

**Lagi Tuimavave**

**A Response to the Report of the Special Inquiry Committee's on matters  
pertaining to the Land and Titles Court.**

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## *I Introduction*

On 27 June 2016, Samoa's Prime Minister announced in Parliament that a special Commission of Inquiry was to be established to investigate the Samoan Land and Titles Court (the LTC). Consequentially, the Special Inquiry Committee (the Committee) was established. The Committee conducted a review of the LTC with the aim to subsequently recommend rules and procedures to expedite the efficient processes of the LTC.<sup>1</sup>

This paper will firstly provide a brief overview of Samoa's land and title system. Secondly, it will provide background information into the coming of this report. Thirdly, issues identified in the report will be set out followed by a summary of some of the relevant recommendations made by the Committee for the purpose of this paper. Lastly, this paper will analyse the selected recommendations outlined in this paper with an aim to address issues that have been raised. The author hopes that this response to the report provides ideas if not solutions for the continuous development of the LTC with the hope that grievances brought by the public will be adequately addressed through the application of some of this paper's recommendations.

## *II Overview of Samoa's Land and Titles System*

### *A Samoan Title-holding System*

The largest kin-group based on non-unilineal principles of descent reckoning in Samoa is the descent group known as the 'āiga.<sup>2</sup> This term 'āiga means family but includes not only the immediate family but also the whole union of families of a clan and those who although not related, are also subject to the family control.<sup>3</sup> Each 'āiga has several titles belonging to it. These titles are regarded as the exclusive and communal property of the said 'āiga. Each title also holds a certain position within the 'āiga's internal hierarchy of titled offices.<sup>4</sup>

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<sup>1</sup> Special Inquiry Committee on Lands & Titles Court *report of the Special Inquiry Committee: Land & Titles Court Matters* (2016).

<sup>2</sup> Sharon W Tiffany "The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa" (1974) 83 *The Journal of the Polynesian Society* 35.

<sup>3</sup> At 36.

<sup>4</sup> At 36.

To assess suitability for a title, there is a list of customary criteria to fulfil. Criteria considered by the entire ‘*āiga* are consanguinity, service and personal qualities.<sup>5</sup> This set of criteria is similar to that used by the LTC. In their approximate order of importance, the LTC in evaluating claims by contenders for a title, looks at:<sup>6</sup>

- (1) blood relations or consanguinity, (2) the rendering of services to the former incumbent of the title, the ‘*āiga* to which the title belongs, and the village and district in which the ‘*āiga* is located, (3) place of residence, and (4) personal character and ability.

The highest-ranking title of an ‘*āiga* acts as trustee over ‘*āiga* property and to promote and protect the welfare of its ‘*āiga*. Other responsibilities include allocating ‘*āiga* “lands for cultivation, designating house sites, supervising the collection of ‘*āiga* contributions for redistribution, maintaining peace among ‘*āiga* members and representing the ‘*āiga* at the village council”.<sup>7</sup> As titles are ranked, the highest-ranking title-holder can delegate some of its duties to lower ranking title-holders within the same ‘*āiga*.

Titles can also be removed from title-holders. An ‘*āiga* can remove a title if there is unanimous consent from all decent group members but if the dispute cannot be settled internally, then a petition can be lodged with the LTC.<sup>8</sup> According to Marsack, the LTC will remove a title from a title-holder if any of the following are satisfied:<sup>9</sup>

- (1) violating the *pule* [authority] attached to his office for his own personal benefit, (2) causing dissension within the ‘*āiga*, (3) refusing to participate in village affairs, and (4) living elsewhere and thereby neglecting his responsibility to his ‘*āiga*.

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<sup>5</sup> At 42.

<sup>6</sup> C C Marsack *Notes on the Practice of the Court and the Principles Adopted in the Hearing of Cases Affecting: (1) Samoan Matai Titles and (2) Land Held According to Customs and Usages of Western Samoa* (Rev. ed, Justice Department, Apia, 1961) at 10 – 14.

<sup>7</sup> Sharon W Tiffany, above n 2, at 36 – 37.

<sup>8</sup> At 50.

<sup>9</sup> C C Marsack, above n 6, at 51.

## *B Samoan Land Tenure System*

In some territories in the South Pacific, the common law rule that the King was the owner of all the land was modified by providing in legislation that the King owned all the land, but subject to the rights of indigenous people and foreign settlers.<sup>10</sup> This was the approach originally adopted in Samoa<sup>11</sup> and other Pacific islands, although in 1962, the State of Samoa was substituted in Samoa for the King of England.<sup>12</sup> Nowadays, in Samoa, the State is said to have radical title but subject to the rights of indigenous people and to persons holding freehold land from early settlers.<sup>13</sup> In Samoa, customary land and freehold land are said to be held from the State, but the State is given no power to recover or forfeit those lands, so its ownership of them is only nominal.<sup>14</sup> Customary land was first defined as that held by native title.<sup>15</sup>

In Samoa, the Constitution of the Independent State of Samoa 1960 (the Constitution) provides for land to be held in accordance with the customs, usages and traditions of the indigenous inhabitants.<sup>16</sup> Such land used to be called ‘native land’ but is now more commonly referred to as ‘customary land’, and the owners of such land are usually called ‘custom owners’.<sup>17</sup> Reference in the written law to custom, usage and tradition implies a certainty about the principles of the tenure of customary land, and their application, which does not correspond with reality.<sup>18</sup>

The most common form of ‘ownership’ of customary land through the region is group or communal ownership, where members of a group of community own joint undivided interests in the area of land where the community is located.<sup>19</sup> The group that forms the land-owning unit is normally based on blood relationship, that is, they are all related by blood, having descended from a common ancestor or ancestors.<sup>20</sup> Although joint communal ownership is the

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<sup>10</sup> Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (4<sup>th</sup> ed, Intersentia Limited, Cambridge, 2017).

<sup>11</sup> Samoa Act 1921 (NZ), s 268.

<sup>12</sup> Constitution of the Independent State of Western Samoa 1960, art 101.

<sup>13</sup> Jennifer Corrin and Don Patterson *Introduction to South Pacific Law*, above n 10, at 318.

<sup>14</sup> At 319.

<sup>15</sup> Samoa Act 1921, s 278.

<sup>16</sup> Jennifer Corrin and Don Patterson *Introduction to South Pacific Law*, above n 10, at 323.

<sup>17</sup> At 323.

<sup>18</sup> At 323.

<sup>19</sup> At 325.

<sup>20</sup> At 325.

most common form of ownership of customary land in the region, it is not the only operating form of ownership now as:<sup>21</sup>

...individuals have replaced corporate *aiga* (family) as the primary land-owning units, nuclear family households have replaced multihousehold extended families as the primary socio-economic units, and economic individual-ism has largely replaced the ‘communistic system’ of Old Samoa.

This view has been contested by Samoan commentators on the grounds that it is based on a misunderstanding of the Samoan culture.<sup>22</sup> Traditionally, disputes arising between ‘*aiga*’ members over ‘*aiga*’ lands and titles were negotiated and mediated internally and exclusively by title-holders from each ‘*aiga*’ however the introduction of colonial judicial institutions modified the way ‘*aigas*’ settled their disputes.<sup>23</sup> An example of such colonial judicial institution is the LTC which has been given power and authority to adjudicate disputes arising between ‘*aigas*’ over customary lands and titles.

### *C Land and Titles Court*

The LTC “is a most important Court, if not, the most important Court of the Independent State of Western Samoa”.<sup>24</sup> During the German administration of Samoa, a LTC was constituted in 1903 which consisted of three Europeans aided by Samoan advisers, all under the governorship of Dr. Solf.<sup>25</sup> During the New Zealand administration, the Samoa Native Land and Titles Commission Order 1924 was enacted in order to set up the Native Land and Titles Commission (the Commission) to apply customary law to land and titles disputes. The Commission consisted of the European Chief Judge of the High Court of Western Samoa, two European assessors and an unspecified number of Samoan commissioners.<sup>26</sup> Since 1903, the Samoan commissioners’ functions were “purely advisory”<sup>27</sup> and consultative although the latter was

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<sup>21</sup> At 327.

<sup>22</sup> At 327.

<sup>23</sup> Sharon W Tiffany, above n 2, at 37.

<sup>24</sup> B C Spring, Chief Justice of Western Samoa “The Land and Titles Court of Western Samoa” (First South Pacific Judicial Conference, 10 – 13 1972).

<sup>25</sup> James Wightman Davidson *Samoa mo Samoa the emergence of the independent state of Western Samoa* (Oxford University Press, Melbourne, 1967) at 81.

<sup>26</sup> Sharon W Tiffany, above n 2, at 37.

<sup>27</sup> Malama Meleisea *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (Institute of Pacific Studies, Suva, 1987) at 183.

enumerated.<sup>28</sup> Furthermore, they did not have voting rights on decisions of the Commission.<sup>29</sup> The Commission's name was changed to the Native Land and Titles Court in 1937,<sup>30</sup> and four Samoan commissioners were replaced by at least two "native judges" who had the same advisory status and the former Samoan commissioners.<sup>31</sup> Several years later, the Constitution enacted that "there shall be a Land and Titles Court with such composition and with such jurisdiction in relation to Matai titles and customary land as may be provided by Act".<sup>32</sup>

### *III Background on Report*

A motion was approved by the Legislative Assembly on 27 June 2016, to establish the Committee to examine the rules and procedures guiding the operation of the LTC.<sup>33</sup> Furthermore, the Committee is to "review and scrutinise the performance of the LTC and the periodic appointment of its judges".<sup>34</sup> The Prime Minister stated in his Ministerial statement "that justice is not easily found when the seeds are sown amongst the thorns".<sup>35</sup> Thus it is crucial that the LTC operates in an effective and efficient manner to ensure harmony amongst its consumers otherwise an error in judgment affects the deceased (resting places will be exhumed), the living and their harmonious existence with their relatives and the future generation who will not have an identity or connection with their family heritage (judgements in rem).

The need for this inquiry emanates from public grievances brought to the attention of the Prime Minister, Ombudsman and Members of Parliament due to the delays in the hearing of LTC cases and issues with written and verbal LTC rulings. Public grievances were directed to the Prime Minister, Ombudsman and Members of Parliament because according to the report, Samoa does not have a person or entity within the judiciary arena for members of the public to bring their grievances to.

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<sup>28</sup> Sharon W Tiffany, above n 2, at 38.

<sup>29</sup> The Native Land and Titles Protection Ordinance 1934, No 2.

<sup>30</sup> Sharon W Tiffany, above n 2, at 38.

<sup>31</sup> The Native Land and Titles Protection Amendment Ordinance 1937, No 2; At 38.

<sup>32</sup> Article 103.

<sup>33</sup> Special Inquiry Committee on Lands & Titles Court, above n 1, at 7.

<sup>34</sup> At 7.

<sup>35</sup> At 5.

The public were invited to make oral or written submissions on 4 July 2016 for the island of Upolu and 26 July 2016 for the island of Savaii. Overall, there were a total of 42 written submissions and 145 oral submissions presented to the Committee.<sup>36</sup>

#### *IV Issues Raised in the Report*

The Ministry of Justice & Courts Administration (MCJA) raised the following reasons for grievances against LTC:<sup>37</sup>

- Continuous increase of requests for appeals;
- Connection of judges to cases;
- Questions inadequately phrased;
- Judges unprepared to hear cases;
- Adjournment of cases;
- Grievance against attendance of Judge who heard case in first instances with an unsuccessful ruling;
- Favouritism;
- Unsigned court rulings by Judges;
- Prejudice;
- Acceptance of cultural gifting from parties involved;
- Health; and
- Capacity.

It has been reported that from the year 1993 to 2015, 610 cases were not processed compared to the 142 cases that were processed within this same period.<sup>38</sup>

Another issue raised in the beginning of the report is that the Chief Justice in his capacity as the then President of the LTC informed the Committee in a letter that neither himself nor any Samoan Judge would appear before the Committee and release of any court records has been prohibited.<sup>39</sup> Parliamentary supremacy was not used to summon anyone before the Committee due to the judiciary maintaining their judicial independence. There is a tension arising from

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<sup>36</sup> At 8.

<sup>37</sup> At 14.

<sup>38</sup> At 14.

<sup>39</sup> At 9.



this refusal especially since the judiciary's ignorance of the request by the Committee "disregards and denies the essence of the inquiry to make and recommend measures to alleviate the burden on the public" and the many grievances they are facing.<sup>40</sup>

### *V Recommendations*

The Committee's recommendations are constructed from the evidence provided by the MCJA and the submissions from the public during the inquiry. There are thirty recommendations in total which excludes two additional recommendations. This paper will not be addressing all the recommendations of the Committee but a summary of all the recommendations are set out in Appendices 1 and 2.

#### *A Prioritising/Restructuring of the LTC*

The Committee's first recommendation concerns prioritising/restructuring of the LTC.<sup>41</sup> What this recommendation recognises is that privilege status afforded to LTC judges is distinguishable from the status of Supreme Court judges. Judicial privilege of the LTC should officially be recognised particularly since they preside over matters concerning Samoan customary land and titles. The reality is, they are not given the status and privilege they deserve. To demonstrate this inequality, the MCJA provided the following evidence to the Committee:<sup>42</sup>

- Only 10% of the appropriation of the [MCJA] is appropriated to the LTC;
- Two Samoan Judges share one court room;
- One vehicle (15-seater van) is available to a staff of 17;
- There is no allocated room for mediations; and
- The salaries and benefits differ for the Judge despite similar judicial duties.

Therefore, the privileges awarded to Supreme Court judges should also extend to LTC judges. The Committee went on to propose a restructuring of the current LTC. The matter will firstly, go before the Court of First Instance. It can subsequently be appealed to the Court of Appeal with a further and final appeal opportunity to the Land and Titles High Court. According to the

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<sup>40</sup> At 9.

<sup>41</sup> At 15.

<sup>42</sup> At 15.

Committee, this restructure means the public will be allowed two opportunities to have their cases reviewed if not successful in the Court of First Instance.<sup>43</sup> Furthermore, the Land and Titles High Court will be the forum for aggrieved parties to seek judicial review of their matters as opposed to the Judicial Service Commission.<sup>44</sup> This restructure comes with associated costs, a barrier to its initiation.

### *B Appointment of Deputy Presidents*

The second recommendation suggests that two extra Deputy Presidents are appointed to assist the President in reviewing requests for appeal.<sup>45</sup> These Deputy Presidents will possess the same knowledge and capacity as the President.

The rationale behind this recommendation is that the delay experienced by majority of the cases before the LTC is a direct result of the insufficient number of presiding judicial officers and conflict of interests claimed by the President.<sup>46</sup> Currently, the President considers applications for appeal alone and if granted, the President presides over the hearing of the appeal alone.<sup>47</sup> There are many issues associated with this such as conflict of interests or unforeseen circumstances such as illness just to name a few. The appointment of Deputy Presidents will ensure that the President is supported in his duties and suspension of hearings will be less frequent.

### *C Verbal Court Rulings*

The third recommendation of the Committee pertains to a legal requirement for the Judge to deliver a verbal ruling within three days following the conclusion of the proceedings.<sup>48</sup> This recommendation has been brought about because members of the public that made submissions during the inquiry reported that they “were aggrieved at the delay in the court rulings which in effect assumes an unjust decision”.<sup>49</sup>

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<sup>43</sup> At 16.

<sup>44</sup> At 16.

<sup>45</sup> At 16.

<sup>46</sup> At 16.

<sup>47</sup> At 17.

<sup>48</sup> At 17.

<sup>49</sup> At 17.

The Committee found that some families waited for 12 months for a ruling. They labelled this delay as attributing to corruption and denying justice. The Committee also recommended that a recording system needs to be re-established to assist Samoan judges in making their rulings. It is apparent from the report that a recording system which was disestablished contributed to the delay in making a ruling available and therefore, the same recording service should be revitalised.

#### *D Written Court Rulings*

The fourth recommendation proposes the following:<sup>50</sup>

- i. Legislate that written rulings be available within seven days after the end of the proceedings. In the case the written ruling is not available within seven days, the [presiding] Judge...should submit their resignation.
- ii. Legislate that only written rulings will be officially recognised by the Courts.
- iii. For Court cases already heard and still awaiting a written ruling, such should be made within six months from the date this Inquiry Report is approved by Parliament.

There are several reasons behind this recommendation. The first concerns a case that is still awaiting a written ruling 30 years later. A verbal ruling was given but no written record has ever been made. This has resulted in further conflicts between the parties due to differing opinions as to the state of the land. The second reason arises from parties to the proceedings requesting records of such proceedings from the Office and being informed that such records have been lost. The third reason is that some Samoan judges resigned without having provided written rulings for their cases. The absence of these rulings further contributes to conflict building between families. The fourth reason is that some cases are being heard twice before the same court despite the parties waiting for the written ruling following the first hearing. The fifth and final reason is that there is an inconsistency in the enforceability of the rulings in that some Judges have deemed verbal rulings and “not official nor recognised”.<sup>51</sup>

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<sup>50</sup> At 17 – 18.

<sup>51</sup> At 18.

### *E Rulings of the Court of First Instance*

The fifth recommendation requires the Court of First Instance to refrain from ruling on a matter twice especially if it shows the contradictions in terms of decisions and non-compliance with the law and for legislation to legislate against the Court of First Instance overruling a Court of Appeal decision.<sup>52</sup>

There are also several reasons for this recommendation with one of them concerning a land and title case in the Samoan village of Manase. Initially the Court of Appeal confirmed the legitimacy of the title and the land attached to it. Shortly after, a counter case was filed and accepted by the LTC who essentially ruled against the decision of the Court of Appeal.

### *F Guidelines for Samoan Judges*

This recommendation suggests a legally set of procedures and guidelines outlining processes for the operation of the LTC and requiring Samoan Judges to compulsorily comply with these rules.<sup>53</sup>

This recommendation came from allegations of favouritism in the Judges questioning, bias, use of offensive language, unpreparedness and discourteous manner of some Judges. Public submissions suggested:<sup>54</sup>

- There should be rules pertaining to the questions used in Court;
- Criminal charges should be brought against any person/persons that removes[s] records of Court proceedings specific to questions and answers;
- The Procedures and Guidelines providing for the powers of the LTC are vague and they contradict other Government Legislations in regard to land; and
- Occasional refresher sessions on LTC Rules and Procedures should be implemented.

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<sup>52</sup> At 19.

<sup>53</sup> At 22.

<sup>54</sup> Te'o Tuvale *An account of Samoa history up to 1918* (New Zealand Electronic Centre, Wellington, 2006) at ch 5.

### *G Declared Judges Conflict of Interest*

The Committed recommends that a Judge must declare their conflict through either marriage, parents, siblings, first cousins, in-laws, commercial partners/colleagues and/or other reasons as stated by the President.<sup>55</sup> If a Judge is declared to have a conflict of interest by a party to the proceeding, the Judge must present a written statement which will be considered during the proceeding.

The Committee believes complaints of this nature should be investigated especially if it requires the removal of a Judge before a hearing is due to take place. To ensure a smooth running of proceedings, parties and Judges should declare any conflict of interest prior to the matter being heard.

### *H Judicial Review (JR)*

The Committee recommends that JR perseveres as part of the Supreme Court's jurisdiction to ensure fundamental rights available to Samoan citizens are upheld.<sup>56</sup> The Supreme Court is an appellate court with the jurisdiction to revisit decisions of subordinate courts. JR of LTC rulings and decisions is prohibited under provisions of the Land and Titles Act 1981 (the 1981 Act).<sup>57</sup> The Supreme Court can only judicially review decisions of the LTC if there is an alleged breach of fundamental rights in the Constitution.<sup>58</sup> According to the Committee, JR looks at the "process of how a decision came about" as opposed to "re-mak[ing] the decision or enquir[ing] about the merits of the decision".<sup>59</sup>

The Committee insists that the President of the LTC be given additional discretionary powers to review applications to re-hear cases ruled on by the Court of Appeal.<sup>60</sup> The review will investigate any errors and omissions in the rulings. The Committee also insists that practices governing Maori land in New Zealand as outlined in the Maori Land Court Act 1993 could be

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<sup>55</sup> Special Inquiry Committee on Lands & Titles Court, above n 1, at 25.

<sup>56</sup> At 30.

<sup>57</sup> Section 71.

<sup>58</sup> The Constitution, Part II.

<sup>59</sup> Special Inquiry Committee on Lands & Titles Court, above n 1, at 30.

<sup>60</sup> At 30.

adopted.<sup>61</sup> The Committee concludes its recommendations by insisting that the LTC maintain its independence from other courts and to be administered by the current Corporate Services.

### *I Mediation*

The Committee has recommended the following:

- i. To modify mediation guidelines and appoint qualified mediators to facilitate mediation processes of the LTC;
- ii. That the mediation process be conducted in the Court of First Instance hearing;  
and

Mediation started in 2012 and it involves that parties to a land or title dispute to identify disputed issues with the Deputy Registrar's help "to develop options, consider alternatives and endeavour to reach an agreement without referring the matter to the LTC".<sup>62</sup> Issues arising from mediation are the inconsistencies pertaining to the principles and guidelines of the process, and the roles of Registrars and Deputy Registrars which can range from assisting parties with their petitions to subsequently presiding as mediators when matters are referred to mediation. Submissions also suggested that alternatives to mediation should be considered because they are often a waste of time, they are inconsistent with Criminal courts procedures and some parties don't attend mediation at all before lodging LTC petitions.<sup>63</sup>

A full report of the mediation is provided to the presiding Judges and assessors by a Registrar to aid their decision-making process.

### *J Written Submissions from Parties to Dispute*

Essential that written submissions are investigated before hearings take place thus the Committee has recommended that it be a legal requirement for the Court of First Instance to receive written submissions no less than fourteen days before the matter is heard.<sup>64</sup> These

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<sup>61</sup> At 31.

<sup>62</sup> At 31.

<sup>63</sup> At 32.

<sup>64</sup> At 25.

submissions shall be date stamped upon receipt and no other submission shall be accepted on the first day of the hearing.<sup>65</sup>

#### *K Family High Chief (Sa'o)*

The recommendation is that it is ideal for an elected Sa'o to live in the village and within the family the title belongs to.<sup>66</sup> Heirs to the title have the collective authority to remove the Sa'o title from the Sa'o if service is not rendered to the village and family. The Sa'o title is highly dignified if held by a maximum of five chiefs at one time.

This recommendation results from several submissions. One example claims that some rightful heirs to a Sa'o title collectively consented to the removal of such title from the Sa'o. Another submission claims that the Sa'o of their family has been absent from the family and village for about forty years but the same Sa'o has consistently refused to bestow this title upon another.

#### *L Registration of the Trustee of Customary Land (Pulefa'amanu)*

The recommendation is for a Register to record all customary land trustees approved by the LTC as this is currently non-existent.<sup>67</sup> One should also exist to record the decisions of the LTC. The Land Titles Registration Act 2008 contains a provision for the registration of customary land to be leased for commercial purposes. MCJA and MRNE proposed to work collaboratively on this project by consolidating their records but such work has not taken place.

### *VI Analysis*

This part of this paper analyses the recommendations raised above in the hope that it will solve some of the issues identified by MCJA to the Committee. Several of the recommendations above have been addressed together in this analysis.

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<sup>65</sup> At 32.

<sup>66</sup> At 34.

<sup>67</sup> At 35.

### *A Parliamentary Supremacy v Judicial Independence*

The first analysis addresses the issue faced by the Committee in not being able to interview the then President of the LTC and Samoan judges. Parliament privilege comes from the Constitution which “ensures that all citizens of Samoa enjoy freedom in regards to speech, assembly, association movement and residence; this by default includes members of Parliament”.<sup>68</sup> The Constitution sets out what constitutes the Legislative Assembly,<sup>69</sup> and further entrenches privileges of the Legislative Assembly.<sup>70</sup> The Legislative Assembly is afforded a number of privileges. For the purpose of this analysis, assembly privileges is of utmost importance. This privilege enables the Assembly to “summon the attendance of witnesses before a Select Committee or issue a warrant if one does not comply with such a summons”.<sup>71</sup> As the Committee was one instructed by the Assembly, this privilege extends to the Committee. Thus, the Committee should have summoned the then President and Samoan judges of the LTC. Although the Committee did not summon, following the refusal of the then President of the LTC, the Committee should have asked for an instruction from the Legislative Assembly “to enable the Committee to entertain them”.<sup>72</sup> The issue here though is that the Committee reiterated that it was only out of cultural respect that it did not summon the President to appear despite his retraction behind judicial privilege.<sup>73</sup>

The LTC Bench book sets out a number of judicial oath and ethical principles with the most relevant being “without fear or favour”. This oath speaks to judicial independence whereby judges should uphold and exemplify judicial independence in its individual and institutional aspects.<sup>74</sup> This independence is grounded in common law.<sup>75</sup> It is arguable that the refusal of the judiciary to become involved in the inquiry relates to their exercise of their judicial functions independently and free from extraneous influence. It could also be attributed to them firmly rejecting the Parliament’s (through the Committee) attempt to influence their decisions in any matter before the Court outside the proper process of the Court. Finally, it can also be

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<sup>68</sup> Office of the Clerk of the Legislative Assembly “Parliamentary Privilege” (October 2014) Parliament of Samoa < <http://www.palemene.ws/new/wp-content/uploads/Infosheet/Infosheet-12-Privilege.pdf> > at 1.

<sup>69</sup> Article 44.

<sup>70</sup> Article 62.

<sup>71</sup> Office of the Clerk of the Legislative Assembly “Parliamentary Privilege”, above n 69, at 2.

<sup>72</sup> Standing Orders of the Parliament of Samoa 2016, SO 141.

<sup>73</sup> Special Inquiry Committee on Lands & Titles Court, above n 1, at 10.

<sup>74</sup> The Land and Titles Court Bench Book 2003, [4.5].

<sup>75</sup> Robert S Catz and Jill J Lange “Judicial Privilege” (1987) 22 Georgia Law Review 89 at 90.



said that the judges were upholding safeguards to maintain and enhance the institutional and operational independence of the Judiciary. The issue here though is that the Committee was not intending to scrutinise or closely inspect the judicial officers as individuals or as a collective. As the Committee reiterated, the purpose of the interviews were to gather from each Judge their proposals of how to better improve processes or maintain the status quo.<sup>76</sup> Furthermore, the then President possessed invaluable knowledge and had experiences within the LTC that puts him in a position to recommend viable solutions to public grievances.

This conflict comes down to these two powers maintaining their positions without due regard to the contribution they could make to improving the operation of the LTC. The judiciary's abstention is a demonstration of them exhibiting and promoting "high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence".<sup>77</sup> However, this same demonstration would fail if the judiciary, responsible for adjudicating disputes pertaining to customary land and title issues, did not assist in providing solutions for improving court processes and resolving public grievances. By participating in interviews with the Committee, the judiciary would be seen as exhibiting judicial conduct that can result in public confidence in them and their work. Where the public has knowledge and awareness of the decisions and workings of the judiciary, this ensures public confidence in the judiciary.<sup>78</sup> Awareness helps the public to have a better understanding of the system.<sup>79</sup> Thus, those that know more about law and courts are more likely to support the judiciary and believe in its legitimacy.<sup>80</sup>

### *B Prioritising/Restructuring of the LTC*

The recommendation made by the Committee for prioritisation of the LTC suggests that the LTC Judges do not have sufficient resources to enable them to exercise their roles efficiently and effectively. Resources here refers to the funding allocated to the LTC, availability of court space and other resources necessary for the operation of certain LTC services. The simple solution here would be to recommend that extra resources be allocated, however, after looking

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<sup>76</sup> Special Inquiry Committee on Lands & Titles Court, above n 1, at 9.

<sup>77</sup> Above n 75.

<sup>78</sup> Aylin Aydın Cakır and Eser Sekercioglu "Public Confidence in the Judiciary: the Interaction between Political Awareness and Level of Democracy" (2016) 23(4) Democratization 634 at 635.

<sup>79</sup> At 646.

<sup>80</sup> At 650.

at statistics specific to New Zealand courts, Hansen J urged that simply throwing additional judicial resources at workloads faced by the courts does not solve the issue.<sup>81</sup> The LTC serves an important purpose in Samoa as it enables parties to solve their land and title disputes. This issue does not require a legal solution, instead the MCJA must seriously consider the financial amount appropriated to the LTC because the current amount is perhaps a contributing factor to the grievances raised by the public.

It also suggests that LTC judges themselves do not have the same privileges as those available to judges in the Supreme Court. This is regarding salaries and benefits. The 1981 Act sets out a salaries and allowances provisions stating:<sup>82</sup>

A Deputy President, Samoan Judge and Assessor shall be paid out of moneys appropriated by the Legislative Assembly such salary, allowance or other benefit, travelling expenses and other costs as may be fixed by the Head of State by order, acting on the advice of Cabinet, after Cabinet has received the recommendations of the Judicial Service Commission.

The Constitution sets out information regarding salaries of Judges of the Supreme Court which includes the President of the LTC because the President is also the Chief Justice of the Supreme Court.<sup>83</sup>

The salaries of Judges of the Supreme Court to whom clause (1) of Article 68 applies shall be determined by Act and shall be charged on the Treasury Fund. The salaries of such Judges shall not be diminished during their period of office, unless as part of a general reduction of salaries applied proportionately to all persons whose salaries are determined by Act.

What is evident from these two provisions, is that the source of funding for judges of these two courts are different. It appears the Legislature has some form of direct influence on the LTC judges here due to their appropriating of funds for LTC judges' salaries. It appears there's several parties involved in processing the LTC judges' salaries and the justification for this involvement is unknown. Although the LTC is not an inferior court to the mainstream court

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<sup>81</sup> John Hansen, Retired High Court Judge "Courts Administration, the Judiciary and the Efficient Delivery of Justice" (F.W. Guest Memorial Lecture 2006, 28 September 2006).

<sup>82</sup> Section 32.

<sup>83</sup> Article 69.

hierarchy, it is reasonable to assume that Supreme Court judges are better off financially than LTC judges.

By way of comparison, the following provision pertains to the salaries and allowances of Maori Land Court Judges in New Zealand:<sup>84</sup>

(1) There shall be paid to the Chief Judge, to the Deputy Chief Judge, and to the other Judges, out of public money, without further appropriation than this section,—

(a) salaries at such rates as the Remuneration Authority from time to time determines; and

(b) such allowances as are from time to time determined by the Remuneration Authority; and

(c) such additional allowances, being travelling allowances or other incidental or minor allowances, as may be determined from time to time by the Governor-General.

(2) The salary of a Judge shall not be diminished during the continuance of the Judge's appointment.

...

The salaries and allowances for Judges in the New Zealand High Court, Court of Appeal and Supreme Court are governed by the following provision:<sup>85</sup>

Permanent Judges and Associate Judges must be paid, out of public money, without further appropriation than this section,—

(a) salaries at such rates as the Remuneration Authority from time to time determines; and

(b) such allowances as the Remuneration Authority from time to time determines; and

(c) such additional allowances, being travelling allowances or other incidental or minor allowances, as the Governor-General may from time to time determine.

Looking at the source of funding for New Zealand judges in the Maori Land Court and the senior courts, both are paid from public money. Unlike the LTC, there is no direct involvement by Parliament and the Executive here in payment of salaries and allowances. Thus, this paper recommends that processes in Samoa for payment of salaries and allowances need to be

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<sup>84</sup> Te Ture Whenua Maori Act 1993, s 13.

<sup>85</sup> Senior Courts Act 2016, s 135.

consistent throughout all the courts to ensure that all judges receive a reasonable salary and more so that they can perform their tasks efficiently and adequately.

The Committee also recommended a new structure. Although it is a straightforward recommendation, a change to the current structure will only continue to add to the backlog because time must be made available for the move, the learning of the new system and the reestablishment of processes. It will be timely and costly and will not be contributing to reducing the amount of grievances brought against the LTC.

### *C Basis for LTC Decisions*

This paper now questions the role and place of precedence in the LTC. It appears that missing from the Committee's report, is a discussion of how LTC judges in fact construct their decisions after presiding over disputes regarding authority over land and the right to register over authority over land. The primary responsibility of Judges should be "to expound, apply and preserve the inherited common law".<sup>86</sup> After such responsibility has been carried out, the LTC must give reasons for the decision<sup>87</sup> of the majority of its judging panel. A discussion of this issue can shine light on the Committee's recommendation regarding the rulings of the Court of First Instance.

The uncertainty here pertains to whether the rules of custom and usage are to be proved as a fact or are they simply a matter of law.<sup>88</sup> Custom is a substitute for the general common law.<sup>89</sup> Custom or customary law are not defined in the Constitution. 'Custom and usage' is however defined:<sup>90</sup>

...the customs and usages of Samoa accepted as being in force at the relevant time and [including]:

- (a) The principles of custom usage accepted by the people of Samoa in general.
- (b) The customs and usages accepted as being in force in respect of a particular place or matter.

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<sup>86</sup> John Smillie "Who wants Juristocracy" (2006) 11(2) Otago LR 183, at 189.

<sup>87</sup> Land and Titles Court 1981, section 66.

<sup>88</sup> Jennifer Corrin "Resolving land disputes in Samoa" in *Making Land Work* (Australian Agency for International Development, Canberra, 2008) Vol 2, 199 at 218.

<sup>89</sup> B C Spring, Chief Justice of Western Samoa, above n 25, at 21.

<sup>90</sup> Land and Titles Act 1981, s 2.

When making its decision, the LTC shall apply the following law:<sup>91</sup>

- (a) custom and usage;
  - (b) the law relating to custom and usage;
  - (c) this Act and any other enactment expressed to apply to the Court.
- (2) Subject to subsection (1), the Court shall decide all matters in accordance with what it considers to be fair and just between the parties.

This applicable law obviously provides very serious hurdles because although custom and usage is defined, it's actually substance is not written down.<sup>92</sup> As this is not written, how can the users of the LTC measure the integrity of the decisions of LTC Judges? Furthermore, are their decisions actually fair and just? As nothing is written down, it is likely that “a judge might be misled into applying to a case a rule that is not actually the custom of the [parties] or is not even custom at all”.<sup>93</sup> Another concern is also, the change in custom and usage with every generation. The reality is “customary laws...have been changing fast in the recent decades”<sup>94</sup> and it is likely that understanding of the customs and usages in force and operating in Samoa will vary between judicial officers and parties to a dispute depending on age and geographic location. Not only this, but there is also a risk “that some of the revered customs of the Samoans recognised for centuries may be lost”.<sup>95</sup> The LTC must be aware of this risk when interpreting, defining and implementing these respected and time-honoured customs in their decisions.

The author's argument is that customs and usage as guides for judges are neither inferior nor superior to statutory or common law. Instead the former runs parallel to the latter except a decision based on the former has a “far reaching effect, for they are binding even on the unborn generations”.<sup>96</sup> For this reason, Judges must at least attempt to outline if not the custom and usage they relied on to reach their decision, the principles of custom usage accepted by the people of Samoa in general. Like the principles of the Treaty of Waitangi,<sup>97</sup> as applied in the

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<sup>91</sup> Section 37.

<sup>92</sup> Jennifer Corrin “Resolving land disputes in Samoa”, above n 89, at 210.

<sup>93</sup> Jean G Zorn and Jennifer Corrin Care *Proving Customary Law in the Common Law Courts of the South Pacific* (British Institute of International and Comparative Law, London, 2002) at 2.

<sup>94</sup> S B Nandri and others “Tribal Customary Law in North-East India” in K S Singh (ed) *Tribal Ethnography Customary Law and Change* (Concept Publishing Company, New Delhi, 1993).

<sup>95</sup> B C Spring, Chief Justice of Western Samoa, above n 25, at 24.

<sup>96</sup> At 15.

<sup>97</sup> Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2002).

Waitangi Tribunal, a specialist institution should be set up to develop a set of principles. The reference to ‘in general’ implies that these principles can be broad which ensures that it will always be adaptable to changing societies and generations. As further alluded to by Corrin, such specialist institution should also “develop expertise in customary land matters”.<sup>98</sup> This development of expertise and creation of principles can eventually become the basis for LTC decisions which will ensure certainty and transparency and ensures that the Court of First Instance does not overrule its own previous decisions.

#### *D Judicially Reviewing Decisions of the LTC*

As per the Committee’s recommendation, the Supreme Court should retain its role to judicially review decisions of the LTC if they are contrary to fundamental rights set out in the Constitution.<sup>99</sup> This is regardless of the fact that the LTC has exclusive jurisdiction and is a court that sits at first instance and on appeal.<sup>100</sup> The most common fundamental rights alleged to have been breached are the right to personal liberty and the right to a fair trial.<sup>101</sup> Sometimes it will be difficult for the applicant to the Supreme Court to prove a breach of the right to personal liberty because in some cases, the applicant “was not arrested, detained, or otherwise deprived or dispossessed of his physical liberty at any time during the proceedings before the LTC”.<sup>102</sup>

Breaches of right to a fair trial have also been alleged and in one particular case, this breach was due to apparent bias because of a suspected family connection between the Deputy President of the LTC and the first-named second defendant.<sup>103</sup> The concern here is that if the Deputy President had disqualified himself on the ground of apparent bias because him and the first-named second defendant were all Judges of the LTC, that would mean that every other Judge of the LTC would be disqualified from hearing the first-named second defendant’s case.<sup>104</sup> What these examples show is that the Supreme Court’s role to judicially review has been used by aggrieved litigants and although these litigants are more likely than not to be

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<sup>98</sup> Jennifer Corrin “Resolving land disputes in Samoa”, above n 89, at 218.

<sup>99</sup> *Alomaina Ulisese v Land and Titles Court* [1998] (unreported judgment); *Police v Italia Taamale* [1995] (unreported judgment).

<sup>100</sup> *Penaia II v Land and Titles Court* [2012] WSCA 6.

<sup>101</sup> Articles 6 and 9.

<sup>102</sup> *Mapuilesua v Land and Titles Court* [2011] WSSC 131 at [14].

<sup>103</sup> *Peniamina v Land and Titles Court* [2004] WSSC 12.

<sup>104</sup> Above n 106.

successful, this right is available and should not be extinguished. Fundamental rights of all citizens must be upheld and regarded as important as in the Universal Declaration of Human Rights:<sup>105</sup>

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Fundamental human rights are not options, thus, the available of this mechanism of JR is a protection of these rights.

### *E Alternatives to Mediation*

The 1981 Act provides that “the court shall refuse to hear a matter if the parties to that matter have not undertaken Samoan conciliation”.<sup>106</sup> As raised by the Committee, mediation has not always been successful, and they have often resulted in petitions being filed in the LTC.

The first proper alternative is that if land dispute arises between members of an extended family or between people who are members of different extended families, the matais must attempt to settle these disputes by using customary dispute settlement methods.<sup>107</sup> Like our Maori counterparts, our matais could use principles that guide their settlement. The first principle is aroha which is the “emotional response stirred by feelings of empathy and kindness towards others, a recognition of the common bond of humanity shared with others”.<sup>108</sup> Demonstration of aroha must be both in words and actions. The second principle to guide this settlement is atawhai which is “the obligation passed to successive [leaders] to serve others, to protect the well-being of their own people and to extend aroha to others”.<sup>109</sup> The third and final principle

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<sup>105</sup> Article 2.

<sup>106</sup> Section 34C.

<sup>107</sup> Nick O’Neill *SEC06 Land Law Course Book* (Extension Services The University of the South Pacific, Suva, 1990) at 62.

<sup>108</sup> Khylee Quince “Maori Disputes and Their Resolution”

<<https://cdn.auckland.ac.nz/assets/law/about/centres%20and%20associations/te-tai-haruru/documents/mdr2006.pdf>> at 9.

<sup>109</sup> At 10.

is that of manaaki which is “the ability to look after those who were temporarily under one’s care”.<sup>110</sup> This speaks to “hosting other groups and to the degree of hospitality and safety extended to the group”.<sup>111</sup> Samoan society is founded on core values, that are not very different from these principles and thus the use of these principles when settling disputes outside of the LTC “provides endless flexibility as to choice of action”.<sup>112</sup>

Another alternative could be re-assessing the forum for settling disputes outside of court. Samoan people are religious and is reflected in the Constitution whereby “the leaders of Western Samoa have declared that Western Samoa should be an Independent State based on Christian principles and Samoan custom and tradition”.<sup>113</sup> Therefore a forum associated with the church could be used. It is a forum where people can be healed and be guided spiritually in their decision making.

#### *F Can the Sa’o Title be Removed from the Sa’o?*

The Sa’o is the person chosen by the extended family to carry the name of the founding ancestor. This Sa’o represents not only his ancestors but also his family members and has the right to say “this is my land, this is out land”.<sup>114</sup> The Sa’o though, because he is elected by his extended family, may also be removed from this position if he fails to provide for the family and to treat his family fairly. In American Samoa, a title is never taken from an individual merely because of old age though there have been cases where titles were removed because of cruelty. The official grounds for removal of title are (1) absence of six months or more and (2) failure to perform duties.<sup>115</sup>

Electing a Sa’o can be analogised to electing a political party leader who can be replaced if voted for by members of his or her political party. Therefore, the Sa’o because he is elected by his family members should also be removed by the same family members. However,

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<sup>110</sup> At 10.

<sup>111</sup> At 10.

<sup>112</sup> At 11.

<sup>113</sup> Preamble.

<sup>114</sup> Serge Tcherkezoff “The Samoan Category Matai (Chief): A Singularity in Polynesia? Historical and Etymological Comparative Queries” (2000) 109(2) The Journal of the Polynesian Society 151, at 153.

<sup>115</sup> Lowell D Holmes “TA’U Stability and Change in a Samoan Village” (1957) 66(3) The Journal of the Polynesian Society 301, at 318.



someone must always continue the Sa'o title therefore once one has been removed, another shall be elected.

### *G Delay*

This analysis addresses the recommendations made by the Committee for the appointment of Deputy Presidents, rules around verbal and written court rulings and written submissions from parties to dispute. This paper has recognised that these recommendations result from the delay experienced by users of the court and thus such recommendations have been discussed under this heading of delay.

Judges must be given a reasonable amount of time to write their judgments but people should not have to wait 12 months for a judgment to be delivered.<sup>116</sup> This delay is often frequently overlooked by Judges but unbeknownst to them, there are direct and indirect financial costs and associated anxiety linked to such delays for users of the courts.<sup>117</sup> Perhaps we need to return to when Judge Marsack was running the LTC, where he usually allowed a maximum of one day for one case so people had to be prepared in advance.<sup>118</sup> If this guarantees justice and timely decisions, then perhaps judges should be required to follow such an approach. There is at least one State in the United States that enacted a legislation saying “a Judge’s salary will be stopped if there are outstanding reserved judgments older than six months”.<sup>119</sup> Measures such as this might be needed if we are to guarantee written and verbal court rulings are delivered in a timely fashion. What is interesting is that, some cases<sup>120</sup> have been delayed for so long that it is a clear breach of sections 67 and 68 of the 1981 Act.

In a paper delivered to the Legal Research Foundation, Professor Smillie noted that Israeli research showed that Judges under pressure, at least in Israel, in fact showed greater productivity than those with less pressure.<sup>121</sup> Thus the moral of this research would be to

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<sup>116</sup> John Hansen, Retired High Court Judge, above n 82, at 2.

<sup>117</sup> At 2.

<sup>118</sup> Commonwealth Magistrates’ Association *Pacific Courts and Justice* (Institute of Pacific Studies, Suva, 1977) at 74.

<sup>119</sup> John Hansen, Retired High Court Judge, above n 82, at 10.

<sup>120</sup> *Toailoa v Land and Titles Court* [2004] WSSC 33.

<sup>121</sup> John Smillie, above n 87, at 191.

“reduce the number of judges and increase both output and quality”.<sup>122</sup> Therefore the appointment of Deputy Presidents may not be necessary.

### *H Guidelines for Samoan Judges*

The 1981 Act requires the LTC to use the same rules of procedure as the Supreme Court, but such rules are largely ignored due to the inquisitorial approach taken by LTC.<sup>123</sup> Formal rule-based adjudication promotes certainty and predictability in the law thus declaratory theory of common law adjudication should be encouraged because it demands judges to at least try and put aside their personal prejudices and predilections.<sup>124</sup> Guidelines and procedures need to be transparent because currently, parties are allowed to tell their stories at their own pace to and to summon as many witnesses as they want.<sup>125</sup> The latter approach is not assisting the LTC to reduce its backlog. The LTC Bench Book provides a good guide but such guide needs to be formalised into legislation to ensure that there is certainty in the process and to gather parties’ trust in the system.

### *I Register for Pulefa’amau and LTC Decisions*

Samoa has a number of legislations in place that have effectively legislated for registers. The 1981 Act provides for a register of matais.<sup>126</sup> The Land Titles Registration Act 2008 provides amongst other things for “the establishment and maintenance of a Register of title to land”.<sup>127</sup> What these two pieces of legislations show is that Samoa already has systems in place for the establishment of registers and it would not be a start from scratch if registers for pulefa’amau and LTC decisions are established.

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<sup>122</sup> At 191.

<sup>123</sup> Jennifer Corrin “Resolving land disputes in Samoa”, above n 89, at 207.

<sup>124</sup> John Smillie, above n 87, at 190.

<sup>125</sup> Jennifer Corrin “Resolving land disputes in Samoa”, above n 89, at 210.

<sup>126</sup> Section 22.

<sup>127</sup> Long Title.

## *VII Conclusion*

This paper has addressed some of the recommendations made by the Committee. What is important about the LTC is that it is a superior special court of record that has unique features and procedures. The impact of a decision of this Court is eternal as opposed to a decision in the common law court. As the Committee pointed out “after a person has served a sentence given by the criminal courts, they are free. On the other hand, if a person is served with an unjust decision from the LTC, past, present and future generations are affected”.<sup>128</sup> The consequence of this is that it impacts the public perception of the legal system.

Public confidence in institutions is an important precondition for the consolidation of democracy and it is generally associated with how the public perceives these institutions to be working.<sup>129</sup> Therefore putting steps into place to improve the working of the LTC will improve the perception of the public on its operation. The Court's authority – possessed of neither the purse.

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<sup>128</sup> Special Inquiry Committee on Lands & Titles Court, above n 1, at 15.

<sup>129</sup> Aylin Aydın Cakır and Eser Sekercioglu, above n 79, at 650.

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## *IX Appendix 1: Summary of the Thirty Recommendations*

### 4.1 Recommendation 1:

#### Prioritizing/Restructuring of the LTC:

Officially recognise the Judicial Privilege of the LTC which handles matters on our customary land and titles to be consistent with the recognition awarded the Supreme Court.

### 4.2. Recommendation 2:-

#### Appointment of Deputy Presidents.

An additional 2 Deputy Presidents are appointed to assist the President in reviewing requests for appeal. The additional Deputies should possess similar knowledge and capacity required for the appointment of the President.

### 4.3. Recommendation 3:

#### Verbal Court Rulings.

Legally provide for the Judge to deliver a verbal ruling within three (3) days after the end of the proceedings.

### 4.4 Recommendation 4:

#### Written Court Rulings

- iv. Legislate that written rulings be available within seven (7) days after the end of the proceedings. In the case the written ruling is not available within seven (7) days, the Judges that presided over the case should submit their resignation.
- v. Legislate that only written rulings will be officially recognised by the Courts.
- vi. For Court cases already heard and still awaiting a written ruling, such should be made within six (6) months from the date this Inquiry Report is approved by Parliament.

### 4.5. Recommendation 5:

#### Rulings of the Court of First Instance.



- i. The CFI should not make two (2) rulings on one matter which shows the contradictions in terms of decisions and non-compliance with the law.
- ii. Provide in legislation that the CFI should not change a decision made by the CA.

4.6. Recommendation 6:

Allegations against Samoan Judges:

- i) The Judicial Service Commission should rule on allegations submitted against Judges.
- ii) Traditional Offerings during surveys  
Forbid the LTC Office from accepting traditional offerings during surveys.
- iii) The LTC should utilize the maps from the Ministry of Natural Resource and Environment (MNRE), ensuring accurate boundaries of customary lands thus reducing surveys to the rural areas.

4.7. Recommendation 7:

Guidelines for Samoan Judges.

Legally develop a procedures and guidelines effectively outlining the process in the operation of the LTC and compulsory compliance with these rules.

4.8. Recommendation 8.

Due date for adjourned businesses.

Legislate a due date for adjourned business of no more than six (6) months from the date the matter is adjourned.

4.9. Recommendation 9.

Fees for Adjourned Cases.

Provide in legislation that a party requesting for adjournment, pay an adjournment fee to the Courts and the other parties to the proceedings.

4.10. Recommendation 10:

Judges Conflict of Interest

Legislate that a Judge must declare a conflict of interest to hear a case within seven (7) days from the date the written submission is received. The declaration must be made before the matter is heard which will prevent unnecessary adjournment of proceedings due to conflict of interest.

4.11. Recommendation 11:-

**Declared Judges Conflict of Interest**

In the Declaration of Conflict of Interest, a Judge must declare their conflict through:-

- (i) Marriage (current spouse and previous marriages);
- (ii) Parents;
- (iii) Siblings (biological and adopted);
- (iv) First Cousins;
- (v) In-laws;
- (vi) Commercial partners/colleagues; and
- (vii) Or other reasons as stated by the President.

The Committee believes that the Judges should uphold the dignity of their oath to make true and just decisions which should be in line with the law.

4.12. Recommendation 12:

**Judges connection to cases.**

Disallow Judges from presiding and leading parties while they are serving as a Judge.

4.13. Recommendation 13:

**JSC and Special Advisory Committee for LTC**

iii) Members for the LTC Judicial Service Commission (LTC-JSC).

The LTC-JSC should constitute three (3) members: the Chief Justice, President of the LTC and the Chairperson of the Public Service Commission (PSC).

iv) LTC Special Advisory Committee (LTC-SAC).

Establish a LTC-SAC that reports to the LTC-JSC tasked with the following duties:-

- Conduct Judges performance review;

- Accept and Investigate public grievances on related matters;
- Offer administrative support services to the LTC-JSC;
- Review applications to Judge positions and present recommendation to LTC-JSC; and
- Other duties as instructed by LTC-JSC.
- Membership consists of AG (Chairperson), MJCA CEO, Representative of the Minister, Member of the Council of Churches and the President of the Law Society.

4.14. Recommendation 14:

a) Employment of Judges.

Below are proposed criterias for the employment of a SJ:-

- vii) All applicants must present a written application;
- viii) Must be a Samoan citizen;
- ix) Must have been registered as a matai for at least three (3) years, rendered village service and service to the title, and resided in Samoa for no less than three (3) years;
- x) Employed as a Samoan Judge for no more than 10 years and reappointment to be reviewed for only two (2) years by the Commission until the Judge is 60 years of age. At the Presidents discretion, a Judge may be employed until he attains the age of 65 years;
- xi) Must attain the age of 50 years or more at the time of appointment as a Samoan Judge;
- vi) The review abovementioned will be carried out by the LTC-SAC chaired by the AG.
- xii) All applicants should attach a reference of employment from PSC including references from other employers if not previously employed in the public sector;
- viii) Must possess qualifications or knowledge of the Law if desiring to be a Samoan Judge (e.g USP - Certificate in Law);

- ix) Must consent to a full medical examination by a panel of doctors appointed by the Commission before commencing employment, or after a successful performance review; and
- x) Be given a copy of the results of the inquiry of the LTC-SAC for personal reference from the MJCA.

b) Salaries of Samoan Judges

Realign salary and benefits for SJs to be consistent with the capacity and reflect the fragility of the matters handled in the LTC.

4.15. Recommendation 15:  
Additional powers of the President.

To invest additional authority upon the President of the LTC to review decisions by the CFI deemed to be uncertain based on petitions lodged.

4.16. Recommendation 16.  
Judicial Review.

That the JR persevere as part of the Supreme Court to adhere fundamental rights of all Samoan citizens.

4.17. Recommendation 17:  
Mediation.

- iv) To modify mediation guidelines and appoint qualified mediators to facilitate mediation processes of the LTC;
- v) That the mediation process be conducted in the CIF Hearing; and
- vi) If the parties involved in the conciliation resolve their dispute over the process, consent should be signed by affiliated parties and become part of the decision of the hearing.

4.18. Recommendation 18.  
Written Submissions.

It shall be mandatory for parties to submit their written submissions not less than 14 days prior to the CFI hearing. The written submissions shall be verified and stamped officially to identify the date upon which it was received by the Office of the Registrar. The written submissions once

received shall be protected as an official document of the LTC, and no other submission shall be accepted by the LTC on the day of its first hearing.

4.19. Recommendation 19

a) Leader of Party to Proceedings.

Legislation must provide for a maximum of 3 leaders per party in the proceedings to prevent the adjournment of cases due to the absence of a leader.

b) Medical Certificate for Leader of Party to Proceedings.

Require in legislation that a medical certificate be presented from a Medical Doctor appointed by the Commission certifying the illness of either one or all of the Leaders of a Party to Proceedings.

4.20 Recommendation 20:

Forms

Revise the current standardized forms so that they are user friendly and clearly articulate the subject matter. For example:

- i. Request form for the use of Court Files.
- ii. Template for filling in family genealogies.
- iii. Template for Petitions.
- iv. Petition form for the Court of Appeal.

4.21 Recommendation 21

Bestowment Registration Form

- i. It shall be made mandatory by law that representatives of the village (Sui o le nuu) shall sign the registration form with ONLY one (1) new title.
- ii. Bestowment of new titles should take place within the village the title belongs to.

4.22. Recommendation 22:

Family High Chief (Sa'o)

It is quintessential for an elected Sa'o to reside within the village and family the title belongs to. The heirs to the title have the collective authority to remove the title from the titleholder if service is not rendered to the family and village. A Sa'o title is highly dignified if held by a maximum of five (5) matai at one time.

4.23. Recommendation 23:

Registration of the Trustee of Customary Land (Pulefaamau).

That there should be a Register to record all customary land trustees approved by the LTC.

4.24 Recommendation 24:

Continuous Capacity Building for Samoan Judges.

There should be ongoing capacity building programs for Samoan Judges in order for them to continuously acquire the knowledge needed for the task and to uphold, revive and remind them of the rules and procedures of their work.

4.25 Recommendation 25:

Publicizing of LTC matters.

Alternative mediums of communication should be considered by the Ministry to publish its notices besides the Savali newspaper.

4.26 Recommendation 26:

Research Division for the LTC.

d) Recommend the establishment of a Research Division as soon as possible to conduct research and investigations ensuring complete and accurate information presented to SJs. The proposed outputs of the Division are as follows:-

- vii. Detail the history of rulings/decisions related to a case under review;
- viii. Maintain any records of memos or writings between the Judges and parties;
- ix. Research the requirements of the Law related to a matter before the Court;
- x. Revise the template to consolidate a clear and brief summary of proceedings for the Judges;
- xi. Other research duties as may be required by the President and the Office; and
- xii. Prepare an information brief on a matter to be submitted to the Judge before the case is heard.

e) Research Division Staff.

- iii) Two Research officers with relevant qualifications for the position; and

iv) Must possess a Degree in Law (or any other relevant qualification) and should be knowledgeable in the Samoan customs and usage, no less than 7 years working experience in a research based working environment and other necessary requirements.

f) Office of the research division.

Construct a room for the Research Division close to the strong room for security and ease of research.

4.27 Recommendation 27;  
Audio Recorders.

To legally enforce the upgrading of audio recording machines in both Upolu and Savaii in order to record the proceedings of the Court and to make sure that all records are being kept properly.

4.28 Recommendation 28;  
Tuasivi Office.

Recommends that the Government build a stable office for the Court office at Tuasivi.

4.29. Recommendation 29:  
Institutional Strengthening Project (ISP).

The MJCA should seek assistance from our international partners to spearhead an Institutional Strengthening Project to address the issues and improve on the process of the LTC.

4.30 Recommendation 30:  
Consultation Rooms.

All matters lodged in the LTC should be consulted in separate and secure rooms to avoid conflict between parties.



## *X Appendix 2: Additional Recommendations*

### **Recommendation A:-**

**The LTC should recognize the support of Consultants.**

#### **Rationale.**

A Consultant expressed grievance in regards to a Judge whose decision impacted a party negatively because the Judge was unsatisfied with the Consultants service. The Consultant believes that they are well versed in the writing of summary of the proceedings which does not need further questioning from Judges.

### **Recommendation B:-**

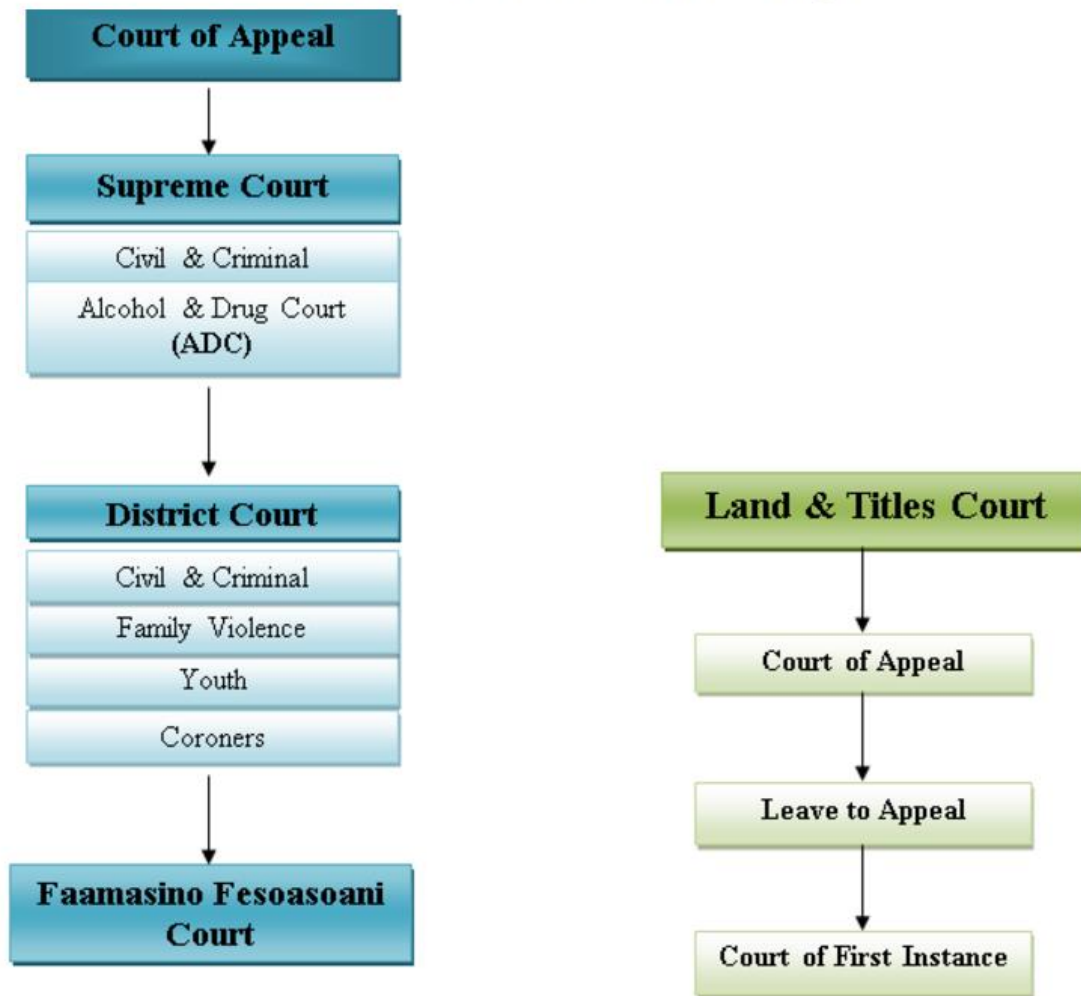
**All matters pertaining to land and titles in Savaii should be conducted at the Court House in Tuasivi.**

#### **Rationale.**

Many submissions by parties from Savaii suggested that all hearings pertaining to land and titles in Savaii should be conducted at Tuasivi as travel is a costly exercise not only for travel expenses but also the costs to sustaining the party as per customary culture and practise.<sup>36</sup>.



## Samoa Court Hierarchy



<sup>130</sup> Ministry of Justice and Courts Administration "Samoa Court Hierarchy" (2016)  
<<https://www.mjca.gov.ws/index.php/services/courts-division/page>>