



Government of Samoa

Samoa
Law Reform Commission
Komisi o le Toefuataiga o Tulafono a Samoa

NATIONAL HERITAGE BOARD
Discussion Paper

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Introduction

On 1 February 2012, the Prime Minister and the Attorney General asked the Samoa Law Reform Commission ('Commission') to examine the feasibility and appropriateness of setting up a National Heritage Board ('NHB') to preserve Samoa's various national heritage sites. The terms of reference specifically ask the Commission to research how national heritage boards overseas are established and operated.

'Heritage' is a broad term. For the purposes of this Discussion Paper, the Commission uses 'national heritage' to encompass both natural and cultural heritage. In general terms, natural heritage relates to features of the natural environment, while cultural heritage relates to buildings, monuments and other features of the built environment.¹ A place may have both natural and cultural heritage value because of the way in which natural and cultural environments co-exist. The terms of reference for this inquiry do not cover issues relating to the protection of intangible heritage, such as expressions of culture, or movable heritage, such as historic artifacts.²

National heritage places are an important part of Samoan identity. Protecting the places that have heritage significance enables us to express and celebrate Samoan identity. The preservation of national heritage is important for current and future generations, to experience and understand Samoa's history and culture. National heritage sites also have significance beyond Samoa as places of outstanding universal value and may, in the future, be included in the World Heritage List.

This Discussion Paper considers ways in which a NHB might be established to protect and preserve national heritage sites in Samoa. Part 1 provides an overview of current laws and policies to protect national heritage. Part 2 outlines the role of national heritage bodies in Australia, New Zealand and other Pacific Island nations. In part 3, the Commission examines three different options for a NHB and asks questions about ways in which Samoan national heritage might be protected.

The Commission invites government agencies, community groups and members of the public to make submissions to this inquiry. After receiving submissions and consulting further with stakeholders, the Commission will make final recommendations to the Prime Minister and the Attorney General on the best options for the protection of heritage sites in Samoa.

¹ The definition of 'national heritage' is discussed in part 3.

² The Commission is currently undertaking a separate inquiry into the protection of traditional knowledge and expressions of culture.

1. Current Issues

- 1.1 Policies and legislation have been developed over the last two decades to address the state's responsibility to manage national heritage. In recent years and months, public debate emerged as a result of government decisions about the future of places perceived by some as historic icons. This has exposed a need for Samoa to review the way in which cultural and natural heritage is managed.
- 1.2 As Samoa continues to develop, it is forced to make decisions about whether and how to invest in the preservation of sites no longer suitable for their original purpose. After the relocation of the Courts to a new building in Mulinu'u in 2010, the threat to pull down the old Court House in Apia, motivated concerned citizens to form a group to lobby for its preservation. More recently, the demise of the *Fale Fono* or *Freedom House* in Mulinu'u, has prompted a mixture of reactions, by many Samoans who felt that the building represented an integral part of Samoan history. The demolition of the iconic building on the 8 of March 2012 raised public awareness of the importance of national heritage.
- 1.3 Thus the question is how do we define national heritage? Additionally, how will the establishment of the national heritage board seek to protect these sites? The answers to these questions will turn on the values attached to national heritage in Samoa, and the cultural, legal and policy influences that bear on this.
- 1.4 The Commission hopes that the Discussion Paper will initiate dialogue amongst stakeholders, the community and interested parties. This feedback is crucial to the formulation of recommendations in seeking to establish a NHB to protect Samoa's national heritage.

2. Part One: The Current Framework for Heritage Protection

- 2.1 There is no single law that governs heritage protection in Samoa. Rather, a range of legislation, customary laws, policies and procedures relate to different aspects of heritage protection. Additionally, heritage protection in Samoa occurs within a wider context of international and regional obligations, which affect how national heritage is defined and preserved.

The International Context

- 2.2 In 2001 Samoa ratified the *Convention for the Protection of the World Cultural and Natural Heritage 1972* ('World Heritage Convention'). The World Heritage Convention declares that some places should be protected as places of 'outstanding universal value'.³ The Convention sets up a scheme in which state parties identify and nominate places for inclusion in the World Heritage List.⁴ The World Heritage Committee, which consists of 21 members chosen from state parties to the Convention, receives expert advice and decides whether a place

³ Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, Preamble.

⁴ Ibid, art 5 and art 11.

should be included in the World Heritage List. Once a place is listed, state parties have an obligation to protect the place so as to maintain its outstanding universal value. Currently, there are no World Heritage listed places in Samoa. The Fagaloa Bay - Uafato Tiavea Conservation Zone, the Manono, Apolima and Nuulopa Cultural Landscape have been placed on the World Heritage Committee's tentative list.⁵

2.3 The World Heritage List has separate categories for cultural, natural and mixed cultural and natural heritage. Article 1 of the Convention defines cultural heritage to include:

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combination of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

2.4 Article 2 defines natural heritage to include:

Natural features consisting of physical and biological formations or groups of such formations which are of outstanding universal value from the aesthetic or scientific point of view;

Geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

Natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

2.5 Aspects of these definitions have been adopted by the Ministry of Natural Resources and Environment ('MNRE'). Its National Heritage Conservation Policy states that:

Natural heritage refers to outstanding physical, biological and geographical formations, habitats of threatened species of animals and plants in addition to areas of environment, scientific or aesthetic value.

Cultural heritage covers monuments, architectural works, works of monumental sculpture and painting, elements of structures of an archaeological nature, groups of buildings, cave dwellings and combinations of features that are of outstanding universal value from the point of view of history, art or science.⁶

5 UNESCO, World Heritage Tentative List, *Fagaloa Bay – Uafato Tiavea Conservation Zone*, <<http://whc.unesco.org/en/tentativelists/5090>; UNESCO, World Heritage Tentative List, *Manono, Apolima and Nuulopa Cultural Landscape*, <http://whc.unesco.org/en/tentativelists/5091>>.

6 Ministry of Natural Resources, Environment and Meteorology, *National Heritage Conservation Policy*, 2004.

2.6 This Policy ‘provide[s] a framework for the sustainable management of Samoa’s natural and cultural heritage’,⁷ and is discussed further below.

The Regional Context

2.7 Co-operation among Pacific Island nations focuses on implementing the World Heritage Convention in the Pacific. The *Pacific World Heritage Action Plan 2010-2015* aims to assist Pacific Island nations in nominating sites for inclusion in the World Heritage List. It includes strategies for co-operation, capacity building and sharing knowledge about the common challenges for heritage protection in the Pacific region.⁸

2.8 As well, the International Council on Monuments and Sites (ICOMOS) is an independent organisation that advises UNESCO on the World Heritage List. ICOMOS Pasifika was established in 2007, focused on furthering the conservation and protection of heritage places in the Pacific Islands. It links local, national and regional heritage organisations, providing expert advice on heritage conservation and protection.⁹

The Local Context

Customary Law

2.9 Customary law has been defined as the ‘usual way of behaving or acting; established usage as a power or as having force of law’.¹⁰ In Samoa, the application of customary law has evolved maintaining traditional practices with aspects included in legislation.

2.10 Law has been defined in the Constitution to include ‘any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction’.¹¹ Significantly the Constitution has encapsulated the *fa’amatai* system stating:¹²

Article 100 *Matai* titles – A *matai* title shall be held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.

Article 101 Land in Samoa – (1) All land in Samoa is customary land, freehold land or public land. (2) Customary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.

2.11 Additionally, the Constitution prohibits the alienation or disposition of customary land by sale, mortgage or for the payment of debts.¹³

⁷ Ministry of Natural Resources, Environment and Meteorology, *National Heritage Conservation Policy*, 2004.

⁸ UNESCO World Heritage Workshop, Apia Samoa, 5-9 September 2011.

⁹ ICOMOS, *National Committees*, <http://www.icomos.org/en/network/national-committees>.

¹⁰ Jennifer Corrin and Don Paterson *Introduction to South Pacific Law*, (2ed, 2007), at 45.

¹¹ *The Constitution of the Independent State of Samoa 1960*, art 111 (1).

¹² *Ibid*, art 100 and 101.

¹³ *Ibid*, art 102.

- 2.12 At present approximately 81% of land in Samoa is customary land. Thus, many places of national heritage significance are located on customary land, owned and managed according to ‘Samoan custom and usage’.¹⁴
- 2.13 Customary law in Samoa continues to ‘define and govern the rights and obligations affecting the land, *matai* – ‘*aiga* relationships and the *pule* of village councils’.¹⁵ The foregoing must be borne in mind in establishing a NHB to ensure it suits the social, political and economic context of Samoa. This description of customary law is brief and there are many facets that have not been covered. However in the context of this Discussion Paper this section on customary law serves to inform the reference project.

Statute

- 2.14 Samoa has a range of statutes relating to the use of land, national parks, reserves, and cultural organizations that deal with aspects of national heritage.

The use of land

- 2.15 The *Planning and Urban Management Act 2004* (‘PUMA’) establishes ‘a framework for planning the use, development, management and protection of land in Samoa in the present and long-term interests of all Samoans and for related purposes’.¹⁶
- 2.16 Under PUMA, the Planning and Urban Management Board is responsible for approving sustainable management plans at a national, regional, district, village or site specific level. Management plans set out rules that apply to the use and development of the land and may, for example, prohibit or restrict construction work on particular sites.¹⁷ The Act requires the Board to take account of the likely effects on cultural and natural heritage when considering an application for development.¹⁸ In addition, when exercising its general functions, the Board must have regard to the objectives of the Act which include, amongst other things, ‘to preserve those buildings areas or other places of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value’.¹⁹
- 2.17 The *Forests Act 1967* relates ‘to the conservation, protection and development of natural resources of Samoa, especially soil, water and forest’.²⁰ As well, it contains mechanisms throughout the Act for protecting national heritage. Specifically section 68 provides that where the Minister considers that any place in forest land is of ‘historic, traditional, archaeological or national interest to Samoa’, the Minister may order the owner of the land or any person using or occupying the land to preserve the site undamaged for a specified time of up to three years while the Government considers what should be done with the site.²¹

¹⁴ Ibid, art 111 (1).

¹⁵ Guy Powlers *The Status of Customary Law In Western Samoa* (Submitted for the Degree of Masters in Laws at the Victoria University of Wellington, 1973, Wellington, New Zealand) at 93.

¹⁶ *Planning and Urban Management Act 2004*, Long Title.

¹⁷ *Planning and Urban Management Act 2004* ss 13, 15.

¹⁸ *Planning and Urban Management Act 2004* s 46(h).

¹⁹ *Planning and Urban Management Act 2004* s 9(h).

²⁰ The *Forests Act 1967*, Long Title.

²¹ Ibid, s 68.

National Parks and Reserves

2.18 The *National Parks and Reserves Act 1974* ('NPARA') 'provide[s] for the establishment, preservation, and administration of national parks and reserves for the benefit of the people in Samoa'.²² Under the NPARA, the Head of State, acting on the advice of Cabinet, may declare public land not set aside for any other public purpose to be a national park or reserve.²³ A historic reserve is land that, in the opinion of Cabinet, is of 'national, historical, legendary, or archaeological significance' and as such may include national heritage sites.²⁴ National parks and reserves are to be protected and managed for the benefit and enjoyment of the people of Samoa.²⁵ The Minister may, by published notice, prohibit any person altering, destroying or interfering with any natural or artificial feature in historic reserves or restrict entry to historic reserves.²⁶ Sustainable management plans created under the *Planning and Urban Management Act* may also designate land as a reserve for public purposes.²⁷

2.19 The *Lands, Surveys and Environment Act 1988* 'make[s] provision for the conservation and protection of the environment and the establishment of National Parks and other forms of protected areas'.²⁸ The Act provides that Cabinet may approve management plans for the protection, conservation, management and control of national parks, reserves and coastal zones on government owned land. When preparing a management plan, the MNRE must have regard, amongst other things, to the 'protection of special features, including objects and sites of biological, archaeological, geological, and geographical interest', which may encompass some kinds of national heritage.²⁹

2.20 Reserves may also be created by specific legislation. The *Stevenson Memorial Reserve and Mount Vaea Scenic Reserve Ordinance 1958* declares that land on Mount Vaea given to the government by Robert Louis Stevenson's heirs is to be maintained as the Stevenson Memorial Reserve 'in memory of Robert Louis Stevenson and his love for the people of Samoa'.³⁰ The Ordinance also creates the Mount Vaea Scenic Reserve and provides for regulations to manage and protect the area.³¹

Private Organisations

2.21 The *Robert Louis Stevenson Foundation Act 1991* provides an example of a way in which legislation may assist a private corporation to protect and preserve national heritage. The Act grants the Robert Louis Stevenson Museum/Preservation Foundation, private corporation, a lease over land at Vailima and exempts it from paying certain taxes on the condition that the Foundation remain a non-profit corporation and that at least two fifths of its directors are

²² *The National Parks and Reserves Act 1974*, Long Title.

²³ *Ibid*, s 4.

²⁴ *Ibid*, s 8.

²⁵ *Ibid*, s 5.

²⁶ *Ibid*, s 8 (2)(a).

²⁷ *Planning and Urban Management Act 2004* s 15.

²⁸ *The Lands, Surveys and Environment Act 1989*, Long Title.

²⁹ *Lands, Surveys and Environment Act 1988*s 116.

³⁰ *The Stevenson Memorial Reserve and Mount Vaea Scenic Reserve Ordinance 1958*, s 2.

³¹ *The Stevenson Memorial Reserve and Mount Vaea Scenic Reserve Ordinance 1958*, s 4d.

appointed by the Head of State.³² Section 4 of the Act sets out a list of approved objects of the Foundation, which include the restoration and maintenance of the residence and grounds at Vailima and the preservation of Robert Louis Stevenson's tomb as a national monument of Samoa.³³ Other approved objects of the Foundation extend beyond Vailima, including the renovation of any building of historical significance in Samoa and the establishment, maintenance and management of a museum and walking tracks and parks in Samoa.³⁴

Policies

2.22 The MNRE's National Heritage Conservation Policy 2004, aims to increase awareness among Samoans about natural and cultural heritage and encourage the protection and conservation of heritage sites. The policy has five broad objectives:³⁵

1. to create public awareness and improve understanding of Samoa's natural and cultural heritage;
2. to identify national sites of significant heritage value for preservation;
3. to strengthen co-operation among local stakeholders to implement heritage preservation programs;
4. to incorporate heritage preservation into environmental planning and assessment; and
5. to develop global partnerships to support the preservation of national heritage.

2.23 This policy re-affirmed the Government's 1994 policy decision to conserve four heritage buildings, namely the Court House at Tamaligi, the Western Samoa Trust Estate Corporation Building at Sogi, the Customs House at Savalalo and the Head of State's residence at Motootua, although the Customs House and the Western Samoa Trust Estate Corporation Building have since been demolished.³⁶

2.24 In 2010, the Cabinet Development Committee formulated a Draft Heritage Conservation Policy or Cultural and Natural Heritage Conservation Policy. This Policy 'provides the framework for the conservation, preservation, use, allocation and sustainable management of heritage resources'.³⁷ Additionally the Policy looks to 'improve approaches to heritage planning by ensuring that the preservation of our natural and cultural heritage are fully recognized and taken into account in the formulation and implementation of development programs'.³⁸ This Policy outlines areas of action for the protection of national heritage:³⁹

- (i) The conservation of our cultural and natural heritage requires a more holistic approach so that heritage resources can be utilized and managed in a sustainable

³² *The Robert Louis Stevenson Foundation Act 1991*, s 3.

³³ *Ibid*, s 4.

³⁴ *Ibid*, s 4 (d) – (f).

³⁵ Ministry of Natural Resources, Environment and Meteorology Policy Statement 'National Heritage Conservation Policy'...

³⁶ *Ibid* 35

³⁷ Cabinet Development Committee 'Heritage Conservation Policy or Cultural & Natural Heritage Conservation Policy (2010).

³⁸ *Ibid* 37

³⁹ *Ibid* 37

manner. This calls for a more collaborative and integrated role by all relevant stakeholders to ensure that everyone works together towards preserving our heritage in a sustainable way.

- (ii) Proper planning procedures and mechanisms need to be in place to guide the utilization and management of our heritage resources. This is very much needed to ensure that these resources are not exploited and not abused for commercial gain.
- (iii) Computerised systems and sophisticated methods for storage information is required for efficient and accurate analysis of data to assist with heritage planning decision-making.
- (iv) Awareness and education are important to ensure that the public is fully informed, understand and aware of the underlying significance and values of sustainable management of heritage resources. These resources need to be recognized and preserved for their sustainability and continuity of our culture.

2.25 The implementation of the Policy will take place over time and it will be reviewed to assess the progress.

Advisory Committees

2.26 Two bodies have been established by Cabinet for the conservation and preservation of national heritage. These bodies are responsible for implementing the heritage conservation policies.

2.27 In 2000, the Advisory Committee for Heritage Conservation ('ACHC') was established by Cabinet Directive and is responsible for the preservation of heritage sites in Samoa. As a first priority it was asked to consider the preservation of:

1. The Supreme Court and Justice Department building;
2. The Family Health and Sports Federation building;
3. The Head of State's Residence at Motootua; and
4. The Samoan Trust Estate Corporation Building.

2.28 The Cabinet Directive stated that the Committee was to consist of: the Director of Lands, the Surveys and Environment, the German Consulate in Samoa, the Director of Samoa Land Corporation, architects from the Ministry of Works Transport and Infrastructure, a representative of the Ministry of Foreign Affairs, a representative of the history department at the National University of Samoa, and a representative of the Chamber of Commerce. This Committee was responsible for the preservation of the sites named above and any other heritage sites in Samoa.

2.29 In 2001, the Samoa National Heritage Co-ordinating Committee ('SNHCC') was established. This SNHCC is responsible 'under the World Heritage Convention to provide

report[s] on measures taken to protect and conserve our natural and cultural heritage sites'.⁴⁰ The SNHCC is chaired by the Chief Executive Officer of MNRE, and works with the Ministry of Education, Sports and Culture and other stakeholders to implement the National Heritage Conservation Policy. Currently the SNHCC is continuing to implement its objectives as stated in the National Heritage Conservation Policy.

3. Part two: Heritage Laws in Other Jurisdictions

3.1 As noted in the Introduction section of the Discussion Paper, the terms of reference ask the Commission to research how national heritage boards in other countries are established and operated. This part outlines the role of national heritage bodies in New Zealand, Australia and some Pacific Island nations.

New Zealand

Heritage Orders

3.2 The main way in which heritage places in New Zealand are protected is by including a heritage order in a district plan. The *Resource Management Act 1991* requires each city and district council to have a district plan that controls planning and land use. A heritage order can be included in the district plan to protect 'any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the *tangata whenua* for spiritual, cultural, or historical reasons'.⁴¹

3.3 The *Resource Management Act* designates Ministers, local authorities and the Historic Places Trust as 'heritage protection authorities'.⁴² Heritage protection bodies are responsible for identifying heritage places and, with the assistance of city and district councils, making heritage orders.

New Zealand Historic Places Trust

3.4 The New Zealand Historic Places Trust is a government entity established by statute. The Government provides its funds and its members are appointed by the Minister.⁴³ The role of the Historic Places Trust is to promote the identification, protection, preservation and conservation of the historical and cultural heritage of New Zealand.

3.5 One of the ways in which the Historic Places Trust performs this role is by managing the Register of Historic Places, which identifies places of heritage value in New Zealand. The Register includes historic places as well as *Wahi Tapu* places, which are sacred to Māori in a

⁴⁰ Terms of Reference for Samoa National Heritage Co-ordinating Committee.

⁴¹ *Resource Management Act 1991* s 189 (NZ).

⁴² *Ibid*, s 187 (NZ).

⁴³ *Historic Places Act 1993*. A Bill is currently before the New Zealand Parliament to amend this Act to rename the Historic Places Trust "Heritage New Zealand Pouhere Taonga" and to change its governance structure so that all members will be appointed by the Minister: Heritage New Zealand Pouhere Taonga Bill, introduced 4 October 2011 (NZ).

traditional, spiritual, religious, ritual or mythological sense. Anyone can apply to have a place or area considered for inclusion in the Register. Registration does not equate to heritage protection or create regulatory consequences. Rather, the Register is a way of informing Government agencies and the public about places of historic heritage. For example, Councils are required to have regard to the Register when developing District Plans.⁴⁴ As a result, 92% of places entered on the Register are also protected in some way under a District Plan.⁴⁵

3.6 The Historic Places Trust is also responsible for protecting archeological sites, which include any place associated with human activity that occurred before 1900 and which may provide evidence relating to the history of New Zealand.⁴⁶ The *Historic Places Act* makes it a criminal offence for a person to destroy, damage or modify an archaeological site unless the Historic Places Trust has given authority to do so.⁴⁷

3.7 Finally, the Historic Places Trust directly owns and manages 48 heritage properties.⁴⁸ It may also negotiate covenants with owners or occupiers of a historic place to provide for the protection, conservation and maintenance of the place.⁴⁹

Australia

Heritage lists

3.8 Australia is a federation, and as a result, different heritage protection laws operate at the national, state and territory levels. Every Australian jurisdiction has a heritage list which includes places with heritage ‘value’ or ‘significance’. At the national level, heritage value means ‘the place’s natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians’.⁵⁰ Further criteria for determining heritage value include that the place:

- has importance in the course or pattern, of Australia’s natural or cultural history;
- possesses uncommon, rare or endangered aspects of Australia’s natural or cultural history;
- has potential to yield information that will contribute to an understanding of Australia’s natural or cultural history;
- demonstrates the principal characteristics of a class of Australia’s natural or cultural places

⁴⁴ *Resource Management Act 1991* s 74(2b)(ia) (NZ).

⁴⁵ New Zealand Historic Places Trust, *Briefing for the Incoming Minister for Arts, Culture and Heritage*, 12 December 2011, p 5.

⁴⁶ *Historic Places Act 1993* s 2 (NZ).

⁴⁷ *Ibid*, ss 10, 99 (NZ).

⁴⁸ New Zealand Historic Places Trust, *Briefing for the Incoming Minister for Arts, Culture and Heritage*, 12 December 2011, p 5.

⁴⁹ *Historic Places Act 1993* s 6 (NZ).

⁵⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528. Legislation in the states and territories adopt a similarly broad definition of heritage, although only two jurisdictions, NSW and the ACT, specifically include natural heritage: *Heritage Act 1977* (NSW) s 4A; *Heritage Conservation Act* (NT) s 3; *Queensland Heritage Act 1992* (Qld) s 4; *Historic Cultural Heritage Act 1995* (Tas) s 3; *Heritage Act 1995* (Vic) s 3; *Heritage of Western Australia Act 1990* (WA) s 3. The *Heritage Act 2004* (ACT) and *Heritage Places Act 1993* (SA) do not contain a specific definition of heritage, rather any place that meets the criteria for heritage value is of heritage significance in ss 10 and 16 respectively.

- or environments;
- has importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
- has importance in demonstrating a high degree of creative or technical achievement at a particular period;
- has a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- has a special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history; or
- has importance as part of indigenous tradition.⁵¹

Heritage Councils

3.9 The Commonwealth, and each state and territory has a Heritage Council, established by legislation.⁵² Generally, the role of the Heritage Councils is to advise the government on the identification, management and promotion of heritage. However, Heritage Councils differ in the extent to which they are merely advisory, or perform regulatory functions. At the national level, the Australian Heritage Council administers the Register of the National Estate. The Register is an information source only, and including a place in the Register does not lead to any regulation or legal protections of heritage sites. The Australian Heritage Council also has an advisory role in the listing process under the Commonwealth legislation. In the states and territories, Heritage Councils have a greater role in regulation.

National Trusts

3.10 National Trusts have been established in some Australian states and territories to own and manage historic properties. While National Trusts are established by legislation, they are statutory corporations and independent from the government.⁵³ The concept of a trust is used so even though the National Trust is the legal owner of the property, it holds the property for the benefit of the public, and not to profit its members. Legislation may also place restrictions on how National Trusts may use the property. National Trusts may purchase heritage properties and accept them as gifts or bequests. National Trusts may also sell heritage properties, but may enter into a covenant to ensure that the new owner protects the heritage value of the property. A covenant binds successive owners, and so it provides some heritage protection without the National Trust having to directly own the property.

⁵¹ *Environment Protection and Biodiversity Conservation Regulations 2000* r 10.01A(2).

⁵² *Australian Heritage Council Act 2003* (Cth); *Heritage Act 2004* (ACT) s 16; *Heritage Act 1977* (NSW) s 7; *Heritage Conservation Act* (NT) s 7; *Queensland Heritage Act 1992* (Qld) s 6; *Heritage Places Act 1993* (SA) s 4; *Historic Cultural Heritage Act 1995* (Tas) s 5; *Heritage Act 1995* (Vic) s 6; *Heritage of Western Australia Act 1990* (WA) s 5.

⁵³ *National Trust (Northern Territory) Act 1976* (NT) s 3; *National Trust of Australia (New South Wales) Act 1990* (NSW) s 4; *National Trust of Queensland Act 1990* (Qld) s 3A; *National Trust of South Australia Act 1955* (SA) s 3(2); *National Trust of Australia (Tasmania) Act 1975* (Tas) ss 4, 9; *National Trust of Australia Act 1964* (WA) s 4.

Pacific Island Nations

3.11 Pacific island nations have established a variety of bodies with a role in the protection and preservation of national heritage.

Vanuatu

3.12 The National Cultural Council is a statutory body corporate responsible for the preservation, protection and development of the cultural heritage of Vanuatu. It has six members appointed by the Minister, including representatives nominated by the National Council of Chiefs and the National Council of Women.⁵⁴

3.13 The *Preservation of Sites and Artefacts Act* establishes a classification regime for sites of historical, archaeological, ethnological or artistic significance. The Minister may consult the National Cultural Council before classifying a place as heritage sites.⁵⁵ Heritage Inspectors, appointed by the Council, carry out assessments to inform the Minister's decision and work to identify sites for possible classification.⁵⁶ Before classifying a place as a national heritage site, the Minister must notify the owner, who then has three months to make a submission. After hearing their views, the Minister makes a decision. Classification is by way of written instrument.

3.14 The effect of classification is to create overriding rights and interests in the land. This means that a person with a lease holds the land subject to the obligations and duties created by classifying the place as a heritage site. A person must not modify or destroy a national heritage site unless the Minister has given approval. The Minister must consider the advice of the Council before giving approval.⁵⁷ In addition, a person in possession of a national heritage site must maintain it. If anything occurs that affects the physical condition of the site the person must ensure so far as reasonably practicable that the national heritage value of the site is not significantly affected.⁵⁸ To assist any person who possesses a national heritage site to comply with these obligations, the Minister may provide financial assistance or building materials.⁵⁹

Cook Islands

3.15 The Cook Islands Cultural and Historic Places Trust is responsible for the protection of sites, buildings or natural objects which are historic by reason of association with the past and which provide evidence of cultural, traditional aesthetic or other value.⁶⁰ Historic places may also include archaeological sites and traditional sites that are important by reason of spiritual or emotional association with the Māori people.

3.16 The Trust has a wide range of functions, and has powers to:

⁵⁴ *Vanuatu National Cultural Council Act* c. 186 s 2(3) (Vanuatu).

⁵⁵ *Preservation of Sites and Artefacts Act* c. 39 s 2 (Vanuatu).

⁵⁶ *Ibid*, s 5A (Vanuatu).

⁵⁷ *Ibid*, s 4 (Vanuatu)

⁵⁸ *Ibid*, s 4 (Vanuatu).

⁵⁹ *Ibid*, s 5 (Vanuatu).

⁶⁰ *Cultural and Historic Places Act 1994-95* s 2 (Cook Islands).

- classify buildings which, because of their heritage value, merit protection and preservation;⁶¹
- issue a protection notice, with the approval of the Minister, declaring that a classified building is protected, and must not be demolished, altered or extended or any works carried out without the consent of the Trust;⁶²
- make financial grants and give other assistance to the owner of a building subject to a protection notice;⁶³
- issue, with the approval of the Minister, a notice requiring repair of a building subject to a protection notice;⁶⁴
- acquire and manage any historic place;
- enter into an agreement with other bodies for the management, maintenance, and preservation of a historic place; and
- take steps to make historic places accessible to the public, for example, by opening historic places to the public, erecting signs and publishing books.⁶⁵

3.17 The Trust is managed by a board of experts appointed by the Minister, the Secretary for the Ministry of Cultural Development and the Financial Secretary of the Treasury.⁶⁶ Where a matter relates to any island or *Vaka*, the Board must consult the Cultural and Historic Places Advisory Committee for the relevant *Vaka*.

4. Part three: Options for Reform

4.1 As the summary in part one shows, there is no single body or law dedicated to the protection of national heritage in Samoa. Rather, laws and policies have developed to deal with different kinds of land and different kinds of national heritage. It is not part of the Commission's terms of reference to conduct a wholesale review of heritage laws in Samoa. However, the Commission's recommendations with regard to the creation and operation of a NHB must complement current laws and policies, and should not duplicate or unnecessarily complicate existing procedures. Additionally the Commission's recommendations must be appropriate and workable to suit the unique context of Samoa. Thus, policies and laws based purely on the Western legal systems may not necessarily reflect the values or meet the needs of the Samoan community.

4.2 This section presents three models for a NHB, considers how each might work to protect national heritage and asks questions in order for the Commission to understand the community's views about the best ways to protect Samoa's national heritage.

⁶¹ Ibid, s 25 (Cook Islands).

⁶² *Cultural and Historic Places Act 1994-95* s 26. An appeal to the Minister is available (Cook Islands).

⁶³ Ibid, s 29 (Cook Islands).

⁶⁴ Ibid, s 31 (Cook Islands).

⁶⁵ Ibid, s 14 (Cook Islands).

⁶⁶ Ibid, s 7 (Cook Islands).

What kinds of heritage sites require protection?

4.3 A preliminary question is what kinds of places should be included in the concept of ‘national heritage’? As noted above, the MNRE uses a definition of cultural and natural heritage drawn from the *World Heritage Convention*.⁶⁷ Cultural heritage would cover sites important to Samoa’s history and identity, and could include, for example, the Old Courthouse on Beach Road in Apia. Natural heritage encompasses places of environmental or aesthetic value, for example, the O Le Pupu Pue National Park.

4.4 The definition in the MNRE policy does not expressly refer to cultural landscapes, which are a specific kind of property defined in the World Heritage Convention as the ‘combined works of nature and man’. Cultural landscapes are places that are significant because of the link between people and their environment. They recognise that a people’s unique way of life, their social systems, history and traditional knowledge may be inextricably connected with and expressed by the natural landscape.⁶⁸

4.5 Significant national heritage sites in Samoa often comprise both cultural and natural heritage and may be considered cultural landscapes. For example, Fagaloa Bay and the Ti’avea area has been nominated by the Samoan Government for inclusion in the World Heritage List as a combined cultural natural heritage place. Geologically, this area is one of the oldest in Samoa and has been occupied by people for over 3000 years. Early settlers used local clay to make Lapita pottery, which is significant in the first settlements of people throughout the Pacific. The area is associated with the legends of *Fatutoama* and *Lufasiaitu* and features of the landscape are associated with the resting place of the ancestral god *Moso*.⁶⁹ As this example demonstrates, national heritage sites in Samoa may combine natural and cultural heritage, as well as intangible cultural heritage such as stories and legends.

4.6 Therefore, there is a question about what kinds of heritage sites should be considered and protected by a NHB. A narrow definition of cultural heritage would include only buildings, monuments and natural reserves, whereas a broader definition might include cultural landscapes and places of mixed cultural and natural significance. New Zealand legislation offers one example of a broader definition of a national heritage site, defining it as any ‘place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the *tangata whenua* for spiritual, cultural, or historical reasons’.⁷⁰

Question 1: How should ‘national heritage’ be defined? Should it include:

- cultural heritage such as buildings, archaeological sites and artworks;
- natural heritage such as nature reserves and parks; and/or
- cultural landscapes which combine a mixture of cultural and natural heritage?

⁶⁷ Ministry of Natural Resources, Environment and Meteorology Policy Statement, 2004.

⁶⁸ Anita Smith and Kevin L. Jones, *Cultural Landscapes of the Pacific Islands*, Thematic Study for the International Council on Monuments and Sites (2007), at 9 and 14.

⁶⁹ Erika J. Techera, ‘Synergies and Challenges for Legal Protection of Sacred Natural Sites in the South Pacific’ in Bas Verschuuren et al (eds) *Sacred Natural Sites: Conserving Nature and Culture*, 2010 p 172; Anita Smith and Kevin L. Jones, *Cultural Landscapes of the Pacific Islands*, Thematic Study for the International Council on Monuments and Sites (2007), at 59.

⁷⁰ *Resource Management Act 1991* s 189 (NZ).

A National Heritage Board for Samoa?

4.7 There are three general models for a national heritage body:

- a) **A national heritage board with powers to identify and protect national heritage sites.** A heritage board of this kind would have significant regulatory powers to protect national heritage sites. As well it would be able to alter people's rights, interests in land and property.
- b) **A national heritage board with an advisory role.** This kind of heritage board would provide advice to the government and to the public about the protection of national heritage sites.
- c) **A national trust with funding to own and manage national heritage sites.** A national trust would take a hands-on role in the preservation and management of national heritage sites that it owns or leases.

4.8 The approach taken to heritage protection will necessarily affect the role, functions and composition of any NHB established in Samoa. This section outlines some of the advantages and disadvantages of each model. It is important to note that the models are not necessarily distinct, and the operation and functions of a NHB could mix all three approaches. The Commission does not at this stage prefer one particular jurisdiction's approach and it is possible that a combination of approaches will best suit Samoa's needs.

a) A National Heritage Board with Regulatory Powers

4.9 The first option is to establish a national heritage board with powers to register national heritage sites and to take measures to protect those sites from destruction, damage or modification. This adopts the 'list model' of heritage protection adopted, in different forms, in New Zealand, Australia, Vanuatu and the Cook Islands. In this model, the national heritage board would be responsible for maintaining a list of national heritage sites in Samoa. Once a place is included in the list, it would be an offence for anyone to damage or modify the place unless they have permission.

4.10 There are several benefits of a strong regulatory system based on the list model. First, it would provide strong legislative protection of national heritage sites. An international study identified a lack of local legislation for the protection of heritage sites to be a key reason for the underrepresentation of the Pacific and other regions on the World Heritage List.⁷¹ The list model, which is used in Australia and New Zealand, would meet international criteria for heritage protection.

4.11 Secondly, listing national heritage sites on a publicly available register provides certainty to owners and occupiers of land, as well as the community, about what sites are protected from damage or destruction. A third benefit is that the listing model incorporates community

⁷¹ Jukka Jokilehto, *The World Heritage List: Filling the Gaps - An Action Plan for the Future*, International Council on Monuments and Sites, 2005, at 93

involvement in decisions about the protection of national heritage. This is important, given that national heritage belongs to the nation and that all Samoans have an interest in heritage, not just the owners of the property.

4.12 Finally, a listing regime would be compatible with current planning laws. Under the Planning and Urban Management Act, a management plan may already prohibit or restrict work on particular sites. A heritage protection procedure like that used in New Zealand, in which heritage orders made by a NHB are incorporated into a district plan, may therefore be workable in Samoa.

4.13 However, the list model raises some problematic issues in the Samoan context. It is important to acknowledge that including a site on a heritage list would affect the rights and obligations of landowners and people who use the land. Owners would not be able to develop or modify the heritage site, and could even be required to take positive steps to maintain it.

4.14 A ‘one size fits all’ approach may not be appropriate given the different kinds of rights and interests in land in Samoa. Alternatively, the NHB’s powers could be limited to regulating government-owned land only. This would, however, leave heritage sites on the vast majority of land outside the powers of the NHB.

4.15 A second issue relates to who makes a final decision about (a) whether to include a place on the heritage list; and (b) whether to approve actions that may damage or modify a place on the heritage list. Overseas jurisdictions take different approaches, with some favouring the NHB, and others the Minister as the final decision maker. A ‘best practice’ model put forward by some heritage professionals, argues that the decision about whether to include a place on the heritage list requires historical, archaeological and other expertise to determine if a place has heritage value and should be made by independent experts on a NHB. On the other hand, decisions about the development or modification of a heritage site involve broader economic and social considerations and therefore should be made at the political level, by a Minister who is accountable to parliament and the people.⁷² In Samoa, there is also a question about whether village *fono* should have a role in decision-making about heritage sites on customary land.

Question 2: *Should Samoa adopt a ‘list model’ of heritage protection, in which places of national heritage significance are registered and thereby protected by law from damage or destruction?*

Question3: *Should a National Heritage Board have power to list heritage sites on all government, freehold and customary land in Samoa? Are there any particular problems with listing sites on customary land?*

⁷² Andrew L. Mackintosh and Deb K. Wilkinson, ‘Best Practice Heritage Protection: Australia’s National Heritage Regime and the Tarkine’ (2012) 24 *Journal of Environmental Law* 75.

Question 4: *If Samoa were to adopt a list model of heritage protection:*

- 4.1 *Should the National Heritage Board, Minister, or some other body have the final say whether or not to include a site on the national heritage list?*
- 4.2 *Who should be consulted before a decision is made whether or not to include a site on the national heritage list?*
- 4.3 *Should a National Heritage Board, Minister or some other body have the final say whether or not to approve works to modify, damage or destroy a national heritage site? Should there be a right to appeal?*

b) A National Heritage Board with an Advisory Role

- 4.16 A second option is to establish a national heritage board which does not itself have powers to manage and protect heritage sites, but can advise those who do. A NHB of this kind would be a body of experts who could identify and list heritage sites in Samoa. The list would be an information source only and would not lead to any legal protection of the sites. The National Register of Historic Places in New Zealand administered by the New Zealand Historic Places Trust, and the Register of the National Estate in Australia administered by the Australian Heritage Council, are examples of this approach.
- 4.17 A benefit of this ‘advisory’ model of NHB is that it can provide advice and support that is appropriate to the specific site, taking into account whether it is on government or customary land and its particular heritage values. For example, the Planning and Urban Management Board and other bodies that regulate the use of land could be required to consult the NHB in relation to any proposal for development on a site on the national register. A NHB could also advise the village *fono* seeking to protect a heritage site on customary land. The major disadvantage of this approach is that the protection of national heritage sites would be ad hoc and dependent on the actions of other bodies outside the NHB’s control.
- 4.18 A NHB of this kind could also have an important advocacy and educative role. It could be designed to meet some of the objectives of the National Heritage Conservation Policy relating to the development of management plans for heritage sites and guidelines to control and monitor development impacts on heritage sites. Functions of this kind could be bestowed on a NHB with regulatory powers under the ‘list model’ as well as a purely advisory NHB. There would be a concern however, that in this function the NHB would duplicate work that is already performed by the MNRE.

Question 5: *Should a National Heritage Board’s functions be limited to providing advice to government agencies, communities and others on how best to protect national heritage sites in Samoa?*

Question 6: *Should a National Heritage Board be responsible for maintaining a register that records places of national heritage significance in Samoa as a source of information only?*

c) A National Trust

- 4.19 A third option is for a NHB to be established and operate as a national trust. A national trust could be a statutory corporation or a government entity whose purpose is to acquire, manage and preserve national heritage sites. National heritage places owned by the government may be transferred or leased to the national trust, and the trust could receive privately owned heritage places as a gift or bequest. While customary land cannot be alienated, a national trust could enter into agreements or bind the owners of customary land with a covenant that protects the national heritage site from damage.
- 4.20 A significant issue that arises in relation to a NHB of this kind relates to funding. The ability of a national trust to preserve, maintain and protect trust properties will be limited by lack of funds. Trusts overseas rely on government funding, membership fees, donations, fundraising and entry fees collected at heritage sites. Further, a national trust is only able to protect and preserve those heritage sites that it owns, leases or otherwise controls. Other national heritage sites would remain outside its protection.
- 4.21 Some national trusts overseas have an advocacy and educative role in relation to national heritage and it is possible that a national trust could be combined with the advisory model described in option B above, as is the case with the Historic Places Trust of New Zealand. Alternatively, the Cook Islands Cultural and Historic Places Trust have strong regulatory function as well as the ability to own and manage historic sites.

Question 7: Should a National Heritage Board be established as a national trust with powers to own and manage property for the purpose of maintaining and preserving national heritage sites for the benefit of the public?

Question 8: Should a National Heritage Board operating as a national trust also have:
(a) a regulatory role, as described in Questions 2, 3 and 4; or
(b) an advisory role, as described in Questions 5 and 6?

Establishment, Membership and Operation of a National Heritage Board

- 4.22 The three options set out above deal with the *functions* of a NHB. The way in which a NHB is established and operated depends in some ways on what its functions are and how independent it is from government. This final section considers some of the details of how a NHB might be established and operated.

How should a NHB be established?

- 4.23 National heritage boards overseas are generally established by legislation. This means that an Act of parliament sets out the board's objectives, powers and functions. An alternative is for a national heritage board to be created by policy, like the various committees described in part one. Policy is more flexible than legislation, but this flexibility can lead to uncertainty about the powers and role of the NHB. In the Commission's view, it

may be appropriate for a NHB with an advisory role to be established by policy. However, a NHB with regulatory powers or power to own and manage government property should properly be established by legislation so that its rights, duties and powers are clearly defined. In addition, policy is much easier to change than legislation, and is generally implemented by public servants. A NHB established by legislation, on the other hand, may be more independent of the government.

Question 9: *Should a National Heritage Board be established and governed by legislation or by government policy?*

Membership

4.24 Membership of a national heritage board also depends on what its functions and powers are. For example, it might be appropriate that a Minister is a member of a NHB with a regulatory role, but it makes little sense for a Minister to be a member of a NHB whose role is to advise the government.

4.25 Membership of NHBs overseas tends to be based on expertise and experience in heritage conservation, or specific disciplines such as history, archaeology, architecture or nature conservation. Members of Heritage Councils in Australia may also include representatives from the government, professional organisations and community groups such as Indigenous Peoples, building development or farmers associations and historical societies.⁷³ This spread of interests reflects the Heritage Councils' regulatory role in heritage protection, and recognizes that heritage regulation must balance interests in conserving heritage sites and using land for economic and other development. Members are usually appointed by the Minister, with some input from various interest groups.

4.26 The directors or trustees of National Trusts in overseas jurisdictions may be appointed by the responsible minister, elected by the members of the National Trust or a combination of both.

Question 10: *Who should be members of a National Heritage Board?*

Question 11: *How should members be appointed or elected?*

Oversight and accountability

4.27 It is important that any body established to perform a public function is subject to some degree of oversight and is accountable for how it operates and spends public funds. The type and degree of oversight would depend on the extent of the NHB's powers, the degree to which it is publicly funded and how independent it is from government.

⁷³ See, eg, *Australian Heritage Council Act 2003* (Cth) ss 6-7; *Heritage Act 2004* (ACT) s 17; *Heritage Act 1977* (NSW) s 8; *Heritage Conservation Act* (NT) s 8; *Queensland Heritage Act 1992* (Qld) s 10; *Heritage Places Act 1993* (SA) s 5; *Historic Cultural Heritage Act 1995* (Tas) s 6; *Heritage Act 1995* (Vic) s 7; *Heritage of Western Australia Act 1990* (WA) s 19.

4.28 Oversight of a NHB with regulatory powers, following the list model of heritage protection described above, could include avenues to appeal decisions to the Minister or a court. Legislation could also require a NHB to implement directions from the Minister, but this would curtail its independence from government.

4.29 Oversight of a NHB that has an advisory function or operates as a national trust could include a requirement that the NHB provide an annual report to the Minister or Parliament to explain how it has acted in the public interest, and submit to auditing to account for how it spends public funds. A national trust that is a statutory corporation would also be subject to the reporting and auditing requirements of company law.

***Question 12:** What oversight mechanisms should be in place to ensure that a National Heritage Board operates in a lawful and accountable manner?*

5. Call for Responses

The Commission seeks your response on the issues that have been raised in this Discussion Paper. The following is a summary of the questions that we seek your views on:

1. *How should 'national heritage' be defined? Should it include:*
 - *Cultural heritage such as buildings, archaeological sites and artworks;*
 - *Natural heritage such as nature reserves and parks; and/or*
 - *Cultural landscapes which combine a mixture of cultural and natural heritage?*
2. *Should Samoa adopt a 'list model' of heritage protection, in which places of national heritage significance are registered and thereby protected by law from damage or destruction?*
3. *Should a National Heritage Board have power to list heritage sites on all government, freehold and customary land in Samoa? Are there any particular problems with listing sites on customary land?*
4. *If Samoa were to adopt a list model of heritage protection:*
 - 4.1 *Should the National Heritage Board, Minister, or some other body have the final say whether or not to include a site on the national heritage list?*
 - 4.2 *Who should be consulted before a decision is made whether or not to include a site on the national heritage list?*
 - 4.3 *Should a National Heritage Board, Minister or some other body have the final say whether or not to approve works to modify, damage or destroy a national heritage site? Should there be a right to appeal?*
5. *Should a National Heritage Board's functions be limited to providing advice to government agencies, communities and others on how best to protect national heritage sites in Samoa?*

6. *Should a National Heritage Board be responsible for maintaining a register that records places of national heritage significance in Samoa as a source of information only?*
7. *Should a National Heritage Board be established as a national trust with powers to own and manage property for the purpose of maintaining and preserving national heritage sites for the benefit of the public?*
8. *Should a National Heritage Board operating as a national trust also have:*
 - (a) *a regulatory role, as described in Questions 2, 3 and 4; or*
 - (b) *an advisory role, as described in Questions 5 and 6?*
9. *Should a National Heritage Board be established and governed by legislation or by government policy?*
10. *Who should be members of the National Heritage Board?*
11. *How should members be appointed or elected?*
12. *What oversight mechanisms should be in place to ensure that a National Heritage Board operates in a lawful and accountable manner?*

The Commission would prefer to receive all responses in writing. It is not necessary to respond to all questions.

Responses should be sent by 23 July 2012 to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to commission@samoalawreform.gov.ws.