

POLITICAL AND CONSTITUTIONAL  
REFORM OPENS THE DOOR: THE  
KINGDOM OF TONGA'S PATH TO  
DEMOCRACY

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Three acronyms are frequently employed –  
NCPR – National Committee for Political Reform  
CEC – Constitutional and Electoral Commission  
RLC – Royal Land Commission.

Unless otherwise indicated, "cl" and "cls" refer to the clauses of the Constitution amended as at 30 November 2010 – for which see the consolidation in the Appendix. Where a year is cited, as in 1988 cl 41, that refers to the consolidation of the laws including the Constitution, of that year.

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# POLITICAL REFORM OPENS THE DOOR: THE KINGDOM OF TONGA'S PATH TO DEMOCRACY

## *I INTRODUCTION*

Legislative Assembly elections held on 25 November 2010 under an amended Constitution and related laws brought to the Kingdom of Tonga for the first time in its history a government chosen by the electorates instead of by the Monarch. Questions have been asked as to the readiness of voters and candidates to take on the responsibility. Within government, the Monarch remains very influential despite the steps taken by the late King Tupou V to cede most, but not all, of the Monarch's executive powers to the Cabinet of Ministers. Issues may arise concerning the Monarch's appointment of advisers and his relationship with certain sectors of the governmental system.

The main purpose of this paper is to provide an overview of the new political and constitutional regime, while offering insights into the thinking and decision-making that went into its development. This Introduction will provide a preliminary outline of recent events as a backdrop to the Sections of the paper.

Tonga's journey thus far has reflected the uniqueness of its political history in the Pacific context, and demonstrated the capacity of individuals to make definitive contributions to the shaping of that history. The nation's vintage Constitution of 1875 has served Tonga well<sup>1</sup> and there has been resistance to change. That the Kingdom now has an amended constitutional structure in place which gives effect to a dramatic reform agenda is testament to a successful pragmatic partnership between King Tupou V and the out-going government led by Dr Felete Sevele.

His Majesty King George Tupou V died on 18 March 2012.<sup>2</sup> With the departure from the scene of both the late King and Lord Sevele<sup>3</sup> at the conclusion of a relatively short and intense period of constitutional change, it is timely to review the achievements of that partnership, and of that period,

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1 The Constitution introduced by King George Tupou I in 1875 was altered little after 1891.

2 He had been on the throne since the death of his father King Tupou IV in 2006. His younger brother has succeeded him as King Tupou VI.

3 On retirement from politics, Dr Sevele was invested by King Tupou V with a Life Peerage – to be known as Lord Sevele of Vailahi (Matangi Tonga 29 Dec 2010).

The November 2010 elections referred to introduced an electoral system in which the two electorates comprised:

- i the hereditary land-holding Nobles (33 titles held by 29-30 Nobles<sup>4</sup>), plus 9 Life Peers (honorary Nobles), who elect 9 hereditary Nobles; and
- ii the balance of the people (around 45-50,000 aged 21 years or more) who elect 17 representatives (Constitution cl 60).

In a secret ballot on 21 December 2010, 14 of the 26 members of the new Assembly chose as Prime Minister Lord Tu'ivakano,<sup>5</sup> a Noble and an experienced parliamentarian. Pro-Democracy veteran, 'Akilisi Pohiva, mustered 12 votes. From the elected members Tu'ivakano appointed a Cabinet of 11 Ministers including 2 Nobles and both independent and 'Democracy' members.<sup>6</sup> Permitted to choose up to 4 Ministers from outside the House, he chose 2, one of whom is a senior woman educator and the other an experienced lawyer and politician (MT 5 Jan 2011). The new Prime Minister said he did not recognize the existence of political parties and that Cabinet was designed to represent the whole country (Radio Australia 'Pacific Beat' 4 Jan 2011). It remains to be seen what form of opposition will develop in the House. Indications are as this paper goes to press, that government leadership will be contested by motions of no confidence, the first of which can be brought after a period of 18 months following the general election.<sup>7</sup>

Comparison must be made with the previous constitutional requirements, under which the people elected only 9 representatives, the Nobles elected 9 (unchanged today) but the Monarch in his discretion appointed the Prime Minister and up to 12 Ministers from outside the Assembly – all of whom then became appointed members of a parliament of 30. The people's representatives had no prospect of participating in government unless appointed by the Monarch. Change was initiated in 2004 towards the end of the reign of King Tupou IV when it was announced that 4 elected representatives would be chosen by the Monarch to join

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4 A Noble may hold more than one title.

5 Lord Tu'ivakano is a former Speaker of the Legislative Assembly (2002-04), was Minister of Works in 2005 and, since 2006, was the Minister of Training, Education, Youth and Sports in the outgoing government. He succeeded, and was appointed to the hereditary Noble title Tu'ivakano in 1986. He holds an honours degree in political science from Flinders University, Adelaide. His eldest son is married to the second daughter of Princess Pilolevu, the King's sister (who is married to the Noble Lord Tuita).

6 After several days, 'Akilisi Pohiva decided not to be a Minister.

7 A report on the anticipated 'motion of no confidence' debate will be provided in a post-script at the end of the text of this paper.

Cabinet as Ministers (on the understanding that they would no longer hold seats as elected members of the House) (MT 11 Nov 2004). The former Prime Minister, now Lord Sevele, entered Cabinet by this route.

With regard to appointments, it is critical to note where the discretion lies – who actually makes the decision. Prior to the 2010 reforms, it was assumed that the Monarch's authority was absolute, and that when he said he would act on advice given to him, that was a concession he could withdraw. Certainly, the wording of the Constitution gave him unrestricted authority. However, King Tupou V, while expressing support for gradual change, spoke of ceding authority and a 'binding precedent' for monarchical authority to be exercised on Prime Ministerial advice (see Section IV 'Input of King George Tupou V' below).

Under the amended Constitution, the Monarch is now bound to follow the recommendation of the Legislative Assembly as to whom he appoints as Prime Minister (cl 50A), and he is similarly required to comply with the wishes of the Prime Minister as to whom he appoints as Cabinet Ministers (cl 51). The whole issue of how exercise of the Monarch's discretion is described in the Constitution, and the importance of clarity of meaning, is discussed in Section VI C under 'The Monarch's Authority in Government'.

Over recent years, there have been conflicts and compromises reflecting different visions of a 'democratic' Tongan state. This paper leads off with a review, in Section II, of the 'Contributors and Sources' in the reform process. This has been significantly advanced by two large-scale public inquiries into political reform. The first was the National Committee for Political and Constitutional Reform (NCPR) established by the Legislative Assembly which toured the country and visited Tongans overseas to obtain information on Tongan priorities. Its lengthy August 2006 Report stressed Tongan values such as the 'three pillar' foundation of society, meaning its components of Royalty, Nobility and People, bound together by notions of respect, concern for kinship relations and attachment to land. Although it made certain recommendations that were eventually discussed by a parliamentary Tripartite Committee, most of the NCPR Report's outcomes lacked specificity for law reform purposes.

No doubt influenced partly by the destructive events of November 2006's Nuku'alofa riot and fires, the Privy Council (comprising King and Cabinet) proposed a timetable leading to elections under new laws (MT 3 June 2008). The Government made a public commitment to holding such elections as soon as the term of the current Parliament expired late 2010.

The second inquiry was established as the Constitutional and Electoral Commission (CEC), which worked through 2009 to a tight schedule (Powles 2009)

and produced its final 82 recommendations in November (CEC Final Report 5 Nov 2009). The 'Accomplishments of the Constitutional and Electoral Commission' are introduced in Section III of this paper. The Report, with draft legislation attached, was submitted to the Privy Council and Legislative Assembly, and published for the public (in Tongan and English, and on the internet). Most of the recommendations were accepted, but, as the Assembly worked through the recommendations, the Prime Minister and Cabinet, after consultation with King Tupou V persuaded the Assembly not to accept some important ones and to change the effect of others. This process was completed by 17 December 2009. The Government introduced and passed into law in the Assembly during the first nine months of 2010 the key legislation which amended the Constitution, made provision for the electoral system and boundaries, and elections themselves, and changed laws relating to government and the Assembly so as to give effect to the reforms. The 'Input of King George Tupou V and the Cabinet of Lord Sevele' is reviewed in Section IV.

However, when the new political regime is examined in its historical context, and in light of the advice provided by the CEC, it can be seen that Tonga has again taken a peculiarly Tongan approach to democracy. This is not itself cause for concern as, of course, no two 'democracies' are the same in today's world, and there is no common yardstick for measuring 'democracy'. The paper will proceed to examine, in light of the CEC's recommendations, the constitutional and legislative changes that have been put in place. No apology is made for the legal detail that is presented here, hopefully to the benefit of those who work with the politics and law of daily government. Section V encompasses the principal 'Analysis of Reform Measures', beginning with a look at the context in order to demonstrate the 'Magnitude of the Proposed Changes'.

Elevated to the apex of the Executive branch of Government, the first component to be examined in Section V is 'The Cabinet', followed by 'The Legislature'. Perhaps the most debate during the reform process has concerned the status, roles and powers of 'The Nobles' – for reasons explained in the Section. Then, new thinking about 'Change of Government' is necessary because, for the first time in its history, parliament has the power to bring that about.

The more interesting questions that arise out of Tonga's new constitutional blueprint concern the particular balance that appears to have been arrived at between the authority and influence of the Monarch on the one hand and the powers and status of the various elements of government, on the other. A significant factor in this equation is the Monarch's retention of powers in relation to the Legislative Assembly, considered in Section V G as 'The Monarch, the



Assembly and Law-Making', and also in relation to 'The Judiciary' (V H) and the office of 'The Attorney-General' (V J). Issues are discussed surrounding the historical and current situations of expatriate judges in the Kingdom and the measures attempted to protect their independence. Further, the role of Attorney-General has been transformed in a way that deserves examination.

At the heart of any consideration of relationships within a Monarchy are questions surrounding how the Monarch is to be advised and how precisely his powers are to be defined. Section VI 'Providing Advice for His Majesty' discusses the new advisory role of 'The Privy Council', together with 'The Law Lords and the Judicial Appointments Panel', and reviews in detail 'The Monarch's Authority in Government'. Although the Sevele Government appeared to have made up its mind as to what type of 'Electoral System' it wanted, most aspects were considered by the CEC, and are discussed in Section VII.

A further development must be considered for the contribution it makes to the political reform scene. In March 2012, the Royal Land Commission (RLC) appointed in 2008 by King Tupou V to review the administration of land in the Kingdom presented and published an extensive report that included an examination of the respective powers and functions of the Monarch, Noble estate holders, Cabinet and Minister of Lands in relation to current problems and concerns with the land system. The political dimensions of land today are discussed in Section V E 'The Nobles: Estate Holders', and Section VIII 'The Land System'.

The paper ends in Section IX 'Conclusion: The Open Door' with reflections on how the Constitution may be amended, and on the reform process generally. As Tonga moves forward under a new Monarch, and its leaders perform new roles, what direction might its path take?

In concluding this Introduction, two observations may be helpful. First is the apparent determination of many leaders in the Executive and the Legislature to ensure that the Monarch should remain a steadying influence politically, at least during a period of major constitutional change.

Secondly, it should be noted that a most significant transition is taking place. King Tupou V has undoubtedly been a guiding influence on Tonga's choice of path to a more democratic system, and the direction taken in at least some of the key reforms has proceeded with his known preferences in mind. New arrangements involving the Monarch, such as those concerning the Privy Council, the office of Lord Chancellor and the Legislative Assembly may have been regarded favourably by lawmakers in reliance on the late King's wishes. Now, His Majesty King Tupou VI, the new Monarch, may bring to the scene personal views, attitudes and

priorities as yet unknown – factors that may affect the Monarch's relationships with Executive Government, the Legislative Assembly and the Judiciary.

Accordingly, in the course of discussing constitutional and political subject-matter in this paper, it has been decided to use the objective term 'Monarch' frequently, as well as 'King' (the term used in the Constitution) rather than the more personal 'His Majesty the King', and to refer to 'King Tupou V' where His late Majesty Tupou V is identified. Obviously, no disrespect is intended.

## **II CONTRIBUTORS AND SOURCES**

Much has been written about the unique amalgam of Tongan chiefly authority and British forms of government and law which secured for Tongan citizens a system of their own that has provided stability for over a century.<sup>8</sup> In the last three decades, growth of the public concern over lack of accountability was followed by demand for constitutional change, and steps towards the events of 2010 were taken.<sup>9</sup> As this paper is primarily concerned with recent developments, it is convenient to summarise these steps by compiling a list of the principal contributors and sources of input into the political reform process, and presenting them in roughly chronological order, as follows:

- Individuals and groups agitated from early 1970s, leading to elected members of the Legislative Assembly supporting a platform urging accountability; 'Akilisi Pohiva, a People's Representative for Tongatapu was, and is, a leading figure; the 1992 Constitutional Convention was organised in Nuku'alofa by the Pro-Democracy Movement; and draft proposals for specific change were submitted by citizens, particularly the Human Rights and Democracy Movement.
- In 2004, as mentioned in the Introduction, the former King Tupou IV, at the suggestion of his son (to become Tupou V), declared that he would appoint four elected Assembly members to his Cabinet following the next election.
- The National Committee on Political Reform (NCPR) was established by the Assembly in 2005 to sound out the priorities of ordinary Tongans at home and abroad, and it reported to the King and Assembly in October 2006 (NCPR 2006).
- In March 2006, Dr Feleti Sevele, an agricultural economist and businessman and one of the promised elected members, was appointed Prime Minister and the King consulted him with regard to certain ministerial appointments.<sup>10</sup>
- Beginning with a succinct statement in September 2006 of his intention to pass executive powers to a government elected by the Nobles and people, His Majesty King Tupou V made his position plain, a position more

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8 See, for example, Campbell (2001) and Powles (1990).

9 Ian Campbell has traced developments in papers such as (2005) and (2006) and his recent book (2011).

10 Those sitting members appointed as Ministers ceased to be members of the House and by-elections were held. In this way, the appointees were saved the embarrassment of loyalties divided between Monarch and electorate.

advanced than that of many of those Nobles and people (see Section IV 'Input of King George Tupou V' below).

- It also became clear that His Majesty's thinking was ahead of that of many members of the nobility and business community who saw their interests threatened by a 'popular' government under leaders who had not been tested.
- A Tripartite Committee recommended by the NCPR was formed within the Assembly in 2007 and began planning stages leading to legislative change.
- The Constitutional and Electoral Commission began its work in early 2009 and produced two Reports – interim in June and final in November.
- In the course of the Assembly's deliberations on the CEC's recommendations in December 2009 and on subsequent reform bills in the House during 2010, the wishes of both His Majesty and the Sevele Cabinet were seen to be highly influential, and often determinative of issues where those wishes did not coincide with the recommendations.

This paper now picks up and expands upon the last two items on the list, then will continue the discussion as it examines each of the main subject areas of reform and how they fared in the process.

The resources drawn upon for the paper include the Constitution and the principal Acts of the Assembly and their respective amendments passed during 2010.<sup>11</sup> It was also necessary to examine the Miscellaneous Amendments Acts that were passed in order to make multiple consequential changes to the large number of Acts which refer to aspects of Government that were the subject of reform. Research was greatly facilitated by the official legislative website maintained by the Crown Law Office.<sup>12</sup>

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11 An 'unofficial consolidation' of the Constitution as amended, prepared by Neil Adsett, then Law Draftsman, was particularly helpful. The document extracted from it is appended to this paper with his consent.

12 <[www.crownlaw.gov.to/cms/index.php](http://www.crownlaw.gov.to/cms/index.php)>.

### **III ACCOMPLISHMENTS OF THE CONSTITUTIONAL AND ELECTORAL COMMISSION**

The concept of a constitutional review body for Tonga owed its origins to discussions led by the then Attorney-General, Hon 'Alisi Taumoepeau, in response to concerns that progress with reform had stalled due to lack of constitutional advice, investigation of alternatives and focused public consultation. An informal meeting of lawyers and advisers in December 2007,<sup>13</sup> led eventually<sup>14</sup> to the drafting of a Constitutional and Electoral Commission Bill which, with Cabinet support, was presented to the Legislative Assembly by the Attorney-General and assented to by the King in July 2008. By that time Cabinet had made it clear that it supported the Assembly's expectation that the constitutional changes would have to be completed before the end of 2010 when a general election would be held under a new system.

In light of the general nature of the NCPR's findings, the Act gave the CEC a tightly regulated task, which was designed to ensure that it would inquire into and report upon both the broad issues and matters of detail listed in the Act. The mandating of these topics, as set out below, was deemed necessary in order that ample opportunity would be afforded for expression of wide-ranging opinions, and that full consideration would be given to the views of His Majesty, the Prime Minister and Cabinet, the Nobles and the people of Tonga on essential elements of political reform.

#### **The Executive**

The roles, functions, powers, duties of, and relationships between, the Monarch, the Privy Council, Prime Minister and Cabinet

The size and composition of the Cabinet

Delegation of certain authority by the King to the Prime Minister

The principle of collective responsibility of Cabinet

#### **The Legislature**

The composition and method of selection of members of the Legislative Assembly

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13 Comprising Hon 'Alisi Taumoepeau, Linda Folaumoetu'i (then Solicitor General), 'Aminiasi Kefu (then Senior Crown Counsel now Solicitor General), Neil Adsett (Law Revision Commissioner, Law Draftsman and now Attorney-General), Drs Malakai Koloamatangi and Jon Fraenkel (political scientists), Dr Guy Powles (constitutional lawyer), 'Aisea Taumoepeau (law practitioner), and Tevita Tupou (law practitioner, now Law Lord).

14 Based on an outline of topics and directions drawn up by Guy Powles and drafted into legislation by Neil Adsett.

The term of the Legislative Assembly

### **Relationships between the Executive and the Legislature**

The roles of the King, the Prime Minister and Cabinet, including accountability measures

The King's function in the law-making process

The appointment of the Prime Minister from the Assembly

The appointment of Members of Parliament to Cabinet and the consequences

The term of office of Cabinet Ministers

Motions of no confidence

### **The Electorate**

The electoral system

Definition of constituencies and distribution of seats (Schedule 2 of the Act)

Further directions called for the Commission's Report to include:

- specific recommendations for or against reform in any particular area
- the principal reasons for and against change, and reasoned arguments for and against each recommendation
- an assessment of how an appropriate balance might be achieved for the Kingdom
- priorities for consideration and implementation of change, consistent with the general expectation that substantial changes will have been made by 2010 and that Legislative Assembly elections under the changed system will then be held
- if change is recommended, discussion of, and a recommendation as to, whether to effect change by adopting constitutional conventions or amending the Constitution or other laws (Section 7 of the Act).

It took some time to assemble a Commission, which began its work early in January 2009, comprising:

- Chairman – Hon Justice Gordon Ward, former Judge and Chief Justice of Tonga (10 years), Judge and Chief Justice of Solomon Islands (5 years), Chair of Court of Appeal of Fiji – recommended by Cabinet; and
- Members
  - Hon 'Alipate T Vaea (Secretary, Tonga Traditions Committee) recommended by Nobles' Representatives;

- Dr Sitiveni Halapua (Director of the Pacific Islands Development Program at the East-West Center in Honolulu) recommended by People's Representatives; and
- Dr 'Ana M Taufe'ulungaki (University Ministry of Education) and Mr Sione T Fonua (lawyer and politician), both recommended by the Judicial Services Commission.

The chairman and four members of the Commission were universally regarded as people of high calibre and integrity. Dr Halapua and Dr Taufe'ulungaki had been members of the NCPR.

As required, the CEC produced an Interim Report in June,<sup>15</sup> which generated much further discussion and some further submissions, and its Final Report on 5 November 2009. Conscious that Tongans were impatient over delays and slow progress with the reform process, the CEC adhered to the timetable. The Commission was well served by competent staff and an experienced law draftsman to prepare the accompanying draft Bills. The work of the law draftsman continued, assisted by the Crown Law Office when the Government and Assembly subsequently reviewed the Commission's recommendations and some significant changes were made.

In all, the CEC produced a reader-friendly Final Report of 350 numbered paragraphs and 82 specific recommendations, together with draft amendments to the Constitution, Legislative Assembly Act, Government Act and Electoral Act. The Report took up and discussed the evidence, discussion and submissions available to it, across the whole political structure of the Kingdom. As an analysis of the constitutional issues underlying this crucial period in Tonga's history, this Report is a remarkable document that weighs up competing considerations and offers advice as to where, in the Commission's view, the best solutions lie.

Before examining the Report in detail, it is important to note certain comments by the CEC that expressed concerns about the process in which it was engaged and the readiness of the public for it. Having received submissions, participated in public consultations and observed parliamentary debate on the Interim Report, the CEC said, in discussing the place of the Constitution in people's thinking:

Despite the reverence with which many will speak of their Constitution, it has been a striking aspect of our consultations that remarkably few people have any real understanding or even, it must be said, knowledge of its actual contents. It is, at the

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15 The CEC's consultative processes and Interim Report are discussed in Powles 2009.

same time, both surprising and reassuring that it is accepted as such a vital part of modern Tonga; holding an almost iconic stature (para 2).

More generally:

It was apparent that many ordinary Tongans have little interest in politics or the structure of government. This may arise partly from a lack of ability to effect change over many generations but comments in the outer districts suggest it also stems as much from the need to support themselves and their families and a perception that government, however formed, will simply continue to neglect their interests and devote most of its time, energy and resources to the central districts (para 51).

The first 36 paragraphs of the Final Report were devoted to an Introduction on the significance of the achievements of King Tupou I, the importance of the Constitution and the developments which led to political change. In its Conclusion, the CEC also reflected on the "dichotomy of feelings held by so many people". It is worthwhile quoting in full:

As we have sought opinions, researched the issues and debated our findings, we have been constantly reminded of the dichotomy of feelings held by so many people. The widespread belief that it is time for some reform has been constantly linked with an almost instinctive anxiety to ensure we preserve the culture and tradition which has so clearly given Tonga independence, security and stability for more than a century and a third – a continuity unparalleled in the islands of the South Pacific (para 337).

The wish for change has been growing for many years. Whilst those who pressed for reform were initially frequently ignored or discouraged both by the government and a significant proportion of the public, their support in the general public has grown steadily and, with it, the strength and, often, stridency of their claims. King Taufa'ahau Tupou IV recognised their aspiration to have a greater part in the way the country was governed and took the first significant steps to meet it. The wish for, and the nature of, those steps was an acknowledgment of the growing division between the government and the people. Sadly, dramatic though they were in the Tongan context, those changes did not lead to the greater openness in government that so many of the reformers sought (para 338).

The Commission made it clear that the responsibility of deciding which of its recommendations would be implemented lay on the Assembly (para 342), and was concerned about the standard of debate.

The lengthy debate on the interim report in the Assembly with its frequent references to already entrenched views in the minds of many representatives does not bode well. Coupled with the all too apparent lack of understanding of the aims or even of



the actual contents of the interim report by some of the members of the House, it gives give cause for some pessimism about the passage of this report and any consequent legislation through the House. Lively, thorough and, especially, well informed debate is essential ... (para 343).

Indications that the Government might pre-empt debate caused the Commission to comment:

We still harbour that hope but the recent statement by the Government only a few weeks before our report is due suggests an intention to press ahead with previously held opinions before they have seen the recommendations of the very Commission they established to make them. Regrettably, it is hard to view that intervention as anything but an intention to pre-empt any possibility our recommendations may be contrary to their chosen view (para 349).

The Government statement reasserts much of the content of the Government's written submissions. We have considered and evaluated those in the same way as we have every submission. If we do not support them, it is because, on an overall consideration of the issues, we have decided they are not the best course for Tonga. Presumably the Government's submissions were put to us for such an evaluation. Now, it appears the Government may not be willing to have them measured by any other yardstick than its conviction that other opinions have little value or, perhaps, to have them measured at all (para 350).

#### **IV INPUT OF KING GEORGE TUPOU V AND THE SEVELE CABINET**

By way of introducing an analysis of the reforms adopted, it is noteworthy that the CEC referred to the great significance it attached to the public statements of King Tupou V in support of reform (paras 29, 69 and 73-86).<sup>16</sup> Cabinet itself had made written submissions to the CEC on specific points and the CEC appears to have assumed that Cabinet was speaking with the late King's approval with regard to the many matters of detail involved in the transfer of executive authority from Monarchy to elected government. There was certainly no suggestion that the Prime Minister and Cabinet in any way encouraged His Majesty to divest himself of more authority than he was willing freely to hand over. Indeed, in February 2009, a month after the appointment of the CEC, the Prime Minister, himself a former member of the pro-democracy movement, stated publicly that he did not support the push by the pro-democracy movement for the King to be stripped of his involvement in the selection of Parliament as well as other executive powers. He added:<sup>17</sup>

The changes that will take place are quite revolutionary in themselves and I think we should move at a pace that would ensure that the changes that will take place will be for the interests of Tonga long term.

One aspect of the reform agenda came to light to puzzle the Commission (paras 92-93) and members of Tonga's legal community. This concerned His Majesty's desire to retain what he called his 'judicial powers',<sup>18</sup> meaning, it transpired, the power to appoint and dismiss the Judges and Attorney-General and to determine their terms of appointment. The nature and significance of this determination of King Tupou V to retain direct influence within a reformed system, as well as the measures adopted that appear to sustain that influence, are discussed later under headings in Section V – 'The Judiciary', and 'The Attorney-General', and in Section

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16 The late King's first dramatic declaration of support for the devolution of executive authority had been made in an announcement of 26 Sept 2006 ('A King well prepared to lead [along the path of political reform]', Office of the Lord Chamberlain, Palace Office, Nuku'alofa). A second statement, made by the Prime Minister at the King's request, followed on 19 Oct 2006 ('King voluntarily cedes constitutional authority', see – *website of the Palace Office* <[www.palaceoffice.gov.to](http://www.palaceoffice.gov.to)>). Incidentally, it should be noted that these announcements were made, but not widely publicised, before the disastrous riots and destruction of 16 Nov 2006, in Nuku'alofa.

17 'Tongan Prime Minister: Too Early To Dismiss – Puts brakes on call to take away executive powers', *Radio New Zealand International*, 19 Feb 2009, Wellington.

18 This was in the third major announcement by His Majesty (*Press Release* from the Office of the Lord Chamberlain, 28 July 2008).

VI – 'Providing Advice for His Majesty', and 'The Monarch's 'Authority in Government'. Also relevant may be the apparent role of the former Prime Minister and Cabinet in relation to these matters, and the methods employed to establish a new scheme for dealing with matters relating to Judges and Attorney-General.<sup>19</sup>

The main opportunity for the former Government (the King and Cabinet) to put into effect their thinking on the CEC's 82 recommendations came during meetings of the Legislative Assembly in December 2009. Because amendments made were of lesser or greater importance, and as there was some overlapping of recommendations, it is helpful to examine the Assembly's decisions closely. This reveals that 52 of the recommendations were accepted either outright or after amendment that did not affect the meaning or intent. Eight were modified to a major extent, 18 were not accepted, and a further 4, although initially accepted, were subsequently not implemented by Government.

Of course, the principal thrust for change by devolution of power was accepted. Unfortunately, in the absence of access to records of the debates, it is sometimes difficult to know the motivation, or policy concerns, behind Government motions and ultimate decisions.

In light of what is recorded above concerning the CEC's fears about the Government's general approach to the process, this assessment by Dr Campbell is noted:<sup>20</sup>

The suspicions of the Commission were largely borne out by the sequel. First, members of parliament still did not seem to understand the purpose of their own legislation: some (generally the PRs) took the view that that the Commission was empowered to decide: others that it merely recommended and that the legislature should decide (generally the Government view). Discussion about the report in parliament was incoherent, erratic and meandering. It soon became clear that the Government was not willing to accept much deviation from its own proposals.

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19 It was during this crucial period that the office of Attorney-General was filled by John Cauchi, who later complained that he was not being consulted by the Prime Minister and Cabinet on substantive issues. He resigned in April 2010.

20 Campbell, 2011: 201.

parliament was incoherent, erratic and meandering. It soon became clear that the Government was not willing to accept much deviation from its own proposals.<sup>21</sup>

Indeed, it seems that the Prime Minister (presumably with the King's approval) had made new ministerial appointments that had the effect of guaranteeing that Cabinet would outnumber the rest of the Assembly, thereby ensuring that its will would prevail when the time came to legislate on the reform measures.<sup>22</sup>

One aspect of executive authority not yet dealt with, and one which was clearly not intended to be dealt with by the CEC, concerns the sensitive subject of land tenure and administration. When the long list of statutes requiring revision consequent upon political reform was compiled, Cabinet decided to omit the Land Act, and no changes were made to the existing constitutional provisions relating to land. While this situation lasts, the Minister of Lands would seem to have a key role to play.<sup>23</sup> The significance of the findings and recommendations of the Royal Land Commission will be discussed below under Section VIII 'The Land System'.

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21 Campbell, 2011: 201.

22 Campbell, 2012: 207.

23 Perhaps there was some nervousness over the Lands portfolio, as a last minute amendment to the Government Act required the Minister of Lands to be a Noble, during Cabinet's first term in the Assembly under the reform laws (s2, Government (Amendment) (No. 2) Act 2010).

## V ANALYSIS OF REFORM MEASURES

### A *Magnitude of the Proposed Changes*

To further appreciate the achievements of 2010, it is worth noting just how much institutional change and re-adjustment of thinking has been involved during the last decade. Tonga's governmental structure today is not the product of a gradual step-by-step process from the Constitution of 1875 to the present. Rather, the period between 150 and 100 years ago was characterised by the initiation and realisation of a remarkably deep and fairly rapid transformation of Tongan society, which then remained fairly static until specific proposals for political reform appeared on the scene this century.

The ordering of society during the early formative period originally involved the adoption and application of compatible concepts selected from two legal cultures. A combination evolved of, on the one hand, the authoritative elements of Tongan chiefly law, and, on the other, the command theory of English jurisprudence accompanied by the Christian notion of individual responsibility. However, certain further characteristics of the two cultures, which would have mitigated the full force and rigour of the application of these concepts, were scarcely reflected in the legal framework of the new state.

Two of these potentially mitigating characteristics that were missing from the new legal order were Tongan – reciprocity of obligation, and primacy of the kinship group; and two were English – separation of powers between executive, legislature and judiciary, and rights of participation in decision-making. Thus, these desirable balancing elements from Tongan and English law were largely omitted from the documentation of the new state.<sup>24</sup> Significantly, the original ingredients of this mix of cultures and concepts have not been easily identifiable, and the system of government and law emanating from the 1875 Constitution has long been regarded as acceptably Tongan.

Tonga's experience of constitutional development differed markedly from that of other Pacific Island states. There, after World War II, during a period of decolonisation, local leaders began to put into practice notions of representative government, the election of legislatures, popular selection of prime minister or president, ministerial responsibility to the legislature and separation of powers.

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<sup>24</sup> For a study of the early amalgam of Tongan and English institutions and the vigorous enforcement of the 1903 Code, *The Law of the Government of Tonga*, see Powles 1990.

Progression to independence, or self-government in free association, under a written constitution was fairly rapid.<sup>25</sup>

In contrasting Tonga with its regional neighbours, three features of its history should be mentioned. First, it has been Tonga's acceptance of centralised authority, hereditary at its head, under the long-standing Constitution that has encouraged respect and support for that leadership, and has stood behind a comprehensive system of pervasive government and law. This feature has ensured Tonga's survival during difficult times.

Secondly, penetration of the Tongan administration by British officials, particularly during the reign of King Tupou II, 1893-1918, and increasingly resisted by Queen Salote, laid impositions on the local leadership which were both inconsistent with true sovereignty and set unfortunate examples, such as involvement of the judiciary in the executive and legislature. Such interference had come to a close by 1970, but a fully-fledged independent judiciary was not operative until 1990 (as discussed below in Section V H 'The Judiciary').

Thirdly, as a consequence of the longevity of Tonga's settled constitutional framework which provided such stability and was the subject of much pride, the people lacked the opportunity, afforded to the Pacific Island societies referred to above, to participate in a step-by-step process leading to fully representative responsible government.

For these reasons, the people of Tonga have been asked by the proponents of the recent political reforms to adopt some fundamental shifts in approach, and to accept, on trust, new political processes and thinking about leadership, all within a comparatively short time-frame.

### ***B Major Changes to the Executive Structure***

It is convenient to follow, very broadly, the order of topics established for the CEC, as set out above. Prior to the reform, the constitutional position was that the Monarch was the Head of Government as well as the Head of State. Also, the Monarch has always been, and still is, of course, the *Hau*, or traditional leader of all Tongans, which role is unaffected by current reforms. The supreme executive body was the Privy Council where the Monarch sat with his Privy Councillors, comprising the Prime Minister, any number of Cabinet Ministers and two

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<sup>25</sup> During the period 1962 – 1981, such constitutions were adopted in Samoa, the Cook Islands, Nauru, Fiji, Niue, Papua New Guinea, Tuvalu, Solomon Islands, Kiribati, Federated States of Micronesia, Marshall Islands, Vanuatu, and Palau.

Governors, all appointed by the Monarch to hold office at his pleasure regardless of the term of the Legislative Assembly. Usually the Prime Minister was a close relative of the Monarch, and predominantly, Ministers were Nobles. The practice was for matters of importance to be investigated by Cabinet which would suggest resolutions for the Monarch's consideration. Over the last two decades, the Monarch has withdrawn gradually from decision-making, until King Tupou V declared he wished no longer to exercise executive powers.<sup>26</sup>

Laws were initiated by Cabinet and introduced into a Legislative Assembly where the Privy Councillors sat, usually about 12 of them, joined by 9 Nobles' representatives and 9 people's representatives elected every three years. The 9 Nobles' reps were elected by the 29-30 holders of Noble titles, while the 9 people's reps were elected by all non-Noble Tongan adults (commoners).<sup>27</sup> Laws passed by the Assembly could not become law until the Monarch signed his assent.

Prime Minister and Cabinet were thus beholden to the Monarch for their office and status, and the responsibilities of parliamentary leadership and accountability to the public threatened to divide their loyalties.

As was to be expected given the anticipated devolution of royal authority to elected representatives, a significant number of the CEC's recommendations dealt with the Monarchy, Privy Council and Cabinet, and major changes were made to Part II of the Constitution dealing with government. The primary recommendation was:

That the King and Privy Council shall no longer be part of the Executive Government of Tonga and the Executive Government shall be the Cabinet answerable to the Legislative Assembly (rec 2).

The 'Form of Government' is now a 'Constitutional Monarchy' [replacing 'Constitutional Government'] under His Majesty King George Tupou V and his successors', and 'Cabinet' replaces 'King and Privy Council' in the following summary:

The Government of this Kingdom is divided into three Bodies –

1<sup>st</sup> The Cabinet;

2<sup>nd</sup> The Legislative Assembly;

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26 Powles 2007. The late King's father, King Tupou IV, died on 11 Sept 2006.

27 The number of registered voters for the election on 25 Nov 2010 was 42,067 (MT 4 Nov 2010).

3<sup>rd</sup> The Judiciary (The Constitution cls 30 and 31).<sup>28</sup>

Consequently, the Monarch will now appoint as Prime Minister the elected member of the Assembly who is recommended by the Assembly under a selection procedure provided in the Constitution, and the Monarch will appoint as Ministers those individuals who are nominated by the Prime Minister (cls 50A and 51). As for the Privy Council, of which Cabinet used to be part, it no longer exists in its earlier form. It is not represented in the Assembly and is now an advisory body (cl 50 – see below in Section VI under 'Providing Advice for His Majesty' and 'The Monarch's Authority in Government').

## ***C The Cabinet***

### *1 Size and Composition*

The size of Cabinet is now limited to the Prime Minister and 11 Ministers nominated by him in a 26-member Legislative Assembly. The significance of the number of Ministers as a proportion of the size of the House is discussed below in Section V D under 'The Legislature'.

### *2 Un-elected Ministers*

A contentious issue was whether the Prime Minister should be able to augment the skills and experience levels of his Cabinet by nominating for appointment as Ministers appropriate persons from outside the Assembly. Monarchs had typically appointed experienced commoners where the need arose. In its Interim Report, the CEC referred to negative aspects of such a practice, including its un-democratic nature,<sup>29</sup> and enlarged upon these sentiments in twelve paragraphs of the Final Report (148-159), with a recommendation against it (rec 30).

The Commission dealt with two separate aspects of having un-elected Ministers in Cabinet. The first appeared to be concerned primarily with the August 2007 recommendation of the Tripartite Committee which had sought to retain some elements of the Monarch's right to appoint Ministers. Because the thinking of that Committee was not adopted by either the Commission or the Government in 2009-10, it is worth taking note of it as an illustration of how views and approaches could fluctuate over a short period. The Tripartite Committee had said:

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<sup>28</sup> Unless otherwise indicated, "cl" and "cls" will hereafter refer to the clauses of the Constitution amended as at 30 Nov 2010 – for which see the consolidation in the Appendix to this paper. Where a year is cited, as in 1988 cl 41, that refers to the consolidation of the laws including the Constitution, of that year.

<sup>29</sup> CEC 2009 a. *Interim Report* paras 49-55.



The recommendation that His Majesty independently selects four representatives is based on the practice with which we have journeyed for over the last one hundred and thirty years in which His Majesty has always selected all the Cabinet Ministers. His Majesty now relinquishes that right to the Legislative Assembly and the people. As such the Honourable Members felt it is important that we retain and maintain the bonds between His Majesty, The King, the Nobles of the Realm and the People, as we continue the journey towards reforming the country together (quoted in Final Report, para 148).

The CEC took the opportunity to reflect at length on the strength of the Monarchy, and how, in the Commission's view, that strength was not diminished by the withdrawal of the Monarchy from government of the country. For example, the CEC observed:

There is no doubt that many Tongans share the view, inherent in the words of the Tripartite Committee, that the involvement of the King in government is a safeguard against too much or too rapid change. However, we cannot accept the logic of the Tripartite Committee's suggestion that the result of such continuing involvement in Government will be the retention and maintenance of the bonds between the King, the nobles and the people (para 149).

We believe that the deep and spontaneous feelings of affection and loyalty to the Sovereign so frequently demonstrated will ensure the retention and maintenance of those bonds far more effectively than the stated disinclination of the Legislative Assembly totally to accept His Majesty's wish to hand over the control of government to them. The very near future will see great changes in the political landscape of Tonga. They require an understanding by the people of their significance but, if they are to be effective, they also require a willingness to grasp them and accept the added responsibility His Majesty has entrusted to them. How they manage will be the measure of their political maturity and a successful outcome would reflect the wisdom of His Majesty's decision (para 150).

The second aspect was whether the CEC would support the idea of un-elected Cabinet members, if it was the Prime Minister who nominated them. The Commission noted that members from outside should not be filling gaps in the expertise of the elected members, because such knowledge and experience should come from the senior civil servants, and the primary quality of a Minister should be leadership. The Commission added:

Sadly the trend in so many countries to employ Chief Executive Officers or, in Tonga, Heads of Department (sometimes with no more specialist knowledge than their Minister) on fixed term contracts has led to politicisation of the higher echelons

of the service, reduction in prospects of promotion for the permanent officers and the real possibility of appointments being made for purely political reasons (para 158).

When the Government and Assembly finally considered this issue, they in effect rejected the views of both Committee and Commission. The Constitution now provides that the eleven Ministers nominated by the Prime Minister may include up to four who are not elected representatives. These Ministers may sit and vote in the House but may not participate in any vote of 'no confidence' in the Prime Minister (cl 51). As noted above, the present Cabinet has two un-elected members.<sup>30</sup> The Prime Minister allocates the Ministries.

### *3 Full Executive Authority and Responsibility*

The transformation of the Tongan Cabinet is indeed a major reform. The 'executive authority of the Kingdom of Tonga' is now vested in it (cl 51). In place of Ministers beholden to the Monarch who were members of his Privy Council and retained office at his pleasure regardless of three-yearly terms of parliament (where they sat 'as Nobles' – 1988 cl 59), the new Ministers are elected MPs representing constituencies (except for up to four, referred to above). They are bound by the conventions of Cabinet government as practiced in countries that follow the British-derived Cabinet-based system, several of which are still, of course, constitutional monarchies.

Thus, Cabinet is now "collectively responsible to the Legislative Assembly" which elected it "for the executive functions of the Government" (cl 51). This new orientation requires thinking about loyalties and conflicts of interest in ways not before experienced in Tonga. Since the inception of government, Ministers have always been "responsible" (1875 cl 44; 1988 cl 41) but 'responsible to whom?' has not, until now, been spelled out in the Constitution.

With regard to the situation of those Ministers who are appointed from outside the Assembly, this would be an added complication were it not for the fact that membership of Cabinet by definition carries with it a set of responsibilities and obligations that places all members in a common relationship with government and the Kingdom at large.

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30 As a consequence, and as there cannot be a total of more than 12 Ministers (Prime Minister plus 11) in the House of 26, if the Prime Minister fills any of those ministerial posts with un-elected members, he will to that extent weaken his support in the event that a motion of no confidence is moved against him.

#### 4 *Cabinet Manual*

The CEC strongly recommended that, not only should the requirement of collective responsibility to the Legislative Assembly be included in the Constitution (rec 31) but also that an up-to-date Cabinet Manual should be produced by the Prime Minister in accordance with the following guidelines (recs 32-36):

- i That the Manual should include the principles of Cabinet confidentiality and collective responsibility, and offer clear instructions on the manner in which a Minister should answer parliamentary questions, and to ensure he understands the need for full and accurate information;
- ii That the Cabinet Manual shall clearly state the binding nature of its provisions and the effect of failure to observe them;
- iii That all final Cabinet decisions are disclosed to the public unless certified by the Prime Minister to be matters of national or public security, commercial in confidence, subject to continuing negotiations or likely to embarrass the Government's foreign relations; and
- iv That the Cabinet Manual shall be published on the internet and also be available for inspection by the public at the Assembly office.

In December 2009, the Government and the Legislative Assembly approved the CEC's recommendations regarding collective responsibility and the Cabinet Manual. One year later, Lord Tu'ivakano wrote his Foreword to the current Cabinet Manual in which he included two defining statements:<sup>31</sup>

This *Cabinet Manual* guides Cabinet's procedure, and is an authoritative guide to central Government executive decision making for Ministers, their offices, and those working within Government.

There have been major changes to the Constitution and related laws in 2010 and these are integrated into this *Cabinet Manual*. At the same time the Manual is not law on its own, but is a statement of conventions, principles and processes affecting decision-making by Government. For this reason, Ministers and officials are expected to understand the *Cabinet Manual* and to abide by its procedures.

The Manual is, indeed, a most important document at this time. In addition to explaining Cabinet's key role in the new political relationships, it provides essential advice on Cabinet decision-making, the preparation of legislation, managing the

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31 *Cabinet Manual* December 2010, 7.

transition of government after an election, confidentiality, and Ministers' involvement with financial and legal matters.

### *5 Information for the Assembly and the Public*

The CEC also made firm recommendations about ensuring that, in a society where tradition dictated a one-way downwards flow of instructions, members of the Assembly and the public would be adequately informed before laws were made. To Cabinet, the CEC said - "intended legislation on matters of public importance should be published in such a manner that the public will have time and opportunity to make submissions" (rec 37). The CEC made several recommendations for the Legislative Assembly related to the same issue that are discussed below. Despite Government acceptance of these Commission recommendations, including those numbered iii. and iv. referred to in the Cabinet Manual discussion above, it is anticipated that it may be some time before the various measures aimed at opening up the decision and law-making processes are put in place.

### ***D The Legislature***

In considering the comparative sizes of the Assembly and Cabinet, the Government seemed generally in agreement with the CEC that it is healthy for Cabinet members to comprise less than half the number of members of the Assembly. Effective accountability is unlikely to occur if a united Cabinet constitutes a majority – as was the case under the previous system. The notion of a 26-member elected House seems to have remained unchallenged from October 2006 when the NCPR Report was explained to the Assembly (NCPR Sections 10 i -ii). When the Speaker is removed from the calculations and Assembly numbers drop to 25, the new constitutional requirement that Prime Minister plus Cabinet should not exceed half that number (cl 51) produces a figure of 12, which is close to the CEC recommendation of 11 (rec 26). Such matters as the division of the Assembly into two groups of representatives, the office of Speaker and the privileges of Nobles, are discussed below under 'The Nobles'. The making and amending of laws, and the Monarch's involvement with parliament generally, will be dealt with below in Section V G under 'The Monarch, the Assembly and Law-Making'.

Another matter relevant to the accountability of Government is its term of office, or the period between general elections to the Assembly. Tonga has grown accustomed to three years between elections, and the CEC noted that the then Cabinet was arguing for four. It should also be pointed out that, although members of the Assembly could be called to account to their electorates every three years,

prior to reform the Government made up of Ministers appointed by the Monarch did not have a term of years attached to it.

Recommending that three years be retained, the CEC observed that "the longer the term, the less effective will be the power of voters" to control an ineffective or poor government, and that the next government would be "operating in a new and unfamiliar political environment" (2009 para 192 and rec 50). However, Cabinet persisted and the Constitution now provides for a four-year term (cl 77). Perhaps the CEC's concern about the 'new and unfamiliar' could justify a longer settling in period.

As indicated under 'Information for the Assembly and the Public' above, the CEC was concerned that parliament should be a place where laws could be initiated, and where all Bills could be adequately considered by interested persons. It said:

- I the right of every representative to introduce a Bill should be enshrined in the Constitution (rec 63);
- II there should be provision to secure sufficient time for proper consideration of all Bills of public interest by the members of the general public (rec 63); and
- III members of the public including the media should have full access to the Journal of the proceedings of the Assembly and to all the records of the public meetings of the Assembly (rec 64).

However, although the 2010 Government and Assembly agreed to provide by constitutional amendment for the representative's right to present Bills, propose motions and present a petition (cl 62), they failed to provide in the same way for matters II and III above.<sup>32</sup> It remains to be seen whether secrecy in decision-making in Tonga will continue to run counter to the willingness of many to adopt accountability measures.

In considering the treatment of those recommendations of the CEC that relate to 'opening up' the process of law-making and 'offences against the Assembly', two factors come to mind. First, these matters constitute an imposition on what might be regarded, rightly or wrongly, as the freedom of Ministers and representatives of the Assembly to regulate their own affairs – thus generating a resistance to reforms that might take public accountability too far. Secondly, as will be referred to below

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32 A sub-clause in the Constitution that would allow four weeks for members to scrutinize a Bill, except where such delay was inappropriate, was drafted, but deleted before the amending Act was passed in July. As for public access to the Assembly's Journal, a provision to that effect was not adopted.

in Section V J 'The Attorney-General', Tonga was without the services of an Attorney-General during the period May 2010 to 30 Aug 2011 when some of the critical legislation was being considered.

### *I Discipline and Impeachment*

Important powers of any legislature include that of punishing offences against the legislature and disciplining its members. In addition to its own Standing Orders, the Tongan Assembly has wide powers under cl 70 to prosecute and punish any person, including an elected member, who acts disrespectfully, interferes with, obstructs or defames the Assembly. In the interests of greater accountability, the CEC recommended an additional offence – "that, being a member of the Assembly, he misconducts himself" (rec 58). The Government and Assembly were not prepared to go that far, and that offence is not included in the current cl 70.

The CEC was also concerned about the Assembly's power of impeachment, which has been a feature of the Constitution since its origin (1875 cl 77; 1988 cl 75). It was the only means by which elected representatives could call to account Ministers, Governors or Judges for maladministration, incompetency, embezzlement of Government property or acts leading to difficulties between this and another country. The impeachment process takes the form of a trial before the Assembly over which the Chief Justice presides.

Under the new constitutional regime, Ministers are responsible to parliament; the two Governors are no longer members of the Legislative Assembly or Privy Council and are appointed to Ha'apai and Vava'u by the King on the advice of the Prime Minister (cl 54) to whom they are responsible; and Judges are the subject of a new regulatory scheme<sup>33</sup> (cls 83A-88). The CEC observed that impeachment is a political process, and was necessary to enable the Assembly to discipline those people appointed by the King (198). Now, however, it is appropriate for this process to be available against any Minister or representative of the Nobles or of the people, and for it to be initiated by any member, of his own volition or as a result of a written complaint by any Tongan subject – which is provided for in the amended clause 75.

### *E The Nobles*

As in the case of the Royal title, the holder of a Noble title has traditional status in Tongan society which carries influence and responsibilities. The Noble title was

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33 A scheme which runs contrary to the Commission's recommendations – see Section V H 'The Judiciary'.

fashioned by King Tupou I after the style of the English baronetcy – that is to say, it is an honour or dignity held from the Monarch; it is hereditary, permanently associated with land estates; and it is inalienable except for treason<sup>34</sup> (as it remains today under cl 44 of the Constitution, and by which its laws of succession are strictly controlled and limited to male heirs, by cl 111). The form of address for the holder of a Noble title in English has, in recent times, been up-graded from 'Honourable' to 'Lord', unless he has had conferred upon him the special honour for life of the title 'Baron'.<sup>35</sup>

In earlier times, the Monarch depended very much on his Nobles to govern the country. The status of a Noble depended, in turn, on his relationship with the royal family, but his influence extended widely through kinship relations and those people residing on his estates. One of the tasks of constitutional review in the 21<sup>st</sup> century is thus to identify where traditional influence lies and take it into account when determining what constitutional functions and powers should be allocated.

Within the legislature, as the Nobles now no longer enter in large numbers as a separate group of Privy Councillors and Ministers, their position remains to be considered from the point of view of:

- their separate representation;
- the office of Speaker;
- their importance as estate holders; and
- the 'privileges' to which they are entitled.

### *1 Representation*

The Nobles have elected 9 representatives to the Assembly since 1982 (as have the people),<sup>36</sup> where they were joined by the Noble Privy Councillors and Ministers. By the time the CEC came to consider the question of Noble representation, the proposed breakdown of a 26-member parliament into 9 members representing the Nobles and 17 representing the people had been on the table since the NCPR Report and was neither changed by the Tripartite Committee nor challenged by Government. It seems that the number '17' may have arisen from the NCPR 's preference for a 'single transferable voting system' and its proposed allocation of seats nation-wide (NCPR Sections 10 i-ii). There were obvious cost advantages in reducing the size of the House to 26 – now that the Ministers were to

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34 Powles 1990, 148-150.

35 The new uses of the 'Noble' style of address are discussed below.

36 Between 1914 and 1982, the number for each group of seats was 7 (Latukeyu, 76-77).

be chosen from the ranks of the elected representatives rather than appointed to parliament.

The CEC noted that:

The presence of the Nobles in the Assembly has long been accepted and is still regarded by a substantial number of members of the public as essential when considered against the traditional structure of Tongan society and the importance of the ties of *kainga* and *ha'a* (para 320).

On the other hand, later submissions to the CEC had argued strongly either for no Nobles in the House at all, or for the election of Nobles' seats by the whole electorate. The CEC observed:

Measured against current perceptions of democracy in much of today's world, there can be no justification for the presence of the Nobles in the Assembly (para 319).

The CEC's resolution of this issue is worth examining for what it reveals about how Commission members approached matters concerning Tongan values. If Nobles remain, the CEC noted, a strong argument can and had been made for allowing all voters, regardless of status, to choose them. In rejecting this argument, the CEC said that it is likely that the universal vote would:

... only peripherally reflect the voters' assessment of who would best represent the interests of the public as a whole and be more firmly based on those ties of *kainga* and *ha'a*. The result is that the same Nobles will tend to be returned at successive elections. The present system has shown a tendency amongst the Nobles themselves to spread the vote between them which, we feel, is likely to secure better representation (para 321).

It is unclear what the CEC meant by this. It concluded that there should be no change regarding the representation of Nobles (rec 80), but added a cautionary remark indicating a certain lack of confidence in the current body of Nobles. The Commission said:

The decision to retain them will be seen by many outside our borders as a failure to grasp a chance to achieve democracy. We define democracy by more than the right to elect a representative parliament. Much that truly defines democracy is already enshrined in traditional Tongan values. ... at this stage, we feel the continued presence of the Nobles in the new and untried representative parliament will be accepted by most Tongans as a sensible and, possibly, necessary influence. Having said that, we feel compelled to note that the apparently casually prepared and inadequate submissions, initially by the Nobles' representatives and later by the Nobles as a whole, leaves us little ground for such a hope (para 323).



Indeed, the Nobles' representatives had opposed the creation of the CEC and abstained from voting on the Bill which set it up.<sup>37</sup> In commenting on the outcome of the 2008 election, the last election held pre-reform, official observer Dr Koloamatangi had cautioned:<sup>38</sup>

Put simply, nobles will have to work extremely hard to ensure that a reform-minded public will continue to accept that the 33 titles have a right to elect 9 representatives while around 100,000 commoners elect just 17 members in the House. This makes the 2008 intake of noble representatives an important issue not only for the present but more crucially for the future of noble representation.

The story must be told here of the conduct of the 2010 intake of Nobles' representatives, who in October 2011 were involved in passing a Private Members' Bill that was widely perceived as self-serving in the extreme. It had been reported that three Nobles' representatives (one of them the Speaker) were being prosecuted for offences under *the Arms and Ammunition Act*,<sup>39</sup> mainly for the possession of arms or ammunition without a licence, for which an offender is liable for imprisonment for up to five years. Clause 23 of the *Constitution* provides –

No person having been convicted of a criminal offence punishable by imprisonment for more than two years shall hold any office under the Government whether of emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly unless he has received from the King a pardon . . . .

The Matangi Tonga report began:<sup>40</sup>

In a year that has seen a dramatic increase in armed robberies in Tonga, parliament voted to massively reduce the penalties for the illegal possession of firearms . . . Tonga's first fully elected parliament voted 12-9 to stop public consultation on the Private Bill to reduce the penalty on the illegal possession of firearms, before going on to pass the Bill 10-8 on Tuesday, 11 October.

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37 It was reported that the Noble Tu'ilakepa argued that the desire for change had already been documented by the NCPR which had itself, he said, been a waste of aid donors' money. "The Nobles' representatives were convinced that the Cabinet Ministers and the people's representatives had made a deal and that they were forcing the Royal Family to give in to their demands." (MT, 2008, Pesi Fonua, 28 Aug). See also Campbell, 2012: 216.

38 Koloamatangi, 2008, 'Analysis of the 2008 Nobles' Election', Annex 4, *The Tongan Elections of 23rd-24<sup>th</sup> April 2008*, Report of the Official Election Observation Team.

39 Cap 39, Laws Revised Edition 1988.

40 MT, Pesi Fonua, 14 Oct 2011.

The Private Members Bill, which proposed to amend the Act to reduce the maximum penalty from five to two years, was considered by the Standing Committee on Legislation then passed through the Assembly without the usual opportunity for public consideration. Two of the implicated Nobles were members of the Committee, and the third was a member of the House who voted for the amendment Bill. A fourth Noble representative currently faces charges in relation to drug importation.<sup>41</sup>

The Nobles were blamed, but it should be pointed out that the Prime Minister and six members of his Cabinet voted for the Bill. A roll call of the House should produce 26 voting members, and it seems that participation in the voting on these two motions was low. Indeed, two of the only three ordinary members of the House to support the Bill's passage were Nobles who had been charged. Where were the other ordinary members? The Minister of Justice argued for the Bill and the only clear opposition within Cabinet came from the Minister of Police who objected to the haste, saying that the usual parliamentary procedure should be followed.<sup>42</sup>

Clause 23 has been in the Constitution in its present form since 1961, and was in the 1875 Constitution<sup>43</sup> referring to conviction of a 'great crime', changed in 1903 to a 'felony'. One has some sympathy for a person found with an unlicensed gun. What action, then, should the Government have taken, if only to be seen to be doing the right thing?

Subsequently, King Tupou V declined to give his assent to the Bill, and perhaps this story is just as important for what it means to those who are concerned about the Monarch's discretion, and about the assistance he may or may not have in his consideration of the relevant issues. This is discussed below in Section VI 'Providing Advice for His Majesty'.

To return to the CEC, it went on to address a fundamental aspect of the reform deliberations, namely the prerogative of the Monarch to create 'titles of honour' under clause 44 of the Constitution. The CEC recommended that no other person should be added to the present number of Nobles eligible for election as Nobles' representatives (rec 81). As this recommendation was not subsequently adopted by the Government and the Assembly, it is interesting to note the Commission's reasons for proposing the restriction, as follows –

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41 PIR, Tonga's Pohiva chastens self-serving Nobles' 18 Oct 2011.

42 MT, Pesi Fonua, 14 Oct 2011.

43 As cl 25.

The King retains the prerogative to create titles of honour and, whilst there is no suggestion that previous Monarchs have used such titles to increase royal influence in the House, it does present an undoubted opportunity for any future King, should he wish to do so. Unlikely as such a possibility may seem, it must be borne in mind that the changes introduced by King Taufa'ahau Tupou IV, and so firmly accepted by His Majesty the present King, meant, for the very first time, that the King did not have power directly to control the Government in the House. It is to preserve the present position into the future that we specifically recommend that no other Nobles or other title holders should be eligible for election as Nobles' representatives (para 325).

The decision of Cabinet and the Assembly not to adopt this recommendation was consistent with others directed towards leaving the late King's discretion unfettered as far as possible, as discussed below.

Also consistent with a willingness to allow King Tupou V freedom to expand and consolidate his influence, post-reform, has been the apparent acceptance in Tonga of an increasing number of 'working titles' and 'titles of honour', all appointments of King Tupou V. As to the former type of title, at the time of his death in March 2012, the late King had on his staff a Lord Keeper of the Privy Seal and a Lord Chamberlain. Also, two existing constitutional offices, namely that of Chief Justice and President of the Court of Appeal, have had their style of address changed by constitutional amendment to Lord Chief Justice and Lord President, and a new constitutional office, that of Lord Chancellor, has been created. Holders of these titles are Lords in name only.

In reliance on cl 44, His Majesty has created in the 'honours' category nine Life Peers, carrying the title "Baron" or "Lord",<sup>44</sup> and enjoying "the same rights and benefits as Nobles" of the Kingdom. Regulations were made before the elections of November 2010 to enable these title-holders to vote in, but not stand as candidates for, the election of Nobles' representatives to the Legislative Assembly.<sup>45</sup>

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44 The first five to be appointed are also "Law Lords" and are listed in Section V I under 'Intervention by the late King' below. Their functions will be discussed in the same Section under 'Current reforms concerning the Judiciary'. The further four Life Peers are –

- Lord Dr Feleti Sevele of Vailahi, former Prime Minister,
- Lord Viliami Tau Tangi of Vaonukonuka, former Minister of Health,
- Lord Afu'alo Matoto of Tu'anekevile, former Minister of Finance, and
- Lord Sonatane Taumoepeau Tupou of Toula and Kotu, Ambassador to the USA and the United Nations.

45 Elections of Representatives of the Nobles Regulations 2010.

By extending and diversifying the types of 'title of honour' available to be conferred, King Tupou V appears to have brought about at least three adjustments that may be significant. First, the honorific 'Noble' no longer means exclusively the hereditary holder of a title permanently associated with a landed estate. The status of the form of address of 'Noble' has thus been somewhat eroded in traditional terms, and it would be interesting to know whether the late King intended such an outcome. On the other hand, and secondly, to the extent that Law Lords, Life Peers and the most senior Judges are recognised for their professional success and contributions to the Kingdom, a certain lustre is added to the title 'Noble', with perhaps the consequence that the landed gentry may become similarly motivated. Thirdly, there is no doubt that, whether intended or not, the late King laid the basis for the formation of an extended network of current and former leaders who would feel obliged, if asked, to serve on his Privy Council (not the Judges, of course) or advise him in other capacities.

## *2 Speaker of the Assembly*

The Speaker has always been a Noble appointed by the Monarch at his discretion. The reform here has been to require that he be one of the Nobles' representatives, and that his appointment and removal follows a recommendation of the majority of members of the Assembly (cl 61). The CEC, however, had been willing to leave unchanged the Monarch's prerogative to appoint the Speaker (paras 185-6).

## *3 Estate Holders*

For reasons that will be elaborated in Section VIII below on the land system, the role of Noble as political leader cannot sensibly be separated from that of estate holder. The great majority of Tongan people live and work on allotments (agricultural and town) held from estate holders under a statutory system of inheritable life interest tenure. Relationships between estate holder and allotment holder vary in character across a spectrum from that of 'traditional chief and loyal kinfolk' to 'landlord and tenant' in the commercial sense. The status of Noble in Tongan society is thus a complex one, and one which the Nobles as a class have sought to defend vigorously since their pre-constitutional authority was defined and circumscribed by the 1875 Constitution.<sup>46</sup>

The Nobles have signaled their intention to contest aspects of reform, thus bringing land into the sphere of political debate. In 2010, instead of submitting

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<sup>46</sup> Powles, 2012.

proposals to the Royal Land Commission, Lord Fakafanua, as Ha'apai representative No.1, tabled in the Legislative Assembly a Land (Amendment) Bill as a Private Members Bill on behalf of estate holders. The purpose of this Bill was to make a sweeping claim to assert the right (in place of the Minister of Lands) to make the grants of allotment from estates, and the power to decide all relevant aspects of leases of estate land (such as original approvals, transfers, renewals, compensation). This was regarded by the RLC to be a pre-emptive and rather improper move, having regard to the widely publicised Terms of Reference of the Royal Commission. The Assembly referred the Bill to the Commission, and it is dealt with in Section VIII.

#### *4 Privileges*

As befits traditional leaders, the pre-reform holders of Noble titles are accorded ceremonial privileges at public functions, and are treated with appropriate respect. In addition, they are recognized as having legal and constitutional privileges, among which the inalienability of their titles and land and their representation in parliament have been mentioned. Life Peers, referred to above, are respected citizens whose recognition by King Tupou V is likely to be popular. However, it is noted that there seems to be no indication in the law as to what is meant by the 'rights and benefits of Nobles' that they have earned, apart from the right to vote as Nobles.

With regard to the nine Noble representatives in the Assembly, the Constitution makes provision under the heading 'Privileges of Nobles', which entitles the Nobles to require that –

only the Nobles of the Legislative Assembly ... [may] discuss or vote upon laws relating to the King or the Royal Family or the titles and inheritances of the Nobles (cl 67).

In the past, the Nobles are believed not to have insisted on this privilege, and neither they nor King Tupou V have suggested any limitation on full Assembly debate around current political reform issues that might fall within clause 67. The CEC was not required by its terms of reference to consider this matter. Perhaps in the interests of engendering a spirit of trust, or simply preferring not to debate the issue publicly, the Cabinet and Assembly did not make any change to the clause. However, the RLC has recommended that clause 67 should be either repealed or amended to limit its effect. As a result of 'concerns voiced by the public', amendment would ensure that the privilege applied only to the personal estate lands of a Noble and family and not more widely to the granting of allotments, leasing of land from the estate or other dealings allowed under the Land Act (rec. 120; pp 260-1).

## *F Change of Government*

For the first time in its history, Tonga has a government which can be removed from office by the legislature. The notion that the Prime Minister, chosen indirectly by the electors, should be the person in whom the Assembly continues to have confidence to head the government is fundamental to the new system which Tonga has adopted. However, Tongans are aware of the instability that can be caused by the use of 'no confidence' motions, for there are several examples of the problem amongst Pacific neighbours. The CEC proposed, and Cabinet and the Assembly accepted, that the Constitution should provide for the power of the Assembly to move a "vote of no confidence in the Prime Minister" which, if carried after five days' notice had been given, would be notified to the King and would result in the Prime Minister and all Ministers being deemed to have resigned (cl 50B (1)).

Interesting questions surround the choice of restrictions on the effect and use of no confidence motions. Instead of a successful motion automatically bringing about a new general election, the CEC recommended that such a motion should name another representative who, it is believed, would have the confidence of the House. This idea was accepted except that it was decided to have the proposed replacement Prime Minister named in a separate motion that had to follow the no-confidence motion within 48 hours (cl 50B (3)). If no such replacement is accepted, the King is required to dissolve the Assembly, command a general election and appoint an interim Prime Minister and Ministers (cl 50B (4)).

Of course, each 'remedy' has its drawbacks. Experience in Nauru shows that the relatively easy substitution of one member of parliament with another can facilitate the rapid succession of several governments.<sup>47</sup>

In order to limit the use of motions of no confidence, the CEC recommended that no such motion should be moved within the first eighteen months following a general election<sup>48</sup> or within six months before an election. Further, no such motion should be moved less than six months after a previous no confidence motion, whether successful or not (recs 38-40). The CEC was making its calculations within its recommended three-year term. Cabinet and the Assembly were thinking of a four-year term, and while generally adopting the CEC's recommendations, they made the 'grace' period between successive motions twelve months instead of six (cl 50B (2)).

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47 Nauru Constitutional Review Commission, 58-66.

48 The Papua New Guinea Constitution, 1975, s 145, also provides for a safe 'grace' period of eighteen months after a general election.

The compromise reached here will not satisfy all constitutional lawyers who argue for or against limitations on the life of a government. Given the scope of Tonga's underlying reform, it is perhaps sensible that, in the meantime at least, the opportunity to remove a government is restricted. Whether it was wise to allow a successful motion to be used, as an option, to bring about a change of government without an immediate election, remains to be seen, especially in the light of events that are unfolding just as this paper is being published.<sup>49</sup>

### ***G The Monarch, the Assembly and Law-making***

The Monarch and the Legislative Assembly have always been closely associated in people's minds, and the ceremonial opening and closing of the Assembly by the Monarch who would usually take the opportunity to address the nation, are significant dates on the social calendar. The Monarch has always had the constitutional power, at his pleasure and at any time, to 'convoke' and dissolve the Assembly and call elections (cls 38, 77(2)). The Monarch has also always had the power, at his discretion, to veto legislation, as, together with the Assembly, he is part of the law-making process (cls 41 and 56). Furthermore, if the Monarch should withhold his assent from any law passed by the Assembly, members are forbidden to discuss the law again until the following session of the House (cl 68).

The CEC commented that:

...many members of the public see the Monarch's powers as a safeguard against unconstitutional actions by the Government. The powers [outlined above] allow the King ultimate power to prevent serious excesses or unconstitutional actions by the elected government (para 99).

It recommended that these powers be retained in their present form (rec 7), which is what occurred. The Monarch has thus retained a crucial legislative power in the public interest. King Tupou V may have had in mind the need to safeguard the reputation of the Legislative Assembly when he refused to assent to the attempt to amend the *Arms and Ammunition Act*, described above. How the new King might take advice in the discharge of this type of responsibility will be discussed below under 'Providing Advice for His Majesty'. In an area where the Monarch has consistently refrained from interfering, a precedent may have been set.

#### *I 'What's in a Name?'*

The Constitution speaks for the first time of a 'Constitutional Monarchy under His Majesty ....' (2010 cl 30). The foundation document declared the Kingdom to

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49 See post-script at the end of the text of this paper.

be – 'a Constitutional Government under His Majesty King George Tupou, his heirs and successors' (1875 cl 34).

As mentioned earlier, there is also a change in the way the structure of government is described. What was once a government in three divisions – i) King, Privy Council, Cabinet; ii) Legislative Assembly; iii) Judiciary (1875 cl 33) – is now recorded as a government which has 'Cabinet' on its own in the first division (2010 cl 31). As this paper shows, the reality for that first division – commonly called the 'Executive' – is rather different. The Monarch retains powers, and perhaps it is misleading to simplify description of the structure in this way.

A further question might be whether the Kingdom, post reform, could now be labelled a 'Parliamentary Monarchy'. If that term is intended to mean a state governed by elected parliamentarians where the role of the Monarch is largely ceremonial (as is standard for the UK and many members of the British Commonwealth), Tonga does not qualify. As indicated above, the Monarch's discretionary powers may, if he wishes, take precedence over those of the law-making Assembly, particularly in regard to the veto over legislation and the power to dissolve the legislature at any time and require new elections. Whether the Monarch may be called to account in parliament for the exercise of his other remaining executive powers, to be discussed below, is also a moot point.

Attempts to characterize their Monarchy as one or other type may be of little consequence to those Tongans who believe that the path they have chosen suits their condition at this time.

## ***H The Judiciary***

The Judiciary, and relationships between it and the Executive and Legislature, were not on the political reform agenda as such (for neither the NCPR nor the CEC) but powers of appointment and dismissal were bound to be considered by the CEC in the course of its review of executive powers generally. As it happened, King Tupou V initiated the discussion with proposals that are considered below under 'Intervention by King Tupou'. Ultimately, contrary to the advice of the CEC, sweeping changes have been made to laws relating to the Judiciary, concerning appointment, complaints, dismissal and matters of administration.

The claim by the late King and proponents of the new laws that they are necessary in order to protect the independence of the Judiciary has some appeal, and requires examination, particularly in light of Tonga's history in this area – see below under 'An Historical Perspective'. Discussion of attitudes shown by political leaders towards judges from time to time, together with consideration of alternative



approaches to the protection of their independence, seems important enough to be given significant space in this review. This is especially so, having regard to the ongoing assessment of the Monarch's role which will no doubt take place under the new political order.

### *1 Court Structure and Appointments*

The structure has undergone only one significant set of changes since its inception in 1875. The system today consists of five jurisdictions – Supreme Court, Land Court and Magistrates' Court, with appeals to the Court of Appeal, except for a special appeals jurisdiction in regard to the hereditary estates and titles of Nobles and recognized chiefs, a jurisdiction vested in the Monarch in Privy Council. The Court of Appeal was brought into operation in 1990, although the legislation to establish it (Constitution Amendment Act 1966) had been passed and assented to 24 years earlier. Prior to 1990, appeals from the Supreme and Land Courts had been heard by the Privy Council, of which the Chief Justice was a member until 1942, and thereafter was legal adviser on appeal cases.

Until the 2010 amendments, judges were appointed by the Monarch with the consent of the Privy Council (King and Cabinet). Subject to contractual arrangements, they held office 'during good behaviour' (as they will continue to do), which protects them from removal without relevant justification.

### *2 Members of the Judiciary Today*

For some 40 years now, judges of the Supreme and Land Courts, joined by Court of Appeal judges over the last 20 years, have been expatriates from the judiciaries and legal professions of the UK, New Zealand and Australia. They have been appointed by the Monarch with the consent of Privy Council (in effect, King and Cabinet) on relatively short terms, sometimes renewed, on salaries usually 'topped up' under financial assistance packages. These men have generally maintained high standards of integrity and judicial conduct, while observing an appropriate separation from the executive and legislative branches of government. Three expatriate Court of Appeal judges of high calibre have been appointed, none of whom have had 'first-instance' experience in Tonga.

As will be discussed further below, it has not always been easy for Monarch, Prime Minister and Cabinet to accept court judgments which thwarted Government plans or decisions. Nor have parties to land cases always been content to have their disputes decided by expatriate Land Court judges. Nevertheless, the supremacy of the Constitution has not been challenged successfully,<sup>50</sup> and the principles of the

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50 In response to concerns raised in parliamentary debates, Clause 82 of the Constitution was amended in 1990 to declare void any law inconsistent with the Constitution (1990 No 23).

'British' common law, extending more recently to judicial review of administrative decisions,<sup>51</sup> are acknowledged elements of the Tongan legal system. As to the future, given the number of experienced Tongan lawyers serving in the public service or practicing law in Tonga and New Zealand, the day must surely not be far off when a Tongan will be appointed to the bench.

### *3 The Judicial Services Commission and Code of Conduct*

A further development of relevance to judicial independence came in 2006 when the then Attorney-General and Minister for Justice proposed a Judicial Services Commission which would:

- make recommendations as to the employment of judges and magistrates, and
- carry out several functions including:
  - organizing a continuing education scheme for judicial officers and staff;
  - developing recommendations about judicial services and court administration generally; and
  - investigating complaints against judicial officers under a balanced set of procedures that would lead, where appropriate, to a recommendation that its report on an investigation be tabled before the King and Privy Council.

The Judicial Services Commission Act embodying these ideas, drawn from New Zealand and other models, was approved by Cabinet, passed by the Assembly, assented to by the King, and came into force on 31 August 2007, with corresponding amendments to the Supreme Court Act and Court of Appeal Act. The Commission comprised the Secretary for Justice as its secretary and three members appointed by the Minister of Justice with the consent of Cabinet. The Commission was serviced by the Ministry of Justice which continued to develop experience and expertise in the administration of the courts and its judges, and, in conjunction with the Prime Minister's Office, arranged the appointment and terms of service of expatriate judges. Recommendations made by the Commission for judicial appointments were submitted to the King in Council.

In January 2010, the Judges and Magistrates agreed to be bound by a detailed set of Judicial Code of Conduct Rules drafted by the Chief Justice, which stressed

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51 The new Cabinet Manual draws the attention of Ministers to the grounds and procedure for such judicial review. 2010, paras 151-154.

the importance of their independence from the executive and legislature. Following international precedent, they undertook to uphold the independence of the judiciary, observe the highest standards of conduct, and maintain the impartiality of the judiciary.<sup>52</sup>

## ***I Judicial Independence***

### *1 Intervention by King Tupou V*

Having regard to the apparently satisfactory state of affairs relating to the judiciary just described, it is perhaps surprising that King Tupou V announced in September 2008 that, while devolving his executive powers upon the Prime Minister and Cabinet, he would retain what he called his "judicial powers". The King's initiative ultimately culminated in September 2010 in constitutional amendments which brushed aside the measures put in place by the Ministry and the Chief Justice. Some elaboration is required.

Tupou V's 2008 announcement explained:<sup>53</sup>

[His Majesty has] given an undertaking that he will be guided by the recommendations of the Prime Minister of the day in all matters of governance, with the exception of the Monarch's judicial powers. These relate to the appointment of Judges and King's Counsel (KC), clemency and commuting prison sentences. King George is strongly of the view that they should never be subject to political considerations. He has appointed a Judicial Committee of the Privy Council consisting of four Law-Lords-in-Waiting to advise him on the exercise of these powers.

It transpired that the King had appointed as 'Law Lords', four men with legal backgrounds, one of whom, an expatriate, seems to have been particularly influential with His Majesty.<sup>54</sup> It was immediately obvious that the three

52 Judiciary of Tonga, 2010, *Judicial Code of Conduct Rules*.

53 Extract from 'His Majesty King George Tupou V, a Monarch for a time of change', Press Release from the Office of the Lord Chamberlain, 28 July 2008, reprinted in *Matangi Tonga* 10 April 2009).

54 The original Law Lords were –

- Baron Fielakepa of Havelu. Noble, Member of the Legislative Assembly, former Lord Chamberlain and Private Secretary to the late King, retired lawyer;
- Lord Tevita Tupou of Kolofu'ou, former Attorney-General and Minister of Justice; and
- Lord Taniela Tufui of Talaheu, former Chief Secretary to Government. Lord Tufui is no longer an active Law Lord, and has retired to Ballarat in Australia.
- Lord Ramsay Dalgety of Sikotilani, Tonga, a retired Scottish barrister who had served as a Judge 1991-94;

distinguished Tongan appointees fully deserved the recognition and honours so conferred, while equally obvious that His Majesty had been poorly advised, not only in regard to the terminology (the powers described by His Majesty were, in fact, 'executive' and not 'judicial') but also because, under the then current arrangements, the Law Lords could not become members of the Privy Council (which would make them, by definition, members of the Legislative Assembly), nor could they become involved in the Council's judicial appeals function.

His Majesty's announcement was considered by the Constitutional and Electoral Commission.

## *2 The CEC's Recommendations*

The Commission's discussion of the roles of the Monarch and the Privy Council included consideration of matters concerning the Judiciary, particularly appointment and dismissal, together with the exercise of clemency and the commuting of sentences, of which King Tupou V had spoken in July 2008. While pointing out that the Monarch has no judicial functions under the Constitution, apart from involvement in hereditary land and title cases on appeal, the Commission applauded His Majesty's stated view that these matters "should never be subject to political considerations" (paras 92 and 93). The appointment of judges of the Supreme Court and Court of Appeal was exercised by the King with the consent of Privy Council – effectively Cabinet. As the intention of reform was to remove the executive functions of the Privy Council, it was necessary to find another appointing body which, unlike the Privy Council, would be independent of political considerations. The CEC recommended that that body should be the Judicial Services Commission, referred to above. (rec 5) The Judicial Services Commission was a non-political body with power to make recommendations, and legislative improvements could readily be made to ensure wide representation on it for the protection of its independence. The CEC added –

The appointment of judges may be subject to criticism or controversy and should any such problem arise, it is better that the King is clear of any association with such problems. This could be ensured by appointing the judges solely on the recommendation of the Judicial Services Commission. For that reason, we recommend that the judges are appointed by the King acting on the recommendation of the Judicial Services Commission and that clauses 85 and 86 of the Constitution and the Judicial Services Commission Act be amended accordingly (para 95).

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They have since been joined by Lord Madraiwiwi Tangatonga, known in Fiji as former Vice-President and lawyer, Ratu Joni Madraiwiwi. His chiefly clan links with Tonga are close.

With regard to complaints against and removal of judges, the Commission drew attention to the inappropriateness of the constitutional provisions for impeachment (see 'The Legislature' above), which failed to observe the doctrine of 'separation of powers'. Instead, the CEC recommended that complaints be dealt with in the comprehensive manner provided in the Judicial Services Commission Act and that that Commission be empowered to recommend dismissal (paras 93,94, 207 and 208, and rec 57).

The granting of pardons and the commuting of sentences are also executive, not judicial, acts. As to the first, the Commission pointed out that it was usual for countries to require the Head of State to obtain a recommendation from a competent body that was:

able to advise about the convict, his offence, the sentence and generally as to the advisability of his release. Clearly all are important considerations in the public interest. Although the Law Lords have been appointed no doubt for their experience and knowledge of the law, they are unlikely to have any direct knowledge of the individual cases or of current judicial practice. We recommend that clause 37 be amended to remove the requirement of the consent of the Privy Council and to replace it with the necessity of consulting with the Chief Justice. In this case, we similarly consider the risk of the King's involvement in any controversial pardon will be reduced if his decision was seen to have been made following consultation with the head of the judiciary (para 96).

The Commission recommended that the Monarch's power to pardon should follow prior consultation with the Chief Justice. As to the second power, the reference to commuting, remitting or mitigating sentences should be deleted as being a matter for prison administration and discipline (rec 6). Subsequently, the Government in Assembly rejected the recommendation as to pardon, conferring such power on the King in Privy Council (cl 37). It was agreed however, that there would be no constitutional power to commute sentences.

### *3 Current Reforms Concerning the Judiciary*

When the Government came to consider the CEC's recommendations in the Assembly in December 2009, it pursued policies in relation to the Judiciary, and also the Attorney-General (for which see below), that signaled a change from earlier thinking. The full story of how this came about is yet to be told, but the outcome can be summarised in two steps. First, Government rejected a constitutional role for the Judicial Services Commission and repealed its Act half way through 2010. Secondly, the Constitution (Amendment) (No3) Act was passed, and assented to by King Tupou V in September, in order to establish an entirely new concept, that of the Office of Lord Chancellor to administer the courts

and chair a Judicial Appointments and Discipline Panel which will offer advice to the King in Privy Council as to the appointment and dismissal of judges.<sup>55</sup>

Four aspects of the new scheme stand out. First is the apparent establishment of a small bureaucracy, an Office, under the Lord Chancellor,<sup>56</sup> which will have prime responsibility for:

- the administration of the courts;
- all matters related to the Judiciary and its independence; and
- the maintenance of the rule of law (cl 83B).

Secondly, the Lord Chancellor, who must be qualified to be a Supreme Court Judge, may make regulations for ages of retirement, a judicial pension scheme and administration of the Office. He is thus responsible to the Monarch rather than Government, for carrying out executive functions. These are tasks that had been carried out by the Ministry of Justice, and may be more expensive under another administration.

The third aspect, which is essential to the concept, is the Judicial Appointments and Discipline Panel, which replaces the Judicial Services Commission. The Panel,<sup>57</sup> established as a Committee of the Privy Council, comprises the Lord Chancellor as Chairman, the Lord Chief Justice, the Attorney-General and the Law Lords, as persons required to be 'versed in the law' (cl 83C (1)), discussed above under 'His Majesty's Intervention'. In addition to recommending judicial appointments, the Panel may be required to recommend to the King in Council –

- the disciplining of members of the Judiciary, their dismissal for "bad behaviour through gross misconduct or repeated breaches of the Code of Judicial Conduct", and their remuneration and terms of service (83C (2));
- a Judicial Pensions Scheme;
- a Code of Judicial Conduct; and

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55 These innovations were carried out during a period when the Tongan Government had no Attorney-General to advise it (see 'The Attorney-General' below).

56 By Constitution Amendment Act 2011 assented to February 2011, provision was made for interim Lord Chancellor and interim Attorney-General. On 30 August 2011 New Zealand lawyer Harry Waalkens was appointed to the first position and New Zealand/Fiji lawyer Barrie Sweetman was appointed to the second.

57 The same constitutional amendment defined a quorum of three for the Panel, namely the Lord Chancellor, either the Lord Chief Justice or the Attorney-General, and a law Lord (2011 cl 83C).

- the appointment of Assessors to the Land Court.

It must be noted that the empowering constitutional clauses under which the Monarch appoints Judges to the three Courts and may dismiss them seem to lack consistency with regard to the role of the Privy Council – see Section VI, below, 'Providing Advice for His Majesty'.

The final feature of the scheme is a constitutional declaration that:

The existing underlying constitutional principles of the Rule of Law and Judicial Independence shall always be maintained (cl 83A).

and the Lord Chancellor, who holds office during good behaviour, is to have:

complete discretion to exercise his functions, powers and duties, independently without any interference whatsoever from any person or authority (83B (2)).

#### 4 *An Historical Perspective*

At the time the Judicial Services Commission was introduced in 2006, there was indeed no constitutional or statutory provision directed at securing and maintaining a clear separation between the Executive and the Judiciary. The Constitution offered only three indicators –

- The Government of the Kingdom was divided into three bodies (cl 30);
- Judges were to hold office during good behaviour subject to contract (cl 87) and subject to impeachment by the Legislative Assembly for incompetence (cl 75); and
- The Assembly could not decrease a judge's salary during his tenure (cl 87 – now repealed).

In fact, an historical review of the relationship between the Monarch and Government members on the one hand, and the Chief Justice of Tonga on the other, reveals a long period of the Kingdom's history during which the two sides were unpleasantly entangled.

Initially, it seems that the drafters of the 1875 Constitution were aware of the importance of separation, for they followed Hawai'i's precedent in declaring that the three divisions of government "shall always be distinct" (1875 Part II). However this was contradicted by the requirement that the Chief Justice be a member of the Privy Council (and, later, of Cabinet) (cl 54), and the words "shall always be distinct" from 1875 were removed in 1882, as was a provision that no judge may be a member of the Legislative Assembly. In 1891 the Minister of

Lands was empowered to deal with disputes in the Land Court.<sup>58</sup> These developments were understandable in a small country lacking qualified people, but they set a precedent.

Then, from 1905<sup>59</sup> to 1940, the British-appointed Chief Justices interfered in the work of the Monarch and the Privy Council, engendering a general mood of antipathy on the part of Tongans toward the judicial office, as well as to the individuals. A study of the six Chief Justices who held office during this period is damning.<sup>60</sup> The study refers to their divided loyalties (as they kept a keen eye on the impression they were making on their overseas employer), and how this affected the quality of their work. Originating from the legal professions of the UK, Ireland, Australia and New Zealand, they were not of high calibre, due in part to the low salary paid.

The principal difficulty for all concerned was that the Chief Justice was expected to play so many roles. Membership of the Privy Council, Cabinet and Assembly has been mentioned. From time to time during Queen Salote's reign, the Chief Justice was also her legal adviser, law draftsman and Chief Magistrate. In short, Queen Salote had great trouble dealing with the Chief Justices, who became involved in local European as well as Tongan politics.

For up to 50 years following the departure of the last of these Chief Justices in 1940, the Monarch and Government did not find it easy to deal with the role of Chief Justice. In light of what had gone before, the natural response was for Tonga to be wary of the unpredictable consequences of allowing expatriate Chief Justices to exercise authority in Government affairs. In 1942, the law was changed to remove the Chief Justice from the Privy Council. For the purpose of hearing appeals from the Supreme and Land Courts, the Chief Justice then attended the Council only to provide legal advice and write the Council's judgment.

Furthermore, from this time, the practice was adopted of appointing an ordinary judge to the Supreme Court, and, if a Chief Justice was required for appeals to the Privy Council, one of Fiji's judges was appointed Chief Justice temporarily for the purpose.<sup>61</sup> It was perhaps significant that only a Chief Justice could strike down, as inconsistent with the Constitution, laws passed by the Assembly or the Privy

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58 Powles, 1990, 153.

59 Under the 'Supplementary Agreement' of 1905 between Tonga and Great Britain, the Chief Justice was chosen by Britain. Wood Ellem, 1990, 170-1.

60 Wood Ellem, 1990, 170-1.

61 Hunter, 1963.



Council (former cl 82), or preside over the parliamentary impeachment of Ministers and Privy Councillors (cl 75). This practice was open to the interpretation that the King and Government saw advantage in keeping the Chief Justice beyond the horizon for as long as possible.

Between 1942 and 1988, the only resident Chief Justice was H S Roberts in 1973. In 1966, a move to initiate a fully-fledged Court of Appeal, drawing on two or three senior judges from neighbouring countries to visit Tonga once or twice a year, was passed as a constitutional amendment. However, the law was not brought into operation until 1990, raising the question whether the Government felt uneasy about depriving the King and Privy Council of their appellate role.

Since 1990 when the Court of Appeal was established, it appears to be Government policy to maintain continuity in the appointment of resident Chief Justices on short terms.<sup>62</sup> During the last twenty years, formal relationships between the Judges (Chief Justices, Puisne Judges and Land Court Judges) and Government have been conducted, at least superficially, in a cordial manner. However, an examination of individual cases and associated events reveals what may be a persisting reluctance in some circles to accept the role of the Judiciary as an entirely separate source of authority, empowered independently to enforce the Constitution wherever it applies, whether to the functions of Ministers, the Legislative Assembly or the Monarch himself.

It is beyond the scope of this review of constitutional reform to embark on a case-by-case analysis of recent years. Relationships with the Judiciary have been tested in a variety of contexts. From time to time, distrust, antipathy and even open hostility have been shown by political leaders towards court decisions and judges personally. It is understandable that such situations can easily arise in a close-knit small-scale society where it is impossible for leaders, political and judicial, to secure the social distance enjoyed by their counterparts in larger countries. This means, of course, that Tonga may need to work harder to protect the independence of its judges.

One such context is broadly contemporaneous with and related to the recent political dissension arising out of concerns to extract greater administrative and financial accountability from the Government of the day, and later to bring about

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<sup>62</sup> Short terms have been standard practice for judges appointed under externally funded aid schemes. In the writer's experience, judges are sometimes in a position to bypass the host government, or to seek to please it, in order to negotiate renewal. On the other hand, frequent turnover is sometimes undesirable where there is much for a new judge to learn in a new cultural environment. Thus, it cannot be assumed that such an appointment regime is easy for a host government to manage.

political reform. It is said that the litigious career of veteran People's Representative, 'Akalisi Pohiva, was launched in 1986-87 after he was dismissed from his post as programmer in the government radio station. His successful action for damages for wrongful dismissal based on the Government's "malice and bad faith", and failure to allow him natural justice,<sup>63</sup> can be bracketed with early attempts by, first a citizen to question allowances paid to Representatives in the Legislative Assembly<sup>64</sup> and then two People's Representatives who challenged an Assembly procedure which deprived them of the opportunity to speak on a Bill.<sup>65</sup> Neither actions were ultimately successful, but they gave the courts the opportunity to point out that the Constitution must be complied with. These proceedings, and related appeals, marked the beginning of nearly two decades during which both the Government and its critics used the courts to test and enforce the law. From Pohiva's early conviction for criminal libel in 1988,<sup>66</sup> through a series of cases against newspapers concluding in 2004,<sup>67</sup> the Government appeared to be using every available means to silence opposing voices in the media.

In the course of affirming the supremacy of the Constitution, judges have occasionally been subjected to attack in the media. It is sufficient to look at two examples in order to give an indication of the tension which surrounded their roles. In 1996, after the Legislative Assembly had sentenced two journalists and a People's Representative to thirty days' imprisonment for contempt, and the Puisne Judge had turned down two applications for release, the Chief Justice returned from leave and, on the 26<sup>th</sup> day of their incarceration, granted a habeas corpus application on the ground that the Assembly had not identified an offence and had denied natural justice.<sup>68</sup> A regular observer takes up the story in her annual review:<sup>69</sup>

The Chief Justice's quashing of the decision shattered the belief that the court had no right to interfere in the internal proceedings of Parliament, and brought the judiciary

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63 *Pohiva v Prime Minister & Kingdom of Tonga* (Martin, Actg CJ, unreported Supreme Court 6 May 1988).

64 *Siale v Fotofili* (Martin, J, 9 January) [1987] TOSC 1, <[www.paclii.org/to](http://www.paclii.org/to)>.

65 *Sanft v Fotofili* (Martin, J, 9 January) [1987] TOSC 2, <[www.paclii.org/to](http://www.paclii.org/to)>.

66 *R v Pohiva* (Martin, Actg CJ, 15 January) [1988] TOSC 1, <[www.paclii.org/to](http://www.paclii.org/to)>.

67 *Taione v Kingdom of Tonga* (Webster, CJ, [2004] TOSC 47, <[www.paclii.org/to](http://www.paclii.org/to)>.

68 *Moala, 'Akau'ola & Pohiva v Kingdom of Tonga (no3)* (Hampton, CJ, SC) [1996]Tonga Law Reports 211; upheld on appeal, *Minister of Police v Moala* [1997] T0CA 1, <[www.paclii.org/to](http://www.paclii.org/to)>.

69 James, 1998, 237.

into direct confrontation with the legislature. The judge pointed out that because Tonga has a written constitution, the Legislative Assembly does not have the privilege of supremacy over the courts, as enjoyed in Britain ... because Britain does not have a written constitution.

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This case has raised the serious issue of the independence and jurisdiction of the judiciary. Minister of Police the Honourable Clive Edwards is reported to have said that he feared that the overturning of the parliamentary decision by the court could have resulted in a breakdown of law and order, although it is not immediately clear why this should be so. The Speaker of the House, rather unwisely, told a journalist that, if the Chief Justice ordered the release of the prisoners the Legislative Assembly would take action against him for overturning its decision. His remarks, duly published in the *Taimi 'o Tonga*, earned him the charge of contempt of court ...

The revelation that certain noble members of Parliament believe the Legislative Assembly can overrule the judiciary will almost certainly have serious legal repercussions and generate much-needed debate on issues of procedure and the proper distribution of authority.

The remarks of the Speaker, Hon Fusitu'a, were construed by some people as a threat to impeach the Chief Justice, timed to coincide with other contentious court proceedings involving a member of the political opposition. In the contempt action against the Speaker, journalist and newspaper, the Puisne Judge found the charge proved and stressed the need to observe the separation of powers, but the Court of Appeal took a broad view and allowed the appeal on the grounds that:<sup>70</sup>

The court by which the rule of law is maintained and implemented is at the heart of a free society, but it is not a fragile institution. It is, and must be, robust enough to bear the criticism of the dissatisfied.

However, three years later the Court of Appeal was presented with a very different situation. A successful businessman and People's Representative in the Assembly had been found guilty by the Chief Justice of contempt of court for his attack on Judges in a television broadcast.<sup>71</sup> His criticism arose from decisions given by a Judge and the former Chief Justice in civil litigation arising from the activities of Government-owned Primary Products Export Ltd and securities over cash-crops. He blamed the Supreme Court for prompting the Government to repeal

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70 *Attorney-General v Hon Fusitu'a, 'Akau'ola & Moala* (Lewis, J SC) [1997] Tonga Law Reports 18; reversed on appeal, *'Akau'ola v Attorney-General* [1997] TOCA 1, <www.paclii.org/to>.

71 *Attorney-General v Namoa* (Ward, CJ) [2000] TOSC 13, <www.paclii.org/to>.

a section of the Land Act, and alleged that the judges were at fault for the case not being in the Land Court and, generally, for their involvement in land matters. Unfortunately, he went much further, referring to past relationships between earlier Tongan Monarchs and Judges which had deteriorated, in one case to the point where the Monarch had sent the Chief Justice away.

The members of the Court of Appeal summarised their rejection of the appeal in this way:<sup>72</sup>

In our opinion, the remarks made by Mr Namoa in the passage set out above were likely [i.e. calculated] to bring the Supreme Court and its Judges into contempt, or to lower their authority, in the eyes of the community. We have reached this conclusion by taking into account (1) the whole of the remarks; and (2) the context in which the remarks were made.

It is likely, we think, that a television viewer hearing these remarks in their context [that is, a public discussion of political issues] would understand that Mr Namoa, as a member of Parliament, was indicating that in the history of this country, the Monarch exercised a significant influence over the way in which the Judges, foreign Judges including Chief Justices, adjudicated upon land matters. A statement to the effect that the Monarchy exerted such authority is likely, in our view, to lead members of the community to conclude that the credibility of the Court as an independent institution, the third arm of government, has been seriously compromised. Once there is a public perception that the exercise of an important jurisdiction of the Court may not be impartial, there will be a loss of public confidence in the Court as an independent institution, with the consequence that the community will have a lower regard for its authority to adjudicate without fear, favour or goodwill.

Throughout this period, the importance of Tonga's constitutional guarantee of freedom of speech and the press (cl 7) should be noted. As successive Government ministers sought to silence criticism, sometimes justified and sometimes not, published in Tongan newspapers, local or imported, their objectives were often thwarted by Court decisions reached in a variety of contexts which helped to establish the supremacy of the Constitution and the Rule of Law.

For example, in 2003, on the day after attempts by Government to ban the importation of the newspaper *Taimi 'o Tonga* under the Customs and Excise Act had been overturned in the Supreme Court, the King in Council passed an

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72 *Namoa v Attorney-General* [2000] TOCA 14, <[www.paclii.org/to](http://www.paclii.org/to)>.

Ordinance for 'The Protection of the King, Royal Family, Government and People of This Kingdom from Abuse of Press Freedom'.<sup>73</sup> The Constitution and Government Act permit the Privy Council to make ordinances between meetings of the Assembly. The publisher asked the Court to set aside the Ordinance on the grounds that it violated freedom of the press, that the reasons behind it were purely political and that he had had no opportunity to put his case. The Government argued that the Ordinance was an exercise by His Majesty of a royal prerogative and therefore not touchable in the courts.

The decision of the Chief Justice,<sup>74</sup> supported by the Court of Appeal,<sup>75</sup> was highly significant for Tonga's legal history in that it stated clearly that, when the Monarchy made itself subject to the Constitution, it acknowledged that its prerogatives used in government would be subject to judicial review by the courts, like any other law-making. Only personal prerogatives might avoid scrutiny.

A further weapon in the 'media freedom' contest which the Government could employ was to broaden and particularise the scope of exceptions to the operation of clause 7, taking advantage of the ease with which the Tongan Constitution may be amended. Shortly after the Chief Justice's decision in the *Taimi* case, the Privy Council, Assembly and King passed into law two pieces of legislation regulating media ownership and an amendment to clause 7 which would allow – "such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, or privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence". The new Chief Justice applied Tongan and international reasoning to demonstrate that this amendment would allow the legislature to pass laws that would breach the basic freedoms – and that therefore the amendment itself was unconstitutional. He pointed in particular to the words "expedient in the public interest", "cultural traditions of the Kingdom" and "the commission of any offence" as opening the door to vague concepts capable of interpretation contrary to the freedom of speech and media. In this way, the authority of the court to enforce the Constitution in relation to law-making was affirmed.<sup>76</sup> No appeal was lodged.

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73 This Ordinance was described as "a direct challenge to the legitimacy and independence of the courts" – see Maloney and Struble 2007.

74 *Lali Media v Lavaka Ata & others* (Ward, CJ.) [2003] TOSC 27 <[www.paclii.org/to](http://www.paclii.org/to)>.

Reviewers reported that – "The judicial review was seen by many people as an act of disrespect toward the King, and an attempt was made to impeach the Chief Justice" – see *Transparency International* 2004, 17.

75 *'Utoikamanu & Lavaka Ata v Lali Media* [2003] TOCA 6 <[www.paclii.org/to](http://www.paclii.org/to)>.

76 *Taione & others v Kingdom of Tonga* [2004] TOSC 47, <[www.paclii.org/to](http://www.paclii.org/to)>.

In concluding this discussion, it must be added that an objective view of the impact of the courts in this politically charged area must highlight also the frequency with which defamation and contempt proceedings brought against journalists and papers succeeded. It seemed that the Government believed that the only way to convince readers and listeners of the correctness of its conduct in the face of criticism was to go into 'attack' mode without delay.<sup>77</sup>

### 5 *Significance for Tonga*

The foregoing Sections have shown that Tonga has a history of overlapping functions between the three branches of government which has not been easy to shake off. As the Kingdom moves into a period of rapid political change, old fears and prejudices are close below the surface. Earlier motivations to remove the influence of expatriate judges from key decision-making linger on in a 21<sup>st</sup> century context, yet there appears to be reluctance to appoint Tongans to the higher courts.

Mention should also be made of the dominant ideology of the Supreme Court and Court of Appeal which is that of the British Commonwealth system of common law and constitutional law together with the application of international law principles, all argued under conventional rules of court procedure. A helpful study has contrasted this higher court environment with that of the wider political system, including the Magistrates and Land Courts, where social and cultural values come into play, in addition to neo-traditional concepts.<sup>78</sup> Here, 'neo-traditional' is used to mean the early selective combination of Tongan and British legal cultures referred to above in Section V A under 'Magnitude of Proposed Changes' and accepted today as Tonga's single fused long-standing legal tradition.

The Philips study shows that, in the higher courts today, through no fault of their own, there can be no appeal to such neo-traditional or multiple sources of authority. There is no room for reliance on custom, or a system of order based on the observance of Tongan cultural values. For example, ideas about duties associated with particular social identities such as the Monarch or Nobles may be thought to be relevant to the behaviour of parties in the court, but in fact (except perhaps in sentencing an offender) they have no place in a jurisdiction where modern Western legal interpretations hold sway. In the circumstances, public

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77 The case of certain particularly malicious allegations made by email onto New Zealand internet sites in Dec 2007-Jan 2008, against the Prime Minister and others, by persons or persons unidentified, demonstrates the vulnerability of leaders in the face of the growing use of communication technologies. Proceedings were issued to no avail against a "Mana Fatulisi" in the New Zealand Supreme Court.

78 Philips, 2004.

outbursts against what seems alien to so many, such as those referred to in the above cases, may be understandable.

During the long period of British involvement, there was no alternative to acceptance of a common law judiciary within a neo-traditional nation. Now that Tonga employs its judges, the evidence indicates that great care is needed in their selection and management.

At the same time, it is apparent that the courts are expected to determine issues of critical public importance, which may include interpreting the Constitution as the supreme authority, and the roles and functions of institutions and office-bearers under it. The Monarch is not immune from this testing of the law, particularly having regard to those constitutional roles that have been retained, those that have been created and others that are yet to be clarified. Furthermore, the obvious willingness of participants in the political sphere to use court proceedings in pursuit of their objectives means that members of the senior judiciary are, or should be, particularly sensitive to any suggestion of interference with their determination to maintain an impartial stance.

The question remains, then, is there good reason for Tongans to pay close attention to the potential for erosion of public and international confidence in the Judiciary, and to focus on the principle of the separation of powers in general, and the independence of the Judiciary from the Executive, in particular? If so, is it sensible to believe, as some influential leaders appear to, that if Tonga can forge its own brand of democracy, then that uniqueness can also characterise the relationships involving the Judiciary?

If, again, the answer is 'yes', is the Monarch's unique system of control over matters relating to the Judiciary – as described above under 'Current Reforms Concerning the Judiciary' – the best way of protecting judicial independence? The conclusion of this review is that the current constitutional arrangements for appointment and dismissal, together with incidental but potentially significant matters, are, through their extensive reliance on the exercise by the Monarch of discretionary executive powers, too great a violation of the principle of separation of powers.

The nature of the Monarch's discretion in these matters is at the heart of the difficulty. In the context of a program of political reform under which the late King sought the devolution of all executive powers, there remains an unfettered discretionary executive power that may be exercised by the Monarch without disclosing the purport of advice received and without giving reasons. This leads to the conclusion that a serious drawback of the new law may not have been considered. This refers to a concern voiced by the CEC in its Report, and indeed by

leaders who have reflected on the problem from time to time, namely that it is undesirable that the Monarch should ever be involved in public disputes or political debate of any kind. The status of the Monarch as the *hau* and traditional head of the people of Tonga should not be exposed to such disputes or debates. The cultural and political integrity of the nation requires that the status of the Monarch should not be eroded.

In short, this review respectfully suggests that the interests of the Monarchy and the country would have been better served by allowing the Judiciary to become the responsibility of an independent, strengthened Judicial Services Commission,<sup>79</sup> working with a well-resourced Ministry of Justice. His Majesty would act on the recommendations of the Commission, and thus be insulated from potential contention. Now that a new system has been devised, however, and constitutional amendments have been made, for the establishment of an Office of Lord Chancellor and a Judicial Appointments and Discipline Panel, it is respectfully suggested that every effort be focused on ensuring the independence of those two institutions. Indeed, the choice of a particular legal structure – whether a Judicial Services Commission or a Judicial Appointments and Discipline Panel – seems less important than achieving two objectives for a Tongan system of justice, namely:

- i that the persons selected to advise the Monarch are senior judges and lawyers with wide professional experience and of high integrity, and
- ii that the Monarch will act only in accordance with the advice of such persons.

At the end of the day, the people must have confidence in their judges and respect for their Monarch.

### ***J The Attorney-General***

"The painfulest task in the realm" (Francis Bacon, A-G, 1614-18.<sup>80</sup>)

The office of Attorney-General appeared on the reform agenda for at least two reasons. First, Tonga had had no experience of such an office until the post of A-G was created in 1988. Prior to that, as indicated in discussion of the judiciary above, for much of Tonga's history, the Monarch and Government obtained legal advice from several sources, including members of the judiciary, until a government Crown Solicitor was appointed after 1942. The appointment of the first Attorney-

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79 As was intended 2007-2010 – see The Judicial Services Commission' above.

80 Cited in Nicholls, 2010.



General in 1988, to lead a government Department, often called the Crown Law Office and run by a Solicitor-General, established the delivery of legal services that have been dedicated to the interests of the Kingdom of Tonga ever since. The Attorney-General was the Minister in Cabinet responsible for the Crown Law Office.<sup>81</sup>

The concept of 'attorney-general' has been built upon and strengthened in accordance with the long-standing principles and conventions of the British Commonwealth system of justice. The role of an Attorney-General in broad terms is to act as the principal legal adviser of the nation's Government, to be responsible for criminal prosecutions, the drafting of legislation for presentation to the Assembly, providing leadership to the legal profession, and generally for ensuring that the Rule of Law (comprising accepted constitutional and common law standards) is upheld by Government, and understood by citizens. How these functions are defined in Tonga will be considered in this Section.

It should also be mentioned that the Crown Law Office/Department is one of Tonga's most efficient and highly regarded government departments. Under the Solicitor-General, it carries out the prosecution functions of the Attorney-General, and its lawyers undertake research and generally perform the work of a large law firm – the Government's own law firm. The Crown Law Office continues to introduce initiatives such as placing all legislation on its website in easily accessed form,<sup>82</sup> and the Department provides support for the drafting, explanation and implementation of all the legislation of the Legislative Assembly.

There is clearly a need to recognise and protect the office of Attorney-General and the functions of the Crown Law Department, as was done in most of the nations of the Pacific Island region, in their independence constitutions, often implemented by an Act which sets out the functions and protection of the Attorney-General and the Department.

### *1 Intervention*

The second reason for the Attorney-General's place in the reform agenda was that the office had become somewhat controversial about the time the Constitutional and Electoral Commission was beginning to receive submissions in early 2009. The Attorney-General at that time was critical of the late King's original proposal for a 'Judicial Committee of the Privy Council' (which was withdrawn), supportive of the then existing independent process for the

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81 Crown Law Department official website, 2012, <<http://crownlaw.gov.to/cms/>>.

82 See <[www.crownlaw.gov.to/cms/](http://www.crownlaw.gov.to/cms/)>.

appointment of the judiciary (discussed above), and concerned over political interference with the judiciary. Furthermore, when it appeared that there was a move to have the Attorney-General removed from Cabinet, this was opposed on the ground that the Attorney-General's professional responsibility as the Government's lawyer could best be discharged within Cabinet, and that, as a Minister, the Attorney-General was accountable to the legislature for the Crown Law Department. In May 2009, the Attorney-General was asked to resign,<sup>83</sup> and her successor, an Australian lawyer,<sup>84</sup> was appointed by King Tupou V to a new post outside Cabinet, while retaining the full range of duties expected of an Attorney-General.<sup>85</sup>

## 2 *The Independent Model*

It is accepted that there are two workable models for the Office of Attorney-General, namely, the Cabinet Model, which Tonga had adopted in 1988 in which the Attorney-General was a Minister in Cabinet, and the Independent Model where the Attorney-General holds a post outside Cabinet. In each case, measures are needed to ensure that the prosecution of offences in court is entirely free of any political interference, and that the Attorney-General can effectively carry out all of the expected functions.

There has been debate in the UK and some Commonwealth nations as to whether the Independent Model should be preferred in order to ensure that the prosecution function is not tainted by the wishes of Ministers in Cabinet. A review in a discussion paper on the needs of smaller Commonwealth countries shows that the advantages of the Cabinet Model – ie. a strong relationship between lawyer and client at the 'top table' of senior Ministers where the Attorney-General is able to see how his advice is implemented in an ongoing capacity – can be retained if a Director of Public Prosecutions is appointed to act independently, protected by statute.<sup>86</sup> It is not clear why, in Tonga, the King and Cabinet decided not to retain that Model and appoint a Director of Public Prosecutions. Indeed, at no stage was there any public statement to the effect that the presence of the Attorney-General in

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83 In the course of evidence to the 'Princess Ashika' inquiry, statements were made by both the former Attorney-General and the former Prime Minister which touched on the circumstances of the Attorney-General's resignation. See 'Press Release: Prime Minister', *Matangi Tonga*, 5 Feb 2010; and 'Press Release: 'Alisi Taumoepeau', *Matangi Tonga*, 12 Feb 2010.

84 Mr John Cauchi, an experienced member of the NSW Bar, had served earlier in Tonga, and also in other Pacific island states.

85 Ministry of Information, 'Press Release: Newly Appointed Attorney-General' – 2 June 2009.

86 Nicholls, 2010, paras 49 and 50.

Cabinet compromised either the Attorney-General's independence or the prosecution of offences in Tonga.

The CEC was, of course, aware of the controversy but, in its Report of 2 November 2009, it considered only very briefly the advantages of the two Models. As King Tupou V had already appointed Mr Cauchi to an independent post, the Commission went on to stress a lawyer's strict rules of conduct in the giving of independent and confidential advice. It recommended that, in order to secure the Attorney-General's independence under the Independent Model, he should be appointed to a constitutionally created office by the Monarch acting on the advice of the Judicial Services Commission (Recs 28 and 29).

When the Government and Assembly came to consider the matter in December 2009, the approach was the same as it was regarding the Judiciary. They resolved that the Attorney-General should be appointed to an independent post by the King in Privy Council. Consequently, the events described above under 'Court reforms concerning the Judiciary' applied equally to the Attorney-General, and, in September 2010, the Constitution (Amendment) (No3) Act brought into force clause 31A under which the King in Privy Council may appoint and dismiss the Attorney-General after receiving advice from the new Judicial Appointment and Discipline Panel (which does not require Monarch to follow that advice).

Significantly, clause 31A(1) mentions only two of the functions of the Attorney-General, namely, to be the principal legal advisor to Cabinet and Government and to be in charge of all criminal proceedings on behalf of the Crown, and the clause leaves all other functions and duties to be provided 'under law'. This would seem to indicate that although the King in Council, after advice from the Panel, may determine the 'terms of appointment', there may still be the possibility of an Act of the Assembly which would define and further secure the Attorney-General's role. Finally, the Constitution declares –

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.

In the meantime, the resignation of Mr Cauchi in April 2010 after one year in office re-ignited controversy in a way that drew attention to unresolved questions – and which has therefore been of some benefit.<sup>87</sup> Most of the grounds given for his resignation related to his concern over appointment of Judges, repeal of the Judicial Services Commission Act, and funding for prosecutions, but there was a further

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<sup>87</sup> John Cauchi AG: "I can't stay and pretend nothing is wrong. . . It is wrong and it is serious!", *Matangi Tonga*, 30 Apr 2010.

note of warning. As Cabinet's lawyer, standing 'independently' outside, he was not expected to offer legal advice unless he was specifically asked for it. He became aware of matters of constitutional and legal importance being considered by Cabinet, but felt powerless to express an opinion. He was not able to function in the way that an Attorney-General should, as upholder of constitutional principles and the Rule of Law.

In conclusion, it seems that Tonga's adoption of the Independent Model for its Attorney-General leaves three important issues unresolved. The first issue is the nature of the Attorney-General's relationship with his client, the Government. Under the new constitutional clause, and in the absence of any other law on the subject, the Attorney-General can only comment on questions put to him by Cabinet, and he has no knowledge of what Government is doing, or thinking of doing, until he is provided with information. As Mr Cauchi discovered, independence could mean isolation from important issues of the day. This need not continue. Several countries which have adopted the Independence Model have one or more of the following arrangements in their laws, which could be introduced in Tonga in an 'Act for the Office of Attorney-General' who is not a member of Cabinet:

- i the Attorney-General may attend Cabinet whenever he considers it appropriate to do so in order to discuss legal matters;<sup>88</sup>
- ii the Attorney-General shall attend Cabinet whenever requested by the Prime Minister to do so;
- iii 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;<sup>89</sup>
- iv in all legal matters concerning the Government, the Cabinet must consult the Attorney General;<sup>90</sup>
- v the Attorney-General must participate in Cabinet meetings to provide legal advice but is not a member and has no vote;<sup>91</sup>

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88 The Attorney-General of Ireland is not a member of Cabinet, but in practice attends most meetings.

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

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

91 State Law Office Act, s 10.

- vi the Attorney-General must attend all Cabinet meetings and sessions of Parliament, may take part but not vote;<sup>92</sup> and
- vii the Attorney-General may take part in the proceedings of Parliament as adviser to the Government, but has no vote.<sup>93</sup>

In short, the Nicholls review recommends that an independent Attorney-General should attend Cabinet regularly, thus giving the members "full access to legal advice rather than it being interpreted and channelled through the Prime Minister".<sup>94</sup>

As far as the Attorney-General's relationships with individual Ministers, Ministries and Departments are concerned, his senior Crown Law staff will no doubt be involved when called upon.

Secondly, under the present constitutional arrangements, although the Attorney-General is appointed by the King in Council (after receiving advice from the Judicial Appointments and Discipline Panel which also determines his conditions of employment), his professional duties are owed solely to Cabinet and Government. For this reason, although he is not a Minister, he is responsible to Cabinet for the organisation and operation of the Crown Law Department, and the Solicitor-General as CEO of the Department reports to him. Is it satisfactory that a Government Department which provides a range of essential services<sup>95</sup> should be unrepresented in Cabinet? Again, an Act could place on the Attorney-General the obligation to attend Cabinet meetings that are related to the operation of the Department.

The fact that the duties are owed solely to Cabinet and Government raises the question whether adequate accountability is built into the relationship. If the Attorney-General's advice is rejected, or not followed, in regard to a matter of public importance, does he have an obligation to report the situation, and, if so, to whom and when? The 'Law Committee' comprising senior judges and practitioners might be an appropriate body for him to report to.<sup>96</sup> If the Attorney-General's statute were to require an Annual Report to the Legislative Assembly, problems of this sort could be made known more widely (without details that would breach confidentiality).

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92 Constitution of Tuvalu 1986, s 79.

93 Constitution of the Solomon Islands 1978, s 42.

94 Nicholls, 2010, para 111.

95 See Crown Law official website, 2012 <[www.crownlaw.gov.to/cms/](http://www.crownlaw.gov.to/cms/)>.

96 Nicholls, 2010, para 77.

Thirdly, there is the broader question as to the advisory role of the Attorney-General beyond the walls of the Cabinet room and Ministry offices. It must be noted that, unless further provision is made, the effect of the 2010 reforms has been to deprive the Legislative Assembly of the presence of the Attorney-General as a Minister, who, in addition to introducing Bills of a legal nature was usually available to assist the House with legal advice on matters as they arose from time to time. Under the new arrangements, provision could be made by Act to require or permit the Attorney-General to attend and contribute to Assembly meetings on legal matters – not as a member, and of course without a vote.<sup>97</sup>

Ideally, the status of the Attorney-General would be second only to that of a Supreme Court Judge. The qualifications for appointment are the same, and both are concerned to uphold the Constitution and the Rule of Law. But the difference is that, while the Judge can only comment on the case that is presented to him, the Attorney-General has the opportunity to reach a wider audience on subjects of current importance as they arise. The question of where and how the voice of the Attorney-General will be heard is linked to issues of resources and support. Experience shows that an Attorney-General who is not a member of the Government in Cabinet must have the full force of the law behind him and be sufficiently resourced in order to discharge his functions properly.<sup>98</sup>

For the first time since April 2010, the office of Attorney-General was filled substantively<sup>99</sup> when Mr Neil Adsett, formerly Law Draftsman and Tongan Law Revision Commissioner was appointed on 16 January 2012.<sup>100</sup>

By establishing an independent office, Tonga is making an investment in the maintenance of the Rule of Law. The Constitution goes part way towards recognising this, but specifies only the advising and prosecuting responsibilities (31A(1)). A more comprehensive list of responsibilities for the Attorney-General, some of which are discharged by the Crown Law Department under his direction, is set out on the Crown Law website and comprises –

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97 Variations of this can be seen in Tuvalu and the Solomon Islands. See items vi) and vii) in the text above.

98 Nicholls, 2010, para 71.

99 Mr Barrie Sweetman of New Zealand and Fiji had acted as interim Attorney-General since August 2011.

100 Crown Law Department official website, 2012 - <[www.crownlaw.gov.to/cms/index.php/about-us/crown-law-officers.html](http://www.crownlaw.gov.to/cms/index.php/about-us/crown-law-officers.html)>. Mr Adsett was appointed Senior Counsel by the Chief Justice on 16 March (MT 18 March 2012).

Main responsibilities through the Crown Law Department under his direction:

- Providing legal advice to His Majesty's Cabinet, Government Ministries, and Departments
- Drafting legislation for Government to be submitted to the Legislative Assembly
- Conducting criminal prosecutions on behalf of the Crown (The Crown meaning his Majesty the King and the community at large)
- Representing the Crown in civil, land, and where appropriate, family litigation
- Performing law officers' roles for the Judiciary and
- Facilitating community law initiatives promoting the rule of law and legal awareness

The Attorney-General's further responsibilities:<sup>101</sup>

- Supporting constitutional integrity and governance
- Ensuring legislative and statutory efficacy
- Facilitating Government's lawful and responsible legal dealings
- Providing legal advice on law reform
- Executing statutory enforcement powers, and
- Performing responsibilities in an independent and transparent manner.

The statute suggested in this paper would legislate comprehensively and provide the foundation for resources and support.

### 3 *Commissioner of Police*

The office of Commissioner of Police should be mentioned in the context of the late King's apparent concern to take some responsibility in the 'law and order' sphere. Amendments to the Police legislation in 2010 introduced a provision for appointing the Commissioner which is identical with that of the Attorney-General under the Constitution.<sup>102</sup> The new Act was not considered by the CEC and the Assembly as part of the political reform process, but once it was decided that the Police Commissioner should be independent from Ministerial supervision, there

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101 <[www.crownlaw.gov.to/cms/index.php/about-us/functions-and-duties.html](http://www.crownlaw.gov.to/cms/index.php/about-us/functions-and-duties.html)>.

102 *Tonga Police Act 2010*, s.10.

was logic in adopting the Attorney-General model. However, in August 2011 some evidence appeared in the media that the newly elected Government would prefer to have more say as to the appointment of Commissioner.<sup>103</sup> Delay in the establishment of the Judicial Appointments and Discipline Panel appears to have contributed to some uncertainty around appointments.<sup>104</sup>

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103 'Cabinet reverses Police reform', *Matangi Tonga*, 3 Aug 2011.

104 'Tonga Faces Constitutional Crisis Over Contract', *Pacific Island Report*, 4 Aug 2011.



## **VI PROVIDING ADVICE FOR HIS MAJESTY**

### ***A The Privy Council***

Of all Tongan political institutions, the one which has undergone greatest change, in both function and composition, is the Privy Council. It was the means by which the Monarch governed the country. From the origin of the Constitution, the Monarch was advised by his Privy Council – "appointed by him to assist him in discharge of his important functions"(1875 cl 54). The Council comprised the Cabinet of his Ministers, originally the Chief Justice, and such others as he chose to appoint, and the decisions of the Council were carried out by Cabinet. The Monarch in Council was the supreme executive body. As time went on, and the Monarch began to step back from the day-to-day matters of government, Cabinet would consider all important issues beforehand and make recommendations for the Monarch's approval in Council.

The current reform has moved all executive authority to the Cabinet, except for certain powers retained by the Monarch discussed in this review. The new Privy Council is appointed by the Monarch, and he may call to the Council whoever he thinks fit to provide him with advice (cl 50). The subject matter of advice is not specified, but these would undoubtedly include the Monarch's function as Head of State, as well as in relation to powers retained by him in a numbers of spheres, and responsibilities regarding the nobility, the Legislative Assembly, the church and other diverse subjects arising in the daily lives of his people. The Privy Council may regulate its own procedure (cl 50(3)).

The Monarch's seat on the throne would be a lonely one, and possibly insecure, if no system were established to keep him informed of current events and issues, and to provide him with advice to assist him in exercising his authority and carrying out his responsibilities. The question is whether it is preferable for the Constitution to define how information and advice should be provided to every Monarch, and by whom – as a minimum requirement – or whether 'being informed', and the composition and operation of the Privy Council, should be left entirely to the Monarch of the day.

This question was highlighted by the decision of the Government and Assembly in December 2009 to reject a plan for the new Privy Council which the members of the CEC felt would help protect and support the King's pre-eminent role in the nation. Unfortunately, the reasons for rejection of the plan do not appear to have been stated outside the Assembly, but it is desirable to summarise those recommendations of the Commission which presumably the previous Government would have considered in reaching its decision to oppose the plan.

The Commission acknowledged that it had always been the Monarch's prerogative to decide whom to call to his Council. However, it would not be appropriate for Cabinet Ministers or members of the Assembly to be members of a Council. That would give the appearance that the Council was involved in Government. How, then, should the Monarch be kept informed of important matters? The CEC said:

Whilst the King will not be involved directly in executive Government, it is still essential that, as Head of State, he be kept fully and regularly informed of the state of the government and of the country. ... It should be the role of the Prime Minister to keep his Monarch advised of the state of the Government and the Nation. There is good reason why that should be confidential and, therefore, delivered personally and privately (para 114).

The recommendation was that:

the Prime Minister should report personally to the King every week. If the King is out of the country, the report shall be in writing to the King and the Regent. It is important that the King is kept informed at all times and receives the same information as the Regent. By reporting in writing when he does not receive the report in person, the uniformity of information will be assured. If the Prime Minister is out of the country or otherwise indisposed, the report shall be made by the acting Prime Minister (rec 16).

As to the composition of the Council, the CEC posed the question:

whether inclusion on the Council should be based on the member's ability to give advice on his or her particular field of expertise and thus continue the Council as an active advisory body, or whether membership should principally be an honour for distinguished service to the country or to the Monarchy. We consider that both questions can be answered positively by amending clause 50 to include some ex officio members, and leaving the King's discretion to call whomsoever else he wishes, whether to obtain practical advice or as an honorific recognition (para 117).

The CEC made it clear:

We do not recommend any change in the King's prerogative to seek advice from anyone he wishes but we feel Privy Council's retention as a constitutional body requires a more formal role as well. For that reason we recommend that there should be a constitutionally protected core of advisers who hold their position on the Council ex officio. Their role will be to keep the King up to date on the overall affairs of the people and the country, particularly matters outside active politics (para 118).

In view of the nobles' special traditional relationship to the Monarch, the CEC felt that the Privy Council, as a purely advisory body, should provide a formal recognition of the continuing importance of that relationship. It recommended that the nobles should nominate two nobles, selected from those nobles who are not in the Assembly, to be members of the Council (para 119, rec 10).

The central importance of the Church in modern Tonga also suggested the need to include a church leader nominated by the National Forum of Church Leaders (para 120, rec 10), and the Commission also recommended the inclusion of the Secretary of the Traditions Committee and the Governors of Vava'u and Ha'apai (rec 10). In this way, the Privy Council would have an *ex officio* core of six members, to which His Majesty would add from time to time.

The CEC was also concerned that the Privy Council be seen as entirely removed from the politics of Government and the Assembly. Accordingly, the Council should not include members of the Assembly and, if Privy Councillors became elected representatives to the Assembly, they should cease to be Councillors (recs 14 and 15).

It was intended that these *ex officio* members would ensure that the Monarch would be given a thorough briefing of most matters necessary to assist him in the discharge of his important functions. There should be a formal meeting of the Council every three months at which all *ex officio* members must attend with such other members as the Monarch might summon. The aim of such Council meeting would be to ensure that the Monarch is kept in touch with events in the country which otherwise might not reach him (para 123 and rec 11).

A final constitutional point needs to be mentioned here, namely the special case of the Privy Council's jurisdiction as a court in matters involving hereditary estates and titles. When the Court of Appeal was finally established, it heard appeals from the Land Court in such matters and referred its decision to the Privy Council for confirmation. The CEC recommended that there was no need for the Council to be involved, and that the Court of Appeal's decision should go direct to the Monarch for confirmation. In this way, the Council would have no judicial function (paras 110, 111 and rec 13). The response of the Government was to say that appeals in these matters shall henceforth go to the King in Privy Council, "which shall determine how the appeal shall proceed, and the judgment of the King in Council shall be final"(cl 50. The significance of this provision will be dealt with below).

As reasons were not published for rejection of the CEC's thinking on a new Privy Council, it is not possible to identify any part of the Commission's plan as being seen as a problem. Was it the creation of a small core of *ex officio* members? Was it the choice of members, or the frequency or compulsory nature of Council

meetings? Or was it simply a desire to leave the Monarch entirely free to create and run a Privy Council as he pleased, from time to time? Whatever the reasons,<sup>105</sup> as indicated above, the new cl 50 of the Constitution empowers the Monarch to call whomsoever he thinks fit to the Council, which regulates its own procedure. This new freedom for the King to make of the Privy Council whatever he wishes, for any advisory purpose and at any point in time, makes it difficult to interpret the Constitution and legislation wherever they refer to the Privy Council, as for example 'the King in Council' and other contexts – as discussed under 'The Monarch's Authority in Government' below.

### ***B The Law Lords and the Judicial Appointments Panel***

Two components of the Privy Council are provided for under the current reform. Four Law Lords, senior retired lawyers, were appointed by the late King in 2008 and a fifth in January 2011. These appointments have been discussed above – see Section V 'Intervention by King Tupou V'. Their purpose, as declared in the Royal Proclamation, was to advise the Monarch on matters relating to the judiciary. Since amendment of the Constitution in 2010, Law Lords are required to be 'persons versed in the law' (cl 83C) and are members of the Privy Council. In practice, the Law Lords have provided constitutional and legal advice during the reform process. It is also almost certain that King Tupou V would have consulted his Law Lords about whether to assent to the Private Members Bill directed at protecting certain Noble members of the Assembly – discussed in Section V 'The Nobles' above.

The Judicial Appointments and Discipline Panel was introduced by constitutional amendment in 2010, in substitution for the Judicial Services Commission – as discussed above under 'Current Reforms Concerning the Judiciary'. The Panel is established as a "Committee of the Privy Council", comprising the Lord Chancellor, the Lord Chief Justice, the Attorney-General, and the Law Lords (cl 83C) – all of whom thus become Privy Councillors.<sup>106</sup>

On the question of the nature of the advice provided to the Monarch and the need for some transparency, the point of view of one of the most experienced of the Kingdom's politicians, Dr Sitiveni Halapua, should be noted. In an interview with

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105 As already indicated, Attorney-General Couchi later alleged that he was not consulted on substantive issues or that his advice was not accepted.

106 In different circumstances but ironically, nevertheless, the Chief Justice has thus returned to the body from which Queen Salote had his predecessors removed (cl 83C(1)(b)).

Pesi Fonua,<sup>107</sup> he referred to how the highlight of Tonga's political reform was the surrendering by the Monarch of executive power to an elected Cabinet and Legislative Assembly, but apart from that, the Monarch at the apex still retained a lot of power. The veto power of the King was questioned:

but we proposed for the King to retain his veto power as a check and balance mechanism. He exercised this veto relating to the amendment to the Arms and Ammunition Act which was passed by the House. ... his veto was publicly acclaimed.

Dr Halapua felt, however, that:

there were concerns over a lack of transparency over how the Monarch goes about making his decision under those circumstances. ... the Monarch chooses the members of the Privy Council, and the members of a panel to nominate the Police Commissioner, the Attorney General, and the Lord Chancellor. The Lord Chancellor in turn nominates the Chief Justice and judges of the Supreme Court and the Police Magistrate. The King is also the Chief in Command of the Tonga Defence Services.

### ***C The Monarch's Authority in Government***

When, in 2009, the CEC was considering what to recommend with regard to the Privy Council, it may have foreseen that one outcome of the political reform process would be some uncertainty as to what the residual powers of the Monarch would be. In that context, the CEC's 'minimum' plan for the Privy Council, as described above, around which the Monarch would have his usual discretion to appoint and listen to whomsoever he pleased, would ensure a structure that would facilitate the governing of the nation. In the absence of that plan, now rejected, it seems unavoidable to attempt a brief check – a 'stock take' – of the Monarch's remaining powers and the continuing involvement of the Privy Council.

At this point a reminder is needed of the constitutional source and guarantee of the status and permanence of the Tongan Monarchy. In addition to the declaration that the form of government is a Constitutional Monarchy under the Monarch and his successors (cl 30), language expresses traditional sentiments describing the King as "Sovereign of all the Chiefs and all the people" and adds that "The person of the King is sacred"(cl 41). Succession to the throne by descent from King Tupou I is defined so as to secure continuity of inheritance (cl 32).<sup>108</sup> Limitations on

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107 'Architect of reform Halapua says government needs "vision"' PIR, 2012, 16 April.

108 The law of Royal succession differs from succession to a Noble title in that, while the accession of a Queen is a real possibility (Queen Salote reigned 1918-65), the Noble title cannot pass to a female heir (cl 111).

power to amend the Constitution, and this clause in particular (discussed in Section IX below) render the Monarchy unassailable by constitutional means.

At the outset, it is important to note that this analysis of what appear to be the Monarch's remaining powers is being done solely for the purpose of clarification, and is in no way critical of the retention by him of these powers. An assumption underlying the whole reform process is that the people of Tonga through their leaders have struck a balance in the recognition of authority for governing the nation, between the four principal sources of power – the Monarch, the Legislative Assembly, the Cabinet and the Judiciary.

That balancing decision was put into effect by the previous Government through amendments to the laws that were passed by the Assembly and assented to by King Tupou V prior to the November 2010 Assembly elections – within a time-frame to which the Government was committed. Whether the time allowed was too short, and whether some of the difficulties seen in the new framework might have been avoided had reform extended over a longer period, are open questions at this stage.

The Constitution was amended to provide for changes in functions and powers, mainly of the Monarch and the Executive branch of Government, along with a large number of consequential but important amendments to statutes (where, for example, in most cases, 'the Cabinet' was substituted for 'the King' or 'the Privy Council'). It seems that, as yet, there has been no published account or summary of the reforms that have taken place. The principal constitutional changes are relatively clear, and have been discussed in this review. It is now necessary to identify, and attempt to interpret, the laws that apply to the Monarch's remaining powers.

It seems desirable to categorise the Monarch's powers under three headings, so that distinctions can be made between those powers that the Monarch can exercise in his own discretion without advice [Category 1]; those where he must listen to advice before acting [Category 2]; and those where he must follow the advice he receives [Category 3]. It is also a good idea to clarify what is meant by words that are commonly used when talking about 'advice'. For example, in Category 2, a requirement 'to *take* advice' means 'to *listen to* advice', and the same meaning applies to 'deciding *after* consultation'. It follows from this that the difference between the King alone deciding a matter, and the King in Council deciding it, is that in the latter case the King must listen to advice offered by members of the Privy Council before he decides. On the other hand, words requiring the decision-maker 'to act *on* the advice of ...' fall into Category 3 where the advice must be

followed. Thus, acting 'on the advice of ...' means the same as 'with the consent of ...' or 'on the recommendation of ...'.

Category 1 – The Monarch: in his discretion without necessarily receiving advice

There are seven main areas where His Majesty retains full executive authority under the Constitution and legislation, and may act with or without advice, as he wishes.

- i Relationship with the Legislative Assembly:
  - The King may convoke and dismiss the Assembly at any time, and may call general elections (cls 38, 58, 77); and
  - The King may withhold his assent to legislation (cls 41,79),<sup>109</sup> and further discussion may be denied until the following session (cl 68).
- ii The Privy Council:
  - The King may appoint whomsoever he thinks fit to the Council to advise him (cl 50).
- iii Armed forces and martial law:
  - The King is Commander-in-Chief of the armed forces (cl 36), he may proclaim martial law (cl 46), and may raise a militia (cl 22);
  - His powers are defined and extended under the *Tonga Defence Services Act*, and include appointing a Commander to advise him (*Act* s 16);
  - The Defence Board comprises the King and Privy Council (s 19) [and appointment of serving officers is made by the King on the recommendation of the Board (s 21), a power belonging under Category 3 below].
- iv International affairs:
  - The King may make treaties with other states and appoint diplomatic representatives (cl 39).
- v Naturalisation:
  - The King may approve applications to become naturalised subjects (cl 29).
- vi Honours and distinctions:

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109 For a rare example, see the Private Members Bill case under Section V 'The Nobles', above.

- The King may confer titles of honour and honourable distinctions (cl 44).

vii Succession to the throne:

- A member of the Royal Family who is likely to succeed to the throne may not marry without the King's consent, and if such marriage occurs, the member's right to succeed may be cancelled (cl 33).<sup>110</sup>

Category 2 – The Monarch: in his discretion after receiving advice

In cases in this category, it seems that the King is required by the law to listen to the advice but not to follow it unless he sees fit. The most common examples are those few remaining situations where the Privy Council is still referred to.<sup>111</sup> The phrase usually found is – "The King in Council". As indicated above, it is for the Monarch to decide who to call to his Council to advise him, except that, in cases involving a number of important appointments, he is required to receive advice from the special Panel which is declared in the Constitution to be 'a Committee of the Privy Council' (cl 83C, and see discussion in the previous Section).

The Monarch may make the following appointments, sitting "in Council" with such members of the Council as he calls for the occasion, after receiving advice from the Judicial Appointments and Discipline Panel. The appointments are –

- the Lord Chancellor (cl 83B);
- the Lord Chief Justice and other Supreme Court Judges (cl 86);
- acting Judges (cl 88);
- the Attorney-General (cl 31A);
- the Police Commissioner (Police Act); and
- the Magistrates (Magistrates Court Act).

The King's powers extend to determining terms of engagement and dismissal, after receiving advice from the Panel.

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110 See Appendix – n 28 to the Constitution – for an example of a Proclamation of Cancellation.

111 In October 2010, the Miscellaneous Amendments (Privy Council) Act substituted the Cabinet for the Privy Council in a large number of statutes. The Act also sought to bring about the same result with regard to any statute that had escaped mention in it, by requiring that, when an example is discovered, the necessary change should be made by regulation.

References to the Privy Council in the Land Act have also been left untouched, see Section VIII below.



A further executive power exercisable by the Monarch is the grant of pardon. The CEC had recommended that the King should be advised by the Chief Justice on such matters. Previously, the Constitution had provided for the consent of the Privy Council (effectively Cabinet). In December 2009, the Government decided that the Constitution should confer the power of pardon on the King in Council.

Another example of the King's authority is found in the Public Order (Preservation) Act where, after the Prime Minister has proclaimed a state of emergency, a copy of the proclamation must be submitted to the King in Council (s 3). The King, having obtained advice from such members as he may call, may approve or annul the proclamation.

### Category 3 – The Monarch: acting in accordance with advice or consent

In some circumstances in the life of the nation, the Monarch is asked to act in such a way as to confer the dignity of his title – the highest in the Kingdom – on an act or decision which has already been made by a lesser authority. Political reform has provided several examples, particularly:

- i the King appoints as Prime Minister the elected member who is recommended by the Assembly (cl 50A);
- ii similarly, he appoints the noble recommended by the Assembly to be Speaker (cl 61),
- iii the King appoints as Ministers the persons nominated by the Prime Minister (cl 51); and
- iv the King appoints the two Governors on the advice of the Prime Minister (cl 54).

Two further constitutional cases are:

- the King's authority to declare war "with the consent of the Legislative Assembly" (cl 36); and
- the King's authority to determine the coinage of the Kingdom "with the advice of Cabinet".

There is an apparent anomaly where the appointment of the Court of Appeal Judges and the Land Court Judges are concerned. Under clauses 85 and 86A, respectively, the King may appoint them (and dismiss, and fix terms, etc) "with the consent of the Privy Council" after receiving advice from the Judicial Appointments and Discipline Panel. The consent of the Council is required. This differs from the provisions for the other members of the Judiciary, dealt with under Category 2, where the decision is made by the King "in Council" (cls 86 and 88).

As the Constitution states, and the intention of the reform was declared, the new Council is advisory, and has no executive authority. So there is no point in retaining the earlier phrase "the King with the consent of the Privy Council". The Council lacks authority to give or deny its consent as an executive decision.

## VII THE ELECTORAL SYSTEM

The most obvious evidence of political inequality in Tonga was the permanent minority status in Parliament of the representatives of the people elected by universal suffrage. The relative numbers representing the people, nobles and ministers of government have been discussed above in Section V D 'The Legislature'. The choice of electoral system for a new structure has not been easy.

In order to understand the significance of proposed changes it is important to appreciate the historical depth of the pre-reform scene. Since 1875, Tongan adults who could read and write and paid land tax (1875: 22) have had the right to vote by ballot for representatives to the Legislative Assembly.<sup>112</sup> At no stage, however, was there the expectation that the people's representatives would have a real say in, much less control, the government of the country. There have been adjustments in the size of the Assembly, but the formula has always been that the number of people's representatives did not exceed the number of nobles or their representatives (originally, all the nobles were in the Assembly – eg twenty in 1875), and the two groups were joined in the House by the government ministers appointed by the Monarch (number unlimited), so that the people's representative were permanently outnumbered.

The electoral system has changed little. As to the distribution of seats in the Assembly, while the number of people's representatives was twenty, the allocation of representatives across the archipelago could, at least roughly, reflect the relative sizes of island populations – for example, in 1875, the spread was Tongatapu 9, Ha'apai 5, Vava'u 4, and one each to the very remote Niuatoputapu and Niuafu'ou.<sup>113</sup> During the period 1914 to 1982, the size of the Assembly, and accordingly the number of people's representatives was at its lowest. Seven seats were allocated – 3 to a combined electorate comprising Tongatapu, 'Eua and the two Niuas, and 2 to each of Vava'u and Ha'apai. With the increase to 9 seats in 1982, 'Eua got a seat of its own, as did the two Niuas combined.

With 17 seats to allocate in a reformed Assembly, the Tripartite Committee and Cabinet proposed an allocation directed toward greater recognition of the fact that Tongatapu's population was increasing at a much greater rate than the rest of the country – namely, Tongatapu 10, Vava'u 3, Ha'apai 2, the Niuas 1 and 'Eua 1.

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112 In 2010, these three requirements were removed (cl 64).

113 It is hard to exaggerate the isolation of these tiny communities. Niuafu'ou, population 700, is 340 kms to the west and north of Vava'u (the northernmost of Tonga's three main groups), while Niuatoputapu, of about 1,000, lies 240 kms north of Vava'u.

The CEC considered at length the problem of the poor access that people in isolated communities would have to their newly empowered political representatives. If the 17 seats were allocated simply on the basis of 'equal number of votes per seat', the Niua's would lose their seat to Tongatapu. It also found that, "in stark contrast" to Tongatapu (para 296), "the geographical distribution of islands in the Ha'apai group does not allow easy access" from outer to central islands (para 297). Consequently, it recommended that Tongatapu give a seat to Ha'apai – to produce Tongatapu 9 and Ha'apai 3. This also would restore the traditional equality between Vava'u and Ha'apai (rec 72). However, Cabinet adhered to its view and in December 2009 successfully moved the Assembly to adopt the '10, 3, 2, 1 and 1' allocation that it had proposed.

When the voting system itself came under review, it became apparent that a number of concerns might be relevant when considering alternative systems. These included:

- whether the development of political parties should be facilitated;
- how best to reflect the interests of women and minority groups;
- complaints about the perceived 'wasting' of votes;
- the need to encourage voting in a system where it is not compulsory;
- whether the system of counting the votes should be intelligible to the ordinary voter;
- making representatives more responsive to the needs of the electoral district;
- the desirability of encouraging the election of politicians of national status and ability who would contribute effectively to governing the country; and
- whether the system adopted would be sufficiently familiar, or easy to learn, so that it could be used for the November 2010 elections to which the government was committed.

In fact, there is little evidence of thorough scrutiny of such concerns, or the study of alternatives in the Tongan context with the assistance of expert advice. Naturally, such a list raises questions about prioritising certain objectives at the expense of others, as well as to what extent choice of electoral system can be relied upon to produce desired outcomes in the political scene.<sup>114</sup>

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114 Fraenkel 2009a, 200.

The alternative systems, very broadly, were:

- i a mixed multi- and single- seat system of the 'first-past-the-post' (FPTP) type, which operates in its simplest form in single-seat districts such as each of the Niuaus and 'Eua. Where electoral districts have two or more seats – a multi-seat block – in districts such as Tongatapu, Ha'apai and Vava'u, the system is called a 'block vote'. In both cases, as they had done for decades, voters were required merely to indicate which candidate(s) on the ballot paper list they favoured, and in the block districts, they had as many choices as there were seats in the district. The candidates with the most votes won;
- ii the FPTP system, but with all multi-member districts sub-divided to become single-seat districts, so that every voter had one vote; and
- iii a single transferable vote (STV) system with mixed single and multi-seat districts. As an example of the latter, Tongatapu would be sub-divided into three districts. This is a preferential system that requires voters to rank all candidates 1, 2, 3, 4 and so on. The number of valid votes overall is divided by one more than the number of seats. That is the 'Droop' quota. If no candidate reaches that quota at the first count, the lowest polling candidate is eliminated, and his or her votes are transferred in accordance with the next preferences marked on the ballot papers. Candidates who reach the quota are deemed elected, and any "surplus" votes over and above the quota are redistributed to other candidates in accordance with preferences marked on the ballot papers. This process of recycling surpluses and eliminating lowest polling candidates is continued until all vacancies have been filled, or until a further elimination or surplus distribution could not change the final result.<sup>115</sup>

Of the above three alternatives, the first was the existing system, the second was proposed by Cabinet and eventually became law, while the NCPR and the CEC had recommended the third system.

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"There is often room for healthy debate about the 'effects' of electoral systems since other factors – such as the presence or absence of strong political parties, the resilience of island-wide solidarity or the existence of cross-cutting allegiances or church pressures – also influence the way politics is conducted. Political characteristics which are not the result of voting laws are therefore often misconstrued as results of the electoral system, and caution is needed before making big claims about the consequences of electoral laws."

115 Reynolds, Reilly and others 2005, 71 and 76-7.

On the subject of electoral districts, Campbell observed that the Parliamentary debate around the number and size of districts was:<sup>116</sup>

... chaotic, with Pohiva declaring that the government was inviting a repetition of 16 November [2006 riots] by frustrating the will of the people, and calling the single-member electorate formula 'divide and rule'.

It is beyond the scope of this paper to explore the arguments around choices of voting system. Discussion of which system to adopt revealed two strongly opposed views. Indeed, this appears to have been the only aspect of Tonga's reform process that was the subject of published academic debate. A vigorous proponent of the STV system was Dr Halapua who assumed the chair of the NCPR during its report-writing stage in 2006, was a member of the CEC,<sup>117</sup> and was elected as Member of Parliament for Tongatapu No.3 district in the November 2010 elections. It must be noted that, in recommending the STV system, the CEC was treading, rather unusually, in the footsteps of the NCPR. The latter had stressed its concern over 'wasted votes' and low voter turn-out at the polls, and argued that a STV system would militate against both ills.<sup>118</sup> Also, the CEC criticised the FPTP system for its unfairness, wasting of votes and tendency to work against minority interests (CEC paras 257-260).

A very different view was formed by political scientist Dr Fraenkel, who had been invited to join the Official Election Observation Team for the last pre-reform elections of May 2008.<sup>119</sup> In fact, after detailing deficiencies in the electoral roll and discussing aspects of the system that might be improved, the joint Report of the Team found the election to be "reasonably well-run", that the method of voting was "generally well-explained" and, significantly, that most voters "had considerable confidence in the integrity of the electoral administration and the reliability of the count". The Team concluded:<sup>120</sup>

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116 Campbell, 2011, 202-3.

117 For his background, see under 'Accomplishments of the CEC' above. Dr Halapua's viewpoint had been put forward by Salmond 2002.

118 National Committee for Political Reform (NCPR), 2006.

119 The Team comprised Dr Jon Fraenkel from the ANU, Dr Malakai Koloamatangi, Tongan political scientist, University of Canterbury, and Mr 'Aminiasi Kefu, Senior Crown Counsel, now Crown Solicitor.

120 Fraenkel, Koloamatangi and Kefu, 2008, 4.

We believe that efforts should be made to sustain this sense of confidence, by avoiding unnecessary revisions of electoral arrangements during a period that is likely to see many other changes to political institutions.

Again:<sup>121</sup>

In general, we found few complaints about the electoral system, and some preference for retaining the present multi-member constituencies and the block vote system. We encountered little enthusiasm for shifting to a preferential voting system. Such a system would entail the discontinuation of the current practice of counting at the polling station and would make it difficult to sustain Tonga's current physical procedures for absentee voting (see Section VI below). In Vava'u and Ha'apai, there was considerable support for the retention of multi-member constituencies, and a reluctance to sub-divide the present two-member constituencies. We found no strong or urgent reasons for changing the electoral system ahead of the 2010 election, although some numerical adjustment will clearly be necessary to cope with the increased number of People's Representatives.

And finally:<sup>122</sup>

There was a strong preference widely expressed for an electoral system that fits well with Tonga's cultural framework, as against importing wholesale some elaborate ready-made alternative from overseas.

Fraenkel's views were elaborated in 2009,<sup>123</sup> and followed by the November publication of the CEC Report where the STV system was recommended.<sup>124</sup> When his criticism of the STV recommendation appeared in the press,<sup>125</sup> Halapua responded.<sup>126</sup>

On reflection, the decision of the CEC to recommend a change to a very different voting system does not appear to have been preceded by close examination of available authorities and professional opinion, or consideration of

121 Fraenkel, Koloamatangi and Kefu, 2008, 5.

122 Fraenkel, Koloamatangi and Kefu, 2008, 5.

123 Fraenkel, 2009a. He warned that to manage an STV system:

would require substantial capacity strengthening at the Tongan Elections Office and considerable overseas technical assistance. Those recommending electoral system changes who neglect the institutional context in which the system will operate could unintentionally open the path to major on-the-ground difficulties (para 203).

124 CEC (rec 69).

125 Fraenkel, 2009.

126 Halapua, 2010.

the practicalities. In offering advice on 'debate and dialogue', the authors of an 'Electoral System Design' Handbook recommend:<sup>127</sup>

It is the task of the reformer not only to understand the legal form of the technical arguments and the implications of potential change but also .....the implications for the wider political framework of the country. ....A sufficient number of those in power will need to be convinced of the benefits, including the benefits to themselves.

The Prime Minister and Cabinet may have taken heart from those who publicly advised against the STV system, or they may have had other considerations in mind. After the Electoral Boundaries Commission completed its demarcation of districts on the basis of single-member constituencies throughout the country, preparations were made for the FPTP system to continue for the elections of 25 November 2010 under the reformed Constitution and laws. It is not intended here to comment on the 2010 elections, but it can be noted that:<sup>128</sup>

Overall, the number of candidates contesting, 143, was more than double that at the previous polls in 2008, an indication that competition has become more acute now that parliament controls who forms the government. Turnout of about 90 per cent was also exceptionally high, another indication of rising popular political engagement. There were no signs of irregularities in the conduct or administration of the electoral process. The head of the Australian observer team, retired diplomat Bob Davies, reported that people in Tonga can be absolutely confident in the integrity of this election process.

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127 Reynolds, Reilly and others, 2005, 21-22.

128 Fraenkel, 2010.



## VIII THE LAND SYSTEM

Tonga's unique system of land tenure and administration has a long history during which the main principles have remained unchanged. Initially, authority to control rights and use of the archipelago of Tonga originated in kinship descent groups and larger *ha'a*, subject to rights of conquest. The foundation premise concerning lands early in the 19<sup>th</sup> century was that the islands and island groups of the archipelago belonged to the victor in wars, from which King George Tupou I emerged as the architect of a new form of government and system of land tenure. His objectives shaped the future. He sought to control the extent and manner of land-holding by competing chiefs, and at the same time to introduce far-reaching innovations, such as the prohibition on the alienation of land (ruling out freehold title), and eventually the rights of all males to obtain securely registered agricultural and town allotments on chiefs' estates or Government land near where they resided.

The principal steps taken to give effect to Tupou I's objectives were:

- to divide the total area of Tonga between the Monarch and Royal Family, the Government, and certain recognised estate holders (predominantly Nobles);
- to create two levels of tenure, namely:
  - Nobles holding estates from the King; and
  - Tongan males holding allotments from estate holders or the Government.
- to declare a system of tenure based upon life interests inherited according to strict rules of succession, under which, if a life interest failed, it would revert to the grantor of the interest;
- to confer on every male on attaining 16 years (recommended by the RLC to be raised to 21) a statutory right to the grant of an agricultural and a town allotment on an estate or Government land;<sup>129</sup>
- to provide that land held as a life interest could be leased for limited periods by churches, enterprises and individuals, regarded as important for economic development; and

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129 See now Land Act s 43.

- to establish under the Constitution and Land Act a system of Government containing a Ministry of Lands which would be the legal edifice within which all land would be administered.

Eventually, conventions developed around the use of terms such as 'the Crown' and 'Crown lands', to denote the roles of Monarch and Government, both acting on behalf of the Tongan Kingdom and its people. Examination of the legal history shows that the Monarch's only remaining personal authority relates to hereditary estates which might revert to him, and, of course, to the estates of the Monarch and Royal Family.<sup>130</sup>

For its success, the 'allotments' component of the system depended on a policy-driven, efficient, equitable and productive distribution scheme that delivered a registered and secure title – but the history and recent data show that this has proved very difficult to achieve. In fact, public dissatisfaction with administration of the system has steadily mounted over many years. In October 2008, King Tupou V appointed a Royal Land Commission (RLC) to:<sup>131</sup>

inquire into and report on all matters whatsoever concerning the land laws and practices in Tonga in order to provide more effective and efficient practices, without changing the basic land tenure of the Kingdom.

The Commission's three highly respected members<sup>132</sup> have consulted throughout Tonga and overseas, and on 30 March 2012 they presented to His Majesty King Tupou VI, and published an extraordinarily wide-ranging and comprehensive Report.<sup>133</sup> To the extent that the RLC's work examined the functions, structure and mechanics of the Ministry of Land, at which much of the public concern had been directed, and extended to investigate unethical land dealings in Vava'u, it was of immense importance to Tonga, but that work did not concern the CEC and is not relevant here. However, the approach taken by the RLC to questions of authority and responsibility, as they arise in the governance of the system, has led the Royal Commission into political dimensions which seem inescapable in the current climate.

130 Powles, 2012.

131 See the Commission's website – <[www.tongaroyallandcommission.com/](http://www.tongaroyallandcommission.com/)>.

132 Two members, Baron Fielakepa, chairman, and Lord Tevita Tupou, are Law Lords, and Kahungunu Baron-Afeaki is a law practitioner in Tonga and New Zealand.

133 The Final Report of 30 March 2012, is downloadable from the RLC website (above), in three Volumes printed in PDF in seven Parts.

To begin with, a brief examination of the Land Act, which is in effect a 'code' of all laws relating to the land system, shows that the King, Privy Council and Cabinet have various powers and responsibilities. Consequently, it is noteworthy that this Act is the only major part of Tonga's law which has not been amended as a consequence of the political reforms, no doubt because any action by Government and the Assembly might trespass on aspects of the RLC's inquiry. Concern to protect the integrity of the inquiry might have been a reason for the last minute amendment to the Government Act requiring the Minister of Lands to be a Noble during Cabinet's first term in the Assembly under the reform laws, referred to at the end of Section IV above.

By way of illustration of how the Land Act appears to require attention in light of the political reforms, one example can be taken, namely, the phrase "the King with the consent of the Privy Council". Prior to the reform, this phrase appeared from time to time throughout the Constitution and legislation of the Kingdom to describe the exercise of the executive power of Government. The Privy Council then comprised Cabinet and, with His Majesty, exercised executive authority. Where "with the consent of Privy Council" was used, that in effect meant that the agreement of Cabinet was necessary.

As Cabinet alone is now the executive authority, amendments have been made throughout the laws of Tonga to substitute "the Cabinet" in place of "the King with the consent of the Privy Council" (with certain possible anomalies concerning the judiciary – mentioned above at the end of Section VI). Such amendments also seem necessary in many provisions of the Constitution and Land Act.<sup>134</sup> Now, recommendations of the RLC would, if implemented, overtake concerns about whether 'King' or 'Cabinet' should be ultimate decision-maker.

A cornerstone of the RLC's Report is the concept of an independent Land Commission, accompanied by an administrative Appeals Tribunal. On the principle that it is inappropriate for the Monarch to be drawn into matters that may well have wider and contentious implications, and that Cabinet's time need not be engaged in relatively minor land matters, the RLC proposes that the independent Commission should investigate, hear the parties and rule upon issues such as the terms and rentals of leases, mortgages of them and compensation. The decision would be in the name of the King or Cabinet, acting on the advice of the Land Commission (reccs 87-99, 100, 101, 102-106, 108).

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134 Examples are cls 105, 106 and 114 of the Constitution and ss 11, 22, 141, 143 and 159, Land Act.

Of greater concern to the RLC was the over-involvement of estate holders in the granting of allotments and the administration of the distribution of land generally. It was noted that, while the original distribution scheme was entirely in the hands of the Minister,<sup>135</sup> since an amendment in 1915 that required the Minister to consult the estate holder over granting allotments, history and current evidence shows that estate holders have taken opportunities to exert influence and control – even to the extent of requiring rent for unregistered allotments, refusing to agree to registration, and demanding money to do so (pp 63-64 and rec 21). The RLC went to some lengths to examine the Bill presented to the Assembly by the Nobles in 2010<sup>136</sup> and concluded:

Estate Holders have appeared to be defensive and have been alleged to be acting with self interest in the recent past. The submission of the *Land (Amendment) Bill* 2010 to the Legislative Assembly in 2010 indicates that any land reform issues were likely to be politicized (para 217).

The Bill now proposed would appear to complete the process started in 1915 in removing the Minister and Cabinet from the decision making power over the grant and leasing of allotments. What appears to have brought this move from the Nobles was the change in the political system to be effective from the November 2010 General Elections onward .... The perceived concern from the Nobles is that the land tenure will be politicized and Nobles may lose control over their estates. There is a possibility under the new political system that Cabinet would not have any Nobles to look after the interests of hereditary estate holders and the Minister of Lands may not be a Noble as has been the tradition in the past.

The Nobles' concerns of possibly losing influence over their estates under the new political system were, in the Commission's opinion, misconceived. The Legislative Assembly is the Supreme Law Maker... it can pass a law that changes the basic land tenure of Tonga for the future. If this is what the Nobles fear then they cannot stop it other than by convincing the Legislative Assembly and obtaining the majority vote against such a law. They cannot do it by taking over the authority to grant and lease land now from the Minister and Cabinet.

The response from the public was almost always negative in that they did not want the Nobles to be given the sole power over their estates concerning matters within the governance provisions. The public preferred to keep this authority with Cabinet and the Minister of Lands. The public viewed the current roles of the Minister of

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135 *Hereditary Lands Act* 1882.

136 See Section V 'The Nobles' 'Estate holders'.

Lands and Cabinet as an essential check on the exercise of powers under the Land Act (paras 237-240).

The independent Commission proposed by the RLC should meet concerns of all stakeholders about the political sensitivity of land distribution and management at a time when estate holders and the people were being asked to accept new relationships in the governing of the country. It was recommended that the Commission would comprise four members, each representing one of the four stakeholders in land, namely the Royal Family, estate holders, Government and registered allotment holders (recommended by the People's Representatives in the Legislative Assembly). These four would then nominate a fifth member as chairman who would be a law practitioner qualified to be a Judge (rec 94). Choice of authority to appoint the Commission interestingly reflects a post-reform approach. The RLC said:

It was proposed that the Commissioners should be appointed by the King .... However, because such appointments would be executive acts the Commission considers it would not be appropriate to involve His Majesty in Privy Council in this process. His Majesty has also removed much of His involvement in matters of this nature to become a more independent leader for the country. This is also in line with Tonga's current political reforms (para 226).

A major concern of the RLC is the absence of adequate data from the Ministry of Lands as to the areas of land held under the prescribed categories. It found that, although it was impossible to determine how much land remained available for distribution:

the Commission was still able to estimate from a range of information gathered, that large areas of land are still not distributed. The question then is why are such large areas of land still not distributed as required by the law? If they have been distributed then why have some of these 'allocated' lands not been registered to guarantee and give security to the title of the land occupier under the law? The answers to these questions are important when the Commission reflects upon the views, concerns and proposals made by the public (para 48).

The 'conventional wisdom' appears to be that, as there are now so many Tongan males without land, there cannot possibly be enough land left for them, and there is no point in trying.<sup>137</sup> On the other hand, the RLC believes that, with the benefit of sufficient measurements and calculations, several initiatives should be taken that

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137 For example – "There has been no land available for allocation of allotments for several decades" from Kingdom of Tonga, *Looking to the Future Building on the Past, Strategic Development Plan Eight, 2006/07—2008/09*, Nuku'alofa, 2006, p70.

would ensure that the land shortage is greatly reduced. This would begin with enforcing the existing laws, which would ensure, for example, that estate holders' families were restricted to personal areas prescribed by regulation and that, except as permitted by law, they did not grant leases of more than 5% of estate land. The RLC recommended that the boundaries and subdivisions of all estates be surveyed, that 'guidelines' be prepared and issued to every estate holder, that the sizes of allotments be checked and that the minimum size of a town allotment be reduced from 30 to 20 perches(recs 20, 45, 47, 50).

This Section has not done justice to the RLC's Report as a whole, and is concerned primarily to place the land issues within the context of political reform, as both informative as to the highly charged nature of those issues and illustrative of the possible nature of future demands upon post-reform Government.

## ***IX CONCLUSION: THE OPEN DOOR***

Fundamental to the transition to a more democratic system has been the understanding that the Monarch would retain a level of influence that would go some way towards meeting the concerns of not only the Nobles and estate-holding chiefs, but also a range of other interests that exist in business, the public service, the churches and the broader community. To this observer, it seemed that there was an anxiety, a fear, about what the future would hold under a government of leaders who had had little or no prior experience of assuming full responsibility for the Kingdom. A leap of faith was called for, based upon what the populace had been told, with little consultation, were the merits of 'democratic governance'. Thus, it seems that it is important for this first Cabinet to build up an investment in the trust of the electorates, both the Nobles' and the People's.

Written by a non-Tongan observer, this review paper does not presume to judge what is in the best interests of Tonga. Instead, the paper makes some respectful suggestions for further consideration.

### ***A Stock-take***

The first suggestion is that an assessment be made of progress achieved so far – a 'stock-take' of what has been done, and what may need to be done to complete the tasks of devolving executive power upon Cabinet and shifting electoral power to the people – where it is intended that that should be done. Where the devolution and the shifting are not intended to be complete, and compromises have been arrived at, these should be identified and understood – and this paper has tried to contribute to that process.

For example, as far as the proposed machinery for Judicial and Attorney-General appointments is concerned, its failure to meet generally accepted standards of independence should be acknowledged and, whenever possible, addressed in the meantime. Establishing and activating that machinery would appear to be a matter of urgency if Tonga hopes to attract lawyers of calibre and integrity to the country.

### ***B Amending the Constitution***

While the new Government will now be settling in and encouraging people to understand the reforms that have been achieved, there will be those who say that political reform is not a 'once in a lifetime' affair and that they may wish to move forward with further changes as time goes by. So, the second suggestion is that steps be taken to examine the means by which the Constitution can be amended, and to consider whether a policy, or perhaps a convention, might be developed that would determine in what circumstances that might occur. Of course the last thing to contemplate at this time is meddling with the reformed laws merely to score

political points. Equally, the relative ease with which the Constitution can at present be amended could be seen as an advantage during a period of gradual reform in response to established needs.

In its own terms, the Constitution of Tonga can be amended in the same way that an Act of the Assembly is passed, namely by three readings in the House followed by the assent of the King (cl 56), the only qualifications being that Cabinet must be unanimous in support, and the amendment must not affect "the law of liberty, the succession to the throne and the titles and hereditary estates of the nobles" (cl 79). Laws relating to "the King, Royal Family, or the titles and inheritances of the nobles" can be discussed and voted on only by the nobles of the Assembly (cl 67), but criticism of of this clause by the RLC may open the way for its repeal.

The CEC felt that some further restraint on amendment was called for:

Considering the ease with which it can be amended, it is remarkable that, except for the major amendments of 1914 and the additions during the 1929 revision, it has suffered few substantial changes. Some of the larger changes in the last decades have been made by the government for expediency to deal with specific difficulties it was experiencing at the time rather than for the long term good of the country such as the amendments to clause 70 by the second amendment act in 1999 and the additions to clause 7 in the 2003 amendment (para 102).

Any Government formed under the new procedures which we are recommending will have to understand the binding effect of the Constitution and the need to act within its terms. The temptation for a government to use its majority in the House to remove sections that it finds obstructive or difficult could suggest a need to entrench its terms in some way. We do not suggest it will be necessary to protect it in this manner but we do consider it should be done on the basis that it is "better to be safe than sorry". We therefore recommend that special terms be introduced to strengthen the means by which the provisions of the Constitution are entrenched (para 103).

We recommend that clause 79 be amended so that any change to the Constitution must be passed by the Legislative Assembly three times with a majority of two thirds of the total membership of the House on each reading before it can be passed to the King for his assent (rec 8).

Cabinet rejected the recommendation of a two-thirds majority for amendments, and a record of any reasons given is not available (cl 79). There is always the need to reach a balance between, on the one hand, the importance of stabilising and



protecting a constitution against hasty change and, on the other, permitting amendment when it is needed.

Further differences of opinion concern the language and style of the Constitution. A feature of the amendments made in the reform process is that they were 'minimal' in the sense that nothing more was changed than was necessary to give effect to particular reforms. Also, wherever appropriate, the Constitution stated the principle, and implementation was by statute. So a document that originated in the language in use in the 19<sup>th</sup> century is alive today in a mixture of styles.<sup>138</sup> Interpretation is made difficult by inconsistencies in word usage, clause headings, and sometimes a confusing order of subject matter. In response to suggestions for a 'clean-up' of the instrument, the CEC opposed the idea of re-writing the Constitution and said that they had "tried to maintain the style that is so characteristic of the instrument originally given us by King Tupou I" (para 86). A consequence, of course, is that the Constitution is more difficult to explain to those who are not familiar with it.

### ***C Public Awareness and Involvement***

Concerns were expressed by the CEC regarding the lack of understanding of, and even lack of interest in, political reform. An immediate post-CEC program of public education on its recommendations was abandoned by the aid providers. Experience in Pacific Island states generally is that central governments are hard-pressed to resource the delivery of services to large proportions of their populations, particularly those in more distant locations. It is unreasonable to expect those who receive few government services to place a priority on participating in changes that do not clearly translate into benefits for them. In this regard, it will be important for the recommendations of RLC to be taken seriously so that land availability and security are improved throughout Tonga through the efforts of the Ministry of Lands backed by an Independent Land Commission.

Certain attempts were made during the process of reform to conduct public information and political orientation programmes. For example, in late 2009 around 3,000 copies of a 100-page booklet outlining basic democratic concepts, in Tongan and English, prepared by Dr Malakai Koloamatangi of Canterbury University, was distributed around Tonga at public meetings.<sup>139</sup> Addressing the Tonga Media Council, Dr Koloamatangi commented "When a political system is people-driven, it works better than any system imposed from the top-down. ...

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138 The Constitution can be read in its entirety in the Appendix.

139 'Political science students discuss Democracy in Tonga' *Radio Australia Pacific Beat*, 25 September 2009. Dr Koloamatangi's earlier participation is mentioned in Section III above.

Therefore it is important that Tongans feel ownership of their new political system." He also stressed "the need for negotiation and dialogue" and that "politics is about compromise."<sup>140</sup>

So the third suggestion is for renewed efforts to familiarise the public with their newly acquired responsibility to elect and support as members of the Assembly representatives of high calibre and integrity. Some of these will form a government while others will constitute the opposition in the House. In the past, some People's Representatives have effectively challenged the government of the day, and sought to bring it to account. It is a new experience for People's Representatives to take ministerial posts and, in turn, face an opposition. Throughout, the objective should not be lost – namely to build the public's trust in the system. The success of Tonga's journey along the path it has chosen may depend upon it.

There is need for vision, says Dr Halapua. With the reform in place, there is no going back, but:<sup>141</sup>

I don't think the intention was that the reform was final, and once it was introduced it should remain unchanged. Once in operation, we should identify what needs to be improved and polished, and that is the true nature of any political reform. I don't think the reform was an end in itself.

This paper has suggested that there are ongoing tasks, and perhaps those mentioned above in this Section are of the sort that would best be handled by a new body, or 'commission' that brings together legal, political and social experience. Ideally, such an independent body could be set up to study, propose and monitor law reform generally, and at least the three tasks – namely:

- i assessing the constitutional health of the country, and testing the amendments actually made (or not, as the case may be) against agreed objectives;
- ii examining the process of amendment of the Constitution, and the language and style of the document; and
- iii reviewing existing educational, information and consultation activities throughout Tonga that are focused upon the political structures and processes of government with the intention of establishing an ongoing and perhaps long-term program, which would be advised by the new body.

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140 'Tonga has opportunity to start afresh, says political scientist' MT, 11 Sep 2009.

141 'Architect of reform Halapua says government needs "vision"' PIR, 16 April 2012.

The proposed 'commission' would have wider functions than the present 'Law Committee'. Many countries have a Law Reform Commission, made up mainly of part-time appointees to reduce cost. In 2007, such a commission was proposed for Tonga, and appropriate legislation was passed and assented to by King Tupou V.<sup>142</sup> It has not been brought into force. Could that legislation be re-examined?

To conclude, this paper has acknowledged the remarkable achievements of the leaders of Tonga over the past two decades, of those who have supported and worked with them, and of those who have spurred them on with persistent calls for change. With the approval and sometimes encouragement of the late King Tupou V, Tonga has accomplished a smooth transition from a governmental framework designed for the Monarch to rule as Head of Government, to a framework built upon the concept, at least substantially realised, of the popular election of most of those who will govern the country. The new executive Cabinet and the new King Tupou VI, who combines the traditional role of *Hau* with that of Head of State, may seek to develop a dynamic relationship under the vintage, but significantly amended, Constitution. The efforts of the past decades have opened the door to constitutional change and its implementation. The reforms of 2010 chose the direction to be taken. The new leaders will guide Tonga along the path.

### *Post-script*

Notice of intention to move a motion of no confidence was presented to the Speaker on 18 June 2012 by 'Akilisi Pohiva, with the signatures of 9 other People's Representatives. Three People's Representative Ministers resigned from Cabinet and supported the motion. The House went into recess, and met again on 17 July (MT 2 and 3 July 2012). In the meantime, a People's Representative who had voted for the motion crossed the floor and was appointed a Minister by the King on the nomination of the Prime Minister. Subsequent postponements of the motion were due to the King's action in removing the Speaker, Lord Lasike, from the House, as the inevitable consequence of his conviction for a relatively minor offence under the Arms and Ammunition Act which nevertheless carried a possible maximum penalty of 5 years imprisonment – see cl 23 Constitution. Lord Fakafanua was elected Speaker and the Nobles' seat in the Assembly vacated by Lord Lasike was to be filled by a by-election (MT 17 and 19 July 2012). It seems that the two sides now formed in the Assembly are of almost equal strength and that the fate of the motion of no confidence is in the balance, Experience with the motion may prove to be a painful process, not conducive to building trust in the Assembly.

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- in the online series of the Pacific Islands Legal Information Institute (**PacLII**) at <[www.paclii.org/to](http://www.paclii.org/to)>.



## ***THE CONSTITUTION OF TONGA***<sup>143</sup>

### **PART I - DECLARATION OF RIGHTS**

#### **1 Declaration of freedom**

Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free for ever. And all men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will.

#### **2 Slavery prohibited**

No person shall serve another against his will except he be undergoing punishment by law and any slave who may escape from a foreign country to Tonga (unless he be escaping from justice being guilty of homicide or theft or any great crime or involved in debt) shall be free from the moment he sets foot on Tongan soil for no person shall be in servitude under the protection of the flag of Tonga.<sup>144</sup>

#### **3 Conditions under which foreign labourers may be introduced**

Whoever may wish to bring persons from other islands to work for him may make an agreement with them for the number of years they will work for him and a copy of the written agreement he makes with them shall be deposited in the Public Offices stating the amount of payment they shall receive the period they shall work and a

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143 This document is extracted, with consent, from the unofficial consolidation of the Constitution of Tonga as at 30 November 2010, prepared by Neil Adsett.

1988 Revised Edition chapter 2.

Amended by Act 13 of 1966, commencement 1 July 1990 (GS 4/1990).

Amended by Act 12 of 1990, commencement 8 August 1990.

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Amended by Act 1 of 1991, commencement 22 February 1991.

Amended by Act 16 of 1997, commencement 29 October 1997.

Amended by Act 11 of 1999, commencement 11 August 1999.

Amended by Act 18 of 1999, commencement 3 November 1999.

Amended by Act 17 of 2003, commencement 21 November 2003.

Amended by Act 9 of 2006, commencement 3 January 2007.

Amended by Act 2 of 2009, commencement 29 June 2009.

Amended by Act 14 of 2010, commencement 6 May 2010.

Amended by Act 20 of 2010.

Amended by Act 39 of 2010, commencement 24 September 2010.

144 Amended by Act 23 of 1990.

promise to take them back to their own land. And the Government shall cause such contract to be carried out both on behalf of those who engage and those who are engaged. And such persons being so introduced shall be subject to the laws of the land and shall pay the same Customs duties as all the people in the Kingdom and taxes as shall be ordained by the King and his Cabinet.<sup>145</sup>

**4 Same law for all classes**

There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.<sup>146</sup>

**5 Freedom of worship**

All men are free to practise their religion and to worship God as they may deem fit in accordance with the dictates of their own worship consciences and to assemble for religious service in such places as they may appoint. But it shall not be lawful to use this freedom to commit evil and licentious acts or under the name of worship to do what is contrary to the law and peace of the land.

**6 Sabbath Day to be kept holy**

The Sabbath Day shall be kept holy in Tonga and no person shall practise his trade or profession or conduct any commercial undertaking on the Sabbath Day except according to law; and any agreement made or witnessed on that day shall be null and void and of no legal effect.<sup>147</sup>

**7 Freedom of the press**

- (1) It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal Family.<sup>148</sup>
- (2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, or privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence.<sup>149</sup>
- (3) It shall be lawful to enact laws to regulate the operation of any media.<sup>150</sup>

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145 Law 35 of 1912, Act 10 of 1918, amended by Act 3 of 1976.

146 Amended by Act 3 of 1976.

147 Substituted by Act 3 of 1971.

148 Amended by Act 23 of 1990.

149 Inserted by Act 17 of 2003.

150 Inserted by Act 17 of 2003.

**8 Freedom of petition**

All people shall be free to send letters or petitions to the King or Legislative Assembly and to meet and consult concerning matters about which they think it right to petition the King or Legislative Assembly to pass or repeal enactments provided that they meet peaceably without arms and without disorder.

**9 Habeas corpus**

The law of the writ of Habeas Corpus shall apply to all people and it shall never be suspended excepting in the case of war or rebellion in the land when it shall be lawful for the King to suspend it.

**10 Accused must be tried**

No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case.<sup>151</sup>

**11 Procedure on indictment**

No one shall be tried or summoned to appear before any court or punished for failing to appear unless he have first received a written indictment (except in cases of impeachment or for offences within the jurisdiction of the magistrate or for contempt of court while the court is sitting). Such written indictment shall clearly state the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him (except according to law) and he shall hear their evidence and shall be allowed to question them and to bring forward any witness of his own and to make his own statement regarding the charge preferred against him. But whoever shall be indicted for any offence if he shall so elect shall be tried by jury and this law shall never be repealed. And all claims for large amounts shall be decided by a jury and the Legislative Assembly shall determine what shall be the amount of claim that may be decided without a jury.<sup>152</sup>

**12 Accused cannot be tried twice**

No one shall be tried again for any offence for which he has already been tried whether he was acquitted or convicted except in cases where the accused shall confess after having been acquitted by the Court and when there is sufficient evidence to prove the truth of his confession.

**13 Charge cannot be altered<sup>153</sup>**

No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial:  
Save and except that —

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151 Amended by Act 8 of 1972.

152 Act 25 of 1942; amended by Acts 13 of 1982 and 9 of 2006.

153 Inserted by Act 10 of 1918, amended by Acts 18 of 1981 and 23 of 1990.

- (a) where the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit that offence the accused may be convicted of this attempt and punished accordingly; and
- (b) where an attempt to commit an offence is charged but the evidence establishes the commission of the full offence the accused may be convicted of the attempt; and
- (c) on the trial of any person for embezzlement or fraudulent conversion the jury shall be at liberty to find such person not guilty of embezzlement or fraudulent conversion but guilty of theft and on the trial of any person for theft the jury shall be at liberty to find such person guilty of embezzlement or fraudulent conversion.
- (d) any Act may provide that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances.

**14 Trial to be fair**

No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law.

**15 Court to be unbiased**

It shall not be lawful for any judge or magistrate to adjudicate or for any juryman to sit in any case in which one of his relations is concerned either as a plaintiff, defendant or witness: Nor shall any Judge or Magistrate sit in any case which concerns himself: Nor shall any Judge or Magistrate or juryman on any pretence receive any present or money or anything else from anyone who is about to be tried nor from any of the defendant's friends but all Judges Magistrates and jurymen shall be entirely free and shall in no case whatever be interested or biased on the discharge of their duties.

**16 Premises cannot be searched without warrant**

It shall not be lawful for anyone to enter forcibly the houses or premises of another or to search for anything or to take anything the property of another except according to law: And should any person lose any property and believe it to be concealed in any place whether house or premises it shall be lawful for him to make an affidavit before a Magistrate that he believes it to be concealed in that place and he shall describe particularly the property so concealed and the place in which he believes it to be concealed and the Magistrate shall issue a search warrant to the police to search for the property according to the affidavit so made.<sup>154</sup>

**17 Government to be impartial**

The King shall reign on behalf of all his people and not so as to enrich or benefit any one man or any one family or any one class but without partiality for the good of all the people of his Kingdom.<sup>155</sup>

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154 Amended by Act 7 of 1967.

155 Amended by Act 20 of 2010.

**18 Taxation - Compensation to be paid for property taken**

All the people have the right to expect that the Government will protect their life liberty and property and therefore it is right for all the people to support and contribute to the Government according to law. And if at any time there should be a war in the land and the Government should take the property of anyone the Government shall pay the fair value of such property to the owner. And if the Legislature shall resolve to take from any person or persons their premises or a part of their premises or their houses for the purpose of making Government roads or other work of benefit to the Government the Government shall pay the fair value.<sup>156</sup>

**19 Expenditure to be voted<sup>157</sup>**

No money shall be paid out of the Treasury nor borrowed nor debts contracted by the Government but by the prior vote of the Legislative Assembly, except in the following cases:

- (i) Where an Act duly passed by the Legislative Assembly gives power to pay out money or borrow or contract debts, then money may be paid out, or borrowing carried out or debts contracted in terms of that Act; and
- (ii) In cases of war or rebellion or dangerous epidemic or a similar emergency, then it may be done by the Minister for Finance with the consent of Cabinet, and the King shall at once convoke the Legislative Assembly and the Minister for Finance shall state the grounds for the expenditure and the amount.

**20 Retrospective laws**

It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.<sup>158</sup>

**21 Army subject to civil law**

Every soldier shall be subject to the laws of the land whether he belong to the Guards, the Artillery or to the Militia in accordance with the twenty-second clause and any soldier who breaks the law of the land shall be tried in the courts as any other person. And it shall not be lawful for any officer to quarter any soldier upon the premises of anyone except in time of war and then only as may be resolved by the Legislative Assembly.

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156 Act 19 of 1927.

157 Substituted by Act 14 of 1972 and amended by Act 20 of 2010.

158 Act 35 of 1912.

## **22 Guards and Militia**

It shall be lawful for the King to command any taxpayer to join the militia for the purpose of instruction or for parade on public occasions should he think fit and also in time of war to call out all those capable of bearing arms and to make orders and regulations for their control and provisioning.<sup>159</sup>

## **23 Disabilities of convict**

No person having been convicted of a criminal offence punishable by imprisonment for more than two years, shall hold any office under the Government whether of emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly unless he has received from the King a pardon together with a declaration that he is freed from the disabilities to which he would otherwise be subject under the provisions of this clause.<sup>160</sup>

## **24 Public officer not to engage in trade**

It shall not be lawful for anyone holding any office under the Government whether of emolument or otherwise to hold any appointment from another Government without first obtaining permission from Cabinet. And it shall not be lawful for anyone holding an office of emolument under the Government to engage in trade or work for anyone else, except with the prior consent of Cabinet.<sup>161</sup>

**25** *[Repealed by Act 28 of 1978]*

**26** *[Repealed by Act 28 of 1978]*

## **27 Age of maturity**

No person may succeed to any tofi'a or any title until he has attained the age of twenty-one years, save for members of the Royal Family who shall be deemed to have attained maturity at eighteen years of age.<sup>162</sup>

## **28 Qualifications for jurors**

Every Tongan who has arrived at the age of 21 years and can read and write and is not disabled by the twenty-third clause of this Constitution shall be liable to serve on juries and the names of all those who are liable to serve shall be published once every year and anyone who neglects to serve shall be punished as shall be enacted by the Legislature. Ministers of the Crown and the Governors, Members of the Legislative Assembly, Judges and Magistrates, heads of Government Departments or Ministries, law practitioners, members of the police force and of the armed forces of Tonga, officers of the Supreme Court, of the Magistrates Courts or of any prison, ministers of religion, persons of unsound mind or persons incapable of serving by

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159 Amended by Act 20 of 2010.

160 Act 8 of 1961.

161 Substituted by Act 20 of 2010.

162 Substituted by Act 28 of 1978.



reason of blindness, deafness or any other permanent physical infirmity shall be exempt from serving on juries.<sup>163</sup>

**29 Naturalization**

Any foreigner after he has resided in the Kingdom for the space of five years or more may with the consent of the King take the oath of allegiance and he may be granted a Certificate of Naturalization and all naturalized subjects shall have the same rights and privileges as native-born subjects of Tonga with the exception that they shall not be entitled to the rights of hereditary tax allotments or town allotments.<sup>164</sup>

**29A Law may declare specific naturalization<sup>165</sup>**

- (1) Notwithstanding clause 29 of this Constitution it shall be lawful for the King and the Legislative Assembly to enact specific laws declaring any persons whether or not they have ever resided in Tonga to be or to have become naturalized subjects of Tonga from any date. All persons who are declared to be naturalized subjects of Tonga by any such legislation shall have, and shall be deemed to have had from the effective dates of their naturalizations, the same rights and privileges as other foreigners becoming naturalized subjects of Tonga by the grant to them of Certificates of Naturalization.
- (2) For the avoidance of doubt, clause 20 of this Constitution shall not apply to any laws enacted in pursuance of sub-clause (1).

**PART II - FORM OF GOVERNMENT**

**30 Form of Government**

The form of government for this Kingdom is a Constitutional Monarchy under His Majesty King George Tupou V and his successors.<sup>166</sup>

**31 Government<sup>167</sup>**

The Government of this Kingdom is divided into three Bodies—

- 1st. The Cabinet;
- 2nd. The Legislative Assembly;
- 3rd. The Judiciary.

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163 Substituted by Act 23 of 1990.

164 Act 35 of 1912, amended by Acts 28 of 1978 and 1 of 1991.

165 Inserted by Act 1 of 1991.

166 Substituted and renumbered by Act 20 of 2010.

167 Amended and renumbered by Act 20 of 2010.

**31A Attorney-General<sup>168</sup>**

- (1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint an Attorney-General, who shall:
  - (a) be the principal legal advisor to Cabinet and Government;
  - (b) be in charge of all criminal proceedings on behalf of the Crown; and
  - (c) perform any other functions and duties required under law.
- (2) 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.
- (3) The Attorney-General shall be a person who is qualified to be a Judge of the Supreme Court and he shall, subject to any contractual arrangements, hold office during good behaviour.
- (4) The King in Privy Council shall determine the terms of appointment of the Attorney-General, and shall have the power to dismiss him.

**32 Succession to the Throne**

The right and title of King George Tupou I to the Crown and the Throne of this Kingdom were confirmed by the Constitution of 1875 and it was further declared in the said Constitution that the succession to the Crown and Throne should devolve upon David Uga and then upon Wellington Gu and then upon them begotten by him in marriage and if at any time there be no heirs of Wellington Gu the Crown and Throne shall descend in accordance with the following law of succession:

It shall be lawful only for those born in marriage to succeed.

The succession shall be to the eldest male child and the heirs of his body but if he should have no children to the second male child and the heirs of his body and so on until all the male line shall be ended.

Should there be no male child the eldest female child shall succeed and the heirs of her body and if she should have no children it shall descend to the second female child and the heirs of her body until the female line is ended.

And if there shall be none of this line of David Uga lawful descendants by marriage to succeed to the Crown of Tonga it shall descend to William Tungi and his lawful heirs begotten by him in marriage and to their heirs begotten by them.

And if there should be no lawful heir the King shall appoint his heir if the House of Nobles consent to it (the representatives of the people having no voice in the matter) and he shall be publicly declared heir to the Crown during the King's life.

Should there be no heir to the Crown or successor who has been so publicly proclaimed the Prime Minister or in his absence the Cabinet ministers shall convoke the nobles of the Legislative Assembly (the representatives of the people having no voice in the matter) and when they meet the House of Nobles shall choose by ballot some one of the chiefs whom they wish to succeed as King. And he shall succeed as

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168 Inserted by Act 20 of 2010 and Amended by Act 39 of 2010.

the first of a new dynasty and he and the heirs of his body born in marriage shall possess the Crown according to law.

And in the event of there being none to succeed according to this law the Prime Minister or in his absence the Cabinet ministers shall again convoke the nobles of the Legislative Assembly in accordance with this law and they shall choose one to succeed to the Throne as the first of a new dynasty and so on according to this law for ever.

### 33 Heir Apparent may not choose consort

- (1) It shall not be lawful for any member of the Royal Family who is likely to succeed to the throne to marry any person without the consent of the King. And if any person should thus marry the marriage shall not be considered legal<sup>169</sup> and it shall be lawful for the King to cancel the right of such person and his heirs to succeed to the Crown of Tonga.<sup>170</sup> And the next person in succession to him who so marries shall be declared the heir and the offender shall be regarded as dead.
- (2) The expression "any member of the Royal Family who is likely to succeed to the throne" in the last preceding sub-clause shall be construed to include all persons born in lawful marriage and related by descent either lineally or collaterally to the King but not more than twenty times removed from the King.<sup>171</sup>

### 34 Coronation oath

The following oath shall be taken by those who shall succeed to the throne—

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169 See G 12/69 and Act 4 of 1970 relating to Mele Siuilikutapu; See G 133/80 and Act 7 of 1980 relating to Fatafehi 'Alaivahamama'o Tuku'aho.

170 See the Proclamation made on 7 November 1980 at G 165/1980 (also at page S-2 of Cap 2 in the 1988 Revised Edition) which provides —

**TAUFA'AHAU TUPOU IV**, by the Grace of God, King of the Kingdom of Tonga, to all to whom these presents shall come, Greetings:

**WHEREAS** Clause 33 of the Act of Constitution of Tonga provides that —

"It shall not be lawful for any member of the Royal Family who is likely to succeed to the Throne to marry any person without the consent of the King. And if any person should thus marry the marriage shall not be considered legal and it shall be lawful for the King to cancel the right of such person and his heirs to succeed to the Crown of Tonga."

**AND WHEREAS** His Royal Highness Prince Fatafehi 'Alaivahamama'o Tuku'aho the second son of His Majesty who is likely to succeed to the Throne married in the State of Hawaii on the 21st day of July 1980 without the consent of His Majesty the King:

**NOW THEREFORE, I, TAUFA'AHAU TUPOU IV**, King of the Kingdom of Tonga, in exercise of my powers under the Act of Constitution of Tonga, **DO HEREBY NOTIFY AND PROCLAIM that I CANCEL** the rights of His Royal Highness Prince Fatafehi 'Alaivahamama'o Tuku'aho and his heirs to succeed to the Crown of Tonga.

**WHEREOF** let all men take notice and govern themselves accordingly.

171 Inserted by Act 3 of 1971.

"I solemnly swear before Almighty God to keep in its integrity the Constitution of Tonga and to govern in conformity with the laws thereof."

**35 Idiot not to succeed**

No person shall succeed to the Crown of Tonga who has been found guilty of an offence punishable by imprisonment for more than two years or who is insane or imbecile.<sup>172</sup>

**36 King commands forces**

The King is the Commander-in-Chief of the armed forces of Tonga. He shall appoint all officers and make such regulations for the training and control of the forces as he may think best for the welfare of the country but it shall not be lawful for the King to make war without the consent of the Legislative Assembly.<sup>173</sup>

**37 King may grant pardons**

It shall be lawful for the King in Privy Council to grant a Royal Pardon to any person for a breach of law (including any person who has been convicted of a breach of law) except in cases of impeachment.<sup>174</sup>

**38 King's relations with Parliament**

The King may convoke the Legislative Assembly at any time and may dissolve it at his pleasure and command that new representatives of the nobles and people be elected to enter the Assembly. But it shall not be lawful for the Kingdom to remain without a meeting of the Assembly for a longer period than one year. The Assembly shall always meet at Nuku'alofa and at no other place except in time of war.<sup>175</sup>

**39 Treaties**

It shall be lawful for the King to make treaties with Foreign States provided that such treaties shall be in accordance with the laws of the Kingdom. The King may appoint his representatives to other nations according to the custom of nations.<sup>176</sup>

**40 Foreign ministers**

The King shall receive Foreign Ministers and may address the Legislative Assembly in writing regarding the affairs of the Kingdom and matters which he may wish to bring before the Assembly for deliberation.

**41 King's powers – Signature to Acts**

The King is the Sovereign of all the Chiefs and all the people. The person of the King is sacred. He reigns the country but ministers are responsible. All Acts that

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172 Amended by Act 23 of 1990.

173 Amended by Act 23 of 1990.

174 Substituted by Act 20 of 2010.

175 Law No. 1 of 1914.

176 Amended by Act 20 of 2010.

have passed the Legislative Assembly must bear the King's signature before they become law.<sup>177</sup>

**42 Prince Regent**

Should the King die before his heir is eighteen years of age a Prince Regent shall be appointed in accordance with the forty-third clause.

**43 Prince Regent, how appointed**

Should the King wish to travel abroad it shall be lawful for him to appoint a Prince Regent who shall administer the affairs of the Kingdom during his absence. And if the King should die whilst his heir is not yet arrived at the age of eighteen years and he has not declared in his will his wishes regarding a Prince Regent during his heir's minority the Prime Minister of the Cabinet shall at once convoke the Legislative Assembly and they shall choose by ballot a Prince Regent who shall administer the affairs of the Kingdom in the name of the King until the heir shall have attained his majority (but the representatives of the people shall have no voice in such election).

**44 King may confer titles**

It is the King's prerogative to give titles of honour and to confer honourable distinctions but it shall not be lawful for him to deprive anyone who has an hereditary title of his title such as chiefs of hereditary lands and nobles of the Legislative Assembly who possess hereditary lands except in cases of treason. And if anyone shall be tried and found guilty of treason the King shall appoint a member of that family to succeed to the name and inheritance of the guilty person.

**45 Coinage**

It is the prerogative of the King with the advice of his Cabinet to decree the coinage which shall be legal tender in this Kingdom and to make regulations for the coining of money.

**46 Martial law**

In the event of civil war or war with a foreign state it shall be lawful for the King to proclaim martial law over any part or over the whole of the country.

**47 National flag**

The Flag of Tonga (the flag of King George) shall never be altered but shall always be the flag of this Kingdom and the present Royal Ensign shall always be the ensign of the Royal Family of Tonga.

**48 Royal property**

The lands of the King and the property of the King are his to dispose of as he pleases. The Government shall not touch them nor shall they be liable for any Government debt. But the houses built for him by the Government and any inheritances which may be given to him as King shall descend to his successors as the property and inheritance of the Royal line.

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<sup>177</sup> Amended by Act 20 of 2010.

**49 King exempt from action**

It shall not be lawful to sue the King in any court for a debt without the consent of the Cabinet.

**PRIVY COUNCIL****50 Constitution and powers of Privy Council<sup>178</sup>**

- (1) The King shall appoint a Privy Council to provide him with advice. The Privy Council shall be composed of such people whom the King shall see fit to call to his Council.
- (2) If any case shall be heard in the Land Court relating to the determination of hereditary estates and titles, it shall be lawful for either party thereto to appeal to the King in Privy Council which shall determine how the appeal shall proceed and the judgment of the King in Privy Council shall be final.
- (3) Privy Council may by Order in Council regulate its own procedures.

**THE PRIME MINISTER****50A The Prime Minister<sup>179</sup>**

- (1) The King shall appoint from amongst the elected representatives a Prime Minister who is recommended by the Legislative Assembly in accordance with the procedure set out in the Schedule to, or clause 50B of, this Constitution.
- (2) The Prime Minister shall hold office until –
  - (a) another Prime Minister is appointed in accordance with this Constitution;
  - (b) his appointment is revoked under clause 50B;
  - (c) he dies, resigns, or his appointment is revoked after he ceases to be an elected representative for any reason other than the dissolution of the Legislative Assembly; or
  - (d) he becomes ineligible to hold the office in accordance with this Constitution or any other law.
- (3) The Prime Minister shall regularly and as required report to the King upon matters that have arisen with the government and upon the state of the country.

**50B Votes of no confidence**

- (1) If the Legislative Assembly passes a motion described as a "Vote of no confidence in the Prime Minister" in accordance with this clause, then upon delivery of that resolution to the King by the Speaker, the Prime Minister and

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178 Substituted by Act 20 of 2010.

179 Inserted by Act 20 of 2010.

all Ministers shall be deemed to have resigned and their appointments revoked.

- (2) A vote of no confidence in the Prime Minister –
  - (a) shall not be moved unless at least 5 working days' notice of the intention to move such a motion has been given to the Speaker; and
  - (b) shall be of no effect if made within 18 months after a general election has been held, nor within 6 months before the date by which an election shall be held in accordance with clause 77(1), or within 12 months after the date on which the last such motion was voted upon in the Legislative Assembly.
- (3) If within 48 hours of the revocation of the appointment of the Prime Minister and all Ministers in accordance with sub-clause (1) following a vote of no confidence in the Prime Minister, the Legislative Assembly passes a motion that recommends the appointment of another elected representative as Prime Minister, then upon delivery of that resolution to the King by the Speaker, the King shall appoint the person so nominated as the Prime Minister.
- (4) If no recommendation is delivered to him in accordance with sub-clause (3) following a vote of no confidence in the Prime Minister, the King shall –
  - (a) dissolve the Legislative Assembly and command that a general election be held on a date not more than 90 days thereafter;
  - (b) appoint as interim Prime Minister the elected representative who the King considers best able to lead an interim government, who shall not be the Prime Minister in respect of whom a motion of no confidence was passed in the Legislative Assembly, until a Prime Minister is appointed after the general election; and
  - (c) in consultation with the interim Prime Minister, appoint interim Ministers to hold office until Ministers are appointed after the general election.

## CABINET

### 51 **Function, constitution and powers of Cabinet**<sup>180</sup>

- (1) The executive authority of the Kingdom shall vest in the Cabinet, which shall be collectively responsible to the Legislative Assembly for the executive functions of the Government.
- (2) The Cabinet shall consist of the Prime Minister and such other Ministers who are nominated by the Prime Minister and appointed by the King:

Provided that –

- (a) the Prime Minister may nominate as Cabinet Ministers not more than 4 persons who are not elected representatives;

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180 Substituted by Act 20 of 2010.

- (b) the Prime Minister and Cabinet shall be fewer in number than half of the number of elected members of the Legislative Assembly excluding the Speaker.
- (3) A Minister shall retain his position as Minister until –
  - (a) his appointment is revoked by the King on the recommendation of the Prime Minister or in accordance with clause 50B;
  - (b) he dies, resigns or is dismissed from office following impeachment under clause 75; or
  - (c) he becomes ineligible to hold the office in accordance with this Constitution or any other law:

Provided that: Following a general election, and when appointed under clause 50B(4)(c), Ministers shall be and remain as caretaker Ministers until their appointments are revoked or continued on the recommendation of the newly appointed Prime Minister; and during such period caretaker Ministers shall not incur any unusual or unnecessary expenditure without the written approval of the caretaker Minister for Finance.

- (4) The Prime Minister may assign and re-assign ministries to and amongst the Cabinet Ministers.
- (5) Each Minister shall draw up an annual report to the Legislative Assembly advising of the activities and plans of his ministry and if the Legislative Assembly shall wish to know anything concerning the ministry of any Minister he shall answer all questions put to him by the Legislative Assembly and report everything in connection with his ministry.
- (6) A Minister who is not an elected representative shall sit and vote in the Legislative Assembly and shall, unless otherwise provided in any Act, have all the rights, duties and responsibilities of an elected representative except that he shall not be entitled to vote in any vote of no confidence in the Prime Minister under clause 50B.
- (7) The term "executive authority" in sub-clause (1) excludes all powers vested in the King or the King in Council, whether by this Constitution, or any Act of the Legislative Assembly, any subordinate legislation, and Royal Prerogatives.

## **52 Duties of Ministers**

Each member of the Cabinet shall have an office in Nuku'alofa the capital of the Kingdom and he shall satisfy himself that all the subordinates in his department faithfully perform their duties. And the Government shall build or rent offices suitable for the work of each minister

## **53 Minister for Finance to report to Parliament**

When the Legislative Assembly shall meet the Treasurer shall present to the Legislative Assembly on behalf of the Cabinet an account of all moneys which have



been received and expended during the current year or since the last meeting of the Assembly and the nature of the receipts and expenditure.<sup>181</sup>

**54 Governors – how appointed**

The King shall appoint Governors to Ha'apai and Vava'u on the advice of the Prime Minister.<sup>182</sup>

**55 Powers of Governors**

It shall not be lawful for a Governor to enact any law but he shall be responsible that the law is enforced in his district.<sup>183</sup>

**THE LEGISLATIVE ASSEMBLY**

**56 Power of Legislative Assembly**

The King and the Legislative Assembly shall have power to enact laws, and the representatives of the nobles and the representatives of the people shall sit as one House. When the Legislative Assembly shall have agreed upon any Bill which has been read and voted for by a majority three times it shall be presented to the King for his sanction and after receiving his sanction and signature it shall become law upon publication. Votes shall be given by raising the hand or by standing up in division or by saying "Aye" or "No".<sup>184</sup>

**57 Title**

The Legislative Assembly shall be called the Legislative Assembly of Tonga.

**58 Sessions**

The Legislative Assembly shall meet at least once in every twelve calendar months but it shall be lawful to summon the same at any time.<sup>185</sup>

**59 Composition of Legislative Assembly<sup>186</sup>**

- (1) The Legislative Assembly shall be composed of –
  - (a) the representatives of the nobles;
  - (b) the representatives of the people; and
  - (c) all members of the Cabinet.
- (2) Cabinet Ministers who are elected representatives shall, unless dismissed after impeachment under clause 75, remain as members of the Legislative Assembly and representatives in their respective electoral constituency during their appointment as Minister.

181 Amended by Act 20 of 2010.

182 Substituted by Act 20 of 2010.

183 Amended by Act 20 of 2010.

184 Law 1 of 1914.

185 Law 1 of 1914.

186 Substituted by Act 20 of 2010.

**60 Representative members**

There shall be elected by the nobles of the Kingdom from their number nine nobles as representatives of the nobles and there shall be elected by electors duly qualified seventeen representatives of the people. The Legislative Assembly shall determine the boundaries of electoral districts for the election of representatives of the nobles and shall establish an independent Commission to determine the boundaries of the electoral constituencies for the election of representatives of the people:

Provided that the constituency boundaries for the general election of 2010 shall be based on the recommendations of the Royal Constituency Boundaries Commission as approved by the Legislative Assembly.<sup>187</sup>

**61 Speaker<sup>188</sup>**

- (1) The King shall, within 5 days after the appointment of a Prime Minister in accordance with clause 50A following a general election, appoint one of the elected representatives of the nobles on the recommendation of the Legislative Assembly, to be the Speaker of the Legislative Assembly.
- (2) The Speaker shall remain in office until –
  - (a) the King appoints an Interim Speaker following the next general election in accordance with subSection (8) of the Schedule to this Constitution;
  - (b) his appointment is revoked under sub-clause (3); or
  - (c) he dies, resigns or his appointment is revoked after he ceases to be an elected representative of the nobles for any reason other than the dissolution of the Legislative Assembly.
- (3) If the Prime Minister, with the approval of at least half of the members of the Legislative Assembly, recommends to the King that the Speaker be removed from office, the King shall revoke the Speaker's appointment and appoint a new Speaker on the recommendation of the Legislative Assembly.
- (4) The King shall appoint a Speaker within 7 days of the occurrence of a vacancy.

**62 Rules of procedure<sup>189</sup>**

- (1) The Legislative Assembly shall make its own rules of procedure for the conduct of its meetings.
- (2) Any member of the Legislative Assembly may, in accordance with its rules of procedure –
  - (a) introduce a Bill in the Assembly;

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187 Substituted by Act 14 of 2010.

188 Substituted by Act 20 of 2010.

189 Substituted by Act 20 of 2010.

- (b) propose a motion for debate in the Assembly; or
  - (c) present a petition to the Assembly,
- and it shall be dealt with in accordance with the Assembly's rules of procedure.

**63 Qualification of nobles**

- (1) No person shall succeed to the position of a noble who is insane or imbecile or who is disabled by the twenty-third clause.
- (2) Every noble shall be competent to vote in an election for representatives of the nobles and to sit in the Assembly if chosen according to law.

**64 Qualification of electors**

Every Tongan subject of twenty-one years of age or more who is not a noble, is not insane or imbecile and is not disabled by the twenty-third clause shall, if registered as an elector, be entitled to vote in an election for representatives of the people to the Legislative Assembly and on the day appointed for election shall be exempt from summons for debt. A person resident outside of Tonga who is qualified to be an elector may vote at an election only if he is registered as an elector and present in Tonga for the election.<sup>190</sup>

**65 Qualification of representatives**

Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, save that no person may be chosen against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer:

Provided that a person resident outside of Tonga who is qualified to be an elector will qualify as a candidate only if he is present in Tonga for a period of 3 months within the 6 months before the relevant election.<sup>191</sup>

**66 Threats and bribery**

Any person elected as a representative who shall be proved to the satisfaction of the Assembly to have used threats or offered bribes for the purpose of persuading any person to vote for him shall be unseated by the Assembly.

**67 Privilege of nobles**

It shall be lawful for only the nobles of the Legislative Assembly to discuss or vote upon laws relating to the King or the Royal Family or the titles and inheritances of the nobles and after any such Bill has been passed three times by a majority of the

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<sup>190</sup> Substituted by Act 14 of 2010.

<sup>191</sup> Substituted by Act 14 of 2010.

nobles of the Legislative Assembly it shall be submitted to the King for his sanction.<sup>192</sup>

**68 King's veto precludes discussion**

Should the King withhold his sanction from any law passed by the Legislative Assembly and submitted to him for approval it shall be unlawful for the Legislative Assembly again to discuss such law until the following session.

**69 Quorum**

It shall be lawful for the Legislative Assembly to pass judgment upon its members for their acts or conduct as members of the Legislative Assembly and although all the members may not be present it shall be lawful for the Legislative Assembly to discuss and pass laws and transact business should one-half of its members be present but should there be less than one-half present the Legislative Assembly shall stand adjourned to another day and if at such adjourned meeting there should be still less than half the members present it shall be lawful for the King or the Speaker of the Assembly to command the presence of all the members and if any fail to attend on such command it shall be lawful to inflict punishment for such disobedience such punishment to be determined by the Legislative Assembly.<sup>193</sup>

**70 Offences against the Assembly<sup>194</sup>**

- (1) Any person who —
- (a) acts disrespectfully in the presence of the Legislative Assembly;
  - (b) by any act or omission, interferes with, obstructs or impedes the Legislative Assembly in the performance of its function;
  - (c) interferes with, obstructs or impedes any member or officer of the Legislative Assembly in the discharge of his duty;
  - (d) defames the Legislative Assembly;
  - (e) threatens any member or his property; or
  - (f) rescues a person whose arrest has been ordered by the Legislative Assembly,

may, by resolution of the Legislative Assembly, be imprisoned for any period not exceeding thirty days and if he is a member of the Assembly he may be suspended from the Assembly for up to thirty days in substitution for or in addition to any other penalty.<sup>195</sup>

- (2) (a) A penalty of imprisonment imposed in accordance with this clause is not affected by a prorogation, the dissolution or expiration of the Legislative Assembly.

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192 Law 1 of 1914.

193 Law 1 of 1914

194 Substituted by Act 18 of 1999

195 Amended by Act 20 of 2010

- (b) A resolution of the Legislative Assembly ordering the imprisonment of a person in accordance with this clause may provide for the discharge of the person from imprisonment.
- (c) Notwithstanding the power to imprison under sub-clause (1) the Legislative Assembly may impose a fine —
  - (i) not exceeding \$5,000, in the case of a natural person; or
  - (ii) not exceeding \$50,000, in the case of a corporation, for an offence against the Legislative Assembly determined by the Assembly to have been committed by that person under this clause.
- (d) It shall not be lawful to both imprison and fine a person for an offence under this clause.
- (e) The Legislative Assembly may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this clause into effect.

**71 Noble may be deprived of his seat**

Should any representative of the nobles be deprived of his seat another noble shall be elected to succeed to his seat in the Legislative Assembly but his title and hereditary estates shall not be confiscated except for treason or sedition.<sup>196</sup>

**72 Journal**

A journal of the proceedings of the Legislative Assembly shall be kept and the votes of each member present for and against every motion or resolution shall be recorded in the journal.<sup>197</sup>

**73 Immunity from arrest**

The members of the Legislative Assembly shall be free from arrest and judgment whilst it is sitting except for indictable offences and no member of the House shall be liable for anything he may have said or published in the Legislative Assembly.<sup>198</sup>

**74 Resignation**

Any representative of the nobles or of the people who may wish to resign his seat in the Legislative Assembly may tender his resignation in writing to the Speaker and his connection with the Legislative Assembly shall cease when he tenders his resignation.<sup>199</sup>

**75 Impeachment**

- (1) It shall be lawful for a member of the Legislative Assembly, of his own volition or as the result of a written complaint made to him by any Tongan subject, to move the Assembly, in accordance with the rules of procedure, for

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196 Substituted by Act 20 of 2010.

197 Law 1 of 1914.

198 Law 1 of 1914.

199 Law 1 of 1914.

the impeachment of any Minister or representative of the nobles or of the people for any of the following offences—

Breach of the laws or the resolutions of the Legislative Assembly, maladministration, incompetency, destruction or embezzlement of Government property, or the performance of acts which may lead to difficulties between this and another country.<sup>200</sup>

- (2) The impeached person shall be given a copy of the accusation in writing seven days before the day of the trial.
- (3) The trial shall be conducted in accordance with the eleventh clause and the Lord Chief Justice shall preside.<sup>201</sup>
- (4) After the witnesses have been heard the impeached person shall withdraw and the Assembly shall consider their decision and upon a decision being made he shall be brought before the Assembly and the decision announced to him. If he be found guilty it shall be lawful to dismiss him from office but if acquitted it shall not be lawful to impeach him again on the same charge as is provided in the twelfth clause.

#### **76 Bye-elections**

Upon the death or resignation of any representative of the nobles or of the people and when a member is deprived of his seat after impeachment, the Speaker shall immediately command that the nobles or the electors of the district which he represented shall elect a representative in his place. But the Legislative Assembly shall have the power to sit and act although its number be not complete.<sup>202</sup>

#### **77 General elections<sup>203</sup>**

- (1) Elections shall ordinarily be held for all the representatives of the nobles and the people every four years, and if not earlier dissolved the Legislative Assembly shall stand dissolved at the expiration of four years from the date of the last general election.
- (2) It shall be lawful for the King, at his pleasure, to dissolve the Legislative Assembly at any time and command that new elections be held.
- (3) If the Legislative Assembly is dissolved by the King or by the operation of sub-clause (1), the King shall, after consultation with the Speaker of the Legislative Assembly, fix a date for a general election.

#### **78 Assembly to assess taxation**

The Legislative Assembly shall assess the amount of taxes to be paid by the people and the customs duties and fees for trading licences and shall pass the estimates of

200 Law 1 of 1914.

201 Substituted by Act 20 of 2010.

202 Law 1 of 1914, Amended by Act 20 of 2010.

203 Substituted by Act 20 of 2010.

expenditure for the Public Service in accordance with the nineteenth clause. And upon the report of the Minister of Finance upon the expenditure and revenue received during the year succeeding the last meeting of the Assembly the Legislative Assembly shall determine the estimates for the expenditure of the Government until the next meeting of the Legislative Assembly. And the ministers shall be guided by the estimates of public expenditure so authorized by the Legislative Assembly.

**79 Amendments to Constitution**

It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles. And if the Legislative Assembly wish to amend any clause of the Constitution such amendment shall after it has passed the Legislative Assembly three times be submitted to the King and if His Majesty and the Cabinet are unanimously in favour of the amendment it shall be lawful for the King to assent and when signed by the King it shall become law.<sup>204</sup>

**80 Enacting formula**

The formula for enacting laws shall be "Be it enacted by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:".

**81 Laws to cover but one subject**

To avoid confusion in the making of laws every law shall embrace but one subject which shall be expressed by its title.

**82 Constitution is supreme law**

This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.<sup>205</sup>

**83 Oaths of Councillors and Representatives**

The following oath shall be taken by the members of the Privy Council:

"I solemnly swear before God that I will be truly loyal to His Majesty King George Tupou V the rightful King of Tonga and that I will keep righteously and perfectly the Constitution of Tonga and assist to the end of my power and ability in all things in connection with the Privy Council".

The following oath shall be taken by the ministers:

"I solemnly swear before God that I will be truly loyal to His Majesty King George Tupou V the rightful King of Tonga and that I will keep righteously and perfectly the Constitution of Tonga and discharge the duties of my department to the end of my ability for the benefit of the King and his Government".

The following oath shall be taken by the nobles and representatives of the people:

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204 Amended by Act 20 of 2010.

205 Substituted by Act 23 of 1990.

"I solemnly swear before God that I will be truly loyal to His Majesty King George Tupou V the rightful King of Tonga and that I will righteously and perfectly conform to and keep the Constitution of Tonga and zealously discharge my duties as a member of the Legislative Assembly".

The members of the Privy Council shall sign their names to the oath and read it in the presence of the King. The ministers, the nobles and representatives of the people shall sign their names to the oath and read it in the presence of the Legislative Assembly.<sup>206</sup>

## THE JUDICIARY

### 83A Rule of law and judicial independence

The existing underlying constitutional principles of the rule of law and judicial independence shall always be maintained.<sup>207</sup>

### 83B The Lord Chancellor<sup>208</sup>

- (1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint a Lord Chancellor who shall have primary responsibility for –
  - (a) the administration of the courts;
  - (b) all matters related to the Judiciary and its independence;
  - (c) the maintenance of the rule of law; and
  - (d) such related matters as are specified in this Constitution or any other Act.
- (2) The Lord Chancellor shall, unless otherwise provided by law, have complete discretion to exercise his functions, powers and duties, independently without any interference whatsoever from any person or authority.
- (3) The Lord Chancellor may, with the consent of the King in Privy Council, make regulations for the following purposes –
  - (a) to establish an age at which the Attorney-General, a Judge, a Magistrate and the Lord Chancellor shall retire from office;
  - (b) to regulate a judicial pension scheme;
  - (c) to provide for administrative arrangements for and related to the Office of the Lord Chancellor.
- (4) The Lord Chancellor shall be a person who is qualified to be a Judge of the Supreme Court and he shall, subject to any contractual arrangements, hold office during good behaviour.

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206 Amended by Act 20 of 2010.

207 Inserted by Act 39 of 2010.

208 Inserted by Act 39 of 2010.



- (5) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Lord Chancellor, and shall have the power to dismiss him.

**83C Judicial Appointments and Discipline Panel<sup>209</sup>**

- (1) There is hereby established, as 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.
- (2) The Judicial Appointments and Discipline Panel shall recommend to the King in Privy Council –
- (a) the appointment of eminently qualified persons to the Judiciary, and as Lord Chancellor and to any other office that the King requires;
  - (b) the disciplining of members of the Judiciary;
  - (c) the dismissal of members of the Judiciary for bad behaviour through gross misconduct or repeated breaches of the Code of Judicial Conduct;
  - (d) the remuneration and terms of service of members of the Judiciary;
  - (e) a Judicial Pensions Scheme;
  - (f) a Code of Judicial Conduct; and
  - (g) the appointment of assessors to the Panel of Land Court Assessors.

**84 The Courts<sup>210</sup>**

- (1) The judicial power of the Kingdom shall be vested in the superior courts of the Kingdom (namely the Court of Appeal, the Supreme Court, and the Land Court) and a subordinate court namely the Magistrate's Court.
- (2) The Judiciary of the Kingdom shall comprise –
- (a) the Lord President of the Court of Appeal and Judges of the Court of Appeal;
  - (b) the Lord Chief Justice, who shall be the professional Head of the Judiciary, and Judges of the Supreme Court;
  - (c) the Lord President of the Land Court and Judges of the Land Court; and
  - (d) the Chief Magistrate and the Magistrates.

**85 The Court of Appeal<sup>211</sup>**

- (1) The Court of Appeal shall consist of the Lord President of the Court of Appeal and of such other judges as may be appointed from time to time by

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209 Inserted by Act 39 of 2010.

210 Substituted by Act 20 of 2010.

211 Inserted by Act 13 of 1966 and Amended by Acts 20 of 2010 and 39 of 2010.

the King with the consent of Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel:

Provided that no person shall be appointed unless—

- (a) he holds, or has held, high judicial office; or
  - (b) (i) he is qualified to practise as an advocate in a court in some part of Her Britannic Majesty's dominions having unlimited jurisdiction in civil or criminal matters; and
    - (ii) he has been qualified so to practise for not less than ten years.
- (2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Judges of the Court of Appeal and may dismiss them.

#### **86 The Supreme Court<sup>212</sup>**

- (1) The Supreme Court shall consist of the Lord Chief Justice, who shall be the professional Head of the Judiciary, and such other judges as may be appointed from time to time by the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel:

Provided that no person shall be appointed unless —

- (a) he holds, or has 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.
- (2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Lord Chief Justice and Judges of the Supreme Court, and may dismiss them.

#### **86A The Land Court<sup>213</sup>**

- (1) The Land Court shall consist of a Lord President and other Judges, assisted by assessors, as may be appointed from time to time by the King with the consent of Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel.
- (2) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Lord President and Judges of the Land Court and may dismiss them.

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212 Substituted by Act 20 of 2010 and Amended by Act 39 of 2010.

213 Inserted by Act 39 of 2010.

**87 Judges to hold office during good behaviour<sup>214</sup>**

The Judges, subject to any contractual arrangements, shall hold office during good behaviour:

Provided that it shall be lawful to appoint Judges of the Supreme Court and Court of Appeal for limited periods, or for the purposes of a particular sitting of the Supreme Court or Court of Appeal, or of particular proceedings to come before the Court, on such terms as may be approved by the King in Privy Council.

**88 Acting Judge**

- (1) It shall be lawful for the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, at any time during the illness or absence of any Judge, or for any other temporary purpose to appoint an acting Judge for the period during which the Judge is ill or absent or for the period necessary to effect the temporary purpose.<sup>215</sup>
- (2) An acting Judge shall have the jurisdiction and powers of, and may exercise all the authorities which are vested in or may be exercised by a Judge and shall be paid such salary as may be determined by the King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel.<sup>216</sup>

**89 Powers**

The Judges shall have power to direct the form of indictments to control the procedure of the lower Courts, and to make rules of procedure.

**90 Jurisdiction of Supreme Court**

The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to land which shall be determined by a Land Court subject to an appeal to the Privy Council in matters relating to hereditary estates and titles or to the Court of Appeal in other land matters) and in all matters concerning Treaties with Foreign States and Ministers and Consuls and in all cases affecting Public Ministers and Consuls and all Maritime Cases.<sup>217</sup>

**91 Appeals from Supreme Court**

- (1) Subject to the provisions of any Act of the Legislative Assembly relating to appeals to the Court of Appeal, a party to any proceedings in the Supreme Court or Land Court (excepting matters relating to the determination of hereditary estates and titles) who is aggrieved by a decision given in those

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214 Substituted by Act 20 of 2010.

215 Amended by Acts 20 of 2010 and 39 of 2010.

216 Added by Act 14 of 1955 and Amended by Act 39 of 2010.

217 Law 25 of 1916; Act 25 of 1942; Amended by Act 12 of 1990.

proceedings by that Court, or a Judge thereof, sitting in first instance, may appeal to the Court of Appeal against such decision.<sup>218</sup>

- (2) Except as may be provided by any Act of the Legislative Assembly, or by rules in respect of limited classes of appeals, no appeal shall be finally determined by less than three members of the Court of Appeal.<sup>219</sup>

**92 Jurisdiction of Court of Appeal**

The Court of Appeal shall have exclusive power and jurisdiction to hear and determine all appeals which by virtue of this Constitution or of any Act of the Legislative Assembly lie from the Supreme Court or Land Court (excepting matters relating to the determination of hereditary estates and titles) or any Judge thereof and shall have such further or other jurisdiction as may be conferred upon it by any such Act.<sup>220</sup>

**93** [*Repealed by Act 23 of 1990*]

**94 Judge may not hear appeal from own decision**

It shall not be lawful for any Judge to sit or adjudicate upon an appeal from any decision which he may have given.

**95 Oath of Judge**

The Lord Chief Justice and any other judge shall take the following oath:

"I swear in the presence of God that I will be loyal to His Majesty King George Tupou V the lawful King of Tonga and that I will perform truly and with impartiality my duties as a judge in accordance with the Constitution and the Laws of the Kingdom".

The judge shall read and sign this oath in the presence of the Cabinet:

Provided that a Lord Chief Justice or any other Judge, who is not a Tongan subject, shall take the following oath in lieu of the foregoing oath:

"I swear in the presence of God that I will perform truly and with impartiality my duties as a judge in accordance with the Constitution and the Laws of the Kingdom."<sup>221</sup>

**96 Court fees**

The Legislature shall determine the fees payable to the various courts. The Registrar of the Supreme Court shall keep the court records.

218 Amended by Act 12 of 1990.

219 Added by Act 13 of 1966.

220 Added by Act 13 of 1966; amended by Act 12 of 1990.

221 Added by Act 13 of 1966.

**97 Judge not to receive fine**

It shall not be lawful for any judicial officer to receive any portion of a fine paid by any person convicted of an offence or for the Government to allot prisoners to serve any judicial officer, police officer, juror, or any other person as payment for duties discharged by them.

**98** *[Repealed by Act 23 of 1990]*

**99 Trial by jury**

Any person committed for trial before the Supreme Court on a charge of having committed any criminal offence shall if he shall so elect be tried by a jury; and whenever any issue of fact is raised in any civil action triable in the Supreme Court any party to such action may claim the right of trial by jury; and the law of trial by jury shall never be repealed.<sup>222</sup>

**100 Form of verdict**

It is the duty of the jury in criminal cases to pronounce whether the person accused is guilty or not guilty according to the evidence given before the Court. In civil cases the jury shall give judgment for payment or compensation as the case may be and according to the merits of the case.

**101 Judge to direct jury**

In civil and criminal cases the Judge shall direct the jury upon the law bearing upon the case and assist them in arriving at a just decision upon the case before them. The Judge shall have power to refuse to admit evidence which he may deem to be irrelevant or improper.

**102 Lord Chief Justice to report upon criminal statistics**

The Lord Chief Justice shall report once a year to the King upon the administration of justice and the criminal statistics of the country and upon any amendments in the law which he may recommend. And the King shall lay this report before the Assembly at its next meeting in the same manner as the reports of the ministers.

**103 Powers of Magistrates**

The Legislature shall determine the time and place for holding the Courts and shall limit the powers of the Magistrates in criminal and civil matters and shall determine what cases shall be committed for trial to the Supreme Court.

**103A Relief for breach of Constitution**

The remedy for breach of any provisions of the Constitution shall be declaratory relief and shall not affect any award of damages under any other law.<sup>223</sup>

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222 Act 10 of 1918; Act 7 of 1933; Act 25 of 1942; amended by Acts 25 of 1984 and 9 of 2006.

223 Inserted by Act 17 of 2003.

### PART III - THE LAND

#### 104 Land vested in Crown – sale prohibited

All the land is the property of the King and he may at pleasure grant to the nobles and titular chiefs or matabules one or more estates to become their hereditary estates. It is hereby declared by this Constitution that it shall not be lawful for anyone at any time hereafter whether he be the King or any one of the chiefs or the people of this country to sell any land whatever in the Kingdom of Tonga but they may lease it only in accordance with this Constitution and mortgage it in accordance with the Land Act. And this declaration shall become a covenant binding on the King and chiefs of this Kingdom for themselves and their heirs and successors for ever.<sup>224</sup>

#### 105 Terms of leases

The Cabinet shall determine the terms for which leases shall be granted but no lease shall be granted for any longer period than ninety-nine years without the consent of His Majesty in Council and the Cabinet shall determine the amount of rent for all Government lands.<sup>225</sup>

#### 106 Form of deed

The forms of deed transfer and permit which shall from time to time be sanctioned by His Majesty in Privy Council are hereby appointed to be the forms according to which all deeds of leases transfers and permits shall be made.<sup>226</sup>

#### 107 Existing leases respected

This Constitution shall not affect any leases which have been granted by the Government or any leases which have been promised whether leases of land in the interior or of town allotments. Such leases will be recognised by the Government but this exception shall not refer to any leases which may be granted after the granting of this Constitution.

#### 108 Church lands not to be sub-let without permission

No leases of any town site shall in future be granted to any religious body for any purpose unless there are thirty adults, male and female, of such church in that town, and it shall not be lawful for any religious body to use such leased lands for other than religious purposes or to sub-let to any person without the prior consent of Cabinet, and upon satisfactory proof before a Court that any such land has been sub-let without consent, such land shall revert to the person from whom the land was leased, or to his successor in title as the case may be.<sup>227</sup>

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224 Amended by Act 3 of 1976.

225 Amended by Act 11 of 1974.

226 Law 25 of 1916; Amended by Act 17 of 1981.

227 Substituted by Act 13 of 1973.

**109 Beach frontage**

All the beach frontage of this Kingdom belongs to the Crown from 15.24 metres above high-water mark and it shall be lawful for the Government to lease any portion of the beach frontage for erecting a store, jetty or wharf and the Minister of Lands with the consent of the Cabinet shall have power to grant such lease.<sup>228</sup>

**110 Registration of deeds**

All leases unless signed by the King himself shall be signed by the Minister of Lands and sealed with the seal of his office and countersigned by one of the Cabinet ministers who shall affix the seal of his office and no lease or transfer will be considered valid or recognised by the Government unless registered in the office of the Minister of Lands.

**111 Law of succession<sup>229</sup>**

The following is the law of succession to hereditary estates and titles:

Children lawfully born in wedlock only may inherit and the eldest male child shall succeed and the heirs of his body but if he have no descendants then the second male child and the heirs of his body and so on until all the male line is ended. Should there be no male child the eldest female child shall succeed and the heirs of her body and if she should have no descendants the second female child and the heirs of her body and so on until the female line is ended. And failing direct heirs the property shall revert to the eldest brother of the owner of the property beginning with the eldest and his heirs in succession to the youngest and their heirs in accordance with the law of inheritance. And if the brothers have no descendants it shall descend to the eldest sister and the female line as provided in the case of the male line. And if these should have no descendants and there should be no legitimate heir it shall revert to the Crown in accordance with the one hundred and twelfth clause. But should a female be next in succession to the title of a noble or of an hereditary chief the next male heir shall inherit the title and estates. But should such female afterwards have a legitimate male issue the title and estates shall revert to the male issue of the female upon the death of the male in possession of the estate:

Provided that the female that is the heir shall occupy the town allotment and the plantation lands appertaining to such title but the hereditary estates that is the lands occupied by the people shall be held by the inheritor of the title.

Whereas by Tongan custom provision has always been made that an adopted child might succeed to the estates and titles of his adoptive father now therefore it is decreed that upon the death of the holder of an estate or title who has inherited such estate or title by virtue of his blood descent from such adopted child the estate and title shall revert to the descendant by blood of the original holder of the estate and title in accordance with the provisions of this clause and should there be alive no such descendant by blood the provisions of the one hundred and twelfth clause shall apply.

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228 Amended by Act 23 of 1990.

229 Added by Act 15 of 1953; Amended by Act 3 of 1976.

And whereas by Tongan custom the noble Niukapu forms part of the 'Ulutolu line, now therefore it is decreed that in the event the holder of the estate and title of Niukapu is not a descendant by blood of the original Niukapu before 1875, such estate and title shall revert at the death of such holder to a descendant by blood of the Niukapu line.<sup>230</sup>

**112 Estate without heirs to revert to the Crown**

Should there be no legitimate heirs to an estate such estate shall revert to the King. But the King may confer the title and estate upon any other person and the person so appointed and his heirs shall possess such title and estates for ever.

**113 Right to allotments**

Tongan male subjects by birth of or over the age of 16 years may be granted town allotments and tax allotments out of estates granted in pursuance of this Constitution with the consent of or upon consultation with the estate holder and out of the lands of the Crown, by the Minister of Lands. Such allotments shall be hereditary and shall be of such size and at an annual rent as may be determined by law. A widow shall have the right to succeed according to law, to her deceased husband's tax and town allotments.<sup>231</sup>

**114 No lease etc. without consent**

No lease, sub-lease, transfer of a lease or of a sub-lease shall be granted—

- (a) without the prior consent of Cabinet where the term is ninety-nine years, or less, or
- (b) without the prior consent of Privy Council where the term is over ninety-nine years:

Provided that no consent shall be granted to a lease by a widow of the land of her deceased husband.<sup>232</sup>

**115 Citation**

This Constitution may be cited as the Act of Constitution of Tonga.

**SCHEDULE**

(clause 50A)

**PROCEDURE FOR APPOINTING A PRIME MINISTER<sup>233</sup>**

- (1) The Legislative Assembly shall recommend the appointment of a Prime Minister as follows –

230 Inserted by Act 11 of 1999.

231 Substituted by Act 16 of 1997.

232 Substituted by Act 17 of 1981.

233 Inserted by Act 20 of 2010.



- (a) within 10 days from the return of the writs of election after a general election has taken place, the Interim Speaker appointed under subsection (8) of this Schedule shall invite all elected representatives to submit to him their nominations for Prime Minister Designate, to be duly seconded by 2 other elected representatives and to be received by the Interim Speaker within 14 days from the return of the writs of election; and no representative who has proposed or seconded a candidate may propose or second any other;
  - (b) within 3 days after the last date for receipt of nominations for Prime Minister Designate, the Interim Speaker shall convene a meeting of all the elected representatives of the people and of the nobles for the purpose of deciding who they shall recommend for appointment as Prime Minister Designate:

Provided that the failure of any representative to attend any meeting, for whatever reason, shall not affect the validity of proceedings under this section;
  - (c) the representatives so convened shall consider who they want to recommend for appointment as Prime Minister Designate, and at that meeting every representative present will have the right to speak on his own behalf or that of another candidate, and they shall vote thereon by secret ballot and if one candidate receives more than half of the votes, the Interim Speaker shall report to the King that the duly elected representatives recommend the appointment of that person as Prime Minister Designate;
  - (d) if no single candidate is elected under paragraph (c) then the Interim Speaker shall 2 days after that meeting convene another meeting at which the candidate(s) who received the least votes shall be eliminated and the representatives shall (without speeches) vote by secret ballot for their choice amongst the remaining candidates, and if one candidate receives more than half of the votes then the Interim Speaker shall report to the King that the duly elected representatives recommend the appointment of that person as Prime Minister Designate;
  - (e) if no single candidate is elected under paragraph (d) then the Interim Speaker shall 2 days after that meeting convene another meeting and the procedure under paragraph (d) shall be likewise repeated, at 2 days intervals if necessary, until one candidate receives more than half of the votes cast; and the Interim Speaker shall report to the King that the duly elected representatives recommend the appointment of that person as Prime Minister Designate.
- (2) If the representatives fail to make a recommendation to the King in accordance with the procedure in subsection (1) of this Schedule, the King may extend any of the times specified and may authorise the Interim Speaker to vary such procedure to enable a recommendation to be made.

- (3) Upon receipt by the King from the Interim Speaker of the recommendation of the elected representatives under subsection (1) of this Schedule, the Lord Chamberlain shall then summon the Prime Minister Designate to be appointed by the King.
- (4) The Prime Minister shall take his oath of office before the Legislative Assembly at its first sitting.
- (5) The Legislative Assembly shall also recommend the appointment of a Prime Minister following a vote of no confidence, in the manner provided in clause 50B of this Constitution.
- (6) In the event of any other vacancy occurring in the office of Prime Minister, except following a vote of no confidence, the procedure specified in this Schedule shall be followed to enable the King to appoint a Prime Minister on the recommendation of the Legislative Assembly, but in such case the Speaker shall perform the role of the Interim Speaker specified in this Schedule.
- (7) Any dispute arising out of or in connection with the calling or conduct of any meeting under this Schedule or the election or recommendation of the Prime Minister under this Schedule shall be determined by the Interim Speaker in consultation with the King.
- (8) For the purposes of this Schedule, the King shall within 7 days of the declaration of the result of a general election, appoint a person who was not a candidate at the general election to be the Interim Speaker of the Assembly, and such person shall hold office as Interim Speaker until a Speaker is next appointed under clause 61 of this Constitution.