



GOVERNMENT OF SAMOA

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

Pule a le Matai Sa'o

Discussion Paper

July 2016

About the Samoa Law Reform Commission

The Samoa Law Reform Commission was established in 2008 by the Law Reform Commission Act 2008 as an independent body corporate to undertake the review, reform and development of the laws in Samoa. Its purpose is to facilitate law reform in Samoa by providing pragmatic recommendations based on high quality research, analysis and effective consultation.

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This Discussion Paper is also available on the Law Reform Commission's website:
www.samoalawreform.gov.ws

CALL FOR SUBMISSIONS

Submissions or comments on this Discussion Paper should be received by the Commission no later than close of business on **2nd December, 2016.**

Emailed submissions should be sent to:
commission@samoalawreform.gov.ws

Written submissions should be addressed and sent to:
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Oral Submissions should be voiced at our Public Consultations:
Dates, Time and Venues for public consultations will be announced on television, radio stations and newspapers for the public's information.

The Samoa Law Reform Commission seeks your views, comments and feedback on issues arising from *Pule a le Matai Sa'o* in particular the questions set out in the last section of this Discussion Paper.

The submitters are advised to focus on any or all of the questions provided therein.

A Final Report and Recommendations to Government is expected to be completed by 2017.

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TERMS OF REFERENCE

The Samoa Law Reform Commission (**Commission**) received a reference from the Honourable Prime Minister in March 2015 to recommend measures (legislative or non-legislative) to address any abuse of power by a *Matai Sa'o* of a family, in respect of decisions made affecting the family (for example relating to family land and bestowal of *matai* titles).

PART 1: INTRODUCTION

1. As part of the law reform process, the Commission carried out preliminary research and consultations from March to May 2016 (See Annexure A for questions raised). The Commission gratefully acknowledges the assistance of the Chief Executive Officer (**CEO**) of the Ministry of Justice and Courts Administration (**MJCA**), Afioga Papalii John Taimalelagi and senior officers of the Land and Titles Court Division of MJCA, the former President of the Land and Titles Court, Afioga Tagaloa Tuala Kerslake and the former CEO of MJCA, Afioga Masinalupe Tusipa Masinalupe whom the Commission consulted at the preliminary stages of this review. Their views and comments have assisted the Commission in identifying relevant issues to be raised in this Discussion Paper.
2. Preliminary consultations revealed that a large number of matters brought to the Lands and Titles Court (**Court**) are by family members accusing a *Matai Sa'o* of some form of abuse of their power. Often allegations were made about a *Matai Sa'o* making significant decisions that affected the welfare of the family, without adequate or prior consultation with all members of the extended family or more specifically the family members making the petition to Court.¹ Another common

¹ Some examples include allegations that the *Matai Sa'o* depositing family money into his daughter's account without prior consultation with other family members; proceeded with a *umusaga o le fale o le aiga* without consulting all sides of the extended family; misusing family funds under the control of the *Matai Sa'o*; being unable to resolve family disputes; failing to carry out duties in acting as a trustee (*osi aiga*) for the *aiga potopoto* in maintaining family assets; performing actions which brought shame upon the family. Consultations with Afioga Tagaloa. D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

scenario is where disputes arise between a *matai* living overseas, opposing decisions made by *matai* living in Samoa.²

3. Information obtained from MJCA revealed that in relation to cases brought before the Court, about 10% against a *Matai Sa'o* were successful in removing the *Matai Sa'o*, whilst 90% of cases were unsuccessful.³ It is unclear from preliminary consultations with MJCA the reasons behind this trend as no further information was provided to support this statistic.
4. The main objective of this paper is to seek submissions from the public on the questions raised in this paper (See Annexure B). Discussions are by no means limited to what is presented in this paper. The Commission is simply providing a platform for the public to have a guiding document to assist with the expression of ideas, views and opinions concerning *Pule a le Matai Sa'o*, keeping in mind the importance of maintaining Samoa's customs and traditions.

PART 2: MATAI SA'O

Sa'o o le aiga

1. The traditional Samoan family or the *aiga* is comprised of all the persons who descended from a common ancestor who held lands in a particular village⁴ in which the descent members of the family were believed to have been originally established by its founder.⁵ Apart, from the family land, the *aiga* has a series of *matai* or chiefly titles that belong exclusively to the family. Each title of the family represents a certain position and plays a certain role within the family's internal hierarchy.
2. *Sa'o* has several meanings such as Titular head⁶, Principal *Matai*⁷, head of a family and the principal chief or chieftains of a village⁸. An extended family may have

² Consultations with Afioga Tagaloa. D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

³ Consultations with Afioga Papalii John Taimalelagi, (CEO) and staff from Ministry of Justice and Courts Administration with Samoa Law Reform Commission, (Ministry of Justice and Courts Administration Court Complex, 23February, 2016).

⁴ J.W Davidson, *Samoa mo Samoa: The Emergence of the Independent State of Western Samoa (1915-1973)*, p. 23.

⁵ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, pp. 35-36.

⁶ Saleimoa Vaai, *Samoa Faamatai and the Rule of Law* (1999), p. 273.

several *matai* titles, but the highest ranking and the most senior title of the family will usually be, but not necessarily, the title that was held by the founder of the family or it may be the founder's name after whom the family is named.⁹ The person who holds this title is known as the *Matai Sa'o* or *Matai Sili* of the family and is believed to be the highest ranking person of the *aiga*. This person is also usually the longest serving *matai* but may not necessarily be the oldest.¹⁰ Metaphorically speaking, a dignified behaviour in the *fa'asamoa* is called a *Sa'o*.¹¹ The head of the extended family is the *Matai Sa'o* of the family and the principal chief of the village is the *Matai Sa'o* of the village.¹² The *Matai Sa'o* is expected to look after the family's interests and affairs¹³ and is accountable to the family.¹⁴ It is expected that the *Matai Sa'o* exercises his or her discretion to make a decision that is in the best interests of the family. Such decision may sometimes be viewed by members of the family that are not in agreement with the decision of a *Matai Sa'o* as an abuse or misuse of his or her authority (although this may or may not necessarily be the case).¹⁵

Other matais under the Sa'o (matai tautua)

3. Even though the *Matai Sa'o* in the *fa'asamoa* may be at the apex of family structure and the *matai* hierarchy, there are other *matai* and chiefly titles of lesser ranking that form the family organization¹⁶. These *matai* are referred to as the *matai tautua* or serving titles of the *Matai Sa'o*, because they are expected to assist the *Matai Sa'o*

⁷ Telea Kamu Tapuai Potogi, *O Tiafau o le malae o le Fa'autugatagi a Samoa: A study of the impact of lands and titles court decision on customary land and family titles* (Master of Arts in History and Politics thesis, University of the South Pacific, 2014), p. 10.

⁸ George Pratt, *A Samoan Dictionary: English and Samoan, and Samoan and English; with a short grammar of the Samoan Dialect* (1862).

⁹ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 36.

¹⁰ Consultations with Masinalupe Tusipa Masinalupe with Samoa Law Reform Commission (Samoa Law Reform Commission Staff Conference Room, Level 1 FMFII Building, Eleele Fou, Apia, 26 May 2016).

¹¹ Jeanette Marie Mageo, *Theorizing self in Samoa: Emotions, Genders and Sexualities*, p. 54.

¹² Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 39.

¹³ Consultations with Afioga Tagaloa D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

¹⁴ Consultations with Afioga Masinalupe Tusipa Masinalupe with Samoa Law Reform Commission (Samoa Law Reform Commission Staff Conference Room, Level 1 FMFII Building, Eleele Fou, Apia, 26 May 2016).

¹⁵ Consultations with Afioga Masinalupe Tusipa Masinalupe with Samoa Law Reform Commission (Samoa Law Reform Commission Staff Conference Room, Level 1 FMFII Building, Eleele Fou, Apia, 26 May 2016).

¹⁶ Saleimoa Vaai, *Samoa Faamatai and the Rule of Law* (1999), pp. 43 and 273.

in handling the affairs of the family.¹⁷ A *matai tautua* title is often viewed as recognition or a reward for rendering service to the family.

4. Customary *matai* bestowed to assist the *Sa'o* are as follows¹⁸:

- a. *Tulafale*: this chief is appointed as the family's representative to speak on behalf of the *Matai Sa'o*;
- b. *Pitovao*: this is the *matai* title which the current *Matai Sa'o* of the family will use when he or she retires from his or her post as the *Matai Sa'o*;
- c. *Tuaigoa*: this is the chief that the *Matai Sa'o* particularly depends on within the family (usually for support and advice);
- d. *Atuapa'usisi*: These are the talking chiefs who are known as the messengers of the extended family.

Duties and responsibilities of a Matai Sa'o

5. The *Matai Sa'o* of the family has a multitude of duties and responsibilities which normally include supervising the collection of the family's contribution for redistribution (especially to a family's *fa'alavelave* and other village obligations) and maintaining peace and order among family members and representing the family in the Village Council.¹⁹ The *Matai Sa'o* also has the *pule* or authority to oversee both the family's estates and *matai* titles (bestowal) as he or she is treated as the custodian and trustee of these important family matters.²⁰
6. In relation to the bestowal of *matai* titles, it is important that the *Matai Sa'o* justifies that persons bestowed are either *suli pa'i ile suafa* or *suli tautua*. The *Matai Sa'o* may be challenged by *Suli* for bestowing titles to those who are not direct descendants of the *Matai Sa'o*.²¹

¹⁷Telea Kamu Tapuai Potogi, *O Tiafau o le malae o le Fa'autugatagi a Samoa: A study of the impact of lands and titles court decision on customary land and family titles* (Master of Arts in History and Politics thesis, University of the South Pacific, 2014), p. 84.

¹⁸ Mailo Pio, *Palefuiono*, Volume I (1992), p. 79.

¹⁹ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 36.

²⁰ Saleimoa Vaai, *Samoa Faamatai and the Rule of Law* (1999), p. 43.

²¹ Consultations with Afioga Tagaloa. D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

7. A *Matai Sa'o* can and is the only person who can allocate and distribute portions of the family land for the use and benefit of individual family members, for example for cultivation or housing sites.²² The *Matai Sa'o* may also order family members who disrespect the authority of the *Matai Sa'o*²³ or failure to render *tautua* or *service* to the *Matai Sa'o* or to the extended family, to vacate the land.²⁴ Any decisions by the *Matai Sa'o* are expected to be made in the best interests of the family and to promote the social and economic welfare of the family.²⁵
8. Where family land is used for commercial purposes, a common view expressed during preliminary consultations was that the consultation between the *aiga potopoto* and the *Matai Sa'o* is essential. This is because a *Matai Sa'o* is viewed as the *tausi mea* (care-taker) of the family, which does not necessarily equate to having absolute power over family's properties and lands and titles.²⁶
9. In carrying out these various duties and responsibilities, a *Matai Sa'o* is expected to consult family members before making any significant decisions.
10. The practice in Samoa is similar to American Samoa,²⁷ in that the *Matai Sa'o* has *pule* to make decisions about family lands, including the assignment of family land for use by individual family members.²⁸

Appointment of a Matai Sa'o

11. Given the significant role and authority played by a *Matai Sa'o* particularly in relation to family land and the bestowal of *matai* titles in the family, the

²² *Seven Day Adventist Church of American Samoa v Maneafaiga 1993* (American Samoa), <http://www.asbhar.org>.

²³ Saleimoa Vaai, *Samoa Faamatai and the Rule of Law* (1999), p. 275.

²⁴ *Seven Day Adventist Church of American Samoa v Maneafaiga 1993* (American Samoa), <http://www.asbhar.org>.

²⁵ Consultations with Afioga Masinalupe Tusipa Masinalupe with Samoa Law Reform Commission (Samoa Law Reform Commission Staff Conference Room, Level 1 FMFII Building, Eleele Fou, Apia, 26 May 2016).

²⁶ Consultations with Afioga Papalii John Taimalelagi, (CEO) and staff from Ministry of Justice and Courts Administration with Samoa Law Reform Commission, (Ministry of Justice and Courts Administration Court Complex, 23February, 2016).

²⁷ The Customs of American Samoa is essentially the same as the customs of the people of Samoa.

²⁸ *Seventh day Adventist church of American Samoa and HTC Tuato'o Tautalatasi v Gatai Maneafaiga and Sinaalevaifoa Fanene 1993* (American Samoa), http://www.asbar.org/index.php?option=com_content&view=article&id=1291:23asr2d150&catid=72&Itemid=29

appointment of a *Matai Sa'o* is a very important decision by each family, as it is considered to be the most senior ranking title of a family in the *fa'asamoa*.

12. A *Matai Sa'o* is selected by the *Suli* of the *Matai Sa'o* title in accordance with customs and traditions practiced by a family, a village or a community. The Commission notes from preliminary consultations that various *Suli* for example, *suli faavae*²⁹, *suli moni*³⁰, *suli pa'i i le suafa/ suli tautua*³¹ and *suli tamafai*³² appear to have differing rights and obligations.
13. Traditionally, only members of the family who were direct descendants of the founder of the family could participate in the appointment of a *Matai Sa'o*, in terms of discussing suitable candidates.³³ The appointment of a candidate to be the *Sa'o* of a family requires the full consent and approval of the *aiga potopoto* who have an interest in the *Matai Sa'o* title.³⁴
14. Family members who are not direct descendants are sometimes allowed to attend family discussions concerning the appointment of a *Matai Sa'o* but are normally only allowed to observe as they are not direct descendants of the founder of the family.³⁵ These may include persons related to the family through connections of a *matai* title, spouses of family members, in-laws, and may also include those under the administration of *Matai Sa'o* title who are not part of the family.³⁶ During the discussions for the appointment of the *Matai Sa'o*, titled members of the family are

²⁹ Children of the original *Matai Sa'o*. Consultations with Afioga Tagaloa D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

³⁰ Direct descendents of the original *Matai Sa'o*. Consultations with Afioga Tagaloa D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

³¹ Persons who provide service (*tautua*) to the *Matai Sa'o*. Consultations with Afioga Tagaloa D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

³² Persons adopted by the *Sa'o* in a customary manner. Consultations with Afioga Tagaloa D. C. Kerslake (former President) Land and Titles Court (Ministry of Justice and Courts Administration Court Complex, 17 March 2016).

³³ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 39.

³⁴ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 37.

³⁵ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 39.

³⁶ Mailo Pio, *Palefuiono*, Volume I (1992), p. 82.

normally free to express their opinions and participate more actively because they represent other untitled members of the family.³⁷

15. The common process³⁸ by which a *Sa'o* is appointed includes:³⁹

- a. The family *fofoga fetalai* call the *matais* of the family to come together to discuss if there is an agreement that a successor to the vacant *Matai Sa'o* title must be decided.
- b. The *fofoga fetalai* will then inform all clans and other untitled family members to come together to a general meeting in which in-laws may also be invited to attend. Speeches are exchanged in this meeting in relation to the main agenda.
- c. Consequently, the *fofoga fetalai* declares that at the next family meeting, each clan or branch of the family is to come prepared with their nominated candidate for the title.
- d. On the day of the appointment, the meeting is opened up by an *ava* ceremony before each clan presents their speech in support of their candidate in the hope that they will persuade the whole family why their candidate is worthy to hold the title. The untitled men and women of the family are not permitted to speak at this meeting but they are allowed to attend as heirs of the family.

16. The title of the *Matai Sa'o* is usually bestowed on the candidate whom the majority of the *aiga potopoto* approve and who has prestigious hereditary rights from either his or her mother or father, is a person with wisdom and knowledge of the *fa'asamoa*, and a person who has immense knowledge of the family's history and

³⁷ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, p. 39. It is important to note that untitled members of the family can also freely express their opinions, especially elderly entitled members of the family who are well versed with family matters.

³⁸ It is important to note that the common process provided here is not the process used by all families in Samoa. Each family, village and district has their own procedures and ways for the appointment of a *Sa'o*.

³⁹ Mailo Pio, *Palefuiono*, Volume I (1992), p. 82.

who has rendered substantial service to the whole family under several title holders.⁴⁰

17. Criteria normally used by families to assess a candidate's suitability to be appointed as the *Matai Sa'o* may differ from family to family but generally in the *fa'asamoa*, the *aiga potopoto* or family usually makes an assessment of the suitability of a candidate based on the following:⁴¹

- a. Consanguinity: the candidate has to be member of the family and is related by blood to the family which owns the title. There have been several cases where the family has chosen a non-member of the family, or person who is not blood related to the family which owns the title because either there was no suitable family member at the time to hold the position or, the family wished to reward a non-member for his loyalty and outstanding service or *tautua* to the family.
- b. Service: the family looks at whether the candidate has regularly rendered services. Service refers to the candidate's personal contributions made by giving food, money and labour provided to the previous title holder, or the family or the village. A candidate who can demonstrate that he or she has rendered service on a regular basis to the family and the village will be considered favourably by the family compared to other candidates.
- c. Personal qualities: The family also take into account the personal attributes or characteristics as to whether he or she is capable of taking on the responsibilities of a *Matai Sa'o*. For example, the family expects the candidate to have some knowledge of the family's history and genealogy but best of all, the ability to mend broken family relationships as well as re-unite dissident family members.

18. Some families appoint more than one *Matai Sa'o* in the family, which could potentially be a contributing factor to disputes within families. Furthermore, it is

⁴⁰ Mailo Pio, *Palefuiono*, Volume I (1992), p. 83.

⁴¹ Sharon W. Tiffany, "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *Journal of Polynesian Society*, pp. 42-44.

not clear what happens when the *Matai Sa'o* are not in agreement as to a significant decision affecting the welfare of the family and how consensus is reached.

QUESTIONS

1. Are there any further duties and responsibilities of a *Matai Sa'o* in the *fa'asamoa* that have not been captured above? (noting that families differ) Which if any, duties and responsibilities should expressly be set out in law?
2. When there is more than one *Sa'o* in a family, how can consensus be achieved? Should the *Sa'o* with the longest tenure make the final decision? Should there only be one *Sa'o* appointed? How can disputes amongst multiple *Matai Sa'o* be minimised? Should these be set out in legislation?
3. Where more than one person is bestowed with the same *matai title* (for example when 50+ get bestowed a title), how does this contribute to disputes within families? What, if any, areas should be considered for legislation to minimise to disputes?
4. What are the main disputes between *Matai Sa'o* and *Suli and* how can these be resolved?
5. In what situations should the *aiga potopoto* replace/remove a *Matai Sa'o*? What are some examples where a *Matai Sa'o* has not acted in the best interest of the family?
6. In the *faasamoa* does the Village *Fono* have the authority to intervene in the removal of a *Sa'o* or disqualify a person as a *matai Sa'o* of an *aiga*? If yes, would the creation of bylaws (for example, relating to the appointment or functions of a *Sa'o*) specific to each village help reduce the abuse of power of a *Matai Sa'o*?
7. Are there any further important aspects of a *matai tautua* in the *fa'asamoa* that have not been captured above? In what circumstances can a *matai tautua* be appointed as a *Matai Sa'o*?
8. Who should participate in the selection and appointment of a *Matai Sa'o*? Should there be criteria for persons who can participate in the selection and if so what? Should these criteria be legislated?
9. What key criteria should a *Matai Sa'o* meet in order to be considered for the position of *Matai Sa'o* in the family? Should some or all criteria be legislated?

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

PART 3: CURRENT LAWS AND PRACTICE

Land and Titles Act 1981

Purpose

1. The *Land and Titles Act 1981* (**the Act**) was passed by Parliament in 1981. The Act is said to consolidate and amend the law relating to customary land and titles, and the laws of the Land and Titles Court. The purpose is to codify the customary law of Samoa in order to regulate disputes among Samoans in relation to customary land and titles.
2. The Court is responsible for hearing cases⁴² which relate to matters involving: Samoan names and titles and making such orders or declarations necessary to preserve or define such names and titles, and such rights and obligations resulting from such names and titles; or any other claims or disputes between Samoans relating to customary land.
3. The Court applies the *fa'asamoa* wisdom (*tofa mamao ma le fa'autautaga loloto*). It is however important to bear in mind that *fa'asamoa* may vary among each family, community or village. For example, two neighbouring villages may not necessarily practice the exact same custom in resolving family disputes. Other areas where there may be different customary practices include such things as, the different roles played by the *Suli* depending on the different types of *Suli*.

Reconciliation

4. Parties are required to make a genuine effort to resolve the dispute before starting a case by participating in Samoan conciliation.⁴³ Furthermore the Registrar may conduct Samoan conciliation in relation to any dispute with a view to resolving that dispute (at

⁴² *Land and Titles Act 1981* (Samoa) s 34.

⁴³ *Land and Titles Act 1981* (Samoa) s 34A.

any stage of the proceedings or prior to a petition being filed).⁴⁴ The Act also provides that the Court should not hear a matter if disputing parties have not undertaken Samoan conciliation, and could also refer the parties to a mediator that must be completed within a period of 45 days⁴⁵ (with or without the consent of the parties), or advise the parties to use a dispute resolution process.⁴⁶

5. The Commission notes that the importance of reconciliation between a *Matai Sa'o* and members of the family before resorting to the Court was strongly emphasised in preliminary consultations as an important part of the *fa'asamoa*.⁴⁷ Furthermore, it was suggested that alternative dispute resolution (ADR) methods, such as mediation, negotiation and conciliation (*soalaupule*) should be fully exhausted before going to the Court.

Practice and Procedures of the Lands and Titles Court

6. The Act provides that rules can be made for the purpose of regulating the practice and procedure of the Court.⁴⁸ It also provides that if no rules of the Court are made, the Supreme Court Rules are applied to determine the practice and procedure of the Court unless it is inconsistent with or inapplicable to the Act.⁴⁹ Furthermore, where practice or procedure is not provided for, or where the strict compliance with any rule of practice or procedure may be inequitable or inconvenient, the Court may act in a manner most consistent with Samoan custom and usage and natural justice and convenience.⁵⁰
7. The Commission notes that no rules have yet been made to determine the practice and procedure of the Court. Furthermore, a special Commission of Inquiry to investigate the performance of the Court Judges is currently ongoing. The Inquiry is expected to look into:
 - a. the rule and procedures of the Court

⁴⁴ *Land and Titles Act 1981* (Samoa) s 34B.

⁴⁵ *Land and Titles Act 1981* (Samoa) s 34C.

⁴⁶ *Land and Titles Act 1981* (Samoa) s 34D.

⁴⁷ Consultations with Afioga Papalii John Taimalelagi, (CEO) and staff from Ministry of Justice and Courts Administration with Samoa Law Reform Commission, (Ministry of Justice and Courts Administration Court Complex, 23February, 2016).

⁴⁸ *Land and Titles Act 1981* (Samoa) s 47(1). Rules are made by the Head of State, acting on the advice of Cabinet and concurrence of the Judicial Service Commission.

⁴⁹ *Land and Titles Act 1981* (Samoa) s 47(3).

⁵⁰ *Land and Titles Act 1981* (Samoa) s 47(5).

- b. the appointments of LTC Judges; and
 - c. scrutiny of the LTC Judges performance.
8. A report is expected to be tabled in Parliament in October 2016 and the Ministry of Justice is expected to respond to the findings in November to be discussed in the December sitting of Parliament.⁵¹ The Commission considers that the outcome of this Inquiry will be relevant to this issue.

Qualifications of a Matai

9. The Act sets out qualifications of a *matai* providing that a person is not qualified to hold a *matai* title unless he or she is at least 25 years of age⁵² and prepared to carry out the obligations of his or her matai title including properly serving his or her family, village and community according to Samoan custom and usage.⁵³

Removal of Matai Title

10. The Act also provides for the removal of a *matai* title, as follows:

Section 20B. Removal of matai title – *The Court on petition by a Sa’o or a Suli may remove a matai title where the holder of that title:*

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

Cases for the Removal of a Matai Title

11. One of the cases in which a *Matai Sa’o* was successfully removed concerned a petition by *Suli* in one of the villages to remove the *Matai Sa’o* claiming she had misused her authority as *Matai Sa’o* to gain personal wealth, without consulting the extended family.⁵⁴ Members of the family complained to the Court that the *Matai Sa’o* had refused to meet and make peace with the *aiga potopoto* regarding land

⁵¹ Palemene Samoa Lomiga 22, Iuni 2016

⁵² *Land and Titles Act 1981* (Samoa) s 20A(2) provides an exception to the minimum 25 year age requirement. Here the Court may in accordance with Samoan customs and usage upon petition by a Sa’o or a Suli, permit a person who is not yet 25 but is at least 21 years old be a matai title holder.

⁵³ *Land and Titles Act 1981* (Samoa) s 20A (1)(b).

⁵⁴ LC 6929 P12-P13, October 2015.

matters. The *Suli* accused the *Matai Sa'o* of not fulfilling her duties as a *Matai Sa'o* to resolve family disputes.

12. The Court in that case stated that a *Matai Sa'o* is expected to be the *tausi mea* and peacemaker in the *fa'asamoa*. Given the failure of the *Sa'o* in this case to fully exhaust all measures to try and resolve the dispute, coupled with the lack of support from the *Suli*, which appeared to highlight distrust in her capability and capacity as the *Sa'o* of the family to make peace and resolve conflicts, the petition was successful and the *Sa'o* was removed.

13. On the other hand, a petition by a family in Apia to the Court to remove a *Matai Sa'o* title from the defendant on the grounds that the defendant failed to care for the family and was not diligent in carrying out his duties as a *Matai Sa'o*, was unsuccessful. The family complained that the decisions of the *Matai Sa'o* were biased and he had misused his authority and had brought shame upon the family.⁵⁵

14. The Court in its decision declined the petition by the family stating:

*'although it is true that the actions and allegations laid before the Court is disgraceful to the family and indicates that the Sa'o has failed to carry out his duties to the best of his ability, however, these allegations and accusations have no basis and/or foundation.'*⁵⁶

15. Preliminary consultations indicated that there is merit in reviewing section 20B of the Act relating to the removal of a *matai* and considering whether further clarification of the role, duties and responsibilities of the *Matai Sa'o*, *matai tautua*, and *Suli* would be helpful.

16. It is noted by the Commission, that in many of the cases raised during preliminary consultations, the Court does not clearly provide reasons for their decisions whether or not to remove a *Matai Sa'o*, and how it has applied section 20B.

⁵⁵ LC 526 P28-P29, October 2015. For example, claiming the *Matai Sa'o* was having an extramarital affair.

⁵⁶ LC 526 P28-P29, October 2015.

QUESTIONS

Removal of Matai

11. The current law states that the Court on petition by a *Sa'o* or *Suli* may remove a *matai title* where the holder of that title has acted in a manner that brings disrepute to the family, village or community of the *matai*, or failed to properly perform the duties of a *matai*.
 - a. What are some examples of situations where a *matai* has acted in a manner that brings shame, disrespect or disgrace to the family of the *matai*?
 - b. What are some examples where a *matai* has failed to properly perform his or her duties as a *matai*? And/or what are some additional duties of a *matai* different from those mentioned above?
12. Are the current grounds for removal of a *matai* under the law clear or should they be expanded? Please explain why.
13. Should the law specify separate or additional grounds for the removal of a *Matai Sa'o*?

Reconciliation

14. The current law requires parties to make a genuine effort to resolve disputes by participating in dispute resolution such as Samoan conciliation, and that the Court may refuse to hear a matter if the parties do not undertake Samoan conciliation. How can the Court ensure a genuine effort has been made to resolve the dispute? What, if any, criteria should be met and should this be set out in legislation?

PART 4: COMPARABLE JURISDICTION – AMERICAN SAMOA

17. The custom of American Samoa⁵⁷ is similar to the custom of the people of Samoa, because both countries share similar histories and face similar challenges and problems. To address this issue, American Samoa has taken the step to legislate certain criterion for the qualifications of matai title and also grounds for the removal of a matai title by eligible members of the family. The provisions also provide

⁵⁷ American Samoa Code Annotated § 1.0202, http://www.asbar.org/index.php?option=com_content&view=article&id=9968&catid=119&Itemid=172.

requirements that may restrain the Sa’o from acting in such a manner where he or she would disregard the rights of his family members.

Eligibility Criteria for a Matai Title Matai

18. In American Samoa, a person is *not* permitted to choose themselves to hold a *matai* title. *Matai* titles are conveyed to a person by means of family concession and court approval. Samoan families are solely responsible and authorised to select for themselves a person to hold the *matai* title, provided that certain statutory requirements are conformed with. For example, the law in American Samoa expressly provides that a person is eligible to succeed to a *matai* title if he or she is:

- a. of at least one-half Samoan blood;
- b. must have been born on American soil;
- c. attain the age of 18 years;
- d. must have resided in American Samoa for a continuous period of not less than 10 years prior to the time he or she filed an application for a *matai* title;
- e. must be chosen by family for the title, and must live with Samoans as a Samoan.⁵⁸

Roles and responsibilities of the Matai Sa’o

19. Various case law in American Samoa set out responsibilities and obligations of a *Sa’o*. These include:

- a. Manages and overlooks family’s welfare and its communally owned land;⁵⁹
- b. Represents the family in village council meetings and village affairs, on behalf of the family;⁶⁰
- c. Directs and advises the family in its affairs;⁶¹

⁵⁸ American Samoa Code Annotated § 1.0403,

http://www.asbar.org/index.php?option=com_content&view=article&id=9976&catid=121&Itemid=172.

⁵⁹ *Kruse v Am. Samoa Gov’t*, 6 A.S.R.3d 318 (Land & Titles Div. 2002).

⁶⁰ *Seven Day Adventist Church of American Samoa v Maneafaiga 1993* (American Samoa),

<http://www.asbhar.org>

⁶¹ *Sagapolu v. Tanielu*, 1 A.S.R. 331, 336 (Trial Div. 1922).

- d. Ensure that family live peaceably and happily together;⁶²
- e. Treat his or her family with kindness and should not display attitude of animosity towards his family members, or evict family members from communal lands solely on the basis that family members have failed to render service to him;⁶³and
- f. Importantly, the *Sa'o* must conduct himself in a manner that warrants respect of his or her family,⁶⁴ for this is the very obligation which places confidence and trust of family members in him or her.

Removal of a Matai or a Matai Sa'o

20. Historically, family members could forcibly remove a *matai* (including a *Matai Sa'o*) on their own preference and appoint another member of the family to hold the *matai* or *Matai Sa'o* title.⁶⁵ Nowadays, such an approach is still applied but has been modified to allow the court to remove a *matai* or *Matai Sa'o*. Family members who wish to remove a *matai* or *Matai Sa'o* title may submit a petition for removal to the High Court to take action.⁶⁶ Once a petition is received, the High Court may consider a petition to be premature if petitioners have failed to follow custom by attempting reconciliation with the *matai*.⁶⁷ Also, the Court does not consider petitions for removal of a *matai* or *Matai Sa'o* where petitioners are not members of the family.⁶⁸

21. There are certain grounds to remove a *matai* title. Where family members wish to remove a *matai* or *Matai Sa'o* on the ground that he or she has failed to perform his or her *matai* duties or roles, the family may petition the High Court. For instance, a *matai* title may be removed by the High Court upon petition for removal by 25 blood

⁶² *Ausega Family by Siitupe v Ausega Afasa*, 1 A.S.R 581 (Trial Div. 1983).

⁶³ *Vaotuua Family by Vaotuua v Puletele*, 3 A.S.R. 145 (Trial Div. 1995).

⁶⁴ *Seven Day Adventist Church of American Samoa v Maneafaiga* 1993 (American Samoa), <http://www.asbhar.org>

⁶⁵ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., p. 419.

⁶⁶ American Samoa Code Annotated § 1.0411,

http://www.asbar.org/index.php?option=com_content&view=article&id=9984&catid=121&Itemid=172.

⁶⁷ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., p. 420.

⁶⁸ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., p. 420.

members of the *matai's* family who are over the age of 18 years and currently serving the *matai* and family in accordance with the Samoan custom.⁶⁹ Once the High Court is satisfied that the petitioner has complied with all procedural requirements and if the petition is not challenged, and/or there is no appearance by the *matai* or *Matai Sa'o* whom the petition is brought against, the court may remove the *matai* title and let the petitioner or family select another *matai* to hold the title.⁷⁰ If it is challenged the matter will be heard.

22. The High Court can also remove a *matai* title from a person upon receipt of a petition from any member of the family, on the basis that a *matai* has been absent from American Samoa for more than one year.⁷¹ If the High Court is satisfied that there is proof of such absence, and if reasonable time has been afforded for the *matai* to respond, and he or she has failed to do so, the High Court may make a decision to remove the *matai* title or *Matai Sa'o* title and allow the family to select for themselves a new person to hold the *matai* title or *Matai Sa'o* title.⁷²

Promoting the authority of the Sa'o

23. The laws of American Samoa have express provisions to protect communally owned family lands. For example, a *Matai Sa'o* who has *pule* over communal family lands is prohibited from selling or disposing of communal family lands or part of it to any person without the prior approval of the Governor of American Samoa.⁷³ The process which must be followed for any sale or disposal of family lands is that the Land Commission must first recommend for the sale or lease of communally owned family land to the Governor, such recommendations are to be based on such considerations as the eligibility of the communal family land to be sold or leased and

⁶⁹ American Samoa Code Annotated § 1.0411,

http://www.asbar.org/index.php?option=com_content&view=article&id=9984&catid=121&Itemid=172.

⁷⁰ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., pp. 420-421.

⁷¹ American Samoa Code Annotated § 1.0412(a),

http://www.asbar.org/index.php?option=com_content&view=article&id=9985&catid=121&Itemid=172.

⁷² American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., pp. 420-421.

⁷³ American Samoa Code Annotated § 37.0204(a),

http://www.asbar.org/index.php?option=com_content&view=article&id=9985&catid=121&Itemid=172. Note: Communal lands may be leased out for a term not exceeding 55 years, and provided that the Governors approval has been obtained.

considerations as to whether or not there are any present ongoing disputes in respect of the land.⁷⁴

Summary of American Samoa

24. The above discussion illustrates that American Samoa and Samoa have similar histories and therefore share similar challenges in relation to custom. American Samoa has however taken legislative measures in regards to providing additional grounds for the removal of a *matai* or a *Matai Sa'o* title by the family with the High Court limited to removing a title and leaving the responsibility of appointing a new *matai* or *Matai Sa'o* to the family (unlike Samoa where the Court may appoint a new *matai* or *Matai Sa'o*), as well as having a process in place to manage any dealings with communal family lands. Overall, there are laws in place to ensure that peace and harmony is maintained in families, communities, villages and the society of American Samoa as a whole.

QUESTIONS

15. Should Samoa adopt a similar legislative approach (or other similar non-legislative approach) taken by American Samoa? If yes, please explain? If no, why not?

⁷⁴ American Samoa Digest (1 A.S.R through 7 A.S.R. 3d), *Covering Opinions From Division of the High Court of American Samoa as reported in the American Samoa Reports*, 2008 ed., p. 67.

ANNEXURE A: QUESTIONS RAISED IN PRELIMINARY CONSULTATIONS

1. *What is the primary role of a Sa'o in the fa'asamoa?*
2. *To what extent has the Court decided on cases relating to the abuse of power by a Sa'o? What are some examples?*
3. *What are some examples of cases where the Court has decided that the Sa'o:*
 - a. *Has acted in a manner that brings disrepute to the family, village or community of the Sa'o; or*
 - b. *Otherwise has failed to properly perform the duties of a Sa'o;*
4. *In cases where a Sa'o has been removed, what have been the grounds relied upon by the Court for such removal?*
5. *What other measures (legislative/non-legislative) would you suggest for us to address issue (a) raised above?*
6. *What are other issues you think the Commission should consider under this review?*

ANNEXURE B: LIST OF QUESTIONS FOR PUBLIC CONSULTATIONS

1. Are there any further duties and responsibilities of a *Matai Sa'o* in the *fa'asamoa* that have not been captured above? (noting that families differ) Which if any, duties and responsibilities should expressly be set out in law?
2. When there is more than one *Sa'o* in a family, how can consensus be achieved? Should the *Sa'o* with the longest tenure make the final decision? Should there only be one *Sa'o* appointed? How can disputes amongst multiple *Matai Sa'o* be minimised? Should these be set out in legislation?
3. Where more than one person is bestowed with the same *matai title* (for example when 50+ get bestowed a title), how does this contribute to disputes within families? What, if any, areas should be considered for legislation to minimise to disputes?
4. What are the main disputes between *Matai Sa'o* and *Suli* and how can these be resolved?
5. In what situations should the *aiga potopoto* replace/remove a *Matai Sa'o*? What are some examples where a *Matai Sa'o* has not acted in the best interest of the family?
6. In the *faasamoa* does the Village *Fono* have the authority to intervene in the removal of a *Sa'o* or disqualify a person as a *matai Sa'o* of an *aiga*? If yes, would the creation of bylaws (for example, relating to the appointment or functions of a *Sa'o*) specific to each village help reduce the abuse of power of a *Matai Sa'o*?
7. Are there any further important aspects of a *matai tautua* in the *fa'asamoa* that have not been captured above? In what circumstances can a *matai tautua* be appointed as a *Matai Sa'o*?
8. Who should participate in the selection and appointment of a *Matai Sa'o*? Should there be criteria for persons who can participate in the selection and if so what? Should these criteria be legislated?
9. What key criteria should a *Matai Sa'o* meet in order to be considered for the position of *Matai Sa'o* in the family? Should some or all criteria be legislated?
10. What are the duties and obligations of a *suli* and which if any duties should expressly be set out in law?
11. The current law states that the Court on petition by a *Sa'o* or *Suli* may remove a

matai title where the holder of that title has acted in a manner that brings disrepute to the family, village or community of the *matai*, or failed to properly perform the duties of a *matai*.

- a. What are some examples of situations where a *matai* has acted in a manner that brings shame, disrespect or disgrace to the family of the *matai*?
 - b. What are some examples where a *matai* has failed to properly perform his or her duties as a *matai*? And/or what are some additional duties of a *matai* different from those mentioned above?
12. Are the current grounds for removal of a *matai* under the law clear or should they be expanded? Please explain why.
 13. Should the law specify separate or additional grounds for the removal of a *Matai Sa'o*?
 14. The current law requires parties to make a genuine effort to resolve disputes by participating in dispute resolution such as Samoan conciliation, and that the Court may refuse to hear a matter if the parties do not undertake Samoan conciliation. How can the Court ensure a genuine effort has been made to resolve the dispute? What, if any, criteria should be met and should this be set out in legislation?
 15. Should Samoa adopt a similar legislative approach (or other similar non-legislative approach) taken by American Samoa? If yes, please explain? If no, why not?