



# **REVIEW OF THE LAW REFORM COMMISSION ACT 2008**

**Discussion Paper**

**November 2018**

## SAMOA LAW REFORM COMMISSION

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The Samoa Law Reform Commission (**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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## 1. INTRODUCTION

1. Law Reform Commissions as formal independent and permanent institutions around the world is a recent phenomenon. The sparse literature on law reform in the Pacific Islands refer to the development of law reform institutions around the world.

“In England, Australia and Canada, there are records of early attempts to establish law reform machinery dating as far back as the fifteenth century. The systematic process of law reform achieved in the nineteenth century was in the form of temporary and part time law reform commissions. The first formal body established to carry out law reform was the 1934 Law Revision Committee in England. The institutional Law Commission was established under the Law Commission Act of 1975 to be an independent and permanent office staffed by lawyers and support staff. The early literature on law reform offers useful insights on how the forces of government, the bureaucracy and civil society transform law reform machineries and agencies at a given place and time.

In the latter half of the twentieth century, the commonwealth developing countries of India and Sri Lanka, and the Pacific island states followed the considerable development of law reform institutions around Australia. By the 1990s, about 60 law reform agencies had been established around the world varying according to scope and capacity and resources. The development of law reform machineries is not entirely relevant to the context of the small Pacific Island societies.

The Pacific Islands law reform institutions developed much later, and in contrasting environments. However, this literature is valuable where it gives insight into the environment in which today’s modern law reform institutions were developed. It sheds light on the main influences behind the choice of law reform machinery in different situations and environments. The early literature is a useful record for the Pacific Islands institutions as they join their more modern counterparts in driving progress through law reform.”<sup>1</sup>

### **The Terms of Reference for the Review of the Law Reform Commission Act 2008**

2. On 16 March 2018, the Terms of Reference for the review of the Law Reform Commission Act 2008 (LRC Act 2008) was approved by the Honourable Prime Minister. The Office of the Attorney General (OAG) endorsed the same on 20 March 2018. The Terms of Reference (TOR) are as follows:
  - a) To review the LRC Act 2008 to ensure it is kept in a modern state to suit the current context of Samoa.
  - b) To research and review best practices of law reform processes that suit Samoa’s context and have the same available in a Law Reform Project Handbook.

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<sup>1</sup> Seumanutafa TLMRS, *Law Reform in Plural Societies*, Springer (2018) 33-36.

- c) To, together with OAG, provide recommendations on a suitable framework for a new updated legislation and a Law Reform Project Handbook.
3. As per the directives attached to the TOR, the Samoa Law Reform Commission is working closely with the OAG in this review.

### **Objectives of the Discussion Paper**

4. This Discussion Paper calls for submissions. The discussions and analysis in this Discussion Paper set out the outcomes of the preliminary research and consultation undertaken by the Commission on the 3 key areas of the Terms of Reference highlighted above. This Discussion Paper seeks comments on the issues and recommendations set out after each Part and listed at the end.

## **2. TERMS OF REFERENCE 1**

To review the Law Reform Commission Act 2008 to ensure it is kept in a modern state to suit the current context of Samoa.

### **Introduction**

Part A firstly gives an overview of the Law Reform Commission Act 2008. Against this background, it then discusses the establishment and its early beginnings and influences. This is followed by a summary of the law reform projects to date and the Samoa Law Reform Commission's work under its other statutory mandates. Part A closes with an overview of the staffing and budget features since establishment.

### **PART A – Where we are**

- 1) **The Law Reform Commission Act 2008 (the LRC Act)**
5. The Samoa Law Reform Commission (Commission) is established under the Law Reform Commission Act 2008 (LRC Act). It began operation in October 2008 under the umbrella of the Office of the Attorney General (OAG).
6. The LRC Act was the 8<sup>th</sup> Act to be passed by the Parliament of Samoa in 2008. The Long Title to the Act says it is an Act to establish the Commission for the review and development of the laws of Samoa. The LRC Act was assented to by the Head of State of Samoa and commenced on 25 March 2008.
7. Since enactment in 2008, the LRC Act has only had one amendment made to it. This was a consequential amendment caused by the Audit Act 2013. That Audit Act amended the LRC Act by inserting a new subsection (5) under section 9, effectively requiring the accounts of the Commission to be audited by the Controller and Auditor General on an annual basis.
8. Overall, the LRC Act is a typical enabling Act, establishing the Commission giving it functions, powers, staff, and allows the establishment and engagement of certain bodies to assist the work of the Commission. It ends with miscellaneous provisions including a protection provision to protect the Commission from any civil actions for work done in good faith in the performance of its functions.

9. The LRC Act has 17 sections, the first 4 provide the preliminaries namely the short title and commencement date of the Act; the interpretation of certain terms used in the Act; an express statement that the Act binds the Government, and the purposes of the Act. The Commission is established under section 5 as a body corporate with perpetual succession and a common seal, capable of amongst other capabilities, suing and being sued. Section 6 lists out the statutory mandate of the Commission as follows:

**6. Functions of the Commission** – *The functions of the Commission are:*

- a) to recommend to the Attorney General suggested programmes for the reform of the laws of Samoa;*
  - b) in accordance with references made to it by the Prime Minister, Cabinet or the Attorney General (whether at the Commission's suggestion or otherwise), to research and analyse areas of law considered to be in need of reform and report its recommendations for reform to the Prime Minister and the Attorney General;*
  - c) to advise government Ministries and agencies on the manner or content of reviews of the law conducted by those Ministries and agencies; and*
  - d) to consult with and advise the public (and any specific sectors of the community) about its work.*
10. The Commission is then given all powers necessary or expedient to enable it to carry out its functions under section 7. Such powers include but are not limited to conducting or sponsoring studies and research where such is expedient for the preparation of law reform reports and associated law reform documents; consulting with any Government Ministry or agency on the review of any law; publicising its work, conducting public hearings, seeking public comment on its proposals, engaging the services of suitably qualified persons to assist with its work and delegating to staff any specific functions of the Commission.
11. Subject to the provisions of the LRC Act, section 8 allows the Commission to regulate its own procedure as it sees fit. Section 9 imposes responsibilities on the Commission and the Prime Minister. The Commission is required to provide a forward plan of the Commission's work to the Prime Minister once a year; prepare and submit for the Prime Minister and Cabinet's approval the Final Reports on law reform projects undertaken under a Terms of References; arrange for the publication of the approved reports; and provide annual reports to the Prime Minister on the Commission's operations and expenditure. Any report provided by the Commission to the Prime Minister is presented by the Prime Minister to Parliament. The 3 sources of Terms of References from which a law reform project may be referred to the Commission under sections 6 and 9 are the Prime Minister, Cabinet and the Attorney General.
12. Sections 10 and 11 provide for the Commission's personnel. Subsection 10(2) provides that the administrative head is the Executive Director who must be a legal graduate with 5 years barrister and solicitor experience. Subsection 10(4) says no appointment of the Executive Director is effective until it is approved by

the Attorney General as meeting the requirements of being a 'legal graduate with 5 years barrister and solicitor experience'. The Executive Director is a public servant together with all the staff appointed and employed in the Commission.

13. A 14 member Advisory Board is established 'to assist' the work of the Commission in section 12. More discussions on the Advisory Board is available towards the end of Part 1.
14. Section 13 allows for the Commission to appoint Commissioners (to be approved by the Advisory Board) or consultants (to be approved by the Attorney General) to manage and undertake law reform projects that are referred to the Commission by the Prime Minister, Cabinet or the Attorney General.
15. Where the Commission intends to appoint a Judicial Officer to be a Commissioner, this needs approval by the Advisory Board, and the Chief Justice (section 14). Such appointment does not affect the Judge's tenure of the judicial office or the Judge's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as a Judge (including those in relation to superannuation) and, for all purposes, the Judge's services as Commissioner is to be taken to be his or her service as a Judge. In addition, a judicial officer who is appointed as a Commissioner is entitled to receive allowances and reimbursement of expenses as approved by the Prime Minister.
16. The Commission and its staff is protected from civil actions or proceedings for damages where such action relates to anything done by the Commission in good faith, in the performance or purported performance, of any of the Commission's functions or powers (section 15). Section 16 provides for the regulation making power and section 17 repeals the Samoa Law Reform Commission Act 2002. To understand the current framework put forward by the LRC Act, it is useful to take a brief look at the Commission's early days.

## 2) [Commentary on the Law Reform Commission Act 2008 \(LRC Act\)](#)

17. On analysis, there are some sections of the LRC Act which require clarity, to remove duplication and update them to the current context of Samoa. Firstly, section 6 sets out the functions of the Commission. There is a repetition of those functions in section 9. There is also a duplication of reporting requirements. In the Commission's implementation of this Act in its first ten years, there has been no significant reason for the Commission's functions and reporting duties to be duplicated under two sections. The Commission would recommend that for clarity, the functions of the Commission must be clearly set out in section 6 and clear reporting requirements be provided under section 9.



18. There are also provisions requiring updating to the current context. Under subsection 10(4), no appointment of the Executive Director is effective until it is approved by the Attorney General as meeting the requirements of subsection 10(2). These requirements under subsection 10(2) are that the appointee: (a) (Executive Director) holds a recognised law degree; and (b) has at least 5 years' experience as a barrister or solicitor, or in other legal work (including suitable academic positions); and (c) meets any further skill and character requirements required by the Attorney General. Perhaps subsection 10(4) was required before 2011 when the Commission was under the umbrella of the Office of the Attorney General. To date, the interview panel for the position of the Executive Director and Cabinet are in practice well informed whether the position criteria is met before appointment, and there is no need for a further endorsement of the same matters by the Attorney General. This reference in section 10(4) may therefore be removed. Preliminary consultations with the Office of the Attorney General shows there is a general agreement on this subsection being removed.

### 3) Establishment and Early Influences

19. In 1997, an institutional strengthening project for the Ministry of Justice and Courts Administration (MJCA) identified the need for a Law Reform Commission in Samoa.<sup>2</sup> With funding from the New Zealand Overseas Development Aid (NZODA), consultants were engaged to carry out the work required and undertake extensive consultations with Government officials and the public.<sup>3</sup> The outcome of these consultations revealed that Samoa did not have a clear established process by which systematic review of law can be undertaken for the purpose of examining its relevance to Samoan society.<sup>4</sup>
20. Consequently, Cabinet directed the formation of an Establishment Group to set up a Law Reform Commission in Samoa.<sup>5</sup> This Establishment Group agreed that the proposed Law Reform Commission will operate as a statutory body dedicated to recommending law reforms to meet the needs of the Samoan society.<sup>6</sup> Such a body would draw on the knowledge and expectations existing in the community. Legal and other relevant research and consultations will take place.<sup>7</sup> Awareness of relevant overseas law would not be overlooked in the process.<sup>8</sup> And finally, it would follow transparent and well publicized processes to reach its recommendations.<sup>9</sup> As for the proposed responsibilities, it was agreed that the Law Reform Commission would carry out various roles such as advising Government on the priority of

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<sup>2</sup> Ming C. Leung Wai, 'Samoa's Experience with the Establishment of a Law Reform Commission' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008), 5.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Leung Wai, above note 2, 7.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.



needed law reforms, assist government agencies to develop changes to the law they administer and make regular contact with overseas Law Reform Commissions.<sup>10</sup>

21. As a result of the Establishment Group's work and with the assistance of consultants, Parliament enacted the Law Reform Commission Act 2002.<sup>11</sup> From the Hansard record of Parliament proceedings, it cannot be said the Law Reform Commission Bill 2001 experienced smooth sailing in its progression through Parliament.<sup>12</sup> It received mixed views from certain members of Parliament during debates.
22. The Members of the Opposition party at the time (Samoa National Development Party) queried whether the role of the Law Reform Commission proposed under the Bill would duplicate the roles of the Office of the Attorney General and Ministries which were already reviewing their own laws.<sup>13</sup> The Prime Minister responded that the proposed Commission would carry out the primary role of reviewing laws of Samoa which are problematic and referred by Government.<sup>14</sup> Also, it was envisaged by the Prime Minister that such a Commission will take over the role of various Commission of Inquiries, which would save costs for the country.<sup>15</sup>
23. Parliament passed the Law Reform Commission Act 2002 (LRC Act 2002) which established a Commission with law reform functions independent from the state.<sup>16</sup> Section 1(2) provided that the LRC Act 2002 was to commence on a date to be determined by the Minister of Justice and published in the Savali, a government newspaper. For various reasons (below) the Act was not implemented.
24. The Act was reviewed in 2007 and the following issues were identified:<sup>17</sup>
  - (a) there were reportedly difficulties in securing a suitable and available person to be the Commissioner;
  - (b) there were challenges with resource allocation; and
  - (c) the structure and function of the Law Reform Commission established under the LRC Act 2002, were not suitable for Samoa's present circumstances.
25. Further discussions resulted in proposed variations to the functions, structure and composition of the Commission, noting Samoa's limited resources, capacity and funding.<sup>18</sup> Consequently, the LRC Act 2002 was replaced by the Law Reform Commission Act 2008.<sup>19</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> Leung Wai, above note 2, 8.

<sup>12</sup> See Samoa, *Parliamentary Debate*, Legislative Assembly, 27 August 2001.

<sup>13</sup> Ibid, at 701.

<sup>14</sup> Ibid, at 702.

<sup>15</sup> Ibid.

<sup>16</sup> Seumanutafa, above note 1, 140.

<sup>17</sup> Leung Wai, above note 2, 11.

<sup>18</sup> Ibid, at 14-15.

<sup>19</sup> Ibid.

26. The Law Reform Commission Act 2008 (LRC Act 2008) reduced the independence of the Commission in that its law reform agenda is now to be in line with the government's agenda.<sup>20</sup> It replaced a Commissioner with an Executive Director as the administrative head and provided for staff to be public servants.<sup>21</sup> Part time commissioners, who may be chosen from judicial officers, may be engaged to undertake law reform projects.<sup>22</sup> Rather than being a standalone office, it forms part of the Office of the Attorney General. These changes were seen as more realistic given resource constraints and the lack of qualified personnel.<sup>23</sup>
27. The main changes made by the LRC Act 2008 to the 2002 framework can be restated in more detail as follows:<sup>24</sup>
  - (a) Similar to other jurisdictions, there was more emphasis for the law reform agenda of the Commission to be coordinated and in line with that of Government's agenda (sections 4, 5 and 9).
  - (b) The functions were reinforced (section 6):
    - (i) recommendations for law reform were to be made to the Attorney General and not the Minister of Justice;
    - (ii) the Law Reform Commission was to review areas of the laws in need of reform in accordance with references made to it by the Prime Minister, Cabinet or the Attorney General and not the Minister of Justice.
  - (c) An Executive Director is the administrative head of the Law Reform Commission and such person should have at least 5 years legal experience as a barrister and/or solicitor, or in other legal work (section 10);
  - (d) The staff and head of the Law Reform Commission shall be public servants and subject to the Public Service Commission (section 11);
  - (e) Part-time Commissioners (approved by the Advisory Board) or consultants (approved by the Attorney General) may be engaged to manage and undertake law reform projects (section 13);
  - (f) Where approved by the Chief Justice, Judicial officers, may be appointed part-time Commissioners for a specific law reform project (section 14).
28. The LRC Act 2008 also adopted certain features of the LRC Act 2002 such as that the Law Reform Commission remained a body corporate (section 5), the 'purposes' (section 4) remained, and the option of appointing judicial officers as Commissioners where approved by the Chief Justice, for specific projects (section 14), continued. This was the initial establishment of the current Law Reform Commission.
29. In 2011, the Samoa Law Reform Commission became independent of the Office of the Attorney General, but its functions under 2008 Law Reform

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<sup>20</sup> Seumanutafa, above note 1, 140.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Leung Wai, above note 2, 15.

Commission Act remain unchanged. This year 2018, the Commission celebrates its 10th year Anniversary.

30. It has been a decade of challenges for the Commission, experiencing first-hand the struggle of a brand new institutional set-up based on modern (as opposed to traditional) values and principles. Nevertheless, the Commission has strived to fulfil its mandate under the LRC Act 2008 towards law reform that promote customs and traditions.
31. The Commission firmly believes that the lessons of the first 10 years can now be reviewed and developed perhaps in an updated statute guiding the Commission's work in the next 10 years and beyond. Accordingly, the review of the LRC Act 2008 is timely and necessary to respond to past challenges and, it is hoped and envisaged, to further meet its mandate in ensuring that the law reform projects referred to the Commission for review, and the resulting reformed laws, are indeed relevant to the needs of the people of Samoa.
32. It is important to understand the influences on Samoa's law reform setup. Relevant research highlights the following.

"As the SLRC is a transplant and not a traditional Samoan institution, at establishment, it needed assistance from outside of Samoa on its direction for development. Although the SLRC has received substantial assistance from overseas, it must develop a law reform process that is suitable for its own plural environment. This is a significant challenge for a newly setup institution in developing modern state laws. In its initial years, the SLRC has had various overseas influences from partner commissions; the most notable are the Australian and Canadian law reform commissions. There have been other influences including New Zealand, the United Kingdom, China, Japan, Thailand, and the USA where the SLRC was represented at conferences or seminars related to law reform. Technical assistance and helpful insights on possible law reform approaches were received from the Australian Law Reform Commission; the Law Reform Commission of Western Australia; the New South Wales Law Reform Commission; the New Zealand Law Commission; the Maori Land Court; the Waitangi Tribunal; the Conference of the Federation of Law Reform Agencies of Canada; the British Columbia Law Institute; and the Alberta Law Reform Institute.

Law reform training for the professional staff of the SLRC has been vital for professional development. Training was received from the ALRC on methodologies in conducting law reform inquiries and capacity building in legal policy and legislative review. This was funded by Australia under the Pacific Legal Policy Twinning Programme with the Attorney General's Department (AGD), Canberra, Australia. Since its establishment in 2008, the SLRC has actively

participated at the Australasian Law Reform Commission Agency Conference (ALRAC)."<sup>25</sup>

33. The Commission presented an update of the work of the Commission to the 2010 Australasian Law Reform Agencies Conference (ALRAC) held in Brisbane. In 2012, the Commission was also represented to the ALRAC in Canberra. In 2014, the Commission hosted the ALRAC in Samoa. The material from these conferences becomes an integral part of the professional and strategic development of the Commission in the search for best practices for Samoa. Samoa's hosting of the biennial ALRAC in Samoa in 2014 is evidence of the importance of the ALRAC to the development of best practices of law reform in Samoa.

#### 4) Staffing

##### *a) Executive Director*

34. The Executive Director is the administrative head of the Commission, responsible for supervising and directing the work of the Commission.<sup>26</sup> The Law Reform Commission Act 2008 requires the Executive Director to:
- a) hold a recognised law degree; and
  - b) have at least 5 years' experience as a barrister or solicitor, or in other legal work (including suitable academic positions); and
  - c) meets any further skill and character requirements required by the Attorney General.
35. To date, in its first 10 years the Commission has been under the leadership of the 3rd Executive Director appointed to the position, the first is currently a Justice of the Supreme Court of Samoa, and the second resides in Australia while the third is in her second year of a first 3 year term. All are female.

##### *b) Legal Staff*

36. The Commission is of two divisions, the Legal Team led by the Assistant Executive Officer as the team leader, and the Corporate Services Unit (CSU) led by the Corporate Services Unit Manager. Both positions are at the Assistant Chief Executive Officer level.
37. All staff of the Commission are appointed and employed in accordance with the laws and practices applying to public servants.<sup>27</sup> The staff of the Commission has increased over the years with the creation of new positions and all positions being filled. Although the number of staff has increased, there is a great need for the

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<sup>25</sup> Seumanutafa, above note 1, 142 - 143. Note that SLRC as cited in this quotation refers to the Samoa Law Reform Commission.

<sup>26</sup> *Law Reform Commission Act 2008* (Samoa) s 10(1).

<sup>27</sup> *Law Reform Commission Act 2008* (Samoa) ss 10(3), 11.

Commission to employ more legal staff at senior level to effectively meet its functions.

<b>Table 1</b> <b>Law Reform Commission Staff 2008 - 2018</b>			
<b>FINANCIAL YEAR</b>	<b>LEGAL STAFF</b>	<b>SUPPORT STAFF</b>	<b>TOTAL STAFF</b>
FY 2008/2009	2	3	5
FY 2009/2010	2	3	5
FY 2010/2011	3	4	7
FY 2011/2012	4	4	8
FY 2012/2013	5	6	11
FY 2013/2014	6	6	12
FY 2014/2015	7	6	13
FY 2015/2016	7	7	14
FY 2016/2017	7	7	14
FY 2017/2018	9	7	16

### *c) Experience of Legal Staff*

38. The statutory mandates of the Commission is informed primarily by the work undertaken by the legal team. Law reform is a specialised area and requires staff with legal research experience, doctrinal and socio-economic research background and analytical legal thinking. After one graduates with a law degree, it is not until 4 to 5 years of legal work experience that one is able to contribute constructively to law reform reviews. As a new setup in Samoa, such a pool of lawyers is non-existent in Samoa, and the Commission is seen as the best place to further the training of a legal graduate into the area of analytical, doctrinal and social research. Unfortunately, the Commission has been unable to keep trained staff due to better paid employment elsewhere. It has been an ongoing challenge for the Commission to employ and maintain senior lawyers with more than 5 years' experience.
39. As of February 2018, a total of 153 lawyers had been admitted to practice in the Supreme Court of Samoa.<sup>28</sup> Most legal graduates prefer to start their legal careers with the Office of the Attorney General or with other Government Ministries and Corporations, which had existed long before the Commission.
40. The majority of lawyers that have been employed in the Commission's office have been new graduates to those with 2-3 years' experience, followed by only a handful

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<sup>28</sup> Email correspondence from the Secretary of Samoa Law Society to members of Samoa's Law Society, June 2018.

with more than 3 years' experience. To date the Commission is still substantially staffed with junior staff.

41. The functions of the Commission is primarily for those interested in research, and having a keen interest in being involved in the development of new laws. Ideally, the Commission is staffed with those with 4 to 5 years post-graduation experience. It is also highly recommended that Samoan legal graduates who wish to take up research be entertained with research post graduate scholarships (1 to 1 ½ years) to equip them to carry out extensive research for the work of the Commission. Samoan graduates must be specifically targeted for these scholarships as the work of the Commission requires one well versed with the English and the Samoan languages for the purposes of public speaking at stakeholder and public consultations.

*d) Corporate Service Unit (CSU)*

42. The legal staff is supported by the Corporate Services Unit (CSU). Since the establishment of the Commission the CSU has consisted of the Corporate Service Unit Manager, finance officers, the Law Reform Project Manager, Information Technology Officer, the Executive Assistant and the Office Driver. (See the number of CSU staff for the last 10 years in Table 1 above).
43. The CSU supports the work of the Legal Division in the following functions.
  - Human Resource and Administration
  - Finance
  - Technological matters
  - Facilities Management
  - Transportation
44. The CSU is responsible for human resource management, finance, and all administrative matters. The Unit coordinates and manages the Budget and Annual Reviews of the Ministry every Financial Year. Limited budget and resources remain a hindrance to the work of the Commission. The CSU has worked tirelessly in having the records in place to substantiate any proposals for more funding each financial year at budget discussions with the Ministry of Finance and at Parliamentary Committee meetings. The CSU has also been instrumental in assisting with seeking for funding especially from organisational partners e.g. UNICEF, Australia's DFAT, and NZ's MFAT, for law reform projects that need funding outside of the financial year budget of the Commission.
45. The CSU also oversees and provides support in the preparation of consultation plans and strategies. The Unit facilitates and coordinates the dissemination of information (issues papers, reports, invitations for consultations, brochures etc.) to relevant groups and the public where necessary for feedback and awareness. As the nature of the Commission's functions involve public consultations from time to time, the movement from consultation venue to venue requires a proper fleet of

vehicles for transportation. This is another role of the CSU, to ensure all consultation material (inclusive of boxes of paperwork; projector stands and machines, Commission banners, and food and water ordered for the public attending consultations) and staff are transported from venue to venue, at every public and stakeholder consultation.

## 5) The Advisory Board

### a) Membership

46. The Law Reform Commission (Commission) is assisted by an Advisory Board under section 12(1) of the Law Reform Commission Act 2008. At least 4 Advisory Board meetings is required under the Act, at the direction of the Prime Minister or the Attorney General (section 12(2)). The Advisory Board consists of the following members (section 12 (3)):
- a) members appointed by virtue of their offices, namely-
    - (i) the Attorney General;
    - (ii) the CEO of the Ministry of Prime Minister and Cabinet;
    - (iii) the CEO of the Ministry of Justice and Courts Administration;
    - (iv) the CEO of the Ministry of Finance;
    - (v) the CEO of the Ministry of Women, Community and Social Development;
    - (vi) the Commissioner of Police;
    - (vii) the President of the Samoa Law Society or nominee from time to time;
    - (viii) the President of the Samoa Chamber of Commerce and Industry Inc., or nominee from time to time;
    - (ix) the President of the National Council of Churches, or nominee from time to time; and
    - (x) the President of the Public Service Association, or nominee from time to time.
  - b) In addition, four members who are able to represent community interests are appointed by the Head of State on the advice of the Prime Minister. These are currently:
    - (i) a matai representative from Upolu;
    - (ii) a matai representative from Savaii;
    - (iii) a representative from the Samoa Umbrella Non-Government Organisation; and
    - (iv) a representative from the Samoa Medical Association.
47. In the earlier attempts to set up the Commission according to the Hansard record of proceedings of Parliament, the Advisory Board proposed under the earlier Law Reform Commission Bill 2001 was initially made of 6 members appointed by virtue of their offices, namely:<sup>29</sup>

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<sup>29</sup> Samoa, *Parliamentary Debate*, Legislative Assembly, 27 August 2001, 698.



- i. the Attorney General,
  - ii. the Secretary of Internal Affairs (currently Chief Executive Officer (CEO) of the Ministry of Women, Community and Social Development (MWCSD)),
  - iii. the Secretary of Justice,
  - iv. the Secretary of Women Affairs (currently CEO of MWCSD),
  - v. the President of the Samoa Law Society or nominee from time to time, and
  - vi. the President of the Samoa Chamber of Commerce and Industry Inc, or nominee from time to time.
48. At the Parliament debates on the Law Reform Commission Bill 2001 (Bill) in 2001, members of Parliament sought to include other members from Government Ministries and NGOs to 'adequately represent the interests of Government and the community'. The Parliamentary Committee to which the Bill was referred also recommended to include:<sup>30</sup>
- i. the Commissioner of Police,
  - ii. a representative of the National Council of Churches,
  - iii. representatives from the Public Service Association, and
  - iv. community members.
49. It is clear however that the members suggested in 2001 to be added to the Advisory Board but were not included in the Law Reform Commission Act 2002, are now current members of the Advisory Board members as stipulated under section 12(3) of the current Law Reform Commission Act 2008. As the membership show, it was envisaged that the Commission would be able to carry out work with some influence from a variety of expertise and community input, in an attempt to develop laws reflective of Samoan customs and traditions in line with its mandate.

*b) Areas of significant contributions by the Advisory Board*

50. An analysis of the minutes of the previous Advisory Board meetings highlights specific areas of the Commission's work to which the Advisory Board had made significant contributions. This includes:
- the formulation and improvements on the Commission's consultation strategies/process;
  - raising the awareness on the work of the Commission in both the private sectors and non-government organizations;
  - keeping the Commission informed and updated of the members' respective ministries/agencies work or any other work in the pipelines they thought would assist the Commission's projects; and
  - proposing ways by which the Commission may safeguard its own funds e.g. by proposing that the relevant Ministry responsible for the law under

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<sup>30</sup> Ibid.

review be invoiced for compensation of the Commission's funds spent in carrying out public consultations.

51. The Commission notes from the record of board meetings that the Board's contributions were mainly towards projects of high level national interest and projects pertaining to Samoan customs and traditions. It is also noted that the contributions were mostly made by non-government organizations and members of the communities, with lesser input from Government Ministries.
52. Notably, the literature shows that: "[T]he Advisory Board (of Samoa) has been instrumental in advising on the way public consultations are to be conducted; setting realistic timelines and advising on priority law reform projects."<sup>31</sup>

### *c) Role of the Board*

53. The role of the Advisory Board is not specified in the Law Reform Commission Act 2008. What is stipulated in the Act is that the Commission is to be 'assisted' by an Advisory Board.<sup>32</sup>
54. In early 2009, following the Advisory Board members' requests for some clarification on the role of the Board, the then Executive Director of the Commission caused a Terms of Reference (TOR) on the functions of the Advisory Board to be brought before Cabinet. Cabinet approved this TOR after which it was circulated to the Board members in March of the same year.<sup>33</sup>
55. The TOR required the Advisory Board to:
  - receive reports on law reform projects currently undertaken;
  - receive reports on law reform projects to be undertaken;
  - recommend process and outcomes desired for each project;
  - recommend stakeholders and timeframes for each project;
  - approve Commissioners; and
  - recommend areas of law to be reviewed and/or reformed so that the Commission can recommend to the Attorney General.

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<sup>31</sup> Seumanutafa, above note 2, 142.

<sup>32</sup> See *Law Reform Commission Act 2008* (Samoa) s 12 (1).

<sup>33</sup> Letter from then Executive Director of Samoa Law Reform Commission to the Advisory Board Members, 4 March 2009.

56. At the Advisory Board Meeting of 4 March 2009 it was clarified by the then Attorney General (Chairperson) that by virtue of its general TOR (above), the Advisory Board was to receive:-
- i) a summary of the Commission's budget; and
  - ii) Annual Reports, Workforce and Corporate Plans.<sup>34</sup>
57. Moreover, the Board was to query, make suggestions or provide advice or recommendations to these documents in (ii) above to assist the work of the Commission on law reform projects currently undertaken. However, this practice ceased to exist following an Advisory Board meeting in June 2013, given a proposal by the Commission that given time constraints, the discussions on law reform projects must be prioritized.
58. Throughout the 9 years of Advisory Board meetings, the minutes show that there was ongoing seeking of reassurance, questions posed and some confusion on the role of the Advisory Board in the work of the Commission. This is evident in the Board meetings of 20 August 2010, 14 August 2015 and 15 December 2015 respectively. All past initiatives were done in good faith for the best approach for Samoa, thus, understandably, this may be due to the Commission being the first of its kind to be set up in Samoa. From these records, it is clear that in the absence of any expressed roles in the Law Reform Commission Act 2008, the 14 member Advisory Board and the Commission have been experimenting on how best to work together, given the emphasis to have a contextual community contribution to law reform through the 14 member Advisory Board.
59. Perhaps this confusion was envisaged earlier in Parliament proceedings on the Law Reform Commission Bill 2001 where a Member of Parliament had cautioned that the appointment of the Attorney General and other Heads of Department to the Advisory Board may compromise their roles in their current positions. If these members are appointed, it was said they would now have to perform the duties of an Advisory Board when they have their own duties to perform. It would duplicate their roles as Head of Departments and may cause confusion on their exact roles as Advisory Board members.<sup>35</sup>
60. A significant factor which also perhaps contributed to the general confusion was evident in the record of attendance to Advisory Board meetings. As the minutes of the Advisory Board meetings show, Offices would send different representatives to Advisory Board meetings, and perhaps this is due to a lack in office and staff capacity.

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<sup>34</sup> See also Samoa Law Reform Commission Advisory Board Meeting Minutes of 6 August 2010, 22 November 2013 and 15 December 2017.

<sup>35</sup> Samoa, *Parliamentary Debate*, Legislative Assembly, 21 August 2001, 700.

61. As can be seen in the Advisory Board Attendance record (See Annexure 1), one Office did not send a representative for all Board meetings for 3 consecutive years. Further, at the Advisory Board meetings, it was usually obvious that a representative was not briefed by the previous attendee from that office. Thus time is again spent on later meetings to repeat or reconfirm earlier meetings' discussions.
62. From the Board Meeting of December 2017, after opportunity was sought by the Board members and some 2 weeks was given for comments, no member made a contribution at the end of the time requested and granted.
63. The Commission considers that to prevent confusion and for the Advisory Board to function effectively, the Board and their roles must be stipulated clearly in the Law Reform Commission Act.

## 6) Annual Budget

64. Similar to many law reform institution setups, the scope and speed in which the law reform projects are undertaken is dependent on resources and the available budget.
65. The working budget of the Commission has steadily increased over the years as can be seen in Table 2 below.

<b>Table 2</b>  <b>Samoa Law Reform Commission</b> <b>BUDGET AND STAFF 2008 - 2018</b>	
<b>FINANCIAL YEAR</b>	<b>BUDGET</b>
FY 2008/2009	\$415,936.00
FY 2009/2010	\$415,936.00
FY 2010/2011	\$447,030.00
FY 2011/2012	\$350,368.00
FY 2012/2013	\$851,3018.00
FY 2013/2014	\$1,246,097.00
FY 2014/2015	\$1,094,258.00
FY 2015/2016	\$1,198,453.00
FY 2016/2017	\$1,319,280.00
FY 2017/2018	\$1,291,513.00

66. There was a significant increase in FY 2013/2014 due to the Australasian Law Reform Agencies Conference hosted by the Commission. The budget dropped in FY 2014/2015 but increased again in FY 15/16 due to the creation of 2 new Executive Legal Officers' positions and 1 Senior IT (Information Technology) Officer position.

The budget increased again in FY 16/17 due to an increase in the number of consultations proposed, budgeted for and undertaken.

67. In the law reform process, the stage requiring significant funding is 'consultation' with the relevant stakeholders and the public.
68. The Commission has been questioned and reprimanded by some Parliamentary Committees for not carrying out sufficient consultation with the public, especially with law reform projects that impact directly on traditional Samoan titles. For example, the Pule a le Matai Sa'o Final Report. Needless to say, the scope and extent of public consultations carried out by the Commission, and whether they amount to 'adequate consultation' as alluded to by the Supreme Court of Canada<sup>36</sup> depends entirely on the budget and resources available to the Commission.

## 7) The 30 Law Reform Projects to Date

### a) *The 30 Reviews – Their Nature*

69. The Commission has reviewed a total of 30 law reform projects, since its establishment in October 2008. These include major referrals and ad hoc references/projects from Ministries (See Tables below).
70. The nature of the projects is wide ranging with a number of projects focusing on the review of outdated laws of Samoa dating back to the 1950s, 1960s and 1970s, the Crimes Ordinance 1961, Prisons Act 1967 and Law Practitioners Act 1976.
71. Some of the projects focused on Samoan customs and traditions. For example, the Village Fono Act 1990, Protection of Samoa's Traditional Knowledge, National Heritage Board and Pule a le Matai Sa'o. The Pule a le Matai Sa'o referral resulted from complaints by private citizens against paramount chiefs or Sa'o of their families, for abuse of power.
72. Other projects focused on reviewing rules of the Courts in Samoa while other projects were on the reforms of criminal law matters and international compliance projects.
73. Projects were also referred to review or to address problems that occurred at or around the time of the referral. For example, the National Heritage Board Review which was triggered by the demolition of the old Parliament house at Mulinuu in 2012. Also, the Sex Offender's Register Review was referred to the Commission to assess the suitability of a Sex Offenders register, given the prevalence in sexual crimes affecting children, particularly re-offenders of such crimes. The projects differed in nature and scope of review.

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<sup>36</sup> See *R v Jack* (1995) 16 BCLR (3d) 201 CA; *R v Noel* (1995) 4 CNLR 78; *R v Nikal* (1996) 1 SCR 1013.

<b>Table 3</b> <b>The 30 Law Reform Projects to Date</b>			
1	Crimes Ordinance 1961	16	Protection of Samoa's Traditional Knowledge
2	International Date Line 2011	17	CEDAW Legislative Compliance Review
3	Daylight Savings 2009	18	Sex Offenders Register Review
4	10% Women in Parliament	19	Civil Procedure Rules (Magistrate and Supreme Court Rules)
5	Coroners Ordinance 1959	20	Alcohol Reform
6	Village Fono Act 1990 (Freedom of Religion)	21	Ministerial and Departmental Arrangements Act 2003
7	Commission of Inquiry 1964	22	Property Law Act 1952 Review
8	District Court Act 1969	23	Narcotics Act 1967 Review (Drugs)
9	National Heritage Board	24	Pule a le Matai Sa'o
10	Media Regulation	25	Exchange of Information
11	Prisons Act 1967	26	Foreign Investment Laws
12	Care and Protection Legislation to Protect Children	27	Fabric of Laws
13	Judicature Ordinance 1961	28	Infants Ordinance 1961
14	Criminal Procedure Act 1972	29	Agriculture and Fisheries Ordinance 1959
15	Law Practitioners Act 1976	30	Review of the Law Reform Commission Act 2008

*b) Terms of References (TOR)*

*(i) Sources of Referrals*

74. Of the above 30 projects:

- 26 were either referred by the Prime Minister, Cabinet or the Attorney General, pursuant to section 6(b) of the Law Reform Commission Act 2008 (LRC Act); and
- 4 projects were self-initiated by the Commission pursuant to section 6(a) of the LRC Act (highlighted in Table 3 above).

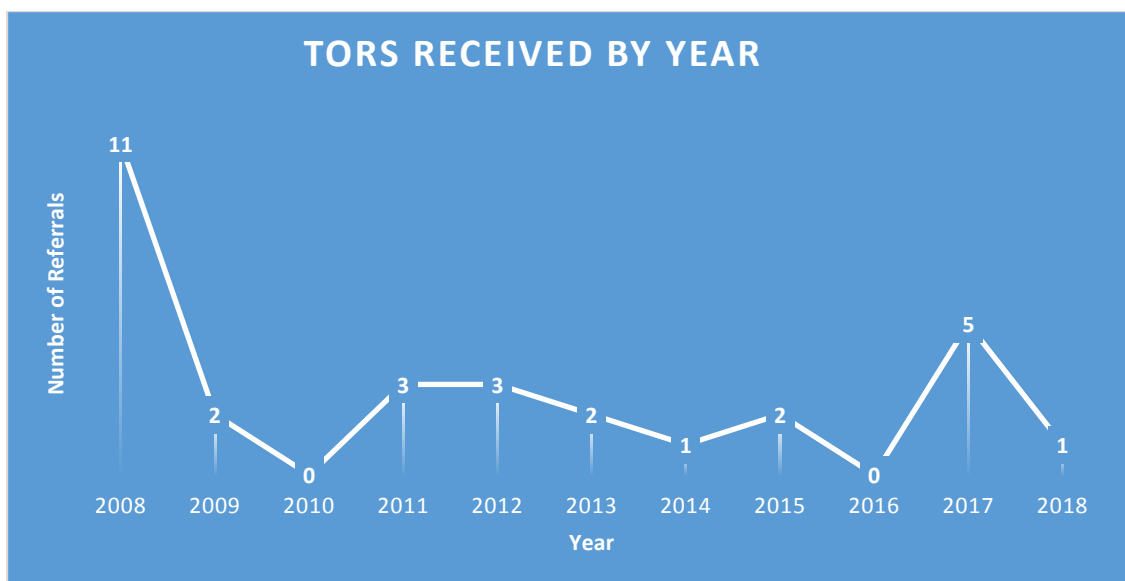
75. The Commission's function to self-initiate reforms (propose reforms to the Attorney General) was recently put to exercise in 2017. This was due firstly to a number of major referrals in the initial 2008 work plan now finally completed, and secondly more lawyers are now interested in joining the Commission. It is anticipated that with the growing capacity of legal staff, the Commission will be endorsed to carry out self-initiated law review projects.

(ii) TOR received by Year

76. Based on the graph below, the initial year of establishment 2008 recorded the highest number of referrals. An extensive work plan developed by the Office of the Attorney General was already in the pipeline for the Commission to undertake in its first year. The second highest number of referrals recorded was in 2017, with 5 projects (3 self-initiated and 2 ad-hoc referrals). As it is apparent from Table 4, the referrals differ in nature and there is no consistent program or agenda for law reform.

<b>Table 4</b> <b>Law Reform Project Referrals 2008 – 2018</b>		
<b>Year</b>	<b>Number of referrals</b>	<b>The referrals</b>
2008	11	(Crimes Ordinance 1961, Coroners Ordinance 1959, Commissions of Inquiries, District Court Act 1969, Convention on the Rights of the Child (CRC), Judicature Ordinance 1961, Criminal Procedure Act 1972, Law Practitioners Act 1976, Protection of Traditional Knowledge, Civil Procedure Rules (Supreme and Magistrate Court) and Convention on the Elimination of Discrimination Against Women (CEDAW)).
2009	2	(Daylight Savings and Prisons Act 1967)
2010	0	
2011	3	(International Dateline, Village Fono Act 1990 and Media Regulation)
2012	3	(10% Women in Parliament, National Heritage Board and Ministerial and Departmental Arrangement Act 2003)
2013	2	(Sex Offenders Registry and Alcohol Reform)
2014	1	(Property Law Act 1952 Review)
2015	2	(Narcotics Act 1967 Review and Pule Matai Sao)
2016	0	
2017	5	(Exchange of Information, Foreign investment laws Review, Fabric of Laws, Infants Ordinance 1961 and Agriculture and Fisheries Ordinance 1961)
2018	1	(Review of Law Reform Commission Act 2008)





#### (iii) Law Reform Projects – The First 10 Years

77. Of the 30 projects referred to the Commission since 2008, 26 have been completed (Final report completed or legal opinion, and approved by Cabinet) to date, with 12 reviews which have resulted in new laws, 3 resulted in new Bills/Rules yet to be enacted/enforced. (See Table 5 below)

<b>Table 5</b> <b>Law Reform Projects Resulting in Acts</b>		
	<b>Project</b>	<b>Act</b>
1.	Crimes Ordinance 1961 Review	Crimes Act 2013
2.	Daylight Savings Act 2009 Review	Daylight Saving Act 2009
3.	International Dateline	International Dateline Act 2011
4.	Coroners Ordinance 1959 Review	Coroners Act 2017
5.	Village Fono Act 1990 Review	Village Fono Amendment Act 2017
6.	District Court Act 1969 Review	District Court Act 2016
7.	Media Regulation	Media Council Act 2015
8.	Prisons Act 1967 Review	Prisons and Corrections Act 2013
9.	Criminal Procedure Act 1972 Review	Criminal Procedure Act 2016
10.	Law Practitioners Act 1976 Review	Lawyers and Legal Practice Act 2014
11.	Sex Offenders Register Review	Sex Offenders Registration Act 2017
12.	10% Women in Parliament	Constitution Amendment Act 2013
<b>Law Reform Projects resulting in Bills/Rules yet to be enacted / enforced</b>		

	<b>Project</b>	<b>Bills/Rules</b>
<b>1.</b>	Alcohol Reform	Alcohol Control Bill
<b>2.</b>	Civil Procedure and Magistrate Court Rules	Supreme Court (Civil Procedure) draft Rules and Magistrate Court draft Rules
<b>3.</b>	Care and Protection legislation to protect children	Child Care Protection Bill
<b>Law Reform Projects which have not been enacted into laws or amendment to existing laws</b>		
<b>1.</b>	Judicature Ordinance 1961	
<b>2.</b>	Commission of Inquiry Act 1964	
<b>3.</b>	Establishment of a National Heritage Board	
<b>4.</b>	Protection of Traditional knowledge in Samoa	
<b>5.</b>	CEDAW Compliance	
<b>6.</b>	Pule a le Matai Sa'o Project	
<b>Law Reform Proposed Projects which Resulted in Legal Opinion (completed)</b>		
<b>1.</b>	Infants Ordinance 1961	
<b>2.</b>	Agriculture and Fisheries Ordinance 1959	
<b>Law Reform Projects With Draft Bills Proposed/Developed</b>		
	<b>Project</b>	<b>Status</b>
<b>1.</b>	Fabric of Laws Review	Fabric of Laws Miscellaneous Repeal Bill 2018 to be endorsed by Attorney General
<b>2.</b>	Narcotics Act 1967 Review	Illegal Drugs Bill to be endorsed by Attorney General
<b>3.</b>	Ministerial and Departmental Arrangement Act 2003 Review	Final Report approved but referred to Cabinet Committee for Reports, for further consideration
<b>Current Law Reform Projects</b>		
	<b>Project</b>	<b>Status</b>
<b>1.</b>	Property Law Act 1952 Review	Final Report stage
<b>2.</b>	Exchange of Information Review	Final Report stage
<b>3.</b>	Foreign Investment Act 2000 Review	On-hold, Ministry of Commerce, Industry & Labour undertaking internal review
<b>4.</b>	Law Reform Commission Act 2008 Review	Discussion Paper stage

#### (iv) Summary of the Status of Law Reform Projects to Date

78. In summary:

- 12 Projects have resulted in enacted legislation;
- 3 Projects resulted in draft law and rules completed but yet to be enacted;
- 6 Projects have not been enacted into laws or amendments to existing laws, as recommended in the Commission's Final Reports for those projects;
- 2 resulted in Legal opinions (completed);
- 3 Projects With Draft Bills Proposed/Developed
- 4 Projects which are currently ongoing

#### 8) Other Duties under the Law Reform Commission (SLRC) Statutory Mandate

##### *a) Ad Hoc References*

79. The Samoa Law Reform Commission (Commission) has also received ad-hoc requests and directives for reviews. The Commission receives this as it is also mandated to "advise government Ministries and agencies on the manner or content of reviews of the law conducted by those Ministries and agencies."<sup>37</sup> The Commission has been tasked to make an input or give advice on reviews by other Ministries and agencies. The available record shows that 6 directives or requests were received and 5 have been completed to date. (See Table 6 below).

<b>Table 6</b> <b>Law Reform Ad-Hoc References</b>				
<b>No.</b>	<b>Ad-Hoc References</b>	<b>Date of Referral</b>	<b>Requested Assistance</b>	<b>Source of Referral</b>
<b>1.</b>	Investment Promotion Committee	23 January 2013 ( Letter from the MCIL) 7 November 2013 (Letter from the OAG)	Research task focused on the following issues: i. Relevant laws in Samoa that will be affected by the proposed legislative framework; and ii. Investment laws in the region	Ministry of Commerce, Industry & Labour (MCIL). (Office of the Attorney General (OAG))
<b>2.</b>	Agriculture and Fisheries Ordinance 1959 Review	27 November 2017	To review the Ministry of Agriculture & Fisheries (MAF) laws based on the concerns raised by the Minister of MAF	Prime Minister
<b>3.</b>	Infants Ordinance 1961 Review	29 September 2017	To address an issue relating to adoption laws.	Prime Minister

<sup>37</sup> Law Reform Commission Act 2008 (Samoa) s 6(c).

4.	Tax Laws of Samoa	19 June 2018	Legal advice	Prime Minister
5.	Meter Onlus Association- Against online pornography	25 June 2018	To assist the Office of Attorney General identify how Samoa can be involved with this Association.	Prime Minister
6.	Lands & Titles Bill 2018	24 July 2018	Legal Opinion	Office of the Attorney General

*b) Assisting Ministries with Ministry/Agency Reviews*

80. Under the same mandate, the Commission has received requests to assist with Ministry and agencies' reviews. Since 2008, a number of 10 requests for reviews were received by the Commission. (See Table 7 below).

Table 7		
Ministry Requests for Advice on their Law Reviews		
No.	Reviews	Year
1.	Convention On The Rights Of Persons With Disabilities Legislative Compliance Review For Samoa	2015
2.	United Nations Convention against Torture	2016
3.	Committee on the Rights of the Child	2016
4.	Crime Prevention Strategy	2016
5.	Documentation of Samoan, Archaeological and Built Heritage Places and Associated Oral Tradition Project	2016
6.	Review of Samoa's Investment Policy & Legislation	2017
7.	Review of the Labour & Employment Relations Act	2018
8.	Review of Immigration Laws	2018
9.	Review in Electricity Tariff	2018
10.	Legal Framework Reform Project	2018

*c) Consulting / Advising the Public (and any specific sectors of the community) about the Commission's work, i.e. the laws of Samoa and the Samoa Law Reform Commission's Review Projects.*

81. The Commission has received a few requests from the public to explain a Draft Bill or a law of Samoa. A recent example is the Congregational Christian Church of Samoa seeking an overview of the Alienation of Customary Land Amendment Bill 2017 in July 2018. The Commission has attended to this after perusing and reviewing the Bill itself and its background, as well as its proposed position in the fabric of laws of Samoa. The Commission only explains as far as the provisions of Draft law was concerned. For any questions on the policies, the Commission would politely refer the audience to the relevant Ministry i.e. the Ministry of Natural Resources and Environment, or the Office of the Attorney General.

*d) Parliamentary Committee Summons*

82. The Commission has also been summoned by Parliamentary Committees to make submissions on Draft Bills before Parliament. To date a number of 7 summons had been received, and to which the Commission has made a contribution before the Parliamentary Committees on the Draft Bills before Parliament. The summons would ask for the Commission to review a Draft Bill and provide a summary of what it is about, its objectives and whether there are any concerns of the Commission on the Bill. These summons have required the Commission to study the Draft Bills (especially those the Commission had not had any input in its development of drafting) and make submissions accordingly.
83. Many times the Commission does not make any submissions outside of the policies promoted by the Bill, but would provide an overall picture of what the Draft Bills' objectives are and what they hope to achieve. In the event that there is any advice given on a Draft Bill (which is rare and has usually been on the structure, the referencing, the place in which provisions are placed in the Draft Bills and the like), the Commission has also imposed upon the Parliamentary Committee, that such advice is still subject to the final advice of the Office of the Attorney General, which is the Principal Legal Advisor to Cabinet under the Constitution of Samoa.<sup>38</sup> This is deferring courtesy to a Constitutional office with the legislative drafting mandate.

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<sup>38</sup> *Constitution of the Independent State of Samoa* (Samoa) art 41.

## Part A – Issues and Recommendations

**Issue 1** - There are duplications in the functions and reporting responsibilities of the Commission under section 6 and 9. *(See pgh 17, pg 7)*

**Recommendation 1** - It is recommended that sections 6 and 9 be revised for certainty, section 6 to set out functions and section 9 to set out the reporting responsibilities (on law reform projects) of the Commission.

**Issue 2** - Under section 10, no appointment of the Executive Director is effective until it is approved by the Attorney General as meeting the requirements of subsection 10(2). To date, the interview panel for the position of the Executive Director and Cabinet are in practice well informed whether the position criteria is met before an appointment is made. *(See pgh 18, pg 8)*

**Recommendation 2** - Remove the requirement in section 10 for the Attorney General to be satisfied the Executive Director meets the appointment requirements.

**Issue 3** - The functions of the Commission is primarily for those interested in research, and having a keen interest in being involved in the development of new laws. Unfortunately, the Commission has been unable to keep trained staff due to better paid employment elsewhere. It has been an ongoing challenge for the Commission to employ and maintain senior lawyers with more than 5 years' experience. *(See pgh 41, pg 14)*

**Recommendation 3** - It is highly recommended that Samoan legal graduates who wish to take up research be entertained with research post graduate scholarships (1 to 1 ½ years) to equip them to carry out extensive research for the work of the Commission. Samoan graduates must be specifically targeted for these scholarships as the work of the Commission requires one well versed with the English and the Samoan languages for the purposes of public speaking at stakeholder and public consultations.

**Issue 4** – The records show that there has been ongoing confusion over the role of the Advisory Board. *(See pgh 63, pg 19)*

**Recommendation 4** - The Commission considers that to prevent confusion and for the Advisory Board to function effectively, the role of a Board or any set up, must be stipulated clearly in the Act.

### 3. TERMS OF REFERENCE 2

To research and review best practices of law reform processes that suit Samoa's context and have the same available in a Law Reform Project Handbook.

#### **PART B - Jurisdictional Analysis: Law Reform Commissions in the Pacific Islands**

To respond to the Terms of Reference 2, it is useful to look at the law reform processes of other countries. It is necessary however, to first understand a comparative analysis of statutory setups, functions and compositions of overseas law reform commissions, against Samoa's existing framework.

##### 1) Law Reform Commissions in the Pacific Region

84. The Australasian Law Reform Agencies Conference (ALRAC) held in Vanuatu in 2008 gave the Pacific Islands, for the first time, a forum in the Pacific Islands, to voice their backgrounds and aspirations on law reform commissions in the Pacific region.
85. From the contributions at the 2008 ALRAC, it was agreed that law reform plays an important role in promoting justice, good governance and accountability.<sup>39</sup> Law Reform Commissions were generally established around the 1990s in the Pacific region to acknowledge, make recommendations in relation to the restatement, codification, amendment or reform of traditional or customary laws.<sup>40</sup>
86. In Samoa, early discussions for the establishment of a Law Reform Commission dates back in the late 1990s where it was revealed that Samoa did not have a clear established process by which the systematic review of law can be undertaken for the purpose of examining its relevance to Samoan society.<sup>41</sup> This is appreciation that many laws of Samoa were outdated and needed law maintenance work.<sup>42</sup>  
It was generally understood by Conference participants that changes to the law tended to occur as a reaction to problems which attracted the attention of Government, and the Legislative Assembly.<sup>43</sup>

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<sup>39</sup> Leung Wai, above note 2, 3.

<sup>40</sup> Frank Kabui & Anna Guthleben, 'The Establishment of a Commission in Solomon Islands' (Paper presented at the Australian Law Reform Agencies Conference, Vanuatu, 10 – 12 September 2008) 2. See full list of Speakers at the 2008 Australasian Law Reform Agencies Conferences at this link: <http://www.paclii.org/other/conferences/ALRAC/index.html>

<sup>41</sup> Leung Wai, above note 2, 5.

<sup>42</sup> Ibid, at 6.

<sup>43</sup> David Weisbrot, 'Opportunities for Regional Cooperation in Law Reform' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11 September 2008). Also see weblink at <http://www.paclii.org/other/conferences/ALRAC/index.html>



87. In the Commonwealth countries, the need for a law reform body stems from the fact that laws were in need of law review and there was a need for a specialised body of professional experts to consider reforms continuously.<sup>44</sup> Their primary function was to revise and consolidate law rather than matters of policy.<sup>45</sup> The chief function of a Law Reform Commission was not merely to make suggestions for legal reform but to do so as an independent voice, at arm's length from government.<sup>46</sup>

## 2) Statutory Setups

88. The Law Reform Commissions of the Pacific Islands are statutory setups. The Table below (Table 8) indicates the year of their setups.

<b>Table 8</b> <b>Law Reform Commissions of the Pacific Islands – Statutory Setups</b>		
	<b>Pacific Island Country</b>	<b>Enacting Legislation</b>
1	Samoa	Law Reform Commission Act 2008
2	Fiji	Law Reform Commission Act Cap 26
3	Vanuatu	Law Commission Act Cap 115
4	Solomon Islands	Law Reform Commission Act Cap 15
5	Tonga	Law Commission Act 2007
6	Cook Islands	Law Commission Act 2007
7	Papua New Guinea	Constitutional and Law Reform Commission Act 2004

89. The Pacific setups were largely modelled on their Australian and New Zealand counterparts. Table 9 sets out the names and years of the law reform institutions of those larger jurisdictions.

<b>Table 9</b> <b>Law Reform Commissions: New Zealand and Australia– Statutory Setups</b>		
	<b>Country/State</b>	<b>Legislation</b>
1	New Zealand	Law Commission Act 1985
2	Australia	Australian Law Reform Commission Act 1996
3	Victoria	Victoria Law Reform Commission Act 2000
4	Queensland	Queensland Law Reform Commission Act 1968
5	New South Wales	New South Wales Law Reform Commission Act 1967

<sup>44</sup> Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Paper delivered at the Australian Law Reform Agencies Conference 2008, 10-12 September 2008) 1. Also see web link

<https://www.lawreform.vic.gov.au/sites/default/files/ALRAC+Paper+NeilRees.pdf>.

<sup>45</sup> Ibid, at 4.

<sup>46</sup> Rees, above note 44, 9.

90. The above two Tables show that the law reform frameworks of the Pacific Island countries and their models (NZ/Australia) are no longer ad hoc establishments but are formal independent institutions tasked with law reform statutory functions.

### 3) Functions

91. The following are law reform commission functions common across the Commonwealth. They are expressly stated to:
- adapt law to present conditions and needs;
  - remove defects and obsolete or unnecessary laws;
  - simplify the law;
  - adopt new or more effective methods of administering law and dispensing justice;
  - improve access to justice; and
  - consolidate and harmonise laws.<sup>47</sup>
92. The law reform institutions of the Pacific Islands do adopt the common functions shared by the more modern countries such as to review and reform the laws of those countries. However, there is a unique feature of several Pacific Island Law Reform Commissions which sets them apart from those other bigger jurisdictions. In the Pacific Islands, there is an additional function of 'acknowledging and codifying Customary Law'. There is emphasis on promoting customs and traditions in law reform. Emphasis is also placed on responding to the needs of the cultural societies and individuals.
93. Overall, the Pacific countries' Law Reform Commissions are required under their statutory functions to ensure that customary laws and the needs of the local traditional setups are addressed in law reform (as highlighted in Table 10 below). The following table sets out a comparative analysis of the statutory functions of the Pacific Islands.

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<sup>47</sup> Weisbrot, above note 43.

<b>Table 10</b> <b>Pacific Islands: Law Reform Commission Legislation - Functions</b>							
<b>Pacific Is LRC Functions</b>	<b>PNG CLRC Act 2004, s12</b>	<b>Fiji LRC Act Cap 26 s5</b>	<b>Vanuatu LC Act Cap 115, s7</b>	<b>Sol Is LRC Act [Cap 15], s5</b>	<b>Tonga LC Act 2007, s29</b>	<b>Cook Is Act 2007, s5</b>	<b>Samoa LRC Act 2008, s6, s4</b>
Examine, study and review for systematic and consistency in reforms	✓		✓	✓		✓	✓
Develop new approaches to reforms & new concepts in the development of law	✓	✓		✓	✓	✓	✓
Codify, revise, consolidate laws		✓		✓	✓		
Reduce separate enactments, simplify law expressions & content	✓	✓		✓	✓	✓	
Repeal obsolete laws & eliminate anomalies	✓	✓	✓	✓	✓		
Simplify, improve and modernise the law		✓		✓	✓		
Recommend restatement, codification, amendment & reform of customary laws	✓			✓			
To take into account local customs; to reflect in the law the distinctive concepts of customs, and to reconcile those concepts;			✓				✓
Develop new approaches and concepts responsive to the changing needs of the small societies & individuals within the country	✓		✓	✓		✓	✓
Promote customs & traditions; enhance the social, cultural, economic and commercial development						✓	✓

94. New Zealand is the only country in the Commonwealth that shares this feature of acknowledging customary context in law reform. The New Zealand Law Commission Act requires that the Law Commission acknowledges the customary values of Maori tikanga (as highlighted in Table 11 ) when providing their recommendations in the Commission's Final Reports. In Australia (Federal Government), New South Wales, Victoria and Queensland there is no emphasis on responding to the changing needs of societies and individuals, nor is there any emphasis in trying to merge customs, common and civil law of these countries.

95. Table 11 sets out a comparative analysis of the functions of the New Zealand and the Australian states law reform commissions.

<b>Table 11</b> <b>Australia and NZ: Law Reform Commission Legislation – Functions</b>					
<b>Australia, NZ, LRC Statutory Functions</b>	<b>NZ LC Act 1985 (s5)</b>	<b>Australia LRC Act 1996 (s21)</b>	<b>Victoria LRC Act 2000 (s5)</b>	<b>Qld LRC Act 1968 (s10)</b>	<b>NSW LRC Act 1967 (s10)</b>
Examine and review for systematic development and consistency in reforms	✓	✓	✓	✓	✓
Develop new approaches to reforms & new concepts in the development of law	✓	✓	✓	✓	✓
Repeal obsolete laws, defects & anomalies		✓		✓	✓
Simplify law expression & content	✓	✓		✓	
Advise on the reviews by government departments	✓			✓	
Develop productive networks	✓				
Recommendations to take account of indigenous and multicultural society	✓				
Power to sponsor, undertake, initiate research, publish & disseminate studies, support seminars & conferences	✓		✓		
Consolidate, codify, revise laws					✓
Simplify, modernise to bring it into accord with current conditions					✓

96. Overall, Samoa and the Pacific Islands Law Reform Commissions are unique in that they put emphasis on developing law reform that take account of their customary contexts. For Samoa, although these functions are not stated in the functions provisions (section 6), the purposes of the Act (section 4) indicate Samoa's intentions to have its customary context promoted in law reform. The purposes of the Law Reform Commission Act Samoa are namely to: (a) promote Samoan custom and traditions; and (b) enhance the social, cultural, economic and commercial development of Samoa; and (c) ensure that the laws of Samoa are kept in a modern state which meets the needs of Government and the community.

#### 4) Revisions on set ups in the Pacific Islands to Date

97. Before a discussion on the composition of Pacific Law Reform Commissions, it must be noted that to date, Fiji's Law Reform Commission has been inactive for some time, Cook Islands and Nauru have not set up their own Commissions, Tonga is experiencing its own setup in 2007, Vanuatu has revised the composition of its

Commission after 32 years (1980-2012), and Papua New Guinea had substantially revised their composition when the Law Reform Commission setup under a 1975 legislation was repealed by the Constitutional and Law Reform Commission Act 2004 (some 29 years after). The Australasian Law Reform Agencies Conference of 2008 in Vanuatu (discussed above) also saw participants present on papers relating to the establishment and re-establishment of Pacific Islands Law Reform Commissions.<sup>48</sup>

98. It may be therefore safe to say that all Pacific Islands are continuously seeking for the best way, the best composition of their Commissions that is suitable and relevant for their plurals contexts. This also shows that the Pacific Islands are willing to revise their original setups when they will for relevance, and not just continue to follow the more modern counterparts where this is not working in the local contexts. It would be beneficial for Samoa also to continue this trend, by, in this review, adopting a setup that does not necessarily follow the more modern counterparts, but to take account of what is most suitable to Samoa's context.

## 5) Composition

99. In a typical law reform commission, the composition is to embody the following principles: - permanence, full time, independence and authoritative.<sup>49</sup> The following Table 12 shows the differences and commonalities in the compositions of Samoa's Law Reform Commission and those of the Pacific Islands, and Table 13 is a comparative analysis of Samoa and New Zealand and Australian states compositions.

<b>Table 12</b> <b>Samoa &amp; Pacific Islands – Commissioner Composition</b>						
<b>Features</b>	<b>Samoa</b>	<b>Vanuatu</b>	<b>Tonga</b>	<b>Fiji</b>	<b>Sol Islands</b>	<b>Papua New Guinea</b>
No. of Commission Members	-	5 Members	4 plus members  Chairperson & not less than 3 Commissioners	4 plus members  Chairman & not less than 3 Commissioners	5 Members	6 prominent citizens (subject to appointment of Chairman)

<sup>48</sup> See Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Paper delivered at the Australian Law Reform Agencies Conference 2008, 10-12 September 2008) 1; See also Alatoi Ishmael Kalsakau, 'The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu's Law Reform Commission' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11 September 2008) 3; Frank Kabui and Anna Guthleben, 'The Establishment of a Commission in the Solomon Islands' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11; Ming C. Leung Wai, 'Samoa's Experience with the Establishment of a Law Reform Commission' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008), 5.

<sup>49</sup> Weisbrot, above note 43.

Term of Office	-	3 years	3 years	3 years	4 years (except for the Chairman)	4 years
Chairperson & Term of Office	-	Chairperson appointed by the Minister of Justice, 3 years	Chairman appointed by Cabinet, 3 years.	Chairman appointed by the Governor General, 3 years.	Chairman appointed by the Judicial & Legal Service Commission, for 5 years.	Chairman, 4 years
Deputy Chairperson, Term of Office	-	Deputy Chairperson appointed by the Chairperson, 3 years	-	-	-	Deputy Chairman elected by Commission members amongst themselves, for 4 years.
Administrative Head & Term of Office	Executive Director, for 3 years	Secretary, 4 years	Chairman, 3 years	Director	Secretary	Secretary, 4 years
Advisory Board, Membership	Advisory Board to assist the Commission, 14 Members, 10 by virtue of office and 4 community members appointed for 3 years	-	Committee to assist in the scrutiny of legislation specified under the Act, 3 Members – from the Judiciary, Executive and Tongan Law Society	Temporary Committee, or a person	Commission may appoint individuals & Committees for consideration of any matter and report to the Commission	-

**Table 13**  
**Samoa & New Zealand & Australian States – Commissioner Composition**

	<b>Samoa</b>	<b>New Zealand</b>	<b>New South Wales</b>	<b>Queensland</b>	<b>Victoria</b>
No. of Commission Members	-	3-6 members	3 plus members  (Chairperson + not less than 3 Commissioners).	At least 3 members (full or part time)	Chairperson and such number of members (full or part time) the Governor in Council considers necessary
Term of Office	-	-	7 years, may be reappointed	3 years in any other case; for judicial officer holders, the Governor in council fixes the term of office.	4 years subject to re- appointment under the Act.

Chairperson Term of Office	-	President (no term)	Chairperson appointed by the Governor. (No term) N.B. however Commission members terms of office above.	Chairperson appointed by Governor in Council. (No term) N.B. however Commission members terms of office above.	Chairperson (full or part time) appointed by Governor in Council. (No term) N.B. however Commission members terms of office above.
Deputy Chairperson Term of Office	-	Deputy Chairperson (no term)	Deputy Chairperson (no term)	Deputy Chairperson (no term) N.B. however Commission members terms of office above.	Acting Chairperson appointed by the Attorney General, for a 6 months term

100. Out of the 10 jurisdictions surveyed, only Samoa does not have Law Reform Commissioners. The following 9 jurisdictions employ law reform commissioners at the highest level of the hierarchy. These are namely Vanuatu,<sup>50</sup> Tonga,<sup>51</sup> Solomon Islands,<sup>52</sup> Fiji,<sup>53</sup> PNG,<sup>54</sup> NZ,<sup>55</sup> New South Wales,<sup>56</sup> Queensland<sup>57</sup> and Victoria.<sup>58</sup> The number of Commissioners range from 4 to 7. All 9 jurisdictions have a Chairperson who is the head of the Commission. The Chairpersons are preferably qualified judges of the higher courts in these respective countries. The calibre or criteria of a Commissioner is generally of a person knowledgeable in traditional customs and laws.<sup>59</sup> In addition, one may be required to be knowledgeable and interested in sociology, anthropology or culture as in the case of the Solomon Islands.<sup>60</sup>

<sup>50</sup> See Vanuatu Law Reform Commission, Government of Vanuatu, 'Our Structure'; See also *Law Commission (Amendment) Act 2012* (Vanuatu) s 2. <<https://lawcommission.gov.vu/index.php/about-us/our-structure>> (accessed 5 June 2018).

<sup>51</sup> *Law Commission Act 2007* (Tonga) s 4.

<sup>52</sup> *Law Reform Commission [Cap 15]* (Solomon Islands) s 3.

<sup>53</sup> *Law Reform Commission Act [Cap 26]* (Fiji) s 3.

<sup>54</sup> *Constitutional and Law Reform Commission Act 2004* (Papua New Guinea) s 3. Also see PNG's Constitutional and Law Reform Commission Official web link at: <http://clrc.gov.pg/> (Accessed 7 August 2018).

<sup>55</sup> NZ Law Commission, 'Our people' *Te Aka Matua o te Ture Law Commission* <http://www.lawcom.govt.nz/content/our-people>. See also *Law Commission Act 1985* (New Zealand) s 9.

<sup>56</sup> New South Wales Law Reform Commission. 'Who we are' *NSW Government: Justice Law Reform Commission* <[http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc\\_aboutus/Who\\_we\\_are.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_aboutus/Who_we_are.aspx)>. Also see *Law Reform Commission Act 1967* (New South Wales) s 3.

<sup>57</sup> Queensland Law Reform Commission, 'Members and staff' <<https://www.qlrc.qld.gov.au/members-and-staff#Members>>. See also *Law Reform Commission Act 1968* (Queensland) s 3.

<sup>58</sup> Victorian Law Reform Commission, 'Who we are' <<http://www.lawreform.vic.gov.au/about-us/who-we-are>>. See also *Victorian Law Reform Commission Act 2000* (Victoria) s 4.

<sup>59</sup> See *Law Commission (Amendment) Act 2012* (Vanuatu) s 3.

<sup>60</sup> See *Law Reform Commission Act [Cap 15]* (Solomon Islands) s 3(3).



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101. As can be seen, Samoa's Law Reform Commission's current composition is different from its counterparts in the Pacific Region, New Zealand and Australia. Samoa does not have Commissioners although section 13 of the Law Reform Commission Act 2008 (LRC Act) provides that Commissioners and consultants may be appointed to manage and undertake certain projects. To date this provision of the LRC Act Samoa (relating to Commissioners) has not been invoked. Compared to its regional counterparts, any such appointments/terms of appointments of Commissioners are optional rather than compulsory with little to no guidance on the appointment criteria as to who, besides a judicial officer on the approval of the Chief Justice, may be appointed a Commissioner for law reform projects.<sup>61</sup>
102. Perhaps it is timely for Samoa to adopt the composition that is prevalent in other jurisdictions, the appointment of Commissioners to assist the Commission with its law reform projects. The appointment of not less than 3 Commissioners may be adopted, where the Commission's work may be assisted by one, two or 3 Commissioners (during a term of appointment) at any one time. The Commissioner/s may be required to meet on the Commission's law reform projects quarterly or 3 times a year only, or where a meeting is necessary, for the staff of the Commission to receive advice from the Commissioner/s on the ongoing projects of the Commission. The criteria for appointment may be such as follows: a retired judge; a very senior law practitioner; senior academics; must have genealogical and honorific knowledge and be very familiar with the customary context of Samoa; even a requirement that an appointee is to be of Samoan descent.
103. There is argument that there is no need for an Advisory Board and the Commission can simply be assisted by a person who can be engaged by virtue of their experience, for certain projects. Thus another line of thinking would be for clear legislative provisions allowing the Commission to engage Commissioners when required for a particular law reform project. There are already provisions to this effect thus the recommendation is for clarity. Input on these proposals will be appreciated.

### 6) Administrative Head of Commission, Staff, Consultants and Experts

104. For Samoa, the Executive Director is the Head of the Office and is statutorily mandated to supervise and direct the work of the Commission.<sup>62</sup> Vanuatu and Solomon Islands both have Secretaries as Head of Office<sup>63</sup> and Fiji<sup>64</sup> has a Director. Contrary to the composition of the Solomon Islands, the Head of Office in Samoa,

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<sup>61</sup> See *Law Reform Commission Act 2008* (Samoa) s 14 which states the conditions of appointments of Judicial Officer as a Commissioner in a law reform project.

<sup>62</sup> See *Law Reform Commission Act 2008* (Samoa) s 10.

<sup>63</sup> See *Law Reform Commission Act [Cap 15]* (Solomon Islands) s 7(1) and *Law Commission (Amendment) Act 2012* (Vanuatu) s 2.

<sup>64</sup> *Law Reform Commission Act [Cap 26]* (Fiji) s 3(8)(a).

Fiji<sup>65</sup> and Vanuatu<sup>66</sup> are expressly required under their Law Reform Commission Acts to be lawyers/legally qualified persons. The Solomon Islands Act only provides that the Secretary of the Commission is to be appointed by the Public Service Commission on terms and conditions as specified in the instrument of appointment,<sup>67</sup> which in reality may expressly require legal qualifications. Only Tonga and Fiji's Law Reform Commission Acts expressly require staff to have legal qualifications.<sup>68</sup>

105. Samoa's Law Reform Commission at present is composed of 16 staff members inclusive of its Head of Office called the Executive Director. As alluded to earlier, the Executive Director and all staff are public servants subject to public service laws.<sup>69</sup> While the Law Reform Commission Act of Vanuatu says that the Commission may appoint any other staff for the proper performance of its functions,<sup>70</sup> the Law Reform Commission Acts of the Solomon Islands, Victoria,<sup>71</sup> New South Wales<sup>72</sup> and Queensland,<sup>73</sup> provide broadly that any other staff of the Commission may be employed under Public Sector/Service Acts of such jurisdictions. Tonga and Fiji's Law (Reform) Commission Acts expressly require staff to have legal qualifications.<sup>74</sup>
106. Tonga, Fiji and Samoa's Law Reform Commissions are expressly empowered to appoint/employ consultants or specialists as necessary to assist in the conduct of the commission's work.<sup>75</sup> The law reform commission legislation of Victoria and Queensland expressly provide for a similar power.<sup>76</sup> This however is not available to the law reform commissions of Vanuatu and the Solomon Islands.

## 7) The Law Reform Process – Samoa and Other Jurisdictions

107. What is the law reform process can be simplified as a reference 'to the process by which changes to state laws are initiated and developed by the Law Reform

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<sup>65</sup> See *Law Reform Commission Act [Cap 26]* (Fiji) s 3(8)(a).

<sup>66</sup> See *Law Commission (Amendment) Act 2012* (Vanuatu) s 2.

<sup>67</sup> *Law Reform Commission Act [Cap 15]* (Solomon Islands) s 7(2).

<sup>68</sup> See *Fiji Law Reform Commission Act [Cap 26]* (Fiji) s 3(8) (b); *Law Commission Act 2007* (Tonga) s 6(1)(a).

<sup>69</sup> See *Law Reform Commission Act 2008* (Samoa) ss 10-11.

<sup>70</sup> *Law Commission (Amendment) Act 2012* (Vanuatu) s 3.

<sup>71</sup> *Law Reform Commission Act 2000* (Victoria) s 15(2).

<sup>72</sup> *Law Reform Commission Act 1967* (New South Wales) s 14. See also section 59 of *Government Sector Employment Act 2013* (New South Wales) which provides for persons employed, or whose services the Commission uses, to be referred to as employees or officers, or members of staff of the Law Reform Commission of New South Wales.

<sup>73</sup> *Law Reform Commission Act 1968* (Queensland) s 14.

<sup>74</sup> See *Law Reform Commission Act [Cap 26]* (Fiji) s 3(8) (a); *Law Commission Act 2007* (Tonga) s 6(1)(a).

<sup>75</sup> *Law Commission Act 2007* (Tonga) s 13; *Law Reform Commission Act [Cap 26]* (Fiji) s 3(6); *Law Reform Commission Act 2008* (Samoa) s 13.

<sup>76</sup> See *Victoria Law Reform Commission Act 2000* (Victoria) s 16; *Law Reform Commission Act 1968* (Queensland) s 9.

Commission.<sup>77</sup> The Law Reform Commissions of the Pacific Islands are significantly influenced by the Law Reform Commissions of their more advanced counterparts; this influence extends to the law reform processes adopted by the Pacific Islands. A perusal of the law reform process of the Australian Law Reform Commission online shows it operates on six stages.<sup>78</sup> On the receipt of a referral, initial research and consultation is undertaken; a Discussion Paper is prepared and submissions are invited on it; the submissions are reviewed and further consultation is carried out; and a final report holds the findings and recommendations. Each project depends on the inquiry, the scope of stakeholders and interest groups, the time period allocated, and the range of laws to review.

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108. The law reform process of Samoa contains the significant stages common in other law reform commissions. As seen in the Chart below, Samoa's law reform process adopts a very similar process to that of the ALRC.<sup>79</sup> A similar approach is adopted by the law reform commissions of the Pacific region.



109. Section 8 of the Law Reform Commission Act 2008 (LRC Act) says 'the Commission may regulate its procedure in such manner as it thinks fit', subject to any provisions in the Act.<sup>80</sup> There are no other express provisions in the LRC Act on the procedure of the Commission. Samoa's 7 step stages are discussed further below, with references to the differences and the common features it shares with other jurisdictions.

<sup>77</sup> Seumanutafa, above note 1, 25.

<sup>78</sup> Australian Law Reform Commission Official website; see <https://www.alrc.gov.au/law-reform-process>.

<sup>79</sup> Seumanutafa, above note 1, 143-144.

<sup>80</sup> *Law Reform Commission Act* (Samoa) s 8.

**Table 14**  
**Samoa & Other Jurisdictions - Law Reform Process**

<b>STAGES</b>	<b>SAMOA</b>	<b>OTHER JURISDICTIONS</b>
<b>Stage 1: Referral of Terms of Reference (TOR)</b>	This is the initial stage of the process where referrals are made to the Commission by either the Prime Minister, Cabinet or the Attorney General, pursuant to section 6(b) of the Law Reform Commission Act 2008 (LRC Act). The referrals are mainly provided by way of letter with the relevant Terms of Reference.	The following countries, namely NZ, Australia, Victoria, NSW, Vanuatu, UK, Queensland, Solomon Islands, have this initial stage of the law reform process. For NZ, it is called the "Idea for Law Reform" while in the UK, it is known as the 'Initiation Stage'. <sup>81</sup>
<b>Who may issue a TOR?</b>	The Prime Minister, Cabinet and the Attorney General may instruct/direct the Commission to review and reform a particular subject matter. The Commission may also propose a Terms of Reference for the approval of the Prime Minister and the Attorney General.	In jurisdictions like NZ, Vanuatu, Solomon Islands and Victoria, the law reform process is commenced by issues/concerns raised by community members, private citizens, or even lobby groups.
<b>Stage 2: Preliminary Research and Consultation</b>	The Commission carries out its preliminary research and consultations with the relevant stakeholders affected by the review referred in Stage 1. The preliminary findings and outcomes of Stage 2 informs a Discussion/Issues Paper in Stage 3.	NZ, Australia, Victoria, NSW, Vanuatu, UK, Solomon Islands have this stage. In NZ and the Australian territories of New South Wales, Victoria, Queensland, their law reform commissions are afforded the option of gathering or assembling a temporary group of experts or people affected by the subject matter a project. The mandate of such a temporary group is to assist or advise the Commission develop either an Issues or a Discussion Paper for Stage 3 of the Law reform process. For instance, NZ has a Maori liaison committee.
<b>Stage 3: Discussion/Issues Paper</b>	A Discussion or Issues Paper is developed for the purpose of public consultations. This Discussion/Issues Paper is submitted to Cabinet for approval.	All 8 jurisdictions referred to above have this uniform third stage of the Law Reform Process.
<b>Stage 4: Public Consultations</b>	'Consultation' has been referred to as the 'cornerstone' of well-informed law reform projects. This	All 8 jurisdictions have this uniform fourth stage of the Law Reform Process.

<sup>81</sup> See NZ Law Commission, 'Introducing the Law Commission Our job is to review the law' *Te Aka Matua o te Ture Law Commission* <[http://lawcom.govt.nz/sites/default/files/contentAttachments/Introducing%20the%20Law%20Commission\\_3.pdf](http://lawcom.govt.nz/sites/default/files/contentAttachments/Introducing%20the%20Law%20Commission_3.pdf)> (accessed July 2018); UK Law Commission, 'How we work' *Law Commission Reforming the law* < <https://www.lawcom.gov.uk/about/how-we-work/>> (accessed July 2018).

	is a crucial step and a core statutory function of the Commission.	
<b>Stage 5: Compiling submissions &amp; Further Research</b>	The Commission compiles the submissions received from public consultations. It then carries out further research on the issues and submissions raised to better inform recommendations for legislative changes in a Final Report.	All 8 jurisdictions have this stage of the law reform process. However, in the UK, this is also known as the policy development stage, the UK Law Commission may produce more Issues papers or consult further on some or the Bill before tabling their final report to the UK Parliament. <sup>82</sup>
<b>Stage 6: Final Report Submitted to Cabinet</b>	<u>This contains the</u> Commission's research findings, analysis and recommendations for reform. Once a Final Report is completed by the Commission, it is submitted for Cabinet's endorsement.	All 8 jurisdictions have this final report stage of their law reform process, which is the last stage.
<b>Stage 7: Referral of Final Report to Parliament</b>	Pursuant to section 9(2) of the LRC Act, the Prime Minister tables the Cabinet approved Final Report before Parliament. Thus, once a Final Report has been translated, edited and bound, it is tabled by the Prime Minister in Parliament.	All countries have the same process. NZ Law Commission is required to submit its final product/report to either the Minister or the Attorney General instead of Parliament. In Victoria, the Law Reform Commission submits its final product to the Attorney General who then tables this report to Parliament within 14 sitting days.

## 8) Post Final Report Crucial Steps - SAMOA

110. Although it is not an expressed mandate of the Samoa Law Reform Commission, in the interests of the recommendations of a Final Report being implemented, over the years, the Commission has maintained an interest and made efforts to follow its Final Reports' recommendations; with a view (and hopes) that the recommendations are realised.

### *a) Drafting of recommended laws and recommended revisions to laws*

111. The drafting of recommended laws and revisions to laws has only been made possible by the availability of funding and resources, and the support from the relevant Ministries and Corporations. Most of the past legislative drafting work were undertaken by consultants funded by the Law and Justice Sector and donor partners such as UNICEF. The consultants engaged were appointed and required to follow the Legislative Drafting Manual of the Office of the Attorney General. This assisted the drafting capacity of the Office of the Attorney General which still had the final say on a draft Bill or revisions to an existing Act in an Amendment Bill. In the absence of adequate funding and support from the implementing Ministries and

<sup>82</sup> UK Law Commission, 'How We Work' *Law Commission Reforming the law*  
<<https://www.lawcom.gov.uk/about/how-we-work/>>.

Corporations and Samoa's partner international agencies, Final Reports' recommendations cannot be fully realised in enacted into laws.

112. As alluded to earlier, the Commission does not have the mandate to progress and implement the recommendations for new laws or revisions to laws as recommended in the Final Reports. This is the primary function of the relevant Ministries and Corporations which administer the relevant laws. At times, the Commission notes that some of the Ministries and Corporations which are responsible for particular laws for which revisions are recommended were not aware of the reforms carried out by the Commission.
113. This may be due to the referral process where the majority of Terms of References are only addressed to the Commission without notifying the relevant Ministries and Corporations affected by the laws to be reviewed. For example, the initial correspondence from the Attorney General in November 2008 providing the work plan of projects to be reviewed, did not copy the relevant Ministries and Corporations.
114. Some, if not all of the relevant Ministries were only informed of their laws either in the consultation process or at the Final Report stage. Without the support from these Ministries and Corporations to progress Final Report recommendation for new laws or revisions to laws, the Commission's recommendations cannot progress further following the Final Reports. Currently, there is no clear process in place to accommodate this issue.

#### *b) Translation and Printing of 80 copies*

115. In the 7 steps of the Commission's current law reform process, except for cover letters to Cabinet attaching a Final Report which are required to be in the Samoan language, the language of instructions of law reform reviews from the Terms of Reference stage to the Final Report is the English language.
116. Following Cabinet endorsement, the Cabinet Decision endorsing a Final Report effectively also requires the Commission to translate the English version endorsed, before presenting the Final Report to the Prime Minister for tabling in Parliament. It is a Constitutional requirement for all reports to be presented before Parliament to be both in the English and Samoan texts.<sup>83</sup> The Commission engages and pays for the translation services of certain individuals who run the business of providing 'translation' services. The relationship between the Commission and a translator is governed under a Contract of Services, and depending on the length of the Final Report, translation can take up to between 2 to 4 weeks, and longer for lengthier reports.

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<sup>83</sup> *Constitution of the Independent State of Samoa 1960* (Samoa) art 54(2).



117. On the return of a translated version of a Final Report to the Commission, the Commission checks the translation i.e. the Samoan text against the English text. Sometimes this may cause a delay where errors are found where the Samoan text does not reflect the English text. Efforts to correct mistakes may take weeks and this has caused delay in some Final Reports reaching Parliament. The Commission hopes it will have capacity to translate the English texts to the Samoan texts in-house, to ensure the Samoan text does reflect the nuances and meanings intended in the English text.
118. When the translation issues are resolved, both the English and Samoan texts of the Final Report are sent to a designated printing service for samples. After checking the samples against each other, which again may take a few days to some weeks where the samples, in particular the Samoan version are misprinted), and being satisfied both versions are in order, both the English and Samoan versions of the Final Report are then sent to the printing company for printing and binding. It is a directive of the Office of the Legislative Assembly that 80 copies of both the English and Samoan versions of a Final Report must be provided for Parliament. Again, depending on the length of the Final Report and the availability of printing services, the time period between sending and receiving of bound English and Samoan versions of 80 copies ranges from 2 to 4 weeks. The translation, printing and binding of Final Reports have been known to cause much delays between Cabinet endorsement and the Final Reports being tabled in Parliament. In addition, the translation, printing and binding of the Final Reports usually takes a significant slice off the budget of the Commission.

*c) Samoa - Parliament procedure on the Commission's Final Reports*

119. The Law Reform Commission Act 2008 states that the Prime Minister shall lay a copy of the Final report before the Legislative Assembly as soon as practicable after receipt of the Report. The intention, as ascertained by 2001 Parliamentary debates on the old 2002 Law Reform Commission Act, is to assist Parliament understand the rationale behind a Bill which has been developed and tabled in Parliament, based on the Commission's Final Report. The submission by the Commission of a Final Report in both the English and Samoan versions to the Clerk of the Legislative Assembly meets this requirement.
120. Some of the issues faced over the years within this period, from Cabinet endorsement to presentation to Parliament, and Parliament actually debating and deciding on that Final Report, is contributed to by a variety of matters such as those mentioned above (translation, printing and binding) as well as Parliament's priorities and procedures. These matters may at times to significant delays. As far

as the Commission is aware, the following is the process of a Commission's Final Report before Parliament:<sup>84</sup>

- a) The Final Report is tabled in Parliament (first instance).
- b) Parliament refers the Final Report to the relevant Parliamentary Committee, depending on the nature of the Final Report e.g. Pule a le Matai Sa'o Final Report was referred to be considered by the Standing Orders, Electoral, Petitions and Offices of Parliament Committee. At referral, the Committee is instructed by the Speaker of the House to report back to Parliament at a next sitting.<sup>85</sup>
- c) The relevant Parliamentary Committee considers the Final Report and invites the Commission to a session with the Committee to explain or expand on a Final Report. It may also summon other parties it wishes to summon under its statutory<sup>86</sup> and Standing Orders powers,<sup>87</sup> to make submissions towards the Final Report.
- d) Following this meeting, the Parliament Committee prepares an outcome report (usually agreeing/disagreeing with the Commission's recommendations in its Final report) and sends it to the Commission for a Government's response.
- e) The Commission drafts a response on behalf of the Government and submits this response to Cabinet for endorsement.
- f) Once Cabinet endorses, the Commission will send Government's response to the Committee, which will then draw a report based on Government's response. It is usually at this stage that more explanations are taken into account by the Committee.
- g) The Final Report is finally again tabled in Parliament together with the relevant Parliamentary Committee's Report with recommendations for endorsement of the Final Report or otherwise. In the Commission's experience, the majority of the Final Reports of the Commission have been endorsed by Parliament.

The majority of the Commission's projects have been tabled before Parliament and have gone through the Parliamentary Committee stage.

#### *d) Outstanding LRC Final Report with Parliament*

121. For reasons unknown to the Commission, the Traditional Knowledge project is a project that has not gone through the Parliament process. Three Final Reports have been referred by Parliament to the relevant Parliamentary Committee but have gone no further. These are the Final Reports for the Review of the Commission of Inquiry Act, the Review of the Judicature Ordinance 1961 and the

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<sup>84</sup> Email correspondence between the Executive Director (Samoa Law Reform Commission) and the Assistant Clerk of Legislative Assembly, 11 October 2018.

<sup>85</sup> Standing Orders of the Parliament of Samoa (Amended January 2016), *Part XXXIII Parliamentary Commission and Parliamentary Committees, Order 171*.

<sup>86</sup> *Legislative Assembly Powers and Privileges Ordinance 1960* (Samoa) pt 2.

<sup>87</sup> Standing Orders of the Parliament of Samoa (Amended January 2016), *Part XXII Parliamentary Committees, Order 155*.



Review on the possible setup of a National Heritage Board for Samoa. It is unclear to the Commission how these Reports can be moved forward, as they are now in the domain of Parliament. Perhaps the Parliamentary Committees should be encouraged to report back to Parliament as soon as possible, on the Final Reports of the Commission. The Commission must be vigilant in following up on its outstanding Final Reports with Parliament and ensure it plays its part where required, whether its Final Reports are endorsed in part or in full by Parliament or otherwise.

122. Importantly, the Commission, being a non-income generating government office, must be interested in seeing to the outcomes of each of the Commission's Final Reports, to ensure the full Government budget allocated to the Commission every financial year is fully utilised and accounted for. In saying this, the Commission is mindful once Reports reach Parliament, it is in Parliament's domain and the Standing Orders of Parliament and the Legislative Powers and Privileges of Parliament in the Legislative Powers and Privileges Ordinance 1960, come into play. However if Samoa is to ensure all Government resources are accounted for, there may be room for Cabinet and the Members of Parliament to consider the following discussions.

*e) Standing Orders of Parliament on the Referral of Reports to Parliamentary Committees*

123. A review of the Standing Orders of Parliament as updated in 2016 shows that the Commission's Final Report is a "Parliamentary Paper" for the purposes of the Standing Orders of Parliament (Standing Order 2). Under Standing Order 166, a Parliamentary Committee, upon consideration of a Parliamentary Paper shall report back to the Assembly within two (2) months from date of referral, unless further time is moved for and granted. More time may therefore be granted to a Parliamentary Committee in addition to the two originally given. In addition, where a Parliamentary Committee wishes to pursue matters in a Final Report in the interest of Parliament, the Committee may move in the Assembly to that effect. This may also add time on to the original two months given to the Parliamentary Committee.
124. Again, the Commission, being a non-income generating government office, all parties which see the Final Reports to the end must ensure the full Government budget allocated to the Commission every financial year is fully utilised and accounted for. This includes the Parliamentary Committees, in reporting back to Parliament on the Final Reports of the Commission within the stipulated time or within reasonable time.
125. It is recommended that Cabinet considers a motion to be moved in Parliament for a revision to the Standing Orders of Parliament, for any extension to a Parliamentary Committee to report back on a Law Reform Commission Final Reports not to exceed an additional time up to 3 months. This is to ensure Parliament makes a decision

on the Commission's Final Reports, and a Commission's Final Report is utilised (or otherwise) to address reforms to law in Samoa, as the Commission is statutorily required to do so.

## 9) Other Significant Challenges in the Pacific Islands

### *a) Public Consultations*

126. Perhaps the most distinguishing key feature of law reform agencies beside their expertise, permanency and independence includes the full commitment to consultations with members of the public.<sup>88</sup> Samoa's Legislative Drafting Handbook 2008 also echoed in consonance this key feature of the law reform process to effective law reform.<sup>89</sup> To keep the momentum going on exploring work of the Commission 10 years into the making, this part seeks to explore the challenges the Commission has faced particularly in the conduct of the consultation phase of the law reform process as it strives towards effective law reform.
127. In a paper presented at the Australasian Law Reform Agencies Conference held in Vanuatu in 2008, Neil Rees declared that effective community consultation is "one of the most important, difficult and time consuming activities of a law reform commission."<sup>90</sup> Michael Sayers dubs it as one of the important attributes of Law Reform agencies, that is, their commitment to full consultation and public participation.<sup>91</sup> Rees suggested there are two major purposes for community participation:<sup>92</sup>
- (1) 'to gain responses and feedback; and
  - (2) to promote a sense of public ownership over the process of law reform.'
128. This part discusses the challenges to the 'consultation' stage experienced (though not alone) by the Samoa Law Reform Commission.

### *b) Technology and internet access*

129. In Australia and New Zealand, it is perhaps safe to say that generally communication is effective due to the majority of the population who are accessible to the internet. In 2016, 89.4% of New Zealand's population was reported to have access to the internet.<sup>93</sup> In Australia it was reported in 2016 that 85.1% of its population had access to the internet.<sup>94</sup> Both countries have well informed websites informing the public of their projects and encouraging submissions, as well as Facebook pages

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<sup>88</sup> Michael Sayers, 'Small States and Law Reform' (Paper prepared for the Commonwealth Secretariat: Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions, London, 4-5 October 2007) 1.

<sup>89</sup> Seumanutafa, above note 1, 145.

<sup>90</sup> Rees, above note 44, 14.

<sup>91</sup> Sayers, above note 88, 1.

<sup>92</sup> Rees, above note 44, 14.

<sup>93</sup> Internet Live Stats, 'New Zealand Internet Users' <<http://www.internetlivestats.com/internet-users/new-zealand/>>.

<sup>94</sup> Internet Live Stats, 'Australia Internet Users' <<http://www.internetlivestats.com/internet-users/australia/>>.

that provide a platform for discussions with the Commission's current projects. Unfortunately, there is no data or information available to highlight the efficacy of consultations, however there is an assumption that with the bulk of the population having access to the internet, the views of the majority of the public can be obtained easily via internet and social media.

130. In the Pacific, communication is very limited. In Fiji, which is considered to be a more developed country compared to the rest of the Pacific Islands, only 46.8% of the population has access to the internet.<sup>95</sup> The issue that most Pacific countries face is their geography and that there are still some remote areas or rural areas where there is no electricity or phone communication apart from a very limited mobile coverage in the provincial capitals of the Solomon Islands.<sup>96</sup>
131. The Solomon Islands contains over 900 islands, with 9 provinces and stretching from the Shortland Islands next door to PNG in the North down to the Santa Cruz Islands which are closer to Vanuatu than the capital of the Solomon Island.<sup>97</sup> It covers 1.35 million square kilometres of sea with a total land area of 27,556 square kilometres. The total sea area is roughly the same size as Australia; the total land area is approximately that of Portugal.<sup>98</sup> Therefore providing information especially to these remote areas is challenging. Vanuatu and Samoa Law Reform Commissions are the only two Pacific countries with official websites. The Solomon Islands have no official website but operates a public discussion forum Facebook page. Though official Law Reform Commission websites have been set up in Samoa and Vanuatu, the challenge is to keep them updated and working.
132. In the past few years, to the competing current networks Digicel, Bluesky and Netvo Samoa, Samoa has had a rapid growth of mobile coverage. With a population of 194,523 (reported in 2016), the Samoa Law Reform Commission received an average of 600 submissions on projects such as the Pule Matai Sa'o project.<sup>99</sup> This is only 0.31% of Samoa's total population. The Samoa Law Reform Commission has an official website which provides updated project information and encourages submissions, as well as a Facebook page that provides a platform for discussion. However, in 2016 it was reported that 29% of Samoa's population had access to the internet.<sup>100</sup> It is also observed, most who do provide comments on the Facebook pages are people living overseas.
133. Thus, although there is now internet technology, the Samoa Law Reform Commission has a long way to go before relying on the official Law Reform Commission website and social media to obtain effective public input on law reform

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<sup>95</sup> Internet Live Stats, 'Fiji Internet Users' <<http://www.internetlivestats.com/internet-users/fiji/>>.

<sup>96</sup> Kabui & Guthleben, above note 40, 10.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Samoa Law Reform Commission, *Pule a le Matai Sa'o*, Final Report No 18 (2017) 5.

<sup>100</sup> Internet Live Stats, 'Samoa Internet users' <<http://www.internetlivestats.com/internet-users/samoa/>>.

projects. Perhaps in the near future, with the new developments in technology e.g. the fibre optic cable being discussed and put in place by the Government, law reform Discussion Papers may be wider circulated, and a higher percentage of the population will be sufficiently technologically educated to be able to make a contribution to law reform from within the village.

*c) Further challenges to consultation in the Pacific Islands*

134. No doubt Samoa's Law Reform Commission has had its fair share of challenges and complications in the conduct of its work throughout the 10 years since it started operations in 2008. As a fairly new office eager to get off the ground over the last 10 years, making official documentation of the challenges or complications it has encountered over the years pertaining to its composition, its functions and its law reform process may not have been deemed a priority. Hence, no such document or information signifying whether the current law reform process is effective is readily available.

135. There are however recent writing on the challenges to law reform consultations. The lack of funding and adequate resources are named as the primary and continuing challenge.<sup>101</sup> The lack of resources/funding is exacerbated by the following realities particular to Samoa:

(a) Expensive cultural etiquettes:

As a country with a culture founded largely on the principles of respect and reciprocity, it was noted from the empirical data collected that this has cultivated a tendency amongst consultation participants to expect reciprocity by the visitors or the requesting consultants, usually in monetary form or food donations, for their attendance at consultations.<sup>102</sup>

(b) Disinterest in laws and law reform consultations:

A mixture of views was discovered when querying the interview participants' knowledge at law reform consultations. For the village sector interview participants, it was noted that the majority of the participants conveyed that law reform consultation was something rarely heard of in Samoa.<sup>103</sup> The same concern was flagged by some government sector members.<sup>104</sup> There is little interest in Parliament laws generally, while village laws and rules are more respected.<sup>105</sup>

*d) Common Challenges*

136. At the conduct of the Australian Law Reform Agencies Conference in Port Vila Vanuatu in 2008, the Pacific Island countries shared some individual

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<sup>101</sup> Seumanutafa, above note 1, 145-148.

<sup>102</sup> Ibid, at 146.

<sup>103</sup> Ibid, at 146.

<sup>104</sup> Ibid, at 147.

<sup>105</sup> Ibid, at 148.

struggles/challenges they faced primarily in reforming their own country's laws immediately after independence. These include:<sup>106</sup>

- Lack of resources and funding for law reform, particularly to fund public consultations and to obtain and maintain senior Commission legal staff;
- Limitation/lack of local expertise to assist law reform;
- Low confidence/regard/mistrust of the public in public institutions including the Law Reform Commissions;
- Lack of collaboration and cooperation amongst public institutions.

## 10) Contextualising Law Reform in Samoa

### a) *Demography and Relevant Factors - Samoa*

137. Samoa is a sovereign independent democracy with a Head of State, a monarchical-like position traditionally reserved for a paramount title holder of Samoa.<sup>107</sup> Samoa's Head of State thereby appoints the Prime Minister from its 50 democratically elected parliamentarians called the 'fono' to head the government of Samoa.<sup>108</sup> Samoa's legal system is constitutional with an amalgamation of English common law or equity and customary law in so far as they qualify as 'law' under Samoa's Constitution.<sup>109</sup>
138. Indigenous Samoans make up about 92% of Samoa's total population.<sup>110</sup> Those of European or Polynesian ancestry make up 7% with the remaining percentage of either European or Asian ancestry.<sup>111</sup> As of 2016, Samoa's total population was 195,843 (37,352 live in the urban area and 158,491 live in the rural village areas) with 75% of that total living on Upolu, the lesser islands mass of the two main islands of Samoa.<sup>112</sup>
139. With a total land area of about 2,830 sq km,<sup>113</sup> about 81% of that total is customary land with the remaining either held as freehold (4%) or owned by government for

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<sup>106</sup> See Alatoi Ishmael Kalsakau, 'The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu's Law Reform Commission' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11 September 2008) 3; Frank Kabui and Anna Guthleben, 'The Establishment of a Commission in the Solomon Islands' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 11 September 2008); Alisi Taumoepeau and Guy Powles, 'Constitutional Change in Tonga' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008).; Katy Le Roy, 'Reforming the Architecture of Legal Systems' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008).

<sup>107</sup> International Business Publications USA, *Samoa (Western) Business Law Handbook* (2013) 219.

<sup>108</sup> Ibid.

<sup>109</sup> University of the South Pacific, 'Samoa system of government information' *Pacific Island Legal Information Institute* <<http://www.pacii.org/ws/government.html>>. See also article 2 of the Constitution of the Independent State of Samoa 1960 (Samoa) for the definition of 'law'.

<sup>110</sup> Sophie Foster, 'Samoa Island Nation, Pacific Ocean' *Encyclopaedia Britannica* <<https://www.britannica.com/place/Samoa-island-nation-Pacific-Ocean>> (accessed July 2018).

<sup>111</sup> Ibid.

<sup>112</sup> Samoa Bureau of Statistics, 'Population and Housing Census 2016' *Samoa Bureau of Statistics* <<http://www.sbs.gov.ws/index.php/population-demography-and-vital-statistics>> (accessed July 2018).

<sup>113</sup> Kiste, Robert C, 'Samoa' Microsoft Encarta Premium 2009.

public purposes (15%).<sup>114</sup> Samoa remains an agricultural society with its recent 2015 agricultural survey recording about 97% of its total 28,119 households categorised as ‘agricultural households’ having either or both growing some crops or raising some livestock.<sup>115</sup> Agriculture remains a secondary activity amongst many households in Samoa with the main purpose of crop production for subsistence farming.<sup>116</sup>

140. As of December 2017, the number people employed in the formal sector in Samoa totalled up to 24,177 with males comprising slightly more than half of that number with the remaining female.<sup>117</sup> The total employed population in Samoa however inclusive of the informal sector employees amounted up to 24,188 people with majority being females who are also recorded as receiving the biggest share of total wages compared to its male counterparts.<sup>118</sup>
141. Samoa’s health care system comprises of public and private health sector with the latter comprised of private sector practitioners, dentists, nurses, pharmacists and so forth. Non-Government Organisations (NGOs), academic institutions, community based organisations and development partners have started to play a more active role in providing health services as part of the new health reforms with the objective, ‘Improving the quality of life for all Samoan people’ in mind.<sup>119</sup>

#### *b) Law Reform Process Relevance to Context*

142. From the above data we can ascertain that in Samoa, the majority of the population who live in the rural village area and their households are agriculturally active and rely heavily on their crops and livestock. Large bulk of the land are customary land, which means there is a vast emphasis on community living and communal ownership. However, out of the 291 laws of Samoa (as of December 2017) only 5 laws discuss customary land. Prima facie, this gives an indication that only a few laws of Samoa’s fabric of laws are directly relevant and would be of interest to the majority of the population. The negative effect of parliamentary laws marginalising

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<sup>114</sup> Press Release, ‘Customary Land are safe and secure’ (24 February 2018)

<<http://www.samoaplanet.com/samoa-and-why-the-land-titles-registration-act-2008-is-in-incapable-of-alienating-customary-land/>>.

<sup>115</sup> Samoa Bureau of Statistics, ‘Agricultural Survey 2015 Report’ (2016)

<http://www.sbs.gov.ws/index.php/new-document-library?view=download&fileId=1845> (accessed August 2018).

<sup>116</sup> Ibid.

<sup>117</sup> See Samoa Bureau of Statistics, ‘Employment Statistics December 2017 Quarter’ (7 March 2018)

<<http://www.sbs.gov.ws/index.php/new-document-library?view=download&fileId=2226>>: Formal employment sector refers to government regulated employment not counting the informal sector and individual contributors to which certain groups of workers such as proprietors, self-employed workers, voluntary workers, farm workers and domestic workers belong to.

<sup>118</sup> Ibid.

<sup>119</sup> Samoa Bureau of Statistics, ‘Samoa Demography and Health Survey 2014’

<<http://www.sbs.gov.ws/index.php/new-document-library?view=download&fileId=1845>>.



the importance of customary laws, jeopardies the existence of Samoan customs and identity.<sup>120</sup>

143. Law acts as a guideline to society. Therefore, it depicts the make up of a society and its beliefs and values. In other words, the law needs to be relevant and accessible to society and its population. If there is a review of law, and for effective Law Reform to occur we need to take a holistic approach and look at relevant factors that make up Samoa's society. This means there needs to be a consideration of factors such as the demography, daily routines of the population, beliefs and values of society, and its livelihood are vitally important when a law is being reviewed. Taking these factors into consideration also ensures that the purpose of the Law Reform Commission is met, and that is, to meet societies and Government's needs. This part will discuss further and explore whether the current Law Reform process utilised by the Commission provides for the Commission to carry out its mandatory obligations as stated in its Act.<sup>121</sup>
144. In previous consultations conducted by the Commission, there is a general observation that the population lack knowledge and interest in the current laws of Samoa. The community members who show up during consultation generally comment they are not aware of the current law. Due to the lack of awareness of the law, the public are also not aware of the law reform process.<sup>122</sup> The state laws are irrelevant to the village, and activities like growing and maintaining a plantation are more important as this contributes to one's livelihood.<sup>123</sup> Perhaps this is the reason the public is only aware of the Village by-laws, because there is a direct effect on their daily lives. Thus, the reason why they have no interest in law reform projects.<sup>124</sup> Limited understanding of the state legal system means the public is unaware of the public's individual rights and duties under the state system.<sup>125</sup> One raises the question if the majority of the population are not aware of the law, it is nonsensical to expect informed input for law reform from the public.

*c) Legislative Drafting as a Mandate for the Commission where there is Capacity*

145. An additional skill that needs to be acknowledged is providing drafting instructions and working with legislative drafters to develop legislation.<sup>126</sup> Currently, it is not a mandate of the Samoa Law Reform Commission to draft legislation of the final recommendations provided in their Final Reports. However, unofficially it is the current practice for both of these Law Reform Commissions (New Zealand and Samoa) to provide a draft bill that parallels recommendations of their Final Reports, or in New Zealand's case provide assistance to the Parliamentary Counsel's during the process of drafting the Bill. The Commission has found that when providing a

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<sup>120</sup> Seumanutafa, above note 1, 85-86.

<sup>121</sup> See *Law Reform Commission Act 2008* (Samoa) s 6.

<sup>122</sup> Seumanutafa, above note 1, 87.

<sup>123</sup> Ibid, at 87-88.

<sup>124</sup> Ibid, at 93.

<sup>125</sup> Ibid, at 92.

<sup>126</sup> Kabui & Guthleben, above note 40, 6.

draft Bill with the Final Report, a resulting Draft Bill is usually tabled and debated in Parliament more speedily than a Final Report without a resulting Draft law.

146. The Commission believes that if the Commission is also permitted to draft resulting legislation (from the Final Reports recommendations) for the review of the Office of the Attorney General, this would assist the early passage through Parliament of draft Bills from the Commission's reviews, and further assist reduce the workload of the Legislative Drafting Division of the Office Attorney General Drafting.
147. The Solomon Islands are considering providing a model or draft Bill with a detailed explanatory memorandum instead of the Final Reports. This could then be provided to the government to streamline the enactment process.<sup>127</sup> The advantage of this approach is that it makes it much easier for the work of the Commission to be clearly understood and to be progressed by the government of the day.<sup>128</sup>

*d) A holistic law reform process*

148. An important aspect of the Law Reform Commission work is the strong role that it will potentially play in providing education and conveying legal knowledge to the general community.<sup>129</sup> Before consultations, legal education of the laws that are being reviewed for the public is essential, for effective law reform. The oral tradition of passing on information from person to person is assuredly effective in Solomon Islands. It is affectionately called the 'coconut telegraph' and we will have to rely on it to a certain extent to get our message out across the miles. <sup>130</sup> The Solomon Islands LRC plans to advertise well in advance of the timing of the programs so that people can tune in. In addition, full texts of the programs will be printed in the local paper, both in English and in Pijin. Newspapers in the Solomon Islands are read cover to cover and shared amongst people, especially in the Provinces, so it is hoped over time our message will be spread far and wide.<sup>131</sup>
149. In the celebration of the Samoa Law Reform Commission's 10<sup>th</sup> years Anniversary since establishment, the following extracts are relevant.

"A suitable law reform process for Samoa must reflect the cultural context and the local realities of Samoa. The unique features of each Pacific society determine the law reform process that is suitable for their needs. The most effective way to secure public acceptance of new laws or any change in laws is to gain the public's respect for the process. A fitting law reform process requires a holistic effort from Parliament, the judiciary, the institutional law reform, law reform agents, the State and state agents, the legal profession, the village councils and traditional

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<sup>127</sup> Ibid, at 7.

<sup>128</sup> Ibid.

<sup>129</sup> Kabui & Guthleben, above note 40, 6.

<sup>130</sup> Ibid, at 11.

<sup>131</sup> Ibid, at 11.



structures and the general public of Samoa. As the State is accountable for the country's development as a whole, it must lead the required changes through the relevant constitutional offices, state ministries and agencies."<sup>132</sup>

"The importance of an informed and educated public cannot be over emphasised. Ongoing public awareness of state laws is vital for progressive reforms. Community programmes must run parallel with state efforts to develop reforms that take account of customs. This collaborative approach increases opportunities to develop an understanding of law reform. Community awareness of state laws and individual rights entrenched in the Constitution is crucial for a whole of society approach to law reform. Parliamentary laws and court decisions must be more readily available to the public than they currently are, in the Samoan language. The state ministry responsible for villages (Internal Affairs) and the Ombudsman (under its human rights functions) are some of the state offices best placed to drive awareness programmes."<sup>133</sup>

#### 11)A Proposed Law Reform Manual for Samoa – Outline

150. Having considered the above matters, a proposed Outline for a Law Reform Process in a Manual is set out below in Part C.

### Part B – Issues and Recommendations

**Issue 5** – Perhaps it is now timely for Samoa to consider a setup on the composition of the Commission, convenient for today's context. (*See pghs 102 & 103, pg 37*)

**Recommendation 5A** – To replace the current Advisory Board with not more than 3 Commissioners (could be one, two or 3 at any one time) to be appointed on a part-time basis, to assist the Executive Director and the staff of the Commission meet the Commission's functions.

**Recommendation 5B** – To revise the Act to replace the Advisory Board provisions with clear legislative provisions allowing the Commission to engage Commissioners when required for a particular law reform project. There are already provisions to this effect thus the recommendation is for clarity.

**Issue 6** – The Commission is a non-revenue generating Commission. It is therefore important that all its Final Report are decided upon, to make sure all the expenses on each Review is accounted for. (*pghs 124 - 125, pg 45-46*)

**Recommendation 6** – It is recommended that Parliamentary Committees be encouraged to complete and report back to Parliament on a Commission report, to ensure the budget allocated to the Commission is accounted for. The Parliament is also encouraged to consider a revision to the Standing Orders of Parliament to allow the Hon Speaker and the Hon Committee Parliamentary Members to express the exact time frame and

<sup>132</sup> Seumanutafa, above note 1, 170.

<sup>133</sup> Ibid, at 171.

extension upon which a Parliamentary must report back on a Final Report of the Commission.

**Issue 7** – The majority of the Final Reports of the Commission had recommended revisions to laws, or a brand new legal framework. To assist the Office of the Attorney General, the Commission may be permitted to draft resulting legislation (from the Final Reports recommendations) for the review of the Office of the Attorney General. This would also assist the early passage through Parliament of draft Bills from the Commission's Projects. *(Pgh 146, pg 52)*

**Recommendation 7** - That the Act (Law Reform Commission Act 2008) be revised to permit the Commission to draft legislation recommended and resulting from a Final Report of the Commission, for the relevant consultations and final review of the Office of the Attorney General.

## 4. TERMS OF REFERENCE 3

To, together with Office of the Attorney General (OAG), provide on a suitable framework for a new updated legislation and a Law Reform Project Handbook.

### PART C - Way Forward: Possible Recommendations

This Part is discussed under 2 headings.

#### 1) Suggested new updated legislation outline.

(Proposed revisions on highlighted provisions)

<b>Table 15</b> <b>Suggested Revisions for an Updated Law Reform Commission Act</b>		
<b>Sections</b>	<b>Section headings</b>	<b>Proposed Revision</b>
1	Short title and commencement	No change
2	Interpretation	To be revised to cater for any new terms defined
3	Act to bind the Government	No change
4	Purpose of the Act	No change
5	Establishment of the Commission	No change
6	Functions of the Commission	Revise for clarity of functions Revise to include legislative drafting where there is capacity, and still subject to AGO review.
7	Powers of the Commission	Revise
8	Procedure of the Commission	No change
9	Responsibilities of Commission and the Prime Minister	Revise
10	Executive Director	Revise to remove subsection (4)
11	Staff of the Commission	No change
12	Law Reform Commission Advisory Board	a. Replace by not more than x3 Commissioners to assist the Commission b. Revise to expressly state the functions of the Advisory Board
13	Appointment of Commissioners and consultants	No change
14	Appointment of Judicial Officers as Commissioner	Repeal given the revisions to section 12

15	Protection from civil actions	No change
16	Regulations	No change
17	Repeal	No change

Given that the proposed revisions would affect certain provisions and not all provisions of the Law Reform Commission Act 2008, an amendment Bill is recommendable under this Review.

## 2) Suggested SLRC Law Reform Process

The following is a proposed outline of the Law Reform Handbook as required by the Terms of Reference. It sets out all the steps and stages of the law reform process, commencing with a receipt of a terms of reference. Set out below is a suggested outline of a Law Reform Handbook for the purposes of consultations, and all comments and inputs are welcome.

# DRAFT OUTLINE – SAMOA LAW REFORM HANDBOOK

## A. HANDBOOK

### 1. INTRODUCTION:

### 2. LAW REFORM:

- 2.1. What is law reform?
  - General definition
  - Specific definition
  - Look at legislation of countries that define law reform
- 2.2. Role of the Samoa Law Reform Commission (SLRC)
  - Mandate under the Law Reform Act 2008
  - Independence
- 2.3. Legislation and law reform
- 2.4. Role of Government on law reform

### 3. THE LAW REFORM PROCESS:<sup>134</sup>

- Law reform process
- Law reform process –Samoa (8 steps)
  - Law Reform Process – chart
- Ideal Process – village involvement

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<sup>134</sup> Additional step 8.

**STEP 1:**

**Sources and scope of TOR for SLRC are from the following:**

- 3.1.1. PM
  - Sample of TOR received from PM
- 3.1.2. AG
  - Sample of TOR received from AGO
- 3.1.3. Cabinet
  - Sample of TOR received from Cabinet
- 3.1.4. Self-initiation TOR
  - Sample of TOR on self-initiate projects (Fabric, FIA Review)

**STEP 2:**

**Preliminary Research and Analysis & Preliminary Consultations**

**A. Preliminary Research and Analysis**

- 4.A.1. Brainstorm the TOR
- 4.A.2. Determine type of Project
  - complex projects = 4 or more years to complete e.g.
  - Standard projects = less than a year e.g. Fabric (1 year), Pule Matai (2 years)
- 4.A.3. Prepare Work plan –time frame on the Project etc.
- 4.A.4. Brainstorming Session No.1
- 4.A.5. Consideration of what paper to develop
- 4.A.6. Material needed for research
- 4.A.7. Legal Research – Legal, Doctrinal, Social, Cultural, Political, Economical

**B. Preliminary Consultations**

- 4.B.1. Why consult?
  - Nature of Project/Review – complexity
  - Implementing bodies
- 4.B.2. Formal letters to Stakeholders
- 4.B.3. Invitation letters to stakeholders
- 4.B.4. Outline of stakeholders submissions
- 4.B.5. Discussion of issues with Stakeholders

**STEP 3:**

**Issues Paper/Discussion Paper**

- 5.1. Content of brainstorming No.2
- 5.2. Questions in Discussion Paper
- 5.3. Content of Discussion Paper
- 5.4. Cabinet submission for approval of Discussion Paper
- 5.5. Approval of Discussion Paper by PM/AG/Cabinet

**STEP 4:****Public Consultations**

- 6.1. Why consult?
  - Public informed and input
  - Legitimacy of Review
- 6.2. Public Consultation Plan
  - Main Stakeholder Consultations
  - Public Consultations
  - Specific Interest Groups Consultations
- 6.3. Media Awareness
- 6.4. Outline of Public submissions
- 6.5. Public Consultation presentation

**STEP 5:****Further Research and Analysis**

- 7.1. Content of Brainstorming Session No.3
- 7.2. Further research required (if required)
- 7.3. Content of Final Report

**STEP 6:****Final Report**

- 8.1. Drafting of Final Report
- 8.2. Preparation of Cabinet submission
- 8.3. Bill if drafted by SLRC
- 8.4. Submission to PM and AG for approval
- 8.5. Cabinet submission for approval of FR

**STEP 7:****Tabled in Parliament**

- 9.1. Translation process
- 9.2. Preparations for Parliament – Printing, Reviewing, Binding

**STEP 8:**

- 10.1. Depending on nature of the Project:
  - 10.1.A. Confirmation sessions;
  - 10.1.B. Follow ups;
  - 10.1.C. Information Paper etc.

**4. ADDRESSING AD HOC REFERRALS (section 6(b) Law Reform Act 2008)**

- Process

- i. Referral/Letter received
- ii. Preliminary meeting to discuss referral and identify issues relating to the referral
- iii. Preliminary research:
  - a. **Issue** – what is the letter asking the Commission to do, review?
  - b. **Rule/Law** –Is there a law that addresses this issue? Yes or no.
  - c. **Application** – what does the law say about the issue? Are there any gaps in the law? Analyse the law against the issue.
  - d. **Conclusion** – what does the Commission
- iv. Meeting – to discuss preliminary research outcomes
- v. Call a meeting –
  - a. Depending on the nature of the referral, to call a meeting with the relevant Authority/Ministry to the review.
  - b. To clarify some issues and the scope of the review
- vi. Compile outcomes of preliminary research and meeting with the relevant Ministry (if any) for draft letter of advice
  - a. The advice with reflect a way forward whether referral suffices a complete review/project.
  - b. Analysis of the Commission based on materials reviewed
- vii. Final advice to Authority whether a TOR is required for a complete review or otherwise

## 5. **ADDRESSING REQUESTS FOR REVIEW (Section 6(c). Law Reform Act 2008)**

### ▪ Process

- i. Referral/Letter received from Ministry/Agency
- ii. Preliminary Research
  - a. What does the referral say?
  - b. Identifying the issues relating to the referral
  - c. Identifying the relevant laws that address the issues
  - d. What does the law say?
  - e. Does the law address the issues?
- iii. Advise government Ministries and Agencies on the manner or content of reviews of the law conducted by those Ministries and agencies (e.g.) LERA review (MCIL)
  - Ministry of Commerce, Industry and Labour requested to consult with SLRC and other relevant stakeholders to identify any inconsistencies and ambiguities of the **LERA**
  - SLRC provided advice to MCIL based on its review of the laws.
- iv. Research legislation and any other laws relating to the particular review
  - To determine adequacy of the current provisions of the law and relevant issues

- v. Review the impacts of the review on the existing laws of Samoa to assess whether there is a need to consolidate, remove or revise those laws
- vi. Conclusions:
  - SLRC meeting to discuss preliminary research outcomes
  - Compile outcomes of preliminary research and meeting with the relevant Ministry if necessary depending on the nature of the referral
  - Meeting with relevant Ministry for draft letter of advice
  - Conduct analysis based on the materials reviewed
  - Final advice to relevant Ministry

**6. CONSULT AND ADVISE (Section 6(d), Law Reform Act 2008)**

- Process
  - i. Receipt of letter of request for consultation and/or advice
  - ii. Preparation, revising the law and relevant material
  - iii. Consult with requestor to confirm logistics
  - iv. Presentation

**Part C- Issues and Recommendations**

**Issue 8** – The law reform process must be relevant and suitable to the contextual, and in particular, the cultural realities of Samoa. (*see pgs 56 -60*)

**Recommendation 8** - That the Law Reform Process to be set out in a Manual be required to be contextually and culturally friendly, to cater for Samoa's context, and to meet the objectives of the Act.



## LIST OF ISSUES AND RECOMMENDATIONS

### LIST OF ISSUES - PART A: ISSUES

**Issue 1** - There are duplications in the functions and reporting responsibilities of the Commission under section 6 and 9. *(See pgh 17, pg 7)*

**Issue 2** - Under section 10, no appointment of the Executive Director is effective until it is approved by the Attorney General as meeting the requirements of subsection 10(2). To date, the interview panel for the position of the Executive Director and Cabinet are in practice well informed whether the position criteria is met before an appointment is made. *(See pgh 18, pg 8)*

**Issue 3** - The functions of the Commission is primarily for those interested in research, and having a keen interest in being involved in the development of new laws. Unfortunately, the Commission has been unable to keep trained staff due to better paid employment elsewhere. It has been an ongoing challenge for the Commission to employ and maintain senior lawyers with more than 5 years' experience. *(See pgh 41, pg 14)*

**Issue 4** – The records show that there has been ongoing confusion over the role of the Advisory Board. *(See pgh 63 pg 19)*

### PART B - ISSUES

**Issue 5** – Perhaps it is now timely for Samoa to consider a setup on the composition of the Commission, convenient for today's context. *(See pghs 102 & 103, pg 37)*

**Issue 6** – The Commission is a non-revenue generating Commission. It is therefore important that all its Final Report are decided upon, to make sure all the expenses on each Review is accounted for. *(pgh 124-125, pgs 45-46)*

**Issue 7** – The majority of the Final Reports of the Commission had recommended revisions to laws, or a brand new legal framework. To assist the Office of the Attorney General, the Commission may be permitted to draft resulting legislation (from the Final Reports recommendations) for the review of the Office of the Attorney General. This would also assist the early passage through Parliament of draft Bills from the Commission's Projects. *(Pgh 146, pg 52)*

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## **LIST OF RECOMMENDATIONS - PART A: RECOMMENDATIONS**

**Recommendation 1** - It is recommended that sections 6 and 9 be revised for certainty, section 6 to set out functions and section 9 to set out the reporting responsibilities (on law reform projects) of the Commission.

**Recommendation 2** - Remove the requirement in section 10(4) for the Attorney General to be satisfied before an appointment that the successful candidate for the position of Executive Director meets the appointment requirements.

**Recommendation 3** - It is highly recommended that Samoan legal graduates who wish to take up research be entertained with research post graduate scholarships (1 to 1 ½ years) to equip them to carry out extensive research for the work of the Commission. Samoan graduates must be specifically targeted for these scholarships as the work of the Commission requires one well versed with the English and the Samoan languages for the purposes of public speaking at stakeholder and public consultations.

**Recommendation 4** - The Commission considers that to prevent confusion and for the Advisory Board to function effectively, the role of a Board or any set up must be stipulated clearly in the Act.

## **PART B - RECOMMENDATIONS**

**Recommendation 5A** – To replace the current Advisory Board with not more than 3 Commissioners (could be one, two or 3 at any one time) to be appointed on a part-time basis, to assist the Executive Director and the staff of the Commission meet the Commission's functions.

**Recommendation 5B** – To revise the Act to replace the Advisory Board provisions with clear legislative provisions allowing the Commission to engage Commissioners when required for a particular law reform project. There are already provisions to this effect thus the recommendation is for clarity.

**Recommendation 6** – It is recommended that Parliamentary Committees be encouraged to complete and report back to Parliament on a Commission report, to ensure the budget allocated to the Commission is accounted for. The Parliament is also encouraged to consider a revision to the Standing Orders of Parliament to allow the Hon Speaker and the Hon Committee Parliamentary Members to express the exact time frame and extension upon which a Parliamentary must report back on a Final Report of the Commission.

**Recommendation 7** – That the Act (Law Reform Commission Act 2008) be revised to permit the Commission to draft legislation recommended and resulting from a Final Report of the Commission, for the relevant consultations and final review of the Office of the Attorney General.

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## DISCUSSION QUESTIONS:

Please comment on the issues and the recommendations given.

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