



KINGDOM OF TONGA

Country Report

Pacific Islands Law Officers' Network
(PILON)

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Samoa

I INTRODUCTION

It gives me great pleasure to present the Kingdom of Tonga's 2009 Country Report to the Pacific Islands Law Officers Network.

I would like to first and foremost thank the Attorney General of Samoa and his office for their warm welcome and great hospitality. I congratulate you on hosting the 2009 PILON meeting.

May I also take this opportunity to pass on to you well wishes from my office in the recovery efforts made after the devastating October tsunami. Tonga suffered the same fate as you did, albeit at a lesser degree, nevertheless to equally devastating effects. We understand what your people are going through, and our prayers are with all victims.

Tonga faced significant events in 2009. First, the October tsunami that hit both American Samoa and Samoa, also hit the most northern island group of Niuaotupapu, and claimed 6 lives. In August the inter-island ferry, the MV *Princess Ashika*, sunk between the island groups of Tongatapu and Ha'apai, resulting in the loss of 74 lives. May I acknowledge with thanks Mr Attorney General for your well wishes sent to our office soon after the tragic sinking of the ferry. May we continue to support each other not only as brothers and sisters in the law, but also as a family in this vast ocean.

More relevant to PILON however are the significant constitutional changes Tonga is going through. First and foremost are the changes to the office of Attorney General. In May 2009 Government appointed for the first time its first independent Attorney General. Furthermore, the post of Attorney General was separated from the post of Minister of Justice. More significantly, the Attorney General is no longer a member of Cabinet, Privy Council or the Legislative Assembly. The post however is of Ministerial level, meaning the post is given the same privileges and benefits of a Cabinet minister.

At present Tonga's Legislative Assembly is currently considering recommendations from the Constitutional and Electoral Commission regarding reforms to Tonga's 134 year old Constitution, and other significant legislation in order to bring into effect political reforms. The challenge is for the Legislative Assembly to enact the necessary legislative reforms in 2010 for elections to take place under the new political reforms in November 2010. One of the recommendations that have been approved is for express recognition and establishment of the office of the Attorney General in the Constitution and to guarantee its independence.

In the judiciary, the Tongan judiciary continues to administer justice with high public confidence, under the leadership of His Honour the Chief Justice Anthony Ford. In July this year the whole of the judiciary and the legal profession came together for the first time in the first ever admission ceremony of a Senior Counsel. This consisted of justices of the Court of Appeal, the Supreme Court, Magistrates, Land Assessors, His Majesty's Law Lords (personal legal advisers to His Majesty), and the Tonga Law Society. Such a ceremony is planned to be an annual fixture.

In relation to litigation, Crown Law continues to enjoy a high conviction rate. Crown Law has introduced its own prosecution guidelines, based on that of the United Kingdom, also new internal criminal procedures, continuing legal education programmes (in-house legal presentations), Crown

counsel classification and job descriptions, and contracting Crown counsels in order to demand high performance. Civil and land cases also provide significant work.

In relation to legislative drafting, Crown Law continued to be tasked with a heavy legislative programme. This year Crown Law processed approximately 43 bills, and 31 regulations. The legislative programme however has been stalled due to the Legislative Assembly's consideration of the recommendations for political reform.

In relation to legal advice, the Attorney General and Solicitor General continue to provide legal advice to Cabinet, individual Ministers, and Heads of Departments. Legal advice is provided in written form, emails and also verbal. Most advice has been on constitutional, criminal, contractual, environmental, immigration and nationality issues.

In 2010 I will be recommending to Government to re-structure Crown Law in order to establish an independent legal service for the Government under a professional and efficient structure. The office will be called the Attorney General's Chambers, consisting of four different offices of the Solicitor-General, Prosecutor-General, Chief Parliamentary Counsel and Executive-General. Each office will be given the scope of work and powers to perform duties and functions independently for the public interest, but each ultimately to be accountable to the Attorney General.

All this however will be subject to political will, and the current political reforms seems encouraging. It is hoped that the new Government will continue to respect and uphold the independence of the office of Attorney General and its support offices.

In closing I hope the discussions in this PILON will be fruitful for all delegates. I look forward to positive and constructive dialogue, and also agreeing on realistic outcomes to better our work as custodians of the rule of law in our region.

Malo 'aupito.

John Cauchi SC
Attorney General

II GENERAL

The Crown Law Department operates under the direction of the Attorney General of the Government of the Kingdom of Tonga.

The Attorney General is the First Law Officer for the Government of the Kingdom of Tonga. The Attorney General is not a Minister of the Crown, and will thus not a member of Cabinet, Privy Council or the Legislative Assembly of Tonga. The Attorney General however will still hold the same powers and privileges of a Minister of the Crown.

In May 2009 Government appointed Mr John Cauchi SC to be its first independent Attorney General. Mr Cauchi first worked with Tonga's Crown Law as a Senior Crown Counsel in the late nineties, and then moved on to work in Vanuatu and Solomon Islands, as Director of Public Prosecutions, and then returned to private practice in Australia, before taking up the post of Attorney General.

The change of nature of the office of the Attorney General performs his legal functions independent of Government, as part of His Majesty's vision for Constitutional Reform and Good Governance. The Attorney General's main responsibility is to direct the legal services provided by the Crown Law Department for the Government. These legal services include the following:

- Providing legal advice to His Majesty's Cabinet, and Government Ministries and Departments;
- Drafting legislation for Government to be submitted to the Legislative Assembly;
- Conducting criminal prosecutions on behalf of the Crown (The Crown meaning His Majesty the King and the community at large);
- Representing the Crown in civil, land and where appropriate, family litigation;
- Performing law officers role for Judiciary; and
- Facilitating community law initiatives promoting the rule of law and legal awareness.

In addition to the Crown Law Department's legal services, the Attorney General is also responsible for the following:

- Supporting constitutional integrity and governance;
- Ensuring legislative and statutory efficacy;
- Facilitating Government's lawful and responsible legal dealings;
- Providing legal advice on law reform;
- Executing statutory enforcement powers; and
- Performing responsibilities in an independent and transparent manner.

The Solicitor General is the Deputy to the Attorney General, and is the Head of Department of the Crown Law Department. He is responsible for implementing the directions of the Attorney General, and the daily administration and operations of the Crown Law Department. In April 2009 Government appointed Mr 'Aminiasi Kefu as Solicitor General after being Senior Crown Counsel for seven years, and a total of 12 years with Crown Law.

III OBJECTIVES AND STRATEGIES

The vision of Crown Law is that “*Crown Law is reliable for providing excellent legal services with professional integrity*”.

Crown Law’s mission is therefore “*To provide professional, independent and quality legal services to His Majesty’s Government, and to support and maintain the integrity of the Kingdom’s judicial system*”.

The vision and mission are based on values of: integrity, professionalism, independence, quality, efficiency, responsiveness, timeliness, commitment, dedication, teamwork, harmony, and loyalty.

Crown Law has set itself the following five objectives to achieve in the next five years:

1 Modernise Infrastructures

- Provide appropriate offices and workstations (including computers, email/limited internet access, telephone) for legal and administrative support staff;
- Develop a law library;
- Establish an office intranet;
- Establish a crown law website, and migrate www.tongalaws.to website to the new website or vice versa;
- Regularly upload recent legislation, including Court judgments on the new Crown Law website;
- Establish an IT section, with centralised printing and photocopying;
- Establish an information Management section, to develop and maintain a centralised and computerised filing system with ability to provide monitoring and statistics reports, and an archives facility;
- Establish a legal bookshop to sell laws (acts, regulations, Orders etc.) and judgments to the public;
- Construct further office space for Chief Crown Prosecutor and Chief Parliamentary Counsel and legal and support staff;
- Construct a new fence for office grounds, with security posts at gates;
- Expand parking areas for staff;
- Install security system for entry; and
- Construct a canteen/ refreshments centre for staff and social functions.

2 Strengthen Human Resources

- Introduce and administer a performance management system;
- Re-designate Administrative Staff/ Job Descriptions;
- Regularly send legal staff on legislative drafting training;
- Regularly send legal staff on prosecution trainings;
- Regularly send legal staff for post graduate legal studies;
- Establish quarterly legal workshops, and may include stakeholders;

- Establish appropriate administrative support staff training;
- Seek in-country scholarships for support staff (computer, administration, and accounting);
- Establish social activities programme, including health fitness programme, and arranging regular health checks; and
- Arrange first-aid and basic life survival skills training.

3 Remunerate legal staff appropriately

- Engage appropriate consultants (with endorsement of Public Service Commission), to conduct work value survey on duties and functions of legal staff (as directed by the Government's Expenditure Committee regarding Crown Law's submission for a Crown Counsel 20% Duty Allowance);
- Complete 'work value survey' to the Public Service Commission by January 2010; and
- Present findings of 'work value survey' to the Government's Expenditure Review Committee in March 2010, and seek approval of the Crown Counsel 20% Duty Allowance.

4 Establish and Maintain Independence

- Obtain formal Government approval that the Crown Law will become an independent office from Government;
- Draft appropriate amendment to the Constitution to provide for the Office of the Attorney General;
- Draft appropriate new legislation (Attorney General Office Bill); and
- Transfer of legal and administrative staff from Public Service to the new Attorney General Office.

5 Restructure Legal Staff Duties and Functions

- Recruit more legal staff so there can be around 23 Crown Counsels;
- Obtain approval for Crown Law Department to change its name to the "Attorney General's Office";
- Create two posts of Chief Crown prosecutor and Chief Parliamentary Counsel, at a level down from the Solicitor General, but all under the Attorney General;
- Designate the Solicitor General to head the provision of Government legal advice, represent the Crown in land and civil matters, appear in Court of Appeal/ Privy Council matters and Prosecute high crimes, with legal staff up to 6 (total 7);
- Designate the Chief Crown Prosecutor to head public prosecutions (police and departmental prosecutions), with legal staff around 9 (total 10); and
- Designate the Chief Parliamentary Counsel to head legislative drafting programme, with legal staff of around 6 (total 6).

IV RESOURCES

The Department is located in the administrative building on the corner of Lavinia and Kausela Road, Fasi-moe-afi, Nuku'alofa. The Department occupies a one storey building with 10 offices, one conference room, one common room, one kitchen, and toilet facilities and garage.

The budget expenditure for the Department for the 2008/2009 financial year the Department was allocated \$1,278,005. For the 2009/2010 financial year, the budget allocated is \$1,380,000. The main financial expenditure for the Department is salaries, consultancy fees, liabilities, utilities and office equipment and furniture.

At present, there are 11 qualified professional legal staff including the Solicitor General and the Attorney General. There is also eight support staff. At present, the task is to recruit more professional legal staff, and also re-designate support staff, in order to effectively carry out the functions of the Department.

The challenges faced by the Department are as follows:

- Remuneration for legal staff;
- Office infrastructure (including office equipment, and furniture);
- Legal staff experience;
- Retention of experienced legal staff;
- Recruiting new legal staff;
- Political pressure;
- Government non-compliance with the rule of law;
- General populous legal illiteracy.

The strengths of the Department are as follows:

- Retention of a few experienced staff;
- Young and capable legal staff;
- High morale;
- Team work;
- Clear leadership.

The opportunities for the Department are as follows:

- Government policy to have an independent Attorney General's Office;
- Ownership of own building and grounds;
- Small to middle sized office;
- Young and capable legal staff (2-3 years experience).

V LITIGATION

1 Criminal Prosecutions

As of September 2009, the Department was dealing with around 82 criminal cases. There have been 28 cases fixed for trial on a 'Not Guilty' basis, and out of those that have been determined, there have been:

- 44 cases resulting in convictions due to guilty pleas and trials;
- 6 cases where the Crown offered no evidence;
- 3 cases resulted in an acquittal; and
- 1 case was remitted for trial in the Magistrate's Court.

As of September 2009, Crown Law continues to achieve a very high conviction rate (81%) out of the 54 cases that have been determined. The Solicitor General and eight other legal staff handle the criminal prosecutions.

In relation to the prosecution of the 16/11 riots from November 2006, all 303 matters in the Supreme Court have been dealt with except one matter, which is awaiting trial in May 2010.

2 Civil Claims

To date, there were 22 civil claims that were filed against the Crown, and five have been settled out of court. Of the remaining 17 active files, there are 12 claims in the Supreme Court and five in the Magistrate's Court. All the claims in the Magistrate's Court are against the police for unlawful use of police powers, and in the Supreme Court there are four claims against the Police, two claims against Customs, two against the Prime Minister's Office, and one claim each against the Ministry of Labour, Commerce and Industries, Ministry of Prisons, Public Service Commission, the Vital Statistics Division of the Ministry of Justice. These cases have been set down for trial in 2010.

Under the Attorney General, Crown Law has re-commenced negotiating settlements and utilising mediation to settle some civil claims, change of policy due to high costs in referring civil cases to hearings on quantum of damages. The Solicitor General looks after all the civil cases.

3 Land Cases

To date, there are 10 claims against the Minister of Lands in relation to land matters. These cases are mainly claims on unlawful granting of land title or leases. These cases have been set down for trial in 2010, and have gone beyond the possibility of any settlement or mediation process. Most of the claims are family disputes over land, and in others, they are disputes without claims against the Minister, and so the Crown take an inactive role and undertake to be bound by the results of the case. The Solicitor General looks after all the land cases.

VI LEGISLATION

Crown Law was tasked by His Majesty's Cabinet with a heavy legislative programme. These included the following bills for the Legislative Assembly:

- 1 Appropriation Act 2009;
- 2 Act of Constitution of Tonga (Amendment) Act 2009;
- 3 Royal Commissions (Amendment) Act 2009;
- 4 Shipping (Amendment) Act 2009;
- 5 Industrial Property (Amendment) Act 2009;
- 6 Companies (Amendment) Act 2009;
- 7 Maritime Zones Act 2009;
- 8 Illicit Drugs Control (Amendment) Act 2009;
- 9 Marine Pollution Prevention (Amendment) Act 2009;
- 10 Petroleum Mining (Amendment) Act 2009;
- 11 Interpretation (Amendment) Act 2009;
- 12 Continental Shelf (Repeal) Act 2009;
- 13 Territorial Sea and Exclusive Economic Zone (Repeal) Act 2009;
- 14 Renewable Energy (Amendment) Act 2009;
- 15 Retirement Fund Board (Amendment) Act 2009;
- 16 Law Revision (Miscellaneous) (Amendment) Act 2009;
- 17 Admiralty (Amendment) Act 2009;
- 18 Minerals (Amendment) Act 2009;
- 19 Aquaculture Management (Amendment) Act 2009;
- 20 Fisheries Management (Amendment) Act 2009;
- 21 Consumer Protection (Amendment) Act 2009;
- 22 Public Health (Amendment) Act 2009;
- 23 Plant Quarantine (Amendment) Act 2009;
- 24 Biosafety Act 2009;
- 25 Waste Management (Amendment) Act 2009;
- 26 Bankruptcy Bill 2009 (Not Approved by Legislative Assembly);
- 27 Remuneration Authority Bill 2009 (Not Approved by Legislative Assembly);
- 28 Personal Property Security Bill 2009;
- 29 Prisons Bill 2009;
- 30 Waste Authority (Amendment) Bill 2009;
- 31 National Retirement Fund Bill 2009;
- 32 Tonga Security and Intelligence Service Bill 2009;
- 33 Public Holidays (Amendment) Bill 2009;
- 34 Probate (Amendment) Bill 2009;
- 35 Public Enterprises (Amendment) Bill 2009;
- 36 Revenue Services Administration (Amendment) Bill 2009;
- 37 Customs and Excise Management (Amendment) Bill 2009;
- 38 Customs (Amendment) Bill 2009;
- 39 Excise Tax (Amendment) Bill 2009;
- 40 Consumption Tax (Amendment) Bill 2009;
- 41 Income Tax (Amendment) Bill 2009; and
- 42 Nationality (Amendment) Bill 2009.

The following were the regulations processed:

- 1 Layout-Designs (Topographies) of Integrated Circuits Regulation 2009;
- 2 Protection of Geographical Indications Regulations 2009;
- 3 Charitable Trusts Regulations 2009;
- 4 Registration of Business Names Regulations 2009;
- 5 Fisheries (Local Fishing) Regulations 2009;
- 6 Fisheries (Vessel Monitoring System) Regulations 2009;
- 7 Fisheries (Tuna Management and Development) Regulations 2009;
- 8 Fisheries (Limutanga'u) Regulations 2009;
- 9 Foreign Exchange Control (Restriction on Removal of Cash) Regulations 2009;
- 10 Fisheries (Coastal Communities) Regulations 2009;
- 11 Pesticides Regulations 2009;
- 12 Animal (Importation) Regulations 2009;
- 13 Districts (Animal Enclosure) Regulations 2009;
- 14 Foreign Exchange Control (Amendment) Regulations 2009;
- 15 Tonga Defence Services (Amendment) Regulations 2009;
- 16 Retirement Fund Administration (Amendment) Regulations 2009;
- 17 Consumption Tax (Amendment) Regulations 2009;
- 18 Money Laundering and Proceeds of Crime Regulations 2009;
- 19 Customs and Excise Management (Amendment) Regulations 2009;
- 20 Income Tax (Amendment) Regulations 2009;
- 21 Traffic (Amendment) Regulations 2009;
- 22 Companies (Amendment) Regulations 2009;
- 23 MV Princess Ashika (Exclusion Zone) Regulations 2009;
- 24 Civil Aviation (Prohibition Zone) Regulations 2009;
- 25 Companies (Amendment) (No.2) Regulations 2009;
- 26 Business Licences (Amendment) Regulations 2009;
- 27 Industrial Property (Amendment) Regulations 2009;
- 28 Incorporated Societies (Amendment) Regulations 2009;
- 29 Passport (Amendment) Regulations 2009;
- 30 Immigration (Amendment) Regulations 2009; and
- 31 Naturalisation (Amendment) Regulations 2009;

The challenge for legislative drafting continues to be a lack of drafting expertise and personnel. The Solicitor General and one designated officer look after the legislative programme, and are assisted by two interpreters. This legal officer has completed the USP's Professional Diploma in Legislative Drafting (PDL).

A second officer is being trained to assist in the legislative programme. She has recently completed the requirements for the PDL programme, and is awaiting results. It is intended to expose legal staff to legislative programme so they may have a balanced experience in all areas of Crown Law work.

VII GENERAL WORK

1 Law Week 2009

For the third consecutive year Crown Law led the community law initiative to improve legal literacy in the community. The theme for the week was “Law Reforms: Dealing with Change”. The week started out with the first ever legal sector combined religious service. During the week Crown Law visited 13 Government primary schools, four secondary schools, and five villages where at each level.

One of the popular activities was the radio talk back show Questions were answered on the spot and it ranged from concerns from land issues, non-recovery of damages, retail stores, quality of goods, social problems and constitutional issues. There was also a lot of support expressed for the continuation of these programmes.

Five television documentaries were also produced and broadcast in the evening, with information provided from Crown Law, the Supreme Court, Magistrate’s Court, Ministry of Labour, Commerce and Industries, the Royal Land Commission and the Ministry of Police. The areas of interest continue to be land laws, followed by constitutional reforms and social reforms. Competitions were also organised for young students to compete for prizes in poster, poem and speech competitions.

2 Ashika Royal Commission

As a result of the sinking of the MV Prince Ashika, His Majesty commissioned a Royal Commission to inquire into the cause of the sinking. The Commission is chaired by Justice Warwick Andrew of the Supreme Court of Tonga, and two other commissioners, one is an expert naval architect and the other an expert mariner. The Ashika Royal Commission has released an interim report and is expected to submit its final report in March 2010. The Attorney General appears before the Royal Commission as Amicus Curiae with a junior counsel. Crown Law also provided a legal officer to assist the Counsel Assisting the Commission during its inquiries.

3 Royal Land Commission

Earlier this year His Majesty also commissioned a Royal Land Commission to look into the land tenure system, and provide recommendations for any necessary reform. The Commission has a three-year tenure, and is chaired by Baron Fielakepa, a former Attorney General and Minister of Justice. The Secretary for the Royal Land Commission is a former Crown Law legal staff.

4 Meeting of Australian and Pacific Chief Prosecutors

Crown Law has benefitted from this meeting of Australian and Pacific Chief Prosecutors since 2007. As a result of attending this meeting Crown Law has introduced prosecution guidelines, criminal file management system and Crown counsel classifications. Crown Law will continue to support this meeting in future.

5 Commonwealth Prosecution Training Program

A legal officer from Crown Law participated in this training programme. The training programme gave the officer an opportunity to access specialised and expert training from experts, and she continues to be in the mentoring programme.

6 Commonwealth Prosecution Exchange Program

Crown Law has registered its interest in participating in this program. Crown Law is interested in dispatching its more experienced officers on a one to two months secondment to larger prosecution offices so that they may learn and gain experience from larger prosecuting authorities.

7 Pacific Islands Law Library Twinning Program

Crown Law continues to benefit from the twinning program with the Australian Attorney General's Department. A large donation of books has been received after Crown Law lost its library in the November 2006 riots. The next stage of assistance is the provision of new shelves for the library.

8 Tonga Law Society Inaugural Law Conference

On 2 and 3 December 2009 the Tonga Law Society for the first time convened a law conference where members of the judiciary and the legal profession made presentations on contemporary legal topics such as judicial independence, pleas in mitigation, legal ethics, appellate advocacy and the new Attorney General office. It is anticipated that the conference will be an annual fixture.