

KINGDOM OF TONGA COUNTRY REPORT

1. Major law and justice sector achievements

A Dealing with illicit drug related offending

Combatting illicit drugs is one of the national priorities of the Kingdom of Tonga. Since the inception of the Tonga Police Drugs Enforcement Taskforce in 2018, the number of drug related arrests that has resulted in prosecutions handled by the Attorney General's Office ("Office) has exponentially grown. In 2018 the Office dealt with 60 drug related prosecutions. That number almost tripled in 2019 with 170 drug related cases prosecuted by the office. As of 14 October 2020, the office is dealing with 243 drug related prosecutions which is more than quadruple the total number of drug matters prosecuted by the office in 2018.

The growth in drug related cases has taken up the majority of criminal work of the Office out of any single offence category. In terms of the impact caused by the exponential growth of drug related offences on the overall prosecution workload of the office, it has been very significant and has not gone unnoticed with crown prosecutors having much heavier workloads compared to previous years.

In recognition of the exponential growth in the number of drug related matters before the Courts, in both the Supreme Court and the Preliminary Inquiry jurisdiction of the Magistrates Court, an Acting Supreme Court Judge was appointed to specifically deal with drugs matters. The appointment effectively increased the number of Supreme Court Judges from three to four. Furthermore, in an effort to avoid the Supreme Court from being swamped and overwhelmed with drug related matters, the Director of Public Prosecutions identified a substantial number of matters which should ordinarily be dealt with in the Supreme Court, to be dealt with summarily pursuant to section 35 of the Magistrates Court Act. This course of action has been endorsed by the Lord Chief Justice. This will ultimately result in more trials being conducted in the Magistrates Court.

The months of July and August 2020, were significant particularly in relation to drug related prosecutions, as a majority of the arrests from 2019 which required testing of drugs to be conducted by the Environmental Science Research Institute in New Zealand, had

been received. Furthermore, all drugs arrests by Police in 2020 that had not been tested in New Zealand due to the COVID travel restrictions were now being tested locally using the TRUNARC Analyser. The analyst reports are being generated locally by Tong Police as well.

In response to the exponential growth in the number of drug and firearms related matters, the Director of Public Prosecutions has out of necessity deemed it necessary to establish internally a division within the Criminal Division of the office to specifically deal with drug related matters. Furthermore, four new crown prosecutor positions have also been created to increase the number of prosecutors to deal with drug related matters.

Currently amendments have been drafted to the Illicit Drugs Control Act to address the current situation. In that respect a Bill has been submitted to the Legislative Assembly for consideration. The single significant amendment in that respect being an amendment to make low level possession of Class A drugs a summary offence. However, the amendment also seeks to introduce new but necessary offences for –

- (1) unlawful possession, manufacture, use and supply of drug paraphernalia;
- (2) permitting unlawful use of a place, premises, vehicle or craft;
- (3) destruction of evidence in relation to commission of an offence;
- (4) controlled purchase powers;
- (5) enhanced Police powers;
- (6) increased penalties; and
- (7) conviction based forfeiture powers.

2. Significant court decisions

Malia Fanua v R AC 8/19

On 26 June 2019, after a trial by judge alone, the appellant was found guilty of four counts of forgery and two counts of knowingly dealing with forged documents. She was sentenced to 3 years on the forgery counts and six months for using a forged document to be served concurrently. All sentences were suspended for two years on conditions including that she perform 60 hours community service.

The Appellant appealed against her conviction on, what was in essence, a single ground concerning the alleged wrongful admission of computer records by reference to sections 54C to F of the Evidence Act ("the Act"). The Appellant's appeal was rejected.

The ruling by the Court of Appeal was important in that it provided guidelines on adducing electronic evidence.

Bin Huang v Police CR 150/2019

The case concerned the proper interpretation of section 19 group of the Money Laundering and Proceeds of Crime Act. The Applicants, along with others, were charged with playing games of mere chance (or illegal gambling) contrary to s.83 of the Criminal Offences Act. During the course of a raid, the police seized, and subsequently detained, all cash found on the premises, which included over TOP\$30,000 belonging to the Applicants. The Applicants sought orders for the return of their cash.

The Respondent opposed the application on the basis that because the Applicants did not file a notice of appeal within 30 days of the seizure of the cash, it was automatically forfeited pursuant to s.19G(5) of the Money Laundering and Proceeds of Crime Act.

It was held that it was arguable that Parliament intended the s.19 group provisions to apply only to trans-border movements of undeclared cash over TOP\$10,000 where there are reasonable grounds for suspecting that that cash may have been derived from, and/or has been used or is intended for use in, the commission a serious offence.

The Supreme Court found that the: (a) seizure of the cash was not in accordance with s.19C and was otherwise unlawful; (b) the detention of the cash was not in accordance with s.19D and was otherwise unlawful; and (c) therefore, the cash was not subject to s.19G(5) and could not lawfully be forfeited to the Crown.

As a postscript, the Lord Chief Justice recommended that consideration be given to amending the Act so as to clarify or address the issues raised in this judgment, in particular, the proper interpretation and intended application of the provisions within the s.19 group.

R v Kupu & Lavelua CR 202 & 203/ 2019

Both Accused were charged with numerous sexual offences. During the course of the trial the Crown sought to admit and rely on three pieces of evidence on the basis that it was similar fact evidence or what is commonly referred to as propensity evidence.

The Supreme Court held that for propensity evidence to be admissible there requires nevertheless that there be a high level of cogency (see *R v Boardman* [1975] AC 43; [1974] 3All ER 887, as explained in *DPP v P* [1991] 2 AC 447). The Court also emphasised the common law position that whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

The Supreme Court also held that where the prosecution wish to admit propensity evidence notice should be given well in advance of trial so that the defence is put squarely on notice, before trial, that this kind of evidence will be part of the prosecution case

R v Siafa Nai & Ors CR 222-225/2019

The case concerned four (4) individuals. Two were charged with murder, one with manslaughter and one with grievous bodily harm

At the conclusion of a three week trial the two people who were charged with murder were convicted of the lesser charge of manslaughter. The person originally charged with manslaughter was convicted of that offence and the final person was convicted of the lesser offence of common assault.

The decision re-affirmed that the judgment of the Supreme Court of the *United Kingdom in R v Jogee* [2016] UK SC 8; [2016] UK PC 7 applies in Tonga. Jogee restated the law on confederate complicity for offences arising out of joint enterprise or common purpose situations. Jogee involved aiding and abetting where there was a common purpose and a discussion of whether foresight of consequences or intent was the appropriate standard to judge accessorial liability.

The Supreme Court also came firmly down on the side of intent, rejecting previous authority that favoured foresight of risk. The Court also held that where the principal is found guilty of murder, the accessory should not be found guilty of murder but only manslaughter if his or

her intention was only to further a violent attack by participating in violence falling short of murder.

R v Lisiate Otuhouma CR61/2020

The Accused was charged with possession of 3kgs of Methamphetamine. The Illicit drugs were found in a bucket in his bedroom. The Accused was convicted after a weeklong trial and was remanded in custody. The Accused is currently awaiting sentence.

Public Service Commission v Public Service Tribunal and Claude Tupou CV 52/2019 (Unreported)

This case addressed the interpretation of section 21C(3) regarding the jurisdiction of the Public Service Tribunal to entertain applications for extension of time for filing an appeal. The Court held that the Tribunal did not have such jurisdiction.

Xi Yun Qian v Kingdom of Tonga CV67 of 2019 (Unreported)

This case relates to confiscation and seizures of cash under section 19G of the Money Laundering and Proceeds of Crime Act. The case highlighted the need for the Crown to satisfy the grounds under 19C and 19D in order for the Crown to rely on 19G.

DS Venture Limited v Tonga Cable Limited CV68 of 2019 (Unreported)

The case focused on the application of the Convention on Limitation of Liability for Maritime Claims 1967 and its Protocol of 1996 to Tonga. The Court held that given a notice had not been published, the Convention and its Protocol did not have the force of law in Tonga.

3. .PILON strategic priorities

(a) Cybercrime

Computer Crimes Bill 2020

During the year the Office prepared and finalised the Computer Crimes Bill 2020. The purpose of this Bill is to repeal and replace the current Computer Crimes Act and fulfil Tonga's obligation as a Party to the Council of Europe Convention on Cybercrime ("Convention") which Tonga acceded to in May 2017. As a requirement of being Party to the Convention, Tonga's legislation must be compliant with the

Articles of the Convention. The main objective of the Convention is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation. The Bill consists of 78 extensive provisions which are divided into five Parts. These Parts cover interpretation, computer offences, computer related offences, procedural powers and miscellaneous provisions. The Bill also has consequential amendments to the Copyright Act, Criminal Offences Act, Interpretation Act and the Tonga Police Act.

(b) **Corruption**

(i) **Tonga ratifies UNCAC;**

On 6 February, Tonga ratified the United Nations Convention Against Corruption. The Office provided legal support to ratify UNCAC and is in the process of assisting line Ministries in facilitating its implementation in Tonga.

(ii) **Mutual Evaluation of Tonga**

As previously reported, corruption was identified as one of Tonga's highest risks, albeit there has not been many investigations and prosecutions on corruption.

Tonga is progressing with its National Risk Assessment on Money Laundering, and Financing of Terrorism and Proliferation, in preparation for its second Mutual Evaluation. Tonga's Mutual Evaluation onsite was completed on 22nd October 2019 to the 1st November 2019.

Tonga was presented with the assessor's 'Preliminary Key Findings' on the last day of the onsite. The Preliminary Key Findings were reviewed, and Tonga submitted its response on the 24th January 2020.

Tonga's Second Draft MER was submitted on the 5th March 2020, in preparation for the Face-to-face Meeting that was scheduled for March 2020. The Face-to-Face Meeting cancelled due to the global effects of COVID-19.

On 17th July 2020, Tonga submitted further reviews and comments on its Second Draft MER, for which for comments was received from the external reviewers in

September 2020. Tonga is now preparing for its Face-to-Face virtual Meeting scheduled for the 3rd to the 5th November 2020 to discuss its Second Draft MER.

(c) **Sexual and Gender-Based Violence**

Model Provisions for amending Evidence or Criminal Procedure Acts to incorporate special measures for vulnerable witnesses to Sexual and Gender Based Violence Offences

The model provisions for amending the Evidence Acts or Criminal Procedure Acts in the Pacific region to incorporate special measures for vulnerable witnesses to SGBV were endorsed by the PILON Working Group. On 24 August 2020, Tonga was allocated two sections of the model provisions to explain the policy justification and operation of the two sections, and also posing the following questions of the relevant sections:

Section 7: Prohibition on publication of identity

- What are the issues involved in identifying witnesses to SGBV offences
- Why is the ability to consent to publication important?

Section 13: Evidence of corroboration

- Why is it important to ensure that any historical requirement for corroboration in SGBV offences is abolished?

The Office submitted to the SGBV working-group the policy justification for the two sections it was assigned on 11 September 2020.

Evidence (Amendment) Act 2016

On 26 March 2020, the Evidence (Amendment) Act came into force. The amendments arose from the trial of *Rex - v - Koloamatangi, Cr 106/13* where the trial Judge Cato J in his findings expressed his concern over the uncertainty whether corroboration was required in sexual complaints in Tonga. He stated that there was certainly no statutory requirement for corroboration in the Tongan Evidence Act in cases of sexual complaints. He highlighted that he was not certain whether the Court of Appeal in *Teisina v Rex [1999] Tonga LR 145* went as far as to abrogate the corroboration rule in sexual offences, when it said that, although there was a common law rule of practice requiring a corroboration

direction in sexual cases, there was no legal requirement to do so. The common law rule of practice requiring a corroboration direction in sexual offences has been discredited and denied application in England in many other commonwealth jurisdictions. Most jurisdictions have done this by expressly providing for it by statute. The amendment was to section 11 of the Act which now requires that where any person is tried for any sexual offence under sections 118 to 137 of the Criminal Offences Act or for any other offence of a sexual nature, no corroboration of a complainant's evidence shall be necessary for the accused to be convicted, and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration.

Criminal Offences (Amendment) Act 2016

The Act came into force simultaneously with the Evidence (Amendment) Act 2016 on 26 March 2020. This amendment Act is consequential to the Evidence (Amendment) Act 2016. The amendment is to reflect in the provisions of the Criminal Offences Act, the amendment in the Evidence (Amendment) Act 2016 that corroboration is no longer required in sexual offences.

Proposed Amendments to the Criminal Offences Act

Lord Chief Justice Whitten recently recommended in *Rex v Haupeakui* (Unreported, Supreme Court, CR 96 of 2020, 14 September 2020) that consideration be given to a possible amendment of section 136 of the Criminal Offences Act, the provision on sodomy and bestiality. He pointed out that the provision did not create the offence of sodomy, but that it only assumed the offence. Also that the provision only provided for a penalty. He recommended that the provision be clarified, and that the proposed amendment consider his observations about the offence of anal rape in other jurisdictions and issues of consent. As it stands, consent is not an element of sodomy in Tonga, however, in other jurisdictions it is. The proposed amendments are solutions to the drafting error which has gone unnoticed until just recently. The first proposed amendment simply corrects the error that was made by the drafters. The second proposed amendment

seeks to not only amend the error, but also evolve the provision by extending the definition of rape to include anal and digital rape. This would be in line with the position now in the UK, New Zealand and Australia. This would bring into line the provisions on rape with the “Model Provisions for amending Evidence or Criminal Procedure Acts to incorporate special measures for vulnerable witnesses to Sexual and Gender Based Violence Offences” developed by PILON. The latter of the two amendments would do away with the traditional definition of rape, purely penal-vaginal sexual intercourse, which made it the case that only a man could commit rape and that only a female could be raped. In this day and age, penetration can include penetration of the anus and not just the vagina. Furthermore, penetration can be caused by not only a penis, but another body part i.e. a finger, or even an object. Lastly, the proposed amendment would also recognise that women offenders also exist and that men can also be victims of this offence. The current definition of “sexual intercourse” in the proposed amendment to section 118 does not include fellatio and cunnilingus, as these would be offences under the current indecent assault provisions (section 124). An increase in the penalty for this offence was also proposed. The UK has taken the position that this offence bears a maximum of life imprisonment, whereas New Zealand law currently sits at 20 years imprisonment. It is perhaps time that Tonga also recognises the seriousness of the offence with an increase in penalty.

Section 119 of the Criminal Offences Act gives the Court the discretion to the presiding Judge or Magistrate on its own motion, or if an application is made by the complainant or the Prosecutor, to make an order directing that the identity of the complainant and her evidence taken in the proceedings shall not be published in the Kingdom, in a written publication available to the public or be broadcast in the Kingdom. However a fundamental flaw in that provision is that its application only applies to section 118 of the Act which is the provision dealing with rape, and does not apply to other sexual offences where vulnerable witnesses are involved, such as indecent assault of a child. The proposed amendment aims at extending the restriction of publication of identification particulars of any complainant for any offence of a sexual nature under the Criminal Offences Act or any other Act such as under the Family Protection Act.

4. Significant issues (including COVID-19) impacting the law and justice sector, and options to address these issues

Tonga has responded well to the impacts of the global pandemic through promulgation of declarations, orders, and directions under the Emergency Management Act, and the Public Health Act for which Tonga remain covid-19 free to date.

Successful criminal prosecutions has been brought under those declarations, orders, and directions with minor evidential challenges identified by the Courts.

Communication and coordination challenges were also identified, in respect of stakeholders established under the Emergency Management Act, and the Public Health Act.

Evidential challenges has been identified and dealt with accordingly, with new regulations now being processed to be promulgated under the Public Health Act to address those prosecutorial, communication and coordination challenges.

The Office acknowledges the lack of technical expertise in this area, but the Office has benefitted from sharing best practices with other Pacific Islands Countries on COVID-19 legislative frameworks through the Risk Governance Technical Working Group facilitated by the Pacific Islands Forum Secretariat and the International Federated Red Cross. We would also like to acknowledge the assistance of Mr. Meiapo Faasau from the IFRC, Suva Office in providing our Office with assistance on COVID-19 related regulatory frameworks from other Pacific Island Countries.

5. Significant initiatives/projects involving the member country and its law and justice sector

A. Law Reform: Legislative Programme

The Legislative Assembly passed Tonga's first Employment Relations Act 2020 on 8 September 2020. This is after 30 years of on-going consultations and reviews with all the relevant stakeholders. This is the first Act of its kind in Tonga and its primary intention is to establish a legal framework governing employment in Tonga. This Act is currently pending Royal Assent.

In addition, the Legislative Assembly also passed the Water Resources Act 2020 which will govern the ownership, management and regulations of water resources in

Tonga. This is also the first Act of its kind for Tonga and it is currently pending Royal Assent.

The Office is now looking at drafting a Public Health (COVID-19) Regulations to regulate all the repatriation procedures, quarantine requirements and isolation and quarantine facilities. This is to combat and assist with the prevention of COVID-19 in Tonga.

B. Launching of Tonga's Laws Consolidation Project

The Law Consolidation task is one which has been vested in the Attorney General by virtue of the Law Consolidation Act 2018. The last official consolidation took place in 1988 with a priority publication made in 2016. The Office intends to publish the 2020 Revised Edition of Laws on the first week of December 2020.

C. Law Week 2020

The Attorney General's Office will deliver Law Week in November 2020 with this year's theme of 'COVID-19 AND THE LAW'. Official launching, Radio talk shows, and youth support programmes have been scheduled to take place throughout the week in order to create and promote public awareness in relation to the theme for 2020.

D. Mutual Evaluation of Tonga

Tonga is preparing for its Face-To-Face virtual meeting to discuss its Second Draft MER to be conducted by the Asia Pacific Group on money laundering in November 2020.

E. The Justice Sector Review Project

Ministry of Justice is progressing its Justice Sector Review Project for the Courts initiated in 2018 under a grant from the New Zealand Government to address the gaps that were identified in the Magistrates and Supreme Court, and also an upgraded database system for the Courts.

6. Technical legal assistance

At present, a number of technical assistance needs fall within the category of advocacy trainings, drafting trainings and international negotiation trainings. Law and justice training

and technical assistance provided to Tonga in the last 12 months are found in Annex 1 of this Report.

7. Contact information for key law and justice agencies

Agency	Key responsibilities	Contact person and position	Phone number and email
Attorney General's Office	Principal Legal Advisor to Cabinet and Government	Attorney General – Linda Folaumoetu'i	+(676) 24055 ag@crownlaw.gov.to
	Chief Crown Prosecutor	Director of Public Prosecutions – James Lutui	+(676) 24055 dpp@crownlaw.gov.to
	Second Legal Officer	Solicitor General – Sione Sisifa	+(676) 24055 sg@crownlaw.gov.to
	Legislative Drafter	Senior Crown Counsel – 'Akanesi Katoa	
Ministry of Justice	Chief Executive Office	Chief Executive Officer – Manakovi Pahulu	+(676) 7400800 tmapahulu@justice.gov.to
	Deputy Secretary	Deputy Secretary – Seniloli 'Inoke	+(676) 7400813 sinoke@justice.gov.to
Supreme Court	Administration	Registrar of the Supreme Court – Tevita Fukofuka	+(676) 23599 tfukofuka@justice.gov.to
	Administration	Deputy Registrar of the Supreme Court – Mamaite Tuputupu	+(676) 23599 mtuputupu@justice.gov.to

ANNEX 1

No.	DATE	MEETING	VENUE	AGO PARTICIPANT
1	5 June 2019	5 th Commonwealth Red Cross and Red Crescent conference on International Humanitarian Law (IHL)	Kigali, Rwanda	Sione F. Sisifa, Solicitor General
2	17-19 June 2019	Pacific Workshop on Targeted Financial Sanctions related to Terrorism Financing and Proliferation Financing	Suva, Fiji	'Aunofu F.'Aholelei, Assistant Crown Counsel
3	20 June 2019	2019 Meeting of the Pacific Legislative Drafter' Technical Forum	Suva, Fiji	'Aunofu F.'Aholelei, Assistant Crown Counsel
4	20-21 June 2019	Professional Diploma in Legislative Drafting Workshop	Suva, Fiji	Joe Fifita, Assistant Crown Counsel
5	25-27 June 2019	Joint International Workshop for Cybercrime Investigation Units and MLA Central Authorities	INTERPOL Global Complex, Singapore	Tunou Kafa, Assistant Lute Fakatou, Assistant Crown Counsel
6	15 – 26 July 2019	25 th Session of the International Seabed Authority, 15 TH – 26 th July 2020, Kingston, Jamaica;	Kingston, Jamaica	Rose Kautoke and Elisiva Akauola Assistant Crown Counsels
7	22-23 July 2019	Magistrate Court 'Eua circuit	'Eua, Tonga	Inoke Finau, Assistant Crown Counsel
8	19 – 30 August 2019	3 rd Session of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation	New York, USA	Sione.F Sisifa, Solicitor General Elisiva 'Akauola, Assistant Crown Counsel
9	26-30 August 2019	Internship Programme for Legal Drafters and National Authority Representatives of State Parties to the Chemical Weapons Convention	The Hague, Netherlands	Leotrina Macomber, Assitant Senior Crown Counsel Fatai Samani, Assistant Crown Counsel

No.	DATE	MEETING	VENUE	AGO PARTICIPANT
10	18-23 August 2019	22 nd APG Annual Meeting and Technical Assistance Forum 2019	Canberra, Australia	Tevita 'aho ,Assistant Crown Counsel 'Aunofo 'Aholelei ,Assistant Crown Counsel
11	23-24 September 2019	6 th ARIN-AP Annual General Meeting	Ulaanbaatar, Mongolia	Tevita 'Aho, Assistant Crown Counsel Joe Fifita, Assistant Crown Counsel
12	25-27 September 2019	6 th ARIN-AP Annual General Meeting Workshop – Finding the Hidden Assets: Concealing the beneficial ownership of proceeds of crime	Ulaanbaatar, Mongolia	Tevita 'Aho, Assistant Crown Counsel Joe Fifita, Assistant Crown Counsel
13	10-11 September 2019	Expert Working Group on Electronic Evidence	London, England	Halaevalu 'Aleamotua, Crown Counsel
14	30 September – 1 October 2019	International Conference on online investigations: Darknet and online sexual violence against children	The Hague, Netherlands	Halaevalu 'Aleamotua, Crown Counsel
15	8 October 2019	2019 Meeting of the 24/7 Network of Contact Points of the Budapest Convention of Cybercrime	The Hague, Netherlands	'Inoke Finau, Assistant Crown Counsel
16	9-11 October 2019	Europol – INTERPOL CYBERCRIME CONFERENCE 2019 <i>Law enforcement in a connected future</i>	The Hague, Netherlands	'Inoke Finau, Assistant Crown Counsel
17	14-25 October 2019	2019 AGD Pacific Legal Policy Champions Program	Canberra, Australia	Halaevalu 'Aleamotua, Crown Counsel
18	November 2019	74 th Session of the Sixth Committee of the United Nations General Assembly, November 2019, New York	New York, USA	Elisiva 'Akauola, Assistant Crown Counsel

No.	DATE	MEETING	VENUE	AGO PARTICIPANT
19	2 -13 December 2019	25 th Conference of the Parties for the United Nations Framework Convention on Climate Change	Madrid, Spain	Elisiva ‘Akaola, Assistant Crown Counsel
20	26 – 29 February 2020	Biological Diversity Beyond National Jurisdiction Pacific Negotiators Meeting and Impacts of Sea Level Rise on Maritime Boundaries	Suva, Fiji	Elisiva ‘Akaola, Assistant Crown Counsel
21	9-11 and 17 September 2020	<i>Regional Conference on Securing the Limits of the Blue Pacific: Legal Options and Institutional Responses to the Impact of Sea-Level Rise on Maritime Zones, in the Context Of International La</i>	Virtual	Rose Lesley Kautoke, Senior Crown Counsel