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Review of implementation of the United Nations Convention against Corruption

Executive summary: Jamaica

Note by the Secretariat

The present conference room paper is made available to the Implementation Review Group in accordance with paragraph 36 of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (Conference of the States Parties resolution 3/1, annex). The summary contained herein corresponds to a country review conducted in the second year of the first review cycle.



Executive Summary

Jamaica

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

Jamaica signed the Convention on 16 September 2005 and ratified it on 5 March 2008. The Convention entered into force for Jamaica on 5 April 2008.

Jamaica is a parliamentary democracy based on the Westminster system of government. The Jamaican judiciary and legal system are based on British common law and practice, with a multi-tiered system to handle criminal and civil matters. Jamaica incorporated provisions of the Convention into domestic law through the Corruption (Prevention) Act (CPA) already in 2001 and therefore had implementing legislation in place before it ratified the Convention. Jamaica is also Party to the Inter-American Convention against Corruption and was reviewed by its Committee of Experts (MESICIC).

Jamaica's anti-corruption institutional framework includes the following bodies: the Commission for Prevention of Corruption, the Integrity Commission, and Anti-Corruption Branch of the Jamaica Constabulary Force (JCF), the Financial Investigations Division (FID) under the Ministry of Finance, and the Contractor General. The Ministry of Justice has responsibility for recommending and implementing policies aimed at combating corruption, and its various departments undertake necessary reforms to the anti-corruption legislative framework.

Criminal matters, including corruption offences, are prosecuted by the Director of Public Prosecutions (DPP) in the exercise of her powers under section 94 of the Constitution. Files are submitted from the JCF, as well as specialized investigative agencies such as the Financial Investigations Division, and by the various Government Ministries/Departments/Agencies containing complaints about alleged or suspected criminal conduct, including corruption, seeking guidance on whether investigations should be commenced or furthered. There are specialized units and prosecutors within the Office of DPP who handle corruption, extradition and mutual legal assistance.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

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

Sections 14 (1) and (2) of the CPA criminalize active and passive bribery.

The term public servant is interpreted widely according to section 2 (1) of the CPA. It covers appointed and elected officials, including Members of Parliament. Alleged acts of corruption, as defined in section 14 of the CPA, which involve Members of Parliament are received and investigated by the Integrity Commission according to section 4 (5) (d) of the Parliament (Integrity of Members) Act. They are reported to the Parliamentary Leader and the DPP according to section 12 (4) of the same act. No such case examples were provided.

The chief justice, the president of the Court of Appeal, and resident magistrates fall within the provisions of the CPA. Other judges are not regarded as public servants.

Active bribery of foreign public officials is criminalized in section 14 (4) of the CPA, but does not include officials of public international organizations. The passive form is not covered in the Jamaican legislation.

Forms of active and passive bribery in the private sector are covered in section 14 (10) to (12) of the CPA when they relate to an agent's principal's affairs or business. Agent includes any person employed or acting for another; principal includes any employer. The wording of sections 14 (10) to (12) does not refer to offences committed directly by persons such as employers or directors. Only in regard to aspects of due diligence in the context of accounting and audit requirements are they liable according to sections 144-150 of the Companies Act.

Jamaica does not criminalize trading in influence.

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

Section 92 of the Proceeds of Crime Act (PoCA) criminalizes money-laundering. The law provides that it is a crime if a person "engages in a transaction that involves criminal property, conceals, disguises, disposes of or brings into Jamaica, converts transfers or removes any such property from Jamaica". Section 93 of PoCA also criminalizes the acquisition, use or possession of criminal property. This includes, according to section 91 of PoCA, an attempt, conspiracy, incitement, aiding, abetting, counselling or procuring of the commission of such offence. Participating and facilitating can be subsumed under these terms.

According to section 91 (1) of PoCA, property is considered criminal if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefited from the conduct). According to section 2 of PoCA, criminal conduct means conduct which constitutes an offence in Jamaica. Foreign offences are deemed predicate offences if they would constitute predicate offences in Jamaica. A person can be convicted of both money-laundering and the underlying predicate offences.

Concealment is criminalized by section 92 and 93 of PoCA, as well as by section 14 (1) of CPA.

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

The provisions on embezzlement, misappropriation or other diversion of property are reflected in two different laws. Section 14 (6) (b) and (8) and of the CPA as well as section 22 of the Larceny Act. The Larceny Act uses the term of a "person being employed in the public service of Her Majesty or being a member of or employed in the Jamaican Constabulary Force". Jamaica noted that the term might be interpreted in the same way as the term "public servant" in the CPA.

The Larceny Act covers embezzlement of "any chattel, money, or valuable security", whereas the CPA refers to property, which includes movable as well as immovable property. The reviewers recommended also, in this regard, to consolidate the terminology of the provisions to cover assets of every kind, corporal and incorporeal, movable and immovable, tangible or intangible, and legal documents or

instruments evidencing title to or interest in such assets. The operational value of the provision remains unclear as no case examples were provided.

Some aspects of embezzlement in the private sector are regulated in sections 22 (1) (b), 24 (1) (ii) and 25 of the Larceny Act, and section 27 of the Securities Act.

Abuse of functions is criminalized partly in section 14 (6) of the CPA. The offence is restricted to specific acts and does not include the failure to perform an act.

Illicit enrichment is criminalized in section 14 (5) of the CPA in case a public servant owns assets disproportionate to his lawful earnings and upon request cannot satisfactorily explain their origin.

Obstruction of justice (art. 25)

The offence of wrongful obstruction of the course of justice is addressed in common law. It was explained that the offence applied if threats, force, bribery or any pressure was used to pervert the course of justice by interfering with a witness, inducing false evidence or tampering with evidence. The offence also applied if such means were used to interfere with official duties by justices or law enforcement officials. Some case law was provided, but the information was not sufficient to analyse if all details of article 25 a) and b) were fully covered and to assess the operational value.

Liability of legal persons (art. 26)

Criminal liability of legal persons is provided for in the domestic legal system. According to section 2 of the Interpretation Act, the term “person” includes any corporation, either aggregate, sole, and any club, society, association or other body of one or more persons. Furthermore, the provisions of the Companies Act, which also regulate, civil liability of legal persons, are applicable. No case examples were provided to assess how effectively such liability could be established.

The same fines apply for natural and legal persons according to section 15 of the CPA. In the case of a first offence the maximum fine in a Resident Magistrate’s Court is one million Jamaican dollars, in a Circuit Court five million. The Companies Act provides for the possibility to wind-up a company, for instance, in cases in which the circumstances suggest that its business is being conducted for an unlawful purpose, according to Sections 161-167 of the Companies Act.

Participation and attempt (art. 27)

Preparatory acts of “whatsoever manner” are covered by section 14 (3) of the CPA, but only in relation to the offences of section 14 (1) and (2) of the CPA. The preparation of an offence is not covered beyond the form of instigation, attempt or conspiracy. Section 91 of POCA covers the relevant forms for the offence of money-laundering and concealment.

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

The penalties for corruption offences are fines and imprisonment as regulated in section 15 of the CPA. The law differentiates between first time and repeat

offenders. Depending on the seriousness the case is tried either by the Resident Magistrate's Court or the Circuit Court, which is a division of the Supreme Court and which can impose higher sanctions. As the maximum amounts of the fines are not very high, fines are often imposed in combination with imprisonment. Administrative sanctions are included in paragraphs 10 (6) and (7) of the Staff Orders for the Public Service as well as in the Police Service, and the Judicial Service Regulations.

According to section 94 of the Constitution, the Director of Public Prosecutions (DPP) has discretion to prosecute based on aspects such as sufficient evidence, a reasonable possibility of conviction and public interest.

Jamaica does not provide for immunities from criminal prosecution for public officials.

Section 13 and 14 of the Bail Act and section 31 of the Judicature (Appellate Jurisdiction) Act provide for the possibility of granting bail. The accused has a constitutional entitlement to bail. The judge can order bail even if police or prosecution provide sufficient demonstration why it should not be granted. The determination of the bail amount is at the discretion of the judge.

According to section 6 of the Parole Act, every inmate serving a sentence of more than twelve months is eligible for parole after having served a period of one-third of such sentence or twelve months, whichever is greater. No information was provided on how the gravity of the offence is taken into consideration when taking a decision about parole.

Pending trial or during disciplinary proceedings, an interdiction to work is possible according section 32 of the Public Service Regulations, section 35 of the Police Service and section 21 of the Judicial Service Regulations. The interdiction goes along with a reduction of salary payments. The Police Service regulations also foresee the option of suspension without pay and with deprivation of all uniform and government property. However, not all public officials are covered by these regulations.

Upon conviction, the dismissal from office or other punishment is possible according to section 35 of the Public Service Regulations, section 38 of the Police Service Regulations and section 24 of the Judicial Service Regulations. Furthermore, the Staff Orders for the Public Service comprise a list of disciplinary sanctions which take the nature and gravity of the offence in consideration.

According to Jamaica's Criminal Justice (Plea Negotiations and agreements) Act, the DPP can enter into an agreement with the accused and accept a plea of the accused to a lesser offence or withdraw charges, if the accused enters a guilty plea and fulfils other obligations. Those obligations could relate to the provision of information. According to section 10, judges and Resident Magistrates are not bound by the agreement. Cooperating offenders who provide information or evidence could fall under the witness definition of section 2 of the Justice Protection Act and receive protection.

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

Jamaica's Justice Protection Act, which entered into force in 2008, defines a witness as a "person who has given, is obliged to give or has agreed to give a statement or

evidence or both". Through section 9 (2) (a), a person "likely to be a witness" could also be included, which might be of relevance in early stages of investigation. Associates may also be considered as participants of the Justice Protection Programme. Those persons could be relatives. However, the formulation of section 9 (2), which regulates the application by DPP, is formulated in a way which seems to include only associates of jurors, judicial officers, legal officers and law enforcement officers, but not of witnesses. It is recommended to reassess the formulation to provide effective protection also to relatives and persons close to witnesses and experts.

The Witness Protection Administration and Victim Support Unit of the Ministry of National Security and Justice is the responsible authority for the programme. Protective measures may encompass the establishment of a new identity or relocation. Currently no special evidentiary rules are applicable. However, a new Evidence (Special Measures) Act has been passed in 2012. Once it enters into force, video or other means can be used for testimony. Protection prior to the decision by the administrative centre, shall be provided by the Commissioner of Police according to section 8 (b) of the Act.

No information on the number of persons which received protection under the programme was available at the time of the review.

Jamaica may enter into relocation agreements with other States according to section 3 (2) of the Act.

In 2012, the Protected Disclosures Act 2010 entered into force. Section 16 provides for protection against any occupational detriment and section 17 establishes the presumption that a detrimental action which happens about the time of the protected disclosure is presumed to be a consequence of the disclosure, unless the employer shows otherwise.

The act of preventing an employee from making a protected disclosure is criminalized. Furthermore, section 24 grants confidentiality of information and criminalizes the break of confidentiality.

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

Section 5 of PoCA regulates the confiscation of proceeds of crime and property. Equipment and instrumentalities destined to be used for offences are not covered. PoCA also regulates the aspects of search, freezing and seizure in various sections, including 32-40, 75, 115, 119. Between January 2008 and November 2011 confiscations have been made in four cases and restraint orders in 14 cases. Administration through the central authority, the Asset Management Unit of the FID, is regulated in section 41 of PoCA.

In case the property has been comingled, transferred, substantially diminished, is located outside Jamaica or cannot be traced, forfeiture of the equivalent value is possible. The provisions apply without prejudice to the rights of bona fide third parties.

Bank secrecy restrictions do not constitute an obstacle in the investigation and seizure of bank, financial and commercial records, according to sections 45 (1) and (2) and the Fourth Schedule of the Banking Act.

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

Jamaica has no statute of limitations for criminal offences. Previous convictions in other States are not admissible.

Jurisdiction (art. 42)

The jurisdiction extends, according to common law principles, to offences committed on board of a vessel that is flying the flag of Jamaica or an aircraft registered under the laws of Jamaica. According to section 14 (9) of the CPA, if an offence of section 14 (1) to (8) has been committed by a citizen outside Jamaica, it may be dealt with as if it was committed in Jamaica. This does not include offences of section 14 (10) to (12) relating to bribery in the private sector.

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

Jamaica does not have provisions regulating the consequences of corruption offences, such as provisions for the annulment of an agreement if it was unlawful due to a corruption offence, or the withdrawal of a concession.

Concerning compensation for damage resulting from acts of corruption, Jamaica referred to common law principles which provide for redress under tort or breach of contract.

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

The Corruption Prevention, Coroner Matters and Organised Crime Unit of DPP, which currently has 8 staff members, is responsible for prosecution of corruption offences.

In regard to detection and investigation of corruption offences, multiple institutions are involved and have different mandates. The principal bodies, which can also receive reports of offences, are the Commission for the Prevention of Corruption (CPC), the Integrity Commission (IC), the Anti-Corruption Branch (ACB) of the JCF, the FID, and the Contractor General. The CPC and IC raised limitations in their investigative powers. Coordination is carried out informally and mostly through the main investigative body, the JCF, but there is a need for better coordination in this field.

According to section 7 (1) of the First Schedules of both, the CPA and the Parliament (Integrity of Members) Act, the Governor General after consultation with the Leader of the Opposition, may at any time revoke the membership of any appointed member. Although the decision requires consultation with different parties, a clearer specification might be advisable to strengthen independence of the Commissions.

Recently, Jamaica established the Major Organized Crime and Anti-Corruption Task Force (MOCA) to improve investigation of corruption offences specifically in regard to high-level cases. The core staff of MOCA will be members of the JCF with support from FID and other institutions.

2.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:

- Establishment of toll-free hotline to report corruption offences.
- Training of staff of the Bank of Jamaica through the FID.
- Efforts to improve inter-agency collaboration through establishment of MOCA.

2.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- Include all persons who hold judicial office in the term of public servant and ensure that both, Members of Parliament and judges, are included in the definition in the new Special Prosecutors Bill. Also, ensure the consolidation of terminology throughout the different laws which are applicable for corruption offences such as the Larceny Act.
- Criminalize bribery of officials of public international organizations to ensure full compliance with article 16 (1) of UNCAC.
- Consider formulating the offence of bribery in the private sector in a way which includes employers and directors to ensure legal certainty in those cases.
- Consolidate the various provisions on embezzlement.
- Consider extending the scope of the current provisions on embezzlement in the private sector to cover the full scope as set out in the Convention.
- Consider including the failure to perform an act into the current regulation of abuse of function.
- Ensure that all aspects of obstruction of justice are fully criminalized.
- The general rate of prosecutions and convictions seems low and most prosecutions of corruption offences are based on section 14 (1) of CPA. Monitor and assess the operational value of the other offences and conduct regular data collection concerning corruption cases in order to take necessary measures to strengthen their implementation.
- Establish more effective, proportionate and dissuasive fines and sanctions, including for legal persons. This would allow for a more differentiated approach which takes into account the gravity of the offence and the damage caused.
- Extend the scope of section 14 (3) of CPA on participation and attempt to cover all corruption offences.
- Assure that the gravity of offences is taken into consideration when decisions on parole are taken in regard to a corruption offence.
- Consider to widen the scope of the Public Service Regulations to cover all public officers.

- Consider to endeavour the promotion of reintegration into society of persons convicted of corruption offences.
- Enable confiscation, identification, tracing, freezing and seizure of equipment and instrumentalities destined for use in corruption offences.
- Introduce measures in line with article 34 of UNCAC.
- Ensure that sufficient measures exist to provide for the compensation of damages resulting from acts of corruption, in line with article 35 of UNCAC.
- To improve the efficient fight against corruption Jamaica should strengthen its institutional framework in the area of anti-corruption and improve inter-agency coordination and collaboration. Sufficient resources should be made available to address capacity constraints and backlogs in the area of investigation, prosecution, and adjudication of cases.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

Jamaica requires a treaty basis for extradition. The Extradition Act of 1991, as amended in 1995 and 2005, contains the requirements for extradition to and from other States. Extradition is allowed with “approved States” defined as “either a designated Commonwealth State or a treaty State”. It was noted that there were no extradition requests for corruption offences sent or received by Jamaica in the preceding five years.

Article 5 (1) of the Extradition Act defines extraditable offences for designated Commonwealth States as “(i) an offence which is punishable under that law with imprisonment for a term of two years or any greater punishment; and (ii) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica (or in the case of an extraterritorial offence, in corresponding circumstances outside Jamaica) and would be punishable under the law of Jamaica with imprisonment for a term of two years or any greater punishment.”

For treaty States, extraditable offences are those provided for in the relevant treaty which would constitute an offence against the law of Jamaica. Section 15 of the CPA further provides that corruption offences are punishable by a minimum of two years imprisonment and therefore extraditable offences for Commonwealth States. There is no indication that Jamaica considers any of the offences established in accordance with the Convention as a political offence.

Jamaica does not take the Convention as legal basis for cooperation on extradition and only uses bilateral treaties or the London Scheme applicable to Commonwealth States. Article 7 of the Extradition Act provides several grounds for refusal of extradition.

Jamaica has not implemented article 45 of the Convention on the transfer of sentenced persons, but indicates that it is engaged in ongoing discussions with other

States in this regard. Article 47 on the transfer of criminal proceedings is not implemented either.

Mutual legal assistance (art. 46)

The Mutual Assistance (Criminal Matters) Act (Jamaica Gazette of 22 February 1996) contains provisions on carrying out mutual legal assistance, including specific requirements in the First Schedule. The Second Schedule of this Act contains the list of eight multilateral treaties that are also covered by its provisions and that enable Jamaica to carry out mutual legal assistance with other States parties to those instruments. There were 48 designated Commonwealth States under this Act. Jamaica is also a party to the Inter-American Convention against Corruption.

Section 2 of the Interpretation Act provides that in any Act in Jamaica the word “person” includes any corporation, either aggregate, sole, and any club, society, association or other body of one or more persons, therefore mutual legal assistance related to cases involving legal persons. The different forms of mutual legal assistance are covered and the use of evidence or information obtained or produced is done so in accordance with the Convention. Bank secrecy is not an obstacle, but banking or account information should be specific. Jamaica is considering the use of videoconferencing.

The Director of Public Prosecutions had been designated by the Ministry of Justice to perform the functions of the Central Authority. Statistics were provided on mutual legal assistance requests sent and received since 2007, classified by State and by type of offence. Prosecutors were designated and specialized for mutual legal assistance and extradition. It was also noted that for the forms of international cooperation available under this Act, it was not necessary to obtain a court order to proceed with the request. It was also reported that periodic meetings were held at the Attorney General’s Chamber focusing on MLA treaties with countries outside the Commonwealth. Explanations for refusals were usually given by the DPP, who seeks to turnover requests in four weeks on average, although the actual length of treatment could take several months.

The First Schedule of the Mutual Assistance Act contains general requirements for particulars to be included in requests by foreign states, as well as a number of specific requirements according to the type of requests made. The Act allows for informal arrangements between Jamaica and other foreign States or organizations not to be affected (Part I Section 3) and for exceptions, adaptations or modifications contained in relevant treaties between Jamaica and foreign States (Part IV Section 31.2) to exist.

The Mutual Assistance (Criminal Matters) Act refers to confidentiality as a ground to deny the execution of MLA requests. Grounds for refusal of such requests do not include the fact that the relevant offence involves fiscal matters. However, it was reported that requests for tax information of an individual were to be obtained under the relevant tax treaties and from the Tax Administration Jamaica (TAJ) Exchange of Information Office (EOI).

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

Article 15 of the Mutual Assistance (Criminal Matters) Act establishes the framework for assistance to be provided to a foreign State on request. Such assistance, in respect of investigations and proceedings in relation to a criminal matter, includes several types of law enforcement assistance referred to in article 15 (3). The Jamaican Constabulary Force, and specifically its Anti-Corruption Bureau (ACB), may assist law enforcement in other States, through formal and informal bases. Several examples of cooperation with given on a bilateral level and the use of the Anti-Corruption Intelligence Database (ACID) was highlighted. Information-sharing provisions are included in bilateral treaties those with the United States, United Kingdom and Cuba.

Joint investigations are conducted routinely in Jamaica, though informally. Service level agreements have been concluded with regional and international partners for investigations to be done and exchange of intelligence and information, including agreements with the United States of America, Canada and the United Kingdom of Great Britain and Northern Ireland, particularly related to intelligence exchange.

On the implementation of article 50 of the Convention, the ACB was noted as very proactive in utilizing covert undercover techniques in its anti-corruption investigations and operations. Bilateral agreements have been concluded with the United States and the United Kingdom for the use of special investigative techniques. Decisions to use these techniques with other countries could be made as the case may arise.

3.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter IV of the Convention are highlighted:

- Regular meetings within the central authority and seeking to turnover requests rapidly.
- Information-sharing and bilateral cooperation with law enforcement in other States.

3.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- Consider concluding additional treaties for extradition and mutual legal assistance or to consider using the Convention as legal basis.
- Consider adding other treaties to which it is a party, namely the Convention against Corruption, as a “relevant treaty” under the definition of the Extradition Act in Section 31.
- Consider adding the Convention against Corruption, to the Second Schedule of the Mutual Assistance (Criminal Matters) Act.
- Consider implementing articles 45 and 47 of the Convention.
- Consider concluding more agreements for law enforcement cooperation and using the Convention as the basis for mutual law enforcement cooperation.