



**ANNUAL REPORT**

**CROWN LAW DEPARTMENT**

**2005**

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## ***I GENERAL***

### ***1 Role of the Crown Law Department***

The Crown Law Department is under the Ministerial direction of the Attorney General and Minister of Justice, Hon. Siaosi Taimani 'Aho. The Department however is headed by the Solicitor General, Mrs. 'Alisi Taumoepeau.

The Attorney General is the Crown's First Law Officer. He is vested with wide common law powers that include: filing of *ex officio* information, entering of a *nolle prosequi* in certain criminal prosecutions, and maintaining relator actions in matters affecting the general public. These powers are exercised by the granting of the Attorney General's *fiat*. As such, he decides whether or not and in what precise circumstances, he will issue his certificate.

In conjunction with these common law powers, the Attorney General has certain statutory responsibilities. The instigation of criminal proceedings in an increasing number of offences is now contingent upon the Attorney General's consent being first obtained. As such, all prosecutions under the Criminal Offences Act, subject to section 197 of that Act, are the responsibility of the Attorney General. He has similar responsibilities under:

- Section 3: Crown Proceedings Act;
- Section 4: Maintenance of Illegitimate Children Act;
- Section 8: Defamation Act;
- Section 84: Quarantine Act; and
- Sections 19, 20, 21: Electoral Act.

The Department's role is based upon the accepted traditional functions of Government Law Officers. Generally, these functions revolve around the following basic categories:

- Providing legal advice to Government;
- Representing the Crown in litigation the Crown is a part to, including criminal, civil, land and family matters;
- Drafting legislation for Government.

### ***2 Office***

The Department continued to be located in the Roy Cocker Building, Fatafehi Road, Nuku'alofa. The Department occupied the entire first floor. The office consisted of offices for the legal and support staff, a library, an interview room, conference room, common room and kitchen.

### ***3 Department Budget***

The budget expenditure granted for the Department for the 2003/2004 financial year was \$898,942.00. For the 2004/2005 financial year the Department was granted \$978,863.00.

## ***II STAFF***

### ***1 Staff during 2005***

In January 2005 the Department had a total of 17 established staff. Eight (8) of those staff made up the legal staff, and the remaining nine (9) made up the support staff. During 2005 two legal officers left the Department. This will be discussed below.

The legal officers hold law degrees from various universities in New Zealand and four are graduates of the University of the South Pacific. All the legal officers have been admitted to practice law in the jurisdictions where they studied and also here in Tonga. The Department continues to struggle with the shortage of legal officers, and more so for experienced legal officers. The legal officers need support and security of tenure in order to perform their legal duties independently without fear of outside pressure.

The support staff carried out mainly administrative and clerical duties.

The Solicitor General conducted weekly meetings with the legal staff in order to coordinate the Department's work. The Solicitor General also conducted monthly meetings with the support staff for administrative matters.

Both the legal and support staff contributed well to the efficient operation of the Department during 2005.

Listed in Schedule 1 are the staff members of the Department as at 31 December 2005.

### ***2 Staff Matters***

On 28 February 2005 'Asipeli 'A. Kefu, Senior Crown Counsel, commenced study leave for one year to read for his Master of Laws degree at Victoria University of Wellington, Wellington, New Zealand.

Ms. Seinimili Fonua, Senior Interpreter and Mr James Bruce Lutui, Interpreter, continued their studies respectively for a Bachelor of Laws at the University of the South Pacific, Vanuatu Campus. Ms. Fonua is expected to resume in 2007, and Mr Lutui in 2008.

In February 2005, Mrs Silia Tokai, Computer Operator Grade I, was confirmed as Assistant Secretary.

On 7 March 2005 Ms Savelina Vika 'Ofahulu was appointed to fill the vacant

post of Computer Operator Grade I.

On 1 March 2005, Ms Mele Ikatonga Tupou, Legal Officer, Ministry of Justice joined the Department on one year attachment.

On 1 March 2005, Mr Sione Sisifa, Assistant Crown Counsel was promoted to Crown Counsel.

On 1 March 2005 Mrs Sarah Raasch, Assistant Legal Officer, was promoted to Assistant Crown Counsel.

In August 2005, Ms Lu'isa Fukofuka, Assistant Legal Officer, resigned from the public service.

In 2005 Mr 'Ofa Pouono, Assistant Senior Crown Counsel, was dismissed from the public service. Mr Pouono appealed the decision to Cabinet.

In November 2005 Mrs Fine Tu'itupou Titaa resumed duty after being suspended due to her being charged with manslaughter by negligence. Mrs Titaa was acquitted by a jury after her trial in September 2005.

### **3 *Regional and International Meetings and Workshops***

In 2005, members of the legal staff attended various regional and international meetings and workshops representing Government on legal matters.

The following is a summary of the various meetings the legal staff attended:

#### **February**

Miss Lu'isa Fukofuka, Assistant Legal Officer attended the Forum Workshop on Human Rights Mechanisms held in Nadi, Fiji on 28 February to 1 March 2005.

#### **June**

The Solicitor General attended the Forum Regional Security Committee Meetings held in Auckland, New Zealand on 14 to 16 June 2005.

Mr Sione Sisifa, Crown Counsel attended the Seminar on Transnational Crime and Criminal Justice System for Pacific Islands held in Kuala Lumpur, Malaysia, 20 – 25 June 2005.

#### **July**

Miss Mele Ikatonga Tupou, Legal Officer, attended the Seminar for

pacific Islands Maritime Legal officers held in Nadi, Fiji on 12 to 15 July 2005.

### **August**

Miss Gloria Guttenbeil, Assistant Crown Counsel, attended a course on Creditor Rights in Emerging Economics held in Singapore at the Singapore Regional Training Institute on 22 to 26 August 2005.

### **October**

Mr Sione Sisifa, Crown Counsel, attended the Regional Workshop on the Bio-security Bill held in Nadi, Fiji on 24 to 28 October 2005.

### **November**

Miss Gloria Guttenbeil, Assistant Crown Counsel attended the Regional Training for Lawyers in Human Rights Conventions & Standard and their application to Domestic Law, Policy and Practice held in Nadi, Fiji, on 7 to 11 November 2005.

Miss Gloria Guttenbeil, Assistant Crown Counsel, attended a workshop on Prosecuting Money laundering & Terrorists Financing held in Suva, Fiji on 14 to 18 November 2005.

The Solicitor General attended the Workshop on Access and Benefit Sharing, Traditional Knowledge and Custom Law held in Cairns, Australia on 21 to 24 November 2005.

Miss Gloria Guttenbeil, Assistant Crown Counsel, attended the Workshop on Liability for Nuclear Damage held in Sydney, Australia on 28 to 30 November 2005.

### **December**

Mr Sione Sisifa, Crown Counsel, attended the Workshop on International Criminal Justice Cooperation held in Port Vila, Vanuatu on 13 to 15 December 2005.

## ***III LEGAL ADVICE***

The Department continued to provide legal advice to various Government Ministries and Departments. The various topics included opinions on company documents, memorandums of understandings, international conventions, employment and on the application of the law to certain situations.

The Department issued a total of 208 written legal advice to Government Ministries and Departments. Oral advice was given where appropriate but this is discouraged within the Department. The remainder of the written correspondences related to administrative matters for Court cases and staff.

The main Government Departments/Ministries that requested and received legal advice from the Department were the Ministry of Justice, Ministry of Labour, Commerce and Industries, Ministry of Finance, Ministry of Foreign Affairs, the Prime Minister's Office and the Ministry of Lands, Survey and natural Resources.

Other Government Departments/Ministries received legal advice but at a lesser number. Schedule 2 contains a breakdown of the number of legal advice issued.

#### ***IV LEGISLATION***

##### ***1 The Law Committee***

The Law Committee continued to meet during the year to consider amendments to existing laws and to evaluate new Bills to be approved by His Majesty's Cabinet and the Privy Council for tabling before the Legislative Assembly.

In 2005, several new Acts and amendment Acts were enacted by the Legislative Assembly after being considered by the Law Committee.

The permanent members of the Law Committee are as follows:

- Minister of Lands, Survey and Natural Resources (Chairman)
- Attorney General & Minister of Justice
- Minister of Health
- Minister of Police
- Chief Justice
- Chief Secretary and Secretary to Cabinet
- Solicitor General
- Senior Crown Counsel
- Representative of the Tonga Law Society
- Secretary, Law Committee

Depending on the issues discussed, the Law Committee occasionally co-opted staff from the relevant Government Ministries and Departments to assist with the Law Committee's deliberations.

##### ***2 Acts of the Legislature***

The Legislative Assembly enacted the following legislation in 2005:

###### ***1 Room Tax (Repeal) Act 2005***

This Act repealed the Room Tax Act 1992.

- 2**     ***2005/2006 Appropriation Act 2005***  
This Act appropriated moneys to the service of the Government for the financial year 2005/2006.
- 3**     ***Consumption Tax (Amendment) Act 2005***  
This Act made several amendments to the Consumption Tax Act 2003.
- 4**     ***Customs and Excise (Amendment) Act 2005***  
This Act amended the Schedule to the Customs and Excise Act (Cap. 67) by varying a few tariffs relating mainly to beer and alcoholic spirits.
- 5**     ***Income Tax (Amendment) Act 2005***  
This Act amended the Income Tax Act (Cap. 68) by extending the exemption from income tax income derived from fishing and farming activities from 30 June 2005 to 30 June 2006.
- 6**     ***Forests (Amendment) Act 2005 (Yet to receive Royal Assent)***  
This Act amended the Forests Act (Cap. 126) to provide for the new Ministerial portfolio of Minister of Forests.
- 7**     ***Pesticides (Amendment) Act 2005 (Yet to receive Royal Assent)***  
This Act amended the Pesticides Act 2002 to provide for the new Ministerial portfolio of Minister of Forests.
- 8**     ***Plant Quarantine (Amendment) Act 2005 (Yet to receive Royal Assent)***  
This Act amended the Plant Quarantine Act (Cap. 127) to provide for the new Ministerial portfolio of Minister of Forests.
- 9**     ***Noxious Weeds (Amendment) Act 2005 (Yet to receive Royal Assent)***  
This Act amended the Noxious Weeds Act (Cap. 128) to provide for the new Ministerial portfolio of Minister of Forests.
- 10**    ***Garbage (Repeal) Act 2005***  
This Act repealed the Garbage Act (Cap. 101).
- 11**    ***Waste Management Act 2005***  
This Act provides for the collection and disposal of solid wastes and the management of all wastes in the Kingdom.
- 12**    ***Aquaculture Management (Amendment) Act 2005***  
This Act amends the Aquaculture Management Act 2003 by inserting reference to the Waste Management Act 2005.
- 13**    ***Public Health (Amendment) Act 2005***



This Act repeals Part VI of the Public Health Act 1992 which is a consequential amendment of the enactment of the Waste Management Act 2005.

- 14** *Transnational Crime Act 2005 (Yet to receive Royal Assent)*  
This Act implements the United Nations Security Council Resolution 1373 and Conventions dealing with terrorism and transnational organised crime, prevent terrorists from operating in the Kingdom and prevent persons in the Kingdom from taking part in terrorist activities and transnational crimes.
- 15** *Money Laundering and Proceeds of Crimes (Amendment) Act 2005*  
This Act amends the Money Laundering and Proceeds of Crime Act 2000 by requiring financial institutions to disclose information regarding specified entities.
- 16** *Aircraft Offences (Amendment) Act 2005*  
This Act amends the Aircraft Offences Act (Cap. 153) by inserting provisions for the disembarkation and delivery of persons who commit an offence in an aircraft.
- 17** *Legislative Assembly Retirement Benefit Scheme (Amendment) Act 2005*  
This Act amends the Legislative Assembly Benefits Retirement Scheme 2004.
- 18** *Criminal Offences (Amendment) Act 2005*  
This Act amends the Criminal Offences Act (Cap. 18) by including the offence of obtaining goods by unauthorised use of employer's name in the offences that may be prosecuted privately.
- 19** *Tonga Trade and Investment Act 2005*  
This Act provides for the establishment of the Tonga Trade and Investment Board to promote growth of trade and investment.

## **2** *Regulations*

The following Regulations were promulgated in 2005:

- 1** *Ports Authority (Overseas Vessels Tariff Fees) (Amendment) Standing Order 2005*  
These Orders amend the Ports Authority (Overseas Vessels Tariff Fees) Standing Orders 1999 made under the Ports Authority Act 1998 by providing new tariff fees for overseas vessels.
- 2** *Consumption Tax Regulations 2005*

These Regulations provide detail requirements for the application of the Consumption Tax Act 2003, and also provides prescribed forms.

**3      *Shipping (International Ship and Port Facility Security) Regulations 2005***

**4      *Traffic (Amendment) Regulations 2005***

**V      *COURT WORK***

The legal staff of the Department continued to appear in litigation matters which the Crown was involved in as a party.

**1      *The Judiciary***

The judiciary continued to be headed by the Chief Justice, Hon. Webster, and was assisted by Hon. Anthony Ford. Both Supreme Court judges alternated in sitting in the Supreme Court Circuit in 'Eua, Ha'apai and Vava'u. The Crown had matters in all the Circuits.

The Court of Appeal sat on 11 to 22 July 2005. The Court of Appeal consisted of the Chief Justice as President, the Hon. Justice Burchett of Australia, the Hon. Justice Tompkins of New Zealand and the Hon. Justice Salmon of New Zealand. Justice Burchett is a retired member of the Australian Federal Court. Justices Tompkins and Salmon are retired New Zealand High Court and Court of Appeal judges.

**2      *Criminal Cases***

Criminal cases continued to take up most of the Court work of the legal staff. A total of 312 new criminal cases were received in 2005. Only 83 criminal cases were dealt with during the year by the Courts. Of these cases 80 were cases from 2003 and 2004.

**3      *Civil Cases***

A total of 6 new civil claims were filed involving the Crown. Most of these cases involved claims for assault by Police officers.

**4      *Guardian ad Litem Cases***

These Family Law matters continue to be a significant part of the Department's work. This involves legal staff making interviews and home visits and writing up reports for the Court on the suitability of applicants for adoption of illegitimate children or to take guardianship of legitimate children. A total of 56 new applications were received and a total of 25 cases were closed during the year.

## 5 *Land Cases*

A total of 3 cases were received where claims were made against the Ministry of Lands. This brought the Land cases to 12. There is a marked decrease in Land cases. Most of the land disputes are between members of extended family.

## 6 *Bailiff Cases*

There were 4 cases received and 2 were closed during the year. In these cases members of the public dispute the Bailiff Division of the Ministry of Justice seizing property pursuant to a Warrant of Distress issued by the Supreme Court. The Department represents the Bailiff Division to ensure they seized the appropriate property.

## 7 *Summary of Significant Cases*

The following are summaries of some of the significant cases in the Court of Appeal and the Supreme Court where the Department's staff represented the Crown:

### **Rex – v – Tevita Siale, CR. 65/2005**

The Accused was charged with the murder of Salesi Taufalele *aka* Painsi Taufalele at Tatakamotonga on 31 January 2005 by repeatedly hitting his head with an iron bar and thus causing his death.

The Accused and Painsi were drinking together. They got into an argument and eventually had a fight. Painsi was able to punch the Accused causing him to fall to the ground. Painsi then stood over him and repeatedly punched the Accused. The Accused then called for some help. A friend of the Accused ran over and struck Painsi with an iron bar causing Painsi to fall to the ground. The Accused then grabbed the iron bar and repeatedly struck Painsi on the head while he was on the ground.

After considering the evidence the jury convicted the Accused of murder. The Chief Justice accordingly sentenced the Accused to life imprisonment. During sentencing the Chief Justice refused to exercise his discretion to impose the death penalty as the offending was not exceptionally depraved and of heinous character and that would constitute, on account of its design and manner of execution, a source of grave danger to the society at large. The Accused was accordingly sentenced to life imprisonment.

### **Rex – v – 'Aleksanita 'Ake, CR 140/05**

The Accused was charged with murdering his cousin Fekumi Matekuolava at Tokomololo on 4 May 2005 by using an iron rod and hitting him twice in the head causing severe injuries that caused his death.

After considering the evidence the Chief Justice found the accused guilty. The Court rejected the defence of extreme provocation. In sentencing the Accused, the Chief Justice held that the penalty for murder is mandatory life imprisonment and that the Court has no discretion to impose a lesser sentence. The Accused was accordingly sentenced to life imprisonment.

**Nakita Folau Tu'itavake – v – Rex, CA 4/05**

The Appellant appealed against his sentence for manslaughter of 10 years imprisonment, the last 2 years being suspended for 2 years. The Appellant was charged with murder but the jury convicted him of manslaughter instead.

The Court of Appeal held that the jury rejected self-defence but accepted there was extreme provocation that caused the Appellant to lose his self-control. The Appellant sought that his whole sentence be suspended because he did not cause the extreme provocation.

The Court of Appeal considered the New Zealand Court of Appeal decision *R v Edwards* CA 371/04 and *Solicitor General v Kane* 154/98 and held that the Appellant's sentence was excessive. The appeal was thus allowed. The sentence of 10 years was quashed and substituted for 5 years, the last 2 years to be suspended for 2 years.

**(1) Siesi Hala'api'api Sefo, (2) Naioka Tisiola Tu'ipulotu – v – Rex, CA 15-16/04**

The Appellants appealed against both conviction and sentence. The First Appellant was convicted of 4 counts of wilfully making false entry with intent to defraud and one charge of forgery. She was accordingly sentenced to 6 years imprisonment. The Second Appellant was convicted of 5 counts of wilfully making a false entry. She was accordingly sentenced to 5 years for each count, the final year is to be suspended for 2 years.

The Court of Appeal held that none of the grounds of appeal advanced by the Appellants had been made out on the appeal against conviction and it was accordingly dismissed.

On the appeal against sentence the main ground relied on was that the Learned Trial Judge had taken into account offending which the

Appellants had not been found guilty of. The Court of Appeal accepted this. The appeal against sentence was thus allowed and the sentences imposed were quashed. Both Appellants were sentenced to 4 years for each count, to be served concurrently, and that the last year be suspended for 2 years.

## SCHEDULE 1

### CROWN LAW DEPARTMENT STAFF AS AT 31 DECEMBER 2005

<i>Attorney General &amp; Minister of Justice</i>	<b>‘Siaosi Taimani ‘Aho</b> BA <i>Auck</i>
<i>Solicitor General</i>	<b>‘Alisi N. A. Taumoepeau</b> LLB, LLM (Hons) <i>Vict MA CM</i> , Dip Litigation Skills, Barrister & Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)
<i>Senior Crown Counsel (2)</i>	<b><i>Linda S. Folaumoetu’i</i></b> B.A. LL.B <i>Auck</i> LLM <i>Melbourne</i> Dip Litigation Skills, Barrister & Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)
	<b>‘Asipeli ‘A. Kefu,</b> LLB <i>Waik</i> Barrister & Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)
<i>Assistant Senior Crown Counsel(1)</i>	<b><i>Vacant</i></b>
<i>Crown Counsel(1)</i>	<b><i>Sione F. Sisifa</i></b> LL.B <i>USP</i> Dip. Legal Practice <i>Fiji</i> Barrister & Solicitor of the High Court of Fiji, Law Practitioner (Tonga)
<i>Assistant Crown Counsel (2)</i>	<b><i>Gloria Guttenbeil</i></b> BComm LLB <i>Otago</i> Barrister & Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)
	<b><i>Sarah N. Raasch</i></b> LLB <i>USP</i> Barrister & Solicitor of the High Court of Fiji, Law Practitioner (Tonga)
<i>Assistant Legal Officer (2)</i>	<b><i>Fine Tu’itupou Titaa</i></b> LLB <i>USP</i>
<i>Senior Interpreter</i>	<b><i>Seinimili T. Fonua</i></b> <i>Dip. Legal Studies USP</i>
<i>Interpreter</i>	<b><i>James Bruce Lutui</i></b>

*Computer Operator Grade I*

**Simaili Ma'ake  
Savelina Vika 'Ofahulu**

*Clerk Class I*

**Taufa 'Otuhouma**

*Computer Grade III*

**Katalina F. Leha**

*Drivers*

**Suiti Leilani Fekau**

*Vacant*

*Housekeeper*

**Siulolo Tu'itavuki**

**SCHEDULE 2****LEGAL ADVICE ISSUED DURING 2005**

<b>GOVERNMENT DEPARTMENT/MINISTRY</b>	<b>NUMBER OF LEGAL ADVICE ISSUED</b>
Prime Minister's Office	19
Ministry of Foreign Affairs	21
Ministry of Labour, Commerce & Industries	37
Ministry of Finance	23
Ministry of Lands, Survey & Natural Resources	13
Ministry of Marine & Ports	3
Ministry of Police	2
Ministry of Education	10
Ministry of Justice	40
Tonga Defence Services	-
Ministry of Agriculture and Forestry	4
Ministry of Health	5
Prisons Department	3
Ministry of Civil Aviation	1
Central Planning Department	6
Tonga Visitors Bureau	2
Ministry of Fisheries	3
Revenue Services Department	6
Ministry of Works	3
Audit Department	3
Office of the Commissioner of Public Relations	-