

KINGDOM OF TONGA
COUNTRY REPORT

31st Pacific Islands Law Officers' Network Meeting
(PILON)

29-30 October 2012
Kokopo, East New Britain, Papua New Guinea

I INTRODUCTION

Malo e Lelei,

1 On behalf of the Attorney General's Office of the Kingdom of Tonga, I have the pleasure of presenting to the distinguished delegates of the 31st Pacific Islands Law Officers' Network Meeting, the Kingdom of Tonga's Country Report for 2012.

2 First, on behalf of the Attorney General Mr Neil Adsett SC, I would like to express the Tongan delegation's gratitude and heartfelt appreciation to the People and the Government of Papua New Guinea, and its Department of Justice and Attorney General, for the warm welcome, fantastic hospitality, and the generous opportunity to meet here in this heavenly slice of paradise. Tenkyu tru!

3 The year 2012 was a tragic and also a busy one. On the morning of Monday 19 March 2012 all Tongans woke up to the early morning announcement by the Lord Prime Minister that His Majesty King George Tupou V had passed away in hospital in Hong Kong.

4 It was a sudden and profound loss for not only the Royal Family, the country and all Tongans around the world, but also for the legal sector. His Majesty was an advocate and supporter of the rule of law, judicial independence and good governance, but his true legacy was that like his great-great-grandfather, King George Tupou I, he was the architect of the 2010 constitutional and political reforms that created representative government in Tonga.

5 Another highlight for 2012 was that in June 2012, a motion for a vote of no confidence in the Prime Minister was tabled by members of parliament who effectively stand as the 'opposition' to Government. It took the Legislative Assembly around 4 months to finally make a ballot, with much of the debate focussed on procedure, thresholds and presentation of responses and replies to responses, and behind the scenes there was manoeuvrings and negotiations to get the numbers of votes. At the end the motion was defeated, but it certainly left parliament exhausted and stalled Government's legislative programme from being achieved in total.

6 One last highlight for 2012 was the appointment of the first permanent and independent Attorney General under the new Constitutional provision enacted in the 2010 constitutional and political reforms, and the consequent transition of the Crown Law Department into the new identity of "Attorney General's Office".

7 The new Attorney General is the principal legal advisor to Cabinet and Government, and he is also in charge of all criminal proceedings on behalf of the Crown, and performs any other functions and duties as required under law. The Solicitor General remains the chief executive officer of the new Attorney General's Office, and the Attorney General, holds the equivalent role of a Minister to provide policy direction.

8 The theme for 2012 PILON Meeting of "Challenges and Strategies to Enhance Democratic Governance and the Rule of Law" is very relevant to Tonga. After nearly two years of democratic government, the main challenges in providing legal services under this new government system is advising on democratic mechanisms and the maintenance of the rule of law.

9 It is an education process for all, and one that has to be taken at the appropriate pace. As all parents are aware, the first two years of a new born child is the period that the child develops the most. We have in a way developed in that sense by introducing legislation for democratic governance and rule of law, however we are now preparing for the time to utilise those new tools. No doubt that when our democratic system becomes more mature, there may be some legislative surgical process required to replace parts of the system, but such is life.

10 We hope that the discussions and activities both within this Network and also individually will continue to reap success for you all in the provision of legal services to your people.

11 I wish you all a Very Merry Christmas, and may you all receive many more blessings for the New Year 2013!

Malo 'aupito

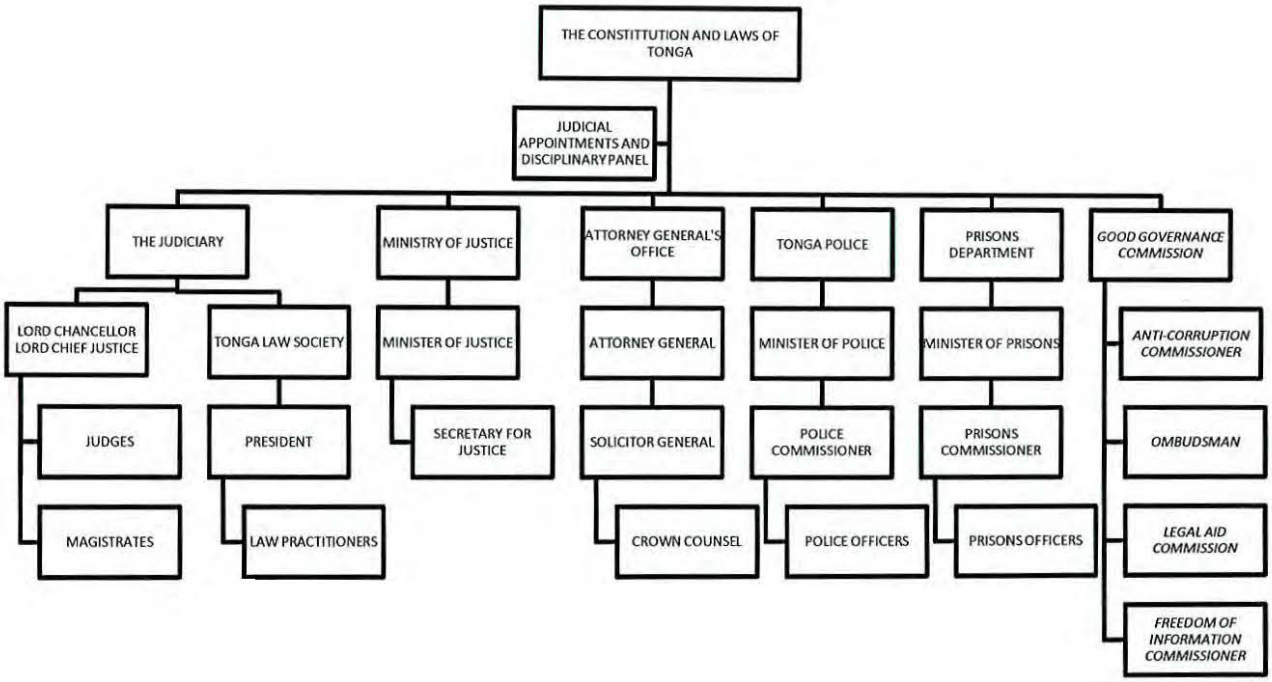
ATTORNEY GENERAL'S OFFICE
KINGDOM OF TONGA

'Aminiasi Kefu
Solicitor General

30 October 2012

II TONGA'S LEGAL SECTOR

12 Tonga's legal sector is projected in the following diagram:



III MAJOR LAW AND JUSTICE SECTOR ACHIEVEMENTS

13 The major law and justice achievements in 2012 were:

(1) Legal Reform

- Appointment of first independent Attorney General
- Transition of Crown Law Department into Attorney General's Office
- Approval of Good Governance Commission to bring together the Office of Anti Corruption Commissioner, Ombudsman, Legal Aid Commission
- Approval of Legal Aid Scheme and Legal Aid Commission
- Approval of Freedom of Information Policy
- Drafting of a Family Protection Bill to deal with domestic violence

(2) Judicial Reform

- Enactment of legislation to separate from the office of the Lord Chief Justice the duties and powers of the Registrar General in dealing with births, deaths and marriages
- Amendment bill to allow some Magistrates to deal with less serious indictable offences that is within the jurisdiction only of the Supreme Court
- Amendment bill for the appointment of Justices of the Peace

- Amendment bill for Preliminary Inquiries or deposition hearings to be available only on exceptional circumstances
- Amendment bill to have a separate court process in the Magistrates Court for youth offenders
- Amendment bill for traffic infringement notices to cut down multitude of traffic prosecutions
- Amendment bill to provide for discharge without conviction
- Amendment bill to allow Magistrates Court to deal with minor drugs offences
- Amendment bill to allow Magistrates Court to deal with minor indictable offences
- Increase hours for community service orders from 120 hours to 200 hours

IV SIGNIFICANT COURT DECISIONS

14 The following are some of the significant Court decisions in 2012:

(1) Crown v Paul David Schaumkel, AC 19/11 [RG 259/11]

This was a Crown appeal to the Court of Appeal with regards to determination whether legislation was retrospective or not. This was the first case of its kind in Tonga to determine retrospective legislation.

In 2007 the Tongan legislature amended the Nationality Act to widen the group of people who can be considered Tongan subjects, and also allowed for double nationality, and provided regulations that allowed for Tongans who had lost their Tongan nationality by naturalising in a foreign country to apply to be re-admitted as Tongans.

The Crown had interpreted that legislation to apply to only persons born in and after 2007. Schaumkel argued that the legislation applied to all persons regardless of when they were born. So persons, who were not Tongans under the old provisions, could now become Tongans from the date of the amending legislation.

In an application to register an overseas birth based on Tongan nationality given by the 2007 amendment, the Lord Chief Justice agreed with Schaumkel, after inviting submissions from the Crown, who opposed it.

The Crown then appealed to the Court of Appeal on the basis that the Lord Chief Justice had applied the 2007 amendment retrospectively. The Court of Appeal dismissed the appeal and held that the 2007 amendment was applied prospectively from the date it came into force, and so anyone who was not Tongan before the 2007 amendment, could now apply and be deemed a Tongan subject.

The Court also held that there is no set formula for determining whether legislation is retrospective, and the yardsticks to use on the effect of the legislation are fairness and justice.

(2) Rex v Ramsay Dalgety, CR 64/12 (Supreme Court, Cato J, 28 September 2012)

This was a perjury case against a former Supreme Court Judge from Scotland who is now a resident of Tonga, and is one of His Majesty's Law Lords.

The Crown had charged the accused with perjury arising from evidence he gave before a Royal Commission of Inquiry into the sinking of the MV Princess Ashika. The accused however applied that there was insufficient evidence to continue the prosecution. The case turned on whether the statements were material to the Royal Commission's inquiry. The accused also argued that he was immune from prosecution under the Royal Commission of Inquiry Act because the Act only provided for prosecution for giving false evidence by interpreters, which is different from perjury, and that the prosecution should be stayed for abuse of process.

The Crown argued that the evidence given by the accused before the Royal Commission was not only false but also material to the investigation by the Royal Commission with regards to the competency of the accused to provide advice on the purchase of the sunken ferry, and the management of the company that operated the sunken ferry. The Crown also argued that the accused was not immune from prosecution, and that the provision relied on by the accused for immunity actually allowed for prosecution of persons who gave false evidence before the Royal Commission, which is perjury in the Criminal Offences Act. The Crown also argued that there was no abuse of process.

The Court agreed with the Crown that the accused was not immune, and that false evidence is perjury and anyone who gives false evidence before a Royal Commission should expect to be prosecuted. The Court also agreed that the prosecution should not be stayed because of there being an abuse of process. However the Court held that although the statement may be false, the accused had given an explanation of that evidence later in his evidence which was not given proper consideration. Further, the Court held that the evidence was not material to the enquiry of the Royal Commission. The accused was thus discharged.

(3) Lord Lasike v Rex, AC 11/12 [CR 285/12] (Court of Appeal, 12 October 2012)

This was a prosecution of the Speaker of the Legislative Assembly, who is a Noble and hereditary title and estate holder, and a Nobles Representative to the Legislative Assembly for possession of two .22 bullets without a licence under the Arms and Ammunitions Act.

The prosecution had first commenced with a charge of possession of a pistol without a licence, however that charge was dismissed in the Magistrates Court because the main witness became hostile when he recanted on earlier evidence by saying that the pistol did not belong to the accused.

In the Supreme Court the Lord Chief Justice convicted the accused by using a provision that gave the Court a presumption of knowledge if the Crown can provide custody and control, and the accused failed on the balance of probabilities that he did not have

knowledge. The Crown did not rely on the presumption because it believed it had evidence to prove both physical possession and knowledge based on the definition of possession adopted by the Courts in Tonga to include custody and control, and knowledge or negligent knowledge.

The accused gave evidence together with his wife regarding the bullets and offered an explanation for their presence being that it belonged to the late first husband of the accused's wife. The Supreme Court did not accept that evidence and did not find the defence evidence credible and rejected it where it conflicted with the evidence with the police. The accused was then convicted and fined $500.00.

The accused appealed to the Court of Appeal on the basis that the test for possession in Tonga was out dated, and that there was a miscarriage of justice when the Lord Chief Justice used the presumption provision without allowing the accused to disprove knowledge on the balance of probabilities, and that there was insufficient evidence for a reasonable jury who is properly directed to convict. The appeal against sentence was that the Lord Chief Justice should have discharged the accused without conviction.

The Court of Appeal did not expressly or by implication dismiss the current test for possession adopted by the Courts in Tonga. The Court of Appeal however held that there was a miscarriage of justice when the Lord Chief Justice did not inform the accused that he would rely on the presumption provision. The Court also held that there was insufficient evidence for a reasonable jury properly directed to convict the accused on the Crown's evidence taken at its highest. The conviction was then set aside.

The other dimension to this case was that under the Land Act, once a noble is convicted of an indictable offence, his hereditary title and hereditary estates are taken off him. Furthermore, under the Constitution, if such conviction occurs, such noble cannot be a nobles' representative. The effect was that in no longer being a nobles' representative, the accused no longer could hold the office of Speaker. The effect of the Court of Appeal decision to set aside the conviction was that the accused's hereditary title and hereditary estate was retained by him, and the issue now is his status as a nobles' representative, given that a new Speaker was appointed and a new nobles' representative was elected.

V LAW REFORM: LEGISLATIVE PROGRAMME

15 In 2012 there was a heavy legislative workload set, but unfortunately the time used up by the Legislative Assembly to deal with the vote of no confidence motion.

16 The following were the legislative that was able to be enacted in 2012, and some are awaiting Royal Assent and promulgation.

	2012 ACTS
(1)	2012/2013 Appropriation Act 2012 (Act No. 6 of 2012)
(2)	Public Service (Amendment) Act 2012 (Act No. 4 of 2012)
(3)	Miscellaneous Amendments (Government Structure Act 2012 (Act No. 5 of 2012)
(4)	National Spatial Planning and Management Act 2012 (initially Act No. 2 of 2012 but renumbered as

	Act No.7 of 2012)
(5)	Customs and Excise Management (Amendment) Act 2012 (Act No. 8 of 2012)
(6)	Customs (Amendment) Act 2012 (Act No. 9 of 2012)
(7)	Public Audit (Amendment) Act 2012 (Act No. 10 of 2012)
(8)	Excise Tax (Amendment) Act 2012 (Act No. 11 of 2012)
(9)	Births, Deaths and Marriages Registration Act 2012 (Act No. 12 of 2012)
(10)	Electoral Commission (Amendment) Act 2012 (Act No. 13 of 2012)
(11)	*National Retirement Benefits Scheme (Amendment) Act 2012 (Act No. 3 of 2012)*
(12)	*Bail (Amendment) Act 2012 (Act No. 16 of 2012)*
(13)	*Traffic (Amendment) Act 2012 (Act No. 17 of 2012)*
(14)	*Illicit Drugs Control (Amendment) Act 2012 (Act No. 18 of 2012)*
(15)	*Criminal Offences (Amendment) Act 2012 (Act No. 19 of 2012)*
(16)	*District and Town Officers (Amendment) Act 2012 (Act No. 20 of 2012)*
(17)	*Business Licence (Amendment) Act 2012 (Act No. 21 of 2012)*
(18)	*Personal Property Securities (Amendment) Act 2012 (Act No. 22 of 2012)*
(19)	*Magistrate's Court (Amendment) Act 2012 (Act No. 23 of 2012)*
(20)	*2012/2013 Supplementary Appropriation Act 2012 (Act No. 24 of 2012)*
(21)	*Tourism Tonga Authority Act 2012 (Act No.25 of 2012)*
(22)	*Public Health (Amendment) Act 2012 (Act No. 1 of 2012)*

(1)	2 **2012 SUBSIDIARY LEGISLATION**
(1)	Customs Duty (Amendment) Order 2012
(2)	Excise Tax (Amendment) Order 2012
(3)	National Retirement Benefits Scheme (Administration) Regulations 2012
(4)	National Retirement Benefits Scheme (Election) Regulations 2012
(5)	Civil Aviation (Licensing Charges)(Amendment) Regulations 2012
(6)	Customs and Excise Management (Amendment) Regulations 2012
(7)	Customs and Excise Management (Amendment) Order 2012
(8)	Ports Management Fees Notice 2011
(9)	Retirement Fund (Administration) (Amendment) Regulations 2012

17 The following are remaining bills to be considered by the Legislative Assembly in the next session:

	2012 BILLS
(1)	Food Bill
(2)	Act of Constitution (Amendment) Bill
(3)	Good Governance Commission Bill
(4)	Anti-Corruption Commissioner (Amendment) Bill
(5)	Commissioner for Public Relations (Amendment) Bill
(6)	Legal Aid Bill
(7)	Water Resources Bill
(8)	Arms and Ammunition (Amendment) Bill 2012
(9)	Civil Aviation Bill
(10)	Counter Terrorism and Transnational Organized Crime Bill

VI LEGAL SECTOR ISSUES

18 The challenges faced by the Tongan legal sector are as follows:

Judiciary

(1) In the Supreme Court, there is a small backlog of cases that need to be dealt with by only two Judges, one handling crime only and the other handling civil, land and family matters.

(2) There is still a concern with the efficiencies of the Magistrate's Court which has the added burden of covering the whole of Tonga throughout the year, whereas the Supreme Court is centralised in Nuku'alofa, and goes on circuit to the main islands either twice or once a year.

(3) The judiciary continues to lack appropriate Court offices and facilities as a whole. There is however plans to build a new Court complex in Central Nuku'alofa; however that is still in the conceptual stages.

(4) The judiciary also continues to lack number of Court staff, and those who are trained staff.

(5) The Judges of the Supreme Court operate without any law clerks so they have to do all their own legal research.

Attorney General's Office

(6) The Attorney General's Office has moved to new premises by taking over one floor of the newly built Taumoepeau Building in central Nuku'alofa, next to the office's old location which was lost during the November 2006 riots, however there is still need for more space for an adequate library and individual offices for legal staff.

(7) The Office continues to be challenged with the lack of experience of its young staff, however close supervision and mentoring has allowed the Crown counsel to gain experience quickly. The Office intends to apply to the New Zealand Government to allow for an annual Short Term Training where a Crown counsel can be sent on placement for a month or two to either a Crown Solicitor's Office, the Office of the Parliamentary Counsel or the Crown Law Office.

(8) So far the Office has not suffered from retention of staff. There are currently 11 Crown counsel in the office, apart from the Attorney General and Solicitor General, and the three of the four senior staff (more than 5 years post admission experience) are likely to remain in the Office for the long term, with one migrating to Australia at the end of the year. The Office expects to receive one returning scholar in January 2012. The Office has no vacancies or a budget to recruit further staff.

(9) Remuneration of legal staff is progressing with the new Remuneration Authority inviting submissions from the Office that would help the Authority to recommend the appropriate remuneration level for Crown counsel, and hopefully deter staff from leaving the Office.

(10) One matter of legal practice that has been highlighted as lacking this year is access to legal electronic databases. This was highlighted with a number of cases that required significant legal research, and the Office's library not containing appropriate texts or law reports. It is accepted that access is expensive, but the Office envisages getting access to Lexis/Nexis, Brookers or Westlaw in order to facilitate legal research.

Tonga Police

(11) Tonga Police is facing the threat of total loss of public confidence after the recent death of a Tongan born New Zealand Police officer in the hands of Tongan police officers and a civilian, while the deceased was taken into police custody for a public drunken offence. Both New Zealand Police and Australian Federal Police continue to assist Tonga Police with reforms and resources in order to restore public confidence in Tonga Police services to the community.

(12) There has been a growth of fraud crimes, and even serious fraud amounting to thousands of Tongan pa'anga. The Tonga Police face a challenge in investigating such crimes as most investigators are used to traditional crimes such as property, violence and sexual offences.

Tonga Law Society

(13) The main challenge for the Tonga Law Society is the limited numbers of private law practitioners. Apart from the 15 Crown counsel in the Attorney General's Office, and a handful in Government Ministries, resident private law practitioners amount to around 20 law practitioners, and around half are university qualified, which is still very small for the legal workload in Tonga.

VII LEGAL SECTOR INITIATIVE/PROJECTS

19 The legal sector initiatives or projects for 2012 were as follows:

(1) Anti-Money Laundering Workshops

In the week of 14 May 2012 the Attorney General's Office hosted two regional workshops on anti money laundering, with one on cash couriers, and the other on suspicious transactions. The workshops were held in conjunction with by the Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Customs and Borders Protection Service (ACBPS), United Nations Counter Terrorism Directorate (CTED), Asia Pacific Group on Money Laundering (APGML), Pacific Islands Forum Secretariat (PIFS), New Zealand Customs Service (NZCS) and the New Zealand Financial Intelligence Unit. Other organizations participating include the Australian Federal Police (AFP) and Oceania Customs Organization (OCO).

(2) Legal Aid Scheme

The Tongan Government approved a recommendation from the Attorney General to set up a modest legal aid scheme for Tonga. Nearly all accused persons appear before the Courts without legal representation mainly because they cannot afford to pay for one. There is also the issue of there not being enough law practitioners practicing in the criminal law. It is hoped that Tonga will pass the legislation in 2013 and hopefully receive donor assistance to match Tonga's initial monetary input.

(3) Public Information on Bills for Parliament

In October 2012 the Attorney General published a notice in Tonga's five newspapers, one online magazine and the Government information portal, containing a list of all the bills that were before parliament, and a brief explanation of their purpose. A second announcement will be released in November 2012 for the bills for 2013.

(4) Consultation on Proposed Legislation

The Attorney General's Office has commenced the initiative to invite public submissions on significant legislation. Two of those bills are the Family Protection Bill to criminalise domestic violence, and Seabed Minerals Bill, to regulate the prospecting, exploration and commercialisation of seabed minerals.

(5) Email Notification on "What's New" on the Website

The Attorney General's Office is in the process of setting up an automatic email notice to relevant stakeholders such as Cabinet Ministers, judges, magistrates, chief executive officers, law practitioners, diplomatic missions, academics and members of the media to inform them of new legislation that has been promulgated on the Attorney General's Office website. Emails have been compiled for the local audience mainly, and the programme is still being set up.

(6) Publication of Government Bills at various legislative drafting stages

The Attorney General's Office intends to re-format its current website to allow for the publication of bills once they have been approved by the Government's Law Committee, and once it has been approved by Cabinet for tabling before parliament. This would allow public dissemination and comment on Government bills, before they are considered by parliament.

(7) Proposed Annual Overseas Placement Programmes

As mentioned above, in order to enhance the experience of Crown counsel in the Attorney General's Office, the Office intends to utilise the offer from the New Zealand Government to provide short-term training, by applying to set up an annual placement programme for Crown counsel to new Zealand's main public law offices – a Crown Solicitor's Office, Office of the Parliamentary Counsel or the Crown Law Office.

(8) Training Calendar for Tonga Police

In order to improve legal skills and knowledge of Tonga Police criminal investigators and prosecutors, the Attorney General's Office intends to set up a training calendar for Crown counsel to offer basic legal training directly to Police officers, at their workplaces. The intention is to have two circuits of training every year.

(9) Consolidation of Laws up to 2011

The consolidation of the laws of Tonga is nearing its end and the target date of publication is the middle of 2013. The consolidation process is led by the Attorney General and a team of Crown counsel and interpreters within the Attorney General's Office, with the assistance of a local consultant. The main expense would be the publication of the laws; however the plan is to publish mainly in electronic form on the internet and on CD ROMs.

(10) 6th Annual Law Week 2012

Next week, from 6th to 9 November 2012, the Attorney General's Office will be providing the 6th Annual Law Week. The theme will be "Law and Business", and so it would be provided in conjunction with the Ministry of Commerce, Tourism and Labour, and the Ministry of Revenue Services. Due to Office's busy workload, there will be only two activities provided. One is the broadcasting of information videos created by the staff and members of the public, and a daily talk back show that would be broadcast throughout the country to answer legal questions regarding the theme or any other legal matter.

ATTACHMENT A

OVERSEAS TRAINING

DATE	TRAINING	VENUE AND ORGANISERS	PARTICIPANT
16 February 2012	Pacific Roundtable on the International Criminal Court	Canberra, Australia	Sione Sisifa, Assistant Senior Crown Counsel
19-21 March 2012	Regional Counter Terrorism Seminar	Cairns, Australia	'Elisapeti Langi, Crown Counsel
8 April – 19 May 2012	Pacific Fellows Women's Rights Program 2012	Washington DC, USA	Joan Puloka, Assistant Crown Counsel
8-9 May 2012	Pacific Regional Roundtable on the Montreux Document on Private Military and Security Companies	Canberra, Australia	Rose Kautoke, Assistant Crown Counsel
14-18 May 2012	Regional Workshop on the Control of Cross Border November of Cash and Bearer Negotiable Instruments, and Suspicious Transactions	Nuku'alofa, Tonga	Solicitor General Juliana Lafaiali'i, Assistant Crown Counsel and Marina Moa, Assistant Legal Officer
17-21 September 2012	Contemporary Maritime Issues in the Western and Central Pacific	Asia Pacific Centre for Military Law	Solicitor General Joan Puloka, Assistant Crown Counsel
1-5 October 2012	Regional Feminist Legal Theory	Dhaka, Bangladesh	Leotrina Macomber, Assistant Crown Counsel
23-31 October 2012	Visit to Republic of Marshall Islands and Federates States of Micronesia by the Forum's Reference Group on Sexual and Gender Based Violence	RMI and FSM	Joan Puloka, Assistant Crown Counsel
29 October – 2 November 2012	Annual Pacific Lawyers Consultation on Human Rights Law	Nadi, Fiji Secretariat of the Pacific Community	'Akanesi Katoa, Assistant Crown Counsel
1 – 2 November 2012	Professional Diploma in Legal Drafting Final Evaluation	Suva, Fiji USP Law School	'Akanesi Katoa, Assistant Crown Counsel and Leotrina Macomber, Assistant Crown Course;
7 November – 3 December 2012	UN Regional Course in International Law	Bangkok, Thailand	Rose Kautoke, Assistant Crown Counsel
22-23 November 2012	Workshop on Pacific Preparedness: Strengthening Laws and Partnerships	Nadi, Fiji	Annis Taumoepeau, Crown Counsel

ATTACHMENT B

NATIONAL, REGIONAL AND INTERNATIONAL MEETINGS

DATE	MEETING	VENUE	PARTICIPANT
5 June 2012	Forum Working Group on Counter-Terrorism	Suva, Fiji	Solicitor General Leotrina Macomber, Assistant Crown Counsel
6-8 June 2012	Forum Regional Security Committee Meeting	Suva, Fiji	Solicitor General Leotrina Macomber, Assistant Crown Counsel
5-7 July 2012	Australia-New Zealand Society of International Law Conference	Wellington, New Zealand	Joan Puloka, Assistant Crown Counsel
11-13 July 2012	Annual Pacific Prosecutors Conference	Honiara, Solomon Islands	Solicitor General 'Elisapeti Langi, Crown Counsel
16-20 July 2012	Asia Pacific Group on Money Laundering Annual General Meeting	Brisbane, Australia	Solicitor General Juliana Lafaiali'i, Assistant Crown Counsel
23-25 July 2012	Pacific Legislative Drafters Forum Technical Forum Meeting	Suva, Fiji	Solicitor General
29-30 August 2012	Law and Culture Conference	Auckland, New Zealand	Solicitor General 'Akanesi Katoa, Assistant Crown Counsel

ATTACHMENT C

CONTACT INFORMATION

JUSTICE AGENCY	CONTACT PERSON AND POSITION	CONTACT DETAILS
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