

purposes.

This proposal asks for reduction of the legal size for an allotment, but a grant can still exceed the legal size if required because that prescribed legal size is only the minimum size for an allotment that can be registered.

Some people believe that if this proposed legal size had been used years ago, more people would have land today. A male attendee stated that according to the last census in Tonga which shows the total population of 100,000, with about 15,000 town allotments and 16,000 tax allotments. If those town allotments were granted in half the size in which each allotment was registered then the number of allotments granted would at least be doubled, which would come to about 30,000 town allotments and 32,000 tax allotments.

It was also proposed under this topic that people with a lot of land should share their land. There are some people who have a substantial amount of land whilst there are still many people who do not have any land. If these larger plots of land can be subdivided and distributed to others starting with their own relatives and those closest to them.

One of the written submissions proposed a change to the law so that the minimum size of an allotment should be the legal size so that no allotment would exceed that legal size. It was further proposed that allotments which have been registered should also be reduced to the legal size and any land in excess of the legal size should be distributed to others who do not have any land. The landholder who has excess land can be given the option of electing who his excess land will go to such as his brother or sister, son or his other children. A procedure for distributing such excess land would be for the landholder to submit an application to the Commission (that is proposed on paragraph 30.8.b) for them to carry out this work. The Commission can specify what the legal size of an allotment should be and the legal size may vary with each estate. It was also proposed that excess land shall not be leased out by the family unless approved by the Commission. It was also proposed that a reasonable time period should be given to landholders or families whose land exceeds the legal size within which to complete the task of surveying and reallocating excess land. If this work is not completed with the specified time period then the land will revert to Government.

Despite this proposal to reduce the legal size for town and tax allotments, the People's Representatives had concerns regarding this topic. There are some allotments which do not reach the existing legal size prescribed by law and they are therefore leased out as they cannot be registered. But it appears that smaller plots result in homes crowding together and located too close to one another and this creates further problems of residents quarrelling. The same problem will arise if the legal size of registered allotments will be reduced. This same problem is evident in settlements over tax allotments which have been sub-divided where roads are too narrow for vehicles and this raises issues of safety of residents. It was proposed that the legal size for registered allotments should also apply to leases to avoid these problems.

**21.2 To clarify what land is available in each estate so that it may be allocated to residents**

It is proposed that land availability (being land that has not been distributed) in each estate should be confirmed. Land available in each estate which is still with the estate holder should be allocated to those who do not have any land and the estate holder should not hold onto it or use it for his own benefit. Some people believe that there are a lot of estates where there is land available for distribution that is still with the estate holder and if such land is allocated it may be enough to form another township. However, the important thing is to clarify what land is available in each estate.

**21.3 To consider "strata titles" which is commonly used overseas**

This proposal seeks consideration of strata titles which is commonly used overseas where houses are built to be several stories high and any one person can purchase and own a part of that building, but he will not own the land on which the building is built. His right will be limited only to the part of the building that he owns, which can be a unit in a level of the building or a whole level or floor. This type of interest is very common overseas including New Zealand and it is a good method to deal with the problem of land shortage.

The TCCI supported this proposal for Tonga in the future if there will be a need for high level rising.

**21.4 To simplify the process for exchanging allotments**

It is proposed that the law and procedure for exchanging allotments should be simplified. Some people have moved from Vava'u or Ha'apai to Tongatapu and they'd want to exchange their allotments in Vava'u or Ha'apai with an allotment in Tongatapu in a Crown or Noble's estate. If the process for exchanges is simplified then allotments in the outer islands would be available to those who live in those islands.

**21.5 An heir to give notice of an unregistered land he holds when he makes an heir's claim**

Some people have told the Commission that there are landholders with a registered town or tax allotment who also have unregistered land. It is proposed that the law should expressly state that when someone makes an heir's claim to land they should give notice in the claim of any land which they currently hold that is not yet registered. These unregistered allotments should be considered because if one is making an heir's claim then the unregistered land should be given to others in the estate that do not have any land. Although the law states that a landholder can register only one town allotment and one tax allotment there are landholders who also hold unregistered land and are able to have access to more land than what is prescribed by law. Although this land is unregistered, the holder has access to and control over it and thereby benefit from it. Such unregistered land also devolves through the family line of succession despite the fact that it is not registered.

Upon receiving notice that a landholder is also the holder of unregistered land, the staff of

the Ministry of Lands should then inform the Minister so that they can follow up on why such land has remained unregistered. This will also help with the Ministry's records of unregistered land.

#### **21.6 Fanga'uta should be distributed (as allotments)**

It was proposed that consideration be given to the idea of granting town and tax allotments from Fanga'uta Lagoon allowing people to reclaim an allotment on the lagoon. This proposal was put forward particularly during the Commission's meetings in towns that surrounds the lagoon including Veitongo as residents believe that this will make more land available for residential purposes as villages are becoming overcrowded. This idea was also brought up in one of the Commission's meetings in America as this may make it possible to grant allotments to Tongans living overseas who would like an allotment in Tonga.

#### **21.7 Each estate should have a "reserve"**

It was proposed that in each estate there should be land designated as reserves for that estate. Land can be allocated from the reserve for various community purposes such as sport or a land to be used for general community purposes. A new cemetery can also be allocated from this reserve and it can even be divided into town allotments when required. It was also proposed that it would be best to designate these reserves from tax allotments which are close to residential areas (matakolo) which can be exchanged with land further out from the town center (matakolo). This can cause the town's development projects to move further away from the limits that it is currently restricted to due to unavailability of land.

The Church leaders also put forward a relevant proposal, namely that land should be made available or set aside in each estate for sporting and recreational activities for the people and children of the town.

### **TOPIC 22: TO IMPROVE THE WORKING RELATIONSHIP BETWEEN ESTATE HOLDERS AND THE PEOPLE**

The public had concerns regarding aspects of their relationship with estate holders and the problems they face when they're dealing with an estate holder in relation to land matters. The public hope for a simpler and closer working relationship with estate holders.

In Dr Elizabeth Wood-Ellem's submission, she referred to the accounts of Alaric Maude regarding practices of the 20<sup>th</sup> century. Back then estate holders would not register people's allotments to ensure that they will work his land and contribute to his responsibilities to the village before an allotment is registered. But the estate holder would use this delaying tactic to increase his power and also make personal gains. People were often threatened with ejectment and this caused people to be totally obedient to estate holders in order that their land may be registered or land be given to their children. Maude stated that this problem

slightly decreased during the Cadastral Survey that was conducted between 1957-62. However, in the 1966 census, it showed that only 42 of all the tax payers actually held a registered allotment.

Wood-Ellem also referred to amendments to laws applying to registration of an allotment in 1915. Before this change the Minister of Lands had the sole authority to register an allotment. But with the change, the Minister of Lands was required to consult the Estate Holder whether he agrees or approves the application for registration before registration can be done. This is where the requirement under the land law that an Estate Holder must sign the application for a grant (tala'api) before the Minister of Lands will register the allotment came about. This amendment was made in 1915 was a significant and major undermining of the basis of the land tenure introduced by Tupou I.

Reference was also made to how Queen Salote Tupou III encouraged people to register their allotments. She also urged estate holders and the Government to make land available. Of great concern to Her Majesty was the distribution and cultivation of land. Extracts from speeches by Queen Salote starting from 1920 showed matters that She was concerned with which included the following:

- a) Strong measures should be taken to distribute land to taxpayers rather than have land lying idle and useless. Government and Nobles should work together to fulfill their duty which is to allocate land to the people.
- b) There are a lot of taxpayers who are without allotments. It is the duty of Estate Holders to induce these people to secure the land to which they are entitled and to develop it for themselves and the future of the country.
- c) Granting of leases should be considered very carefully and always keeping in mind that our population is increasing. Careful consideration should be given to the amount of land in hereditary estates that has not yet been appropriated. There are many leases where the lessee is not able to pay their lease money and consequently persons end up with a lot of land. The number of people in that year (1931) who did not have a tax allotment was between 700 to 1200 and only 127 taxpayers received tax allotments during the year.
- d) It is important to cultivate one's land as political freedom has no more secure foundation than personal freedom from want. If we do not cultivate our land there are bound to be shortages and those who cultivate their land shall suffer because of those who do not.
- e) Our land system is unique and that is the sure foundation of our peaceful way of life. We should look to the land as a means to provide for our families. There are people still without land so those who do have land should work their land and concentrate their efforts.

From the information provided by Dr Elizabeth Wood-Ellem and the proposals provided under this Topic, it is evident that problems in the relationship between the Nobles and the people in the time of Queen Salote Tupou III are still prevalent nowadays.

The following matters were raised for consideration by the Commission under this Topic:

**22.1 The law should expressly specify a time period within which an estate holder must make a decision regarding an application for a grant (tala'api)**

It is proposed that the law should expressly specify a time period within which the Estate Holder should make a decision regarding an application for grant of an allotment. Some people believe that Estate Holders have too much freedom under existing laws because it does not specify a time limit for making a decision on an application for grant of an allotment.

**22.2 Granting the same allotment twice (to two different people)**

The Commission was told in one of its meetings in Tongatapu that there is an Estate Holder who has granted the same allotment to three different people. It is proposed that the law should ensure that this will not happen and the law may also want to specify who this land should go to. Shall it go to the person whose application was first signed by the Estate Holder? Or to the person who had given the most money to the Estate Holder?

**22.3 The Minister of Lands should not be a Noble**

It is proposed that the Minister of Lands should not be a Noble due to alleged corruptions in land matters. The Minister should exercise his powers independently and this independence will be difficult to achieve if the Minister of Lands is also a Noble.

**22.4 To ensure that land which was surrendered to be given to a particular person does in fact go to that person**

The public believe that the current practice for surrender of land does not ensure the security of individual land rights. The concern is due to the land surrendered not being surrendered directly from the landholder to the person to whom he wishes to give his land to. Instead, when a surrendered allotment goes to the Estate Holder who will then grant it to the person that the landholder wanted to give the land to *if he so wishes*. It is proposed that the Land Act should be amended to ensure that land which has been surrendered will go to the actual person that land was intended for. Under the current Land Act, the Estate Holder can grant this surrendered allotment to someone else once it has been surrendered back to the Estate Holder.

This proposal is relevant to the proposals in paragraphs 29.4 and 32.5.

**22.5 Estate holders do not allow some allotments to be registered and occupiers are told to just continue to live on the land**

The public proposed that there should be a legal procedure to force Estate Holders to register the allotments that have been occupied for many years, but has not been registered for many years. Some people inform the Commission that there are some Estate Holders who do not allow them to register their allotments when they lodge an application for grant of an allotment. Instead they're told to just live on the land. An allotment which is

not registered is uncertain and many fear that the current Estate Holder will die and the new Estate Holder will succeed with different intentions regarding unregistered land.

A law practitioner who is also a People's Representative to the Legislative Assembly informed the Commission that this is common in his constituent particularly in Houma and Ha'akame. There are a lot of allotments which have not been registered despite having been occupied by families for many years. The Commission asked the Representative why these people find it difficult to go to the Estate Holder with an application for grant of an allotment (tala'api). The Representative informed the Commission that some people feel that they should take gifts to the Estate Holder although he does not expect it. So some people have not gone to the Estate Holder for this reason while there are others who have been to Estate Holder many times, but their land remain unregistered as they are told to just live on the land.

#### **22.6 Estate holders subsequently stop the registration of an allotment after having signed the application for grant of that allotment**

The public have asked for clarification in the law the status of an application for grant of an allotment which the Estate Holder had signed. Can the same Estate Holder cancel an application for a grant which he had signed? The same question applies to an application which had been signed by an Estate Holder and later cancelled by the succeeding Holder by contacting the Minister of Lands and asking him not to sign the registration of that allotment. These matters should be clarified.

#### **22.7 Difficult to secure a time to see a Noble**

The public proposed that the Estate Holders should have an office so that people are aware of the Estate Holder's place and time of business and when they are available to deal with people's land needs. Some people say that it is hard to secure a time to go and see an Estate Holder regarding one's land matters. Tongans living overseas often have to travel to Tonga to personally tend to their land transactions, but they find it hard to get an opportunity to see the Estate Holder and some even return overseas without having seen the Estate Holder to complete what task is required of them.

People who reside on the King's estates also hope for a more simple way to bring their land needs to the land agent (fakafofonga kelekele). They say it is very hard to get in touch with the Estate Holder or the land agent.

Similar problems are faced by residents of estates where the Estate Holder has died and the heir is still a minor so the title remains vacant and tending to residents land needs are delayed because of this vacancy. It is proposed that a trustee should be appointed to the vacant hereditary title until the heir comes of age. It is also proposed that this proposed trustee should be approved by the Land Commission (proposed in paragraph 30.8.b) or the Minister of Lands before the trustee is to be appointed by the Prime Minister.

The Commission was told during its meeting with the People's Representatives that they

were concerned with the extended absences of Estate Holders from their various estates. It is important that the Estate Holder lives in his estate and cater for the land needs of his people. The Estate Holder will also be more aware of his people's needs. Some Estate Holders spend a lot of time overseas for various reasons and the Holders of estates in the outer islands spend most of their time in Tongatapu.

There was also a proposal for estate holders who live overseas for extended periods and do not reside in their estates to appoint a trustee to look after his people and deal with land matters in his estate while he is away. It was also proposed that this trustee should be registered with the Ministry of Lands so that residents of the estate know of his existence.

The public also hope that Estate Holders would not demand money or gifts from people before they sign an application for a grant or deal with any land matter. This relates to the proposal in paragraph 29.24 to make such a demand an offence under law.

#### **22.8 Guidelines should be drafted to guide Estate Holders in the exercise of their powers**

It is proposed that a guide should be made that clearly sets out matters to be considered by an Estate Holder when he exercises his power to distribute land either through leases or registered allotments. This guide is to assist Estate Holders, but he will make his decision independently. Some of the matters relevant to this Topic can be included in this guide such as the following:

- a) Priority should be given to residents of the town who contribute to obligations of the estate over and above any new comers to the estate.
- b) Where a plot of unregistered land has been occupied by a family for many years, the first priority to register that plot should be given to that family.
- c) Land that has reverted to the Estate Holder because no claim was made by the heir, the first priority to register that land should be given to the family from whom the land had reverted from.
- d) A piece of land should not be granted more than once.
- e) An Estate Holder shall not cancel his signature from an application for grant of an allotment once it has been given.
- f) A succeeding Estate Holder should honor grants made by his predecessor.
- g) If someone has lodged an heir's claim to a registered allotment whilst they also occupy an unregistered allotment, registration of the unregistered allotment should be considered so that the heir can then choose which allotment he will hold – the land to which he is entitled as heir or the newly registered land.
- h) The Estate Holder should work together with the Town Land Council (which is proposed in paragraph 24.4) in distributing allotments from the estate.

#### **22.9 Estate boundaries should be clarified**

It is proposed that Government should urgently do what work is required to clarify the estate boundaries (as is proposed in paragraph h) of Part A). The Commission was informed during the public meeting in Niuatoputapu of an attendee's concern that as years pass it

seems that the estate boundaries have moved. For example, Tangipa's estate was a small estate, but with the years this estate has increased and invades part of Ma'atu's estate. This is unsatisfactory to some people particularly those who had lived in Ma'atu's estate but their land is now part of Tangipa's estate. The Commission was also told that there are allotments which are located between the two estates so that part of the allotment is on Ma'atu's estate and the other part is on Tangipa's estate. The public together with the town officers and district officer want to draw attention to the matter.

### **TOPIC 23: TO REVIEW THE LAND PRACTICES OF THE MINISTRY OF LANDS, SURVEY & NATURAL RESOURCES**

#### **23.1 A time period should be specified within which the Ministry of Lands should complete a land transaction or query from the public**

Due to delays in completing land matters submitted by the public to the Ministry of Lands, it is proposed that the laws should expressly state a time period within which the Ministry of Lands should complete their work to people's land matters. There are some applications for allotment (tala'api) which has been granted and has been with the Ministry for many years awaiting registration despite the fact that the intending landholder has completed all requirements to the Ministry of Lands. The same problem arises with the Ministry's performance in relation to leases and including applications to cancel a lease, which can take years to complete.

This same problem exists in all Divisions of the Ministry. If it can be proposed that work should be completed within one year from the date it is received by the Ministry. Some people die and their land matters regarding their allotment are still not completed from the Ministry of Lands. The Ministry should try and reduce these backlogs by using new methods such as the internet and electronic methods to accelerate their work. If this will result in higher charges for the services rendered by the Ministry that would be preferred as long as it will meet people's demands.

The *Tonga Chamber of Commerce & Industries (TCCI)* told the Commission that the Ministry of Lands takes too long to complete processing of mortgage applications which are submitted to them from the Banks. They believe that these processing times would be quick as delays by the Ministry of Lands in processing a mortgage will also hold up the release of funds to businesses and people which will affect economic development when the borrower does not receive the funds when it is required.

Businesses advised TCCI that another problem is the difficulty in obtaining clear and reliable information on the status of an allotment. A lot of people need a piece of land for their business activities, but it is difficult to obtain sure and reliable information on a piece of land which one would like to use. It does not benefit a business to start using and developing a piece of land for only to find out later that you don't have the right to that



particular allotment.

The Banks, businesses and the public would like the Ministry to clearly outline the procedures and processes involved in each land transaction including application for a grant (tala'api), lease application, mortgage application and surrender. Information provided from clerks within the Ministry in response to queries from the public are sometimes contradictory and the public are not aware of the processes and various Divisions of the Ministry that their land matter goes through before it can be registered. These processes should be simple and transparent.

### **23.2 Staff of the Ministry of Lands often cause available allotments in Government estates to be registered in the name of their relatives and friends**

Some people heard allegations from the public that some employees of the Ministry of Lands cause vacant allotments on Crown land to be registered in the names of their own relatives and friends. This means that people from another district can come and own land and reside in estates which belong to the Crown while there are people in those towns who do not have any land.

During some of the public meetings in the outer islands, residents raised concerns regarding nearby islands which are Government estates. Not everyone in the outer islands has a piece of land; so it was proposed that they should be given the first opportunity to receive an allotment in a nearby island. Some people allege that when plots of land in these islands (which are Government estates) are distributed or allocated, the surveyors who had conducted the survey nominate their relatives and friends to be granted these allotments.

The Commission received a letter from the 'Eua Council which was addressed to the Minister of Lands. This letter was dated 4 April 2011. The letter was a complaint from the people of 'Eua which was submitted through the Council concerning employees of the Ministry of Lands in the distribution of land in Government estates including Government estates in 'Eua. The letter referred to methods of land distribution which they were acquainted with in the past. After the Ministry carries out a survey, the Minister usually went to 'Eua and called a fono whereby people were allocated a plot so as to ensure that families get an allotment. But this method is no longer used nowadays where surveyors conduct the survey then proceed to allocate the allotments to people and they usually start with their own relatives and friends. People who end up registering these allotments are not from those towns and they do not contribute to the activities of the town. At the same time, there are many people in those towns that do not have any land and there are families where the father, son and grandson are all without land.

The people of 'Eua hope to see an end to this practice by the Ministry of Lands so that people of 'Eua who do have any land are allocated an allotment.

The letter also provided information on the number of people in each town in 'Eua who do not have a town and tax allotment as is in the Table below:

Name of the town	Men with no allotment
Mu'a	35
Petani	13
Futu	10
Angaha	54
Tongamama'o	38
Sapa'ata	15
Kolomaile	69
'Ohonua	65
Pangai	21
'Esia	14
Houma	25
Fata'ulua	19

### **23.3 Surveys should be done in a more reasonable manner**

Sometimes when a survey is done it is discovered that an allotment overlaps with the next allotment and both allotments although occupied are not registered. These allotments have been occupied by families for at least 20 years and problems arise when they try to register the allotments and discover that they overlap. It is proposed that Government and the Ministry of Lands should find a way to solve these problems so that the allotments can be registered. This kind of problem worsens when allotments are allowed to be occupation for many years without registration as is referred to in paragraph 22.5.

### **23.4 Consider privatizing services**

Services provided by the Ministry should be privatized. If the Ministry could retain a Land Registrar while surveys are let out as there are many surveyors to meet demands more efficiently. The Ministry should be scaled down so that they only concentrate on record keeping while surveys and other services are let out. This will be more efficient and satisfactory to the public.

### **23.5 To facilitate contacts from Tongans living overseas regarding their land needs**

Tongans living overseas hope to see a simplified procedure to facilitate conveying their land queries and needs from overseas to Tonga. What was proposed from the public under this topic is discussed in 26.1 a) to c) and Topic 29.

### **23.6 To require identity documents from anyone who makes a land claim such as the heir**

As is discussed in paragraph 26.1 d), it is proposed that the Ministry of Lands should make specific requirements to confirm the identity of anyone who claims to be an heir, the holder of an allotment, a lessor or anyone who claims to have any rights over an allotment. This will reduce and restrain corruption in land matters.

A Tongan living overseas says that anyone can just go to the Ministry of Lands and obtain information on an allotment or other information without being asked of your identity or your relation (if any) to the land or land transaction in question.

### **23.7 Problems faced with residents of outer islands when they are required to pay the costs of conducting a survey**

It is proposed that the Ministry of Lands should try and cover all expenses of services they provide. People sometimes face difficulties when a survey of their allotment is required as part of a land transaction and this was raised in the public meetings including the meetings in the outer islands. The cost of a survey is to be borne by the allotment holder, but they cannot afford it. This includes paying for chartered boats to transport the surveyors to the outer islands, fixing meals for the surveyors and their return trip to the main island.

### **23.8 To facilitate the land needs of residents in the outer islands and the Governors' offices**

It is proposed that the Ministry of Lands should leave documents containing information on allotments in Ha'apai and Vava'u in the respective Governor's offices. People residing in these districts say that they when they go to search for land information they are usually told that they'd have to go to Tongatapu to get the information required or if they need to look at the maps. People in the outer islands cannot afford to travel to Tongatapu and the Governor's offices should be able to perform these functions in these two islands.

### **23.9 The law should specify a time period within which an estate holder must make a decision regarding an application for grant of an allotment**

As is proposed in paragraph 22.1 regarding Noble estate holders, the same proposal is made regarding Government estates. The Land Act should expressly state a time period within which the Minister of Lands should make a decision regarding an application for grant of an allotment. A lot of applications have been made regarding various allotments, but years have passed and still no decision has been made on whether a grant will be made. The proposal is to give the Minister of Lands a period of one year, which is the same period proposed for Noble Estate Holders.

### **23.10 Survey fees for renewal of a lease**

The Commission was informed that when a lease is renewed at the end of the lease, a survey fee is still paid although it is only a renewal. It was proposed that this matter should be considered as a "survey fee" should not be levied because it concerns the same piece of land and the lease is simply renewed. There is no survey done, but the fee is still charged.

### **23.11 To ensure than an allotment which has been subdivided are allocated in accordance with the wishes of the landholder**

It is proposed that when a landholder surrenders an allotment for the purpose of subdividing that allotment for allocation to others in his family then those allotments so allocated by the landholder should in fact go to whom the subdivided plots was intended. This process of surrendering land to the Estate Holder is not subject to any restrictions (on

the Estate Holder once the land has reverted to him) and problems arising as is discussed in paragraph 22.4. Some people say that sometimes once land is surrendered to the Minister of Lands (for Government estates) and the surrender has been approved by Cabinet, the employees of the Ministry allocate these plots to other people and not to those from the family of the landholder for whom the plot was intended.

### **23.12 The fees prescribed under the Land Act should be reviewed**

It is proposed that the fees prescribed under the Land Act for services provided by the Ministry of Lands should be reviewed as it may be time to increase these fees. Increasing the fees would be beneficial particularly if it will help expedite the Ministry's work in catering for people's land needs. It was also proposed that new fees should be prescribed for any work that is currently being carried out by the Ministry that does not attract a fee under the Land Act. If this is so then reasonable fees should be levied for those services.

### **23.13 The Ministry of Lands should have a legal adviser**

It is proposed that a post for a legal advisor should be provided within the Ministry so that they can provide daily legal advice to the employees in the performance of their functions in accordance with the provisions of the Land Act. This legal advisor should be knowledgeable, experienced and with expertise in land laws in Tonga. One main function to be carried out by this person is to supervise the performance of registry staff to ensure that the land devolves to the rightful person in the line of succession.

The Commission was told that there's a real need for the registry staff to carry of the Ministry of Lands to carry out their functions efficiently and a legal advisor will assist them. Legal advice provided from registry staff of the Ministry of Lands is not always accurate due to lacking legal knowledge and this gives rise to distrust and causes more delays in service delivery.

### **23.14 Commercial work of the Ministry of Lands**

It is proposed that a Commercial Division of the Ministry of Lands should be established to look after any potential sources of revenue that Government can get from leases, sub-leases and tenancy agreements.

### **23.15 A Division to deal with complaints**

It is proposed that a Division of the Ministry should be established to deal with any complaints from the public due to dissatisfaction of staff performance. It was also proposed that the same Division should also supervise the staff to ensure that their will not be discriminatory, corrupt or accept bribes whilst they're performing their functions.

### **23.16 Survey should be privatized**

One of the surveyors in the Survey Division of the Ministry of in a written submission to the Commission proposed the privatization of the Ministry's current survey services. This proposal is based on the fact that the Survey Division of the Ministry cannot meet the

demand for survey services (as there are 5 different types of surveys) that are required of the Ministry of Lands.

At present, the Survey Division's services are to be carried out only during Government working hours. The number of survey staff is also limited. This means that a lot of surveys are not completed for years. Privatization is the practice in foreign countries including the smaller Pacific Islands nations which means they can meet the market demand and people's survey needs.

The following matters should be considered together with this proposal:

- a) establish an Association of Surveyors and this body will administer and regulate surveyors in the private sector;
- b) the Association shall be governed by a board whose members will comprise of surveyors elected from the surveyors who are registered with the Association;
- c) private surveyors must register with the Association who will assess them to determine whether they have sufficient experience (including the requirement for a Surveyor degree, fluent in written and oral English and Tongan, knowledgeable in laws and regulations that is relevant to surveyors and other matters);
- d) a surveyor license should be renewed annually and it should be open to any qualified surveyor whether they are Tongan subjects or foreigners.

It is also proposed that the above proposal should be considered together with the proposal to allow surveyors who are employed with Government to conduct services outside working hours like doctors do as this will help cater for the public's demands

## **TOPIC 24: TO CONSIDER THE LANDS NEEDS OF TOWNS AND CHURCHES**

The public hope to simplified ways of landholding for Churches in Tonga because their land is destined for building of chapels, residences for reverends and schools. Tonga is a Christian country and the churches look after the spiritual well being of the people of this country and they have also taken on the responsibility of educating the children and youth in their schools. Christian values should be evident in our land laws by providing special rights to Churches.

### **24.1 To create a separate type of leasehold for Churches**

Churches acquire land through leaseholds and it is proposed that due consideration should be given to Church leases so that it is easy to acquire and renew such leases. Furthermore, low rent should be charged to these leases or it may be even rent free because rent charged on Church leases are paid by members of each Church, but there are some Churches which are smaller in number and members face a lot of difficulty when burdened with lease payments.

### **24.2 A separate type of landholding should be provided for Churches**

It was also proposed that a separate type of land holding should be provided for Churches by law so that leases are no longer required. It would be better for Church lands to be registered under the name of the Church to avoid repeated renewals and having to pay money for other things as is done with leases. The Church Leaders supported this proposal because some members of the Churches sometimes provide a piece of land as a gift to the Church. It would be better if these gifted lands could be registered as the Church's land.

#### **24.3 An allotment for the town ('api fakakolo)**

It was proposed for consideration that that Estate Holders, both Government and the Nobles, should be able to allow land from their various estate to be registered under a Town Committee or Council if required. Some people believe it would be better not to lease these allotments because lease rentals are subject to change and could be increased in future. This proposal suggests registration of these allotments or another form of landholding to ensure that the land will be used for that purpose indefinitely. An allotment for the town is vital for performance of town functions.

As in paragraph 21.7, if there are reserves in each town such land needed for town functions can be allocated from this reserve.

#### **24.4 Town land council**

It is proposed that each town should have a Town Land Council to advise the Estate Holder in performing his functions. People of each town will know a lot about the history of family allotments, who contributes to town activities, families in desperate need of land and related matters. Each town can establish a Council where their concerns can be voiced and advice provided to the Estate Holder to assist with his decision-making.

### **TOPIC 25: URGENT ATTENTION SHOULD BE GIVEN TO THE PEOPLE'S NEED OF CEMETERIES**

The people of the country are concerned with the current status of cemeteries. The current cemeteries in each town are overcrowded and this problem should be given special attention as the people's need for cemeteries should be met. In the Commission's public meetings the idea of cremation was also brought up for consideration whether it is time for Tonga to use this method of disposing of bodies due to the lack of available land for cemeteries. This idea was not supported and many believe that it is not time yet to introduce this method in Tonga as it will clash with Tongan traditions and customs.

The following matters were put forward to assist with the consideration of this Topic:

#### **25.1 Government should provide more land to be used as cemeteries**

It is proposed that Government should consider providing more cemeteries in each town. People face difficulty due to the lack of available plots in existing cemeteries as plots in most cemeteries occupied or already allocated. Some families usually quarrel when one family buries their dead on a plot that had been allocated to another family as per

directions from the town officer. There are also people from the outer islands who have moved to Tongatapu and they are shunned when they are in need of a plot in a cemetery.

This is one of the reasons for the proposal in paragraph 21.7 to allocate reserves in each town so that any land required by the town for public purposes such as cemeteries can be taken from these reserves.

#### **25.2 To allow home burials**

It is proposed that home burials in tax and town allotments should be allowed where these lands are available for use as such. A lot of people would prefer to bury their families in their own homes and this will help alleviate the problems faced due to lack of available plots in cemeteries.

#### **25.3 To facilitate and encourage families to take a piece of family land and reserve it for a family cemetery**

It is proposed that families should be encouraged to allocate a family cemetery from family land and a simple procedure should be provided in the law to legalize it. Some families have plenty of land and part of it can be designated as their family cemetery.

#### **25.4 To ensure that a plot of land is taken from each new settlement and land so taken should be used for that purpose**

It is proposed that when a landholder subdivides an allotment for the purpose of allocating to others then some land from this allotment should be allocated as a cemetery. Such subdivisions can result in some 20 or more plots of town allotments so land for a cemetery should be allocated from this subdivision to cater for the needs of residents in that subdivision and may be even residents living nearby.

It was also proposed that the Minister of Lands should ensure that any land taken for the purpose of a new cemetery when an allotment is subdivided is in fact used for that purpose. In one of the public meetings, the Commission was told that one allotment was subdivided and the landholder was told that part of the land will be taken by Government and it was understood that this land is to be declared a cemetery. However, when the town officer followed up this matter, it was later found that this land has since been registered under someone else.

#### **25.5 The law should specify the authority over cemeteries**

It is proposed that the law should clarify or specify how plots in a cemetery are to be allocated. In the past, cemeteries used to belong to families, but quarrels sometimes happen today between families and the town officer because people do not know who has the authority to allocate plots in cemeteries – is it the town officer or the family who makes a claim on the cemetery? People need a clear process to follow when they have a funeral and need plots for burial.

#### **25.6 Church cemeteries**

The Commission was told during the meeting with Churches that the Catholic Church has concerns regarding their cemeteries. The Church acquires land for use as cemeteries and it is subsequently declared in the Gazette. The Minister of Lands has authority over these cemeteries once they are gazette. The Church is concerned because usually the power over cemeteries is delegated to Town Officers or Estate Holders and they sometimes allow a burial in a Church cemetery without prior consultation with the Church or the Minister. It is proposed that this practice should be reviewed so that not just any body is buried in Church cemeteries without prior approval from the Church.

The Catholic Church has certain rituals that they conduct in Church cemeteries in each year on the 2<sup>nd</sup> of November and on other Sundays where they conduct a service on the cemetery ground. This is why they are concerned with the burial of non-members in the Church cemetery as families of those non-members may object to these Church rituals being carried out in cemetery grounds.

The Commission was also informed that a Convent will be built in Fahefa which will include cemeteries to use for burial of nuns if they die. It was proposed that such a cemetery should be allowed by law as it is very similar to the approval of burials in private homes.

## **TOPIC 26: TO AMEND THE LAND ACT SO AS TO PROVIDE MORE PROTECTION FOR FAMILY LANDS AND PROVIDE MORE OPPORTUNITIES FOR THE LANDHOLDER TO BENEFIT FROM HIS LAND**

### **26.1 To review the requirements regarding an heir's claim upon the death of the landholder**

It was proposed that legal requirements under the Land Act relating to the lodgment of an heir claim's should be reviewed, including the following:

- a) The period provided under the law within which an heir's claim should be lodged should be extended from one year to say five years. This will be more convenient for Tongans living overseas as an heir living overseas will usually have to travel to Tongan in order to lodge the claim. Despite this proposal for extension of time for lodging an heir's claim, commercial banks are concerned that it will create further problems in ascertaining the legal status of a particular piece of land due to the wait until the time specified under the law for lodging a claim ends. This proposal is discussed in more detail in paragraph 31.2.
- b) Consider allowing an heir's claim to be lodged with the Consular offices overseas who will then submit the claim to the Ministry of Lands in Tonga.
- c) Communication over the internet should be used for submission of a claim by an heir or widow who resides overseas to avoid extra expenses of travelling to Tonga.
- d) The requirement of an ID from anyone making an heir's claim should be fully



enforced and the history of the family should be investigated to confirm that it is the rightful heir who is making the claim. Any person who is not the rightful heir can make a claim that he is the heir so the Ministry should ensure that they insist on provision of sufficient IDs in all land transactions.

- e) There are some allotments where the heir does not make a claim within the specified time and the allotment reverts to the Estate Holder. The first opportunity to that allotment which has reverted should be given to the family from which the land had reverted and a meeting should be held with that family to discuss a peaceful way that this land can be returned to the family. Sometimes families and heir forget to make the claim and they end up losing the land which they have maintained for years. Some Estate Holders do not take this land away from these families although this has happened in some estates where the Estate Holder takes possession of the land despite the family asking for its return.
- f) The Ministry of Lands and the Estate Holder can help families allocate the land of a deceased within one year of the death of the landholder. This will be a peaceful way to allocate or distribute family land with the help of the Ministry.

#### **26.2 The law should clarify the rights of the registered holder as against an occupier of the allotment**

It is proposed that due consideration should be given to the rights of a landholder as against someone who is living or occupying that same piece of land as many problems arise in these situations. On many occasions, the landholder may be living on another allotment or in an overseas country or in the outer islands and he's to find out later that someone is living on his allotment without his knowledge. On other occasions, the landholder willingly let another person live on his allotment and they are now quarrelling. The main question is whether the landholder is entitled to return to his allotment. It is therefore proposed that the law should clearly state whether the landholder should get his land back. The landholder's rights should be well protected and any rights afforded to the occupier should also be stated clearly in the law and means of enforcing and protecting their respective rights.

#### **26.3 The brothers of the landholder should be given an allotment where the heir subdivides the family land for distribution**

As is discussed in paragraph 2.5, it is proposed that the law should expressly state that if the heir subdivides the family land for distribution then he must provide a share to each of his brothers before he can allocate an allotment to anyone else from the family.

#### **26.4 The landholder should receive a share of any natural resources discovered on his land**

It is proposed that a landholder should get a share of any natural resources or precious stones discovered on his land. The landholder should get a share because it is his land and the rest can go to the Government.

**TOPIC 27: TO ASSIST THE PUBLIC IN ENFORCING THEIR LAND RIGHTS AND BECOME MORE AWARE OF THEIR RIGHTS**

**27.1 To establish a legal aid programme to assist people seek enforcement of their rights**

It is proposed that a legal aid programme should be established to help people seek enforcement of their rights to land. A lot of people wrongfully lost their land or rights to land, but they are not able to take legal action to rights these wrongs and recover their land due to insufficient finances to pay for legal fees. A majority of people in Tonga are not able to pay for legal fees and this problem should be given due consideration because of those in line to succeed to family allotments in generations to come. If the family land is lost, not only does it affect the current landholder, but it also affects the rights of those in the line of succession. This is evident in some of the public meetings where some people talked about family land that had been lost for more than 10 years. People who raised these matters for discussion are descendants that should have acquired the family land if it was not lost and still remained in the family, but they're dissatisfied as they are without land today because the family land had been lost many years ago through no fault of their own.

Many people referred to land disputes which they have had for many years. It is understood that it is the Land Court which has jurisdiction to determine these disputes. When people were asked why they had not taken the matter to Court their answer was they had no money to pay for a lawyer to prepare the legal action. It was also evident from the meetings that a lot of people did not know of the limitation under the law for bringing legal action on land matters. Such legal actions must be made within 10 years from the date of the alleged wrongful act.

**27.2 Government should have a procedure whereby the public are informed of changes to the Land Act**

It is proposed that Government and the Ministry of Lands, Survey & Natural Resources should keep the public informed of changes that are to be made to the Land Act. Tongans living overseas also proposed that dissemination of any such information should also include them because although they reside overseas they still have land in Tonga. It is important for landholders to know of changes to the law so that they can comply with the law and avoid losing their land.

**27.3 To devise educational programmes to promote the public's awareness of their land rights**

It is proposed that Government should consider organizing education programmes throughout towns to raise awareness of land laws and particularly the basic land rights of individual landholders. Some requirements under the Land Act may appear simple enough to understand, but many people are still not aware of it such as the line of succession to land and the requirement to lodge an heir's claim within one year after the death of the landholder. Some people only learnt from the discussions in the public meetings that an heir's claim must be lodged. Some people were under the impression that allotments

devolve automatically to the heir and this sometimes caused dissatisfaction when the allotment reverted to the Estate Holder who in turn grants it to someone else. The Estate Holder is then accused of corruption as these people thought that he had granted the same allotment twice, but that is not the case.

It is proposed that basic land rights should be included in the syllabus for primary and secondary education to assist with public awareness and education of land rights.

#### **27.4 To establish a body or division to deal with land disputes**

It is proposed that a land dispute body should be established. It should be independent from the Courts and deal with land disputes. Only if the Tribunal is not able to resolve a dispute should it be referred to the Courts.

#### **27.5 Land Court**

It is proposed that a deeper review of the Land Court is required. Many things that people had referred to during the public meetings can be resolved by the Land Court who performs its functions effectively and independently. The current status of the Land Court should be reviewed.

#### **27.6 The 10 year limitation within which a court action must be made**

A lot of people are not aware that legal action on a land matter must be brought within 10 years from the date the alleged wrongful act occurred. Some people suggest that this limitation should be reviewed and 10 years extended to 20 years. Descendants in later generations may want to bring legal action against alleged wrongdoings regarding a family allotment, but they are restricted by this limitation. Such legal actions should not be limited so that it may be brought at any time.

#### **27.7 Government should pay costs of a court action in the Land Court where Government was to be at fault**

It is proposed that Government should pay the legal fees or costs that resulted from the wrongdoing of the Ministry of Lands if the Land Court found the Ministry of Lands was at fault.

### **TOPIC 28: TO CATER FOR LAND NEEDS OF TONGANS LIVING OVERSEAS**

As was mentioned in some of the proposals already referred to, Tongans living overseas expect the Government to cater for their land-related needs. Tongans living overseas hope for a simplified system so that they can easily communicate their land-related transactions or queries to Tonga, which includes the following:

- a) To allow an heir's claim to be lodged through the internet and the Tonga Consular offices overseas.
- b) To be able to send payment of rent on leases directly to the Ministry of Lands office

instead of sending payments through their families.

- c) To provide information on any amendments to land laws that has been enacted. If it will be the function of the Ministry of Lands to disseminate this information throughout Tonga then it might as well be disseminated to Tongans living overseas using the Consular Offices, websites, radios and newspapers. The Ministry should not limit publication of land notices to the Tonga Chronicles and local newspapers, but they should use more extensive methods that will send the same information to Tongans abroad.

**TOPIC 29: TO CONSIDER WHETHER THE LEGAL STATUS REGARDING THESE MATTERS ARE RIGHT AND JUST IN ACCORDANCE WITH THE NEEDS OF PEOPLE OF THIS COUNTRY AND TO PROVIDE SPECIFIC LAWS TO DEAL WITH MATTERS THAT ARE NOT SPECIFICALLY DEALT WITH IN EXISTING LAWS**

**29.1 Should land be severed from the house built on the land?**

The land is severed from the house on the land under existing laws. But according to British common law whatever becomes attached to the land becomes part of the land, but this is not the case in Tonga. It is proposed that current laws in Tonga on this matter should not be changed as the severance is correct. A person may build a house on some land, but he is later chased or ejected from the land so when he leaves he can take his house with him leaving behind just the land. This suits our Tongan customs and ways. If your brother allows you to build a house on a piece of land and you do so not expecting that you will ever leave your house, but there comes a time where you'll need to vacate the land and it is best that you're allowed to take your house with you so that you may rebuild it on another piece of land seeing that you may not be able to afford building another house from scratch. The law as it stands is reasonable – so that one can take his roofing, timber and what can be detached from the house so that you can easily rebuild on another piece of land and provide a shelter for your family. At the same time, problems do arise because of this same law severing the house from the land. If the house was build on the family land by the younger siblings, when the parents die these younger siblings would come and remove the house from the land because it is their property and all that is left behind for the heir is the vacant land.

A law practitioner raised the same matter in the Commission's meeting with the People's Representatives and he referred to problems that arise when the house is severed from the land. Under common law, all that is attached to the land becomes part of the land and the two are always considered as one. However, in Tonga there are separate interests over the house and the land and the problem is it defeats the purpose of the Land Act which state that all matters relating to the land shall go through the Minister so that it complies with what is prescribed under the Land Act and approved by the Minister. The purpose of the

Land Act is defeated because the Chinese and others can occupy the land under a contract for use of a small retail store, but they will have access to the whole plot of land where the small store is located through a rental agreement giving rights to the tenant without having to seek the approval of the Minister. This is due to the severance of the house from the land. It was therefore proposed that the current status of the law should be reviewed so that if Tonga will continue with the existing laws then the laws should also clearly define the rights of the tenant. If we are to adopt the common law where the house will become part of the land so that then rental agreements and set tasks therein should go to the Minister for approval.

The commercial banks in Tonga submitted written a written submission to the Commission and they supported a change to remove the severance of the house from the land so that everything that it attached to the land becomes part of that land and whoever owns the land owns everything that is attached to it including the house. Severing the house from the land reduces the market value of the land because it can be difficult to ascertain who owns the various houses on that land because it is common amongst some families to register the land under the name of the eldest son while the house was built by his siblings. This means that anyone (who owns a house) applying for a mortgage must obtain a lease over the land to ensure that the lessee holds the interest over both the house and the land. But obtaining a lease involves a complex process which usually results in banks tightening its review of mortgage applications making it the more difficult to obtain a mortgage. Tonga should assist sectors that are major contributors to economic growth such as Tourism. These sectors can expand only if people are free to use their properties (including land) to secure a loan for development projects.

The TCCI also supported the proposed change to merge the house with the land as one interest. They agree with banks that severing the two reduces the value of the land that one wishes to mortgage which means that only a small loan can be secured with that piece of land.

### **29.2 To reconsider the requirement by law to plant 200 coconuts**

Section 74 of the Land Act provides that the landholder must plant 200 coconut trees in a tax allotment. It was proposed that this section should be enforced by devising a way to ensure that tax allotment holders do plant these coconut trees as it can be a form of food reserve and there is also a market demand for coconuts today. Planting of coconut trees should be encouraged.

### **29.3 The law should clarify the prohibition of sale of land**

Many people believe that despite the prohibition on the sale of land, land is being sold and it is conjecturally referred to as exchange of gifts. An application for grant of an allotment that is given to an Estate Holder is usually accompanied with the giving of money to the Estate Holder. A landholder who subdivides his allotment for allocation to others surrenders the allotments so that others can apply for **respective grants** of those allotments

in exchange for money. Although this money is referred to as a gift, it is in fact money being paid in exchange for land so it is a sale. It is proposed if prohibition of land sale is not fully enforced to ensure that this exchange of "gifts" is stopped then we might as well allow the sale of land under the law because it is widely known that land is being sold through this practice.

These alleged land sales is a common topic of discussion. A lot of allotments are subdivided and plots therein are in fact sold. But this notion of "sale" means that the buyer is only buying the landholder's right to surrender his land. In many cases, the landholder would just tell someone to go and occupy one of the allotments in the subdivision in exchange for say \$5000 and work will be carried out later to officially allocate these allotments. Would this be considered "unlawful agreement" that is prohibited by law? If it is prohibited, what can be done because someone is at a loss having given the landholder money in exchange for the allotment?

It was proposed that the Commission should take this matter into account in its report. The case *Fonohema vs Piukala* went to the Court of Appeal and one of the issues considered was the ruling that sale of land is prohibited under Tonga's laws, but under Tonga's system of laws sale of land is not possible. In other words, if the landholder sells the land he is in fact only selling his right to the land by surrendering his in exchange for money, but he does not control what happens to the land after that and it will not go to the person who has bought it because it will devolve to the heir. That is one matter for consideration in light of review of the law that if sale of land will continue to be a breach of law then it should be clarified in light of what is referred to above and if we're free to sell our land then that should also be clarified.

A written submission proposed that sale of land in Tonga, either directly or indirectly, should be prohibited. It was not Tupou I's Wish that land in Tonga be sold.

#### **29.4 Surrender**

The law should be very clear on this issue. Is it correct to say that when a landholder surrenders land, he is only surrendering his right to the allotment as he has no right to surrender it directly to Sione or Pita or anyone else? Some believe that the landholder has no right to specify who his surrendered allotment should go to because the law state that the allotment will devolve to the heir if there is one and if there is no heir then the land will revert to the Estate Holder. As such, many people have raised this issue particularly the younger siblings of the heir and the rest of the family. They often complain that the eldest son does not give them any land from the family land, but a law practitioner usually advise them to rejoice because when the landholder surrenders the land notice thereof is given in the newspapers and within one year they (as heirs) should make a claim to the same allotment and they should get the land. A surrendered allotment should not go to the person it was surrendered for my the landholder and this is an opportunity for others further down in the line of succession to make a claim as the landholder and his son have surrendered their rights. This method is starting to work well for others in the family.

One law practitioner proposed that the law should be amended to allow the landholder to surrender his allotment directly to the person to whom he wishes to give his allotment instead of surrendering to the Estate Holder before the person for whom it was intended will have to make a new application for grant of that allotment. This proposal relates to the proposal in paragraph 32.5.

The Church Leaders were also concerned with the term of one year which must expire before surrender is complete and this period is too long. The Churches usually have to extend their use of land which has been leased at the end of that lease through surrender. The landholder usually surrenders the land back to Government (if it is a Government Estate) so that the Church can then lease the same land from Government for a longer term. But completion of this process is delayed by the one year period which must expire before surrender is complete. It is proposed that there should be an "option" under the law so that if the heirs to the surrendered land all agree to the surrender and the Ministry of Lands confirms this then the process should be completed instead of having to wait for a period of one year.

#### **29.5 Land eroded by the sea**

As is discussed in Topic 19, the legal status of land that has been eroded by the sea should be confirmed. Government's land is next to the sea and it is this land (next to the sea) that is eroded by the sea. The law should expressly state whether due to the erosion of Government's land (which starts from 50 feet from the high water mark), surrounding land belonging to individual landholders close to the coasts will have to be taken away to make up for Government's eroded land.

#### **29.6 A son who was born before his parents married – who is the heir?**

As is discussed in paragraphs 2.4 and 3.3, some children including male children are born before their parents marry. It is proposed that the law should clarify whether the heir is the eldest son who was born before his parents married provided that his parents had legitimized this male child.

#### **29.7 Fanga'uta – should it be leased just as it were dry land?**

Paragraph 30.1 below also refers to concerns from the people regarding the lease of part of the Fanga'uta Lagoon to the Lomipeau Company. A question asked of the Commission in Folaha is whether the granting of this lease over the lagoon to the Lomipeau Company is contrary to the laws of Tonga. It is proposed that this interpretation that Fanga'uta is part of "internal waters" should be reviewed because they believe that Fanga'uta is not "internal water" but this is wrong. This matter was also raised in the Commission's meeting with the People's Representatives to the Legislative Assembly. There is no law which states that "inland waters" is land. This was based on legal advice from the Crown Law Department, but there is no specific law on the matter.

**29.8 To specify in the law the rights of the registered landholder against the right of the occupier of the allotment**

As is proposed in paragraph 26.2 for protection of the landholder, the law should clearly state the rights of the landholder as against the rights of an occupier of his land.

One of the law practitioners in Tonga who is also a People's Representative to the Legislative Assembly says this is an important issue. If someone goes and lives on or occupies another person's land and he continues to do for more than 10 years the 10-year limitation for bringing an action against the occupier has lapsed so the landholder cannot seek enforcement of this right to his allotment.

It is proposed that there should be exemptions to the limitation period provided by law so that the period will commence from the time the landholder learns that someone else is occupying his allotment.

**29.9 The Nationality (Amendment) Act 2007 and Tongans who acquired foreign citizenship before this Act was passed – what happens to their land**

As is discussed under Topic 16, Tongans who had acquired foreign citizenship seek clarification under the land laws whether they had lost their land because they acquired foreign citizenship before 2007. If the land is lost, does it revert to the Estate Holder or does it devolve to through the line of succession (as well as other related questions on this issue that is referred to in paragraph 16.2). Can someone who had acquired foreign citizenship get his land back if he has been re-admitted to Tongan nationality and his land had not been re-granted and no one had challenged his right to the allotment during the period starting from when he acquired foreign citizenship to when he was re-admitted?

**29.10 Work should be done to foreigners who are conducting business as real estate agents**

The Commission was told that work should be done to foreigners who are acting as real estate agents, particularly in Vava'u. It is alleged that what these agents are selling land and people want them stopped if they are in fact engaging in land sales. There is also concern that they advertise small islands, coastal land, Royal estates and even land belonging to individual land owners without the approval of those who have legal rights over these lands. Government should be careful with this type of business activity so that licenses are issued in a reasonable manner. There should be high fees charged for these licenses to reflect these foreigners' substantial financial gain from these types of business operations.

It is proposed that "tenancy agreements" and other agreements used by these foreigners to let out land should be reviewed. The law should clearly state whether is it lawful to use of these types of agreements over vacant or open land (with no house on it). This type of agreement is widely used in Vava'u and there's concern for that the legal status of these agreements in not clear.



In the Commission's meeting with the People's Representatives to the Legislative Assembly, this issue was raised again due to concerns over problems in Vava'u that result in assault and quarrels arising from the same type of agreement over land where foreigners act as agents. It has gotten to a stage where these problems occur almost daily. The Commission confirmed that the investigation of assaults is the responsibility of the Minister of Police.

#### **29.11 Penalties under the Land Act should be more severe and fully enforced by law**

It is proposed that penalties prescribed under the Land Act for breach of its provisions should be reviewed. These penalties should be more severe in order to protect land in Tonga. There's also a need to improve enforcement of this law and to ensure that those who act in breach of its provisions face prosecution.

#### **29.12 Estate boundaries and public reserves (land for public works)**

It is proposed that existing estate boundaries should extend to the edge the foreshores and lagoons. It is also proposed that the Government land which is 50 feet inwards from the high water mark should also be part of the estates instead of designating these as Government land as is under current laws.

This proposal is due to the Government increasingly leasing out their land on the foreshores for various purposes and particularly for commercial purposes allowing businesses to conduct development projects on this land. The Estate of Ma'ufanga extends only to Vuna Road and Government land includes the wharves. In Haveluloto, the Tonga National Center is built on land that is part of Haveluloto.

These development projects happen to defeat the purpose of designating land on the foreshores to Government which was to allow all people of the country free access to the sea for their livelihood. If development projects are more important than the foreshores should be given to the Estate Holder of each town who will be responsible for considering any development project in his estate.

#### **29.13 Using land as security for a loan**

It is proposed that the current laws state that land can be used as security for a loan (mortgaged) only if the loan is for the purpose of improving the land.

This was a topic of concern to the commercial banks in Tonga and this issue was discussed in their written submission to the Commission. Banks believe that this limitation on the purpose of a mortgage hinders the economic development of the landholder as he will not be able to use his land to secure a loan for a business or personal reasons. Because of this limitation, people usually surrender their land so that it may be leased back to them before it is used to secure a mortgage. Another option is lodge a joint application for mortgage by joining in another family member. However, the legal processes required to complete these land transactions is complicated and business projects are often abandoned. Furthermore, because of this limitation, banks impose additional requirements making it harder to

approve a mortgage application.

This issue was also raised in the Commission's meeting with law practitioners and they supported the proposals made by the banks.

This limitation should be removed so that people can use their land to secure any loan they may wish to take to contribute to economic development and their individual well-being.

**29.14 Should land tax be levied on land transactions?**

This issue was raised by the TCCI because consumption tax of 15 percent is charged on land transactions. They question whether this tax should apply to land matters. Furthermore, 15 percent tax is too high.

**29.15 The right to drill a water supplier in one's land**

TCCI ask for clarification of the legal process one must go through to dig a well in his land. This is a vital need in a tax allotment for farmers and particularly commercial growers. They hope for a simple legal process to allow farmers or anyone to drill a well and create a sufficient water supply for his business.

**29.16 Land used for new settlement of people in Niuatoputapu**

Work is currently underway in Niuatoputapu to allocate land for the new settlement after the tsunami. In the Commission's meeting in Niuatoputapu, this matter was raised as they sought clarification their status as residents of this new settlement. They wanted clarification on whether they would then be accountable to the Estate Holder whose land the new settlement is located or to Government.

The People's Representatives proposed that these new residents should be advised of their rights and this should be done before they start building on or working the land.

**29.17 Distributing land on foreshores**

The People's Representatives were concerned with the allocation of land on the foreshores. They had discovered from their meeting with the Ministry of Lands that Government distributes these lands as town and tax allotments. They proposed a review of this distribution as it may be contrary to clause 109 of the Constitution. That clause clearly state what is allowed by law to be carried out on the foreshores when it is leased out by Government and the grant of allotments for registration from this land is not authorized by this clause. And if allotments are being granted from land on the foreshores then clause 109 of the Constitution should be amended to legalize those grants. But amending the law is something to be done much later as the first task for the Commission is to these grants were done lawfully and if it was done unlawfully then legal action must be taken.

**29.18 To reconsider whether a Noble should be Minister of Lands**

In the Commission's meeting with the People's Representatives, a question arose as to

whether it is right for a Noble to be the Minister of Lands. This is based on the fact that there is a conflict of interest when a Noble is also the Minister. The Minister has certain functions under the law that may compromise the Minister's position because he is also a Noble Estate Holder. It is difficult to ascertain whether a Minister who is also a Noble can exercise his powers independent of any conflict of interest.

#### **29.19 To reconsider the division of estates**

A law practitioner proposed in a meeting with the Commission that division of Estates should be reviewed as there are Estate Holders who have small estates while other have big estates. Estates should be redistributed so that the estates are similar in size.

The Commission informed the meeting that distribution of estates was based on major historical events including war and it will be hard to try and redefine the estates.

#### **29.20 Does a widow have the right to surrender her right as widow to the heir?**

A law practitioner proposed that a widow's rights should be reviewed, particularly whether the widow has a right to surrender her right as widow. The wording of section 54 provides that only a landholder can surrender his right and there's no mention that the widow can surrender her right because she is not a landholder. But the widow does have a right to surrender and this should be expressly stated in section 54 because according to the current wording of that section the widow has no legal right to surrender her right to land.

#### **29.21 To repeal the law that authorizes only Nobles to discuss and vote on matters regarding estates and Royal estates**

Because all recommendations from the Royal Land Commission will eventually be submitted to the Legislative Assembly for consideration and approval, it is proposed that the section that provides that only Nobles may discuss and vote on a matter tabled before the Legislative Assembly regarding estates and the King's estates should be repealed. The Commission's recommendations will not be debated independently if this law will still be in force at the time the report is submitted to the Legislative Assembly.

#### **29.22 Applications for grant of an allotment should not be subject to restrictions**

It is proposed that the application for grant of a town or tax allotment should be free from limitations so that any Tongan male subject can apply for grant of any allotment in Tonga and not be restricted to apply only to allotments in the town that you live in.

It is proposed that if someone is allocated an allotment which he does not like and he does not accept that allotment for good reasons then he should be able to apply for grant of another allotment. However, he should be able to apply for another allotment if he did not have any good reason for having refused the first allotment granted to him then he should not apply for another allotment.

#### **29.23 Right of a person who already holds an allotment to elect where he is also the heir**

to another allotment

It is proposed that anyone who already holds an allotment and later becomes entitled to succeed as heir to another allotment should have a right to elect which of the two allotments he will keep.

29.24 Demanding money before an allotment is registered should be prohibited

It is proposed that no one including Estate Holders should demand money from anyone before allotment is registered. The same applies to renewal of leases – demanding money before a lease is renewed should be prohibited. Any such demand for money should be an indictable offence and met with legal actions.

**TOPIC 30: DEVELOPMENT PROJECTS SHOULD BE ENCOURAGED TO ASSIST DEVELOPMENT AND GOVERNMENT REVENUES AND TO FACILITATE IMPROVED LAND SERVICE DELIVERY TO THE PUBLIC BUT THIS SHOULD BE DONE IN A REASONABLE MANNER TO ENSURE THAT WE WILL CONTINUE TO RETAIN OUR LAND**

30.1 Fanga'uta and the Lomipeau Project

As discussed in earlier Topics regarding Fanga'uta, it is proposed that due consideration should be given to any proposed project. Although the Lomipeau project is for development purposes, it should be done in a reasonable manner. People are concerned with the development work that is to be carried out in Fanga'uta because it will affect the sea organisms in this area which is a livelihood for the people of this country.

The residents of Folaha and Nukuhetulu conveyed their distress because they do not know much about the lease to the Lomipeau Project. They consider Fanga'uta a source of livelihood for them as it has been for generations. The lease is over approximately 450 acres and what is troubling the residents is that they do not know what activities will be conducted as part of this project and they learnt that they will drill a massive hole in the lagoon to create a mariner and some parts will be reclaimed. Residents are concerned with the likely impact on the environment. This lagoon is just like the open sea as there are low and high tides and there are many varieties of sea creatures (fingota) and fish and their kind have lived in the lagoon for centuries.

30.2 Chinese nationals

It is proposed that due consideration should be given to foreigners who own/buy land in Tonga. Tonga is a small country and five, six or a small group of wealthy Chinese nationals can buy all the land in Tonga and we don't know what to expect then. The Commission should carefully consider this matter as it is happening particularly with the Chinese and in about 5 or 10 years from now Nuku'alofa would be no different from Hong Kong. The same

concern regarding Chinese nationals and their leases is also discussed in paragraph 8.3.

### **30.3 To establish a Land Bank**

This proposal was raised in one of the Commission's public meetings and the same proposal was raised in the meeting with TCCI for establishment of a body to be known as a "Land Bank" in Tonga. The purpose of this Land Bank would be to provide information to the public on what land is available in Tonga for use for various purposes including leases, farming or commercial activities. It will be easier for people to go to the Land Bank both to get information if you're looking for land for your own use or if you have land that is available for use by others so that the Land Bank can find someone to use it.

It is proposed under Topic 7, Topic 9, paragraph 12.3, paragraph 17.4 and paragraph 27.4 that an independent body should be established to perform functions similar to what is being proposed for the Land Bank. The one body can perform all these functions and the above-mentioned Topics and paragraphs also mention proposals that it is essential for this independent body to obtain the consent of the landholder and specify terms upon which the land will be available for use by the Land Bank.

### **30.4 Land tax**

It is proposed that a property tax should be levied on all registered allotments in Tonga and shall apply both to town and tax allotments. At present, the rent for a tax allotment is 80 cents per annum. Some people believe that 80 cents is too low and that is probably why collection of this rent is not enforced. It is proposed that this door should be opened as it will be a source of revenue for Government if this new tax is imposed. This will also encourage people to work their land in order to earn money to pay for the tax. Part of this revenue should be allocated to town officers to assist them in keeping the towns clean.

Tongans living overseas also proposed that this tax should be imposed on their land in Tonga. It was also proposed that part of this tax should be set aside to assist cleaning of their town allotments in Tonga so help maintain the general cleanliness of the town.

There was another proposal that the amount of tax payable should vary according to the size of the land and those without land will not be required to pay the land tax. Government is to be sole beneficiary, but this tax should be used only for the social well-being of the public such as renovation of chapels and school that is owned by churches or Government.

Although imposing of a land tax was proposed, some people do not support this tax because landholders would not be able to afford this tax.

### **30.5 To draft a national land use policy**

A written submission from the Deputy Director of Agriculture, Foods, Forestry and Fisheries propose that there should be a national land use policy to ensure a sustainable resource base as this will help build sustainable development of the agriculture sector.

It is proposed that regulations be drafted to govern the use of land and related activities including the following:

- a) Adoption of sustainable farming practices to ensure that land are used wisely to avoid land degradation;
- b) Protect land through investing to ensure it will remain in good farming conditions for future generations by replanting. Government can help by providing seedlings for replanting or the people in the community can be trained to grow their own seedlings.
- c) To restrict bulldozing large tracts of land from allotments which has been leased particularly commercial leases. Although this is done for short term economic gain, it will have long term detrimental effect on land;
- d) To restrict or prohibit the removal or cutting of trees in the coastal areas (selective or no cutting).

This proposal is relevant to a matter which was raised in the Commission's meeting with TCCI that a lot of tax allotments have been subdivided and allocated as town allotments which means there's less land for farming. Furthermore, residents of these subdivided allotments complain against the farmers growing crops too close to these residents and this creates problems for farmers.

This proposal is relevant to the proposal in paragraph 31.6 below.

### **30.6 Land should be designated for tourism purposes**

In the Commission's meeting with the General Manager of the ANZ Bank (Pacific), it was proposed that Tonga should consider conducting development projects as in Fiji where they identify land that is suitable for tourism work and designate or set it aside for that purpose as in a hybrid system. If that land is owned by an individual landholder then his land should be compensated for his land which has been resumed for this purpose.

### **30.7 To create a Dual land system for Tonga and designate special land as zones for development projects**

This proposal was raised in the Commission's meeting with TCCI and a written submission was received from the President regarding this matter. This proposal relates to the proposal in paragraph 30.6 above. This proposal is intended for the future and should be considered if there'll be new land planning in areas like Nuku'alofa as a central business center.

A lot of people support the existing system of landholding such as the maximum term for a mortgage (30 years) and the maximum term for leasing a tax allotment (20 years) while at the same time there is pressure from businesses, banks and people to extend the maximum period for these things as is prescribed by law. It is proposed that the Land Act be amended to provide a dual land system with two ambits. The *first ambit* will consist of the current provisions of the law apart from land that has been indentified to be suitable

for development projects which will be designated as land to be governed under the second ambit of this dual system. The **second ambit** will include land that is to be used for development projects such as a central business district, tourism, and major projects like wharves, airports, and oil depots. Some land has natural resources such as quarries, oil and precious stones and these lands will be governed by the second ambit of the land system. Laws that will apply under the second ambit will be drafted to facilitate development works and the limitations under the first ambit will not apply under the second ambit.

The suggestion is that land that is to be governed under the second ambit should be assigned from Government land, but it can also include an individual's land that may be located on a Noble's estate that has been resumed by Government due to its suitability for a development project. Landholders with land that fall under the first ambit should be allowed to elect that their land be governed under the second ambit so that their land can be used for development works.

The benefits of this dual system includes the following things:

- a) a majority of land in Tonga will still be protected by provisions of existing laws under the first ambit;
- b) application of the second ambit can start on a smaller scale to assess ways it can be improved before it can extend further;
- c) land under the second ambit will have a higher value which means higher returns and benefits for those landowners;
- d) simplified and transparent practices will apply to land under the second ambit;
- e) Tonga will be more attractive to foreign investors.

### **30.8 To establish a Land Commission**

Submissions were received proposing the same idea of a Land Commission, but each differed in the functions and set up that they proposed for this Commission.

#### **a) Land Commission proposed by Reverend Faifekau Siupeli Taliai**

Reverend Faifekau Siupeli Taliai proposed that the King of Tonga in partnership with the Parliament of Tonga should establish a Commission to examine on behalf of the people of Tonga the Constitution and Land Laws and provide recommendations to avoid violating human conscience and a collision with Divine Natural Moral law of Justice. To ensure transparency and the trust of the people of Tonga, it was also proposed that this Commission should comprise of people of high moral sensitivity, in addition to technical expertise to carry out this most difficult undertaking. Recommendations from this body must be approved by a referendum and not debated in the Tongan Parliament.

#### **b) Land Commission proposed by Dr Elizabeth Wood-Ellem**

A proposal very similar to that made by Reverend Siupeli Taliai was made by Dr Elizabeth Wood-Ellem. Wood-Ellem's proposal was to enact legislation that will

establish an independent Land Commission. The function of this Commission is to enact laws to implement recommendations from the Royal Land Commission which are approved by Parliament. This Commission will also supervise the implementation of recommendations of the Commission which are approved. The idea of such a Commission is not new as a similar Commission was established in 1917 to determine boundaries. It is good to establish such a Commission to perform the functions proposed as it is not good for one body to perform multiple functions.

It was proposed by Wood-Ellem that the member of this Commission should be appointed according to their professional expertise in land matters and as representatives of the various districts in Tonga. This Commission should work only for the interests of the country and should show no fear. The Minister of Lands should be a member of this Commission but he should not be the chairperson. The chairperson should be a fully qualified lawyer. It is important to appoint a number of proxies so that the work of the Commission should not be delayed due to unavailability of members. It is also proposed that the Commission should have a Research and Advisory Unit and this Unit shall work together with the Ministry of Lands. Funding should be secured to fund this Unit for a period of 4 years. Appropriate skilled and expert people in Tonga and from overseas should be engaged in fact-finding and making assessments of needs for housing and cultivation throughout the Kingdom. The Ministry of Lands' records are not complete and research is required to confirm what land is available for distribution and to be allocated for farming. The Commission should pay special attention to the vision by Tupou I that food should be plentiful in this country.

**c) Land Commission proposed by Guy Powles**

Guy Powles believe that an important question to be considered now is whether Privy Council (which is now only an advisory body) and Cabinet should have the various powers they had before the political changes in 2010 as was referred to in Part A. This includes the approval and renewal of leases, fixing rental rates, approve mortgages, surrenders and others powers. The political reform did not remove Privy Council's power to determine certain land matters, but should this body continue to exercise these powers and perform those functions? Wouldn't it be better to let a board or an independent statutory body exercise these powers? It is proposed that such a body should be established and the powers of Privy Council and Cabinet over land matters should be given to this body. This body will act under policy guidelines and sue procedures designed to ensure outcomes such as legality and fairness between the public and Estate Holders which will promote economic development.

There are guardians in the current land system which includes the King, Estate Holders and the Ministry of Lands (Government/Cabinet). These guardians each stand in a **position** which would make them a **good guardian** of the current land



system. The King has devolved His executive powers to Cabinet and He now assumes the status of an independent impartial leader and it would be unfortunate for the Monarch to be in a position of authority where he would be seen not to be impartial. Estate Holders are very defensive and have been selfish in the past. The submission by Lord Fakafanua of his Land (Amendment) Bill to Parliament in 2010 shows that any land reform issues are likely to be politicized. The Ministry of Lands has been seen as part of the problem in land matters and it will be hard for the Ministry to win the trust of the public unless their services delivery will manifest their independence and incorruptible.

It is therefore important for the Royal Land Commission to consider carefully the best way to improve the current system while at the same time retaining the foundation that was the basis for Tonga's land tenure. It is proposed that the best option is to let an independent body take over most of the powers of Privy Council and Cabinet and to become a "guardian" of important key aspects of the country's land system.

The following are functions proposed for the Independent Commission and more functions may be added on:

- i. To work on major policy issues, and specific cases when they arise, concerning such matters as the availability of land for allotments, the size of allotments, holders ceasing to live on their allotments, abandonment of holdings, the rights of absentee holders, categories and terms of leases, leasing between Tongans, land use priorities for productivity and development.
- ii. Numerous matters which are currently the responsibility of the Privy Council and Cabinet.
- iii. Review of administrative decisions made by the Minister of Lands in areas where officials are entrusted with discretions in the implementation of policy. This includes the following matters under the Land Act:
  - 1) section 7, whether land 'has become available;
  - 2) section 8, what amounts to 'prior consultation';
  - 3) section 10, projects of general public interest and benefit;
  - 4) section 33(1), whether 'such portions of the estate as ... will not, in the opinion of the Cabinet, be required for allotments within the term of the lease';
  - 5) section 34(2), whether to reverse *tofi'a* holder's refusal to agree to grant;
  - 6) section 35, meaning of 'belonging to another locality';
  - 7) section 36(1), whether to reverse *tofi'a* holder's refusal to grant new lease;
  - 8) section 44(1), what amounts to 'without reasonable cause' if refusing to accept the land granted;

- 9) section 47(1), whether there is 'sufficient land for the purpose' when considering the amount of land available for tax allotments;
  - 10) section 49, 'to facilitate survey of the prescribed areas';
  - 11) section 50, land available for allotments;
  - 12) section 53(1), whenever it is possible so to do' to subdivide;
  - 13) section 55, 'discretion' to permit exchange, and 'the benefit of a minor';
  - 14) section 60, consent to renewal of lease;
  - 15) section 62, 'planting and upkeep' of the allotment;
  - 16) section 68 whether he has not maintained the allotment 'in the average state of cultivation for tax allotments in the district;
  - 17) section 72, whether he desires to 'remove permanently';
  - 18) section 73, whether land in the estate or Crown Land is 'available';
  - 19) section 94, the 'state of cultivation';
  - 20) section 95, compliance with planting' and the 'ability and character' of the applicant;
  - 21) section 100, for the purposes of 'improvement of the allotment', and whether the 'use to which the loan or advance or consideration is to be put constitutes an improvement';
  - 22) section 101, what constitutes an 'unallocated part' of a *tofi'a*, whether the total amount of all land mortgaged 'does not exceed five per centum of the total land comprising the *tofi'a*', and whether the use to which a loan or advance or consideration is to be put constitutes 'an improvement';
  - 23) section 105, whether to dispense with the consent of the mortgagor; and
- iv. To let the Commission handle complaints received by or lodged against the Ministry of Lands, which the Commission would oversee, and where an administrative appeals *Tribunal* (which is proposed in paragraph 30.9 below) would make final decisions.

The Commission will work closely with the Minister of Lands on a day-to-day basis, particularly with regard to developing policy and providing advice. However, in some matters such those mentioned in paragraphs ii, iii and iv above, an investigation is required before a decision is made. As such a decision by the Tribunal on an administrative appeal will be final and the Minister will have to act on that final decision.

The Commission should also submit an annual report to the Legislative Assembly on all the matters that they deal with as part of their functions.

A tentative suggestion on the composition of the Commission should include representatives of the Monarch, Government, Estate Holders and registered landholders as these are four sources of interest in the administration of land in Tonga. There may be 5 members and the **Chairperson** shall work full-time while the

other members work part-time to minimize costs. The members should be elected by their peers so that the Noble Estate Holders' can elect their representative member and the member representing Government can be elected by Cabinet and the member representing landholders may be elected from landholders who are also member of Parliament.

It is proposed that the Commissioners should be appointed by the King and work for a term of 6 years (so that their appointments are not politicized if their term of appointment is the same as the 4 year term of members of Parliament).

It is proposed that the Commission is to be serviced and funded by the Ministry of Lands under the instructions of the Minister of Lands.

### **30.9 To establish a "Tribunal"**

This proposal was also submitted by Guy Powles for establishment of an Administrative Appeals Tribunal to deal with complaints regarding the service delivery and performance of the Minister of Lands and his staff which they carry out in accordance with the powers provided under the Land Act. Ministry officials regularly make the decisions required of them by the Land Act and the vast majority of the decisions involve simply applying the detailed statutory rules. But there is also a considerable number of decisions that require the assessment of facts and application of policy – thus the exercise of administrative discretion such as decisions required on matters referred to in paragraph 30.8.1)-23) above. Where the consequences of these latter decisions can affect people's livelihoods, it is essential that the principles of natural justice should apply and that the decision-maker is impartial. The practice in most Commonwealth countries is for there to be a process of review available if required.

The Land Court is not the appropriate forum for complaints or review of the decisions referred to in the above paragraphs. A large range of disputes are already allocated to the Land Court, particularly concerning title, succession and boundaries, together with the hearing of offences and proceedings for enforcement of the Act.

The review of administrative decisions in accordance with powers under the Land Act is best carried out by a tribunal.

It is proposed that a Tribunal be established which will be part of the Land Commission already proposed under paragraph 30.8.c above and it will be under the Ministry of Lands. The following outcomes will be achieved with the establishment of this Tribunal:

- a) provide experienced and impartial review of administrative decisions
- b) encourage Cabinet through the Ministry of Lands to formulate policy and relieve it of the need to spend time on supervising its implementation;
- c) act as an appeal body in respect of complaints against the Ministry of Land.

The decisions of the Tribunal would be final and not reviewable in a court, leaving the Land Court to deal with matters that should properly be before it.

The members of the Tribunal should include the Commissioners representing the Noble Estate Holders and landholders, senior Ministry official and a lawyer or judge experienced in land matters as the Chairperson.

It is proposed that this Commission should be independent, which can be secured by giving it constitutional status with an amendment of the Constitution. A detailed statute should be enacted to specify its functions and powers etc, or this can be added under a new Division under the Land Act.

### **TOPIC 31: LAND PRACTICES TO BE AMENDED**

The public and other community stakeholders have concerns over land practices and they have called for a review of the following practices:

#### **31.1 Applying for grant of an allotment**

The current practice provided by law for application and grant of an allotment is complex and difficult to complete and usually results in long delays.

In the submission from the banks they say that although some provisions in the Land Act are there to simplify the process of applying for an allotment such as section 34, complying with requirements under the law still result in long delays before the registration of an allotment is complete. Because of these delays, banks often decline loan/mortgage applications because of the uncertainty of the title to the allotment and the bank cannot therefore approve the mortgage. When a loan is declined, it eliminates opportunities for economic development.

#### **31.2 Procedure for lodging an heir's claim under the Land Act**

The commercial banks believe that the practice for making an heir's claim is a barrier to processing of loan applications. The law provides that the claim shall be made within one year which means that the actual period must expire before the land can be-registered under the heir. The same applies even if the claim was made within say one month from the death of the landholder. Some loan applications are declined because the 12-month wait required before the loan applicant (who is an heir) becomes the registered owner is too long a delay. The banks suggest a review of this practice so that loan applications can be approved without long delays and funds released to the applicant at the time it is required.

#### **31.3 Keeping records of land information and the need for an Archive**

This is a problem which the Ministry has faced for many years as land information is not orderly, complete and reliable. Records are kept manually and a search can take weeks or months. Delays in searching for land records is due to retaining information in a manual

form and the Ministry is therefore not able to meet the demands from banks and the public.

The banks say that because the Ministry does not keep land information in an orderly manner and delays in searches for information means that banks will not be able to process mortgage applications as quickly as they would like. Banks as well as investors do not have confidence in the Ministry of Lands' records, but their confidence in the Ministry's records is essential to their assessment of loan applications to ensure that banks will not lose their money.

It is proposed that the records should be kept electronically and computerized for ease of searches and reliability. The ANZ Bank say that their records were destroyed during the 16/11 riots and a lot of work has been done to recover these records and this process may have been much easier if the Ministry of Lands kept their records electronically.

The Church Leaders also had concerns because of this same problem and they want to see an improvement in the way Government land records are kept as it is important that this is done in an orderly and secure manner.

Another proposal suggest that having electronic records is the first priority as a more pressing issue is to tidy up the Ministry of Lands' records and create a catalogue for it. This will make it easier to search for records and it will also help the performance of the Commission that is proposed in paragraph 30.8.b. Staff should be trained to look after this and funding should be sought from UNESCO or the World Bank to fund this and train staff so that they can maintain records according to international standards.

#### **31.4 Referring land matters to Cabinet for approval**

As was proposed in paragraph 8.9 regarding leases, it is proposed that the approval of land transaction that is done by Cabinet should be changed so that approval can be given by the Minister of Lands or the Registrar. This includes leases, transfer of leases, sub-lease and mortgage sales. Seeking Cabinet approval causes delays which slows down businesses, banks and people because these land transactions cannot be completed within a satisfactory time period. And if these matters will continue to be referred to Cabinet, then a time limit should be provided so that Cabinet makes a decision within in period.

Law practitioners say that they would support any improvements that will reduce the long delays but they do not support the transition from Cabinet to Estate Holders as is proposed under Topic 20.

#### **31.5 The powers of the Minister of Lands**

Because of dissatisfaction arising from delays in service delivery by the Ministry of Lands, a law practitioner questioned whether the Minister has the discretion to approve or not approve a lease application when these land transactions are submitted to the Ministry. The Ministry's function is to check that the lease application is in order and their power is

one of endorsement because the parties already agreed on the terms.

### **31.6 To review Government policies**

It is proposed that Government policies relating to land distribution, registration and productivity should be reviewed, and the following should be taken into account:

- a) whether all land were meant to be distributed to people under the Land Act and the Constitution have in fact been made available for distribution and surveyed;
- b) whether registration of allotments are carried out effectively and with good progress;
- c) whether the powers under the Land Act are being used to promote and assist land productivity;

## **TOPIC 32: SECTIONS OF THE LAND ACT TO BE AMENDED**

Some proposals which were raised in the Commission's public meetings and in written submissions that pointed to a specific section which requires amendment. Some of these proposals had been discussed in other parts of this report. This Topic deals specifically with sections which were highlighted in the proposals.

### **32.1 Section 7**

It is proposed that this section should be amended to include Tongan female subjects so that they shall have the same right to apply for grant of an allotment as Tongan male subjects do.

### **32.2 Section 13**

It is proposed that this section should be amended to extend the power of the Minister and to extend agreements permitted by law to include "tenancy agreements". Urgent work needs to be done to these types of agreements which is common in Vava'u.

### **32.3 Section 35**

It is proposed that section 35 be repealed because it undermines section 34, which restricts the Estate Holders and forces him to allow someone whom has been given an allotment in his estate by the Minister to live in his estate in that allotment so granted. Section 35, however, states that despite section 34 the Estate Holder, the Estate Holder still has a right to eject anyone from his estate if that person comes from another locality.

### **32.4 Section 43(1)**

It is proposed that this section should be amended to add Tongan female subjects so that they shall be able to apply for grant of an allotment at the age of 16 years as Tongan male subjects do.

### **32.5 Section 54**

It is **proposed** that this section be amended to ensure that an allotment which has been

surrendered can go directly from the landholder to anyone that he may wish to give the allotment to if the allotment is not a family allotment.

#### **32.6 Section 56**

It is proposed that paragraph (ii) of section 56 is repealed to allow a widow to lease out land over which she has a widow's life interest.

It is proposed that paragraph (iv) be repealed so that term of lease of a tax allotment is not limited to 20 years.

#### **32.7 Section 60**

As is discussed in paragraph 8.10, it is proposed that this section be reviewed to simplify the process for renewal of leases.

#### **32.8 Section 87**

It is proposed that this section be amended by deleting "12 months" and replacing it with "a reasonable time period". The purpose is to shorten the period prescribed for lodging an heir's claim.

#### **32.9 Section 100**

It is proposed that subsection (1) (i) be repealed to simplify the applying for a mortgage.

#### **32.10 Section 101(1)(iii)**

It is proposed that this paragraph of section 101(1) be amended by deleting "30 years" and replacing with "not less than 99 years". This will ensure that mortgages will not be limited to just 30 years.

It is also proposed that all of subsection (1) be repealed, but no specific reason was provided for the proposed amendment.

#### **32.11 Section 108**

This section relates to the discharge of the mortgagor from the mortgage agreement after the loan is paid in full. The discharge of the mortgagor should be done by the mortgagee and it is not the mortgagor who discharges the bank as is in the Tongan version of Form 5 in Schedule VIII. So the amendment is to the form used for discharge of a mortgage which needs to be signed by the mortgagee and not the mortgagor.

#### **32.12 Section 149**

A law practitioner proposed that the amendment to this section which was passed in 1997 should be reviewed. That amendment added a new paragraph (e) to subsection (1), which effectively meant that the Land Court is to have jurisdiction to determine any action for damages, loss, compensation, manse profit, rent or claim in respect of any allotment, lease,

sub-lease, permit or interests” and the Supreme Court will no longer apply its civil jurisdiction. The law practitioner submits that the amendment appears to be contrary to the law of equity which provides that the Supreme Court in its civil jurisdiction can also determine such actions.

One of the Commissioners thought that this matter can be easily resolved by agreement between the two Courts as to which Court will determine the action.