on an equal basis with others (Article 17); directs States to provide health care “of the same quality to persons with disabilities as to others, including on the basis of free and informed consent” (Article 25(d)); and prohibits any restrictions on legal capacity based on disability (Article 12(2)), which mental health legislation typically does. A cross cutting principle of the CRPD is “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons” (Article 3).

The CRPD Committee has been consistently critical of mental health laws that sanction forced psychiatric treatment and detention as these violate core rights under the CRPD, causing needless suffering and being generally ineffective. In its General Comment No.1 on Article 12, the Committee stated its position:

As has been stated by the Committee in several concluding observations, forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16). ... *States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, as it is an ongoing violation found in mental health laws across the globe*, despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment. The Committee recommends that States Parties ensure that decisions relating to a person’s physical or mental integrity can only be taken with the free and informed consent of the person concerned.178

In addition, the CRPD Committee has called for an end using distinctions such as ‘competent and incompetent’, and ‘incapacity and capacity’ that are used to justify denial of legal capacity. Instead, States are required to ensure that people can get assistance in exercising their legal capacity, including through supported decision-making, representative support, and other interventions aimed at safeguarding rights to health, life and housing etc. In the context of mental health, this type of non-intrusive support takes many forms including crisis respite housing, alternatives to medication, individual advocacy, and family-based interventions and support.179

Most mental health law in the Pacific region falls within the orbit of the CRPD Committee’s criticism of conventional mental health law because it promotes forced psychiatric treatment and detention. In particular, it establishes the procedure for involuntary committal of a person deemed to be “insane.” The provisions in the Pohnpei and Kosrae State Codes and the FSM National Code typify this approach. Under the Pohnpei Code, the Court is authorized to “commit an insane person within its jurisdiction to any hospital for the care and keeping of the insane, or if the court deems best, to a member of the insane person’s family lineage or clan, which person may thereafter restrain the insane person to the

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177 CRPD Article 12(2).
178 CRPD General Comment No.1 on equal recognition before the law (2014) CRPD/C/GC/1, para. [42]. (Emphasis added).
180 Pohnpei State Code Title 17, Chapter 7; Kosrae State Code Title 6, Chapter 33.
extent necessary for his own safety and that of the public."181 Commitment can take place after two or more witnesses have testified, at least one of whom must be a doctor of medicine or medical practitioner. The legislation also outlines the procedure for temporary commitment (s.7-103) and the apprehension of absentees or escapees, against whom “such force as may be reasonably necessary” is permitted (ss.7-106).

Kosrae State makes provision for the forced transfer and detention of persons with mental illness or psychosocial disabilities (“insane persons”) who are committed to state custody by court order, and it authorizes involuntary medical treatment in an institutional facility.182 Like the national jurisdiction of FSM, the State otherwise has identical provisions to the Pohnpei State Code on the committal procedure, temporary commitment, and the use of force deemed necessary for personal and public safety.183

Similarly, RMI’s Public Health Safety and Welfare Act sanctions the committal of persons with psychosocial disabilities (“insane persons”) based on two witnesses (one a doctor); indefinite detention either in a hospital or other place of detention (including under family or clan supervision) and temporary confinement in “jails or penal institutions” in an emergency; the use of restraints including by family members “to the extent necessary for his own safety and that of the public”; and the apprehension and return to the place of detention of any escaping patient with permission to use “such force as may be reasonably necessary to effect such return.”184

Elsewhere, the mental health legislation of Vanuatu (Mental Hospital Act), Solomon Islands (Mental Treatment Act), Tuvalu (Mental Treatment Act) and RMI (Public Health, Safety and Welfare Act) reproduce the coercive and paternalistic approaches typical of the old medical model. The legislation requires either full repeal or a major overhaul in order to achieve harmonization with the CRPD.

The Solomon Islands Mental Treatment Act is currently under review (as of September 2020). As it was enacted a decade before the CRPD came into force, most of its provisions are outdated and inconsistent with Articles 12 and 14. The detention and guardianship provisions are consistent with the former medical model and a substitute decision-making system. Together these deprive persons with assumed “mental incapacity or incompetence” of their right to legal capacity, subjecting them to non-consensual psychiatric interventions and treatment, and forced hospitalisation. Other provisions authorize indefinite detention and treatment in a mental hospital of persons “suffering from mental disorder or defect”, and vest substantial powers in the police and courts to facilitate this.185

Tuvalu’s Mental Treatment Act conforms to this pattern. Its discriminatory stamp is evident in the coercive set of rules applied to persons with psychosocial disabilities; rules that restrict many of their fundamental rights, particularly the right to refuse healthcare interventions (Article 25), the right to liberty (Article 14), the right to freedom from cruel, inhuman or degrading treatment (Article 15), and the right to mental integrity (Article 17), all of which are enjoyed by others. The differences in treatment under the law arise due to perceptions on disability; and while the ostensible purpose of the Act is the “care and maintenance” of persons of “unsound mind”, the regime legitimizes forced psychiatric treatment and detention.

The detention provisions of the Mental Treatment Act (Part III) deal with the committal of persons with mental illness or psychosocial disabilities. The legislation requires either full repeal or a major overhaul in order to achieve harmonization with the CRPD.
disabilities to the mental health wing of the Funafuti Central Hospital, and the detention of prisoners of “unsound mind” who are awaiting trial, or persons found to be guilty but “insane”, or “insane” on arraignment in the same facility. There are sweeping powers for arrest and detention on the basis of disability. Under section 7, a person can be arrested if “deemed to be of unsound mind at large or not under proper care or control or who is cruelly treated or neglected by any relative or person having the care or charge of him.” A person brought before a magistrate under this section “or after having been apprehended under circumstances denoting a derangement of mind and a purpose of committing some crime” may be committed to the mental health wing if a medical examination indicates that “such person is a dangerous person of unsound mind or is a person of unsound mind who was wandering at large or was not under proper care and control...” (s.8). In an emergency situation, a person may be detained in the mental health wing without warrant or order if the medical officer in charge “ha(s) reason to believe” the person is “of unsound mind” (emphasis added).

A feature of this traditional approach is the implied criminalization of mental illness which is reinforced by the coercive content and language of the law. This includes the mandated arrest of “any patient, confined or detained in the mental health wing” who escapes the facility and confinement in a “cell” of a patient considered dangerous. While the Mental Health Wing Management Regulations caution staff to be restrained in behavior and language, and “no patient shall be struck”, the management style nevertheless is akin to a correctional facility with its rules including stripping on admission, seclusion for “refractory” patients, and sanctioned use of mechanical restraints in situations where it is anticipated that violence will inflict injury to self, others, or the buildings.

Such practices violate Article 15 (freedom from torture and cruel, inhuman or degrading treatment or punishment). In its concluding observations for Australia in 2013, the Committee raised concerns that persons with disabilities, particularly those with intellectual or psychosocial disabilities, were subjected to “unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion in various environments, including schools, mental health facilities and hospitals.” The Committee recommended that Australia:

- take immediate steps to end such practices, including by establishing an independent national preventive mechanism to monitor places of detention — such as mental health facilities, special schools, hospitals, disability justice centres and prisons —, in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions.

A few Pacific countries – Solomon Islands, Nauru, and Tonga – have attempted or are attempting reform of mental health laws and provide interesting insight into the extent to which harmonization with the CRPD is being achieved. While Solomon Island’s draft Mental Health Bill 2016 is intended to be a modern law that is consistent with contemporary standards, it remains problematic from a CRPD perspective.

In particular, it promotes the continuance of psychiatric institutionalization, forced detention and medical treatment, the use of restraints and seclusion, and substitute decision-making (plenary guardianship on the basis of a person having a psychiatric diagnosis), thereby denying persons with psychosocial disabilities

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186 See in particular Parts V and VI, and regulations under section 11 of Part IV.
187 Ibid. ss. 12-14.
188 Tuvalu - Mental Treatment Act ss. 7-11, 15-21.
189 Ibid. ss. 12-14.
190 Tuvalu - Mental Treatment Act, s. 23(1).
191 CRPD Committee concluding observations on the initial report of Australia (2013) CRPD/C/AUS/CO/1, para. [35-36].
their right to have and exercise legal capacity (Article 12) as well as their right to liberty on an equal basis with others (Article 14). 192

Nauru’s Mentally-disordered Persons Act 1963 requires repeal despite comprehensive amendments undertaken in the last few years. The Mentally-disordered Persons Act 2016 (Amendment) amends the definition of a mentally-disordered person to add an element of “serious danger to the health or safety of that person or others.” It also adopts non-discrimination principles; gives more attention to the care and needs of persons including children with a “mental disorder”; and provides for greater regulation. However, the amendment Act otherwise consolidates the principles and non-compliant approach of the principal Act consistent with the medical model approach. In particular, it continues to sanction committal (“inpatient treatment order”), non-consensual medical treatment, and the use of mechanical and body restraints and seclusion. It also retains the police powers to apprehend a wandering person if he/she is believed to be a “mentally-disordered person” who is not under “proper care and control.”

Further, under a new section (s.6A), there are provisions to regulate involuntary assessments and detention, police powers of arrest and processes, treatment orders, involuntary medical treatment/surgery (including, subject to court order, sterilization or a surgical operation upon an unborn child in emergency situations threatening the life or health of the patient, if the latter is deemed incapable of giving consent or is capable and refuses). Criminal penalties are imposed on any person trying to remove an involuntary patient from a treatment centre, or helping such a patient to leave. Under Nauru’s Mentally-disordered Persons (Amendment) No. 2 Act 2017, additional powers are conferred on authorized officers to stop a person from self-harm or harming others; “restrain a person for the purpose of having treatment administered”; “stop a person who is being involuntarily assessed or detained from leaving a designated mental health facility without authorisation;” and “return a person who is being involuntarily assessed or detained and who has left without proper authorisation to a designated mental health facility.” There are no regulations to guide the exercise of these powers and prevent excesses. Importantly, a new section under the Act on the rights of persons admitted to a mental health facility (s.6E (C)) does not appear to question the established practice of involuntary committal and treatment. A consent requirement applies only to the making of an audio or video recording, and even then, decision-making rights are waived (legal capacity denied) and substitute decision-making rights given to next of kin, if the person is deemed to be “unable to give consent.” 193

Tonga’s legislation also highlights the need for reform. The Mental Health Act is a relatively modern mental health law, enacted in 2001. However, like other Pacific legislation it is aligned to international standards that prevailed prior to the CRPD. 194 The Act establishes mechanisms for service users and those 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 like 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, appears in the ESCAP/PIFS legislative review for compliance with the CRPD (November 2019). 195 Nauru - Mentally-disordered Persons (Amendment) No. 2 Act 2017, s.6(E)(c).

192 A detailed critique of Solomon Islands’ draft Mental Health Bill 2016 was submitted by ESCAP to Solomon Islands in December 2017 at the request of the Ministry of Health and Medical Services. This had the benefit of specialist analysis of Dr. Piers Gooding, an expert in mental health law and international human rights law base as well as valuable input from the Human Rights and Disability Adviser for OHCHR Geneva, Facundo Chavez Penillas. A summary of the issues and recommendations for the Bill

193 Nauru - Mentally-disordered Persons (Amendment) No. 2 Act 2017, s.6(E)(c).

194 These pre-CRPD standards include WHO recommendations for mental health legislation and UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.
restrictions on the right to liberty are weighed against the right to life.

The Mental Health Act fails to comply with the CRPD because of the restrictions on the rights of persons with psychosocial disabilities, in particular on the rights to refuse healthcare interventions and to liberty. It contains several provisions that allow a person to be detained on the basis of a psychosocial or intellectual disability. For example, sections 26 and 27 permit a medical practitioner to detain an individual if he or she deems that the person meets the criteria for involuntary admission on the grounds of mental illness or mental disorder. Under section 44, the criteria for involuntary treatment are:

(a) the person has a mental illness and requires treatment that is available in the community; or
(b) as a result of mental illness the person is likely within the next months to cause imminent harm to himself or others, or is likely to suffer serious mental or physical deterioration unless treated,

and the person lacks the capacity to give informed consent to treatment for his mental illness or he has unreasonably refused treatment for his mental illness.

There are several problems with this formulation, both from a human rights perspective (as the CRPD Committee has outlined) and from a more pragmatic perspective, based on available evidence about the effectiveness of involuntary treatment and assessments of risk. The likelihood of a person causing imminent harm to self or others is difficult (even impossible) to predict. A growing body of evidence suggests that risk assessments and non-consensual psychiatric interventions under mental health law do not reduce the incidence of violent crime and other risks. Similarly, there is limited evidence to support the hypothesis that mental health regulations prevent self-harm and suicide.

From a human rights perspective, the Mental Health Act violates Article 14 and Article 12. The CRPD Committee has made it abundantly clear that there can be no exceptions to detaining persons on the basis of their actual or perceived disability, not even in crisis situations (i.e. the prohibition is absolute). Similarly, the Committee prohibits removing legal capacity from a person in any instance, even in crisis situations. Instead of establishing substitute decision-making schemes (e.g. guardianship), arrangements should be made to provide support, including supported decision-making, to persons with disabilities, if required. Safeguards are necessary to prevent any interference or undue influence by the support giver (Article 12(4)).

Article 19 is also relevant in this context because Tonga’s Mental Health Act allows for persons with mental illness to be forcibly removed from their communities and detained in a mental health facility (institutionalised) (s.18). Persons with disabilities are often presumed to be unable to live independently, so States ostensibly make arrangements for institutional care by professional caretakers for their protection. However, Article 19 recognizes the equal right of all persons with disabilities to live independently and be included in the community, with choices equal to others. It aims to prevent abandonment, institutionalisation and segregation in domestic and institutional settings and to promote more inclusive environments. Article 19 echoes the principles

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enshrined in the Convention, in particular “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons” (Article 3(a)). A precondition for human dignity is the right to make your own choices and to be allowed to participate freely and fully in society.

Like other mental health laws in the region, Tonga’s Mental Health Act also sanctions the use of restraint and seclusion on persons with psychosocial disabilities (ss.38 and 39) contrary to the strict guidelines of the CRPD and other international human rights mechanisms. The CRPD Committee has made clear in several concluding observations (including for Australia as noted above) that the use of any restrictive practices such as physical and chemical restraints, solitary confinement, and other harmful practices on persons with disabilities, particularly those with intellectual or psychosocial disabilities, is a violation of personal integrity and may even amount to torture.197

A number of reform initiatives are recommended for consideration by Pacific countries. These are discussed below in Part VII. It is important that all legislative provisions that perpetuate forced hospitalization and medical treatment, and restrictive practices like the use of mechanical and chemical restraints, are abolished as a matter of urgency. The CRPD Committee has called on States parties like Australia to review laws that allow for the deprivation of liberty on the basis of disability and “repeal provisions that authorize involuntary interment linked to an apparent or diagnosed disability.”198 It has also urged Australia to “repeal all legislation that authorizes medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders.”199 These directives serve as a guide for neighbouring Pacific island states who have similar non-compliant legislation.

**CRIMINAL LAW AND PROCEDURE**

**Criminal law**

- Human trafficking

Globally, trafficking in persons with disabilities, like violence against persons with disabilities, is still a generally invisible and under addressed issue. However, persons with disabilities are at particular risk of falling victim to violent crimes, including human trafficking, especially children and women with disabilities. Human Trafficking and Modern-Day Slavery Belgium, a Belgian non-governmental organisation, has reported that in the country’s major cities gangs organize begging rings using children and individuals with disabilities, typically from Romania.200 In China, there have also been incidents of abduction and forced labour of thousands of persons with intellectual disabilities, especially children, reported to the CRPD Committee. This has included evidence of slave labour in the provinces of Shanxi and Henan.201

**United Nations Convention against Transnational Organised Crime (UNTOC) and its protocols** make no reference to the situation of persons with disabilities. It should therefore come as no surprise that only a modest number of countries in the world have legislated to protect them against organized crime. The Pacific mirrors this global trend. Although an

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197 See concluding observations for Germany CRPD/C/DEU/CO/1, Austria CRPD/C/AUT/CO/1, Australia CRPD/C/AUS/CO/1, Azerbaijan CRPD/C/AZE/CO/1, Croatia CRPD/C/HRV/CO/1, Denmark CRPD/C/DNK/CO/1, Mexico CRPD/C/MEX/CO/1, Paraguay CRPD/C/PY/CO/1, Peru CRPD/C/PER/CO/1, Korea CRPD/C/KOR/CO/1 and Czech Republic CRPD/C/CZE/CO/1.
198 CRPD Committee concluding observations on the initial report of Australia (2013) CRPD/C/AUS/CO/1, para [32].
199 CRPD Committee concluding observations on the initial report of Australia (2013) CRPD/C/AUS/CO/1, para [34].
201 CRPD Committee concluding observations on the initial report of China (2012) CRPD/C/CHN/CO/1, para [29].
increasing number of island states have anti-trafficking legislation – Tuvalu\textsuperscript{202}, Tonga\textsuperscript{203}, Vanuatu\textsuperscript{204}, FSM\textsuperscript{205}, Pohnpei State\textsuperscript{206}, Kosrae State\textsuperscript{207}, Nauru\textsuperscript{208}, and RMI\textsuperscript{209} - there is little in the content of these laws that addresses the rights and needs of victims with disabilities.

Yet trafficking in persons with disabilities should be considered an extreme form of exploitation that requires special consideration. Article 16 of the CRPD requires States parties to “take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.” This covers a wide range of violations including physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, sexual abuse, abandonment, and harassment.

Given the vulnerability of persons with disabilities to human trafficking, it is important that regional human trafficking laws are more disability inclusive. For starters, the definition of “trafficking in persons” should include a reference to persons with disabilities. This is usually absent. Tuvalu’s \textit{Counter Terrorism and Transnational Organised Crime Act 2009} (s.3) and Nauru’s \textit{Immigration Act} (s.14) for example both provide a standard definition of “trafficking in persons” as “the recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of exploitation.”

Consideration should also be given to recognising disability as an aggravating factor. Pohnpei State for example authorizes the court to apply sentence enhancements to those convicted of human trafficking in certain circumstances, including when there is sexual assault, injury or death, long periods of servitude, and multiple victims.\textsuperscript{210} This provision could be broadened to recognize circumstances where a trafficking victim is a person with disability. FSM 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.”\textsuperscript{211} While this section recognizes the vulnerability of persons with disabilities to violence and abuse, and enhances sentencing, the term “handicapped” is outdated and should be avoided to comply with Article 8 of the CRPD (awareness-raising). As an alternative, the provision could read: “if the victim is a person with a disability.”

Other avenues for strengthening disability inclusion are available. The definition of exploitation could be broadened so that where the person subject to exploitation is a person with disability, exploitation includes forced prostitution or forced sexual services, forced begging, forced marriage and unpaid housework; payment of discriminatory wages including below minimum wage rates and gender wage disparities; employment in sheltered workshops where financial compensation or social protection is absent or inferior to what is available on the open labour market. These types of provisions are currently under consideration in RMI as are other amendments that make victim assistance, court protection and compensation provisions more disability inclusive.\textsuperscript{212}

Trafficking legislation sometimes specifies that assistance should be given to victims and

\begin{footnotes}
\item[202] Tuvalu – \textit{Counter Terrorism and Transnational Organised Crime Act 2009}.
\item[203] Tonga – \textit{Counter Terrorism and Transnational Organised Crime Act}.
\item[204] Vanuatu – \textit{Counter Terrorism and Transnational Organised Crime Act 2005}.
\item[205] FSM National Code Title 11, Chapter 6, Subchapter II, \textit{Trafficking in persons}.
\item[206] Pohnpei State Code Title 61, Chapter 8A \textit{Human Trafficking and Criminal Exploitation}.
\item[207] Kosrae State Code Title 13 Chapter 8 \textit{Anti-Human Trafficking and People Smuggling Act of 2013}.
\item[208] Nauru – \textit{Immigration Act} 2014.
\item[209] RMI – \textit{Prohibition of Trafficking in Persons Act 2017}.
\item[210] Pohnpei State Code Title 61, Chapter 8A, s.8A-109.
\item[211] FSM National Code Title 11, Chapter 6, s.617.
\item[212] RMI Rights of Persons with Disabilities (Consequential Amendments) \textit{Bill 2018}, Schedule 29, \textit{Prohibition of Trafficking in Persons Act 2017}.
\end{footnotes}
witnesses of trafficking. This is the case in FSM for example.\footnote{213 FSM National Code Title 11, Chapter 6, s.620.} Where this arises, all necessary support and assistance, including accessibility measures, reasonable accommodation, procedural accommodation, and health care, should be a requirement for any victim of human trafficking who is a person with disability. This would comply with Article 5 (reasonable accommodation), Article 9 (accessibility), Article 13 (access to justice), and Article 25 (health). Where legislation deals with the rights of victims including the right to information on legal rights, immigration rights, emergency assistance and other support, as in the case of Pohnpei State\footnote{214 Pohnpei State Code Title 61, Chapter 8A, s.8A-200 (1) & (2).} and Kosrae State,\footnote{215 Kosrae State Code, Title 13, Chapter 8 Anti-Human Trafficking and People Smuggling Act of 2013, s.13.814(2)(f).} trafficking legislation should expressly direct this information be made available in accessible formats (Braille, Easy Read) where required, and that there be live communications assistance such as sign language interpreters available at any stage prior to and during criminal proceedings. This would be consistent with the requirements of Article 9 (accessibility), Article 13 (access to justice) and Article 21 (access to information).

Restitution or compensation provisions provide another window for disability inclusion. In Pohnpei State, a person convicted of a trafficking violation is obligated to pay “mandatory restitution” to the victim.\footnote{216 Pohnpei State Code Title 61, Chapter 8A: Human Trafficking and Criminal Exploitation, s.8A-106(1).} The restitution scheme prescribes a list of items that need to be taken into account including relocation expenses, and the costs of medical and psychological treatment, housing and child-care.\footnote{217 Ibid. s.8A-106(2).} This list should be amended to include disability-related items such as mobility aids to cater for the needs of trafficking victims with disabilities.

- Weapons control

RMI, FSM and Pohnpei State have legislation that disqualifies access to weapons or firearms on the basis of disability.\footnote{218 RMI – Weapons Control Act, s.1305; FSM National Code Title 11, Chapter 10 Weapons Control, s.1005; Pohnpei State Code Title 68, Chapter 1 Weapons Control, s.1-105.} An identification card is a prerequisite for carrying, purchasing or using a firearm and all three jurisdictions prohibit the issuance of a card to a person who has been “acquitted of any criminal charge by reason of insanity”; “adjudicated mentally incompetent”, or “treated in a hospital for mental illness.” Additional disability-based restrictions demand that any person “suffering from a physical or mental defect, condition, illness or impairment” must provide medical certification that “the defect, condition, illness, or impairment does not make the applicant incapable of possessing and using a firearm or dangerous device without danger to the public safety.”\footnote{219 FSM National Code Title 11, Chapter 10, s.1005(7) & (8); Pohnpei State Code Title 68, Chapter 1, s.1-105(8); RMI Weapons Control Act, s.1305(7).}

These restrictions are discriminatory in targeting persons with intellectual and/or psychosocial disabilities, as well as persons with physical disabilities. They contravene the CRPD by:

- imposing restrictions on the possession of any firearm, dangerous device or ammunition solely or partly on the basis of disability (and the implied assumption of incapacity to operate a firearm);
- promoting stigma and prejudice against persons with disabilities implying that they are stereotypically violent and unpredictable; and
- using outdated, derogatory language.

Imposing restrictions on the possession of firearms or other dangerous devices does not in itself contravene the CRPD so long as the restrictions do not unfairly target or disproportionately affect persons with disabilities (or any other category of protected persons). In this case, the exclusions are discriminatory and in violation of Article 5.
(equality and non-discrimination). An alternative non-discriminatory and more effective way to approach the issue of restrictions, bearing in mind the issue of public safety, would be to permit them where there is evidence of violent behaviour or substance abuse, rather than status such as disability (or gender, age, ethnicity etc.) or misguided assumptions about the danger posed by persons with disabilities. This alternative approach would not only bring the legislation into compliance with the CRPD but would align it with a large body of empirical evidence about the predictors of violence globally. A personal history of violence or substance abuse is more predictive of a tendency to be violent in the future than a psychiatric diagnosis or any other disability.\textsuperscript{220}

As they stand, these provisions promote unfounded fears about persons with mental health conditions and other disabilities, thus undermining efforts to encourage communities to be more inclusive of persons with disabilities. It is recommended that they be removed and replaced with disability neutral criteria for testing competency and knowledge of firearm use and handling, applicable to anyone applying for an identification card. In the interests of public safety, restrictions applied to persons with convictions for violent or drug-related criminal offences should remain.

- Abortion

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

The criminalization of abortion conflicts with established international human rights law notably under CEDAW. It also fails to uphold a number of CRPD rights including the right to equality for women with disability, (Article 6) and the right to health (Article 25). In most Pacific island jurisdictions (Tonga, Solomon Islands, Tuvalu, Nauru, FSM, Kiribati, Fiji), abortion is generally illegal although there are sometimes exceptions, most commonly to preserve the life of the mother. In Solomon Islands, there are no exceptions. Section 158 of the Penal Code states:

\begin{quote}
Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any child poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing, or means to be administered or used to her, shall be guilty of a felony, and shall be liable to imprisonment for life.
\end{quote}

The same provision and punishment can be found in Tuvalu’s Penal Code (s.151). However, under section 227, “a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the benefit, or upon any unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.” As in the Solomon Islands, abortion is criminalized without exception in Tonga under the Criminal Offences Act, but a lower sentence of three years is imposed on a woman or girl for procuring her own miscarriage (s.104).

In Vanuatu, a woman convicted of procuring her own miscarriage under the Penal Code is liable to a two-year prison sentence. However, “good medical reasons” is a defence to any such charge (s.117). In Kosrae State, FSM, classify abortion as a category one felony incurring a penalty of up to 10 years in prison or a fine up to $20,000, or both. Nauru has the most complex legislation (Crimes Act 2016) and includes exceptions based on the serious danger posed by a continued pregnancy to the life, or physical or mental health of the woman, the pregnancy is the result of a rape or incest, or the person “suffers a severe developmental impairment.” These are regarded as “lawful medical procedures” (s.63). It is an offence to carry out an abortion that is not a “lawful medical procedure” (s.68), in which case a prison sentence of 10 years is applicable.

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. This is reflected in the traditional methods used to induce an abortion such as the consumption of herbal medicine, the insertion of a cassava stems into the uterus, and the administering of a stomach massage. All of these methods continue to persist notwithstanding their illegality and health risks to women. Importantly, there is a well-established link between the criminalization of abortion and maternal mortality/morbidity, with global research showing that most deaths from unsafe abortions occur in countries where abortion is severely restricted by law. This raises important medical and ethical arguments for consideration in any discussions about law reform. The imperatives of international, regional and domestic human rights commitments, in particular with regard to gender equality and non-discrimination, also call for the recognition of women’s sexual and reproductive health rights, including the sexual and reproductive health rights of women with disabilities.

The criminalisation of abortion and the harsh sentences that apply are not consistent with CEDAW, a treaty ratified by most Pacific island states. The CEDAW Committee has explained that the criminalization of health services that are only required by women (as is the case with abortion), and that inflict punitive measures against women who undergo an abortion, are a form of discrimination against women and a barrier to their access to health care. It has further stated that:

Violations of women’s sexual and reproductive health and rights, such as criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

This position has also been highlighted by the United Nations Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment who has asserted that:

the denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill treatment.

In many of its concluding observations (including for the Cook Islands and Tuvalu), the...
CEDAW Committee has therefore urged States to remove punitive measures imposed on women who seek an abortion. This is consistent with the *Beijing Declaration and Platform for Action*, which over two decades ago called upon governments to re-examine restrictive abortion laws that punish women.

From a CRPD perspective, there are also compliance issues. The criminalization of abortion is not consistent with the rights of women with disabilities to health (Article 25) and to respect for home and the family (Article 23). Article 23(1)(b) upholds “the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education ... and the means necessary to enable them to exercise these rights ...” In its General Comment on women with disabilities, the CRPD Committee discusses multiple barriers women with disabilities face in respect of realizing their sexual and reproductive health and rights. These barriers include being 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 issue of medical procedures or interventions without free and informed consent has been examined closely in the 2017 report of the United Nations Special Rapporteur on the rights of persons with disabilities. The report stresses that women and girls with disabilities “face significant challenges in making autonomous decisions with respect to their reproductive and sexual health, and are regularly exposed to violence, abuse and harmful practices, including forced sterilization, forced abortion and forced contraception.”

These sentiments were echoed by the CRPD Committee in its concluding observations for Australia in 2019, where the Committee stated that it was “seriously concerned about ... the ongoing practice of forced sterilization, forced abortion and forced contraception among persons with disabilities, particularly women and girls, which remains legal.”

Two legislations in Nauru raise a red flag in this context. Firstly, the *Mentally-disordered Persons (Amendment) Act 2016* allows the court to order “a surgical operation upon an unborn child” of a person with psychosocial disability treated and detained (s.6A). Secondly, as noted above, the *Crimes Act 2016* permits forced abortion on a pregnant woman who “suffers a severe developmental impairment” (ss. 63 and 68), where severe developmental impairment means an intellectual, mental, or physical condition, or combination of conditions, that results in a substantial impairment in the capacity to:

- understand the nature of sexual activity;
- foresee the possible results of a decision about sexual activity;
- make responsible decisions about sexual activity; or
- communicate decisions about sexual activity (s.63(3)).

These provisions are problematic as they authorize an abortion to be procured on a...
woman with intellectual, psychosocial or physical ability without her free and informed consent. Contrary to Article 12, the right to consent or refuse medical treatment is transferred to a third party (substitute decision maker) based on the perception that the pregnant woman is “incapable of consenting.” This violates multiple rights under CEDAW and CRPD including rights to equality and non-discrimination, legal capacity, family, health, and freedom from cruel and degrading treatment. As the CRPD Committee has lamented of the global situation, “Discrimination has occurred and continues to occur, including in brutal forms such as …forced and coerced abortion.”

As a general rule, abortion on the grounds of fetal impairment (disability) is not expressly permitted in Pacific legislation; but nor is it prohibited. This is a more contested area in human rights discourse with varying positions taken by the Human Rights Committee, the CRC Committee, the CEDAW Committee and the CRPD Committee. The CEDAW Committee for example considers that a severe foetal impairment is a legitimate ground for termination. From a CRPD perspective, such a practice 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). So too the 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 including harmful stereotypes about children (and in turn adult persons) with disabilities as “imperfect” specimens that are incapable of living meaningful lives and/or are less worthy, even unworthy, of protection and life (pre-natal eugenics).

The CRPD Committee has therefore criticised “laws which explicitly allow for abortion on the grounds of impairment” as they violate Articles 4, 5 and 8 of the Convention, stating that “experience shows that assessments on impairment conditions are often false. Even if it is not false, the assessment perpetuates notions of stereotyping disability as incompatible with a good life.” The Committee has further clarified that: “The principle of universality of all human rights is based on th(e) understanding that all human beings have equal worth and dignity and that all human beings should enjoy equal rights” and “a disability-selective antenatal screening policy … go(es) against the recognition of the equal worth of every person.”

In its concluding observations for the United Kingdom in 2017, the Committee urged that legislation permitting disability-based termination be reformed:

The Committee is concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment.

The Committee recommends that the State party amend its abortion law accordingly. Women’s rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of fetal deficiency.

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.

232 CEDAW Committee concluding observations on the combined third and fourth periodic reports of Tuvalu (2015) CEDAW/C/TUV/CO/3-4, para. [30(b)].
233 CEDAW Committee concluding observations on the combined third and fourth periodic reports of Tuvalu (2015) CEDAW/C/TUV/CO/3-4, para. [30(b)].
234 CRPD Committee Comments on the draft General Comment No. 36 of the Human Rights Committee on Article 6 of the International Covenant on Civil and Political Rights, para [1].
235 CRPD Committee General Comment No. 6 (2018) on equality and non-discrimination (First draft as at 31 August 2017 paras. [7 & 44]).
236 CRPD Committee concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland (2017) CRPD/C/GBR/CO/1, paras. [12-13].
One approach sometimes taken deals with abortion as a health issue where authority for terminations is vested in medical practitioners. Another approach conceptualizes abortion in terms of women’s reproductive rights and vests authority for the decision to terminate in pregnant women themselves. Most modern approaches to abortion are a hybrid of the two approaches giving women the right to have an abortion up to a designated number of weeks (usually 20-24 weeks) and then requiring authority from a medical practitioner afterwards. Pacific countries are encouraged to consider a full reproductive rights model that gives women autonomy over their bodies and the right to request a termination throughout their pregnancies. This is the approach most in line with CEDAW. At the very least, decriminalization should apply in cases where pregnancy results from rape or sexual abuse (incest), or where the pregnancy endangers the life or health (including mental health) of woman, as is the case in Nauru (see above).

For CRPD compliance, any law that authorizes or promotes disability-based terminations, whether in respect of a forced abortion on a pregnant woman with disability (as under Nauru law) or the consensual termination of an unborn child with a known or suspected impairment, should be repealed (or avoided).

- Idle behavior

Legislation that criminalises a range of innocuous but stigmatized behaviours closely associated with psychosocial, intellectual or physical disability is another colonial legacy. Variously categorise as “idleness”, “wandering”, “loitering” or “vagabonage”, these behaviours typically invoke suspicion of trespass, disorderly or dangerous behavior, a breach of public order or other “unlawful” purpose or conduct, even though there may be nothing to substantiate this suspicion. In view of such stereotypes, it is not surprising that persons with disabilities tend to be overrepresented globally in places of detention, commonly on account of loitering or trespass. They therefore unfairly bear the brunt of this misguided and discriminatory law.

Solomon Islands, Tuvalu and Tonga are amongst the Pacific countries that have this type of legislation. In the Solomon Islands, the connection between “wandering”, mental illness, and public disorder is strongly implied, including the assumption that a “wandering” person is likely to be of “unsound mind.” This is illustrated by section 19(1) of the Mental Treatment Act which allows the police to take into custody any person believed “to be suffering from mental disorder or mental defect and who is found wandering at large” and is considered likely “to be dangerous to himself or to others, or who, by reason of such mental disorder or mental defect, acts, or is likely to act, in a manner offensive to public decency.” The “wandering or dangerous person” may – under a court reception order - then be admitted into a mental hospital following a medical examination (s.22).

Tuvalu’s Penal Code is another anachronistic legislation dating back to the colonial era. One of the behaviours identified as idle and disorderly, and liable to imprisonment or a fine, refers to “any person wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather aims” (s167). While the purpose of this provision may be to eliminate begging in public places, reference to “deformation” makes the provision disability-specific and therefore discriminatory.
It raises the possibility of a person with a physical disability being charged with an offence under section 167 simply for being in public. Another form of purported idleness under the Penal Code arises where “any person [is] found wandering or loitering in or upon or near any premises or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose” is deemed to be a “rogue” and “vagabond”, and is guilty of a misdemeanour (s.168).

Under Tonga’s Criminal Offences Act, a person may be arrested without warrant if “found by night in any town in an enclosed yard, garden or other enclosed area without lawful justification for his presence” (s.175). This offence is liable to imprisonment for up to two years. With a slightly different emphasis, “vagabondage” is identified as an impediment to social order under the Town Regulations Act. In particular, “any able-bodied male person above the age of 16 years [who] appear[s] to the police to have no employment or profession nor means of providing for himself or those that depend on him or have failed to plant and provide sufficient food to keep himself and those that depend on him” may be charged with idleness and on conviction sentenced to three months imprisonment. A second conviction and failure to comply with a court order to plant food can incur a prison term of 12 months and a whipping of up to 25 lashes (s.4).

All these provisions are likely to promote discriminatory profiling and arbitrary detention, and disproportionately affect persons with disabilities (indirect discrimination). “Wandering” charges under Solomon Islands’ Mental Treatment Act, Tuvalu’s Penal Code and Tonga’s Criminal Offences Act are especially likely to affect persons with mental illness or psychosocial disabilities who are more prone to wander into and around public spaces due to a lack of community services or family support. The same goes for “idleness” charges under Tonga’s Town Regulations Act in view of the greater susceptibility of persons with disabilities to unemployment and economic insecurity. These provisions should be removed as they contravene Article 5 (equality and non-discrimination), Article 8 (awareness-raising), Article 9 (accessibility) and, importantly, Article 19, which requires States parties to facilitate full enjoyment by persons with disabilities of the right to live in the community and fully participate in community life. The homeless, the unemployed, and the poor, many of whom are likely to be persons with psychosocial or other disabilities, should have a right to use public spaces on an equal basis with others.

The use of criminal sanctions in this context is unwarranted and in violation of the CRPD. Punishing people for engaging in necessary and degrading life sustaining activities like begging or wandering in public places when there is no other means of livelihood or place to go, or for other forms of “idleness” like “vagabondage” in Tonga, or those with psychosocial disability “wandering at large” essentially criminalises poverty, homelessness, unemployment, lack of economic activity, and even, arguably, mental illness which results in forced hospitalization (detention). Begging and street wandering are activities over which affected persons have little or no control, so they should not be subject to regulation and criminal sanction. Such provisions should therefore be removed. Instead, the focus should be on policies that address the root causes of “idleness” (notably poverty, lack of housing and employment opportunities, mental illness, disability, discrimination, family-based violence etc.). Under Article 28 of the CRPD, persons with disabilities have a right to enjoy an
adequate standard of living and to be able to access social protection.\textsuperscript{238}

The penalty of whipping under section 4 of Tonga's \textit{Town Regulations Act} violates human rights under the UDHR (Article 5) as well as other key international human rights instruments like ICCPR and CAT, in particular the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.\textsuperscript{239} It is also likely to violate rights under CRPD, in particular Article 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment), Article 16 (freedom from exploitation, violence and abuse) and Article 5 (indirect discrimination) as it would disproportionately affect persons with intellectual, cognitive and psychosocial disabilities who are more susceptible to unemployment and a lack of livelihood as well as idle wandering ("vagabondage"). Section 4 should therefore be removed entirely. Under no circumstances should a person with disability be subject to whipping.

\textbf{Criminal procedure}

A key compliance issue 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." It is a highly contested area that requires substantial reform in order to recognize a range of pivotal rights under the CRPD.

- Unfitness to plead or stand trial due to unsoundness of mind

The "unfitness to plead or to stand trial" doctrine ("unfitness" doctrine) is applied in most common law jurisdictions across the Pacific including Solomon Islands, Tuvalu, Vanuatu, FSM and RMI. Its rules contravene a number of pivotal rights under the CRPD including non-discrimination, legal capacity, a fair trial, liberty, and access to justice, which has given rise to a vigorous challenge from the CRPD Committee. The doctrine is closely associated with the insanity defence, and the rights violations are essentially the same, so there is some overlap in the analysis below.

Solomon Islands and Tuvalu both have very similar provisions, applying the doctrine of "unfitness" to persons deemed to be "of unsound mind" or with a "disease of mind" who face criminal charges.\textsuperscript{240} Under the Criminal Procedure Code of Solomon Islands, the court can conduct an inquiry into the unsoundness of mind of the accused if it "has reason to believe that the accused is of unsound mind so that he is incapable of making his defence" (s.144). The court 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(2)). The Governor General may then direct that the accused be detained in a mental hospital or "other suitable place of custody" until such time as the Governor General makes another order or the court finds the accused capable for making a defence (ss.147-148). A similar procedure for detention at the Governor General's pleasure is prescribed under section 149 where the accused is not deemed 'insane', but is considered incapable of understanding the proceedings.

Likewise in Tuvalu, the \textit{Criminal Procedure Code} authorizes the court to inquire into the state of the accused's mind during the course of a trial or preliminary investigation if it "has reason to believe that the person "is of unsound mind so that he is incapable of making his defence" (s.144). It can then postpone proceedings if the accused is found to be of constituting a violation of his right to be free from cruel, inhuman and degrading treatment under Article 7. Sooklal v. Trinidad and Tobago, Comm. 928/2000, U.N. Doc. A/57/40, Vol. II, at 264 (HRC 1905).

\textsuperscript{238} For a more detailed discussion on the issue of begging in the context of advocacy to decriminalize it in Victoria, Australia, see Pilch Homeless Persons Legal Clinic (2010) \textit{We want change! Calling for the abolition of the criminal offence of begging}.

\textsuperscript{239} In 2000, the Human Rights Committee found that the sentencing of a man to a whipping in Trinidad and Tobago constituted a violation of his right to be free from cruel, inhuman and degrading treatment under Article 7. Sooklal v. Trinidad and Tobago, Comm. 928/2000, U.N. Doc. A/57/40, Vol. II, at 264 (HRC 1905).

\textsuperscript{240} See in particular Solomon Islands Criminal Procedure Code ss.144-149 & 256; and Tuvalu Criminal Procedure Code ss. 144-145 & 246.
“unsound mind”; and “order the accused to be confined in a mental health wing or other suitable place of custody.” Trial postponement and detention periods are indefinite. Another provision allows the court to pronounce an accused person “of unsound mind, and consequently incapable of making his defence” if the person “stands mute of malice, or neither will, nor by reason of infirmity can answer directly to the information” i.e. is unable to take a plea. The court may then order that the trial be postponed and the accused person “be kept meanwhile in safe custody in such place and manner as the court things fit…” (s.246).

A similar procedure is followed in FSM. In Kosrae State, a person is not considered criminally responsible if, at the time of the commission of the offence, he or she lacks capacity “as a result of physical or mental disease, disorder, or defect ….”241 Under both Kosrae state law and FSM national law proceedings are suspended if a defendant “lacks fitness to proceed” and the court is authorized to commit the defendant to “an appropriate institution for the purpose of restoring fitness to proceed. If the court is satisfied that the defendant may be released on conditions without danger to himself or herself or to the person or property of another, the court shall order his or her release, which shall continue at the discretion of the court, on such conditions as the court determines necessary.”242

Vanuatu’s Penal Code gives more attention to the “insanity defence” but also applies the “unfitness” doctrine. Under section 13, a medical report is prepared for any person charged with a criminal offence who is considered to be unfit to plead or stand trial “by reason of insanity or other mental disorder.” The court is directed to make an order placing the person under guardianship. Finally, RMI’s Criminal Code 2011 states that: “No person who as a result of mental disease or defect lacks capacity to understand the proceedings against such person, or to assist in his or her own defense, shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.”243

The terms “of unsound mind” and “disease of the mind” and the associated doctrine of unfitness to plead to a criminal charge or to stand trial are outdated and demeaning concepts that specifically refer to persons with intellectual and/or psychosocial disabilities. They raise compliance issues at the heart of the CRPD, as do the discontinuance of criminal proceedings on the basis of disability and the detention that follows (as illustrated above in the legislation of Solomon Islands, Tuvalu, and FSM). Of particular concern here is the right to legal capacity. Article 12(1) and (2) of the CRPD establish that “persons with disabilities have the right to recognition everywhere as persons before the law”, including the right to “enjoy legal capacity on an equal basis with others in all areas of life.” A person’s mental competence can never be used to justify denying or depriving that person of legal capacity, so persons with intellectual and/or psychosocial disabilities must always be able to enjoy this right like anyone else, no matter the competency challenges they may face. Moreover, they are entitled to support, including supported decision-making and procedural accommodation, to enable them to make decisions that have legal effect, to give instructions and evidence, and otherwise participate in a trial process. Article 12(3) obliges States parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

Criminal procedures cannot be discontinued without serious consequences for the defence of the accused who has a right to due process and a fair trial just like anyone else, with procedural accommodation. However, common law countries have contended that “special defences” like the “unfitness to stand trial” rules

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241 Kosrae State Code Title 13, Chapter 1, s.13.104(2).
242 Kosrae State Code Title 13, Chapter 1, S.13.104(2)(g).
243 FSM National Code Title 11, Chapter 3, s.304(2).
244 RMI – Criminal Code 2011, Article 4, s. 4.04.
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. 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/incapacity and they typically involve alternative procedures with fewer or no due process rights. In particular, a person is denied the right to plead guilty and so to test the evidence against him or her with access to the full range of defences. Further, there is the likelihood of a period of detention that is far longer than the sentence that would follow a typical trial. In many countries, persons found unfit to stand trial can be detained indefinitely because – it is argued – the person is being held for ‘therapeutic’ rather than punitive purposes.

The CRPD Committee has argued that decisions about a person’s capacity to stand trial are not driven by therapeutic or humanitarian considerations but by discriminatory social perceptions and stereotypes, as well as a preoccupation with risk and court efficiency, with courts showing a preference for diverting the person to community or prison-based services. Defendants with psychosocial disabilities (“mental disorders”) are likely to be perceived as posing an unquantifiable danger, and this leads to a disproportionate focus on risk management. Of particular concern is what appears to be an underlying assumption that a person will eventually become fit to plead/stand trial, as this can be used to justify lifelong incarceration of persons who have an incurable mental illness or psychosocial disability. This assumption and perceived danger are evident in Pacific legislation.

The CRPD Committee has further clarified that:

(i) abolish declarations of incompetency as a means to limit legal capacity and justify a deprivation of liberty; and

(ii) adopt disability-related support measures in order to make accessible the mainstream substance and procedures of law.

Accordingly, the Committee has consistently advanced the view that there is a need to:

The Committee has gone further to assert that detaining a person on the basis of a disability amounts to the arbitrary deprivation of liberty. This standard and its application have been elucidated in General Comment No. as well as in concluding observations for Belgium, Denmark, Mexico, Korea and Ecuador amongst other states parties where the Committee has expressed concern about the 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 one Pacific example of legislation that does have a mandatory review process (Criminal Procedure Code s.146).

In its concluding observations for Belgium in 2014, the Committee summed up the arguments as follows:

The Committee is concerned that the new Act on the Confinement of Persons, adopted in May 2014, which governs safety measures applicable to persons who have been deprived of legal capacity, is not in conformity with the Convention. The measures are forms of social punishment that are adopted not on the basis of the principle of proportionality, but rather in response to a person’s perceived “dangerous” state. The procedure used to put in place safety measures for persons who have been deprived of legal capacity is not in accordance with the procedural guarantees established in international human rights law, such as, inter alia, the presumption of innocence, the right to a defence and the right to a fair trial.

The Committee recommends that the State party revise the Act of May 2014 to remove the system of safety measures applicable to persons with disabilities who have been deprived of legal capacity. Persons with disabilities who have committed a crime should be tried under the ordinary criminal procedure, on an equal basis with others and with the same guarantees, although with specific procedural adjustments to ensure their equal participation in the criminal justice system.250

The unfitness to plead and stand trial provisions in Pacific jurisdictions should be repealed to enable defendants with intellectual (cognitive) and/or psychosocial (mental health) disabilities to go through the same criminal justice process as any other person charged with an offence. They are entitled to a fair trial like any other defendant (with reasonable and procedural accommodation); to assistance with decision-making (for exercising legal capacity); and to deprivation of liberty only on conviction of an offence following a fair trial (instead of indefinite custody based on an impairment). The harsh injustice of contemporary practice is seen in a number of communications and individual complaints to the CRPD Committee under Article 5 of the CRPD Optional Protocol. In one such case involving Australia, the author (complainant) - an Aboriginal man with intellectual impairment charged with common assault but found not guilty by reason of his mental impairment - was held in maximum security in a correctional facility for 5 years and 10 months, during which time he was confined to his cell in isolation for long periods and his mental health deteriorated. The man’s detention period was nearly six times longer than the sentence a person without disability would have served (12 months) on conviction for the same offence. The Committee found discrimination on the basis of disability and violation of rights under Articles 5, 12, 13, 14 and 15.251

- Defence of unsoundness of mind (Insanity defence)

The insanity defence is a long-established “special defence” found in common law jurisdictions across the Pacific including Vanuatu, Solomon Islands, Tuvalu, FSM, and RMI. It is another archaic area of law that is usually expressed in cumbersome legislative

250 CRPD Committee concluding observations on the initial report of Belgium (2014) CRPD/C/BEL/CO/1, paras. [27-28].
251 Views adopted by the Committee under Article 5 of CRPD Optional Protocol concerning communication No. 17/2013 (Christopher Leo v Australia), 18 October 2019, CRPD/C/22/D/17/2013. See also Views adopted by the Committee concerning communication No. 7/2012 (Marlon James Noble v Australia), 10 October 2016, CRPD/C/16/D/7/2012; and concerning communication No.18/2013 (Manuway (Kerry) Doolan v Australia), 17 October 2019, CRPD/C/22/D/18/2013.
text and derogatory terms like “insane” and “criminal lunatic.” The provisions contravene several articles under the CRPD including the right to legal capacity (Article 12), the right to liberty and security of person (Article 14), the right to access justice (Article 13), and the right to dignity and avoidance of stereotypes (Article 8). They also breach non-discrimination principles under Article 5 including the obligation to “recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law” (Article 5(1)).

In Vanuatu, the defence of insanity is established under section 20 of the Penal Code. It essentially hinges on demonstrating that the person facing a criminal charge “was at the time in question suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable effects of his conduct…” (s.20(2)). A finding of insanity results in an acquittal, after which the court may issue an order for confinement (s.20(3)).

The insanity defence provisions are more detailed in Solomon Islands and Tuvalu. In Solomon Islands, they are set out in the Penal Code (ss. 11-12) and the Criminal Procedure Code (s.146). The Penal Code deals with the presumption of sanity (s.11) and exemption from criminal responsibility for any act or omission if at the time the person “is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission.” (s.12) Section 146 of the Criminal Procedure Code in turn establishes the defence of insanity in a trial and outlines the consequences that flow for the accused person where this defence succeeds. In essence, a person may be found not guilty on the ground of insanity, and on that basis admitted to a mental hospital, prison or “other suitable place of safe custody” at the pleasure of the Governor-General. The detention is reviewed at the end of three years and thereafter at the end of every two years taking into account “the condition, history and circumstances of the person so detained.” (s.146(2)) The Governor General has the discretionary power to order the discharge, subject to conditions, on these occasions or at any other time on application (s.146(3) and (4)). He/she is also able to order the transfer of a detained person from/to a mental hospital, prison or other place of custody (s.146(5)).

Tuvalu’s insanity defence provisions are likewise found in both its Penal Code and Criminal Procedure Code. Part IV of the Penal Code establishes the general rules governing criminal responsibility, which include the presumption of sanity (s.11) and the defence of insanity where a “person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission …” (s.12). Under the Criminal Procedure Code, the court is permitted to make “a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission” where it finds on the evidence submitted during trial that when the act was done or omission made “he was by reason of a disease of mind labouring under such defect of reason as to be incapable of knowing the nature and quality of the act, or, if he did know it that he did not know it was contrary to law” (s.146(1)). On the basis of this “special finding”, the court can order the accused be kept in custody as “a criminal lunatic” (s.146(2)) pending an order by the Minister that “such person to be confined in a mental health wing, prison or other suitable place of safe custody” (s.146(3)). Unlike Solomon Islands, Tuvalu has no prescribed review requirements. Other examples can be found in the legislation of FSM and separately.
The “insanity defence” is usually considered advantageous as disability is factored in. If it is found that the person committed the offending act (actus reus) for which he or she is charged, but without reference to whether there was criminal intent (mens rea), the person has the prospect of an acquittal, so avoiding conviction. However, contrary to popular opinion and to some extent idealised representations, the so-called 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. Like the “unfitness” doctrine, the defence rests on denying capacity for criminal responsibility (legal capacity) because of an intellectual and/or psychosocial (mental) disability. It implies that such a person is incapable of criminal liability.

A thematic study by the OHCHR on enhancing awareness and understanding of the CRPD highlights that in the area of criminal law:

> recognition of the legal capacity of persons with disabilities [Article 12] requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead, disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant.\(^{253}\)

No restriction should therefore be placed on the criminal responsibility (legal capacity) of a person on the basis of a perceived (or actual) mental incapacity. Instead, the person should be provided with support to exercise his or her legal capacity with appropriate safeguards as outlined in Article 12.

The insanity defence also builds the foundation for 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 – indeed for the rest of his or her life. There do not appear to be any provisions in Pacific legislation that set out a timeframe for detention in cases of “insanity” or “unsoundness of mind.” Moreover, as discussed above in relation to the unfitness doctrine, the deprivation of liberty (“confinement”) is arbitrary as it is based on the disability, and is determined without any of the rights and procedural safeguards guaranteed to others. The indefinite, discretionary, and arbitrary nature of the “confinement” thus points to a criminal procedure without boundaries. Article 14(1)(b) prohibits the “arbitrary” deprivation of liberty and emphatically states that “the existence of a disability shall in no case justify a deprivation of liberty.”

Mainstream processes in the criminal justice system can and should respond in non-discriminatory ways to specific situations in which a person is found to have committed a crime without criminal intent or knowledge due to mental impairment, or is unable to take part independently in criminal proceedings due to a disability. It is imperative that persons with disabilities have the same rights as other accused persons, including the same range of defences, the same capacity to test (cross examine) evidence, and dispositions that order definitive sentencing following conviction rather than arbitrary and indefinite detention as is currently the case. All non-compliant provisions such as those identified above should be repealed, and persons currently detained on the basis of “insanity” (or “unfitness to plead” or “stand trial”) should have their cases reviewed with some 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 UN agencies during the reform process.
FAMILY BASED VIOLENCE AND SEXUAL VIOLENCE

There is a well-established misconception that no-one would intentionally hurt a person with disability. In fact, empirical studies in both developed and developing 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 subject to multiple and intersectional discrimination by virtue of their gender, age, disability, ethnicity, and other identities. This special vulnerability has been noted with concern by the CRPD Committee in its General Comment No. 3:

Women with disabilities are at a heightened risk of violence, exploitation and abuse compared to other women. Violence may be interpersonal or institutional and/or structural. Institutional and/or structural violence is any form of structural inequality or institutional discrimination that keeps a woman in a subordinate position, whether physically or ideologically, compared with other people in her family, household or community.254

The Pacific is no exception to this global trend although due to the stigma associated with disability, violence against persons with disabilities is often invisible. Tonga provides one example of the susceptibility of young women or girls with disabilities to physical and sexual abuse 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, and who fear the consequences.255

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. Article 16(1) of the CRPD exhorts States parties to protect persons with disabilities from violence. In particular, it directs that they should take “all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.” The phrase “all forms of exploitation, violence and abuse” covers a wide range of violations including physical, psychological or emotional violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, sexual abuse, abandonment and harassment. Article 6(1) recognises the multiple discrimination faced by women and girls with disabilities and obligates States to “take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

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 despite the violent excesses of patriarchal power relations. Family protection legislation in the region seeks to protect persons in domestic relationships from violence and to this end establishes protective mechanisms like protection orders. It also clarifies police powers and duties, addresses the health and safety needs of victims of domestic violence, and prescribe a range of offences and penalties.

From a CRPD perspective, more needs to be

254 CRPD Committee General Comment No. 3 (2016) on women and girls with disabilities CRPD/C/GC/3 para. [29].

255 Mission visits to Vaiola Hospital and Women and Children Crisis Centre, Nuku’alofa June 2017.
done to recognize the intersectionality of gender and disability that places women and girls with disabilities at greater risk of family-based violence. Silence on disability and narrow definitions of domestic violence and domestic or family relationships speak directly to a lack of disability inclusion. Globally, persons with disabilities are commonly looked after by non-family members (caregivers) in domestic settings or live in institutional settings where they are either cared for by family or professional staff. Comprehensive definitions of “domestic relationship” are therefore needed to capture the full range of relationships that usually apply to persons with disabilities. In particular, it is important to ensure that protection extends to those who are under the care of a non-family member/caregiver in a home setting (formal care) or who are cared for in a residential or other institutional facility (formal setting).

The definition of a “domestic relationship” in Pacific legislation can be quite narrow with the focus on conventional family relationships (marital, relative, family member) and settings (home) which do not capture these other relationships. This is reflected in Vanuatu’s Family Protection Act 2008, RMI’s Domestic Violence Prevention and Protection Act 2011, and Kosrae State’s Family Protection Act. Solomon Islands’ Family Protection Act 2014 includes a “domestic worker” relationship; however, this is not defined. A more expansive definition can be found in Nauru’s Domestic Violence and Family Protection Act 2017 where a “domestic relationship” arises where 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 from violence (s.4) (emphasis added). 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 to 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 the perpetrator “otherwise harms or endangers the health, safety or well-being of the victim or other person at risk.” There is no mention of failure to provide support and the necessities of life (neglect), economic abuse, or denial of personal mobility or accessibility including access to assistive devices.

By contrast, RMI is currently considering comprehensive amendments to the definition of domestic violence under its Domestic Violence and Protection Act 2011. The proposed amendments incorporate psychological abuse and intimidation, and economic abuse, both of which are defined in detail. Commendably, the draft amendments shine an unprecedented light on social isolation, segregation, exclusion from family or community activities, and other restrictions on freedom of movement globally experienced by persons with disabilities in household care settings, 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 or mechanical restraints, forced detention in a residential care, psychiatric or other institutional facility, or “any other non-consensual intervention that violates the rights and dignity of a person with disability, particularly a woman or girl with disability.” All these acts typically
take place with the consent and/or support of family caregivers.

As other Pacific countries consider future reform of their family protection legislation, they are urged to broaden their definitions of domestic violence (and in turn domestic violence offences) to cover the multiple situations and ways in which violence, exploitation and/or abuse against women with disabilities can be perpetrated, in violation of Article 16. The CRPD Committee has drawn attention to this in its General Comment No. 3, highlighting the following forms of violence:

(i) the acquisition of a disability as a consequence of violence;
(ii) physical force;
(iii) economic coercion;
(iv) trafficking and deception;
(v) misinformation;
(vi) abandonment;
(vii) the absence of free and informed consent and legal compulsion;
(viii) neglect, including the withholding or denial of access to medication;
(ix) the removal or control of communication aids and the refusal to assist in communicating;
(x) the denial of personal mobility and accessibility by, for example, removing or destroying accessibility features such as ramps, assistive devices such as white canes or mobility devices such as wheelchairs;
(xi) the refusal by caregivers to assist with daily activities such as bathing, menstrual and/or sanitation management, dressing and eating, which hinders enjoyment of the right to live independently and to freedom from degrading treatment;
(xii) the withholding of food or water, or the threat of doing so;
(xiii) the infliction of fear by intimidation through bullying, verbal abuse and ridicule on the grounds of disability;
(xiv) the harming or threat of harming, removing or killing pets or assistance dogs or destroying objects;
(xv) psychological manipulation; and the exercise of control, for example by restricting face-to-face or virtual access to family, friends or others.257

Legislation is generally lacking in any provisions that facilitate complaints and investigations for persons with disabilities, thus potentially undermining 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. This might for example take the form of communication assistance (e.g. sign language interpretation) during police reporting, interviews and investigations; personal assistance during trial; or adjustment to the pace of court proceedings. Persons with disabilities, especially those with intellectual or sensory disabilities, may have difficulties filing a complaint or seeking a protection order.

Like RMI, Tuvalu makes 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.”258 This anticipates the difficulties that women with disabilities or older women might face making an application to the court for a protection order. Importantly, surrogate applications require the oral or written consent of the complainant, which ensures that the autonomy and legal capacity of a complainant with disability will not be compromised (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.”259 These provisions violate a number of CRPD rights including the right to legal capacity (Article 12).

257 Ibid. para. [31].
258 Tuvalu – Family Protection and Domestic Violence Act 2014, s. 8(2).
259 Tonga – Family Protection Act 2013 s. 9(3).
To treat an offence perpetrated against a person with disability as aggravated and therefore liable to more severe penalties is entirely consistent with the obligations arising under the CRPD. Article 16 requires States parties to “take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.” Pacific jurisdictions vary in the way they approach this matter. Disability is not considered an aggravating factor in Vanuatu, Tuvalu, RMI or Kosrae State.

However, a few other jurisdictions – notably Solomon Islands, Nauru and Tonga – do so, signaling a positive recognition of the special vulnerability of women with disabilities to acts of domestic violence. Under Nauru’s *Domestic Violence and Family Protection Act 2017*, the court is directed to consider commission of an offence against a person with a disability as aggravating circumstances (s.37). Tonga’s *Family Protection Act 2013* has a similar provision although the term “special needs” is used, which is not CRPD compliant and could arguably include persons other than those with disabilities. Solomon Islands provides the most comprehensive response with its *Family Protection Act 2014* applying this principle not only to an offence of domestic violence but also to any breach of a police safety notice or protection order (s.62(b)).

Vanuatu, Solomon Islands, Tuvalu, and Tonga are amongst 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. The legislation should be amended to require the court when making an order for restitution or compensation to take into account additional expenses that might arise in relation to a disability, for example, the 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 to the accommodation.

A few jurisdictions have family protection bodies. These take different forms such as a Family Protection Advisory Council in Tonga and Solomon Islands, and a Family Protection Coordination Committee in Nauru. None of these bodies has any representation of women with disabilities or other persons with disabilities. Representation by a national disabled persons organization would be desirable to improve disability inclusion and ensure compliance with Article 4(3).

Wide-ranging reforms are needed to harmonize family protection legislation with the CRPD. Compliance gaps have already been highlighted by the CRPD Committee in respect of Vanuatu. It is expected that similar concerns will be expressed as other Pacific States come under its radar with their reports.

**Sexual offences**

Four issues of relevance to persons with disabilities arise in this context: the denial of legal capacity; sexual and reproductive health and rights; marital rape; and disability as an aggravating factor for the purpose of sentencing. All issues highlight multiple and intersectional forms of discrimination based on gender and disability faced by women and girls with disabilities.

- Denial of legal capacity

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260 Vanuatu – *Family Protection Act 2008*, s. 22.
261 Solomon Islands – *Family Protection Act 2014*, s. 63.
262 Tuvalu – *Family Protection and Domestic Violation Act 2014*, s. 41.
267 CRPD Committee concluding observations on the initial report of Vanuatu (2019) CRPD/C/VUT/CO/1.
The right to legal capacity arises as an issue in section 115 of Tuvalu’s Penal Code, which establishes the offence of defilement of an “idiot or imbecile” and states:

(1) Any person who …
(b) has or attempts to have unlawful sexual intercourse with any female idiot or imbecile woman or girl under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanour, and shall be liable to imprisonment for 5 years.

A virtually identical offence of defilement of an “idiot or imbecile” can be found in the Penal Code (s.143) of Solomon Islands prior to its repeal in 2016. While Tonga’s Criminal Offences Act lifts the bar to classify such unlawful conduct as rape (rather than defilement), the language and underlying premise in respect of women with disabilities remain the same. In particular, section 118(1)(c) includes in the elements of rape that the violated female is “feeble minded, insane or is an idiot or imbecile as to be incapable of giving or refusing consent” (s.118(1)(c)). Similarly, in respect of the offence of indecent assault, section 124(6) establishes that:

A person who is feeble minded, insane or an idiot or imbecile cannot in law give any consent which would prevent an act being an indecent assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on such woman by reason of that incapacity to consent, if that person knew or had reason to suspect her to be feeble minded, insane or an idiot or imbecile.

By way of comparison, both Pohnpei and Kosrae States establish the offence of sexual assault where any person who “intentionally subjects another person to sexual contact or penetration, or forces another person to make a sexual contact or penetration on himself or another, or on a beast, without the other person’s consent, or under conditions in which the defendant knows or should know that the other person is mentally or physically incapable of resisting or understanding the nature of his conduct shall be guilty of sexual assault … (emphasis added)”.

In all these jurisdictions, there may be a laudable intention to protect women with intellectual or psychosocial disabilities from sexual violence. However, as they stand, these provisions are unacceptable from a CRPD and human rights perspective. Firstly, the terms “idiot”, “imbecile”, “feeble minded” and “insane” are disrespectful, and therefore not compliant with Article 8. Secondly, a blanket determination that any person deemed to be an “idiot”, “imbecile”, “feeble minded” or “insane” is incapable of giving or refusing consent even if over the age of consent undermines the sexual agency and autonomy of women with intellectual or psychosocial disabilities including their right to engage in consensual sexual relationships and control their own sexual and reproductive decision-making. This is a denial of legal capacity contrary to Article 12, including the right to freely enter consensual sexual relationships.

Thirdly, the implied criminalization of consensual sexual relations with an adult woman with psychosocial and/or intellectual disability violates her rights to privacy (Article 22) and respect for home and family (Article 23), and threatens to compromise her right to health (Article 25), which includes the right to sexual and reproductive services on an equal basis with others. Lastly, the requirement of legal barriers for persons with disabilities wishing to engage in consensual sexual relationships, and difficulties accessing sexual and reproductive health and rights services and
force or the threat of force (“subjects another person”) as implied in the Pohnpei and Kosrae State provisions, does not recognise 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 in the case of women with disabilities, whether sensory, physical, intellectual or psychosocial disabilities. The CEDAW Committee states in General Recommendation 35 that the definition of sexual crimes must be based on the lack of freely given consent. As already the practice in some Pacific jurisdictions like Solomon Islands and Tonga, it is therefore important to ensure that there are no requirements for force in sexual offences, only absence of consent. As the CRPD Committee has noted:

women with disabilities are subjected to high rates of forced sterilization and are often denied control of their reproductive health and decision-making, the assumption being that they are not capable of consenting to sex. Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than on men. Therefore, it is particularly important to reaffirm that the legal capacity of women with disabilities should be recognized on an equal basis with others.

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. It is important to achieve this balance. Recent reform in Solomon Islands seems to provide a positive example. 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 of Solomon Islands Law Reform Commission appears to be the need to protect a person with a “significant disability” from unconscionable conduct by a person, namely 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. As the Commission explains:

The offence is committed when a person has, or attempts sexual intercourse with a person who has a significant disability, knowing that the person has a significant disability and has attained the person’s acquiescence in submission to participation in or undertaking of the act by taking advantage of the disability.

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:

(1) “significant disability” means an intellectual, mental or physical condition or impairment (or a combination of more than one of these types of condition or impairment) that affects a person to such an extent that it significantly impairs a person’s capacity to:

education. The 1993 Act had a ‘chilling effect’ - significantly affecting the ability of persons with disabilities to enjoy the privacy necessary for intimate consensual relationships and to access education on sexuality and sexual health. http://www.inclusionireland.ie/content/page/sexual-relationships. The Act was repealed in 2017 and replaced by the Criminal Law (Sexual Offences) Act 2017. This shifted the focus to determining the capacity of persons with “mental or intellectual disability or a mental illness” to consent to sexual intercourse. As such, it also falls short of CRPD compliance as the test of capacity to consent (to make the decision to have sexual contact) only applies to persons with disabilities, and remains a denial of legal capacity based on perceived mental incapacity.

271 See CEDAW Committee General Recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation 19.
272 CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1, para. [35].
(a) understand the nature of sexual conduct; or
(b) understand the nature of a decision about sexual conduct; or
(c) communicate decisions about sexual conduct.

(2) A person (the “offender”) commits an offence if:

(a) the offender has sexual intercourse with a person with a significant disability; and
(b) the offender knows the person has a significant disability; and
(c) the offender knows that the person is submitting to the sexual intercourse as a result of the disability.

Maximum penalty:
Life imprisonment.

(3) A person (the “offender”) commits an offence if:

(a) the offender commits an indecent act on or in the presence of a person with a significant disability; and
(b) the offender knows the person has a significant disability; and
(c) the offender knows that the person is submitting to act as a result of the disability.

Maximum penalty:
(a) if the victim is a child and the offender is a person in a position of trust in relation to the child – 10 years imprisonment; or
(b) if the victim is under 13 years of age – 10 years imprisonment; or
(c) if the victim is between 13-15 years of age - 7 years imprisonment; or
(d) in any other case – 5 years imprisonment.

(4) To avoid doubt, subsections (2) and (3) apply even if the offender and the other person are married or in a marriage-like relationship.

These provisions in Solomon Islands law appear to shift away from the traditional denial of sexual agency and capacity of persons with intellectual or psychosocial disabilities while at the same time improving the legal protection of women and children with disabilities who are especially vulnerable to sexual violence and abuse. However, as with Pohnpei’s law on sexual assault (s.5-141), it is unknown how these new provisions are working in practice. It is imperative that they are applied only in situations of assault rather than anything resembling consensual relationships.

Sexual and reproductive health and rights

As discussed above in the context of reforming domestic violence legislation, Pacific legislative frameworks do not protect persons with disabilities (particularly women and girls with disabilities) from a range of violent non-consensual medical and other procedures which usually involve their families as substitute decision makers. RMI is pioneering reform through amendments to its Criminal Procedure Code 2011. These broaden the traditional terrain of sexual offences to capture several areas which impact on the sexual and reproductive health and rights of women and girls with disabilities, and are typically not criminalized (e.g. forced abortion and forced sterilization).

This law reform seems timely given the concerns expressed by the CRPD Committee about the lack of legal protection of women and girls with disabilities from forced sexual and reproductive health procedures including...
forced sterilization in the Cook Islands\textsuperscript{275} and evidence of forced sterilization being practices in Tuvalu\textsuperscript{276} and Vanuatu, particularly amongst women with psychosocial or intellectual disabilities. The Committee has recommended that Vanuatu “prevent and prohibit all forms of coercive medical treatment, including forced sterilization, of persons with disabilities without their free and informed consent, and ensure that no women or girls with psychosocial or intellectual disabilities are subjected to forced sterilization.”\textsuperscript{277}

RMI’s amendments to the Criminal Procedure Code 2011 introduce a new category of forced or involuntary interventions against persons with disabilities (Article 213A) and establish:

\begin{itemize}
  \item 213A.0 Any person who coerces a person with disability, including a woman or girl with disability, to undertake any of the following forced or involuntary interventions, or who authorizes any such intervention without the person’s free, prior and informed consent, or who conducts such an intervention on the authorization of a third party, including a family member or relative, commits an offense:
    \begin{itemize}
      \item (a) forced termination of pregnancy;
      \item (b) non-consensual birth control or denial of sexual and reproductive health services;
      \item (c) forced sterilization or any other non-consensual medical or psychiatric procedure or treatment including invasive surgical practices, electroshock therapy, and the use of chemical, physical or mechanical restraints;
      \item (d) forced detention in an institutional or residential care
    \end{itemize}
  \end{itemize}

With a few notable exceptions like Nauru\textsuperscript{278} and Solomon Islands,\textsuperscript{279} Pacific countries generally fail to comply with the requirement of international human rights law to criminalise rape within marriage. This has been a matter for concern for the CEDAW Committee.\textsuperscript{280} Tonga’s \textit{Criminal Procedure Act} expressly states that “Sexual intercourse by a man with his wife shall not be deemed rape unless consent to such sexual intercourse has been withdrawn through process of law.” (s.118(2)). Similarly, the criminal law of Pohnpei State asserts that “A defendant may not be convicted of a sexual assault if the defendant and complainant were cohabitating in an ongoing voluntary sexual relationship at the time of the alleged offense, or if the complainant is the defendant’s spouse …”\textsuperscript{281} Equally if not more egregious is the failure to criminalise the sexual abuse of a child aged 15 years old or younger if the child is married to her abuser.\textsuperscript{282}

\textsuperscript{275} CRPD Committee concluding observations on the initial report of Cook Islands (2015) paras. [35 & 36].
\textsuperscript{276} Mission visit, Princess Margaret Hospital Funafuti 15.8.18.
\textsuperscript{277} CRPD Committee concluding observations on the initial report of Vanuatu (2019) paras. [30 & 31].
\textsuperscript{278} Nauru Crimes Act 2016, s. 104.
\textsuperscript{279} 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)).
\textsuperscript{280} 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].
\textsuperscript{281} Pohnpei State Code Title 61 (Criminal Law), Chapter 5, s. 5-141(2).
\textsuperscript{282} Ibid, s. 5-142.
These provisions effectively mean that rape and sexual assault of both women and the girls within marriage or an ongoing relationship (in the case of adult women) are acceptable and within the law, contrary to international norms. The implied legalization of sexual abuse of a married child in Pohnpei could also be seen as encouraging child marriage which is prohibited under international human rights law.

The lawfulness of marital rape is likely 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 would probably find it more difficult to leave an abusive situation. It is therefore important that this legislation is amended to guarantee them protection from the physical and mental trauma of rape and sexual assault from their intimate partners. Sexual abuse of children should be criminalized without exception. The CEDAW Committee has recommended that the age of sexual consent should be raised in Pohnpei State to 18 years (as it has already been in Chuuk State), and that the legislation should be adopted to criminalize all forms of gender-based violence against women. 283 The United Nations Declaration on the Elimination of Violence against Women defines violence against women as including both marital rape and the “sexual abuse of female children in the household.”284

Shifting the focus to disability, Article 16 of the CRPD (freedom from exploitation, violence and abuse) requires States parties to take all measures to protect persons with disabilities, both within and outside the home, from all forms of violence, exploitation and abuse, including their gender-based aspects. One measure that can be taken is to consider all sexual offences committed against persons with disabilities as aggravated and therefore liable to more severe penalties. PNG has taken commendable steps to develop a sexual assault framework that recognizes the greater harm inflicted by “circumstances of aggravation.” One such circumstance arises where “the complainant has a serious physical or mental disability.”285

PRISONS

A number of compliance issues relating to prisons and police have already been raised earlier in the context of mental health laws and criminal law and procedure. This section should therefore be read alongside those sections as well as the recommendations for law reform under Part VII. Of particular relevance are police powers of arrest under mental health laws and in respect of persons found “wandering” or engaged in other “idle behavior” under the criminal law; custodial sentencing following declarations of “unfit to plead” or “unfit to stand trial” or acquittals on the basis of a mental impairment (“insanity”); and the committal of persons with intellectual or psychosocial disabilities under mental health

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283 CEDAW Committee concluding observations on combined initial to third periodic reports for FSM (2017) CEDAW/C/FSM/CO/1-3, para. 27(a).


285 PNG - Criminal Code 1974 ss. 349, 349A.
laws including the authorized use of restrictive practices in psychiatric facilities or other institutional settings. These practices violate several rights under the CRPD including Article 5 (equality and non-discrimination), Article 12 (legal capacity) Article 14 (liberty and security of person) and Article 15 (freedom from torture and cruel, inhuman or degrading treatment or punishment).

This section identifies other areas of non-compliance across a selection of laws regulating prisons or correctional facilities. Prisoners with disabilities, especially those with intellectual and/or psychosocial disabilities, are especially vulnerable in prison settings. It is therefore important that domestic legislation is consistent with international standards including the CRPD. Pacific countries are urged to make every effort to respect the physical and mental integrity of every prisoner 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. Reasonable accommodation, accessibility measures, and support (including support for persons with communication difficulties) should be mandatory for all prisoners with disabilities. Finally, any reform plans should include human rights training for prison officers, including training on all rights under the CRPD. This is expressly required under Article 13(2) of the Convention to help ensure effective access to justice for persons with disabilities.

Reasonable accommodation, accessibility and prison conditions

Reference to the conditions or rights of prisoners with disabilities is sometimes completely absent from prisons legislation in the Pacific (Tuvalu, Tonga). For most countries including Solomon Islands, Vanuatu and Nauru which have one or more disability-related provisions, there are no requirements for reasonable accommodation and accessibility.

Solomon Islands and Vanuatu have both attempted to be more inclusive of disability and to improve alignment of their laws with international standards. The objects of the Correctional Services Act 2007 of Solomon Islands, for example, highlight the need for correctional centres to be “based on internationally accepted standards for the fair and humane treatment of offenders” (s.3). In the Act, there is also a noticeable move away from outdated and derogatory language (“persons of unsound mind”) to more CRPD compliant terms (“prisoners with a disability”); the representation of prisoners with disabilities on any visiting committee (official visitors) (s.29(2)(c) and on the Parole Board (s.73(2)(b) and (d))); the use of disability as a disaggregating variable in the classification of prisoners in correctional centres (s.36(d)); and consideration of disability in the review of sentences (s.48). Disability is also a ground for sentence review under Nauru’s Correctional Service Act 2009 (s.48). So too, Vanuatu has in recent amendment legislation demonstrated a willingness to recognize the rights and needs of persons with disabilities and to use language more consistent with the Convention. Under its 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, in particular pregnant or nursing mothers, and persons with disabilities, including intellectual and psychosocial disabilities (s.21(2)).286 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.”

286 The phrase “detainees with mental impairment” is used in the Correctional Services Act 2006 (s.21(2)(c)). This was replaced by “detainees with psychosocial disabilities and intellectual disability” in the Correctional Services (Amendment) Act 2019.
Both provisions would benefit from some adjustment to improve CRPD compliance. For section 21(2), there should ideally be an express obligation to provide reasonable accommodation according to the specific needs of the individual detainee, subject only to the proportionality test (adjustments not causing a disproportionate or undue burden). Catering to the "special needs" of a detainee with disability “where practicable" falls short of this standard. Section 23(3) also lacks clarity and full compliance as it could be construed to deny detainees with disabilities the opportunity to engage in work on health grounds. The provision should be amended to ensure that detainees with disabilities are provided with reasonable accommodation if directed to work under section 23(1), and that remandees with disabilities (who are entitled to request work under section 23(2)) are not prevented from enjoying the opportunity to work on an equal basis with other remandees.

Similar amendments should be made to Solomon Islands’ Correctional Services Regulations which require all “convicted prisoners … to perform work as directed by a correctional services officer unless a medical officer has certified that the prisoner is not fit to perform the particular work” (reg.185) and state that “remand prisoners may perform work at their own request and with their consent, and may receive payment or reward, at the discretion of the Commissioner” (reg.187). The obligations arising under Article 27 (work and employment) of the CRPD include a prohibition of employment-based discrimination and the duty to provide reasonable accommodation in the workplace. These obligations are equally applicable in detention centres and should be mandated in all prisons legislation across the region including Nauru’s Correctional Service Regulations 2020 which includes a list of approved work activities (reg.24).

Failure to provide reasonable accommodation or to ensure accessibility for detainees with disabilities are viewed as serious violations by the CRPD Committee. Article 14(2) states that where persons with disabilities are legally detained, they must be given reasonable accommodation and otherwise treated in accordance with the Convention:

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

To comply with Article 14(2), the prison complex and detention premises, including all facilities, must be fully accessible. As a general (cross-cutting) principle of the CRPD, accessibility applies to situations in which persons with disabilities are deprived of their liberty. This means that in implementing Article 14(2), States parties should take all relevant measures, including identification and removal of obstacles and barriers, so that persons with disabilities who are serving a custodial sentence in prison, or are held in any other place of detention including a police cell or weekend detention centre, can enjoy equal access to bathrooms, recreational areas, eating facilities, libraries, workshops, health and legal services etc.

In its Guidelines on Article 14, the CRPD Committee directly addresses the matter of the poor conditions prevailing globally in detention facilities and calls for appropriate legislative responses:

17. The Committee has expressed its concerns for the poor living conditions in places of detention, particularly prisons, and has recommended that States parties ensure that places of detention are accessible and provide humane
living conditions … (T)he Committee has recommended that States parties establish legal frameworks for the provision of reasonable accommodation that preserve the dignity of persons with disabilities, and guarantee the right to reasonable accommodation for those detained in prisons.287

An important contribution to CRPD jurisprudence can be found in a complaint against Argentina under the CRPD Optional Protocol.288 The Committee’s communication at the conclusion of its investigation provides useful insight into the application of the Convention to prison settings. The case concerned a prisoner with disability who was receiving medical treatment on a daily basis as an outpatient. The prisoner complained of the conditions of detention, including lack of accessibility and inadequate accommodations, and of the transfer between the prison and the hospital, which he alleged put his life and health at risk. The Committee concluded that Argentina’s prison authorities had failed to provide adequate reasonable accommodation and accessibility measures for the prisoner, and that as a result they had placed him in “substandard conditions of detention that are incompatible with the right set forth in article 17 of the Convention” (para. [8.6]).

Other breaches observed by the Committee related to Article 15(2), which obliges States parties to take all measures to protect persons with disabilities on an equal basis with others from “being subjected to torture or cruel, inhuman or degrading treatment or punishment”; Article 25, which recognizes the right to enjoy the highest attainable standard of health without discrimination on the basis of disability; and Article 26, which requires effective and appropriate measures to be taken to guarantee “maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.”

In view of the above, prisons legislation in the Pacific should be amended to establish obligations to provide adequate accessibility measures and reasonable accommodation in all prison or correctional facilities for detainees with disabilities. Reasonable accommodation should not be contingent on the availability of resources or practicability concerns but should be considered a hard obligation.

Medical treatment for prisoners

The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) were adopted by the UN General Assembly on 17 December 2017. While they are not legally binding on countries as are conventions once ratified, 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.” 289 In respect of health care services, the Rules highlight the right of prisoners to “enjoy the same standards of health care that are available in the community.” Prisoners "should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status" (rule 24). The relationship between health care professionals and prisoners must also be:

governed by the same ethical and professional standards as those applicable to patients in the community, in particular … (a)dherence to prisoners’ autonomy with regard to their own health and informed consent in the doctor-patient relationship … [and] (a)n absolute prohibition on engaging, actively or passively, in acts that may

287 A 72/55 (2017), CRPD/C/CO/KO/1, para. 28 b), CRPD/C/CMG/CO/1, para. 25, CRPD/C/TKM/CO/1 para. 26 b), CRPD/C/CE/EU/CO/1, para. 28, CRPD/C/D/EU/CO/1, para. 32 c), CRPD/C/KOR/CO/1, para. 29, CRPD/C/NZL/CO/1, para. 34, CRPD/C/AZE/CO/1, para. 31, CRPD/C/AUS/CO/1, para. 32 b), CRPD/C/SLV/CO/1, para.

288 Views adopted by the Committee under Article 5 of CRPD Optional Protocol concerning communication No. 8/2012 (Mr. X v Argentina), 18 June 2014, CRPD/C/11/D/8/2012.

289 CRPD/C/BEL/CO/1, para [29].
constitute torture or other cruel, inhuman or degrading treatment or punishment, including medical or scientific experimentation that may be detrimental to a prisoner’s health such as the removal of a prisoner’s cells, body tissues or organs (rule 32).

A number of Pacific countries including Tonga, Tuvalu, and Solomon Islands subject prisoners to mandatory medical examinations or treatment in their laws. It is also common practice for detainees with psychosocial disabilities to be given medical treatment without their consent. In Solomon Islands, the Correctional Services Act 2007 allows a prisoner to be transferred from a correctional centre to a hospital, psychiatric institution or other medical or psychiatric facility on the order of certain officers. The period of hospitalisation is at the discretion of the officer and there appear to be no express provisions either under the Act or Regulations to ensure that the rights of prisoners are protected. In Tonga, the Prisons Act 2010 authorises the use of “reasonable force” and “mechanical restraints” to enforce compulsory medical examinations and treatment of prisoners (s.21(5) and (6)).

By contrast, Vanuatu’s Correctional Services (Amendment) Act 2019 establishes access to medical care and treatment as a right of prisoners along with other rights like clean bedding, washing facilities, clean drinking water and food, and a minimum one hour of daily outdoor physical exercise in fresh air and sunlight (s.22(2)). The language and purpose of these provisions do not suggest any form of compulsion. However, it is important that the legislation clarifies the voluntary nature of the medical care and treatment, and that informed consent is specified. This is particularly necessary in view of section 39(4), which states that a detainee “may be removed by or under the direction of the correctional centre manager to a hospital or other suitable place for the purpose of examination or treatment.” While the consent of the detainee is required before family is informed of a transfer (s.39(5)), there are no consent requirements for the medical, surgical or dental treatment itself. In addition, anecdotal evidence indicates that at the correctional facilities in Port Vila, non-consensual medical treatment is standard practice for detainees with mental illness or psychosocial disabilities.

Access to medical care and treatment is also a right of prisoners under Nauru’s Correctional Service Act 2009 (s.25(1)(i)), and this must be to “community standard” (s.27). However, other provisions are more evocative of forced treatment and interventions, particularly those concerning the use of strait jackets on medical grounds (s.36(4)).

Non-consensual or forced medical treatment should not be administered to persons with disabilities in custody or any other circumstances, and prisoners with disabilities, including those with psychosocial disabilities, must be assured of appropriate health care, protected from any violations of Article 15 of the CRPD. This states that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

The CRPD Committee has therefore directed States parties to ensure that persons with disabilities who are detained in prison have “access to health care on an equal footing with others, on the basis of their free and informed consent, and to the same level of health care

290 Tonga – Prisons Act 2010, s.21.
291 Tuvalu – Prisons Act, Schedule 2.
292 Solomon Islands – Correctional Services Act 2007, s.41.
294 Site visits to correctional facilities (low risk, medium risk, high risk) in Port Vila, Vanuatu, 13.10.15.
as that provided in society at large.”\textsuperscript{295} The Committee has made it clear that 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 to persons with disabilities under any circumstances. The non-compliant provisions of Pacific laws should be amended for harmonization with these requirements as well as alignment with the Nelson Mandela Rules.

**Disciplinary offences**

Prison discipline is an area that requires review for better CRPD compliance. Prisoners with intellectual or psychosocial disabilities 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 behavior (which could be wrongly cast as dangerous, threatening or insubordinate). The legislative text of Tuvalu, Tonga, Nauru and Solomon Islands provide potential entry points for disability-based discrimination. In Tuvalu, the list of offences under Schedule 2 of the *Prisons Act* includes the rather obtuse reference to “an act calculated to create alarm for other prisoners or prison officers.” Under Tonga’s *Prisons Act*, the types of conduct that constitute a breach of discipline include disobeying a direction of a prison officer or using abusive, indecent, offensive or threatening language. Amongst the many acts or omissions that constitute misbehavior by a prisoner under Nauru’s *Correctional Service Act 2009* is “acting in a disruptive, abusive, offensive, discriminatory or indecent manner, whether by language or conduct.” (s.62(f)). In Solomon Islands, the *Correctional Services Regulations 2008* cites amongst a multitude of minor offences: “being idle, careless or negligent in performing assigned work,” “using abusive, threatening, indecent, offensive, rude or improper language”, “performing an act or using a gesture that is offensive, threatening or indecent”, “communicating with another person without the authority of an officer”, “committing any nuisance or disturbance whilst in lawful custody”, “malingering”, or “doing any act likely to cause unnecessary alarm or panic among officers of prisoners.”

In order to avoid disability stereotypes (Article 8) and ensure that there is no discrimination on the basis of disability (Article 5), it is important to clarify in the legislation that no conduct or behavior linked to a disability can be grounds for a breach of discipline under these provisions. Aside from the need to comply with the CRPD, *Nelson Mandela Rules* direct that:

Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner’s mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability (rule 39(3)).

**Solitary confinement and other punishments**

Disciplinary measures should never diminish or violate the fundamental rights of detainees, including their right to health. Under the *Nelson Mandela Rules*, there are a number of practices that are strictly prohibited. These include indefinite or prolonged solitary confinement, placement of a prisoner in a dark or constantly lit cell, corporal punishment, and the reduction of a prisoner’s diet or drinking water (rule 43). Further, rule 43(1) states that: “In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment.”

\textsuperscript{295} CRPD/C/BEL/CO/1, para [29].
Solitary confinement refers to confinement for 22 hours or more a day “without meaningful human contact.” Prolonged solitary confinement means solitary confinement for more than 15 consecutive days (rule 44).

Under Tuvalu’s Prisons Act, punishments include “cellular confinement” and a “penal diet” (food restrictions). The forfeiture of privileges and separate confinement for a period not exceeding seven days are amongst the punishments under Tonga’s Prisons Act 2010 and Solomon Islands’ Correctional Services Regulations 2008 (for a minor disciplinary offence) (reg. 164). In Vanuatu, a detainee found guilty of a disciplinary offence under the Correctional Services (Amendment) Act 2019 is liable to a range of punishments including “separation in the detainees sleeping quarters for a maximum of seven days” (s.32(2)). The duration of similar punishments for misconduct in Nauru and Solomon Islands (for a serious disciplinary offence) is significantly longer. For example, the forfeiture (or restriction) of privileges under Nauru’s Correctional Service Act 2009 can be applied for up to 60 days, and separation can be ordered for as long as 28 days (s.32). Under 2020 Regulations, a prisoner can be denied the right to receive visitors for up to 30 days (reg.63(4)). In Solomon Islands, a prisoner who commits a serious offence under the Correctional Services Regulations 2008 is liable to confinement in a separate cell for up to 28 days (reg.165). The total amount of time that can be spent in separation in a single year is capped at 90 days (reg.170).

As noted above, prolonged solitary confinement (more than 15 consecutive days) is contrary to the Mandela Prison Rules as is the “prohibition of family contact” as a disciplinary sanction or restrictive measure (rule 43(3)). Food restrictions as a form of punishment (as in Tuvalu’s “penal diet”) also constitute a violation of rights for persons in detention (rule 43(1)(d)). Where it amounts to isolation, any form of cellular or separate confinement could have serious health implications for a person with a psychosocial or intellectual disability. The Nelson Mandela Rules accordingly insist that the imposition of solitary confinement on prisoners with mental or physical disabilities should be prohibited “when their conditions would be exacerbated by such measures” (rule 45(2)). In general, the Rules permit the use of solitary confinement “only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority” (rule 45).

The CRPD Committee has called on States parties to abolish the use of seclusion for persons with disabilities, particularly those with psychosocial disabilities, in all institutional environments including prisons as it violates the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (Article 15). The United Nations Special Rapporteur on Torture has further clarified that the imposition of solitary confinement of any duration on persons with psychosocial (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.”

It is recommended that all Pacific countries expressly prohibit the use of solitary confinement, separation or seclusion on prisoners with disabilities in their legislation. Any existing provisions that permit this practice should be repealed. The legislation should also ensure that prolonged solitary confinement for other prisoners, and other forms of punishment that are not consistent with international standards like food restrictions, are abolished.

296 Tuvalu – Prisons Act, ss 44 and 45.
297 “Separation” is also used “in order to protect an individual from harming himself or herself or other detainees” (s.38).
298 A/66/268, paras. [68, 78].
All punishments should strictly comply with recognised international standards in view of their potentially harmful psychological and even physiological effects. The use of any disciplinary protocols or facilities for prisoners with psychosocial disabilities who have not committed a disciplinary offence should also be prohibited. Such practices can arise, as they do in the Solomon Islands for example, where prison mental health services are limited and prison officers have no training in how to manage prisoners with mental health problems or intellectual or psychosocial disabilities. 299 While not intended as a punishment, these practices should not be used as a substitute for proper health care as they are likely to cause considerable psychological stress to the prisoners and exacerbate existing mental health conditions.

**Use of force and restrictive practices**

The Nelson Mandela Rules prohibit the use of force except in self-defence or prevention of attempted escape, or resistance to an order. Force must be used “no more than is strictly necessary” and the incident must be reported immediately to the prison director (rule 82). The use of instruments of restraint are also strictly circumscribed. In particular, the use of “chains, irons or other instruments of restraint which are inherently degrading or painful” are prohibited. While restraint instruments of can be used as “a precaution against escape during a transfer”, and to prevent injury or damage to property, there are clear limits to their use (rule 48). The CRPD Committee has repeatedly called on States parties including Australia and New Zealand to ban seclusion and physical, chemical and mechanical restraints for persons with disabilities, particularly those with psychosocial disabilities, in all institutional environments including prisons. From a CRPD perspective, these practices violate the right to freedom from torture and other cruel, inhumane or degrading treatment or punishment (Article 15).300

Against this backdrop, the legislation of Solomon Islands, Nauru and Tonga show some compliant features but also require improvement for detainees with psychosocial disabilities. Significantly, Solomon Islands’ Correctional Services Act 2007 (ss.53 and 54) and Nauru’s Correctional Service Act 2009 (ss.33 and 36) both prohibit the use of corporal punishment and instruments of restraint, including chains and irons, as a form of punishment. The Nauru Act states that the use of restraints must only be undertaken in ways that will not cause “unnecessary pain” and that “preserve the dignity of the prisoner as far as is practicable” (s.36(2)). Tonga similarly prohibits the application of mechanical restraints as a form of punishment along with “corporal punishment, torture, or cruel, inhumane or degrading treatment”, or “any other punishment or treatment that may reasonably be expected to adversely affect the prisoner’s physical or mental health” (s.66). However, contrary to international human rights norms and the CRPD, the use of a strait jacket is authorized on medical grounds in Solomon Islands (s.54(4) and Nauru (s.36(4)). Likewise, the Prisons Act 2010 of Tonga permits restraints during compulsory medical examinations (s.21). Mechanical restraints are defined under Nauru’s Correctional Service Regulations 2020 as “handcuffs, waist restraints, torso restraints, head protectors and spit hoods.”301

The use of force and restrictive practices are permitted under the prisons legislation of Tuvalu, Solomon Islands, Tonga, Vanuatu, and

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299 At the Rove Correctional Facility in Honiara, detainees with psychosocial disabilities - whether on remand, deemed unfit to stand trial, or acquitted on the grounds of insanity - are routinely dispatched to the “punishment block” (Special Management Unit) which is for prisoners who commit disciplinary offences. Site visit 10.4.17.

300 CRPD/C/NZL/1, para. 32, CRPD/C/AUS/CO/1, para. [36], CRPD Committee Guidelines on Article 14 (liberty and security of person), 14th session, Sept. 2015, para. [12].

301 Under Reg. 3, a “waist restraint” is defined as “a belt designed to be worn around a prisoner’s waist attached to which is a handcuff to restrain the movement of hands”; a “torso restraint” refers to “a soft belt restraint designed to immobilise a prisoner’s arms or leg; and a “spit hood” is “a bag or face mask of an open mask fabric designed to be placed over a prisoner’s face to prevent the prisoner from spitting at or biting an officer.”
Authorisation is typically subject to limits, but there is no prohibition on the use of restraints on prisoners with disabilities, including persons with psychosocial disabilities, as required under the CRPD. Under the Prisons Act of Tuvalu, officers are authorized to use “a reasonable degree of force” against a prisoner when attempting to escape or using violence against a prison officer or another person (s.18). The Prisons Regulations expound further, specifying that handcuffs and leg-irons (contrary to the Mandela Prison Rules) can be used on a prisoner during transfer (reg.36) and mechanical restraints to prevent injury (reg.38). Tonga’s Prisons Act 2010 permits the use of “reasonable force” and “mechanical restraints” (s.21), and force can be used to prevent an escape and when a prisoner “resists an officer acting in the lawful discharge of his duty” under Nauru’s Correctional Service Act 2009 (s.35(1)). In similar vein, Vanuatu’s Correctional Services Act 2006 authorises the use of “restraint” where necessary to prevent a detainee from self-injury or injury to others, for the purpose of seeking medical advice, and to prevent escape during transfer to and from the correctional centre (s.36(1)). It also permits the use of force to restore order and security when there has been a serious breach (s.37). Under the 2019 Amendment Act, force can be used to prevent an escape or damage to property, but this must be “reasonable force that is necessary and fair in the circumstances” (s.37(3) and (4)).

All these provisions should be reviewed and brought fully into line with international norms, including the standards specifically developed for prisoners with disabilities, against whom any form of force or restraint is strongly cautioned and, in the case of psychosocial disabilities, strictly prohibited. While the use of force and instruments of restraint are regulated to some extent (at least in the language of the law), they do not meet the stricter requirements of the Nelson Mandela Rules (rules 47 and 48). They should be amended in light of CRPD Committee jurisprudence on mechanical, chemical and physical restraints as well as for stricter compliance with international human rights standards.

Rights of remand prisoners

The rights of remand prisoners (under arrest or awaiting trial) merit brief comment in this context. In mid-2017, over 60 per cent of the prison population at the Rove Correctional Facility in Honiara comprised unsentenced detainees, around double the average global rate of 30 per cent. Many had been detained for periods of two years or more, some up to six years. These numbers included detainees with mental illness or psychosocial disabilities.

The prolonged detention of unsentenced persons pending trial violates the right to liberty and security of person and the right to access justice. Access to justice is included in key global and regional commitments to peaceful and inclusive societies (2030 Agenda for Sustainable Development and SAMOA Pathway) and is fundamental to good governance, the full observance of democratic values, the rule of law, human rights and just societies (Framework for Pacific Regionalism). All Pacific countries are party to these global and regional commitments. It is therefore strongly recommended that future reforms to prisons legislation incorporate provisions to protect and enforce the rights of unsentenced detainees (remandees), including those with mental health problems or psychosocial disabilities. These provisions should be strictly aligned to international standards including the Mandela Prison Rules (rules 111-120).

Disciplinary offences – prison officers

Under Tuvalu’s Prison Act, disciplinary offences by prison officers include violence against a more senior officer, striking or bullying a prisoner, and being drunk while on duty (Schedule 1). Bullying and harassing (or assaulting or fighting with) another officer or a
prisoner similarly constitute punishable misconduct under Nauru’s Correctional Service Regulations 2020 (reg.64)). In Solomon Islands, a prison officer is guilty of a major disciplinary offence under the Correctional Services Regulations 2008 if the officer “assaults or uses excessive force in dealing with another officer, employee, visitor or prisoner” (reg.34(2)) or “uses any instrument of restraint or protective equipment without orders or just cause, or uses unnecessary force or violence towards any person encountered in the course or execution of his or her duty” (reg.34(9)). Another positive inclusion as a disciplinary offence is discriminatory conduct or language in Nauru (reg.64(l)) although this is not defined. A similar offence can be found under the Solomon Islands Correctional Services Regulations 2008. However, the disciplinary sanction applies only when the conduct (unfavourable treatment “on the basis of gender, ethnicity, race, marital status or disability”) is directed to other officers, not to prisoners (reg.35(4)).

It is recommended that any form of discriminatory conduct towards a prisoner with disability be added to the list of disciplinary offences in all legislation. For compliance with Article 5 of the CRPD, this should include refusal to provide reasonable accommodation to a prisoner with disability. It is also recommended that countries consider any offence of violence (“bullying”, “striking” etc.) as aggravated when committed against a prisoner with disability. Under the Tuvalu Act, it is unclear why only subordinate officers are subject to any of the disciplinary offences. This ambiguity should be addressed to ensure that all prison officers including officers in charge and police officers who perform the duties of subordinate officers (s.10) come within the regulatory scope of the legislation, in particular section 19 and Schedule 1.

**Disciplinary and complaints procedures**

Most Pacific countries (Solomon Islands, Tuvalu, Tonga, Vanuatu and Nauru) have procedures for complaints of rights violations by detainees and for disciplinary hearings in legislations. Under Tuvalu’s Prisons Act, prisoners can also submit petitions to object to punishments imposed for a disciplinary offence (s.47). In Nauru, allegations of prisoner misconduct are investigated by the Chief Correctional Officer and regulated under regulation 63 of the Correctional Service Regulations 2020. Prisoner complaints can be made to a visiting Judge or Resident Magistrate (reg.47).

It is important to ensure that prisoners with disabilities have the right to procedural accommodation when making complaints or preparing a defence in disciplinary proceedings. This would be consistent with Article 13 of the CRPD which upholds the right of persons with disabilities to access justice on an equal basis with others. An obligation to provide procedural accommodation should therefore be established as a legal requirement. 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).

**JURY SERVICE, EVIDENCE, AND PROCEDURAL ACCOMMODATION**

There are many different barriers that persons with disabilities face in accessing the justice system. These include laws that deny legal capacity and permit substitute decision-making; a lack of physical accessibility to police stations and the courts; an absence of legal aid; a lack of accessible information and communication (e.g. sign language and Braille) during court proceedings; a lack of procedural accommodation that is age and gender appropriate; a lack of awareness in the judiciary, prisons and police of the rights of persons with disabilities to participate on an equal basis as others in the justice system: and
a lack of awareness by persons with disabilities themselves of the remedies and redress available to them, and how to access them. These are amongst the persistent barriers that have been noted with concern by the CRPD Committee in its concluding observations for Vanuatu and the Cook Islands as well as other countries outside the region. A few of these issues are considered in some detail below.

**Jury service**

Jury service is an important civic duty and forms part of the system of justice and participation in legal proceedings (Article 13). However, it is quite common for persons with disabilities to be prevented from performing jury service on the basis of their disability. The *Supreme Court Act* (s.9) in Tonga for example authorises the appointment of jurors, drawing on “a list of all Tongans of or over the age of 21 years who are competent and liable under clause 28 of the Constitution to serve on juries.”

Clause 28 of the Constitution sets out the rules for appointing jurors and essentially exempts from jury service “persons of unsound mind or persons incapable of serving by reason of blindness, deafness or any other permanent physical infirmity …” This provision should be removed (alongside clause 28 of the Constitution) as it contravenes Article 5 (reasonable accommodation), Article 9 (accessibility), Article 12 (legal capacity), Article 13 (access to justice), Article 21 (freedom of expression & opinion), and Article 29 (participation in public life). Similar amendments are needed for RMI’s *Qualifications of Jurors in Jury Trial Act* which disqualifies a person from jury service if “incapable by reason of mental or physical infirmities to render efficient jury service” or “incompetent to serve” (s.503(b) and (c)).

The ability to read and write is another requirement for jury service in both Tonga and RMI. In RMI’s case there are additional communication and language specifications: A person is disqualified from jury service if “unable to read, write, speak and understand either English or Marshallese” (s.503(a)). Both provisions amount to indirect discrimination as they are likely to disproportionately impact upon persons with intellectual, learning and sensory disabilities. While some jurisdictions worldwide continue to stipulate a literacy requirement, this approach has been abandoned elsewhere. In Australia, Victorian and Tasmanian legislation do not make reference to the ability to read and write, shifting the focus to communication instead. In order to be eligible for jury service in those jurisdictions, a person must instead be able to adequately communicate in and understand English.

RMI takes this further. The *Rights of Persons with Disabilities (Consequential Amendments Bill) 2018 amendments* propose that literacy and communication abilities under the *Qualifications of Jurors in Jury Trial Act* are assessed with reference to accessible formats (e.g. Braille, Easy Read, large print, sign language).

For CRPD harmonisation, and to facilitate full and equal participation in jury service by persons with disabilities, legislation should make provision for reasonable accommodation and prohibit any disability-based exclusions. In three cases brought against Australia by persons with hearing disabilities who were denied reasonable accommodation (sign language or real-time steno-captioning) in order to perform jury service, the CRPD Committee found that the State had failed to fulfil its obligations under various Articles, notably Articles 5 (reasonable accommodation), 9 (accessibility), 13 (access to justice), 21 (alternative communication formats), and 29 (participation in public life). In order to prevent further violations in future, Australia was required to take various measures including amending relevant laws, regulations and policies.

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304 CRPD Committee concluding observations on the initial reports for Vanuatu (2019) and Cook Islands (2015).
305 *Juries Act 2000 (Vic)* sch 2; *Juries Act 2003 (Tas)* sch 2.
306 See Views adopted by the CRPD Committee 30 May 2016,
Evidence

It is not unusual for States to disregard testimony given by persons with intellectual and/or psychosocial disabilities when they participate in legal proceedings. This practice contravenes the CRPD, in particular Article 12 (right to legal capacity) and Article 13 (access to justice). The CRPD Committee has questioned the appointment of special representatives for persons with disabilities when they are parties to proceedings (as complainants or dependents) as this is tantamount to substitute decision-making, which is not consistent with Article 12.

Solomon Islands and Tonga provide two examples of this discriminatory practice in the Pacific. In the Evidence Act of Solomon Islands, the court can prevent a person from giving evidence, sworn or unsworn, if it considers the person lacks capacity, including a physical disability, to understand or give an answer that can be understood, to a question of fact (s.29(3)).

The court can also determine whether a witness in criminal proceedings is competent to give evidence. These provisions imply a denial of legal capacity contrary to Article 12. They also directly contravene Article 5 (non-discrimination) and Article 13 (access to justice). The provisions should be amended to enable persons with disabilities to give evidence like anyone else but with procedural accommodation and support to exercise their legal capacity (for example a representative or personal assistant who acts in accordance with the person’s “rights, will and preferences”). These amendments would be made for the purpose of complying with Article 12(3) and (4) and Article 13(2).

Tonga’s Evidence Act also 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). As with Solomon Islands, this provision invokes disability-based discrimination, contravening Article 5, the right to legal capacity (Article 12), and the associated obligation 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 accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings.” (Article 13(1)). The section should be amended to remove disqualification; expressly permit a person with an intellectual or psychosocial disability to testify; and obligate courts to provide procedural accommodation and supported-decision making measures such as a representative or personal assistant who acts in accordance with the person’s “rights, will and preferences”.

Procedural accommodation

Giving evidence in court can be intimidating for anyone unfamiliar with legal proceedings and can be exacerbated for persons with certain intellectual, psychosocial or developmental disabilities (persons with autism for example). In view of this, general procedures could result in indirect discrimination if they are applied without exception or appropriate adjustment.

Pacific legislation generally do not meet procedural accommodation requirements where relevant, such as in areas of evidence, civil and criminal procedure, extradition, courts, appeals, commissions of enquiry, and ombudsman legislation.307

306 Michael Lockrey v Australia, Communication No 13/2013, CRPD/C/15/D/13/2013; Views adopted by the CRPD Committee 25 May 2016, Gemma Beasley v

307 See for example Nauru – Civil Evidence Act 1972, Civil
For CRPD compliance, it is therefore important that the courts (as well as any other tribunals) be directed to make whatever adjustments to proceedings are needed to enable persons with disabilities to participate effectively as parties or witnesses. Article 13 obliges States to ensure access to justice for persons with disabilities on an equal basis with others, including through procedural and age-appropriate accommodations.

The concept of procedural accommodation is not defined in the Convention but it is similar to the concept of reasonable accommodation though applied to court or similar proceedings. One important difference is that it is not subject to a proportionality test which means that individual adjustments must be provided unconditionally, irrespective of any perceived or actual “disproportionate or undue burden.” Like reasonable accommodation, procedural accommodation should be applied on a case-by-case basis, with the adjustment or “accommodation” being tailored to the specific needs (age and gender) of the person concerned in order to facilitate participation in the proceedings. It may therefore assume very different forms in court: for instance, relaxing rules relating to court attire; allowing a person to testify in private through a video link or in the judge’s chambers; allowing extra time for evidence to be given (taking a slower pace); permitting extra or frequent breaks; allowing personal assistance; producing easy to read and understand summaries of proceedings at the end of each day; conducting educational sessions or programmes; or providing interpretation and/or explanation. Important accessibility measures include modifying court rooms for improved physical accessibility and using accessible formats for information and communication such as sign language, captioning, Braille, Easy Read formats, and tactile, alternative and augmentative formats like pictures and communication boards.

All of this can be done without endangering the general principles guiding hearings and other legal proceedings i.e. without jeopardising due process. Supported decision-making – helping the accused person, witness or victim to make decisions – could also be applied as a form of procedural accommodation, for example, where a person must make a decision about entering a plea and needs support to make that decision.

Solomon Islands provides a good example in this context though it falls short of compliance. Under the Evidence Act 2009, courts are given discretion to receive unsworn evidence, use communication assistance, and make special arrangements for taking evidence from vulnerable witnesses, including persons with disabilities. Several provisions assist persons with disabilities to participate in the justice system, in particular sections 68 and 69, which mandate communications assistance to witnesses and the accused. 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.”

Further, section 41 allows for special arrangements to be made in the interests of justice and at the request of vulnerable witnesses, who include “persons with a mental or physical disability, illness or impairment” (section 41(2)(d)). Subsections (3) and (4) state:

(3) The court must have regard to the following matters in determining what orders to make –

(a) the desirability of minimising distress or trauma for the witness;

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(b) the witness must be treated with dignity, respect and compassion; 
(c) the possibility of the witness being intimidated when giving evidence; 
(d) the proceeding should be resolved as quickly as possible.

(4) Special arrangements that the court may make include the following…

(d) remote audio visual taking of evidence; 
(e) allowing a support person to accompany the witness …

While these provisions demonstrate a welcome sensitivity about the rights and dignity of persons with disabilities in Pacific legislation, they fall short of CRPD standards implied under Article 13. One reason is that the accommodations under subsection (4) are discretionary whereas procedural accommodation is a mandatory requirement under the Convention: it is about access to justice, for which there can be no equivocation or exceptions. It is therefore recommended that in this and other Pacific legislation dealing with court procedural matters there are clear obligations to provide procedural accommodation in line with Article 13, along with a CRPD-aligned definition that draws on more of the examples listed above.

It is also recommended that training be provided to judges and magistrates on their duty to ensure that persons with disabilities can fully participate in the justice system, including through alternative communications formats. Article 13(2) requires States parties to ensure that justice professionals, including police and prison staff, are adequately trained on the rights of persons with disabilities.

**IMMIGRATION AND CITIZENSHIP**

Article 18 of the CRPD recognises the right of persons with disabilities to a nationality and citizenship, on an equal basis with others, by ensuring their right to acquire and change a nationality and by prohibiting deprivation of their nationality on the basis of disability. It also establishes their right to be able to choose their place of residence; enjoy liberty of movement; not be denied the right to enter their own country; and be free to leave any country, including their own. The CRPD Committee has questioned the existence of nationality and immigration laws that limit the right to acquire a nationality on the grounds of disability or that prohibit or restrict the entry of persons with intellectual and/or psychosocial disabilities.

The regulatory regimes governing immigration and citizenship in Pacific jurisdictions contain common areas of non-compliance.

*Immigration law*

In Vanuatu, the *Immigration Act 2010* classifies persons with psychosocial (mental) disabilities as “prohibited immigrants”, and authorises the Minister to order the removal from Vanuatu of a non-citizen believed to be “suffering from a mental condition”, and whose presence is considered a risk to community health. Amendment legislation in 2018 entrenches these provisions by clarifying that a “prohibited immigrant” may be removed without notice from Vanuatu by Ministerial Order. It also broadens the definition of “prohibited immigrant” to include a “character of concern.” The latter includes a person who “is a danger to a community in Vanuatu by way of being involved in activities that are, violent, disruptive to or that threaten harm to, that community;” or who, “in the opinion of the Director, after considering that person’s past and present conduct (including but not limited to criminal conduct), the person is not of good character.” In view of the negative stereotypes about mental illness

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308 Vanuatu – *Immigration Act 2010* s.50(1)(a) and s.53 (Part 6).

309 Vanuatu – *Immigration (Amendment) Act 2018*, s.26B.

310 Vanuatu – *Immigration (Amendment) Act 2018*, s. 53A.
and symptomatic behaviour, the “character of concern” category is likely to disproportionately affect (indirectly discriminate against) persons with psychosocial disabilities.

The character issue also arises under Solomon Islands’ *Immigration Act 2012* although it is more precisely defined as criminal conduct and is directly discriminatory. The Act gives the Director of Immigration power to cancel a visa if there is “a character concern” (s.21(1)(c)), which arises if a person has “a record of serious criminal conduct” (s.23(1)). Curiously the latter includes acquittal for an offence “on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution” (s.23(2)(d)).

Another ground for cancelling a visa in Solomon Islands is if there is “a serious health concern about the holder …” (s.21(1)(d)). A serious health concern arises when a person is certified by a government medical officer to be “suffering from a physical or psychological condition that poses a serious threat to the health or safety of the community” (s.24). Such a broad and ambiguous definition is open to discriminatory application. Although a “serious health concern” might include a contagious disease of risk to the community, thus warranting the cancellation of a visa, it could also be construed to apply to persons with psychosocial and/or intellectual disabilities who, on account of the prejudice and stigma associated with mental illness and disability, are assumed to be a threat to the safety of the community. Visa cancellation on this basis would be an act of discrimination contrary to Article 5 (equality and non-discrimination) and Article 18 (liberty of movement and nationality).

The discriminatory denial of immigration rights on mental health grounds is common to Tuvalu, Tonga, Solomon Islands, RMI and FSM. The *Immigration Act* of Tuvalu prohibits the entry of persons certified to be “suffering from mental disorder or is a mental defective” and whose presence in Tuvalu “would be a danger to the community.” 311 Replicating this content and text, Tonga’s *Immigration Act* classifies as “prohibited immigrants” any person medically certified to be “suffering from mental disorder or is a mental defective”, and whose presence in Tonga “would be a danger to the community.”312 In FSM, persons with psychosocial disabilities (“serious mental irresponsibility evidenced by having been adjudged insane or mentally irresponsible, or incompetent… or having been treated for serious mental or neurological disorders”) can be denied an entry permit or a renewal of an entry permit, or deported. 313 Finally, in RMI, the *Immigration Act 2006* identifies a number of people as ineligible for an entry permit to RMI. These include those who are believed to be “of unsound mind” or “mentally defective” (s114(1)(d)(iv)).

All legislative provisions that deny or restrict immigration rights on the basis of disability contravene Articles 5 and 18, and should be repealed. The derogatory terms and erroneous assumption that a mental health impairment carries an inherent risk of endangering the community are also inconsistent with the Convention, which promotes respect for the dignity and rights of persons with disabilities and discourages stereotyping (Article 8).

**Citizenship law**

Tuvalu, Nauru, and RMI all establish “full capacity” as a requirement of citizenship, effectively denying citizenship to persons with intellectual and/or psychosocial (mental) disabilities. In Tuvalu, the *Citizenship Act* establishes “full age and capacity” as a prerequisite for citizenship by naturalization (s.6(1)) and renunciation of citizenship (s.8(1)). Section 2 defines “full capacity” as meaning “he is of sound mind and that he has authority in matters of his own citizenship.” Similar provisions can be found in Nauru where the *Naero Citizenship Act 2017* stipulates “full age and capacity” as a requirement to renounce....

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311 Tuvalu - *Immigration Act*, s. 10(2).
312 Tonga - *Immigration Act*, s. 8(2)(d)(iii).
313 FSM National Code Title 50 *Immigration*, s. 107.
citizenship (s.22(1)); and in RMI where the Citizenship Act 1984 establishes “full age and full capacity” as a requirement of citizenship by naturalization (s403(1)) and renunciation of citizenship (s.408). Section 402(2)(b) of the RMI Act defines “full capacity” as applicable to a person who is “not a mentally disordered or defective person; or who is “so found and not discharged as sane, under the provisions of any law of any country relating to mental treatment.”

Like the immigration legislation discussed above, these provisions constitute disability-based discrimination contrary to Articles 5 and 18. Out-dated and derogatory terms like “mentally disordered” and “mentally defective” also perpetuate stigma and discrimination in contravention of Article 8. Importantly, the denial of legal capacity based on an assumed absence of mental capacity (“full capacity”) on the part of the citizenship applicant violates Article 12. The incapacity label has been a common and longstanding source of discrimination against persons with disabilities. Its consequences continue to be far-reaching, extending to the denial of a range of rights, including the rights to vote, marry, buy or sell property and citizenship. The idea that only persons with “capacity” can make decisions about their citizenship also perpetuates discriminatory stereotypes about persons with physical, intellectual, cognitive, psychosocial or other disabilities.

For all these reasons, “full capacity” should be removed as a requirement of citizenship. Instead, Pacific legislation should make provision for reasonable accommodation, accessibility measures, and support, including supported decision-making and alternative modes of communication such as sign language interpretation, as appropriate. Such measures would be consistent with Article 5 (equality and non-discrimination), Article 12(3) (legal capacity), Article 13 (access to justice) and Article 9 (accessibility). They would also promote empowerment and inclusion in place of exclusion and disenfranchisement: assisting a person with disability to understand the rights, privileges, responsibilities and duties of citizenship; as well as comprehend and fully participate in the application or renunciation process.

Commendably, recent law reform in Solomon Islands has removed the discriminatory denial of citizenship that previously applied to persons with intellectual or psychosocial disabilities under colonial legislation and that continues to prevail in other Pacific jurisdictions. Under the now repealed Citizenship Act Cap 57, citizenship by naturalization was denied to persons deemed to be not of “full capacity”, which – as in RMI - was defined as “a mentally disordered or defective person.” By contrast, the new Citizenship Act 2018 removes this barrier to citizenship rights and expressly provides for the eligibility of any person who “has a permanent or enduring physical or mental incapacity that means the person … is not capable of understanding the nature of the application; or … is not capable of demonstrating that the person meets [certain] requirements…” (s.14(2)(f)). These (waived) requirements are knowledge of English, Pidgin or a vernacular language sufficient for conversational purposes; respect for the culture and way of life of Solomon Islands; and ability to understand the rights, privileges, responsibilities and duties of citizenship (s.14(2)(g),(h),(i)).

This is a welcome removal of disability-based discrimination in respect of citizenship rights, notwithstanding the retention of disempowering (“incapacity”) language. The purpose of the provision could be achieved more succinctly and with greater CRPD compliance by simply replacing the text in section 14(2)(f) with the words “is a person with disability.” A new provision should establish the right of any applicant with disability to reasonable accommodation, accessibility measures, and support, including supported decision-making and sign language interpretation if required. RMI is also taking a step in the reform direction for CRPD compliance. The Rights of Persons
with Disabilities (Consequential Amendments) Bill 2019 removes the “full capacity” requirement in the Citizenship Act 1984. In addition, it disallows rejection of an application for citizenship by naturalisation on the basis of disability; and requires provision of reasonable accommodation and support, including supported decision-making, to enable persons with disabilities to meet certain application criteria.314
Part VI. Legislative Frameworks
[CRPD Articles 21-31]

INFORMATION, COMMUNICATIONS AND TECHNOLOGY

Accessibility is a critical feature of the CRPD and three Articles in particular are relevant in this context. Article 9 recognizes the multiple dimensions of accessibility, notably the physical environment, transportation, information, communications and technology (ICT). States must adopt measures to ensure that persons with disabilities can, on an equal basis with others, access information and communications, including information and communications technologies and systems. These measures include the identification and elimination of obstacles and barriers to information, communications and other services, including electronic services and emergency services; and promoting the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 21 specifically highlights the obligations of States parties to ensure access to information for persons with disabilities, including by encouraging public service providers to use accessible formats, such as sign language for persons who are deaf, Braille for persons who are blind, and Easy Read formats for persons with intellectual disabilities. Finally, Article 30 obligates States to adopt measures to ensure access of persons with disabilities to television programmes and films in accessible formats for participation in cultural life, recreation and leisure on an equal basis with others.

There is a fairly consistent silence on disability in telecommunications legislation across the Pacific. In Vanuatu, the Telecommunications Act and Telecommunications and Radiocommunications Regulation Act 2009 (amended in 2018) make no provision for the accessibility requirements of persons with disabilities despite the detailed provisions for regulating telecommunication and radio broadcasting practices; the existence of a Universal Access Policy which targets improvements for underserved locations (s.17); opportunities to make accessibility a precondition of licence approval; and provisions relating to fair dealing practices (s.39) which could potentially require invoices in accessible formats from service providers, if required or requested by customers with disabilities.

In similar fashion, none of the legislation in FSM, Pohnpei State, Kosrae State, Solomon Islands (Broadcasting Act, Telecommunications Act 2009, and Television Act), Nauru (Telecommunications and Regulatory Affairs Act 2017) and Tuvalu (Public Broadcasting Act 2014 and the Television License Regulations, Telecommunications (Radio) Regulations and Telephone Regulations under the Tuvalu Telecommunications Corporation Act) addresses the accessibility requirements of persons with disabilities.

315 FSM National Code Title 21 Telecommunications, Chapters 1 & 2.
316 Pohnpei State Code Title 20 Public Broadcasting.
317 Kosrae State Code Title 7 Agencies and Government Financed Enterprises, Chapter 2 The Broadcast Authority.
A positive attempt to address this neglected area can be found in RMI’s current law reform efforts. Draft amendments to the Marshall Islands National Telecommunications Authority Act of 1990 establish a duty to ensure all telecommunications services are accessible to persons with disabilities, including by providing sign language insets or sub-titles and video description for news and educational programs, films and national events coverage.\(^{318}\) In Vanuatu, an atypically inclusive approach has been adopted under the Right to Information Act. Section 28(7) states:

(7) 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.

Across the region, a comprehensively inclusive and non-discriminatory approach is needed for public radio and television broadcasting and information services. This could be reflected in the guiding principles set for service providers, thereby laying a foundation for practical accessibility measures. All broadcast content on information, current affairs, education, culture, sport and entertainment should be accessible to persons with disabilities, especially sensory disabilities. One way this could be achieved is by providing this content in accessible formats and technologies. For example, sign language interpretation (insets) or subtitles should be standardized in television for persons who are deaf or hearing impaired. Other options include the use of programming data that permits speech to text conversion and display on a receiver screen for blind or visually impaired persons.

Radio access for deaf persons remains one of the more elusive areas of ICT accessibility but Pacific governments have a duty to ensure that aurally delivered information over the radio (including alerts during times of natural disaster) is accessible to persons with hearing disabilities. Assistive technologies or listening devices for deaf persons include text or videotext displays and computer aided transcription services (real time captioning).

Telephones/mobiles should be accessible to person with sensory disabilities. Legislation such as Nauru’s Telecommunications and Regulatory Affairs Act 2017 (Part 3) and Tuvalu’s Telephone Regulations could be amended to establish a duty to provide support services to subscribers with disabilities, and to make provision for accessible telephone services. In Tuvalu’s case, telephone service contracts (reg.4) and telephone bills (reg.5) could be available in accessible formats, for example in Braille for blind subscribers. Text telephones are well-established telecommunications devices for deaf persons (enabling spoken conversation to be replaced by text exchanges). There is also assistive technology available for blind or visually impaired persons. Additional charges should not be levied for any assistive devices or technology supplied to subscribers with disabilities. Regulation 5(2) authorises the Minister to “remit or reduce any charge payable under these Regulations.”

Finally, legislation that incorporates licensing provisions (including grounds for granting, renewing, suspending or cancelling broadcast licences) – e.g. Solomon Islands’ Television Act, Nauru’s Telecommunications and Regulatory Affairs Act 2017, and Tuvalu’s Television Licence Regulations and Telecommunications (Radio) Regulations – should be amended to stipulate accessibility as a condition of a licence. This would help Pacific states fulfill their accessibility obligations under the CRPD and introduce legal sanctions for non-compliance.

In its concluding observations for Vanuatu in 2019, the CRPD Committee expressed concern about the limited access to information in accessible formats, the lack of accessible technology, and the persistence of communication barriers.\(^{319}\) Similarly, the lack of access to ICT and the non-availability of Braille, sign language, Easy Read and digital communications have been noted with concern in respect of the Cook Islands.\(^{320}\) As discussed above, these shortcomings are region-wide, so the Committee’s recommendations to: “(e)nact legislation to ensure that all information and communications provided to the general public are available to all persons with disabilities in accessible formats, including sign language, Braille, and other accessible modes, means and formats of communication, and ICTs” and to promote training in sign language and Braille, resonate for other Pacific island jurisdictions.

When issuing its General Comment No. 2 on accessibility, the CRPD Committee recommended that States parties review the relevant recommendations of the International Telecommunications Union (ITU) as a basis for strengthening their national legislative frameworks. In particular, the ITU issued in 2004 a Model ICT Accessibility Policy Report to assist national policy makers and regulators with developing and implementing ICT accessibility policy frameworks. The report addresses different aspects of ICT accessibility including mobile communications, television and video programming, and public procurement of accessible ICTs\(^ {321}\).

**MARRIAGE AND DIVORCE**

The right to legal capacity under Article 12 of the CRPD (comprises the capacity to be a holder of rights and duties (legal standing) and to exercise those rights and duties as an actor (legal agency). The legal capacity to act under the law recognizes the person as an agent with the power to engage in transactions and to create, modify or enter into legal relationships. The denial of legal capacity to persons with disabilities is longstanding and widespread. It has led to the deprivation of many fundamental rights including the right to marry and found a family, sexual and reproductive rights, parental rights, and the right to give consent to intimate relationships.\(^ {322}\)

Restrictions on the right to intimate relationships and marriage on the basis of disability are abundantly found in Pacific legislation. Provisions vary but have the same discriminatory effect and consistently imply demeaning and erroneous stereotypes about 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 marriage licence to any person deemed to be “insane”\(^ {323}\) is bluntly prohibited, and an already solemnized marriage can be invalidated due to “incapacity to marry”\(^ {324}\).

Similarly, in Vanuatu, a marriage is void (invalid and unenforceable) where one party was at the time of the marriage “by reason of unsoundness of mind incapable of understanding the nature of the ceremony” orvoidable where one party was “of unsound mind, or subject to recurrent fits of insanity or epilepsy.”\(^ {325}\)

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\(^{319}\) CRPD Committee concluding observations on initial report of Vanuatu (2019) CRPD/C/VUT/CO/1, paras. [18, 36].

\(^{320}\) CRPD Committee concluding observations on initial report of Cook Islands (2015) CRPD/C/COK/CO/1, para. [42(a) & (b)].


\(^{322}\) CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1.

\(^{323}\) Tonga – Births, Deaths and Marriages Registration Act, s.6.

\(^{324}\) Tonga – Births, Deaths and Marriages Registration Act, S.17.

\(^{325}\) Vanuatu – Matrimonial Causes Act, ss. 1 & 2
In Nauru, the same kind of impediments can be found along with additional inuendo about lack of fitness or suitability for the requirements of marriage. Specifically, a marriage is voidable if either party was, at the time of the marriage “suffering from such disease or defect of the mind that the party was unable to understand the nature of the contract and the duties of marriage”; “suffering from mental deficiency or disorder of such a kind or to such an extent as to be unfitted for marriage or the procreation of children”; or “subject to recurrent attacks of insanity.” Vanuatu goes beyond inuendo to address the procreation issue more directly. Under its Matrimonial Causes Act, a marriage is voidable if it “has not been consummated owing to the incapacity or willful refusal of the respondent to consummate the marriage.” An identical (non-consummation) ground for nullifying a voidable marriage is found in Solomon Islands Islanders’ Divorce Act.

None of these provisions is CRPD compliant. Firstly, any prohibition of marriage for a person with an intellectual or psychosocial disability (“unsoundness of mind” or “insanity”) is completely inconsistent with the right of “all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses” under Article 23. Secondly, invalidating a marriage on the ground that one of the parties is considered to be lacking in (mental) capacity is in breach of Article 12 (equal recognition before the law including legal capacity). As the CRPD Committee has made clear, under Article 12 “perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity” where legal capacity refers both to legal standing and legal agency. Similar provisions in Pacific legislation should therefore be amended to ensure that adults with disabilities can enter marriage on an equal basis with others. This would be in line with the CRPD Committee directives in its concluding observations on Vanuatu’s initial report in 2019 to amend or repeal the country’s “discriminatory legislation on family and marriage, including sections 1 and 2 of the Matrimonial Causes Act (1986) that prohibit marriage on the grounds of disability, including psychosocial or intellectual disability.” “Unsoundness of mind”, or “mental or moral disability”, or “structural defect in the organs of generation” are not legitimate reasons for the denial of legal capacity and the right to marry, and they are stigmatising terms that do not promote respect for the dignity of persons with disabilities, contrary to Article 8. There should be a duty to provide support to any person having difficulty understanding the nature of the marriage ceremony. This would be consistent with Article 12(3) and should be stipulated in the legislation.

The grounds for divorce reveal a similar pattern of disability-based discrimination across the region. Tuvalu, Tonga, Solomon Islands, Vanuatu, FSM, Pohnpei State and Kosrae State all make provision for the dissolution of marriage of a person with physical or mental disability (“insanity”, “unsoundness of mind”). This is perhaps most harshly put in Tonga’s Divorce Act (s.3) where it is possible to dissolve a marriage due to the respondent’s alleged lack of mental capacity (“insanity”, “unsoundness of mind”) or physical disability (“incapable of consummating the marriage by reason either of some structural defect in the organs of generation which is incurable and renders complete intercourse impracticable or of some incurable mental or
moral disability resulting in an invincible repugnance to sexual intercourse with the petitioner.”).

As well as “unsoundness of mind” and “insanity”, leprosy is a ground for divorce in Pohnpei State, Kosrae State, and RMI. This ground is not consistent with international human rights standards and is of concern given the longstanding discrimination and stigma associated with leprosy as a communicable disease. In 2010, the United Nations Human Rights Council Advisory Committee published a Draft set of principles and guidelines for the elimination of discrimination against persons affected by leprosy and their family members. The Principles establish that persons affected by leprosy and their families are entitled to be treated with dignity and to enjoy the human rights and fundamental freedoms under the UDHR and other relevant international core human rights instruments, which would include the CRPD. Section 1.1(a) of the Guidelines accordingly direct states to:

Take all appropriate legislative, administrative and other measures to modify, repeal or abolish existing laws, regulations, policies, customs and practices that discriminate directly or indirectly against persons affected by leprosy and their family members, or that forcefully or compulsorily segregate and isolate persons on the grounds of leprosy in the context of such discrimination;

Moreover, the Principles specifically state that persons with leprosy “should have the same rights as everyone else to marriage, family and parenthood” and that leprosy should not be a basis for denying a person the right to marry or a ground for divorce.

There is another issue that arises in legislation. The defence of forgiveness as a ground to refuse a divorce appears across the Codes of RMI, FSM, Pohnpei State and Kosrae State. Provisions that disallow a divorce where the ground for divorce has been “forgiven by the injured party” raise concerns in the context of the Pacific especially as forgiveness can be demonstrated by continued cohabitation. While forgiveness can be revoked if the injured party is not treated with “conjugal kindness”, this defence fails to take account of the typical power imbalances between men and women and the cultural pressures on Pacific women to accept violence as part of marriage, which could effectively coerce them into “forgiving” their partners and thus relinquishing their right to a divorce. The risk of this is greater for women with disabilities as they are more likely to be dependent on care; enjoy less or no independent source of income; and have limited mobility. Women with disabilities are also more susceptible to domestic violence including the possibility of violent recriminations from their partners if they are unwilling to “consent” to “voluntary cohabitation” or the “restoration... to all marital rights.” For all these reasons, moving out of the marital home to demonstrate non-cohabitation may simply not be an option for any woman, especially a woman with disability. The forgiveness defence should therefore be removed.

More generally, the long-established practice of recognising disability (whether physical, mental or leprosy-based) as a ground for divorce should be prohibited as it is contrary to Article 5 (equality and non-discrimination), Article 12 (equal recognition before the law), and Article 23 (respect for home and family). There are no exceptions under Article 23 to the right of sess, United Nations Doc A/HRC/15/30 (12 August 2010).

332 Regarding leprosy, see Pohnpei State Code Title 51, Chapter 3, s.3-107(7); Kosrae State Code Title 6, Chapter 32 Annulment and Divorce, s.6.3207(7); FSM National Code, Title 6, Chapter 16, Subchapter II Annulment and Divorce, s.1626(7).

333 Human Rights Council Draft set of principles and guidelines for the elimination of discrimination against persons affected by leprosy and their family members, 15th

334 Ibid. Annex, Principles para. [1].

335 Ibid. para [3].

336 RMI – Domestic Relations Act, s.117; Kosrae State Code Title 6, Chapter 32 Annulment and Divorce, s.6.3209; Pohnpei State Code Title 51, Chapter 3 Annulment and Divorce, s.3-109; FSM National Code, Title 6, Chapter 16, Subchapter II Annulment and Divorce, s.1628.
persons with disabilities who are of marriageable age to marry and to find a family on the basis of free and full consent of the intending spouses. As Pacific states consider reforming marriage and divorce legislation for compliance with the CRPD, it is recommended that attention be given to broader harmonization with international human rights standards, notably with respect to CEDAW. In particular, consideration should be given to removing fault-based divorce altogether including all the traditional grounds like adultery, desertion, cruelty and unsound mind. These grounds should be replaced with a single ground based on irretrievable (or irreversible) breakdown of the marriage.

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. The “best interests” principle is a complex concept. Essentially, it is intended to be a guide to the implementation of all rights of the child under the CRC and other relevant international instruments, not a pretext for overriding any of these rights.

Article 16(1)(f) of CEDAW requires that women and men have the same rights and responsibilities in relation to adoption, but the CEDAW Committee has not otherwise set out the requisite components of good practice adoption legislation. The literature however has identified the following elements:

(i) a requirement for the full and free consent of the biological parents;
(ii) eligibility of all persons over the age of 18 to adopt;
(iii) protection for girls and persons with disabilities who might be subject to pressure to give their child up for adoption;
(iv) a requirement for the full and free consent of the child if the child is of an age and capacity to understand the proceedings;
(v) the best interests of the child as the paramount consideration in all adoption determinations;
(vi) a requirement that the adoptive parent or parents have the ability and capability to provide a stable and secure environment for the child;
(vii) a prohibition on any payment to the birth mother for the adoption.337

The “best interests” principle is expressly recognised in Article 7 and Article 23 of the CRPD. In Article 23(2), the principle is applied to specific family relationships including adoption; while Article 7(2) places it firmly in the context of all rights of the child with disability (Article 7(1)) including the right to be consulted on all matters affecting that child on an equal basis with any other child (Article 7(3)). Article 7 states:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-
appropriate assistance to realize that right.

From the perspective of the CRPD, there are a number of concerns regarding adoption legislation in the Pacific. Most important amongst them is the dispensing of consent requirements for a parent with a psychosocial or intellectual disability. While there are slight variations in the legislative content of these provisions, there is a general tendency to deprive biological mothers/parents of their legal capacity (right to deny consent), contrary to Article 12. There is also a consistent use of terms like “insanity”, “incapacity”, and “incompetence” contrary to Article 8.

Tonga’s Maintenance of Illegitimate Children Act (s.15(2)) expressly allows the consent of a mother to be waived in respect of an ex nuptial child. The grounds for which this is permitted include neglect, persistent ill treatment, abandonment and disability (“incapable of giving her consent” or “unreasonably withholds her consent”). In Solomon Islands, the Adoption Act 2004 gives the court power to dispense with consent requirements of a parent or guardian who is “incapable of giving his consent” or “certified to be insane by a qualified medical practitioner.” The State of Pohnpei similarly waives the right to consent to an adoption in cases where a parent has been “adjudged insane or incompetent”; and Nauru ‘s Adoption of Children Act 1965 allows the court to dispense with parental consent to an adoption order if satisfied the person is “incapable of giving his consent” (s.10(2)). RMI’s Adoptions Act section 816(1(d)) sets a threshold similar to Solomon Islands. The Act allows parental consent to be dispensed with “where a natural parent is unable to care for the child by reason of severe mental illness … Such mental illness may be established by the testimony of a qualified physician.”

Any legislation that denies a person the right to consent (or withhold consent) to an adoption because he or she is deemed incapable of independent decision-making violates the right to legal capacity under Article 12 and the right to parenthood under Article 23. Under Article 12, there are no exceptions to the right to make decisions, not even for persons who require more intensive support to make those decisions. In fact, the State has an obligation to provide supported decision-making in the realm of parenting, just as it does in other areas. This is explicitly stated under Article 23(2), which demands that persons with disabilities be given appropriate assistance to undertake their child rearing responsibilities. Further, any consent waiver based on disability that results in a forced adoption would violate the legal and parental rights of persons with disabilities under Article 23(4), which establishes that States parties must ensure that “a child shall not be separated from his or her parents against their will … (unless) such separation is necessary for the best interests of the child; and “(i)n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” In sum, any disability-based discrimination in matters relating to marriage, family, parenthood and relationships is strictly prohibited under Article 23.

These non-compliant provisions should therefore be amended or removed entirely to ensure that the right to consent to an adoption is not denied on the basis of disability, and to provide for reasonable accommodation and support, including supported decision-making, subject to CRPD safeguards (Article 12), if required by a mother with an intellectual, psychosocial or other disability. There should also be a requirement to provide procedural accommodation for any parent or child with disability who is party to legal proceedings under the legislation.

During the reform process, it is recommended that all legislation that violates other international instruments is simultaneously reviewed. For example, consideration should be given to abolishing the legal category of the “illegitimate child” (as in Tonga, Tuvalu). This 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).

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 standard requirements. Specific support might be given to students who are integrated, but if they cannot fulfil the regular requirements, they are typically 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 three of these approaches by creating an alternative model of what is known as “inclusive education.” Amongst the numerous distinguishing features of this model is that it is not limited to formal education but applies to lifelong learning (which is appropriate because adults with disabilities are amongst those with the highest rates of illiteracy in the general population) and it is dedicated to fostering the principles of equality, non-discrimination and inclusion in society at large. By giving children with and without disabilities an opportunity to interact and learn together, this transformative system promotes respect for diversity from early childhood, paving the way for “the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity.” (Article 24(1)(a)).

At its core then, inclusive education is about transforming the whole culture, policies and practice of mainstream schools so that the needs of all students (including those with disabilities) are accommodated within a mixed learning environment. Inclusive education is expected to nurture values of equality and non-discrimination, celebrate diversity, and generally provide a healthy (and sustainable) foundation for challenging stigma, prejudice and misconceptions about disability. As the CRPD Committee has noted in its General Comment on Article 24 (education), society as a whole benefits from this approach as well as persons with disabilities themselves:

Inclusive education is central to achieving high-quality education for all learners, including those with disabilities, and for the development of inclusive, peaceful and fair societies. Furthermore, there is a powerful educational, social and economic case to be made ... [O]nly inclusive education can provide both quality education and social development for persons with disabilities, and a guarantee of universality and non-discrimination in the right to education.

Article 24 of the CRPD establishes important rights and obligations concerning the education of persons with disabilities and provides guidelines for an inclusive educational system at all levels. In summary, inclusive education means that:

- there must be no exclusion on the basis of disability from the mainstream education system;
- there must be access to quality, free and compulsory primary education and secondary education within the mainstream system on an equal basis with others;

CRPD/C/GC/4, para [2].
• there must be access to tertiary education, vocational training, adult education and life learning without discrimination and on an equal basis with others;
• universal design policies should be adopted by mainstream schools and other places of learning to ensure accessibility;
• support including individually tailored support (reasonable accommodation) must be available to facilitate inclusion at all levels;
• there must be opportunities to obtain skills for personal and social development, including learning sign language, Braille, and augmentative and alternative formats of communication;
• education should be delivered in the most appropriate languages, modes and means of communication for blind, deaf and deafblind persons;
• teachers qualified in sign language and Braille, including teachers with disabilities, should be employed, and professionals working at all levels of the educational system should be given training in disability awareness and inclusive education including the use of alternative communication modes, formats, techniques and materials.

Contemporary legal frameworks can contribute to either promoting transformative change or sustaining disparities of opportunity and discrimination. In Pacific legislation, there is sometimes a failure to recognize the educational rights and needs of children with disabilities (Solomon Islands, Tuvalu); a failure to explicitly prohibit discrimination or exclusion on the basis of disability (FSM); or an endorsement of disability-based exclusion, whether express or implied (Tuvalu, Pohnpei). Under Tuvalu’s Education Act, the Education (Compulsory Education) Order specifically exempts from compulsory education “a child who is so badly physically handicapped or mentally retarded that, in the opinion of a medical officer, he would in the circumstances derive no substantial benefit from schooling or further schooling.” (s.5(c)). The rules governing compulsory education in Pohnpei State also 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.” This is consistent with the National Code of FSM which while establishing that education is “compulsory for all children, including children with disabilities,” allows for exclusions and exemptions from school attendance “for sickness or behavioral problems as determined by the appropriate State authorities.”

These provisions violate Article 24 as well as Article 3 (general principles), Article 5 (equality and non-discrimination), and, in the case of Tuvalu, Article 8 (awareness-raising). They should therefore be removed or amended to make clear that no student can be rejected or otherwise excluded from the general education system on the basis of disability. Education must be accessible to all children, regardless of disability, so no exemption should be considered on this basis. Anachronistic and degrading terms like “so badly handicapped”

342 Solomon Islands – Education Act.
343 Tuvalu – Education Act.
344 Ibid. s.104(2).
and “mentally retarded” should also be avoided as they fail to respect the dignity and human rights of persons with disabilities.

There are a few welcome exceptions to this general pattern. Firstly, Nauru’s Education Act 2011 expressly states that: “(1) 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 respect of 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.

Compliance with Article 24 requires the removal of any barriers that restrict access or opportunity for education. In particular, Article 24(2)(a) demands a non-exclusion provision to ensure that no student can be rejected or otherwise excluded from the mainstream education system on the basis of a disability.

**Segregated education (“special schools”)**

Despite some positive developments, Pacific education systems (and their supporting legislation) still appear to fall short of CRPD standards. A conspicuous feature of education policy and legislation is the continued use of “special schools” or “special education” (Solomon Islands, Tuvalu, Tonga, RMI, FSM). The CRPD Committee has repeatedly stated in concluding observations that special or segregated learning (i.e. education of students with disabilities “designed or used to respond to a particular or various impairments” and provided in separate settings so that they are isolated from students without disabilities) is not consistent with the Convention.345

FSM is one of several Pacific countries with an established “special education” system.346 “Special education” is defined as “instructional or other services necessary to assist children with disabilities.” It is “specifically designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.” (s.102(21)). “Special education” instruction may be conducted in classrooms, at home, hospitals and institutions, in other settings, and in physical education. A range of procedures are “designed to provide access to a reasonable, appropriate, and economical elementary and secondary education for children with disabilities, through graduation from grade 12 or age 21” (s.107(3)).

Although these measures may be well-intentioned, and the main objective is to provide education to children with disabilities in mainstream classrooms, “special education” is still essentially separate from mainstream education which is not acceptable under the CRPD. Overall, the measures prescribed are more consistent with the integrationist model and as such fall short of the transformative approach (inclusive education model) required by the Convention.347 In order to comply with Article 24, there needs to be a comprehensively inclusive education system without exceptions. Section 107 should therefore specify that all education policies and procedures created for the education of children with disabilities should be developed within the framework of CRPD-aligned inclusive education. To this end, 346 FSM National Code Title 40 Chapter 2, Subchapter III.
education must take place in mainstream schools, guided by principles of accessibility, support, and the pivotal right to reasonable accommodation. Importantly, the quality of education for children with disabilities should be the same as for other children, not “reasonable, appropriate, and economical”, which implies a distinction and disparity in the content and quality of the education. Consideration should also be given to lifting the age limit of 21 years in order to accommodate the needs of students with learning or other disabilities, and to comply with the life-long learning approach of the Convention.

Lack of transformation

There are other anomalies in the definition and/or scope of inclusive education; the lack of understanding of its elements or what is required for its implementation; even a perception that “special education” and “inclusive education” are compatible. This paradoxical approach of retaining “special education” arrangements within an overarching framework of inclusive education can be found in Nauru, Tuvalu, and Tonga. Not surprisingly, the shape and form of what is claimed to be “inclusive education” in Pacific legislation lacks many of its mandatory features, or the kinds of measures necessary or desirable to promote this approach – placement in regular schools with buildings, classrooms, facilities, devices, equipment, educational materials, computer software and curricula that are all accessible; alternative modes and technologies of instruction and learning, including sign language and Braille; personal learning support and reasonable accommodation, including for exams; accessible transport; teacher training; and representation of persons with disabilities and/or an inclusive education expert on all boards, committees and review panels where appropriate for compliance with Article 4(3). In its concluding observations on Vanuatu’s initial report, the CRPD Committee emphasized the importance of ensuring “continuous training for teachers and non-teaching staff on inclusive education at all levels, including training in sign language and other accessible formats of information and communication.”

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 in section 95 (as noted above). It also 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 relating to “special education.” Bearing in mind the normative framework mentioned above, the Act should therefore be amended to shift from an integrationist to an inclusive education model. This could be done by redesigning Part 11 of the Act, and including a series of measures to guide implementation including:

- universal design, accessibility in all its complexity, individualised support, and reasonable accommodation;
- learning of Braille and sign language and supply of accessible learning materials (Part 11);
- education delivery in appropriate languages and communication formats especially for blind, deaf or deaf blind students;
- free of charge education for persons with disabilities including support measures and other disability-specific requirements;
- support within the mainstream system to replace special education centres;
- a definition of disability that stresses its relational character, rather than focuses

349 Tuvalu – Education Act.
351 CRPD Committee concluding observations on the initial report of Vanuatu CRPD (2019) CRPD/C/VUT/CO/1.
LABOUR AND EMPLOYMENT

Persons with disabilities experience a great deal of discrimination in the area of work and employment. Globally, their rate of unemployment is considerably higher (two or three times higher) than for the rest of the population, and exclusion from the open market place is widespread. The right to work and employment, established under Article 27, is both a right in itself and an important means to achieve independence, autonomy and self-determination (Article 3). Article 27 obliges States parties to prohibit discrimination on the basis of disability in all aspects of employment and to protect the right of persons with disabilities to the same terms and conditions of work as anyone else. It identifies a range of obligations to ensure the enjoyment of this right, including the provision of reasonable accommodation in the workplace.

While law reform will not necessarily solve all the problems persons with disabilities in this area, it can help to eliminate some of the institutional barriers to employment and decent work and promote a more inclusive labour market within a rights-based policy and legal framework. This section accordingly identifies key areas of non-compliance with the CRPD across regional employment legislation in the hope that this will help guide national law reform processes.

Non-discrimination principles

For CRPD compliance, it is important to ensure 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. Legislation should expressly mandate reasonable accommodation, accessible workplaces, decent work on an equal basis with others, and any other measures necessary to improve the access of persons with disabilities to employment and decent work and protect them from any form of exploitation or discrimination. The definition of discrimination should include multiple and intersectional discrimination (such as that based on gender and disability); discrimination by association (discrimination against a person associated with a person with disability); and the denial of reasonable accommodation as a form of disability-based discrimination in line with its definition under Article 2.

With few exceptions, these provisions are conspicuously missing from Pacific employment legislation. This is a matter of concern for the CRPD Committee which has criticized the fact that no attention is given to the rights of persons with disabilities in Vanuatu’s Employment Act (2006).352

While there are some inconsistencies in its legislation, Tuvalu provides a good regional standard. Amongst 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 - importantly for this review - disability (s.50). This interdiction covers all areas of employment including recruitment, training, promotion, terms and conditions of employment, and termination. It also applies to both direct and
indirect discrimination (s.(3)); and there is 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)).

Another noteworthy feature of the Labour and Employment Relations Act 2017 is numerous provisions that promote gender equality including: the prohibition of discrimination based on gender, sex, pregnancy, marital status, sexual orientation or family responsibilities (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). These measures are consistent with Article 6 of the CRPD (women with disabilities), which requires States parties to “take all appropriate measures to ensure the full development, advancement and empowerment of women …”

Another positive example can be found in FSM although its much leaner provision applies only to employment in the education sector, where anti-discrimination safeguards are established for employees of the College of Micronesia. Discrimination is prohibited on multiple grounds including sex, marital status, race, religion and “physical handicap”, and non-discriminatory procedures for appointments and promotions are designed to ensure “impartial selection of the ablest person for the particular job.”

While it is laudable that the FSM National Code prohibits disability-based discrimination, the term “physical handicap” is outdated and leaves persons with non-physical disabilities (such as sensory, intellectual or psychosocial) at risk of discrimination. The phrase “the ablest person” is also ambiguous and could be construed to exclude a person on the basis of disability (“disabled person”). Amendments should include: expanding the scope of protection to include all types of impairments; replacing “physical handicap” with a more inclusive term “disability” using a definition consistent with the CRPD; establishing an obligation to provide reasonable accommodation for any employee (or job applicant) with disability; and replacing the phrase “the ablest person” with an alternative phrase like “the most suitable person.”

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. This applies to both public and private sector employment including many positions of high office. Sometimes, disability is expressly identified as the basis for the discriminatory treatment, for example under Tonga’s Ports Authority Act, where a Board Director may be removed on the basis of “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.” These perceptions are sometimes justified by reference to a physical examination or medical test (for example in Pohnpei State with respect to the employment of police and security officers).

Any blanket decision by the court or other authority to remove a person from a position of employment, including a position of public office or leadership, on the basis of that person’s perceived or actual disability or “incapacity” contravenes numerous Articles of the CRPD, notably 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) whether the act of...
discrimination is direct (“unsoundness of mind”) or indirect (“incapacity” or “lack of physical or mental fitness”). As noted elsewhere, “incapacity” has traditionally been associated with disability, both physical and mental (cognitive or psychosocial) and has typically given rise to a denial of legal capacity. Physical examinations or medical tests of fitness should not be used as a barrier to exclude a person on the basis of disability. Any person with disability is entitled to reasonable accommodation (e.g. modified hours or for the examination itself) in order to enjoy the right to employment including continuance of employment.

A selection of legislative provisions that promote disability-based discrimination are discussed below. More examples are listed in a summary table (see Annex 2). Together they comprise a snapshot of well over 200 discriminatory legislative provisions across multiple sectors. This highlights the magnitude and diversity of employment opportunities effectively denied to persons with disabilities; the extent to which this discrimination is institutionalized; and the need for law reform to remove the legal barriers to employment and participation in public life.

The Leadership Code Act of Tuvalu reflects the country’s commitment to good governance and is designed to guide the conduct of the leaders of the Tuvaluan people – those holding senior positions in government such as the Head of State and Cabinet Ministers, members of the Kaupule, Members of Parliament, judicial officers, government appointed company directors, and traditional leaders. There are numerous ways in which this piece of legislation can be better aligned to international human rights standards including the CRPD. However, a few provisions only are singled out for comment. These pave the way for persons holding positions of leadership or public office to unfairly lose their positions (source of employment) on account of a disability.

Firstly, any position established by the Leadership Code Act falls vacant if the incumbent dies, resigns, is kidnapped or disqualified, or “is declared by a court to be too mentally or intellectually ill or impaired to carry out the functions of that position” (s.8). Secondly, a member of the Leadership Tribunal deemed “unfit to hold office” can be removed from the Tribunal (s.48). An officer may be considered “unfit to hold office” if he or she “lacks the minimum physical or mental ability, or the moral character, needed to carry out the functions of that office adequately” (s.9(1)(b)). Thirdly, the Chief Ombudsman can be removed from office on the grounds of “inability to perform properly the functions of his or her office or position (whether arising from infirmity of body or mind, or from other cause), or misbehavior” (s.43(b)).

All of these provisions, including the requirement for “minimum physical or mental ability”, open the door to disability-based discrimination because of the usual assumptions about what persons with disabilities are able/capable of doing (or not doing) or should be doing (or not doing), especially persons with intellectual or psychosocial (mental) disabilities. Although there might be legitimate reasons for stipulating certain physical requirements in some jobs, for example some areas of policing, this is unlikely to apply to the leadership positions covered by the Leadership Code Act. Persons with disabilities can and should be employed (and be able to retain their source of employment) in any area including public office and leadership with appropriate adjustments and accommodations, support, and (if a disability is acquired during the period of service) rehabilitation, in line with the Articles noted above. In particular, Article 27 creates an important obligation to provide reasonable accommodation in the workplace, the denial of which is an act of discrimination (Article 2). Denial of employment or removal from a position (or revocation of an appointment) should only be contemplated if the person is unable to perform the inherent (core) requirements of the position after receiving reasonable accommodation and any other
accessibility and support measures required. These and like non-compliant provisions elsewhere should accordingly be amended to incorporate CRPD obligations and rights, ideally supported by an express prohibition on removing a person from office on the basis of disability. The reference to “minimum physical or mental ability” should be deleted, or amended to clarify that the phrase cannot be construed to allow an officer’s removal on the basis of a disability. Inherent requirements should be distinguished from secondary (non-essential) requirements so that the test of ability to perform (with reasonable accommodation etc.) is applied only to core duties. In respect of the Chief Ombudsman, the outdated phrase “infirmity of body or mind” should be deleted, particularly as the general test of “[i]ability to perform properly the functions of office” suffices. Importantly, where the incumbent is a person with disability, any test to determine competency should only be applied to “core functions of office” and be undertaken once obligations to provide reasonable accommodation, accessibility measures, and other support have been fulfilled.

The requirements of a “fit and proper person” and “capacity” appear more precisely under Tuvalu’s Magistrates’ Courts Act. Under sections 7 and 9, an appointment to the magistracy must be “any fit and proper person” and a magistrate may be removed “in case of illness, absence, or incapacity” and replaced by “any other fit and proper person.” There are no indicative guidelines for determining that a person is a “fit and proper person.” However, given stigma and prejudice associated with disability and mental illness, the ‘fit and proper’ test is likely to disproportionately affect persons with disabilities, and pave the way for discriminatory disqualifications or exclusions based on disability, contrary to Articles 5 and 27. In view of this, these provisions should be amended to clarify that “fit and proper person” and “incapacity” do not include disability. Magistrates should be provided with reasonable accommodation, support, and where appropriate rehabilitation to enable them to perform their duties in the magistracy regardless of disability.

Lastly, the language of “lunacy” and “unsoundness of mind” appears in the context of appointments under the National Bank of Tuvalu Act. Section 8 identifies various grounds for disqualifying a person from appointment as director. These grounds include membership of Parliament, bank employment, bankruptcy, conviction for an offence involving dishonesty, and where a person “is found lunatic or becomes of unsound mind.” A similar provision can be found in Solomon Islands’ Planning and Development Act which empowers the Minister to revoke the appointment of Board members and the Chairperson on grounds including insolvency, conviction of a criminal offence involving dishonesty, and if declared by the court to be “of unsound mind”. “Unsoundness of mind” as a termination ground directly discriminates against a person with intellectual and/or psychosocial disability. It should therefore be removed and replaced with mandatory reasonable accommodation and support provisions as outlined earlier. The use of terms like “lunatic” and “unsound mind” should be avoided as they are do not respect the dignity of persons with psychosocial and intellectual disabilities.

The barriers posed by disability tests of “mental and physical fitness” and “physical and mental incapacity” also appear in Vanuatu’s legislation. Under the Police Act (s.31), a member of the police force is discharged if “mentally or physically unfit for further service.” Under a more recent piece of legislation, the Maritime Sector Regulatory Act 2016, a person can be disqualified from appointment as Maritime Regulator if “unable to perform the Regulator’s responsibilities, functions, duties and powers due to any physical or mental incapacity” (s. 8(3)(d)). The appointment of a Regulator can also be suspended or terminated “after being medically assessed by a medical practitioner the medical practitioner certifies that he or she is mentally or physically unfit to discharge all of his or her duties, for a period exceeding 28
days” (s. 9(1)(e)). A member of the Maritime Appeals Tribunal can be removed or suspended by the Chief Justice on the grounds of “physical or mental incapacity” (s.49(1)(e)).

As they stand, all these regulations are discriminatory and should be amended. Although as noted above there might be a legitimate reason for stipulating certain physical requirements in some areas of policing, the profession should not exclude persons with disabilities who can be employed and serve in the police force with appropriate adjustments (reasonable accommodation). Moreover, if a serving police officer under the Police Act acquires a disability due to his or her work, there is an obligation under the CRPD to make rehabilitation measures available as well. The same requirements to provide reasonable accommodation, rehabilitation, and support apply to the Maritime Regulator and tribunal members under the Maritime Sector Regulatory Act 2016.

The Tonga Broadcasting Commission Act makes provision for the termination of a Board member for “incompetence” and a Commission Manager who “becomes permanently incapable of performing his duties.” Similarly, under Tonga’s Public Enterprises Act, a director may be removed from office on the grounds of: incompetence, incapacity, bankruptcy, neglect of duty, and misconduct. While there is no specific mention of disability, issues of incompetency, incapacity, and disability are commonly conflated to imply disability so they are not consistent with the CRPD. It is therefore preferable that such terms are avoided or at the very least clarified to ensure they cannot be construed to justify the (discriminatory) termination of a Board member or Manager on the basis of a disability. An alternative provision should focus more on the ability to perform the core duties and responsibilities of the job with reasonable accommodation etc.

Wage discrimination

Wage discrimination is another area of employment discrimination for persons with disabilities. It is especially associated with the practice of sheltered employment where (predominantly) persons with intellectual disabilities are placed in segregated work settings with atypical and substandard working conditions. As one of the most commonly used employment measures used in Europe and the United States, sheltered employments promote segregation and exclusion from the community; and they infringe on the rights of persons with disabilities to access a freely chosen and accessible workplace in the open market. 356

The CRPD Committee has noted with concern the ubiquitous practice of paying lower wages to persons with disabilities in sheltered work settings. It has consistently criticized the rights violations in its concluding observations, and called for legislative reform.357 In its concluding observations for New Zealand in 2014, for example, the Committee was critical of the continued use of sheltered employment scheme for workers with disabilities. This allowed for reduced wages to be paid based on individually assessed exemptions under the Minimum Wage Act 1983. Noting with concern that around 1,200 persons with disabilities were paid less than the minimum wage under these exemption permits, the Committee recommended that the State examine alternatives.358 This is a controversial area which has generated polarized views including the argument of human rights advocates that far from assisting persons with intellectual disabilities, sheltered workshops “contribute(s) to their stigmatization as unproductive, worthless citizens.” 359 In the Pacific, Solomon Islands’ Labour Act empowers the

357 See CRPD Committee concluding observations for Austria (CRPD/C/AUT/CO/1), China (CRPD/C/CHN/CO/1) and Germany (CRPD/C/DEU/CO/1), paras. [49-50].
358 CRPD Committee concluding observations for New Zealand CRPD/C/NZL/CO/R.1 2014, paras. [57-58].
Commissioner of Labour to issue permits employing persons with disabilities for wages below the minimum wage. A collective agreement may reflect this abatement and authorize the reduced wages and conditions applicable to persons with disabilities (s.36(2)). These provisions clearly contravene Article 27 of the CRPD and should be removed. They are also inconsistent with Solomon Islands’ ILO-aligned Decent Work Programme in the Department of Labour, one of the priorities of which is the promotion of decent work opportunities for youth and persons with disabilities.

Tuvalu’s Labour and Employment Relations Act 2017 is silent about disability in respect of minimum wages. However, the Minimum Wage Board is authorized under the Act to recommend different minimum rates for different types of employment or work, and to advise the Minister on “other matters related to the fixing of minimum wages for employees” (s.123(3) and (4)). Section 124 establishes the criteria for minimum wage recommendations including “such other matters as [the Board] thinks fit” (s.124(1)(i)). These provisions should be amended to ensure that they are not used to authorize the lowering of minimum rates on the basis of an employee’s disability. For CRPD compliance (Article 27), there must be no disability-based discrimination in respect of minimum wage levels, including with respect to persons with cognitive, intellectual or psychosocial disabilities.

Both Pohnpei State and Vanuatu prohibit wage discrimination in their legislation. However, the prohibited grounds for this discrimination are limited to race, religion and sex (Pohnpei) or just sex (Vanuatu). For CRPD compliance, the prohibited grounds of wage discrimination should be extended to include disability, including intellectual or psychosocial disability.

With the exception of Tuvalu (noted above), Pacific employment legislation typically lacks any requirement for reasonable accommodation in the workplace. This implies a lack of commitment to disability inclusive employment, for which reasonable accommodation and accessible workplaces are both prerequisites. It is important that legislation expressly recognizes the right of all persons (including women) with disabilities to work and earn a living on an equal basis with others, including accessing decent work in the open market, in any occupation, and at any level in both the public and private sectors. For compliance with Article 27(1), employers should be under an express obligation to provide reasonable accommodation for any employee who requires this, and to ensure that all workplaces are accessible and inclusive. The CRPD Committee has called on Vanuatu to make sure that “persons with disabilities, especially women with disabilities and persons with intellectual or psychosocial disabilities, are not denied reasonable accommodation in the workplace.”

Reasonable accommodation in the workplace could take various forms such as modified working hours (to accommodate those needing frequent breaks, flexible working hours, or reduced working hours); provision of a computer with a Braille reader; the assignment of a job coach (for persons with an intellectual or mental health disability); the provision of a sign language interpreter for a job applicant or employee who is deaf; and the removal of certain tasks from a job for an employee who 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 evidence to...
demonstrate why it is needed. An employer who considers that reasonable accommodation constitutes an undue burden should have to prove this.

Positive measures (employment quotas)

Pacific countries are encouraged to consider the introduction of positive measures to promote employment opportunities for persons with disabilities in the open market. Establishing an employment quota is one possible measure. This would involve setting aside a certain number or proportion of jobs/positions for persons with disabilities. 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, they have proved to be an effective mechanism for increasing employment opportunities for persons with disabilities in some countries. Success is likely to be contingent on quotas being mandatory (not discretionary) and supported by enforcement mechanisms. A penalty should therefore be imposed on employers who fail to comply with the prescribed quota. Importantly, legislation should specify 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 to minimize the risk of the system being used to hire only persons with mild disabilities who could find employment without the need for reasonable accommodation or a quota system. Fiji’s employment quota (2 per cent) applies to employers who have more than 50 employees. It is discretionary and therefore not legally enforceable. It only applies to “physically disabled persons.”

Other positive measures could be considered to promote self-employment opportunities for persons with disabilities. The CRPD Committee has proposed the exemption of business license fees to Vanuatu, for example.

Worker compensation and rehabilitation

As a colonial legacy, workers’ compensation legislation is a fairly common feature of the legal landscape regulating employment in the Pacific. Examples include Tuvalu, Vanuatu and Nauru. Vanuatu’s Workmen’s Compensation Act provides for compensation to be paid by an employer to any employee “who suffers injury from any accident arising out of and in the course of his employment” (s.1(1)), or to the estate of any employee “who dies as a result of any accident arising out of and in the course of his employment” (s.1(2)). Tuvalu’s Workmen’s Compensation Act provides for compensation to be paid by an employer to an employee who dies, sustains an injury, or contracts a disease in the workplace. Nauru’s Workers Compensation Act 1956 similarly provides compensation for occupational disease as well as injury. However, the list of injuries that guide the assessment of incapacity for the purpose of compensation comprise only physical injuries (see Schedules).

Financial compensation is an important and necessary response to occupational injury, disease and disability. However, rehabilitation should also be amongst the mandated responsibilities of employers. This is currently absent from Pacific legislation. For CRPD compliance, habilitation and rehabilitation programs should therefore be put in place in order to enable persons with disabilities to continue performing their assigned tasks or to resume these in time if prevented from doing so because of an injury or illness. Overall, the focus should shift towards promoting the rehabilitation of workers who acquire a disability due to an occupational accident or illness/disease in order to enable persons with disabilities to retain (rather than relinquish) their employment.

Article 27 requires States parties to adopt legislative and other measures to “safeguard
and promote the realization of the right to work, including for those who acquire a disability during the course of employment.” Such measures include reasonable accommodation and “vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.” In addition, with its specific focus on habilitation and rehabilitation, Article 26 requires states to:

> take effective and appropriation measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, State Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services… (Article 26(1)) (emphasis added)

As a general rule, employment law, anti-discrimination law, and workers’ compensation law play distinct but overlapping roles in the promotion of employment rights for persons with disabilities. Anti-discrimination law and/or employment law (such as Tuvalu’s Labour and Employment Relations Act 2017 and Vanuatu’s Employment Act) are appropriate places to establish obligations to provide reasonable accommodation in the workplace since, like accessible workplaces, 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 established as part of a mandatory inclusive working environment, 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 (if any) environmental and attitudinal barriers. By contrast, rehabilitation obligations would be better established under workers’ compensation law (such as the Workmen’s Compensation Acts cited above) in order to improve the prospects of a return to work following a workplace accident or contraction of an occupational illness. This is amply demonstrated in the Workers’ Compensation and Rehabilitation Act 2003 of Queensland, Australia. The name itself highlights the importance of rehabilitation following a workplace injury. Under the Act, the statutory agency tasked with implementing rehabilitation, WorkCover Queensland, has an obligation to provide treatment and rehabilitation for return to work. Section 220 states that:

> … an insurer must refer a worker who has lodged a notice of claim to an accredited return to work program of the insurer, unless the insurer is satisfied that, as a result of the injury, the worker will not be able to participate in the program.

It is recommended that workers’ compensation legislation in the Pacific be comprehensively reviewed for alignment to the CRPD, in particular to comply with the relevant rehabilitation obligations under Articles 26 and 27. The review should include the Schedules to the Acts for the purpose of expanding the list of compensatable injuries to include mental health conditions, brain injuries and any other non-physical injuries, illnesses, diseases or disabilities that should also be compensated 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 and should take into account good global practices in compensation and rehabilitation law. 364 It

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364 For more information on good practices, see the ILO Code of practice on managing disability in the workplace, developed at the Tripartite Meeting of Experts on the Management of Disability at the Workplace Geneva, October 2001, 
should anticipate significant reform.

The Queensland legislation, for example, contains an entire division on rehabilitation. Amongst other things, this establishes rehabilitation policies and procedures and various roles to co-ordinate the return to work. It also includes a range of definitions that may be of help to Pacific countries, for example a comprehensive definition of worker rehabilitation:

(1) "Rehabilitation" of a worker, is a process designed to—
   (a) ensure the worker’s earliest possible return to work; or
   (b) maximise the worker’s independent functioning.

(2) "Rehabilitation" includes—
   (a) necessary and reasonable—
      (i) suitable duties programs; or
      (ii) services provided by a registered person; or
      (iii) services approved by an insurer; or
   (b) the provision of necessary and reasonable aids or equipment to the worker.

(3) The purpose of "rehabilitation" is—
   (a) to return the worker to the worker’s pre-injury duties; or
   (b) if it is not feasible to return the worker to the worker’s pre-injury duties — to return the worker, either temporarily or permanently, to other suitable duties with the worker’s pre-injury employer; or
   (c) if paragraph (b) is not feasible — to return the worker, either temporarily or permanently, to other suitable duties with another employer; or
   (d) if paragraphs (a), (b) and (c) are not feasible — to maximise the worker’s independent functioning.365

Retirement on medical grounds

Worker compensation legislation overlaps with an aspect of social security legislation, namely the medical grounds for retirement. Provisions for medical retirement can be problematic, especially when they prescribe mandatory retirement or involuntary discharge as well as where they imply voluntary retirement without making available the option of continued employment. According to Article 27 of the CRPD, workers who have a workplace accident resulting in a disability should be allowed to rehabilitate and retain their job, including through the provision of reasonable accommodation. The rights to job retention, professional rehabilitation, and reasonable accommodation in the workplace are fundamental employment rights for persons with disabilities.

Solomon Islands Pensions Act deals with public service pensions. Many of its provisions date back to ordinances in colonial times. Section 8 concerns the payment of pensions on retirement including early retirement on medical grounds. Although this provision appears to be about voluntary retirement, it is likely to impact adversely on government employees with disabilities as it implies that a person who is considered “incapable by reason of any infirmity of mind or body of discharging the duties of his office …” is unfit to remain employed in the public service. This contravenes anti-discrimination principles and the right of persons with disabilities to work and employment on an equal basis with others, including the right to retain or continue in employment, and to professional or vocational rehabilitation where a disability is acquired during the course of employment.

Under Tonga’s National Retirement Benefits Fund, benefits are provided to members of the Fund on retirement, death, or “permanent total disablement” (s.10). The latter refers to a

365 Workers’ Compensation and Rehabilitation Act 2003 (Queensland) s. 40.
condition that is medically certified as resulting in permanent incapacity to the extent of not being able to earn more than one-third of the normal occupational rate (s.2). A member of the Fund is entitled to a Leaving Service Benefit in the event of "permanent and total disablement before retirement age" (ss. 40 and 44). Apart from replacing terms like "disablement" and "incapacity" with terms that are consistent with the CRPD ("disability" and "impairment"), section 44 should be amended to create the option for continued employment with reasonable accommodation, rehabilitation, and support, consistent with rights under Article 27.

The FSM National Code makes provision for any Member of Congress who resigns from office due to "physical incapacity, disability or illness" to be paid out for the remainder of his or her term. While a favourable compensation deal, it does not allow ongoing service. The section should be amended to establish that Members of Congress who acquire a disability are entitled to remain in office (in lieu of resigning) and to receive reasonable accommodation and other necessary measures to support this decision. The term "physical incapacity" should be removed.

It is important in the context of medical retirement or discharge that legislation protects the right of any person with disability to enjoy continuance of employment with reasonable accommodation and other support measures as relevant. This issue was the subject of a complaint against Spain under the CRPD Optional Protocol in 2015. The CRPD Committee found that the forced retirement of a police officer with disability and the refusal to permit his continued employment or his assignment to other (modified) duties were discriminatory acts, in contravention of Articles 5 and 27. It considered that the State party had failed to fulfil its obligations under Articles 27, as well as Articles 3, 4, and 5, and asserted that it "must comply with its obligations under Article 4 of the CRPD to modify and harmonize all local, autonomous-community and national provisions that bar individuals from being assigned to modified duty without providing for an assessment of the challenges and opportunities that persons with disabilities may have, and that thereby violate the right to work."

**PUBLIC SERVICE**

As one of the recommended steps to protect and promote the right of persons with disabilities to work in the open labour market, Article 27(1)(g) of the CRPD directs States parties to employ persons with disabilities in the public sector.

Public sector employment is primarily governed by public service legislation in the Pacific and CRPD transgressions generally mirror those identified in employment legislation discussed above. Amongst the more conspicuous examples of non-compliance are: a lack of non-discrimination principles relating to disability; discriminatory practices in recruitment such as medical examinations, forced retirement on medical grounds, and dismissal on the basis of disability; the absence of reasonable accommodation specifications or any positive measures to promote the employment of persons with disabilities; and a general failure to guarantee access to justice for persons with disabilities participating in disciplinary or grievance proceedings. With few exceptions mainly relating to discriminatory dismissal or
discharge matters, Pacific legislation is silent on disability. There is little to indicate any anticipation of or commitment to employing persons with disabilities in the public service.

Tuvalu, Nauru, FSM and Kosrae provide illuminating examples in respect of hiring and firing practices that imply rights violations for persons with disabilities who apply for or hold positions in the public service. Prospective public service employees in the national government of FSM and the State government of Kosrae can be required to undergo competitive examinations, including physical examinations, to test the “relative capacity and fitness” of the candidates as part of the recruitment process. Examinations are open to everyone, subject to limitations in regard to health, physical condition.369

As with other rules implying discriminatory tests, provisions should be amended to safeguard against any disability-based discrimination and to prioritise the obligation to provide reasonable accommodation. Terms like “incapacity” and “lack of fitness” are closely associated with disability, so should be avoided because they open the door to discrimination. Candidates with disabilities may require adjustment to the examination process or any other aspect of the recruitment process in order to have an equal opportunity to secure employment and for compliance with Articles 5 and 27. An express non-discrimination provision should therefore make clear that no person required to take a physical examination (or test of “fitness”) can be rejected or disqualified on the basis of disability. A person should only be denied employment if unable, with reasonable accommodation and support, to meet the inherent (core) requirements of a particular position.

A welcome development in Nauru has been the repeal of similar discriminatory provisions that existed in its Public Service Act 1998. Under section 13 of the 1998 Act, eligibility for admission to the public service required evidence of “health and physical fitness for appointment to that office.” Since establishing physical fitness as a requirement for employment amounts to disability-based discrimination, this provision contravened Articles 5, 27 and 29. In addition, under section 3, the definition of efficiency was likely to amount to indirect discrimination if applied without due consideration to reasonable accommodation when assessing the efficiency of a public servant. Commendably, both provisions have been repealed under Nauru’s Public Service Act 2016.

However, it should be noted that this reform is not reflected in other legislation relevant to public service employment in Nauru such as the Nauru Superannuation Act 2018 (disqualification of a person being appointed as a Board member if the person “lacks capacity in respect of his or her duties as a member within the meaning of the Mentally-disordered Persons Act 1963”) (s.12(2)(c)); the Liquor Control Act 2017 (removal of a member of the Liquor Licensing Board if the member “fails to perform functions, powers and duties under the Act or due to illness and incapacity”) (s.8(1)(f)); and the Electoral Act 2016 (disqualification of a person certified to be “intellectually impaired" from being appointed as Electoral Commissioner) (s.16(b)).

Under the Public Service Commission Rules of Tuvalu’s Public Service Act, provisions for retirement on medical grounds authorise the Commission to terminate the services of an officer deemed to be “incapable by reason of any infirmity of body or mind of discharging in a proper manner the functions of office” (rule 43). This follows a medical examination conducted by a medical board appointed by the Secretary for Health, Sports and Human Resources Development. Rules 37 and 38 also make specific provision for the termination of permanent and non-permanent officers for “medical reasons.”
As it stands, rule 43 implies that a person who is considered “incapable” of discharging the duties of office “by reason of any infirmity of mind or body” is unfit to remain employed in the public service. While there is no mention of disability, as noted previously it is common to equate notions of “incapacity” and “infirmity of body or mind” with disability, thus sanctioning the removal of an officer on the basis of a physical, sensory, intellectual or psychosocial (mental) disability. This contravenes anti-discrimination principles (Article 5) and the right of persons with disabilities to work and employment on an equal basis with others, including the right to retain or continue in employment with reasonable accommodation and professional rehabilitation where a disability is acquired during the course of employment (Article 27). The phrase “infirmity of mind or of body” is also contrary to Article 8.

Rule 43 should therefore be repealed and replaced by a general health ground for early voluntary retirement. Rules 37 and 38 should also be amended to clarify that “medical reasons” cannot be construed to mean disability, and to prohibit any termination on the basis of disability. For compliance with the CRPD, civil servants with disabilities must be provided with reasonable accommodation, rehabilitation, accessibility measures and any other support. An officer should only be considered for involuntary discharge or mandatory retirement on medical grounds if unable to perform the core requirements of a position after being provided these various support measures.

The same type of forced medical retirement discrimination can be found in Nauru where the language is less oblique. The Public Service Act 2016 (amended in 2018 and 2019) makes provision for both voluntary retirement (s.85) and mandatory retirement on medical grounds (ss. 86-88). Under section 88, the Chief Secretary has discretion to retire an employee from the public service if “reasonably satisfied” following a medical examination that:

(a) the employee’s absence or unsatisfactory performance is caused by mental or physical illness or disability”; and
(b) the illness or disability or its effects will not end within a reasonable time.

Anti-discrimination provisions are increasingly making their presence felt for example in Tonga, Tuvalu, FSM, Nauru and Solomon Islands but they are not a consistent feature of public service legislation and there continue to be discriminatory provisions (in particular “incapacity” provisions) across a multitude of sectoral laws (see Annex 2). With the exception of Solomon Islands, disability is typically excluded or recognized very narrowly. In the Codes of FSM and Kosrae State, for example, merit principles recognise the right to equal opportunity and non-discrimination in the 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. In addition, while under the Kosrae State Code there is some attempt to conduct “impartial selection of the ablest person for public service by means of tests which are fair, objective…,” this seemingly neutral provision is likely to impact negatively on applicants with disabilities in the absence of reasonable accommodation, quite apart from the loaded term “ablest” which should be replaced by an alternative like “most suitable” to avoid the discriminatory implications.

Lastly, an express attempt in both Codes to protect persons with disabilities from discrimination is limited to those with “a physical handicap unconnected to his ability to perform effectively the duties of the position in which he is employed or in which he is seeking employment; provided that the employment of such physically handicapped person will not be
hazardous to him nor endanger the health or safety of others.” 372 The FSM National Code asserts another proviso to the protection from discrimination, namely that the “physically handicapped person” does not “require major expenditures by the central Government to provide such employee or candidate for employment with an adequate place of work or access thereto.” 373 These anti-discrimination provisions therefore fail to cover persons with sensory, intellectual and psychosocial disabilities and they are highly equivocal and conditional. They fall short of the equal right to employment under Article 27, which includes the right to reasonable accommodation.

A welcome contrast can be found in Solomon Islands which expressly prohibits discrimination on the basis of disability in its Public Service Code of Conduct. A draft Public Service Bill also incorporates non-discrimination and equal employment principles and prohibits discrimination against persons with disabilities in all aspects of the employment process including recruitment, promotion, transfers and training opportunities. However, this rights-based approach is not consistently taken in other legislation that regulates employment for public servants, for example the Planning and Development Act, which revokes the appointment of the Chairman or any other Board members if declared to be of “unsound mind” (Schedule, clause 3(2)(b)).

It is important that legislation be amended across the region to expressly recognize inclusion, non-discrimination, equality of opportunity, and respect for diversity as core principles governing employment in the public service. For compliance with Article 5, disability should be specifically identified as a prohibited ground for discrimination, and there should be a duty to provide reasonable accommodation. In addition, 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. An example could also be set by introducing positive and special measures such as employment quotas as a pathway to more employment opportunities for persons with disabilities. This would be consistent with Article 27(1)(g), which requires States parties to take appropriate steps to promote the realization of the right to work, including by employing persons with disabilities in the public sector. Under Article 5(4), “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination.”

Disciplinary and grievance proceedings are rarely disability inclusive in public service legislation. They do not include requirements to provide procedural accommodation, thus potentially denying persons with disabilities equal access to justice. Under Tuvalu’s Public Service Commission Rules, there are procedures for preliminary inquiries, investigations, and appeals in the context of disciplinary proceedings involving permanent and non-permanent officers (Part V). For compliance with Article 13 (access to justice), these provisions should be amended to establish an obligation to provide procedural accommodation for any officer with disability who is a party to proceedings. The same requirements should be considered for the Pohnpei State Code which includes regulations to govern hearings on employee grievances 374 and a process for appealing decisions relating to dismissal, suspension or demotion; 375 and the Kosrae State Code which makes provision for arbitration, appeals, dispute resolution, and judicial proceedings in the public service. 376

SOCIAL PROTECTION AND DISABILITY INCLUSIVE DEVELOPMENT

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372 FSM National Code Title 52, Chapter 1, s.113(2); Kosrae State Code Title 18, Chapter 1, s.18.103(2).
373 FSM National Code Title 52, Chapter 1, s.113(2).
374 Pohnpei State Code Title 9 Chapter 2, s.2-134.
375 Pohnpei State Code Title 9 Chapter 2, s.2-140.
376 Kosrae State Code Title 18 Chapter 5, ss. 18.504-507.
Since the adoption of the *Vienna Declaration and Programme of Action* in 1993, it has been recognised that all human rights are “universal, indivisible and interdependent and interrelated.” This highlights the need for a bridge between civil and political rights, and social and economic rights. The *Vienna Declaration* highlighted the right to development, stating that it was a universal and inalienable right and an integral part of fundamental human rights. The CRPD was the first international human rights treaty to be adopted following the *Vienna Declaration*, and so captured many of its provisions, making them binding obligations. In particular, Article 28 recognises development as a fundamental human right, upholding the right of persons with disabilities “to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions...”

Persons with disabilities have traditionally been excluded from social development programmes and funding, and this has led to a high level of marginalization and exclusion. Women, children, youth and older persons with disabilities have been particularly prone to exclusion and face particular challenges due to the intersectionality of discrimination. Significantly, the Millennium Development Goals were silent on disability although the new Sustainable Development Goals have disability components in a number of targets. Disability inclusiveness in social development programmes is essential to reducing poverty and inequality, and realising an adequate standard of living for persons with disabilities. This is why the CRPD promotes disability mainstreaming through Article 28 and Article 4(1)(c), which establishes a general obligation for states “to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.” Legislative reforms are recommended to help take this process forward and to establish the legal foundations for disability inclusive development. RMI is pioneering this transformative (mainstreaming) approach by amendments to over 100 pieces of legislation across multiple sectors.\(^{377}\)

The right to social protection is a key pathway to realising an adequate standard of living and alleviating poverty. In particular, social protection programmes are necessary as there are people who have no other source of income or have insufficient means to support themselves and their dependents. For CRPD harmonization, it is imperative that any social protection system is disability inclusive. This requires recognizing the risks and vulnerabilities faced by persons with disabilities, and devising a system that offers them protection from poverty and economic hardship and guarantees their ability to fully participate in every area of life.

Article 28 upholds the right of persons with disabilities to social protection without discrimination and States parties are obliged to take appropriate measures including ensuring their equal access to: affordable services, devices and other disability-related needs; social protection and poverty reduction programmes (especially for women with disabilities and older persons with disabilities); state assistance with disability-related expenses including training, counselling, financial assistance and respite care for persons with disabilities and their families living in poverty; public housing; and retirement benefits and programmes (Article 28(2)).

One of the most visible examples of formal social protection in the Pacific are superannuation schemes. National Provident Fund Acts can be found in Tuvalu, Vanuatu, Solomon Islands and Nauru.\(^ {378}\) These social security schemes are mainly intended to provide financial security for employees when they retire or cease employment, including after

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acquiring disability. In some countries, disability cash benefits also exist.

A major barrier to disability inclusion under the superannuation schemes is that benefits are premised on a history of formal employment and contributions. In similar fashion, social security benefits in FSM are based on evidence of employment and contributions (full insurance). As they stand, these systems are inclined to marginalise persons with disabilities who have very limited access to employment, especially in the formal sector. This issue has given rise to criticism from the Human Rights Council during FSM’s UPR process. The national government has been urged to consider a broader and more inclusive social protection system since the “highly restrictive” eligibility criteria for social security benefits excluded persons, including the many persons with disabilities, outside the formal (wage earning) sector.

In Vanuatu and Solomon Islands, this discrimination extends further and is more direct, expressly denying access to the Fund by any person detained in a “mental hospital or leper asylum.” These statutory exclusions contravene both Article 5 and Article 28 and should be repealed so that workers who experience mental illness at any time in their working lives or have an intellectual or psychosocial disability are permitted to benefit from the Fund on an equal basis with others.

Another CRPD infringement is common to Solomon Islands, Vanuatu and Nauru. It consists of a denial of benefits to members on the basis of disability. In all three jurisdictions, the rules applied to the withdrawal of member funds authorize payment to another person if the member is “incapable of acting” or “incapable of managing his own affairs.” These provisions contravene Article 12, which recognizes the right of all persons with disabilities to enjoy legal capacity on an equal basis with others, and rejects any form of substitute decision-making on the basis of limited mental capacity or competency. Of particular relevance here is Article 12(5) which requires States to adopt measures to ensure their equal right to control their own financial affairs. All such provisions should be repealed and replaced with a duty to provide support (including supported decision-making) for any Fund member (or nominee) with intellectual or psychosocial disability who requires assistance to withdraw (or receive) funds or otherwise needs assistance making decisions or taking action under the legislation.

While state-sponsored disability benefits signal welcome recognition of the disadvantages faced by persons with disabilities as a marginalised group, they must satisfy the standards implied by Article 28 (adequate standard of living). In Tuvalu for example, a non-contributory national disability support scheme established by the government in 2015 provides support for a growing number of persons with disabilities. However, a modest 70 Australian Dollar per month is only payable up to the age of 70 years, after which it is replaced by a senior citizens benefit. Recipients are not permitted to receive both benefits. This appears to also be the prevailing practice elsewhere in the region, whether expressed through policy initiatives or legislation. For example, under RMI’s Social Security Act 1990, a person cannot receive more than one type of benefit (old age insurance benefit, disability insurance benefit, surviving spouse or parent insurance benefit, or surviving child’s insurance benefit) (s.135).

379 FSM National Code Title 53, Chapter 8 Social Security and Prior-Service Benefits ss. 803A and 804(3). Disability benefits also require a three-month period of disability.
381 Solomon Islands National Provident Fund Act First Schedule; Vanuatu National Provident Fund Act Schedule.
382 Solomon Islands National Provident Fund Act s.66(1).
383 Vanuatu National Provident Fund Act s.41.
384 Nauru Superannuation Act 2018 s.37(4).
385 Tavola, H. (2018) op.cit. 6; Tuvalu initial report to the Committee on the rights of persons with disabilities, 7 March 2019, CRPD/C/TUV/1, para [57, 121].
Prohibiting the holding of twin disability and old age (or other) benefits does not comply with the CRPD, in particular Article 5 (equality and non-discrimination). While a seemingly neutral rule, it is almost certain to disproportionately affect persons with disabilities as it ignores the expenses that are specific to them (e.g. assistive devices, housing adaptations, higher transport costs etc.) and are over and above the ordinary living expenses incurred by anyone else. Removing a disability benefit at the age of 70 as in Tuvalu is likely to compromise the income security of persons with disabilities in their old age. It is therefore important that all social security schemes are reviewed with a view to ensuring comprehensive disability inclusion consistent with Article 28. This process should be guided by the Report of the United Nations Special Rapporteur on the rights of persons with disabilities, as well as the concluding observations of the CRPD Committee. In respect of Vanuatu, the Committee has recommended:

(i) the adoption of “social protection programmes, including allowances, for persons with disabilities and their families, particularly those who are living in poverty and those with high support requirements, to cover the additional costs related to disability;”

(ii) allocation of “an adequate budget” and “assessment and eligibility criteria for social protection and poverty reduction programmes… in line with the Convention, taking into account the Committee’s general comment No. 6 (2018) on equality and non-discrimination;”

(iii) “adequate resources to provide support, including personal assistants and social protection, for persons with disabilities and their families to enable them to live independently in the community and to choose where and with whom they live;”

Proposals for greater disability inclusion in social security legislation are currently under consideration in RMI. If approved, an overhauled Senior Citizens Act will significantly improve compliance with Article 28 and provide useful guidance to other Pacific countries. Additional concessions under the (draft) renamed Senior Citizens and Other Vulnerable Persons (Amendment) Bill include subsidies or allowances for mobility aids and assistive devices, sea, air and land transportation, housing accessibility, educational materials and support, hospital, dental and rehabilitation services, and income support. Significantly, proposed amendments to RMI’s Social Security Act of 1990 include removal of the interdiction on receiving more than one social security benefit so that “the receipt of a disability insurance benefit under section 137 shall not affect a person’s entitlement to any other benefit available to the general population under this Chapter, including an old age insurance benefit.”

TAXATION

As noted above in the context of social protection, Article 28 of the CRPD requires States parties to take appropriate measures to safeguard and promote the realization of the right to an adequate standard of living and social protection. These measures include ensuring access to affordable support services, personal assistance, and mobility, assistive and communication devices such as wheelchairs and sign language interpretation. The obligations under Article 28 are reinforced by Article 20 which establishes the right to personal mobility and seeks to ensure access to mobility aids, devices and assistive technologies at affordable cost in order to
bolster the independence of persons with disabilities.

In 2015, the United Nations Special Rapporteur on the Rights of Persons with Disabilities issued a report on social protection for persons with disabilities. The report recognized that persons with disabilities incur a range of common daily expenditures not incurred by others. These include the costs of structural modifications to home/residences, assistive devices, healthcare, transportation, and personal assistants. Some of these goods and services are disability-specific, such as mobility aids, appropriate and adaptive services and assistive technologies, including information and communication systems and live assistance and intermediaries, such as personal assistants and service animals. Such items are not usually covered by social protection programmes in States that have ratified the CRPD, and they can be costly (for example wheelchairs). Highlighting this problem, a 2017 study of persons with disabilities in Tuvalu found that 87 per cent of those interviewed were without an assistive device that they needed. These devices included glasses, wheelchairs, walking sticks, walking frames and commodes. Over one-third (39 per cent) of the respondents had an assistive device in need of repair.

The CRPD Committee has questioned some States about their failure to provide personal mobility and assistive devices. In the Pacific, the Committee has expressed concern to Vanuatu about “the limited access to personal assistive devices for persons with disabilities, especially in rural areas” and the “insufficient financial support provided by the State party to facilitate access to assistive devices.”

It is therefore important that States implement measures to address these disability-related costs so that persons with disabilities can effectively exercise their right to live in the community. Although tax exemptions are not a substitute for conventional forms of social protection, they do provide a pathway to achieving greater equality of basic social and economic rights, improved community participation, and independent living. It is also a strategy that is promoted by the CRPD Committee itself. In 2019, for example, the Committee urged Vanuatu to “introduce tax and customs exemptions for the purchase of assistive equipment and devices for persons with disabilities.”

There is a plethora of tax legislation across the region and a longstanding tradition of exempting items from consumption/sales tax and import duties. However, the legislation is usually silent on disability requirements even where there is provision for the exemption of health and education supplies such as under Tuvalu’s Consumption Tax Act. The following list of tax laws typify this silence.

- Vanuatu - Value Added Tax Act 1988, Import of Goods Act, Import Duties (Consolidation) Act
- Tuvalu – Consumption Tax Act, Customs Act, Import Levy (Special Fund) Act - Import Levy (Imposition of Levy) Order, Sales Tax
- Tonga – Consumption Tax Act, Customs and Excise Management Act, Excise Act
- Solomon Islands – Goods Tax Act
- FSM – Title 54 Taxation and Customs
- Pohnpei State – Title 12 Taxation
- Kosrae State – Title 9 Taxation and Revenue Sharing

A rare exception can be found in Tuvalu’s Customs Revenue and Border Protection Act 2014 which includes amongst goods exempted from customs duties:

392 CRPD Committee concluding observations on the initial report of Vanuatu (2019) CRPD/C/VUT/CO/1 para. [34].
393 Ibid. para. [35(c)].
(a) Goods for the relief, employment, rehabilitation and cultural needs of the permanently bodily and mentally disabled when such goods are imported or taken from bond by organisations approved by the Minister. (emphasis added)

The duty exemption on disability items is a positive initiative by Tuvalu, notwithstanding the use of out-dated language (“bodily and mentally disabled”). For CRPD compliance, it is recommended that the concession is broadened to cover all persons with disabilities (i.e. those with sensory, cognitive or any other kind of disability) and is not limited to those with “permanent” disability (Article 1). In addition, the narrow classification of “health aids and goods for the relief etc. of the permanently disabled etc.” should be reviewed as it reflects the out-dated medical approach to disability, thus failing to allow for the much wider range of assistive devices, equipment and technologies necessary for an independent life and to meet all the educational, sporting, cultural, communications and accessibility needs of a person with disability. This broader range of items should also be considered for customs duty exemption.

It is recommended that the taxation legislation for all countries (as listed above), and any other similar legislation, be amended to extend exemption to mobility aids (including wheelchairs, white canes), hearing aids, adapted motor vehicles, accessible computer software, and other assistive devices, technologies, equipment, products and services specifically required by persons with disabilities for their accessibility. In keeping with Article 4(3), the precise items for tax exemption should be determined in consultation with disabled persons organizations, which are best placed to identify all relevant devices. Pacific countries might also consider dispensation for personal assistants engaged in travel. Under Vanuatu’s Airport Departure Tax (Domestic Flights) Act, certain passengers are exempt from airport departure tax. They include any passenger under the age of two years; passengers in transit; or passengers travelling for urgent medical reasons including up to two persons “travelling in attendance on such passenger” (s.4). Any legislation like this should be amended to exempt personal assistants of persons with disabilities when they provide support as travelling companions. This would be consistent with Article 30, which recognizes the equal right of persons with disabilities to participate in recreational, tourism, leisure and sporting activities. A few provinces in Vanuatu already exempt persons with disabilities from paying departure taxes. Similar dispensation (tax exemption) could be considered for persons with disabilities under legislation that levies taxes or fees on hotel rooms (as a positive measure under Article 30); animal license fees (guide dogs); and taxes on professional services (personal assistants). In addition, Pacific countries are encouraged to consider making disability expenses tax deductible under income tax legislation. RMI is currently considering a range of tax-deductible items under its Income Tax Act 1989 for any taxpayer with disability or one or more children with disability. These are in the form of draft amendments and comprise:

(a) all medical expenses;
(b) travel costs to access medical services, including outer island transport;
(c) all expenses for personal assistance or attendant care;
(d) sign language interpreting services;
(e) mobility aids including wheelchairs;
(f) assistive devices or specialised equipment or technology, including voice recognition software, Braille machines, and computer screen reader programs;
(g) vehicle adaptation;
(h) adaptation of a place of residence including ramp construction or other necessary modification for accessibility.394

394 RMI Rights of Persons with Disabilities (Consequential Amendments) Bill 2018, Schedule 37, s.100.
ELECTORAL LAW

The CRPD requires States parties to guarantee political rights to all persons with disabilities. Article 29(a) explicitly directs them to "ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity ... to vote and be elected ..." This recognition of political rights is one of the cornerstones of the paradigm shift enshrined in the Convention. It requires that persons with disabilities are able to enjoy and exercise rights to vote, to stand for elections, to hold office, and to perform all public functions at all levels of government like anyone else. Article 29 does not contain any exceptions to justify an exclusion, disqualification or restriction of rights on the basis of disability, even an intellectual or psychosocial disability.

The right of persons with disabilities to participate in political and public life invokes rights under Article 9 (accessibility) and Article 12 (equal recognition before the law) which should therefore be read alongside Article 29. Under its General Comment 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 Committee makes clear that failure on the part of any State party to make these provisions effectively deprives persons with disabilities from being able to participate in public elections and to exercise their political rights equally and effectively.395

At a more fundamental level lies the “inextricable link” between political rights under Article 29 and the right to “enjoy legal capacity on an equal basis with others in all aspects of life” under Article 12. Registration on an electoral role requires being recognized as a legal person before the law. Under comments on Article 12, the Committee has further clarified that:

Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (art. 29). This means that a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.396

Mental incapacity has been a traditional pretext for denying electoral rights. This is demonstrated across a number of Pacific constitutions (see Part III) and is mirrored in the region’s electoral laws. The disenfranchisement of persons with intellectual or psychosocial disabilities (both with respect to voting and standing for election) is common to Tonga, Solomon Islands, Vanuatu, Tuvalu and FSM. Under the Electoral Provisions (Parliament) Act 1980 (amended 2019) and Falekaupule Act of Tuvalu, for example, a person “certified to be insane or otherwise adjudged to be of unsound mind” is not entitled to vote in any parliamentary election or election of Kaupule, or to be a member of parliament and Kaupule.397 The same text is used in Solomon Islands where the Electoral Act 2018 draws on constitutional provisions to disqualify persons “certified to be insane or otherwise to be adjudged of unsound mind” from voting or

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395 CRPD Committee General Comment No. 2 (2014) on accessibility CRPD/C/GC/2, para.[43].
396 CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1, para. [48].
397 Tuvalu – Electoral Provisions (Parliament) Act 1980, ss. 5 & 9; Falekaupule Act, s.9(2)(d) & s.15(1)(b).
standing for parliamentary election. In Tonga, the *Electoral Act* disqualifies any person deemed to be “insane or imbecile” from voting. Psychosocial disability (“insane”) and intellectual disability (“imbecile”) are prescribed grounds for disenfranchising a noble under the *Legislative Assembly Act*.399

In FSM, the grounds for disqualifying a person from voting or standing in congressional elections also cover the two traditional grounds of intellectual and psychosocial disability – “mental incompetency or insanity.”400 Similar provisions can be found in respect of state elections in Pohnpei (“mental incompetency or insanity”, “adjudication of insanity or feeblemindedness”)401 and Kosrae (“mentally incompetent”).402 Under the *Municipalities (Statutory Orders) Act*403 and the *Representation of the People Act of Vanuatu*,404 persons detained in a mental hospital or institution are expressly prohibited from voting, even if their names are on the electoral roll.

In some respects, Nauru electoral law is similar to that of other Pacific countries. The right to stand for political office is denied on the basis of a psychosocial disability, the founding rule for which derives from the Constitution. Article 31(b) disqualifies a person from being elected as a member of Parliament if “certified to be insane or otherwise adjudged according to law to be mentally disordered.” Paradoxically, this discriminatory ground is invoked even to disqualify a person who has already achieved electoral success: Article 32(1)(b) requires that a Member of Parliament must vacate his or her seat on becoming disqualified under Article 31. Nauru’s *Electoral (Amendment) Act 2019* establishes Article 31 as grounds for withdrawing the nomination of an electoral candidate contrary to Article 29 of the CRPD.

Another non-compliant feature of the *Electoral (Amendment) Act 2019* is the disqualification from appointment as Electoral Commissioner of any person “certified or otherwise adjudged according to law to be intellectually impaired.”405 This contravenes the equality and non-discrimination principles of the Convention (Article 5) and is inconsistent with Article 27 (see Part VI for general discussion on discriminatory employment provisions).

Otherwise, recent electoral reforms in Nauru demonstrate modest improvements in voting rights and some divergence from the region. Until 2016, the 50-year old *Electoral Ordinance 1965* regulated elections to the legislature. Under section 8, a Nauruan resident of 21 years of age was allowed to have his or her name entered on an electoral roll, and had the right to vote, subject to two exceptions, one of which was that the person was “of unsound mind.”406 The *Electoral Act 2016* has removed this disqualification and appears to make wholesale provision for automatic voter registration at the age of 20 years based on a person’s name being entered in the Register for Births.407

This non-discriminatory threshold for voting rights is a welcome improvement. However, it is potentially undermined by an ambiguous exemption from mandatory voting on the grounds of “illness or infirmity.” This provision featured in the 1965 Ordinance408 and reappears in the 2016 Act.409 It is also found in the *Referendum Procedure Act 2009*.410 Exemption from voting may be a well-meaning response to the difficulties that voters with disabilities (like older voters, or voters in poor health) may face in getting to a polling station. However, any exception on the basis of disability would be incompatible with the equal right of persons with disabilities to public and political participation under Article 29. Instead,
Nauru should focus on ways to assist persons with disabilities (voters who are “ill or infirm”) to ensure they are able to participate in elections and referenda. This could be done for example by means of mobile ballot boxes or closed polling stations (see Part VII). There is already provision for mobile polling stations in the Electoral Act 2016 (see discussion regarding section 79 below).

Realising full and equal participation in political life for persons with disabilities requires both the removal of legal barriers (to voting and standing etc.) and the adoption of a range of accessibility and other measures. Crucially, States parties must therefore ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use. Also, persons with disabilities should be assured of being able to vote by secret ballot in elections and public referenda without any risk of interference or intimidation, and to have access to appropriate assistive technologies if elected or appointed to public office. When casting their ballots, voters with disabilities should be allowed assistance by a person of choice (not an electoral official, police officer, or designated family member) in order to guarantee “the free expression of the(ir) will … as electors.” Political campaigns should be fully accessible to persons with disabilities. Amongst other things, this requires the availability of alternative formats and modes of communication for all political meetings, advertising, information, campaign materials and communications.

There are two distinguishing features of Nauru’s Electoral Act 2016 that should be mentioned in this context. These are the provisions for assisted voting and mobile polling stations. Unlike the more common Pacific practice of assistance from a polling agent or presiding officer (Fiji, Solomon Islands, 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. This represents a positive shift towards the CRPD requirement of a person of choice. However, it falls short of full compliance in view of the proviso that if no person is nominated by the voter, the presiding officer “may accompany the voter into the polling booth”, assist with marking up the ballot paper under instruction from the voter, and is responsible for ensuring that the ballot is placed in the ballot box. In order to safeguard the confidentiality of a ballot, it is critical that support only be provided by a nominated person with whom there is an established relationship of trust. In addition, the section should be amended to expand the narrow range of disabilities covered (persons who are blind or “physically incapacitated”) to include voters with any type of disability including persons with sensory, intellectual (cognitive) or psychosocial disabilities who may require assistance with voting.

Mobile polling stations are another positive measure. They are not usually found in Pacific jurisdictions but are common across Europe where “closed polling stations” (for larger institutions) are used in conjunction with mobile ballot boxes (for smaller institutions) for voters with disabilities. Section 63 of Nauru’s Electoral Act 2016 makes provision establishing mobile polling stations in hospitals, care facilities, detention centres, and correctional facilities. Under section 79(3) it is clarified that the purpose of a station is to “afford(ing) an opportunity to vote to every voter who:

(a) is for the time being resident in the

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411 Nauru – Electoral Act 2016, s.77.
412 Nauru – Electoral act 2016, s.79.
413 Fiji – Electoral Act 1998, s.78.
414 Solomon Islands – Electoral Act 2018, s.85.
416 Nauru – Electoral Act 2016, s.77.
hospital, care facility, detention centre or correctional centre in which the booth is situated; and

(b) by reason of illness or infirmity, or, in the case of a woman, by reason of approaching maternity, is unable to attend a polling station to record her vote.

While the references to “illness or infirmity” and “care facility” suggest the likely inclusion of voters with disabilities, this should be expressly stated.

Proxy voting is another potential avenue for ensuring the (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.420 Absentee ballots are a preferred measure, and these are part of the electoral law of FSM421, Pohnpei State422 and Kosrae State.423 In all three cases, 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…” These provisions should be amended to replace the reference to “physical disability” with “disability” so that the option of absentee voting is extended to registered voters with non-physical (sensory, intellectual/cognitive or psychosocial) disabilities who are unable to attend a polling place. It is also recommended that an absentee voter with disability be permitted to designate a person of choice to assist with marking his or her ballot paper in order to safeguard its secrecy (see Part VII for more discussion on the secret ballot and positive measures).

420 Nauru – Electoral Act 2016, s.78.
421 FSM National Code Title 9, Chapter 6, s.601(2)(a).
422 Pohnpei State Code Title 10, Chapter 6, ss. 6-113 and 6-
Part VII. Improving CRPD Harmonization through Law Reform

This last Part of the report proposes a number of legislative options to help pave the way forward and it highlights some key areas requiring urgent law reform. It should be read in conjunction with the law reform obligations outlined in Part II and the recommendations made with respect to Pacific constitutions and legislation in Parts III-VI. These are a product of the legislative review processes conducted across nine Pacific island jurisdictions between 2015 and 2019 and subsequent research undertaken in 2020 for this report. More detailed analysis and recommendations, tailor-made for each piece of legislation in each country, can be found in the country reviews where the proposed revisions are aimed at eliminating all forms of disability-based discrimination and promoting equality and inclusion for persons with disabilities across regional legal frameworks, including through the adoption of positive measures where appropriate. While the law 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.

Pacific countries considering how best to fulfil their law reform obligations under the CRPD should take heed of Article 4 (general obligations) and Article 5 (equality and non-discrimination) of the Convention as well as General Comment No. 6 where the CRPD Committee emphasizes the duty of States parties to modify or abolish existing laws, regulations, customs and practices that constitute discrimination. The Committee has also identified priority areas for law reform in its concluding observations to States, some of which are highlighted in its General Comment No. 6:

- Guardianship laws and other rules infringing upon the right to legal capacity;
- Mental health laws that legitimize forced institutionalization and forced treatment, which are discriminatory and must be abolished;
- Non-consensual sterilization of women and girls with disabilities;
- Inaccessible housing and institutionalization policy;
- Segregated education laws and policies;
- Election laws that disenfranchise persons with disabilities.

Pacific countries should also be mindful of the Committee’s call for the adoption of enforcement measures if there is to be “the effective enjoyment of the rights to equality and non-discrimination.” It identifies the following measures:

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424 See CRPD Committee General Comment No. 1 (2014) on equal recognition before the law.
425 See CRPD Committee General Comment No. 1 (2014) on equal recognition before the law.
426 See, for example, General Comment No. 5 (2017) on living independently and being included in the community.
427 See CRPD Committee General Comment No. 6 on equality and non-discrimination (2018) CRPD/C/GC/6 para.[30].
(a) Measures to raise the awareness of all people about the rights of persons with disabilities under the Convention, the meaning of discrimination and the existing judicial remedies;
(b) Measures to ensure rights contained in the Convention are actionable in domestic courts and provide access to justice for all persons who have experienced discrimination;
(c) Protection from retaliation, such as adverse treatment or adverse consequences in reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions;
(d) The legal right to bring a lawsuit to court and to pursue claims through associations, organizations or other legal entities that have a legitimate interest in the realization of the right to equality;
(e) Specific rules relating to evidence and proof to ensure that stereotyped attitudes about the capacity of persons with disabilities do not result in victims of discrimination being inhibited in obtaining redress;
(f) Effective, proportionate and dissuasive sanctions for breach of the right to equality and adequate remedies;
(g) Sufficient and accessible provision of legal aid to ensure access to justice for the claimant in discrimination litigation.430

Further guidance to the law reform process can be found in the concluding observations of the Committee for the small but growing number of Pacific island States parties who have submitted CRPD reports.431 This includes gaps identified in 2015 in respect of the Cook Islands Disability Act which apply to most other Pacific countries,432 and express directives to “repeal or amend all discriminatory legislation, within a clear timeline, adhering to the Convention and ensuring that persons with disabilities are consulted and meaningfully engaged in the process” as issued to Vanuatu in 2019.433

LEGISLATIVE OPTIONS AND OPPORTUNITIES FOR THE PACIFIC

General obligations for the legislative implementation of the Convention under Article 4 can be fulfilled by a variety of approaches or methods. Different pathways to reform are not mutually exclusive and in fact a combination of actions can be effective, for example under the twin track approach discussed below. Legislative frameworks across many Pacific jurisdictions would also benefit from being more gender responsive, and in turn CEDAW compliant. A gender inclusive approach should therefore be consistently adopted in the reform process. This would require recognising the right of women with disabilities to enjoy all fundamental human rights and freedoms on an equal basis with men, and with other women and other persons with disabilities, and being attentive to the multiple forms of discrimination they face in different contexts. Special attention should be given to protecting women and girls with disabilities from all forms of violence, abuse and exploitation and empowering them to claim their rights.

Enacting standalone disability law

One pathway to reform is the enactment of a disability law. This should incorporate the rights and obligations under the Convention and be consistent with the human rights model of disability. The law should specifically provide legal protection against disability-based discrimination including the multiple and intersectional forms of discrimination faced by persons with disabilities. It should incorporate an express prohibition of discrimination on the

430 CRPD Committee General Comment No. 6 (2018) on equality and non-discrimination CRPD/C/GC/6 para [31].
431 Although initial reports have been submitted by Vanuatu, Cook Islands, Tuvalu, RMI, Palau and Kiribati, so far concluding observations have only been issued for Vanuatu and Cook Islands.
432 CRPD Committee concluding observations on the initial report of the Cook Islands (2015) paras. [9-10].
433 CRPD Committee concluding observations on the initial report of Vanuatu (2019) para. [7].
basis of disability consistent with the breadth and scope required under Article 5 and General Comment No.6 on equality and non-discrimination. A disability law should also incorporate the organic provisions contained in Article 33. These comprise national implementation mechanisms including designated focal points across government (Article 33(1)), with one or more independent monitoring mechanisms (National Human Rights Institutions) mandated to “protect, promote and monitor implementation.” (Article 33(2)). There should be mechanisms for the active involvement and full participation of organisations of persons with disabilities in the monitoring process (Article 33(3)).

Several States reviewed by the CRPD Committee have opted to implement major CRPD obligations in a standalone law. In the Pacific region, there have been a number of attempts to introduce disability legislation prior to and since the adoption of the Convention. However, these are not generally CRPD compliant and/or are more consistent with the medical model of disability. RMI has taken the lead amongst Pacific island states to develop legislation that is largely harmonized with the CRPD (see below).

One advantage of the standalone law is that it gives greater visibility to disability issues and the human rights model of disability. It can also highlight the obligations of government, clarify the roles of the implementing agency or agencies, and promote consistency and coherence in the cross-sectoral response to disability. This approach has some practical advantages as well. In particular, it offers a concise and efficient way of legislating crosscutting principles and key concepts such as disability, legal capacity, accessibility, reasonable accommodation and procedural accommodation that are likely to be relevant to many different sectors and areas of law.

For example, the obligation to provide procedural accommodation as a necessary measure to achieve access to justice (Article 13) is required for all legal and administrative proceedings. Since such proceedings arise under multiple areas of civil and criminal law, there are obvious benefits to legislating this obligation under a general disability law or an anti-discrimination law. The alternative is to replicate the same or similar provision under multiple pieces of legislation and/or regulations and rules.

Mainstreaming approach

On its own, a standalone law carries the risk that disability will be marginalized; its implementation confined to the government department that is given responsibility for disability issues on a day-to-day basis.

An alternative approach is to integrate disability across the entire legislative framework including all relevant sectors. A mainstreaming approach, 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 could also have other benefits: improve 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 this mainstreaming, a general anti-discrimination law that incorporates other treaty obligations, such those arising under CRC and CEDAW, could be considered. In most Pacific countries, while there might be anti-discrimination provisions in the Constitution, there is typically no primary legislation that prohibits discrimination in all areas of life and on all grounds including race.

ethnicity, nationality, sex, gender, sexual orientation, religion, disability and political opinion.

**Twin track approach**

In view of the relative merits of both legislative approaches and their limitations if pursued as a standalone measure, it is recommended that Pacific governments consider a twin-track approach. This would combine a standalone disability law (or laws) with disability mainstreaming. The RMI has opted for this approach, combining its *Rights of Persons with Disabilities Act 2015* with a comprehensive omnibus Bill that proposes reform and CRPD alignment to over 100 statutes.

**RMI: a model approach for the region?**

The twin track approach to disability law reform is being pioneered in the Pacific by RMI. The two components of this approach are: the *Rights of Persons with Disabilities Act 2015* and the *Rights of Persons with Disabilities (Consequential Amendments) Bill 2019*.

- **Rights of Persons with Disabilities Act 2015 (RPD Act)**

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 the 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 the holding of political and public office, and includes CRPD-aligned definitions for key concepts like “persons with disabilities”, “discrimination on the basis of disability”, “reasonable accommodation” and “procedural accommodation”.

The *RPD Act* 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).

- **Rights of persons with disabilities (Consequential Amendments) Bill 2019**

The consequential amendments that form the substance of the *RPD (Consequential Amendments) Bill 2019* are the product of a detailed review of approximately 300 statutes: the full complement of the Marshall Islands Revised Code (MIRC) as in January 2018. Over 100 statutes across 41 Titles were identified as requiring amendment for harmonization with the *RPD Act* and the CRPD. The proposed amendments seek to comprehensively 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 decision-making processes and bodies.

Although dealing with disparate subject matter, and organized into individual schedules, the statutes are bundled together into an omnibus Bill because they are implicitly linked to the *RPD Act*. This is normal practice for a Bill of such nature. Notably, there are recurring areas

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435 RMI *Rights of Persons with Disabilities (Consequential Amendments) Bill 2019*.
436 RMI *Rights of Persons with Disabilities Act 2015* Title 26, Chapter 11.
437 The establishment of a National Human Rights Commission or other independent body with a human rights mandate (NHRI) is expected to replace the current government monitoring mechanism established under the *Human Rights Committee Act 2015* in the future.
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.

PRIORITIES FOR LAW REFORM

The following are some suggested priority areas for law reform.

**Legal capacity for persons with disabilities**

As noted in the body of this report, the right to equal recognition before the law and legal capacity is a groundbreaking feature of the CRPD. It challenges long held assumptions and prejudices which are embedded in both the common law and legislation about persons with disabilities, particularly those with intellectual, cognitive or psychosocial (mental) disabilities. Article 12 reaffirms that they have the right, on an equal basis with others, to be recognized as persons before the law, and to enjoy legal capacity. It rejects the ubiquitous practice of denying legal capacity on the basis of perceived mental incompetence (usually determined by a functional competency test).

Many rights associated with legal capacity are currently denied persons with disabilities under Pacific law, based on a perceived lack of mental capacity. As demonstrated in Parts III-VI, 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, and work, the right to consent (e.g. to intimate relations and consensual medical treatment or hospitalization), and the right to participate in public life, are also restricted or denied outright under existing legislation in the region.

Women with disabilities – particularly women with intellectual or psychosocial disabilities - face particular challenges with exercising their legal capacity because of their susceptibility to intersectional discrimination (gender and disability). This is exemplified in the area of reproductive health and rights where they can be subject to forced medical interventions like sterilization and abortion. The CRPD Committee has found that: “Certain jurisdictions also have higher rates of imposing substitute decision-makers on women than on men. Therefore, it is particularly important to reaffirm that the legal capacity of women with disabilities should be recognized on an equal basis with others.”

The CRPD Committee has made clear that the right to legal capacity is a non-derogable right and a person’s decision-making ability or their level of mental capacity or competency can never be used to justify denying or depriving that person of legal capacity, and ascribing decision-making authority (legal capacity) to a guardian or other substitute decision-making entity. Instead, States parties are obligated to provide whatever support or assistance is required, including supported decision-making and reasonable or procedural accommodation, to enable persons with intellectual, cognitive or psychosocial disabilities to exercise legal capacity and make their own decisions, even 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. 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. Per the Committee recommendation to Vanuatu, all Pacific states should:

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438 CRPD Committee General Comment No. 1 (2014) on equal recognition before the law CRPD/C/GC/1, para. [35].
(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.439

There are a number of good global practices that could help guide this process of reform in the Pacific. In August 2016, Costa Rica became the first country to formally eliminate from its legal framework all forms of substitute decision-making for persons with disabilities. The Law for the Promotion of Personal Autonomy of Persons with Disabilities (Law No 9379) abolishes guardianship and creates the legal figure of the “guarantor for the equality before the law of persons with disabilities.” The role of the guarantor is to ensure the full enjoyment of legal capacity by persons with disabilities. Major reforms have also been undertaken in Colombia and Peru. These include recognition of the capacity to act for persons with disabilities; the elimination of guardianship; and the introduction of a set of supported decision-making arrangements. In both countries, legislation was drafted by multi-stakeholder commissions and received the endorsement of different political parties and civil society.440

As noted in Part V, Peru has recently reformed its Civil Code to remove all restrictions on legal capacity based on disability. These include:

- an obligation that notaries, courts, health care providers, financial services and other relevant stakeholders must ensure that their processes are accessible; reasonable accommodation is offered and provided; and there is cooperation with concerned persons regarding their chosen support arrangements for the exercise of their legal capacity;
- the establishment of mechanisms to help with the making of arrangements to support persons with disabilities with exercising their legal capacity. Arrangements must respect the autonomy, will and preferences of the person concerned.441

Mental health law

As discussed in Part IV, this is one of the most outdated and draconian areas of law in respect of disability rights. Mental health laws violate a range of fundamental rights and principles. They typically prescribe interventions and authorise rights restrictions that exclusively target persons with disabilities without affecting the rest of the population. No other persons or groups are routinely subject to assessments of the risk they pose, after which they may be pre-emptively detained and given mind-altering psychiatric treatment against their will. Not surprisingly, the CRPD Committee has roundly condemned these practices. In particular, it has consistently and emphatically stated, including to Pacific States parties and Australia, that all legislation including mental health laws that permit involuntary (forced) placement in hospitals, institutions, prisons, or which allow compulsory medical treatment of persons with disabilities in either institutions or the community, must be abolished.442

CRPD compliance is likely to require the

439 CRPD Committee concluding observations on the initial report of Vanuatu (2019) CRPD/C/VUT/CO/1 para [23].
440 Law projects No. 248/2017C and No. 872/2016-CR.
441 For more information, see Antonio Martinez-Pujalte, ‘Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms’ (2019) 8(1) Laws 4. See also Ireland’s supported decision-making system established under the Assisted Decision-Making (Capacity)
complete overhaul and/or repeal of such legislation including all measures that authorise forced psychiatric treatment. Unfortunately, the pace of reform has been slow and it is perplexing that no country appears to have achieved full compliance with the CRPD. Most countries including those in the Pacific remain governed by coercive or paternalistic approaches typical of the old medical model of disability including involuntary psychiatric interventions and the use of restrictive practices (restraints and solitary confinement) which constitute inhuman and degrading treatment or torture. Even those countries that incorporate community-based treatment for example Australia and United Kingdom have usually retained the same involuntary features of institutional care in violation of human rights and had limited efficacy.

Pacific countries are strongly advised to comply with the benchmark set by the CRPD and to explore community-based options that respect the human rights and dignity of persons with psychosocial (mental) disabilities. In particular, they should be based on supported decision making (not substitute decision making) and a “rights, will and preference” standard (not the “best interests” approach). At times when a person’s will and preferences are unclear, the focus should 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. Both India and Argentina have instituted reforms that consider the issues of consent (India) and community support options (Argentina) before any involuntary intervention can be entertained. While these provisions do not comply with the CRPD, they demonstrate positive steps in the right direction.

Peru) provide model examples on the global stage for transformative shift to substitute decision making required by the CRPD. Peru’s reforms to its Civil Code demonstrate the kinds of changes needed to harmonise mental health legislation with Article 12, including a new non-discrimination section on mental health treatment in the general law on health. This requires the free and informed consent of the person concerned except in emergencies.

Pacific countries could consider an alternative approach based on independent living. This would comply with Article 19 and be a fitting alternative in a region where cultural norms still place importance on family and community, and institutional facilities for those with mental illness or psychosocial disabilities are uncommon. Legislative protection for the right to independent living could be done through the enactment of a standalone independent living and personal autonomy law or detailed provisions inserted into an existing law. This would signal the move away from traditional approaches to mental health, institutional settings, and substitute decision making. It would also recognise the full legal capacity of persons with disabilities and their right to access all mainstream community services and facilities including regular schools, public transport and employment in the open market, along with community-based habilitation and rehabilitation services and individualised support, including personal assistance where necessary, to support home and daily life and inclusion in the community. Support provided in segregated settings, even small settings, or as part of fixed living arrangements, are not consistent with this approach.

Any legislative scheme to recognise the right of persons with disabilities to independent living in the community would need to establish clear benchmarks and timelines for implementation. It should be adequately resourced to provide for services in India (Chapter V).

443 See discussion in Solomon Islands Mental Health Bill 2016.
444 See the Indian Mental Health Act 2017, which sets out the rights of persons with mental illness/psychosocial disabilities to access (and refuse) healthcare and other
both inclusive community-based services and home-based individualised services, for example crisis prevention, response and rehabilitation measures, personal assistants, and social protection. All support measures should be consensual and at the request of persons with disabilities themselves. They should never be imposed but respect their will and preferences so any funding made available for individualized support should be under their control. Persons with disabilities should be able to freely decide who to hire as personal assistants and what the general conditions of support are to be, including if and when a contract of assistance should be terminated. Personal assistants should be given adequate training to ensure that they do not adopt a traditional medicalised or welfare approach. Given the cultural and social fabric of the Pacific, it may be more feasible to build on existing networks and resources (e.g. primary health clinics) as opposed to establishing entirely new systems.446

Criminal law

The denial of legal capacity produces serious rights violations for persons with disabilities in the context of criminal law. As discussed in Part V, the CRPD calls for a shift away from criminal procedures that declare persons with intellectual or psychosocial disabilities “incapable of criminal responsibility”, “unfit to stand trial” or entitled to an “insanity defense.” These procedures deny them equal protection under the criminal justice system and constitute disability-based discrimination. In particular, they deprive defendants with disabilities the right to access justice including the right to a fair trial, presumption of innocence, due process, and other human rights protections and safeguards available to other defendants. Special (disability-based) criminal procedures divert persons with intellectual or psychosocial disabilities to a separate track of law, including mental health law, which has a lower (human rights protection) standard, and is likely to result in indefinite detention within a health or correctional facility. This directly convenes Article 14 (right to liberty and security of person).

Pacific countries are urged to review their criminal justice systems and legislation with a view to amending all provisions that deprive persons with disabilities of their right to legal capacity, and associated rights. In particular, they are strongly encouraged to repeal all constitutional and legal provisions that allow for the detention of persons with disabilities on the basis of impairment and permit the indefinite postponement of criminal proceedings during detention. Instead, regional criminal laws and procedures should recognize the right of defendants with disabilities to enjoy the same rights and safeguards as anyone else including a fair trial with all necessary procedural accommodation and support, including supported decision-making where required.

Electoral law

It is not known how many Pacific Islanders with disabilities are unable to vote in national elections or referenda, or to stand for parliamentary, congressional, state or other elections to high public office. However, in view of the legal and technical barriers that exist across the region, it is inevitable that significant numbers will be shut out of the electoral process. It is certainly a sobering fact that as many as 800,000 citizens of 16 EU member states are “deprived of the right to participate in EP (European parliamentary) elections because of their disabilities or mental health problems” while millions of EU citizens are prevented from voting because of “organisational arrangements (technical barriers) which do not take into account the needs resulting from their disability.”


Removing discriminatory legal barriers

Pacific countries are urged to uphold the democratic principle of universal suffrage without discrimination and to adopt all possible measures to remove any legal restrictions affecting the political rights of persons with disabilities. The deprivation of voting rights, whether directly through constitutional or electoral law provisions, or indirectly through guardianship legislation, unjustly divests persons with disabilities of their legal capacity and prevents them from participating in an important aspect of community life. All citizens or qualifying residents should be legally entitled to vote and be elected once they reach the designated voting age, and irrespective of their disability, ethnicity, gender, class, religion, educational background, literacy level, or any other classification.

Legislative reform has been underway across Europe during the past decade. This has been a complex process especially in those countries whose legal systems have historically deprived citizens of voting rights automatically if they are placed under “protective” guardianship regimes (when they lose legal capacity). As a result, some reforms are only partial or in progress, and restrictions or deprivation of voting rights due to a disability continue to affect hundreds of thousands of citizens with disabilities. However, there are nearly a dozen European countries which have now taken the position envisaged by the Convention that “in no circumstances may an individual be deprived of the right to vote.” Amongst these positive examples are Slovakia, whose Constitutional Court ruled in 2017 that “legal deprivation of the right to vote due to intellectual disability was against the Constitution...” and Spain, where the advocacy by a group of disabled persons organisations led to the unanimous amendment of the organic law by the Congress of Deputies in 2018 to guarantee the right of suffrage of all persons with disabilities.

Pacific countries are urged to follow this example and remove any legal impediments to universal suffrage in their respective jurisdictions, in particular any constitutional or legislative measures that deprive persons with intellectual or psychosocial disabilities of the right to participate in political and public life on an equal basis with others. With the partial exception of RMI, these legal barriers persist in most Pacific islands states just as they do in Australia. While the process of constitutional reform in RMI is yet to be completed, the Rights of Persons with Disabilities Act 2015 represents an admirable attempt to break with this discriminatory tradition. Section 1121 of the Act establishes that:

(1) Persons with disabilities have the right, on an equal basis with others, to participate in all aspects of political and public life.

(2) This right includes the right to:

(a) effective enjoyment of political rights including the right to:
   (i) vote by secret ballot;
   (ii) stand for election; or
   (iii) be elected or appointed to public office;

(b) be actively involved in political parties and other nongovernmental organizations and associations concerned with public and political life; and

(c) form and join organisations representative of persons with disabilities.

8.2.1.2.
448 Ibid. para. [5].
449 Ibid. para [5.1.6].
450 Ibid. para [5.1.4]. The eleven countries are Austria, Croatia, Denmark13, Finland, Ireland, Italy, Latvia, the Netherlands, Slovakia, Spain and Sweden.
451 Ibid. para [5.2.2].
452 CRPD Committee concluding observations on the combined second and third periodic reports of Australia, CRPD/C/AUS/CO/2-3, para. [53].
(3) A person must not be prevented or restricted, directly or indirectly, from exercising any right under subsection (2) on the basis of an actual or perceived disability, including a mental, intellectual or psychosocial impairment or impaired cognitive functioning.

- Safeguarding the confidentiality of ballots

Reform in the Pacific is also needed to ensure the secrecy of ballots for voters with disabilities. While there is a general commitment to this pivotal democratic principle, whether expressed or implied in legislation, there is an absence of clear safeguards. Article 29(a)(ii) of the CRPD requires that States parties "protect" the right of persons with disabilities to vote by secret ballot. As noted in Part VI, several Pacific island countries and New Zealand make provision for a presiding officer to assist a voter with disability, a practice that has been criticized by the CRPD Committee.454 There may be good intentions behind this practice, and it may be an improvement on the total absence of assistance that previously existed. However, the CRPD position is that the support person must be a person of choice since the confidentiality of ballots could potentially be compromised if assistance is only available from polling officials, police officers, or other ostensibly neutral persons with whom there is not an established and trusted relationship. This risk is greater for voters who are blind and in small Pacific countries where close knit community networks make it likely that voters will be known to others.

Designated support persons (assistants) should not be subject to any kind of restriction that would defeat the purpose of the support or undermine the task of marking and casting the ballot in accordance with the wishes of the assisted voter. Rules relating to voting assistance should therefore be sure to allow support persons to accompany and assist the voter at every stage, and not stipulate conditions e.g. medical proof of the need for assistance; time limitations to complete the process; or requirements that a support person must be a registered voter at the same polling station.

- Improving electoral arrangements

A common feature of Pacific electoral legislation is the failure to ensure that persons with disabilities have the opportunity to vote and stand for election i.e. that they are able to exercise their legally recognised rights to vote and stand. The CRPD establishes equality of opportunity as a general and cross cutting principle (Article 3) and this is reaffirmed in Article 29 in the context of political rights. For compliance with Article 29, it is therefore incumbent on States not only to abolish legal impediments but also to remove technical and practical (including accessibility) barriers to political rights. To ensure that persons with disabilities can fully participate in the electoral process, Pacific countries are encouraged to enact legislative provisions that guarantee the opportunity to vote and stand as a candidate. These provisions should be supported by national strategies and action plans that include any measures necessary to enhance the political participation of persons with disabilities, including women with disabilities for whom there are likely to be the combined barriers of gender and disability. Every effort should be taken to involve organisations representing persons with disabilities from the outset. Fortunately, this is an area that is receiving growing attention in the region and advocacy by national disabled persons organisations, supported by the Pacific Disability Forum.

Many European countries have recognised the benefits of early voting, postal voting, mobile ballot boxes (especially useful for voters unable to get to the polling station due to their disability or medical condition), electronic voting, proxy...
voting and closed polling stations (for persons living in long term residential and hospital institutions). There has also been an effort to simplify ballot paper mark-up requirements and to ensure that information is disability inclusive for example with respect to election timetables (polling dates and times), polling stations, voting procedures and options, and assisted voting.\textsuperscript{455} Ballot papers should cater for the needs of blind and visually impaired persons, and others who cannot write easily and legibly with a pen, or have limited use of their hands. They should be designed with the aim of securing valid votes (which is going to be less likely if there are complicated requirements such as writing, making circles, and placing things in order).\textsuperscript{456} Other practical measures should be designed to make information appropriate for voters with intellectual disabilities, including the “best approach” recommended of limiting text to simple sentences or graphic instructions particularly where the voting process is complicated and requires a series of decisions and actions.\textsuperscript{457}

Amongst the many information initiatives taken in Europe are: a “speaking” internet portal for blind and visually impaired persons in Sweden and Germany, and election information in Easy Read Swedish and sign language;\textsuperscript{458} how to vote materials and a list of candidates in Braille and as an audio recording in Slovakia;\textsuperscript{459} and official website information on transport to polling stations for persons with disabilities in Poland.\textsuperscript{460} All National Electoral Commission press conferences on the elections which are broadcast and available on the internet in Poland have sign language interpretation.\textsuperscript{461} Malta has a legal requirement that all polling stations be equipped with audio players and a Braille template listing the candidates and political parties on the ballot paper.\textsuperscript{462}

Pacific island countries could look to the experience of regions like Europe which have achieved some success with their electoral reforms. They could also take advantage of an election checklist of accessibility measures drawn up by the United States Department of Justice, adapting these to suit local requirements.\textsuperscript{463} Countries are urged to undergo comprehensive reviews of their electoral laws, rules and practices (including audits of polling stations and polling booths) in close consultation with national disabled persons organisations. For the effective implementation of rights under Article 29, it is of paramount importance that polling stations and booths are accessible, and that the voting process is disability inclusive, accessible and non-discriminatory at every stage. In particular, attention should be given to ensuring that:

- voter registration methods are disability responsive so that the process of registration is not unduly burdensome;
- polling stations and polling booths are of a configuration (including height and width) that is accessible and otherwise suitable for wheelchair users, small persons, voters with assistants, and other person with disabilities;
- electoral information, notices and advertising are available in accessible formats (Easy Read, Braille, audio format, and sign language) in all appropriate venues including polling stations and at heights suitable for all voters to read including wheelchair users;
- ballot papers are simple, available in alternative formats, and adapted to the needs of voters with intellectual disabilities. An appropriate quantity of ballot papers and nomination papers should be available in Braille for blind voters and candidates;

\textsuperscript{456} Ibid. para. [6.3.13].
\textsuperscript{457} Ibid. para. [6.1.3].
\textsuperscript{458} Ibid.
\textsuperscript{459} Ibid.
\textsuperscript{460} Ibid.
\textsuperscript{461} Ibid. para. [6.2.17].
\textsuperscript{462} Ibid. para. [6.2.17].
• there is provision for reasonable accommodation in respect of any relevant procedures or rules;
• where voting is compulsory, this rule is applied equally to persons with disabilities but with adequate measures in place to guarantee a barrier-free voting environment;
• all voters with disabilities are expressly authorised to designate a person of choice to assist them with marking and casting of ballot papers in order to ensure the confidentiality of their ballots;
• alternative voting arrangements/options are available to persons with disabilities including early voting, postal voting, mobile ballot boxes, closed polling stations (if there are large numbers in institutional care facilities), and absentee voting, with provisions for voter designation of an assistant in all cases;
• persons with disabilities who have difficulty walking or standing are given preferential access to voting booths;
• accessible transport is guaranteed on voting day and accessible parking and pathways are available at every polling station;
• electoral petitions provisions include an obligation to provide procedural accommodation for any hearing in which a person with disability is involved in any capacity;
• offences provisions include any attempt to influence the vote of a person with disability.

Noting the importance of accessibility, the CRPD Committee states:

Accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. Without access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public, persons with disabilities would not have equal opportunities for participation in their respective societies.464

Legislative reform should aim to ensure that environments are accessible everywhere including public buildings and services, transportation (air, sea, river, and land), footpaths, roads and street signage, schools (public and private), workplaces, courts, hospitals, information and communications. As the CRPD Committee has advised the Cook Islands, Pacific countries should:

adopt a legally binding accessibility action plan, with benchmarks, indicators and timelines, to cover all aspects of the built environment, public service provision, information and communications, and air and sea transport, as referred to in the Committee’s general comment No. 2 (2014) on accessibility, and carry out regular monitoring and evaluation of the plan with the participation of organizations of persons with disabilities to eliminate all existing barriers within specified periods of time.465

Specifically, building codes across the region should be amended (or developed where they do not exist) in consultation with organisations

Accessibility, universal design and public procurement

Legislating for accessibility must also be a priority, not least because the right to accessibility is immediately enforceable. The CRPD Committee’s General Comment on accessibility should serve as a reference point for any new legislative provisions or amendments in this area.

464 CRPD Committee General Comment No. 2. (2014) on accessibility CRPD/C/GC/2 para. [1].
465 CRPD Committee concluding observations on initial report for Cook Islands (2015) paras. [19 & 20].
representing persons with disabilities. The codes should stipulate accessibility requirements, including as a condition for permits and licences. Accessibility measures should be applied to both the public and private sectors and include the retrofitting of inaccessible buildings supported by appropriate enforcement measures such as the issuance of adjustment orders to owners of inaccessible public buildings, as enacted by RMI. 466 Legislating for accessibility to the physical environment must also require that all new buildings be constructed in ways that make them accessible for persons with disabilities. The adoption of universal design principles is therefore imperative for all future building plans and should be reflected in building codes. This would comply with Article 4(1)(f) which establishes as a general obligation to promote the development of universally designed goods, services, equipment and facilities. Under Article 2, “universal design” is defined as:

the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Making provision for accessibility at the design stage is far less expensive than having to retrofit existing buildings. As the CRPD Committee has stated in its General Comment No. 2 on accessibility, the application of universal design from the initial design stage:

helps to make construction much less costly: making a building accessible from the outset might not increase the total cost of construction at all in many cases, or only minimally in some cases. On the other hand, the cost of subsequent adaptations in order to make a building accessible may be considerable in some cases, especially with regard to certain historical buildings.467

In the area of ICT, accessible ICT can and should become a legal obligation for both the public and private sectors, and be made a requirement of licenses where appropriate. This could be achieved through a mainstreaming approach since requirements for alternative formats or modes of communication are likely to be needed across many areas including education, vocational training, employment, public records, and court proceedings, and involve multiple modes and formats - sign language or captioning (for deaf persons); Braille, augmented text, and audio (for blind or visually impaired persons); and Easy Read or plain language (for persons with intellectual or cognitive disabilities). Legislation should stipulate that all public information must be available in accessible formats. Pacific countries should also consider amending their constitutions to recognize sign language as an official language.

Public procurement can potentially be a powerful tool for promoting accessibility (and universal design), and generally implementing the CRPD. In view of this, it has been suggested that procurement laws “are among the top priority laws to be modified to harmonize with the Convention.”468

Arguably, there is also a moral imperative for ensuring that public procurement systems are CRPD compliant (disability inclusive) given the substantial public funds expended through procurement.469 In its General Comment No. 2 on accessibility, the CRPD Committee insists that States parties “should … ensure that all newly procured goods and services are fully accessible for persons with disabilities.”470

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466 RMI Rights of Persons with Disabilities Act 2015, ss.1145 & 1146. 467 CRPD Committee General Comment No. 2 (2014) on accessibility, CRPD/C/GC/2 para. [15]. 468 Ibid. 469 Ibid. 470 CRPD Committee General Comment No. 2 (2014) on accessibility, CRPD/C/GC/2 para. [30].
The Committee gives specific direction for law reform, and highlights the injustice of inaccessible environments sustained by the public purse:

States parties must also consider their laws on public procurement to ensure that their public procurement procedures incorporate accessibility requirements. It is unacceptable to use public funds to create or perpetuate the inequality that inevitably results from inaccessible services and facilities.471

There is some procurement legislation in the Pacific (Tonga472, FSM473, Nauru474, and Vanuatu475). However, none of this is designed to ensure that persons with disabilities benefit on an equal basis with others. National governments should therefore consider amending their legislation to comply with the accessibility and equality obligations under the CRPD and specifically to establish public procurement systems that are disability inclusive, accessible, and non-discriminatory. There should ideally be provisions to expressly prohibit discrimination on the basis of disability in order to ensure that persons with disabilities are “not excluded or restricted from benefitting from procurement processes and outcomes on an equal basis with others.”476

Disability inclusive procurement is typically found in two forms: preferential contracting (where contracts are awarded to organisations that employ persons with disabilities) and procurement to promote accessibility and universal design (where contracts are awarded on the basis of compliance with specified accessibility criteria).477 The procurement process to promote accessibility has been outlined by ESCAP as comprising six key phases:

These begin with identifying the accessibility needs of the procurer in respect of particular products, goods and services. This is followed by: calling tenders to supply the required products, goods and services which have mandatory accessibility criteria; evaluating these tenders to assess compliance with these criteria; selecting one tender and awarding procurement contracts to the chosen supplier. The last phase deals with the management of these contracts which includes ensuring the usability of the procured items by persons with disabilities.478 Importantly, the tender process (including advertising, bidding, and the awarding of contracts) should make provision for alternative (accessible) formats,479 and legislation should stipulate technical requirements and standards for accessibility that are consistent with international standards.

The CRPD Committee has recognized the role that public procurement policy can play as an affirmative action measure, enhancing accessibility as well as de facto equality for persons with disabilities in line with Article 5(4).480 The Constitution of South Africa (1996) demonstrates how the law can require state organs or institutions at all levels to develop procurement policies that give preference to designated groups (including persons with disabilities) in view of their historical disadvantage. Section 217(2) addresses both preferential contracts and protective or positive measures to combat discrimination.

217. Procurement

1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is

471 Ibid. paras. [30 & 32].
472 Tonga – Public Finance Management Act (Public Procurement Regulations).
473 FSM – Title 55 Government Finance and Contracts.
476 International Disability Alliance (2015) op. cit. 12.
477 ESCAP Disability Public Procurement: Promoting Universal Design and Accessibility, Social Development Policy Paper (2019/01), Figure 7, 24.
478 Ibid, 25. See Figure 8 for more details.
479 International Disability Alliance (2015) op.cit. 13.
480 CRPD Committee General Comment No. 2 (2014) on accessibility, para. [32].
fair, equitable, transparent, competitive and cost-effective.

2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for

a. categories of preference in the allocation of contracts; and
b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

The Preferential Procurement Policy Framework Act of South Africa gives effect to section 217(2) of the Constitution. It instructs all state organs and some public entities to devise and implement a preferential policy that includes “contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.”

Preferential procurement regulations (2017) consolidate the measures to advance “designated groups” through criteria specified under tender conditions. The definition of “designated groups” includes “people with disabilities.”

Other disability-inclusive procurement can be found in the United States, the European Union, Australia and Japan.

Two noteworthy developments in Europe in recent years have been intended to improve the mainstreaming of universal design principles across the European Union. The first of these is the enactment of the European Accessibility Act (EAA) in 2019 which requires that all products and services must adopt a “design for all” (universal design) approach for a wide range of goods and services that include computer and operating systems, telephones and smart phones, television, ticketing and check in machines, ATM, and transport services. The second development is a universal design standard published by the European Commission. This supports the legislation by guiding public procurement and private sector companies engaged in the design of goods and services.

Pacific countries may find these global examples a helpful guide to the development of their own procurement policies and laws. In particular, the regional blueprint developed by the European Commission for EU member states includes obligations to develop and implement PPD-aligned domestic legislation. Hefty fines are imposed for breach of these obligations. Based on the implementation challenges faced by the US, it would seem important for Pacific procurement legislation to:

- establish clear directives on accessibility requirements and universal design;
- ensure the rigorous application of international standards albeit adapted for local contexts;
- require comprehensive testing of products and services (quality control); and
- establish effective enforcement mechanisms.

initially applied to official websites, digital devices, and software (EN 301 549) but subsequently expanded to cover a much large range of products and services (EN 17161: 2019) 29-33.

481 South Africa – Preferential Procurement Policy Framework Act, s.2(1)(d)(i).
482 United States - Rehabilitation Act (1996), s.58. For details of measures adopted to promote accessibility through public procurement in the European Union see ESCAP (2019) op.cit. Part IV, 28-35.
483 European Public Procurement Directive (2014 (PPD). Under the PPD, all member states of the European Union are required to enact national procurement legislation for accessibility. Failure to comply by the due date in April 2016 has invoked sanctions against a number of countries. By July 2018, 24 member states had enacted PPD legislation. ESCAP (2019) op.cit. 28-29. Also see the European standards developed for the procurement of accessible ICT

485 ESCAP (2019) op.cit. 40.
486 “European Commission – Design for All - Accessibility (EN 17161:2019)”
487 Ibid 33-34. European member states have three years to enact national legislation based on the EAA and six years to bring the legislation into force.
488 The enforcement provisions of the Commonwealth of Australia Procurement Rules include criminal, civil and administrative penalties against government officials who fail to comply with the Rules. ESCAP (2019) op.cit. 34.
There should also be provision for training of procurement personnel, including on the technical features of disability inclusive procurement. Following the European example, common technical standards would seem to have merit for the Pacific, not least because this would promote coherence and uniformity across the region, and make it easier for suppliers. Finally, procurement legislation should cover state agencies and entities at all levels and sectors, and ensure the broadest range of accessible products and services as contained in the revised European standards (EN 17161:2019). As in other areas of policy and legislation development, it is imperative that national and regional DPOs are properly consulted and engaged from the outset. The CRPD Committee specifically directs that minimum accessibility standards “must be developed in close consultation with persons with disabilities and their representative organizations” (Article 4(3)).

Inclusive education

Inclusive education appears to enjoy a high-level regional mandate and this should make it one of the “low lying fruit” for law reform. However, as evident from country examples reviewed in Part VI, it is common to find legislation across the region that features all three pre-CRPD models of education based on exclusion, segregation and integration, none of which is consistent with the CRPD. Where there is a commitment to inclusive education, this is sometimes equivocal or ambiguous, and as a result it is not uncommon for “special education” to still feature prominently. Of particular concern are the provisions that allow children with disabilities to be excluded from mainstream schools.

As one of only two Pacific states that has had the benefit of concluding observations by the CRPD Committee, Vanuatu has been urged to address a number of compliance gaps.

In particular, the Committee has expressed concern over the promotion of segregated educational institutions over an inclusive education system, the non-admission of children with severe disabilities, the lack of accessible schools, and the lack of adequately trained teachers. In its General Comment No. 6, the CRPD Committee has urged all States parties to make “segregated education laws and policies” one of their priority areas for law reform.

A review of education legislation in the Pacific is therefore required to improve CRPD harmonization and ensure disability inclusion in the ways envisaged by the Convention and explained by the CRPD Committee in its General Comment No. 4 on education. In addition to the specific amendments proposed in Part V, countries should heed the Committee’s call (to Vanuatu) for measures to achieve a complete transition from segregated to inclusive education; to prevent non-admission of children with disabilities into the mainstream educational system; to ensure school buildings and facilities, and learning materials are accessible for all students with disabilities; and to provide mandatory teacher training in inclusive education and in sign language, Braille, Easy Read material and tactile communication.

All of these issues have been addressed by RMI in its standalone disability law (RPD Act), which might be of assistance to other countries. The Act recognises the right of persons with disabilities to quality and inclusive education without discrimination; 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 lists a range of mandatory requirements to enhance

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489 CRPD Committee concluding observations on the initial report of Vanuatu (2019) para. [48].
490 CRPD Committee General Comment No. 6 (2018) on equality and non-discrimination CRPD/C/GC/6 para [30].
491 CRPD Committee concluding observations on the initial report of Vanuatu (2019) para. [49].
reasonable accommodation and support for students with disabilities. More detailed provisions can be found in the amendments proposed for several education statutes and considered under RMI’s RPD (Consequential Amendments) Bill 2018.494

Reasonable accommodation and procedural accommodation

CRPD concepts – reasonable accommodation and procedural accommodation – should be incorporated into Pacific legal systems without delay as States parties have an immediate duty. Reasonable accommodation captures the essence of equality and non-discrimination for persons with disabilities as it requires individually tailored adjustments to be made as and when needs arise in any social environment so long as they do not inflict a disproportionate or undue burden. Environments include schools and training institutions, workplaces, courts (e.g. for jury service) and prisons. The critical importance of reasonable accommodation is highlighted by the fact that failure or refusal (“denial”) in provision amounts to an act of disability-based discrimination (Article 5).

Procedural accommodation entails “all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others. Unlike reasonable accommodations, procedural accommodations are not limited by the concept of “disproportionate or undue burden.” Adjustments can take many forms including slower proceedings, permission for a support person, or sign language interpretation. 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 and ensure access to justice on an equal basis with others.

When embarking on reform in this area, Pacific countries are encouraged to consult the 2020 International Principles and Guidelines on Access to Justice for persons with disabilities which provide a long list of prescribed measures under Principle 3 (the right to appropriate procedural accommodations). 496 They should also take into account any cultural barriers and/or gender power relations that create additional barriers for women and girls with disabilities to access justice on an equal basis with men.

RMI has incorporated both these key concepts into its Rights of Persons with Disabilities Act 2015. The concepts are also expected to be mainstreamed across the Marshall Islands Revised Code when the RPD (Consequential Amendments) Bill 2018 is enacted.

“Nothing about us without us”
Whatever approach is adopted to harmonise national laws with the CRPD, Pacific governments are urged to pay scrupulous attention to the obligation under Article 4(3) of closely consulting and actively involving persons with disabilities and their representative organisations. “Nothing about us without us” has been a rallying cry associated with the CRPD since its inception. Ensuring the full involvement of persons with disabilities through their representative organizations is also emphasized in the CRPD Committee’s General Comment No. 7 on the participation of persons with disabilities in the implementation and monitoring of the Convention.497

The CRPD Committee has advised that the inclusion and representation of persons with disabilities must be meaningful and set up formally through high level consultative mechanisms. There should be adequate funding, and representation should include organizations of women with disabilities, children, young and older persons with disabilities, and persons with intellectual or psychosocial disabilities. 498 Express provision should be made for the inclusion of women with disabilities in any mechanism that promotes consultation with, and representation of, persons with disabilities in government decision-making bodies or processes.

Opportunities for representation and engagement can be created through standalone disability legislation. Other avenues for improving participation arise in any legislation where there exist boards, committees or other decision-making or advisory bodies with relevant mandates. Under the nine legislative reviews for the Pacific conducted under the Pacific Enable Project, recommendations for representation of persons with disabilities (including women with disabilities) have been made to legislation governing multiple sectors including disaster management, climate change, broadcasting, sports, trafficking, price control, health, education, health, ports authorities, elections, and utilities. RMI’s *RPD (Consequential Amendments) Bill 2018* also demonstrates a serious attempt to comply with Article 4(3) of the CRPD by bringing persons with disabilities into the mainstream of public policy making through improved representation on boards, committees and taskforces.

497 CRPD Committee General Comment No. 7 (2018) on participation of persons with disabilities in the implementation and monitoring of the Convention

498 CRPD Committee concluding observations on the initial report of Cook Islands (2015) paras. [8 & 12].
Acknowledgement

The regional report is authored by Dr. ‘Atu Emberson-Bain in her capacity as consultant under the general supervision of the ESCAP Pacific Office. It provides a comparative legislative analysis of CRPD compliance across seven Pacific Island countries and nine national and state jurisdictions: Vanuatu, Nauru, Republic of Marshall Islands (RMI), Solomon Islands, Tonga, Tuvalu, and the Federated States of Micronesia (FSM, Pohnpei State and Kosrae State). The report consolidates key findings of a series of CRPD legislative compliance reviews for seven Pacific countries between 2015 and 2019. The nine national and state reviews provide the main primary source material and analytical foundation for this regional report. In addition, several hundred laws enacted since the completion of original reviews were examined to bring the findings and recommendations up to date. This latest round of legal research was undertaken in 2020 by Dr. ‘Atu Emberson-Bain, who was also responsible for producing the final drafts of each of the national and state reviews, reviewing and co-drafting the RMI legislation, and producing this comparative analysis of Pacific legislation as a consultant. Her final report incorporates comments on an earlier draft by ESCAP (Headquarters in Bangkok and Subregional Office for the Pacific), OHCHR (CRPD Secretariat in Geneva and Regional Office for the Pacific), and the Pacific Disability Forum.

The national and state reviews were led by ESCAP and funded under the Pacific Enable Project (Phases I and II) with funding support from the UN Partnership to Promote the Rights of Persons with Disabilities (UNPRPD) in response to requests from Pacific governments for technical assistance with CRPD implementation. Technical assistance and advisory services were provided by ESCAP (Regional Adviser, Social Development, Dr. ‘Atu Emberson-Bain) in partnership with the Pacific Island Forum Secretariat (PIFS, Legislative Drafting Officer, Nola Fa’asau), and the Pacific Disability Forum (Director Operations, Laisa Vereti). A wide range of government and non-government stakeholders, including national disabled persons organisations (DPO), were consulted during several country missions and contributed immeasurably to the team’s understanding of disability issues and challenges in each local context as well as the prevailing national policy and legislative frameworks.

Special appreciation is expressed to three international consultants (from Mexico and Australia) who worked closely with the team to produce the first two drafts of the country reviews. They were selected for their internationally recognized CRPD expertise, intimate knowledge of CRPD jurisprudence (two of them being former members/Chair and Vice Chair of the CRPD Committee), international disability rights advocacy and scholarship, and relevant areas of legal specialization – international human rights law, mental health law, criminal law, and labour law.
The consultants involved with the national reviews were:

Vanuatu and Nauru (2015) – Carlos Rios Espinosa, Human Rights Watch
Solomon Islands (2017) – Emeritus Professor Ron McCallum, University of Sydney
Tonga, Tuvalu and FSM (2017-2019) – Dr. Piers Gooding, University of Melbourne

Following a rather different process, the legislative review for RMI was undertaken as a parallel process alongside support for CRPD ratification and the drafting of disability legislation. This was due to the Government’s wish for urgent tabling of disability legislation in early 2015 following a ratification resolution in the national Parliament (Nitijela). Technical assistance was provided by ESCAP (Regional Adviser, Social Development, Dr. ‘Atu Emberson-Bain) and PIFS (Legislative Drafting Officer, Nola Fa’asau), working in close collaboration with RMI’s Attorney-General’s Office (Bernard Adiniwin), Legislative Counsel’s Office (Divine Wati), and the Ministry of Culture and Internal Affairs (Wallace Peters and Molly Helkena). Preliminary scoping of the Marshall Islands Revised Code (MIRC) was undertaken by Dr. Anita Jowitt at the University of South Pacific in late 2014; and drafting input to a standalone disability law was provided by legislative drafting consultant John Wilson in early 2015.

ESCAP acknowledges with gratitude the valuable technical advice on the CRPD provided during the critical early stages of this process by the Human Rights and Disability Adviser of the OHCHR through Facundo Chavez Penillas and consultant Carlos Rios Espinosa, a former CRPD Committee member, vice Chair, and co-drafter of CRPD General Comment No. 1. In addition to undertaking country reviews for Vanuatu and Nauru, Mr. Espinosa provided CRPD training in Samoa (2015) for senior government lawyers and legislative drafters from around the region including non-review countries such as Fiji, Samoa, Palau, and Cook Islands.

Finally, on behalf of the partners, ESCAP wishes to express its appreciation to the Governments and people of the Federated States of Micronesia (including the State Governments and people of Pohnpei and Kosrae), Nauru, Republic of Marshall Islands, Solomon Islands, Tonga, Tuvalu, and Vanuatu for the opportunity to provide technical assistance on the CRPD. The support of all stakeholders, their active engagement in the consultations, and generous assistance during country missions between 2014 and 2019, were critical to the successful completion of the reviews (and drafting of two pioneering pieces of legislation in the case of RMI). Without this support, a regional perspective on disability-based discrimination in the law would not have been possible.
## Annex

### ANNEX 1: DISCRIMINATORY LANGUAGE IN PACIFIC LEGISLATION

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FSM NATIONAL CODE</strong></td>
<td>Education Law (Title 40)</td>
<td>“mental retardation”, “special education”, “physical handicap”, “ablest person”</td>
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<tr>
<td></td>
<td>Immigration Law (Title 50)</td>
<td>“insane”, “mentally irresponsible or incompetent”</td>
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<td>Mental Health Law (Title 6)</td>
<td>“insane”</td>
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<td></td>
<td>Public Service Law (Title 52)</td>
<td>“physical handicap”, “physically handicapped person”, “capacity”, “fitness”</td>
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<td><strong>FSM - KOSRAE STATE CODE</strong></td>
<td>Adoption Law</td>
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<td></td>
<td>Commitment/Mental Health Law</td>
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<tr>
<td></td>
<td>Divorce Law</td>
<td>“insanity”</td>
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<tr>
<td></td>
<td>Health Law</td>
<td>“disabled people”, “disabled”, “special needs”, “mental retardation”</td>
</tr>
<tr>
<td></td>
<td>Limitation on Actions</td>
<td>“insanity”/“insane”</td>
</tr>
<tr>
<td></td>
<td>Public Service Law</td>
<td>“physical handicap”, “physically handicapped person”, “ablest person”</td>
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<tr>
<td></td>
<td>Trafficking Law</td>
<td>“physical or mental disease or defect”</td>
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<tr>
<td><strong>FSM - Pohnpei STATE</strong></td>
<td>Alcohol Beverages Business Licensing Law</td>
<td>“insanity”, “mental incompetence”</td>
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<td></td>
<td>Business Association Law</td>
<td>“lunatic”, “unsound mind”</td>
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<td></td>
<td>Criminal Law</td>
<td>“lacked criminal responsibility by reason of mental disease or defect”, “special needs”</td>
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<td></td>
<td>Disability Law</td>
<td>“mental retardation”</td>
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<td></td>
<td>Electoral Law</td>
<td>“insanity”, “feeblemindedness”, “mental incompetency”</td>
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<td></td>
<td>Health Law</td>
<td>“handicapped”</td>
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<td></td>
<td>Judiciary</td>
<td>“incompetent”, “unsound mind”</td>
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<td></td>
<td>Limitations on Actions</td>
<td>“insane”, “incapacity”, “incompetence”, “mental illness”, “retardation or other mental defect”</td>
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<td>FSM - Pohnpei State</td>
<td>Prison Law</td>
<td>“facility for the mentally ill or mentally defective”</td>
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<tr>
<td></td>
<td>Public Service Law</td>
<td>“physical handicap”, “physically handicapped person”, “capacity”, “fitness”</td>
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<td></td>
<td>Traffic and Motor Vehicles Law</td>
<td>“insane”, “idiot”, “imbecile”, “feebleminded”, “suffering from such physical or mental disability or disease”</td>
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<tr>
<th>Nauru</th>
<th>Criminal Justice Act 1999</th>
<th>“handicapped persons”</th>
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<tbody>
<tr>
<td></td>
<td>Matrimonial Causes Act 1979</td>
<td>“suffering from disease or defect of the mind, mental deficiency or disorder, or insanity”</td>
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<td>Mentally-disordered Persons Act 1963</td>
<td>“mental disorder”, “mentally defective”, “unsound mind”</td>
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<td>Ports and Navigation Act 2019</td>
<td>“permanent or serious impairment or loss of a bodily function”, “permanent serious disfigurement”, “permanent severe mental or behavioural disturbance or disorder”</td>
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<tr>
<th>RMI</th>
<th>Citizenship Act 1984</th>
<th>“mentally disordered or defective person”; “sane”, “full capacity”</th>
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<tr>
<td></td>
<td>Communicable Diseases Prevention and Control Act 1988</td>
<td>“incompetent”</td>
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<td></td>
<td>Criminal Code 2011</td>
<td>“mentally impaired or insane person”, “mentally defective”, “mental illness, disease or defect”, “legally incompetent”</td>
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<td>Fishing Access and Licensing Act</td>
<td>“fit and proper”</td>
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<td></td>
<td>Foreign Affairs Act 2007</td>
<td>“mentally or physically disabled person”</td>
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<td></td>
<td>Marshall Islands Development Bank Act 1988</td>
<td>“incapacity”</td>
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<td></td>
<td>Marshall Islands Guardianship Act 1984</td>
<td>“incompetent” “mental retardation”, “senility”, “physical or mental incapacity” – “incompetent”</td>
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<td>Parole of Prisoners Act of 2001</td>
<td>“incapacity”</td>
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<td></td>
<td>Public Health, Safety and Welfare Act</td>
<td>“mental disorder”, “insane”, “feebleminded”</td>
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<tr>
<td></td>
<td>Weapons Control Act</td>
<td>“mentally incompetent”, “insanity”, “physical or mental defect”</td>
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</tbody>
</table>

<p>|         | Adoption Act 2004 | “incapable of giving consent”, “insane” |</p>
<table>
<thead>
<tr>
<th><strong>SOLOMON ISLANDS</strong></th>
<th><strong>TONGA</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Affiliation, Separation and Maintenance Act</td>
<td>“not a fit and proper person”, “unsound mind”</td>
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<tr>
<td>Citizenship Act</td>
<td>“mentally disordered or defective person”, “physical or mental incapacity”</td>
</tr>
<tr>
<td>Civil Aviation Act 2008</td>
<td>“fit and proper”, “infirmity, defect, incapacity”</td>
</tr>
<tr>
<td>Health Services Act</td>
<td>“mental retardation”, “suffering from mental disorder”, “suffering from mental illness or mental retardation”</td>
</tr>
<tr>
<td>Health Workers Act</td>
<td>“fit and proper person”</td>
</tr>
<tr>
<td>Immigration Act</td>
<td>“unsoundness of mind”, “insanity”</td>
</tr>
<tr>
<td>Islanders’ Divorce Act</td>
<td>“unsoundness of mind”, “insane”, “incapacity”</td>
</tr>
<tr>
<td>Islanders’ Marriage Act</td>
<td>“unsound mind”, “fit and proper person”</td>
</tr>
<tr>
<td>Juvenile Offenders Act</td>
<td>“depraved or unruly”, “fit person”</td>
</tr>
<tr>
<td>Mental Treatment Act</td>
<td>“unsound mind”, “mental disorder”, “mental defect”</td>
</tr>
<tr>
<td>Penal Code</td>
<td>“female idiot”, “imbecile woman or girl” – Act now repealed</td>
</tr>
<tr>
<td>Public Trustee Act</td>
<td>“unsound mind”</td>
</tr>
<tr>
<td>Births, Deaths and Marriages Registration Act</td>
<td>“insane”, “incapacity to marry”</td>
</tr>
<tr>
<td>Civil Aviation Act</td>
<td>“bodily or mental infirmity, defect, incapacity, or risk of incapacity”</td>
</tr>
<tr>
<td>Criminal Offences Code</td>
<td>“insanity”, “insane”, “mental disease”, “feeble minded, insane, idiot, imbecile”</td>
</tr>
<tr>
<td>Divorce Act</td>
<td>“unsoundness of mind”, “structural defect”, “incapable of consummating the marriage by reason either of some structural defect in the organs of generation which is incurable and renders complete intercourse impracticable or of some incurable mental or moral disability resulting in an invincible repugnance to sexual intercourse with the petitioner.”</td>
</tr>
<tr>
<td>Electoral Act and Legislative Assembly Act</td>
<td>“insane”, “imbecile”</td>
</tr>
<tr>
<td>Evidence Act</td>
<td>“mentally deficient”, “dumb”</td>
</tr>
<tr>
<td>Land Act</td>
<td>“idiot”, “imbecile”, “insane”, “fit and proper person”, “mental infirmity”</td>
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<td>TONGA</td>
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<tr>
<td>National Retirement Benefits Fund Act</td>
<td>“mentally or physically incapable”</td>
</tr>
<tr>
<td>Prisons Act</td>
<td>“physical or mental incapacity”</td>
</tr>
<tr>
<td>Public Enterprises Act</td>
<td>“incapacity”</td>
</tr>
<tr>
<td>Supreme Court Act</td>
<td>“incapacitated person”, “mental disorder”</td>
</tr>
<tr>
<td>TUVALU</td>
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<tr>
<td>Alcoholic Drinks Act</td>
<td>“insanity”, “unsound mind”</td>
</tr>
<tr>
<td>Citizenship Act</td>
<td>“sound mind”</td>
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<tr>
<td>Co-operative Societies Act, Co-operative Societies Regulations</td>
<td>“unsound mind”, “insane”</td>
</tr>
<tr>
<td>Companies Act</td>
<td>“unsound mind”, “insanity”</td>
</tr>
<tr>
<td>Criminal Procedure Code</td>
<td>“unsound mind”, “by reason of some disease of mind labouring under a defect of reason as to be incapable of knowing ...”</td>
</tr>
<tr>
<td>Customs Revenue and Border Protection Act 2014</td>
<td>“disabled”, “bodily and mentally disabled”</td>
</tr>
<tr>
<td>Development Bank of Tuvalu Act</td>
<td>“is found lunatic or becomes of unsound mind”</td>
</tr>
<tr>
<td>Falekaupule Act</td>
<td>“certified to be insane or otherwise adjudged to be of unsound mind”</td>
</tr>
<tr>
<td>Immigration Act</td>
<td>“suffering from mental disorder or is a mental defective”</td>
</tr>
<tr>
<td>Income Tax Act</td>
<td>“unsound mind”, “idiot”, “insane person”</td>
</tr>
<tr>
<td>Island Courts Act</td>
<td>“insane”, “criminal lunatic”</td>
</tr>
<tr>
<td>Leadership Code Act 2006</td>
<td>“infirmity of body or mind”</td>
</tr>
<tr>
<td>Magistrates’ Courts Act</td>
<td>“incapacity”, “fit and proper person”, “insane”, “criminal lunatic”</td>
</tr>
<tr>
<td>Mental Treatment Act</td>
<td>“unsound mind”, “insane”, “derangement of mind”, “idiot”</td>
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<tr>
<td>Methylated Spirit Act</td>
<td>“unsound mind”</td>
</tr>
<tr>
<td>National Bank of Tuvalu Act</td>
<td>“found lunatic or becomes of unsound mind”</td>
</tr>
<tr>
<td>National Fishing Corporation of Tuvalu Act</td>
<td>“found lunatic or becomes of unsound mind”</td>
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<td>TUVALU</td>
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</tr>
<tr>
<td>Penal Code</td>
<td>“insane”, “insanity”, “mental derangement”, “idiot”, “imbecile”, “suffering from such abnormality of mind”, “arrested or retarded development of mind”</td>
</tr>
<tr>
<td>Police Powers and Duties Act 2009</td>
<td>“disorder”, “disturbed behavior”, “loss of mental functions”, “physical capacity”, “mental capacity and condition”, “impaired capacity”</td>
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<tr>
<td>Public Broadcasting Act 2014</td>
<td>“insane”, “unsound mind”</td>
</tr>
<tr>
<td>Superior Courts Act</td>
<td>“insane”, “criminal lunatic”</td>
</tr>
<tr>
<td>Tuvalu Maritime Training Institute Act</td>
<td>“lunatic”, “unsound mind”</td>
</tr>
<tr>
<td>Tuvalu Philatelic Bureau Act</td>
<td>“lunatic”, “unsound mind”</td>
</tr>
<tr>
<td>Tuvalu Telecommunications Corporation Act</td>
<td>“lunatic”, “unsound mind”</td>
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<tr>
<td>Vaiaku Lagi Hotel Corporation Act</td>
<td>“lunatic”, “unsound mind”</td>
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<thead>
<tr>
<th>VANUATU</th>
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<tbody>
<tr>
<td>Charitable Associations (Incorporation)(Amendment) Act 2017</td>
<td>“fit and proper criteria”</td>
</tr>
<tr>
<td>Civil Aviation Act</td>
<td>“fit and proper person”, “any history of mental health or serious behavioural problems”</td>
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<tr>
<td>Co-operative Societies (Amendment) Act 2017</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Co-operative Societies (Amendment) Act 2019</td>
<td>“permanent incapacity”</td>
</tr>
<tr>
<td>Companies (Amendment) Act 2018</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Companies Act</td>
<td>“unsound mind”, “jurisdiction in lunacy”</td>
</tr>
<tr>
<td>Company and Trust Services Providers Act 2010 (and Amendment Act 2017)</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Correctional Services Act 2006</td>
<td>“mentally impaired”, “incapacitated”</td>
</tr>
<tr>
<td>Credit Unions (Amendment) Act 2017</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Decentralization (Amendment) Act 2019</td>
<td>“physically or mentally incapacitated”</td>
</tr>
<tr>
<td>E-Business (Amendment) Act 2017</td>
<td>“fit and proper”</td>
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<tr>
<td>Financial Dealers Licensing (Amendment) Act 2018</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Foundation (Amendment) Act 2017</td>
<td>“fit and proper”</td>
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<td>Act</td>
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<tr>
<td>Maritime Sector Regulatory Act 2016</td>
<td>“physical or mental incapacity”</td>
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<tr>
<td>Mental Hospital Act</td>
<td>“criminal lunatic”</td>
</tr>
<tr>
<td>National Youth Authority Act 2018</td>
<td>“permanently incapacitated”, “permanently incapable”</td>
</tr>
<tr>
<td>Partnership Act</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Penal Code</td>
<td>“insanity”, “mental disease”, “abnormality of mind” and “arrested or retarded development of mind”</td>
</tr>
<tr>
<td>Public Service (Amendment) Act 2018</td>
<td>“physical or mental incapacity”</td>
</tr>
<tr>
<td>Telecommunications and Radiocommunications Regulation (Amendment) Act 2018</td>
<td>“fit and proper”</td>
</tr>
<tr>
<td>Telecommunications and Radiocommunications Regulation Act 2009</td>
<td>“mentally or physically unfit”, “physical or mental incapacity”</td>
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### ANNEX 2: EMPLOYMENT DISCRIMINATION IN PACIFIC LEGISLATION

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation</th>
<th>Reference</th>
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<tbody>
<tr>
<td><strong>FSM NATIONAL CODE</strong></td>
<td></td>
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<tr>
<td></td>
<td>Title 2, Chapter 3</td>
<td>Removal of a President if “has become totally disabled”</td>
</tr>
<tr>
<td></td>
<td>Title 20, Chapter 6</td>
<td>Certification of airman contingent on evidence of “proper qualification” and being “physically able to perform duties pertaining to the position.”</td>
</tr>
<tr>
<td></td>
<td>Title 24, Chapter 2</td>
<td>Termination of appointment of a member of the National Oceanic Resource Management Authority on grounds of “incapacity”</td>
</tr>
<tr>
<td></td>
<td>Title 4, Chapter 1</td>
<td>Replacement of Chief Justice who is “unable to perform the duties of office” – where phrase “unable...” has been interpreted by the FSM Supreme Court to mean “a physical or mental disability of some duration …. “ <em>(Jano v. King, 5 FSM Intrm. 326, 331 (App. 1992))</em></td>
</tr>
<tr>
<td></td>
<td>Title 41, Chapter 9</td>
<td>Board authorized to take disciplinary action against a nurse who “has a physical or mental disability that renders the licensee unable to perform nursing services or duties with reasonable skill or safety to the patient”</td>
</tr>
<tr>
<td><strong>POHNPEI STATE CODE</strong></td>
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<tr>
<td></td>
<td>Title 16, Chapter 1</td>
<td>Stipulates a range of qualifications including passing a physical examination that must be met by a prospective police or security officer.</td>
</tr>
<tr>
<td></td>
<td>Title 17, Chapter 4 (Health Care Plan)</td>
<td>Removal of a member of the Board of Trustees of the Health Care Plan on the ground of “incompetency” .</td>
</tr>
<tr>
<td></td>
<td>Title 38, Chapter 6</td>
<td>Removal of a member of the Board of Land Surveyors Examiners on the grounds of “incompetency”</td>
</tr>
<tr>
<td></td>
<td>Title 4, Chapter 3 Pohnpei Supreme Court</td>
<td>Removal from office of a Chief Justice on the basis of “incapacity .... due to a physical or mental disability of some duration, death or other immediate personal incapacity.”</td>
</tr>
<tr>
<td></td>
<td>Title 9, Chapter 6</td>
<td>(Pending) Removal of member of Board of the Pohnpei Pension Plan due to “incompetency”.</td>
</tr>
<tr>
<td><strong>KOSRAE STATE CODE</strong></td>
<td></td>
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<tr>
<td></td>
<td>Title 5 Chapter 3</td>
<td>Removal of Governor from office if he/she “has a disability”</td>
</tr>
<tr>
<td></td>
<td>Title 6 Chapter 12</td>
<td>Removal of a justice pro tempore who “becomes disabled”</td>
</tr>
<tr>
<td></td>
<td>Title 7 Chapter 8</td>
<td>Removal of a Chairperson or Vice Chairperson with a disability</td>
</tr>
<tr>
<td></td>
<td>Title 7, Chapter 7</td>
<td>Vacancy in any government agency in various circumstances including “incapacitating illness”</td>
</tr>
<tr>
<td>Country</td>
<td>Legislation</td>
<td>Reference</td>
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</tr>
<tr>
<td><strong>KOSRAE STATE CODE</strong></td>
<td>Title 7, Chapter 7</td>
<td>Removal of Chairperson of the Education Advisory Board on grounds of a disability</td>
</tr>
<tr>
<td></td>
<td>Title 9</td>
<td>Removal of a representative of the Kosrae State to the Board of Directors of the FSM Revenue Authority if the person “has been incapacitated or disabled which renders him unable or unfit to perform the duties as a member of the Board for at least six (6) months.”</td>
</tr>
<tr>
<td><strong>NAURU</strong></td>
<td>Cenpac Corporation Act 2018</td>
<td>A person is disqualified from being appointed as Director or will be removed as Director if “lacks capacity in respect of his or her duties as a Director within the meaning of the Mentally-disordered Persons Act 1963”</td>
</tr>
<tr>
<td></td>
<td>Corporations Act 1972 (amended 2018)</td>
<td>Director disqualified if “he becomes of unsound mind or otherwise permanently incapable of carrying out his duties”</td>
</tr>
<tr>
<td></td>
<td>Electoral Act 2016</td>
<td>Disqualification of a person certified to be “intellectually impaired” from being appointed as Electoral Commissioner; removal of Electoral Commissioner on the grounds of “proven incapacity ... in the performance of his or her functions and duties under this Act” or “incompetence”</td>
</tr>
<tr>
<td></td>
<td>Leadership Code Act 2016</td>
<td>Removal of Ombudsman for “inability to perform adequately the functions of his or her office or position, whether arising from infirmity of body or mind or other cause”</td>
</tr>
<tr>
<td></td>
<td>Legal Practitioners Act 2019</td>
<td>A legal practitioner is obliged to withdraw his or her services where “the mental or physical condition of the practitioner renders it difficult for him or her to carry out the employment effectively”</td>
</tr>
<tr>
<td></td>
<td>Liquor Control Act 2017</td>
<td>Removal of a member of the Liquor Licensing Board if “fails to perform functions, powers and duties ... due to illness and incapacity”</td>
</tr>
<tr>
<td></td>
<td>Naoero Postal Services Corporation Act 2018</td>
<td>A person is disqualified from being appointed as Director or will be removed as Director if the person “lacks capacity in respect of his or her duties as a Director within the meaning of the Mentally-disordered Persons Act 1963;” and office of Director declared vacant if the incumbent is “considered by a Board of not less than 2 health practitioners, appointed by the Minister, to be incapable of performing his or her duties efficiently;”</td>
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<tr>
<td>Country</td>
<td>Legislation</td>
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<tr>
<td></td>
<td>Nauru (RPC) Corporation Act 2017</td>
<td>Person disqualified from being a Director of the Board if “lacks capacity in respect of his or her duties as a Director within the meaning of the Mentally-disordered Persons Act 1963”; and office of a Director to be declared vacant by Minister if (14)(f) “is considered by a Board of not less than 2 health practitioners, appointed by the Minister, to be incapable of performing his or her duties efficiently.”</td>
</tr>
<tr>
<td></td>
<td>Nauru Fibre Cable Corporation Act 2017</td>
<td>Appointment to Board revoked for a member who “is considered by a Board of not less than two legally qualified medical practitioners, appointed by the Minister, to be incapable of performing his or her duties efficiently;”</td>
</tr>
<tr>
<td></td>
<td>Nauru Superannuation Act 2018</td>
<td>A person is disqualified from being appointed as a member of the Nauru Super Scheme Board if the person “lacks capacity in respect of his or her duties as a member within the meaning of the Mentally-disordered Persons Act 1963;” Vacancy declared for member if the incumbent is “considered by not less than 2 health practitioners to be incapable of performing his or her duties efficiently;”</td>
</tr>
<tr>
<td></td>
<td>Nauru Utilities Corporation (Amendment) Act 2016</td>
<td>Appointment of Board member can be revoked if considered by two medical practitioners to be “incapable of performing his duties efficiently”</td>
</tr>
<tr>
<td></td>
<td>Tourism Corporation Act 2019</td>
<td>A person is disqualified from being appointed as Director or will be removed as Director if the person “lacks capacity in respect of his or her duties as a Director within the meaning of the Mentally-disordered Persons Act 1963;” and office of Director declared vacant if the incumbent is – “considered by a board of not less than 2 health practitioners, appointed by the Minister, to be incapable of performing his or her responsibilities and duties efficiently;”</td>
</tr>
<tr>
<td></td>
<td>Attorney-General Act of 2002</td>
<td>Deputy AG acts for AG in the “absence or incapacity” of the AG</td>
</tr>
<tr>
<td></td>
<td>Civil Aviation Safety Act 1988</td>
<td>Appointment of Director based on “his fitness for the efficient discharge of the powers and duties ...”</td>
</tr>
<tr>
<td></td>
<td>Marshall Islands Development Bank Act 1988</td>
<td>Vacancy on the Board of Directors can be created by “incapacity”.</td>
</tr>
<tr>
<td></td>
<td>Trust Act of 1994</td>
<td>Authorises the removal and replacement of a trustee who is “a person of unsound mind”.</td>
</tr>
<tr>
<td></td>
<td>Trust Companies Act 1994</td>
<td>A director of a licensed trust company ceases to be director if “he becomes permanently incapable of performing his duties”.</td>
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<td>Country</td>
<td>Legislation</td>
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<tr>
<td>SOLOMON ISLANDS</td>
<td>Broadcasting Act</td>
<td>Removal of a Corporation member who is “incapacitated by physical or mental illness”</td>
</tr>
<tr>
<td></td>
<td>Citizenship Act</td>
<td>Termination of membership of Commission on grounds of “physical or mental inability to satisfactorily perform the duties of the office”</td>
</tr>
<tr>
<td></td>
<td>Civil Aviation Act 2008</td>
<td>Grant or renewal of an aviation license premised on being “fit and proper person” with definition of “fit and proper person” making reference to “any history of physical or mental health or serious behavioural problems”; Revocation or suspension of licence similarly based on medical grounds (“any ... infirmity, defect, incapacity, or risk of incapacity”)</td>
</tr>
<tr>
<td></td>
<td>Companies Act</td>
<td>Disqualification of a Director if “becomes of unsound mind”; denial of shareholder property rights on grounds of “incapacity”.</td>
</tr>
<tr>
<td></td>
<td>Development Bank of Solomon Islands Act 2018</td>
<td>Criteria for appointment to Board includes “the physical and mental capacity to perform his or her functions as a Board member”; and grounds for termination include “physical or mental incapacity to satisfactorily perform the duties of the office”; ditto appointment and termination of CEO</td>
</tr>
<tr>
<td></td>
<td>Education Act</td>
<td>Education requirements for registration as a teacher include “evidence of fitness to teach”</td>
</tr>
<tr>
<td></td>
<td>Family Protection Act 2014</td>
<td>Termination of appointment of member of Family Protection Advisory Council on grounds of being “physically or mentally incapable of performing their functions as a member”</td>
</tr>
<tr>
<td></td>
<td>Health Workers Act</td>
<td>Requirement that to be registered as a health worker, person must be “a fit and proper person ...”; censure, suspension and removal from the register of a health worker who is “suffering from any physical or mental illness rendering him unfit to practice.”</td>
</tr>
<tr>
<td></td>
<td>Local Courts Act</td>
<td>Appointment to local courts of “fit and proper person”.</td>
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<tr>
<td></td>
<td>Planning and Development Act</td>
<td>Removal of a Board member and Chairman if “of unsound mind”</td>
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<td></td>
<td>Police Act 2013</td>
<td>Criteria for appointment and enlistment of police officers include “physical and mental fitness”</td>
</tr>
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<td></td>
<td>Solomon Islands National University Act 2012</td>
<td>Removes a Council member on the basis of disability – “any physical or mental incapacity ...”</td>
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<tr>
<td></td>
<td>Solomon Islands Tertiary Education and Skills Authority Act 2017</td>
<td>Disqualification of a member of the Authority “on the ground of physical or mental inability to satisfactorily perform the duties of the office”</td>
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<tr>
<td>Country</td>
<td>Legislation</td>
<td>Reference</td>
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<tr>
<td><strong>SOLOMON ISLANDS</strong></td>
<td><strong>Telecommunications Act 2009</strong></td>
<td>Exclusion from appointment as Commissioner, or subject to suspension or removal due to “any physical or mental incapacity to perform the functions or duties ...”</td>
</tr>
<tr>
<td><strong>TONGA</strong></td>
<td><strong>Companies Act</strong></td>
<td>Disqualification of a company director who “has become of unsound mind”</td>
</tr>
<tr>
<td></td>
<td><strong>Family Protection Act</strong></td>
<td>Disqualification of a member of the Family Protection Advisory Council on the grounds of “physical or mental incapacity”.</td>
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<td></td>
<td><strong>Financial Institution Act</strong></td>
<td>Termination of appointment on grounds of disability.</td>
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<tr>
<td></td>
<td><strong>Medical and Dental Practice Act</strong></td>
<td>Refusal or withdrawal of registration, or suspension of a medical practitioner, health officer, dentist or dental therapist, or applicant, “by reason of infirmity, injury or illness, whether mental or physical, unfit to carry on the practice of medicine or dentistry”; complaints procedure where a practitioner “does not have sufficient physical or mental capacity to carry on practice ...”</td>
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<td></td>
<td><strong>Microfinance Institutions Act 2018</strong></td>
<td>Disqualification of a person from being director or manager of a microfinance institution if does not meet the “fit and proper person” criteria prescribed by Reserve Bank.</td>
</tr>
<tr>
<td></td>
<td><strong>National Retirement Benefits Fund Act</strong></td>
<td>Discharge of a Board director on the basis of a physical or mental disability (“mentally or physically incapable of fulfilling the office of Director”)</td>
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<tr>
<td></td>
<td><strong>Nurses Act</strong></td>
<td>Refusal to register, deregistration, or suspension of a nurse, nurse practitioner or midwife who “by reason of infirmity, injury or illness, whether mental or physical, unfit to carry on the practice of nursing or midwifery”</td>
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<tr>
<td></td>
<td><strong>Ombudsman Act</strong></td>
<td>Removal of an Ombudsman from office if “certified by a medical officer to have a disability that is likely to impact on his ability to fulfill his obligations”; establishes “incapacity” of the Ombudsman as grounds for temporary replacement.</td>
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<tr>
<td></td>
<td><strong>Pesticides Act</strong></td>
<td>Removal of Committee member on the basis of disability.</td>
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<td></td>
<td><strong>Police Act</strong></td>
<td>Dismissal of a Police Commissioner on grounds including “physical or mental incapacity”</td>
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<td></td>
<td><strong>Prisons Act</strong></td>
<td>Dismissal of Commissioner of Prisons “on the grounds of physical or mental incapacity ...”</td>
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<tr>
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<td>Legislation</td>
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<td>TONGA</td>
<td>Public Audit Act</td>
<td>Removal of Auditor General on the grounds of “disability”</td>
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<td></td>
<td>Public Procurement Regulations</td>
<td>Removal of an independent expert responsible for reviewing complaints on grounds of “disability”</td>
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<td>Tonga National Qualifications and Accreditation Board Act</td>
<td>Removal of Board member if “mentally or physically incapable of fulfilling his duties.”</td>
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<td>Tonga Tourism Authority Act</td>
<td>Removal of a director on the basis of “incapacity”; and a person disqualified from being appointed as director if “prohibited from being a director under the Companies Act” – latter disqualifies a director who “has become of unsound mind”</td>
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<td>TUVALU</td>
<td>Alcoholic Drinks Act</td>
<td>Disqualification from holding a licence to sell alcohol or managing licensed premises if “certified to be insane or otherwise adjudged to be of unsound mind”</td>
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<td>Arbitration Act</td>
<td>Removal of arbitrator if deemed “incapable of acting”</td>
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<td>Development Bank of Tuvalu Act</td>
<td>Disqualification of a person from appointment as a Director on the Board if “found lunatic or becomes of unsound mind”</td>
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<td>Falekaupule Act</td>
<td>Dismissal of an officer or employee on the grounds of “incapacity” …</td>
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<td>Island Courts Act</td>
<td>Criteria for appointment of magistrates and vacancies – “fit and proper person” and “temporary incapacity”</td>
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<td>Medical and Dental Practitioners Act</td>
<td>Removal from registration of a medical or dental practitioner who becomes a “certified mental patient” under the Mental Treatment Act</td>
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<td>National Fishing Corporation of Tuvalu Act</td>
<td>Same provision/disqualification as National Tuvalu – Bank of Tuvalu Act – recommendation to apply to director, all management personnel, officer or employee with disability.</td>
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<td>Police Service Act 2009</td>
<td>Appointment to police service requires “physical and mental fitness”; a member of police service or a police officer to be stood down, suspended, transferred, retired or dismissed on the grounds of physical or mental unfitness or illness.</td>
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<td>Public Enterprises Performance and Accountability Act 2009</td>
<td>Disqualification of a director if “adjudged to be mentally defective under the Mental Health Ordinance 1961.”</td>
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<td>Disqualification of a director for being “lunatic” or “becomes of unsound mind”</td>
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