

PILON Report
of the
Office of the Attorney-General
Tuvalu



December 2009

Office of the Attorney-General

Delivering Excellence in Legal and Justice Services to the
Government and People of Tuvalu

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1 Introduction

It is with pleasure that I present the Office of the Attorney-General's Annual Report for 2009. This report covers the period January 2008 to December 2009. At the outset, I would like to thank the staff of the Office for their dedication and commitment during the year and for their assistance in preparing this report.

2 Office of the Attorney-General

2.1 Structure and Personnel

The Office of the Attorney-General has an organisational structure of 6 legal staff and two non-legal staff as follows:

- Eselealofa Apinelu - Attorney-General;
- Daniel Gorman - Legal Adviser;
- Sa'aga Talu – Senior Crown Counsel;
- Filiga Taukiei – Crown Counsel;
- Kitele Tefoto – Registration Officer for Births, Deaths and Marriages; and
- Panapa Timoteo – Clerical Officer

One of the office's legal staff (Daniel Gorman) is a non-Tuvaluan citizen, funded by AusAID through the PACTAM program to deliver technical assistance to the office.

There is no division of roles for legal staff within the office and all work is allocated to legal staff on the basis of legal complexity, knowledge of the Tuvaluan language and workload. All legal staff undertake civil, criminal advisory and counsel work. Legislative drafting is carried out predominantly by senior lawyers.

In relation to the movement of office personnel in the past year, Sa'aga Talu (previously a Crown Counsel) has been promoted to the position of Senior Crown Counsel, Kitele Tefoto (previously an Executive Officer) has been promoted to the role of Registration Officer for Births, Deaths and Marriages, Simon Kofe (previously Crown Counsel) has been appointed as an Assistant People's Lawyer and Stephen Earl (previously Crown Counsel funded through the VIDA programme) has returned to legal practice in Australia. During the year, Albert Seluka and Agaifo Houati both acted as Crown Counsels for short periods before respectively accepting positions in the public service and police force. A reshuffle in the administrative cadre has brought Panapa Timoteo to the Office as the Clerical Officer in place of Tieni Iona.

In 2009, budgeted Government expenditure in respect of the Office of the Attorney-General was \$182,228.

2.2 Roles and Functions

2.2.1 Advisory

Under the Constitution, the Attorney-General is the principal legal adviser to the Government, and has such other functions as are prescribed. In Tuvalu, the Attorney-General is a public officer and not a Minister or a member of Parliament. The Attorney-General sits in Parliament as the legal adviser to Parliament and is entitled to take part in proceedings in accordance with the Parliamentary Rules and Procedure.

The Office also has the function of advising Statutory Corporations and Local Governments when so requested.

To date in 2009, there has been 11 Scheduled Cabinet meetings and 40 Special Cabinet meetings, which the Attorney-General or Acting Attorney-General have attended.

The Office of the Attorney-General has also provided over 42 detailed advices to 14 different government departments and agencies. The Office has advised Government in relation to its obligations under 6 international treaties and has advised Government and State-owned Enterprises in relation to at least 10 substantial commercial agreements.

This year the Office signed a funding agreement with AusAID to secure funding for the completion of the law revision project to provide wide access to up to date legislation through the publication of laws in hard-copy, CR-Rom and on the internet.

The Office (mainly through the Clerical Officer) has prepared and published 60 General Notices and 17 Legal Notices. Included in the Legal Notices are Room Tax Regulations, Income Tax Regulations, Consumption Tax Regulations, Customs (Amendment) Regulations, a Customs (Tariff) Order and other regulations.

2.2.2 Civil litigation

The Office of the Attorney-General represents the Government in all civil suits against the Government. In 2009, the Court of Appeal and the High Court have held sittings. Three civil cases listed for determination before the High Court involved claims against the Government.

The Office also provides legal advice and representation to all State-owned Enterprises and Local Government's where requested. In the past year the office has been particularly involved in assisting the Government and State-owned Enterprises to pursue outstanding debt recoveries work. Two of the civil appeal cases heard before the Court of Appeal and 6 of the civil cases listed for determination before the High Court involved claims against Local Governments.

Crown Counsels are occasionally called upon to represent private persons in civil claims between individuals, when cases are referred by the Office of the People's Lawyer due to conflicts of interest. Through this mechanism, Crown Counsels have advised and represented six private individuals in Court cases this year.

2.2.3 Criminal Prosecutions

Summary offences are heard and determined in the subordinate Courts and are prosecuted by Police Prosecutors. The Office of the Attorney-General often reviews case files and provides advice to Police Prosecutors in relation to appropriate charges in the subordinate courts. Serious offences which fall under the jurisdiction of the High Court are prosecuted by the Attorney-General or Crown Counsel. In recent year, it appears there has been an increase in serious crime in Tuvalu, with a number of sexual offences being brought for prosecution in the High Court.

This year, the Office of the Attorney-General has advised Police Prosecutors in relation to 25 criminal case files. Crown Counsel prosecuted three criminal cases in the High Court, all for serious sexual offences. Crown Counsels were also involved in the prosecution of five criminal appeals heard in the High Court.

2.2.4 Court of Appeal

In September 2009, the Court of Appeal sat in Tuvalu for the first time in Tuvalu's history. The learned Justices of Appeal for Tuvalu's Court of Appeal are Sir David Tompkins QC, Barry Paterson QC and Robert Fisher QC. This represents an important step in the development of the legal system in Tuvalu.

The Office of the Attorney-General and the Office of the People's Lawyer were involved with the Office of the Judiciary in the administration of the Court of Appeal. Crown Counsel also heavily involved in preparing for and appearing in two of the three appeal cases. We hope that sittings of the Court of Appeal will become a regular feature in Tuvalu's judicial system and wish to thank the Justices of Appeal for their commitment.

2.2.5 Registrar of Births, Deaths and Marriages; Registrar of Citizenship; Registrar of UK Patents and Trademarks

The Attorney-General performs the functions of Registrar of Births, Deaths and Marriages, Registrar of Citizenship and Registrar of UK Patents and Trademarks under relevant laws.

The Registrar of Births, Deaths and Marriages maintains the Register and issues certified extracts of the Registers upon application. In 2009, the Registrar issued 882 certifications of the Births' Register, 8 certifications of the Deaths' Register and 63 certifications of the Marriages' Register.

In 2009, the Registrar of UK Patents and Trade Marks registered 9 new patents and 54 new trademarks as well as processing 42 Trade Mark renewals.

The Registrar for Citizenship processed 22 applications for citizenship by registration and 2 applications for citizenship by naturalization.

2.2.6 Participation in international and national meetings, conferences and workshops

In the past year, the office has received invitations to participate in international and regional gatherings. Below is a list of the meetings and courses attended by staff of the office:

- UNDP, Universal Periodic Review Training, Auckland, January to February 2009.
- UNHCR, Adoption of Tuvalu National Periodic Report, Geneva, March 2009.
- Forum Secretariat and Oceania Customs Organisation, Customs Legislation Drafting Workshop, Nadi, April 2009.
- Commonwealth Secretariat, Prosecution Training Programme, Wollongong, April/May 2009.
- UNODC, Counter-Terrorism Workshop, Suva, April/May 2009.
- Pacific Law Librarian Twinning Programme & PACLII, Pacific Law Librarians Workshop, Port Vila, May 2009.
- Forum Secretariat, Colloquium for Public Prosecutors and Judiciary on Intellectual Property Enforcement, Kuala Lumpur, May 2009.
- UNODA, Small Arms and Light Weapons Seminar, Sydney, 22-24 June 2009.
- FFA, Sub-regional Workshop Western and Central Pacific Fisheries Commission, Nadi, July 2009.
- FFA, Workshop for Legal Options giving effect to WCPFC Obligations, Honiara, 4 to 6 August 2009.
- UNITAR, Regional Training Programme to Enhance the Conflict Prevention and Peacebuilding Capacities of Indigenous Peoples' Representatives of the Pacific, Cairns, 18 to 24 August 2009.
- SPC, Economic Partnership Agreement between PACP States and EU, Belgium, September 2009.

Domestically, Crown Counsels are invited by various ministries to be a resource person for particular workshops. The Office has participated in Forum Fisheries Agency's workshops, Parliamentary Training workshops, Tobacco Control and Human Rights awareness programmes. This year, with Tuvalu presenting its country report to the UN in

relation to CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women), there has been a significant focus on the rights of women.

3 Office of the People's Lawyer

3.1 Structure and Personnel

The Office of the People's Lawyers has three staff members, two legally qualified and one clerical. The staff are:

- Isala Isala – People's Lawyer;
- Simon Kofe – Assistant People's Lawyer; and
- Maleta Saifoloi – Clerical Officer.

In relation to the movement of personnel in the last year at the Office of the People's Lawyer, the former People's Lawyer, Joelle Grover, returned to private practice in Australia in February 2009. Simon Kofe, a former Crown Counsel has been appointed to the position of Assistant People's Lawyer. In February 2009 Isala Isala returned from working with the Pacific Regional Rights Resource Team (**RRRT**) in Fiji to fill the role of People's Lawyer in May 2009.

In 2009, budgeted Government expenditure in respect of the Office of the People's Lawyer was \$57,910.

3.2 Roles and Functions

The Office of the People's Lawyer is established under the **People's Lawyers Act**. The Office of the People's Lawyer provides independent advice and representation to people in Tuvalu in relation to all civil and criminal matters. Alternative dispute resolution practices are advocated by the Office of the People's Lawyer where appropriate.

The People's Lawyers have accompanied the Senior Magistrate on circuit to the outer islands on two occasions this year. The People's Lawyers were also involved in preparing cases for the High Court and for the Court of Appeal.

4 Office of the Judiciary

The Chief Justice of Tuvalu is the Hon. Gordon Ward. Chief Justice Ward resides abroad, but generally visits Tuvalu twice yearly to hear pending High Court cases. In the past year, because of the understaffing of the Office of the People's Lawyer, the High Court sat only once in October 2009. Details of significant High Court decisions are discussed below.

Since September 2009, the judiciary also consists of three non-resident Court of Appeal judges.

The daily administration of the Office of the Judiciary is under the control of the Senior Magistrate who is supported by two other staff.

In 2009, budgeted Government expenditure in respect of the Judiciary was \$149,914.

4.1 Significant Court Decisions

4.1.1 Mase Teonea v Kaupule of Nanumaga (Unreported, Court of Appeal, Civil Appeal 1 of 2005)

The appellant appealed against a decision of the High Court which refused to make declarations as to the infringement of the appellant's right to freedom of religion under the Constitution. At first instance, the case turned on the interpretation of section 29 of the Constitution, which provides for permissible restrictions to the Constitutional right to spread beliefs where the exercise of those rights are divisive, unsettling or offensive to people or directly threatening Tuvaluan values. The High Court found as a fact that the actions of the Nanumaga Falekaupule (traditional assembly) in banning the spreading of new religions on the island was directed to this purpose. The Court also found as a fact that the appellant's new religion was unsettling and divisive to the island community. The Court further found that the decision of the Falekaupule was not a law and was therefore not subject to the requirements of section 29(5) of the Constitution, which provides that any law that is inconsistent with the freedom of belief and freedom of expression must be reasonably justifiable in a democratic society. Consequently, the High Court did not consider this issue.

On appeal to the Court of Appeal, the key appeal issues were (1) whether the decision of the Falekaupule was a law and (2) whether the decision was reasonably justifiable in a democratic society. The Court of Appeal decision is pending.

4.1.2 Tehumu Lamese & Ors v Kaupule of Nanumaga (Unreported, High Court of Tuvalu, Civil Case No 3 of 2006) – Civil Contempt

The High Court summoned four persons to appear before the High Court in relation to civil contempt. The contempt proceedings arose from the termination of Kaupule (Council) workers and other workers on the island of Nanumaga after the Court had issued an injunction restraining the Falekaupule (traditional assembly of leaders) or its agents from taking any actions to terminate the employment of members of the Tuvalu Brethren Church. The Falekaupule has subsequently refused to obey this order. The Kaupule (Council) acting as the agent of the Falekaupule had deliberately breached the court order by dismissing Kaupule workers who were church members. In a separate earlier decision, the Court had awarded damages for wrongful dismissal.

The Court found two of the alleged contemnors guilty of contempt and two of the alleged contemnors not guilty. The two men who were found guilty of contempt were the Secretary of the Kaupule (Council) and a member of the Kaupule. Both men were non-matais and had a customary obligation to obey the decision of the Falekaupule. In sentencing the two men for contempt, the Court accepted the men were in a difficult and vulnerable position when the Falekaupule (traditional assembly) deliberately embarked on a course of open defiance of the Court. However, the Court said that as the defiance was implemented by these men, it must mark the seriousness of their actions by the penalty. The Court did not order imprisonment, but imposed fines of \$4,000 and \$3,000

on the two contemnors. These are very substantial fines in an outer-island economy, being the equivalent of more than 6 months' salary.

4.1.3 R v Sei Kauapa (Unreported, High Court of Tuvalu, Crim Case No 5 of 2009)

In this case, the Crown sought a declaration as to the meaning of section 304 of the Criminal Procedure Code after the Senior Magistrate refused the Crown access to the orders of the Court until after an appeal was filed. The High Court ordered that the parties to a criminal case and anyone else affected by a decision has a right to a copy of the order and the written reasons for it. The application can be made orally at the hearing, or subsequent to the hearing either orally or in writing. The Chief Justice noted that any formal requirement may discourage a person from seeking his right.

4.1.4 Isaia Italeli v Attorney-General; Solomona Viliamu v Attorney-General (Unreported, High Court of Tuvalu, Crim. Case No 8 of 2009)

In this case the plaintiffs sought judicial review and an extension of time in which to apply against the decisions of the Public Service Commission (PSC) to terminate their employment.

The factual background to both cases are similar. Both employees were public officers and were terminated by the PSC in 2006 on the basis of being involved in the leaking of exam papers in 2005. A Commission of Inquiry was held in 2006, which implicated both of the plaintiffs as the prime suspects in leaking examination papers. However, the report was treated as confidential and not shown to the applicants prior to their dismissal (**the First Decision**). Subsequently, the applicants appealed the decision to the PSC and were provided with a copy of the Commission of Inquiry report before the appeal hearing was held. However, they were not allowed to attend the appeal hearing. The PSC dismissed the appeal (**the Second Decision**).

The Court:

- (a) held that the First Decision by which the applicants were dismissed from the Public Service was reached by a totally incorrect procedure under which they were dismissed without being told the case against them and were denied the right to make a proper defence.
- (b) held that although a decision-maker who reaches a decision by the wrong procedure can always correct it by a fresh hearing under the correct procedure, but found that the Second Decision was not such a case.
- (c) granted certiorari, to quash the decisions of the PSC dated 18 August 2006 and 16 February 2006.
- (d) held that due to the long passage of time, the applicants could not be reinstated and that their remedy lay in damages for unlawful dismissal.

5 Parliament and Law making

5.1 Bills before Parliament

The Parliament of Tuvalu has held two sessions in the past year. In the May 2009 session, Parliament passed the following Acts:

- Traffic (Amendment) Act 2009;
- Law Revision (Miscellaneous Amendments) Act 2009;
- Waste Operations and Services Act 2009;
- Provident Fund (Amendment) Act 2009; and
- The 2008 Supplementary Appropriation (no. 3) Act 2009.

In the November 2008 session, Parliament passed the following Acts.

- 2009 Supplementary Appropriation (No 1) Act 2009;
- 2010 Appropriation Act 2009;
- Counter-Terrorism and Transnational Organised Crime Act 2009
- International Companies Act 2009.
- Police Service Act 2009
- Police Powers and Duties Act 2009
- Prescription of Salaries Act 2009

Currently before Parliament are the following Bills which have passed their first reading only:

- Constitution (Miscellaneous Amendments) Bill
- Public Enterprise (Accountability and Performance) Bill
- Banking Bill

In accordance with the Rules of Procedure, the above Bills will be circulated to the traditional assemblies of each Island (the Falekaupules) for comment before being presented to Parliament for its second and third readings.

6 Conclusion

As in previous years, the institutions involved in upholding the rule of law in Tuvalu (the Office of the Attorney-General, the Office of the People's Lawyer and the Office of the Judiciary) have had to perform their roles as best they can with the limited resources on offer. There is a severe shortage of practicing lawyers in Tuvalu. In the past year, the

presence of an ex-patriate lawyer (funded through the PACTAM programme) has enabled Tuvaluan lawyers to complete much needed training in the areas of criminal prosecution, fisheries law enforcement and legislative drafting. However, with only five practicing Tuvaluan lawyers (three within the Attorney-General's Office and two within the People's Lawyer's Office) there is still much work to do to fulfill our mission of delivering excellence in legal and justice services to the Government and people of Tuvalu.