



Pule a le Matai Sa'o

Final Report (FR 18/17)

February 2017



GOVERNMENT OF SAMOA

**OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA LAW
REFORM COMMISSION**

The Honourable Speaker
THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with section 9 (2) of the *Law Reform Commission Act 2008*, I have the honour to submit to you copies of the Report on the Pule a le Matai Sa'o Project as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations on Pule a le Matai Sa'o after public consultations and research in accordance with section 4 of the *Law Reform Commission Act 2008*.

(Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi)
**PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM
COMMISSION**



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(Ulupale Fuimaono)

ACTING EXECUTIVE DIRECTOR
SAMOA LAW REFORM COMMISSION

Table of Contents

PREFACE	5
1. INTRODUCTION	7
A. Background:.....	7
B. Structure of the Report.....	8
2. FA'AMATAI SYSTEM AND THE FA'ASAMOA	9
A. Overview of the Fa'amatai	9
B. <i>Pule</i> (Authority).....	10
C. Duties of a <i>matai</i>	11
D. Duties of a <i>Sa'o</i>	11
3. CURRENT LAW	13
A. Constitution of the Independent State of Samoa	13
B. Land and Titles Act 1981	14
4. KEY ISSUES:	17
A. Eligibility for Appointment as <i>Matai</i> and <i>Matai Sa'o</i>	17
B. Duties of a <i>Sa'o</i>	30
C. Removal of <i>Matai Sa'o</i> and <i>Matai</i>	40
D. Multiple <i>Sa'o</i> and <i>Matai</i>	48
F. Dispute Resolution	62
G. Non Legislative measures	75
5. LIST OF RECOMMENDATIONS:	80

PREFACE

The Samoa Law Reform Commission received a reference from the Honourable Prime Minister, in April 2015, to address abuses of powers of a *Matai Sa'o* (titular head) of the family. The terms of reference are a response to common complaints of abuse of power by the *Matai Sa'o* primarily related to *matai* titles and customary land which has resulted in numerous disputes between family members and the family *Sa'o*.

Due to the sensitive nature of this project and the approaching general elections which was the main focus of the public during that time, work on this project commenced in March 2016. A Discussion Paper was published in August 2016 following preliminary research and consultations to seek public input on the relevant issues.¹

Public Consultations took place over a four day period in Upolu and Savaii in October and November 2016 on issues raised in the Discussion Paper, with over 700 members of the public in attendance, indicating high levels of public interest. To garner as representative a view as possible, public consultations were carried out with selected constituencies participating on different dates. Public notices of the consultation were issued for extensive broadcast on television, radio and social media. To disseminate notice of public consultations to rural areas, the Commission, through the Ministry of Women, Community and Social Development, also notified *Pulenuu* and *Sui Tamaitai o le Nuu* around the country.

The public were also invited to provide individual submissions to the Commission on any issues raised in the Discussion Paper. The Commission has received an unprecedented number of individual submissions from the public illustrating the magnitude and importance of the issues considered in this review.

As part of the law reform process, the Commission has compiled, analysed and carefully considered all submissions received from the public in making its recommendations.

This Report sets out the Commission's recommendations for reform on the key issues raised in the Discussion Paper and in public consultations. In response to issues arising from families having more than one *Matai Sa'o*, the Commission provides some options for reform for the government, given the complexity of the matter and the diverse views of those affected.

The Commission acknowledges the sensitive nature of this project as with all matters that touch upon our *aganuu ma le fa'asamoa*, especially in regards to the importance of the *Matai Sa'o* within the *fa'asamoa*. Therefore, great care has been taken to ensure that

¹Those who consulted include, the Chief Executive Officer (**CEO**) of the Ministry of Justice and Courts Administration (**MJCA**), Papalii John Taimalelagi and senior officers of the Land and Titles Court Division of MJCA, the former President of the Land and Titles Court, Tagaloa Tuala Kerslake and the former CEO of MJCA, Masinalupe Tusipa Masinalupe.

all recommendations for reform (legislative and non-legislative), take into account Samoan custom and tradition and its importance in Samoan life. To this end, the Commission notes that there is not a 'one size fits all' approach and that each family, village and community may practice *fa'asamoa* differently; *E talalasi le atunuu. E tofu le nu'u ma lonafaasinomaga, tofu le nuu ma ana talatuu ma lanamau.*

The Commission acknowledges the assistance of the Chief Justice Honourable Tiavaasue Patu Falefatu Sapolu, the former President of the Land and Titles Court, Tagaloa Tuala Kerslake, the Chief Executive Officer of the Ministry of Justice Courts and Administration (MJCA) Papalii John Taimalelagi Afele and staff of the Land and Titles Court Division of MJCA, former Chief Executive Officer of MJCA, Masinalupe Tusipa Masinalupe, and members of the public who were interviewed by Commission to share their expertise in the *fa'asamoa*. The Commission expresses its gratitude to those whom participated in public consultations which has assisted the Commission tremendously, as well as members of the Advisory Board for their continued support in the Commission's work. The Commission also acknowledges MJCA, the Office of the Attorney General, the Ministry of Women Community and Social Development, and the Ministry of Police for their assistance with the public consultations.

1. INTRODUCTION

A. Background:

1. The terms of reference for this project were to consider the incidence of abuse of power by *Matai Sa'o*, particularly in relation to *matai* titles and customary land, and recommend measures to reduce this in future.
2. The concept of *matais* or *Sa'o* abusing their power in decision-making has been a common issue for years in the Lands and Titles Court of Samoa (**Court**).² Often allegations are made about a *Matai Sa'o* making significant decisions affecting the welfare of the family, without adequate or prior consultation with all extended family members.³ These disputes often relate to the use, settlement or leasing of customary land, allocation of *matai* titles, or allocation of family funds under the control of the *Matai Sa'o*.⁴ There are also numerous claims of the *Sa'o* being biased in their decision-making and treating family members unfairly or providing special treatment to other family members,⁵ and bestowing *matai* titles to ineligible recipients or those who have not served the family. Other concerns raised were in relation to the mass bestowal of *matai* titles that is often exacerbated by multiple *Matai Sa'o* within a family⁶ and also situations where a *Matai Sa'o* residing overseas opposes decisions made by *matai* or the *Matai Sa'o* living in Samoa.
3. For the purposes of this report, the Commission distinguishes between *matai* and *Matai Sa'o*, to make it clear when additional or different duties, powers, appointment or removal procedures exist between the two. When the Commission refers to '*matai*' generally however, it refers to *matai* titles entered in the Register of *Matai* established and kept under the *Land and Titles Act 1981*, and does not intend to capture titles held as a complimentary honour only.
4. Finally, the Commission received an overwhelming number of submissions to change the term "*Sa'o*", "*Matai Sa'o*" or "*Pule*". It was perceived by the majority who

² It was revealed that in relation to cases brought before the Court, about 10% against a *Matai Sa'o* were successful in removing the *Matai Sa'o*, whilst 90% of cases were unsuccessful. Consultation with Ministry of Justice and Courts Administration (Ministry of Justice and Courts Administration Complex, Mulinuu, 23 February 2016).

³ Some examples include allegations that the *Matai Sa'o* depositing family money into his daughter's account without prior consultation with other family members; proceeded with a *umusaga o le fale o le aiga* without consulting all sides of the extended family; misusing family funds under the control of the *Matai Sa'o*; being unable to resolve family disputes; failing to carry out duties in acting as a trustee (*osiaiga*) for the *aigapotopoto* in maintaining family assets; performing actions which brought shame upon the family. Tagaloa. D. C. Kerslake, Former President of Lands and Titles Court (consultation, Ministry of Justice and Courts Administration Court Complex, Mulinuu, 17 March 2016).

⁴ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

⁵ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

⁶ Tagaloa. D. C. Kerslake, Former President of the Land and Titles Court (Consultations, Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

attended public consultations that the terms ‘*Sa’o*’, ‘*Matai Sa’o*’ or ‘*Pule*’ infer that the *Sa’o* has absolute authority and the sole authority over family members as well as family properties (*pule i tagata toe pule i eleele*). In addition, the *Sa’o* is perceived to be always making the right decision, as in the literal translation of ‘*Sa’o*’. However, this is not the correct interpretation of the role of the *Sa’o* in the *fa’asamoa*. Suggestions by the public of suitable terms that better encapsulate the role of the *Matai Sa’o* as a custodian or trustee of the family, whose authority derives from and depends on the consensus of family members.

5. The range of suggestions included Taitai O Le Aiga (leader of the family); TausiMeasina (custodian of the family estate/assets); *Matai* TausiAiga (family caretaker); Leoleomea A Le Aiga (guardian of the family); Fa’amalumu or *Pule* Fa’amalumu (provider of protection); Fa’atama (father-like figure); Sui O Le Aiga (representative of the family). This illustrates the differences in how a *Sa’o* is perceived in different families as also evident in the diverse submissions, and highlights the complexity of this project.
6. It is important to note that this report strongly emphasizes the role of the family and *Matai Sa’o* in making decisions according to what is best for the family, and resolving any differences in accordance with the families’ customs and traditions, and the *Fa’asamoa*. Recommendations include legislative and non legislative measures. Most of the legislative measures recommended are consistent with the majority of views from those consulted, which strongly advocated that any legislation should reflect as much as possible the roles, duties and expectations of a *Matai Sa’o* that are common across families in Samoa, despite differences in how a *Sa’o* is perceived in different families.

B. Structure of the Report

7. The Report has been structured so that the focus is on key issues identified by the Commission and raised in public consultations. The Report is divided into four parts:
 - Part 1 discusses the *Faamatai* System and the *fa’asamoa*, providing a brief overview of *pule* (authority) that is central to the *faamatai* system. It also briefly discusses the duties of a *matai* and a *Matai Sa’o*.
 - Part 2 discusses the *matai* system and the *fa’asamoa*
 - Part 3 discusses the current law.
 - Part 4 covers key issues identified in submissions and public consultations, and discusses the Commission’s views and recommendations. The issues include:
 - Eligibility for appointment as a *Matai* and *Matai Sa’o*
 - Duties of a *Sa’o*, *Matai* and *Suli*
 - Removal of a *Sa’o*
 - Multiple *Sa’o* and *matai*
 - Dispute resolution
 - Non legislative measures

Submissions will also be set out under each issue.

- Part 5 provides a list of the Commission’s recommendations for reform.

2. FA’AMATAI SYSTEM AND THE FA’ASAMOA

A. Overview of the Fa’amatai

1. The *fa’asamoa* is simply the Samoan way of life. *Fa’a-Samoa* embodies and incorporates itself into every aspect of everyday life of a Samoan: economic, political, social and cultural. It prescribes traditions and cultural norms as well as indicating Samoans' relationships to one another and to persons holding positions of authority. Within the heart of the *fa’asamoa* is the concept of “*faamatai*” (chiefly system), which shapes the behaviour and lifestyle Samoans and their obligations to the *aiga* (family), community and church.⁷
2. *Samoa ua uma ona tofi* - the maxim states that Samoa is already divided hierarchically within families, villages and the larger community. This categorization embraces the *fa’amatai* system hierarchy of titles through genealogy and kinship.⁸This system is founded on customs and traditions that are village based and tied to customary land and titles.⁹
3. *Matai* titles are the common property of a lineage consisting of all those who are connected to the titles.¹⁰ A *matai* or chief is selected by the extended family through consensus to represent its (family) interests within a village or the extended family itself and is “.....committed to the achievement and maintenance of peace within the *matai’s* respective village or family.”¹¹
4. For ease of understanding, the following diagram compares the *fa’amatai* structure to a corporate structure where the *Sa’o* is the managing director, the *matai* hierarchy is the board and management, and the family members are the shareholders of various classes depending on connections to the family unit and the nature and status of one’s membership in *aiga*.¹²

⁷ Susana Taua’a, ‘The Samoan Fa’a matai System: Social Protection and Governance Issues’ (2014) 34(1) *Journal of Pacific Studies*.

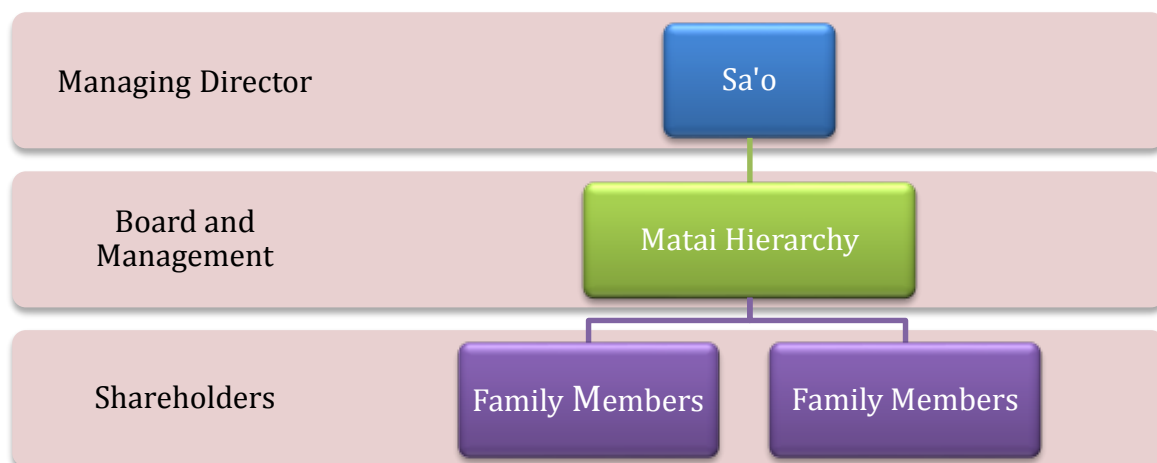
⁸ See Saleimoa Vaai, *Samoa fa’amatai and the rule of law* (National University of Samoa, 1999) 29.

⁹ Susana Taua’a, ‘The Samoan Fa’amatai System: Social Protection and Governance Issues’ (2014) 34(1) *University of the South Pacific Journal of Pacific Studies*, 59.

¹⁰ Malama Meleisea, ‘Governance, Development and Leadership in Polynesia: a microstudy from Samoa’, in E Huffer and Asofou So’o (eds), *Governance in Samoa: Pulega I Samoa* (Asia Pacific Press and Institute of Pacific Studies, 2000) 189-198.

¹¹ Saleimoa Vaai, *Samoa fa’amatai and the rule of law* (National University of Samoa, 1999) 30.

¹² Saleimoa Vaai, *Samoa fa’amatai and the rule of law* (National University of Samoa, 1999) 42-43.



B. *Pule* (Authority)

5. Central to the *faamatai* system, is the *pule* that governs the use, distribution, and protection of village customary land and resources.¹³ This *pule* is not possessed solely by a *matai* or groups of *matai* but is also vested in other elements of the family.
6. In village governments, *pule* is divisible into 4 types of authority: *pule faavae* (constitutive authority), *pule faaoga* (exploitative authority), *pule faasoa* (distributive authority) and *pule faamalumu* (protective authority).¹⁴
7. The traditional authority of *Pule Faavae* (Constitutive Authority) is arguably the most extensive type of authority which is exercised by heirs of *matai*, and which all village property and occupants are subject to. This is the authority to act in a manner that will affect or likely affect the constitution of the extended family. This relates to significant matters such as the appointment of successors to founding titles, and actions which may remove group property out of its territory of influence and control. For example, the alienation of a *matai* title especially that of a founding title or *matai faavae* to another group, or the absolute alienation of family land.¹⁵
8. It is suggested that actions which affect the family estate would be treated by the family as affecting its constitution and those actions could only be considered valid if approved by the family's constitutive authority.¹⁶

¹³ Susana Taua'a, "The Samoan Fa'amatai System: Social Protection and Governance Issues" (2014) 34(1) *Journal of Pacific Studies*.

¹⁴ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999).

¹⁵ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999). Note the absolute alienation is no longer possible under Article 102 of the Constitution of the Independent State of Samoa 1960.

¹⁶ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999).

9. On the other hand, the traditional authority of *Pule Faaaoga* (Exploitative Authority) gives individuals the right to control and use family land being occupied and allocated to them to utilize. However, even though the family land is in the exclusive possession and use of several generations of a particular member or members, the ownership of the land remains in the extended family, under its constitutive authority. This concept is derived from the established principle of Samoan customary land that all family land is owned by extended family in perpetuity and not by a certain individual.¹⁷

10. As Chief Justice Patu Tiavaasue Falefatu Maka Sapolu stated:

*Customary land is not land belonging to individuals. Land is under the Protective authority of the Alii and Faipule. Subject to this is the Pule of the matai which authorises the exploitation and usage of family land. The individual has no land, it is land given by the village to the matai. Just because the individual occupies and uses the land is not his to own.*¹⁸

C. Duties of a *matai*

11. The *matai* are responsible for maintaining the respect, traditions, and administration of the village. The overarching concept of a duty of a *matai* or a title holder is to represent the interests of the extended families who bestowed the family title to the *matai*.¹⁹ This responsibility aligns with the Samoan proverb “*O le alai le pule o le tautua*”²⁰ which is the notion that in order to lead, one must serve.

12. There are two categories of *matai* being the *ali'i* and the *tulafale*. The *ali'i* title is a high chief title which links to the historical genealogies of Samoans which are considered sacred as it carries with them the *mana* of the gods. The *tulafale* or talking chief title carries special duties which vary as some are associated with service to an *ali'i*, or reciting historical knowledge and so forth.²¹ The role of the *ali'i* is to make final decisions having listened to the advice of the *tulafale* who speaks for and issues orders from the *ali'i*.

D. Duties of a *Sa'o*

13. At the top of the *matai* hierarchy is the *Sa'o*. An extended family may have several *matai* titles, but the highest ranking and the most senior title of the family is

¹⁷ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999).

¹⁸ Record of Lands and Titles Seminar Proceedings, in Saleimoa Vaai, *Samoa fa'amatai and the Rule of law*, (National University of Samoa, 1999) 46.

¹⁹ Malama Meleisea, 'Governance, Development and Leadership in Polynesia: a microstudy from Samoa', in E Huffer and Asofou So'o (eds), *Governance in Samoa: Pulega I Samoa* (Asia Pacific Press and Institute of Pacific Studies, 2000) 189-198.

²⁰ The path to leadership/authority is through service.

²¹ Malama Meleisea, *Lagaga: A short History of Western Samoa* (University of the South Pacific, 1987).

normally held by the highest ranking person of the *aiga* known as the *Matai Sa'o* or *Matai Sili* of the extended family.²²

14. The *Sa'o* is the overall governing authority with multiple functions under customary law including legislative, executive and judicial functions over family estate and members.²³
15. The *Sa'o* of the family is vested with authority and power to allocate land and distribute family wealth – this is known as *Pule Faasoa* (Distributive Authority). Through this distributive authority, the *Sa'o* has the power to:
 - allocate land amongst members as the *Sa'o* renders appropriate for the use of the land,
 - appoint successors to *matai* titles of less rank based on either the group history or authority vested in the *Sa'o*, approved by group members, for the convenience of group administration.²⁴
16. The overall purpose of *Sa'o* responsibilities is to promote the social and economic welfare of the family. The *Sa'o* is expected to maintain peace and stability within the family,²⁵ look after the family's interests and affairs, make decisions in the best interests of the family and be accountable to the family.²⁶ The *Sa'o* leadership and protection of family assets and heirlooms (*measina*) inspires respect from the family.²⁷
17. The *Sa'o* is expected to consult and seek advice from other group members, particularly other *matai*, especially on more important issues affecting the family's well-being. The *Sa'o* should seek the opinions of *suli* in making decisions that create harmony within the family.²⁸ *Matai* members of the group and the *Sa'o* generally form a governing body that consults, formulates and implements important family projects relating to its social and economic well-being.²⁹

²² Similarly the principal chief of the village is the *Matai Sa'o* of the village.

²³ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999) 42-43.

²⁴ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999).

²⁵ Patu Ativalu (and Tofaeono Tau) *Matai Sa'o* (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

²⁶ Masinalupe Tusipa Masinalupe (Consultation, Samoa Law Reform Commission Conference Room, Level 1, FMFM II Building, Matagalalua, 26 May 2016).

²⁷ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

²⁸ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

²⁹ Saleimoa Vaai, *Samoa fa'amatai and the Rule of law* (National University of Samoa, 1999) 42-43.

18. The *Sa'o* and *matai* of the family are also expected to protect family members and property from harm and usurpation by others. This responsibility is known as *Pule Faamalumalu* (Protective Authority).³⁰
19. The power of the *Matai Sa'o* is limited however, in the selection of another *Matai Sa'o* to succeed the *Sa'o* title, which is normally a decision made by *suli*.³¹
20. There are *Sa'o* specific to families only and *Sa'o* specific to family and village.³²

3. CURRENT LAW

A. Constitution of the Independent State of Samoa

Provisions relating to matai titles and customary land

1. The Constitution of Samoa contains provisions governing *matai* titles and customary land. These provisions set out the principles of dealing with *matai* titles and customary land which are mainly based on the *fa'asamoa*. For example, *matai* titles shall be held according to Samoan custom and usage, and to the law relating to such custom and usage.³³
2. Similarly, customary land in particular, is also to be held in accordance to Samoan custom and usage and should not be alienated or disposed of.³⁴ Alienation and the disposal of customary land is deemed unlawful under the law. However, there are certain circumstances where an Act of Parliament may authorise the leasing and use of customary land for public purposes and development.³⁵

³⁰ A practical demonstration of the protective authority of *matai* in relation to general family welfare is the practice of *ifoga* involving humble offerings of amends to injured parties. The family with a *matai* leading the *ifoga* would sit outside the residence of the *matai* of the injured person's family with fine mats over their head is offering themselves as objects for venting anger and revenge by the victim's family. In doing so the *matai* and his *aiga* humble themselves to the mercy of the aggrieved family and are exposed to serious harm and even death; Saleimoa Vaai, *Samoa fa'amatai and the rule of law* (National University of Samoa, 1999).

³¹ Patu Ativalu (and TofaeonoTau) *Matai Sa'o* (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

³² Patu Ativalu (and TofaeonoTau) *Matai Sa'o* (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

³³ *Constitution of the Independent State of Samoa 1960* (Samoa) art 100.

³⁴ *Constitution of the Independent State of Samoa 1960* (Samoa) art 101.

³⁵ *Constitution of the Independent State of Samoa 1960* (Samoa) art 102; *Alienation of Customary Land Act 1965* (Samoa) provides laws governing the leasing and licensing of customary land for certain purposes. Generally, the leasing and licensing of customary land for agricultural or pastoral purposes to any Samoan who is not a *matai* title holder is prohibited. However, the Minister for Natural Resources and Environment can grant a license or a lease in accordance with Samoan custom and usage. The Minister also takes into account the interest of the beneficial owners and the public.

B. Land and Titles Act 1981

Purpose of the Act and Jurisdiction of the Court

3. The *Land and Titles Act 1981* (**the Act**) deals specifically with matters relating to customary land, *matai* titles and the Land and Titles Court (**the Court**).³⁶
4. The Court has exclusive jurisdiction to deal with cases involving Samoan names and titles as well as claims and disputes relating to customary land.³⁷ In relation to names and titles, the Court has the power to make orders or declarations necessary to preserve or define such names and titles, and define and preserve the rights and obligations resulting from these names and titles.³⁸ The Court also deals with all claims and disputes relating to customary land and the right of succession to property or land held in accordance with the customs and usages.³⁹

Definition of 'Matai title'

5. The Act currently defines '*Matai*' as a person whose title has been registered under the Act.

Laws applied by the court when making decisions

6. The Court applies custom and usage, laws relating to custom and usage and any other legislation applicable to the Court in all matters that come before it.⁴⁰ Furthermore, the Court is expressly required to decide matters in accordance with what it considers to be fair and just between the parties.⁴¹ Aside from these provisions, the Act provides little guidance on how the Court decides what is fair and just.
7. In consultations with the Former President of the Court, he informed the Commission that in determining what is fair and just, the Court in practice applies the *fa'asamoa* wisdom (*tofamamao ma le fa'autautagaloloto*).⁴² In doing so, the Court is mindful of the various interpretations of *fa'asamoa* that Samoan families, communities and villages have.⁴³ Some examples provided include that villages may not necessarily practice the exact same custom in resolving family disputes, and that roles and duties of *Suli* may differ from village to village.

³⁶ *Land and Titles Act 1981* (Samoa) Long title.

³⁷ *Land and Titles Act 1981* (Samoa) s 34.

³⁸ *Lands and Titles Act 1981* (Samoa) s 34(b).

³⁹ *Lands and Titles Act 1981* (Samoa) s 34(c).

⁴⁰ *Lands and Titles Act 1981* (Samoa) s 37(1).

⁴¹ *Lands and Titles Act 1981* (Samoa) s 37(2).

⁴² Tagaloa. D. C. Kerslake, Former President of Lands and Titles Court (Consultation, Ministry of Justice and Courts Administration Court Complex, Mulinuu, 17 March 2016).

⁴³ Tagaloa. D. C. Kerslake, Former President of Lands and Titles Court (Consultation, Ministry of Justice and Courts Administration Court Complex, Mulinuu, 17 March 2016).

Practice and Procedures of the Court

8. The Act provides that the Head of State has the power (acting on the advice of Cabinet) to make rules to regulate court practice and procedure.⁴⁴These include rules relating to:
- trial management;
 - the adjournment of proceedings;
 - mediation and preliminary conferences prior to a hearing;
 - the prevention or termination of frivolous or vexatious proceedings;
 - the summary disposal of proceedings;
 - how a person makes a submission to the Court;
 - dispute resolution processes and the procedure to be followed when any dispute resolution process ends;
 - consent orders where parties have reached agreement about a matter in dispute in the proceedings; and
 - such other matters as the Court thinks appropriate.
9. The Act provides that where there are no rules regulating court practice and procedure, the Supreme Court Rules are applied unless inconsistent with or inapplicable to the Act.⁴⁵Furthermore, in matters of practice or procedure not provided for, or where the strict compliance with any rule of practice or procedure may be inequitable or inconvenient, the Court may act in a manner that is most consistent with Samoan custom and usage, and natural justice and convenience.⁴⁶To date, no rules under the Act have been enacted to regulate Court practice and procedure.⁴⁷
10. This issue along with many others including the performance of the Court judges, were investigated by a special Commission of Inquiry (COI).⁴⁸ The COI recommended that Rules and Procedures of the Court should be legislated to ensure

⁴⁴ *Land and Titles Act 1981* (Samoa) s 47(1). Rules are made by the Head of State, acting on the advice of Cabinet and concurrence of the Judicial Service Commission.

⁴⁵ *Land and Titles Act 1981* (Samoa) s 47(3).

⁴⁶ *Land and Titles Act 1981* (Samoa) s 47(5).

⁴⁷ It was suggested in consultations that the Court has approached many of its decisions inconsistently, and that this was attributed in part by the lack of rules regulating court practice and procedure. This inconsistency has resulted in the view by many consulted that the court's decisions is unfair or lacks merit. It was suggested by the Chief Justice that a reason for the inconsistent approach and unclear reasoning (written or made available) by some of the judges could be attributed to the lack of legal training. Therefore, some judges have difficulty in distinguishing between relevant facts and irrelevant facts compared to their legally trained counterparts. Nonetheless he noted that judges take a common sense approach in reaching a reasonable outcome (tofa ma le faautautaga).

⁴⁸ A special Commission of Inquiry was launched in June 2016 by the Prime Minister to investigate the performance of Land and Titles Court (L.T.C) Judges. The COI looked at matters relating to the rules and procedures of Land and Titles Court as well as the appointments and scrutiny of the Land and Titles judges performances. A Final Report containing 32 recommendations was tabled in Parliament in October 2016. The Commission acknowledges that changes made as a result of the COI's Report could reduce disputes before the court relating to customary lands and matai titles as well as the abuse of power by a *Matai Sa'o*.

efficiency, comprehensiveness and effectiveness of the Court's work.⁴⁹ It also recommended ongoing capacity building workshops and programmes for judges of the Court to ensure efficiency and foster greater understanding of the law and rules applicable to the decisions of the court.⁵⁰

Reconciliation

11. The Act does contain extensive reconciliation provisions to deal with disputes relating to *matai* titles and customary land. For example, parties are required to make a genuine effort to resolve disputes through Samoan conciliation, and by serving notice of claims and exploring options for settlement.⁵¹
12. Furthermore, the Registrar can conduct Samoan conciliation⁵² at any stage in the proceedings or prior to the petition, or claim, being filed,⁵³ and can delay setting down a matter for hearing until the parties have undertaken it or otherwise attempted reconciliation according to Samoa custom and usage.⁵⁴
13. The Act also provides that the Registrar may make suggestions and provide advice and assistance to parties to a dispute with a view to resolving that dispute notwithstanding that no petition has yet been filed.⁵⁵
14. It is clear in the Act that if disputing parties have not undertaken Samoan conciliation, the Court shall refuse to hear any matter that comes before it.⁵⁶ The Court can refer the parties to mediation (with or without consent of the parties) which must be completed within 45 days,⁵⁷ or advise the parties to use a dispute resolution process.⁵⁸

Qualifications of a Matai and removal of a Matai Title

15. The Act also sets out provisions relating to qualifications of a *matai*. It provides that a person is not qualified to hold a *matai* title unless he or she is at least 25 years of

⁴⁹ Parliament of Samoa, Special Commission of Inquiry into the performance of the Lands and Titles Court Judges, *Final Report* (2016) 57.

⁵⁰ Parliament of Samoa, Special Commission of Inquiry into the performance of the Lands and Titles Court Judges, *Final Report* (2016) 57.

⁵¹ *Lands and Titles Act 1981* (Samoa) s 34A.

⁵² Samoan conciliation is a dispute resolution process facilitated by the Registrar(s), in accordance with Samoan custom and usage and the requirements of the Act. On the contrary, reconciliation according to Samoan customs is the same process as conciliation except that it's the family itself who facilitates their own resolution of issues and disputes within the confine of their family homes without the involvement of court registrars and non-family members.

⁵³ *Lands and Titles Act 1981* (Samoa) s 34B(1).

⁵⁴ *Lands and Titles Act 1981* (Samoa) s 42(6).

⁵⁵ *Land and Titles Act 1981* (Samoa) s 34B(2).

⁵⁶ *Land and Titles Act 1981* (Samoa) s 34C(1).

⁵⁷ *Land and Titles Act 1981* (Samoa) s 34C.

⁵⁸ *Land and Titles Act 1981* (Samoa) s 34D.

age.⁵⁹ Furthermore, a person is not eligible to be a *matai* if he or she is not prepared to carry out the obligations of his or her *matai* title including properly serving his or her family, village and community according to Samoan custom and usage.⁶⁰

16. Where there has been a petition by a *Sa'o* or a *Suli* challenging the way in which a *Sa'o* exercises his or her authority, the Court can also remove a *matai* title based on certain grounds. These grounds include where the holder of that title has acted in a manner that brings disrepute to the family, village or community of the *matai*; or has failed to properly perform the duties of a *matai*; or has been convicted of a serious crime that is punishable by imprisonment for life.⁶¹

Notice of intention to appoint a Matai

17. When intending to appoint a *matai*, there are certain notice requirements provided under the Act. A Samoan intending to appoint a *matai* can, though it is not mandatory, notify the Registrar of this intention. If the Registrar receives this notice however, and they are satisfied that the intention to appoint is bona fide, then they must publish details of the intention to appoint in 2 issues of the Savali, and the notice must give anyone affected by the appointment 3 months to lodge an objection.⁶²

4. KEY ISSUES:

A. Eligibility for Appointment as *Matai* and *Matai Sa'o*

1. One of the key issues that emerged in preliminary consultations and was raised in the Commission's Discussion Paper related to the selection and appointment of a *Matai Sa'o* and what criteria a *Matai Sa'o* should meet to be considered for the position (including if criteria should be legislated).
2. As mentioned above, the *Land and Titles Act 1981* sets out eligibility criteria for a *matai*, namely that a person must be at least 25 years of age and prepared to carry out the obligations of the *matai* title. This includes serving the family, village and community according to Samoan custom and usage.⁶³ The Act does not extend to provide specific or additional eligibility criteria for a *Matai Sa'o* however.
3. The Act also includes some notice requirements in relation to appointment of *matai*, though it is not mandatory to notify the Registrar of the appointment. The

⁵⁹ *Land and Titles Act 1981* (Samoa) s 20A(2) provides an exception to the minimum 25 year age requirement. Here the Court may in accordance with Samoan customs and usage upon petition by a *Sa'o* or a *Suli*, permit a person who is not yet 25 but is at least 21 years old be a *matai* title holder.

⁶⁰ *Land and Titles Act 1981* (Samoa) s 20A(1)(b).

⁶¹ *Lands and Titles Act 1981* (Samoa) s 20B.

⁶² *Land and Titles Act 1981* (Samoa) s 14-16.

⁶³ *Land and Titles Act 1981* (Samoa) s 20A(1)(b).

responsibility to do so is allocated to the person who intends to appoint the *matai*, and is left open as to who this would be. Additionally, the current publication requirements extend only to the Savali and not to other mediums like radio and television broadcast.

Appointment of a Sa'o

4. At 7th International Measina Conference of the National University of Samoa, ⁶⁴it was presented that previously the selection of a *Matai Sa'o* was done according to the wishes (*mavaega*) of the current *Sa'o*. However, in cases where the *Sa'o* passed away before an appointment was made, such decision was left to the *suli*.⁶⁵
5. Nowadays, the appointment of a candidate to be the *Sa'o* of a family requires the full consent and approval of the *aiga potopoto* who have an interest in the *Matai Sa'o title*.⁶⁶ A *Matai Sa'o* is normally selected by the *Suli* of the *Matai Sa'o*. Traditionally, only family members who are direct descendants of the founder of the family can participate in appointing a *Matai Sa'o* and discussing suitable candidates.⁶⁷
6. Family members who are not direct descendants of the founder of the family are normally only allowed to observe family discussions concerning appointment of a *Matai Sa'o*.⁶⁸ These may include persons related to the family through connections of a *matai* title, spouses of family members or in-laws.⁶⁹ During these discussions, titled members of the family are normally free to express their opinions and participate more actively.⁷⁰
7. The common process by which a *Sa'o* is appointed includes:⁷¹
 - The family *fofoga fetalai* call the *matais* of the family together to discuss if there is agreement that a successor to the vacant *Matai Sa'o* title must be appointed.
 - The *fofoga fetalai* will then inform all clans and other untitled family members to come to a general meeting in which in-laws may also be invited

⁶⁴ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

⁶⁵ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

⁶⁶ Sharon W. Tiffany, 'The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa' (1974) 83 *Journal of Polynesian Society* 36, 37.

⁶⁷ Sharon W. Tiffany, 'The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa' (1974) 83 *Journal of Polynesian Society* 36, 37.

⁶⁸ Sharon W. Tiffany, 'The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa' (1974) 83 *Journal of Polynesian Society* 36, 37.

⁶⁹ Mailo Pio, *Palefuiono* (Tofa Enterprises, Pago Pago, 1992) vol I, 82.

⁷⁰ Sharon W. Tiffany, 'The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa' (1974) 83 *Journal of Polynesian Society* 36, 39. It is important to note that untitled members of the family can also freely express their opinions, especially elderly entitled members of the family who are well versed with family matters.

⁷¹ It is important to note that the common process provided here is not the process used by all families in Samoa. Each family, village and district has their own procedures and ways for the appointment of a *Sa'o*.

to attend. Speeches are exchanged in this meeting in relation to the main agenda.

- Consequently, the *fofoga fetalai* declares that at the next family meeting, each clan or branch of the family is to come prepared with their nominated candidate for the title.
- On the day of the appointment, the meeting is opened up by an *ava* ceremony before each clan presents their speech in support of their candidate in the hope that they will persuade the whole family why their candidate is worthy to hold the title. The untitled men and women of the family are not permitted to speak at this meeting but they are allowed to attend as heirs of the family.⁷²

8. The title of the *Matai Sa'o* is usually bestowed on the candidate whom,

- the majority of the *aiga potopoto* approve to have the personal attributes or characteristics expected of a *Matai Sa'o* ;
- has the ability to maintain peace and harmony in the family, for example mending broken family relationships and re-uniting dissident family members.⁷³
- is related by blood to the family which owns the title⁷⁴ and has prestigious hereditary rights from either his or her mother or father;
- has wisdom and knowledge of the *fa'asamoa*; and
- has immense knowledge of the family's history; and
- has rendered substantial service to the whole family under several title holders and to the village.⁷⁵

9. In relation to service (*tautua*) to the family, village and community⁷⁶, it is widely accepted that this is one of the main determining factors when choosing a new *Matai Sa'o*, as he or she is expected to carry on the family title and legacy. Factors including academic qualifications and wealth are also increasingly more influential nowadays.⁷⁷ Service to the family includes:

- Exceptional service to the family, honest, hardworking without complaint (*Tautua Tuavae*);
- Knowledge of the family genealogy, taboos throughout the family history, cultural knowledge and oratory skill (*Tautua Upu*);

⁷² Mailo Pio, *Palefuiono* (Tofa Enterprises, Pago Pago, 1992) vol I, 82.

⁷³ Sharon W. Tiffany, 'The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa' (1974) 83 *Journal of Polynesian Society* 36, 42-44.

⁷⁴ Note there are cases where a person who is not blood related to the family is chosen where there was no suitable family member at the time to hold the position or, the family wished to reward a non-member for his loyalty and outstanding service or *tautua* to the family.

⁷⁵ Mailo Pio, *Palefuiono* (Tofa Enterprises, Pago Pago, 1992) vol I, 83.

⁷⁶ These normally include contributions of food, money or labour.

⁷⁷ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

- Calm and brave, someone able to defend and die for the family (*Tautua Toto*); and
- Always present to serve the family of the current *Sa'o* (*Tautua Mamao*).⁷⁸

Registration Procedure

10. Under the Act, once notice of the intended appointment of a *matai* has been published for 3 months, then the title will be registered upon payment of the required fee. There is currently no other criteria to be satisfied, or evidence required by the Registrar, before they register the title.⁷⁹

American Samoa

11. The custom of American Samoa is similar to Samoa, because both countries share similar histories, and challenges.

Eligibility

12. Similar to Samoa, American Samoa sets out in legislation requirements a person must meet before they are eligible to be a *matai*. Any *matai* title bestowed on any person contrary to the legislation may not be recognized in any way.⁸⁰

13. *Matai* titles are conveyed to a person by family concession and court approval. Samoan families are solely responsible and authorised to select for themselves a person to hold the *matai* title, provided that the statutory requirements are met.

14. American Samoa legislation expressly provides that a person is eligible to succeed to a *matai* title if the person:

- i. is of at least one-half Samoan blood;
- ii. is born on American soil;⁸¹
- iii. has attained the age of 18 years;
- iv. was chosen by his family for the title;
- v. lives with Samoans as a Samoan.⁸²

15. It also provides that a person is not eligible to claim or object to the succession to a *matai* title unless he is resident in American Samoa for one calendar year immediately preceding the date of the claim or objection.⁸³ However, residents of American Samoa who are absent from the Territory for particular purposes such as

⁷⁸ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

⁷⁹ *Land and Titles Act 1981* (Samoa) s 18.

⁸⁰ *American Samoa Code Annotated* (American Samoa) § 1.0413

⁸¹ *American Samoa Code Annotated* (American Samoa) § 1.0403 sets out how this requirement may be met, for example if born to parents who were inhabitants of American Samoa but residing overseas, a person may be considered as born on American soil if he has resided in American Samoa for a continuous period of not less than 10 years prior to applying to be registered as a *matai*.

⁸² *American Samoa Code Annotated* (American Samoa) § 1.0403.

⁸³ *American Samoa Code Annotated* (American Samoa) § 1.0404.

education, service in the United States armed forces, medical training and recuperation, temporary travel and missionary work, may remain eligible to claim or object to the succession to a *matai* title as though they actually reside in American Samoa.⁸⁴

Appointment Procedure

16. A person claiming succession to a *matai* title should file a written claim which must be accompanied by:

- a certificate from the chiefs of the village to which the title is attached stating that the title is a traditional title of the Samoan people;
- a petition signed by 25 persons related to the title claimed by blood⁸⁵ stating that a family meeting was held to select a successor to the title in question, according to family traditions.⁸⁶

17. The Registrar gives 60 days' notice of the petition for any interested person to file a counterclaim or objection.⁸⁷ Any counterclaim or objection must be supported by a petition signed by no less than 25 persons related by blood to the title in question.⁸⁸ If no counterclaim or objection is filed within the 60 day notice period, the Registrar shall register the *matai* title to the claimant.⁸⁹

Disputed Appointments

18. The High Court hears and determines any disputed claim and is required to issue a written decision based on the following considerations set out in the legislation in the priority listed:

- i. The best hereditary right to the title;⁹⁰
- ii. The wish of the majority of those clans of the family as customary in that family;

⁸⁴ *American Samoa Code Annotated* (American Samoa) § 1.0404.

⁸⁵ *American Samoa Code Annotated* (American Samoa) § 1.0405. The blood members must be at least 18 years old and residents of American Samoa at the time the petition is filed. Where the family do not have enough blood members to support the claim, the claimant must state so in a signed affidavit.

⁸⁶ *American Samoa Code Annotated* (American Samoa) § 1.0405.

⁸⁷ *American Samoa Code Annotated* (American Samoa) § 1.0406 and § 1.0407.

⁸⁸ *American Samoa Code Annotated* (American Samoa) § 1.0407. The blood members must be at least 18 years old and residents of American Samoa at the time the petition is filed. Where the family do not have enough blood members to support the counterclaim or objection, the counter claimant or objector must state so in a signed affidavit.

⁸⁹ *American Samoa Code Annotated* (American Samoa) § 1.048.

⁹⁰ *In re Matai Title "Te'o"* 26 A.S.R.2d 101 (1994). The best hereditary right in this case looked at each candidate calculated his degree of hereditary entitlement under the traditional formula, that is, descent line to the nearest titleholder in his genealogy. For example 'A' stated his degree of hereditary right to be 50% in that his father, who was a previous titleholder; 'B' traced his descent to his grandfather, which thus gives him a 25% degree of hereditary right 'C' traced his descent to, his great, great grandfather, and thus stated his degree of hereditary right to be 6.25%. The Court held that 'A' had the best hereditary right.

- iii. The forcefulness character and personality of the persons under consideration for the title and their knowledge of Samoan customs; and
- iv. The value of the title holder to the family, village and country.⁹¹.

Submissions

19. In the Discussion Paper, the Commission sought submissions on the following:

- *Who should participate in the selection and appointment of a Matai Sa'o? What if any criteria be legislated?*
- *What key criteria should a Matai Sa'o meet in order to be considered for the position of Matai Sa'o in the family? What if any should be legislated?*

Participation in Selection of Sa'o

20. Majority of public submissions received from Upolu conveyed that only true heirs (*sulimoni*) are entitled to participate in the selection and appointment of a *Matai Sa'o*. *Alii ma Faipule* of Savaii emphasized that family members (*suli*) should continue to appoint their own *Matai Sa'o* instead of the court.

21. They also submitted that legislation should allow family members to choose another successor to a *Matai Sa'o* if the current *Matai Sa'o* becomes incapable of carrying out duties/responsibilities/obligations expected of him or her.

22. A notable number of public submitters continued to emphasize the importance of legislating guidelines to codify the principles that all *suli* will consider when selecting a *Matai Sa'o*.

23. The *Alii ma Faipule* of Upolu proposed to legislate for members of a family to sign an undertaking or an agreement once they have selected a *Matai Sa'o* to prevent or minimise disputes in future and also show agreement by all *suli* when the *Matai Sa'o* was selected.

24. The Commission also consulted a *Sa'o* from Matautu who expressed his disagreement and opposition to the fa'asamoa practice of voluntary assignment of a title held by one person to another (*Faauile Ula*). He viewed this principle as biased as he explained that in such circumstances a *Matai Sa'o* can voluntarily assign his son or any member of his direct line to hold the *Sa'o* title after him without consulting family members. He was of the strong view that this should not be

⁹¹ *American Samoa Code Annotated* (American Samoa) § 1.049. See *In re Matai Title "Te'o"* 26 A.S.R.2d 101 (1994).

practiced anymore to ensure that the selection of a proper and suitable *Matai Sa'o* is done through consultation with all family members.⁹²

25. Professor Asofou So'o noted that the process of appointing a *Sa'o* is a two way process where the candidate is firstly approved by all members of the family, and then left to the village council to endorse the appointment and legitimise the family decision. As part of this process, the village council normally checks the family genealogy of the *suli* and the candidate to verify if the family has made an appointment in accordance with Samoan customs and traditions. He suggested that the traditional practice of the '*usu*' should be reinforced as this is the mechanism used in the village council to check eligibility before endorsing the bestowal of *matai* titles.⁹³

Criteria for Sa'o

26. The majority present during public consultations were of the view that criteria for selecting a *Matai Sa'o* should be legislated. Many considered that an important criterion is that he or she resides in Samoa.

27. Many members of the public consulted from Upolu were of the strong view that the law should require *Matai Sa'o* to be selected from true heirs/blood related members of the family instead of members affiliated with the family through service.

28. Other aspects commonly raised in consultations emphasized that *Matai Sa'o* should have good knowledge of family heirlooms, properties and possessions as guardian of family properties and a protector of family reputation and honour, and that he or she should be a descendant by blood or *sulimoni* in order to be eligible for the *Sa'o* title.

29. In relation to key criteria that a *Matai Sa'o* should have to be considered for *Matai Sa'o*, *Alii ma Faipule* of Savaii lay emphasis on requiring *Matai Sa'o* to live permanently in Samoa and in the village. This is because it was conveyed that *Matai Sa'o* would more actively perform his duties as *Sa'o* when he or she resides in Samoa. The *Alii ma Faipule* of Upolu on the other hand proposed to for a residential requirement to be set out legislation to allow for only a person living in Samoa for a certain period (for example 5 to 10 years) preceding appointment to be eligible to become *Matai Sa'o*.

30. Professor Asofou So'o highly emphasised that in choosing a *Matai Sa'o* to represent the family, the extent of *tautua* to the family is a significant consideration especially

⁹² Patu Ativalu (and Tofaeono Tau) *Matai Sa'o* (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

⁹³ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

when it comes to the scope of influence and authority that the law gives to each *Matai Sa'o*.⁹⁴

31. In consultations with Chief Justice, Honourable Sapolu, his Honour suggested that any criteria to hold a *Matai Sa'o* title should not be an exhaustive list, given differences in families' criteria for their selection of *Matai Sa'o*.⁹⁵ For instance, a minimum requirement to appoint a *matai Sa'o* could be specified in legislation, with family considering additional criteria depending on that family and their practice.⁹⁶

Opposition to legislating criteria

32. Those who opposed legislating criteria of a *Matai Sa'o* were in the minority. They raised concerns about intervention by Government into what they consider purely family matters as Samoan families differ, and their guidelines in determining issues and matters tend to differ from one family to another.
33. There was also concern that such legislation could result in a floodgate of people using this as an opportunity to take frivolous matters to court rather than attempting to genuinely resolve them within the family. Other submitters simply did not want legislation and wanted to keep the culture and traditions of Samoa separate to the law.
34. Some stated that the selection of a *Matai Sa'o* should not be legislated but should be left solely up to the family to exercise what they consider their legal right to choose a *Matai Sa'o*. The *Alii ma Faipule* of Upolu were particularly vocal about letting the family use whatever criteria they have regarding the selection of their *Matai Sa'o*.
35. Some viewed legislation as a barrier which limits the rights of people to select a *Matai Sa'o*, and suggested instead to have non-binding guidelines on the selection criteria for a *Matai Sa'o*, particularly as families often differ from one another. Furthermore, legislating criteria would remove the uniqueness of the Samoan culture.

⁹⁴ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

⁹⁵ Chief Justice His Honour Patu Tiavasu'e Falefatu Sapolu Patu Tiavasu'e (Consultation, Ministry of Justice Courts and Administration Complex, 30 November 2016).

⁹⁶ Chief Justice His Honour Patu Tiavasu'e Falefatu Sapolu Patu Tiavasu'e (Consultation, Ministry of Justice Courts and Administration Complex, 30 November 2016).

Commissions Views

36. The Commission strongly emphasizes that the selection of the *Matai Sa'o* should remain the prerogative of each family in accordance with its own customs and traditions, as each family differs.
37. Although it is commonly accepted that *suli* of the family appoint a *Sa'o* according to the families' own customs and traditions, views of the public have often differed as to which *suli* were entitled to participate in the actual selection and appointment. Many members of the public suggested that only *suli moni* were normally permitted to participate in the selection but also acknowledged that in some families the selection was not exclusive to *suli moni*, as family members affiliated with the family through service were sometimes permitted to participate. In other cases, some families the *Matai Sa'o* would bestow the *Sa'o* title onto another family member he or she thought suitable.
38. The Commission considers that regardless of the different customs and traditions of families in deciding who is entitled to participate in selecting and appointing a *Matai Sa'o*, the following criteria should be considered. That is, to be eligible for appointment as a *Matai Sa'o*, he or she must::
- be a *suli*;
 - have good knowledge of the duties and responsibilities of *Sa'o* ;
 - have good knowledge of family heirloom (*measina*), family genealogy and history, ability to maintain peace and harmony in the family;
 - have provided exceptional service (*tautua*) to the family and village; and
 - any other criteria of the family according to their customs and traditions.
39. These minimum criteria are consistent with the majority of views from those consulted, which reflect as much as possible expectations of a *Matai Sa'o* that are common across families in Samoa. The Commission suggests that these minimum criteria should be considered by families in selecting who would best carry out the roles, duties and responsibilities of the *Matai Sa'o* in the best interest of the family. These criteria are non exhaustive, and families can have additional criteria particular to their own customs and traditions. The Commission considers that careful consideration by family members of these criteria may alleviate disputes before the Land and Titles Court concerning the appointment of a *Matai Sa'o*.
40. As these minimum criteria reflect the roles, duties and expectations of a *Matai Sa'o* common across families in Samoa, the Commission suggests that it may be set out in law. Doing so will signify the importance of these criteria, and encourage families to carefully consider them in deciding who to appoint. Families should be made aware of these legislative requirements through awareness programs in families and villages by relevant Government ministries (for example MJCA and MWCSO).

41. However, if these minimum criteria are not legislated, the Commission suggests that relevant Government ministries provide/ support awareness programs in families and villages, promoting the consideration of these criteria in selection and appointment. Such programs should clarify how careful consideration of this criteria is less likely to result in inappropriate or unpopular appointments, and may reduce the multitude of disputes before the Land and Titles Court often between *Matai Sa'o* and *suli*. Furthermore, careful consideration of these minimum criteria is more likely to maintain peace and harmony in families and villages.
42. The majority of views of those consulted also indicated a desire for *Matai Sa'o* who are appointed to reside in Samoa. Common concerns raised were about the proper performance of the duties and responsibilities of a *Sa'o* whilst living overseas, and that such individuals residing overseas were often not sufficiently or well informed of issues pertaining to the family in Samoa. Another common complaint was that a *Sa'o* residing overseas would often prevent family developments in Samoa, despite being away from Samoa for extensive periods of time.⁹⁷
43. The Commission considers that a residential requirement, where the proposed *Matai Sa'o* must have resided in Samoa for a certain length of time, could be considered as a further requirement to be eligible for appointment. This could be similar to the residential eligibility requirement to be a candidate for election, which requires that a person should have been in Samoa for at least 240 days in each year for a consecutive 3 year period ending on nomination day.⁹⁸ Should a residential requirement be imposed, then it would need to be set out in legislation.
44. The Commission suggests that if a residential requirement is imposed, that consideration should be given to require the proposed *Matai Sa'o* to have been living in Samoa for at least 1 year ending on the day of appointment, and that this should be met where the person has been in Samoa for at least one third of the year (or approximately 120 days).⁹⁹ If this requirement is imposed, it is the Commission's view that this sets out the minimum residential requirement that must be met, but that families may choose to have longer residential requirements than that prescribed in law, if they consider it appropriate.
45. The Commission considers that a residential requirement may alleviate the common concerns about people being appointed as *Sa'o* whilst residing overseas, and will

⁹⁷ This is discussed further in Part 2B: Duties of a *Sa'o*.

⁹⁸ See *Electoral Act 1963* (Samoa) ss 5(3), 4A, 7, 8. The requirement to reside in Samoa for a period equalling or exceeding 3 years should mean a person has been in Samoa for at least 240 days in each year for a consecutive 3 year period ending on nomination day. This excludes temporary absences where required to be absent from Samoa for the conduct of official duties where they are the holder of a Government position, post or office or a member or official of a representative body or an organisation which is based in Samoa.

⁹⁹ The Commission intends that if this requirement is legislated that it only apply to future appointments of *Matai Sa'o*.

likely result in a reduction of the numbers persons residing overseas being appointed as a *Sa'o*.

46. Currently under the Act, a person intending to appoint a *matai* may choose to notify the Registrar of the intention to do so, which must then be published by the Registrar so that anyone affected by the appointment may lodge an objection within 3 months. The Commission suggests that this discretion to notify the Registrar of an intention to appoint a *matai* (or *Matai Sa'o*) should become mandatory. This would ensure that before a *matai* (or *Matai Sa'o*) is registered, the public/ wider family is notified about the intended appointment and given an opportunity to object. This is likely to provide further incentive for families to closely consider the minimum criteria proposed, reducing the incidence of inappropriate or unpopular appointments. Such provision could be better enforced by allocating the responsibility to notify the Registrar to the person intended to be appointed as *matai* (or *Matai Sa'o*).
47. While the Commission recommends making this notice requirement mandatory, it does consider that the requirement that it be published for at least 3 months before appointment can take place can be waived by the Registrar, if satisfied that prior publication to the family and *soalaupulega* has already occurred. This is intended to cover scenarios where the family has been consulted and is in agreement about the intended appointment.
48. In relation to the mode of publication of intended appointments, the Commission considers that the publication requirements set out in the *Electoral Act 1963*,¹⁰⁰ better reflect how information is received by the population nowadays and should be used to expand the current publication provisions in the *Land and Titles Act 1981*.¹⁰¹ This includes that notice be published in a newspaper, by radio broadcast or in other conspicuous places in Apia and Samoa. The Commission acknowledges the additional cost burden involved in this broader publication, but notes that this should be borne by the intended *matai* (or *Matai Sa'o*), and that the interest in notifying those affected by *matai* appointments outweighs the anticipated costs involved. A *matai* (or *Matai Sa'o*) seeking to satisfy the Registrar that prior publication has already occurred such that the 3 month notice is not required, should satisfy these same requirements in relation to mode of publication.
49. The Commission also considers it particularly important that, before registering appointments of a *Matai Sa'o*, the Registrar must be satisfied that the nominated person meets residential and eligibility requirements, if any are required by law. The Registrar can be satisfied upon receipt of evidence from the nominated *Matai Sa'o*, indicating they have met the residential and eligibility requirements. The

¹⁰⁰ *Electoral Act 1963* (Samoa) s 2.

¹⁰¹ See *Land and Titles Act 1981* (Samoa) s 15.

evidence can be in the form of a statutory declaration, which details how they meet the residential and eligibility criteria. This evidence should remain with the Court in case of any later dispute about the appointment of the *Matai Sa'o*, though the Commission considers that this requirement would likely reduce the incidence of inappropriate or unpopular appointments. The onus to provide this evidence should be on the *Matai Sa'o* to be appointed.

50. The Commission considers that these changes can be incorporated by inserting an additional provision under Part 4 of the Act, so that a person appointed as a *Matai Sa'o* must file with the Court proof that they meet the eligibility criteria for appointment as set out in the Act. A form can be prescribed for this purpose.¹⁰² The Registrar must receive this Form before the title can be registered under the Act.

Recommendations

1. Consistent with the majority of views of the public consulted reflecting expectations of a *Matai Sa'o* common across families in Samoa, the following minimum criteria should be considered by families in selecting and appointing a *Matai Sa'o* in the best interest of the family. That is, to be eligible for appointment as a *Matai Sa'o*, he or she must:
 - i. be a *suli*;
 - ii. have good knowledge of the duties and responsibilities of *Sa'o* ;
 - iii. have good knowledge of family heirloom (*measina*), family genealogy and history, ability to maintain peace and harmony in the family;
 - iv. have provided exceptional service (*tautua*) to the family and village; and
 - v. any other criteria of the family according to their customs and traditions.
2. These minimum criteria may either:
 - i. be set out in law (which will signify the importance of these criteria and specify the minimum criteria for families to carefully consider when deciding who to appoint); or
 - ii. NOT be set out in law but for relevant Government departments (for example MJCA and MWCSO) to provide/ support awareness programs in families and villages, promoting the consideration of these criteria in selection and appointment so that inappropriate or unpopular appointments are less likely to occur, and fewer family disputes are brought before the Land and Titles Court between *Matai Sa'o* and *suli*.
3. Whether legislated or not, the eligibility criteria is non exhaustive, and families can

¹⁰² Form 1A in the *Electoral Act 1963* (Samoa) provides helpful guidance about the format and content of a statutory declaration that would meet the evidence requirement.

consider additional criteria when selecting and appointing *Matai Sa'o*, particular to their own customs and traditions.

4. A residential requirement, where the proposed *Matai Sa'o* must have resided in Samoa for a certain length of time, should be considered as a further requirement to be eligible for appointment (similar to the residential eligibility requirement to be a candidate for election). This would require the proposed *Matai Sa'o* to have been living in Samoa for at least 1 year ending on the day of appointment, and that this should be met where the person has been in Samoa for at least one third of the year (or approximately 120 days). Should a residential requirement be imposed, then it would need to be set out in legislation.
5. If a residential eligibility requirement is legislated, it should only apply to future appointments of *Matai Sa'o*.
6. If a residential requirement is set out in law, then this is considered to be the minimum requirement to be met, but families can choose to have longer residential requirements if they consider it appropriate.
7. The *Land and Titles Act 1981*, (section 14) should be amended to:
 - i. make it mandatory that notice be given to the Registrar of intentions to appoint a *matai* (or *Matai Sa'o*); and
 - ii. that the person responsible for providing this notice is the *matai* (or *Matai Sa'o*) who is intended to be appointed.
8. The *Land and Titles Act 1981* (section 15) be amended to require publication of the notice of intention to appoint a *matai* in a newspaper, by radio broadcast and in other conspicuous places in Apia and Samoa. The cost burden is to be borne by the intended *matai* (or *Matai Sa'o*).
9. An exception should be included in Part 4, so that a Registrar may waive the 3 month notice requirement if satisfied that prior publication to the family and *soalaupulega* has already been carried out, using the modes of publication specified in section 15.
10. Should recommendation 1 and or 3 be legislated, insert an additional provision under Part 4 of the Act, so that a person appointed as a *Matai Sa'o* must file with the Registrar proof that they meet the eligibility criteria for appointment as set out in the Act. A form can be prescribed for this purpose. The Registrar must receive this Form before the title can be registered under the Act.

B. Duties of a *Sa'o*

51. The duties of a *Sa'o* are discussed thoroughly in Part 2 D of this report. In short, a *Matai Sa'o* is responsible to protect the family, the family's assets as well as the *Matai Sa'o* title.

Submissions

52. In the Discussion Paper, the Commission sought submissions on the following:

- *What, if any, duties and responsibilities of a Matai Sa'o should expressly be set out in law?*

53. The Commission sought the public views on what duties and responsibilities a *Matai Sa'o* should have and which should be expressly set out in legislation. General duties of a *Matai Sa'o* and *matai* are also discussed earlier in Part 2.

54. The majority of public submissions the Commission received favored setting out the roles and particular responsibilities of a *Matai Sa'o* in legislation. The Commission received a significant amount of submissions regarding the types of duties that should be legislated. The duties most commonly submitted are grouped as follows:

- duty to inform and consult on family matters such as proposed bestowal of *matai* titles
- duty to inform and consult on leasing of communal land (and matters of a commercial nature)
- duty to oversee family properties
- duty to make decisions that are reasonable, fair and in accordance with law, customs and traditions of Samoa
- duty to reside in Samoa
- duty to maintain peace and ensure wellbeing of family
- duty to contribute to family obligations

Duty to inform and consult on general family matters

55. The submissions raised that the overarching duty and perhaps the most important of any *Matai Sa'o* is to inform and consult family members before making important decisions which may impact family members or familial property. It was suggested that the duty to consult involved the *Matai Sa'o* seeking and being open to views and opinions of the family. These views should assist the *Matai Sa'o* in arriving at a final decision which is properly informed. The majority of submissions raised that the importance of this duty warranted it being expressly provided in legislation and that it would significantly reduce disputes on such matters.

56. However, there were also concerns raised about the practicality of legislating the duty to consult. A notable concern was highlighted by Professor Asofou Soo who

raised that there are decisions that are made unilaterally by *Matai Sa'o* due to urgency and also because the decisions are 'common sense' decisions that do not warrant extensive consultation.¹⁰³ Another concern was that the reality of extended families nowadays is that they are so scattered that reaching consensus from them was often very difficult.¹⁰⁴

57. Some submitters suggested that genuine attempts by the *Matai Sa'o* to consult the family would suffice to dispense this duty, even if no agreement is reached.

Duty to inform and consult on bestowal of matai titles

58. The submissions also raised that where *matai* titles were involved, the family should always be consulted. The submissions highlighted that many family disputes have been borne out of decisions by the *Matai Sa'o* to bestow familial *matai* titles without informing or consulting the family. The views from the public stressed that *matai* titles are a *measina* of the family and as such, the family should decide with the *Matai Sa'o* suitable recipients of *matai* titles.

Duty to inform and consult on leasing of communal land (and matters of a commercial nature)

59. The Commission was informed that many of the disputes between the *Matai Sa'o* and family concerned land or money, and was usually a situation where the *Matai Sa'o* was claimed to have unilaterally made decisions to his pecuniary benefit.

60. The common view of the public consulted and from information from MJCA is that disputes over land is often exacerbated where there is a pecuniary benefit involved, such as leasing arrangements. The MNRE submitted that there have been numerous issues affecting the management of income from leases by the *Matai Sa'o* of the family. As such, MNRE has received proposals from the public suggesting that there should be some regulation around how lease monies should be dealt with to avoid abuse and misuse by the *Matai Sa'o*. In an effort to address these problems, the MNRE also indicated an intention to amend to the *Alienation of Customary Land Act 1975*.¹⁰⁵ Some other examples submitted to the Commission included cases where the *Matai Sa'o* would lease the family land to his children.

61. A common view shared by Alii ma Faipule consulted from Savaii and Upolu was that the *Sa'o* should always consult family members where decisions concern lands and

¹⁰³ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹⁰⁴ Leasolagi Le Malama Meleisea, Director of Centre of Samoan Studies, National University of Samoa (Consultation, Samoa Law Reform Commission Conference Room, Level 1, FMFM II Building, Matagalalua, 6 October 2016).

¹⁰⁵ Ministry of Natural Resources and Environment, Written submission to the Samoa Law Reform Commission, *Pule a le Matai Sa'o Discussion Paper*, 4 November 2016.

financial benefits (for example to lease customary land or when investors want to establish a business on customary land). The Chief Justice echoed these sentiments stating that the obligation to consult is beneficial in the sense that the *Matai Sa'o* fulfils their duties to family members by seeking their views. However, the Chief Justice also indicated some concerns regarding this duty if it were to be legislated. He stated that a requirement to consult the family may cause delays to the government's ongoing efforts to make productive use of customary land and overall to the economic development of Samoa. He elaborated that consulting the family, addressing their concerns and obtaining their approval could be a cumbersome process that takes a long time, resulting in a wasted opportunity for the family.

62. Similar views were expressed by some of the public who raised that legislating a requirement to consult and gain consensus from the family may deter foreign investors from wanting to invest in Samoa due to delays, as foreign investors would normally prefer a simple expedited process. A requirement for extensive consultation and consensus would essentially mean that one dissenting view in the face of majority views could potentially prevent a development on the land or lease of family land, particularly where there are multiple *Sa'o*.¹⁰⁶
63. Professor Asofou So'o also supported the leasing of customary land to foreign investors but noted that the current process often results with only one person or few actually receiving any benefits of the lease. He queried the practicality of this process for situations with more than 300 holders for a title as is that current situation today in some families, and submitted that it would be extremely difficult to obtain consensus and would inevitably result in disputes amongst family members. He suggested that one way to deal with this is to require the *Matai Sa'o* to consult and genuinely try to obtain consensus from the family on an issue, but if after two meetings an agreement cannot be reached, the *Matai Sa'o* should be able to proceed with the decision making.
64. The *Alii ma Faipule* from Savaii that were consulted suggested a registration system for all *suli* of the family, and the consent of all registered *suli* should be obtained before land can be leased. However many questioned the practicality of this system as it would be an immense task and extremely difficult especially for larger families and where *suli* live overseas. Furthermore, registration of *suli* could itself be cause for further dispute.
65. Others suggested that legislation should provide that all income from leases of customary lands should be deposited in a family bank account or trust account. It was also suggested that the legislation should also provide a positive duty on *Matai Sa'o* to distribute proceeds from the lease fairly and honestly to all family members.

¹⁰⁶See Part 4D: Multiple *Sa'o*.

Others suggested that legislation should provide a ratio for which money received from such leases should be distributed to all members of the family and the *Sa'o*.

Duty to oversee as trustee of family properties

66. The Commission also received a notable number of public submissions expressing that legislation must provide a duty on the *Matai Sa'o* to oversee all family properties in a trustee like capacity. The submissions largely indicated that this was one of the most controversial duties of a *Matai Sa'o* as it involved the family's assets, and therefore to safeguard the family's assets from the misuse of the *Matai Sa'o* a duty to oversee the family's properties as a trustee should be encapsulated in legislation.

67. The submissions received raised that the legislation must clearly define that a *Matai Sa'o* is not the owner but rather the custodian or trustee of familial property. One submitter provided that the authority of *Matai Sa'o* over family assets was that of a de facto trustee which meant that *Matai Sa'o* had no individual authority to use these assets, which belonged to the whole family. He stressed that *Sa'o* had no authority to alienate family land or unilaterally use family's money or other property.¹⁰⁷

Duty to make decisions that are reasonable, fair and in accordance with law, customs and traditions of Samoa

68. The Commission also received submissions highlighting the need to legislate guidelines to direct the *Matai Sa'o* in the exercise of his decision making authority.¹⁰⁸

69. Chief Justice Sapolu suggested legislating a minimum guideline for the Court to consider in cases of the abuse of power by *Matai Sa'o*. He suggested that the minimum guideline should require the courts to assess whether the decision was reasonable, fair and in accordance with law and customs and traditions of Samoa. He stated that the legislation should be formulated in general terms to allow the law to cater for both foreseeable and unforeseeable cases. Professor Asofou Soo also agreed with legislating a minimum guideline, and suggested that the court should assess whether the decision made by *Matai Sa'o* was of substantial benefit to the family and whether it was made for the maintenance of the peaceful cohabitation of the family.¹⁰⁹

¹⁰⁷ Galumalemana Afereti Hunkin citing Dr Ituisone Salevao, *Rule of Law, Legitimate Governance and Development in Pacific* (ANU Press, 2005), Written submission to the Samoa Law Reform Commission, *Pule a le Matai Sa'o Discussion Paper*, November 2016. Note this issue is discussed in more detail under Part 4B: Duties of a *Sa'o* on commercial matters.

¹⁰⁸ *Pule a le Matai Sa'o* Public Consultations, Upolu, 1-2 November 2016.

¹⁰⁹ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

Duty to reside in Samoa

70. The Commission also obtained a significant number of submissions relating to *Matai Sa'o* living overseas. On one end of the spectrum were submissions that called for an absolute legislative prohibition on *Matai Sa'o* residing overseas. The rationale being that *Matai Sa'o* would better serve his family if residing in Samoa. These submissions provided examples of dissatisfaction with *Matai Sa'o* who moved overseas after being bestowed their title with no further contact or service provided to their families in Samoa, and also submissions where the *Matai Sa'o* would prevent family developments on land without actually visiting the land and family for long period of time.
71. However, many submissions also raised that the reality of modern society is that many *Matai Sa'o* live outside of Samoa with many serving their families financially and materially from overseas. The submissions indicated that the legislation should expressly provide that *Matai Sa'o* either return to live permanently in Samoa, serve their family faithfully from overseas or give up their title to a family member living in Samoa.
72. Other submissions raised alternative options including providing a stipulated minimum timeframe within a year that a *Matai Sa'o* must reside in Samoa. It was also raised that the legislation should provide for requirements similar to those under the election process whereby a *matai* had to be contributing *monotaga* while living overseas.

Duty to maintain peace and ensure wellbeing of family

73. Submissions received also highlighted that another important duty of a *Matai Sa'o* is to maintain peace and ensure the wellbeing of the family. If disputes arise between family members, the *Matai Sa'o* should initiate making amends and bring the family together to peacefully resolve the dispute. Professor Asofou Soo highlighted that one of the overarching duties of the *Sa'o* was to enable the family to live peacefully together. He also pointed out that maintaining peace and harmony sometimes resulted in leaving some members of the family at a disadvantage, which illustrates concerns if duties of a *Matai Sa'o* are legislated.

Duty to contribute to family obligations and provide service to village

74. The Commission also received a number of submissions stating that there must be a legislative requirement for the *Matai Sa'o* to contribute at least equally to family obligations. Professor Asofou elaborated that it is the norm in families to expect the *Matai Sa'o* to make a higher contribution compared to other family members during

faalavelave. Submissions highlighted instances where the *Matai Sa'o* did not contribute financially or materially to family obligations however, there were no repercussions as they held the paramount title.

75. Submissions also raised that legislation must also include a duty for the *Matai Sa'o* to provide *monotaga* or service to the village. *Monotaga* means the compulsory service, assistance or contribution (such as contribution in cash, kind or goods) rendered for customary, traditional or religious activities, events, function or similar purposes pursuant to the customs of a particular village.¹¹⁰ The Commission was informed that part of the duties of the *Matai Sa'o* is not only to the family but to provide active service to the village.

Concerns about legislating Duties

76. There were also strong views raised opposing legislating the duties of *Matai Sa'o*. One of the views most commonly raised in opposition is that customs by their nature are fluid and codifying them would put rigid parameters around them. Professor Asofou So'o submitted that codification would create a limitation that is incapable of catering for the different aspects of Samoan culture.¹¹¹ Some of these concerns were shared by the Sapolu CJ who cautioned that customs by its nature is subject to change and evolves over time. Therefore, the values and customs in today's generation will likely be different from those in future generations. He also advised that the law must have an element of certainty which is difficult especially in the Samoan context where customs and usages differ from village to village. The Chief Justice advised that a balance needed will be difficult to achieve but essentially the legislation must not be too rigid that customs cannot retain their evolving nature.¹¹²

77. It was raised that the reality is, it would be hard for the *Matai Sa'o* to please everyone within the extended family. As was previously mentioned from Professor Asofou Soo's submission, a decision made to enable the family to live in peace will at times result in certain family members being disadvantaged. The concern is that codification of duties will perhaps encourage aggrieved family members to take their grievances to court on the breach of duties rather than make amends within the family unit.

¹¹⁰ *Electoral Act 1963* (Samoa) s 3A.

¹¹¹ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹¹² Chief Justice His Honour Patu Tiavasu'e Falefatu Sapolu Patu Tiavasu'e (Consultation, Ministry of Justice Courts and Administration Complex, 30 November 2016).

- *What are the duties and obligations of a suli and which if any duties should expressly be set out in law?*

78. Not many submissions were received regarding the duties and obligations of a *suli* compared to that of the duties and obligations of a *Matai Sa'o*. One of the duties that the public indicated is for the *suli* to assist the *Sa'o* in looking after the welfare of the family and other duties relating to the wellbeing of the family.¹¹³ There was emphasis that *suli* had a say in all decisions to family lands and resources as heirs.¹¹⁴ Public submissions also stated that all *suli* must be present and must discuss amongst themselves at first instance if a *Matai Sa'o* does not perform his/her duties well.¹¹⁵

79. The public noted on the role of *sulimoni* to select the *Matai Sa'o* and emphasised that it is of utmost importance that this is enforced and maintained according to the *fa'asamoa* and *aganuu*. It was recommended by one submitter that *sulimoni* should expressly have the right under the law to remove the *Matai Sa'o*.

80. Some members of the public recommended that the law needs to clearly define the rights of *asuli* and their duties.

Commissions Views

81. The Commission received a significant number of submissions from the public emphasizing the need to clearly identify the duties and responsibilities of a *Sa'o* in legislation.

82. The majority of public submissions focussed on the need to codify the duty of *Matai Sa'o* to inform and consult their family before making decisions. These submissions highlighted that many familial disputes have been borne out of the lack of consultation and transparent decision making by the *Matai Sa'o*. However, there were also some views to the contrary which expressed that *Matai Sa'o* often make decisions unilaterally when they are 'common sense' decisions or when the time does not allow for consultation with the family. The Commission is inclined to agree with the view that there are certain matters that do not warrant consultation with the family which include general matters and day to day decisions about the family.

83. However, the Commission considers that when decisions concern the family *measina* such as titles and land, the *Matai Sa'o* has an absolute duty to inform and consult the family. The Commission supports the view underpinning an

¹¹³ Togatalima, Written submission to the Samoa Law Reform Commission, *Pule a le Matai Sa'o Discussion Paper*, 29 November 2016.

¹¹⁴ Malama Meleisea, Written submission to the Samoa Law Reform Commission, *Pule a le Matai Sa'o Discussion Paper*, 6 October 2016.

¹¹⁵ *Pule a le Matai Sa'o* Public Consultations, Savaii, 27-28 October 2016.

overwhelming number of submissions which put forward that as the *measina* belong to the family unit, the views of the family should be sought on any decision pertaining to them.

84. The Commission again received numerous suggestions from the public consulted to legislate the duty of a *Matai Sa'o* to consult on commercial matters such as leasing of customary land. The Commission considers that matters involving commercial matters with pecuniary benefits should always require consultation for many reasons. The first reason is that leases that are properly consulted on beforehand would prevent or reduce the likelihood of problems arising from aggrieved parties in future after the lease has been signed. It would also assist to reduce possible court action taken by aggrieved parties and the irreparable damage to the family caused from that. It would save expense and resources to the court as well as provide more certainty for developers. The Commission is also of the view that codifying consultation can act as a safeguard against the misuse of power by *Matai Sa'o* from unilaterally using land for their own personal gain. This in turn would reduce familial disputes going to court over this problem.
85. A related issue to the duty of consultation is the manner in which consultation should take place. The Commission considers that where the *Matai Sa'o* or family member wishes to call a family meeting pertaining to titles, land or any other significant issue, public notification should be made. The notification should be issued at least one month prior to the selected date and should include the time, venue, and the subject matter to be discussed in the meeting. Such notification should be circulated in a newspaper, by radio broadcast and in other conspicuous places in Apia and Samoa. The requirements for notification should be set out in law. Provided these requirements for notification are met, if members of the family do not subsequently attend, the duty of consultation is nonetheless met.
86. The Commission also received views from the public to specify in legislation the role of *Matai Sa'o* in relation to family properties. The submissions clarified that the role of the *Matai Sa'o* is to oversee the family estate in a trustee like capacity. It was put forward that the legislation should clearly define that the *Matai Sa'o* is not the owner but rather custodian or trustee of family property. The Commission agrees with the views expressed that the nature of the authority of the *Matai Sa'o* is not as owner of the property but rather as the custodian or trustee of the property.
87. Some submissions emphasized the need for legislation to provide guidelines to assist in determining whether a *Matai Sa'o* is appropriately exercising their decision-making authority. Chief Justice Sapolu suggested codifying a minimum guideline requiring the court to assess whether the decision made by the *Matai Sa'o* was reasonable, fair and in accordance with law, customs and traditions of Samoa. The Chief Justice elaborated that the minimum guideline must be formulated in general terms to cater for foreseeable and unforeseeable cases that the court may

deal with. The Commission agrees with these views and recommends that a minimum guideline be codified to assist the court in adjudicating cases of abuse of power by *Matai Sa'o*.

88. An issue of contention during consultations concerned the requirement for a *Matai Sa'o* to permanently reside in Samoa. The majority of submissions preferred that *Matai Sa'o* permanently reside in Samoa. However, the Commission was informed that the reality today is that many *Matai Sa'o* reside and serve their families from outside Samoa. The Commission considers a blanket requirement for all *Matai Sa'o* to permanently reside in Samoa would unfairly penalise *Matai Sa'o* who are living and serving their families faithfully from overseas. However, the Commission is also mindful of the significant number of submissions detailing their experiences with *Matai Sa'o* moving overseas after receiving their title with no further contact or service provided to their families.
89. The Commission recommends that a residency requirement should apply to a *Matai Sa'o* so that he or she resides in Samoa for at least 120 days in each year. Residency requirements if imposed will need to be set out in legislation.
90. The Commission also received submissions recommending that there be a legislative requirement for the *Matai Sa'o* to contribute to family obligations and provide *monotaga* or service to the village. Many submissions raised their dissatisfaction with *Matai Sa'o* who failed to contribute to family obligations but who keep all or the majority of *faaloaloga* received by the family. Submissions also identified the failure of the *Sa'o* to contribute to family obligations or provide *monotaga* as the subject of many disputes within families. The Commission considers that the proper execution of the duties of the *Matai Sa'o* should include a requirement to contribute to family obligations and actively serve the village through providing *monotaga*. However, the Commission also notes that this requirement should not impact villages with customs and traditions that exclude certain *matai* titles from providing *monotaga*.
91. The Commission was informed that another important duty for the *Matai Sa'o* is to maintain peace and ensure the wellbeing of the family. This was met with some concerns raised that maintaining peace is an ambiguous concept. Professor Asofou Soo illustrated this point when he highlighted that maintaining peace and harmony may at times result in putting some family members at a disadvantage. The overall peace and harmony will be achieved but as a consequence, there will be aggrieved and dissatisfied members of the family. The Commission agrees that there are practical difficulties associated with codifying this duty. However, this duty is central to the role of the *Matai Sa'o* and the Commission therefore recommends that if it is included in legislation as a duty, that it be interpreted broadly.'

92. The Commission notes that the majority of the public consulted viewed the duties and responsibilities of a *Matai Sa'o* as common across families in Samoa and many supported inclusion in legislation. Nonetheless, the Commission acknowledges that setting out the duties in legislation is culturally sensitive and should be carefully considered. However, the Commission considers that legislation not only signifies the importance of these duties, but also provides clarification where there are petitions for the removal of a *matai*.¹¹⁶

93. The Commission considers that the following non-exhaustive list of duties and responsibilities of a *Matai Sa'o* should be set out in legislation:

- Duty to inform and consult on bestowal of *matai* titles;
- Duty to inform and consult on leasing of communal land (and matters of a commercial nature);
- Duty to oversee family properties as a trustee;
- Duty to reside in Samoa;
- Duty to maintain peace and ensure wellbeing of family;
- Duty to contribute to family obligations and provide service to village; and
- Duty to make decisions that are reasonable, fair and in accordance with law, customs and traditions of Samoa.

Recommendations

11. The following duties and responsibilities of a *Matai Sa'o* should be set out in legislation. These duties and responsibilities should be non-exhaustive, and should include:

- Duty to inform and consult on bestowal of *matai* titles;
- Duty to inform and consult on leasing of communal land (and matters of a commercial nature);
- Duty to oversee family properties as a trustee;
- Duty to reside in Samoa;
- Duty to maintain peace and ensure well being of family;
- Duty to contribute to family obligations and provide service to village; and
- Duty to make decisions that are reasonable, fair and in accordance with law, customs and traditions of Samoa.

12. As there are practical difficulties associated with codifying the duty to maintain peace and ensure wellbeing, if it is included in legislation as a duty, it should be interpreted broadly.

13. In relation to the 'duty to reside in Samoa', legislation should clarify that the requirement for a *Matai Sa'o* to reside in Samoa means he or she must be living in

¹¹⁶ See Part 4C, Removal of *Matai Sa'o* and *Matai*

Samoa for at least 120 days each year for the duration of service as a *Matai Sa'o*.

14. Legislation should also stipulate prior to consultation relating to familial titles or land; notification should be issued at least one month before the selected date and should include the time, venue, and the subject matter to be discussed in the meeting. Such notification should be circulated in a newspaper, by radio broadcast and in other conspicuous places in Apia and Samoa.

C. Removal of *Matai Sa'o* and *Matai*

94. The *Land and Titles Act 1981* expressly provides for the removal of a *matai* title, as follows:

Removal of matai title – *The Court on petition by a Sa'o or a Suli may remove a matai title where the holder of that title:*

- a. *has acted in a manner that brings disrepute to the family, village or community of the matai; or*
- b. *otherwise has failed to properly perform the duties of a matai; or*
- c. *has been convicted of a serious crime that is punishable by imprisonment for life.*¹¹⁷

95. One of the cases in which a *Matai Sa'o* was successfully removed using this provision, concerned a petition by *Suli* to remove the *Matai Sa'o* claiming she had misused her authority to gain personal wealth without consulting the extended family. They claimed that she refused to meet and make peace with the *aigapotopoto* regarding land matters, and therefore did not fulfil her duties to resolve family disputes. The Court stated that a *Matai Sa'o* is expected to be the *tausimeasina* and peacemaker in the *fa'asamoa*. Given the failure of the *Sa'o* to exhaust all measures to resolve the dispute, coupled with the lack of support from the *Suli* highlighting distrust in her capacity to make peace and resolve conflicts, the petition was successful and the *Sa'o* was removed.¹¹⁸

96. A matter unsuccessful under this provision however, was where a family petitioned to remove a *Matai Sa'o title* from the defendant on grounds that he failed to care for the family and was not diligent in carrying out his duties. The family complained that his decisions were biased and he misused his authority and brought shame upon the family.¹¹⁹ In its decision the Court declined the petition stating:

'it is true that the actions and allegations laid before the Court is disgraceful to the family and indicates that the Sa'o has failed to carry out his duties to the best of his

¹¹⁷ *Land and Titles Act 1981* (Samoa) s 20B.

¹¹⁸ LC 6929 P12-P13, October 2015.

¹¹⁹ LC 526 P28-P29, October 2015. For example, claiming the *Matai Sa'o* was having an extramarital affair.

ability, however, these allegations and accusations have no basis and/or foundation.¹²⁰

97. Aside from this provision, *aigapotopoto* can meet and collectively decide to remove a *Matai Sa'o* of their own accord. However, if the *Matai Sa'o* contests the *aiga's* decision, then the only recourse available to the *aigapotopoto* is through the Court, relying on section 20B.

98. Currently, the Village Council does not have any power to remove a *Matai Sa'o* under the *fa'asamoa* or section 20B.

American Samoa

99. Historically, families could remove a *matai* (including a *Matai Sa'o*) on their own and appoint another family member to hold the *matai* or *Matai Sa'o title*.¹²¹This approach is still applied but has been modified to allow the court to remove a *matai* or *Matai Sa'o*. Family members who wish to remove a *matai* or *Matai Sa'o title* may submit a petition to the High Court.¹²²The law requires the petition to be filed by 25 members of the *matais* family (related by blood), over the age of 18, who at the time of the petition are all serving the *matai* and family according to Samoan custom.¹²³ The Court does not consider petitions for removal of a *matai* or *Matai Sa'o where* petitioners are not members of the family,¹²⁴ and may consider a petition to be premature if petitioners have failed to follow custom by attempting reconciliation with the *matai*.¹²⁵

100. Notice is given of the petition for 30 days. If no answer is filed and no appearance made at the hearing, the court may enter judgment for the petitioners without further hearing. Upon removal, another *matai* may be selected by the family in accordance with family traditions.¹²⁶

101. A significant provision in the American Samoan legislation provides that any *matai* absent from Samoa for more than 1 year may be removed of his title upon petition filed in the High Court by any member of the family. In making this decision, the Court may consider reasons for such absence and the wishes of the family actively serving the *matai*.¹²⁷

Submissions

¹²⁰ LC 526 P28-P29, October 2015.

¹²¹ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d) *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., 419.

¹²² *American Samoa Code Annotated* (American Samoa) § 1.0411.

¹²³ *American Samoa Code Annotated* (Samoa) § 1.0411.

¹²⁴ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., 420.

¹²⁵ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., 420.

¹²⁶ *American Samoa Code Annotated* (Samoa) § 1.0411.

¹²⁷ *American Samoa Code Annotated* (Samoa) § 1.0412.

102. In the Discussion Paper, the Commission sought submissions on the following:

- *Does the current law for the removal of a matai title (section 20B) need to be clarified further (e.g. what are examples of a matai bringing shame, disrespect or disgrace to the family and failing to perform their duties) or expanded?*
- *Would creating village bylaws that include the power to remove a Matai Sa'o help to reduce abuse of power by a Matai Sa'o?*

Bringing shame to the family & failure to perform duties

103. Public consultations generated numerous examples where a *Matai* has acted in a manner that has brought shame, disrespect, or disgrace to the family, or otherwise failed to perform their duties. Whether or not these examples would result in the removal of a *Matai Sa'o* is unclear and would likely depend on the facts of the case.

104. The following examples were provided of bringing shame, disrespect or disgrace to the family:

- Adultery/*Soli tofoga*;
- Dishonesty - for example offering bribes to *pulenuu* to register *matai* titles;
- Commission of a serious offence - for example sexual offences, *solu tofaga*, trespass;
- Drunk behaviour;¹²⁸ and
- Losing a family case in Court.¹²⁹

105. The following examples were given where a *Matai* has failed to perform his or her duties:

- Failure to consult all members of the family in decision-making, particularly relating to customary land and assets;¹³⁰
- Failure to provide impartiality in their decision making and acting in self interest;
- Misuse of Power – examples provided included a *Matai Sa'o* exercising control over the family despite not living in the village, and where a *Matai Sa'o* accepts bribes to bestow titles to individuals who were not true heirs; and
- Neglecting duties and living overseas.

Should the grounds for removing a matai be clarified or expanded?

106. The majority view of the public consulted in both Upolu and Savaii considered it necessary for section 20B to be expanded to include additional grounds for the

¹²⁸ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹²⁹ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹³⁰ *Pule a le Matai Sa'o* Public Consultations, Savaii, 28 October 2016. Alii ma Faipule replied yes to question 1 of the Discussion Paper.

removal of a *Matai Sa'o*, in order to prevent abuse of power and their unfair control over family assets (land and titles).

107. Chief Justice Falefatu Sapolu supported the view that duties of a *Matai Sa'o* and the grounds upon which they should be removed should be expressed in legislation, but noted that care should be taken as it may reduce the Court's flexibility to make decisions according to the facts of the case. He recommended that the legislation should expressly provide matters that the Court must take into account when making their decisions about whether a *Matai Sa'o* should be removed, but that such list should not be exhaustive.¹³¹
108. Consultations with representatives from the Ministry of Health commented that identifying grounds for removing a *matai* in legislation is a difficult task, particularly as considerations that may be appropriate today may not be appropriate in the future (and vice versa) because of the uniqueness of the *Matai* system.
109. The majority public view in both Upolu and Savaii believed that the provision for the removal of a *matai* title should also be further clarified and that additional grounds should be added to it particularly in relation to the removal of a *Matai Sa'o*.
110. The suggestions included:
- Reference to 'bringing disrepute to the family, village and community'¹³² should be clarified with some examples provided in the legislation. For example it was unclear if it related only to inappropriate behaviour such as sexual offending, or committing adultery (which are more obvious actions that bring disrepute) – or whether it also included where the *Matai Sa'o* made decisions favourable only to their nuclear family instead of considering the best interests of the whole family.
 - It was suggested that 'failing to properly perform duties of a *matai*'¹³³ should be clarified in the legislation with more common examples of duties of a *matai*' provided because of differences in duties in different families.
111. The majority view submitted that removal of a *matai* title from a person on grounds that he or she been convicted of a serious crime that is punishable by imprisonment for life¹³⁴, should be expanded to capture all serious crimes (and not just crimes punishable by imprisonment for life). Some also suggested listing criminal offences that would result in removal of a title. In respect of these grounds, some suggested that the *Matai Sa'o should* automatically lose their title if they were

¹³¹ Chief Justice His Honour Patu Tiavasu'e Falefatu Sapolu Patu Tiavasu'e (Consultation, Ministry of Justice Courts and Administration Complex, 30 November 2016).

¹³² See *Land and Titles Act 1981* (Samoa) s 20B(a).

¹³³ See *Land and Titles Act 1981* (Samoa) s 20B(b).

¹³⁴ See *Land and Titles Act 1981* (Samoa) s 20B(c).

convicted of a serious offence (such as a sexual offence) instead of upon petition by a *Sa'o* or a *Suli* as the current law provides).

Additional criteria to be included in the provision

112. The majority view indicated that the following criteria should be legislated with examples provided where a *Matai Sa'o* title may be removed upon petition by a *Sa'o* or a *Suli*:

- when the *Matai Sa'o* consistently misuses his/her power. It was suggested that examples are included in legislation to guide the courts, for example mismanagement of customary land.
- when the *Matai Sa'o* lives permanently overseas.
- when the *Matai Sa'o* acts contrary to family consensus to bestow *Matai* titles to other family members.
- when the *Matai Sa'o* is found to be physically or mentally unfit.¹³⁵

113. The minority perspective is that government should not intervene as Village Council have bylaws, and it is the families' responsibility to discuss amongst themselves removal of the *Matai's* title. Some also indicated that the current law is sufficient and does not need to be amended.

Removal by Village Council

114. The only submissions received about the role of the village fono in removing a *Matai Sa'o*, related to empowering the village council to punish or evict a *Matai Sa'o* from the village for refusing to obey village bylaws and regulations.

Removal of a matai absent from Samoa

115. It was submitted that consideration should be given for the inclusion of a provision where a *matai* absent from Samoa for a certain period of time can be removed upon petition by any member of the family. This follows the approach in American Samoan which provides a period of more than 1 year.

Commissions Views

116. The Commission heavily emphasises that the power to remove the *matai* or a *Matai Sa'o* rests with the family concerned, and that the family should endeavour to resolve any disputes between them before resorting to court.¹³⁶

117. The Commission notes that the underlying view expressed in submissions is that the current provision (*Lands and Titles Act* section 20B) for the removal of a *matai* is

¹³⁵ Pule a le Matai Sa'o individual submission 8 answered yes to question 2 of the Discussion Paper.

¹³⁶ Dispute resolution is discussed in more detail under Part 4F of the Report.

ambiguous and needs clarification. The overwhelming majority of submissions expressed dissatisfaction with the current removal clause. It was raised that the provision is ambiguous and has resulted in a general lack of understanding, for example in relation to what constitutes acting in a manner that brings disrepute. Submissions indicated that the definition of 'disrepute' is open to many differing interpretations and therefore provides limited guidance for the public and also the court. In response to this problem, it was submitted that the legislation should provide some factual examples of where *Matai Sa'o* can be removed for bringing disrepute to the family, although not limited to the examples provided.

118. Similarly, the public stressed the need for additional grounds for removal. Some suggestions included where the *Matai Sa'o* has made decisions related to customary land and familial assets without proper consultation, where the *Matai Sa'o* has consistently misused his/her power in self-interest, or where *Matai Sa'o* has bestowed *matai* titles without the family's consent. The Commission notes its recommendation to include as a duty the requirement to consult on certain matters and recommends that breaching the duties and responsibilities of a *Matai Sa'o* be a ground for removal.
119. Another additional ground submitted includes where a *Matai Sa'o* may no longer continue in his or her role due to mental incapacity. The Commission is mindful that this is a decision that may be more appropriately reserved for the family. However, the Commission considers that such a provision may still be valid for situations where the *Matai Sa'o* opposes the decision and the family may wish to petition on grounds of mental incapacity. The Commission recommends that to guide the Court in its assessment in respect of a petition made under this ground, expert evidence can be produced, for example by a medical professional.
120. Numerous submissions received by the Commission highlighted that there is a need to expressly provide grounds for removal of a *Matai Sa'o* in legislation, separate from that relating to *matai*. The Commission considers that a standalone provision or an expansion to 20B of the Act to include a removal provision specifically for *Matai Sa'o* is warranted. The nature of the duties and responsibilities for a *Matai Sa'o* as well as the standard to which a *Matai Sa'o* must be held accountable differs from other *matai* and justifies a separate removal section.
121. The Commission discusses the eligibility requirements at Part 4A of this Report. In that part, the Commission suggests that residential requirements should be set out in law, and that the Registrar must be satisfied that the nominated person meets the residence and eligibility requirements before registering the appointment of a *Matai Sa'o*. The onus is on the nominated *Matai Sa'o* to provide evidence in the form of a statutory declaration, to detail how they meet the eligibility criteria. The Commission considers that additional grounds for removal of a *Matai Sa'o* should include where the nominated *Matai Sa'o* has provided a false statutory declaration

purporting to meet residential and eligibility criteria (or other criteria in the event other criteria are also legislated). The Commission considers that there should be legal recourse for families in these situations.

122. The Commission is of the view that in addition to expanding the grounds for removal, the Court would be better assisted with factors to consider when hearing petitions for removal of a *Matai Sa'o*. The overall aim of providing these factors is to assist the court in assessing whether the petition satisfies the threshold for the ground of removal relied upon. Care must be taken not to limit the ambit of the provision or place rigid parameters thereby limiting the Court's discretion, nor should the courts consideration be limited to the matters listed. Examples of factors include:

- the nature of the alleged breach of duties (and whether the breach of duties was one-off or part of a consistent pattern);
- the severity of the alleged actions;
- whether the alleged actions included any criminal offending;
- the extent of any loss, damage or harm from the breach;
- whether any action was taken by the *Matai Sa'o* to reconcile with the affected members of the family;
- prior history of service to the family; or
- any other matter the Court considers necessary.

123. The Commission also considers that there are very clear reasons for removal that should be included in the legislation such as when a *Matai Sa'o* has been convicted of criminal offending. The general view submitted is that the current provision is too narrow in its ambit with it only applying to offences punishable by life imprisonment. Instead, it was submitted that the provision should be set out more broadly to generally include serious crimes. The Commission agrees and further considers that the legislation should also include an automatic removal clause for very serious crimes which include rape, murder and the like committed in Samoa or another country. Under this clause, a *Sa'o* convicted of any of these criminal offences would be subject to removal. The legislation should identify what constitutes a 'very serious criminal offence'. In addition, an amendment to section 22(3) would be required so that the Registrar may remove the name of a *Matai Sa'o* from the register if proved to the satisfaction of the Registrar that the person has been convicted of a 'very serious criminal offence'.

124. The Commission considers that the factors for the court's consideration in removal cases should also include conviction of criminal offending of a lesser severity than the very serious offending for automatic removal, but still sufficiently serious to warrant the court's consideration. The Commission considers that for low level offending; the decision for removal should continue to rest with the family and not be automatic.

125. The Commission considers that the above views should also be reflected, where necessary, to the provisions on the removal of *matai* in general.

Recommendations

15. The power to remove the *matai* or a *Matai Sa'o* rests with the family concerned, and that the family should endeavour to resolve any disputes between them before resorting to court.

16. The legislation should provide a standalone clause or an expansion of the current provision (section 20B of the Act) to include removal provisions relating to *Matai Sa'o*.

17. The legislation should provide that the Court, upon petition, may order the removal of a *Matai Sa'o* title on any of the following grounds:

- Failure to properly execute duties and responsibilities of a *Matai Sa'o* under the legislation;
- Acting in a manner that brings disrepute to the family;
- Inability to continue due to mental incapacity as supported by evidence from a medical practitioner;
- Knowingly providing false documents regarding the residential and eligibility criteria to the Registrar for the purported registration of *Matai Sa'o* title (if the residential and eligibility criteria is set out in legislation);
- Conviction for criminal offending. Note: the legislation should identify or clarify what constitutes 'criminal offending' which should not capture very minor offending such as traffic offences.

18. In assessing whether to remove a *Matai Sa'o* title, the Court should give consideration to the following factors:

- the nature of the alleged breach of duties (whether the breach of duties was one-off or part of a consistent pattern);
- severity of the alleged actions;
- whether the alleged actions included any criminal offending;
- the extent of any loss, damage or harm from the alleged breach;
- whether any action was taken by the *Matai Sa'o* to reconcile with the affected members of the family;
- prior history of service to the family; or
- any other matter the Court considers necessary.

19. The legislation should also provide that a *Matai Sa'o* may be removed by the Registrar from the register if he or she has been convicted of a very serious criminal offence, punishable by life imprisonment, which includes murder, manslaughter, rape, etc. Other serious sex offences such as incest should also be included as very

serious criminal offences. The legislation should identify or clarify what constitutes a 'very serious criminal offence'. This will require an amendment to section 22(3) so that the Registrar may remove the name of a *Matai Sa'o* from the register if proved to the satisfaction of the Registrar that the person has been convicted of a 'very serious criminal offence'.

20. The legislation should also reflect the above changes, as far as necessary, to the current provision (section 20B of the Act) for the removal of *matai* (adjusted as appropriate).

D. Multiple *Sa'o* and *Matai*

126. A significant issue raised during consultations relates to multiple *Sa'o*s and multiple *Matai*'s in a single family and how it has contributed to many disputes and disagreements ending up before the Court.

127. Based on research the Commission conducted, there are two main groups of *matais*. These include chosen *matais* (*matai filifilia*) and *matais* who are selected (*matai tofia*). The chosen *matai* is the *Matai Sa'o*. Selected *Matais*' are *suli* who are selected by the *Sa'o* to assist him or her in carrying out the responsibilities and duties of a *Sa'o*.¹³⁷ In relation to chosen *Matais*, the common belief is that only one person is normally chosen as the *Matai Sa'o* according to custom and tradition.¹³⁸

Reasons for Multiple appointments of Sa'o

128. The mass bestowal of *matai* titles which is common nowadays, is itself one of the reason for the appointment of multiple *Sa'o* in a family. This becomes circular because multiple *Sa'o* in a family is also in itself a reason for the increase in the bestowal of *matai* titles.

129. A Paper presented at the 7th Measina Conference at the National University of Samoa suggested some of the reasons why multiple *matai* were bestowed *Sa'o* titles. One reason given is due to the overarching power of *sulias* rightful heirs of the *Sa'o* title, to select the *Matai Sa'o*. As a result *suli* can choose as many *Sa'o* as they want, resulting in a single family having more than one *Sa'o*. It was also suggested that as *suli* are now more educated and aware about their rights as well as the powers of the *Sa'o*, more *suli* are wanting to become a *Matai Sa'o* (*fiapa'iivai o le tama*).

¹³⁷ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

¹³⁸ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

130. Another reason given is that sometimes the Courts have decided in favour of the division of families into factions (*fa'aitupaepae o suafo, fa'afuaifalesuafo, fa'a-faletamasuafo, fa'amavaevaefilifiliga*) on petition by *suli*. As a result each faction then appoints one or more *Sa'o* as they see fit.
131. Appointments of multiple *Matai Sa'o* on the basis of or personal wealth is also suggested as another reason, due to their and economic contributions to the family (or even merely the potential to do so).
132. Furthermore, it suggested that *suli* residing overseas would sometimes seek a *Sa'o* title to uphold their legacy and remain influential on the family. However often they would request the appointment of another *Sa'o* who would reside in Samoa who could carry out duties and responsibilities that the *Sa'o* overseas was unable to do.¹³⁹
133. Another reason suggested for the common practice of multiple appointments of *Sa'o* is that Samoan families are much larger now more dispersed, and therefore having one *Sa'o* may be impractical as he or she will not be able to properly carry out the role and responsibilities of a *Sa'o* in such circumstances (*fa'amalieina le tupu ma ola o le aiga*). It was indicated that in some circumstances the Court appears to validate appointments of several *Matai Sa'o* for large families to foster this growth and expansion, when it is satisfied that it is the best and most effective way of resolving the issue.¹⁴⁰

Impacts of having multiple Matai Sa'o appointed

134. The bestowal of multiple *Matai Sa'o titles* has led to many problems affecting Samoan families and culture. One of the common issues is that having multiples' within a family often results in disagreements and confusion over the distribution and ownership of assets and resources. For example, one *Matai Sa'o* would argue that he should get the sole authority or more influence over a certain piece of land because he worked hard to develop the land compared to another *Sa'o*.¹⁴¹
135. Research carried out by the Commission suggested that a common dispute scenario is where there are multiple *Matai Sa'o* who make a decision (for example in relation to the leasing of family customary land), with one or more *Sa'o* in the minority dissenting. The dissenting *Matai Sa'o* could prevent the decision as he or she has the equal rights, authority and power with regards to the land as the other

¹³⁹ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

¹⁴⁰ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

¹⁴¹ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

Sa'o title holders.¹⁴² Where for example *suli* in favour of the majority decision take the matter to court, the Court would normally uphold the right of the dissenting title holder to disagree – as such *Sa'o* is treated equally by the Court to all the other *Matai Sa'o*, regardless of how many there are, and how long they have held the *Sa'o* title.¹⁴³ The Court does not follow on the common understanding in the *fa'a-Samoa* that “*e fa'alogomulimaiiamuamai*” (the most recent titled *Matai Sa'o* has listens to the longest serving title holder).¹⁴⁴

136. In addition, having multiple *Sa'o* has often resulted in claims of bias by the *Sa'o* towards particular family members affected the bond between members of the extended family with the *Sa'o*. For example, there have been reported cases where,

- the *Matai Sa'o* has bestowed *Matai* titles onto his or her children without the knowledge of the extended families;
- proposed that one of his children to become the next *Matai Sa'o* without mentioning *tautua* from families while the *Matai Sa'o* was alive;¹⁴⁵ and or
- have made decisions on matters concerning the whole family in a manner that appears to favour the *Sa'o* and his direct descendants.¹⁴⁶

137. Nowadays, despite multiple *Matai Sa'o*s being appointed within a family, normally only one of the multiple holders of the title is chosen to represent the family in the village council (i.e. *faaloaloga* or *aliimatua*).¹⁴⁷ *Faaloaloga* evidently reflects the original practice where only one *Matai Sa'o* is chosen to represent the family, however even the *faaloaloga* is often disputed before the Court.¹⁴⁸

Reasons for Multiple Matais

138. As mentioned earlier the mass bestowal of *matai* titles is common nowadays, and may be attributed in part to the appointment of multiple *Sa'o* in a family. As noted by the Prime Minister, this in turn has led to the mass bestowal of *matai* titles all over the country.¹⁴⁹

¹⁴² *Pule a le Matai Sa'o* Public Consultations, Upolu, 1-2 November 2016.

¹⁴³ *Pule a le Matai Sa'o* Public Consultations, Upolu, 1-2 November 2016.

¹⁴⁴ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

¹⁴⁵ Faamausili Soloina Brown (Keynote address at the 7th International Measina Conference, National University of Samoa, 15 November 2016).

¹⁴⁶ Faamausili Soloina Brown (Keynote address at the 7th International Measina Conference, National University of Samoa, 15 November 2016).

¹⁴⁷ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

¹⁴⁸ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered for Samoa Law Reform Commission's Public consultations, Savaii & Upolu, October – November 2016).

¹⁴⁹ Mata'afa Keni Lesa, P.M's warning shot about matai titles', Samoa Observer (online), 6 December 2016 <http://www.samoobserver.ws/en/06_12_2016/editorial/14643/PM%E2%80%99s-warning-shot-about-matai-titles.htm>.

139. According to many members of the public consulted, some of the reasons for multiple *matai* are to reduce costs of the bestowal ceremony, others are to appease different factions within the families (often very large and dispersed).
140. The pool of persons who may be bestowed a *matai* title are not limited to *suli*. *Matai* titles may be bestowed on *suli* (*suafaulufatu*) but may also be bestowed on outsiders who have rendered some service or *tautua* to the family (*suafaigagato*). Sometimes a title is bestowed on persons some who have not rendered some service but who have personal wealth. Many of the public consulted stated that sometimes the decision for bestowal of a *Matai* title is purely for the economic gain of the *Matai Sa'o*.¹⁵⁰ For example, *Matai* titles are bestowed upon receipt by the *Matai Sa'o* of money (\$1000) instead of through service to family. Therefore, if a *Matai Sa'o* decided to bestow 50 titles, they would receive \$50,000 and may not distribute or share this money equally among the family.

Impacts of having multiple Matai

141. The mass bestowal of *matai* titles was noted by the Prime Minister in a public statement as reducing the value of the title.¹⁵¹ An example provided was of a family with numerous *Matai Sa'o*, each bestowing numerous *Matai* titles.
142. Mass title holders also increases the number of disagreements and disputes between family members, or with the *Sa'o* or multiple *Sa'o*, or between the multiple *Sa'o* of the family. In a Paper presented at the 7th Measina Conference, it was reported that there is often conflict between *suli* bestowed a *suafa* (*suafaulufatu*) and outsider awarded a *suafa* (*suafaigagato*). Members of the family who are awarded a *suafa* have challenged the authority and ownership of the *Matai Sa'o* title causing disagreements and disputes.¹⁵²
143. This has also created challenges regarding consensus as to who the next *Sa'o* will be when a new *Matai Sa'o* is appointed. This is because each *Matai Sa'o* (if a family has more than one) would want to have their own say on decisions and represent the family.¹⁵³

¹⁵⁰ See discussion in Part 4D: Multiple *Sa'o*.

¹⁵¹ Mata'afa Keni Lesa, P.M.'s warning shot about matai titles', Samoa Observer (online), 6 December 2016 <http://www.samoasobserver.ws/en/06_12_2016/editorial/14643/PM%E2%80%99s-warning-shot-about-matai-titles.htm>.

¹⁵² Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

¹⁵³ Tuia Logoiai Pu'a Letoa, 'E Sui Faiga Ae Tumau Fa'avae' (Paper presented at the 7th International Measina Conference, National University of Samoa, 15-17 November 2016).

American Samoa and registration of ‘only one’ matai title

144. The law of American Samoa provides that “persons may not register more than one *matai* title at one time”.¹⁵⁴ Therefore, where a person is bestowed two *Matai* titles, only one of the 2 would be recognised.¹⁵⁵ The title bestowed contrary to the law cannot be registered, and its use (i.e. use of an unregistered *matai* title) is an offence.¹⁵⁶

145. It is suggested that the ‘one titleholder clause’ in American Samoa’s laws has helped develop a valuable defining concept that has shaped extended family into one integral entity by avoiding duplication of family titleholders. It is also suggested that this provision holds the family together under one leadership and gives the one registered *matai* full responsibility for leading the family.¹⁵⁷

Submissions

146. In the Discussion Paper, the Commission sought submissions on the following:

- *When there is more than one Sa’o in a family, how can consensus be achieved? Should the Sa’o with the longest tenure make the final decision?*
- *Should there only be one Sa’o appointed?*
- *How can disputes amongst multiple Matai Sa’o be minimised? Should these be set out in legislation?*
- *Where more than one person is bestowed with the same matai title (for example when 50+ get bestowed a title), how does this contribute to disputes within families? What, if any, areas should be considered for legislation to minimise to disputes?*

Reaching a consensus and who should have the final say

147. The majority of submissions received agree that having multiple *Sa’o* has often made reaching consensus challenging. Many submitters have suggested as a way reaching consensus between *Matai Sa’o*, is to give respect to the most senior title holder (years of holding the title) as practiced today with *faaloaloga*. This links to the Samoan culture in which respect, reverence and privileges of a family are reserved for the most senior members of the family or a group.¹⁵⁸ Therefore, the more senior title holders would have more authority and influence in decision making compared to their younger counterparts.

¹⁵⁴ *American Samoa Code Annotated* (American Samoa) § 1.0402.

¹⁵⁵ Peseta T. Sunia Seloti, ‘Pipi’imale’ele’ele Bonding with the Land: The Oneness of Man and His Land’ (An observation of the present day matai system in American Samoa) cited in So’o, Asofou (ed), *Changes in the matai system = O suiga i le fa’amatai* (Centre for Samoan Studies, National University of Samoa, 2006) 95-96.

¹⁵⁶ *American Samoa Code Annotated* (American Samoa) §§ 1.0401-1.0414. See also, *Toilolo v. Poti* 23 A.S.R.2d 130 (1993).

¹⁵⁷ Peseta T. Sunia Seloti, ‘Pipi’imale’ele’ele Bonding with the Land: The Oneness of Man and His Land’ (An observation of the present day matai system in American Samoa) cited in So’o, Asofou (ed), *Changes in the matai system = O suiga i le fa’amatai* (Centre for Samoan Studies, National University of Samoa, 2006) 95-96.

¹⁵⁸ *Pule a le Matai Sa’o* Public Consultations, Upolu, 1-2 November 2016.

148. It was also submitted by some members of the public that when representing the family in the Village Council, the priority as to who will attend should also be given to the most senior title holder¹⁵⁹. It was suggested that the Court should by prioritise the views of senior title holders rather than giving all title holders equal recognition based on their individual rights. Many also emphasised that if priority is given to the senior holder to represent the *aigapotopoto* in the village council, such person should be also physically and mentally fit to represent the family.¹⁶⁰
149. Professor Asofou So’o suggest that for cases where the *Matai Sa’o* resides overseas and who dissents on a decision relating to land, titles and family members in Samoa for instance, the court should give priority to the title holders in Samoa.¹⁶¹
150. Others have suggested a more collaborative approach so that multiple holders should take turns to attend village council meetings.¹⁶²

One or more than one Matai Sa’o?

151. Most of public consulted supported legislating that a family have only one holder of the *Matai Sa’o* title, as multiple *Matai Sa’o* were viewed as causing and resulting in many family disputes.
152. Some consulted disagree with limiting the number of *Sa’o* title holders to only one per family stating that it is simply not practical this day and age. This was because Samoan families have grown much larger and are often widely dispersed, so it is simply impractical and ineffective to have just one *Sa’o* title holder to effectively carry out the role of *Sa’o* in such circumstances.
153. Some suggested that Government choose to limit the number of *Matai Sa’o* in legislation, there should be a maximum of 3 title holders. In line with this view, the COI Report recommended that it would also be more respectful and conducive to avoiding disputes, to have only five (5) *Matai Sa’o* in a family at a time.¹⁶³
154. Similarly, Professor So’o expressed although that having one *Matai Sa’o* similar to American Samoa would be ideal to avoid or reduce the abuse of power by a *Matai Sa’o*, he emphasised that the current practice of having multiple *Matai Sa’o* should be maintained for Samoa. His reasons were that the downside of having one *Sa’o* is that the *Sa’o* should be the *Sa’o* of the ‘aigapotopoto’ and if that individual is not

¹⁵⁹ *Pule a le Matai Sa’o* Public Consultations, Upolu, 1-2 November 2016.

¹⁶⁰ *Pule a le Matai Sa’o* Public Consultations, Upolu, 1-2 November 2016.

¹⁶¹ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹⁶² *Pule a le Matai Sa’o* Public Consultations, Upolu, 1-2 November 2016.

¹⁶³Parliament of Samoa, Special Commission of Inquiry into the performance of the Lands and Titles Court Judges, *Final Report* (2016) 56. No specific reason was provided by the COI as to why 5 is the chosen number, also no solution provided as to what to do with families with multiple *Sa’o* in the meantime.

respected and supported by some members of the extended family, it could result in disharmony and more disputes.

155. Some members of the public strongly rejected intervention by the Government in cultural and family issues, which they stated should be left to the family to resolve themselves. There was great concern that legislating could somehow interfere with the family's right to choose their own *Matai Sa'o* and whether they wish to appoint more than one. What was proposed was to still permit multiple *Sa'o* holders but for legislation to clearly specify that the family had to identify and choose the *Matai Sa'o* who will represent the family in the Village Council and village affairs. Some of the considerations to assist a family's decision included the age of the individual, and the length of years of service to the family and the village. In this way, the exclusive right of a family to choose their own *matai Sa'o* will be preserved.

Multiple Matais

156. Submitters also acknowledged that having multiple *matais* similar to having multiple *Sa'o*s also contributes to disagreements among the family. One of these issues is the challenges regarding decision-making and consensus as to who the next *Sa'o* will be. Despite this and other issues associated with having multiple *matai* title holders, it was emphasised that the selection of *Matais* is the role of the *Matai Sa'o* and that he or she could select as many *matais* as he or she pleases to assist the *Sa'o*. To minimise problem problems associated with multiple *matai*, the *Matai Sa'o* should take into account certain factors when selecting new *matais*.¹⁶⁴

157. The Commission notes the complexity of this issue given that each extended family is different in the way they appoint their *Sao* and criteria they consider for such appointments although similar, may be given different weight different.

Commissions Views

Multiple Sa'o

158. Public consultations and submissions indicated the various reasons why multiple *Sa'o* are appointed instead of one *Sa'o* which was traditionally the normal practice. Some of the reasons provided are as listed.

- Samoan families are much bigger than before and often widely dispersed and therefore it is practical to appoint more than one *Sa'o* to ensure family matters are dealt with properly and family properties (*measina*) are well looked after. Larger and more dispersed families also meant that in some situations a *Sa'o* would not always have a strong hold or influence over the

¹⁶⁴ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016). See also discussion on Duties of *Matai* at Part 2C.

family as a whole particularly where there were factions, and multiple *Sa'o* with influence over the different factions would be appointed.

- The overarching powers of the *suli* to appoint as many *Sa'o* as they want, sometimes resulting in appointing who they believe will best serve their interests.
- More *matai* wish to hold the *Sa'o* title to have increased control and influence over family lands and titles.
- Court decisions have often divided families into factions and as a result each faction would appoint one or more *Sa'o* as they saw fit.
- Personal wealth of the appointed.

159. Common disputes associated with the appointment of multiple *Sa'o* revealed during public consultations include:

- Disagreements over the distribution and ownership of family assets and resources and the bestowal of titles. These often included claims of not being consulted or claims of favouritism by the *Matai Sa'o* towards particular family members;
- Leasing of customary land- the Court would normally uphold the right of the dissenting title holder who objected to a lease of customary land despite the majority of the *Sa'o* supporting the lease;
- Multiple *Sa'o* appointing multiple *Matai* adding to the complexity and increasing the difficulty in reaching agreement.

160. The majority view of public consulted and submissions received support the current practice of having more than one *Matai Sa'o* in the family. However they also put emphasis on the need for legislation to provide some restrictions or guidelines to minimise disputes.

Matai Sa'o to meet Eligibility Requirements for appointment as a Sa'o

161. The Commission considers that legislating key minimum criteria for the selection and appointment of a *Sa'o*¹⁶⁵ (see Recommendation 1) would assist in minimising some of the issues relating to *Matai Sa'o*, whether or not legal reforms are made requiring only one *Matai Sa'o* for a family or the continuation of the current practice by many families having more than one *Sa'o*.

162. The Commission also notes that families have different customs and traditions, which makes it very challenging to make 'one size fits all' recommendations that address every concern. As a result, the Commission has provided some law reform options for Government to consider.

¹⁶⁵ See Part 4A: Eligibility for Appointment as Matai and Matai Sa'o, Recommendation 1.

163. The options include keeping multiple Matai Sa'o or changing practice and having only one Matai Sa'o. Under each option, the Commission lists some additional considerations for the government to deliberate on, to try to reduce the number of disagreements arising from multiple Sa'o and also to reduce abuse of power if only one Sa'o is appointed. Depending on the option chosen, some considerations will need to be legislated whilst others are left to the family to decide.

OPTION 1: Multiple Sa'o to continue to be permitted

164. Firstly, the Commission re-emphasizes that the power to appoint more than one Sa'o rests exclusively with the family, in accordance with its own custom and tradition.

165. This is the Commission's preferred option. If the government decides to adopt this option, due consideration should then be given to:

- i. Whether the status quo should remain where a family can appoint as many Sa'o as they want; or
- ii. To impose a maximum number of Matai Sa'o appointed.

166. The Commission notes that the COI recommended limiting the number of Matai Sa'o to 5 at any one time.¹⁶⁶ The Commission considers it may be easier for 5 or less Sa'o to reach agreement on decisions than it is with more Sa'o. However, it is not clear in the COI's report how the limit of 5 was chosen nor were recommendations made by the COI to address what to do with the current situation where there are more than 5 Matai Sa'o in a family.

167. Regardless of whether the status quo remains or a maximum number of Matai Sa'o is allocated per family, issues concerning consensus will still be present. The Commission therefore suggests that the following proposals should be considered in decisions made relating to family land and titles¹⁶⁷ where there is more than 1 Matai Sa'o in a family:

- i. Decisions are made by 'consensus' of all Matai Sa'o; or
- ii. Decisions are made by 'majority' of Matai Sa'o; or
- iii. Decisions are made by a Matai Sa'o who has been identified as the 'Paramount Matai Sa'o.

¹⁶⁶ Parliament of Samoa, Special Commission of Inquiry into the performance of the Lands and Titles Court Judges, *Final Report* (2016) 39. It is conducive in avoiding disputes among families and abuse of power by a Matai Sa'o, to have only 5 Matai Sa'o ("E onomea ma mamalu pe a faagata i le lima (5) matai e umia ma nofoia suafa Sa'o a aiga i se taimi e tasi".)

¹⁶⁷ See discussion in Part 4B: Duties of a Sa'o.

Decisions by consensus

168. If decisions are to be made by consensus, the Commission recommends that consideration be given to whether this means:

- i. Consensus by all *Matai Sa'o* residing in Samoa and overseas; or
- ii. Consensus by *Matai Sa'o* residing in Samoa.

169. In addition, if consensus is not reached and a dispute comes before the Court, the Commission considers that the Court should give preference to views of:

- i. *Matai Sa'o* residing in Samoa, where the dissenting *Sa'o* resides overseas;
or
- ii. *Matai Sa'o* who is the most senior title holder (i.e. years of holding the title); or
- iii. Both.

170. The Commission notes that although these proposals differentiate between *Matai Sa'o* residing in Samoa and overseas, this differentiation may not be necessary if the Commission's recommendation for a *Matai Sa'o* to reside in Samoa is implemented.¹⁶⁸

Decisions by majority

171. In relation to decisions made by majority, the down side is that it may inadvertently result in more *Matai Sa'o* being appointed specifically to increase supporting numbers in decision making.

172. If the decision results in a tie, consideration should be given to whether the Court should give preference to the most senior title holder (i.e. years of holding the title). For example, if Simi has held the *Sa'o* title for 20 years and the other 3 *Sa'o* have held the same title for less than 10 years, Simi would normally have more influence in decision making compared to the other *Sa'o*, and would also normally be the representative of the family in village council meetings. As a result, deference would normally be given by other *Matai Sa'o* to Simi's view and he would normally have final say in all matters affecting the family.

173. If there is more than 1 title holder who has held the title for the same length of time, then consensus should be required by all the *Matai Sa'o*, or both of the longest serving.

¹⁶⁸ See Part 4A: Eligibility for Appointment as Matai and Matai Sa'o, Recommendation 4.

Decisions by a Paramount Matai Sa'o

174. This is where one of the *Matai Sa'o* is identified as having the highest authority out of all the *Matai Sa'o* of the family, and is given the final say or decision making authority on behalf of all the *Matai Sa'o* in the family in significant decisions relating to family lands and titles.

175. The following are some suggested ways about how the paramount *Matai Sa'o* can be chosen:

- i. The family can choose from the existing *Matai Sa'o* in their family who the Paramount *Matai Sa'o* will be; or
- ii. All the *Matai Sa'o* of the family select amongst themselves who the paramount *Matai Sa'o* will be (this appears similar to the practice of respect/ deference (*faaaloaloga*) currently carried out today); or
- iii. The most senior person in terms of length of tenure as *Matai Sa'o* and service to the family. However, if there is more than one person with the same length of tenure and service, then these *Matai Sa'o* can decide amongst themselves who will be the Paramount *Matai Sa'o*.

OPTION 2: Limit of One *Matai Sa'o*

176. Many members of the public consulted called attention to practices in the past, where it was normally for a family to have only one *Matai Sa'o*. An advantage is that decisions can be made swifter under one leader. It would also omit disputes and disagreements amongst multiple *Matai Sa'o* (for example in relation to decisions to lease family land where there is a dissenting view of 1 *Matai Sa'o* to stop a lease from proceeding despite agreement by all others, the dissenting *Matai Sa'o* could potentially put an end to it).

177. The following are some concerns about having one *Matai Sa'o*:

- i. the impracticality of having one *Sa'o* due to the large size of families nowadays that are normally spread across Samoa and overseas;
- ii. diminished respect and support by members of the extended family particularly if he or she is unable to look after the interests of all members of the *aiga potopoto*. There are also likely to be more claims of biased decision making particularly in relation to bestowal of *matai* titles.¹⁶⁹

178. Should this option be chosen by Government, further consideration should be given to what to do to the multitudes of *Matai Sa'o* currently in existence for many families.

¹⁶⁹ Note this may be addressed by clarifying in legislation the duties of a *Matai Sa'o* to consult in such situations. See Recommendation 11.

179. Before making a decision on which option to proceed with, the Commission recommends that the Government allow time for any implemented recommendations to take effect, as the other recommendations may effectively reduce issues associated with abuse of power by the matai *Sa'o* such that a decision need not be made on this particular issue at this time.

Recommendations

21. Government to consider the following Options 1 and 2, and note the further considerations under each option.

OPTION 1: Multiple Sa'oto continue to be permitted

21.1 This is the Commission's preferred option. In choosing this option consideration should be given:

- A. Whether the status quo should remain where a family can appoint as many Sa'oto as they want; or
- B. To impose a maximum number of Matai Sa'oto appointed (for example 5) as recommended by the COI.

21.2 Consideration should also be given as to how and by whom decisions relating to land (such as leasing of land) and bestowal of titles are made where there is more than 1 Matai Sa'oto in a family. The options are:

- A. Decisions are made by 'consensus of all' Matai Sa'oto.
 - a. Here consideration should be given as to whether consensus means:
 - i. Consensus by all *Matai Sa'oto* 'residing in Samoa and overseas'; or
 - ii. Consensus by *Matai Sa'oto* 'residing in Samoa'.
 - b. Where consensus is not reached, the Commission recommends that the Court should give preference to views of:
 - i. *Matai Sa'oto* residing in Samoa, where the dissenting *Sa'oto* resides overseas; or
 - ii. *Matai Sa'oto* who is the most senior title holder (i.e. years of holding the title); or
 - iii. Both.

Note: the differentiation between *Matai Sa'oto* residing in Samoa and overseas may not be necessary if the Commission's Recommendation 2 for a *Matai Sa'oto* to reside in Samoa is implemented.

- B. Decisions are made by 'majority' of Matai Sa'oto,

If there is a tie the Court should give preference to the views of title holder with the most years holding title (whether or not there is more than one) or as the Court otherwise directs (to provide for unlikely circumstances where two title holders with opposing views have the same tenure of

title).

Note: All the *Matai Sa'o* should be encouraged to give deference to the views of title holder with the most years holding title (this aspect should not be legislated).

C. Decisions are made by the Paramount *Matai Sa'o*.

- a. The final say or decision making in respect of significant decisions relating to family land and titles is made by the on behalf of the Paramount *Matai Sa'o* on behalf of all the *Matai Sa'o* in the family.
- b. The Paramount *Matai Sa'o* can be selected in one of the following ways:
 - i. The family can choose from the different *Matai Sa'o* in their family who the Paramount *Matai Sa'o* will be; or
 - ii. All the *Matai Sa'o* of the family can select amongst themselves who the paramount *Matai Sa'o* will be (this appears similar to the practice of respect/ deference (*faaloaloga*) currently carried out today); or
 - iii. The most senior person in terms of the length their tenure as *Matai Sa'o* and also service to the family. However, if more than one person with the same length of tenure and service, then these *Matai Sa'o* can decide amongst themselves who will be the Paramount *Matai Sa'o*

OPTION 2 : Limit of One *Matai Sa'o*

Should this option be chosen by Government, further consideration should be given to what to do to the multitudes of *Matai Sa'o* currently in existence for many families.

22. Before making a decision on which option to proceed with, the Commission recommends that the Government allow time for any implemented recommendations to take effect, as the other recommendations may effectively reduce issues associated with abuse of power by the *matai Sa'o* such that a decision need not be made on this particular issue at this time.

F. Dispute Resolution

23. “*E fofo e le alamea le alamea*” (the remedy for the sting of the crown-of-thorns starfish is found in the alamea itself). This Samoan expression indicates that the resolution of cultural disputes is the *fa’asamoa* itself. Issues and disputes within the Samoan community is discussed and consulted on through the village council or within families for internal matters. All disputes are raised in the village council or in family meetings and discussed at length – this is called *soalaupule*. This allows *matai*’s (each representing their extended families) to express their opinion before a final decision is made. Consensus is often reached on decisions through *soalaupulega* as conflicting parties commonly overcome their differences and find solutions for themselves regarding their disputes.
24. As discussed in Part 3, the *Land and Titles Act 1981* contains extensive provisions on dispute resolution. This includes requiring parties to make a genuine effort to resolve disputes through Samoan conciliation, and exploring options for settlement.¹⁷⁰ Samoan conciliation can be conducted at any stage of proceedings or prior to the petition being filed.¹⁷¹ The Registrar can also delay setting down a matter for hearing until the parties have at least attempted reconciliation according to Samoa custom and usage.¹⁷² Furthermore, the Act clearly provides that the Court should refuse to hear a matter if parties have not undertaken Samoan conciliation,¹⁷³ and can refer parties to mediation (with or without their consent)¹⁷⁴ or advise them to use a dispute resolution process.¹⁷⁵
25. Many disputes arise over who has the supreme authority over land. The Commission is informed that generally the authority over land rests with the *Matai Sa’o* of the family.¹⁷⁶ In most instances the general view of the *Matai Sa’o* is that his authority extends over the family and land (*e pule I fanua, pule itagata*). The usual response from the aggrieved families is that regardless of the control of the *Sa’o* over the familial titles and land, the family have a right to challenge the authority of the *Matai Sa’o*. This right of the family is invoked where the *Matai Sa’o* has used his authority unilaterally without consulting the family and has disrupted the peace of the family.
26. *Soalaupulega* is expected to be carried out before a decision is made by a *Sa’o*, as it is custom to seek the views of all family members including the elder members. The underlying purpose is that a *Sa’o* will be able to make an informed decision after hearing each point of view presented by the family members. This also ensures that

¹⁷⁰ *Lands and Titles Act 1981* (Samoa) s 34A.

¹⁷¹ *Lands and Titles Act 1981* (Samoa) s 34B(1).

¹⁷² *Lands and Titles Act 1981* (Samoa) s 42(6).

¹⁷³ *Lands and Titles Act 1981* (Samoa) s 34C(1).

¹⁷⁴ *Land and Titles Act 1981* (Samoa) s 34C.

¹⁷⁵ *Land and Titles Act 1981* (Samoa) s 34D.

¹⁷⁶ Ministry of Justice and Courts Administration (Consultation, Ministry of Justice and Courts Administration Complex, Mulinuu, 23 February 2016).

village members are well informed of societal changes and can accordingly better monitor any abuse of power by a *Matai Sa'o*

Submissions

27. In the Discussion Paper, the Commission sought submissions on the following:

- *What are the main disputes between Matai Sa'o and Suli and how can these be more easily resolved?*
- *The current law requires parties to make a genuine effort to resolve disputes by participating in dispute resolution such as Samoan conciliation, and that the Court may refuse to hear a matter if the parties do not undertake Samoan conciliation. How can the Court ensure a genuine effort has been made to resolve the dispute? What, if any, criteria should be met and should this be set out in legislation?*

Main disputes between Matai Sa'o and Suli

28. The following are some of the key disputes between *Matai Sa'o* and *Suli* raised in consultations and submissions received:

- *Matai Sa'o* not consulting the family in their decision-making
- *Matai Sa'o* refusing to approve the use of land and bestowal of titles
- Improper distribution of lease payments
- Validity of the *Matai Sa'o* appointment
- Bias towards certain family members
- Inability to maintain peace within the family

Matai Sa'o not consulting the family in their decision-making

29. The majority of view in public consultations were that the main disputes families have with their *Matai Sa'o* stem from the *Matai Sa'o* failure to consult the family before making significant decisions affecting the family and its properties.

30. The Commission sought the views of Professor So'o on this issue who stated that sometimes disputes would arise where a *Matai Sa'o* used the families' resources, predominantly land, for his own personal benefit without the family's knowledge or without consulting all family members for approval. For instance, to build his house or set up his farm or plantation on family land.

31. He suggested that this was likely because there are clear cut cases where *Matai Sa'o* believe they must consult but also situations where it was not necessary to consult. He emphasised that in a situation where it is not necessary for the *Matai Sa'o* to consult, a decision must be beneficial to the family and maintain peaceful cohabitation. In the example of a *Sa'o* building his own house or setting up a farm or plantation on family land without consulting the family, some family members may

perceive this as being for the *Matai Sa'o* personal benefit. However the *Matai Sa'o* may argue that his or her decision is beneficial to the family, for example for family accommodation during family gatherings and faalavelave (*e tuaiaifaigamea ale aiga*). Additionally, Professor Asofou So'o clarified that there are some incidents where a *Sa'o* feels justified to use the family's resources so that they can become better resourced to make the most contribution in both family and village obligations (*saogamea*).

32. Chief Justice Sapolu stated that a growing number of court cases involve *suli* asserting their right to stop *Matai Sa'o* from releasing family land for lease without their knowledge and permission. According to the MJCA, failure to seek approval to lease family land is one of the main causes of family disputes before the Court.¹⁷⁷ Professor Malama Meleisea also shared some dispute scenarios in which the *Matai Sa'o* informed only some family members. He reiterated the importance of the *Sa'o* making genuine attempts to consult and inform all family members in all matters pertaining to lease of family land.

33. It was suggested that legislation should require the *Matai Sa'o* to consult his family before he or she decides to lease family land to investors wanting to establish a business on family land.¹⁷⁸

Matai Sa'o refusing to approve the use of land and bestowal of titles

34. The Commission received considerable submissions about family disputes involving an aggrieved family member who sought consent from a *Matai Sa'o* to use some portion of the land but his application was rejected. Many members of the public expressed outrage at the *Matai Sa'o* acting in a way based on his or her personal interests.

35. During the Commission's public consultations in Savaii, numerous attendees stated that particularly with *Matai Sa'o* living overseas, family members living on the family land are often aggrieved by rejections to proposed usage of the family land to benefit the family in Samoa. Chief Justice Sapolu shared this concern and clarified that the court itself has been hearing a proliferating number of cases between families and their *Matai Sa'o* living overseas who refuse to consent to attempts of family members living in Samoa to utilize and develop some portion of the family land to better position them to serve families and contribute to family faalavelave (obligations).

36. For other aggrieved submitters, disputes often arising when *Matai Sa'o* refuse to allow family members to build their homes on the family's land. In some instances, it

¹⁷⁷ Papalii John Taimalelagi Afele, 'Pule a le Matai Sa'o' (Speech delivered at the Samoa Law Reform Public Consultations, Savaii & Upolu, 27-28 October & 1-2 November 2016).

¹⁷⁸ Patu Ativalu (and Tofaeono Tau) Matai Sa'o (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

was submitted that disputes arise when a *Matai Sa'o* orders some family members to evict the family land despite having lived there for many years.

37. Other grievances related to decisions of an outgoing or former *Matai Sa'o* being altered by a new *Matai Sa'o*. For example, one *Matai Sa'o* allotted a portion of family land to a family to make a home on but after his death, the next *Matai Sa'o* evicted the family.
38. In relation to bestowing titles, submitters cited families taking their *Matai Sa'o* to Court for interfering with family consensus to bestow *matai* titles to other family members. Some submitters stated that families were often in dispute when people without blood connection to the family, or who have not rendered service to the family are bestowed titles and appointed as *matai* tautua.

Distributing lease payments

39. The Commission received public submissions suggesting that a large number of disputes related to the failure by a *Matai Sa'o* to distribute lease payments received from leasing family land, to the family. It was conveyed that the *Matai Sa'o* either keeps the money or distributes it only to a small portion of the family.
40. One submitter suggested that one way to resolve this issue could be to legislate so that the family must agree on how lease payments will be distributed and a duty is imposed on the *Matai Sa'o* to distribute the money according to this agreement. Another suggestion was to legislate to require a *Matai Sa'o* to distribute lease money to all members of the family at a ratio of 50:50¹⁷⁹.
41. Chief Justice Sapolu reiterated the public's concern on this issue. He stated that in some cases, the whole family is aggrieved because the *Matai Sa'o* reserved most of the money for his own direct line/offspring (*faletama*) rather than making fair distribution to all. The MJCA also confirmed a growing number of family disputes that are heard by the court stem from this failure of *Matai Sa'o* to distribute lease payments.
42. Chief Justice Sapolu recommended that a first guideline to direct the court in dealing with these issues would be to legislate that the *Matai Sa'o* does not have any right or authority to use all lease payments themselves but that they must share money with all family members. He also recommended adding that the court must use its wisdom (*tofa ma le faautautaga*) to decide whether it is fair, reasonable or accordance with law and custom to award these payments to certain members of the family in contentious cases. For instance, it was conveyed that in some cases, the *Matai Sa'o* argues that the family members challenging his decision to withhold

¹⁷⁹ Patu Ativalu (and Tofaeono Tau) Matai Sa'o (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

payments never contributed to family faalavelave, never rendered tautua or never appeared in family/village affairs, but because they are *suli*, they deserve to get money from the lease of communal land. The Chief Justice stated that when he hears cases of this nature, he asks whether it is fair or reasonable to award lease money to family members who have failed to do their duty to the family.

The validity of a Matai Sa'o appointment

43. The Commission noted from submissions that sometimes disputes transpire because family members challenge the validity of a *Matai Sa'o* s appointment. In these cases, the true heirs (*sulimoni*) to the title challenge the appointment of an adopted heir (*sulitamafai*) in court because they argue that it is unfair that they are bestowed the title which rightfully belongs to them and should be retained in the family. In some cases, the *suli* challenge an appointment where on the death of adopted heir, the title passes on to the heirs of the adopted heir (which was never the intention as it was conditional on being limited to the adopted heir) and consequently out of the true family's reach completely.
44. Other submitters complained that court records are sometimes unreliable because they provide that an appointed *Matai Sa'o* is a true heir when in fact it is well known within the family that he or she is actually not.
45. There were also reports of cases where *Matai Sa'o* directly appointed their heir as the next *Matai Sa'o*, true heir or not, without the family's consensus.

Bias towards certain family members

46. The Commission also received submissions that some prolonged disputes within families happen because the *Matai Sa'o* is biased towards some family members. It was submitted that this favouritism also extends to distribution of family money, goods, lands and titles. The public submissions also conveyed that this favouritism has caused division in families and is a reason why attempts at reconciliation (*soalaupulega*) fail.
47. It was also indicated that the *Matai Sa'o* can cause divisions between families by encouraging some to override the views of others, which also inhibits the reconciliation (*soalaupulega*) process.
48. The Commission also received submissions stating that some family clashes transpire and continue when a *Matai Sa'o* cannot achieve harmony in the family and either makes no effort to bring the family together, is not influential or respected enough, or simply cannot do it for other reasons.

Genuine Efforts to Resolve Matter before Resorting to Court

49. The majority view is for families to deal with their matters outside of the Court system. Only if all these options are exhausted should the matters then be referred to Court. .
50. The current law states that a 'genuine effort' should be made to conciliate and that the Court can refuse to hear a matter if this does not occur. The provision requiring parties to make a genuine effort only stipulates that they must participate in dispute resolution and exchange written communication that explores option for settlement. The provision is somewhat limited, however, as there have been reported cases of parties participating in dispute resolution to satisfy this requirement but with no intention to resolve the dispute. There is also a lack of guidance in the provision about how dispute resolution processes in the home can be carried out to satisfy this provision'.
51. The Commission invited submissions on how the Court can ensure that 'genuine effort' are being made by a *Matai Sa'o* and families to resolve disputes, and if any criteria should be set out in legislation to guide the dispute resolution process.
52. The majority of the public consulted suggested that families should make a 'genuine attempt' to reach an agreement and resolve family dispute and for matters to only be referred to Court as a last resort. Suggestions on how to assist the Court determine whether a genuine effort has been made by families and *Matai Sa'o* to resolve a dispute fell into 3 main groups:
- *Soalaupulega* in families
 - Notification of *soalaupulega* in various medium
 - Village Councils participating in *Soalaupulega* between families
53. The public consultations overwhelmingly recommended that these should form criteria that should be legislated and that the Court should refuse to hear a matter that has not met criteria showing that a genuine effort was made to resolve the dispute,.

Soalaupulega in Families

54. The need for *Matai Sa'o* to discuss matters with the family first was a common view. The majority view is for families to resolve their own conflicts and refer their matter to Court as a last resort. Very often it seemed that there was a litigation mind-set where participants had already decided that a matter would be best decided by the Court as many cases were often referred back to Court.
55. Alii and *Faipule* in Upolu that were consulted firmly emphasised that *soalaupulega* between families should continue until a unanimous decision has been made. Alternatively it should clearly state in legislation that family must firstly participate

in *soalaupulega* and attempt it at least twice before referring matters to Court if no general consensus is reached. Another submission indicated that it should be mandatory for all *sulimoni* to attend family meetings and for each topic to be discussed in a clear manner during the family meetings.

56. A majority view from group consultation proposed that the law should emphasize more discussions amongst families rather than reconciliation convened by the Registrar. Some views expressed that they do not agree with the dispute resolution (mediation) convened by the Registrars, and firmly believe that the matters should only be discussed within families. However, another view proposed that perhaps the Registrar can attend mediation in the family home and for families to form their own guidelines for the Registrar to follow.
57. Majority view suggested that when parties fail to reach consensus using the Court's reconciliation process, then the matter must be referred back to the family home so that they can try and resolve their own issues. If there is still no agreement then the case can again be referred to the Court. If successful, a written agreement should be signed by all family members who participated in family discussions with the *Sa'o* and the agreement must be reported back to Court and kept in the Court's records. It is also recommended that a provision should allow parties to request at any time during Court proceedings that their matter be referred back to families for their own deliberations.
58. One submitter recommended legislating guidelines of the *Matai Sa'o* duties which would be a helpful guide to families attempting to resolve their disputes during *soalaupulega*. This view is similar to one expressed in public consultations that there should be directives clearly set out in legislation to guide families on the mediation process.
59. Another issue arising from consultations are situations where a decision has been made by the family in Samoa and members of the family residing overseas disagree with the decision and file a petition in Court. Submissions noted that in these situations, if those living overseas were aware of the meeting, they cannot later intervene or disrupt the decision made by the family in Samoa.
60. Another view from consultations is to legislate to empower Courts to refuse petitions filed from people who are not serving (*tautua*) the family. It was also suggested that Court officials should identify and record if the participants in a case are *sulitaupule*, *sulifaavae*, *sulिताutua*, *sulimoni* or *suli tama fai*. If they are not a *suli* then the case should not proceed.
61. In regards to the *soalaupulega* process, some views noted that family members not related by blood to the title should not attend the family's *soalaupulega*. This

suggests that *suli* who are not blood related (*sulitautuai*), and *suli* who were adopted (*suli tama fai*) should not be entitled to attend *soalaupulega*.

Notification of soalaupulega via various medium

62. Consultations and submissions indicated that normally the *Matai Sa'o* is responsible for informing all *Matais* of the family about family meetings. Often family members claimed that they were not aware that family discussions were occurring.
63. The majority view received from public consultations is for all family meetings to be notified widely (for example on TV, radio, newspaper etc.). The rationale for public notification is to ensure that all *sulimoni* are informed and given an opportunity to participate at the *soalaupulega* process. It was suggested that such public notification should be made at least one month before the selected date and should include the time, venue, and subject matter to be discussed in the meeting. Submissions suggested that this be required by law, and that if legislative requirements for advertising were met and members of the family did not turn up to the meeting, then the *Sa'o* will still have met his or her duty.

Participation by Village Councils in Soalaupulega between families

64. Some suggested that Village Council should intervene and help facilitate the process if the family cannot achieve reconciliation. It was also recommended that pastors or church ministers assist and provide advice to families during the *soalaupulega* process. One submitter expressed the view that the involvement of the church minister in reconciliation may be problematic as it may oblige family members to adhere to his advice, even though families disagree with it.
65. Majority view generally agreed that legislation should provide that Village Council rights to intervene and assist families with their *soalaupulega* and provide impartial advice to ensure agreement between families and help reconcile their differences.
66. Another submission received noted that Village Council should create guidelines or bylaws to enable them to assist families to resolve their disputes.
67. One view in favour of Village Council participation suggested however, that attendance of Village Council representatives should depend on the severity of the topic discussed. For example where it related to commercial leases of family land.
68. Some views opposed to Village Council involvement, stated that family members must authenticate the *soalaupulega* process themselves, not the village representatives. The issue of privacy was also a concern with the involvement of the Village Council in family affairs. In addition, there was reluctance by some to refer matters to the Village Council in the event it could result in the family being

penalised, or the Village Council providing a bias view in favour of the more influential party in certain families.

Improved Mediation Process

69. Submitters emphasised the importance of re-examining the dispute resolution process, which some said was unsatisfactory due to inexperienced mediators. A group of Alii and Faipule from Upolu criticized the role of the Registrar during *soalaupulega*, stating that they provided very little if any guidance about what would be discussed or during the *soalaupulega* process. A submitter noted an experience they had where the Registrar clearly did not understand the dispute. They stressed that the Registrar needed to familiarise themselves with the matter and examine previous decisions made on the matter in Court if any. More training for facilitators was suggested particularly in the Samoan culture. Professor Asofou So’o believes that the issues with facilitators stems from their genuine lack of care to arrive at a settlement or restore broken relationships.¹⁸⁰ The majority of public consultations noted a need for the Court Registrar to be well prepared and have a thorough knowledge of the dispute before he or she supervises mediation between family members.
70. Other views from public consultations noted that the process is ineffective because of conflicts of interest between one of the parties and the Registrar. Policies should be in place to manage conflicts of interest and appropriate checks made for family genealogy for conflict of interest training and that the process needs to ensure there is no conflict of interest or bias between mediators and the parties.¹⁸¹ Professor Malama Meleisea also supports this view, and believes the facilitators need training and the process must ensure there is no conflict of interest or bias between mediators and parties.¹⁸² Professor Asofou So’o also notes that there should be a record of conflict issues to create precedents to guide facilitators in future with the process.
71. Majority view proposed the involvement of village church Ministers to facilitate the process, as well as village council representatives and lawyers to attend mediation. Others suggested the involvement of judges.
72. Members of the public consulted also suggested to extend the 45 day period provided under the law, in which mediation should be completed. It was thought that with the fixed time frame participants simply attended without any genuine

¹⁸⁰ Fui Le'apai Tu'ua 'Īlaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹⁸¹ Leasolagi Le Malama Meleisea, Director of Centre of Samoan Studies, National University of Samoa (Consultation, Samoa Law Reform Commission Conference Room, Level 1, FMFM II Building, Matagalalua, 6 October 2016).

¹⁸² Leasolagi Le Malama Meleisea, Director of Centre of Samoan Studies, National University of Samoa (Consultation, Samoa Law Reform Commission Conference Room, Level 1, FMFM II Building, Matagalalua, 6 October 2016).

efforts made to resolve the dispute. Other submitters suggested that there should not be any fixed period and families should be able to take as much time as necessary to try to resolve an issue within the family.

Commissions Views

73. The Commission agrees with the majority view that the Court should be the last resort for resolution of family disputes. The Commission acknowledges the existing provision in the Act, which requires genuine efforts to be made to resolve disputes including participating in conciliation and contemplating settlement options.¹⁸³ The Commission nevertheless considers that the provision can be expanded, so that the Court can better assess when ‘genuine efforts’ are being made and to provide greater clarity around the dispute resolution processes available to parties outside of the court mediated process. Additionally, the Commission considers that greater emphasis should be placed on resolving disputes with families and in the village before taking matters to Court.

74. Generally speaking, the Commission considers that the following procedure should be used as a guide to dispute resolution in cases involving abuse of power by *Matai Sa’o*:

- i. Families meet to discuss and resolve matters amongst themselves. Care should be taken to ensure that all relevant parties are included in the resolution process. Evidence of attempts to publicly circulate notice of mediation will be considered by the Court when assessing whether a ‘genuine effort’ has been made to resolve the dispute.
- ii. If the dispute is not resolved during the family meeting, then parties can consider involving village council, depending on the type of dispute, or church ministers or pastors if they consider it will help to reach resolution. Parties should keep records outlining requests to engage with these parties and the *Matai Sa’o*, as well as any minutes from these meetings should they occur. This can later be relied on in court to establish that ‘genuine efforts’ have been made to resolve the dispute.
- iii. If the dispute remains unresolved, the parties can, as a matter of last resort, rely on the dispute resolution provisions under the Act to participate in court based conciliation with a Registrar or as ordered by the Court.¹⁸⁴

75. Evidence of ‘*genuine effort*’. A common theme throughout this paper has been a lack of consultation between the *Matai Sa’o* and family members in decision-making. The Commission has recommended earlier in this report, that duties to consult be legislated for certain matters. The responsibility to notify family members of meetings, particularly those convened to try and resolve disputes, should also be

¹⁸³ *Land and Titles Act 1981* (Samoa) s 34A.

¹⁸⁴ *Land and Titles Act 1981* (Samoa) ss 34A-34D.

published publicly, where appropriate. If the matter cannot be resolved, then evidence of publication can later be produced and considered by the court when determining whether the parties have made a 'genuine effort' to resolve the dispute.

76. The Commission therefore considers that section 34A of the Land and Titles Act 1981 be amended to expressly state that when determining whether a 'genuine effort' has been made, the Court can also consider evidence of meetings, for example public notices of meetings and meeting minutes recording attendances and matters discussed.

Village Councils and Church participating in Soalaupulega between families

77. In relation to village council involvement, the Commission does not consider it appropriate to legislate to mandate village council involvement as this may not be appropriate in all matters and for all families. However, the Commission does consider that village council involvement in dispute resolution should be encouraged, particularly in matters relating to leasing of customary land. For example, an agreement to lease customary land to a foreign enterprise might impact on a greater number of village members as frequent access to that land may be required, there may be an increase in tourist activity or it may impact on noise levels in the village, which may be matters that the village council will have involvement in. Ultimately, the decision to involve the Village Council should be left to families to decide.

78. To assist in the dispute resolution process however, the Commission does recommend that the Village Council create their own guidelines to govern the process, for example, how and where the mediation will occur, who will attend, how will notice be provided and so forth.

79. The Commission encourages families to seek out church ministers or pastors to assist in dispute resolution process as a means of exhausting all methods of dispute resolution before going to court, but only as appropriate to the dispute and the parties involved.

Improved mediation process

80. The Commissions considers that the following policy measures could be implemented to improve the current dispute resolution process

- i. Establish a process to manage conflicts of interest between Registrars and parties. This could be achieved through a general policy governing conflicts of interest or by amending the prescribed petition forms so that a Registrar must acknowledge there is no conflict before referring a matter to mediation, for example. Alternatively, the Court could issue a Practice Direction with a

procedure for completing family genealogy checks to ensure Registrars have no connections with the parties. This ensures that efforts to resolve disputes are not undermined and that there is no bias, or perceived bias, in the mediation process.

- ii. The relevant ministry should publish a Guide to Dispute Resolution for families, to guide them during the mediation process. The guide should provide clear instructions about how different mediations can occur (for example, court based conciliation and conciliation in the home), including timeframes, who attends, where they occur, what documents a person requires (if any), how details of the meeting should be recorded, how to inform the court of a successful resolution and what the next steps are if conciliation is not achieved. The *Mediation Rules 2013* (Samoa) provide helpful guidance about other matters that could be included in the guide.¹⁸⁵ The guide should be available to all members of the public online and at the Registry of the Land and Titles Court, on request.
- iii. Training for Registrars should be conducted, particularly in the Samoan culture and preparing for mediation. This training could include topics like what parties should be informed of before mediation, what parties should bring to mediation and what matters the Registrar should be appraised of before mediation, for example.
- iv. Registrars to be well prepared and have a thorough knowledge of the dispute before mediation. This could be articulated in an internal registry policy and complemented by the training described above.
- v. Consider reviewing the 45 day period provided under the Act for parties to participate in mediation. Notwithstanding the submissions in favour of extending the timeline, the Commission is cautious to do so at this time as this could inhibit an aggrieved party from bringing their case in court, if the *Matai Sa'o* were to continue delaying resolution processes until the timeframe is exhausted. The current timeframe provides parties approximately six weeks in which to conduct their own dispute resolution processes, which the Commission considers sufficient to issue a public notice where appropriate and conduct one or more conciliation meetings.

Recommendations

23. The following procedure should be used as a guide to dispute resolution in cases involving abuse of power by *Matai Sa'o*:

¹⁸⁵ The Commission also acknowledges that the COI made a similar recommendation about publishing mediation guidelines for judges and mediators, and that if this recommendation is implemented then the content of these guidelines may also prove relevant to the Commission's recommendation.

- a. Families meet to discuss and resolve matters amongst themselves. Evidence of attempts to publicly circulate notice of mediation will be considered by the Court when assessing whether a 'genuine effort' has been made to resolve the dispute.
- b. If the dispute is not resolved during the family meeting, then parties can consider involving village council, depending on the type of dispute, or church ministers or pastors if they consider it will help to reach resolution. Parties should keep records outlining requests to engage with these parties and the *Matai Sa'o*, as well as any minutes from these meetings as proof that 'genuine efforts' have been made to resolve the dispute.
- c. If the dispute remains unresolved, the parties can, as a matter of last resort, rely on the dispute resolution provisions under the Act to participate in court based conciliation with a Registrar or as ordered by the Court.¹⁸⁶

24. Amend section 34A of the Land and Titles Act 1981 to state that when determining whether a 'genuine effort' has been made, the Court can consider evidence of meetings, for example public notices of meetings and meeting minutes recording attendances and matters discussed.

25. Encourage village council involvement in dispute resolution for certain matters, particularly those relating to leasing of customary land. Decision to involve village council is ultimately the decision of the family and should not be legislated.

26. Village Council to establish guidelines to govern dispute resolution process, for example, how and where the mediation will occur, who will attend and how notice will be provided.

27. Families to involve church ministers or pastors in dispute resolution as appropriate to the dispute and the parties involved. This should not be legislated.

28. Consider and implement the following policy measures to improve mediation processes:

- a. Establish conflict of interest policy, as between Registrars and parties. This could be achieved through a general policy governing conflicts of interest, amendments to the prescribed petition forms or Practice Directions.
- b. Relevant ministry to publish a Guide to Dispute Resolution for families.

¹⁸⁶ *Land and Titles Act 1981 (Samoa) ss 34A-34D.*

The guide should set out details about different mediation types, including timeframes, participants, location and evidence required.

- c. Carry out training for Registrars, particularly in Samoan culture and preparing for mediation.
- d. Registrars to be well prepared and have thorough knowledge of dispute before mediation.
- e. Consider reviewing the 45 days period provided under the Act but cautiously approach any extension in time, as could inhibit aggrieved party from bringing their case in court if the *Matai Sa'o* continued delaying resolution processes until the timeframe expired.

G. Non Legislative measures

29. The Commission recognises that any legislative measures should be complemented by non-legal measures to more effectively address issues raised in this report concerning the abuse of power by a *Matai Sa'o*. Non-legislative measures include awareness programs, education schemes, and guidelines aimed at making *suli, matai, Matai Sa'o* and all family members better informed of their rights and duties under the *fa'asamoa*.

30. This part also discusses the important role of the village council in the *fa'asamoa* and in resolution of family and village disputes.

Submissions

31. Submissions received from the public provide suggestions on alternative non-legislative measures which can be carried out to reduce issues and concerns relating to abuse by *Sa'o* of their powers.

Village Council intervention

32. Submissions received indicated the importance of the village council in the *fa'asamoa* and in resolving family and village disputes. One submitter from Savaii expressed the need to recognise the role of the village council. Other submitters from Savaii suggested that the village should be empowered and encouraged to be involved in the resolution of matters within the village. They suggested strengthening the involvement of the village council by allowing them to impose penalties on a *Matai Sa'o* and if necessary evicting him or her from the village for breach of village bylaws.¹⁸⁷

¹⁸⁷ *Pule a le Matai Sa'o* Public Consultations, Savaii, 27-28 October 2016.

33. They also suggested that village councils should be encouraged to supervise and oversee the conduct of *soalaupulega* for families to reach decisions in the best interests of the family. The rationale is that the village council and families would work together to maintain peace and order in the community.
34. Malama Meleisea suggested that many family issues could be easily resolved or settled with the involvement of the village council, using the concept of *vatapuia* or respect between one another and with elders, although it was considered that this process does not appear to work as well as it used to in the past because of ‘ganging up’ in village governance nowadays. Nonetheless it was submitted that with the *vatapuia*, the village council could still be involved to mediate family disputes.¹⁸⁸
35. A *Sa’o* from Matautu, Apia also suggested having guidelines for village fono intervention in resolving disputes in village communities. He emphasised the importance of village intervention in assisting families to resolve disputes and avoid family matters being decided by the court and suggested that this be reinforced in legislation.¹⁸⁹
36. Professor Asofou also emphasised that the public should be made aware of the various roles and capacity of the *village fono* to assist in resolving family disputes. This was preferable as many family disputes can be solved within the realm of the family home and village itself without resorting to legalized procedures that are available to settle such disputes.¹⁹⁰

Education and Awareness Programs

37. Majority of the public during consultation expressed a common view of the need to implement awareness programs and seminars in villages to assist and remind the *Matai Sa’o* of their duties and responsibilities.
38. A submitter also expressed during consultations for awareness programs to be raised in villages to inform the public of the issues and aspects pertaining to the *fa’asamoa* and the duties and responsibilities of a *Sa’o*.¹⁹¹
39. Professor Asofou also acknowledged that education is a key measure, particularly important in keeping and maintaining the *fa’amatai* system. He suggested that education schemes should be put in place to teach basic information about the

¹⁸⁸ Leasolagi Le Malama Meleisea, Director of Centre of Samoan Studies, National University of Samoa (Consultation, Samoa Law Reform Commission Conference Room, Level 1, FMFM II Building, Matagalalua, 6 October 2016).

¹⁸⁹ Patu Ativalu (and Tofaeono Tau) Matai Sa’o (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

¹⁹⁰ Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹⁹¹ Patu Ativalu (and Tofaeono Tau) Matai Sa’o (Consultation, Residential Home, Matautu, Samoa, 20 October 2016).

matai Sa'o and ensure the information is passed on. He stated that many Samoans today may not have any customary training in the family or village, which was common in the past. This was where parents, *matais* or elders with significant knowledge of the Samoan culture and traditions passed on their knowledge and understanding of the *fa'amatai* and the traditional system of power and authority of the *matai Sa'o* to other family members. He emphasised that education and awareness programs are an important way to revive these aspects of the *fa'asamoa*.¹⁹²

Affiliation of the Church

40. Submitters commented on the vital role the church plays in the *fa'asamoa* and that it is important to recognise the potential of church ministers to assist or provide counselling to families during *soalaupulega*.¹⁹³

41. Malama Meleisea also suggested that the church should play a more active role in assisting families to resolve their disputes with the *Matai Sa'o* and be given the same recognition as that of the village council to assist families to resolve conflicts.¹⁹⁴

Government Programs

42. Queries were raised from submissions as to whether there are government programs in place that may assist with good governance by the *Matai Sa'o*.¹⁹⁵ Submitters were also of the view Government should formulate relevant programs to enable village council intervention.¹⁹⁶

Commission's views

43. Submissions raised that the village councils should have a role in *soalaupulega* of family matters and village affairs as their involvement ensures that decisions reached by families are in the best interest of the family. However, the Commission is mindful that family matters are private and is wary of mandating village council involvement in private and sensitive issues. Despite this, the Commission considers there is merit in involving the village where the actions of the *Matai Sa'o* has breached village bylaws or for specific matters like leasing of customary land to foreign enterprises. In the leasing example, numerous people in the village may be affected by an increase in tourist activity, noise levels in the village or access to the

¹⁹² Fui Le'apai Tu'ua 'Ilaoa Asofou So'o, Vice Chancellor of the National University of Samoa (Consultation, National University of Samoa Campus, 19 October 2016).

¹⁹³ *Pule a le Matai Sa'o* Public Consultations, Savaii, 27-28 October 2016.

¹⁹⁴ Leasolagi Le Malama Meleisea, Director of Centre of Samoan Studies, National University of Samoa (Consultation, Samoa Law Reform Commission Conference Room, Level 1, FMFM II Building, Matagalalua, 6 October 2016).

¹⁹⁵ *Pule a le Matai Sa'o* Public Consultations, Upolu, 1-2 November 2016.

¹⁹⁶ *Pule a le Matai Sa'o* Public Consultations, Upolu, 1-2 November 2016.

village, for example. The Commission considers that this would properly invoke the involvement of the village into familial matters

44. The submissions received by the public also highlighted that awareness programs and education schemes should be implemented on the roles and responsibilities of *Matai Sa'o*. These programs should elaborate and emphasise principles of good governance and transparency in decision making. They should also cover eligibility for appointment, grounds for removal, reconciliation requirements and any changes to the law arising out of this Report.
45. Additionally, education about the negative impacts of disputes within families and the irreparable damage caused by disputes that result in court cases could also be beneficial. Therefore the Commission considers that education and awareness programs should be implemented as a means of reviving the *fa'asamoa*.
46. In regards to consultation, the Commission notes that the practice will vary between families. The Commission consider that general guidelines below may assist families in engaging in meaningful consultations:
 - a. Sufficient time must be given for consultation to take place.
 - b. There must be genuine effort by those consulting to engage in meaningful discussion.
 - c. The matai *Sa'o* or the person calling the meeting should ensure that the family are adequately informed ahead of time about the matters to be discussed.
 - d. Depending on the matters discussed, the time period for consultation should be sufficient to carry out proper consultations. Proper consultations may mean that more than one meeting is required.
 - e. The matai *Sa'o* should be open to the views expressed by the family and consider these views in coming to a final decision.
 - f. Consultations do not necessarily mean consensus, but a genuine effort should be made to reach agreement, where possible.

Recommendations:

29. The responsible Ministries should provide awareness and education programs on the roles and responsibilities of *Matai Sa'o*. These programs should highlight the importance of the principles of good governance and transparency in decision making as well as the irreparable consequences of familial disputes ending in court. They should also cover eligibility for appointment, grounds for removal, reconciliation requirements and any changes to the law arising out of this Report.
30. Regardless of whether recommendations relating to legislating duties to consult and publish notices of appointments are implemented, the Commission considers

that general guidelines should be developed that may assist families in engaging in meaningful consultations:

- a. Sufficient time must be given for consultation to take place.
- b. There must be genuine effort by those consulting to engage in meaningful discussion.
- c. The matai *Sa'o* or the person calling the meeting should ensure that the family are adequately informed ahead of time about the matters to be discussed.
- d. Depending on the matters discussed, the time period for consultation should be sufficient to carry out proper consultations. Proper consultations may mean that more than one meeting is required.
- e. The matai *Sa'o* should be open to the views expressed by the family and consider these views in coming to a final decision.
- f. Consultations do not necessarily mean consensus, but a genuine effort should be made to reach agreement, where possible.

5. LIST OF RECOMMENDATIONS:

Eligibility for appointment as Matai and Matai Sa'o

1. Consistent with the majority of views of the public consulted reflecting expectations of a *Matai Sa'o* common across families in Samoa, the following minimum criteria should be considered by families in selecting and appointing a *Matai Sa'o* in the best interest of the family. That is, to be eligible for appointment as a *Matai Sa'o*, he or she must:
 - i. be a *suli*;
 - ii. have good knowledge of the duties and responsibilities of *Sa'o* ;
 - iii. have good knowledge of family heirloom (*measina*), family genealogy and history, ability to maintain peace and harmony in the family;
 - iv. have provided exceptional service (*tautua*) to the family and village; and
 - v. any other criteria of the family according to their customs and traditions.
2. These minimum criteria may either:
 - i. be set out in law (which will signify the importance of these criteria and specify the minimum criteria for families to carefully consider when deciding who to appoint); or
 - ii. NOT be set out in law but for relevant Government departments (for example MJCA and MWCSO) to provide/ support awareness programs in families and villages, promoting the consideration of these criteria in selection and appointment so that inappropriate or unpopular appointments are less likely to occur, and fewer family disputes are brought before the Land and Titles Court between *Matai Sa'o* and *suli*.
3. Whether legislated or not, the eligibility criteria is non exhaustive, and families can consider additional criteria when selecting and appointing *Matai Sa'o*, particular to their own customs and traditions.
4. A residential requirement, where the proposed *Matai Sa'o* must have resided in Samoa for a certain length of time, should be considered as a further requirement to be eligible for appointment (similar to the residential eligibility requirement to be a candidate for election). This would require the proposed *Matai Sa'o* to have been living in Samoa for at least 1 year ending on the day of appointment, and that this should be met where the person has been in Samoa for at least one third of the year (or approximately 120 days). Should a residential requirement be imposed, then it would need to be set out in legislation.

5. If a residential eligibility requirement is legislated, it should only apply to future appointments of *Matai Sa'o*.
6. If a residential requirement is set out in law, then this is considered to be the minimum requirement to be met, but families can choose to have longer residential requirements if they consider it appropriate.
7. The *Land and Titles Act 1981*, (section 14) should be amended to:
 - i. make it mandatory that notice be given to the Registrar of intentions to appoint a *matai* (or *Matai Sa'o*); and
 - ii. that the person responsible for providing this notice is the *matai* (or *Matai Sa'o*) who is intended to be appointed.
8. The *Land and Titles Act 1981* (section 15) be amended to require publication of the notice of intention to appoint a *matai* in a newspaper, by radio broadcast and in other conspicuous places in Apia and Samoa. The cost burden is to be borne by the intended *matai* (or *Matai Sa'o*).
9. An exception should be included in Part 4, so that a Registrar may waive the 3 month notice requirement if satisfied that prior publication to the family and *soalaupulega* has already been carried out, using the modes of publication specified in section 15.
10. Should recommendation 1 and or 3 be legislated, insert an additional provision under Part 4 of the Act, so that a person appointed as a *Matai Sa'o* must file with the Registrar proof that they meet the eligibility criteria for appointment as set out in the Act. A form can be prescribed for this purpose. The Registrar must receive this Form before the title can be registered under the Act.

Duties of a Sa'o

11. The following duties and responsibilities of a *Matai Sa'o* should be set out in legislation. These duties and responsibilities should be non-exhaustive, and should include:
 - Duty to inform and consult on bestowal of *matai* titles;
 - Duty to inform and consult on leasing of communal land (and matters of a commercial nature);
 - Duty to oversee family properties as a trustee;
 - Duty to reside in Samoa;
 - Duty to maintain peace and ensure wellbeing of family;
 - Duty to contribute to family obligations and provide service to village; and
 - Duty to make decisions that are reasonable, fair and in accordance with law, customs and traditions of Samoa.

12. As there are practical difficulties associated with codifying the duty to maintain peace and ensure wellbeing, if it is included in legislation as a duty, it should be interpreted broadly.
13. In relation to the 'duty to reside in Samoa', legislation should clarify that the requirement for a *Matai Sa'o* to reside in Samoa means he or she must be living in Samoa for at least 120 days each year for the duration of service as a *Matai Sa'o*.
14. Legislation should also stipulate prior to consultation relating to familial titles or land; notification should be issued at least one month before the selected date and should include the time, venue, and the subject matter to be discussed in the meeting. Such notification should be circulated in a newspaper, by radio broadcast and in other conspicuous places in Apia and Samoa.

Removal of Matai Sa'o and matai

15. The power to remove the *matai* or a *Matai Sa'o* rests with the family concerned, and that the family should endeavour to resolve any disputes between them before resorting to court.
16. The legislation should provide a standalone clause or an expansion of the current provision (section 20B of the Act) to include removal provisions relating to *Matai Sa'o*.
17. The legislation should provide that the Court, upon petition, may order the removal of a *Matai Sa'o* title on the following grounds:
 - Failure to properly execute duties and responsibilities of a *Matai Sa'o* under the legislation;
 - Acting in a manner that brings disrepute to the family;
 - Inability to continue due to mental incapacity as supported by evidence from a medical practitioner;
 - Knowingly providing false documents regarding the residential and eligibility criteria to the Registrar for the purported registration of *Matai Sa'o* title (if the residential and eligibility criteria is set out in legislation);
 - Conviction for criminal offending. Note: the legislation should identify or clarify what constitutes 'criminal offending' which should not capture very minor offending such as traffic offences.
18. In assessing whether to remove a *Matai Sa'o* title, the Court should give consideration to the following factors:
 - the nature of the alleged breach of duties (whether the breach of duties was one-off or part of a consistent pattern);
 - severity of the alleged actions;

- whether the alleged actions included any criminal offending;
- the extent of any loss, damage or harm from the alleged breach;
- whether any action was taken by the *Matai Sa'o* to reconcile with the affected members of the family;
- prior history of service to the family; or
- any other matter the Court considers necessary.

19. The legislation should also provide that a *Matai Sa'o* may be removed by the Registrar from the register if he or she has been convicted of a very serious criminal offence, punishable by life imprisonment, which includes murder, manslaughter, rape, etc. Other serious sex offences such as incest should also be included as very serious criminal offences. The legislation should identify or clarify what constitutes a 'very serious criminal offence'. This will require an amendment to section 22(3) so that the Registrar may remove the name of a *Matai Sa'o* from the register if proved to the satisfaction of the Registrar that the person has been convicted of a 'very serious criminal offence'.

20. The legislation should also reflect the above changes, as far as necessary, to the current provision (section 20B of the Act) for the removal of *matai* (adjusted as appropriate).

Multiple Sa'o and matai

21. Government to consider the following Options 1 and 2, and note the further considerations under each option.

OPTION 1: Multiple Sa'o to continue to be permitted

21.1 This is the Commission's preferred option. In choosing this option consideration should be given:

- A. Whether the status quo should remain where a family can appoint as many Sa'o as they want; or
- B. To impose a maximum number of Matai Sa'o appointed (for example 5) as recommended by the COI.

21.2 Consideration should also be given as to how and by whom decisions relating to land (such as leasing of land) and bestowal of titles are made where there is more than 1 *Matai Sa'o* in a family. The options are:

- A. Decisions are made by 'consensus of all' Matai Sa'o.
 - a. Here consideration should be given as to whether consensus means:

- i. Consensus by all *Matai Sa'o* 'residing in Samoa and overseas';
or
 - ii. Consensus by *Matai Sa'o* 'residing in Samoa'.
- b. Where consensus is not reached, the Commission recommends that the Court should give preference to views of:
- i. *Matai Sa'o* residing in Samoa, where the dissenting *Sa'o* resides overseas; or
 - ii. *Matai Sa'o* who is the most senior title holder (i.e. years of holding the title); or
 - iii. Both.

Note: the differentiation between *Matai Sa'o* residing in Samoa and overseas may not be necessary if the Commission's Recommendation 2 for a *Matai Sa'o* to reside in Samoa is implemented.

B. Decisions are made by 'majority' of *Matai Sa'o*

If there is a tie the Court should give preference to the views of title holder with the most years holding title (whether or not there is more than one) or as the Court otherwise directs (to provide for unlikely circumstances where two title holders with opposing views have the same tenure of title).

Note: All the *Matai Sa'o* should be encouraged to give deference to the views of title holder with the most years holding title (this aspect should not be legislated).

C. Decisions are made by the Paramount *Matai Sa'o*

- a. The final say or decision making in respect of significant decisions relating to family land and titles is made by the on behalf of the Paramount *Matai Sa'o* on behalf of all the *Matai Sa'o* in the family.
- b. The Paramount *Matai Sa'o* can be selected in one of the following ways:
 - i. The family can choose from the different *Matai Sa'o* in their family who the Paramount *Matai Sa'o* will be; or
 - ii. All the *Matai Sa'o* of the family can select amongst themselves who the paramount *Matai Sa'o* will be (this appears similar to the practice of respect/ deference (faaaloaloga) currently carried out today); or

- iii. The most senior person in terms of the length their tenure as *Matai Sa'o* and also service to the family. However, if more than one person with the same length of tenure and service, then these *Matai Sa'o* can decide amongst themselves who will be the Paramount *Matai Sa'o*

OPTION 2: Limit of One *Matai Sa'o*

Should this option be chosen by Government, further consideration should be given to what to do to the multitudes of *Matai Sa'o* currently in existence for many families.

22. Before making a decision on which option to proceed with, the Commission recommends that the Government allow time for any implemented recommendations to take effect, as the other recommendations may effectively reduce issues associated with abuse of power by the *matai Sa'o* such that a decision need not be made on this particular issue at this time.

Dispute Resolution

23. The following procedure should be used as a guide to dispute resolution in cases involving abuse of power by *Matai Sa'o*:
 - a. Families meet to discuss and resolve matters amongst themselves. Evidence of attempts to publicly circulate notice of mediation will be considered by the Court when assessing whether a 'genuine effort' has been made to resolve the dispute.
 - b. If the dispute is not resolved during the family meeting, then parties can consider involving village council, depending on the type of dispute, or church ministers or pastors if they consider it will help to reach resolution. Parties should keep records outlining requests to engage with these parties and the *Matai Sa'o*, as well as any minutes from these meetings as proof that 'genuine efforts' have been made to resolve the dispute.
 - c. If the dispute remains unresolved, the parties can, as a matter of last resort, rely on the dispute resolution provisions under the Act to participate in court based conciliation with a Registrar or as ordered by the Court.¹⁹⁷
24. Amend section 34A of the Land and Titles Act 1981 to state that when determining whether a 'genuine effort' has been made, the Court can consider evidence of meetings, for example public notices of meetings and meeting minutes recording attendances and matters discussed.

¹⁹⁷ *Land and Titles Act 1981* (Samoa) ss 34A-34D.

25. Encourage village council involvement in dispute resolution for certain matters, particularly those relating to leasing of customary land. Decision to involve village council is ultimately the decision of the family and should not be legislated.
26. Village Council to establish guidelines to govern dispute resolution process, for example, how and where the mediation will occur, who will attend and how notice will be provided.
27. Families to involve church ministers or pastors in dispute resolution as appropriate to the dispute and the parties involved. This should not be legislated.
28. Consider and implement the following policy measures to improve mediation processes:
 - a. Establish conflict of interest policy, as between Registrars and parties. This could be achieved through a general policy governing conflicts of interest, amendments to the prescribed petition forms or Practice Directions.
 - b. Relevant ministry to publish a Guide to Dispute Resolution for families. The guide should set out details about different mediation types, including timeframes, participants, location and evidence required.
 - c. Carry out training for Registrars, particularly in Samoan culture and preparing for mediation.
 - d. Registrars to be well prepared and have thorough knowledge of dispute before mediation.
 - e. Consider reviewing the 45 days period provided under the Act but cautiously approach any extension in time, as could inhibit aggrieved party from bringing their case in court if the *Matai Sa'o* continued delaying resolution processes until the timeframe expired.

Non Legislative Measures

29. The responsible Ministries should provide awareness and education programs on the roles and responsibilities of *Matai Sa'o*. These programs should highlight the importance of the principles of good governance and transparency in decision making as well as the irreparable consequences of familial disputes ending in court. They should also cover eligibility for appointment, grounds for removal, reconciliation requirements and any changes to the law arising out of this Report.
30. Regardless of whether recommendations relating to legislating duties to consult and publish notices of appointments are implemented, the Commission considers that general guidelines should be developed that may assist families in engaging in meaningful consultations:

- a. Sufficient time must be given for consultation to take place.
- b. There must be genuine effort by those consulting to engage in meaningful discussion.
- c. The matai *Sa'o* or the person calling the meeting should ensure that the family are adequately informed ahead of time about the matters to be discussed.
- d. Depending on the matters discussed, the time period for consultation should be sufficient to carry out proper consultations. Proper consultations may mean that more than one meeting is required.
- e. The matai *Sa'o* should be open to the views expressed by the family and consider these views in coming to a final decision.
- f. Consultations do not necessarily mean consensus, but a genuine effort should be made to reach agreement, where possible.