



GOVERNMENT OF SAMOA

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

VILLAGE FONO ACT 1990
Report 09/12

June 2012



GOVERNMENT OF SAMOA

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 before you copies of the Report of the Village Fono Act 1990, as per reference referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations for reform of the Village Fono Act 1990 after its public consultations and research on the changes to be in line with Section 4 of the Law Reform Commission Act 2008.

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



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(Leilani Tuala-Warren)
EXECUTIVE DIRECTOR
SAMOA LAW REFORM COMMISSION

Preface

By way of background, a Commission of Inquiry (“COI”) was appointed in 2010 to inquire into the issues that have arisen in the past involving art 11 (freedom of religion) and report to Cabinet. The right to freedom of religion, affirmed by art 11 of the Constitution of Samoa (“Constitution”), has been subject to controversy over the years. The courts in Samoa have dealt with cases involving the application of art 11 in the context of religious disputes in rural settings governed by Alii and Faipule (‘village *fono*’). The prominent issues that have arisen over the years involve family members or village groups who have become part of a different church denomination that is separate from the prominent churches that were long established in the history of Samoa such as the Methodist Church, Catholic Church and the Congregational Christian Church of Samoa. For instance, family members or village group conducting bible studies in their respective villages and subsequently leading to the establishment of a new church.

Problems arise when the village *fono* issues orders evicting and eventually banishing these family members or village groups from their villages. The banished families then bring a claim before the courts in Samoa for breach of art 11. Decisions of the courts have upheld the supremacy of the constitution over village authority but have been careful in determining validity of village *fono* decisions in the context of customs and traditions. Nevertheless, the dissatisfaction of village *fono* with court’s decisions in favor of the evictees prolongs restoration of banished families to their respective village and sometimes the village *fono* only effects reconciliation when it is good and ready.

Specific terms of reference of the COI appointed in 2010 included:

- a) inquiring into and report to Cabinet on the working of art 11 in relation to churches and other religious organizations in Samoa; and*
- b) deciding whether further specific legislation related to art 11 is necessary or desirable.*

Following its inquiry, the COI prepared a Report which recommended the following:

- a) There is no basis for making any change to the Constitution and hence art 11 should remain untouched.
- b) Government to consider legislative measures to consider communal collective rights and customary role that is played by Alii and Faipule in the process of establishing a new church in a traditional village.
- c) To consider having guidelines in the *Village Fono Act* requiring Alii and Faipule to consider in their decision making in these matters, only objective factors pertaining to the preservation of harmony, stability and security, fundamental rights, monotaga etc...as opposed to discriminatory or religious reasons.
- d) Consideration of administrative requirements or measures through the *Village Fono Act* to bring to light village policies on new churches and religions for registration and scrutiny.
- e) An awareness programme for rural areas on the religious freedom provisions of the Constitution.
- f) Consideration of establishing a Religious Practices Commission to examine on a continuing basis and to make appropriate recommendations to Government, as necessary, on practices considered prejudicial to

Samoa in the context of Art 11 (2). This must bear in mind the values of Samoan society expressed in the Preamble of the Constitution.

In February 2011, the Samoa Law Reform Commission (“Commission”) was given reference by Cabinet F.K. (11) 02 to look into the Commission of Inquiry Report 2010 (“COI Report”) on the workability of art 11 (Freedom of Religion) of the Constitution, in specific the following:

- a) Cabinet directed that art 11 should remain untouched, as stated in option (a) above of COI Report.
- b) To review the options (b, c, d, e, f) above of the COI Report and report to Cabinet.

Accordingly, the Commission prepared and submitted a Cabinet submission (“submission”) in June 2011 in response to Cabinet F.K. (11) 02 (b) above. The submission considered the current laws relating to art 11 and the legal issues that gave rise to the COI inquiry in 2010. The laws considered by the Commission in the submission included the Constitution and the *Village Fono Act 1990* (“VFA”). Included also in the submission to Cabinet were previous court decisions relating to the determination of art 11. In concluding its submission to Cabinet, the Commission recommended as a feasible option the amendment of the VFA to address concerns relating to the powers of the village *fono* and the establishment of new churches. The Commission recommended that such an approach take into account general applicable laws¹ and the reasonable limitation approach in art 11 (2) of the Constitution.

Cabinet Directive F.K (11)23 endorsed the recommendation by the Commission to amend the VFA and to consider general applicable laws and the reasonable limitation approach in art 11(2) of the Constitution. Following Cabinet’s endorsement of the Commission’s recommendations, the Commission in collaboration with the Law and Justice Sector partners engaged in public consultations in September 2011 on the review of the VFA as it relates to art 11 of the Constitution. During public consultations the Commission sought views from stakeholders and members of the public on ways to improve and amend the VFA to address the issues discussed earlier in this part.

This Final Report (‘Report’) provides a way forward in amending the VFA to ensure that the concerns raised by the COI report and the Commission’s submission to Cabinet are considered and addressed. The report concludes with the Commission’s recommendations on reforms to the VFA taking into account issues that arose in relation to art 11 of the Constitution.

¹ Principle widely used in courts in the USA which provides that the First Amendment (Free Exercise Clause) to the Constitution of USA is not offended if laws are generally applied. For instance, laws that specifically targets religion is subject to high scrutiny of the First Amendment. Laws should be content-neutral and generally applicable.(Bogen D ‘*Generally Applicable Laws and the First Amendment*’)

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Introduction

This Report is the final stage of the law reform process in reviewing the VFA and it focuses on the review of the VFA provisions. With the enactment of the VFA, the role of the village *fono* was formally recognized. The VFA is described in its Long Title as follows:

“AN ACT to validate and empower the exercise of power and authority by village fono in accordance with the custom and usage of their villages and to confirm or grant certain powers and to provide for incidental matters”.

In concluding this Report, the Commission provides its recommendations as directed by way of F.K. 11(02) and F.K. 11(23) on proposed new amendments to the VFA. The Report adopts the following structure:

- 1) Parliamentary Debates
- 2) *Faamatai* – village *fono*
- 3) Village Fono Act 1990
- 4) Review of the VFA Provisions and Recommendations
- 5) Freedom of Religion
- 6) Summary of Recommendations

1. Parliamentary Debates on the Village Fono Bill 1990

Select Committee Report

- 1.1 The Select Committee Report on the Village Fono Bill 1990 (‘Bill’) was tabled in Parliament in July 1990 for deliberations. There was much discussion regarding the objective of the Bill as some members of parliament (‘MPs’) perceived this Bill as vesting too much power in the village *fono*, thus affecting constitutional provisions relating to fundamental human rights. During the debate, the Speaker of Parliament focused on the supremacy of the Constitution in Samoa’s legal system. In defense to the validity of the Bill, cl 11 of the Bill relating to the right of appeal was invoked as allowing the opportunity for aggrieved parties to present their case on fairness of village *fono* decisions. There was opposition against cl 11 from others who saw this as undermining the authority of the village *fono*. On the other hand, some MPs expressed the view that the new Bill was timely as it sought to protect customs and traditions such as the role of the village *fono*. Moreover, the objective of the Bill was to protect, uphold, recognize and maintain powers of the village *fono*.
- 1.2 In considering the Bill, MPs deliberated on the uniqueness of the Samoan culture, particularly the existence of a local authority at village level to govern village affairs. They found it difficult to draw comparison with other Pacific Island Countries.
- 1.3 Historically, the village *fono* has long co-existed alongside Western political governance in Samoa. However one MP said that problems experienced in most villages then stemmed from the misuse of power by the village *fono* for personal interest. He claimed that too much politics was influencing village *fono*. The Bill tends to monitor and supervise the powers of

the village *fono*. In the past, the village *fono* made the final decisions and families respected this; whereas in modern times, international human rights have influenced the Samoan customs and traditions in a way that clashes with the communal nature of the Samoan way of life. One MP commented that the drafting of the Bill took into consideration the foundation of Samoa which is the Constitution, which both protects the Samoan culture and fundamental human rights.

- 1.4 Cl 11(4) of the Bill proposed a one month time frame to file an appeal. One MP questioned the sufficiency of the time provided to file an appeal from a decision of the village *fono*. The right of appeal provision is balanced by cl 11(5) (c) which provides that the Land and Titles Court has the power to allow the appeal, dismiss the appeal or refer the matter back to village *fono* for reconsideration. This means that although a person has appealed the decision of the village *fono*, there is an opportunity for the matter to be referred back to village *fono* thus still recognizing the powers of the village *fono*. There was strong support for this provision. One MP argued that the due process of law should take place in the determination of matters before the village *fono*. This would ensure that a party affected by a decision of the village *fono* was provided with the opportunity to defend his or her case by calling witnesses.
- 1.5 The Government emphasized the importance of the Bill in merging the roles of village *fono* and police to ensure the safety of the community. It was a Bill to protect each village and combat serious village misconduct involving youth, and to push for village development. The Government reflected that the enactment of the Constitution had impacted the role of the village *fono* as citizens were empowered to exercise their individual rights. It was said that the Bill would provide recognition of the role of the village *fono*. The Opposition party expressed the view that non-residents (cl 9) should still obey village rules and principles.
- 1.6 The issue of ‘banishment’ was also discussed and was agreed that the original clause 6(c) relating to ‘banishment’ be removed from the Bill. The Opposition challenged the removal of cl 6(c) as its removal ignored the overall objective of the Bill, which was to provide the village *fono* with powers to impose punishment in accordance with customs and usage. Ultimately, despite this argument, clause 6 (c) relating to banishment was removed from the Bill.

2. Faamatai – Village Fono

- 2.1 Until about 1860, Samoa operated under an Indigenous political system: *faamatai* or chiefly system, with no centralized government.² Villages were ruled autonomously by their *matai* and aligned themselves into district and sub-district political entities for common causes - such as war.³ With the arrival of missionaries, their role became more focused on keeping the peace and maintaining solidarity within each village. This Indigenous political system, or the *faamatai*, co-existed alongside Western governments established by the colonial powers. Although it has long existed, there was no formal recognition of this political system and as a result, conflicts would ensue between the locals and colonial powers. It is seen as an influential tradition-based village system which deals with local offences at the village level

² *Politics of Samoa* (Access: http://en.wikipedia.org/wiki/Politics_of_Samoa)

³ Ibid at n2

and makes decisions accordingly. It has its own set of rules based entirely on Samoan custom and usage. It is the cornerstone of Samoan society, contributing to the country's stability. The *faamatai* system is a system where traditional leaders or *matai* within each village council are highly respected, ensuring social and political cohesion.

2.2 The role of the *matai* (chief) is to provide leadership and make rules for everyone to abide by. Each village *fono* meets regularly to deal with the affairs of the village in accordance with custom and usage. It also has the power to impose punishment in accordance with the custom and usage of the village, including the power to impose punishment of fines in money, mats, animals, food or a combination of any of these things, or work on village land.⁴ The *matai* sitting in every village *fono* deal regularly with local offences which threaten village harmony.⁵ The head of every extended family is a chief, and some villages have over 100 chiefs who make up the village *fono*.

3. Village Fono Act 1990

3.1 The following provisions as set out below illustrate the current authority of the village *fono* under the VFA. These are important in the context of the Report for reference when presenting legal arguments and analysis.

The powers of the village *fono* relating to hygiene and economic development are provided in section 5:

- a. *The power to make rules for the maintenance of hygiene in the village;*
- b. *The power to make rules governing the development and use of village land for the economic betterment of the village.*
- c. *The power to direct any person or persons to do any work required to be done pursuant to rules made in accordance with the powers granted or preserved by paragraphs (a) and (b) above.*

In addition, the powers of the village *fono* extend to imposing punishments for village misconduct. Village misconduct is defined in section 2 of VFA. Section 6 provides that- 'Without limiting the power of village *fono* preserved by the VFA to impose punishments for village misconduct the powers of every village *fono* to impose punishment in accordance with the custom and usage of its village shall be deemed to include the following powers of punishments.':

- a. *The power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things;*
- b. *The power to order the offender to undertake any work on village land.*

Section 8 provides that 'Where punishment has been imposed by a village *fono* in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of sentence the punishment imposed by the village *fono*.'

Section 9 provides the limitation of jurisdiction of village *fono*. The jurisdiction of any village *fono* does not extend to include:

⁴ Village Fono Act 1990 (Samoa)

⁵ Powles & Pulea '*Pacific Courts and Legal Systems* (1988) 363.

- a. Any person who does not ordinarily reside in its village; or
- b. Any person who not being a matai of its village ordinarily resides in its village on Government, freehold, or leasehold land and is not liable in accordance with the custom and usage of that village to render tautua to matai of that village.

Section 11 as discussed in the Select Committee Report provides for the right of appeal. Moreover, every person adversely affected by a decision of a Fono (including a decision as to punishment) shall have a right of appeal to the Land and Titles Court against such decision and the Court shall have jurisdiction to hear and determine the matter. The Land and Titles Court may determine the appeal in one of the following ways:

- a. It may allow the appeal and the decision appealed from shall thereupon be null and void;
- b. It may dismiss the appeal;
- c. It may refer the decision back to the Fono for reconsideration.

There shall be no right of appeal from a decision of a Fono given after reconsideration.

Public Submissions

3.2 The Commission in collaboration with its Law and Justice Sector partners conducted public consultations nationwide to obtain views from the public and stakeholders on the current status of the VFA. Consultations were divided into groups:

- i) village *fono* in all constituencies;
- ii) women committees;
- iii) pastors/church representatives; and
- iv) youth.

During consultations, the Commission asked 3 questions:

- i) is the VFA good law?
- ii) if not, in what ways can the VFA be improved?
- iii) how can the VFA be amended to harmonize art 11 (freedom religion) with customs and traditions.

Art 11 of the Constitution will be dealt with separately in this Report.

3.3 The issues that have arisen in the last 20 years concerning the role of the village *fono* and its impact on communities pose the need to review the legislation. For example, families being banished from villages due to misconduct and disobeying village rules are common. Subsequently, some of these cases are challenged in court by way of appeal.

3.4 Submissions received from the public and stakeholders in relation to the three questions put by the Commission have assisted the Commission in formulating its recommendations. These submissions are summarized under the next subheading where each provision of the VFA is set out along with a discussion of the submissions, the Commission's view, and any recommendations arising from the review of the legislation.

4. Review of VFA Provisions and Recommendations

Long Title

4.1 The long title is intended to provide a summary description of the purpose or scope of the legislation; it contrasts with the short title which is merely intended to provide a useful name when referring to it. The VFA provides a summary description on the purpose and scope of the Act:

AN ACT to validate and empower the exercise of power and authority by village fono in accordance with the custom and usage of their villages and to confirm or grant certain powers and to provide for incidental matters.

4.2 In the United Kingdom, the long title in any legislation is important since, under the procedures of Parliament, a Bill cannot be amended to go outside the scope of its long title.⁶ For that reason, most long titles in modern legislation tend to be rather vague ending with the formulation ‘and for connected purposes’ or in the context of the VFA, ‘*and to provide for incidental matters*’.

4.3 With reference to the long title, the Commission emphasizes the use of the words ‘power’ and ‘authority’ of village *fono*. The words ‘power’ and ‘authority’ imply the ability to control people or things or the right or authority of a person or group to do things⁷. The Commission proposes a more neutral word which represents the status of village *fono*, such as ‘role’ or ‘functions’, which is defined as ‘*position that somebody has or is expected to have in an organization*’.⁸

4.4 The Commission is of the view that the village *fono* as watchdogs of Samoan custom, plays an important ‘role’ in society to monitor and regulate behavior in accordance with its village rules and bylaws, and to deal with local offences and misconduct in accordance with custom and usage of each village. The Commission raises its concern with the use of ‘power’ because it implies control and authority over the lives of families and community.

4.5 There were no public submissions on this issue. Stakeholders raised concerns, however, that the VFA places too much power in the hands of the village *fono*. Therefore, the Commission recommends revisiting the use of words ‘power’ and ‘authority’ in the long title and consider more neutral terms such as ‘*role*’ or ‘*function*’. The Commission also suggests that instead of the word ‘empower’ in the long title, the word ‘recognize’ should be used.

Recommendation 1: The use of words ‘power’ and ‘authority’ in the long title of the *Village Fono Act 1990* should be revisited to consider more neutral words such as ‘role’ and ‘function’. The long title should read:-

⁶ Wikipedia Free Encyclopedia (Access: http://en.wikipedia.org/wiki/Long_title)

⁷ Oxford Advances Learners Dictionary (2005) Oxford University Press

⁸ *ibid* at n7

AN ACT to validate and recognize the role and function of the Village Fono in accordance with the custom and usage of their villages and to confirm or grant certain functions and to provide for incidental matters.

Recommendation 2: The words ‘role’ and ‘function’ should replace all references to power and authority in the *Village Fono Act 1990*.

Preamble (proposed new clause)

4.6 The VFA does not have a preamble. Preambles are sometimes used in legislation as introductory statements to explain purpose of legislation and underlying philosophy. The Commission recommends the incorporation of a ‘preamble clause’ to establish the purpose and underlying philosophy of the VFA, as this is a significant piece of legislation which deals with an important customary institution. When applied to the opening paragraphs of a statute, a preamble may recite historical facts pertinent to the subject of the statute. For instance, the preamble of Australia’s *Native Title Act 1993* (Cth) sets out the following as recognized facts:

- *the Aboriginal people and Torres Strait island people were the first people of Australia before European settlement;*
- *there was a historical dispossession of aboriginal lands and an overwhelming response by the people of Australia to legally recognize the aboriginal race;*
- *the Government of Australia recognizes international standards for the protection of human rights and fundamental freedoms;*
- *a decision by the High Court of Australia in 1992 held that that the common law of Australia recognizes a form of native title;*
- *the Government of Australia intends to rectify past injustices and creating mechanisms to fully protect rights of indigenous people.*

4.7 The inclusion of a preamble is supported by individual submissions as a mechanism to guide the village *fono* in its decision making. The public made submissions about the need for guidelines for village *fono* to follow in performing their role.

4.8 The Commission is of the view that a preamble similar to that used in the Native Title Act of Australia should be inserted into the VFA. Similar to native title in Australia, the village *fono* is an important customary institution which needs to be fully protected and recognized by law. The village *fono* has been described as the ‘watchdogs of Samoan custom’ and it is the most institutionalized traditional court in the Pacific.⁹ Its role has always been to promote custom and traditions within each village by way of maintaining peace and harmony. It also ensures that village misconduct and local offences are dealt with in accordance with customs and usages of each village. It is crucial to establish the historical significance of a village *fono* to give context to the subsequent legal provision for its role and functions. The preamble should include discussion of the following:

⁹ Oxford Advances Learners Dictionary (2005) Oxford University Press

- the historical significance of the village *fono* in Samoan society and why it needs protection/recognition;
- the organisational structure and composition of the village *fono*;
- recognition of international standards for the protection of human rights and fundamental freedoms (*Constitution 1960*);
- the underlying philosophy of the *Village Fono Act* as deliberated in Parliamentary Debates 1990.

Recommendation 3: The *Village Fono Act 1990* should incorporate a preamble clause establishing its historical significance, to give context to the subsequent legal provision for its role and functions. The preamble should include discussion of the following:

- i) *the historical significance of the village fono in Samoan society and why it needs protection/recognition;*
- ii) *the organizational structure of the village fono and composition;*
- iii) *recognition of international standards for the protection of human rights and fundamental freedoms (Constitution 1960);*
- iv) *the underlying philosophy of the Village Fono Act as deliberated in Parliamentary Debates 1990.*

In drafting the preamble, reference can be made to the preamble of the *Native Title Act 1993* (Aus).

Section 2 Interpretation

4.9 Public submissions suggested clarifying the difference between village land and freehold land to clarify the extent of jurisdiction of village *fono* as stated in s 9. The significance of this distinction will be considered later in this Report in the review of s 9.

Recommendation 4: The difference between ‘village land’ and ‘freehold land’ in the *Village Fono Act 1990* should be clearly defined to clarify the extent of jurisdiction of village *fono* in s 9.

4.10 With reference to the definition of ‘village misconduct’, the Commission recommends expanding the definition to consider a registration system to keep record of village misconduct and the traditional punishment available to a village *fono*. It is recommended that this be done before the Registrar of the Land and Titles Court. The Commission sees this move as a formal system to recognize custom and usage of each village.

4.11 The Commission also recommends that the registration process require the classification of ‘village misconduct’ into two categories: ‘minor misconduct’ and ‘major misconduct’, with corresponding punishments designated for each category. This will ensure that there is some form of guideline for village *fono* to follow in imposing appropriate punishment or penalties. This classification can be implemented with reference to current practice of each village *fono* in imposing punishments and penalties. In addition, the Commission proposes to allow each

village *fono* to draw up its own classification and provide statutory powers which allow them to register village bylaws relating to village misconduct and traditional punishment.

Recommendation 5: The definition of ‘village misconduct’ should be expanded to consider a registration system to keep record of village misconduct and traditional punishment available to a village *fono*. This is recommended to be done before the Registrar of the Land and Titles Court who has the discretion to either accept or reject registration.

Recommendation 6: The registration process in Recommendation 5 should also require the classification of ‘village misconduct’ into two categories- ‘minor misconduct’ and ‘major misconduct’, with a corresponding range of punishment for each category. This classification can be implemented with reference to current practice of each village *fono* in imposing punishment and penalties. In addition, the Commission proposes to allow each village *fono* to draw up its own classification and provide statutory powers which allow them to register village bylaws relating to village misconduct and traditional punishment.

Section 3 Village Fono Continue

4.12 Section 3 of the VFA further explains the role of the village *fono* and functions of the Registrar in relation to compiling and updating the register of village *fono*.

4.13 The Commission recommends that following subs 3(1), a provision be inserted to oblige village *fono* to register their assembly of *Alii and Faipule* and the name of the respective village.

Recommendation 7: An additional subsection to section 3 to oblige village *fono* to register assembly of *Alii and Faipule* and the name of the respective village.

4.14 Subsection 3(3) provides that ‘past and future exercise of power and authority’ by every Village Fono with respect to the affairs of its village in accordance with the custom and usage of that village ‘is hereby validated and empowered’. The Commission is concerned about the legitimacy of this provision, in particular the reference to past exercise of power and authority by every village *fono*. In the Commission’s view, this refers to infinite exercise of power by every Village *fono* before the year 1990 in which the VFA was enacted. With the enactment of the Constitution in 1960, it became the supreme law and any law inconsistent with provisions shall be held void. In other words, there are constitutional implications with regards to subs 3(3). The Commission suggests revisiting subs 3(3) to take into account constitutional provisions and the following jurisdictional analysis.

4.15 Following the prominent case of *Mabo v Queensland*¹⁰ in Australia, the public opinion was divided over the appropriate legislative response to the case. The perceived need for legislation arose from the combined decision of the High Court which recognized native title

¹⁰ (1992) 175 CLR 1. In this case, the High Court ruled that the common law of Australia recognized a form of ‘native title’ over land for Aboriginal and Torres Strait Island People. Moreover, the doctrine of ‘terra nullius’ (which had been used to express that the land of Australia belonged to no-one prior to settlement) was overturned. The *Native Title Act 1993* (Cth) was enacted for the formal protection of native title in 1993.

(custom and tradition based rights), and provisions of the *Racial Discrimination Act 1975*¹¹ (Cth). The Racial Discrimination Act was enacted following Australia's ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1965. A consequence of the *Mabo* decision and the *Racial Discrimination Act* was that dealings and interest granted over land where native title survived until 1965 may have been invalid if the dealings could not have been lawfully done.

4.16 State and Territory Legislatures in Australia were constrained from acting unilaterally to validate past actions which were invalid because of the overriding operation of the Racial Discrimination Act. On the other hand, the Native Title Act provides that a validation by a Territory and State be in certain terms¹². This restricts the manner which State and Territory legislation could operate to validate any invalid past actions. Sections 15 and 16 of the Native Title Act provides for categories 'of past acts attributable to the State or Territory which are valid and are taken always to have been valid'. For instance, past acts relating to public works or use of land and water resources by a State or Territory.

4.17 The Commission takes the view that certain past acts that have been validated by subs 3(3) of the VFA may in fact be invalid under the Constitution. The issue of banishment offends, for instance, the freedom of movement provision as people's freedom to remain in their homes and on their lands have been deprived, or burning of houses (*ati ma le lau*) upon village *fono* order affects property rights, to list a few. Subs 3(3) could be reframed to allow past power and authority of village *fono* to be validated only on certain terms or conditions. In other words, past actions may be validated insofar as consistent with the Constitution and Samoa's international obligations. This would restrict the manner in which the VFA could operate to validate any past exercise of power and authority of the village *fono*.

4.18 The Commission also recommends amending reference to 'past exercise of power and authority' to 'past actions' as to encompass village *fono* exercise of power and its decision making role.

Recommendation 8: Subsection 3(3) regarding the validation of past exercise of power and authority of the village *fono* should be revisited to consider the following factors:

- 1) Overriding constitutional provisions (Constitution of Samoa 1960)
- 2) Validating past power and authority of village *fono* on certain terms or conditions i.e. insofar as consistent with the Constitution and Samoa's obligations.

Recommendation 9: The words 'past exercise of power and authority' in subs 3(3) of the *Village Fono Act 1990* should be replaced with the words 'past actions'.

¹¹ Section 10 of the *Racial Discrimination Act 1975* provides for rights to equality before the law.

¹² Section 19 Native Titles Act 1993 provides that if a law of a State or Territory contains provisions to the same effect as sections 15 and 16, the law of the State or Territory may provide that past acts attributable to the State or Territory are valid, and are taken always to have been valid.

Section 4 Written Records not required

- 4.19 Section 4 of the VFA provides that no written records of an enquiry by a village *fono* into any allegation of village misconduct, or of any punishment imposed, need to be kept. In addition, no person found by any village *fono* to have been guilty of village misconduct shall by reason only of that fact be deemed to be guilty of a crime or offence under any other enactment, nor except with the consent of that person shall evidence be given in any Court of the decision of the village *fono* or of any punishment imposed by it.
- 4.20 The Commission recommends that written records of an enquiry into any allegation of village misconduct and punishments imposed shall be kept by the village *fono* for future references, particularly in situations where such information is required by the Court to assist with the determination of appeal matters.

Registration of village rules and bylaws

- 4.21 Public submissions revealed the need to formally register village rules and bylaws. The Commission supports registration of village rules and bylaws and keeping records of an enquiry and punishment imposed by the village *fono*, as being essential for the maintenance of the rule of law. The rule of law ensures that the people are aware of the laws that they are governed by. The Secretary-General of the United Nations defines the rule of law as:¹³

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.

- 4.22 The Commission recommends a formal registration system be set up by the Registrar of the Land and Titles Court to register village rules and bylaws. Under such a system, each village *fono* must also keep records of its own of the punishments imposed and submit this information when required by the Court to assist with the determination of appeal matters. In doing so, the Commission proposes to allow each village *fono* to draw up its own village rules and bylaws and provide statutory powers which allow them to register village rules and bylaws. There can be a draft set of village rules and bylaws which can be adopted, varied or not used by each village *fono*, similar to Fisheries bylaws. To ensure that these village rules and bylaws are consistent with the constitution, they must be vetted for constitutional compliance. In doing so, the Commission proposes the following option for the vetting process:

- i) The Registrar of the Land and Titles Court who receives submission for registration of village rules and bylaws shall have the discretion to either reject or accept such

¹³ (Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies” (2004))

registration based on guidelines and principles for best practices, consistent with provisions of the constitution. Such guidelines for best practices must take into account principles of fairness and natural justice and such principles may only apply in the event of a serious breach of village rules and bylaws which affects peace and harmony in the village. Registration does not automatically give the full effect of law to these rules and bylaws. Only those which comply with the Constitution and all other laws will have the full effect of law.

4.23 Section 4 is not well structured. The Commission recommends splitting s 4 for easier reading, for example:

- (1) *Every village fono must keep records of their own enquiry into any allegation of village misconduct or of any punishments imposed;*
- (2) *Every village fono must register their village rules and bylaws before the Registrar of the Land and Titles Court, who may reject or accept such registration;*
- (3) *no person found by any Village Fono to have been guilty of village misconduct shall by reason only of that fact be deemed to be guilty of a crime or offence under any other enactment;*
- (3) *only with the consent of that person shall evidence be given in any Court of the decision of the Village Fono or of any punishment imposed by it.*

Recommendation 10: Written records of an enquiry into any allegation of village misconduct shall be kept or of any punishments imposed, by the village *fono* for future references, particularly in situations where such information is required by the Court to assist with the determination of appeal matters.

Recommendation 11: The Commission recommends a formal registration system be set up by the Registrar of the Land and Titles Court to register village rules and bylaws. Under such a system, each village *fono* must also keep records of its own of the punishments imposed and submit this information when required by the Court to assist with the determination of appeal matters. In doing so, the Commission proposes to allow each village *fono* to draw up its own village rules and bylaws and provide statutory powers which allow them to register village rules and bylaws. There can be a draft set of village rules and bylaws which can be adopted, varied or not used by each village *fono*, similar to Fisheries bylaws. To ensure that these village rules and bylaws are consistent with the constitution, they must be vetted for constitutional compliance. In doing so, the Commission proposes the following option for the vetting process:

- i) The Registrar of the Land and Titles Court who receives submission for registration of village rules and bylaws shall have the discretion to either reject or accept such registration based on guidelines and principles for best practices, consistent with provisions of the constitution. Such guidelines for best practices must take into account principles of fairness and natural justice and such principles may only apply in the event of a serious breach of village rules and bylaws which affects peace and harmony in the village. Registration does not automatically give the full effect of law to these rules and bylaws. Only those which comply with the Constitution and all other laws will have the full effect of law.

Recommendation 12: Section 4 of the *Village Fono Act 1990* should be divided in the following way for easier reading, for example:

1. *Every village fono must keep records of their own enquiry into any allegation of village misconduct or of any punishments imposed.*
2. *Every village fono must register their village rules and bylaws before the Registrar of the Land and Titles Court, who may reject or accept such registration; (refer to Recommendation 11)*
3. *No person found by any Village Fono to have been guilty of village misconduct shall by reason only of that fact be deemed to be guilty of a crime or offence under any other enactment;*
4. *Only with the consent of that person shall evidence be given in any Court of the decision of the Village Fono or of any punishment imposed by it.*

Section 5 Powers of Village Fono relating to hygiene and economic development

4.24 Parliamentary Debates on the Village Fono Bill in 1990 interpreted powers stipulated in s 5(2)(b)–(c) as effective in developing village lands for economic benefit for families. This was perceived as more beneficial than the punishment of providing food or animals (s 6(a)) which are temporary. The lawyer who drafted the Bill, in clarifying the intention of the VFA, said that one of the objectives of the VFA is to give power to village *fono*, **in addition to other powers not specifically stated in the VFA**, to impose punishment by way of cultivating village land for economic development, hence the motive was economical.

4.25 Public submissions revealed that powers of the village *fono* are not adequately addressed in the VFA. The misconception among the public is that these powers stipulated in section 5 of the VFA are the only powers of a village *fono*. Therefore, members of the public during consultations in both Savaii and Upolu submitted that the powers of the VFA should be expanded beyond s 5 of the VFA. These powers should be fairly exercised without discrimination to a particular group of people and powers should consider the interest of the community as a whole. On the other hand, individual submissions expressed the view that powers of the village *fono* should not go beyond s 5 of VFA.

4.26 Section 5 focuses on hygiene and economic development. The Commission understands that in practice, s 5 does not limit the powers of village *fono* to only hygiene and economic development. However, the Commission recommends specifying in the VFA more general ‘functions’ or ‘roles’ of village *fono* in addition to hygiene and economic development, for easier reference and also to make the intention of the VFA clearer. The following functions of the village *fono* should be added to the existing roles relating to hygiene and economic development:

- *to meet regularly, deliberate and make decisions for future village development;*
- *to make rules for the maintenance of hygiene in the village, and for other purposes aimed at improving the standard of living of each community;*
- *to make rules governing the development and use of village land for the economic betterment of the village, good governance and keeping the peace and solidarity (harmony);*

- *to conduct inspections within the village to ensure village lands are maintained and kept in a good state;*
- *to deal with local offences by establishing a practical mechanism for hearing cases before them, and impose appropriate punishment;*
- *to make rules directing any person or persons to do any work required to be done pursuant to rules made in accordance with the powers granted or preserved by paragraphs (a) and (b).*

4.27 The Commission recommends adding a new subsection to s 5 ensure that village rules and bylaws are reviewed periodically to ensure they remain relevant.

Recommendation 13: The following functions of the village *fono* should be added to the existing roles relating to hygiene and economic development:

- *to meet regularly, deliberate and make decisions for future village development;*
- *to make rules for the maintenance of hygiene in the village, and for other purposes aimed at improving the standard of living of each community;*
- *to make rules governing the development and use of village land for the economic betterment of the village, good governance and keeping the peace and solidarity (harmony);*
- *to conduct inspections within the village to ensure village lands are maintained and kept in a good state;*
- *to deal with local offences by establishing a practical mechanism for hearing cases before them, and impose appropriate punishment;*
- *to make rules directing any person or persons to do any work required to be done pursuant to rules made in accordance with the powers granted or preserved by paragraphs (a) and (b).*

Recommendation 14: Add a new subsection to s 5 of the *Village Fono Act 1990*, requiring each village *fono* to review their village rules and bylaws periodically.

Section 9 Limitation of Jurisdiction of Village Fono

4.28 As a matter of structure, the Commission recommends that s 9 of the VFA should come after s 5. This is because the limitations on the power of the village *fono* logically follow from the powers explicitly given in s 5. Section 9 was one of the contentious provisions discussed during public consultations. The public in both Savaii and Upolu expressed concerns regarding s 9(b), which excludes from the jurisdiction of the village *fono* people living on freehold land within each village. The concern is that some people living on freehold land undermine village *fono* jurisdictions by disobeying village rules and bylaws.

4.29 Freehold land is exempted from village *fono* jurisdiction on the basis that it is privately owned¹⁴, as opposed to customary land which is communally owned. About two percent of

¹⁴ Dr Peggy Fairbairn-Dunlop *Changing perception of land: Samoa* (2000) 64

Samoa's land is designated as freehold. Some parcels of freehold land are located in villages where village *fono* governs. The issues that arise from this situation are as follows:¹⁵

- i) whether the purchase of freehold land indicates a family's withdrawal from the *faasamoa*;
- ii) whether families living on freehold land maintain the *faasamoa*;
- iii) whether this *faasamoa* practiced by families on freehold land is the same as the *faasamoa* experienced in the daily lives of those living on customary land and in close communal settings.

4.30 The Commission is of the view that the solution depends on whether individuals who have purchased freehold land maintain their connection to the *faasamoa*. According to Emela Moa 1991, *the faasamoa is the matai: the matai is the family is the land. The land is the village; the village is the family, is the matai, is the faasamoa*.¹⁶ To consider separately the village where people live and the land on which they work would be unrealistic.¹⁷ Any change in land tenure will have implications for the *faasamoa* structure – social, political, spiritual and feelings of identity and esteem.¹⁸

4.31 In 2000, Dr Fairbairn-Dunlop published these findings of her research on the changing perception of land in Samoa, with particular reference to the high demand to purchase freehold land. She found that traditional perceptions of land are under review as Samoa moves towards an increasing consumer and commercial society, evident in the increasing purchase of freehold lands nowadays. The general perception is that the desire for freehold land is to have something to pass on to future generations. Parents want to give their children a good start: one which is better than they had and one which they have worked for with their own hands¹⁹ – one in which the *matai* cannot interfere with.

4.32 The issue concerning the exemption of freehold land from village *fono* jurisdiction is a complex one. Retaining the traditional value of land and its integral land role in the *faasamoa* in these times of rapid change, both social and economic, is a challenge. Hence, the Commission considers it important to maintain the status of freehold land as is, but take steps to ensure that the *faasamoa* sense of community is still achieved and promoted among those people who own and live on freehold land within a village with a village *fono*. This can be developed by having in place some policy guidelines to make known to individuals living on freehold land within a village with a village *fono*, the village rules and protocols. It is hoped that such policy guidelines would promote awareness of and respect for the role of the village *fono*, whilst maintaining the individual's sense of ownership of the freehold land.

4.33 One view states that if individuals who have purchased and live on freehold land maintain their connection to the *faasamoa* ('connection'), then this can be interpreted as the

¹⁵Ibid at n14

¹⁶Ibid at n14

¹⁷Ibid at n14

¹⁸Ibid at n14

¹⁹Ibid at n14

reinforcement of the *faasamoa*, indicating submission to village *fono* jurisdiction. However, this view differs depending on what people mean by the *faasamoa*. For instance, families living on freehold land contributing to village obligations can be seen as maintaining the connection, or a member of such family being a member of the village *fono*. In maintaining the connection, the people could be seen as being part of the *faasamoa* structure, inclusive of the village *fono*.

4.34 The other issue is that freehold lands are dispersed throughout Samoa. Some families have purchased freehold land in areas without the *faasamoa* structure of the village *fono*. For instance, Vaitele uta, Vaitele tai and Vaitele fou. Public submissions revealed that these villages should adopt a village *fono* structure to develop feelings of community in these areas. These villages experience social problems which are often dealt with by police intervention. There is little influence of the *faasamoa* at the village level as the sense of ownership is more individualistic, compared to traditional villages which are governed by the village *fono*. In other cases, where freehold land is dispersed in traditional villages under village *fono* jurisdiction, there is a serious clash in terms of boundaries in which the village *fono* role can be exercised.

4.35 In addressing the clash between freehold land and the village *fono* jurisdictions, the Commission recommends the following options:

- i) Given the changing perception of land tenure concerning the purchasing of freehold land, the current status of freehold land should be maintained, but steps should be taken through the VFA to maintain the influence of the *faasamoa* sense of community. This can be developed by having in place some policy guidelines to make known to individuals living on freehold land within a village with a village *fono*, village rules and protocols for awareness, whilst still maintaining their freehold land sense of ownership. Alternatively, VFA should clarify what it means to maintain the *faasamoa* connection where freehold land is involved. New provisions should provide the opportunity to families living on freehold land within a village with a village *fono* to establish their connection to the *faasamoa* and the intention to maintain this connection. Having established such connection, this could be perceived as following the *faasamoa* structure, in other words, village *fono* jurisdiction.

4.36 In cases where peace and harmony of the village is disrupted by actions of people living on freehold land/government lands within a village with a village *fono*, the Commission is of the view that there should be some form of remedy available to the village *fono* to ensure peace and harmony is maintained in their respective villages. Hence, the Commission proposes the following options:

- ii) In the case of excessive noise during curfew hours or other breach or disregard of village rules and bylaws, the village *fono* may be obliged to take a more stringent approach and summon these people before the village *fono*. Subsequently, if these people appear before the village *fono* as summoned, they shall be warned and be made aware of village rules and bylaws. As watchdogs of Samoan custom, the

village *fono* must ensure that peace and harmony is maintained and upheld in their respective villages. Should these people still refuse to comply with village rules and bylaws after appearing before the village *fono*, the village *fono* may then file a complaint with the Ministry of Police or file a civil claim. The Commission recognizes the impracticality of going to the Police and the high costs of civil claims and prefers the alternative below.

- iii) In the event of complete disregard of village rules and bylaws, contrary to preserving peace and harmony within the villages, the village *fono* may file a complaint to the Registrar of the Land and Titles Court who shall invoke the ‘Samoan conciliation’ provision (*soalaupule* provision)- *section 34A, 34B & 34C of the Land and Titles Amendment Act 2012*). The ‘Samoan conciliation’ provision is the process by which the parties to a dispute, with the assistance of the Registrar and in accordance with Samoan custom and usage, identify the disputed issues, develop options, consider alternatives and endeavor, and in which the Registrar may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with Samoan custom and usage.²⁰

4.37 In assessing the complaint made by the village *fono* and the outcome of the Samoan conciliation, the Registrar may decide to refer the matter back to the village *fono* for reconsideration, or refer the matter to the Land and Titles Court for resolution. However, the Land and Titles Court shall refuse to hear a matter if the parties to the dispute have not undertaken Samoan conciliation or mediation. Should Samoan conciliation and mediation provisions fail, the Land and Titles may then hear the matter for speedy resolution. Once the Land and Titles Court determines a matter and issue orders, all parties must comply with the court order. Failure to comply with court orders will result in contempt of court proceedings.

- iv) In the event these people fail to appear before the village *fono* after being summoned, the village *fono* may also follow the above procedure and file a complaint to the Registrar of the Land and Titles Court who shall also invoke the ‘Samoan conciliation’ provision (*soalaupule* provision- (section 34A, 34B & 34C of the Land and Titles Amendment Act 2012).

Recommendation 15: The current status of freehold land should be maintained, but steps should be taken through amendments to the *Village Fono Act 1990* to maintain the influence of the *faasamoa* sense of community. This can be developed by having in place some policy guidelines to make *known* to individuals living on freehold land within a village with a village *fono*, village rules and protocols for awareness, whilst still maintaining the individualistic status of freehold land.

Recommendation 16: Alternatively, the *Village Fono Act 1990* should clarify the meaning of *faasamoa* in connection to freehold land. Subsequently, the families living on freehold land within a village with a village *fono* should be provided with the opportunity to establish their connection to the *faasamoa* and the intention to maintain this connection.

²⁰ Section 3 of the Land and Titles Amendment Act 2012

Recommendation 17: In cases where peace and harmony of the village is disrupted by actions of people living on freehold land/government lands within a village with a village *fono*, the Commission is of the view that there should be some form of remedy available to the village *fono* to ensure peace and harmony is maintained in their respective villages. Hence, the Commission proposes the following option:

- i) In the case of excessive noise during curfew hours or other breach or disregard of village rules and bylaws, the village *fono* may be obliged to take a more stringent approach and summon these people before the village *fono*. Subsequently, if these people appear before the village *fono* as summoned, they shall be warned and be made aware of village rules and bylaws. As watchdogs of Samoan custom, the village *fono* must ensure that peace and harmony is maintained and upheld in their respective villages. Should these people still refuse to comply with village rules and bylaws after appearing before the village *fono*, the village *fono* may then file a complaint with the Ministry of Police or file a civil claim. The Commission recognizes the impracticality of going to the Police and the high costs of civil claims and prefers the alternative below.
- ii) In the event of complete disregard of village rules and bylaws, contrary to preserving peace and harmony within the villages, the village *fono* may file a complaint to the Registrar of the Land and Titles Court who shall invoke the ‘Samoan conciliation’ provision (*soalaupule* provision)- section 34A, 34B & 34C of the Land and Titles Amendment Act 2012). The ‘Samoan conciliation’ provision is the process by which the parties to a dispute, with the assistance of the Registrar and in accordance with Samoan custom and usage, identify the disputed issues, develop options, consider alternatives and endeavor, and in which the Registrar may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with Samoan custom and usage.²¹

In assessing the complaint made by the village *fono* and the outcome of the Samoan conciliation, the Registrar may decide to refer the matter back to the village *fono* for reconsideration, or refer the matter to the Land and Titles Court for resolution. However, the Land and Titles Court shall refuse to hear a matter if the parties to the dispute have not undertaken Samoan conciliation or mediation. Should Samoan conciliation and mediation provisions fail, the Land and Titles may then hear the matter for speedy resolution. Once the Land and Titles Court determines a matter and issue orders, all parties must comply with the court order. Failure to comply with court orders will result in contempt of court proceedings.

- iii) In the event these people fail to appear before the village *fono* after being summoned, the village *fono* may also follow the above procedure and file a complaint to the Registrar of the Land and Titles Court who shall also invoke the ‘Samoan conciliation’ provision (*soalaupule* provision- (section 34A, 34B & 34C of the Land and Titles Amendment Act 2012).

²¹ Section 3 of the Land and Titles Amendment Act 2012

Section 6 Punishments

- 4.38 This section of the VFA is interpreted as not limiting the powers of the village *fono* to impose punishment in accordance with the custom and usages of each village. In other words, the provision implies that the power to impose banishment extends beyond the scope of section 6.
- 4.39 Consultations in Upolu revealed that stricter penalties (such as banishment) should be included in this section for serious village misconduct. The lawyer who drafted the VFA commented that the VFA was enacted to develop village lands to provide lasting benefits for families and communities. Instead of imposing penalties which are temporary, such as fines, fine mats and animals, the lawyer who drafted the VFA expressed the view that ordering people to work on village land benefits not only the offender but families as they will reap the fruits of the land. Other traditional punishment such as banishment was unaffected and remained.
- 4.40 There were also submissions to suggest that offenders be provided with adequate time to prepare for any penalties or fines that they have been ordered by the village *fono*.
- 4.41 Every village *fono* differs in the scale of penalties applied for village misconduct, as the Commission heard during consultations. In each village, there is usually a committee appointed by the village *fono* to inquire into a case of village misconduct and advise on the appropriate punishment. Section 6 is general about the powers of village *fono* to impose punishment and does not provide any form of guideline to village *fono* on the proportionality of the punishment or penalty. Instead, it leaves the village *fono* with the discretion to impose any punishment or penalty they deem fit. There have been concerns raised about the punishment imposed as being too substantial compared to the misconduct. For example, some families are fined large amounts of money for less serious misconduct. Some members of the public expressed the view that the village *fono* are abusing their powers.
- 4.42 The Commission is of the view that there needs to be a draft set of standard village rules and bylaws on punishments and penalties to ensure that the same punishment or penalty applies across each village for the same case of village misconduct. Although customs and usage in each village is different, a more systematic scale ensures transparency and accountability in making decisions. In implementing such a scale, the Commission recommends the following options to take:
- i) A draft set of standard village rules and bylaws on punishments and penalties for each village misconduct (similar to Fisheries bylaws), to be drawn up by the Ministry of Women, Community and Social Development, with the assistance of the Registrar of Lands and Title Court. Consequently, the Attorney General may review these set of standard village rules and bylaws for constitutional compliance. Once they have been vetted, the village *fono* may choose to accept or reject the standard village rules and bylaws, or modify their terms in accordance with their current village practices, as the Commission understands that each village *fono* differs in their scale of punishments and penalties imposed for village misconduct.

In the event the village *fono* accepts the standard set of village rules (with or without modifications), they can then apply for registration before the Registrar of the Land and Titles Court.

- ii) Alternatively, each village *fono* can draw up their own set of village rules and bylaws on punishments and penalties and submit it to the Registrar for formal registration. Similar to Recommendation 11, the Registrar shall have the discretion to either reject or accept such registration based on guidelines and principles for best practices, consistent with provisions of the constitution. Such guidelines for best practices must take into account principles of fairness and natural justice and such principles may only apply in the event of a serious breach of village rules and bylaws which affects peace and harmony in the village. Registration does not automatically give the full effect of law to these rules and bylaws. Only those which comply with the Constitution and all other laws will have the full effect of law.

Recommendation 18: The Commission is of the view that there needs to be a uniform scale to ensure that the same punishment or penalty applies across each village for the same case of village misconduct. Although customs and usage in each village is different, a more systematic scale ensures transparency and accountability in making decisions. In implementing such a scale, the Commission recommends the following options to take:

- i) A draft set of standard village rules and bylaws on punishments and penalties for each village misconduct (similar to Fisheries bylaws), to be drawn up by the Ministry of Women, Community and Social Development, with the assistance of the Registrar of Lands and Title Court. Consequently, the Attorney General may review these set of standard village rules and bylaws for constitutional compliance. Once they have been vetted, the village *fono* may choose to accept or reject the standard village rules and bylaws, or modify their terms in accordance with their current village practices, as the Commission understands that each village *fono* differs in their scale of punishments and penalties imposed for village misconduct. In the event the village *fono* accepts the standard set of village rules (with or without modifications), they can then apply for registration before the Registrar of the Land and Titles Court.
- ii) Alternatively, each village *fono* can draw up their own set of village rules and bylaws on punishments and penalties and submit it to the Registrar for formal registration. Similar to Recommendation 11, the Registrar shall have the discretion to either reject or accept such registration based on guidelines and principles for best practices, consistent with provisions of the constitution. Such guidelines for best practices must take into account principles of fairness and natural justice and such principles may only apply in the event of a serious breach of village rules and bylaws which affects peace and harmony in the village. Registration does not automatically give the full effect of law to these rules and bylaws. Only those which comply with the Constitution and all other laws will have the full effect of law.

Banishment

- 4.43 The issue to consider is whether ‘banishment’ should be specifically reinstated in the VFA. Parliamentary Debates reached a consensus to remove the original subsection (c) referring to banishment. This was challenged by MPs on the basis that its removal would defeat the purpose of the Village Fono Bill. It is unclear from Parliamentary Debates as to why such a consensus was reached; nevertheless the prevalence of banishment cases over the years has prompted the need to re-examine the status of such punishment in legislation such as the VFA. The definition of banishment in accordance with Samoan customs means ‘*faatula*’ or ‘*cause to remove*’. In practice, there are two different meanings to the word ‘banishment’ - one is to still allow a person to remain in the village but he or she is not allowed from taking part in village affairs and meetings. The other meaning is to banish on a permanent basis where the person (which can include his or her family) is not allowed to set foot in the village and this can include removal of all his or her possessions and properties.
- 4.44 Banishment orders vary from village to village, depending on the nature of the misconduct. Non-compliance with village *fono* orders would sometimes result in banishment, for instance, the issue concerning the establishment of new churches in some villages. Nevertheless, the issue remains whether such form of punishment should be specified in the VFA to give it the full effect of the law. The lawyer who drafted the VFA commented that the current VFA does not take away the power of village *fono* to impose banishment. This is rephrased as saying that the village *fono* has the power to impose banishment regardless of the fact that it is not specified in the VFA.
- 4.45 Section 34 of the *Land and Titles Act 1981* provides that the Land and Titles Court has jurisdiction to make orders or declarations in accordance with Samoan customs and usages. The Land and Titles Court also has jurisdiction in all claims and disputes between Samoans relating to customary land and the right of succession²². Whether the Land and Titles Court has jurisdiction to order banishment remains unclear. In practice, a village *fono* may seek an order from the Land and Titles Court to banish people who have not complied with village rules and bylaws. However, this proceeding is not specifically provided for in the *Land and Titles Act 1981*.
- 4.46 Both VFA and the Land and Titles Act 1981 do not specifically stipulate banishment. During public consultations, there was strong support from the public in Upolu and Savaii to specify banishment in the VFA. This will ensure that banishment is recognized in law as a way to deter unacceptable behavior in the villages. The public emphasized its long existence and contribution in maintaining peace and harmony in the villages. Its removal from legislation defeats the objective of the VFA and undermines the authority of the village *fono*. On the other hand, it was observed during consultations in both Savaii and Upolu that banishment orders imposed by the village *fono* are often reversed by the Land and Titles Court. The explanation given for such reversal is that the village *fono* do not have the power to banish.

²² Section 34 Land and Titles Act 1981

4.47 The Commission is of the view that such form of punishment should be available at all times to the village *fono*. In other words, village *fono* should be given specific powers to banish, in addition to imposing punishment in section 6 of the VFA. To ensure banishment orders comply with constitutional provisions, the Commission recommends having general guidelines specific to banishment provisions, to guide village *fono* in making their decision to banish. Such guidelines should take into account the proposed preamble of the VFA and the following factors:

- i) *natural fairness and justice;*
- ii) *banishment is justified if there is a likelihood that the issue at stake will disrupt peace and harmony within the village.*
- iii) *application of section 11 (Right to Appeal) without interference from the village fono.*

4.48 There is already a balance of right provision under section 11 where the matter may be referred to the village *fono* for re-consideration. On the other hand, the appeal process stipulated in section 11 may allow time for village *fono* to re-consider their decision and choose to reconcile differences.

Recommendation 19: The Commission recommends a separate provision for banishment. Such form of punishment should be specified in the VFA and be made available at all times to the village *fono*. To ensure banishment orders comply with constitutional provisions, the Commission recommends having general guidelines specific to banishment provisions, to guide village *fono* before making their decision to banish. Such guidelines should take into account the proposed preamble of the VFA and the following factors:

- i) *natural fairness and justice;*
- ii) *the banishment is justified if there is a likelihood that the issue at stake will disrupt peace and harmony within the village; and*
- iii) *the application of section 11 (Right to Appeal) without interference from the village fono.*

There is already a balance of right provision under section 11 where the matter may be referred to the village *fono* for re-consideration. On the other hand, the appeal process stipulated in section 11 may allow time for village *fono* to re-consider their decision and instead choose to reconcile differences.

Section 7 Power of Delegation

4.49 In s 7 of the VFA, it provides that a village *fono* may delegate to a committee of its members all or any of its powers. The composition and role of such a committee is not clear in the VFA.

Recommendation 20: The role and composition of a committee with delegated powers should be clarified under section 7 of the *Village Fono Act 1990*.

Section 8 Courts to take into account of penalty imposed by Village Fono

4.50 Section 8 of the VFA provides that the Courts should take into account penalty imposed by village *fono*. This is consistent with past practices of the courts in considering customary punishment as mitigating factors for sentencing purposes.

Recommendation 21: To maintain status quo of section 8 of the *Village Fono Act 1990*.

Section 11 Right of Appeal

4.51 An appeal ‘as of right’ is one that is guaranteed by statute or some underlying constitutional or legal principle, without requiring the appellant to seek leave of a court to appeal. It allows the appellant an opportunity to petition for review of a case that has been decided by a court of law. The legal structure of Samoa, along with s 11, provides that a person can appeal to the Land and Titles Court against a decision of the village *fono*. Every appeal shall be commenced by a petition in accordance with section 44 of the *Land and Titles Court Act 1981*.²³

4.52 In Parliamentary Debates, the right of appeal provision was perceived by some MPs as undermining the authority of the village *fono*. In practice, the right of appeal provision allows aggrieved parties to seek answers from the Land and Titles Court on validity of village *fono* decisions. The right of appeal provision allows both sides the opportunity to present their case. This provides an element of due process often absent at the village *fono* level, where final decisions can be made without providing the aggrieved party with adequate opportunity to present his or her case. Due process is important to be considered because it is the legal requirement that the state must respect all of the legal rights that are owed to a person. Due process balances the power of law of the land and protects individual persons from it. When a government harms a person without following the exact course of the law, this constitutes a violation of due process, which offends against the rule of law.

4.53 The main concern arising from this provision during consultations was that the right of appeal provision would undermine the jurisdiction of the village *fono*. However, section 11(5)(c) provides that the Land and Titles Court may refer the decision back to the village *fono* for reconsideration, and may thus be perceived as still recognizing the role of village *fono*.

4.54 To ensure that all Samoans are accorded due process and the right to have a decision affecting their rights reviewed, the Commission recommends maintaining the status quo of section 11.

Recommendation 22: The status quo in section 11 of the *Village Fono Act 1990* should be maintained.

²³ *Village Fono Act 1990* subs 11(2).

5. Freedom of Religion

Constitutional Status

5.1 Freedom of religion is guaranteed by art 11 of the Constitution of Samoa in the following terms:

11. Freedom of religion - (1) Every person has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in a community with others, and, in public or private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Nothing in clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that clause in the interests of national security or of public order, health or morals, or for protecting the rights and freedom of others, including their rights and freedom to observe and practice their religion without the unsolicited interference of members of other religions.

5.2 In accordance with Cabinet Directive F.K (11)02, the status quo of art 11(1) highlighted above is maintained. The Cabinet Submission prepared by the Commission in June 2011 and endorsed by Cabinet F.K. (11)23 recommended the following:

Amendment to the Village Fono Act 1990 to consider the following factors:

- i) General Applicable Laws;
- ii) The reasonable Limitation Approach in article 11(2) of the Constitution of Samoa.

5.3 The Commission will consider the above factors jointly. In the Commission's view, article 11(2) can be addressed under the principle of general applicable laws. This part of the Report will take the following form:

- 1) Public submissions;
- 2) General Applicable Laws;
- 3) Commission's view and Recommendations.

Public submissions

5.4 The questions posed by the Commission during public consultations sought views on ways to improve the VFA, and ways to amend the VFA to harmonize article 11 with Samoan customs and traditions. Public consultations in Savaii and Upolu were split up into groups comprising the village *fono*, women's committees, church ministers and representatives, and youth groups. This Report provides a general overview of public submissions.

Savaii and Upolu

5.5 The public in general submitted that consultations should firstly be undertaken with the village *fono* before a new church is established. Some stakeholders also expressed the view that the number of churches should be restricted to Christian religion. In the case that

churches are restricted, people should be allowed to attend churches in neighboring villages. On the other hand, people who provide service (*tautua*) to the village *fono* must be eligible to establish new churches if they wish to do so. In the event that someone wants to establish a church, he or she must obtain agreement from a certain number of people, or alternatively obtain village consensus.

5.6 There were also views to establish a body to assess new churches. Some expressed the view that churches in Samoa should be registered. The general view is that powers must be left with the village *fono* to determine whether to accept new churches into each village. This is solely because these churches are situated within the vicinity of communal lands thus the village *fono* should have the right to have a say in the establishment of these new churches.

Individual submissions

5.7 Fuimaono Sam Te'o Anifale submitted that it would be unjust and unfair for village *fono* to determine issues of religion. There will be a flood of cases before the courts concerning families who do not support village *fono* decisions if the village *fono* determine issues of religion. Jason Joseph supported Fuimaono's view that the village *fono* does not have jurisdiction to determine matters arising under art 11. He further expressed the view that the Constitution of Samoa is the ultimate point of reference for any legislative amendment.

5.8 Molisi Tavete also expressed the view that village *fono* should not interfere with the establishment of new churches but in the event that these churches do not comply with village rules and bylaws then they should impose punishment accordingly. Aleni Saulo Fuatimau submitted that if a church is registered and wishes to be set up, the church has the right to establish itself in the village after consultation with the village *fono*.

5.9 Logoitea F. Masoe submitted that the VFA should focus on ways to enhance harmony and security within each village. Afoafouvale M Moors expressed the view that research should be undertaken to closely examine cause of disruptive, anti social or anti-cultural activities. He also proposed to have, in addition, to the powers of village *fono* 'the power to ensure the rights of individuals in the village, as guaranteed by the Constitution, are absolutely protected.

5.10 The primary concern of the Church of Latter Day Saints ('Church') is that the review of the VFA will be a 'means to strengthen the role of the *village fono* or *alii* and *faipule* vis-à-vis the religious observances in villages or the establishment of new churches and faiths in villages, thus diminishing, if not wholly undermining, the individual right to freedom of religion entrenched in the Constitution'.

5.11 By way of background the submission outlines an introduction, history, doctrines and role of the Church in Samoa. It is not necessary for present purposes to present this detail in this summary. The church submits that art 11 must be understood in its entirety and in the context of Samoa's obligations under international human rights law. As stated in the submission, the language of the *Universal Declaration of Human Rights* ('UDHR') as well as the *International Covenant on Civil and Political Rights* ('ICCPR') is closely followed by art 11.

5.12 The Church submits that in becoming a party to the ICCPR in 2008, Samoa ‘accepted obligations to protect freedom of expression, freedom of association, and equal protection under law, as well as to extend these protections to religious minorities’. Thus the Church submits that any possible amendments to the *Village Fono Act* must ‘construe art 11 and the limitations clause in art 11 (2) in a manner that is consistent with Samoa’s international obligations and the sound principles of constitutional interpretation, and that would in no event allow additional limitations on freedom of religion rights’.

5.13 Further, art 11 (2) must place limitations on the rights that are reasonable to justify limiting the right. Public order, for example, justifies a permissible limitation on the right to freedom of limitation. However this must be construed narrowly. As evidenced in the application of Art 18 of the ICCPR, only breaches of the peace that threaten actual disturbances or violence justify limitation on the basis of public order.

General Applicable Laws and Article 11(2)

5.14 The Cabinet Submission discussed in detail art 11 of the Constitution for the purpose of providing a way forward on the issue of freedom of religion. This Report elaborates on the principle of general applicable laws and neutrality. General applicable laws simply mean a law applicable equally to a wide variety of conduct²⁴. In the context of fundamental freedoms, it can have several different meanings, depending on the context:²⁵

- i) *a facially speech-neutral law, which is to say a law applicable to a wide variety of conduct, whether speech or not;*
- ii) *a facially religion-neutral law, which is to say a law applicable equally to religious observers and to others; or*
- iii) *a facially press-neutral law, which is to say a law applicable equally to the press and to others.*

5.15 For the purpose of this Report, the Commission focuses on (ii) above:- a facially religion-neutral law, which is to say a law applicable equally to religious observers and to others.

5.16 Similarly to art 11 of the Constitution of Samoa, the free exercise of religion clause in the *First Amendment* to the United States Constitution means, first and foremost, the right to believe and profess whatever religious doctrine one desires.²⁶ The First Amendment protects expression and religious exercise from impairment by laws that are not generally applicable.²⁷ Where the free exercise of religion is at issue, a majority of the Justices in recent decisions in the USA have indicated that neutral, generally applicable laws do not violate the First

²⁴ Volokh E, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, Situation-Altering Utterances’ and the Uncharted Zones* (Accessed: <http://www2.law.ucla.edu/volokh/conduct.pdf>)

²⁵ Ibid at n24

²⁶ Bogen D ‘*Generally Applicable Laws and the First Amendment*’ 1997, School of Law, Southwestern University

²⁷ Ibid at n26

Amendment.²⁸ Bogen argues that a determination that content-neutral generally applicable laws are not subject to heightened scrutiny under the First Amendment, might be justified on the grounds that the First Amendment is concerned with the purpose of the law, rather than its effect on the individual.²⁹

5.17 Neutrality and general applicability are interrelated. Neutrality is determined by the object of the law. General applicability involves categories of selection. Any law affecting religion must use the proper means (general applicability) to achieve proper end (neutrality).³⁰ Neutrality and general applicability are requirements for the validity of laws under the Free Exercise Clause of the First Amendment because there is no legitimate state interest that justifies violating them.³¹ Restriction of religion is not a legitimate object of any law. Thus, a classification limited to religion carries on its face the indicia of illegitimate purpose. The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted. This does invalidate laws by reason of evil motives of their authors.

5.18 One of the cases in the USA that dealt with the issue of the free exercise clause and general applicability is the case of *Employment Division, Department of Human Resources of Oregon v. Smith*³², where the majority of opinions suggested that neutrality and general applicability insulated the law from First Amendment challenge. This is an Oregon case involving two respondents who were fired from their jobs with a drug organization because they ingested peyote³³ for sacramental purposes at a ceremony of the Native American Church of which both are members. Oregon Law prohibits the knowing and intentional possession of a controlled substance unless the substance has been prescribed by a medical practitioner.

5.19 The issue in this case was whether the prohibition was valid under the Free Exercise Clause of the First Amendment. Case laws involving the Free Exercise Clause of the First Amendment of the USA have developed over the years in the USA. In the Oregon case, various legal viewpoints have been expressed concerning the prohibition of certain acts which are regarded as forms of religious practices. The court (majority) expressed the view that ‘...if prohibiting the exercise of religion is not the object of the issue or law, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended’.

5.20 The Supreme Court of the USA has never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. This is proven in one viewpoint which stated ‘...to permit this would be to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself’.

²⁸ Bogen D ‘*Generally Applicable Laws and the First Amendment*’ 1997, School of Law, Southwestern University

²⁹ Ibid at n28

³⁰ Ibid at n28

³¹ Ibid at n28

³² 494 U.S. 872 (1990)

³³ Peyote is a hallucinogen derived from the plant *Lophohorawilliamsii* Lemaire.

5.21 In the end, the court held that the Oregon's ban on the possession of peyote is not a law specifically aimed at a physical act engaged in for a religious reason. Rather, it is a law that applies to everyone who might possess peyote, for whatever reason—a "neutral law of general applicability," under generally applicable laws. Hence, the prohibition in Oregon law above is constitutional and consistent with the Free Exercise Clause. It is the Court's role to examine laws affecting religious exercise to determine whether they are generally applicable and whether the object of the law is neutral. In doing so, the Court must be focusing on the government's behavior rather than that of the religious practitioner.³⁴

6. Commission's view and Recommendations

6.1 As a starting point, the Commission sees the importance of freedom of religion and acknowledges submissions from the Church of Latter Day Saints towards this issue. Their submissions were most helpful and insightful. Submissions received on art 11 of the Constitution generally support the view that village *fono* do not have jurisdiction to determine matters of religion. This is based on the view that restricting religion is associated with higher levels of violent persecution.

6.2 In Samoa, court cases in the past involve families who have been banished from their villages and this has caused disharmony within the villages, particularly between the village *fono* and families affected. In practice, there are village bylaws and rules restricting the number of churches. In some villages, individuals who introduce a new church or practice a new religion, by conducting bible studies or establishing new churches, have been ordered by the village *fono* to refrain from doing so. If these families continue to practice or establish a new church or religion, a banishment order will be made against these families. There is evidence from court cases of rebellious behavior towards village *fono* resulting from dissatisfaction with village *fono* decisions. In worst situations, riot becomes a solution to forcefully remove these families from their homes and eventually leads to greater disharmony between the village and the families affected.

6.3 Contrary to popular opinion, research on religious persecution in the past has shown that ensuring religious freedom for all reduces violent religious persecution and conflict.³⁵ History tells of the consequences of restricting and denying religious freedom, such as the mass murder of 6 million Jews in 1933 and the violent persecution of Christians in Turkey around the time World War 1, to name a few.³⁶ Lessons learned from the past and supported by international studies and analysis provides that 'restriction on religious freedom produce persecution and conflict, undermine democracy, and contribute to terrorism and international instability.'³⁷

6.4 The Commission supports the view that restrictions on religious freedom produce persecution and conflict, undermine democracy, and contribute to terrorism and international instability. Although Samoa has not experienced serious religious persecution and conflict prevalent in other countries around the world, there is already evidence of village disharmony which

³⁴ Bogen D 'Generally Applicable Laws and the First Amendment' 1997, School of Law, Southwestern University

³⁵ Grim J.B & Finke R 2011 'The Price of Freedom Denied 2011, Cambridge

³⁶ Ibid at n35

³⁷ Ibid at n35

occurs when, for instance, bible studies are undertaken by village groups and families in some villages. In some situations, there is disharmony caused by the establishment of new churches in villages where the number of churches is restricted. With the exercise of religious freedom to undertake bible studies within villages with a village *fono* structure, the Commission recommends that such practice should not be denied in light of art 11. However, in addressing the issue on the establishment of new churches, the Commission recommends adopting the principle of general applicable laws and neutrality applied in Courts in USA.

6.5 Both Samoa and USA have written constitutions which protect religious freedom- art 11 of the Constitution of Samoa and Free Exercise Clause of the First Amendment of the USA constitution. The Courts in the USA in applying general applicable laws have held in the Oregon case that [if prohibiting the exercise of religion is not the object of the tax (*or purpose of a law*), but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended]. In other words, restriction of religion must not be the legitimate object of any law contemplated to be put in place. The challenge is to ensure that religion is not singled out or targeted when formulating and applying general applicable laws. For instance, the Courts will invoke First Amendment standards when a law applies to behavior that is ‘engaged in exclusively for religious or expressive purposes, such as prohibiting the slaughter of animals for religious reasons’.³⁸

6.6 General applicable laws can be *content-neutral*, for instance, a law prohibiting the sale or use of alcohol deals with behavior that usually is engaged in to achieve pleasurable sensations. Although alcohol use may be important in some religious ceremonies, any impact on religion is probably incidental.³⁹ Any law affecting religion must use the proper means (general applicability) to achieve proper end (neutrality).

6.7 The Commission recommends adopting principles of general applicable laws and neutrality in the VFA. Such principles should take into account the following issues:

- i) Establishment of new buildings, halls, dwellings and other chattels in traditional villages for community purposes and developments either of commercial or non-commercial nature;
- ii) Determinations of such establishments to be based on the following grounds:
 - o Registered village rules and bylaws ensuring community safety, social order and promoting village harmony;
 - o Consultation with affected parties and in particular the village *fono* of village concerned;
 - o Compliance with the relevant building requirements. For example Planning Urban Management Agency requirements, Fire and Emergency Services, Health legislation and regulations;

³⁸ Bogen D ‘*Generally Applicable Laws and the First Amendment*’1997, School of Law, Southwestern University

³⁹ Ibid at n38

iii) Village fono role to assist the relevant authorities in determining the establishments taking into account the above grounds.

6.8 Based on the Courts' findings in the USA, general applicable laws do not offend the Free Exercise Clause of the First Amendment, provided that the object of such a law does not restrict or prohibit exercise of a religion. Given that USA has a written Constitution similar to Samoa, general applicable laws should also be applied as far as article 11 of the Constitution is concerned.

6.9 The Commission recommends inserting provisions into the VFA regarding the establishment of new buildings and housing for community purposes and developments. In applying the principle of general applicable laws to the application of the VFA in the context of the guarantee of freedom of religion in art 11 of the Constitution, such provisions should not exclusively target church buildings. They should apply equally to a wide variety of buildings such as hotels, housing and halls which are built or converted from existing buildings for community purposes and developments.

Recommendation 23: The principle of general applicable laws and neutrality should be applied to harmonise the powers of the village *fono* in relation to the establishment of new churches with art 11 of the Constitution. Applying this principle, the following section should be inserted into the *Village Fono Act 1990*:

12. Establishment of new buildings and housing for community purposes and developments

In this section:

'new buildings and housings' include but are not limited to hotels, beach resorts, village halls, churches, temples, church halls, government housings and diplomat housing.

'community purpose and development' means 'promoting Samoan customs and traditions and ensuring community safety and wellbeing and social cohesion'.

(1) Any new buildings, housing or dwellings to be built only for community purposes and developments in any village or district shall comply with the relevant requirements as prescribed by the relevant laws or alternatively village rules and bylaws having been validated with the coming into force of the VFA, to ensure village safety and harmony within each community.

(2) In establishing such buildings and housing, the village *fono* must assist in ensuring that each building suits the purpose for which it was built in accordance with the provisions of the Village Fono Act 1990, taking into account the safety and occupation of such buildings for community purposes and developments.

(3) The village fono may, after consultation with affected parties and in particular the village *fono* of the village concerned, accept or decline the establishment of new buildings and housings, taking into account the following issues:

1) the adverse effect of such establishments to the enjoyment of the community,

2) the safety of occupants to occupy such new establishments,

3) registered village rules and bylaws in promoting social cohesion and village harmony.

Summary of Recommendations

Recommendation 1: The use of words ‘power’ and ‘authority’ in the long title of the *Village Fono Act 1990* should be revisited to consider more neutral words such as ‘role’ and ‘function’. The long title should read:-

AN ACT to validate and recognize the role and function of the Village Fono in accordance with the custom and usage of their villages and to confirm or grant certain functions and to provide for incidental matters.

Recommendation 2: The words ‘role’ and ‘function’ should replace all references to power and authority in the *Village Fono Act 1990*.

Recommendation 3: The *Village Fono Act 1990* should incorporate a preamble clause establishing its historical significance, to give context to the subsequent legal provision for its role and functions. The preamble should include discussion of the following:

- v) *the historical significance of the village fono in Samoan society and why it needs protection/recognition;*
- vi) *the organizational structure of the village fono and composition;*
- vii) *recognition of international standards for the protection of human rights and fundamental freedoms (Constitution 1960);*
- viii) *the underlying philosophy of the Village Fono Act as deliberated in Parliamentary Debates 1990.*

In drafting the preamble, reference can be made to the preamble of the *Native Title Act 1993* (Aus).

Recommendation 4: The difference between ‘village land’ and ‘freehold land’ in the *Village Fono Act 1990* should be clearly defined to clarify the extent of jurisdiction of village *fono* in s 9.

Recommendation 5: The definition of ‘village misconduct’ should be expanded to consider a registration system to keep record of village misconduct and traditional punishment available to a village *fono*. This is recommended to be done before the Registrar of the Land and Titles Court who has the discretion to either accept or reject registration.

Recommendation 6: The registration process in Recommendation 5 should also require the classification of ‘village misconduct’ into two categories- ‘minor misconduct’ and ‘major misconduct’, with a corresponding range of punishment for each category. This classification can be implemented with reference to current practice of each village *fono* in imposing punishment and penalties. In addition, the Commission proposes to allow each village *fono* to draw up its own classification and provide statutory powers which allow them to register village bylaws relating to village misconduct and traditional punishment.

Recommendation 7: An additional subsection to section 3 to oblige village *fono* to register assembly of *Alii and Faipule* and the name of the respective village.

Recommendation 8: Subsection 3(3) regarding the validation of past exercise of power and authority of the village *fono* should be revisited to consider the following factors:

- 1) Overriding constitutional provisions (Constitution of Samoa 1960)
- 2) Validating past power and authority of village *fono* on certain terms or conditions i.e. insofar as consistent with the Constitution and Samoa's obligations.

Recommendation 9: The words 'past exercise of power and authority' in subs 3(3) of the *Village Fono Act 1990* should be replaced with the words 'past actions'.

Recommendation 10: Written records of an enquiry into any allegation of village misconduct shall be kept or of any punishments imposed, by the village *fono* for future references, particularly in situations where such information is required by the Court to assist with the determination of appeal matters.

Recommendation 11: The Commission recommends a formal registration system be set up by the Registrar of the Land and Titles Court to register village rules and bylaws. Under such a system, each village *fono* must also keep records of its own of the punishments imposed and submit this information when required by the Court to assist with the determination of appeal matters. In doing so, the Commission proposes to allow each village *fono* to draw up its own village rules and bylaws and provide statutory powers which allow them to register village rules and bylaws. There can be a draft set of village rules and bylaws which can be adopted, varied or not used by each village *fono*, similar to Fisheries bylaws. To ensure that these village rules and bylaws are consistent with the constitution, they must be vetted for constitutional compliance. In doing so, the Commission proposes the following option for the vetting process:

i) The Registrar of the Land and Titles Court who receives submission for registration of village rules and bylaws shall have the discretion to either reject or accept such registration based on guidelines and principles for best practices, consistent with provisions of the constitution. Such guidelines for best practices must take into account principles of fairness and natural justice and such principles may only apply in the event of a serious breach of village rules and bylaws which affects peace and harmony in the village. Registration does not automatically give the full effect of law to these rules and bylaws. Only those which comply with the Constitution and all other laws will have the full effect of law.

Recommendation 12: Section 4 of the *Village Fono Act 1990* should be divided in the following way for easier reading, for example:

1. Every village *fono* must keep records of their own enquiry into any allegation of village misconduct or of any punishments imposed.
2. Every village *fono* must register their village rules and bylaws before the Registrar of the Land and Titles Court, who may reject or accept such registration; (refer to Recommendation 11)
3. No person found by any Village Fono to have been guilty of village misconduct shall by reason only of that fact be deemed to be guilty of a crime or offence under any other enactment;
4. Only with the consent of that person shall evidence be given in any Court of the decision of the Village Fono or of any punishment imposed by it.

Recommendation 13: The following functions of the village *fono* should be added to the existing roles relating to hygiene and economic development:

- to meet regularly, deliberate and make decisions for future village development;

- to make rules for the maintenance of hygiene in the village, and for other purposes aimed at improving the standard of living of each community;
- to make rules governing the development and use of village land for the economic betterment of the village, good governance and keeping the peace and solidarity (harmony);
- to conduct inspections within the village to ensure village lands are maintained and kept in a good state;
- to deal with local offences by establishing a practical mechanism for hearing cases before them, and impose appropriate punishment;
- to make rules directing any person or persons to do any work required to be done pursuant to rules made in accordance with the powers granted or preserved by paragraphs (a) and (b).

Recommendation 14: Add a new subsection to s 5 of the *Village Fono Act 1990*, requiring each village *fono* to review their village rules and bylaws periodically.

Recommendation 15: The current status of freehold land should be maintained, but steps should be taken through amendments to the *Village Fono Act 1990* to maintain the influence of the *faasamoa* sense of community. This can be developed by having in place some policy guidelines to make *known* to individuals living on freehold land within a village with a village *fono*, village rules and protocols for awareness, whilst still maintaining the individualistic status of freehold land.

Recommendation 16: Alternatively, the *Village Fono Act 1990* should clarify the meaning of *faasamoa* in connection to freehold land. Subsequently, the families living on freehold land within a village with a village *fono* should be provided with the opportunity to establish their connection to the *faasamoa* and the intention to maintain this connection.

Recommendation 17: In cases where peace and harmony of the village is disrupted by actions of people living on freehold land/government lands within a village with a village *fono*, the Commission is of the view that there should be some form of remedy available to the village *fono* to ensure peace and harmony is maintained in their respective villages. Hence, the Commission proposes the following option:

i) In the case of excessive noise during curfew hours or other breach or disregard of village rules and bylaws, the village *fono* may be obliged to take a more stringent approach and summon these people before the village *fono*. Subsequently, if these people appear before the village *fono* as summoned, they shall be warned and be made aware of village rules and bylaws. As watchdogs of Samoan custom, the village *fono* must ensure that peace and harmony is maintained and upheld in their respective villages. Should these people still refuse to comply with village rules and bylaws after appearing before the village *fono*, the village *fono* may then file a complaint with the Ministry of Police or file a civil claim. The Commission recognizes the impracticality of going to the Police and the high costs of civil claims and prefers the alternative below.

ii) In the event of complete disregard of village rules and bylaws, contrary to preserving peace and harmony within the villages, the village *fono* may file a complaint to the Registrar of the Land and Titles Court who shall invoke the ‘Samoan conciliation’ provision (*soalaupule* provision)- *section 34A, 34B & 34C of the Land and Titles Amendment Act 2012*). The ‘Samoan

conciliation' provision is the process by which the parties to a dispute, with the assistance of the Registrar and in accordance with Samoan custom and usage, identify the disputed issues, develop options, consider alternatives and endeavor, and in which the Registrar may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with Samoan custom and usage.⁴⁰

In assessing the complaint made by the village *fono* and the outcome of the Samoan conciliation, the Registrar may decide to refer the matter back to the village *fono* for reconsideration, or refer the matter to the Land and Titles Court for resolution. However, the Land and Titles Court shall refuse to hear a matter if the parties to the dispute have not undertaken Samoan conciliation or mediation. Should Samoan conciliation and mediation provisions fail, the Land and Titles may then hear the matter for speedy resolution. Once the Land and Titles Court determines a matter and issue orders, all parties must comply with the court order. Failure to comply with court orders will result in contempt of court proceedings.

iii) In the event these people fail to appear before the village *fono* after being summoned, the village *fono* may also follow the above procedure and file a complaint to the Registrar of the Land and Titles Court who shall also invoke the 'Samoan conciliation' provision (*soalaupule* provision- (section 34A, 34B & 34C of the Land and Titles Amendment Act 2012).

Recommendation 18: The Commission is of the view that there needs to be a uniform scale to ensure that the same punishment or penalty applies across each village for the same case of village misconduct. Although customs and usage in each village is different, a more systematic scale ensures transparency and accountability in making decisions. In implementing such a scale, the Commission recommends the following options to take:

- iii) A draft set of standard village rules and bylaws on punishments and penalties for each village misconduct (similar to Fisheries bylaws), to be drawn up by the Ministry of Women, Community and Social Development, with the assistance of the Registrar of Lands and Title Court. Consequently, the Attorney General may review these set of standard village rules and bylaws for constitutional compliance. Once they have been vetted, the village *fono* may choose to accept or reject the standard village rules and bylaws, or modify their terms in accordance with their current village practices, as the Commission understands that each village *fono* differs in their scale of punishments and penalties imposed for village misconduct. In the event the village *fono* accepts the standard set of village rules (with or without modifications), they can then apply for registration before the Registrar of the Land and Titles Court.
- iv) Alternatively, each village *fono* can draw up their own set of village rules and bylaws on punishments and penalties and submit it to the Registrar for formal registration. Similar to Recommendation 11, the Registrar shall have the discretion to either reject or accept such registration based on guidelines and principles for best practices, consistent with provisions of the constitution. Such guidelines for best practices must take into account principles of fairness and natural justice and such principles may only apply in the event of a serious breach of village rules and bylaws which affects peace and harmony in the

⁴⁰ Section 3 of the Land and Titles Amendment Act 2012

village. Registration does not automatically give the full effect of law to these rules and bylaws. Only those which comply with the Constitution and all other laws will have the full effect of law.

Recommendation 19: The Commission recommends a separate provision for banishment. Such form of punishment should be specified in the VFA and be made available at all times to the village *fono*. To ensure banishment orders comply with constitutional provisions, the Commission recommends having general guidelines specific to banishment provisions, to guide village *fono* before making their decision to banish. Such guidelines should take into account the proposed preamble of the VFA and the following factors:

- i) *natural fairness and justice;*
- ii) *the banishment is justified if there is a likelihood that the issue at stake will disrupt peace and harmony within the village; and*
- iii) *the application of section 11 (Right to Appeal) without interference from the village fono.*

There is already a balance of right provision under section 11 where the matter may be referred to the village *fono* for re-consideration. On the other hand, the appeal process stipulated in section 11 may allow time for village *fono* to re-consider their decision and instead choose to reconcile differences.

Recommendation 20: The role and composition of a committee with delegated powers should be clarified under section 7 of the *Village Fono Act 1990*.

Recommendation 21: To maintain status quo of section 8 of the *Village Fono Act 1990*.

Recommendation 22: The status quo in section 11 of the *Village Fono Act 1990* should be maintained.

Recommendation 23: The principle of general applicable laws and neutrality should be applied to harmonise the powers of the village *fono* in relation to the establishment of new churches with art 11 of the Constitution. Applying this principle, the following section should be inserted into the *Village Fono Act 1990*:

12. Establishment of new buildings and housing for community purposes and developments

In this section:

‘new buildings and housings’ include but are not limited to hotels, beach resorts, village halls, churches, temples, church halls, government housings and diplomat housing.

‘community purpose and development’ means ‘promoting Samoan customs and traditions and ensuring community safety and wellbeing and social cohesion’.

(1) Any new buildings, housing or dwellings to be built only for community purposes and developments in any village or district shall comply with the relevant requirements as prescribed

by the relevant laws or alternatively village rules and bylaws having been validated with the coming into force of the VFA, to ensure village safety and harmony within each community.

(2) In establishing such buildings and housing, the village *fono* must assist in ensuring that each building suits the purpose for which it was built in accordance with the provisions of the Village Fono Act 1990, taking into account the safety and occupation of such buildings for community purposes and developments.

(3) The village fono may, after consultation with affected parties and in particular the village *fono* of the village concerned, accept or decline the establishment of new buildings and housings, taking into account the following issues:

- 1) the adverse effect of such establishments to the enjoyment of the community,*
- 2) the safety of occupants to occupy such new establishments,*
- 3) registered village rules and bylaws in promoting social cohesion and village harmony.*