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State of implementation of the United Nations Convention against Corruption

Executive summary

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 second review cycle.

* CAC/COSP/IRG/2021/1.

II. Executive summary

Nauru

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

Nauru acceded to the United Nations Convention against Corruption on 11 August 2012, and the Convention entered into force in the country on the same day. Nauru was reviewed in the fourth year of the first implementation review cycle (CAC/COSP/IRG/I/4/1/Add.7).

In section 52 (2) of the Interpretation Act 2011, it is set out that any relevant treaty or other international agreement to which Nauru is a party may be considered when interpreting a written law or statutory instrument. However, Nauru has sought to codify that no international treaty can be directly enforceable through that new provision of the Interpretation Act.

The legal and institutional framework of Nauru includes the country's Constitution, the Crimes Act 2016, the Criminal Procedure Act 1972, the Anti-Money-Laundering Act 2008, the Proceeds of Crime Act 2004, the Audit Act 1973 as amended by the Audit (Amendment) Act 2015, the Leadership Code Act 2016, the Members of Parliament (Register of Interests) Act 2004, the Public Service Act 2016, the Criminal Justice Act 1999, the Extradition Act 1973, the Mutual Assistance in Criminal Matters Act 2004, the Public Finance (Control and Management) Act 1997, the Treasury Fund Protection Act 2004 and various annual and supplementary appropriations acts.

2. Chapter II: preventive measures

2.1. Observations on the implementation of the articles under review

Preventive anti-corruption policies and practices; preventive anti-corruption body or bodies (arts. 5 and 6)

Nauru has no single anti-corruption body, policy or strategy, nor does it have in place a system of periodic review and evaluation of existing legislation to determine its adequacy for preventing and combating corruption.

Agencies exercising mandates and functions that are relevant, albeit not explicitly, to the prevention of corruption include the Department of Justice and Border Control, the Office of the Director of Public Prosecutions, the Nauru Police Force, the judiciary, the Nauru Financial Intelligence Unit, the Public Audit Office, the Public Service Appeals Board, the Department of the Chief Secretary and the Department of Finance.

The establishment of the Office of the Ombudsman was provided for in the Leadership Code Act 2016, in which the role, functions and powers of the Ombudsman are outlined. At present, an Ombudsman has yet to be appointed.

In relation to the independence of the key authorities mentioned above, the Financial Intelligence Unit is situated in the Department of Justice. The Unit was established under the Anti-Money-Laundering Act 2008 (sect. 7), and while the functions and responsibilities of the Unit are outlined in section 8 of the Act, there are no legal provisions to secure the institutional and financial independence of the Unit.

The Nauru Police Force is the portfolio of the Minister for the Nauru Police Force, an office held by the President of Nauru. The Nauru Police Force Act 1972 establishes the Nauru Police Force and makes provisions in relation thereto. For example, the Commissioner of Police can be removed only after a decision of a parliamentary committee. The appointment, discipline and termination of employment of police officers are all subject to appeal with the Police Service Board, established under article 69 of the Constitution and part 2 of the Nauru Police Force Act.

Under section 45 of the Criminal Procedure Act 1972, the Director of Public Prosecutions is appointed by the President and is exclusively responsible "for the representation of the Republic in criminal proceedings before the courts". The Director of Public Prosecutions is not accountable to any other office or position with regard to powers of prosecution.

At the time of the country visit, legislative efforts were under way to enhance the independence of the judiciary in Nauru. The country participates in regional initiatives and organizations that assist in the prevention of corruption, such as the United Nations Pacific Regional Anti-Corruption Project and the Pacific Islands Law Officers' Network.

Nauru was reminded of its obligation under article 6 of the Convention to inform the Secretary-General of the name and address of its authority or authorities responsible for the prevention of corruption.

Public sector; codes of conduct for public officials; measures relating to the judiciary and prosecution services (arts. 7, 8 and 11)

The office of the Chief Secretary is established under the Constitution, and the Chief Secretary is responsible for the appointment of public officials, as well as their confirmation, removal and disciplinary control. The public sector recruitment process is merit-based and the same for all types of positions (part 5, division 1, of the Public Service Act 2016). Salary scales are codified by publication in the Government Gazette (part 6, division 1). An appeals mechanism against human resource decisions exists and is codified (art. 70 of the Constitution and part 8, division 2, of the Public Service Act). Only employees currently in the public service may appeal a decision with the Public Service Appeals Board. While such appeals cannot be challenged, the Board is an inferior tribunal and hence its decisions are subject to judicial review before the Supreme Court.

There are no specific procedures for the selection, rotation and training of individuals considered especially vulnerable to corruption. However, under the Public Service Code of Conduct, public servants may be disciplined by the Public Service Disciplinary Committee for failing to disclose conflicts of interest, acquiring any personal benefit from public service employment, providing misleading information or engaging in political activity. Apart from demotion and termination, one of the many penalties is the transfer of public servants (part 3 of the Public Service Act 2016).

Few training programmes exist for public service employees, and even fewer are aimed at enhancing ethics and integrity in the public service. In order for an employee to be selected for training that would lead to qualifications for promotion, a proposal must be made to the Chief Secretary, who is then obligated to ensure that the selection is based on merit (sects. 27A, 27B and 27C of the Public Service (Amendment) Act 2016).

Nauru does not have a political party system, and individual candidates are responsible for their own campaigns. The criteria for the qualification and disqualification of those standing for elected public office are outlined in articles 30 and 31 of the Constitution. There are no guidelines or rules that govern the funding of candidatures for elected public office. Provisions on corrupt practices in relation to elections are set out in part 10 of the Electoral Act 2016 (e.g., sect. 124, on bribery, and sect. 129, on electoral treating).

A code of conduct exists for all public officials and provides disciplinary measures, including dismissal, for non-compliance (part 3 of the Public Service Act 2016). Furthermore, sections 8 (g), (h) and (k) of the Act address conflicts of interest and the improper use of a position. No measures or systems are in place to facilitate the reporting by public officials of acts of corruption to appropriate authorities or for the protection of reporting persons. Some bodies and organizations have their own additional codes of conduct. In the Public Service (Disciplinary Procedures)

Regulations 2016, bribery and acts of theft, misappropriation or wilful dishonesty against the Government, another employee or a client of the Government are deemed serious misconduct. If any public service employee is charged and found guilty of such serious misconduct, the employee is liable to a number of penalties, including termination. The Regulations also contain provisions on serious misconduct committed by the head of a department.

A code of conduct for Members of Parliament is codified in part 2 of the Members of Parliament (Register of Interests) Act 2004. The Act requires that Members of Parliament not engage in activities that may result in conflicts of interest, and a register of interests is kept by the Clerk of the Parliament (sect. 5 of the Act). Members of Parliament must disclose any monetary or material interests with respect to any matter that is brought up in Parliament (part 3 of the Act). The obligation to disclose such interests and assets also applies to the families of Members of Parliament but the disclosures are not available to the public (sect. 6 of the Act). The enforcement of the register of interests falls within the duties of the Ombudsman, a position that remained vacant at the time of the country visit.

Members of the judiciary are subject to a code of conduct that is codified in the Constitution and in section 36 of the Courts Act 1972.[1] A magistrate or judge may be removed from office on proven grounds of misconduct, incapacity or incompetence. However, it is important to note that neither a judicial service council nor a disciplinary board exists; the Chief Justice hears complaints against magistrates and judges, which are then put to vote in Parliament.

Although the common law principle of separation between the judiciary and executive is followed, the Constitution does not contain any provisions that protect the separation of powers or the independence of the Office of the Director of Public Prosecutions.

Public procurement and management of public finances (art. 9)

Public procurement in Nauru is regulated by the Public Finance (Control and Management) Act 1997,[2] the Public Finance (Control and Management) Regulations 2013 and the Procurement Manual. The enforcement of the Act and the Regulations, which in theory provide a legal framework more or less in line with international standards, is limited as a result of the nature of procurement and the availability of suppliers. Procurement using donor funding is carried out through a single procurement and supply chain company. Procurement under the national procurement plan has been delegated to the consulate of Nauru in Brisbane, and while the Nauruan procurement framework should be adhered to, there is little oversight to ensure such adherence. Furthermore, during the country visit, it was highlighted that the consulate in Brisbane also uses the services of the above-mentioned procurement and supply chain company when it cannot source items to procure. Although it is possible to challenge a procurement decision, this has never happened to date.

While single instances of procurements below 3,000 Australian dollars ($A), or approximately 2,163 United States dollars, can be carried out directly by the procuring institution, that is, the department seeking to purchase items, there is no system to flag multiple procurements with a total sum in excess of $A 3,000.

After consultations and the receipt of budget inputs from the various departments and national institutions, the Minister of Finance first submits the consolidated budget to the Cabinet for its approval. Thereafter, as required under article 59 of the Constitution and under the Treasury Fund Protection Act 2004, an appropriations bill is submitted to Parliament for debate and passage.

Article 66 of the Constitution provides for the establishment of the Office of the Director of Audit, including its powers and functions. In 2015, the title of the Director

[1] Repealed under the Supreme Court Act 2018.

[2] The Public Finance (Control and Management) (Amendment) Act 2019 has since entered into force.

of Audit was changed to Auditor General by an amendment to the Audit Act 1973. Under the Constitution, the salary and allowances of the Auditor General are a direct charge on the Treasury Fund and not dependent on a budget. In addition, the Auditor General's tenure is protected under the Constitution in that the Auditor General cannot be removed from office without the approval of two thirds of the Members of Parliament. All duties and functions of the Office must be performed in accordance with the Act. The Auditor General is obliged to examine, inquire into and audit all official books of accounts of Nauru, both inside and outside the country, in accordance with the Act. The Auditor General must report any irregularities to the Minister; however, there is no provision for corrective action.

Nauru does not have an established archiving law, regulation or system to preserve its documents related to public expenditure and revenue. There are provisions under various laws which require that records and documents be retained for a period of at least seven years.

Public reporting; participation of society (arts. 10 and 13)

As a proposed constitutional amendment providing for the inclusion of the right of access to information was rejected in a referendum held in February 2010, Nauru does not have legislation in place on access to information. Hence, there is no formal way to request access to government information, and access to certain kinds of official information is prohibited by the Official Information Act 1976. However, in 2008 the Government established the Government Information Office, which is situated within the Office of the President and regularly publishes press releases and public notices and provides other information services. Parliamentary sessions are broadcast live on television, the radio and the Internet.

Nauru has not taken any legal steps to increase the transparency of and public access to its public administration with regard to its functioning or decision-making processes. However, the Government has published national laws, declarations, speeches and ministerial statements online through the creation of an online legal database (RONLAW) and is a party to the declaration on free access to law that was agreed upon by the Pacific Islands Legal Information Institute.

In terms of the involvement of society in public decision-making processes, the public has been called upon to participate a few times in the past. In the constitutional review process in 2004, their inputs were taken into account in order to allow the Nauruan people to review their own Constitution. Furthermore, before the enactment of the Leadership Code Act 2016, consultations were held for a period of three months, during which the public was involved and people were encouraged to voice their views and opinions on the draft law. However, it must be noted that there is no established system for sharing information and consulting the community on a regular basis or during the negotiation process leading to adoption. Hence, laws are first passed and codified and then shared with the public.

Private sector (art. 12)

The Corporations Act 1972 requires each company registered in Nauru to keep company records at its registered office (sect. 110). In recent years, Nauru has made conscious efforts to clear out and deregister overseas companies in a bid to ensure that the records are current. Directors of registered companies are required to disclose information to a Nauruan public official (sect. 103 (7) of the Act).

The Corporations Act 1972 also provides for mandatory administrative penalties imposed for breaches, including the late renewal of licences. In addition, warning letters are issued to each proprietor. Apart from administrative penalties, there are penal offences for which prosecution is required, and the court is given the discretion to impose a fine, a term of imprisonment, or both. Generally, the fines range from $A 1,000 to $A 10,000, and imprisonment may be up to two years for individuals.

In addition, the use of false documents, the intentional destruction of bookkeeping documents, the fraudulent appropriation of property and the maintenance of fraudulent accounts are all prohibited under the Crimes Act 2016. The 2018 amendment to the Act now requires that records be kept for seven years. Regulations introduced under the Corporations Act 1972 contain guidance on the preparation of financial statements (Corporations (Forms and Fees) Regulations 2018).

The Beneficial Ownership Act was passed by the Parliament of Nauru in December 2017. With effect from 1 January 2018, the registrar of corporations and other business licences has enforced the registration of beneficial ownership information, which is readily available for inspection at the office of the beneficial ownership authority (i.e., the Secretary for Justice and Border Control).

Measures to prevent money-laundering (art. 14)

The main piece of legislation for the prevention of and fight against money-laundering is the Anti-Money-Laundering Act 2008. At the time of the country visit, a bill to amend the Act had been submitted to Parliament and a national risk assessment was under way but had not yet been completed. Currently, the Act does not follow a risk-based approach and establishes only two levels of due diligence (standard and enhanced).

According to the definitions provided in section 2 of the Anti-Money-Laundering Act 2008, the term “proceeds of crime” means any property derived from any unlawful activity; thus any offence may be a predicate offence to money-laundering. By contrast, the Proceeds of Crime Act 2004 (sect. 3) defines “proceeds” as property derived from a “serious offence” with a penalty of at least 12 months’ imprisonment.

The Anti-Money-Laundering Act 2008 covers financial institutions only. Under section 8 (f) of the Act, the anti-money-laundering supervisory authority for all financial institutions in Nauru is the Financial Intelligence Unit. However, the only financial institution currently present in Nauru is an agency (branch office) of an Australian bank. In practice, that agency has to comply with the Australian anti-money-laundering regulatory regime and is overseen by the Australian prudential and anti-money-laundering supervisory authorities. The same applies to the local representative of a worldwide money remitter.

Verification of the identity of customers and beneficial owners is provided for in section 27 of the Anti-Money-Laundering Act 2008, on customer due diligence.[3] According to section 27 (4), there is no requirement to systematically verify the identity of the beneficial owner, unless the financial institution has reasonable grounds to believe that a person undertaking a transaction is not the beneficial owner. Section 27 (3) provides for enhanced customer due diligence with regard to politically exposed persons. However, section 27 does not apply if the transaction is an occasional one that does not exceed $A 10,000, unless the transaction is suspicious (sect. 33). Suspicious transaction reporting is regulated in part 4 of the Anti-Money-Laundering Act.

Nauru has established a financial intelligence unit. The legal basis for the Nauru Financial Intelligence Unit, which is an administrative-type financial intelligence unit, is part 3 of the Anti-Money-Laundering Act 2008, and the Supervisor of the Unit is its head (sect. 7 (2) and (3) of the Act).

In respect of national cooperation, the Financial Intelligence Unit may request information from any law enforcement agency, government institution or supervisory authority (sect. 8 (c) of the Anti-Money-Laundering Act 2008) and may share information as described under chapter V below. Mutual legal assistance in relation to money-laundering is regulated in part 8 of the Act.

The legal framework relating to the declaration or disclosure of cross-border movements of currency and bearer negotiable instruments is based on the Proceeds of

[3] That section was repealed and replaced by new provisions in May 2018.

Crime Act 2004, the Customs Act 2014 and Customs Proclamation No. 2 of 1999. In particular, the physical cross-border transportation of cash and bearer instruments in the amount of $A 10,000 or more must be reported to a customs officer (sect. 96 of the Proceeds of Crime Act 2004). Under Customs Proclamation No. 2 of 1999, no person is allowed to take more than $A 2,500 out of Nauru without first obtaining a permit from the Treasury. Section 37 of the Anti-Money-Laundering Act 2008 covers wire transfers.

Nauru became a member of the Asia/Pacific Group on Money Laundering, a Financial Action Task Force-style regional body, in July 2007. The country's implementation of the recommendations of the Financial Action Task Force was assessed in a mutual evaluation report in 2012. The Nauru Financial Intelligence Unit is a member of the Association of Pacific Island Financial Intelligence Units, but not yet of the Egmont Group of Financial Intelligence Units.

2.2. Successes and good practices

- The reviewing experts commended the initiative to publish and display A4-size posters with the code of conduct for public officials in the administration's offices (art. 7).
- Inclusion of the Leadership Code Act 2016 to form part of the Constitution (art. 8).
- Updating of the register of corporations operating in Nauru, in particular the removal of obsolete companies and shell companies (art. 12).
- Establishment of the RONLAW website to publish and make publicly available all laws and bills introduced to Parliament (art. 13).
- Nauru adopted the Beneficial Ownership Act 2017, which requires the registration of all beneficial owners with the beneficial ownership authority (arts. 12 and 14).

2.3. Challenges in implementation

It is recommended that Nauru:

- Continue considering measures to clarify mandates, strengthen independence and allocate adequate resources to bodies charged with preventing corruption (art. 6).
- As a matter of priority, fill the position of Ombudsman that was vacant at the time of the country visit (art. 6, para. 1).
- Endeavour to adopt procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and for the rotation, where appropriate, of such individuals to other positions (art. 7, para. 1 (b)).
- Ensure that the complaints procedure for recruitment to the public service is clearly outlined and made available to all applicants (art. 7, para. 1 (b)).
- Consider ways to increase the number of training opportunities for public officials, including on the code of conduct and other integrity/ethics aspects (art. 7, para. 1 (d)).
- Consider amending the Electoral Act 2016 to regulate matters related to the funding of candidatures for elected public office, which was absent at the time of the country visit (art. 7, para. 3).
- Consider establishing measures or systems, including through legislation, to facilitate the reporting of suspected and other acts of corruption to appropriate authorities, such as hotlines and anonymous online reporting (arts. 8, para. 4, and 13, para. 2).

- Enforce the conflict of interest system that already exists with respect to Members of Parliament in the legal framework of Nauru; consider extending the system to other public officials (arts. 7, para. 4, and 8, para. 5).
- Strengthen the systems of public procurement in line with the requirements under article 9 of the Convention, including through the public distribution of information relating to procurement procedures, tendering rules and criteria, invitations to tender and information on the award of contracts, for example, through e-procurement processes, and matters regarding procurement personnel (art. 9, para. 1).
- Establish, within public procurement systems, an effective system of domestic review and appeal, and provide legal recourse and remedies to address disputes over adherence to applicable rules and procedures (art. 9, para. 1).
- Consider adopting a law to establish uniformity in public archiving requirements and enhance the storage facilities to preserve the physical integrity of documentation related to public expenditure and revenue (art. 9, para. 3).
- In view of enhancing transparency in its public administration, consider deploying e-governance tools in general, which would allow it to publish more information concerning government procedures online (art. 10).
- As a matter of priority, take measures required to enhance the accountability of judges and the independence of the prosecution service in Nauru in line with the Convention (art. 11).
- Finalize and adopt the national prosecution guidelines (art. 11, para. 2).
- Expand section 27 (4) of Anti-Money-Laundering Act 2008 to ensure the inclusion of information on the identity of the legal or natural persons involved in the establishment and management of corporate entities (arts. 12, para. 2, and 52, para. 5).
- Consider strengthening corruption prevention in the private sector, including by taking measures to prevent conflicts of interest in the private sector, such as a cooling-off period (art. 12, para. 2 (e)).
- Ensure the disallowance of the tax deductibility of expenses that constitute bribes (art. 12, para. 4).
- Consider reviewing its legal requirements and limitations regarding access to information, in line with the Convention, to allow the participation of individuals and groups outside the public sector in the prevention of and fight against corruption, in particular through contributions to public decision-making processes, public awareness measures and public education programmes (art. 13, para. 1).
- Take additional measures to ensure that the relevant anti-corruption bodies are known to the public and that reporting procedures, including anonymous procedures, are established and accessible to the public (art. 13, para. 2).
- Harmonize the definition of proceeds of crime between the Proceeds of Crime Act 2004 and the Anti-Money-Laundering Act 2008 (art. 14, para. 1 (a)).
- Amend the title of the Schedule to the Anti-Money-Laundering Act 2008 to correctly reflect that it covers not only financial institutions but also designated non-financial businesses and professions (art. 14, para. 1 (a)).
- Abolish the exemptions from customer due diligence under section 33 of the Anti-Money-Laundering Act 2008 (art. 14, para. 1 (a)).
- Ensure the operational and financial independence of the Nauru Financial Intelligence Unit (arts. 14, para. 1 (b), and 58).

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

Nauru indicated that it required technical assistance in the following areas:

- Financial assistance for establishing the office of the Ombudsman (art. 6).
- Technical and financial assistance to boost the functions and operations of the Office of the Auditor General (art. 6).
- An independent expert to be appointed in the public service to conduct training on ethics and integrity for public servants, particularly in relation to corrupt practices (arts. 6, 7 and 8).
- Streamlining the Government's procurement process and its selection of procurement agents, as well as replacing the complex Procurement Manual (art. 9).
- Boosting the functions and operations of the Office of the Auditor General (art. 9).
- Conduct of a national assessment of risks relating to money-laundering and the financing of terrorism (art. 14).
- Assistance may be required, also from the Australian Reporting and Analysis Centre, in monitoring the movement of cash from any Nauruan accounts held with Bendigo Bank (art. 14).

3. Chapter V: asset recovery

3.1. Observations on the implementation of the articles under review

General provision; special cooperation; bilateral and multilateral agreements and arrangements (arts. 51, 56 and 59)

The asset recovery framework of Nauru can primarily be found in part 7 of the Mutual Assistance in Criminal Matters Act 2004, on assistance regarding proceeds of crime. International cooperation is also provided for in part 8 of the Anti-Money-Laundering Act 2008, on mutual assistance in relation to money-laundering. A confiscated assets fund has been established under the Proceeds of Crime Act 2004 but is not yet operational.

Pursuant to section 10 of the Anti-Money-Laundering Act 2008, the Financial Intelligence Unit may exchange information with foreign institutions and agencies on such terms and conditions as are set out in an agreement between the two sides (sect. 11). Where such an agreement has not been concluded, it is still possible to disclose information on the basis of an ad hoc agreement between financial intelligence units. Spontaneous information-sharing is not explicitly enshrined in the law, but it is not excluded.

Prevention and detection of transfers of proceeds of crime; financial intelligence unit (arts. 52 and 58)

As indicated above, provisions on the verification of the identity of customers and beneficial owners are contained in section 27 of the Anti-Money-Laundering Act 2008.[4]

Beneficial ownership details are also kept by the beneficial ownership authority under the Beneficial Ownership Act 2017. The record of beneficial owners is statutory information that is available for exchange under the Beneficial Ownership Act itself. An electronic database of beneficial ownership information is also available.

[4] Sect. 27 of the Anti-Money-Laundering Act was replaced in the Anti-Money-Laundering (Amendment) Act 2018.

Politically exposed persons are defined in section 2 of the Anti-Money-Laundering Act 2008. That definition does not include domestic politically exposed persons.[5]

Nauru has prepared two sets of guidelines, recently revised and reissued, to cover suspicious transaction report filing, customer due diligence and record-keeping. In practice, the bank agency present in Nauru relies on the Australian supervisory authorities and commercial databases to identify politically exposed persons and individuals on United Nations sanctions lists. The list of politically exposed persons is prepared by the Financial Intelligence Unit.

An obligation to keep documents for a period of five years is established in section 35 (3) of the Anti-Money-Laundering Act 2008. Banks that have no physical presence and that are not affiliated with a regulated financial group are no longer present in Nauru. However, there is no explicit prohibition of shell banks in the country's legislation, nor is there a clear prohibition on establishing correspondent banking relationships with shell banks or foreign financial institutions that permit their accounts to be used by shell banks.[6]

Pursuant to the code of conduct in section 8 (g) of the Public Service Act 2016, every employee of the public service must disclose details of any material personal interests in connection with the employee's public service employment. Members of Parliament are required to declare their outside interests under the Members of Parliament (Register of Interests) Act 2004. Aside from those provisions, public officials who have an interest in or signature or other authority over a financial account in a foreign country are not subject to any requirements to report that relationship.

Nauru set up a financial intelligence unit in 2004. The Anti-Money-Laundering Act 2008 enhanced the powers of the Nauru Financial Intelligence Unit. A restructuring to make the Unit more effective was undertaken in October 2011. At the time of the country visit, the operational capacity and independence of the Unit, particularly in terms of leadership, recruitment and budget, were not deemed sufficient. The obligation to report suspicious transactions is established in section 17 (1) of the Act. The Financial Intelligence Unit received the first suspicious transaction reports from the bank agency established in Nauru and from the Australian Reporting and Analysis Centre in 2017.

Measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for purposes of confiscation (arts. 53, 54 and 55)

There does not appear to be any explicit legislative basis providing locus standi to other States parties and permitting them to initiate civil action in Nauru courts. The common law in principle gives a foreign State standing before Nauru courts. However, this has not yet been tested in practice. Equally, there is no express legislative prohibition on any other State having locus standi to initiate civil action in Nauru courts. If this were to be tested, Nauru would be obliged under the Convention to allow any other State party to initiate civil suits.

Provisions in the Anti-Money-Laundering Act 2008 and Proceeds of Crime Act 2004 provide for the recognition of third-party rights in confiscation procedures. However, it is unclear whether the term "person" as used in the legislation would extend to a foreign State party.

A foreign forfeiture order can be registered in the Supreme Court under the Mutual Assistance in Criminal Matters Act 2004 (sects. 38 and 39); it then has effect, and may be enforced as if it were a forfeiture order made by the Supreme Court under the

[5] The provision was amended in May 2018 and now includes a definition that covers domestic politically exposed persons. Under sect. 27 (6) of the Anti-Money-Laundering Act (as amended), politically exposed persons are subject to special measures and enhanced due diligence.

[6] This was addressed in the amendment to the Corporations Act in 2018, which requires physical presence of any corporations registered in Nauru.

Proceeds of Crime Act 2004 (sect. 40 (1) of the Mutual Assistance in Criminal Matters Act and sect. 25 of the Proceeds of Crime Act). Under the Foreign Judgments (Reciprocal Enforcement) Act 1973, the Supreme Court is also empowered to make the enforcement of judgments and orders reciprocal between Nauru and other countries.

Domestic confiscation orders can be issued upon request for mutual legal assistance on the basis of section 83 of the Anti-Money-Laundering Act 2008. Confiscation in Nauru is normally conviction-based. However, section 15 of the Proceeds of Crime Act 2004 provides for the procedure for applying for a forfeiture order in cases where a person has absconded.

A freezing or seizure order issued by a foreign court may be enforced under section 45 of the Mutual Assistance in Criminal Matters Act 2004 and sections 70 ff. of the Proceeds of Crime Act 2004. A request for mutual assistance for the purposes of seizure may be executed on the basis of section 83 of the Anti-Money-Laundering Act 2008 and sections 60 ff. of the Proceeds of Crime Act. The police can execute seizures at the request of foreign States if the Director of Public Prosecutions has authorized the assistance to the foreign State (sect. 44 of the Anti-Money-Laundering Act). Provisional measures without a prior request cannot be ordered because domestic applications for freezing or forfeiture require a conviction or indictment of a defendant (sect. 50 of the Proceeds of Crime Act and sect. 54 of the Anti-Money-Laundering Act).

Section 8 of the Mutual Assistance in Criminal Matters Act 2004 clarifies that measures to enforce foreign orders are discretionary and that assistance under that Act may be provided to a foreign country in whole or in part and subject to any conditions that the Minister for Justice and Border Control determines. The content of requests for mutual legal assistance for the purpose of confiscation is determined by section 7 of the Act. In addition, for the enforcement of foreign confiscation orders, section 38 of the Act requires the Minister to be satisfied that a person has been convicted of the offence, and that the conviction and the order are not subject to further appeal in the foreign country. In relation to assistance for money-laundering, section 90 of the Anti-Money-Laundering Act 2008 outlines the information to be included in a request for assistance.

Nauru provided copies of its relevant laws in the context of the review mechanism. Nauru does not make cooperation for the purposes of confiscation conditional on the existence of a treaty.

In section 7 (3) of the Mutual Assistance in Criminal Matters Act 2004, it is provided that insufficient evidence is not a ground for refusing, but for postponing, a request for mutual legal assistance. Section 9 of the Mutual Assistance in Criminal Matters Act and section 85 of the Anti-Money-Laundering Act 2008 list the grounds for refusal of assistance and do not include the de minimis value of the property.

The Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth provides for consultation in relation to any matter arising under the Scheme. The rights of bona fide third parties are protected under section 20 of the Proceeds of Crime Act 2004 and sections 57, 62 and 78 of the Anti-Money-Laundering Act 2008.

Return and disposal of assets (art. 57)

Nauru cannot return confiscated property in direct application of the Convention. In addition, there are no detailed rules on the return and disposal of assets. However, pursuant to section 40 (3) of the Mutual Assistance in Criminal Matters Act 2004, the Minister for Justice and Border Control may enter into an arrangement with a foreign country to share with that country the amount forfeited or paid pursuant to a registered foreign forfeiture order or foreign pecuniary penalty order. Under section 100 (4) (b) of the Proceeds of Crime Act 2004, assets held in the Confiscated Assets Fund may

be shared with a foreign jurisdiction to satisfy obligations of Nauru under a treaty or a mutual legal assistance arrangement.

The rights of bona fide third parties and the rights of legitimate owners are protected by sections 57, 62 (4) and 78 of the Anti-Money-Laundering Act 2008 and sections 17 (4) and 20 of the Proceeds of Crime Act 2004. There is no general provision on cost in the Mutual Assistance in Criminal Matters Act 2004. Cooperation requests are, in principle, executed free of charge. However, there is nothing to prevent Nauru from deducting reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposal of confiscated property. Likewise, nothing prevents Nauru from concluding agreements, on a case-by-case basis, for the final disposal of confiscated property.

3.2. Successes and good practices

- Nauru does not make cooperation for the purposes of confiscation conditional on the existence of a treaty.

3.3. Challenges in implementation

It is recommended that Nauru:

- Include domestic politically exposed persons in the definition in section 2 of the Anti-Money-Laundering Act 2008 (art. 52, para. 1).
- Expand section 27 (4) of Anti-Money-Laundering Act 2008 to ensure the inclusion of information on the identity of the legal or natural persons involved in the establishment and management of corporate entities (arts. 12, para. 2, and 52, para. 5).
- Explicitly prohibit the establishment of shell banks and correspondent banking relationships with shell banks (art. 52, para. 4).
- Consider establishing an obligation for officials to report interests in foreign accounts (art. 52, paras. 5 and 6).
- Monitor whether other States parties are granted locus standi by the courts and, if necessary, take legislative measures for the implementation of article 53 (a) and (b).
- Ensure that the protection of the rights of third “persons” in confiscation procedures extends to foreign States (art. 53 (c)).
- Consider taking additional measures to preserve property for confiscation without a request (art. 54, para. 2 (c)).
- Ensure that the Minister exercises the discretion set out under sections 8 and 38 of the Mutual Assistance in Criminal Matters Act 2004 in such a way that the binding obligations under article 55 of the Convention are observed (art. 55, paras. 1 and 2).
- Include a reference in the legislation to the specific mechanisms and requirements of article 57 and monitor the application thereof in all asset recovery cases, bearing in mind the mandatory requirement of the return of embezzled public funds (art. 57, paras. 1 and 3).
- Ensure the operational and financial independence of the Nauru Financial Intelligence Unit (arts. 14, para. 1 (b), and 58).
- Consider having the Financial Intelligence Unit apply for membership of the Egmont Group with a view to facilitating information-sharing with other member jurisdictions (art. 58).

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

- Needs assessment regarding the specific kinds of assistance required, which should include the secondment of a technical adviser to be based at the Department of Justice and Border Control.
- Enhancement of technological capacities with respect to the detection of proceeds of crime and capacity-building for stakeholders (art. 52).