



GOVERNMENT OF SAMOA

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

NATIONAL HERITAGE BOARD

Report 13/13

May 2013



GOVERNMENT OF SAMOA

OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM COMMISSION

The Honourable Speaker
THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with section 9 (2) of the Law Reform Commission Act 2008, I have the honour to submit to you copies of the Report on examining the feasibility and appropriateness of setting up a National Heritage Board to preserve Samoa's various national heritage sites, as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations for examining the feasibility and appropriateness of setting up a National Heritage Board to preserve Samoa's various national heritage sites after its public consultations and research on the changes to be in accordance with section 4 of the Law Reform Commission Act 2008.

(Hounourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi)
**PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM
COMMISSION**



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(Leota Theresa Potoi)
EXECUTIVE DIRECTOR
SAMOA LAW REFORM COMMISSION

Preface

On 1 February 2012, the Prime Minister and the Attorney General asked the Samoa Law Reform Commission (“Commission”) to examine the feasibility and appropriateness of setting up a national heritage board to preserve Samoa’s various national heritage sites. The terms of reference specifically asked the Commission to research how national heritage boards overseas are established and operated.

In this Report, the Commission recommends legislation to establish the Samoan Heritage Authority/*Pulega o Measina a Samoa*. Part 1 surveys existing laws and policies relating to heritage protection and considers stakeholders’ views on how they operate in practice. Part 2 recommends a definition of heritage that is consistent with international standards and appropriate to the context of Samoa. Part 3 examines the role of heritage bodies overseas and recommends a range of functions that the Samoan Heritage Authority should perform. Finally, Part 4 makes recommendations about the operations of the Samoan Heritage Authority, including how it should be established, governed and staffed.

The recommendations in this Report have been developed with the assistance of members of the public, representatives from government agencies, non-government organisations and experts in heritage protection and management. In June 2012, the Commission released a Discussion Paper outlining the issues involved in this Inquiry and seeking feedback from members of the public. The Commission received 11 written submissions. It also held public consultations across Upolu and Savaii and conducted targeted consultations with key stakeholders from July to October 2012. The Commission also consulted heritage experts overseas. Lists of people who provided submissions and were consulted are set out in Appendices 2 and 3.

The Commission would like to thank all those who contributed their time, expertise and views to assist the Commission in this Inquiry. In particular, the Commission extends its appreciation to international experts in heritage and law reform who assisted in this Inquiry, namely Lorena Sciusco from the University of Otago; Jamin Moon; staff at the NSW Office of Environment and Heritage; and members of the Australian and NSW Law Reform Commissions. The Commission would also like to thank Anna Dziedzic, a volunteer legal analyst at the Commission, for her assistance over the course of this Inquiry.

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Part 1: Does Samoa need a National Heritage Body?

- 1.1 This part considers whether there is a need for reform in order to better protect and preserve Samoa's national heritage sites. It surveys existing laws and policies relating to heritage protection and considers stakeholders' views on how they operate in practice. Based on this review, the Commission recommends that the government should establish a body dedicated to the protection of heritage sites in Samoa.

Current laws and policies

- 1.2 There is no single law that governs heritage protection in Samoa. Rather, a range of customary laws, legislation and policies relate to various aspects of national heritage.

Customary law

- 1.3 The Constitution defines three categories of land in Samoa: customary land, freehold land and public land.¹ Under the Constitution, customary land is 'land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage'.² Customary land may not be sold or alienated.³ Approximately 81% of Samoa's land is customary land.⁴ As such, many rights and obligations in relation to land, and any heritage forming part of the land, are defined and governed at the local level by customary law. Each village has a *fono* (council) that meets regularly to govern the affairs of the village in accordance with Samoan custom and usage. The village *fono* consists of *matai* (chiefs) who are usually the heads of the families in the village. The authority of the village *fono*, including its authority over village land, is recognised and regulated by the *Village Fono Act 1990*, which specifically provides that village *fono* have power to 'make rules governing the development and use of village land for the economic betterment of the village' and to direct any persons to do work pursuant to rules made by the *fono*.⁵

Legislation

- 1.4 Legislation dealing with land management and cultural institutions touch upon aspects of heritage protection.

Land Management

- 1.5 The *Planning and Urban Management Act 2004* sets out a framework for the use, development, management and protection of Samoa's land. The Act establishes the Planning and Urban Management Agency ("PUMA"), which is responsible for making sustainable management plans and approving developments. PUMA must take into account the likely effects on cultural and natural heritage when considering an application

¹ *Constitution of Samoa* (1960) art 101(1).

² *Constitution of Samoa* (1960) art 101(2).

³ *Constitution of Samoa* (1960) art 102.

⁴ Tu'u'u Ieti Taule'alo, So'oialo David Fong and Patea Malo Setefano, 'Samoan Customary Lands at the Crossroads – Some Options for Sustainable Management' (2003) 4 *Proceedings of the 2002 National Environmental Forum, Samoa* 2.

⁵ *Village Fono Act* (1990) s 5(2).

for development⁶ and must generally have regard to the objectives of the Act which include 'to preserve those buildings areas or other places of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value'.⁷

- 1.6 Legislation dealing with national parks and reserves also protect heritage sites. The *National Parks and Reserves Act 1974* permits the Head of State, acting on the advice of Cabinet, to declare public land of 'national, historical, legendary, or archaeological significance' a historic reserve to be protected and managed for the benefit and enjoyment of the people of Samoa.⁸ Regulations may restrict entry to a reserve and prohibit any person altering, destroying or interfering with any feature on a reserve.⁹ Under the *Lands, Surveys and Environment Act 1989*, Cabinet may approve management plans for the protection, conservation, management and control of national parks and reserves on government-owned land. Management plans must have regard to the 'protection of special features, including objects and sites of biological, archaeological, geological, and geographical interest',¹⁰ which may encompass some kinds of national heritage.
- 1.7 Reserves may also be created by specific legislation. The *Stevenson Memorial Reserve and Mount Vaea Scenic Reserve Ordinance 1958* declares that land given to the government by Robert Louis Stevenson's heirs is to be maintained as the Stevenson Memorial Reserve. The Ordinance also creates the Mount Vaea Scenic Reserve and provides for regulations to manage and protect the area.¹¹
- 1.8 The *Forestry Management Act 2011* regulates the management of Samoa's forestry resources and includes provisions to protect national parks and reserves. The Act requires that logging permits must be consistent with laws relating to the management of national parks or reserves and the protection of places of national, historic, legendary or archaeological interest. A permit may include conditions to protect areas of national, religious, historic, legendary or archaeological significance, amongst other things.¹²
- 1.9 The *Taking of Land Act 1964* authorises the Head of State, on the advice of Cabinet, to take ownership of customary and freehold land for any public purpose.¹³ While the definition of 'public purpose' does not expressly include the protection of heritage, it is possible that heritage protection could fall within 'all lawful purposes and functions of the Government of Samoa' or be declared a public purpose under the Act.¹⁴ The government is required to compensate the owners or any person with an interest in land that is taken for public purposes.¹⁵

⁶ *Planning and Urban Management Act 2004* s 46(h).

⁷ *Planning and Urban Management Act 2004* s 9(h).

⁸ *National Parks and Reserves Act 1974* ss 4, 5 and 8.

⁹ *National Parks and Reserves Act 1974* s 8 (2)(a).

¹⁰ *Lands, Surveys and Environment Act 1989* s 116.

¹¹ *Stevenson Memorial Reserve and Mount Vaea Scenic Reserve Ordinance 1958* ss 2, 4.

¹² *Forestry Management Act 2011* ss 56(1)(a); 57(1)-(2).

¹³ *Taking of Land Act 1964* s 7.

¹⁴ *Taking of Land Act 1964* ss 2-3.

¹⁵ *Taking of Land Act 1964* s 25.

Cultural heritage

- 1.10 The *Youth, Sports and Cultural Affairs Act 1993/1994* establishes the Ministry of Education, Sports and Culture (“MESC”).¹⁶ A principal function of MESC is to promote and encourage the development and improvement of cultural activities.¹⁷ Within MESC, the Culture Division is mandated ‘to nurture, promote, revive and preserve Samoan tangible and intangible heritage, language, artistic creativity, cultural values and practices’.¹⁸ The Culture Division includes institutions such as the Museum of Sāmoa and National Archives Sāmoa.
- 1.11 The *Ministry of Women Affairs Act 1990* establishes the Ministry for Women, Community and Social Development (“MWCSA”).¹⁹ Internal Affairs is part of this ministry and promotes local governance through strengthening the capacity of *Pulenuu, Sui o le Malo, Komiti o Pulenuu* and *Komiti o le Faleula*. Internal Affairs also liaises between the community and government when disseminating projects and initiatives into the villages.

Private Organisations

- 1.12 The *Robert Louis Stevenson Foundation Act 1991* is an example of legislation made to assist a private organisation to protect and preserve heritage. The Act grants the Robert Louis Stevenson Museum/Preservation Foundation, a private corporation, a lease over land at Vailima and exempts it from paying certain taxes on the condition that the Foundation remain a non-profit corporation and that at least two fifths of its directors are appointed by the Head of State. The Act sets out a list of approved objects of the Foundation, which include the restoration and maintenance of the residence and grounds at Vailima; the preservation of Robert Louis Stevenson’s tomb as a national monument of Samoa; the renovation of any building of historical significance in Samoa; and the establishment, maintenance and management of a museum, and walking tracks and parks.²⁰

International conventions

- 1.13 Samoa became a party to the *Convention for the Protection of the World Cultural and Natural Heritage 1972* (“World Heritage Convention”) in 2001, and is in the process of ratifying the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003* (“ICH Convention”).
- 1.14 The World Heritage Convention declares that some sites should be protected as places of ‘outstanding universal value’. It establishes a scheme in which state parties to the Convention identify places for inclusion in the World Heritage List. The World Heritage Committee, which consists of 21 members chosen from parties to the Convention, receives expert advice and decides whether a place should be included in the World Heritage List. Once a place is listed, state parties have an obligation to protect the place so

¹⁶ *Youth, Sports and Cultural Affairs Act 1993/1994* s 4.

¹⁷ *Youth, Sports and Cultural Affairs Act 1993/1994* s 6 (b).

¹⁸ Submission from Ministry of Education, Sports and Culture, 21 August 2012.

¹⁹ *Ministry of Women Affairs Act 1990* s 4.

²⁰ *Robert Louis Stevenson Foundation Act 1991* ss 3, 4.

as to maintain its outstanding universal value.²¹ Currently, there are no Samoan sites on the World Heritage List. Two sites have been included on the World Heritage Committee's tentative list. The Fagaloa Bay–Uafato Tiavea Conservation Zone has been proposed as a mixed site comprising both natural and cultural heritage; and the Manono, Apolima and Nuulopa Cultural Landscape has been proposed as a cultural landscape.²² The categories of 'natural', 'cultural' and 'mixed' heritage and 'cultural landscape' are explained in Part 2 of this Report.

- 1.15 The ICH Convention aims to safeguard intangible cultural heritage across the world. Intangible cultural heritage encompasses practices, representations, expressions, knowledge and skills that are recognised as part of a community's cultural heritage.²³ As discussed further in Part 2 of this Report, intangible cultural heritage may be connected to tangible heritage sites that are the focus of this Inquiry. The ICH Convention requires state parties to create and maintain an inventory of the intangible cultural heritage within its territory; to adopt policies and establish institutions to safeguard intangible cultural heritage; and to raise awareness in the general public about the recognition, respect and enhancement of intangible cultural heritage.²⁴ At the international level, the Convention establishes a Committee which provides state parties with guidance and in some cases funding to safeguard intangible cultural heritage, and maintains a Representative List of the Intangible Cultural Heritage of Humanity.²⁵

Policies and committees

- 1.16 Several policies and committees relating to heritage protection have been established over recent years.

Policies

- 1.17 The Draft Cultural Policy 2008 was developed by MEC with the aim of developing policies for protecting Samoa's tangible and intangible cultural heritage. The policy emphasizes the importance of protecting and promoting culture, and covers heritage sites, including sites associated with legends and myths, archaeological sites and monuments; museums and archives; visual arts, crafts and literatures; and traditional sports.
- 1.18 The National Heritage Conservation Policy 2004 was developed by the Ministry for Natural Resources and Environment ("MNRE") in collaboration with other government agencies and local stakeholders. The objective of the policy is 'the sustainable management of Samoa's natural and cultural heritage resources, in recognition of their significance to the lives of Samoan people, for the benefit of present and future generations'. The policy outlines strategies to meet five key objectives, namely:

²¹ *Convention for the Protection of the World Cultural and Natural Heritage* (1972), arts 5 and 11.

²² UNESCO, World Heritage Tentative List, *Fagaloa Bay – Uafato Tiavea Conservation Zone*, <<http://whc.unesco.org/en/tentativelists/5090>; UNESCO, World Heritage Tentative List, *Manono, Apolima and Nuulopa Cultural Landscape*, <http://whc.unesco.org/en/tentativelists/5091>>.

²³ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) art 2.

²⁴ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) arts 12-14.

²⁵ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) arts 7, 16.

1. to create public awareness and improve understanding of Samoa's natural and cultural heritage;
2. to identify national sites of significant heritage value for preservation;
3. to strengthen co-operation among local stakeholders to implement heritage preservation programs;
4. to incorporate heritage preservation into environmental planning and assessment; and
5. to develop global partnerships to support the preservation of national heritage.²⁶

Committees

1.19 Since 2000, three committees have been established with responsibilities that include heritage protection. In 2000, Cabinet established the Advisory Committee for Heritage Conservation, comprising representatives from a range of government agencies, private organisations and academic institutions. As a first priority the Committee was asked to consider the preservation of four historic buildings, the Supreme Court and Justice Department building; the Family Health and Sports Federation building; the Head of State's Residence at Motootua; and the Samoan Trust Estate Corporation Building.²⁷

1.20 The Samoa National Heritage Coordinating Committee was established following Samoa's ratification of the World Heritage Convention. The Coordinating Committee is chaired by the Chief Executive Officer of MNRE. Its Terms of Reference task the Committee with developing a National Action Plan, preparing a list of proposed activities to protect sites with cultural and natural significance at both the national and international level, and implementing the National Heritage Conservation Policy.²⁸ The Committee's work has included:

- awareness campaigns with schools and villages on the importance of safeguarding Samoa's natural and cultural heritage;
- preparing an inventory of key sites of natural and cultural heritage significance in Samoa, including field studies and expert analysis; and
- ongoing consultation with communities about sites proposed to be nominated on Samoa's tentative list for consideration by the World Heritage Committee.²⁹

1.21 The Coordinating Committee is also involved in implementing the *Pacific World Heritage Action Plan 2010-2015*, which aims to assist Pacific Island nations in nominating sites for inclusion in the World Heritage List. It includes strategies for co-operation, capacity building and sharing knowledge about the common challenges for heritage protection in the Pacific region.³⁰

1.22 Finally, the National Committee for Intangible Cultural Heritage was established in 2012. It currently operates under MESC, a part of the Culture Working Group. The work of this

²⁶ Ministry of Natural Resources, Environment and Meteorology Policy Statement 'National Heritage Conservation Policy' (2004).

²⁷ Cabinet Directive PK(00)06, 15 March 2000.

²⁸ Terms of Reference for Samoa National Heritage Coordinating Committee, 26 April 2006.

²⁹ Elisaia Talouli and Tuiolo Schuster, 'Community Participatory Approach to Heritage Conservation in Samoa' in UNESCO, *World Heritage in a Sea of Islands: Pacific 2009 Programme* (2012), p 78.

³⁰ UNESCO, *Final Report: UNESCO Pacific World Heritage Workshop (Apia, Samoa, 5-9 September 2011)*, (2011), p 4.

committee includes proposing nominations for a National Register of Intangible Cultural Heritage; advising on ratification of the ICH Convention; and developing a the National Memory of the World Register for the International Memory of the World Register.³¹

Need for reform

- 1.23 This section draws on the views of heritage experts and stakeholders consulted by the Commission to consider how these laws and policies operate in practice. This analysis shows that while many people think that it is important to protect heritage, there are a number of challenges facing heritage protection in Samoa.

Importance of heritage

- 1.24 Recent events show that the community is very interested in the protection of heritage sites. After the relocation of the Courts to a new building in 2010, the threat to pull down the old Court House in Apia motivated concerned citizens to form a group to lobby for its preservation. More recently, the demolition of the *Fale Fono* in Mulinu'u, prompted mixed reactions from the public, with many Samoans feeling that the building represented an integral part of Samoan's history.
- 1.25 People think heritage is important for a range of reasons. Some see it as part of Samoan identity. Others said it was important to preserve heritage so that future generations can understand and be inspired by Samoa's history, culture and traditions. While not everyone agrees on which cultural and historic sites in Samoa are heritage and should be preserved, many people expressed concerns that sites have been demolished with little consultation or consideration of their heritage value. Some people noted that several historic buildings have recently been destroyed, even though they were included in the heritage policies and said that if this tendency continues there will not be much heritage left to protect.

Challenges to heritage protection

- 1.26 There are many challenges facing effective heritage protection in Samoa:

Our heritage sites are threatened from a variety of forces linked to population growth, environmental degradation, urban redevelopment, industrialization and the globalization of traditional socio-cultural fabric. It can also be recognized that tourism and the process of presentation for tourism purposes can introduce subtle threats. Absence of clear definitions of what constitutes heritage, lack of regulatory controls, inadequate financing and incentives can compromise heritage conservation efforts in Samoa... [Other] issues ... of the greatest danger to longer-term safeguarding of heritage sites in Samoa [include] inadequate public understanding of the need to conserve the heritage and inadequate localization of stewardship responsibility over heritage resources.³²

³¹ Ministry of Education Sports & Culture, *Culture Working Group Terms of Reference* (Apia, Sāmoa, 30 July 2012).

³² Tuiolo Schuster, 'Samoa and the World Heritage Convention: Is Samoa Ready for World Heritage Listing?' in *Samoa Environment Forum, Proceedings of the 2005 National Environment Forum*, 2006, p 49.

1.27 Stakeholders echoed many of these concerns during consultations for this Inquiry. The issues are not new and have informed previous initiatives in heritage protection. Even so, the Commission considers it worthwhile to describe these challenges so that the recommendations made in this report can adequately address them.

Funding

1.28 Several stakeholders identified a lack of adequate funding as a major impediment to heritage protection. The resource constraints faced by the government and the community mean that decisions must be made about where best to allocate limited funds and resources. A number of submissions to this Inquiry expressed concern that heritage protection may require funding and resources that the Samoan government and community may not be able to commit. First, ongoing funding is required to implement heritage laws and policies and support a sustainable and long-term approach to heritage protection. Secondly, many stakeholders noted that heritage protection often 'loses out' to economic interests. For example, some heritage sites may be damaged or destroyed in the course of new buildings, industry or agriculture. In these cases, funding is needed so that heritage protection is a viable alternative. Finally, conserving and maintaining some heritage sites, particularly colonial buildings, can incur significant costs.

Capacity and expertise

1.29 Other barriers to an effective and sustainable system of heritage protection in Samoa are gaps in the capacity and expertise necessary to put heritage protections into practice and the lack of appropriate information and data management systems.³³ There are several current initiatives to increase capacity: the Centre for Samoan Studies at the National University of Samoa ("NUS") has introduced a course in archaeology and developed international partnerships;³⁴ and there are increased opportunities for training people involved in heritage management.³⁵ However, many stakeholders considered that further opportunities to develop capacity were needed.

Community awareness

1.30 Members of the community and heritage experts alike considered that the best protection of heritage comes when the community understands and supports the value of heritage sites. Many stakeholders emphasised the need for education to ensure that people are aware of the significance of heritage sites. This has also been recognised in government

³³ Helene Martinsson-Wallin, 'The complexity of an archaeological site in Samoa: The past in the present' in Jolie Liston, Geoffrey Clark and Dwight Alexander (eds), *Pacific Island Heritage: Archaeology, Identity & Community*, Terra Australis 35 (Canberra: ANU epress, 2011), pp 108, 110; International Council on Monuments and Sites (ICOMOS), *Filling the Gaps: An Action Plan for the Future World Heritage List* (Paris, ICOMOS, 2005), p 8.

³⁴ Unumoe Esera, 'Sweden, Samoa benefit from Cultural Exchange', *Samoa Observer*, 7 March 2013

³⁵ For example, the recently launched Pacific Heritage Hub to link the UNESCO World Heritage Committee and South Pacific nations will support capacity building and heritage related activities across the region: UNESCO Office in Apia, 'Hub to Strengthen Heritage Management' 7 March 2013, http://www.unesco.org/new/en/apia/about-this-office/single-view/news/hub_to_strengthen_heritage_management/.

policies.³⁶ Some people consulted by the Commission complained that previous heritage committees and programs have not been visibly active in the community or across government. Some members of the public suggested that it was essential that the committees and any new heritage body conduct workshops to educate the community about their objectives and activities.

Fragmentation of responsibility for heritage protection

- 1.31 The distribution of responsibility for different aspects of heritage across different government agencies was seen as a source of potential difficulties. Currently, Culture Division in MESC deals with cultural aspects of heritage and intangible cultural heritage; MNRE is responsible for natural heritage and environmental conservation; PUMA, a division of MNRE, is responsible for planning and urban development; while the Samoa Tourism Authority (“STA”) deals with heritage sites with tourism value.³⁷
- 1.32 The activities of these agencies are understandably driven by what funding is available to them, and money is often available for heritage sites only when incidental to the agencies’ core activities. This has led to an ad hoc approach to heritage protection, in which heritage protection is ancillary to other programs, rather than the core focus. Further, each agency has different definitions and approaches to heritage, leading to possible inconsistencies. Finally, particular problems arise when a site has mixed values. For example, a site may have biodiversity significance, which is dealt with by MNRE, but may also be associated with cultural heritage, which is the responsibility of MESC. In these cases, there is a danger that the agencies will duplicate each other’s work, or alternatively, that such sites will ‘fall through the cracks’ as each agency believes that the other is responsible for it.

Independence

- 1.33 Many stakeholders emphasised the need for any new heritage body to be independent from government to ensure that its decisions are not unduly influenced by outside considerations. A number of people expressed the view that without independence, a heritage authority would not have sufficient influence to prevent the destruction of national heritage, citing the destruction of the *Fale Fono* as an example. However, stakeholders also did not want to create a new body that would duplicate existing work, cost more than Samoa can afford or run counter to current government policies. Several stakeholders suggested the possibility of combining heritage protection functions within an existing agency in order to streamline costs and avoid duplication.

Lack of regulatory controls

- 1.34 Some stakeholders considered that heritage protection was compromised by the absence clear regulatory controls over heritage sites. Such regulatory controls might include a list or other mechanism to identify heritage, an approval process for activities that may affect heritage, and strong legal sanctions for unauthorised damage of heritage. The

³⁶ Ministry of Natural Resources and Energy, *(Draft) Policy Paper for Cabinet Development Committee*, www.mnre.gov.ws/documents/policies/Policy_Heritage.pdf.

³⁷ Consultation with Samoa Tourism Authority, 9 August 2012.

International Council on Monuments and Sites (“ICOMOS”) has identified the absence of appropriate heritage conservation legislation as a reason for the limited representation of the Pacific region in World Heritage List.³⁸ In Samoa, several stakeholders noted that the committees lack the decision-making powers to regulate heritage sites and considered that legislation should provide for substantive protection powers.

Customary ownership of land

- 1.35 Many people consulted by the Commission discussed the issues that might arise in relation to heritage sites on customary land. Rules and procedures developed to protect heritage must take account of the nature of customary authority over land. A number of stakeholders expressed the view that customary landowners are generally aware of the importance of heritage and actively maintain and protect heritage sites on their land. There were some concerns that a legal regime to protect heritage sites on customary land might interfere with the authority of the village *fono* to manage the land, or that the regime may exacerbate legal disputes about the ownership of customary land.³⁹ A number of stakeholders pointed to the strength of traditional understandings of village authority over customary land, in which landowners see themselves as custodians of the land for future generations, rather than as owners of something of monetary value. Overseas experts noted that this approach reflects best-practice heritage principles that the local community should have ownership and responsibility for heritage sites rather than heritage being seen as the responsibility of the government alone.
- 1.36 Several stakeholders emphasised the need for flexibility when it comes to protecting heritage sites on customary land. They noted that legislation and sanctions alone will be ineffective, and that the best approach is to work with village *fono*, church communities, women’s committees and schools, to encourage the community to take ownership of heritage sites. This consultative process depends on building relationships, participation by the community, and potentially providing financial assistance and incentives to support heritage work undertaken at the community level.

Commission’s views

- 1.37 Although many stakeholders considered it important to protect and preserve heritage sites, there was a sense that current laws and policies have not worked sufficiently in practice. The Commission therefore considers that Samoa would benefit from legislation establishing a new body dedicated to the protection of Samoa’s heritage sites.
- 1.38 There are three key benefits to establishing a new body to protect heritage sites in Samoa. First, a single body with a clear mandate and funding to protect and promote heritage sites can address the problem of fragmentation. The sustainable protection and management of heritage sites requires a holistic approach, which integrates and

³⁸ International Council on Monuments and Sites (ICOMOS), *Filling the Gaps: An Action Plan for the Future World Heritage List* (Paris, ICOMOS, 2005), p 8.

³⁹ For a description of a dispute over land and its impact on archaeological research, see Helene Martinsson-Wallin, ‘The Complexity of an Archaeological Site in Samoa: The Past in the Present’ in Jolie Liston, Geoffrey Clark and Dwight Alexander (eds), *Pacific Island Heritage: Archaeology, Identity & Community*, Terra Australis 35 (Canberra: ANU epress, 2011), 106-7.

coordinates the activities of all agencies and people who deal with heritage sites. While a heritage body should not necessarily take over all functions relating to heritage sites, it can take a leadership role, and develop uniform heritage policies and provide expert advice on how government agencies, private organisations and the wider community can protect heritage.

1.39 Secondly, legislation creating the new heritage body can vest it with appropriate regulatory functions, which the existing committees currently lack. In Part 3 of this Report, the Commission makes recommendations about the kind of functions the new heritage authority might perform, taking particular care to ensure these functions work with, not against, customary authority over land and existing regulatory systems.

1.40 Thirdly, a dedicated heritage body can act as a bridge between the community and the government on heritage issues. A recurring concern expressed during public consultations was that the government did not listen to people before making decisions about heritage. It is important to provide people with a guaranteed opportunity to have their views about heritage protection heard. An independent heritage body can facilitate community involvement in heritage protection through its decision-making procedures, as well as education and awareness-raising activities.

1.41 Many of the challenges to heritage protection will not be immediately resolved by establishing a new body. However, the Commission believes that the challenges stemming from funding constraints, developing capacity and expertise, and the need to raise community awareness can be addressed by designing a heritage body that suits the particular context of Samoa. These issues therefore inform all the recommendations made in this Report.

1.42 Finally, there is a question about what the heritage body should be called. Several stakeholders commented on this question, noting that the name of the body will affect how it is perceived in the community. One stakeholder suggested that the word 'Foundation' would carry more weight than 'Heritage Board'. Another suggested that the body be given the Samoan name of *Measina* to emphasise that the body would deal with Samoan conceptions of heritage, and encompass all of Samoa's cultural heritage, not just colonial buildings. The Commission agrees with these views and recommends that the body be called the Samoan Heritage Authority/Pulega o Measina a Samoa.

Recommendation 1: A new body, known as Samoan Heritage Authority/Pulega o Measina a Samoa, should be established under legislation dedicated to the protection of Samoa's national heritage sites.

Part 2: Definition of Heritage

- 2.1 Heritage is a difficult concept to define. The word 'heritage' is used in many different ways to describe a range of objects, values and ideas and can mean different things to different people. One dictionary defines heritage as 'the history, traditions and qualities that a country or society has had for many years and that are considered an important part of its character'.⁴⁰ Another definition emphasises the connection between heritage and the idea of 'inheritance'.⁴¹ As such, heritage may be defined as 'whatever each of us individually or collectively wishes to preserve and pass on to the next generation'.⁴²
- 2.2 In Samoa, heritage includes not only historic buildings, but other places with historic or cultural significance, as well as oral traditions and expressions; social practices and rituals; and knowledge and practices concerning nature and the universe. In Samoa, our understanding of heritage is influenced by our geographical location, our genealogy and our standing in our community. The challenge is how to turn these ideas and values into a clear definition of heritage that can be included in policies and legislation to guide the work of the Samoa Heritage Authority and other agencies.

Context and guiding considerations

International conventions

- 2.3 The World Heritage Convention and the ICH Convention outlined in part 1 each define different aspects of heritage.

World Heritage Convention

- 2.4 The World Heritage Convention has separate categories for cultural, natural and mixed cultural and natural heritage. Article 1 of the Convention defines cultural heritage as:

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combination of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

⁴⁰ Sally Wehmeier (ed), *Oxford Advanced Learner's Dictionary of Current English* (Oxford, Oxford University Press, 2005), p 729.

⁴¹ Judy Pearsall (ed), *Concise Oxford Dictionary, Tenth Edition* (Oxford, Oxford University Press, 1999), p 665.

⁴² Tuiolo Schuster, 'Samoa and the World Heritage Convention: Is Samoa Ready for World Heritage Listing?' in *Samoa Environment Forum, Proceedings of the 2005 National Environment Forum*, 2006, p 49.

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

2.5 Article 2 defines natural heritage to include:

Natural features consisting of physical and biological formations or groups of such formations which are of outstanding universal value from the aesthetic or scientific point of view;

Geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

Natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

1.43 The term ‘outstanding universal value’ means ‘cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity’. Thus, heritage of this nature warrants permanent protection as it is of the highest importance to the international community as a whole.⁴³

1.44 Two additional categories have been added by the Operational Guidelines for the Implementation of the World Heritage Convention (“Guidelines”). First, sites may be ‘mixed cultural and natural heritage’ if they satisfy a part or the whole of the definitions of both cultural and natural heritages laid out in Articles 1 and 2 of the Convention.⁴⁴ The second additional category is ‘cultural landscapes’, which are places that are significant because of the link between people and their environment. The Guidelines define cultural landscapes as:

... illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.⁴⁵

1.45 As such, cultural landscapes recognise that a people’s unique way of life, their social systems, history and traditional knowledge may be inextricably connected with and expressed by the natural landscape.⁴⁶

ICH Convention

2.6 The ICH Convention defines ‘intangible heritage’ as:

... the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and,

⁴³ Operational Guidelines for the Implementation of the World Heritage Convention (2005), para 49.

⁴⁴ Operational Guidelines for the Implementation of the World Heritage Convention (2005), para 46.

⁴⁵ Operational Guidelines for the Implementation of the World Heritage Convention (2005), para 47.

⁴⁶ Anita Smith and Kevin L. Jones, *Cultural Landscapes of the Pacific Islands*, Thematic Study for the International Council on Monuments and Sites (2007), pp 9, 14.

*in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, this promoting respect for cultural diversity and human creativity.*⁴⁷

2.7 Intangible cultural heritage is manifested in:

- a. *oral tradition and expressions, including language as a vehicle of the intangible cultural heritage;*
- b. *performing arts;*
- c. *social practices, rituals and festive events;*
- d. *knowledge and practices concerning nature and the universe;*
- e. *traditional craftsmanship.*⁴⁸

2.8 Intangible cultural heritage is not separate from tangible heritage sites that are the focus of this inquiry. The ICH Convention recognises that there is ‘deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage’.⁴⁹ Heritage sites often have value and meaning because of the relationship between the place and intangible cultural heritage such as stories or traditional crafts. As such, the ICH Convention incorporates the ‘cultural spaces’ associated with intangible cultural heritage as heritage protected under the Convention.

Heritage in Samoa

2.9 Applying these international definitions of heritage, it is clear that Samoa has a rich variety of heritage. In relation to tangible heritage sites, Samoa has natural heritage sites of outstanding beauty and significant biodiversity value as well as sites with cultural heritage significance such as the Pulemelei mound, graves, memorials, churches and colonial buildings, all of which reflect the 3000 year history of Samoa. Many heritage sites in Samoa may be considered mixed heritage sites or cultural landscapes. For example, Fagaloa Bay and Uafato-Ti’avea Conservation Area is one of the oldest geological places in Samoa and has been occupied by people for over 3000 years. Early settlers used local clay to make Lapita pottery, which is significant in the first settlements of people throughout the Pacific. Legends of Fatutoama and Lufasiaitu arise from this area, and features of the landscape are associated with the resting place of the ancestral god Moso.⁵⁰

2.10 It is therefore important that the definition of heritage is consistent with the international definitions and broad enough to encompass all kinds of heritage in Samoa, including intangible cultural heritage. While the focus of this Inquiry is tangible heritage sites, there is value in developing a broad definition that can be used consistently across the various heritage fields within Samoa.

⁴⁷ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) art 2.

⁴⁸ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), art 2.2 (a)-(e).

⁴⁹ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), preamble.

⁵⁰ Erika J. Techera, ‘Synergies and Challenges for Legal Protection of Sacred Natural Sites in the South Pacific’ in Bas Verschuuren et al (eds) *Sacred Natural Sites: Conserving Nature and Culture*, 2010 p 172; Anita Smith and Kevin L. Jones, *Cultural Landscapes of the Pacific Islands*, Thematic Study for the International Council on Monuments and Sites (2007), p 59.

Overseas approaches

- 2.11 Many countries overseas have legislation to protect their national heritage sites. Generally, legislation first sets out the kinds of places or objects that might be protected, defining for example 'land' or 'building' or 'structure', and then sets out the criteria for deciding whether that place or object has heritage value. For example, New Zealand's *Historic Places Act 1993* defines historic place as 'any land, building or structure that is part of the historical and cultural heritage of New Zealand', and then establishes a procedure by which the heritage authority decides if the place has 'aesthetic, archaeological, architectural, cultural, historical, scientific, social, spiritual, technological, or traditional significance or value'.⁵¹ The Historic Places Act also protects *wahi tapu*, which is defined to mean a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense. Similarly, in Victoria, the *Heritage Act 1995* defines 'cultural heritage' to mean 'places and objects of cultural heritage significance' and further defines 'cultural heritage significance' to mean 'aesthetic, archaeological, architectural, cultural, historical, scientific or social significance'.⁵²
- 2.12 In some cases, legislation incorporates ideas of significance or value into the definition of heritage itself. For example, the *Resource Management Act 1991* of New Zealand seeks to protect 'any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the *tangata whenua* for spiritual, cultural, or historical reasons'.⁵³ Similarly, the *National Heritage Resources Act 1999* of South Africa aims to recognise and protect 'those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations'.⁵⁴
- 2.13 In addition to a general definition, overseas heritage legislation generally sets out specific criteria that must be considered when deciding whether a place is a heritage place. The criteria usually relate to the values that give a place heritage significance, and commonly cover:
- Cultural value – the place's importance to the community, or a particular group in the community, for social, cultural or traditional reasons;
 - Historical value – the association of the place with events, persons or ideas of importance in the nation's history;
 - Aesthetic value – the place's architectural, engineering or artistic merit;
 - Research or scientific value – the potential for the place to yield information about the nation's prehistory or history, because it possesses archaeological or other date or unique, uncommon or endangered aspects of the nation's tangible or intangible heritage.
- 2.14 A place may have a combination of values, or have different values for different people and groups.

⁵¹ *Historic Places Act 1993* (NZ) s 23.

⁵² *Heritage Act 1995* (Vic) s 3.

⁵³ *Resource Management Act 1991* s 189 (NZ).

⁵⁴ *National Heritage Resource Act 1999* (SA) s 3(1).

Submissions and consultations

2.15 In the Discussion Paper, the Commission asked how ‘national heritage’ should be defined and whether it should include:

- *Cultural heritage such as buildings, archaeological sites and artworks;*
- *Natural heritage such as nature reserves and parks; and/or*
- *Cultural heritage which combine a mixture of cultural and natural heritage.*

2.16 The general consensus from consultations was to have a broad definition of national heritage covering natural and cultural heritage and mixed sites. The Apia Office for the United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) suggested other potential categories, namely moveable, underwater and intangible heritage.⁵⁵

2.17 Some stakeholders emphasized that the definition must fit the context of Samoa. One submitted that the ‘[n]atural environment already has strong protections...Cultural heritage is the human modification of landscape and is better suited to the Samoan context’. The New Zealand Archaeological Association (“NZAA”) submitted that the definitions in the World Heritage Convention ‘are primarily concerned with the Outstanding Universal Values; any definition of heritage needs to be specific to Samoa as an independent nation in the Pacific rather than following international definitions’.⁵⁶

2.18 Other stakeholders suggested that the focus should be on cultural heritage, and that a site or object should not be protected for itself, but because of the story it tells and its association with human activity, past and present. For these reasons, it was recommended that intangible and tangible heritage not be separated.

2.19 Stakeholders suggested a range of criteria for assessing potential heritage sites, including the cultural and historical importance of the site, its archaeological value, architectural qualities, aesthetic features, uniqueness and representativeness. Some emphasized that the criteria should include those qualities important to the history and identity of the Samoan people, noting that different heritage values may exist at the national, village and family levels of the Samoan community.

Commission’s views

2.20 A broad definition is required to guide the work of the Heritage Authority and other agencies that deal with heritage. While this Report focuses on heritage sites, the Commission considers that there is merit in recommending a broad definition of heritage that may be applied to all matters that relate to heritage. In this way, a common definition of heritage can be used across legislation and policies relating to tangible and intangible heritage. The Commission recommends legislation define heritage as ‘places, objects and

⁵⁵ Submission from UNESCO, Apia Office, 26 June 2012.

⁵⁶ Submission from New Zealand Archaeological Association, 9 August 2012.

practices of cultural significance or other special value to the present community and future generations’.

- 2.21 In relation to heritage sites, the Commission recommends that the legislation first define the kinds of places that might have heritage significance and secondly set out the criteria for determining heritage significance.
- 2.22 The Commission considers that heritage sites should encompass the four categories recognised by the World Heritage Convention and the Guidelines, namely, natural and cultural heritage, cultural landscapes and mixed sites. The Commission agrees with those stakeholders who argued that the language of the World Heritage Convention is somewhat outdated and not necessarily well adapted to the context of Samoa. However, the Commission considers that the four categories are a useful way of thinking about the different kinds of places that might have heritage value. As such, the Commission recommends that legislation adopt the four categories, and adapt the language of the World Heritage Convention to indicate, in a non-exhaustive way, the kinds of places that may fall within each category.
- 2.23 Secondly, the Commission recommends that the legislation should not use the language of ‘outstanding universal value’ but should focus on the significance of heritage sites to Samoa and the Samoan people. Focusing on the values or significance of heritage is important because it moves the idea of heritage beyond the physical attributes of a place to an understanding of what the place might mean to people in the community. This holistic understanding of heritage reflects a shift in ideas of heritage protection, which has moved from focusing on cordoning off sites for preservation and scientific inquiry to a community-based approach in which heritage is seen to belong to, and have meaning for, the entire community.⁵⁷ It also allows the legislation to define ‘significance’ in a way that reflects the context of Samoa, including the important connections between places and intangible cultural heritage, such as customary values and practices, rituals and stories.
- 2.24 Following overseas examples, the Commission recommends that legislation should set out a range of values that might give a place heritage significance. The values recommended below follows the range of cultural, historic, aesthetic and research values set out in overseas legislation, with some amendments to recognise the particular cultural values associated with heritage in Samoa.

Recommendation 2: A broad definition of heritage should be adopted in policies and legislation. Heritage should be defined as ‘places, objects and practices of cultural significance or other special value to the present community and future generations’.

Recommendation 3: A heritage place may consist of:

- **Natural heritage, including natural sites or features consisting of physical and biological formations, geological features or places of biodiversity;**

⁵⁷ NSW Office of Environment and Heritage, *Aboriginal Heritage in Perspective: A Comparative Review of Legislation and Management Regimes in Australia and Beyond* (Draft, 2012) p 108.

- **Cultural heritage, including buildings, monuments, archaeological sites, artistic works or other built structures;**
- **Mixed natural and cultural heritage sites; or**
- **Cultural landscapes, including sites illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.**

Recommendation 4: A place has heritage significance if:

- **The place is important to the community or a particular group in the community for social, cultural, spiritual or traditional reasons;**
- **The place is associated with events, persons or ideas of importance in Samoa's history or culture;**
- **The place possesses unique, uncommon or endangered aspects of Samoa's tangible or intangible heritage, including aspects of Samoa's distinctive customs and practices that are in danger of being lost;**
- **The place has architectural, engineering or artistic merit;**
- **The place has potential to yield archaeological or other information about Samoa's prehistory or history;**
- **The place is a notable example of a particular type or class of place.**

Part 3: Functions of the Samoan Heritage Authority

3.1 In accordance with our terms of reference, Part 3 examines the role of heritage bodies in overseas jurisdictions including American Samoa, Australia, the Cook Islands, Japan, New Zealand, Singapore, South Africa, Sweden, the United Kingdom and Vanuatu.⁵⁸ This Part presents the various functions that the Heritage Authority might perform and considers which functions would best suit Samoa, taking into account the challenges to heritage protection outlined in Part 1 of this Report.

General approach to heritage protection

Overseas approaches

List model of heritage protection

3.2 A common function of heritage bodies overseas is to identify and register heritage sites. The heritage body is responsible for assessing sites, determining whether they have heritage value, and including sites on a register or list. The list model is adopted, in different forms, in many jurisdictions, including Australian states and territories, the Cook Islands, Singapore, South Africa and Vanuatu. At the international level, the World Heritage Convention also adopts a listing approach.

Overseas examples

Australia: Every Australian state and territory has an official list of places of heritage significance.⁵⁹ Legislation sets out the criteria for heritage significance and the factors that must be considered when making a decision to include a place on the Heritage List. Once a place is included on the list, it is a criminal offence to engage in conduct that damages the heritage value of a place on the Heritage List, unless the person has prior approval.⁶⁰ Some legislation requires the owner of the site to maintain or repair a place that is included on the Heritage List.⁶¹

Cook Islands: The Cook Islands Cultural and Historic Places Trust has the power to classify buildings according to four categories:

1. buildings of such historical significance or architectural quality that their permanent preservation is regarded as essential;

⁵⁸ These jurisdictions were studied because they share similarities with the legal or social context of Samoa, or on the recommendation of stakeholders. The Commission thanks the following people who provided us with information about heritage protection in overseas jurisdictions: Akatsuki Takahashi (Japan); Helene Martinsson-Wallin (Sweden); Jamin Moon (Aboriginal heritage in Victoria); and the NSW Office of Environment and Heritage (New South Wales).

⁵⁹ *Heritage Act 2004* (ACT) s 20; *Heritage Act 1977* (NSW) s 31; *Heritage Conservation Act* (NT) s 16; *Queensland Heritage Act 1992* (Qld) s 31; *Heritage Places Act 1993* (SA) s 13; *Historic Cultural Heritage Act 1995* (Tas) s 15; *Heritage Act 1995* (Vic) s 18; *Heritage of Western Australia Act 1990* (WA) s 46.

⁶⁰ *Heritage Act 2004* (ACT) ss 74-76; *Heritage Act 1977* (NSW) s 156; *Heritage Conservation Act* (NT) s 33; *Queensland Heritage Act 1992* (Qld) s 104; *Heritage Places Act 1993* (SA) s 36; *Heritage Act 1995* (Vic) s 64; *Heritage of Western Australia Act 1990* (WA) s 79.

⁶¹ *Heritage Conservation Act* (NT) s 49; *Historic Cultural Heritage Act 1995* (Tas) s 60; *Heritage Act 1995* (Vic) s 162; *Heritage of Western Australia Act 1990* (WA) s 59.

2. buildings which merit permanent preservation because of their very great historical significance or architectural quality;
3. buildings which merit preservation because of their historical significance or architectural quality; and
4. buildings which merit recording because of their historical significance or architectural quality.⁶²

Buildings in category 1 or 2 may be subject to a protection notice and must not be demolished, altered or extended without the consent of the Trust.⁶³

New Zealand: The National Register of Historic Places, maintained by the New Zealand Historic Places Trust serves as a source of information only.

Submissions and consultations

3.3 A number of stakeholders considered that a vital part of the Heritage Authority's role should be to establish a list of heritage sites. UNESCO regarded a list as an 'effective tool to strengthen heritage protection and preservation'.⁶⁴ Others submitted that a list would be a beneficial way to inform the public and potential developers about the location and significance of heritage sites. Some stakeholders suggested that two lists should be established: one to provide an overview of all potential heritage sites in Samoa, and a second list of sites that warrant legal protection.

3.4 There was some concern that listing heritage sites on customary land would compromise the authority of village *fono*. One stakeholder suggested that owners should be given the option of registering heritage sites and a range of protections then made available depending on the nature of the heritage and land involved.

Advantages and disadvantages

3.5 The list approach provides a way to systematically identify, assess and record the heritage significance of places in Samoa. The list then becomes an important source of information for government, developers, researchers, educators and the general public. While a list gives everyone certainty, the actual protection of heritage sites depends on the legal consequences of including a place on the list. As some stakeholders noted, it is possible to have different classes of listed sites to which different consequences attach. A disadvantage is that heritage sites that have not been discovered and listed may not be adequately protected. Other risks identified by some stakeholders were that people may be discouraged from reporting the discovery of heritage sites because listing may limit what they can do to the site, and that people may use the list to identify historic places in order to loot or damage them.

⁶² *Cultural and Historic Places Act 1994-95* (Cook Islands) s 25.

⁶³ *Cultural and Historic Places Act 1994-95* (Cook Islands) s 26. An appeal to the Minister is available.

⁶⁴ Submission from UNESCO, Apia Office, 26 June 2012.

Duty of care

- 3.6 Another approach to heritage protection places obligations on people whose activities potentially affect heritage sites, such as government agencies, developers and industry. Legislation may impose 'due diligence' or 'duty of care' obligations which require people to take reasonable steps to ensure that their activities do not harm heritage sites.
- 3.7 In some jurisdictions, there is 'blanket protection' of all heritage sites, which means that places are protected automatically, without the need for a list. People whose activities may affect heritage are then required to consult with traditional or customary owners, experts and other interested parties and enter into agreements regarding the protection of the sites. This form of community-based heritage protection, in which the local community has responsibility for identifying heritage sites and negotiating ways to protect them, is adopted some in Australian states to protect Aboriginal heritage sites.

Overseas examples

American Samoa and South Africa: These jurisdictions adopt a list model of heritage protection but also impose higher obligations on government agencies to protect heritage sites in their control. In American Samoa, the *National Heritage Preservation Act 1966* requires government agencies to identify and take steps to protect historic sites on government land or which are affected by government activity.⁶⁵ The American Samoa Historic Preservation Office assists government agencies to meet these responsibilities by providing advice; reviewing archaeological and historic reports and plans; and negotiating agreements for the management of heritage sites. In South Africa, a government agency must refrain from actions that may adversely affect a heritage site unless there is no feasible alternative. The South African Heritage Resources Agency ("SAHRA") must be given an opportunity to comment on any proposed actions that may affect a heritage resource.⁶⁶

Aboriginal heritage protection in Queensland and Victoria: In these states, all people who use land must ensure that their actions do not harm Aboriginal cultural heritage. While the procedures in each state differ, Aboriginal people play a key role in identifying and protecting Aboriginal cultural heritage. In Queensland, developers must consult with Aboriginal Native Title holders or claimants or Aboriginal people with 'particular knowledge about traditions, observances, customs or beliefs associated with the area', and may enter into agreements to protect heritage.⁶⁷ In Victoria, heritage specialists and representatives of the Aboriginal community work with developers to prepare Cultural Heritage Management Plans.⁶⁸ In this way, Aboriginal groups are responsible for identifying the sites of heritage significance in the area and negotiating ways to protect those sites from harm.

Submissions and consultations

- 3.8 Several stakeholders expressed concerns about the impact of large development projects on heritage sites. They recommended imposing a requirement that government agencies

⁶⁵ *National Heritage Preservation Act 1966* 16 USC 470, s 106.

⁶⁶ *Heritage Resources Act 1999* (South Africa) s 9.

⁶⁷ *Aboriginal Cultural Heritage Act 2003* (Qld) ss 35, 105.

⁶⁸ *Aboriginal Heritage Act 2006* (Vic) s 148.

undertake heritage impact assessments and ensure that their projects do not damage a heritage site or, if a decision is made to destroy the site, to ensure it is fully documented. One stakeholder expressed concerns that foreign investors from countries with strong heritage protection regimes build in Samoa to take advantage of the lack of strong regulations here, and suggested that similar obligations be imposed on foreign-funded projects. It was considered that this approach was particularly suitable where the heritage value of a site was not readily apparent without expert research and evaluation.

Advantages and disadvantages

- 3.9 Placing obligations on those who seek to use or develop the land to identify and protect heritage sites can be an effective method of heritage protection. Imposing higher obligations on government agencies is a way of ensuring that government sets the example of best practice heritage protection.⁶⁹ Blanket protection ensures that heritage sites that have not been discovered or recorded are protected from harm and places greater emphasis on discovering the impact on an activity on heritage before it happens. However, systems of this kind rely on a degree of self-regulation that may be difficult to enforce, and may lead to inconsistent approaches to heritage protection. Another disadvantage is that this approach does not result in the systematic assessment and recording of heritage sites across the nation.
- 3.10 As noted in Part 1, many stakeholders emphasised the need for customary owners to have a key role in the protection of heritage sites on customary land. Community-based approaches to heritage protection may provide a useful model for the management of heritage sites on customary land in Samoa. In particular, requiring developers to negotiate with customary owners gives the community a preeminent role in heritage protection and recognises them as the experts on their own heritage, particularly in relation to its cultural value.⁷⁰ There are some difficulties implementing a community-based approach in practice. A problem faced in Australia is that a lack of support, education and funding for Aboriginal parties has limited their ability to effectively undertake their heritage work.⁷¹ Other issues relate to who is entitled to make decisions for the community during negotiations, and how agreements made between the community and developers can be enforced.

Integration with the planning authority

- 3.11 In some jurisdictions, planning agencies are primarily responsible for the protection of heritage sites. In some cases, the heritage body provides advice on planning and

⁶⁹ Andrew Hall, 'Initiating a Review of National Heritage Legislation in the South African Experience' in Webber Ndoro and Gilbert Pwiti, *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa*, (ICCRROM Conservation Studies, 2002) 36, p 39.

⁷⁰ NSW Office of Environment and Heritage, *Aboriginal Heritage in Perspective: A Comparative Review of Legislation and Management Regimes in Australia and Beyond* (Draft, 2012) p 108; Albert Mumma, 'The Link between Traditional and Formal Legal Systems' in Webber Ndoro and Gilbert Pwiti, *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa*, (ICCRROM Conservation Studies, 2002) 22.

⁷¹ NSW Office of Environment and Heritage, *Aboriginal Heritage in Perspective: A Comparative Review of Legislation and Management Regimes in Australia and Beyond* (Draft, 2012) p 61.

development decisions, for example by reviewing applications for development or examining heritage impact assessments.

Overseas example

New Zealand: The *Resource Management Act 1991* requires each local council to have a District Plan that controls planning and land use. A heritage order may be included in a District Plan to protect a heritage site. The Historic Places Trust, as well as Ministers and local authorities, are designated 'heritage protection authorities' and are responsible for identifying heritage places and, with the assistance of councils, making heritage orders.⁷² No one can do anything that would compromise the effect of the heritage order in a District Plan unless they have the prior consent of a heritage protection authority.⁷³ In addition, the Historic Places Trust maintains a Register of Historic Places, which Councils are required to consider when developing District Plans.⁷⁴ As a result, 92% of places entered on the Register are also protected in some way under a District Plan.⁷⁵

Submissions and consultations

3.12 Several stakeholders considered that the involvement of planning authorities was critical to heritage protection. The NZAA proposed that Samoa adopt an integrated land use permitting system in which the Heritage Authority assesses all applications for development to determine whether the proposed works impact upon heritage. The Heritage Authority would also be able to request a heritage impact assessment and impose conditions on development approvals to mitigate the impact on the heritage. Noting that PUMA already has a range of powers to control development, some stakeholders suggested that one option would be to strengthen PUMA's mandate with respect to heritage protection so that the Heritage Authority could work with it to better protect heritage sites.

Advantages and disadvantages

3.13 Integrating heritage protections into existing planning processes ensures that heritage is considered when assessing all development applications. Using existing planning procedures is also cost effective and reduces duplication and the potential for conflict between different regulatory systems. A disadvantage of this approach is that the development authority may not give due weight to heritage values, which may 'lose out' to economic or other interests. It should be recognised, however, that balancing such interests is required in all heritage decisions.

⁷² *Resource Management Act 1991 (NZ)* s 187.

⁷³ *Resource Management Act 1991 (NZ)* s 193.

⁷⁴ *Resource Management Act 1991 (NZ)* s 74(2b)(iia).

⁷⁵ New Zealand Historic Places Trust, *Briefing for the Incoming Minister for Arts, Culture and Heritage*, 12 December 2011, 5.

National Trust and direct ownership of sites

- 3.14 National trusts are non-government organisations or charities which acquire, manage and preserve heritage places. National trusts receive funding from a variety of sources, including membership fees, donations, legacies and government grants. The legal concept of a trust means that the National Trust owns the property for the benefit of the wider public and not for its own profit. Many national trusts overseas are governed by legislation which also restricts how they may use heritage properties.⁷⁶
- 3.15 Some heritage bodies overseas, while not being national trusts per se, are permitted to own heritage sites. For example, the Cook Islands Cultural and Historic Places Trust may own and manage historic sites.⁷⁷ The New Zealand Historic Places Trust owns and manages 48 heritage properties.⁷⁸

Overseas example

United Kingdom: The National Trust for Places of Historic Interest or Natural Beauty was founded in 1894 by a group of individuals devoted to the preservation of lands and buildings for the benefit of the nation. The National Trust is now a registered charity and governed by its own legislation. It owns over 300 historic houses and 250,000 hectares of countryside, much of which is open to the public. These places have been purchased by the National Trust or received as gifts or bequests. Other sources of income are membership subscriptions, income from properties, and legacies. Volunteers perform much of the work of the National Trust.⁷⁹

Submissions and consultations

- 3.16 Many stakeholders considered that a National Trust was unlikely to be successful in Samoa due to a lack of public and private funding to support its operations and the fact that only a small percentage of land is government or freehold land and therefore available for purchase.
- 3.17 It was suggested that the Heritage Authority could take ownership of heritage sites on freehold and customary land under the *Taking of Land Act 1964*. However, many stakeholders cautioned against this approach, citing the requirements to compensate owners, disputes that may arise about ownership, and misunderstandings about takings of land in the past.
- 3.18 Some stakeholders drew attention to the successful use of private foundations and trusts in preserving specific properties, such as the Robert Louis Stevenson

⁷⁶ See, eg, *National Trust (Northern Territory) Act 1976* (NT); *National Trust of Australia (New South Wales) Act 1990* (NSW); *National Trust of Queensland Act 1990* (Qld); *National Trust of South Australia Act 1955* (SA); *National Trust of Australia (Tasmania) Act 1975* (Tas); *National Trust of Australia Act 1964* (WA).

⁷⁷ *Cultural and Historic Places Act 1994-95* s 14(b).

⁷⁸ New Zealand Historic Places Trust, *Briefing for the Incoming Minister for Arts, Culture and Heritage*, 12 December 2011, p 5.

⁷⁹ These figures relate to 2011: National Trust UK, www.nationaltrust.org.uk, viewed 20 September 2012.

Museum/Preservation Foundation. The benefits of private trusts include that a trust must have a well-defined beneficial objective; and can receive funding from a variety of sources, which may be earmarked by donors specifically for the conservation of the heritage site. In this way, donors can have confidence that their money will be spent directly on the heritage site. One risk with a private trust is that if the benefactor disappears and the trust ends, the site will return to the original owner. The Robert Louis Stevenson Foundation noted that because its functions were set out in legislation and Samoan representatives sat on its governing board, the Foundation was assured of operating in a way that does not run counter to the government's cultural and environmental objectives. It also noted the importance of its efforts to ensure respect for Samoan culture and the involvement of the wider community in its efforts to preserve the home and memory of Robert Louis Stevenson.⁸⁰

Advantages and disadvantages

3.19 There are two disadvantages of the national trust model: its reliance on public and private funding and the limited opportunities for acquiring heritage sites in Samoa. As noted above, there are a number of advantages to using private trusts to protect specific heritage sites in Samoa, particularly where there is support from the local and international community. These include the ability to receive funding from a variety of sources and existing accountability mechanism under trust law. Finally, stakeholders noted several difficulties with using the *Taking of Land Act* to acquire ownership of heritage sites.⁸¹ A further disadvantage of this approach is that it can be seen to be unduly heavy-handed and unlikely to facilitate community ownership and involvement in heritage protection.

Commission's views

3.20 The Commission recommends that the functions of the Samoan Heritage Authority should be informed by a community-based approach to heritage. Community-based approaches conceive of heritage as something that belongs to, and has meaning for, the community. Heritage sites are not places that should be fenced off and accessed only by a select few. Rather, heritage sites have meaning *because* of how the community has related to them in the past, and continues to relate to them into the future. Rather than impose regulations and sanctions in a top-down way, the Heritage Authority should have a range of different functions to enable it to work with the community to identify, manage and protect Samoa's heritage sites.

3.21 In particular, community-based approaches to heritage protection resonate with traditional concepts of customary ownership in Samoa. As noted above, because the majority of land in Samoa is customary land, most heritage sites are subject to customary authority. Empowering local people to take responsibility for heritage sites on customary land fits well with Samoan traditions of respecting local knowledge and the

⁸⁰ Submission from the Robert Louis Stevenson Foundation, 16 July 2012.

⁸¹ Some of these issues are discussed in Jennifer Corrin, 'Resolving Land Disputes in Samoa' and Chris Grant, 'Accessing Land for Public Purposes in Samoa', both in Theo Levantis, Marjorie Sullivan, Peter O'Connor, John Munro and Steven Wawrzonek (eds), *Making Land Work* (AusAID), chs 10, 13.

responsibilities of village *fono* for local governance.⁸² As such, the Commission recommends an approach in which the Heritage Authority works in a consultative way to educate and support customary owners, as well as private and government owners and custodians of heritage sites, to identify, manage and protect heritage.

- 3.22 To this end, the Commission recommends, first, that the Samoa Heritage Authority should be responsible for identifying and maintaining a National List of Heritage Sites. In creating this list, the Heritage Authority should adopt the definition of heritage recommended in Part 2 and include heritage sites on customary, government and freehold land. The List would provide an important source of information for government, developers, educators and the community and ensure that heritage places in Samoa are systematically identified, assessed and recorded. As such the National List of Heritage Sites should aim to reflect *all* heritage sites in Samoa, including heritage sites of local or regional significance, as well as national significance.
- 3.23 Places on the list would not automatically be protected by regulations or criminal sanctions. However, stronger regulations and sanctions may be appropriate to protect highly significant national heritage sites. Recognising the different kinds of interests that lie in government, freehold and customary land, the Commission recommends two different approaches to ensuring that significant heritage sites are protected from harm. In relation to sites subject to customary authority, the Commission recommends the Heritage Authority be empowered to provide support to customary owners of sites included on the National List of Heritage Sites, including by providing financial assistance and expert advice to assist communities to manage heritage sites; and by negotiating agreements and by-laws which will enable *village fono* to make and enforce appropriate rules to protect heritage sites.
- 3.24 In relation to significant heritage sites on government and freehold land the Commission recommends that the Heritage Authority should have the power to declare a place a 'Protected Heritage Site'. Once a declaration is made, it would be a criminal offence for any person to modify, damage or destroy such sites without prior authorisation.
- 3.25 Thus, the Commission recommends two layers of heritage protection: the National List of Heritage Sites would serve as a source of information; while highly significant heritage sites which warrant protection would be protected by laws that impose sanctions on people who damage or harm them. For heritage sites on customary land, these laws would be developed and enforced by local authorities; while for heritage sites on government or freehold land, the protections would be set out in legislation and enforced by criminal sanctions. In this way, sites with important national heritage significance will be protected from destruction without proper consideration and extensive consultation.
- 3.26 The Commission considers that a national trust model is unlikely to be successful in light of the funding constraints that the government and wider community currently face. However, it is important to continue to encourage private trusts dedicated to the

⁸² Elisaia Talouli and Tuiolo Schuster, 'Community Participatory Approach to Heritage Conservation in Samoa' in UNESCO, *World Heritage in a Sea of Islands: Pacific 2009 Programme* (2012).

protection of specific heritage sites. One need only look at the success of the Robert Louis Stevenson Museum to see that private trusts with external funding can work successfully with the government and wider community to preserve heritage places. In addition to working with customary owners, the Heritage Authority should have a mandate to support the work of government agencies, private trusts and individuals who seek to protect heritage sites on government and freehold land.

- 3.27 The Commission rejects the suggestion that the government should compulsorily acquire customary or freehold land for the purposes of heritage protection using the *Taking of Land Act*, as it is contrary to the community-based approach recommended here. Rather than take direct ownership, the Heritage Authority should work with owners to develop and establish protections for sites on their land. However, legislation should permit the Heritage Authority to own and manage heritage sites, should such an opportunity arise in the future, for example if an owner left a property to the Heritage Authority in a will.
- 3.28 Finally, the Commission is of the view that the Heritage Authority should work with the existing land management system established by the *Planning and Urban Management Act*. Integrating heritage protections with the current planning system is a more cost effective and sustainable avenue for reform than creating new procedures that duplicate current procedures.
- 3.29 The remainder of Part 3 sets out the details of the general approach outlined here.

Specific functions of the Heritage Authority

Establish and maintain a national list of heritage sites

- 3.30 The Commission recommends that a key function of the Heritage Authority should be to create and maintain a National List of Heritage Sites as an important source of information for all members of the community. This section discusses the procedures that the Heritage Authority should follow when establishing and maintaining the List.

Identification and assessment

- 3.31 Overseas jurisdictions share a general approach to identifying and assessing potential heritage sites for listing. Places may be nominated by any member of the community or by the Heritage Authority itself. The Heritage Authority then investigates the site and assesses its heritage significance. As part of this investigation, the Heritage Authority may consult experts in archaeology, history, cultural studies, architecture or other relevant disciplines; commission research; or undertake a field survey. The assessment process usually also involves public notification of the nomination and consultation with the owner and members of the community.⁸³

⁸³ See, eg, *Historic Places Act 1993* (NZ) ss 24, 25, 28; *Heritage Resources Act 1999* (South Africa) s 27; *Heritage Act 1977* (NSW) s 33; *Heritage Act 1995* (Vic) div 2.

Submissions and consultations

- 3.32 In the Discussion Paper, the Commission asked who should be consulted when making a decision about including a place on the National List of Heritage Sites. All stakeholders who responded considered that the owners of all types of land should be involved in the identification and assessment process. There was a strong view that extensive consultation with customary owners was required before a decision was made to list a site on customary land. Stakeholders suggested that independent experts in archaeology, history, Samoan culture and other relevant areas should also be consulted.
- 3.33 A number of stakeholders noted that significant work has already been done to identify and record Samoa's heritage sites. MNRE has a database containing information on over 40 heritage sites in addition to its extensive records of sites of environmental and biodiversity significance. MESC has produced *Samoa Na Galo*, which contains information about traditional sites across Samoa and the oral histories associated with them. The Centre for Samoa Studies at NUS has also developed a database of archaeological work on sites of cultural significance. Finally, STA has developed a list of sites with tourism value, some of which are also heritage sites. It was submitted that this material should be used by the Heritage Authority so as to avoid replicating work already done in this area.

Commission's views

- 3.34 It is vital that the Heritage Authority have inclusive and transparent procedures for identifying and assessing heritage sites. It is particularly important that the community have input into this process.
- 3.35 To this end, legislation should provide that the Heritage Authority and any member of the public may nominate places for inclusion in the National List of Heritage Sites. Once a potential heritage site is identified, the Heritage Authority should assess the heritage value of the site according to the definition of heritage and the criteria for heritage significance, set out in Recommendations 2-4. The Heritage Authority should be permitted to consult experts in archaeology, history, cultural studies, art, architecture, anthropology and any other relevant disciplines, and conduct or commission research where it would assist in the evaluation of the site.
- 3.36 Assessing heritage value is not solely a job for experts. It is equally important that the community have a say, particularly when determining the social and cultural importance of the place. As such, the Commission recommends that legislation require the Heritage Authority to consult the community as part of its assessment of heritage value. Consultation may take a range of forms, including meetings with landowners and interested parties; public meetings in locations across Samoa; and calls for submissions. What kind of consultation is appropriate will depend on a range of factors, including the nature of the site; the type of heritage values it may have; who owns the land; and the extent of public interest in the decision. Given this, the Commission considers that legislation should not mandate a particular form of consultation but rather should specify that:

- the owner of the site must be notified of the nomination and given an opportunity to comment;
- the nomination should be advertised nationally, and reasonable opportunity provided for people to comment; and
- the Heritage Authority may consult the community and any specific sectors of the community about any nomination.

3.37 Where consultation with customary owners is required, the Heritage Authority should follow the protocols for engaging with village *fono* established by the MWSCD.

3.38 Substantial work has already been done to identify and assess heritage sites in Samoa, including in some instances consultation with landowners and members of the community. As such, existing lists of heritage sites, and supporting information, research and consultations, should be made available to the Heritage Authority to inform its work in establishing the National List of Heritage Sites. The Commission recommends that the legislation enable the Heritage Authority to consult any government agency and request and receive any information relevant to heritage.

Recommendation 5: The Heritage Authority should be responsible for creating and maintaining a National List of Heritage Sites. The list should include all sites on government, freehold and customary land that have heritage significance.

Recommendation 6: The Heritage Authority or any member of the public may nominate a site for inclusion in the National List of Heritage Sites.

Recommendation 7: The Heritage Authority must undertake an assessment of any nominated site in order to identify whether the site has heritage significance according to the criteria set out in Recommendation 4.

Recommendation 8: When assessing the heritage significance of a site, the Heritage Authority must notify the owner/s of the site and members of the public and provide them with a reasonable opportunity to comment.

Recommendation 9: In order to assess the heritage significance of a site, the Heritage Authority may:

- **consult experts in any relevant field;**
- **conduct or commission archaeological surveys or other research;**
- **conduct public hearings and consult any members or specific sectors of the community; and**
- **consult any government agency and request and receive any information from any government agency.**

Decision to include a place on the National List of Heritage Sites

3.39 Overseas jurisdictions differ as to who is responsible for making the final decision to include a site on a heritage list. In some jurisdictions, the heritage body makes the final

decision,⁸⁴ in others the Minister, acting on advice from the heritage body, is the decision-maker.⁸⁵ In Samoa, there is also a question about whether owners of customary land and village *fono* should have a veto over decisions to include a site on their land in the National List of Heritage Sites. In other jurisdictions, while landowners must be consulted and notified of a decision to list a site on their property, they generally do not have the right to refuse permission to include the site on a heritage list.

Submissions and consultations

3.40 The views of stakeholders were split on this question. Several stakeholders considered that the final decision should rest with the independent experts on the Heritage Authority. Other stakeholders were of the view that the final decision about listing a site should be made by the Heritage Authority and a Minister, based on expert advice. Some stakeholders considered that the relevant village authorities should be able to decide whether or not a site on customary land was included in the list.

Commission's views

3.41 The Commission considers that the Heritage Authority should make the final decision about whether to include a site on the National List of Heritage Sites. The list is intended to be a comprehensive list of heritage sites in Samoa and a source of information for the whole community. As such, it is important that places be included on the basis of their heritage value alone and experts on the Heritage Authority are best placed to make a decision about heritage value, uninfluenced by external considerations.

3.42 The Commission notes concerns about government interference with heritage sites on customary land. Because the National List of Heritage Sites is primarily a source of information, the risk of government interference as a result of inclusion of the site on a list is minimal. In fact, the consequences of including a site on the list may be positive for the community, with listing opening the way for agreements, funding and expert support in managing the heritage site.⁸⁶ In light of the proposed consequences of listing, the Commission recommends that wherever possible, the Heritage Authority should use its best endeavours through consultation to ensure that owners of heritage sites on customary land agree to the site being included in the National List of Heritage Sites. However, where the Heritage Authority determines that a site on customary land has heritage value it should be included in the list and this decision should not be subject to veto by customary owners.

3.43 The usual avenues of appeal of an administrative decision would apply to decisions made by the Heritage Authority under legislation.

⁸⁴ See, eg, *Heritage Act 2004* (ACT) s 40; *Cultural and Historic Places Act 1994-1995* (Cook Islands) s 25; *Queensland Heritage Act 1992* (Qld) s 47; *Heritage Resources Act 1999* (South Africa) s 27; *Heritage Act 1995* (Vic) s 42.

⁸⁵ See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Aus) s 324J; *Heritage Act 1977* (NSW) ss 31, 32; *Preservation of Sites and Artifacts Act 2006* (Vanuatu) s 2.

⁸⁶ Recommendations 15-16.

Recommendation 10: The Heritage Authority must decide whether to include a place on the National List of Heritage Sites after taking account of expert advice; the views of the owner/s of the site; and the views of all people and organisations consulted.

Recommendation 11: The Heritage Authority should use its best endeavours through consultation to secure the agreement of the owners of heritage sites on customary land to have the site included on the National List of Heritage Sites.

Consequences of including a place on the National List of Heritage Sites

3.44 Different consequences may arise once a heritage site is listed. In some jurisdictions, it is unlawful for a person to damage, destroy or modify a listed site without prior approval from the heritage body or some other authority. In other jurisdictions, the list serves as a source of information only.

Submissions and consultations

3.45 Stakeholder's views on this question are set out earlier in this Part. In summary, while some stakeholders considered that listing should attract legal protections, others suggested its primary function should be to provide information on the location and significance of heritage sites around the country. Some stakeholders favoured a flexible approach in which different options and legal protections were available depending on the nature of the heritage site and the needs of the owners for assistance and support, particularly for sites on customary land.

Commission's views

3.46 The Commission recommends that the National List of Heritage Sites should primarily be a source of information, and that no regulatory consequences directly arise as a result of including a site on the list. This permits the Heritage Authority to adopt a flexible community-based approach to managing heritage sites. It also means that the core function of the List lies in educating and raising awareness of heritage values in the community.

3.47 As such, the Commission recommends that there should be two main consequences of including a site on the National List of Heritage Sites. First, the National List of Heritage Sites, and decisions of the Heritage Authority in relation to it, should be publicly available. A decision to include a site on the list should be published in two Samoan newspapers and on the Heritage Authority's website, and the owner/s and all people and bodies who were consulted notified. While the List should itself be readily available to the public, there may need to be restrictions on access to some information in order to respect the privacy of owners or protect the sites. As such, detailed information about particular heritage sites may be available on request, subject to restrictions determined by the Heritage Authority.

3.48 The second consequence of listing should be that the Heritage Authority works with the owners of listed heritage sites to effectively manage and protect them. This function is discussed below.

Recommendation 12: The Heritage Authority should inform the owner/s of the heritage site and all people and organisations who were consulted of its decision to include, or not include, a site on the National List of Heritage Sites. The decision should be published in two local newspapers and on the Heritage Authority’s website.

Recommendation 13: The Heritage Authority should make the National List of Heritage Sites publicly available in print and in electronic form on its website. The details of sites on the list should be available to any member of the public on request, subject to restrictions determined by the Heritage Authority in order to protect the sites or the interests of owners.

Removing a site from the National Heritage List

3.49 As part of the Heritage Authority’s function of managing the National List of Heritage Sites, it should also have the power to remove places from the list, for example if the place is destroyed or loses its heritage value. The procedure for making a decision to remove a site from the list should be similar to those for listing, including research, consultation and publication of the Heritage Authority’s decision. Any records of the site should be archived and made publicly available.

Recommendation 14: The Heritage Authority should have the power to remove a site from the National List of Heritage Sites if it no longer meets the criteria for heritage significance set out in Recommendation 4. When making a decision to remove a site from the list, the Heritage Authority should follow the notification and consultation procedures set out in Recommendations 8-13.

Support for owners and custodians of heritage sites

3.50 As discussed above, the Commission recommends a community-based approach to heritage protection and management. There is a range of ways in which a heritage body might support community-based heritage management, including by: providing financial support and technical assistance; developing management plans; and working with village *fono* to develop and apply by-laws or other regulations to protect heritage sites.

3.51 Many overseas heritage regimes include mechanisms to provide financial support to people who own or manage heritage sites. For example, in South Africa, SAHRA may provide grants or loans to a person or organisation for projects that contribute to heritage protection.⁸⁷ Legislation in Australian states and territories provides for financial assistance by way of grants, loans or tax concessions.⁸⁸ In Samoa, legislation grants the Robert Louis Stevenson Museum/Preservation Foundation, which was established to preserve the residence of Robert Louis Stevenson at Vailima, relief from paying customs

⁸⁷ *Heritage Resources Act 1999* (South Africa) s 40. See also *Cultural and Historic Places Act 1994-95* (Cook Islands) s 14(m).

⁸⁸ *Heritage Act 2004* (ACT) s 105; *Heritage Act 1977* (NSW) ss 103-108; *Heritage Conservation Act* (NT) s 38; *Heritage Places Act 1993* (SA) s 33; *Historic Cultural Heritage Act 1995* (Tas) s 55; *Heritage Act 1995* (Vic) s 140; *Heritage of Western Australia Act 1990* (WA) s 33.

duty and excise tax on items used to restore the site and an exemption from paying income tax and certain other fees and duties.⁸⁹

- 3.52 Another way in which heritage bodies overseas support owners and custodians of heritage sites is by helping them to develop management plans to protect the heritage. For example, in Victoria representatives of the Aboriginal community have a key role in preparing and evaluating the Cultural Heritage Management Plans and may also enter into agreements for the protection of Aboriginal heritage.⁹⁰ Management Plans are registered and available for members of the community to look at. In South Africa, SAHRA can negotiate agreements with an owner of a heritage site or any person or community which may cover the maintenance of the heritage site, access to the site and financial assistance.⁹¹
- 3.53 Current environmental laws and policies in Samoa provide a precedent for combining legislation and customary law to enable local authorities to regulate and protect heritage sites. Under the *Fisheries Act 1988*, the Chief Executive Officer of the Ministry of Agriculture may make by-laws for the conservation and management of fisheries in consultation with fishermen, industry and village representatives.⁹² Using this power, government agencies have worked with village authorities to make by-laws to regulate fishing in village waters that are then enforced by the village *fono*. Villages have also worked with government to create Fishery Management Plans that enable villages to establish their own policies for fishery management. This community-based approach, built on the values of customary law, has a dual benefit: it ensures compliance with government regulations and empowers local communities to take responsibility for managing their own resources.⁹³

Submissions and consultations

- 3.54 Many stakeholders considered that financial incentives were an important part of heritage protection. One noted that where new development risked heritage, landowners need viable alternatives to the development in order to protect the heritage. Another noted the importance of providing financial support and expertise to customary owners, who may not otherwise appreciate the value of the heritage sites on their land. The NZAA proposed that the Heritage Authority could negotiate agreements with villages to outline the responsibilities of all parties in the protection of any listed places. Such agreements could define a 'buffer zone' around the heritage site, prohibit certain activities and identify the activities required for the upkeep of the site. The Heritage Authority could also facilitate opportunities for the presentation and interpretation of heritage sites to visitors and members of the community.⁹⁴

⁸⁹ *Robert Louis Stevenson Foundation Act 1991*, ss 6-8.

⁹⁰ *Aboriginal Heritage Act 2006* (Vic) pts 4 and 5.

⁹¹ *Heritage Resources Act 1999* (South Africa) s 42. See also *Cultural and Historic Places Act 1994-95* (Cook Islands) s 14(e).

⁹² *Fisheries Act 1988* s 3(3)(d).

⁹³ Erica J Techera, 'Samoa: Law, Custom and Conservation' (2006) 10 *New Zealand Journal of Environmental Law* 361.

⁹⁴ Submission from New Zealand Archaeological Association, 9 August 2012.

Commission's views

- 3.55 The Commission considers that a range of mechanisms should be available to the Heritage Authority to provide support to owners and custodians of places included on the National List of Heritage Sites. This would allow the Heritage Authority to work flexibly with owners and custodians to develop and apply mechanisms to manage and protect heritage sites that best suit their particular needs and circumstances. As noted above, combining customary law with national legislation has greater potential for success than the top-down imposition of rules and sanctions, and works to foster the community's sense of ownership of heritage. It is also important that the Heritage Authority support the owners of heritage sites on freehold land and private individuals and organisations who work to preserve heritage sites, for example by negotiating lease arrangements or entering into agreements to recognise and facilitate the work of such organisations.
- 3.56 To this end, the Commission recommends that legislation permit the Heritage Authority to enter into agreements for the management and protection of any site included on the National List of Heritage Sites. Such agreements could be made with a range of different groups, including customary owners, owners of freehold land, government agencies and developers whose activities affect heritage sites, and community organisations that work to preserve heritage sites. The content of agreements should be tailored to particular circumstances. As such, legislation should specify that agreements may cover any matters relevant to the management and protection of a heritage site, and provide non-prescriptive list of examples, such as:
- the provision of financial assistance by way of grants, loans or other advances of money on such terms and conditions as the Heritage Authority thinks fit for the protection and management of heritage;
 - the provision of technical assistance and advice to identify and protect heritage;
 - the activities required to be done in order to protect heritage; and
 - any activities prohibited in order to protect heritage.
- 3.57 As a matter of good practice, the Heritage Authority should develop quality standards for agreements, including benchmarks for evaluating performance, how each party's obligations are to be policed and enforced, an appeal process and, if financial assistance is provided, how recipients are to account for funds spent. The Heritage Authority, in consultation with the other parties to the agreement, should also determine who may have access to agreements. When working with village authorities to protect heritage sites on customary land, the Heritage Authority should follow the protocols established by MWCSA.
- 3.58 The Commission also recommends that the Heritage Authority should have a general power to make by-laws for the protection and management of any heritage site on government, freehold and customary land. Following the model in the *Fisheries Act 1988*, legislation should provide that by-laws should be prepared in consultation with village representatives, owners of the heritage site and other relevant stakeholders. Empowering local authorities to administer such by-laws is an important aspect of the community-based approach and maintains the authority of village *fono* over customary land. It also

recognises that different approaches may be needed, depending on the nature of the heritage site and the needs of the particular customary owners.

Recommendation 15: The Heritage Authority should be able to enter into agreements with government agencies, village authorities, corporations, trusts, and any other individual or organisation, for the protection and management of any place included on the National List of Heritage Sites. Such agreements may cover:

- **the provision of financial assistance by way of grants, loans or other advances of money on such terms and conditions as the Heritage Authority thinks fit;**
- **the provision of technical assistance and advice to identify and protect heritage;**
- **the activities required to be done in order to protect the heritage;**
- **any activities prohibited in order to protect the heritage; and**
- **any other matter, terms and conditions that the Heritage Authority considers appropriate.**

Recommendation 16: The Heritage Authority should have the power to prepare and promulgate by-laws for the protection and management of a place included on the National List of Heritage Sites. Such by-laws must be made in consultation with the owners of the site, village authorities and any other relevant persons. Where by-laws relate to heritage sites on customary land, they may be enforced by local village authorities.

Declaration of a Protected Heritage Site

3.59 A common approach to the protection of heritage sites overseas is to make it a criminal offence for any person to damage, destroy or modify a heritage site without prior approval. While most overseas jurisdictions establish criminal offences to protect heritage, the details of the regulatory regimes vary. Some jurisdictions protect all places included in the heritage list with criminal sanctions.⁹⁵ Legislation in the Cook Islands permits the Cultural and Historic Places Trust, with the approval of the Minister, to issue a protection notice with respect to any building that has such historical significance or architectural quality that its permanent preservation is regarded as essential. Once a protection notice is made, it is a criminal offence to destroy, damage or modify the building without the consent of the Trust.⁹⁶

Submissions and consultations

3.60 There was qualified support for laws that impose criminal sanctions on persons who damage or destroy heritage sites. Several stakeholders considered that criminal sanctions alone would not be an effective way to protect heritage sites, and recommended that they be used as only one regulatory tool in a wider, community-based approach. Other

⁹⁵ See, eg, *Heritage Act 2004* (ACT) ss 74-76; *Heritage Conservation Act* (NT) s 33; *Heritage of Western Australia Act 1990* (WA) s 79.

⁹⁶ *Cultural and Historic Places Act 1994-95* (Cook Islands) ss 26, 42.

stakeholders noted that heritage buildings that have recently been destroyed, such as the *Fale Fono*, were demolished as a result of a decision by the government and in such cases criminal sanctions are not applicable.

Commission's views

- 3.61 While the Commission does not recommend that criminal sanctions apply to protect all places on the National List of Heritage Sites, there is merit in protecting some heritage sites with stronger regulation, including criminal sanctions. Experience shows that heritage buildings have been especially vulnerable to destruction, as land is developed for industrial or other uses. Further, sites on government land are directly regulated by the government and not subject to the authority of customary owners, making a different approach to heritage protection necessary.
- 3.62 The Commission recommends that heritage sites on government or freehold land that have such heritage significance so as to warrant permanent preservation should be subject to stronger regulatory protection, including criminal sanctions for unauthorised damage or modification. The higher degree of protection sends a powerful message of the value of heritage at a national level. Because the Commission considers that higher regulatory consequences should apply only to highly significant heritage sites on government and freehold land, it recommends that Samoa adopt an approach like that in the Cook Islands, where declarations may be made to protect specific heritage sites from harm. Once a declaration is made, it would be a criminal offence for a person to damage, destroy or modify the heritage site without prior approval. In order to ensure that the criminal offence is an effective deterrent, a person should be guilty of the offence if he or she knowingly does an act that harms the site and knew that, or was reckless or negligent as to whether, the site was a Protected Heritage Site. Penalties should be tiered depending on the fault element proved.
- 3.63 The Commission does not recommend that declarations be made in relation to heritage sites on customary land. Customary land is subject to customary authority, and customary ownership is, by its nature, very different to private ownership. Customary owners are seen as guardians or custodians of the land for future generations, not as owners of land for private use. This is not to say that heritage sites on customary land should not be regulated or protected, but rather that a different regulatory approach is required, namely through the use of agreements between the Heritage Authority and customary owners and the by-laws developed and enforced at the local level in consultation with the Heritage Authority.

Recommendation 17: A place that is included on the National List of Heritage Sites; situated on government or freehold land; and has such heritage significance that it merits permanent preservation may be declared a Protected Heritage Site.

Recommendation 18: It should be a criminal offence for a person to knowingly damage, destroy or modify a Protected Heritage Site without prior approval where that person knew that, or was reckless or negligent as to whether the site was a Protected Heritage Site.

Power to declare a Protected Heritage Site and approve works

- 3.64 The declaration of a Protected Heritage Site results in significant regulatory consequences. The question arises whether the Heritage Authority or a Minister should have the power to declare a site a Protected Heritage Site and approve works that modify or destroy the heritage site.
- 3.65 A best practice model proposed by some heritage professionals allocates decision-making powers depending on the kind of considerations to be taken into account. On this view, a decision about the heritage significance of a place should be made by independent heritage experts, while a decision about the modification or destruction of a heritage site, which involves broader economic and social considerations, should be made at the political level by a Minister.⁹⁷
- 3.66 Overseas jurisdictions take different approaches. In South Africa, the heritage body is responsible for declaring places with such exceptional qualities that they are of special national significance to be protected national heritage sites.⁹⁸ In New Zealand, the minister, local authorities and the Historic Places Trust are all designated heritage protection authorities with power to make the protection orders, subject to appeal to the Environment Court.⁹⁹ In the Cook Islands, the Cultural and Historic Places Trust may make a declaration with the approval of the Minister, essentially giving the Minister the power to veto the Trust's decision. In Australia, Singapore and Vanuatu, the Minister makes the decision after consulting the heritage body.¹⁰⁰
- 3.67 Jurisdictions also differ as to who has the authority to approve works to modify or destroy a Protected Heritage Site. In some cases, the Minister decides whether to approve works.¹⁰¹ In others it is left to the heritage body¹⁰² or planning authority,¹⁰³ in some cases with an avenue of appeal to the Minister. Often, legislation permits the decision-maker to place conditions on the approval.

⁹⁷ Andrew L. Mackintosh and Deb K. Wilkinson, 'Best Practice Heritage Protection: Australia's National Heritage Regime and the Tarkine' (2012) 24 *Journal of Environmental Law* 75.

⁹⁸ Heritage Resources Act 1999 (South Africa) s 27. See also *Heritage Act 2004* (ACT) s 40; *Queensland Heritage Act 1992* (Qld) s 47; *Historic Cultural Heritage Act 1995* (Tas) s 21; *Heritage Act 1995* (Vic) s 42.

⁹⁹ *Resource Management Act 1991* (NZ) ss 187, 192.

¹⁰⁰ Environmental Protection and Biodiversity Conservation Act (1999) s 324JJ; *Preservation of Monuments Act 2009* c. 239 (Singapore) s 11; *Preservation of Sites and Artefacts Act* c. 39 (Vanuatu) s 2. See also: *Heritage Act 1977* (NSW) ss 31 and 32; *Heritage Conservation Act* (NT) s 26; *Heritage of Western Australia Act 1990* (WA) ss 46 and 47.

¹⁰¹ See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Aus) pt 9; *Preservation of Sites and Artefacts Act* c. 39 (Vanuatu) s 4; *Heritage Act 1977* (NSW) s 57(2); *Heritage Conservation Act* (NT) s 39K; *Integrated Planning Act 1997* (Qld) s 37.

¹⁰² *Heritage Resources Act 1999* (South Africa) s 27(18); *Cultural and Historic Places Act 1994-95* (Cook Islands) s 28; *Heritage Act 1977* (NSW) s 57(3); *Integrated Planning Act 1997* (Qld) s 33; *Historic Cultural Heritage Act 1995* (Tas) s 32; *Heritage Act 1995* (Vic) s 67.

¹⁰³ *Land Act 1991* (ACT) s 231; *Development Act 1993* (SA) s 36.

Submissions and consultations

3.68 Stakeholders expressed different views on whether the Heritage Authority or the Minister should have the final say in the protection of a heritage site. Some stakeholders submitted that heritage experts are best able to evaluate and protect the heritage significance of a place. Others emphasised the importance of ensuring that decisions about heritage protection were not made by any one person, and especially not a Minister or Member of Parliament who may be under severe political pressure. On the other hand, some stakeholders were of the view that the final decision about protecting a site and approving works should be made by a Minister, on the advice of the Heritage Authority.

Commission's views

3.69 The Commission recommends dividing responsibility for declaring a place to be a Protected Heritage Site and approving works on such sites between the Heritage Authority and the Minister with portfolio responsibility for heritage, following the 'best practice' approach outlined above.

3.70 The Heritage Authority should have the authority to declare a place to be a Protected Heritage Site. A decision about the national heritage significance of a site is best made by heritage experts, following the same consultation process recommended in relation to the inclusion of a site on the National List of Heritage Sites. As an independent body, the Heritage Authority can consult the community in good faith and come to an independent and expert view on the national heritage significance of a site and whether it merits permanent protection, without being pressured to consider external factors.

3.71 The Minister should be responsible for approving works which modify or damage a Protected Heritage Site. This decision involves weighing interests in heritage protection with other interests such as economic development, the provision of adequate services or environmental protection and so should be taken at a level where all political interests can be considered and by a person who is democratically accountable.

3.72 Sometimes there are legitimate reasons to modify, or even destroy a heritage site. What is important is that such decisions are made in a transparent and accountable way, and take account of the heritage value and the community's views. 'Modifications' may cover a wide range of activities, from repairs and restoration to preserve the site, to actions that may damage or demolish the site. It is sensible that more rigorous procedures apply where the proposed works would significantly affect the heritage value of the site, while modifications to repair or preserve the site should be more readily approved. As such, the Commission recommends that any proposal for works on a Protected Heritage Site first be assessed by the Heritage Authority to determine their affect on the heritage value of the site.

3.73 If the Heritage Authority considers the modifications are likely to affect the heritage value of the Protected Heritage Site, the Minister should be required to conduct a process of public consultation in order to inform his or her decision to approve the works. The Minister should take account of all views expressed in submissions or other public

consultations, as well as the views of the Heritage Authority, other government agencies and the person seeking to undertake the works. On the other hand, if the Heritage Authority considers that the proposed modifications are consistent with the heritage value of the site, it should recommend that the Minister approve them. In these cases, the Minister should be free to approve the works without further consultation. It should of course be open for the Minister to conduct consultations and seek further information before making a decision where he or she considers this desirable.

3.74 The usual avenues for appealing an administrative decision would apply to decisions made by the Heritage Authority and the Minister under these provisions.

Recommendation 19: The Heritage Authority should have the authority to declare a place a Protected Heritage Site, following similar identification, assessment and notification procedures set out in Recommendations 6-10 and 12-13.

Recommendation 20: The Minister should have the authority to approve or not approve modifications to a Protected Heritage Site, and to impose conditions on that approval.

Recommendation 21: The Heritage Authority should assess any proposed modifications to a Protected Heritage Site to determine the likely effect on the heritage significance of the site and provide its assessment to the Minister.

- **Where the Heritage Authority considers that the modifications are likely to affect the heritage significance of a Protected Heritage Site, the Minister should issue a public notification of the proposal and seek views from any interested people and organisations. When making a decision, the Minister should consider the views of the Heritage Authority, the person seeking to undertake the modifications and any other persons consulted.**
- **Where the Heritage Authority considers that the modifications are not likely to affect the heritage value of the site, the Minister may approve the works without further consultation.**

Education and promotion

3.75 Education and awareness about the history, significance and cultural importance of heritage sites is integral to heritage protection. Several commentators have noted that while awareness of heritage values has improved in recent years in Samoa, many people are still unaware of the existence of heritage sites and the need to protect them.¹⁰⁴ A recent study identified gaps in education about heritage and archaeology at primary, secondary and tertiary levels in Samoa.¹⁰⁵ There are some education programs, including 'Our Pacific Heritage: The Future in Young Hands', an education program developed by UNESCO in 2004 and used in Samoan schools. The Centre for Samoan Studies at NUS

¹⁰⁴ Tuiolo Schuster, 'Samoa and the World Heritage Convention: Is Samoa Ready for World Heritage Listing' 2006 *Samoa Environmental Forum: Proceedings of the 2005 National Environment Forum* 46, p 49.

¹⁰⁵ Helene Martinsson-Wallin, 'The complexity of an archaeological site in Samoa: The past in the present' in Jolie Liston, Geoffrey Clark and Dwight Alexander (eds), *Pacific Island Heritage: Archaeology, Identity & Community*, Terra Australis 35 (Canberra: ANU epress, 2011), pp 107-108.

conducts research and education in archaeology, Samoan language and culture and works to ensure that 'the wider Samoan community are informed and provided with the necessary skills to be the rightful custodians of their heritage'.¹⁰⁶

3.76 Many overseas heritage bodies are responsible for community education and raising awareness about the importance and value of heritage.¹⁰⁷ For example, a function of the Heritage Council of Victoria, Australia, is 'to promote public understanding of Victoria's cultural heritage and develop and conduct community information and education programs'.¹⁰⁸ There are a variety of ways in which overseas heritage bodies promote heritage in the community, including by encouraging public interest and involvement in the identification, assessment and management of heritage sites; conducting education programs; and facilitating the use and enjoyment of heritage sites.

Submissions and consultations

3.77 Many stakeholders felt that a core function of the Heritage Authority should be to increase community awareness about the importance of protecting heritage. One stakeholder cited the success of education programs on environment and biodiversity and suggested that a similar approach was needed to support heritage protection. The NZAA considered that the Heritage Authority should act as the first point of call for members of the community interested in protecting heritage sites. It suggested that the Heritage Authority's functions should include education about its activities and supporting legislation so that all members of the community are informed about its role and how the community can be involved in identifying sites for inclusion in the National List and in protecting heritage sites.¹⁰⁹

3.78 Suggestions for raising awareness about heritage included opening heritage sites to visitors and providing signs and brochures; presentations at the Teuila festival and other events to showcase the richness and diversity of Samoa's national heritage sites; and publishing the National List of Heritage Sites on a website with links to photographs, oral history and other information about each site. The website of the American Samoa Historic Preservation Office was cited as a good example.¹¹⁰

Commission's views

3.79 The Commission considers that an important function of the Heritage Authority should be to educate the community about the importance of protecting heritage sites and the history, culture and stories that are associated with particular heritage sites. Education is

¹⁰⁶ Submission from Tautala S. Asaua, Centre for Samoan Studies, NUS.

¹⁰⁷ *Cultural and Historic Places Act 1994-95* (Cook Islands) s 13(1)(e), (f); *Heritage Resources Act 1999* (South Africa) s 13(1)(e)-(f); *Heritage Act 2004* (ACT) s 18(e)-(g); *Heritage Act 1977* (NSW) s 21(1)(f); *Heritage Conservation Act* (NT) s 12(f); *Queensland Heritage Act 1992* (Qld) s (8(1)(b)); *Heritage Places Act 1993* (SA) s 5A(1)(b)(iv); *Historic Cultural Heritage Act 1995* (Tas) s 7(1)(f)(g); *Heritage of Western Australia Act 1990* (WA) s 7(1)(h)-(j).

¹⁰⁸ *Heritage Act 1995* (Vic) s 8(1)(b).

¹⁰⁹ Submission from New Zealand Archaeological Association, 9 August 2012.

¹¹⁰ American Samoa Historic Preservation Office <http://www.ashpo.org/>.

also necessary to ensure that people understand the new legal regime for the protection of heritage sites.

3.80 The existence and activities of the Heritage Authority will in itself raise awareness about the protection of Samoa's heritage sites, as will community participation in the listing process and managing and protecting heritage sites. The Commission also recommends that legislation should bestow a separate function on the Heritage Authority to promote the community's understanding of national heritage and raise awareness about the protection of Samoa's heritage sites. The specific education policies and programs should be developed by the Heritage Authority, but may include the development of education programs for schools; educational and promotional activities in the local community such as exhibitions, community events and consultations; and the development of an interactive website about Samoa's national heritage. These activities should build on existing educational programs and utilise links with UNESCO, government agencies, the NUS and community organisations so as to complement work already performed in this area.

Recommendation 22: The functions of the Heritage Authority should include:

- **to promote understanding in the community about Samoa's heritage; and**
- **to encourage and provide public education programs about Samoa's heritage.**

Owning and managing heritage sites

3.81 For the reasons discussed above, the Commission is of the view that it is not appropriate to establish a National Trust in Samoa. However, a number of heritage bodies overseas have the power to own and manage heritage sites.¹¹¹ For example, the Cook Islands Cultural and Historic Places Trust has power to acquire, restore and manage any historic place and to acquire an interest in any property by purchase, lease, exchange, bailment, gift or other means.¹¹²

3.82 The Commission is of the view that legislation should enable the Heritage Authority to own property with heritage significance. The Commission does not anticipate that the Heritage Authority will come to own many properties in this way, given that alienation is possible only with regard to freehold and government land. However, including this function would permit the Heritage Authority to acquire an interest in property with heritage significance should the opportunity arise. The Heritage Authority's decision to acquire such property should take account of the heritage significance of the site and the requirements for the preservation and management of the site.

¹¹¹ *Heritage Resources Act 1999* (South Africa) s 21(5)(b); *Resource Management Act 1991* (NZ) s 54(2)(c); *Heritage Act 1977* (NSW) s 112; *Heritage of Western Australia Act 1990* (WA) ss 8(2)(F), 74.

¹¹² *Cultural and Historic Places Act 1994-95* (Cook Islands) s 14 (b), (f). See also *Heritage Act 1995* (Vic) s 139.

Recommendation 23: The Heritage Authority should have the ability to own property, for example by purchase or donation, having regard to the heritage significance of any site on the property and the requirements for the future management of that heritage.

The role of PUMA in heritage protection

- 3.83 As noted in Part 1, PUMA has responsibility for land planning and development in Samoa. It has two key functions in this regard.
- 3.84 *Sustainable Management Plans:* Sustainable Management Plans set out rules that apply to the use and development of any land and may prescribe development standards; prohibit or restrict construction work on particular sites; and reserve land for public purposes.¹¹³ When preparing a Sustainable Management Plan, PUMA must notify the public, consult all stakeholders and to provide people with relevant information about the land in question, including information on heritage.¹¹⁴
- 3.85 *Development Applications:* All development, which includes temporary and long term use of land, building structures, and any work that changes the existing condition of the land, requires PUMA's consent.¹¹⁵ Before giving consent, PUMA may require the developer to prepare a development plan and/or an environmental impact assessment.¹¹⁶ PUMA must also notify interested persons, consult relevant public authorities and consider a range of matters including the 'likely effects on cultural and natural heritage'.¹¹⁷
- 3.86 PUMA has a range of enforcement powers, including the ability to issue an order restraining a person from doing anything that would contravene a Sustainable Management Plan or condition in a development approval.¹¹⁸ It is an offence for a person to carry out development without consent or to contravene a Sustainable Management Plan.¹¹⁹
- 3.87 Like all planning authorities, PUMA is called upon to balance interests in heritage protection against a range of other legitimate interests, including economic development, the provision of adequate services and environmental protection. The context of Samoa, in particular its limited financial resources, the distinctive nature of land ownership, and the need to address both economic development and environmental protection issues, present PUMA with particular challenges. Despite these challenges, PUMA is recognised as a model planning authority in the Pacific region.¹²⁰

¹¹³ *Planning and Urban Management Act 2004* ss 13, 15.

¹¹⁴ *Planning and Urban Management Act 2004* ss 17-21.

¹¹⁵ *Planning and Urban Management Act 2004* s 2 (definition); s 34. There are some exceptions to this requirement set out in the Act.

¹¹⁶ *Planning and Urban Management Act 2004* ss 41, 42.

¹¹⁷ *Planning and Urban Management Act 2004* ss 43, 44, 46

¹¹⁸ *Planning and Urban Management Act 2004* s 80.

¹¹⁹ *Planning and Urban Management Act 2004* s 84.

¹²⁰ Asian Development Bank, *The State of Pacific Towns and Cities: Urbanization in ADB's Pacific Developing Member Countries* (2012) 63-66.

Submissions and consultations

- 3.88 While the *Planning and Urban Management Act* allows PUMA to consider heritage when making planning decisions, some concerns were raised about PUMA's ability to do so in practice. One stakeholder noted that while PUMA may recognise the heritage value of a site and recommend that it be preserved, in the absence of funding to assist the owner or developer to protect the heritage, economic reality means that the development will win out. Another stakeholder considered that there were inconsistencies in the planning procedures and in some cases construction had begun and archaeological finds destroyed before interested parties could raise concerns.
- 3.89 Some stakeholders recommended strengthening PUMA's mandate in relation to heritage protection by including a statement in the objectives section of the Act, and specific provisions about heritage protection. Two stakeholders suggested that the Act should require developers to conduct Heritage Impact Assessments as part of the development approval process so as to identify heritage that may not be readily apparent.¹²¹ Others suggested that the Act include a provision for archiving sites, so that when a decision was made to destroy a site with heritage value, or where archaeological finds are made during construction, there is a full assessment and the history of the site documented.

Commission's views

- 3.90 There are a number of ways in which PUMA's mandate with respect to heritage protection may be strengthened.

Sustainable Management Plans

- 3.91 PUMA is already required to consult widely when developing a Sustainable Management Plan. The Commission recommends that the *Planning and Urban Management Act* include a specific requirement that PUMA, when developing a Sustainable Management Plan, identify any heritage sites or potential heritage sites and consult the Heritage Authority, with a view to agreeing upon any restrictions or conditions to be included in the sustainable management plan in order to protect the heritage value of these sites. Such consultation will also assist PUMA to provide relevant information to the public about the heritage values of the planning area, as required under s 18(h) of the Act.

Development approval

- 3.92 When considering applications for development approval, PUMA must currently consider the 'likely effects on cultural and natural heritage'. The Heritage Authority would have expertise and information that could assist PUMA in this regard. In order to ensure that the Heritage Authority can contribute, PUMA should notify the Heritage Authority of any applications for development that potentially affect a place registered on the National Heritage List and take the Heritage Authority's advice in relation to the impact of the development on the heritage value of the site and any conditions that could be imposed to

¹²¹ For overseas precedents see *Heritage Resources Act 1999* (South Africa) s 38; *Aboriginal Heritage Act 2006* (Vic) pt 4.

minimise damage to the heritage value. Because developing the National Heritage List will take some time and that new places with heritage value may be discovered through archaeological work or further research, PUMA should also refer applications where development might affect any site potentially eligible for inclusion in the National List of Heritage Sites.

3.93 In some cases, there may also be merit in requiring a developer to undertake a Heritage Impact Assessment, involving, for example an archaeological survey or research into cultural heritage. A Heritage Impact Assessment is a particularly useful tool where a place is likely to have heritage value that is not yet discovered or listed. The *Planning and Urban Management Act* already permits PUMA to require an Environmental Impact Assessment and regulations have been developed to govern Environmental Impact Assessments, addressing such issues as the criteria for determining when an assessment is required, the type and content of the Assessment and procedures for review and approval.¹²² The Commission recommends that a similar approach be taken to Heritage Impact Assessments, with regulations to be developed by PUMA in consultation with the Heritage Authority. The costs of the heritage impact assessment should be borne by the developer.

3.94 Finally, where approval is given for a development that is likely to damage heritage, PUMA should have the power to impose a condition on the development approval that the heritage values be recorded and archived with the Heritage Authority before work begins. Archiving the site in this way ensures that the heritage value is at least recorded for the benefit of researchers and future generations.

Notification

3.95 Given the areas of overlap between PUMA and the Heritage Authority, it is essential that they work well together, including by sharing information. The Commission recommends that the Heritage Authority should be required to inform PUMA of all proposed entries into the National List of Heritage Sites and declarations of Protected Heritage Sites so that PUMA can provide comment; and all decisions made by the Heritage Authority in respect of the National List of Heritage Sites and Protected Heritage Sites so that this information can inform development approvals and sustainable management plans.

Recommendation 24: Part IV of the *Planning and Urban Management Act 2004* should be strengthened to require PUMA to liaise with the Heritage Authority about provisions in sustainable management plans to protect places that are included, or eligible for inclusion, on the National List of Heritage Sites.

Recommendation 25: The *Planning and Urban Management Act 2004* should be strengthened to require PUMA to:

- **notify the Heritage Authority of any applications for development which may affect a place included, or eligible for inclusion, on the National List of Heritage Sites; and**

¹²² Planning and Urban Management (Environmental Impact Assessment) Regulations 2007.

- seek the Heritage Authority's advice in relation to the application, including whether to require the developer to undertake a Heritage Impact Assessment.

Recommendation 26: The *Planning and Urban Management Act 2004* should be strengthened to permit PUMA to require an applicant for development approval to provide a Heritage Impact Assessment. The format, structure and subject matter of a heritage impact assessment should be specified in writing by PUMA in consultation with the Heritage Authority.

Recommendation 27: The list of conditions that PUMA may include in a development consent in section 48 of the *Planning and Urban Management Act 2004* should be strengthened to include:

- a condition to protect the heritage values of the site; or
- a condition that any heritage value of the site affected or destroyed as a result of the development must be recorded and provided to the Heritage Authority.

Recommendation 28: The Heritage Authority should be required to consult with and notify PUMA of all proposed entries into the National List of Heritage Sites and declarations of Protected Heritage Sites; and all decisions made by the Heritage Authority in respect of the National List of Heritage Sites and Protected Heritage Sites.

Part 4: Operations of the Samoan Heritage Authority

4.1 This Part makes recommendations about the structure and operations of the Heritage Authority, including how it should be established, governed and staffed.

Structure of the Heritage Authority

Overseas approaches

4.2 Many overseas heritage bodies are statutory bodies corporate, which means that they are separate legal entities established by legislation. While their structure varies, overseas heritage bodies generally consist of an independent board which acts as the decision-maker under legislation and which is supported by staff of an independent agency or government ministry. For example, the Heritage Council of Victoria is an independent statutory authority established by the *Heritage Act 1995*. The Council receives advice and administrative support from Heritage Victoria, which is part of the Department of Planning and Community Development.¹²³ Taking a different approach, in Singapore, the National Heritage Board has assumed responsibility for a range of cultural institutions. Over time, various independent statutory bodies have been merged under the National Heritage Board, so that it now has overarching responsibility for the National Museum, National Archives and the Preservation of Monuments Board.¹²⁴

Comparable agencies in Samoa

4.3 Existing regulatory bodies in Samoa have a range of different structures. The most similar to the Heritage Authority in terms of function is PUMA, which is established by legislation as a division of MNRE.¹²⁵ The Planning and Urban Management Board, appointed by the Head of State, is the key decision-maker under the Act while a divisional head and staff of MRNE are responsible for administration of the Agency.¹²⁶

4.4 Some government bodies in Samoa are established as 'public bodies'. A public body is structured like a private company with a board of directors, managing director and staff and the government has a controlling interest, for example through government members on the board or by holding the majority of shares in the company. There are two categories of public body: Public Trading Bodies, such as the Electric Power Corporation or Samoa Post; and Public Beneficial Bodies, such as the STA, NUS or National Health Services.¹²⁷ Public bodies are governed by the *Public Bodies (Performance and Accountability) Act 2001*, which sets out rules relating to the objectives of the corporation, the appointment and role of directors and accountability.

¹²³ Department of Planning and Community Development Victoria, 'Heritage' <http://www.dpcd.vic.gov.au/heritage/about>. Heritage Councils in other Australian states operate on similar lines.

¹²⁴ Website of the National Heritage Board, Singapore, <http://www.nhb.gov.sg>.

¹²⁵ *Planning and Urban Management Act 2004* s 3. PUMA's functions are described in Part 3 of this Report.

¹²⁶ *Planning and Urban Management Act 2004* ss 6-7.

¹²⁷ *Public Bodies (Performance and Accountability) Act 2001* sch 1.

4.5 Some bodies are designed to be as independent from government as possible. For example, the Ombudsman is appointed as an officer of the Parliament¹²⁸ and the *Komesina o Sulufaiga (Ombudsman) Act* is administered by the Office of the Clerk of the Legislative Assembly. The staff of the Ombudsman's Office is appointed by the Ombudsman and is not part of the Public Service.¹²⁹

Submissions and consultations

4.6 As noted in Part 1, many stakeholders considered that the Heritage Authority should be independent but also recommended making use of existing agencies and resources in order to save costs and avoid duplication. A number of stakeholders recommended that the Heritage Authority form part of an existing entity. MESC highlighted several advantages of this approach: 'combining existing entities whereby all cultural heritage related functions are operated under one authority ... may pool together expertise and existing resources can be utilized at their maximum level instead of establishing new corporate services and human resources.' MESC also noted that because there is a lack of cultural administrators in Samoa, staff from existing cultural entities would need to be involved in the Heritage Authority's activities. It submitted that the Heritage Authority might logically be added to either the Culture Division of MESC or MNRE. Regardless of where the Heritage Authority is housed, many stakeholders noted that it would need to work closely with both Ministries.

4.7 One stakeholder suggested that it was preferable to group all cultural issues, including heritage, under one entity. Others noted the connections between the functions of the Heritage Authority and MESC's current work in relation to intangible cultural heritage. Another stakeholder commented that a significant benefit of housing the Heritage Authority within MESC would be the integration of heritage with the education work of MESC, thereby increasing awareness of heritage amongst children, and through them, their families and the wider community.

4.8 It was suggested that the Heritage Authority could be a part of the STA, as tourism was seen as one way to encourage the preservation of heritage sites. STA cautioned against this approach. It noted that tourism value is determined by what tourists want to see, while heritage value is determined by entirely different factors. While some sites have both tourism and heritage value, there is little tourist demand for some kinds of heritage sites and these sites are not the focus of STA's work.

Commission's views

4.9 The Commission considers that it is possible to establish the Heritage Authority in a cost-effective and sustainable way and also ensure that its key functions are performed with an appropriate degree of independence. It recommends that the new Heritage Authority should be set up within existing government structures. This will minimise costs, make use of existing resources and heritage expertise within government, and also ensure the financial sustainability of the Heritage Authority. This approach is consistent with the

¹²⁸ *Komesina o Sulufaiga (Ombudsman) Act 1988* s 2.

¹²⁹ *Komesina o Sulufaiga (Ombudsman) Act 1988* s 9.

structure of some heritage bodies overseas in which an independent statutory Board or Council is supported by Ministry staff.

- 4.10 Given the combination of regulatory, advisory and supportive functions recommended in Part 3, the Commission does not consider it appropriate to establish the Heritage Authority as a quasi-corporate 'public body' or totally independent agency on par with the Ombudsman. Rather, the Heritage Authority should be established as a division of an existing Ministry. As a division, the Heritage Authority will have a distinct name and office, which will help to promote the Heritage Authority and its functions in the community, while also utilising the Ministry's existing administrative and corporate structures, thus saving costs. This approach is similar to the way in which PUMA operates as a division of MNRE. The Commission recommends that the Heritage Authority, like PUMA, should consist of a board as the primary decision-maker under the legislation, and staff to support the board to perform its functions and implement its decisions.
- 4.11 As discussed in Part 1, both MESC and MNRE currently work in the area of heritage protection. It would be possible for either MESC or MNRE to house the Heritage Authority. On balance, the Commission considers that it is more appropriate to establish the Heritage Authority as a division of MESC for three reasons. First, the majority of heritage sites in Samoa consist of cultural landscapes and mixed sites, which combine natural and cultural heritage. While MNRE focuses on the protection of the environment and biodiversity, MESC are best placed to assess and manage the cultural value of heritage sites, in particular through their association with intangible cultural heritage. Secondly, MNRE currently houses PUMA and in the Commission's view, there is merit in separating the Heritage Authority from PUMA, so that it can be an independent advocate for heritage protection outside the planning process. Finally, the best way to foster heritage values and protect heritage sites is through education and involving the community in the identification, management and protection of heritage sites. This important aspect of heritage protection fits well with MESC's mandates in relation to education and the promotion of Samoan culture.

Recommendation 29: The Heritage Authority should be established as a division of the Ministry of Education, Sports and Culture. It should consist of a Board with responsibility to make decisions under the legislation and staff led by a division head to assist the Board to perform its functions.

Board

- 4.12 As the decision-maker under the Act, the Board will be responsible for the range of functions recommended in Part 3. The composition of the Board and its decision-making procedures can support the independence and accountability of the Heritage Authority.

Membership

- 4.13 Heritage boards overseas are composed of different combinations of heritage experts and government and community representatives. Some heritage boards consist primarily of heritage experts: for example, six of the ten members of the Heritage Council of Victoria

must possess skills in history, architectural conservation or history, archaeology, engineering or building construction, property management and planning law; while three members must have expertise in Victoria's heritage or the management of heritage places.¹³⁰ Other heritage boards consist of representatives of certain groups in the community: for example, nine of the fifteen members of SAHRA must represent each of the nine provinces and the board as a whole must be representative of the relevant sectoral interests and demographics of South Africa.¹³¹ Finally some heritage boards include representatives from government and groups within the community. For example, the Australian Capital Territory Heritage Council includes two senior members of relevant government agencies and three members representing the community, the Aboriginal community and the property ownership and development sector respectively.¹³² Members of overseas heritage boards are usually appointed by the responsible Minister.¹³³ In some cases, the minister must select members from panels nominated by different interest groups.¹³⁴

- 4.14 Comparable boards in Samoa tend to consist of government and non-government members. The Board of PUMA consists of the Minister for Natural Resources and Environment as chair, and five government and five community representatives appointed by the Head of State on the advice of Cabinet.¹³⁵ The *Samoa Water Authority Act* requires that at least half of the 10 directors are persons with relevant skills who are not ministers or public servants.¹³⁶ The governing board of STA consists of six government representatives and eight persons appointed by the Head of State on the advice of Cabinet to represent the interests of the tourist industry and community.¹³⁷
- 4.15 The members of many overseas heritage boards and comparable boards in Samoa are appointed for a term of 3 years and are subject to reappointment,¹³⁸ although some legislation specifies a maximum number of terms a member may serve.¹³⁹ Legislation may also set out the circumstances in which a member of the board may be removed, for

¹³⁰ *Heritage Act 1995 (Vic)* s 7.

¹³¹ *National Heritage Resources Act 1999 (South Africa)* s 14.

¹³² *Heritage Act 2004 (ACT)* s 17.

¹³³ See, eg, *Australian Heritage Council Act 2003 (Aus)* s 7; *Cultural and Historic Places Act 1994-1995 (Cook Islands)* s 7(2); *Historic Places Act 1993 (NZ)* s 42(1)(b); *National Heritage Board Act 1993 (Singapore)* s 5; *National Heritage Resources Act 1991 (South Africa)* s 14(1).

¹³⁴ See, eg, *Queensland Heritage Act 1992 (Qld)* s 10; *Heritage Act 1977 (NSW)* ss 8-9; *Heritage Conservation Act (NT)* s 8.

¹³⁵ *Planning and Urban Management Act 2004* s 5(2). The Land Board established under the *Land, Surveys and Environment Act 1989* is similarly constituted, although s 6 of that Act specifies which Ministers and government officials are to be members of the Board.

¹³⁶ *Samoa Water Authority Act 2003* s 4.

¹³⁷ *Samoa Tourism Authority Act 1984* s 3.

¹³⁸ See, eg, *Australian Heritage Council Act 2003 (Aus)* s 8(2); *Cultural and Historic Places Act 1994-1995 (Cook Islands)* s 7(3); *Historic Places Act 1993 (NZ)* s 43(2); *National Heritage Resources Act 1991 (South Africa)* s 14(5).

¹³⁹ For example, members of heritage boards of Australia and South Africa may only serve two consecutive terms: *Australian Heritage Council Act 2003 (Aus)* s 8(3); *National Heritage Resources Act 1991 (South Africa)* s 14(6).

example misbehaviour, incapacity, bankruptcy, repeated absence from meetings, conviction of a serious offence or failure to disclose a conflict of interest.¹⁴⁰

Submissions and consultations

- 4.16 Some stakeholders emphasised the need to ensure that the all people involved in heritage protection and land management are represented. The NZAA submitted that the members of the Heritage Board should represent all agencies with authority relating to land use, environmental management, planning and the provision of infrastructure and services. One stakeholder noted that a benefit of including government representatives on the Board of the Heritage Authority would be to ensure that it functions consistently with governmental, cultural, environmental or accepted best practices.
- 4.17 Others noted the importance of ensuring that members of the Heritage Board have a connection with the community. One stakeholder suggested that the majority of members should be local Samoan people with special cultural knowledge, expertise or standing within the community. Two stakeholders suggested that the Board include *matai*, while another submitted that the composition of the board should aim to cover all stakeholders, including those from the private sector.
- 4.18 Some stakeholders emphasised the need for the Board to include members with relevant expertise and experience. They suggested that the Board should include experts in fields such as archaeology, history, anthropology, Samoan language and cultural studies, environmental science, education and heritage management. Several argued that the NUS should have a central role in the Heritage Board, noting the wealth of archaeological and cultural studies expertise and resources that exist at the Centre for Samoan Studies; the links it has established with other academic institutions; and its responsibility as an educational institution to ensure that the Samoan community has the knowledge and skills to be custodians of their heritage.
- 4.19 A number of stakeholders emphasised the qualities Board members should have. They considered that Board members must be committed to working for the Board and be proactive within government and the community to promote heritage and willing to share their knowledge and expertise. Several stakeholders noted the importance of a strong, independent chairperson, who is able to inspire confidence and build the reputation and capacity of the Heritage Authority.
- 4.20 Different opinions were expressed about whether ministers should be members of the Heritage Board. Some stakeholders argued that including ministers on the Board might be seen to compromise its independence. On the other hand, two stakeholders suggested that the political presence of members of parliament with an interest or knowledge in heritage issues might be beneficial.

¹⁴⁰ See, eg, *Australian Heritage Council Act 2003* (Aus) s 13; *Cultural and Historic Places Act 1994-1995* (Cook Islands) s 9(2)-(3); *National Heritage Resources Act 1991* (South Africa) s 14(3). In Samoa, see *Samoa Tourism Authority Act 1984* s 5.

4.21 Some stakeholders expressed views about how members of the Board should be chosen. Most considered that the government or a Minister should appoint the members of the Board. Some suggested that members might be elected, although there was a concern that this may lead to the selection of only the most politically active or well-resourced people. One stakeholder submitted that members be selected using accountable proceedings, such as an appointments panel, rather than by direct government appointment.

Commission's views

4.22 Four considerations should inform the composition of the Heritage Board. First, the Heritage Authority should have some degree of independence from government. Independence can be promoted by appointing heritage experts who will make decisions solely on the basis of heritage values and not take extraneous considerations into account. Including non-government members on the Board will also counter perceptions of undue political interference in the Heritage Board's decisions. Secondly, the Board should include members of the community who have interest or expertise in Samoan heritage and culture. As discussed previously, heritage is best protected when the community itself takes responsibility as custodians of its own heritage. As such, it is essential that the community have a role in heritage protection. Community representatives can provide a voice for heritage issues, both on the Board and in the wider community. Thirdly, it is important that the activities of the Board complement other government initiatives and government members of the Board will perform an essential coordinating function, as well as provide expertise and experience. Finally, the Heritage Board must be an efficient and effective decision-maker and there is a danger that too large a Board will be unwieldy and unable to reach consensus. Board members will also require remuneration, and so a larger board will incur greater costs.

4.23 The Commission recommends that the Board consist of seven members, with three government representatives and four community representatives. The three government representatives should be senior public servants in MESC, MNRE and MWCSD. Involving these agencies will ensure that the Heritage Authority's work will be consistent with policies relating to culture, education, planning and environmental management as well as initiatives relating to village affairs. The four community representatives should be appointed by the Head of State on the advice of Cabinet. These members should have expertise or experience in fields relevant to heritage, such as archaeology, history, Samoan language and culture, architecture, engineering and education. Members may also have additional qualities such as experience in public leadership roles or relevant contacts and networks within the community and overseas. One of the non-government members should be appointed Chairperson of the Board by the Head of State on the advice of Cabinet.

4.24 All members of the Board should be appointed for a term of three years and open to reappointment. Legislation should also include provisions for the removal of members of the Board by the Head of State on the advice of Cabinet for reasons of proved misbehaviour, incapacity, bankruptcy, repeated absence from meetings, conviction of a serious offence or failure to disclose a conflict of interest.

Recommendation 30: The Board should consist of three government representatives and four community representatives. Government representatives should represent the Ministry of Education, Sports and Culture; the Ministry of Natural Resources and Environment; and the Ministry for Women, Community and Social Development respectively. Community representatives should be appointed by the Head of State on the advice of Cabinet and must have expertise or experience in archaeology, history, Samoan language and culture, architecture, engineering, education or other fields relevant to heritage.

Recommendation 31: The Head of State acting on the advice of Cabinet should appoint the Chairperson of the Board from the four community representatives.

Recommendation 32: Members of the Board should be appointed for a term of three years and open to reappointment.

Recommendation 33: A member of the Board may be removed by the Head of State acting on the advice of Cabinet for reasons of proved misbehaviour, incapacity, bankruptcy, repeated absence from meetings, conviction of a serious offence or failure to disclose a conflict of interest.

Procedures

4.25 Legislation establishing heritage boards overseas and comparable boards in Samoa generally include provisions governing the procedures of the Board. For example, the *Planning and Urban Management Act* provides that:

- meetings of the Board are called by the chairperson, who must also convene a meeting if requested by at least two members of the Board;
- the quorum required for the transaction of business is six of the ten members of the Board, including the chairperson or deputy chairperson;
- voting is by majority, and the chairperson has a deliberative vote and a casting vote where votes are equal;
- minutes of each Board meeting must be circulated to all members and endorsed by the chairperson; and
- the remuneration of Board members is to be determined by Cabinet and paid out of agency funds.¹⁴¹

4.26 Some overseas legislation includes provisions about conflicts of interest. Such provisions generally require a Board member who has a pecuniary interest in a matter being considered by the Heritage Board to disclose his or her interest and not take part in any deliberations with respect to the matter.¹⁴²

Submissions and consultations

4.27 The NZAA submitted that the Heritage Board should convene regularly with flexibility to convene additional meetings should the need arise. It recommended that members of the public and developers should be able to attend meetings to present issues to the Board.

¹⁴¹ *Planning and Urban Management Act 2004* s 5. There are similar provisions in the *Samoa Water Authority Act 2003* s 6-7; *Samoa Tourism Authority Act 1984* ss 8-9.

¹⁴² See, eg, *Heritage Act 1977* (NSW) sch 2 cl 9; *Heritage Act 1995* (Vic) sch 1, cl 13. In Samoa see *Samoa Tourism Authority Act 1984* s 9.

Further, in order to assure independence and accountability, the minutes of each Board meeting and the voting record should be made publicly available.

Commission's views

4.28 The Commission considers that there is merit in setting out key procedures of the Board in legislation, but leaving the Board with discretion to determine the detail of how it will conduct its affairs. To this end, legislation should provide that:

- the Chairperson is to convene meetings of the Board at least every two months and additional meetings convened at the request of at least two Board members;
- the quorum required for the transaction of business is four Board members;
- voting on decisions is to be by majority, with the Chairperson to have a deliberative vote and a casting vote where votes are equal.

4.29 Legislation should also set out clear rules regarding conflicts of interest to ensure that members are, and are seen to be, impartial. The legislation should also adopt a standard provision regarding remuneration of Board members, with remuneration to be determined by Cabinet and paid from agency funds.

4.30 Finally, members of the public should have some access to the Board's proceedings. Minutes of board meetings should be circulated to all Board members and endorsed by the Chairperson before being made available for inspection upon request by any member of the public. Public access to Board meetings or presentations on particular issues should be determined by the Board on a case-by-case basis.

Recommendation 34: Legislation should set out the following procedural requirements with respect to meetings of the Board:

- **The Chairperson shall convene at least one meeting of the Board every two months. Additional board meetings should be convened where at least two board members make such a request to the Chairperson in writing.**
- **The quorum required for decisions by the Board is four of the seven board members.**
- **Voting on decisions of the Board shall be by majority, with the Chairperson to have a deliberative vote and a casting vote where votes are equal.**
- **All Board members must declare any private pecuniary interest in matters being considered by the Board and remove themselves from discussions or decision-making with respect to that matter.**
- **Minutes of Board meetings should be circulated to all Board members and endorsed by the Chairperson before being made available for inspection upon request by any member of the public.**

Recommendation 35: The remuneration of Board members should be determined by Cabinet and paid from agency funds.

Staff and expertise

4.31 A permanently staffed division should support the Board to perform its functions. It should work to gather information to identify and assess sites for inclusion on the National List of Heritage Sites and/or declared Protected Heritage Sites; liaise with owners of heritage sites and members of the community about listing, agreements and protections; raise community awareness about heritage; and advise government agencies and private organisations on heritage issues. This work will require people with expertise in a range of areas, including the technical disciplines of archaeological survey, cultural research and heritage management; education and communications; and people with the standing and experience in community consultation. It may also be necessary for the Heritage Authority to employ a person with qualifications in corporate governance and financial management.

Submissions and consultations

4.32 Several stakeholders emphasised the need for specialist staff to support the Heritage Board and do the 'nitty-gritty' work of surveys, establishing databases, conducting awareness programs and checking compliance with protection measures. Some emphasised the importance of involving professionals in archaeology and heritage management with training to identify and document heritage and suggested that it may be useful to request assistance from experienced staff from heritage bodies overseas. Several people suggested that the NUS should have a key role, given the experts currently at the Centre for Samoan Studies and its relationships with overseas institutions.

Commission's views

4.33 As noted in Part 1, there is a need to increase capacity in heritage. The Heritage Authority will therefore need to build qualifications and knowledge in this specialized area, including by fostering relationships with professionals at NUS and institutions overseas; seeking opportunities for professional development for example through membership of regional groups such as the Pacific Islands Museums Association and ICOMOS Pasifika; and facilitating staff exchanges or volunteer placements with heritage bodies overseas.

Recommendation 36: The Heritage Authority should seek opportunities to build the capacity and skills of its staff by building upon relationships with the Centre for Samoan Studies at the National University of Samoa, regional organisations and other relevant institutions; engaging in professional development activities; and promoting staff exchanges with heritage bodies overseas.

Funding

4.34 The Heritage Authority requires sufficient funding to perform its functions and cover the costs associated with identifying and assessing heritage sites and the provision of assistance to owners. Funding is also required to cover the operational costs of the Heritage Authority, although overheads will be minimised if the Heritage Authority is established as part of an existing ministry.

- 4.35 Heritage bodies overseas are predominantly funded by government. Other sources of funding may include donations; fees, for example in relation to development applications and heritage impact assessments; and income from the sale or lease of properties owned and operated by the heritage body.¹⁴³
- 4.36 International aid and assistance may be a source of income for the Heritage Authority. For example, UNESCO provided funding to prepare a tentative list of heritage sites under the World Heritage Convention.¹⁴⁴ Overseas governments have also provided Samoa with some assistance – for example, Japan has supported recent work towards ratification of the ICH Convention¹⁴⁵ and Sweden has fostered educational exchanges to develop the skills of archaeology students and professionals at the Centre for Samoan Studies.¹⁴⁶
- 4.37 Private donors have been instrumental in the protection of some of Samoa’s most significant heritage buildings. The Robert Louis Stevenson Foundation was established by private benefactors to preserve the site and grounds at Vailima. The Apia Court House Trust has received funding from Germany, New Zealand and Unitec Institute of Technology in Auckland and donations from private individuals to support its work.¹⁴⁷

Submissions and consultations

- 4.38 Stakeholder’s views about the challenges that funding constraints present to heritage protection are set out in Part 1. In relation to sources of funding, some stakeholders recommended that the Heritage Authority obtain funds from government and external sources such as international donors and non-government organisations. Some also suggested that the Heritage Authority fundraise. To facilitate private donations, some stakeholders recommended that the Heritage Authority be able to receive funds in trust, for example to spend on a particular heritage site.

Commission’s views

- 4.39 Establishing the Heritage Authority as a division of an existing Ministry means that its operational costs will be smaller than those of a stand-alone agency. However, some additional funding will be required to support the new functions of the Heritage Authority. Core funding for the Heritage Authority should primarily come from government, so that it has a steady source of income to sustain its central functions. Additional funding might be sought from international donors, non-government organisations and private individuals for the protection or maintenance of particular heritage sites; to support education and awareness programs; or to facilitate training and capacity building. To facilitate donations, legislation should expressly allow the Heritage Authority to receive donations, either without restrictions or in trust for particular purposes.

¹⁴³ See, eg, *Cultural and Historic Places Act 1994-95* (Cook Islands) s 20.

¹⁴⁴ UNESCO, ‘World Heritage Convention State Parties: Samoa’, <http://whc.unesco.org/en/statesparties/WS/assistance/>.

¹⁴⁵ Lumepa Apelu, ‘Our Culture, Our Heritage’, *Samoa Observer*, 26 February 2013.

¹⁴⁶ Unumoe Esera, ‘Sweden, Samoa benefit from Cultural Exchange’, *Samoa Observer*, 7 March 2013.

¹⁴⁷ The Apia Courthouse Trust, *Living Heritage: A New Life for the Courthouse*, Exhibition flyer, August 2012.

4.40 Another potential source of funding may be fees charged to developers and investors for particular services, such as Heritage Impact Assessments and approval of modifications. The *Planning and Urban Management Act* allows regulations to prescribe fees for services provided by PUMA.¹⁴⁸ The Commission recommends that a similar provision be included in heritage legislation to allow regulations to set fees for certain services provided by the Heritage Board. Leaving the details of fees to regulations will allow the Heritage Board to consult with relevant ministries and update fees over time. Donations and fees should go into a separate Heritage Fund, rather than consolidated revenue, so that the Heritage Authority may draw on the funds for purposes authorised by its legislation. This will also help secure the Heritage Authority's financial sustainability.

Recommendation 37: The Heritage Authority should be principally funded by the Samoan government. Legislation should permit the Heritage Authority to accept donations from international donors, non-government organisations and private individuals, either without restrictions as to the use of those funds or in trust for particular purposes.

Recommendation 38: Legislation should permit regulations to prescribe fees payable for certain services that the Heritage Authority provides in the performance of its functions.

Oversight and accountability

4.41 The Heritage Authority must be accountable for how it operates and spends funds. Typical oversight and accountability mechanisms include the preparation of a corporate plan, regular financial reports, an annual report to the Minister and/or Parliament, and financial and performance audits.¹⁴⁹ Stakeholders suggested a variety of accountability mechanisms, including the right to appeal decisions, auditing and the preparation of annual financial reports. An additional form of accountability stems from adopting the transparent decision-making procedures and ensuring that the Board's decisions and procedures are publicly available.

4.42 The Commission recommends that legislation require the Heritage Authority to keep full accounts in accordance with guidelines issued by the Minister for Finance; have all accounts audited by the Samoa Audit Office; and prepare an annual report, which shall be provided to the Minister and laid before Parliament and published on the Heritage Authority's website. The usual avenues to appeal an administrative decision will apply to decisions made by the Heritage Authority.

Recommendation 39: Legislation should require the Heritage Authority to: keep full accounts; have all accounts audited by the Samoa Audit Office; and prepare an annual report, which shall be provided to the Minister and laid before Parliament and published on the Heritage Authority's website.

¹⁴⁸ *Planning and Urban Management Act 2004* s 93.

¹⁴⁹ See, eg, accountability requirements in *Public Bodies (Performance and Accountability Act) 2001* pt VI; *Samoa Tourism Authority Act 1984* ss 17-19A.

Part 5: Conclusion

- 5.1 Heritage sites are just one aspect of Samoa’s heritage – objects and practices, as well as places, have significant heritage value to the community. Several stakeholders raised issues about the protection of other aspects of Samoa’s cultural heritage, including intangible cultural heritage such as the *tatau* and *malu*, historic artifacts and oral traditions and literature.¹⁵⁰ While dealing with these matters was beyond the terms of reference for this Inquiry, the Commission has sought to ensure that its recommendations in this Report fit within the broader context of current and ongoing work on heritage in Samoa.
- 5.2 It may be that the Samoan Heritage Authority/*Pulega o Measina a Samoa* has some role in the protection and promotion of other aspects of heritage in Samoa in the future. However, the Commission cautions against expecting the Heritage Authority to do too much too soon. It would be a mistake to think that any new Heritage Authority will be able to immediately function in the same way that older, more established heritage bodies overseas do. It is better that the Heritage Authority be given the time and support to proceed in an incremental and sustainable way, and first concentrate on establishing its operations and procedures, protecting key heritage sites and implementing the community-based approach recommended in this Report. This in itself will take time, commitment and dedicated support, but the Commission believes that the outcome – the recognition and protection of heritage sites for the benefit of current and future generations – is well worth the effort.

¹⁵⁰ The Commission is currently conducting a separate inquiry into the protection of traditional knowledge and expressions of culture.

Appendix 1: Abbreviations used in this Report

Commission	Samoa Law Reform Commission
Guidelines	Operational Guidelines for the Implementation of the World Heritage Convention
ICH Convention	<i>Convention for the Safeguarding of the Intangible Cultural Heritage 2003</i>
ICOMOS	International Council on Monuments and Sites
MESC	Ministry of Education, Sports and Culture
MNRE	Ministry of Natural Resources and Environment
MWCSD	Ministry of Women, Community and Social Development
NUS	National University of Samoa
NZAA	New Zealand Archaeological Association
PUMA	Planning and Urban Management Agency
SAHRA	South Africa Heritage Resource Agency
STA	Sāmoa Tourism Authority
UNESCO	United Nations Educational, Scientific and Cultural Organisation
World Heritage Convention	<i>Convention for the Protection of the World Cultural and Natural Heritage 1972</i>

Appendix 2: Submissions

Tautala S Asaua, Centre for Samoan Studies, National University of Samoa

Urlike Hertel

Marie Kronberg

Helene Martinsson-Wallin, Adjunct Professor/Associate Professor, Centre for Samoan Studies,
National University of Samoa/Gotland University Sweden

Ministry of Education, Sports and Culture

Ministry of Natural Resources and Environment

New Zealand Archaeological Association

Robert Louis Stevenson Museum/Preservation Foundation

Sāmoa Chamber of Commerce and Industry

Akatsuki Takahashi, Programme Specialist for Culture, UNESCO Office for the Pacific States

Adam Wild, Archifact Ltd; Dr Christoph Schnoor, Unitec; and John Taliva'a, Unitec

Appendix 3: Consultations

Consultations with government, private sector and non-government organisations

Ministry of Finance and Trade; Planning and Urban Management Agency; Public Service Commission	2 July 2012
Development Bank of Sāmoa; Electric Power Corporation, Sāmoa Chamber of Commerce and Industry Inc; United Nations Educational, Scientific and Cultural Organisation, Apia Office	3 July 2012
Apia Court House Trust; Ministry of Education, Sports and Culture; Ministry of the Prime Minister and Cabinet; National University of Sāmoa	4 July 2012
Ministry of Natural Resources and Environment; Ministry of Commerce, Industry and Labour; Ministry of Revenue	20 July 2012

Public consultations

To'oa Salamasina Hall, Apia	9 July 2012
Pulenu'u Residence, Taelefaga, Fagaloa Bay	11 July 2012
EFKS Hall, Siumu i Sisifo, Siumu	13 July 2012
Methodist Hall, Manono-uta	16 July 2012
Falealupo Beach Fales, Falealupo	17 July 2012
Rosalote Hall, Sapapalii	18 July 2012

Individual consultations

Centre for Sāmoa Studies and Department of Archaeology, National University of Sāmoa	2 August 2012
Apia Court House Trust	2 August 2012
Ministry of Education, Sports and Culture	2 August 2012
Planning and Urban Management Agency	6 August 2012
UNESCO, Apia Office	8 August 2012
Ministry of Natural Resources and Environment	8 August 2012
Sāmoa Chamber of Commerce and Industry	9 August 2012

Dr Te’o Unasa Felese Va’a, Anthropologist	9 August 2012
Sāmoa Tourism Authority	9 August 2012
New South Wales Office of Environment and Heritage	October 2012
Jamin Moon	9 November 2012

Recommendation Workshop, 18 March 2013

Ministry of Commerce, Industry and Labour
 Ministry of Education, Sports and Culture
 Ministry of Finance
 Ministry of Natural Resources and Environment
 Ministry of Women, Community and Social Development
 National University of Sāmoa
 Office of the Attorney-General
 Planning and Urban Management Agency
 Public Service Commission

Appendix 4: List of Recommendations

1. A new body, known as Samoan Heritage Authority/*Pulega o Measina a Samoa*, should be established under legislation dedicated to the protection of Samoa's national heritage sites.
2. A broad definition of heritage should be adopted in policies and legislation. Heritage should be defined as 'places, objects and practices of cultural significance or other special value to the present community and future generations'.
3. A heritage place may consist of:
 - Natural heritage, including natural sites or features consisting of physical and biological formations, geological features or places of biodiversity;
 - Cultural heritage, including buildings, monuments, archaeological sites, artistic works or other built structures;
 - Mixed natural and cultural heritage sites; or
 - Cultural landscapes, including sites illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.
4. A place has heritage significance if:
 - The place is important to the community or a particular group in the community for social, cultural, spiritual or traditional reasons;
 - The place is associated with events, persons or ideas of importance in Samoa's history or culture;
 - The place possesses unique, uncommon or endangered aspects of Samoa's tangible or intangible heritage, including aspects of Samoa's distinctive customs and practices that are in danger of being lost;
 - The place has architectural, engineering or artistic merit;
 - The place has potential to yield archaeological or other information about Samoa's prehistory or history;
 - The place is a notable example of a particular type or class of place.
5. The Heritage Authority should be responsible for creating and maintaining a National List of Heritage Sites. The list should include all sites on government, freehold and customary land that have heritage significance.
6. The Heritage Authority or any member of the public may nominate a site for inclusion in the National List of Heritage Sites.
7. The Heritage Authority must undertake an assessment of any nominated site in order to identify whether the site has heritage significance according to the criteria set out in Recommendation 4.

8. When assessing the heritage significance of a site, the Heritage Authority must notify the owner/s of the site and members of the public and provide them with a reasonable opportunity to comment.
9. In order to assess the heritage significance of a site, the Heritage Authority may:
 - consult experts in any relevant field;
 - conduct or commission archaeological surveys or other research;
 - conduct public hearings and consult any members or specific sectors of the community; and
 - consult any government agency and request and receive any information from any government agency.
10. The Heritage Authority must decide whether to include a place on the National List of Heritage Sites after taking account of expert advice; the views of the owner/s of the site; and the views of all people and organisations consulted.
11. The Heritage Authority should use its best endeavours through consultation to secure the agreement of the owners of heritage sites on customary land to have the site included on the National List of Heritage Sites.
12. The Heritage Authority should inform the owner/s of the heritage site and all people and organisations who were consulted of its decision to include, or not include, a site on the National List of Heritage Sites. The decision should be published in two local newspapers and on the Heritage Authority's website.
13. The Heritage Authority should make the National List of Heritage Sites publicly available in print and in electronic form on its website. The details of sites on the list should be available to any member of the public on request, subject to restrictions determined by the Heritage Authority in order to protect the sites or the interests of owners.
14. The Heritage Authority should have the power to remove a site from the National List of Heritage Sites if it no longer meets the criteria for heritage significance set out in Recommendation 4. When making a decision to remove a site from the list, the Heritage Authority should follow the notification and consultation procedures set out in Recommendations 8-13.
15. The Heritage Authority should be able to enter into agreements with government agencies, village authorities, corporations, trusts, and any other individual or organisation, for the protection and management of any place included on the National List of Heritage Sites. Such agreements may cover:
 - the provision of financial assistance by way of grants, loans or other advances of money on such terms and conditions as the Heritage Authority thinks fit;
 - the provision of technical assistance and advice to identify and protect heritage;
 - the activities required to be done in order to protect the heritage;
 - any activities prohibited in order to protect the heritage; and
 - any other matter, terms and conditions that the Heritage Authority considers appropriate.

16. The Heritage Authority should have the power to prepare and promulgate by-laws for the protection and management of a place included on the National List of Heritage Sites. Such by-laws must be made in consultation with the owners of the site, village authorities and any other relevant persons. Where by-laws relate to heritage sites on customary land, they may be enforced by local village authorities.
17. A place that is included on the National List of Heritage Sites; situated on government or freehold land; and has such heritage significance that it merits permanent preservation may be declared a Protected Heritage Site.
18. It should be a criminal offence for a person to knowingly damage, destroy or modify a Protected Heritage Site without prior approval where that person knew that, or was reckless or negligent as to whether, the site was a Protected Heritage Site.
19. The Heritage Authority should have the authority to declare a place a Protected Heritage Site, following similar identification, assessment and notification procedures set out in Recommendations 6-10 and 12-13.
20. The Minister should have the authority to approve or not approve modifications to a Protected Heritage Site, and to impose conditions on that approval.
21. The Heritage Authority should assess any proposed modifications to a Protected Heritage Site to determine the likely effect on the heritage significance of the site and provide its assessment to the Minister.
 - Where the Heritage Authority considers that the modifications are likely to affect the heritage significance of a Protected Heritage Site, the Minister should issue a public notification of the proposal and seek views from any interested people and organisations. When making a decision, the Minister should consider the views of the Heritage Authority, the person seeking to undertake the modifications and any other persons consulted.
 - Where the Heritage Authority considers that the modifications are not likely to affect the heritage value of the site, the Minister may approve the works without further consultation.
22. The functions of the Heritage Authority should include:
 - to promote understanding in the community about Samoa's heritage; and
 - to encourage and provide public education programs about Samoa's heritage.
23. The Heritage Authority should have the ability to own property, for example by purchase or donation, having regard to the heritage significance of any site on the property and the requirements for the future management of that heritage.
24. Part IV of the *Planning and Urban Management Act 2004* should be strengthened to require PUMA to liaise with the Heritage Authority about provisions in sustainable management plans to protect places that are included, or eligible for inclusion, on the National List of Heritage Sites.
25. The *Planning and Urban Management Act 2004* should be strengthened to require PUMA to:
 - notify the Heritage Authority of any applications for development which may affect a place included, or eligible for inclusion, on the National List of Heritage Sites; and

- seek the Heritage Authority's advice in relation to the application, including whether to require the developer to undertake a Heritage Impact Assessment.
26. The *Planning and Urban Management Act 2004* should be strengthened to permit PUMA to require an applicant for development approval to provide a Heritage Impact Assessment. The format, structure and subject matter of a heritage impact assessment should be specified in writing by PUMA in consultation with the Heritage Authority.
 27. The list of conditions that PUMA may include in a development consent in section 48 of the *Planning and Urban Management Act 2004* should be strengthened to include:
 - a condition to protect the heritage values of the site; or
 - a condition that any heritage value of the site affected or destroyed as a result of the development must be recorded and provided to the Heritage Authority.
 28. The Heritage Authority should be required to consult with and notify PUMA of all proposed entries into the National List of Heritage Sites and declarations of Protected Heritage Sites; and all decisions made by the Heritage Authority in respect of the National List of Heritage Sites and Protected Heritage Sites.
 29. The Heritage Authority should be established as a division of the Ministry of Education, Sports and Culture. It should consist of a Board with responsibility to make decisions under the legislation and staff led by a division head to assist the Board to perform its functions.
 30. The Board should consist of three government representatives and four community representatives. Government representatives should represent the Ministry of Education, Sports and Culture; the Ministry of Natural Resources and Environment; and the Ministry for Women, Community and Social Development respectively. Community representatives should be appointed by the Head of State on the advice of Cabinet and must have expertise or experience in archaeology, history, Samoan language and culture, architecture, engineering, education or other fields relevant to heritage.
 31. The Head of State acting on the advice of Cabinet should appoint the Chairperson of the Board from the four community representatives.
 32. Members of the Board should be appointed for a term of three years and open to reappointment.
 33. A member of the Board may be removed by the Head of State acting on the advice of Cabinet for reasons of proved misbehaviour, incapacity, bankruptcy, repeated absence from meetings, conviction of a serious offence or failure to disclose a conflict of interest.
 34. Legislation should set out the following procedural requirements with respect to meetings of the Board:
 - The Chairperson shall convene at least one meeting of the Board every two months. Additional board meetings should be convened where at least two board members make such a request to the Chairperson in writing.
 - The quorum required for decisions by the Board is four of the seven board members.
 - Voting on decisions of the Board shall be by majority, with the Chairperson to have a deliberative vote and a casting vote where votes are equal.

- All Board members must declare any private pecuniary interest in matters being considered by the Board and remove themselves from discussions or decision-making with respect to that matter.
 - Minutes of Board meetings should be circulated to all Board members and endorsed by the Chairperson before being made available for inspection upon request by any member of the public.
35. The remuneration of Board members should be determined by Cabinet and paid from agency funds.
 36. The Heritage Authority should seek opportunities to build the capacity and skills of its staff by building upon relationships with the Centre for Samoan Studies at the National University of Samoa, regional organisations and other relevant institutions; engaging in professional development activities; and promoting staff exchanges with heritage bodies overseas.
 37. The Heritage Authority should be principally funded by the Samoan government. Legislation should permit the Heritage Authority to accept donations from international donors, non-government organisations and private individuals, either without restrictions as to the use of those funds or in trust for particular purposes.
 38. Legislation should permit regulations to prescribe fees payable for certain services that the Heritage Authority provides in the performance of its functions.
 39. Legislation should require the Heritage Authority to: keep full accounts; have all accounts audited by the Samoa Audit Office; and prepare an annual report, which shall be provided to the Minister and laid before Parliament and published on the Heritage Authority's website.