



KINGDOM OF TONGA COUNTRY REPORT

40th Pacific Island Legal Officers' Network (PILON)

**PREPARED BY THE ATTORNEY GENERAL'S OFFICE
GOVERNMENT OF THE KINGDOM OF TONGA**

2021

1. MAJOR LAW AND JUSTICE SECTOR ACHIEVEMENTS

1. Recent developments and achievements which have taken place in the law and justice sector, are as follows:

A Tonga Justice Sector Support Program (TJSSP)

2. The TJSSP is a three-year project initiated by the Ministry of Justice and funded by the New Zealand Ministry of Foreign Affairs and Trade. The Project that focuses on the development of the following three key areas:
 - (a) Capacity Building for Judicial Officers;
 - (b) Development of the Court Management System; and
 - (c) Development of a Youth Diversion Scheme (YDS).
3. In the first half of 2021, the TJSSP focused on undertaking the following activities –
 - (a) award of small grants to community and non-government organizations that propose “innovative ways of conveying, strengthening and collaborating with key justice government agencies to enhance access to justice, particularly as it relates to Youth; and
 - (b) stakeholder consultations and workshops in Tongatapu, ‘Eua, Ha‘apai and Vava’u on the establishment of a Youth Diversion Scheme.

B International Arbitration Act 2020

4. In an effort to increase foreign investment in Tonga, Tonga acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) on 12 June 2020 (New York Convention). In the year 2021, Tonga enacted the International Arbitration Act, to give effect to the Convention. The Act provides for the resolution of international commercial disputes by arbitration, the recognition and enforcement of arbitral awards and other related matters.

C Electronic Communication Abuse Offences Act 2020

5. Online social media platforms are becoming a means by which people commit a series of offences. Tonga enacted the Electronic Communications Abuse Offences Act to address the global problem of using a service to abuse, harass and otherwise harm a person by

communicating inappropriate content on the internet or communications platforms. Online bullying, posting pictures or videos that are revengeful after the breakup of a relationship and commenting in abusive and vulgar ways about fellow citizens, are being witnessed in the Kingdom of Tonga. This Act criminalizes such behaviour where the victim has been harmed emotionally, physically, or mentally. The Act introduces procedural powers for Tonga Police to investigate the allegations of online abuse. The Act also includes a regime for service providers, both in Tonga and internationally who may have evidence of the alleged crime to assist the Tonga Police as part of the investigation. This Act also introduces civil remedies which will provide Tongans the right to sue for statutory tort and apply to the Court for an Order to either stop publication of the offensive material or disable access to the material.

D Act of Constitution of Tonga (Amendment) Act 2018 and Act of Constitution (Amendment) Act 2021

6. Tonga amended its Constitution to provide a constitutional status for the Ombudsman and the Auditor General. This is to allow both of the Ombudsman and the Auditor General, to be seen to be independent and to be able to operate without being influenced by Government action. This would ensure that administrative accountability will be taken seriously. The enhanced independence of the Ombudsman and the Auditor General, derived from Constitutional recognition will undoubtedly increase public confidence in these Offices, as well as requiring the public service to ensure its engagement with these Offices are genuine.

2. SIGNIFICANT COURT DECISIONS

CRIMINAL CASES

A Police v Viliami Mohenoa AM 6/2020

7. Mohenoa was charged with theft contrary to section 143(a) and 145(a) of the Criminal Offences Act ('COA'). It was alleged that Mohenoa stole from Viliami Ongosia ('Complainant') \$1,700 whilst the Complainant was remanded at the Central Police Station. At the end of a day trial, the Magistrate delivered an ex-tempore judgement and found Mohenoa not guilty of theft. The Magistrate held the following:

- (a) The Crown has proven beyond reasonable doubt that Mohenoa did dishonestly take without any colour of right the Complainant's \$1,700;

(b) The Crown failed to prove beyond reasonable doubt that Mohenoa intended to deprive the \$1,700 permanently from the Complainant; and

(c) The Crown failed to prove beyond reasonable doubt that Mohenoa intended to convert the \$1,700 to the use of any other person without the consent of the Complainant.

8. The Crown appealed the Magistrate's verdict and sought an order for the Magistrate's ruling be quashed. Lord Chief Justice Whitten QC after hearing this appeal found that the Magistrate's ruling was correct and the acquittal was rightly entered. Therefore the appeal was dismissed. However, Lord Chief Justice Whitten QC made these important findings:

(a) The intention to permanently deprive under section 143(a) of the COA must be ascertained at the time of the taking.

(b) As a postscript, commended this case to the Legislature and the Attorney General as an example in favour of consideration being given to amending section 143 of the COA. Because what Mohenoa did is not an offence under section 143. Mohenoa's actions are categorised as unauthorised borrowing or temporary use and it does not fall within the definition of theft in section 143. The options are to amend section 143 of the COA or create a separate offence/s.

B Rex v Haupeakui (Unreported, Supreme Court, CR 96 of 2020)

9. The Accused was charged with one count of sodomy pursuant to section 136 of the Criminal Offence, common assault and domestic violence. After a contested trial, the Accused was acquitted on all charges. In his ruling Lord Chief Justice Whitten made the following remarks and recommendations concerning the sodomy provision:

165. ... s.136 of the Criminal Offences Act does not require lack of consent as an element to the offence of sodomy thus stated. ... Whilst in other jurisdictions, the facts alleged in this count are more readily characterized as anal rape, where lack of consent is an element, such an offence does not presently exist in Tongan criminal law.

166. A further observation on a plain reading of s.136 is that it does not in fact create the crime of sodomy. It assumes it. The provision only operates to provide a penalty. There are no other provisions in the Act which define or create 'the crime of sodomy'. I therefore recommend consideration be given to possible amendment to the Act to clarify the matter including the observations in the preceding paragraph above. ...

10. At present, section 136 of the Criminal Offences Act reads:

136 Sodomy and bestiality

Whoever shall be convicted of the crime of sodomy with another person or bestiality with any animal shall be liable at the discretion of the Court to be imprisoned for any period not exceeding 10 years.

C Rex v Mikaele Hoponoa Pahulu CR 107/21

11. The Defendant was initially charged with Causing Grievous Bodily Harm to which he was convicted and sentenced. Whilst serving his sentence, the victim died within 1 year from the date of the assault and the Crown re-charged the Defendant with Manslaughter. In his ruling on a submission of autrefois convict by Counsel for the Defence, Justice Cooper referred to the nine guiding principles set out in *Connelly v DPP HL* [1964] 2 W.L.R 1145. He stated that the fifth principle relates to autrefois convict. The fifth principle is as follows - *“that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus, if there is an assault and a prosecution and conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies”*. Cooper also referred to the Court of Appeal’s clarification of the Connelly principles in *R v Beedie* (Court of Appeal) Criminal Division [1997] 2 Cr.App.R 167 which was summarised in Archbold 2021 4-89 as *“The principle will not prevent a trial for murder or manslaughter where the victim has died after proceedings for assault: the offences will not arise out of substantially the same set of facts because of the additional fact of the death and/or special circumstances will exist”*. Justice Cooper ruled that in this case, there are special circumstances in the second charge, and that is the death of the victim which is a fact that did not exist at the time of the first charge. He concluded that the offence charged in the second indictment had not been committed at the time of the first; therefore the Crown is not barred from proceeding by way of autrefois convict.

D AG v Vaipulu Ikamanu AC 7/21 (CR 53/20); AG v Viliami Talivakaola AC 8/19 (Cr 43/20)

12. In both the above stated matters, the Crown appealed on identical questions of law following acquittals in the Supreme Court for charges of causing importation of prohibited

goods, contrary to section 95(1) of the Customs and Excise Management Act. The questions of law are as follows:

1. Question 1: Was Niu J correct when he ruled that s.117 of the Act is void because it is inconsistent with clause 11 of the Constitution?
2. Question 2: Does a charge of causing to be imported prohibited goods under section 95(1) of the Act include causing to be imported restricted goods, by virtue of the definition of the “prohibited goods” in section 2 of the Act?

13. On 23 March 2021, the Court of Appeal consisting of President -Lord Chief Justice Whitten, Justice Moore and Justice Randerson heard both these appeal.

On 30 March 2021, the Court of Appeal delivered their judgment as follows:

1. Answer to Question 1: No
2. Answer to Question 2: Yes

14. The Court of Appeal in its written decision recommended that consideration be given to amend sections 95(1) and 117 of the Customs and Excise Management Act.

CIVIL CASES

E Minister of Revenue and Customs v Cost Low Company Limited, AC 12 of 2019 [CV 72 of 2018]

15. The Appellant (the Minister) appealed against orders for discovery made by a Supreme Court judge, in an application made by the respondent (Cost Low) for judicial review against the Minister, alleging that he failed to discharge his statutory duties. The Minister stated that the documents he had been ordered to discover are confidential and prohibited from disclosure under section 125 of the Customs and Excise Management Act 2007 (CAP 67) (the Act) and also under the general law.

16. The Court of Appeal held that the issue is whether section 125(3) of the Act, which provides for the disclosure of confidential information to the Tax Tribunal or the Supreme Court in relation to proceedings under the Act, applies to permit disclosure in this case. Cost Low submitted that it does as the documents relate to proceedings under the Act. The Minister contended that the documents do not fall within the exceptions made by section

125(3). The Court of Appeal held that the appeal then stands or falls on the question of whether the proceedings are under the Act.

17. The Court of Appeal held that the ability to challenge the exercise of statutory powers by way of judicial review arises under the general law. The proceedings are brought independently of the Act and not authorised by the Act. The Court of Appeal further held that there is a difficulty for Cost Low in seeking to bring the proceedings within section 125(1) of the Act. This is because the relevant statutory duties arise not under the Act but under the Customs Act. Proceedings under the Customs Act do not come within section 125(3) of the Act, and even if the proceedings could be said to be proceedings under the statute imposing the duty, the documents will remain confidential.
18. The Court of Appeal was satisfied that the Minister cannot be required to provide discovery in the terms ordered, and therefore allowed the appeal with costs to the Minister.

LAND CASES

F (1) Lord Luani (2) Minister of Lands v (1) Samiuela Loteni Kava (2) Paula Kava, AC 9 of 2019

19. This case relates to a surrender by Paula Kava of his tax allotment which is part of the hereditary estate of Lord Luani. The issue was whether Paula's eldest son, Samiuela Kava, as his heir, still had a claim to the allotment under section 54 of the Land Act. The purpose of section 54 is to ensure that an heir is aware of the surrender, hence by way of publication in the Tonga Government Gazette and three issues of a Tongan weekly newspaper. Paula and Samiuela sought in the Land Court a declaration that the tax allotment had not reverted to Lord Luani and that the Minister failed to comply with section 54, claiming that Samiuela is the heir and successor and can claim the tax allotment.
20. The notice of Paula's surrender was only published once in a weekly newspaper. Samiuela made no claim within 12-months of the publication. Lord Luani argued that the tax allotment lawfully reverted to him. Counsel for the Minister submitted that there had been partial compliance in that the notice had been published once in the terms stipulated by section 54 and so establishing the 12-month period for any claim by an heir. However, the

judge in the Land Court upheld the claim of Paula and Samiuela and ordered the Minister to publish the notice in accordance with section 54 and for Lord Luani to avoid any dealings with the allotment.

21. Lord Luani and the Minister both appealed against the decision of the judge in the Land Court asserting that a partial failure by the Minister to comply with the notice requirements of section 54 has not had the consequence that Samiuela still has the right to claim the tax allotment.
22. Relevantly, the Court of Appeal held that if there was no publication at all, time never begins to run against the heir, because there is no first publication creating a starting point for the 12-month period. However, if one publication occurs, time does begin to run. It surely cannot have been intended by the Legislature that where the publication does not fully comply with section 54, the heir is nevertheless to lose his right to claim the allotment upon expiry of the date specified in the notice.
23. The appeal was allowed and the orders of the Land Court were set aside, thus Paula and Samiuela's claim against Lord Luani and the Minister were dismissed.

G Ka'ili Tu'alau v (1) Kalusa Tu'alau (2) Minister of Lands, AC 5 of 2020 [LA 22 of 2019]

24. The appellant and the first respondent are brothers. A dispute arose between them as to who is lawfully entitled to succeed to the tax allotments in question after the death of the last registered holder. Neither party applied as heirs within the 12-month period as required by section 87 of the Land Act. Consequently, the allotments reverted to the estate holder. The allotments were later granted by the Minister to the first respondent with the consent of the estate holder.
25. The appellant's claim to be entitled to the allotments was dismissed in the Land Court, and he appealed against the decision. Two issues were advanced on appeal: first, the appellant submitted that section 87 of the Land Act is ultra vires principally because it is inconsistent with clause 113 of the Constitution of the Kingdom of Tonga; secondly, the Minister was

obliged to investigate whether there was an heir after the allotments reverted to the estate holder and before granting registration of the allotments to the first respondent.

26. The Court of Appeal accepted the respondents' submission that the rules of succession must be determined to create a certainty and the orderly disposition of land in accordance with law. The Court of Appeal concluded that the appellant's argument of the first issue must be dismissed. The Court of Appeal held that there was no information before the Minister in the present case that required him to make any inspection or inquiry; the first respondent had been in occupation of the allotments at all times, he had the estate holder's consent and no claim had been made by the appellant as heir since the death of the last registered holder. The Court of Appeal concluded that the second ground for appeal must also fail, and therefore dismissed the appeal with costs for the respondents.

H (1) Sione Ma'ake Kaufusi (2) Sitiveni Kaufusi v AC 10 of 2020 [LA 21 of 2018]

27. This case relates to the proper construction of the rules of succession to allotments, pursuant to section 82 of the Land Act. The central legal issue was, if a brother of the holder of a tax allotment which would have been entitled to the grant of the allotment by succession is dead, and at that time, the brother's son is dead, whether a son of the brother's son is entitled to be granted the allotment. The Land Court concluded that a grandson had no such entitlement.
28. The appellants challenged the Land Court's judgment, seeking to establish that they were the lawful heirs. The appellants' arguments concerned the general meaning of the word 'heir' and this was allied to an argument concerning, in particular, the provisions of clause 111 of the Constitution together with clause 4.
29. The Court of Appeal held that the word 'heir' in section 82(e) and elsewhere in that section has a meaning influenced by the context in which it appears. It does not have a meaning in a vacuum which can be transposed into the statutory provisions irrespective of context. Insofar as the Constitution is concerned, the provisions about the law of succession to hereditary estates and titles, found in clause 111, are directed quite clearly to a narrow and specific subject matter. It must be borne in mind that the general declaration in clause 4

that the law must be the same for chiefs and commoners is in the same instrument (the Constitution) as clause 111 and must be read subject to that latter provision.

30. A further issue arose during the hearing of the appeal, on whether the Tongan language version of section 82(e) is different to the English language. The Court of Appeal held that if an assumption is made that the appellants are correct in identifying that there is a difference and the Tongan version prevails, it would be curious indeed to treat the subsection as creating an open ended generational succession for brothers other than the first and second brother of the estate holder while the latter brothers and their progeny are restricted to succession for one further generation only. Section 82(e) cannot be considered in isolation and both the English and the Tongan versions must be construed in the context of the whole of section 82. The appeal was dismissed and the appellants were ordered to pay the respondents' costs.

3 PILON STRATEGIC PRIORITIES

(a) Cybercrime

31. Combatting cybercrime remains a priority for Tonga. With the enactment of the Electronic Communication Offences Act (ECAO), on the 24-25 June 2021, the Attorney General's Office, Ministry of Police and Ministry of Communication, together with the Council of Europe, Australian and New Zealand governments, collaborated to conduct the Electronic Communications Abuse Offences Act Workshop. The workshop focused on ensuring law enforcement agencies were equipped with the knowledge and skills in implementing and enforcing the new Act.
32. On 1 – 10 September, the Attorney General's Office participated in an online executive course titled "*International Law in the Cyber Era: Finding the Balance between state interests and individual rights*", conducted by the Australian Department of Foreign Affairs and Trade. The Course focused on raising awareness of how to manage the challenges presented by cyberspace, such as those posed by the COVID-19 pandemic, in a manner that supports legitimate national interests and complies with international law. Topics on the agenda covered the following areas -
- understanding online expression

- addressing online content issues
- rights, obligations and governance of technology companies
- data protection and privacy

(b) **Corruption**

33. Tonga at present is a party to the United Nations Convention Against Corruption (2003). The Government has allocated funds for the establishment of an Anti-Corruption Commissioner, which will likely take place in a year or two. In addition to this, the United Nations Development Program has reached out to Tonga to discuss options for tailor-made support and deliver overall technical and advisory issues on relevant governance issues to combat corruption. This cooperation will include the review and strengthening of existing laws to address corruption.

4 TECHNICAL LEGAL ASSISTANCE

| Technical Assistance received on legislative drafting | | |
|---|-----------------------------|--|
| No. | Technical Assistance | Relevant Bills / Regulations |
| 1 | Ms. Catherine Smith | <ul style="list-style-type: none"> • Engaged by the Attorney General Office through funding assistance from the Department of Foreign Affairs and Trade (Australia) to draft the Electronic Communications Abuse Act. • Ms. Smith was also responsible for conducting relevant consultations regarding the Bill and worked closely with the Attorney General and the Cybercrime Team in the Attorney General’s Office. |
| 2 | Mr. Meiapo Faasau | <ul style="list-style-type: none"> • Received assistance from Mr. Meiapo Faasau regarding the drafting of some of the Tonga’s COVID19 instruments and emergency laws. This is through the exchange and sharing of information through the Risk Governance for Resilient Development Technical Working Group. |
| We continue to welcome and encourage any training on legislative drafting regionally and internationally. | | |

| Technical Assistance received for international law matters | | |
|--|--|--|
| No. | Technical Assistance | Area of International Law |
| 1 | Pacific Resilient Boundaries | <ul style="list-style-type: none"> • Law of the Sea • Drafting Training for Treaties, Amendments to Maritime Legislation and Drafting Observations |
| 2 | Pacer Plus Implementation | <ul style="list-style-type: none"> • Legal assistance in the implementation of Pacer Plus |
| 3 | Australian Department of Foreign Affairs and Trade | <ul style="list-style-type: none"> • Online executive course on international law in the cyber era |
| We continue to welcome and encourage any training on topical issues of law and international law | | |

5 CONTACT INFORMATION FOR KEY LAW AND JUSTICE AGENCIES

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