

WHY SO COMPLICATED? THE ROLE AND STATUS OF THE ATTORNEY-GENERAL IN PACIFIC ISLAND STATES, AND THE CASE OF TONGA

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I OUTLINE

It is arguable that the most difficult lawyer's job in the Pacific region is that of the Attorney-General – in fact the most difficult in British common law countries generally, and exacerbated in small island states. Yet I am sure that if I were to ask everyone present today, what does the Attorney-General do, all would say "that's easy - he/she gives the Government legal advice", or "he/she is the Government's lawyer". Sounds straightforward enough!

Why, then, has the United Kingdom government, and its top lawyers been debating reform of the office of the Attorney-General for at least 10 years? And what has caused all the legislative activity relating to the Attorney-General here among Pacific Island states in recent years?

The 14 independent and associated states reviewed here are the Cook Islands, FSM, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, PNG, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

II THE INDEPENDENCE ISSUE

The main point at issue seems to be whether the Attorney-General should be one of the Ministers appointed from Parliament by the Prime Minister or President, and thus a so-called political member of Cabinet belonging to the political party or group in power or, alternatively, should the Attorney-General hold an entirely independent office? There are at least three related questions.

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First, with regard to one of the Attorney-General's functions, namely, responsibility for the prosecution of crime, should this be separate from the Attorney-General's ministerial office in Cabinet? In other words, must decisions about who should be prosecuted, for what offence and in what manner, be absolutely free of political motives, or any public perception of such? The weight of opinion in the UK is that the most problematic aspect of the Attorney-General's role is this responsibility for prosecutions.¹ A common answer in larger countries has been for the prosecution of crime function of the Attorney-General to be administered entirely separately by a Director of Public Prosecutions.

Second, does the giving of legal advice to Cabinet Ministers require the Attorney-General to sit in on all Cabinet meetings, whether as a political Minister or not? In order to respond to this, the professional and ethical duties, and the advice-giving role of the lawyer to his client, need to be understood in the Cabinet context of political and policy decision-making.

Third, where the Monarch as Head of State chooses to exercise powers in respect of which he is not obliged to act on the advice of the PM and Cabinet, to whom may the Monarch turn for advice on constitutional and legal matters?

This discussion has many ramifications in the Common Law world, not the least being the fact that the establishment of independent legal offices is expensive and beyond the means of some small jurisdictions.

This Attorney-General topic has been chosen for this conference because it is topical for at least one state in the region, the Kingdom of Tonga. The author of this paper was engaged as consultant in some of the thinking about Tonga's constitutional reform programme which culminated in 2010.² The principle underlying this reform is that the executive authority of the state be vested in a Cabinet of Ministers chosen from Parliament by the Prime Minister, all of whom are elected for four-year terms. Previously, under the veteran 1875 Constitution, the Monarch appointed all the Ministers at pleasure, usually from outside Parliament, after elections and appointments. Parliament was comprised of nine elected representatives of the nobles, nine elected representatives of the people and twelve or so appointed Ministers.

The Monarch remains Head of State, and the new Tongan system could be said to be 'Westminster style' except that the Monarch also retains certain executive

1 The Constitutional Role of the Attorney-General (the Report of the Constitutional Affairs Committee) para 72 p 31, 17 July 2007.

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

powers and very significant political influence. In Parliament, the Prime Minister appoints the Cabinet from among nine representatives of the nobles and seventeen representatives of the people.

Previously known as the Crown Solicitor's Office, the Tongan Crown Law Department was created administratively in 1988, headed by a Solicitor-General and under the ministerial supervision of an Attorney-General. As in the case of all Ministers at the time, the Attorney-General was not an elected member of Parliament but was appointed from outside as a Minister in Cabinet to advise the King and his Ministers. In 2009, the late King Tupou V and the then Prime Minister decided to create an independent office of the Attorney-General, but there was no opportunity for consideration of the move by the Constitutional and Electoral Commission appointed to advise on reform, nor any public discussion, and the constitutional amendment concerning the Attorney-General became effective in 2010. There have been difficulties with an Attorney-General located outside Cabinet, and concerns about legal and constitutional advice for the King. Today, Tonga is thus at a crossroads, searching for the best model to adopt.

This paper will begin with some historical background that helps to explain where Attorneys-General stand generally today. The Attorney-General's various roles and functions will be listed, and examples from around the region will be given. An important task of the paper is to look closely at the constraints under which the Attorney-General must operate, such as avoidance of conflicts of interests (and what a murky concept that is!), professional and ethical duties as a lawyer, and accountability – to whom? And, for what?

II THE OFFICE

The office of Attorney-General is nearly as old as the Magna Carta. When the King's courts were first set up, he wanted lawyers to represent him, and the original title was 'Mr Attorney', a form of address used in court to this day. As the legal system grew in size and complexity, the Attorney-General came to be relied on in awkward situations where his advice would often displease powerful people. Conventions governing the role were developed, and evolved over time. Sir Francis Bacon, a famous judge and philosopher, was Attorney-General in the 1600s and his conclusion has echoed down the centuries – "the Attorney-General has the painfullest task in the realm".³

3 Sir Elwyn Jones 'The Office of Attorney-General' (1968) 27(1) Cambridge Law Journal 43-53.

So the Attorney-General eventually came to the Pacific as part of the paraphernalia of the Common Law system of government. Four factors need to be borne in mind when considering the Attorney-General in the new environment.

Firstly, the notion that the Attorney-General was 'the King's man' had long gone, replaced by requiring him to advise and act for 'the Crown', a term now symbolising the whole state – and thus the Head of State, the Government and all the people. The exception was Tonga, as the hereditary monarch remained head of the executive Government under its Constitution of 1875 until reform in 2010. Some would say that he is still very much the personification of the Crown.

The second factor is the huge growth that had occurred, during the heady centuries of empire and industrial revolution, in the size and complexity of the roles and functions performed by the Attorney-General's office and under its supervision. And so, when Attorneys-General were appointed in the new Pacific states, it was clear that there might have to be real limitations on what services the small governments could provide, or at least that a single Attorney-General's office would have to discharge a range of functions that are conducted by several separate offices in larger countries.

Thirdly, longstanding constitutional traditions and conventions concerning elements of the governmental system like the Attorney-General were imported colonially without a text, leaving it to Pacific states to decide what to adopt and provide for in constitutions and statutes. For example, the obligation to promote understanding of, and adherence to, the rule of law is seldom expressed in the law. The courts have seen it as a crucial convention and, as might be expected, have supported Attorneys-General when they have taken action to defend judges from attack in the public domain.⁴

Fourthly, the small-scale nature of Pacific island societies means that there is little room for 'social distance' between role-players, nor generally between those with authority and those to whom it is applied. Confidentiality and resistance to local pressures are often difficult to maintain.

As experience has been gained over time, so has the thinking I mentioned in opening become more topical – should the Attorney-General have an independent status, protected under the constitution? A helpful paper written in 2010 for a

4 For example, Papua New Guinea - *Public Prosecutor v Nahau Rooney (No 2)* [1979] PNGLR 448; and *Attorney General v Hamidian-Rad* [1999] PNGLR 278; and Fiji - *Chaudhry v Attorney-General* [1999] 45 FLR 87; and *State v Fiji Times Ltd, ex parte Attorney General* [2013] FJHC 59.

Meeting of Commonwealth Law Ministers and Attorneys-General of Small Jurisdictions⁵ began with this assessment of the Office of Attorney-General:

The fact that this "unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent Bar and the public prosecutors, the State and the citizenry at large"⁶ has led to frequent complaints of bias and appearance of bias which are reflected in recent attempts to enshrine the independence of the Office in Commonwealth constitutions and in the current UK proposals for reform.

The paper concludes:⁷

Allegations of widespread government corruption in small states, such as are alleged to have occurred in the Turks and Caicos Islands, indicate that measures designed to safeguard the independence of prosecutors are needed not only to ensure freedom from improper political interference, but to ensure the proper investigation and prosecution of corruption in close-knit communities.

III ROLE AND FUNCTION

The Attorney-General is usually said to have three main areas of responsibility –

- legal adviser to the Government,
- the prosecution of offences, and,
- as the state's most senior law officer, the promotion and maintenance of the rule of law.

But this is a simplification. Every Attorney-General has a list of tasks. Some fall within the scope of the Attorney-General's Office, often headed by a Solicitor-General. Others are more personal to the Attorney-General. The following list is taken from the website of the Tongan Office⁸ - and while this is a conventional list of tasks, local circumstances may require differences elsewhere.

The Attorney-General is the First Law Officer and Legal Adviser to the Government of the Kingdom of Tonga.

5 Fifteen small states and British self-governing territories were reviewed, in the Caribbean, Atlantic and Mediterranean island groups. Of the many Pacific states, only Vanuatu was included.

6 J L Edwards *Attorney General Politics and the Public Interest* (Carswell Legal, 1984).

7 Colin Nicholls *The Role of the Attorney-General ... in Small Commonwealth Nations*, LMSCJ, 21 October 2010, paras 3 and 113.

8 <www.crownlaw.gov.to/cms/about/functions-and-duties.html>.

The Attorney-General's main responsibility is to direct the legal services provided by the Crown Law Department for the Government. These legal services include:

- Providing legal advice to Cabinet, Government Ministries, and Departments
- Drafting legislation for Government to be submitted to the Legislative Assembly
- Conducting criminal prosecutions on behalf of the Crown
- 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.

In addition to the Crown Law Department's legal services, the Attorney-General is also responsible for:

- Supporting constitutional integrity and governance
- Promoting adherence to the rule of law
- 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

IV SEPARATE PROVISION FOR PROSECUTIONS

How may the Attorney-General and the functions of the office be provided for in the governmental system? – by Cabinet decision to establish the post and provide departmental support, or by statutory or constitutional provision? Obviously, if independence from perceptions of unwanted influence is desired, constitutional status may be preferred. Certainly, a statute defining functions provides valuable guidance. Perhaps the first provisions to look for are those that help to separate advising Government from prosecuting crime.

The island states of the Pacific region have adopted a range of possibilities, as seen in this summary of constitutional and statutory provisions.

At first glance, it seems that most of the states have found it necessary to change the law since they became independent (from the earliest, Samoa [1962]⁹ to Palau [1994]). Some have made progressive changes, while the three smallest, the Cook Islands [1965], Nauru [1968] and Niue [1974] have no constitutional or legislative

9 Years in square brackets are the years the independence constitutions of each country came into force.

provision for an office of Attorney-General. The two 'Washington' style presidential systems of Federated States of Micronesia [1990] and Palau do not appear to provide for an Attorney-General except as the officer responsible for prosecutions.

Only two states (Papua New Guinea [1975] and Solomon Islands [1978]) recognised the value of establishing an independent Public Prosecutor as well as the Attorney-General in their first constitutions, and they also followed up with comprehensive legislation in PNG: 1989 and 2013, and Solomon Islands: Criminal Procedure Code. Three states, Tuvalu [1978] in its second Constitution of 1986, and Kiribati [1979] and Marshall Islands [1990] in their first, included provisions intended to keep the prosecution functions of the Attorney-General separate from other responsibilities. Marshall Islands required the Attorney-General "to act independently" in both the advisory and prosecutorial functions, then went further and established separate 'Divisions' of the Office under the Office of Attorney-General Act 2002. The Attorney-General must "appoint an attorney to act as Special Assistant Attorney-General in any case if the Attorney-General determines that there is a conflict of interest, or the appearance of a conflict of interest, if the office were to handle the case." In such cases, no instructions may be given by the Attorney-General to the Special Assistant Attorney.

Vanuatu [1980] provided for the Public Prosecutor in its Constitution but not for an Attorney-General, then detailed both offices in the State Law Office Act 1998 and the Public Prosecutor Act 2003. Samoa has amended its Constitution [1962] in 2013 to provide for a National Prosecutor in addition to the Attorney-General, and each now has its own statute (Attorney-General's Office Act 2013 and National Prosecutor's Office Act 2015).

Fiji [1970], which holds the record with four constitutions - 1990, 1997 and 2013 - authorises the Attorney-General to sit, but not vote, in Parliament. The Office was established constitutionally in 1997, and the Constitutional Decree of 2013 places the Attorney-General in Cabinet while establishing an independent Director of Public Prosecutions.

The most recent constitutional creation of the office of Attorney-General occurred in Tonga [1875] in 2010. This will be considered below.

To summarise, it seems clear that Pacific island states recognise that perceptions of bias and interference can occur in the criminal justice system if the person responsible for prosecutions is not independent.

V *LEGAL ADVISER*

Turning to the Attorney-General's role as legal adviser, most would say 'the main role', the subject is divisible into alternative models of relationships that might be established for the Attorney-General.

For the purpose of discussion, a couple of preliminary points should be made.

First, "legal adviser to Government" is normally taken to mean advisor to Cabinet and its individual Ministers. The Attorney-General can also delegate advisory work to deputies, particularly in relation to Government Ministries, Departments and agencies. Advising Parliament is also usually a function of the Attorney-General.

Second, what of the position of the Head of State? Do arrangements need to be made for the Head of State to have independent access to constitutional and legal advice? As a general rule in Common Law countries the Head of State is required to act on the advice of the Prime Minister or President and Cabinet. However, Heads of State often have 'reserve powers' and, in the case of Tonga, the King has several in relation to the legislature and other matters which have the potential to become contentious.¹⁰ Indeed, the 'sharing' of executive authority where Head of State and Head of Government may wish to take different, possibly opposing, courses of action causes difficulties when it comes to establishing a workable system of providing legal advice. A large part of the problem stems from a decision of the late King Tupou V to take responsibility for the judiciary and office of Attorney-General by appointing a Lord Chancellor and a panel of retired judges (the Law Lords). When political reform subsequently took effect, the name 'Privy Council', which had previously applied to the all-powerful meetings of King and Cabinet – and where the latter advised the former – was perhaps confusingly given to "such people whom the King shall see fit to call to his Council to provide him with advice" (cl 50). The Constitutional Commission had earlier strongly recommended, in addition to people of the Monarch's choice, a structured body with ex officio representatives from sectors of society, meeting regularly, to be sure the Monarch is kept well-informed.¹¹ However, with rejection of this recommendation, the Monarch is in a position to appoint an influential Privy Council and speak of it as his. To date, the members are the Law Lords, and it seems that certain personalities have come to the fore with the result that the King and the Cabinet are receiving conflicting advice.

¹⁰ See Powles 'The Head of State and the Legislature: the Power of Veto in Pacific Island States and the case of Tonga' paper for ALTA conference, Wellington, 5-7 July 2016.

¹¹ See Powles, above n 2, chapter VI.

A Model 1 'Integrated'

If the Attorney-General is a politician, that is to say, an elected member of Parliament who is appointed by the Prime Minister as a Cabinet Minister to be Attorney-General, then the Attorney-General is 'fully integrated' into the political process, bound to support Cabinet colleagues as well as serve his or her parliamentary constituency.

What does integration mean? The Attorney-General is a Minister in Cabinet, appointed by the Prime Minister from Parliament; able to participate in discussion of any subject where the Attorney-General thinks advice would be beneficial; in a position to mention possible legal or 'rule of law' difficulties in any suggested course of action; ready to assist Ministers in interpreting laws and governance principles; suggesting wording for ministerial statements to Parliament touching these matters. Thus, the Attorney-General sits with the client, just as 'in-house counsel' would in the corporate world. Having been elected, the Attorney-General has a seat in Parliament, and is able to vote there as well as in Cabinet. The influence of the Attorney-General in Cabinet and government circles is enhanced if the Attorney-General is a Minister. Opinions expressed during the UK reviews of the Office revealed support for the integrated model and belief that the case for separating the Attorney-General's legal and political functions had not been made out.

Would the UK reasoning hold good in the Pacific island states? In larger countries such as the UK there is pool of lawyer experience to call upon, and there are often several lawyers in Cabinet. In a small country, however, where there are few, if any, resident lawyers who are suitably qualified to be the Attorney-General, it seems more likely that the lawyer-politician elected to the House who is appointed to the Ministry has had little of the desired experience – and he or she may be the only lawyer member of the Prime Minister's political party or support group. Tonga has sought to give the Prime Minister more scope in Cabinet appointments by allowing him to appoint up to four additional Ministers from outside Parliament (2010, cl 51). The two Prime Ministers since the reform have shown no sign of doing so.

B The Lawyer-Client Relationship

The professional ethics of the lawyer-client relationship apply. The Attorney-General must exercise independence of judgment, meaning that personal beliefs and values, political and otherwise, must be put aside when giving advice. When discussing proposed Cabinet action that is driven by political considerations, the Attorney-General will know that firm advice consistent with the law and good governance should be given. Also, when asked in Parliament about advice given in Cabinet, not only does Cabinet confidentiality apply but lawyer-client privilege also

prevents the Attorney-General from disclosing it. Further, the 'political Attorney-General' may find it very difficult to dispel concerns as to bias in any of the functions assumed where impartiality and fairness should be paramount. In Part IV above, Pacific states are shown to be keen to move prosecutions, at least, out of harm's way.

In the early days of some Pacific states, it was felt desirable for a qualified lawyer who was elected to Parliament and who supported the PM to be appointed Attorney-General. No other local lawyers might be willing to enter politics, and an expensive expatriate lawyer who did not speak the local language might seem inappropriate. This was done by the Prime Minister in the course of appointing and assigning portfolios, and no change was made in the law. Papua New Guinea legislated for the situation in 1989 by requiring that the Minister for Justice be the Attorney-General unless that Minister is unqualified, in which case the head of the Attorney-General's Department would hold the Office.¹² Fiji in 2013 has a rather similar provision. The Prime Minister will appoint as Attorney-General a legally qualified Minister, but if one does not exist, the Prime Minister may appoint any legally qualified Member of Parliament who supports the Prime Minister's political party. Failing that, a lawyer from outside Parliament may be appointed and that person will sit in Cabinet as a Minister, and also in Parliament without the right to vote.¹³

C Model 2 'Independent' or 'Quasi-Independent'

There seems to be a spectrum from 'fully-committed politician' to the Attorney-General who is isolated from Cabinet and Parliament unless requested to advise on a matter.

At the 'independent' end of the spectrum there are concerns, some of which involve the lawyer-client relationship. How well can an independent Attorney-General operate at a distance, and without the right to sit in Cabinet? If the Attorney-General is not involved in the Cabinet decision-making process on a particular matter from the beginning, then when the documents on the issue ultimately come for advice, the Attorney-General may have an unpleasant choice. If, after examination, the Attorney-General feels obliged to disagree with Cabinet, the Attorney-General may have a battle on his or her hands. If the Attorney-General's views as to the correct course for government to take are modified – perhaps by giving in to pressure – respect for self, and probably of others for the Attorney-General, will be diminished. And this is a patently inefficient decision-making process for any Cabinet to put up with. Taking independence to the extreme, if the Attorney-General has no access to Cabinet at all unless invited, the Attorney-General cannot be sure

12 Attorney-General Act 1989 (PNG) ss 4-6.

13 Constitution 2013 (Fiji) s 96.

that legal and rule of law questions will be properly attended to. This is the present situation in Tonga, detailed below.

Towards the 'integrated' end of the spectrum, lie states like Kiribati where the President appoints as Attorney-General a qualified lawyer who becomes a member of Cabinet but not a Minister, and who sits in Parliament *ex officio* unless elected a member. Association of the Attorney-General with the Government of the day is recognised in the Constitution where it is required that, in the discharge of the prosecution functions, the Attorney-General 'shall not be subject to the direction or control of any other person or authority'.¹⁴

More clearly independent are the Attorneys-General who are required to attend Cabinet meetings but not as members. In Samoa,¹⁵ the Attorney-General is required to attend and advise Cabinet; the Attorney-General must attend Cabinet unless otherwise directed in Solomon Islands,¹⁶ or excused Tuvalu.¹⁷ The Attorney-General of the Marshall Islands¹⁸ may be limited in the action he or she can take, as 'he shall advise on legal matters referred to him by the Cabinet, the President or a Minister'. However, in doing so, the Attorney-General is not to be 'subject to the direction or control of any other person or authority'. Tonga's move in 2010,¹⁹ away from a ministerial post to establish an independent office of Attorney-General to advise and prosecute has freed up the Attorney-General's working day but provided no right of access to Cabinet. The Attorney-General has no authority to attend, and, like the Marshall Islands Attorney-General, can advise only on matters referred to the office. The isolation of the post has led to the resignation of two expatriate Attorneys-General who were highly competent and well qualified in terms of prior Tongan experience. The first of the two, gave several reasons for resigning but expanded on the extent to which he was unable to discharge his function as an Attorney-General should – as an upholder of constitutional principles and the rule of law.²⁰ It must be recognised that if Cabinet proceedings are conducted in the local language an expatriate Attorney-General might need the assistance of an interpreter, but I am unaware of that being an issue in Tonga.

14 Constitution 1980 (Kiribati) ss 40, 42, 53.

15 Constitution 1962 (Samoa) s 41; Attorney-General's Office Act 2013 (Samoa) s 6(2)(b).

16 Constitution 1978 (Solomon Islands) s 35(4).

17 Constitution 1986 (Tuvalu) s 79(5).

18 Constitution 1990 (Marshall Islands) Ch VII s 3; Office of Attorney-General Act 2002, s 607.

19 Constitution Consolidated 2010 (Tonga) cl 31A.

20 John Cauchi, Attorney-General, *Matangi Tonga*, 30 Apr 2010.

Perhaps the most powerful expression of the Attorney-General's authority appears in Vanuatu's legislation.²¹ As the principal legal officer of the State and the principal legal adviser to Government, the Attorney-General is required to participate in all meetings and deliberations of the Council of Ministers (Cabinet) for the purpose of providing independent legal advice but has no vote, and is not deemed to be a member of the Council (s10(3)). Independence is declared and interference prohibited (ss 11(1)(2) and 21). Importantly, the Act requires that "in all legal matters concerning the State or Government, the President, and Government must consult the Attorney General", and the President and Government are not permitted to instruct a private legal practitioner in matters of state without the prior written approval of the Attorney-General (s 22).

VI CONCLUSION

Tonga's Attorney-General has experienced a leap from political integration under the King and Cabinet to a position of independence bordering on isolation (subject to appointment and dismissal by His Majesty). This was accomplished without discussion. The outcome proved unworkable, and there is now an opportunity to introduce provisions that better reflect Tonga's needs, along with others in the region.

This paper has offered for consideration a review of alternative approaches and processes. A brief summary follows –

- (1) The great majority of Pacific Island states have felt obliged to take action to protect the independence and integrity of both the Attorney-General's office and that of the Director of Public Prosecutions. The pattern is to establish the offices in the Constitution and to provide for them in detail by statute. These are major aspects that Tonga seems not to have addressed.
- (2) Given that the King has significant executive powers and that the Cabinet may often reflect progressive views, it seems desirable that the Attorney-General be independent of both – as far as possible – and able to maintain good relationships with both.
- (3) It is possible to choose from existing Pacific arrangements to build a model that, in addition to declarations of independence and enforceable non-interference, establishes that it is normal for the Attorney-General to attend Cabinet and parliamentary meetings without a vote, and to offer legal advice on his or her own initiative as well as when requested to do so.

Finally, it is clear that competence and efficiency are among the qualities required of an Attorney-General in the 21st century, and that the state is in competition with

21 State Law Office Act 1998 (Vanuatu).

the private profession for qualified lawyers – especially in small states with fewer financial resources. The role of Attorney-General can be satisfying, even rewarding, as well as hugely challenging. Perhaps island governments could ensure it is not also the 'painfullest' by rethinking the structures and relationships for the modelling of the Office. The dedication and success of a potentially well-motivated Attorney-General is likely to be discouraged and blunted by a system that has been allowed to become unworkable.

