

KINGDOM OF TONGA

COUNTRY REPORT

Pacific Islands Law Officers' Network 2011
(PILON)

4-6 December 2011
Auckland, New Zealand

I INTRODUCTION

1 On behalf of the Government of the Kingdom of Tonga, I would like to submit Tonga's PILON Country Report for 2011.

2 First, on behalf of the Interim Attorney General I would like to thank the New Zealand Government and its Crown Law Office for hosting PILON 2011.

3 2011 has been a relatively quiet year in the legal sector compared to the historical events of 2010. The main work for the legal sector this year has been the monitoring the implementation of the constitutional and political reforms of 2010 by all three branches of Government – the legislature, the executive and the judiciary. In addition, and as expected, there were a few issues that was identified that needed to be tweaked for improvement of the new governance system, but there are also a few fundamental issues that has to be worked out.

4 The 2011 theme of Legal Challenges and Strategies to Enhance pacific Sustainable Development is a timely one for Tonga. With the completion of the constitutional and political reform and the pressures of the global economic crisis, economic development is the main priority of the Tongan Government. As a result the legal sector is moving to new areas of law that have economic implications.

5 I hope the discussions in this PILON 2011 will be beneficial and positive and carried out in the warm spirit of Pacific co-operation and sharing.

6 May I take this opportunity to wish all the delegates an enjoyable Christmas holiday, and also a prosperous 2012!

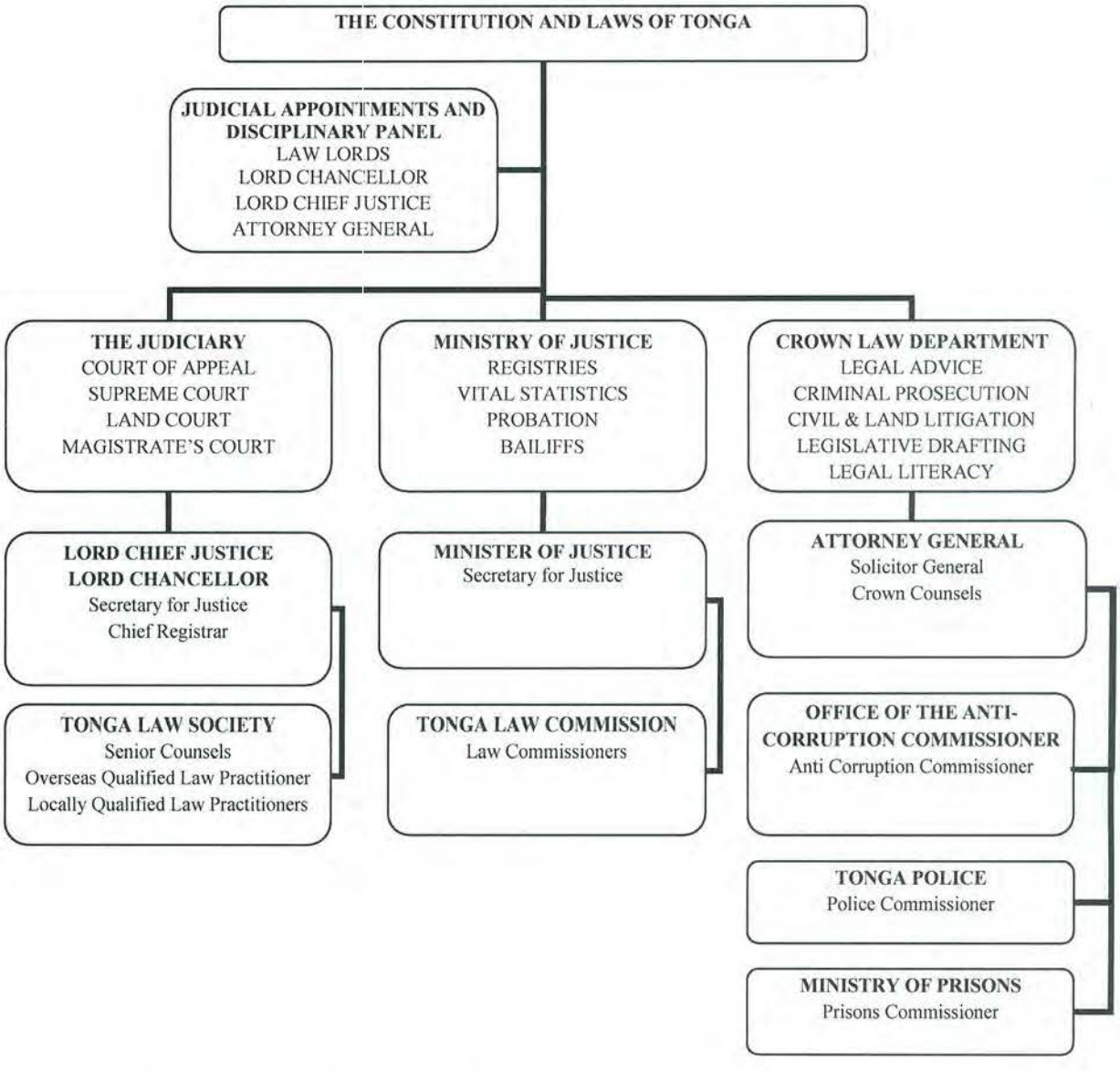
Malo 'aupito



'Aminiasi Kefu
Solicitor General

II TONGA'S LEGAL SECTOR

7 Tonga's legal sector consists of the following:



III MAJOR LAW AND JUSTICE SECTOR ACHIEVEMENTS

8 The major law and justice achievements in 2011 were:

(1) Constitutional and Political Reform:

- Establishment of a 26 member elected Legislative Assembly;
- Election of a Prime Minister by members of parliament;
- Constitutional recognition of Rule of Law and Judicial Independence principles;
- Constitutional recognition of Office of Attorney General

(2) Judicial Reform

- Establishment of the Office of Lord Chief Justice as the professional head of the Judiciary;
- Establishment of the Office of Lord Chancellor as the administrative head of the Judiciary;
- Establishment of a Judicial Appointments and Disciplinary Panel to recommend to His Majesty the appointment and terms of employment of judicial officers, the Lord Chancellor, the Attorney General and Police Commissioner.

IV SIGNIFICANT COURT DECISIONS

9 The significant Court decisions in 2011 were as follows:

(1) Rex – v – Ramsay Dalgety, AC 25/10 (Court of Appeal, 15 April 2011)

This was an appeal by the Crown regarding a ruling by a Supreme Court judge that the laws of Tonga required the Crown prosecutors to sign indictments before they are filed, and as a result the Court quashed the indictment. The Court of Appeal held that there was no such requirement under Tongan law and thus reinstated the indictment.

(2) John Owen Jonesse – v – Rex, AC 08/11 (Court of Appeal, 30 September 2011)

This was an appeal by the appellant against his conviction and sentence arising out of the tragedy of the sinking of the MV Princess Ashika. The appellant was charged and convicted after trial before a jury on one charge of manslaughter by negligence, five counts of sending an unseaworthy ship to sea and one further charge each of forgery and knowingly dealing with a false document. The Appellant was sentenced in total to 5 years imprisonment, to be served concurrently, with no part of the sentence suspended.

The Crown conceded that the sentence was inconsistent with the sentences of co-accused that were more culpable. In light of that concession, the Appellant withdrew his appeal against conviction.

The Court of Appeal then allowed the appeal, and ruled that the sentence imposed in the Supreme Court was manifestly excessive. The Court of Appeal then vacated the sentences imposed for manslaughter by negligence and sending an unseaworthy ship to sea, and replaced them each with a sentence of 3 ½ years imprisonment, with 3 years suspended for 3 years. There was no change to the sentences of forgery and knowingly dealing with a false document. Having served six months by the time of the appeal, the Appellant was released and he was allowed to return to his home country.

(3) Shipping Corporation of Polynesia Ltd- v- Rex, AC 09/11 (Court of Appeal, 30 September 2011)

The Appellant is a public enterprise that had purchased the MV Princess Ashika that had sunk on 5 August 2010. The appellant company was charged and convicted for manslaughter by negligence, and five charges of sending an unseaworthy ship to sea. The appellant was fined in the Supreme Court for $1,000,000 on the manslaughter charge and $200,000 on each of the five charges of sending an unseaworthy ship to sea, which were made concurrent. Furthermore, the judge ordered that out of the fines imposed certain sums were to be paid out to the Tonga Maritime Polytechnic Institute and Tonga Women's Crisis Centre.

The Appellant appealed against sentence, and in particular argued that the sentence imposed for manslaughter by negligence was excessive, and that the Supreme Court should have considered the financial position of the Appellant and its lack of ability to pay the fine of $1,000,000. It also claimed that the Supreme Court had no power to order these extra pecuniary penalties, and that the Supreme Court had failed to take into account the differences economically between Tonga and the UK when using a UK decision as guidance regarding corporate manslaughter.

The Court of Appeal upheld the fine of $1,000,000 imposed for manslaughter by negligence. However, the fines imposed on the counts of sending of unseaworthy ship to sea were vacated and replaced with fines of $100 on each charge. The fines were ordered to be paid within 30 days. The order requiring payments to the Tonga Maritime Polytechnic Institute and the Tonga Women's Crisis Centre were also vacated.

(4) Rex – v – Semisi Ve'etutu Pomale, AC 10/11 and Rex – v- Viliami Makahokovalu Tuputupu, AC 11/11 (Court of Appeal, 30 September 2011)

These were appeals by the Crown against the sentences imposed on the Respondents arising out of the tragedy of the sinking of the MV Princess Ashika. The Crown claimed that the Learned Sentencing Judge had issued suspended sentences in excess of the 3 year time limit imposed by section 24 of the Criminal Offences Act.

Pomale was the first mate of the vessel. He was convicted of one count of manslaughter by negligence and five counts of taking an unseaworthy ship to sea. He was sentenced to 5 years imprisonment in total, and 3 ½ years imprisonment was suspended for 3 ½ years. Pomale was therefore required to serve only 18 months imprisonment.

Tuputupu was the captain. He was convicted of one count of manslaughter by negligence and five counts of taking an unseaworthy ship to sea. He was sentenced to 4 years imprisonment in total and 3 ½ years was suspended for 3 ½ years. Tuputupu was therefore required to serve only 6 months imprisonment.

The Court of Appeal allowed the appeal with regards to Pomale and sentenced Pomale to 4 ½ years imprisonment in total, serving 18 months imprisonment, and the remaining 3 years imprisonment be suspended for 3 years.

The Court of Appeal also allowed the appeal with regards to Tuputupu and sentenced Tuputupu to 3 ½ years imprisonment in total, and he was to serve 6 months imprisonment, and the remaining 3 years be suspended for 3 years. As a result, 6 months were deducted from each of the Respondents' original sentences. There were special reasons why the Crown did not appeal on grounds of the sentences being inadequate.

(5) Re: Schaumkel, Application for Registration of Overseas Birth, RG 259/11

The Applicant applied to have his son who was born in New Zealand registered in the Tongan register of births. Under the Nationality Act a person born overseas of a Tongan father born in Tonga is deemed to be a Tongan subject. In 2007 the Nationality Act was amended to make any person born overseas of a Tongan mother or Tongan father to be deemed a Tongan subject.

The Applicant was born in New Zealand of a Tongan father born in Tonga and so that made him a Tongan. However, the Applicant's son was born in New Zealand of a Tongan father who was not born in Tonga, because the Applicant was born in New Zealand. Accordingly the Applicant's son was not Tongan.

The Applicant applied to register his son under the 2007 amendment on the premise that regardless of when a person was born, since the 2007 amendment all persons born overseas of either a Tongan father or Tongan mother shall be Tongan. The Crown was given an opportunity to make submissions on this matter, and opposed the Applicant's application on the basis that the 2007 Amendment was intended to apply only to births after the 2007 amendment, not before, and the effect was that the 2007 amendment could not be enforced retrospectively. The Supreme Court however agreed with the Applicant and granted the application. The Crown is appealing the decision to the Court of Appeal and all similar applications are deferred until the Court decision.

V LAW REFORM: LEGISALTIVE PROGRAMME

10 By way of background, Crown Law's legislative drafting capacity consists of four trained legislative drafters under the USP's Post Graduate Diploma in Legislative Drafting. Two of the trained drafters are responsible for Government's legislative programme under the supervision of the Solicitor General. There are also two Tongan language translators to translate legislation.

11 Most legislation is drafted by consultants. There are five trained and experienced legislative drafted in the private sector, all are former Crown Law employees. Crown Law's main legislative drafting role is therefore to vet and format draft legislation, and draft other laws when appropriate.

12 The legislative process now has significantly changed and may cause some delays in the enactment process. Legislation is initiated by Government ministries and agencies upon

consultation with Crown Law. Once approved by Cabinet, normally a consultant is engaged to draft the legislation. The draft legislation is then submitted to Crown Law for formatting and vetting before it is submitted to the Cabinet's Law Committee for further detailed vetting for policy consistency and legal issues. Once the Law Committee completes reviewing the draft, the draft legislation is then re-submitted to Cabinet for approval for tabling before the Legislative Assembly, or for the competent authority, normally a Minister, to issue if it is subordinate legislation. Once the Assembly passes the draft bill as an Act, it is then referred to His Majesty for Royal Assent. With regards to the subordinate legislation, after the subordinate legislation is issued by the competent authority and it comes into force, the subordinate legislation is tabled before the Legislative Assembly for confirmation, rescission or amendment.

13 The significant changes now are that the Bills that are tabled before the Legislative Assembly which are deemed of public interest may be subject to public consultation. Furthermore, once those Bill are submitted to His Majesty as Acts for Royal Assent, those Acts are first vetted by the Law Lords who then give advice to the His Majesty on whether Royal Assent should be granted. Furthermore, regulations that are submitted to the Legislative Assembly are vetted in the Legislative Assembly in detail as they were Bills or Acts. These changes may cause delay, duplication and disruption to Government's legislative programme.

14 After the historical 2010 legislative programme, law reform in Tonga has been quiet with only 4 Acts and 13 subordinate legislations enacted in 2011. They are as follows:

(1) 2011 Acts:

1	Act of Constitution of Tonga (Amendment) Act 2011
2	Remuneration Authority (Amendment) Bill 2011
3	2011-2012 Appropriation Act 2011
4	Retirement Fund Board (Amendment) Act 2011

(2) 2011 Subordinate Legislation

1	Personal Property Security Regulations 2011
2	Registrar General's (Change of Name) Regulations 2011
3	Registrar General's Births and Deaths (Amendment) Regulations 2011
4	Consumption Tax (Amendment) Order 2011
5	Excise Tax (Amendment) Order 2011
6	Therapeutic Regulations 2011
7	Retirement Fund (Administration)(Amendment) Regulations 2011
8	Excise Tax (Amendment) (No. 2) Order 2011
9	Customs Duty (Amendment) Order 2011
10	Passport (Amendment) Regulations 2011
11	Census Regulations 2011
12	Traffic (Amendment) Regulations 2011
13	Retirement Fund (Administration) (Amendment) (No 2) Regulations 2011

14 There is however a total of 27 bills and 15 subordinate legislation that will be processed for enactment in 2012.

15 Included in these proposed legislation are new legislation on:

(1) counter-terrorism and trans-organised crime;
(2) violence against women and children;
(3) sports development;
(4) water resources;
(5) fire services;
(6) national spatial planning; and
(7) civil aviation.

VI LEGAL SECTOR ISSUES

16 The Tongan legal sector continues to suffer from a lack of resources, both monetary and human resources.

17 Office space is a major issue. The Judiciary are struggling with sub-standard facilities. Crown Law and the Ministry of Justice are sharing offices. The only option to solve this is to build a new Court building, which is in progress, and for Crown Law and Justice, one or the other has to find new premises, not only because of space constraints but also the perception of independence.

18 Remuneration of professionals in the legal sector is also a debilitating issue for development. Expatriate judges are now locally funded. The magistracy is not an attractive career for experienced law practitioners. Crown counsels are not being properly remunerated compared to doctors. Significant investment has to be made to improve remuneration; otherwise experienced legal staff will look for other employment opportunities elsewhere.

19 Building legal experience of Crown Law staff is a working progress. The average years of experience for Crown Law staff are 2 to 3 years post admission. Crown Law is trying to develop legal experience in a number of ways. First, by seeking to formalise arrangements for annual secondment of staff to overseas prosecution or legislative drafting offices so they can learn from more experienced prosecutors and drafters. Crown Law is also pairing lawyers to work on complex criminal prosecutions so they can learn from each other. Supervision of legal work has also been increased. Crown Law staff are also required to give monthly presentations on legal topics of their choosing. Crown Law staff are also sent out during annual Law Week to give presentations to the public and to answer their questions. In addition to this an evaluation system has been piloted and modified to fit Crown Law circumstances so personal development of counsels is encouraged. It is hoped that these mechanisms will improve experience at a quicker pace.

20 Retention of legal staff is likely to be an imminent threat to Crown Law office functions. Crown Law staff levels have shown a see-sawing pattern of highs and lows. At this time there are 11 Crown counsels, which is considered a high number. Fortunately the labour market for law practitioners within Tonga is currently not vibrant enough to lure Crown Law legal staff

away and also the inexperience in the staff. However it is realised that within the next two to three years Crown counsel numbers may drop one they have had 4 to 5 years post-admission experience, as there is always the threat from overseas legal posts such as those in regional organisations. We therefore are trying to address this by providing incentives for lawyers to stay with Crown Law such as providing reasonable remuneration, regular overseas training and travel, comfortable and enjoyable office environment, and ensuring legal staff take leave entitlements.

VII LEGAL SECTOR INITIATIVES/PROJECTS

21 The legal sector initiatives or projects for 2011 were as follows:

(1) Crown Law and the National Reserve Bank of Tonga hosted a Strategic Implementation Planning workshop to set out a plan to respond to respond to the recommendations contained in Tonga's mutual evaluation report on anti-money laundering and combating terrorist financing activities adopted by the Asia-Pacific Group on Money Laundering in 2010. This workshop was carried out with the assistance of the APG, Pacific Islands Forum Secretariat and AUSTRAC.

(2) Crown Law launched its new website (www.crownlaw.to/cms) containing information on Crown Law's work, and also all included a complete legislation page that is updated once new legislation is enacted;

(3) Crown Law has updated the Tonga Law Reports up to 2009 and 2010 with the assistance of the Commonwealth Pacific Governance Facility, which should be published early next year;

(4) In April 2011, Crown Law and the Ministry of Information and Communication hosted a three day regional workshop on cybercrime legislation, aimed at encouraging Pacific Island jurisdictions to review or enact their cybercrime legislation based on guidance from the Council of Europe's Convention on Cybercrime (Budapest Convention). Tonga's legislation is deemed compliant with the Budapest Convention and is now considering applying to be invited to accede to the Budapest Convention along with Australia from the Pacific region. This would allow access to technical assistance and training and also access to the wide network of ICT contacts around the world, both in the public and private sector;

(5) Crown Law is at the final stages of completing the revision of the laws of Tonga in both English and Tongan, with the assistance of the Commonwealth Secretariat. It is hoped that publication in electronic reform of the revised laws up to 2010 will be completed by June 2012; and

(6) The 5th Annual Law Week 2011 was held from Sunday 28 November to 2 December 2011. The theme was "Laws and Social Life", which was aimed at disseminating the laws on tobacco control, alcohol, illicit drugs and domestic violence. The activities included a joint church service for the legal sector, visits to secondary and tertiary

institutions, radio talk back and poster, poem, speech competitions for primary and junior secondary students.

VIII REFLECTIONS ON PILON 2011 THEME

22 The theme of sustainable economic development is relevant for Tonga. Given the significant and disturbing impact of the global financial crisis and the completion of the constitutional and political reform process, Tonga's priorities now lies with sustaining social and economic development.

23 The legal sector, especially Crown Law, is therefore now exposed to new areas of law such as renewable energy, climate change, environment impact assessments, cybercrime, deep sea mining, petroleum mining, domestic violence, anti-money laundering, counter-terrorism, procurement processes, commercialisation of Government assets, infrastructure development, insolvency, personal property security and others.

24 This offers a tremendous challenge in the Tongan legal sector to legal advisors, legislative drafters, legislators, and the Courts. These subjects are fast paced in their own development, are sensitive to local circumstances and most of all very new.

25 Tonga is committed to regional co-operation on the legal aspects of these new economic topics, and is willing to share and also learn from other jurisdictions regarding relevant legislation, legal policy and law enforcement development.

ATTACHMENT A
TRAINING

DATE	TRAINING	VENUE AND ORGANISERS	PARTICIPANTS
7 March to 11 May 2011	Pacific Legal Policy Twinning Program	Canberra, Australia Office of Legislative Drafting and Publication, Australian Attorney General's Department	Annis Finau, Crown Counsel
12-13 April 2011	APG Strategic Implementation Plan Workshop	Nuku'alofa, Tonga APG, Austrac, PIFS, Crown Law	Solicitor General, Juliana Lafaiali'i, Assistant Crown Counsel
27-29 April 2011	Regional Workshop on Cybercrime Legislation	Nuku'alofa, Tonga Australian AGD, Council of Europe, SPC	Solicitor General Leotrina Macomber, Assistant Crown Counsel
3 May 2011	Ready Pasefika II	Auckland, New Zealand NZ MFAT and NZ Police	Solicitor General Police Commander Deputy Police Commander
5-9 September 2011	Regional Counter Terrorism Seminar	Cairns, Australia Counter Terrorism Training Intelligence Program	Leotrina Macomber, Assistant Crown Counsel CIP 'Atunaisa Taumoepeau, Tonga Police Tupou Vaipulu, Ministry of Foreign Affairs
18 – 20 October 2011	9th Regional Meeting of the State Parties with respect to Article IX of the Chemical Weapons Convention	Singapore Organisation for the Prohibition of Chemical Weapons	Sione Sisifa, Assistant Senior Crown Counsel
11 November 2011	PDLD Final Evaluation	Suva, Fiji, USP	Juliana Lafaiali'i, Assistant Crown Counsel

ATTACHMENT B

NATIONAL, REGIONAL AND ITNERNATIONAL MEETINGS

DATE	MEETING	PLACE	PARTICIPANT
4 May 2011	Counter Terrorism Working Group Meeting	Auckland, New Zealand	Solicitor General Police Commander Deputy Police Commander
1-3 June 2011	Forum Regional Security Committee	Suva, Fiji	Solicitor General
6-8 June 2011	Commonwealth and ICRC International Humanitarian Law Conference	Kuala Lumpur, Malaysia	Solicitor General
26-29 June 2011	16th Annual Conference and General Meeting of the International Association of Prosecutors	Seoul, South Korea	Annis Finau, Crown Counsel
1 July 2011	World Summit of Prosecutors General, Attorneys general and Chief Prosecutors	Seoul, South Korea	Annis Finau, Crown Counsel
10 July 2011	Pacific Young Lawyers Meeting	Sydney, Australia	Solicitor General Joan Puloka, Assistant Crown Counsel Silivia 'Atiola, Assistant Crown Counsel
11-14 July 2011	Commonwealth Law Ministers Meeting	Sydney, Australia	Solicitor General Joan Puloka, Assistant Crown Counsel Silivia 'Atiola, Assistant Crown Counsel
18-22 July 2011	Asia Pacific Group on Money Laundering Plenary Meeting	Kochi, India	Solicitor General 'Ungatea Latu, Manager, NRBT
2-4 November 2011	Pacific Women's Policy Dialogue	Canberra, Australia	Annis Finau, Crown Counsel
7-9 November 2011	Regional Working Group Meeting on Preventing Terrorist Financing Abuse of the Non Profit Sector	Auckland, New Zealand	Solicitor General
16-18 November 2011	Commonwealth Secretariat Seminar on the Integrity in Public Life	Auckland, New Zealand	Solicitor General
21-23 November 2011	Octopus Conference and 10th Anniversary of the Budapest Convention on Cybercrime	Strasbourg, France	Solicitor General APC 'Unga Fa'aoa, Tonga Police

ATTACHMENT C
CONTACT INFORMATION

JUSTICE AGENCY	CONTACT PERSON AND POSITION	CONTACT DETAILS
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Crown Law Department	Mr 'Aminiasi Kefu, Solicitor General	(676) 24055/24007 (676) 25347 (Direct) sg@crownlaw.gov.to / aminiasi@kalianet.to