

AN INDEPENDENT ATTORNEY-GENERAL OR AN ISOLATED ATTORNEY-GENERAL? THE EXPERIENCE OF THE KINGDOM OF TONGA

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This paper chronicles the role of the Attorney-General in the Kingdom of Tonga. It makes particular reference to the challenges of the role and its independence of operation in a small democratic monarchy in the Pacific in the 21st century.

Cet article examine le rôle du Procureur Général dans le Royaume de Tonga.

Les développements portent plus particulièrement sur les difficultés inhérentes à cette fonction notamment lorsqu'il s'agit de concilier au XXI^e siècle, le maintien d'une nécessaire indépendance de fonctionnement avec les règles et usages encore en vigueur au sein de cette petite monarchie démocratique du Pacifique Sud.

I INTRODUCTION

The Kingdom of Tonga is an archipelago of islands comprising four main groups of islands with approximately 170 islands scattered across an area of the central Pacific Ocean to the east of Fiji and to the south of Samoa.¹ The Kingdom "extends between latitude 15 and 23.5 degrees south and longitudes 173 and 177 degrees west, lying north of the Tropic of Capricorn and West of the International Dateline, 1700 kilometres Nor-East of New Zealand."² As at 2021, Tonga was reported to have a population of 100,179.³

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1 Mele Tupou Vaitohi, *The Process and Outcome of the 2010 Constitutional Reform in Tonga* (PhD Thesis, University of Otago, 2019) pp 9-10.

2 Ibid.

3 Tonga Statistics Department, Population and Housing Census, <https://tongastats.gov.to/census-2/>.

The Constitution of Tonga was first granted to the people by King George Tupou I in 1875 with the help of a missionary who later became the King's advisor, Shirley Baker.⁴ Initially, Baker arrived in Tonga in 1860 and was working for the Methodist Church until 1866 when he became an associate and adviser to the King, assisting in drafting laws for Tonga including the Constitution of Tonga.⁵ A record of how the Tongan and English drafting of the 1875 Constitution was carried out is attached to the Constitution as published by Sione Latukefu, which reads:⁶

This Constitution was originally compiled, at the request of His Majesty King George, by the Rev Shirley W Baker; afterwards amended and completed by His Majesty himself, together with certain alterations made by the Legislative Assembly, 1875.

By His Majesty's request, the Rev S W Baker translated this Constitution from Tongese into English.

'WELLINGTON T GU'

AIDE-de-Camp.

As a result of how the Constitution of Tonga was formulated in 1875, this document has been described as a woven constitution due to its incorporation of both modern concepts and institutions from the British-style monarchy and of selected values from Tonga's traditional leadership.⁷ The woven approach was seen to have been adopted again when the Constitution went through the 2010 reform.⁸

This article looks at some of those modern concepts – the establishing of an Attorney-General, how it has been conceptualised in Tonga, and the impacts of the 2010 political and constitutional reform. The first part begins with a broad canvass of how the United Kingdom and small states have conceptualised the roles of the Attorney-General. It then looks at the Kingdom of Tonga and how it has conceptualised the roles, functions, and status of the Attorney-General within its constitutional framework. It also considers the historical development of the position of Attorney-General in Tonga and the general principles that apply in countries from

4 Cited in Sione Latukefu *The Tongan Constitution: A Brief History to Celebrate Its Centenary* (Tonga Traditions Committee, Nuku'alofa, 1975) 41.

5 Edward Gifford, *Tongan Society* (Bishop Museum, Honolulu, 1929) x–xii.

6 Above n 4.

7 See Guy Powles, *Political and Constitutional Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (2nd ed, The University of the South Pacific Press, Suva, 2013).

8 Ibid, above n 1.

which Tonga has inherited its systems of law and government. The various ramifications of the 2010 constitutional and political reform are also considered.

II THE POSITION OF THE ATTORNEY-GENERAL - THE UNITED KINGDOM AND THE OTHER SMALL PACIFIC ISLAND STATES

It is important to note the relevant constitutional principles as they have developed in the United Kingdom, and particularly in the small states of the Commonwealth whose size and capacities are closer to those of Tonga. This article will also make references to the writings of a respected constitutional and Commonwealth lawyer, Colin Nicholls QC, who has advised Governments. He has also taken a particular interest in how the principles surrounding the offices of Attorney-General, Minister of Justice and Director of Public Prosecutions might best be organised in very small Commonwealth states.⁹ The positions and nature of the Attorney-General in other Pacific Island countries and small Commonwealth jurisdictions will also be helpful to provide context for this article and to show how other small island states handle the matter. A quick survey of the United Kingdom, the small Pacific islands' and Commonwealth jurisdictions' roles of Attorney-General follows.

A United Kingdom

The position of Attorney-General is usually that of principal legal advisor to government. The Attorney-General is also the legal counsel who defends Government in litigation. The Attorney-General is responsible for the drafting of proposed legislation for Government and is responsible for all criminal prosecutions carried out in the name of the Crown. The Office of the Attorney-General is described as operating at the interface between law, government and politics.¹⁰

The Attorney-General in the United Kingdom was first seen in the 13th century as a hired lawyer to represent the King's interests in the King's courts. By the 15th century, the Attorney-General took on a political role when he was summoned to advise parliament on legal matters. In the 17th century it became established convention for some time that the Attorney-General should be a member of the House of Commons or the House of Lords, but never be a member of Cabinet

9 Colin Nicholls 'The Role of the Attorney-General: Establishing an Independent A-G's Office in Small Commonwealth States' (Meeting of Law Ministers and Attorneys-General, Commonwealth Secretariat, London, 21-22 October 2010).

10 John Llewellyn Edwards *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984), 'This unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent Bar and the public prosecutions, the State and the citizenry at large', p viii.

because the Attorney-General should be separated from the political decision making which is the subject of his or her advice. However, the Attorney-General in the United Kingdom has held a Cabinet post with Minister of Justice in more recent times, and the result has been controversial, especially where prosecutions were concerned.

So, the Attorney-General in the United Kingdom is a member of Parliament and a member of Cabinet.¹¹ The function of the Attorney-General within the Cabinet is to act as legal adviser to the Cabinet, to supervise important public prosecutions and to represent the Crown of the United Kingdom in legal affairs.¹² The Attorney-General can be distinguished from their ministerial colleagues in two respects. First, in the United Kingdom, Attorneys-General are drawn from the senior lawyers who have been in legal practice as a barrister.¹³ This is because the functions they must perform are professional legal functions. Since 1894 the Attorney General has been precluded from conducting a private practice while in office.¹⁴

B The Small Pacific Island States

1 Papua New Guinea

In Papua New Guinea, the Attorney-General Act 1989 specifically requires the person appointed as Attorney-General to be a 'lawyer fully admitted to practice under the Lawyers Act 1986'. The Attorney-General shall, of his own initiative, give legal advice where it appears to him necessary or appropriate for legal advice to be given on a matter.¹⁵

The Attorney-General may jointly hold a ministerial portfolio as Minister of Justice if the requirements set out in the Lawyers Act 1986 are met. This implies that where the Minister of Justice, appointed by the Prime Minister to the National Executive Council, does not hold the qualifications in the Lawyers Act 1986, then he or she will not hold the office of Attorney-General. Further where the Minister of Justice is not qualified to be the Attorney-General, the Departmental Head of the

11 Robert Buckland 'UK government law officers – Understanding the role of the attorney and solicitor general', <https://www.robertbuckland.co.uk/news/uk-government-law-officers-understanding-role-attorney-and-solicitor-general>.

12 Peter Madgwick and Diana Woodhouse *The Law and Politics of the Constitution of the United Kingdom* (Harvester Wheatsheaf, 1995) pp 101-102.

13 House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General, Fifth Report of Session 2006-07*, (The Stationery Office Limited, London, 2007), p 5.

14 Norman Wilding and Philip Laundry, *An Encyclopaedia of Parliament* (4th ed), (St. Martin's Pr, New York, 1971), p 426.

15 Attorney-General Act 1989, Papua New Guinea, s 8.

Ministry is the Attorney-General and principal legal adviser to the National Executive Council. If the departmental Head of the Ministry is the Attorney-General then he is a member of the National Executive Council only *ex officio*, present only to give legal advice. The related provisions of the Attorney-General Act imply that the Minister of Justice is a political appointee whereas the Attorney-General is not a political appointee (the exception of course being, where a politically appointed Minister of National Justice Administration is qualified to be the Attorney-General).

2 *Vanuatu*

In all legal matters concerning the Government, the Cabinet must consult the Attorney-General.¹⁶ The Attorney-General must participate in Cabinet meetings to provide legal advice but is not a member and has no vote.¹⁷

3 *Tuvalu*

The Constitution of Tuvalu creates the office of the Attorney-General who is appointed by the Head of State on the advice of Cabinet, having consulted with the Public Service Commission.¹⁸ The Attorney-General is a non-political appointee, though the manner of appointment implies that the appointee has the confidence of the Prime Minister and Cabinet.

The Attorney-General is the legal adviser to Government and must attend sessions of both Parliament and Cabinet meetings to give advice but not to vote.¹⁹

A person may be appointed as an Attorney-General only if qualified to practise before the High Court of Tuvalu, ie he or she must be a licensed practitioner duly admitted to the Bar.

4 *Solomon Islands*

Article 42 of the Constitution establishes the Attorney-General as a public office. The Attorney-General is appointed by the Judicial and Legal Service Commission acting in accordance with the advice of the Prime Minister. The Attorney-General is the legal advisor to Cabinet and the principal legal advisor to Government. The Attorney-General attends the meetings of the Cabinet unless otherwise directed by

16 State Law Office Act (Consol Ed 2006), Vanuatu, s 22.

17 *Ibid*, s 10.

18 Section 79 of the Constitution provides that 'An office of the Attorney-General for Tuvalu is established as an office in the Public Service.'

19 Constitution of Tuvalu 1986, s 79.

Cabinet (art 35(4)) and may take part in the proceedings of Parliament as adviser to the Government, but has no vote.²⁰

5 *Fiji Islands*

The Attorney-General is entitled to take part in Cabinet as a Minister, and to sit in Parliament, but has no right to vote in Parliament.²¹

6 *Samoa*

The Attorney General is appointed by the Head of State on the advice of the Prime Minister – thus indicating the confidence of the Prime Minister and Cabinet in the appointee. The Attorney General must be a person qualified to be a judge of the Supreme Court of Samoa. The appointment is not entitled to a seat in Cabinet or Parliament but is required to advise on matters referred to him or her by the Head of State, the Prime Minister, Cabinet or a Minister.

The Attorney General is empowered to prosecute offences, and has a right of audience in any court, where precedence is taken over all other persons.²²

C Small Commonwealth Jurisdictions Generally

In 2010 the Attorneys-General and Ministers of Justice of Small Commonwealth Jurisdictions, in their triennial meeting held in London, received a paper by Colin Nicholls QC of England, on the 'The Role of the Attorney-General: Establishing an Independent Attorney-General's Office in Small Commonwealth States'.²³ Three broad recommendations were made so as to bring the role of the Attorney-General in small Commonwealth countries close to Commonwealth principles. This was due to allegations of:²⁴

widespread government corruption in small states...indicat[ing] that measures designed to safeguard the independence of prosecutors are needed not only to ensure freedom from improper political interference, but to ensure the proper investigation and prosecution of corruption in close-knit communities.

It should however be noted that around the time Nicholls was writing in 2009, there had been much debate in the United Kingdom over the independence of the Attorney-General from political influence as far as prosecutions were concerned.

20 Constitution of Solomon Islands 1978, ss 35(4) and 42.

21 Constitution of the Republic of Fiji 2013, s 96(4).

22 Constitution, s 41(1)-(3).

23 *Ibid*, above n 9.

24 *Ibid*, paras 3 and 113.

This is highlighted because this concern in the United Kingdom coloured the discussion there for some time. Fortunately, in Tonga, political interference with prosecutions has not been raised as an issue in the discussion of the Attorney-General's being in Cabinet.

The three broad recommendations of the Nicholls paper appear in para 8 and this summary reflects the two major concerns – that the Attorney-General be independent, and that prosecutions must be entirely free of political bias. The summary takes into account the different laws and practices discussed in the paper. The following is a shortened version of the recommendations that concentrates on what is relevant for Tonga.

- (1) The Attorney-General should be a lawyer and a non-political appointee, and must be so if the Attorney-General has responsibility for criminal prosecutions. His independence should be enshrined in the constitution or by statute. The provisions for appointment and removal should be independent of the executive, similar to those required for judicial office, and subject to clearly defined criteria. Arrangements for appropriate security of tenure and levels of remuneration should be in place. In common with public officers the Attorney-General should be required to swear a statutory oath to uphold the rule of law and to act independently in exercising the functions in so far as they relate to the investigation and prosecution of criminal offences.
- (2) Where the Attorney-General is a Government Minister or Member of Parliament, the constitution or legislation ideally should provide for the responsibility for criminal prosecutions to be transferred to a Director of Public Prosecutions. Where the Attorney-General remains a Government Minister or Member of Parliament and is required to advise on policy matters the Attorney-General should be entitled to attend Cabinet meetings to give legal advice. Such advice should not include advice on specific criminal investigations or prosecutions.
- (3) Ideally the Director of Public Prosecutions should be independent and report to a Committee of Parliament to ensure accountability and scrutiny. Where the Director of Public Prosecutions has a duty to consult the Attorney-General or Minister of Justice before deciding to prosecute or not to prosecute and in some cases to stop an investigation or prosecution a clearly defined protocol should be established excluding judicial review and Parliamentary oversight. Except for the purpose of safeguarding national security the Attorney-General or Minister of Justice should not have the power to instruct the Director of Public Prosecutions to commence or halt a criminal investigation or a prosecution.

In short, the Nicholls' review recommends that an independent Attorney-General should attend Cabinet regularly, thus giving members 'full access to legal advice rather than it being interpreted and channelled through the Prime Minister'²⁵ or individual Ministers.

Although the Attorney-General may be the legal adviser to Government, his or her advice or performance of his duties should not be subject to review except by the Court.

III THE ATTORNEY-GENERAL OF TONGA BEFORE THE 2010 REFORM

Before the office of the Attorney-General was created in 1988, the roles of legal advisor, legislative drafter, Crown prosecutor, and Crown advocate were conducted by the Crown Solicitor and, at a later stage prosecution was handled by a Crown Prosecutor. This part will examine the historical evolution of the office of the Attorney-General in Tonga up to 2010.

It is not known when the office of Crown Solicitor was established, however it is believed that it was established by Government in the late 1940s or early 1950s. It may have been after the Chief Justice ceased to be a member of the Privy Council in 1942, because the Chief Justice used to proffer legal advice to Government in Privy Council. It is also understood that the office holder was funded by the United Kingdom, and perhaps later by Australia, and that the appointees were either English or Australian. It is also understood that the Crown Solicitor's office was under the responsibility of the Premier (named Prime Minister in 1971). Hence, the Government's first legal officer was called the Crown Solicitor and was later known as the Solicitor-General. This office was a public office, appointed by Cabinet, and served under the Prime Minister. Therefore there was some degree of independence in the Crown Solicitor's or Solicitor-General's not being a member of Cabinet, though on the other hand subject in theory to the direction of the Prime Minister.

A The First Office of the Attorney-General and Ministry of Justice 1988

In 1988, the Government of the day decided to create the office of Attorney-General and Minister for Justice as a combined Cabinet post. The obvious rationale for this decision was as follows:

- (a) The Privy Council and Cabinet required legal advice to be received on important legal matters to be provided during its Cabinet deliberations, rather than deferring important decisions to receive legal advice later;

25 Ibid, above n 9, para 111.

- (b) The Privy Council and Cabinet recognised that the office of the legal advisor, Crown prosecutor and legislative drafter should be recognised as an important post of Tonga's legal regime, by creating the office of the Attorney-General; and
- (c) The Privy Council and Cabinet recognised that the administration of an efficient and effective courts system to enable access to justice, the development of legal policy, law reform, laws consolidation and law reporting deserved to be handled at Ministerial level, with the creation of the Ministry of Justice.

Accordingly, Lord Tupou, who was then Mr Tevita Tupou the Solicitor-General, was appointed as the first ever Attorney-General and Minister for Justice. Mr 'Aisea Havea Taumoepeau, who was Senior Crown Counsel in the Crown Law Department, was later promoted to be the second Solicitor-General.

The first combined Attorney-General and Minister for Justice was thus responsible for two portfolios. It also meant that the Attorney-General and Minister of Justice was a member of both His Majesty's Cabinet and of the Legislative Assembly.

As Attorney-General, he was the Ministerial head of the Crown Law Department, which was responsible for providing legal advice, drafting legislation and prosecuting criminal trials, under the daily administration of the Solicitor-General as Head of Department.

As Minister for Justice, the Attorney-General was the Ministerial head of the Ministry of Justice and thus responsible for the administration of the courts under the Judiciary, and also for developing law reform, law revision and law reporting, under the daily administration of the Secretary for Justice as Head of Department.

B The Waves of Change

This new model worked for some time, until Government began to face more complicated legal matters due to the emergence of regionalism, globalisation and political activism. These matters included the Cold War, the operations of a regional shipping company, increased international trade, the rise of foreign imports, the sale of Tongan passports, the obtaining of satellite orbital slots, the operations of an international airline, investments in foreign stock markets, the discovery of a new agricultural market niche in Japan, membership in the United Nations, membership in the World Trade Organization, and the increasing call for a more democratic government.

As a result, the post of Attorney-General became a difficult seat to hold. Beginning from 2001, after holding office for 13 years, Lord Tupou was requested

to resign his office in relation to the then Government's dissatisfaction with his handling of certain sensitive legal matters.

Lord Tupou was replaced by Mr 'Aisea Taumoepeau from around 2001 to 2003, and Mrs 'Alisi Taumoepeau became Solicitor-General. Mr Taumoepeau however was 'requested' to resign as a result of the then Government's perception of the Solicitor-General's handling of the Flyniu Airlines civil action laid against the then Prime Minister on the 'one airline' domestic air policy.

Mr Taumoepeau was then temporarily replaced by the late Baron Fielakepa, who was then the Minister for Lands, Survey and Natural Resources, for a few months before he was permanently replaced by Mr Siaso Taimani 'Aho in 2004.

Mr 'Aho was the first non-lawyer to be appointed Attorney-General and Minister of Justice of Tonga, although he had been Secretary for Justice from 1988-2000. Mr 'Aho exercised his Attorney-General roles based on conventions that required him to accept the advice of the Solicitor-General and the Crown Law Department.

In 2006, Lord Sevele of Vailahi (Mr Feleti Vaka'uta Sevele) was appointed Prime Minister. Lord Sevele was the first commoner since Shirley Baker to be appointed as Prime Minister.

Lord Sevele re-allocated portfolios including the appointment of Mrs 'Alisi Taumoepeau as Attorney-General and Minister of Justice, and of Mr 'Aho as the Minister for Police, Prisons and Fire Services.

Mrs Taumoepeau became the first woman to be appointed Attorney-General and Minister for Justice. Mrs Linda Simiki Folaumoetu'i was then appointed (the second woman in that role) to be Solicitor-General from 2006 until she resigned in July 2008.

These global and institutional changes affected the role of the Attorney-General in Tonga.

IV THE CONTROVERSIES AROUND THE ROLE OF THE ATTORNEY-GENERAL

A The Attorney-General Controversy

In 2009, the office of the Attorney-General had become somewhat controversial. The Attorney-General at that time was critical of the late King's original proposal for a 'Judicial Committee of the Privy Council' and was supportive of the then existing independent process for the appointment of the judiciary.²⁶ Clearly, the Government

²⁶ Guy Powles *Political and Constitutional Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (2nd ed, The University of the South Pacific Press, Suva, 2013) p 45.

was not accepting of the Attorney-General's advice on the constitutional and political reforms that were occupying the Government at the time, and matters relating to adherence to the rule of law. Consequently, Mrs Taumoepeau was requested to 'resign' by Lord Sevele.

B Legal Pressure and High Turnover

It is clear that since 2001, with Government becoming more complex and advanced; the legal issues that were before Government and the Attorney-General were new and complicated, and created the tension between Government and its Attorney-General and led to the high turnover of office holders. Between 2001 and 2009, five Attorneys-General held office, with the three substantive holders being 'requested' to resign.

C The Need to Re-organise the Ministry of Justice and the Office of the Attorney-General

The Minister for Justice, unlike that of Attorney-General, is a relatively recent development. The existence of this Office depends on the size and complexity of the jurisdiction involved and except in the few cases where it is combined with the role of Attorney-General, it is dependent like other ministries on the executive discretion of Prime Ministers when forming their governments. The remit of justice ministers is determined by the government of the day and tends to include functions which appear to belong more appropriately to other ministries, particularly home office and interior ministries.

The Minister's primary role is to provide access to justice by providing an adequately resourced judiciary and efficient court service. In every country there is a different mix of roles and tasks. This may involve dealing with a variety of issues including some of the following:²⁷

legal advice to government ministries and departments; ensuring that all actions taken by all departments of government are consistent with national laws and international legal obligations; judicial appointments (and judicial removals); legislative process; law commissions and law reforms; the conduct of criminal prosecutions; supervision of coroners; international cooperation in criminal matters (including extradition, mutual legal assistance and prisoner exchanges); the prison service; legal education; human rights; anti-corruption; access to justice; crime prevention; administration of the law courts; judicial training; magistrates; ombudsman services; the registration and

27 Ministry of Justice Annual Report (Tonga), July 2012 June 2013.

protection of intellectual property rights; administration of deceased and insolvent estates; liquidation of companies; rehabilitation of offenders; justice for victims.

Hence, this position may be responsible for the implementation and development of legal policy with the assistance of the law reform and similar agencies. The breadth of this role varies widely and often includes law reform, immigration, human rights, the punishment and rehabilitation of offenders, prisons, mutual legal assistance, elections, public order issues and (occasionally) policing.

Where the Minister of Justice is also Attorney-General the role also includes advising the government on legal matters and making the final decision whether to prosecute or not to prosecute criminal offences. Where there is a separate Attorney-General, legal advisory matters and the legality of actions taken or proposed to be taken by government ministries and departments are the responsibility of the Attorney-General.

However, due to the legal pressure and high turnover of incumbents in the office of Attorney-General and Ministry of Justice between 2001 and 2009, it was decided by the Government in 2009 that it was best for the Attorney-General to be separated from Cabinet,²⁸ and to be appointed by the King on the advice of the Prime Minister.

This was based on the following rationale:

- (a) The roles of the Attorney-General should be exercised independent of any pressure or influence from any person;
- (b) The Attorney-General should not be exposed to, or influenced by, the emotions of politics;
- (c) The Attorney-General should therefore perform his roles in accordance with his oath to the office, without fear of loss of tenure or any disciplinary repercussions, except for misconduct in office;
- (d) Furthermore, and equally important, the role of Attorney-General and Minister for Justice should be separated because the Attorney-General prosecuting accused persons or defending Government in the Courts, was the same Minister for Justice who was to ensure that the judiciary was fair and impartial.

Accordingly, in May 2009, His Majesty the late King George Tupou V, with the support of Lord Sevele's Government, decided to appoint the first non-political and independent Attorney-General, Mr John Joseph Cauchi. Mr Cauchi was a former Senior Crown Counsel in the Crown Law Department, who had held similar offices

28 While retaining the full range of duties expected of an Attorney-General. Ministry of Information, 'Press Release: Newly Appointed Attorney-General' – 2 June 2009.

in Vanuatu and Solomon Islands after leaving Tonga around 1998. When Mr Cauchi took office, Mr 'Aminiasi Kefu who had acted in the office of Solicitor-General since July 2008, was confirmed in that role in April 2009 and held it until April 2014.

V THE POSITION OF ATTORNEY-GENERAL IN TONGA AFTER 2010 CONSTITUTIONAL REFORM

The office of the Attorney-General in Tonga is now provided for under the Constitution of Tonga as revised in 2010, clause 31A, which also provides for the appointment of the Attorney-General. The appointment of the Attorney-General at the discretion of the Monarch in Privy Council²⁹ after receiving advice from the Judicial Appointments and Discipline Panel. Because of the importance of this office, the Attorney-General must have been qualified to be a Judge of the Supreme Court of Tonga,³⁰ and 'subject to any contractual arrangements' and will hold office 'during good behaviour'.³¹

The Monarch's power extends to determining the terms of appointment and their dismissal,³² meaning that the Attorney-General is removable by the King in Privy Council.

The Attorney-General occupies a unique position in the justice administration process in Tonga. As earlier pointed out, the Constitution of Tonga expressly provides for the power of the Attorney-General. Under clause 31A(2), it states:

The Attorney-General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority.

The above provision provides the Attorney-General with the powers to exercise complete discretion to exercise legal powers and duties, independently, but in accordance with the Constitution and the laws of Tonga. This independence is premised on the principles of good governance.³³

29 The Monarch decides who to call to his Privy Council as his advisers.

30 The Constitution of Tonga, clause 86(1) – which provides that the King in Privy Council may appoint judges after receiving advice from the Judicial Appointments and Discipline Panel, provided that 'no person shall be appointed unless – (a) he holds, or had held, high judicial office; or (b)(i) he is qualified to practise as an advocate in a court in some part of the Commonwealth having unlimited jurisdiction in civil or criminal matters; and (ii) he has been qualified so to practise for not less than ten years.

31 The Constitution of Tonga, clause 31A.

32 Ibid.

33 Attorney General's office, Corporate Plan and Budget 2019/20-2021/22, p 4.

Contrary to the position in England where the Attorney-General is a member of Parliament, the Attorney-General of Tonga is neither a member of Parliament nor has the authority to attend Cabinet. This is even though the Attorney-General is constitutionally the "principal legal advisor to Cabinet and Government; is charge of all criminal proceedings on behalf of the Crown; and performs any other functions and duties required under law."³⁴ Notably, the current incumbent of the position of Attorney-General was appointed as a Law Lord³⁵ in June 2017 before she was appointed to the office of the Attorney-General in March 2019.³⁶ The Attorney-General does not have executive authority and is not a government minister but is ranked at ministerial level.³⁷

As the principal legal advisor to the government of Tonga, the office of the Attorney-General provides legal advice to all government ministries, departments and agencies. The office of the Attorney-General also involves in public consultations with the general public when requested by the government ministries, departments and agencies.

Notably, in 2019 the then Minister of Justice submitted the Act of Constitution of Tonga (Amendment) Bill 2019 to amend clause 31A of the Constitution. In the explanatory notes for this Bill, it was stated that:³⁸

(4) After the constitutional and electoral reforms were made in 2010, the structure of the Judiciary was changed, and it was unique to Tonga. After using this structure there have been administrative and operational issues that have created challenges. These challenges are now addressed by the proposed amendments to the Constitution relating to the Judiciary.

This amendment Bill was one of the six Bills³⁹ that were submitted to the Legislative Assembly of Tonga which were referred to the House's Standing

34 Ibid, clause 31A(1).

35 The Constitution of Tonga, clause 83C(1) provides for the establishment of a 'Committee of the Privy Council, a Judicial Appointments and Discipline Panel comprising – (a) the Lord Chancellor, who shall be the Chairman; (b) the Lord Chief Justice; (c) the Attorney-General; and (d) the Law Lords, being such persons versed in the law as the King from time to time shall so appoint.'

36 Notably, for the appointments of Attorneys-General made since 2010, the Judicial Appointments and Discipline Panel did not advertise the post.

37 Attorney General's office, Corporate Plan and Budget 2019/20-2021/22, p 6.

38 Act of Constitution of Tonga (Amendment) Bill 2019, https://ago.gov.to/cms/bills/bills-by-year.html?view=bills_by_year.

39 These Bills are – Act of Constitution of Tonga (Amendment) Bill 2019, Act of Constitution of Tonga (Amendment) (No. 2) Bill 2019, Tonga Police (Amendment) Bill 2019, Magistrate's Court

Committee on Legislation for public consultations. The six Bills were later withdrawn because the outcome and report from the public consultations indicated that the public were generally not supportive of these proposed amendments to the Constitution.⁴⁰

***VI AN INDEPENDENT ATTORNEY-GENERAL OR AN ISOLATED ATTORNEY-GENERAL?*⁴¹**

Initially, the Attorney-General was appointed by His Majesty the King, on the advice of the Prime Minister. The Attorney-General was engaged under contract, and was accountable to the King, through the Prime Minister. Under the current constitutional arrangements which were introduced in 2010, the Attorney-General is appointed by the Monarch on the advice of the Judicial Appointments and Discipline Panel.

However, in the course of attempting to discharge the duties as Government's legal adviser, the Attorney-General may only comment on questions put to him or her by Cabinet; the Attorney-General has no knowledge of what Government is doing, or thinking of doing, unless provided with information on that.⁴²

Unfortunately, the King and the Sevele Cabinet had decided that the Attorney-General should be independent under a model that kept the Attorney-General away from Cabinet and the Assembly. Hence, the then Attorney-General was not allowed to be involved in advising the Government in the preparation of the important constitutional and political reforms. The reason given was to 'keep the Attorney-General free of political interference in his work'.

The problem for the King and Cabinet was that, starting with Mrs 'Alisi Taumoepeau, a succession of Attorneys-General sometimes gave advice that the recipients did not like. Eventually, Cabinet began to ignore the Attorney-General, causing great dissatisfaction on the part of the Attorneys-General concerned. For instance, the Attorney-General's advice to appoint independent prosecutors for the prosecution of accused persons in relation to the sinking of the *MV Princess Ashika* was not accepted by Government due to limited financial resources. The Attorney-

(Amendment) Bill 2019, Judicial and Legal Service Commission Bill 2019, National Spatial Planning and Management (Amendment) Bill 2019.

40 Fakamatala 'o e Ngaue 'a e Fale Alea 'I he Ta'u Novema 2017 ki he Sepitema 2021 (The Legislative Assembly's Annual Reports from November 2017 through September 2021), https://parliament.gov.to/images/Fakamatala_o_e_Ngaue_a_e_Fale_Alea_i_he_Tau_Novema_2017_ki_he_Sepitema_2021.pdf.

41 Ibid, n 26, p 46.

42 Ibid, p 47.

General had not been supportive of the Government's decision to repeal the Judicial Services Commission Act, and its replacement with the Judicial Appointments and Discipline Panel, headed by the Lord Chancellor. As a result, in April 2010, Mr Cauchi submitted his resignation from the Office of the Attorney-General.

The Government then decided to appoint the then Minister of Justice, Mr Samiua Vaipulu, as the Acting Attorney-General and Minister of Justice. Government had directed that the Acting Attorney-General would continue his role as an independent Attorney-General, although he was a member of Cabinet.

At the end of 2010, the Government decided to appoint Mr Barrie Sweetman as Interim Attorney-General. Mr Sweetman was also the Chairman of the Electoral Commission at the time. This occurred after the first general elections under the new constitutional and political reforms. Mr Sweetman held office until the end of 2011, when the new Lord Tu'ivakano decided to recruit a new Attorney-General under clause 31A of the Constitution, which had been enacted in 2010 as one of the reform measures.

For the first time since April 2010, the office of the Attorney-General was filled substantively. In January 2012, Mr Neil Adsett became the second independent Attorney-General appointed by His Majesty the King; this time on the advice of the Judicial Appointments and Discipline Panel.

In June 2014 however, Mr Adsett resigned from office as a result of 'personal circumstances'. It was evident that Mr Adsett was having the same experience with Government as those experienced by Mr Cauchi; however, Mr Adsett kept those frustrations away from the public. In June 2014, Mr Kefu was appointed by His Majesty the King as Acting Attorney-General to replace Mr Adsett. Then in March 2019, Linda Folaumoetu'i was appointed as Attorney-General and as at July 2023 is the current incumbent of the role.

The two independent Attorneys-General proved to have been disadvantaged because they were non-Tongan. If the Attorney-General feels duty bound to oppose decisions on constitutional or legal grounds, he or she may be treated as an obstructive person – as an obstacle to what the Cabinet wants – and Cabinet may prefer not to seek the advice of the Attorney-General. This means that the quality of Cabinet decision-making may suffer. It was difficult for those officers to follow the pulse of Government or the public through the media, or through the Legislative Assembly broadcasted debates, or through communicating effectively with Ministers and public servants, to truly understand what Government and the public required, and also to respond proactively by providing advice or to intervene effectively when required in the pursuance of the rule of law. As Mr Cauchi

discovered, independence could mean isolation from important issues of the day.⁴³ In short, 'independence' can become 'isolation' if the Attorney-General is not consulted, and a Government that chooses to avoid asking for legal advice could lead the country into serious difficulties.

VII CONCLUSION

In conclusion, the position and role of the Attorney-General was created in 1988. From 1988 until 2009 the Attorney-General also held the office of the Minister of Justice. Before the reform in 2010, the Attorney-General and Minister of Justice was responsible not only for supporting the Judiciary but also for leading the Crown Law Department which was established to deliver legal services to the Government. Further, the Attorney-General/Minister of Justice was appointed as one of the King's Ministers in the Cabinet and was also a member of the Legislative Assembly. In 2010 the Constitution was amended to establish an independent office of Attorney-General.

The distribution of the functions and roles of the Attorney-General and Minister of Justice is open to abuse such as breaches of the rule of law and is highly relevant to the separation of powers. In Tonga, the position of the Attorney-General is one that predates that of Minister of Justice.⁴⁴ However, today it remains an issue whether the offices of the Attorney-General and Minister of Justice be held as one office or separated. It is appropriate to consider how best these two institutions should be organised so as to give effect to the principles of democracy, good governance and separation of powers, particularly in the efforts to harmonise Tonga's form of government with the democratic aspirations surrounding adoption by the Assembly of the 2010 constitutional reforms.

Changing circumstances in Tonga, including the major reforms of 2010, the demands of global pressures and the increased volume and complexity of legal work at home, have all focused attention on the need to examine and improve arrangements in this area of government. So far, no change is more significant than the 2010 conversion of Cabinet Ministers from being appointees of the King for life or until dismissed by the King, to being Ministers who are chosen from elected members by a Prime Minister similarly chosen, for a fixed term of Parliament of four years unless earlier dissolved.

43 Ibid.

44 Dr Guy Powles "Why so complicated? The role and status of the Attorney-General in Pacific Island states, and the case of Tonga", A paper presented at the Pacific Law Students Law and Culture Conference in Wellington on 6 July 2016, p 3.

The current situation in Tonga is that the Attorney-General is a prerogative appointee who is appointed by the Monarch on the advice of the Judicial Appointments and Discipline Panel. Though the Attorney-General may be the legal adviser to Government, the advice or performance of duties by the Attorney-General should not be subject to review by another body except the Court. This article notes the press release to the public by which the Prime Minister reprimanded the Acting Attorney-General on the performance of his duties in 2015.⁴⁵ Such an act not only undermined the then Acting Attorney-General's role as legal adviser to Government and his role as Director of Public Prosecutions but also had the unfortunate implication that the Judiciary and its decisions were subject to the directions of the Director of Public Prosecutions.

In looking for the way forward, it is worth remembering that a public reprimand of this sort undermines the public confidence in one of the officers tasked with ensuring the independence of the judiciary and the upholding of the rule of law. When it comes from the Head of Government, it does more harm than good.

45 Hon Prime Minister's Letter to Acting Attorney-General (13 February 2015), www.mic.gov.to/news-today/press-releases/5224-hon-prime-ministers-letter-to-acting-attorney-general?tmpl=component&print (accessed on 11 September 2015).