



KINGDOM OF TONGA COUNTRY REPORT

41st Pacific Island Legal Officers' Network (PILON)

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

2022

I INTRODUCTION

1 The Attorney General’s Office of the Kingdom of Tonga wishes to present its Country Report to all distinguished delegates attending the 41st session of the Pacific Island Law Officer’s Network Meeting.

II MAJOR LAW AND JUSTICE SECTOR ACHIEVEMENTS

2 The Major Law and Justice sector achievements for the Kingdom were as follows:

(1) **Upholding the rule of law throughout triple calamities, Pandemic, Tsunami and Volcanic Eruption**

On 26 September 2022, Tonga concluded a two year long state of emergency together with restrictions directions in place. The Government, through various line Ministries, issued and renewed declarations of state of emergencies, restrictions notice, appointment of authorized officers, advising and drafting rules and regulations for border control, prosecution of breach of rules and restrictions. This was vital in ensuring the continued rule of law through times of natural disasters and pandemics.

(2) **Disaster Risk Management Act 2021**

In response to the on-going natural disasters in Tonga, the Legislative Assembly enacted the Disaster Risk Management Act 2021 on 25 August 2021. The Disaster Risk Management Act 2021 is currently pending Royal Assent.

The Disaster Risk Management Act (“the Act”) seeks to repeal and replace the Emergency Management Act 2007. The Act builds on provisions in the current Emergency Management Act, but seeks to widen the scope of the Act by changing the emphasis from emergency management to disaster risk management generally.

The primary purpose for the Act is to establish a coherent legal, institutional and regulatory framework for –

- (a) planning and management of disaster risk reduction and preparedness activities before a disaster occurs;
- (b) coordinating emergency response during a disaster; and
- (c) facilitating disaster recovery work following a disaster.

Key features of the Act include –

- (a) clarifying functions of NDRMO, the Ministry, governing bodies established under the Act and key Government line Ministries and agencies;
- (b) establishing different types of declarations of emergency that can be issued under the Act;
- (c) formalising the cluster system, including establishing functions and responsibilities of clusters;
- (d) establishing new powers, including the power to evacuate, impose quarantine measures, border control and rationing;
- (e) providing for the establishment of relief warehouses and rules for the management and maintenance of equipment and machinery;
- (f) providing for the establishment of new regulations, including regulations to facilitate international disaster relief and initial recovery assistance; and
- (g) allowing the designation of authorised officers both from within the Ministry and outside the Ministry.

(3) Public Health (Amendment) Act 2021

In response to the vaccination requirements for COVID19, the Public Health (Amendment) Act 2021 was enacted on 25 August 2021 and received Royal Assent on 28 October 2022. The amendment Act created a new section 181A to cater for compulsory vaccination against emergency notifiable conditions in Tonga. The current Public Health Act provides separately for measures to be taken in responding to public health emergencies. However, it does not specifically provide for compulsory vaccination.

The new section intends to make vaccination compulsory with set conditions to be met before the provision is triggered. Firstly there must be a declaration of public health emergency and as well a declaration of an emergency notifiable condition in place. Accordingly, considering Tonga's response to the declared public health emergency, the Chief Executive Officer for Health may exercise his discretion to declare in writing that all persons in Tonga must be vaccinated against the emergency notifiable condition.

Further, the new provision also proposes to address such a time where children are to be vaccinated against an emergency notifiable condition. Non-compliance with the declaration without lawful or reasonable excuse under this section is an offence carrying a fine of \$1,000 and imprisonment or both.

(4) Public Health (COVID19) Regulations 2021

In response to the on-going COVID19 pandemic, the Public Health (COVID19) Regulations 2021 was enacted and approved by Cabinet on 23 November 2021. The main purpose of these Regulations is to -

- (a) putting in place isolation and quarantine requirements for persons arriving in Tonga in a conveyance;
- (b) prevent, protect, control and provide a public health response to the international and domestic spread of the COVID-19;
- (c) manage and minimise the impacts of COVID-19; and
- (d) restricting entry to any managed quarantine facility to persons who are authorised or required to enter.

(5) Appointment of Hon. Justice Petunia Tupou

On 30 June 2022, His Majesty in Council¹, upon the recommendation of the Judicial Appointments and Discipline Panel, appointed Hon. Justice Petunia Tupou K.C, as the new sitting Judge of the Supreme Court of Tonga. Justice Tupou, KC’s appointment was effective as of 1 August 2022. She was appointed to replace Hon. Justice Niu who retired earlier this year.

III SIGNIFICANT COURT DECISIONS

3 A number of significant court decisions are set out below:

- (1) *Jones Business Services Limited & others v The Kingdom of Tonga (Unreported, Supreme Court, CV 32 of 2020, 13 November 2020)*** The Plaintiffs in this case applied for judicial review, and sought a declaration from the Court that the decision of the Ministry to decline each of the Plaintiffs’ “applications” for whale watching and whale swimming licenses were wrong at law, and an order that they be quashed. The Defendant’s defence was that although the Act and regulations provided that a license shall be valid for a period of three years, it has been common practice within the

¹ PCD No.35 of 30/06/22.

Ministry for licences to be granted for four months from 1 July to 30 November each year, in order to enforce the purpose of the Regulations and to ensure the conservation, management and protection of whales. In his Judgment, LCJ Whitten QC stated that “it is axiomatic that a decision maker must understand correctly the law that regulates his/her decision-making power and must give effect to it. The decision-maker, in making its evaluation, and drawing its conclusions, must proceed upon a correct interpretation of relevant law and must have taken account of relevant considerations and ignored irrelevant considerations. To fail in any of those respects is an error of law. It also followed that the ‘high threshold’ for a finding of ‘Wednesbury’ or legal unreasonableness was met. For the reasons above, the Court ordered judgment for the Plaintiffs and declared that the Minister’s decisions were infected by errors of law and were ultra vires the Act and the Regulations.

(2) *Lord Tu’ivakano v 1. Police Commissioner 2. The Attorney-General 3. Kingdom of Tonga, (Unreported, Court of Appeal, AC 32 of 2021 (CV 23 of 2021) 25 May 2022)*

This appeal was made against a judgement of Whitten LCJ dismissing a claim for damages by the Appellant against the Respondents for malicious prosecution. In brief, the Appellant was charged and tried in the Supreme Court on five counts of accepting a bribe as a Government servant, as well as single counts of money laundering, perjury, making a false statement for the purpose of obtaining a passport, and possession of a firearm and ammunition without a licence. The trial before Judge and jury commenced on 10 February 2020. In the fourth week of the trial, the Crown entered a *nolle prosequi* in respect of the bribery and money laundering charges. The appellant pleaded guilty to the charge of possession of a firearm but was found guilty on the perjury and false statement charges as well as the charge of possession of ammunition. The appellant successfully appealed against all but one of his convictions. This Court acquitted him on the perjury and false statement charges and dismissed the appeal in respect of the ammunition. The appellant then commenced a proceeding against the respondents claiming a total of TOP \$5.75 million in damages for malicious prosecution. The Appellant’s written submissions and the oral submissions ably made on his behalf by Mr. Edwards focussed primarily on the bribery and money laundering charges. It was submitted that the Lord Chief Justice had erred in finding that the prosecution had reasonable and probable cause to charge the appellant and to continue the proceedings until the *nolle prosequi* was filed. The Court ruled that the element of malice in this

context requires the plaintiff to prove that the sole or dominant purpose to prosecute was one other than the invocation of the criminal law. They stated that the sufficiency of evidence in a criminal trial may be affected in a wide variety of ways. An apparently strong Crown case may be significantly weakened by the vagaries of trial. Where a prosecutor maintains an honest belief in the existence of reasonable and probably cause, proof of an improper purpose is still required before liability will be imposed even if, objectively assessed, reasonable and probable cause is absent. The Court was not able to accept the Appellant's submissions that there was any obligation for the Crown to inform the Judge of the reasons for the decision to proceed. Furthermore, they observed that the Appellant could have renewed his application for a no case ruling at that point but did not do so. As such, the Court concluded that no material error in the Lord Chief Justice's decision was shown and therefore dismissed the appeal.

(3) *An Application for Adoption of M, (Unreported, Supreme Court, FA 01 of 2019, 10 June 2021)* In this adoption case, the Applicants applied for Letters of Adoption of *M* who was born illegitimate on 1 June 2009. The Female Applicant is the natural mother of the child, while the male applicant is not the child's biological father. The Applicants married in 2013 and have raised the child since then. The question before the Court was whether the natural mother can adopt or be part of the adoption of her child. The question was answered differently in 4 Supreme Court decisions, two saying that the natural mother can be part of the adoption of her child with another person, and two saying she cannot. These decisions are discussed further in detail below. The Adoption of illegitimate children is covered by the Maintenance of Illegitimate Children Act. Section 16 (1) gives the right to any person to apply to the Supreme Court to adopt an illegitimate person. Section 15 (1) states: "*An illegitimate child under the age of 21 years may, with the consent of the mother be adopted by another person.*" In FA 65/2011 Application by Mr & Mrs J for the adoption of an illegitimate child of Mrs J Chief justice Scott ruled (24 August 2012) that; [6] *once the mother of an illegitimate child marries a man who is not the father of the child, her status changes. She is no longer a femme sole who under the provisions of the section 4 of the Guardianship Act 2004 is the sole guardian of the child. Now that she is a married woman the child has in fact become part of a new family. In these circumstances the adoption is not simply by "another person" but by "the mother and step father jointly"* Scott CJ granted Letters

of Adoption. At [7] of his ruling he said; *As I see it, there is everything to be said to be in favour of this type of application, which should be encouraged. In my view it cannot have been the legislature's intention to prevent such obviously beneficial arrangements*" In FA 112 of 2018, Application by Mr and Mrs T for Letters of Adoption, the applicants were the natural parents of the children who were all born whilst the applicants were living together as man and wife but unmarried. The applicants married in 2015 shortly after the male applicant divorced his previous wife. The applicants' marriage does not however serve to legitimate the children because of the effect of section 3(2) of the Legitimacy Act. LCJ Paulsen referred to the decision by LCJ Scott above and said – (11) *The Chief justice did not explain why, as matter of interpretation he accepted the argument advanced by Counsel as to the meaning of the words "another person" in section 15 (1) Rather, it appears that he took a pragmatic approach consistent with his stated view that the granting of Letters of Adoption was in that case, "an obviously beneficial arrangement"* It can be taken from this that the decision to refuse was based on the fact not only that there was no new family unit or benefits for the children but it was unnecessary and legally unsound. In FA 123 of 2020, an application by Mr and Mrs H for Letters of Adoption, the child was 17 years old and the natural mother of the child was the female applicant. In that case, LCJ Whitten preferred the approach taken by LCJ Paulsen to that taken by LCJ Scott. At paragraph [13] of his ruling, he stated; *"A plain reading of s.15 (1) makes clear that an illegitimate child may only be adopted by a person other than his or her natural mother. The concept of a natural mother applying to become effectively as the adoptive mother is a non sequitur and contrary to the Act. It is not something that could sensibly be expected to have been Parliament's intention.* In FA 183 of 2020, an application by Mr. and Mrs. T for Letters of Adoption, Justice Niu made the a ruling on the right of the natural mother to jointly adopt her illegitimate child with her husband. His Honor followed Scott LCJ's approach and views of s.15 in that when the mother and her husband apply for letters of Adoption, they jointly become 'another person' for the purpose of s. 15 (1). In the present case, the Court favoured the views of Whitten LCJ and Paulsen LCJ and consequently ordered that the application of the natural mother be dismissed, while granting the Male Applicant's application for letters of adoption.

Further remarks on the effect of the above development. In light of the recent developments in how s. 15 (1) of the Maintenance of Illegitimate Children Act should

be interpreted, LCJ Whitten QC has taken a firm stance in that a natural mother cannot adopt her own child. This is shown in FA 60 of 2022, an application by Mr. and Mrs. P for Letters of Adoption in respect of K, in which His Honor, following a recommendation by the *Guardian Ad Litem*, dismissed the Natural Mother's application and granted the Letters of Adoption to the Male Applicant.

(4) *Attorney General v Vola Tuamei'uta (Unreported, Court of Appeal, AC 22/21)*

The Crown submitted questions of law to the Court of Appeal for determination following the acquittal of the Respondent for unlawful importation of restricted goods. The Crown appealed pursuant to section 17D of the Court of Appeal Act, on two questions of law –

- (i) was Cooper J correct to depart from the interpretation of the Court of Appeal in *AG v Ikamanu*, AC 7 of 2021 and dismiss count 1 of the indictment on the basis that guns and ammunition are not 'prohibited goods'?
- (ii) is a person, charged under 95(1) of the Customs and Excise Management Act with importing an arm or ammunition without an import licence, entitled to a defence under section 15(1) of the Arms and Ammunition Act?

On 16 May 2022, the Court of Appeal consisting of Lord Chief Justice Whitten, Justice Blanchard and Justice Randerson heard the matter. On 27 May 2022, they delivered their judgement as follows:

- (i) Answer to Question 1: "No"
- (ii) Answer to Question 2: "Yes".

(5) *Rex v De Feng Mo (Unreported, Supreme Court, AM 3/22)*

The Crown appealed a sentence in the Magistrates Court where the Respondent was sentenced to 1 ½ years imprisonment, but fully suspended for two years on conditions, after a contested trial for serious causing bodily harm. The matter was initially arraigned in the Supreme Court, however it was remitted to the Magistrates Court pursuant to section 36 of the Magistrates Court Act for trial. The Crown appealed on the ground that the sentence was manifestly inadequate, and some of following reasons for appeal were based on the Magistrates reason for sentencing as follows: (a) the maximum penalty provided by ss 107(4)(a) of the *Criminal Offences Act* for causing

serious bodily harm is five years imprisonment; (b) "Pursuant to section 36(3) and section 11 (2) of the *Magistrates Court Act*, the maximum penalty ... for serious bodily harm by a Magistrate is imprisonment for a period not exceeding 3 years or a fine of \$10,000"; (c) the Magistrates did not accept the Prosecution's submitted starting point of three years imprisonment saying that even though the Prosecutor 'knew the limited jurisdiction of the Magistrates is 3 years, she started there';

This case clarified the jurisdiction of the Magistrates Court that there is only one sentencing range where indictable offences are remitted to the Magistrates Court. On 6 September 2022, Lord Chief Justice Whitten QC, allowed the appeal in part and imposed the following sentence: The sentence of 18 months imprisonment, fully suspended for two years, was affirmed. **In addition** to the conditions of suspension imposed by Magistrate Ma'u, the Accused was required to:

- a) To perform 80 hours of community service as directed by his probation officer; and
- b) To pay the Victim a sum of TOP\$5,000 within one month of the issuing of the judgement of appeal, in default, the Accused would be imprisoned for a separate period of three months.

IV PILON STRATEGIC PRIORITIES

A Cybercrime

- 4 Tonga began its engagement in the Third Session of the UN Ad Hoc Committee (AHC) to elaborate a comprehensive International Convention on countering the use of Information and Communications Technologies for criminal purposes. As a first-time participant in the process, Tonga is undertaking internal review in order to determine key positions and areas for submission in the lead up to the Fourth Session of the UN Ad Hoc Committee.
- 5 *Police v Afimeimo'unga Hola (Unreported, Magistrates Court, CRS 475,476/21)* was the first criminal prosecution under the newly enacted *Electronic Communications Abuse Offences Act*, where the Accused was charged with *using a service to abuse and cause harm by posting an electronic communication*, contrary to section 4(1)(a)(b) of the *Electronic Communications Abuse*.

6 The Accused was alleged to have gone live of Facebook from his Facebook account with the username “Afimeimo’unga Hola” and stated that the Complainants (who were business owners that supplied water tanks) were laundering money and were bringing in illicit drugs into Tonga. He had urged his viewers if anyone was willing to burn down this business together with the Complainants. As a consequence of his live footage, both Complainants were afraid, their sales decreased, and subsequently one of the company warehouses was set on fire. The Accused pleaded not guilty to the charges, and a trial occurred, however on the final day of trial, the Accused changed his plea. The Accused was convicted and was sentenced to 11 months imprisonment, fully suspended for 2 years on the following conditions:

1. Community service of 70 hours.
2. Not to commit any offence punishable by imprisonment.
3. Placed on probation.
4. Not to defame anyone or a business using any form of electronic communication including Facebook, concerning illicit drugs if no evidence has been produced and such person has not been convicted of any offence relating to illicit drugs; and
5. Not to incite other people or a business, by using an electronic communication including Facebook, to commit an offence.

B Corruption

7 In October to November 2021, Tonga underwent general elections. In January 2022, a number of petitions were filed against a number of successful candidates pursuant to the Electoral Act, which subsequently resulted in the unseating of a number of Parliamentarians. A significant case on one of these matters is as follows:

8 *Rev Dr Pohiva Tu’i’onetoa v Kapelieli Militoni Lanumata (Unreported, Court of Appeal, AC 13 of 2022 (CV 73 of 2021), 09 August 2022)* Mr Lanumata, an unsuccessful candidate for the Tongatapu 10 Electoral District at the election on 18 November 2021, brought an election petition under s25 of the Electoral Act 1989 against the Appellant, Dr Tu’i’onetoa, who had been elected as the People's Representative for the district. The petition alleged several counts of bribery in breach of s2I(1)(a) committed the day before the election. Whitten LCJ has found one claim of bribery proved and has declared the Appellant's election void and

ordered him to pay costs. For the Appellant, they contend that the only ground of appeal related was that the Judge erred in concluding that s35 enabled him to find that the water tanks were donated by the Chinese embassy and used by the Appellant for the purpose of bribery. That finding by the Judge arose from questions that the Judge himself asked of the Appellant in relation to who supplied the water tanks, how many water tanks were received and what they were used for. The Judge wrongly assumed that the purpose of the water tanks being allocated to the electorate was for bribery. The Appellant submitted that the matter should have been confined to the allegation as pleaded and the response to the allegation by the appellant. The Respondent, on the other hand, was content to rely upon the Amended Petition and the application of s35 in supporting the judgment. The Appeal Judges, in their discussion, found that the Lord Chief Justice was confronted by a case that had been very inadequately pleaded but they also considered that he should not have himself expanded it by questions to Dr. Tu'i'onctoa about the wider context in which 50 tanks came to be distributed around the electoral district. His finding that bribery had been committed was in large measure based upon the answers to those questions. That was unfair to the appellant who may well have expected that the case against him would be confined to, and he would be examined only about, the circumstances directly pertaining to the collection of a single tank the day before the election. Furthermore, they stated that section 35 authorizes relaxation of rules of evidence to enable the court "to deal effectively with the case" and it dispenses with "legal forms and technicalities" in favour of "the substantial merits and justice of the case". But it does not authorise a complete transformation of the allegations in a petition, thereby bringing in potentially prejudicial background material that is not even hinted at in the petition. Dr Tu'i'onctoa was entitled to know from the petition the case he was facing. It was unfair to him that he was exposed to lengthy questioning from the Judge about the operation of the water tank aid program in Tonga generally and the arrangements for distribution of tanks in his constituency. Finally, the Appeal Judges said that they understood why the judge was tempted to explore the background to the case in the way he did, as it may have appeared to expose wider corruption possibly involving the appellant, but as that was not the offence alleged in the petition, he should not have taken his questioning there. The Appeal was allowed.

V TECHNICAL LEGAL ASSISTANCE

- 9 The Government of Tonga continues to benefit from various technical legal assistance from a multitude of donor partners and funds. The development of regulatory frameworks are incorporated as components of grants or projects offered by the World Bank, Asian

Development Bank, Global Environment Facility, Pacific Islands Forum, South Pacific Regional Environmental Program, Pacific Community, Commonwealth Secretariat, and other donor partners.

1. 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) 7401400 ag@ago.gov.to |
| | Chief Crown Prosecutor | Director of Public Prosecutions – James Lutui | +(676) 7401400 dpp@ago.gov.to |
| | Second Legal Officer | Solicitor General – Sione Sisifa | +(676) 7401400 sg@crownlaw.gov.to |
| | Legislative Drafting | Senior Crown Counsel – 'Akanesi Katoa | +(676) 7401400 akatoa@ago.gov.to |
| Ministry of Justice | Chief Executive Office | Chief Executive Officer – Manakovi Pahulu | +(676) 7400800 tmapahulu@justice.gov.to |
| Supreme Court | Supreme Court | Registrar of the Supreme Court – Tevita Fukofuka | +(676) 23599 tfukofuka@justice.gov.to |