

## CROWN LAW DEPARTMENT

### 1 GENERAL

#### 1.1 Role

The Crown Law Department is under the Ministerial direction of the Attorney General and Minister of Justice.

The Attorney General is the Crown's First Law Officer. She 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, she decides whether or not and in what precise circumstances, she will issue her 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. She has similar statutory responsibilities under various statutes such as the

- Section 3: Crown Proceedings Act;
- Section 4: Maintenance of Illegitimate Children Act;
- Section 8: Defamation Act;
- Section 84: Quarantine Act;
- Sections 19, 20, 21 Electoral Act; and
- The Public Enterprises Act 2002.

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

- 1) Providing legal advice to Government;
- 2) Representing Government in civil litigation;
- 3) Criminal Prosecutions;
- 4) Legislative Drafting;
- 5) Law Officer functions;
- 6) Implement Government's Community Law Initiatives.

#### 1.2 Office

The Department is currently located in the Ministry of Justice Building on Lavinia Road, Nuku'alofa.

#### 1.3 Department Budget

The budget expenditure of the Department for the 2006/2007 financial year was \$1,147,355. For the 2007/2008 financial year the Department was granted \$1,483,041.

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### **2 STAFF**

#### **2.1 Staff during 2007**

In January 2007 the Department had a total of 9 established staff in which five (5) were law practitioners, and four (4) were the administrative support staff.

Later in 2007, three legal officers were recruited. Two were new graduates from the University of the South Pacific. The other had joined the Department the previous year on a daily paid basis and Cabinet had approved her to become an assistant legal officer.

A senior crown counsel funded by AUSAID was also recruited during the year to assist the Department in its litigation work.

There were two other support staff members whom are employed by the Department as daily paid labourers.

As of 31<sup>st</sup> December 2007, there were a total of 15 people working for the Department.

The legal officers employed in the Department hold law degrees from various universities in Australia, New Zealand and the University of the South Pacific. They each 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, of experienced legal officers.

Both the legal and administrative support staff contributed well to the efficient operation of the Department during 2007.

#### **2.2 Staff Matters**

On 21 June 2007, Mr Sione Sisifa Crown Counsel, was promoted to the post of Assistant Senior Crown Counsel, and Ms Gloria Pole'o, Assistant Crown Counsel, was promoted to the post of Crown Counsel.

On 4 July 2007, Mrs Seinimili Fonua, Assistant Legal Officer resumed duty after completing a Professional Diploma in Legal Practice from the University of the South Pacific.

On the 16 July 2007, Mr James Bruce Lutui, Assistant Legal Officer, went on study leave to study for a Professional Diploma in Legal Practice from the University of the South Pacific.

On 16 November 2007, Miss Annis Fapuiaki Finau, Returning Scholar, and Miss Lesieli Mafi, Assistant Legal Officer (Daily Paid) were appointed by his Majesty's Cabinet respectively to the posts of Assistant Legal Officer.

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On 16 November 2007, Miss Norma Fifita, Clerk (Daily Paid) was appointed by His Majesty's Cabinet to the post of Interpreter.

### **2.3 Regional and International Meetings and Workshops**

In 2007, members of the legal staff attended various regional and international meetings and workshops representing Government on legal matters.

Schedule II sets out in detail the regional and international meetings and workshops attended by the Department's legal staff.

### **2.4 Continued Legal Education**

Mrs. Seinimili Fonua, Assistant Legal Officer, and Mr James Bruce Lutui, Assistant Legal Officer attended the University of the South Pacific to complete a Professional Diploma on Legal Practice during 2007.

The legal staff initiated in-house presentations on legal topics of interest and directly relevant to the work of the Department. This allowed legal staff to share legal knowledge and experience with each other on an informal basis.

## **3 LEGAL ADVICE**

The Department continued to provide legal advice to Government Ministries and Departments. This was provided in written form in a timely manner and where necessary advice, advice was provided orally.

## **4 LEGISLATION**

### **4.1 The Law Committee**

The Crown Law Department continued to provide the secretariat duties to the Law Committee during the year. The 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 Privy Council for tabling before the Legislative Assembly, and also new draft regulations.

In 2007, several new Acts and amendment Acts were enacted by the Tongan Legislature after being considered by the Law Committee.

The permanent members of the Law Committee are as follows:

- Attorney General and Minister of Justice (Chair)
- Deputy Prime Minister and Minister of Health
- Minister of Finance
- Chief Justice
- Solicitor General
- Senior Crown Counsel
- Representative of the Tonga Law Society
- Secretary, Law Committee

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

Schedule III sets out the laws enacted by the Legislature and a brief description of the laws.

### **5 LITIGATION**

#### **5.1 Court of Appeal**

The Court of Appeal continued to sit in its annual session in July 2007. The Court of Appeal bench consists of Justices Burchett and Moore of Australia, and Justice Salmon of New Zealand.

This year the Court of Appeal dealt with 6 appeals. One appeal however was dealt with on the papers. The Crown was involved in 4 appeals, three were criminal appeals and one was a civil appeal.

In the criminal appeals, two appeals were against sentences imposed in the Supreme Court. The appeals were successful and so the sentences imposed in the Supreme Court were reduced. One appeal was against conviction, but the appeal was dismissed.

In the civil appeal, the matter was deferred to the Supreme Court for trial.

#### **5.2 Supreme Court**

The Supreme Court continues to be headed by the Hon Chief Justice Anthony Ford of New Zealand, and was assisted on a short-term basis by the Hon Justice John Laurensen, New Zealand High Court Judge, (Retired). In May 2007 Justice Laurensen's short term contract expired, and was replaced by Justice Warrick Andrew of Australia as the new permanent Supreme Court judge.

During the year, both Supreme Court judges alternated in sitting in the Supreme Court Circuits to 'Eua, Ha'apai and Vava'u. The Crown had matters in all the circuits.

##### **5.2.1 Criminal Cases**

Criminal cases continued to take up most of the litigation work of the legal staff.

At the start of the year there were 33 criminal cases that were yet to be resolved by the Courts.

During 2007 a total of 388 new criminal cases were committed from the Magistrates Court to the Supreme Court for criminal prosecution. These were mainly criminal prosecutions arising out of the riots of 16 November 2006.

A total of 187 criminal cases were resolved by the Courts, 58 of those were from previous years, and 129 were 2007 criminal cases.

At the end of 2007, a total of 234 cases remain to be resolved by the Courts.

### 5.2.2 Civil Cases

At the start of the year there were five civil cases involving the Crown that were yet to be resolved by the Courts.

During 2007 a total of 15 new civil claims were filed involving the Crown. A majority of the civil cases were against the Police.

A total of five civil cases were closed.

At the end of 2007, a total of 15 civil cases remain to be resolved by the Courts.

### 5.2.3 Family Matters

The Supreme Court continued to refer family applications under its Family Jurisdiction to the legal staff to provide confidential reports in the interests of the children. This work continues to be a significant part of the work of the legal staff. These are mainly applications for adoption of illegitimate children under the Maintenance of Illegitimate Children Act (Cap 30), and applications for guardianship of legitimate children under the Guardianship Act 2004.

During 2007 a total of 43 applications were referred to the legal staff to provide confidential reports to the Courts.

### 5.3 Land Court

At the start of the year there were 5 land cases involving the Crown that were yet to be resolved by the Land Court.

During 2007 a total of four land cases were filed against the Hon Minister of Lands.

Only one case was resolved during the year.

At the end of 2007, a total of eight land cases remain to be resolved by the Land Court.

### 5.4 16/11 Criminal Cases

#### 5.4.1 Riot Trials

The riots of 16 November 2006 increased the Department's criminal workload by around threefold. In order to cope with the hundreds of criminal cases to be tried in the Supreme Court, the Court agreed with counsels to group the cases for group trials. Nearly all the accused elected to have jury trials, with a handful preferring judge alone trials.

Accordingly there are groups based on location, i.e. Central Nuku'alofa, Central Nuku'alofa (Shoreline), Eastern Nuku'alofa, Southern Nuku'alofa; and groups based on the charges they face, i.e. group that destroyed vehicles and sedition groups. There are 11 jury group trials, one judge alone group trial, two sedition group trials and one vehicles group trials. The Court has indicated that it aims to complete all 16/11 trials by the end of 2008.

### 5.4.2 Adult Diversion Scheme

The Hon Attorney General, through her inherent powers as First Law Officer of the Crown and thus head of all Crown Prosecutions, established the Adult Diversion Scheme. The scheme was endorsed by the Police, the Courts and the defence counsels. The main objective of the scheme is to grant certain offenders a second opportunity to mend their ways and not go through criminal prosecution if their circumstances satisfied the following criteria:

- no previous convictions (particularly for property offences);
- return/recovery of all or most of goods stolen;
- low level of offending, i.e. an opportunist as opposed to a rioter causing damage then committing looting;
- number of charges (generally for those charged with only one count);
- further use of stolen goods (e.g. selling stolen property);
- co-operation with the police/military;
- admission of offending;
- remorsefulness;
- unlikelihood of further offending;
- benefit of adult diversion.

The scheme also greatly assisted in lightening the workload of the Courts and legal counsels involved, and alleviating scarce Court resources.

The social aspects of the scheme were provided by the Tonga Lifeline, Napa'alilo

During 2007 45 criminal cases relating to the riots of 16 November 2006 were identified to be considered for adult diversion.

A total of 17 criminal cases were referred to the Adult Diversion Scheme.

At the end of 2007 28 criminal cases remain to be referred to the Adult Diversion Scheme

### 5.5 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:

#### ***Hon Veikune – v – Kingdom of Tonga LA 09/07***

Hon Veikune filed a claim in the Land Court against the Kingdom that since the date of his conviction on 25 January 2006 for bribery of a Government servant, the Kingdom has been wrongfully withholding his emoluments as a Noble and the rent paid up on his leases from his hereditary estates. This was done on the basis of section 37 of the Land Act which provided that any noble convicted of an indictable offence lost his hereditary title and hereditary estates.

Hon Justice Andrew held that the Plaintiff had been deprived of the hereditary title of "VEIKUNE" and the hereditary estates assigned to the "VEIKUNE" title by operation of the law, namely section 37 of the Land Act. The Court also held that the Plaintiff ceased to hold his title and his estates on the 25 January 2006 when he was found guilty in the

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Supreme Court of having committed an indictable offence. Finally, there is no conflict between clause 44 of the Constitution and section 37 of the Land Act. The Plaintiff therefore has no claim to any emoluments as a Noble from the 25 January 2006 and no claim to any rent on leases from his former hereditary estates as from 25 January 2006.

The claim was thus dismissed and costs were awarded for the Kingdom. The Plaintiff however applied to the Court to order the parties to pay their own costs because this case was the first of its kind and it has Constitutional significance. This issue has yet to be determined by the Court.

### ***Rex – v – 'Akilisi Pohiva, Clive Edwards, 'Isileli Pulu, 'Ulifi Uata, Lepolo Taunisila, CR 124-8/07***

The five accused are the Peoples Representatives in the Legislative Assembly of Tonga who have been charged with sedition arising from the events of 16 November 2006. The Crown made an application to amend the indictments for the second time for the purpose of adding new charges. The accused opposed the application.

The Hon Chief Justice held that the Crown had a right to seek leave to amend an indictment by adding additional counts even after the case has been set down for trial, without having a further preliminary inquiry.

The trial will be held in August 2008.

### ***Rex – v – Latiume Fungavai, CR 113/06***

The accused was a police constable who was charged with rape of a woman while she was kept in police custody. After a two day trial, and written submissions by Counsel, the Hon Chief Justice returned a verdict of guilty. The accused was sentenced to seven years imprisonment. The accused did not appeal the sentence.

### ***Rex – v – Ma'ake Kali, CR 57/07***

This was the first criminal trial arising of the riots of 16 November 2006. The trial was heard before the Hon Chief Justice and a jury in July 2007. The accused was charged with riotous assembly and destruction of building by rioters. The Crown called only one witness. After a six day trial the jury convicted the accused. He was subsequently sentenced to serve 3 years imprisonment for riotous assembly and seven years imprisonment for destruction of building by rioters, and both sentences were made concurrent. The accused did not appeal his sentence.

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### SCHEDULE 1

#### CROWN LAW DEPARTMENT STAFF AS OF 31 DECEMBER 2007

<i>Attorney General &amp; Minister of Justice</i>	<b>'Alisi N. A. Taumoepeau</b> MA (CM), LLB, LLM (Hons), Dip Litigation Skills, Barrister & Solicitor of the High Court of NZ, Law Practitioner (Tonga)
<i>Solicitor General</i>	<b>Linda S. Folaumoetu'i</b> B.A. LL.B Auck LLM Melbourne Dip Litigation Skills, Barrister & Solicitor of the High Court of NZ, Law Practitioner (Tonga)
<i>Senior Crown Counsel (3)</i>	<b>'Asipeli 'A. Kefu,</b> LLB, Waik LLM VUW, Barrister & Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)  <b>Peter J. Little</b> LLB, Sydney LLM, Sydney, Dip Criminology Sydney, Barrister of the Supreme Courts of NSW, Vic, Qld, SA, ACT, Barrister & Solicitor of High Court of Solomon Islands, Law Practitioner (Tonga)
<i>Assistant Senior Crown Counsel (4)</i>	<b>Sione F. Sisifa</b> LL.B USP Dip. Legal Practice USP Barrister & Solicitor of the High Court of Fiji, Law Practitioner (Tonga)
<i>Crown Counsel (3)</i>	<b>Gloria Gutfenbeil Pole'o</b> BComm LLB Otago Barrister & Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)
<i>Assistant Crown Counsel (3)</i>	<b>Sela Moa</b> LLB USP Barrister & Solicitor of the High Court of Fiji, Law Practitioner (Tonga)
<i>Assistant Legal Officer (5)</i>	<b>Seinimili T. Fonua</b> LLB USP  <b>Lesieli Mafi</b> BA/LLB Otago, Barrister and Solicitor of the High Court of New Zealand, Law Practitioner (Tonga)  <b>Annis F. Finau</b> LLB USP



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	<b>James B. Lutui</b> LLB USP
<i>Senior Interpreter</i>	<b>Vacant</b>
<i>Interpreter</i>	<b>Norma O.C. Fifita</b>
<i>Computer Operator Grade I</i>	<b>Savelina Vika 'Ofahulu</b>
<i>Clerk Class I</i>	<b>Taufa 'Ofuhouma</b>
<i>Computer Grade III</i>	<b>Katalina F. Leha</b>
<i>Driver</i>	<b>Vacant</b>
<i>Housekeeper</i>	<b>Siulolo Tu'itavuki</b>

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### Schedule II

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

#### **February**

Mrs Gloria Pole'o, Assistant Crown Counsel, attended a workshop on Drug Trafficking held in Sydney Australia.

#### **July**

Mr 'Aminiasi Kefu, Senior Crown Counsel, attended the International Crime Cooperation Workshop held in Apia, Samoa. The workshop was funded by AUSAID.

Mr. James Bruce Lutui, Assistant Legal Officer, attended a workshop on Legislative Drafting held in Port Vila, Vanuatu.

#### **August**

Miss Lesieli Mafi, Assistant Legal Officer, attended a red cross and red crescent conference held in Wellington New Zealand.

#### **September**

Miss Lesieli Mafi attended a workshop on Fisheries and building capacity which was held in Apia, Samoa.

#### **November**

Mrs Linda Folaumoetu'i, Solicitor General, attended a Conference for Commonwealth Law Officials Meeting held in London England.

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### Schedule III

#### 1. **Appropriation Act 2007/2008**

This Act provides for the appropriation of money from the General Revenue and other funds of Kingdom of Tonga to supplement the expenses of Government for financial year 2007/2008.

#### 2. **Health Promotion Foundation Act 2007**

This Act proposes to establish a Health Promotion Foundation, with the Tongan Health Promotion Fund. The Foundation will be governed by a Board, which will administer the Fund. Funding is expected to be obtained primarily from appropriation from Government, tobacco taxation (directly or otherwise), donations, or other sources. The intention is to make grants available for a range of health promotion activities (tobacco, nutrition, physical activity, alcohol misuse, injury, sexual health, etc). The Fund will not be applied for medically orientated clinical treatments or interventions, but rather for activities that address risk factors and prevent the onset of disease (eg. anti smoking programmes, physical activity programmes, etc.)

#### 3. **Nationality (Amendment) Act 2007**

Dual Citizenship is an issue of increasing public interest since the enactment of the Nationality (Amendment) Act d2007, which allowed Tongan nationals to maintain their Tongan nationality when they acquire a foreign nationality. The Nationality (Amendment) Act 2007 makes provision for re-admitting to Tongan nationality persons who lost their Tongan nationality prior its commencement. The Nationality (Re-admission) Regulations 2008 prescribes the procedure for re-admission.

#### 4. **Customs and Excise Management Act 2007**

This Act contains the administrative provisions for the Customs Act 2007 and the Excise Tax Act 2007, namely the standard customs provision which include Customs control on all goods arriving within or departing from the Kingdom until an appropriate written declaration has been lodged to the satisfaction of Customs.

#### 5. **Customs Act 2007**

This Act has been drafted to give effect to a new tax regime in Tonga to facilitate accession to the WTO.

The Act was drafted to take effect concurrently with the Customs and Excise Management Act 2007, and the Excise Tax Act 2007. The purpose of this Act is to impose customs duty on imported goods. On Tonga's accession to the WTO the sum total of Customs duty and excise tax on imported and domestically manufactured excisable goods are to be harmonised, with similar rates of tax applying to both imported and domestically manufactured goods.

#### 6. **Excise Tax Act 2007**

This Act has been drafted to give effect to a new tax regime in Tonga to facilitate accession to the WTO.

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The Act was drafted to take effect concurrently with the Customs and Excise Management Act 2007, and the Customs Act 2007. The purpose of the Excise Tax Act is to impose an excise tax on selected imported and manufactured goods. In the Customs and Excise Act (CAP.67), excise duty was imposed on locally manufactured goods, however, this has been separated into this Act with the addition of imposing excise tax on some imported goods also. On Tonga's accession to the WTO the sum total of Customs duty and excise tax on imported and domestically manufactured excisable goods are to be harmonised, with similar rates of tax applying to both imported and domestically manufactured goods.

The goods subject to excise tax will be listed in the Regulations, however it is intended that this tax will apply to consumable alcohol, tobacco and petroleum products, also motor vehicles.

### **7. Customs and Excise (Repeal) Act 2007**

This Act is comprised of 3 sections and proposes to repeal the Customs and Excise Act (CAP. 67), which will be replaced by the new Customs and Excise Management Act 2007, Customs Act 2007 and the Excise Tax Act 2007.

### **8. Consumption Tax (Amendment) Act 2007**

The act is consequential to the passing of the Customs and Excise Management Act 2007, the Customs Act 2007 and the Excise Act 2007 and makes provisions in the Consumption Tax Act 2003 to ensure that the amount paid for excise tax will be included in the value of the import of goods for the purposes of calculating the amount of consumption tax payable.

### **9. Revenue Services Administration (Amendment) Act 2007**

The Act is consequential to the passing of the Customs and Excise Management Act 2007, the Customs Act 2007 and the Excise Tax Act 2007 and makes provisions in the Revenue Services Administration Act 2002 to ensure the appeal provisions in that Act also apply where applicable to the Customs and Excise Management Act 2007, the Customs Act 2007 and the Excise Tax Act 2007.

### **10. Income Tax Act 2007**

The Act has several purposes. First, the Act implements a number of policy changes to the income tax and include the simplification and rationalisation of income tax rates and personal deductions and the treatment of wage withholding as a final tax for many employees. Secondly, the Act modernises the income tax including more detailed provisions relating to the taxation of international transactions have been included reflecting the increased importance of international transactions in the global economy. Thirdly, the Act simplifies the structure and drafting of the income tax law. There is significant clarification of the amounts that are subject to tax or allowed as a deduction. Finally, the Act includes measures to prevent the avoidance of tax.

### **11. Electricity Act 2007**

The purpose of this Act is to modernise the regulation of the electricity sector in Tonga. The regulation established by this Act will give consumers certainty about the price of

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electricity and the service they should receive, and give electricity businesses the certainty they need to invest and improve their business.

### **12. Tonga Electric Power Board Repeal) Act 2007**

This Act repeals the Tonga Electric Power Board Act (CAP. 93).

This amendment is consequential on the new Electricity Act 2007.

### **13. Anti-Corruption Commissioner Act 2007**

### **14. Emergency Management Act 2007**

This Act makes provision for emergency management in the Kingdom. The policy objective of the Act is to provide for effective emergency management, and to protect lives, property, the economy and the environment in the Kingdom through prevention, mitigation, preparedness, response and recovery. Events may be natural, including a cyclone and associated storm surge, earthquake, tsunami, volcanic eruption, or man-made, such as an oil spill, failure or essential infrastructure or terrorist attack.

### **15. Public Audit Act 2007**

This Act takes over and replaces the existing Public Audit (CAP. 66) in order to meet Tonga's present and future requirements while at the same time introducing audit provisions reflecting existing trends and International Organisation of Supreme Audit Institutions ("INTOSAI") best practices.

### **16. Public Audit (Repeal) Act 2007**

This Act repeals the Public Audit Act (CAP. 66)

This amendment is consequential on the new Public Audit Act 2007.

### **17. Interpretation (Amendment) Act 2007**

This Act amends the Interpretation Act (CAP. 1), in section 2(1) of that Act, by adding a new definition for "Minister of Finance" to include both the Treasurer and the Chief Commissioner of Revenue. It also adds a new section 6A, which is a saving provision for Judges.

### **18. Tonga Law Commission Act 2007**

This Act establishes the Tonga Law Commission

### **19. National Reserve Bank of Tonga (Amendment) Act 2007**

The National Reserve Bank of Tonga Act (Cap. 102) has been in force for some 17 years. The domestic and international financial intermediaries and system have advanced and developed significantly over the past 17 years. The Act has therefore been reviewed to identify changes that would enhance the ability of the Bank to implement its principal purposes especially the conduct of monetary policy. The amendments proposed

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focuses on increased autonomy for the NRBT in conducting monetary policy and increased obligations placed on it to strengthen the accountability and transparency of the NRBT in exercising those powers. The proposed amendments also update the current legislation to become more in line with international and regional best practice.

### **20. Criminal Offences (Amendment) Act 2007**

This Act amends the Criminal Offences Act (CAP. 18); section 197 is repealed and replaced by stating that all prosecutions may be brought by the Attorney General or the person aggrieved.

### **21. Industrial Development Incentives (Repeal) Act 2007**

This Act repeals the Industrial Development Incentives (CAP. 114).

Notwithstanding section 2, the Industrial Development Incentives Act (CAP 114) will continue to apply for all purposes.