

Judicial Officers' Fraud and Corruption Workshop

Republic of Marshall Islands

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Chapter 1: Similarities and differences of provisions across all jurisdictions

This chapter outlines the similarities and differences between fraud and corruption offences across PJIP partner court jurisdictions. The two most prevalent fraud and corruption offence categories defined by the region¹ are: fraud and bribery.

Fraud

In most jurisdictions, the Fraud regime is complex and there is significant overlap with various other provisions. The provisions annexed below are those with which a public officer could be charged, who embezzled public funds. Six jurisdictions (Fiji, Kiribati, Nauru, Republic of Marshall Islands, Solomon Islands, and Tonga) have provisions that specifically target fraud or embezzlement by public servants. In the other six jurisdictions, recourse must be had to general provisions (present in all jurisdictions) dealing with fraudulent misappropriation of property. These offences may be variously referred to as "theft", "cheating", "obtaining by false pretences", "obtaining by deception", or "fraudulent conversion". Palau is the only jurisdiction to have a specific offence of theft of government property that can be committed by a private individual.

Kiribati and Solomon Islands have identical provisions dealing with the following:

- Frauds and breaches of trust by persons employed in the public service²
- Theft, including taking by trickery or despite knowledge of a mistake on the part of the person defrauded
- Larceny and embezzlement by public servants
- Obtaining by false pretences

Vanuatu has provisions dealing with theft and obtaining by false pretences which are substantially similar to those in the three aforementioned jurisdictions. However, it lacks any provisions dealing specifically with frauds by public servants. The other eight jurisdictions have substantially different regimes.

¹ As outlined in the PJIP Judicial Officer Needs Assessment Survey Report, June 2022

² Fiji has a similarly worded provision



There is a degree of practical commonality among the fraudulent misappropriation or theft offences in all jurisdictions. There are three main elements of which most jurisdictions include at least two. These are that the taking of a thing is done:

- Dishonestly, or by fraud or deceit;
- Without a good faith claim of right (some jurisdictions (Federated States of Micronesia, Fiji, and Nauru) merely include the weaker proposition that the property belongs to another); and
- With intent to permanently deprive the owner of the thing.

Kiribati, Nauru, Solomon Islands, Tonga and Vanuatu include all three elements; Palau, Republic of Marshall Islands, Samoa and Tokelau include the first and third; and Papua New Guinea and Federated States of Micronesia include the second and third.

Bribery

All jurisdictions except Nauru focus on bribery in official and political matters, with relevant bribery being bribery of public officials to act in a certain way in the course of their official duties. Nauru, by contrast, focuses on the dishonest provision/receipt of a bribe with the intention of gaining/providing a favour. All jurisdictions address both directions of bribery, that is, provision and receipt. Papua New Guinea and Fiji both have provisions that address bribery of judicial officials. The most detailed provision is that in the Marshall Islands. Fiji also has specific bribery legislation.³

Offence provision/s by jurisdictions

Unless otherwise specified, all references to statutory provisions are to the following Crimes Acts:

- **Federated States of Micronesia:** [Code of the Federated States of Micronesia](#) ;
- **Fiji:** [CRIMES ACT 2009 - Laws of Fiji](#); [Prevention of Bribery Act 2007](#) (For offences committed prior to 1/2/2010 see [Laws of Fiji Chapter 17 \(Penal Code\)](#));
- **Kiribati:** [Penal Code 1977](#);
- **Nauru:** [Crimes Act 2016](#);
- **Palau:** [Penal Code of the Republic of Palau](#);
- **Papua New Guinea:** [Criminal Code Act 1974](#);
- **Republic of Marshall Islands:** [Marshall Islands Revised Code 2014 Title 31 Chapter 1](#);
- **Samoa:** [Crimes Act 2013](#);
- **Solomon Islands:** [Penal Code 1963](#);
- **Tokelau:** [Crimes, Procedure and Evidence Rules 2003](#)
- **Tonga:** [Laws of Tonga Chapter 18 \(Criminal Offences\)](#)
- **Vanuatu:** [Penal Code 1977](#)

	Fraud	Bribery
Federated States of Micronesia	s 601(9) s 602	s 516
Fiji	ss 4, 200, 290, 291, 292, 293, 317, 318, 319(1)(b), 323, 324, 325, 327, 328, 329, 330	s 4, 133, 134, 135, 136, 137, 138 <u>Prevention of Bribery Act</u> ss 2, 3, 4, 5, 6, 8
Kiribati	ss 121, 251, 266	s 85

³ Prevention of Bribery Act 2007



Nauru	ss150, 153, 166-168, 179	s 173
Palau	ss 2600, 2614, 2615	s 4100
Papua New Guinea	s406, s365 s 383A, s403, s404, s405	ss 87, 97B, 119, 120
Republic of Marshall Islands	ss 223.0 , 223.3 , 240.7	s 240.0 s 240.1
Samoa	s 172	s 138
Solomon Islands	ss 129, 258, 273, 308	s 91
Tokelau	ss 27, 31, 73(1)	s 72 (1), 72 (2)
Tonga	ss 53, 143, 144, 145	ss 50, 51
Vanuatu	ss 122, 123, 124, 125	s 73



Chapter 2: Republic of Marshall Islands - Legislative Provisions and Elements of the Offences

Under the two offence categories, the below offences pursuant to the [Marshall Islands Revised Code 2014 Title 31 Chapter 1](#), have been identified as falling within the scope of “*corruption*”. Power is used corruptly if it has been “used to obtain some private advantage or for any purpose foreign to the Power”.⁴ For the purposes of this program, “*corruption*” refers to the abuse of entrusted power by public servants, with particular reference to the dishonest pursuit of gain. ALTERNATIVELY: we have used this term in its generic meaning opposed, to its legal connotation.

Fraud: s 223.0. Definitions

(2) "Deprive" means:

- (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or
- (b) to dispose of the property so as to make it unlikely that the owner will recover it.

(6) "Obtain" means:

- (a) in relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another; or
- (b) in relation to labor or service, to secure performance thereof.

(7) "Property" means anything of value, including money, real estate, tangible and intangible personal property, contract rights, choses in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.

(8) "Property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

Fraud: s 223.3. Theft by Deception

A person is guilty of theft if the person intentionally obtains or exercises control over property of another by deception, with the intent to deprive the person of the property. A person deceives if the person intentionally:

⁴ *State v Gamato* [2021] PGNC 485, 136 (Berrigan J).



- (9) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that the person did not subsequently perform the promise; or
- (10) prevents another from acquiring information which is pertinent to the disposition of the property; or
- (11) fails to correct false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship; or
- (12) fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which the person transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

The term "deceive" does not include falsity as to matters having no pecuniary significance, or exaggerated commendation of wares or services unlikely to deceive ordinary persons in the group addressed.

Fraud: s 240.7. Embezzlement, Misappropriation and Diversion By Public Servants.

A public servant commits a felony of the second degree if that public servant commits an act of embezzlement, misappropriation or other diversion of property, funds, securities or any other item of value entrusted to the public servant in his or her official capacity, for the public servant's benefit or the benefit of any other person.

Bribery: s 240.0. Bribery in Official Matters

In this Article, unless a different meaning plainly is required.

- (1) **“administrative proceeding”** means any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals.
- (2) **“benefit”** means gain, advantage or pecuniary benefit, or anything regarded by the beneficiary as a gain or advantage, including a benefit to any other person or entity in whose welfare the beneficiary is interested, but not an advantage promised generally to a group or class of people as a consequence of public policies, laws or measures;
- (3) **“harm”** means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare the person is interested.
- (4) **“official proceeding”** means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding;
- (5) **“pecuniary benefit”** is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain, but excluding economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally;



- (6) “**public body**” includes Ministries, including the Office of the President, departments, agencies, state owned enterprises, the Nitijela, all courts of Marshall Islands and local councils;
- (7) “**public servant**” means any officer or employee of government, including members of the Nitijela, local councilors and judges, and any advisor or consultant during the period that they are performing a governmental function or providing services to the government;

Bribery: s 240.1. Bribery in Official Matters

- (1) A public servant is guilty of bribery, a felony of the second degree, if the public servant, whether in Marshall Islands or elsewhere, without lawful authority or reasonable excuse, directly or indirectly solicits, accepts or agrees to accept from another person any benefit as an inducement to, or a reward for, or on account of that public servant’s:
 - (a) decision, opinion, recommendation, vote or other exercise of discretion in his/her position as a public servant;
 - (b) performing or abstaining from performing, or having performed or abstained from performing, any act in his/her capacity as a public servant;
 - (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his/her or that other public servant’s capacity as a public servant;
 - (d) assisting, favoring, hindering or delaying, or having assisted, favored, hindered or delayed, any person in the transaction of any business with a public body;
 - (e) using his/her real or supposed influence to obtain or attempt to obtain an undue advantage or benefit for that person or a third person from a public body;
 - (f) giving assistance or using influence in, or having given assistance or used influence in the promotion, execution, or procuring of any contract with a public body and/or any sub-contract for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance; or
 - (g) giving assistance or using influence in, or having given assistance or used influence in the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as described in subsection (f) above;
 - (h) refraining or having refrained from bidding at any action conduct by or on behalf of any public body;
- (2) A person is guilty of bribery, a felony of the second degree, if the person, whether in Marshall Islands or elsewhere, directly or indirectly promises, offers, confers or agrees to confer upon a public servant any benefit as an inducement to, or a reward for, or on account of that public servant’s:
 - (a) decision, opinion, recommendation, vote or other exercise of discretion in his/her position as a public servant;
 - (b) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
 - (c) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant’s capacity as a public servant; or
 - (d) assisting, favoring, hindering or delaying, or having assisted, favored, hindered or delayed, any person in the transaction of any business with a public body.
 - (e) using his/her real or supposed influence to obtain or attempt to obtain an undue advantage or benefit for that person or a third person from a public body;



- (f) giving assistance or using influence in, or having given assistance or used influence in the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as described in subsection (f) above;
- (h) refraining or having refrained from bidding at any action conducted by or on behalf of any public body;
- (3) A person, including a public servant is guilty of bribery, a felony of the second degree, if the person, whether in Marshall Islands or elsewhere, directly or indirectly promises, offers, confers or agrees to confer a benefit upon a foreign public official or an official of an international organization as an inducement to, or a reward for, or on account of:
 - (a) Obtaining or retaining business or other undue benefit in international business;
 - (b) Taking action or refraining from acting in a manner that breaches an official duty;
- (4) If a public servant other than a prescribed officer solicits or accepts an advantage with the permission of the public body of which he is an employee being permission which complies with subsection (5), neither he/she nor the person who offered the advantage shall be guilty of an offense under this section.
- (5) For the purposes of subsection (4) permission shall be in writing and-
 - (a) be given before the advantage is offered, solicited or accepted; or
 - (b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance, and for such permission to be effective for the purposes of subsection (4), the public body shall, before giving such permission, have regard to the circumstances in which it is sought.
- (6) It is no defense to prosecution under this Section that:
 - (a) a public servant was not qualified to act in the desired way, whether because the public service had not yet assumed office, or lacked jurisdiction, or for any other reason;
 - (b) his/her doing or forbearing to do, or having done or forborne to do, any act referred to in that section, and he/she:
 - (i) did not actually have the power, right or opportunity so to do or forbear;
 - (ii) accepted the advantage without intending so to do or forbear; or
 - (iii) did not in fact so do or forbear.

Partner Court / Topic	Fraud	Bribery
REPUBLIC OF MARSHALL ISLANDS	<i>Title 31 – Crimes and Punishment Chapter 1 - Criminal Code 2011</i>	
Legislative Provisions	s 223.0 Definitions (2) Deprive, (6) Obtain, (7) Property, (8) Property of another s 223.3 Theft by Deception	s 224.0 Definitions s 240.1 Bribery in Official Matters



	<p>s 240.7 Embezzlement, Misappropriation and Diversion by Public Servants</p>	
<p>Elements of the Offence</p>	<p>s 223.3 Theft by Deception</p> <ol style="list-style-type: none"> 1. A obtains or exercises control over property of another 2. A does so intentionally 3. A does so by deception (defined in s 223.3 (1)-(4)) 4. A does so with intent to deprive the person of the property <p>s 240.7 Embezzlement, Misappropriation and Diversion by Public Servants</p> <ol style="list-style-type: none"> 1. A is a public servant 2. A commits an act of embezzlement, misappropriation or other diversion of property, funds, securities or any other item of value entrusted to A 3. A does so in A's official capacity 4. A does so for the benefit of any person 	<p>s 240.1 Bribery in Official Matters</p> <ol style="list-style-type: none"> 1. A is a public servant 2. A solicits, accepts or agrees to accept a benefit from X as an inducement, consideration, or reward for A's conduct in connection with A's public capacity or duties <p>ALTERNATIVELY</p> <ol style="list-style-type: none"> 1. X is a public servant <p>A offers, confers, or agrees to confer a benefit on X as an inducement, consideration, or reward for X's conduct in connection with X's public capacity or duties</p>



Chapter 3: Republic of Marshall Islands - Elements of the Defences

Under the two offence categories, the below common defences have been identified across each jurisdiction. The **offence** is highlighted by **orange font**; the **common defence** is identified by **pink font** and the **elements of the defence** in **blue font**.

Fraud	Bribery
REPUBLIC OF MARSHALL ISLANDS	
<p>Common defences</p> <p>s 2.04 (Ignorance or Mistake)</p> <ul style="list-style-type: none"> - ignorance or mistake negates the intent, purpose, knowledge, belief, recklessness or negligence required to establish a material element - law must provide that the state of mind established by such ignorance or mistake constitutes a defence - defense not available if defendant would be guilty of another offense had the situation been as the defendant supposed (but ignorance or mistake will reduce the grade and degree of the offense) - belief that conduct is not illegal is a defense where: <ul style="list-style-type: none"> (a) violate administrative regulation or order, and the regulation or order is not known to the actor and was not reasonably available prior to the conduct alleged; (b) person acts in reasonable reliance upon an official statement of law which is afterward determined to be invalid or erroneous from either: (i) statute or enactment; (ii) judicial decision, opinion or judgment; (iii) administrative order or grant of permission; or (iv) official interpretation of the public officer or body charged by law <p>s 2.08 (Intoxication)</p> <ul style="list-style-type: none"> - intoxication is not self-induced - the actor at the time of their conduct was unable to appreciate the nature and quality of their conduct or the wrongfulness of their conduct <p>s 2.09 (Duress)</p> <ul style="list-style-type: none"> - engaged in the conduct charged - actor coerced to do so by the use of, or threatened imminent use of, unlawful force against themselves or the person of another - a person of reasonable firmness in the actor’s situation would have been unable to resist - unavailable with respect to murder - only available to a women who acts on the command of her husband if she acted under such coercion as would establish a defence <p>s 2.11 (Consent)</p>	



- received consent from the victim
- consent negatives an element of the offence or precludes the infliction of the harm or evil sought to be prevented by the law defining the offence
- s 2.12 (De Minimis Infractions)**
- prosecution dismissed if conduct:
 - (a) was within a customary licence or tolerance
 - (b) did not actually cause or threaten the harm or evil sought or did so only in a trivial manner to warrant condemnation of conviction;
 - (c) presents other extenuating circumstances that were not envisaged by the legislature
- ss 3.01 to 3.11 (justification)**
- justification is an affirmative defense, including with respect to:
 - (a) choice of evils – s 3.02
 - (b) execution of public duty – s 3.03
 - (c) use of force in self-protection – s 3.04
 - (d) use of force for the protection of other persons – s 3.05
 - (e) use of force for protection of property – s 3.06
 - (f) use of force in law enforcement – s 3.07
 - (g) mistake of law as to unlawfulness of force or legality reckless or negligent use of otherwise justifiable force, reckless or negligent injury or risk of injury to innocent persons – s 3.09
 - (h) justifications in property crimes – s 3.10
- s 4.01 (mental disease or defect excluding responsibility)**
- person has a mental disease or defect, which constitutes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioural controls
- unable to appreciate the nature and quality or the wrongfulness of their acts
- s 5.01 (criminal attempt and warning to law authorities)**
- actor engages in conduct that constitutes an attempt
- person gave prior warning to law enforcement authorities or made reasonable effort to prevent the conduct or result which is the object of the attempt
- manifest a complete or voluntary renunciation of criminal purpose
- does not affect the liability of an accomplice who did not join in such abandonment or prevention
- s 5.02(3) (renunciation of criminal purpose in the context of solicitation)**
- after soliciting another person to commit a crime, the actor persuades the other person not to do so or prevent the commission of the crime
- manifests a complete and voluntary renunciation of purpose
- s 5.03(4) (renunciation of criminal purpose in the context of conspiracy)**



<ul style="list-style-type: none"> - after conspiring to commit a crime, actor gave timely warning to law enforcement authorities or otherwise made reasonable efforts to thwart the success of the conspiracy - manifesting a complete and voluntary renunciation of his or her criminal purpose <p>s 5.04(2) (defense to charge of solicitation or conspiracy)</p> <ul style="list-style-type: none"> - actor commits a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice <p>s 5.05(2) (multiple convictions barred)</p> <ul style="list-style-type: none"> - person already convicted of more than one offence for conduct designed to commit or to culminate with the same crime 	
<p>s 223.3 (theft by deception)</p> <ul style="list-style-type: none"> - No express defences but general theft defences likely applicable from s 223.1: (a) claim of right ; (b) unaware that property or services was that of another; (c) acted under an honest claim of right to the property or service involved OR that the actor had a right to acquire or dispose of it as he did <p>s 240.7 (embezzlement, misappropriation and diversion by public servants)</p> <ul style="list-style-type: none"> - No express defences but general defence likely applicable from s 240.9, which concerns the defence of lawful authority or reasonable excuse, noting the burden of proof lies upon the accused 	<p>s 240.1 (bribery in official matters)</p> <ul style="list-style-type: none"> - No express defences



Chapter 4: Evidentiary issues

From the PJIP needs assessment and ongoing discussions with Partner Courts, the following evidentiary issues were identified.

A summary of the similarities and differences between the jurisdictions are discussed below.

Exceptions to Hearsay – Bankers’ books & business records

In all jurisdictions, there are statutory or common law exceptions to the rule against hearsay evidence. Most jurisdictions (Federated States of Micronesia, Kiribati, Palau, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Fiji and Papua New Guinea) have statutory provisions pertaining to the admissibility of business records or bankers’ books. In six jurisdictions (Federated States of Micronesia, Palau, Republic of Marshall Islands, Samoa, Solomon Islands and Tonga) these provisions are framed as exceptions to the rule against hearsay evidence. In Fiji and Papua New Guinea, the relevant legislation contains provisions regarding the admissibility of trade or business records more generally. However, it is likely that hearsay evidence would be admitted pursuant to these provisions.

The Federated States of Micronesia, Palau and the Republic of Marshall Islands have provisions which are almost identical. For the exception to apply to business records, two conditions must be established by the testimony of the custodian of the records, another qualified witnesses or, in the Republic of Marshall Islands only, a permitted certificate submitted to the court. First, the records were kept in the course of a regularly conducted business activity. Second, it was the regular practice of that business to make those records. Similar conditions are required in Fiji, Papua New Guinea, Samoa, Solomon Islands and Tonga.

In addition to these requirements, three jurisdictions (Fiji, Tonga, and Samoa) specify that witnesses must not be available before the business records can be admitted. In Fiji, the person who supplied the statement in the record must be either dead, unfit to give evidence as a witness, missing or cannot be reasonably expected to have any recollection of the matters dealt contained in the record. Samoa’s legislation contains similar provisions and two additional alternatives. Specifically, that the Judge may consider first, that the witness would not be useful to the proceedings as the person cannot be reasonably expected to recollect the matters dealt with in the record or secondly, it would cause undue expense or delay if the person were required to be a witness.

Papua New Guinea’s provisions specify that the court is not required to admit business records if, having regarding to all of the relevant circumstances, it would not be in the interests of justice to do so. Papua New Guinea also has provisions in relation to bankers’ books; however, the legislation does not specify any rules in relation to admissibility of hearsay evidence.

We have been unable to identify any relevant statutory provisions in Tokelau and Vanuatu. Consequently, in these jurisdictions hearsay contained in business records is not admissible because there is no such exception at common law.⁵

⁵ Further research into the case law will need to be undertaken to determine the position adopted in each jurisdiction.



Expert Evidence

In all jurisdictions, expert opinion evidence is admissible as an exception to the rule against the admissibility of opinion evidence. Generally, expert opinion testimony is admissible at common law if the witness is qualified as an expert by knowledge, skill, experience, training or education and the expert's opinion will assist the court to understand a fact or issue relevant to the matter. Some jurisdictions (Federated States of Micronesia, Palau, Republic of Marshall Islands, Samoa, Solomon Islands, Tokelau and Tonga) have provisions in their statutes or court rules pertaining to the qualification of experts or competency of witnesses more generally. In these jurisdictions, except Tokelau, the common law exception is codified in the relevant statute (Samoa, Solomon Islands, Tonga) or court rules (Federated States of Micronesia, Palau, Republic of Marshall Islands).

In the Federated States of Micronesia, Palau and Republic of Marshall Islands the specific rules are almost identical. In those jurisdictions, a court may require an expert to disclose underlying facts or data prior to testifying or during cross-examination. Facts or data which an expert relies upon to form an opinion do not need to be admitted as evidence if that evidence is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. Testimony which is admissible is not objectionable if it relies upon a contested fact which is to be determined by the ultimate decision maker. In the Republic of Marshall Islands and Palau, facts or data which are relied on by an expert that are inadmissible do not need to be disclosed to the jury unless the court determines that the probative value of evidence, in assisting the jury to evaluate the expert's opinion, substantially outweighs their prejudicial effect.

We have been unable to identify any relevant statutory provisions in Fiji, Kiribati, Nauru, Papua New Guinea, Tokelau and Vanuatu. However, it is our understanding that the common law exception exists in all of these jurisdictions.⁶

Evidence Admissible Against Co-accused Defendants

Two jurisdictions (Papua New Guinea and Vanuatu) contain statutory provisions regarding accessorial liability. We have been unable to identify provisions in nine jurisdictions (Fiji, Kiribati, Nauru, Palau, Republic of Marshall Islands, Samoa, Solomon Islands, Tokelau and Tonga).⁷

Regarding the admissibility of evidence against a co-accused, the common law position applies in most jurisdictions.⁸ At common law, the co-conspirator's rule permits acts or statements of a co-accused in furtherance of a conspiracy to be admissible against a co-accused.

We have been able to identify provisions in five jurisdictions (Papua New Guinea, Samoa, Solomon Islands and Tonga).

The Solomon Islands and Samoa have provisions which specify that the common law position in relation to the admissibility of statements by co-conspirators prevails. In the Solomon Islands, this is only in relation to confessions. The statute also provides that a co-accused is considered a competent and

⁶ Further research into the case law will need to be undertaken to determine the position adopted in each jurisdiction.

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compellable witness. They may also offer propensity evidence only if that evidence is relevant to the defence raised or proposed to be raised by the accused.

Comparatively, in Papua New Guinea, a person charged with an offence shall not be called as a witness in any legal proceedings in connection with the offence. Notwithstanding this, where a person charged with an offence is a witness they may be asked any questions in cross-examination.

Electronic Evidence

We have been unable to identify any provisions regarding the evidentiary rules applicable to electronic evidence generally in all jurisdictions except for Papua New Guinea and Tonga. In Papua New Guinea, the *Electronic Transactions Acts 2021* specifies that the evidential requirements of admissibility and weight provided by the *Evidence Act* apply to electronic records or data messages. In Tonga, the *Evidence Act* contains provisions regarding the admissibility, standards and authentication of electronic evidence generally.

Some jurisdictions specify that forms of evidence include electronic records or documents stored electronically. The Federated States of Micronesia, Palau and Republic of Marshall Islands specify that writings and records includes electronic recordings. In Samoa, the meaning of ‘documents’ includes ‘information electronically recorded or stored, and information derived from that information’. In Kiribati, the *Evidence Act 2003* contains a provision regarding the ‘[a]dmissibility of statements produced by computers’.

Some jurisdictions have specific evidentiary rules or exceptions in relation to electronic evidence. For example, in the Solomon Islands section 122(1) of the *Evidence Act 2009* provides that the hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail, fax, telegram, letter gram or telex.

Relevance of Evidence

Five jurisdictions (Federated States of Micronesia, Palau, Republic of Marshall Islands, Solomon Islands, Tonga) have provisions in either their statutes or court rules regarding the relevancy of evidence. In all of these jurisdictions relevant evidence is generally admissible.

In the Federated States of Micronesia, Palau and Republic of Marshall Islands, relevant evidence is defined as ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence’. Comparatively, in Tonga, any evidence which is admissible under the relevant provisions is deemed relevant.

Some jurisdictions (Papua New Guinea and Samoa) specify in their statutes that the relevancy of evidence can be questioned during later stages of criminal proceedings, such as during cross-examination or following the end of submissions.



Unless otherwise specified, all references to statutory provisions and rules are to the following:

- **Federated States of Micronesia:**
 - [Code of the Federated State of Micronesia Title 6, Chapter 13 - Evidence](#)
 - [Rules of Evidence for the Trial Division of the Supreme Court of the Federated States of Micronesia](#)
- **Fiji:**
 - [Evidence Act 1944](#)
- **Kiribati:**
 - [Evidence Act 2003](#)
- **Nauru:**
 - [Criminal Procedure \(Amendment\) Act 2020](#)
- **Palau:**
 - [Rules of Evidence for the Courts of the Republic of Palau](#)
- **Papua New Guinea:**
 - [Evidence Act 1975](#)
 - [Electronic Transactions Act 2021](#)
 - [Criminal Practice Rules – Fraud & Corruption Related Offences 2013](#)
- **Republic of Marshall Islands:**
 - [Title 28 – Evidence Act of 1989](#)
- **Samoa:**
 - [Evidence Act of 2015](#)
- **Solomon Islands:**
 - [Evidence Act 2009](#)
- **Tokelau:**
 - [Crimes, Procedure and Evidence Rules 2003](#)
- **Tonga:**
 - [Evidence Act 2020](#)
- **Vanuatu:**
 - [Chapter 136 - Criminal Procedure Code](#)

	Exceptions to Hearsay	Expert Evidence	Evidence Against Co-accused	Electronic Evidence	Relevance of Evidence
Federated States of Micronesia	Rules 801, 802, 803	Rules 601, 602, 702, 703, 704, 705, 706	N/A	Rule 1001	Rules 401, 402, 403
Fiji	s 4	N/A	N/A	N/A	N/A
Kiribati	ss 32, 33, 34	N/A	N/A	s 28	N/A
Nauru	ss147A, 176	N/A	N/A	N/A	N/A
Palau	Rules 801, 802, 803	Rules 702, 703, 704, 705	N/A	Rule 1001	Rules 401, 402, 403

Papua New Guinea	s61, 91, 92, 93, 94 (Evidence Act)	N/A	s 9, 14 (Evidence Act)	s 12 (Electronic Transactions Act) ss 64, 65, 66, 67 (Evidence Act)	s 26 (Evidence Act)
Republic of Marshall Islands	s3 Rules 803, 902	s3 Rules 702, 703, 704, 705	N/A	s3 Rule 1001.	s3 Rules 104, 401, 402, 403
Samoa	ss 9, 10, 11	ss 2, 16	s 6	s 2	s 70, 83
Solomon Islands	ss 102, 103, 117, 118, 120	ss 24, 30, 129, 130	s 39, 40, 172	s 122	ss 20, 21, 22
Tokelau	ss 163, 175	ss 164, 175	s 175	N/A	N/A
Tonga	ss 88, 89	s24, 25	s 4	ss 2, 54A, 54C, 54D, 54E, 54F	s 14
Vanuatu	N/A	s86	N/A	N/A	N/A

Exceptions to Hearsay – Bankers’ books & business records

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

.....

- (11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of the Nitijela or rule prescribed by the High Court pursuant to statutory authority, certifying that the record;
- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
 - (B) was kept in the course of the regularly conducted activity; and
 - (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

- (12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record;
- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
 - (B) was kept in the course of the regularly conducted activity; and
 - (C) was made by the regularly conducted activity as a regular practice.



The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

- (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this Paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) Absence of entry in records kept in accordance with the provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Expert Evidence

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts or data;
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.



Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Evidence Admissible Against Co-accused Defendants

At the time research was undertaken, we have been unable to identify relevant provisions regarding the *Evidence Admissible Against Co-accused Defendants* within the *Evidence Act of 1989*.

Electronic Evidence

Rule 1001. Definitions.

For purposes of this Article the following definitions are applicable:

- (1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

Relevancy of Evidence

Rule 104. Preliminary questions.

- (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 401. Definition of "relevant evidence"

"**Relevant evidence**" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution, by Act of Nitijela, by these Rules, or by other rules prescribed by a court pursuant to statutory authority. Evidence which is not relevant is not admissible.



Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

