



KINGDOM OF TONGA
PILON COUNTRY REPORT

36th Pacific Islands Law Officers' Network Meeting

(PILON)

18-20 October 2017

Majuro, Republic of the Marshall Islands

Attorney General's Office

Kingdom of Tonga

I INTRODUCTION

Malo e lelei,

- 1 On behalf of the Attorney General’s Office of the Kingdom of Tonga, I have the distinct pleasure of presenting the Kingdom of Tonga’s Country Report for 2017 to distinguished colleagues attending the 36th Pacific Islands Law Officers’ Network Meeting in Majuro, Republic of the Marshall Islands.

- 2 At the outset I would like to thank our host, the Attorney General of the Republic of the Marshall Islands, and his staff and Government and peoples of the Republic of the Marshall Islands for their wonderful and generous hospitality, and congratulate them for the organisation of the 2017 annual meeting.

- 3 Tonga continues to live up to the saying that “There is never a dull moment in the Pacific”. On 24 August 2017 His Majesty King Tupou VI dissolved the Legislative Assembly and called for new elections to be held to elect new peoples and nobles representatives. This was the first time that this Constitutional prerogative was ever exercised by a Monarch in Tonga’s 142 years of modern Government. This decision has profound impacts on the legislative agenda of Government, and has given rise to legal debate on numerous significant legal issues.

- 4 However, the Attorney General’s Office was still able to perform its duties and functions, and maintained the delivery of professional legal services with independence and integrity. The Office continued to provide legal advice to Government on complex legal issues, including international law. In prosecution terms, Tonga saw a rise of sexual offences prosecutions, and also possession of arms and ammunitions without license. The legislative programme was truncated with the dissolution of parliament, and so it has been deferred to the new Cabinet.

- 5 In relation to PILON’s priority legal issues, Tonga has been most active in cybercrime as the Chair of the PILON Working Group. It has organised both in-country and regional cybercrime workshops using expertise from the Council of Europe, and also from

Australia, New Zealand and the United States, and also from Interpol. Tonga remains committed to continuing to source information and training and technical assistance for PILON members in the hope that they also develop their cybercrime legislation and technical capacities in order to effectively combat cybercrime, and also hopefully consider acceding to the Budapest Convention, the only international instrument that thoroughly deals with cybercrime.

- 6 Tonga was also pleased to host the 6th Meeting of the Pacific Legislative Drafters Technical Forum in August 2017, and was pleased with the outcomes agreed inter-session by participants.
- 7 Overall, Tonga is grateful for all the support provided by the development partners, especially Australia and New Zealand, the European Union and Council of Europe, and the Pacific Islands Forum Secretariat, and also PILON members. Tonga hopes that this regional cooperation continues, and it results on positive changes and developments for the legal and justice sectors of PILON Members.
- 8 Tonga also hopes that in this annual meeting, PILON Members and Observers consider sparking a rejuvenation of PILON to be well represented within, but also to other regional organisations and entities.
- 9 Finally, I take this opportunity to wish all Distinguished Delegates for a successful and fruitful annual meeting, and wish PILON Members success in 2018.

Malo ‘aupito,



‘Aminiasi Kefu

Acting Attorney General and Director of Public Prosecutions

16 October 2017

II TONGA'S LEGAL SECTOR

10 Tonga's legal sector is projected in the diagram set out in **Annex 1**.

11 Since the 2016 Annual Meeting, there have been no significant changes to the legal structure.

A Office of the Ombudsman

12 The Commissioner for Public Relations (Amendment) Act 2016 was approved by the Legislative Assembly on 27 October 2016, and received Royal Assent on 24 November 2016, and was promulgated and came into force on 2 December 2016. This resulted in a change of name of the Office of the Commissioner for Public Relations to that of the Office of the Ombudsman.

B Anti-Corruption Commissioner

13 The Anti-Corruption Commissioner (Amendment) Act 2016 was also approved by the Legislative Assembly on 27 October 2016, but Royal Assent was deferred by His Majesty the King on the basis that the Anti-Corruption Commissioner should not also be the Ombudsman. Cabinet was required to explain the position to His Majesty the King, but it has not done so.

C New Chief Executive Officer for Justice

14 Following the resignation of the former Chief Executive Officer for Justice, Mrs Mele Vaitohi to pursue post-graduate studies, the Public Service Commission re-appointed the former Chief Executive for Justice, Ms Susana Faletau to the post in 2017.

III MAJOR LAW AND JUSTICE SECTOR ACHIEVEMENTS

15 The major law and justice achievements in 2017 were:

(1) Law Reform

- The Receivership Act 2015 was granted Royal Assent on 25 May 2017, and was promulgated on 20 June 2017, but it is awaiting public notice of effective date;
- The Meteorology Act 2017 was passed by the Legislative Assembly on 13 February 2017, and received Royal Assent on 30 March 2017, and was promulgated and came into force on 4 April 2017.

(2) Judicial Reform

There were no major judicial reforms, however the Ministry of Justice and the New Zealand Ministry of Foreign Affairs and Trade are currently working on a concept for a long term judicial reform project to develop the whole of justice sector, from the judiciary to prisons.

IV SIGNIFICANT COURT DECISIONS

16 The following are some of the significant Court decisions in late 2016 and 2017:

(1) Attorney General v Yin Lin Wei, CR 79/2013

This was the first case arising out of section 28(1) of the Money Laundering and Proceeds Act 2000. It was an application by the Attorney General for an order that the sum of \$28,289.00 Tongan pa'anga, USD \$91.00 and CYN 985.00 (the property) that was seized by Tonga Police from the Respondent as tainted property, be confiscated to the Crown.

In this case, the application for confiscation arose out of a conviction which had been entered in the Enhanced Jurisdiction of the Magistrates Court in January 2015 for the offence of holding out expressly to be a medical

practitioner, contrary to section 11 of the Medical and Dental Practice Act 2001. This is an offence punishable by up to five years imprisonment.

The Magistrate had originally ordered that money located by the Police in the Respondent's room and alleged to be tainted property be returned to the Respondent unless the amount owing under the fines. The Crown sought and order from the Magistrate and was successful in having the original order varied so that the money was retained by the Police. The proceedings for confiscation were not commenced until 27 January 2017.

The Defence Counsel argued that the confiscation application should not proceed because the matter was remitted and tried in the Enhanced Jurisdiction of the Magistrates Court. He also argued that the order sought was a penalty and the Magistrate was responsible for sentencing the Respondent in the Enhanced Jurisdiction.

The Crown submitted that the Magistrate's jurisdiction did not include making orders under the Money Laundering and Proceeds of Crimes Act 2000, that jurisdiction belonged exclusively to the Supreme Court and the Supreme Court Judge agreed with that.

The Judge ruled that the Supreme Court has the jurisdiction to make the order sought because the offence for which the Respondent was convicted qualified as a "serious offence", the Act defining a "serious offence" as being one where the maximum penalty is not less than 12 months imprisonment. The Court found that the money was tainted property acquired from the illegal operation of the Respondent's medical clinic, because there was evidence that there was no other source of income which the money could have derived from.

The Judge granted the application and ordered that the sum of money seized by Tonga Police from the Respondent as tainted property be confiscated to the Crown. He also ruled that the Crown was responsible for converting the foreign cash that was part of the property into Tongan currency, and depositing it into the Tongan Confiscated and Forfeited Assets Fund established in the Crown's public accounts under section 48A of the Money Laundering and Proceeds of Crimes Act 2000, such funds to be managed and utilized in accordance with the relevant statutory provisions governing such fund.

The Crown is working with the Ministry of Finance to establish the Confiscated and Forfeited Assets Fund.

(2) Rex v Malolo 'Inia, CR 29/2015

This case was a ruling made by a Supreme Court Judge as to the admissibility of evidential breath test results. The Accused in the above matter was charged for causing death whilst driving under the influence of alcohol, contrary to section 26A of the Traffic Act.

The Crown sought to include the evidence of a Police officer as to the evidential breath test readings which exceeded the lawful amount of 250 micrograms of alcohol per litre of breath. The Police had failed to conduct a breath screening test of the Accused at the scene, however they arrested him and conducted the evidential test at the Police Station.

The Judge posed a question whether a failure to follow procedure correctly that was not the product of deliberate Police malpractice or abuse but a genuine mistake in procedure should inevitably mean that evidence is excluded.

The Judge ruled that a breath screening test should have been undertaken by the Police officers at the scene or at the Police Station before the evidential test. However, the Judge did not regard the omission as anything other than an error and not one that could be described as deliberate or reckless disregard of the Accused's rights. It could have been performed, nor was the failure to administer a breath screening test a material abuse of the Accused's right to liberty because he had been arrested. The evidence was cogent, and not corrupted by the illegality.

(3) Police v Quynvor Hurrell, AM 18/2016

This was an appeal to the Supreme Court by the Crown against a judgment of a Magistrate and submitted that he had misconstrued and misapplied section 21 of the Interpretation Act to mean that, when there is a discrepancy between the Tongan version and English version of a word in a statute, the Tongan version shall take precedence.

The Crown submitted that the Magistrate had incorrectly gone on to dismiss a charge of serious bodily harm on the grounds that “wilful” in the English section 107(1) and (2)(c) of the Criminal Offences Act was not represented by the Tonga word included in the Tongan version of the legislation, “fakalotokovi”. The Magistrate considered that “fakalotokovi” meant ill will and not wilful, on the facts before him the charge should be dismissed because the Respondent had not acted “wickedly” when he pointed the gun at the Complainant and shot him.

The Crown contended that the Magistrate had overlooked the new provision contained within section 8 of the Law Revision (Miscellaneous Amendment) Act 7 of 2009. The position taken by the Magistrate has never been taken before in Tonga and the change postulated by the Magistrate would represent a radical change in approach for Tonga in common offences such as causing serious bodily harm.

The Supreme Court Judge referred the matter back to the Magistrate to reconsider this issue in accordance with the appropriate statutory provisions. He further stated that this case raises some uncertain and quite fine legal issues and is unusual, and the issues raised are of significant importance to the orderly development of Tonga’s criminal law.

The Magistrate’s ruling was quashed and matter was referred back for a rehearing.

(4) Sione Havili Maile and Others v Siasi Tokaikolo ‘ia Kalaisi, AC 17/2016
[LA 19/2015]

This was an appeal to the Court of Appeal from the Ruling of the Lord Chief Justice in the Land Court regarding a church property that the appellants claimed was gifted to them. The respondent is a church founded in Tonga in 1978 and registered under the Charitable Trusts Act 1993. One of the churches was located in Ha’ateiho where the appellants were in possession of when they established their new church and moved away from the respondent.

The appellants stated that by virtue of the statements made and the conduct of the respondent’s representatives, an estoppel arises which would make it

inequitable for the respondent to assert its rights as owner. They resisted proceedings in the Land Court to regain possession of the church property.

The Lord Chief Justice found against the appellants and held that there had been no gift and there were no grounds for an estoppel or any other basis on which the appellants could assert a right to ownership or possession of the church property.

The Court of Appeal held that estoppel by acquiescence or proprietary estoppel is to be distinguished from estoppel under section 103 of the Evidence Act which may be seen as an evidential rule that prevents a person denying what he or she has by words or conduct asserted. In contrast, estoppel by acquiescence is a means by which property rights may be affected or created. The doctrine gives the Court a wide discretion to grant relief when an owner of land induces, encourages or allows the claimant to believe that he or she has or will enjoy some right or benefit over the land. The appellants in this case were unable to show that they were induced, encouraged or allowed by the respondent to believe that they had a right or benefit over the land. The Court of appeal held that the element of unconscionability was absent.

The appeal was dismissed.

V LAW REFORM: LEGISLATIVE PROGRAMME

17 The year 2017 was not a busy legislative year due to the dissolution of the Legislative Assembly, and so the Government's legislative programme was discontinued, and so the Government's bills will be re-considered by the new Government in 2018.

18 **Annex 2** sets out the laws that the Office processed for enactment on behalf of Government.

19 The legislation enacted in 2017 are summarised as follows:

- The Legislative Assembly passed only 5 Acts;
- All the 5 Acts have been granted Royal Assent, gazetted and have been enforced;
- Certain executive authorities made 7 subsidiary legislation.

VI LEGAL SECTOR ISSUES

20 The challenges faced by the Tongan legal sector are as follows:

The Judiciary

- (1) The main challenges for the Judiciary include the following:
 - (a) State of Court facilities;
 - (b) Judicial training to develop Magistrates;
 - (c) Remuneration for Magistrates;
 - (d) Backlog of cases in the Magistrates Court.

Ministry of Justice

- (2) The main challenges for the Ministry of Justice are:
 - (a) a lack of specifically skilled practitioners and technical expertise;
 - (b) lack of information sharing within the legal and justice sector.

Attorney General's Office

- (3) The main challenges for the Office include the following:
 - (a) Interference with independence;
 - (b) Maintenance of confidence from Government;
 - (c) Retaining legal staff;
 - (d) Continued legal education for Crown counsel and Crown prosecutors;
- (4) The Office has also been challenged in providing representation to official regional and international meetings to support Government Ministries and Agencies. **Annex 3** sets out the training and international meetings that the Office attended.

Tonga Police

- (5) The main challenges for Tonga Police are as follows:
 - (a) Investigation skills, ethics and resources;
 - (b) Prosecution skills;
 - (c) Tonga Police discipline; and

- (d) Interference with Tonga Police operational independence.

Contact Details

- (6) **Annex 4** contains contact details for officers in the Ministry of Justice, the Attorney General's Office and the Director of Public Prosecutions.

VII PILON LEGAL POLICY AGENDA: UPDATE

A Environmental Crimes and Corruption

- 21 Tonga remains committed to fighting corruption at all levels of society.
- 22 Tonga has prosecuted environmental crimes in the past years in relation to illegal fishing, but these have been at a minor level, involving bechdemer and sea cucumbers. There have been no cases where corruption arising from environmental crimes.

B Sexual and Gender Based Violence

- 23 Tonga continues to implement and enforce the Family Protection Act since it came into force in July 2014.
- 24 Of concern, there has been a number of cases involving Police committing domestic violence. There are also concerns about skills of Police prosecutors to prosecute domestic violence in the Magistrates Court, and also the Magistrates' capability to deal with such cases.
- 25 The introduction of the Family Protection Act has been effective so far given victim and complainants are more aware of their rights to lodge complaints against their spouses or close relatives for assault and violence matters.
- 26 There have been a number of convictions and sentencings in the Supreme Court for domestic violence arising from violent and sexual offending.

27 The Ministry of Justice with the Regional Rights Resource Team of the Secretariat of the Pacific Community have established a pilot project for a Legal Aid Centre for Survivors of Domestic Violence. The Centre is established under the implementation project of the Family Protection Act 2013. The Centre will employ a Legal Officer to provide free legal advice for victims, a Project Manager to deal with the administration of the services and the Centre, and a Family Protection Advocate to provide support for victims. Advertisement for these posts will close on 18 October 2017.

C Cybercrime

28 In November 2016, His Majesty in Council approved for Tonga to become a party to the Convention on Cybercrime. In May 2017, Tonga deposited its instrument of accession to the Council of Europe and officially became a Party to the Convention. Tonga is now the first Pacific Island country to be a Party to the Convention. The Convention came into force in Tonga on 1 September 2017.

29 There are currently 56 State Parties to the Convention, including 24 non-Council of Europe countries, such as Australia, the United States and Japan.

30 Tonga is currently finalising the Computer Crimes Bill and consequential amendments to other related Acts, to ensure that Tonga meets its obligations under the Convention on Cybercrime. The Bills have been received from the drafters of the Australian Attorney General's Department, and will be reviewed by officials before submission to the new Cabinet and new Legislative Assembly in early 2018.

31 Tonga's Computer Emergency Response Team (CERT Tonga) successfully celebrated its first year of responding to cyber related incidents and assisting law enforcement with investigations. The Office is a member of the CERT Board.

32 Tonga continues to benefit from the Council of Europe's Global Action against Cybercrime extended project (GLACY+) which will run until 2020. This project will ensure that Tonga Police, IT officials, judicial officers and prosecutors are trained in the area of cybercrime and electronic evidence.

- 33 On 23 to 25 May 2017, Tonga hosted the PILON Cybercrime Workshop, with assistance from the European Union and the Council of Europe and the Australian Government.
- 34 On 25 to 29 September 2017 Tonga hosted a regional workshop on “Introductory Training of Trainers on cybercrime and electronic evidence for judges and prosecutors” of the Pacific Region. Representatives of the judiciary attended from Kiribati, Samoa, Solomon Islands and Vanuatu.
- 35 The GLACY+ project is now organizing an in-country activity for Tonga as an advisory mission on Tonga’s new Computer Crimes Bill, and in the first quarter of 2018 an in-country activity on cybercrime legislation and the judiciary in Tonga, hopefully followed by a regional workshop at an advanced level, to follow-up the judicial workshop held in September 2017.
- 36 Tonga is also looking into hosting a second workshop around June 2018 for the PILON Cybercrime Working Group, to focus on a tentative topic of ‘Obtaining Electronic Evidence by International Cooperation’.
- 37 A Tongan delegation will be attending the 18th meeting of the Committee of the Budapest Convention State Parties (T-CY), and also the 1st meeting of the Protocol Drafting Plenary, to consider initial work of the Protocol Drafting Working Group, which Tonga is a member, who is responsible for drafting a second protocol on obtaining electronic evidence from the Cloud.

VIII INTERNATIONAL LAW

A Council of Europe Convention on Cybercrime

- 38 Tonga is the first Pacific island country in the world to sign the Budapest Convention, which is the only body that deals internationally with how to tackle criminal activities carried out by means of computers or the internet.

39 The Office continues to support and implement Government policy to combat cybercrime to allow Tonga to benefit from the potential of cyber-space to increase livelihoods.

B PACER Plus Agreement

40 Tonga signed the PACER Plus agreement in Nuku'alofa. The Tongan Government is now reviewing legislation required to be amended to facilitate the Agreement, and also seeking technical assistance to improve its infrastructure and market capabilities.

C Mutual Evaluation of the Cook Islands

41 Tonga is a member of the team assessors that are assessing the Cook Islands' anti-money laundering and terrorist financing legal framework against the Revised 40 Recommendations of the Financial Action Task Force, together with assessors from Australia, People's Republic of China, Fiji, Hong Kong China, and Samoa.

IX LEGAL SECTOR INITIATIVE/PROJECTS

A Law Week 2017

42 The Attorney General's Office will celebrate the 10th Anniversary of Law Week from 5 to 10 November 2017. The activities arranged include a joint prayer service for the legal and justice sector, a prayer breakfast, a release of the new consolidated laws in electronic form, radio talkback shows, village visits, and poster and speech competitions for junior students.

B Consolidation of Laws to 2016

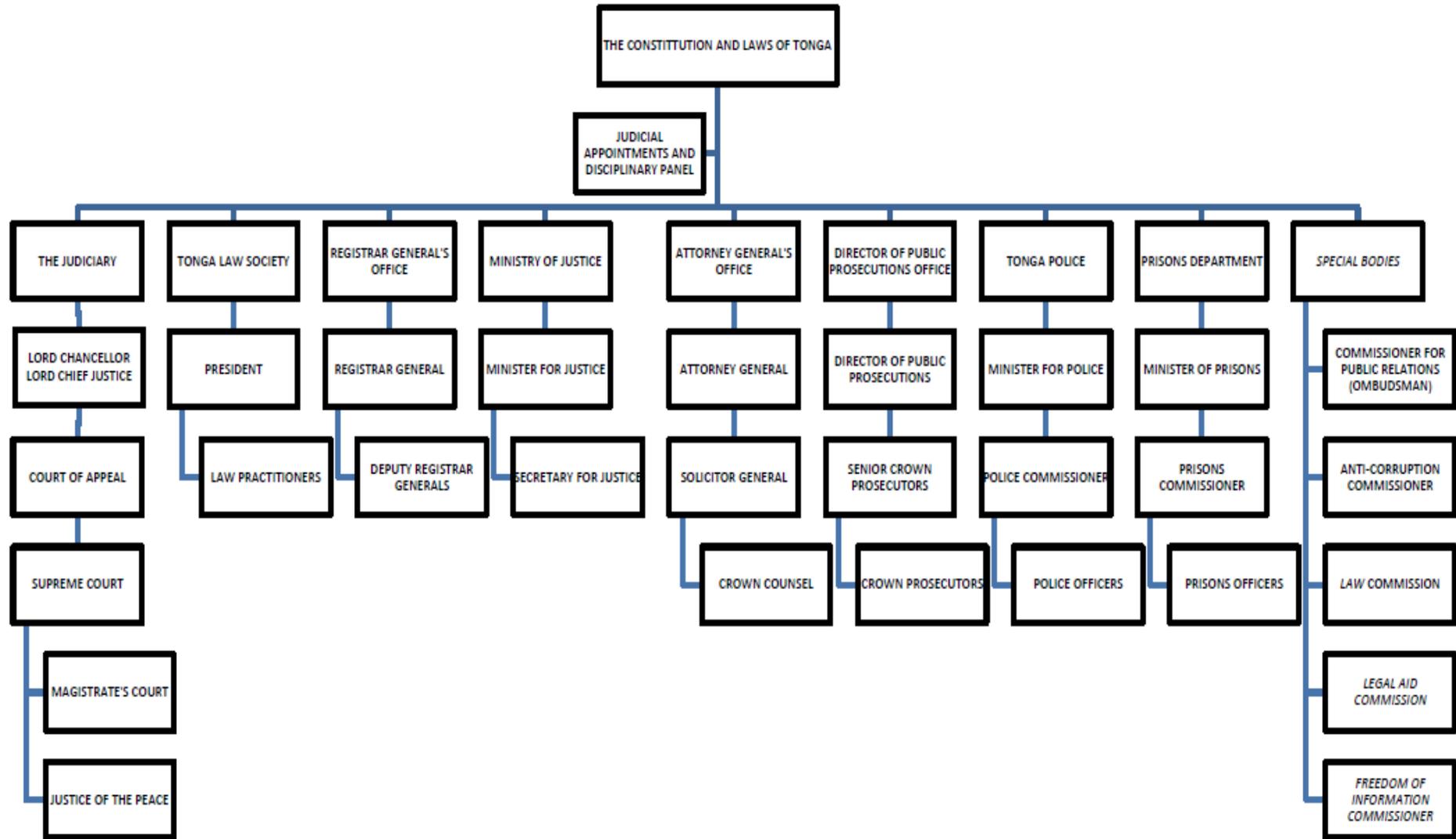
43 The consolidation of the laws of Tonga is near complete. The dissolution of the Legislative Assembly prevented the passing of miscellaneous amendments to complete the consolidation. The laws are consolidated up to 2016, and is currently being proof read in English and Tongan. It will be released on Monday 6 November 2017 on the internet

but only in the English language. The finals laws will be released by July 2017 once the Legislative Assembly convenes in 2018.

C Tonga Law Reports

- 44 The Tonga Law Reports are up to date with the recent receipt of the 2016 Tonga Law Reports from the Editor. It is now being printed and will be released during Law Week 2017.

ANNEX 1
TONGA'S LEGAL SECTOR



ANNEX 2
2017 LEGISLATION

2017 ACTS	
(1)	Meteorology Act 2017
(2)	National Reserve Bank of Tonga (Amendment) Act 2017
(3)	Pacific Games 2019 Taxation Incentives Act 2017
(4)	Appropriation Act 2017
(5)	Pacific Games Organisation (Repeal) Act 2017

2017 SUBSIDIARY LEGISLATION	
(1)	Interconnection and Access (Submarine Cable Services) Rules 2017
(2)	Customs Duty (Amendment) Order 2017
(3)	Income Tax (Amendment) Order 2017
(4)	Excise Tax (Amendment) Order 2017
(5)	Health Services (Fees and Charges) Regulations 2016
(6)	Electoral Boundaries Regulations 2017
(7)	Electoral (Election of the Representatives of Nobles) Regulations 2017

ANNEX 3
NATIONAL AND OVERSEAS TRAINING

DATE	MEETING	VENUE	AGO PARTICIPANT
13-15 September 2016	Pacific Capacity Building Workshop for the Implementation of the Arms-Trade Treaty	Apia, Samoa	Ms Halaevalu Aleamotu'a, Assistant Crown Counsel
1-5 May 2017	APG Assessor Training	Sydney, Australia	Mr 'Aminiasi Kefu, Acting Attorney General and Director of Public Prosecutions
23-23 May 2017	Consultation Workshop on the Bali Process Policy Guide on following the Money in Trafficking Persons	Bali, Indonesia	Mr Sione Sisifa, Solicitor General
22-26 May 2017	Pacific Islands Maritime Boundaries Development Working Session	Sydney, Australia	Mr James Lutui, Senior Crown Counsel
5-8 July 2017	Professional Diploma in Legislative Drafting	Suva, Fiji	Ms Lute Fakatou, Assistant Crown Counsel Mr 'Inoke Finau, Assistant Crown Counsel

2-9 November 2017	PILON Litigation Skills Training Programme	Apia, Samoa	Ms Lute Fakatou, Assistant Crown Counsel Miss 'Elisiva 'Akau'ola, Assistant Crown Counsel
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NATIONAL, REGIONAL AND INTERNATIONAL MEETINGS

DATE	MEETING	VENUE	AGO PARTICIPANT
26-28 April 2017	Head of Prosecuting Agencies Conference	Sydney, Australia	Mr 'Aminiasi Kefu, Acting Attorney General and Director of Public Prosecutions
15-27 July 2017	Asia Pacific Group on Money Laundering	Colombo, Sri Lanka	Mr 'Aminiasi Kefu, Acting Attorney General and Director Public Prosecutions
27-28 September 2017	Asset Recovery International Network – Asia Pacific Seminar	Tokyo, Japan	Mr Tevita 'Aho, Assistant Crown Counsel
03-05 October 2017	Pacific Consultation on Alliance 8.7 – Ending Child Labour, Forced Labour, Modern Slavery and Human Trafficking and preparing for the 4 th Global Conference on the Sustained Eradication of Child	Nadi, Fiji	Ms Lute Fakatou, Assistant Crown Counsel
16-19 October 2017	Triennial Commonwealth Law Ministers Meeting (CLMM)	Nassau, Bahamas	Mr Sione Sisifa, Solicitor General

24 October 2017	Digitization of Civil Registry	Auckland, New Zealand	Mr Sione Sisifa, Solicitor General
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ANNEX 4
CONTACT INFORMATION

JUSTICE AGENCY	CONTACT PERSON AND POSITION	CONTACT DETAILS
Ministry of Justice and Registrar General's	Ms. Susana Faletau for the Ministry of Justice	(676) 25 618 sfaletau@justice.gov.to
Supreme Court of Tonga	Ms Fatima Fonua, Acting Registrar of	(676) 23 599
Attorney General's Office	Mr 'Aminiasi Kefu, Acting Attorney General	(676) 24055/24007 (676) 25347 (Direct) dpp@crownlaw.gov.to / aakefu@gmail.com
	Mr. Sione Sisifa, Solicitor General	(676) 24055/24007 sg@crownlaw.gov.to
Director of Public Prosecutions	Mr 'Aminiasi Kefu, Director of Public Prosecutions	(676) 24055/24007 (676) 25347 (Direct) dpp@crownlaw.gov.to / aakefu@gmail.com