



Tonga

**ACT OF CONSTITUTION OF TONGA
(AMENDMENT) BILL 2019**



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Arrangement of Sections

Section

1	Short Title and Interpretation.....	5
2	Clause 31A amended	5
3	Clauses 83B and 83C repealed	6
4	New clause 83B	6
5	Reference to Judicial Appointments and Discipline Panel deleted.....	6
6	Clause 84 amended	6
7	Clause 85 amended	6
8	Clause 86 amended	7
9	Clause 86A amended	7
10	Clause 88 amended	7
11	Clause 102 repealed.....	7

EXPLANATORY NOTES

8



ACT OF CONSTITUTION OF TONGA (AMENDMENT) BILL 2019

A BILL FOR AN ACT TO AMEND THE CONSTITUTION TO REFORM THE JUDICIARY AND OTHER MATTERS RELATED THERETO

BE IT ENACTED by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

1 Short Title and Interpretation

- (1) This Act may be cited as the Act of Constitution of Tonga (Amendment) Act 2019.
- (2) In this Act, the Act of Constitution of Tonga (Cap. 2), as amended, shall be referred to as the “the Constitution”.

2 Clause 31A amended

Clause 31A of the Constitution is amended –

- (a) by deleting sub-clause (1) and replacing it with the following –
 - “(1) The Attorney General shall be appointed by the King, on the recommendation of the Judicial and Legal Service Commission, who shall –
 - (a) be the principal legal advisor to Cabinet and Government; and
 - (b) perform any other functions and duties required under law.”;

- (b) by deleting sub-clause (3) and replacing it with the following –
 - “(3) A person shall not be qualified to be appointed to hold or act in the office of the Attorney General unless he is a law practitioner who has practised for over 10 years.”; and
- (c) in sub-clause (5) by inserting the words “on the recommendation of the Judicial and Legal Service Commission” after the words “King in Privy Council”.

3 Clauses 83B and 83C repealed

Clauses 83B and 83C of the Constitution are hereby repealed.

4 New clause 83B

The Constitution is amended by inserting the following new clause 83B -

“83B Judicial and Legal Service Commission

- (1) There shall be a Judicial and Legal Service Commission who shall advise on the appointment of judicial and legal officers.
- (2) The Judicial and Legal Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions.”.

5 Reference to Judicial Appointments and Discipline Panel deleted

The Constitution is amended by deleting the words “Judicial Appointments and Discipline Panel” wherever appearing and replacing them with the words “Judicial and Legal Service Commission”.

6 Clause 84 amended

Clause 84(2)(b) of the Constitution is amended by deleting the word “professional”.

7 Clause 85 amended

Clause 85 of the Constitution is amended -

- (a) in sub-clause (1), by deleting the words “with the consent of” and replacing them with the word “in”; and
- (b) in sub-clause (1)(b)(i), by deleting the words “Her Britannic Majesty’s dominions” and replacing them with the words “the Commonwealth”.

8 Clause 86 amended

Clause 86(1) of the Constitution is amended by deleting the word “professional” and inserting after the word “Judiciary” the words “appointed by the King in Council”.

9 Clause 86A amended

Clause 86A(1) of the Constitution is amended by deleting the words “with the consent of” and replacing them with the word “in”.

10 Clause 88 amended

Clause 88(2) of the Constitution is hereby amended by inserting a full stop after the second appearance of the word “judge” and by deleting the remaining wording.

11 Clause 102 repealed

Clause 102 of the Constitution is hereby repealed.

Passed by the Legislative Assembly this day of 2019.

EXPLANATORY NOTES

(These notes do not form part of the Bill and is only intended to explain its scope and purpose)

- (1) In 2008 the Constitutional and Electoral Commission was established under the Constitutional and Electoral Commission Act to propose recommendations for constitutional and electoral reforms. The recommendations of the CEC were considered by the Legislative Assembly in 2009, and resolutions were passed which led to the significant amendments to the Constitution in 2010.
- (2) The CEC's terms of reference focused on proposing constitutional and electoral reforms relating to the Executive and the Legislative Assembly. The Judiciary was not under review of the CEC.
- (3) Prior to the constitutional and electoral amendments made to the Constitution in 2010, the Judiciary was based on judicial structures found in other Commonwealth countries. No public discussion were held regarding proposed reforms to the Judiciary and no proposals or recommendation for reforming the Judiciary have ever been made.
- (4) After the constitutional and electoral reforms were made in 2010, the structure of the Judiciary was changed, and it was unique to Tonga. After using this structure there have been administrative and operational issues that have created challenges. These challenges can now be addressed by the proposed amendments to the Constitution relating to the Judiciary.
- (5) The provisions of the Constitution relating to the Lord Chancellor, and the Judicial Appointments and Discipline Panel are the focus of the proposed amendments to the Constitution.
- (6) The office of the Lord Chancellor is proposed to be removed, and the Lord Chief Justice will be the one head of the Judiciary.
- (7) The Judicial Appointments and Discipline Panel will be replaced by a rejuvenated Judicial Services Commission, to include members of the community to be involved in the appointment of judicial officers and legal officers.
- (8) The provision relating to the Attorney General is also reviewed to remove responsibility for criminal prosecutions on behalf of the Crown to be conducted by a new Constitutional office for the Director of Public Prosecutions, so that the Attorney General is not conflicted if a prosecution is made against any person in the Executive.

Section No.	Current Provision & Amendments	Explanation
2	<p>31A Attorney General</p> <p>(1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint an Attorney General, who shall:</p> <p>(a) be the principal legal advisor to Cabinet and Government;</p> <p>(b) be in charge of all criminal proceedings on behalf of the Crown; and</p> <p>(c) perform any other functions and duties required under law.</p> <p><u>(1) The Attorney General shall be appointed by the King, on the recommendation of the Judicial and Legal Service Commission, who shall –</u></p> <p><u>(a) be the principal legal advisor to Cabinet and Government; and</u></p> <p><u>(b) perform any other functions and duties required under law.</u></p> <p>(2) The Attorney General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority.</p>	<p>Clause 31A is amended as follows:</p> <p>(i) The Attorney General shall be appointed by the King on recommendation of the Judicial and Legal Services Commission;</p> <p>(ii) The role of the Attorney General to be in charge of all criminal proceedings on behalf of the Crown has been removed;</p> <p>(iii) The position of the Attorney General must be held by a law practitioner who has practiced for over 10 years;</p> <p>(iv) The Attorney General ad interim may be appointed by the King in Privy Council on the recommendation of the Judicial and Legal Services Commission.</p>

	<p>(3) The Attorney General shall be a person who is qualified to be a Judge of the Supreme Court and he shall, subject to any contractual arrangements, hold office during good behaviour.</p> <p><u>(3) A person shall not be qualified to be appointed to hold or act in the office of the Attorney General unless he is a law practitioner who has practised for over 10 years.</u></p> <p>(4) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Attorney General, and shall have the power to dismiss him.</p> <p>(5) In the event of a vacancy in the office of the Attorney General, and pending the appointment of an Attorney General under sub-clause (1), the King in Privy Council <u>on the recommendation of the Judicial and Legal Service Commission</u> may appoint a suitably qualified person to be Attorney General ad interim, to hold office until a substantive appointment has been made. Any such appointee shall have all the powers and privileges and perform all the duties of Attorney General as set forth in this clause.¹</p>	
3	83B The Lord Chancellor	Section 3 removes Clause 83B which

	<p>(1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint a Lord Chancellor who shall have primary responsibility for—</p> <p style="padding-left: 2em;">(a) the administration of the courts;</p> <p style="padding-left: 2em;">(b) all matters related to the Judiciary and its independence;</p> <p style="padding-left: 2em;">(c) the maintenance of the rule of law; and</p> <p style="padding-left: 2em;">(d) such related matters as are specified in this Constitution or any other Act.</p> <p>(2) The Lord Chancellor shall, unless otherwise provided by law, have complete discretion to exercise his functions, powers and duties, independently without any interference whatsoever from any person or authority.</p> <p>(3) The Lord Chancellor may, with the consent of the King in Privy Council, make regulations for the following purposes—</p> <p style="padding-left: 2em;">(a) to establish an age at which the Attorney General, a Judge, a Magistrate and the Lord Chancellor shall retire from office;</p> <p style="padding-left: 2em;">(b) to regulate a judicial pension scheme;</p> <p style="padding-left: 2em;">(c) to provide for administrative arrangements for and</p>	<p>provided for the position of the Lord Chancellor. Clause 83C is also removed which provided the establishment and powers of the Judicial Appointments and Disciple Panel.</p>
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	<p style="text-align: center;">related to the Office of the Lord Chancellor.</p> <p>(4) The Lord Chancellor shall be a person who is qualified to be a Judge of the Supreme Court and he shall, subject to any contractual arrangements, hold office during good behaviour.</p> <p>(5) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Lord Chancellor, and shall have the power to dismiss him.</p> <p>(6) In the event of a vacancy in the office of the Lord Chancellor, and pending the appointment of a Lord Chancellor under sub clause (1), the King in Privy Council may appoint a suitably qualified person to be Lord Chancellor ad interim, to hold office only until a substantive appointment has been made. Any such appointee shall have all the powers and privileges and perform all the duties of the Lord Chancellor as set forth in this clause and the Lord Chancellor ad interim shall also be the Chairman of the Judicial Appointments and Discipline Panel constituted under clause 83C.²</p> <p>83C — Judicial Appointments and Discipline Panel³</p> <p>(1) There is hereby established, as a Committee of the Privy</p>	
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	<p>Council, a Judicial Appointments and Discipline Panel comprising—</p> <p>(a) the Lord Chancellor, who shall be the Chairman;</p> <p>(b) the Lord Chief Justice;</p> <p>(c) the Attorney General; and</p> <p>(d) the Law Lords, being such persons versed in the law as the King from time to time shall so appoint.</p> <p>(2) The Judicial Appointments and Discipline Panel shall recommend to the King in Privy Council—</p> <p>(a) the appointment of eminently qualified persons to the Judiciary, and as Lord Chancellor and to any other office that the King requires;</p> <p>(b) the disciplining of members of the Judiciary;</p> <p>(c) the dismissal of members of the Judiciary for bad behaviour through gross misconduct or repeated breaches of the Code of Judicial Conduct;</p> <p>(d) the remuneration and terms of service of members of the Judiciary;</p> <p>(e) a Judicial Pensions Scheme;</p>	
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	<p>(f) a Code of Judicial Conduct; and</p> <p>(g) the appointment of assessors to the Panel of Land Court Assessors.</p> <p>(3) At any meeting of the Judicial Appointments and Discipline Panel the quorum shall be three, namely the Lord Chancellor (or anyone appointed to act as Lord Chancellor ad interim); one of the Lord Chief Justice or the Attorney General (or anyone appointed to act as Attorney General ad interim); and not less than one of the Law Lords.⁴</p>	
4	<p><u>“83B Judicial and Legal Service Commission</u></p> <p><u>(1) There shall be a Judicial and Legal Service Commission who shall advise on the appointment of judicial and legal officers.</u></p> <p><u>(2) The Judicial and Legal Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions.”.</u></p>	<p>Section 4 provides for a new Clause 83B which will now provide for the establishment of the Judicial and Legal Services Commission and its independent powers to appoint judicial and legal officers.</p>
5	<p>31A Attorney General</p> <p>(1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>, shall appoint an Attorney General, who shall:</p> <p>(a) be the principal legal advisor to Cabinet and Government;</p>	<p>Section 5 provides that any reference made to the Judicial Appointment and Discipline Panel in the Constitution is replaced with the Judicial and Legal Services Commission.</p>

	<p>(b) be in charge of all criminal proceedings on behalf of the Crown; and</p> <p>(c) perform any other functions and duties required under law.</p> <p>(2) The Attorney General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority.</p> <p>(3) The Attorney General shall be a person who is qualified to be a Judge of the Supreme Court and he shall, subject to any contractual arrangements, hold office during good behaviour.</p> <p>(4) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>, shall determine the terms of appointment of the Attorney General, and shall have the power to dismiss him.</p> <p>(5) In the event of a vacancy in the office of the Attorney General, and pending the appointment of an Attorney General under sub-clause (1), the King in Privy Council may appoint a suitably qualified person to be Attorney General ad interim, to hold office until a substantive appointment has been made. Any such</p>	
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	<p>appointee shall have all the powers and privileges and perform all the duties of Attorney General as set forth in this clause.⁵</p> <p>85 The Court of Appeal</p> <p>(1) The Court of Appeal shall consist of the Lord President of the Court of Appeal and of such other judges as may be appointed from time to time by the King with the consent of Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>:</p> <p>Provided that no person shall be appointed unless—</p> <p>(a) he holds, or has held, high judicial office; or</p> <p>(b)</p> <p> (i) he is qualified to practise as an advocate in a court in some part of Her Britannic Majesty's dominions having unlimited jurisdiction in civil or criminal matters; and</p> <p> (ii) he has been qualified so to practise for not less than ten years.</p> <p>(2) The King in Privy Council, after receiving advice from</p>	
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	<p>the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>, shall determine the terms of appointment of the Judges of the Court of Appeal and may dismiss them.</p> <p>86 The Supreme Court</p> <p>(1) The Supreme Court shall consist of the Lord Chief Justice, who shall be the professional Head of the Judiciary, and such other judges as may be appointed from time to time by the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>: Provided that no person shall be appointed unless —</p> <p>(a) he holds, or has held, high judicial office; or</p> <p>(</p> <p>(i) he is qualified to practise as an advocate in a court in some part of the Commonwealth having unlimited jurisdiction in civil or criminal matters; and</p> <p>(ii) he has been qualified so to practise for not less than ten years.</p>	
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	<p>(2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>, shall determine the terms of appointment of the Lord Chief Justice and Judges of the Supreme Court, and may dismiss them.</p> <p>86A The Land Court</p> <p>(1) The Land Court shall consist of a Lord President and other Judges, assisted by assessors, as may be appointed from time to time by the King with the consent of Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>.</p> <p>(2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>, shall determine the terms of appointment of the Lord President and Judges of the Land Court and may dismiss them.</p> <p>88 Acting Judge</p> <p>(1) It shall be lawful for the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>, at any time during the illness or absence</p>	
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	<p>of any judge, or for any other temporary purpose to appoint an acting judge for the period during which the judge is ill or absent or for the period necessary to effect the temporary purpose.⁶</p> <p>(2) An acting judge shall have the jurisdiction and powers of, and may exercise all the authorities which are vested in or may be exercised by a judge and shall be paid such salary as may be determined by the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel <u>Judicial and Legal Service Commission</u>.⁷</p>	
6	<p>84 The Courts</p> <p>(1) The judicial power of the Kingdom shall be vested in the superior courts of the Kingdom (namely the Court of Appeal, the Supreme Court, and the Land Court) and a subordinate court namely the Magistrate's Court.</p> <p>(2) The Judiciary of the Kingdom shall comprise –</p> <p>(a) the Lord President of the Court of Appeal and Judges of the Court of Appeal;</p> <p>(b) the Lord Chief Justice, who shall be the professional Head of the Judiciary, and Judges of the Supreme Court;</p> <p>(c) the Lord President of the Land Court and</p>	<p>Section 6 provides for a minor amendment to Clause 84(2)(b) so that the Lord Chief Justice is referred to as the Head of the Judiciary, as a consequence of the removal of the Lord Chancellor office resulting only one Head of the Judiciary being the Lord Chief Justice.</p>

	<p>Judges of the Land Court; and</p> <p>(d) the Chief Magistrate and the Magistrates.</p>	
7	<p>85 The Court of Appeal</p> <p>(1) The Court of Appeal shall consist of the Lord President of the Court of Appeal and of such other judges as may be appointed from time to time by the King with the consent of in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel:</p> <p>Provided that no person shall be appointed unless—</p> <p>(a) he holds, or has held, high judicial office; or</p> <p>(b)</p> <p>(i) he is qualified to practise as an advocate in a court in some part of Her Britannic Majesty's dominions the Commonwealth h having unlimited jurisdiction in civil or criminal matters; and</p> <p>(ii) he has been qualified so to practise for not less than ten years.</p> <p>(2) The King in Privy Council, after receiving advice from the Judicial Appointments</p>	<p>Section 7 provides for minor amendments to Clause 85. Clause 85(1) amends that it is the King in Privy Council and not the King with the consent of Privy Council that has the power to appoint Judges of the Court of Appeal. Clause 85(1)(b) amends the reference made to Her Britannic Majesty's dominion to be replaced with the Commonwealth, because the dominions are no longer existent.</p>

	and Discipline Panel, shall determine the terms of appointment of the Judges of the Court of Appeal and may dismiss them.	
8	<p>86 The Supreme Court</p> <p>(1) The Supreme Court shall consist of the Lord Chief Justice, who shall be the professional Head of the Judiciary <u>appointed by the King in Council</u>, and such other judges as may be appointed from time to time by the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel: Provided that no person shall be appointed unless —</p> <p>(a) he holds, or has held, high judicial office; or</p> <p>(b)</p> <p style="padding-left: 40px;">(i) he is qualified to practise as an advocate in a court in some part of the Commonwealth having unlimited jurisdiction in civil or criminal matters; and</p> <p style="padding-left: 40px;">(ii) he has been qualified so to practise for not less than ten years.</p> <p>(2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall</p>	<p>Section 8 provides for a minor amendment to Clause 86(1) so that the Lord Chief Justice is referred to as the Head of the Judiciary, as a consequence of the removal of the Lord Chancellor office resulting only one Head of the Judiciary being the Lord Chief Justice. This amendment also makes it clear that the Lord Chief Justice of the Supreme Court is appointed by the King in Council.</p>

	determine the terms of appointment of the Lord Chief Justice and Judges of the Supreme Court, and may dismiss them.	
9	<p>86A The Land Court</p> <p>(1) The Land Court shall consist of a Lord President and other Judges, assisted by assessors, as may be appointed from time to time by the King with the consent of in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel.</p> <p>(2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Lord President and Judges of the Land Court and may dismiss them.</p>	Section 9 provides for a minor amendment to Clause 86A(1) which provides that the King in Privy Council and not the King with the consent of Privy Council has the power to appoint the Lord President and other Judges of the Land Court.
10	<p>88 Acting Judge</p> <p>(1) It shall be lawful for the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, at any time during the illness or absence of any judge, or for any other temporary purpose to appoint an acting judge for the period during which the judge is ill or absent or for the period necessary to effect the temporary purpose.⁸</p> <p>(2) An acting judge shall have the jurisdiction and powers of, and may exercise all the</p>	Section 10 amends Clause 88(2) by removing the reference made to the determination of remuneration of the Acting Judge by the King in Privy Council on advice of the Judicial Appointment and Discipline Panel.

	<p>authorities which are vested in or may be exercised by a judge. and shall be paid such salary as may be determined by the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel.⁹</p>	
11	<p>102 — Lord Chief Justice to report upon criminal statistics</p> <p>The Lord Chief Justice shall report once a year to the King upon the administration of justice and the criminal statistics of the country and upon any amendments in the law which he may recommend. And the King shall lay this report before the Assembly at its next meeting in the same manner as the reports of the ministers.</p>	<p>Section 11 repeals Clause 102 which in effect will remove the requirement of the Lord Chief Justice to provide a report of criminal statistics of the country and recommendations of amendment in the law that he may have to the King. The reason being that the Court statistics are provided in the Ministry of Justice's annual report.</p>

Hon. Sione Vuna Fa'otusia
Minister of Justice and Prisons

¹ Inserted by Act 1 of 2011

² Inserted by Act 1 of 2011

³ Inserted by Act 39 of 2010

⁴ Inserted by Act 1 of 2011

⁵ Inserted by Act 1 of 2011

⁶ Amended by Acts 20 of 2010 and 39 of 2010

⁷ Added by Act 14 of 1955 and Amended by Act 39 of 2010

⁸ Amended by Acts 20 of 2010 and 39 of 2010

⁹ Added by Act 14 of 1955 and Amended by Act 39 of 2010