

of heart ache because she has no right as a widow to elect for the land that she and her husband worked so hard to obtain and develop to go to her children.

TOPIC 4A: COMMITMENTS, NATIONAL PLANS (etc) THAT THE GOVERNMENT OF TONGA HAS MADE FOR THE IMPROVEMENT OF WOMEN'S ACCESS TO LAND

The Director of the Women & Children's Crisis Center submitted a written submission to the Commission which provided details of national, regional and international commitments that the Government of Tonga has made in past years in recognition of the need to support gender equality between men and women including equal rights to land ownership and access to resources.

Tonga made several commitments when the Government recognized the negative impacts that result because women do not have equal rights as men. This restricts women from achieving economic benefits that would have been theirs but for the limitation on their rights. The following matters were referred to in the submission as recognized negative impacts on women due to limitations on their rights:

- a) Statistics in Tonga show that women and girls are the most vulnerable due to limited opportunities for economic development provided to them under the Land Act. Land ownership is the key to economic security and earning higher incomes.
- b) Women's lack of property and land ownership contributes to women's low social status and lives in poverty, low representation in decision making at the highest level and development-related problems including disease, hunger, domestic violence etc.
- c) The majority of women who seek refuge with the Center (WCCC) are those who are powerless due to lack of ownership of property. This results in women accepting domestic violence in the home because they have nowhere else to go. This also contributes to teenage problems such as teen pregnancy and contracting diseases such as STIs and even HIV.

Women in Tonga do have land rights such as the right to lease land and an unmarried daughter's interest, but the submission stated that these rights only provides access to land which is different from "ownership". Countries in the World are starting to enact reforms to eliminate discrimination against women under law and in social standards.

The submission referred to the following commitments and other relevant matters:

d) National Commitments

The National Policy on Gender and Development was formulated in 2001. The goal for the policy was to promote gender equality between genders within the first quarter of the 21st century. The policy places emphasis on matters such as gender and the family,

economy and the private sector. The Plan calls for equality among all members of society including men, women, boys and girls with particular reference to property rights (equal share and access).

e) Regional and International commitments to gender equality

Tonga has committed itself to the following Conventions/Agreements:

- i. Beijing Platform for Action (Sep 1995)**

This action platform is designed for the advancement of women and requires member countries to undertake legislative and administrative reforms to give women full and equal access to economic resources including the right to inheritance and to ownership of land and other property.
- ii. Millennium Development Goals (Sep 2005)**

Land rights and resource rights is vital to achieving the MDGs by 2015. Women in developing countries own less than 2% of all land and receive less than 5% of all support services despite their pivotal roles. Secure land rights for women are vital to their economic empowerment and also increases their social and political power. Strengthening the rights of women is indispensable to achieving the MDGs.
- iii. Commonwealth Plan of Action for Gender Equality (2005-2015)**

This Plan supports and works towards achieving the goals of instruments referred to in i) and ii) above. This plan aims to reduce poverty by enhancing women's capabilities. It also aims at promoting and protecting women's rights to land/property.
- iv. Revised Pacific Platform of Action for Gender Equality (2005-2015)**

Twenty-two Pacific Island countries have committed to this agreement including Tonga. The critical areas of concern include mechanisms to promote advancement of women, women's legal and human rights, women's access to services and economic empowerment of women. One of the objectives expected from member countries is the review of national legislation to ensure that women's human rights are fully protected by the law.
- v. The Convention on the Rights of the Child (Ratified by Tonga in 1995)**

Article 2 of this Convention provides that no child should be discriminated or treated unfairly on any basis.

The following recommendations are provided based on the matters already referred to above under this Topic:

I. Land titling

Land titling is proposed as it is often suggested as a solution to gender disparities in land rights by allowing women and families to register land that they have occupied for many years. Although this is only one way through which women can own land it can protect them against capricious action by one spouse and dispossession following divorce or separation. This method will also increase women's bargaining power in the household.

II. Mandatory joint titling for legally married couples

Mandatory joint titling for legally married couples provides the most secure land rights

for women. Some countries have voluntary joint titling where the married couple may choose to have land registered under both their names or not. Although this provides less secure rights for women it does provide some security for women and they can gain significant benefits from it. To better ensure success, voluntary titling requires significant support including women education and advisory services.

III. Collective Approaches

Women should support each other through different types of collective approaches to accessing land such as:

- A. women who own individual land holdings can work together with women who have funds to invest in the land;
- B. women can purchase land jointly while owning it individually and farming it collectively;
- C. women can lease land and cultivate it as a group;
- D. women's groups can manage and oversee cultivation of land owned by men;
- E. women can hold group rights over land distributed by the Government to them for farming.

IV. Women should be able to register land

As is proposed in Topic 3, it is again proposed here that women should be allowed to apply for grant of an allotment and to register an allotment in her name. This proposal provides that such a right should not apply to hereditary/family land and should be limited only to grant of a new allotment. This will provide equal rights for men and women to apply for grant of an allotment.

V. Legalize Trusts

People should be given the right to choose whether their land should devolve on the line of succession or be vested with a family trust so that they may determine how their land is to be used.

Freehold is a type of landholding that is different from holdings such as of registered land, leaseholds and other means of land holdings through which one can hold land in Tonga as is provided under the current land laws. This is a new method of landholding which is free from limitations provided under the current Land Act. A holder of freehold land can do as he wishes with his land as if it is an asset and this type of land can also be sold. Freehold is very common in foreign countries and it works well in countries who adopt it as it stimulates economic development due to ease of transfer of ownership.

There is hope for Tonga to benefit from freehold land by applying this concept only to land identified specifically for that purpose such as "new land". By new land we're referring to

newly created land obtained through reclamation which extends the existing/old boundaries and creates new boundaries. Freehold is not to be applied to land within the old boundaries which has been allocated and registered town and tax allotments which will continue to be subject to succession laws.

New land referred to in the above paragraph will be identified mainly from land in coastal areas to promote the use of such land for tourism and other projects that will contribute to the country's development.

TOPIC 5: FREEHOLD MAY BE INTRODUCED TO TONGA BUT ITS APPLICATION SHOULD BE LIMITED ONLY TO NEW LAND (RECLAIMED LAND)

When this topic was discussed in public meetings the public were interested to know how the principle of freehold was to be applied to land in Tonga. The public were particularly concerned as land on coastal areas which is likely to be reclaimed so that new land is acquired will be Government land. People sought clarification on whether anyone who is able can proceed with reclamation and new land acquired thereby will be considered "his" freehold land. Or would Government carry out the reclamation of identified areas before it will distribute or sell this new land accordingly.

Although no recommendations have been finalized regarding this topic, the public offered their views to be taken into account when this topic is considered.

The following grounds were submitted in opposition to the proposed introduction of freehold to Tonga:

5.1 It will introduce sale of land to Tonga

There is no doubt that freehold will introduce the sales of land in our country which poses the risk of extending sales from new land reclaimed from the foreshores to hereditary land that is subject to the law of succession. There are a lot of uncertainties surrounding freehold and we are not able to ascertain the adverse effects that can result from it. It would be safer for Tonga to continue to prohibit land sales so as to protect our land and avoid foreigners taking over our land. We only have to look at Fiji, New Zealand and Hawaii as proof of foreigners taking over the land from the natives. It was Tupou I's vision that his people should not be homeless and that was the basis for prohibiting sale of land in Tonga. This vision should be prolonged and not dismantled.

5.2 It will only benefit the rich

The rich and wealthy will get the first opportunity to own freehold land such as the Chinese and other foreigners. The average Tongan will not be able to compete with the wealthy for freehold land particularly because freehold land will be located on coastal areas which are popular amongst foreigners. Freehold land will be taken over by foreigners as we've seen

how the Chinese have taken over retail stores in Tonga and they can easily take over freehold land. Tonga is a small country and if freehold is adopted then it will result in nice and ideal beaches being selected for freehold and no longer available for the public's use. Adverse effects of introducing freehold to Tonga cannot be foreseen and the public hopes that future generations will not suffer the consequences.

5.3 Reclamation will affect the environment and sea organisms

There is national legislation which regulates the impact of reclamation on the environment. This law was enacted to protect the environment and sea organisms and to avoid adverse effects of reclamation.

There is concern from residents of villages which are close to coastal areas as they currently face the problems associated with sea level rising. They fear that any further reclamation will cause the sea to flood nearby homes as residents do not have the resources to deal with problems of that magnitude.

There is also concern that the country lacks the natural resources that may be required to facilitate large reclamations.

5.4 It will affect the public's right to fish and earn a living from the sea

Residents of villages that are located close to the sea are concerned as they fish from the sea and that has been their source of food and living for generations. If their beaches are reclaimed it will not only affect the environment and sea organisms but it will also affect their right to go and fish in these beaches as they and their ancestors have done for many generations. It was amongst the visions of Tupou I for all Tongan subjects to have access to the sea.

5.5 It will affect the rights of people living in coastal areas

There are people who have homes and house currently located on the foreshores. Reclamation will bring others into these areas that will be closer to the sea ahead of those who have been living close to the sea for generations.

The following reasons were provided as the basis for supporting reclamation and freehold:

5.6 It will create more land

It is evident that there is not much land available for distribution whilst the population is growing. Freehold should be introduced as reclamation will create more (much needed) land. If some people have the funds and resources to reclaim land then they should be allowed to proceed provided that they are subsequently allowed to register their newly reclaimed land.

5.7 The right to reclaim land should be reserved only for Tongan subjects and people from villages where the beach is located

The concern regarding this proposal is the risk of losing "our land" to foreigners as well as

the rich. As such it is proposed that reclaimed land which will be freehold should be reserved only for Tongan subjects. Furthermore, it is proposed that the first opportunities should be given to Tongan subjects from the village where the reclaimed land is located should they wish to register this newly reclaimed land before it is offered to other Tongan subjects. Tongan registered owners can subsequently lease the reclaimed land or let out the premises to foreigners who may wish to conduct business on the land.

5.8 Limit freehold to lagoons

It is proposed that reclamation and freehold should be limited to lagoons. Reclamation should apply only from lagoon boundaries and not from beaches.

This Topic was of interest not only to the public but commercial banks also had great interest in it due to increasing number of defaults on mortgage agreements. The Commission also met with the Banks and provided concerns from the public regarding mortgage agreements which provided Banks with an opportunity to provide their views on these matters of concern.

TOPIC 6: TO REVIEW LAWS RELATING TO MORTGAGES AND BANK PRACTICES

The public have growing concerns due to the increasing number of homes which have been forfeited by the Banks due to defaults on mortgages. This is an important topic as it does not only result in the loss of family land for the remainder of the term of the mortgage but it also affects the rights of the heir. Some heirs succeed to family allotments which are already subject to a mortgage and he usually has to bear the burden of the mortgage through repayments otherwise he faces losing the family land.

These are proposals from the public providing their views on matters they wish to be reviewed:

6.1 To review the interest rate charged by banks mortgages

Some people allege that Banks have too much power particularly in relation to the determination of interest rates on loans. They believe that defaults on mortgages result from high interest rates which the borrower isn't able to meet leading to the forfeiture of his home/land. People hope for more control on rates of interest charged by banks as it can be quite high. If a scale of interest rate can be established which Banks will be required to follow rather than their having absolute freedom on what interest rate to charge.

6.2 Size of land used to secure a mortgage should parallel the principal amount of the loan

A lot of people believe that the size of land used to secure a loan should be parallel to the

amount of the loan. For example – if a mortgagor has an 8acre tax allotment and he wishes to borrow \$2000, current practices will see all 8acres used to secure this loan and if the mortgagor fails to repay the amount borrowed of \$2000 he will lose his 8acre land for the remainder of the term of the mortgage. If it is only a \$2000 loan then it should be secured by only 1acre and not the whole 8acres.

6.3 Term of the mortgage should parallel the principal amount borrowed

Although the law allows registered allotments to be mortgaged for a term of up to 30 years but the maximum term should not be adopted in all mortgage agreements. For example – if the amount borrowed is only \$2000 the term of the mortgage will still be set at 30 years. If it is a loan for \$2000 it is proposed that the term of the mortgage should be reduced to only 5 years so that it parallels the amount being borrowed. It is not right that a land holder stands to lose his land for 30 years upon default where the amount borrowed was only \$2000, particularly if the balance of the mortgage was even a lesser amount of say \$500. The term for which the land is forfeited should reflect the amount borrowed and the balance of the loan at the time of default.

6.4 Review the maximum number of years of mortgages terms

Members of the public told the Commission during its public meetings that the maximum term for mortgages should be reduced from 30 years to 20, 15 or 10 years. Although this proposed reduction will make it harder for landholders to obtain a mortgage, many still prefer it as it would be better to live in poverty and still retain your land than to borrow funds and possibly end up losing it due to default. And if one does lose their land, they would still be better off if the maximum term is shorter.

Some law practitioners who provide legal services for Banks, in a Commission meeting with law practitioners, told the Commission the same concern that Banks conveyed to the Commission that it's important for people to know the adverse effects of reducing the term of mortgages from 30 years. They advised that a reduction in the term of mortgages will require an increase in loan repayments. This create difficulty for people with low incomes as it will lead to decline of loan applications due to low capacity to make substantial repayments in order to complete loan repayments within the lesser term.

This topic was also referred to in a written submission from commercial banks (Association of Banks Tonga). The Banks also propose a review of the maximum term for mortgages with a view to increasing the maximum term from 30 years. They state that limiting the term of mortgages to 30 years reduces the market value of land and its credibility as security for a loan. This in turn reduces the ability of a land owner to apply for a mortgage for development projects due to the lesser amount that could be borrowed against these allotments. There are ways of getting around the 30-year limitation and extending the term of the mortgage such as transferring leases, but these methods although available are cumbersome and subject to delays. This results in banks making it more difficult for borrowers to secure a mortgage due to uncertainties regarding the status of land that is to be used as security for a mortgage.

It is important to extend the term for mortgages to be the same as the term allowed for leases so that banks can be assured that the rights over the land being used as security can be sold if required in order to ensure that money lent will be repaid. Banks believe that it is convenient for landholders to have their land revert back to them once the 30-year term ends and this reduces the incentive to comply with loan repayments. These things impede the development of Tonga's economy and it is time to review these matters and do what other countries in the Pacific have done with their mortgage laws in order to promote economic development. The ANZ Bank is the major financier of development projects in Fiji and Fiji has developed because laws relating to mortgages facilitate development. Tonga's Land Act does not do the same.

In a Commission meeting with Banks in Tonga, Kahungunu Barron-Afeaki put forward a proposal because there are people who wish to see mortgage terms extended (as well as the term of lease for tax allotments) to aid the country's development while some people still prefer the current provisions in the law as it protects the rights of the heir and the family land. Kahungunu Barron-Afeaki proposed that any amendments to laws should take into account both these views and provide the landholder with options so that he may choose that which suits his family's needs. The General Manager of the Tonga Development Bank supported this proposal as there are families who wish to provide their children with an education, but families usually are not able to use their land to obtain the necessary finances to assist. This proposal relates to the proposal in paragraph 30.7.

Although the proposal to provide options for the landholder was supported it was noted that it is important to explain any such amendments so that people understand these options particularly as it was evident from public meetings of the Commission that some people do not quite understand laws relating to mortgages. As such, the public should be educated and made aware of any such amendments and any repercussions that may follow because of decisions they will make regarding their land. The General Manager of Westpac Bank also proposed the use of covenants to help bind the parties to the mortgage agreement as this practice is widely used in foreign countries like Papua New Guinea.

There was another proposal for current mortgage terms to be retained, but a new requirement that mortgages are to be cancelled and renewed every ten years to take into account of any increase in the value of the land mortgaged.

6.5 Specific limitations should be placed on mortgage of town allotments (including the house on the allotment)

The public had specific concerns regarding mortgage of town allotments which usually includes the residential house on the allotment. When town allotments are lost due a mortgage default it greatly affects these families. It is important to ensure that families will continue to retain their town allotments so that they have land to reside on as it was the vision of Tupou I for his people not to live on the streets.

There is hope that greater restrictions or closer scrutiny to be placed on applications for mortgages of town allotments so that it is more difficult to approve such a mortgage and reduce the increasing number of homes occupied by families being forfeited by banks. It is common to obtain a loan for various purposes and use a town allotment for security.

Although this proposal is made specifically for town allotments, some people believe that similar restrictions and scrutiny should also apply to tax allotments as it is the source of income for many families.

6.6 An heir's consent should be obtained before a mortgage is allowed

It is proposed that the male heir should have a say in the determination of a mortgage by expressly stating in the Land Act that the both the landholder and his heir should consent before family land can be mortgaged. A mortgage obtained by the landholder will affect his male heir if the landholder dies before the mortgage is discharged. As such, the heir should have a say before a mortgage is approved.

6.7 Land sold in a mortgage sale should revert to the landholder in the same condition it was in at the time of the sale

It is proposed that the Land Act and a mortgage agreement should expressly state that if an allotment is forfeited and sold in a mortgage sale to someone else for the remainder of the term of the mortgage then that allotment should revert to the owner in the same condition it was in at the time of the sale. This should deal with mortgaged allotments sold in a mortgage sale that are excavated leaving a big hole on the land when it reverts to the landholder at the end of the mortgage term.

6.8 Mortgage agreements should be provided in both the English and Tongan language

It is proposed that there should be a requirement that mortgage agreements should be printed in both the Tonga and English language. A mortgage agreement presented to a Tongan subject should be in his native tongue so that they fully understand agreements that they enter into.

6.9 A widow should be able to mortgage land over which she holds a widow's interest

This is one of the proposals submitted from commercial banks. The widow cannot mortgage land on which she holds a widow's interest under current laws so she is not able to access funds via a loan in order to finance any development projects she may wish to carry out. A lot of widows have steady incomes to support a loan and she may also have children who can guarantee the loan particularly if the loan is for the development of the family land.

It is proposed that widows should be allowed to mortgage the land provided that the heir also consents. However, if there is no male heir then the widow should be able to mortgage land without any limitations.

6.10 Public awareness programmes should be carried out educate the public on mortgage laws

It was evident from the Commission's meetings with the public that people do not fully understand the provisions of the Land Act that relates to mortgages including matters referred to in paragraph 6.1 to 6.9 above. It is therefore proposed that there is an urgent need to educate the public so that they are fully aware of laws that relates to mortgages because lack of such knowledge results in people making accusations against banks.

One such accusation which was brought up in one of the public meetings is that banks earn more than the principal amount that was borrowed under the loan when they sell the mortgage upon the default of the mortgagor. If this is the case, people believe that banks should pay any to the mortgagor any excess they earn from a mortgage sale. Furthermore, people believe that once the bank makes a mortgage sale and is paid the balance of the amount owing under the mortgage then the mortgagor's land should revert back to him at that time as the money owing has been repaid.

The banks, however, made it very clear that they face problems when looking for a potential buyer of a mortgage property upon default by the mortgagor due to the current state of the economic. On average, the bank usually recovers only 20-30 percent of the principal amount borrowed from mortgage sales and some mortgages just do not sell. The banks also clarified that it is very rare for banks to receive more than the principal amount that was borrowed when they make a mortgage sale, but when and if it does happen then the bank must return the excess to the mortgagor. The banks also advised that it is not possible for the land to revert to the mortgagor at the time money is recovered in a mortgage sale because the term of the mortgage has not expired and the land must go to the buyer of the mortgage for the remainder of the term. That is the whole purpose of a mortgage sale - the bank can recover its money while the land will be used by the buyer so it is not possible for the land to revert back to the mortgagor once a sale is made because although the bank had recovered its money the buyer paid that money because he wanted to use of the land for the remainder of the term.

6. 11 Bankruptcy laws are required

The banks propose the enactment of a Bankruptcy Act in Tonga as such a law is important for mortgages. Because there is no such law in Tonga banks are restrained from using procedures usually provided under this law to assist the banks in recovering its money that was lent out to a borrower. Banks have repeatedly asked Government to enact this law for Tonga, but nothing has been done.

6.12 Mortgage laws should be amended to allow the use of "all money mortgages" in Tonga

A law practitioner proposed the introduction of all money mortgages in Tonga as this will be beneficial to banks and it will assist businesses. This type of mortgage does not specify the amount to be borrowed so it eases further borrowings on the same mortgage without going through the process of extending or varying a mortgage which is subject to delays. This type of mortgage is used mainly for mortgages that allow overdrafts.

Despite the proposals regarding laws relating to mortgages, some people still believe that current laws in Tonga are fair. The landholder does not 'lose' his land when the bank forfeits it due to default. The bank's powers are limited to the term of the mortgage at the end of which the land will revert back to the landholder.

TOPIC 7: AN INDEPENDENT BODY SHOULD BE ESTABLISHED TO PROVIDE SUPPORT SERVICES TO PEOPLE WHO WISH TO ENTER A MORTGAGE AGREEMENT

One of the proposals submitted from the public is the establishment of an independent body or a designate these tasks to a branch of the Ministry of Lands, Survey & Natural Resources. The purpose of this body is to provide any assistance that people may require before they enter into a mortgage agreement including the following matters:

7.1 To provide advice to the mortgagor before he enters a mortgage agreement

Some people claim that they put their signature to a mortgage agreement although they do not fully understand the contents of the agreement. This usually happens when they are desperate for money and they sign the agreement while they do not fully understand their obligations under the agreement.

People told the Commission that they understand that they get legal advice from a lawyer, but most people cannot afford to pay a lawyer's fee so that they are probably advised before they enter an agreement.

The proposal is to have a body that could provide advise needed and to make it mandatory under the law for the landholder to receive such advice before he considers the mortgage agreement. It would also assist if this body will also take on the task of explaining contents of the agreement and consequences of default to the mortgagor.

7.2 To provide valuation services

The proposal is for this body to also carry out valuation of land that is to be mortgaged. For example: if the land is located in Pelehake, on Taufu'ahau Road and is located close to the airport – what is the value of that piece of land? And if it is a piece of land located in central Nuku'alofa and suitable for a business – what is its value? And if it is a piece of land located on a coastal area – what is its value? If these valuations are provided it can be accepted by the bank and the mortgagor to guide them in determining the amount to be borrowed against that piece of land according to its value. This valuation can be taken into consideration together with the borrower's income to determine how much will be lent to the borrower.

The public are concerned with laws and practices used in leases of land as this is a common form of landholding both for Tongans and foreigners. The proposals for review under this Topic were received from people who have had first-hand experience of the adverse effects of some of the current provisions in the law and their wish to see these provisions amended.

TOPIC 8: TO REVIEW PROVISIONS OF THE LAND ACT THAT RELATES TO LEASES TO BETTER PROTECT THE RIGHTS OF THE LESSOR AND TO PROVIDE MORE FREEDOM TO PARTIES TO THE LEASE

People want more protection of rights of anyone who leases his land and more freedom to deal with his land. The Commission was asked to consider the following matters:

8.1 The consent of the landholder (lessor) should be obtained before his land can be sub-leased

Landholders who lease out their land (lessors) are concerned that a lessee can sublease the leased land although the landholder or lessor does not consent. Leased land is usually sub-leased at a higher rent while the landholder/lessor does not get any additional benefits from it. Furthermore, the purpose of the sub-lease usually differs from the purpose of the original lease. So the landholder can lease his land to the lessee for residential purposes and the lessee can then lease out the same land for commercial purposes. The Landholder's rights should be better protected to ensure that he will get a share of any benefits accrued through his land.

It is proposed that the landholder's consent should be obtained before the leased land is to be sub-leased by the lessee. This will provide the lessor with an opportunity to consider the purpose of the sub-lease and the any further benefits he should in light if purpose and rent under the sub-lease. If the lessor/landholder does not consent to the proposed sub-lease then it should not be approved.

There was also a proposal to use two separate lease application forms. There should be a form for leases that would not allow a sub-lease unless with the consent of the lessor/landholder. The other form should be used for lease applications where the lessor/landholder prefers not to allow any sub-lease at all. This provides the landholder with an opportunity to choose which lease application form would suit him and the lessee.

8.2 Leased land should revert to the landholder in the same condition it was in at the time the lease started

There is concern as to the state of the leased land when it reverts to the landholder at the end of the lease as it should be in the same state it was in when the lease started. Problems arise for example when the leased land contains resources such as a quarry or if the land is

planted with coconut trees and other plants. At the end of the lease, land that was used as a quarry for example would have a big hole on it so that it may be useless to the landholder unless he can cover up that hole. Land that had trees usually reverts back without those trees as they have been destroyed.

It is therefore proposed that the lease agreement should contain a clause that requires the lessee to ensure that the land will revert back to the lessor in the same state it was in when he received it so that the landholder can lease out that same piece of land or sub-lease it should he wish.

8.3 Special attention should be given to leases to foreigners and Chinese nationals in particular

Because there is limited land available in Tonga whilst the population is growing there is hope for Tongan subjects to be given the first priority to land. There is concern due to the growing number of allotments being leased to foreigners including Chinese. Foreigners have more money and they have more opportunities when it comes to land that is available to be leased.

It is proposed that a limitation should be placed on land in each estate and within the Kingdom as a whole that may be leased to foreigners. There should also be limitations on the term of leases as well as the size of land that could be leased to foreigners under each lease – such as a limitation of one lease per foreigner. It is also proposed that landholders who are about to lease their land to foreigners must seek advice from the independent body proposed on Topic 9. This will ensure that land of Tonga subjects will not be undervalued when it is leased to a foreigner in light of the purpose and term of the lease.

8.4 Maximum term for leasing of tax allotments should be increased

Because of the limitation under the current law on the maximum term a tax allotment can be leased out (20 years with another 10 year extension), the public propose that the maximum term for lease of tax allotments be extended to say 50 years or the same term as town allotments.

This proposal was usually backed by economic justifications and the Tonga Chamber of Commerce & Industries and the Tonga Association of Banks (where all commercial banks in Tonga are members) both supported this proposal. The country is currently faced with problems in economic development due to investors' lack of interest in Tonga due to the limited term allowed for leases of tax allotments. 20 years is too short a period to allow the investor to recover funds he's invested in a business in Tonga and also make a profit. Tax allotments are more popular to investors due to the larger area of land that could be leased. Investors in the tourism industry are also interested in land on coastal areas which are mainly tax allotments. Banks believe that terms leases of should be allowed to go up to 99 years so the same term applies to both town and tax allotments as this will also facilitate mortgage of leases over longer periods. Banks prefer to have long term leases as security for mortgages so that they have a longer term to try and recover their investment where

the borrower has defaulted on his mortgage. At present, banks face increasing losses because of mortgage defaults while there is only a few years left on the term of the lease which prevents it from subleasing the land to recover its losses. Furthermore, banks also face problems with defaulted which are advertised for sale, but do not sell due to lack of interest.

Although the current law allows leases of up to 99 years most lease of town allotments are only approved at 50 years. The longer the term of the lease the more credible that lease is as security for a mortgage. Because there is no freehold in Tonga the closest thing to freehold that Tonga can offer are long term leases such as 99 years.

It is not only foreign investors that we should entice but there are foreign individuals who want to come to Tonga and build residential or holiday houses and this would be a good source of income for individual landholders and for the country in general.

Nevertheless, there are people who believe that the current laws relating to lease of tax allotments is preferred. The limitation on the term of a lease will ensure that the male heir will be able to live off the tax allotment when he does succeed as heir. If there will be an amendment to the term of leases the legal requirements for the term should be reduced not increased.

8.5 The heir should have a say in whether land will be leased

It is proposed that the male heir should be included in determining whether a lease of land that he is entitled to succeed to should be approved. The landholder should not have absolute power in allowing a lease as is referred to in paragraph 2.1 above.

8.6 Rent payments from lessees who are Tongans living overseas should be facilitated

Tongans living overseas believe that there should be a procedure to facilitate and make more convenient rent payments from lessees who reside overseas. The Ministry of Lands, Survey & Natural Resources does not have a set procedure to assist them in making rent payments from overseas so they are forced to use their families and friends as agents. But there are many times where the money sent through these people do not actually end up being used for that purpose which result in their rents not being unpaid for many years.

8.7 The parties to a lease should be notified of an intention to cancel the lease before it is cancelled

A review of procedures for cancelling a lease and a sublease. The Commission was told that the Ministry of Lands usually submits a cancellation of a lease or sub-lease to Cabinet for approval without prior notification to all the parties particularly the lessee. The grounds under which a lease can be cancelled should be clearly stated in the law together with the requirement that both parties should be notified before a cancellation of a lease is submitted to Cabinet.

Some leases are cancelled before it is registered and the lessee usually does not understand the reason for the cancellation and neither is he notified before the cancellation is submitted to Cabinet.

8.8 Cabinet approval of leases

One of the matters referred to in the written submissions from banks was the delay in processing of lease applications due to the requirement that a lease must be approved by Cabinet. There are a lot of outstanding loan applications while the lease (which is to be used as security) awaits Cabinet approval as delays can be up to 12 months. The proposal is to consider giving the Minister of Lands the power to approve leases as this will expedite the processing and approval of leases.

The proposal is made in paragraph 31.4, but that proposal asks that it should include all other matters that are referred to Cabinet and not limit the proposal just to leases.

This matter was also discussed in the Commission's meeting with law practitioners as they were also concerned with the delay in the approval of leases due to the need for Cabinet approval. This causes delay and applications are not completed within a satisfactory timeframe.

8.9 Compensation to a lessee

Commercial banks propose a compensation to be given to a lessee under the Land Act where the lease is not renewed/extended whilst the lessee had made improvements to the land while he was leasing it from the landholder. be given

There was also a proposal to provide an easier process for renewal of leases and this proposal should be considered together with section 60 of the Land Act.

8.10 A lessee should be given notice of an intention to "repossess" the leased property

A law practitioner proposed that the Land Act should be amended to expressly state that it is a legal requirement for notice to be given by the lessor to the lessee of an intention to repossess the leased land and sell the assets on the land due to non-payment of rent for more than 21 days.

Another law practitioner proposes that the law should be amended to expressly state that the purpose of repossessing leased land is to recover the outstanding rent and that the lessor must return the land to the lessee once the rent is recovered. This is not expressly stated in the law, but that is the law and it should be spelled out in the statute.

8.11 Land needs of a Tongan should be prioritized over the needs of a foreigner

It is proposed that land lease application by a foreigner should not be allowed if there is a Tongan who seeks a grant of the same piece of land to be his town of tax allotment.

TOPIC 9: AN INDEPENDENT BODY SHOULD BE ESTABLISHED TO PROVIDE ADVISE REGARDING LEASES

There is hope for an independent body or a branch of Government to assist in providing advice to landholders who intend to lease out an allotment and the potential lessee in order to facilitate negotiation of their lease agreement. This body or branch may also be responsible for advising parties to a lease from an estate holder. It is proposed that consideration to given as to whether this same body or branch can also take on the functions of the body proposed under Topic 7.

The following functions were proposed for this body:

9.1 Provide advice to the landholder and the potential lessee

The landholder can receive good advice and information regarding leases from this body including information on the term of leases as is provided by law and also the average rate of rent that he may ask from the lessee. This will assist both parties and in particularly with commercial leases as the parties' views and terms will be put to this advisory body who will in then draw a compromise that takes into account both their interests.

9.2 Collect and disseminate information on land that is available to be lease out

A lot of landholders wish to lease out their land, but they do not know of anyone who may be interested in leasing it. And there are people who want to lease land, but they do not know any landholder who is interested in leasing out his land. It is proposed that one of the functions of this body is to collect such information and disseminate or make it available to the public. So anyone who wishes to lease out his land can provide details of his land and terms to this body and people who wish to wants access to land via leaseholds can go to this body to obtain information on what land availability. This body's function can extend to include the introduction of interested parties and advise them accordingly on the terms of the lease according to their wishes.

9.3 Facilitate renewal of leases by assisting parties through mediation

This proposal is very important particularly where it comes to commercial leases, church leases as well as leases where significant improvement has been made to the land which had been leased. It would be better for the current lessees to see an extension or renewal of their lease so that their business can continue or they can continue to live on this piece of land, but the landholder will still have the final say on the matter. This body can assist by providing advice to both parties of the lease so that they may do what is in the best interest of both parties. If the parties do not agree on a renewal then this body can assist in locating appropriate land to be leased by the lessee and also look for a new lessee to lease the lessor's land.

9.4 An independent Land Commission should determine applications for renewal of leases

It is proposed that the power to approve a lease renewal should be given to the Land Commission (as is proposed in paragraph 30.8.b). The Commission should not have to consult the Estate Holder unless it wishes to refer the application for renewal to the Estate Holder.

9.5 Automatic renewal of leases should be allowed

It is proposed that automatic renewal of leases should be allowed particularly where the leased land will continue to be used for the same purpose as in the original lease. This proposal is directed particularly at school and church leases and leases for community centers or similar purposes. The lessee shall continue to honor obligations under the lease.

9.6 A lease should be terminated if the land is not used for the purpose stated in the lease

It is proposed that a lease should be terminated where the land is not used for the purpose it was leased.

TOPIC 10: TO RECONSIDER LEASES OF LAND TO CHURCHES AND CHURCH SCHOOLS

There are two matters of concern regarding land that is leased to churches and church schools and including the matters referred to below. The same concern applies to leases from estate holders and leases from individual landholders.

10.1 Special consideration should be given to land leased to churches and church schools

There is concern over leases of land to churches for the purpose of chapels and schools. The public wish to see special terms provided for these leases so that rent would not be too high and ease of renewal. The lease of Tupou College was usually referred to as the obvious example of problems arising with church leases.

A proposal was made to the Commission in a written submission to give the Commission (that is proposed in paragraph 30.8.b) the power to approve terms and rent for leases of land for church schools and churches as well as leases for community or public purposes. It would be beneficial to give 99-year leases to schools.

In the Commission's meeting with Church Leaders they had particular concern with land that is leased to Churches because of problems they face with their leases. The following matters were proposed regarding this issue:

- a) Churches should work closely with the Government on matters relating to leased land under Churches that is used for church schools. The proposal is for Government to pay the rent on leased land used for school churches whilst the Churches concentrate on administering these schools which are tasked with educating the children and youth of this country. Schools are not businesses and there are no profits earned from the administration of church schools that would justify the demand of high monetary

payments from land leased to churches.

This proposal was discussed in the Commission's meeting with Church Leaders. The Commission informed the meeting that this proposal could be one of the matters recommended by the Commission on the basis that it will assist the education of the youth of this country. It is a matter for Government to consider and decide whether to accept such a recommendation.

There was also a recommendation from the public for rent on church leases to be reduced to a minimal figure and particularly on leases of land used for church schools. This will be of great assistance to the performance of this function namely the education of the youth of this country.

The Churches also informed the meeting that they have no problems with leases over Government estates. The problem is mainly with churches leases of land over nobles' estates.

- b) The lease to churches should be just one lease rather than multiple leases for different purposes. The purpose of this proposal is to secure one lease for a church in a particular village which will allow multiple purposes under the one lease. This will allow the church to use the land secured under the leases for different purposes such as a chapel, church hall, residences (for reverends) and similar purposes.

The Commission informed the meeting that it is important to use the land for the purpose it was leased as is stated in the lease agreement. If the land is used for any other purpose then the Minister of Lands can apply to Cabinet to cancel the lease. It is important to clearly state the purpose(s) of the lease under the lease agreement.

The Commission also informed the meeting that the law prohibits erecting a place of worship in a town or tax allotment unless the place of worship was built by a Church on land that had been leased to that Church for that purpose. It was proposed that the Commission should consider whether that law conflicts with the freedom of worship afforded to everyone under the Constitution. The Commission clarified that anyone can worship at any place as what is being prohibited is erecting a place of worship.

- c) A separate of special type of lease should be provided to Churches such a "perpetual leases" of 999 years. This type of lease is used in New Zealand and other countries. The proposal is to use this type of lease for church leases which should be approved by His Majesty which will be the same as current procedure for leases that exceed 99 years. It was also proposed that these leases should be given only to charitable bodies that had acquired their land prior to 1875 and to Churches who has been using the land for more than 100 years and a favorable recommendation from the Minister of Lands should be obtained before such a lease application is submitted to His Majesty.

The Commission informed the meeting that a lot of matters need to be considered in light of a proposal to give a perpetual right to land to an individual; a body or a church and such leases will also attract lease payments/rents.

- d) The Government should be responsible for ensuring that there is sufficient land available to church schools to conduct its activities.

The proposals made in the paragraphs above are relevant to a written submission from Reverend Siupeli Taliai which discussed the lease of Toloa. The matters referred to in the submission relates to the demand from the Estate Holder (over the land in Toloa) for payment of \$2million before the lease will be renewed after which an annual rent of \$50,000 per annum will be paid on the lease. This was raised because of the following matters:

- e) The clauses of the Constitution should not clash with the needs of the people subjected to the Constitution as this means that the Constitution is no longer suitable to the circumstances of today. The population as well as the level of education and theological knowledge of the people in 1875 is very different from 2011. The 1875 Constitution can be said to be effective if it can be applied for the general welfare of the people in the year 2011.
- f) Legality should not clash with morality. The law that was made by man is different from the law that was made by God. It will be socially dangerous for man-made laws to undermine God's laws. Righteousness should always prevail and the Land Act should refrain from undermining the law of morality.

There were proposals related to church leases which are provided in paragraphs 24.1 and 24.1 which include the proposal to allow churches to register land in the name of the church.

10.2 Lesser land should be leased by Churches

It is proposed that consideration be made of large plots of land that is held by Churches and church schools. The proposal is to limit the amount of land so leased so that some land would be made available for distribution to the people of the country who still do not have any land. Not only do churches hold large plots of land, but they also hold interests over the same for many years.

In the Commission's meeting with the People's Representatives to the Legislative Assembly, the MPs voiced their concern due to a large plot of land that is about to be leased to a Church. A complaint has been made with a request to consider whether such a large plot of land should be leased to one Church whilst there are many people in the estate who has no land.

10.3 Cabinet's power under section 36 of the Land Act should be fully enforced

The proposal is to ensure that the Minister of Lands and Cabinet's use their power under section 36 of the Land Act as this authorizes their approval of renewal of leases whose term is almost up if the lessor (or the estate holder) does not consent to the renewal of the lease.

TOPIC 11: TO CONSIDER THE TOTAL AMOUNT OF LAND THAT HAS BEEN LEASED IN EACH ESTATE

The public are also concerned with the percentage of land in each estate that is leased out by the estate holder. In a written submission from Elizabeth Wood-Ellem to the Commission, she referred to a speech by Tupou I in 1882 where he stated that the Nobles shall not be allowed to please themselves concerning the hereditary lands as Tonga will most certainly be lost – because if any chief should be vexed with his people he can eject them and lease their tax allotments to foreigners, and Tongans will become strangers in this land.

11.1 To ensure that the total land leased out in each estate does not exceed 5 percentage

It is proposed that the 5 percent limitation on land that is to be leased (by the estate holder) should be enforced – meaning that only 5 percent of the estate can be leased out, not including the lease to Churches.

In the Commission's meeting with the People's Representatives to the Legislative Assembly this topic was raised. The representatives advised that people in some estates are upset that the Noble leases out an increasing area of land for his financial gain while there are people in the estate who are without a registered allotment. Furthermore, people are also concerned with the substantial funds that the estate holder receives from leases such as lease of schools and churches. It is only one family (that of the estate holder) who benefit from such financial gain, but this matter should be reconsidered that so a substantial part of the funds is given to Government. The vision of the new Government is based on fair distribution. This vision should be the basis for review of major leases in estates.

11.2 To abolish the estate holder's power to approve leases in his own estate

It was proposed in the Commission's meeting with the Church Leaders that the estate holder's power to approve his leasing out of part of his estate should be abolished. This power should be given to the Minister of Lands or to Government. The Commission was also reminded of Clause 130 of the Constitution of 1875 where the estate holder was not allowed to lease land in his estate to a foreigner without the prior approval of Cabinet and this was meant to stop the estate holder from leasing out unreasonably large areas of land from his estate to foreigners while the Tongan subjects will be pushed to live on the sea.

11.3 To limit the estate holder's power to determine rent on leases

The Church Leaders advised the Commission in their meeting that they are concerned with the substantial financial demands from Estate Holders before a lease is renewed. It was proposed that the estate holders should not be free to determine the rent on leases as this

allows them to demand substantial rent payments. The law should provide a set procedure to prescribe rent payments and special recognition of leases to Churches and charitable bodies so that it is not treated the same as leases to businesses. It is proposed that a review of sections 17 and 18 (of the Land Act) should be reviewed with a view to applying these sections to matters raised in this paragraph and this Topic regarding leases to Charitable bodies. It was also proposed that land that is to be leased should be valued and that valuation should be taken into account in determining rent on a lease. For example, different rates may apply to residential leases, business leases, school leases and Church leases so that the same rate (based on the market value) does not apply equally to all these leases despite their different purposes as lessees have different financial circumstances depending on the purpose of the lease.

There was a proposal to let the Commission (that is proposed in paragraph 30.8.b below) determine the rent that is appropriate a piece of land that is to be leased out.

There are allotments in Tonga which has been registered, but it is not used for residential or farming purposes and this applies to both tax and town allotments. In most cases, the allotment holder resides overseas and his allotment is not used, but there are also unused allotments of landholders who reside in Tonga.

TOPIC 12: ABANDONED (UNUSED) ALLOTMENTS SHOULD BE MADE AVAILABLE FOR USE BY OTHERS IF THE LANDHOLDER CONSENTS

Because there are a lot of people in Tonga who do not have land whilst they want a piece of land for various purposes such as residential, farming and business there is a need to devise a process whereby unused land can be let out to people who are in need of land. Such land will be made available with the consent of the landholder so that it can be used by those who need land whilst the landholder's right to his registered land remains secure. The landholder's right will give him the power to indicate the term or number of years over which his land will be made available for use by someone else as well as the rent or share that the landholder will gain financially from the use of his land. There should be incentives for the landholder to make his land available for use by others if the law will not force him to let out his unused land.

A man talked to the Commission during one of the meetings in Tongatapu regarding an association of farmers in Tonga which has over 2000 registered members (farmers). This association grows crops in Tonga for export overseas. The major problem that these farmers face is the lack of land available for them to farm on. At the same time there is land in Tonga which is not being used. An attempt was made to use some of these unused allotments and

although some allotments were given to them to farm on subsequent problems developed which resulted on crops that were already planted on the land being useless. Farmers need help getting access to land for their use in order to assist their families.

Land is Tonga's resource that can assist in developing the economy of this country so it would be used and not left unused.

The following proposals were made on how unused land can be made available for use:

12.1 The landholder should elect who will work on his land

It is proposed that the landholder should elect or choose a person to let his land to or the landholder can give the land to the same person who will then let it out to anyone who may want to work on that land.

Another proposal similar to the proposal above called for the landholder to appoint a trustee for his land. This trustee will ensure that the land is farmed on or used for some other purpose and will also be responsible for payment of any land tax that will be levied on the land as is proposed in paragraph 30.4 below. This proposal was made together with another proposal to expressly state in the law the number of years over which an allotment is left unused before it will be considered "unused" land in the same sense as unused land belonging to Tongans living overseas or living in another district (from the one he has an allotment in such as someone who owns land in the outer islands but has moved to Tongatapu).

12.2 The Town Officer should be the custodian for such allotments

It is proposed that the landholder should place their unused allotments in the custody of the town officer of the village where the land is located. The town officer will know the people of the town who are in need of land as well as residents who are responsible enough and deserving of access to such land.

12.3 Such land should be given to an independent body

This proposal is for such land to be placed with an independent body or a branch of Government who will be an intermediate between the landholder and anyone who is in need of land. This function can be performed by the same body that is proposed under Topics 7 and 9. This will be more convenient both for landholders who wants to let out their land and those who are in need of land. They will make contact with this body to obtain information on land that is available. This body will have information on available allotments and people will learn that it is the place to go for such information.

The proposals made in paragraphs 12.1 to 12.3 will depend on an agreement between the landholder and the person to whom the land is entrusted with and the terms and conditions for letting out the land including the term or number of years (which shall also state the notification period to the person using the land should the landholder require the land back before the term ends so as to ensure that any work initiated on the land will not

be futile), type of work allowed to be carried out on the land and payment required for use of the landholder's land. If this proposal will be approved or recommended then it should be allowed under the Land Act. It would be beneficial to prescribe forms under the Land Act which is to be used for such agreements.

12.4 Such land should be given to the Government

It is proposed that any land that is not used for residential, farming or business should be given to the Government and such land shall become part of Crown estates.

TOPIC 13: PENALTIES SHOULD BE LEVIED ON UNUSED ALLOTMENTS

The concern with unused allotments is not only because land is not used, but it is also an eyesore in the villages. Many town officers are concerned with these allotments as it adds to their duties because they and the town committees often have to clean up these allotments particularly in times of town inspections. This concern is mainly with town allotments as it affects the beauty of the town.

It is proposed that holders of unused allotments should be forced to upkeep their allotment so that it is not overgrown with weeds by imposing some form of penalty on them if an allotment is not well maintained. The following penalties are proposed:

- a) Impose a fine once it is confirmed that an allotment has not been maintained for a specified period such as a month or a year. A lot of people believe that it is better to impose a fine so that funds collected from fines can contribute to the maintenance of the unkept allotments. Some people who attended the Commission's meetings overseas told the Commission that they would not mind paying fines if it will guarantee that their right to the land will not be taken away because it is not used. This will encourage them to ensure that their allotments are maintained.
- b) Impose a land tax on landholders who reside overseas. This proposal was made in one of the Commission's meetings overseas. The proposal is to allow them to pay land tax and part of tax collected should be used to the upkeep of their allotments to ensure it looks well maintained (*ma'ala'ala*).
- c) Impose a penalty by taking away the landholder's right to the land after it has remained unused for a specified period.

TOPIC 14: UNUSED LAND SHOULD BE FORFEITED

As is in Topic 13, paragraph c) above, some people have proposed in meetings of the Commission that rights to registered land (both to town and tax allotments) should be forfeited from those who have left their land unused.

The following reasons were provided as the basis for forfeiture of such land:

- a) Unused land belonging to landholders who live overseas should be given to Tongans who live in Tonga and who work for the development of the country because there is not enough land to provide them all with an allotment. A lot of people have become citizens of the countries that they live in so they should let go of their land in Tonga.
- b) Allotments which are not maintained by the landholder is an eyesore to the town and its upkeep is a burden on town officers and the people of the villages.

[Secretary's note – This proposal did not specify whether land so forfeited should revert back to the line of succession or whether it should revert back to the Estate Holder.]

Although some people have proposed the forfeiture of such land from the registered holders, particularly holders who have lived overseas for many years, there is overriding pressure from more people not to forfeit these homes. Many people believe that it will be better to find a way where these lands will be used as is proposed under Topic 12, instead of forfeiture. Tongans who attended the Commission's meetings overseas told the Commission that they feel as if they are being blamed or singled out for not using their land while at the same time there are Tongans in Tonga who also leave their allotments unused. Tongans in Tonga should look at their own allotments and try and put it to use first before considering the unused land of those living overseas.

The reasons provided to justify the proposal that Tongans living overseas should continue to hold their allotments in Tonga is the same as the reasons provided in paragraph 15.1.

TOPIC 15: TO CONSIDER WHETHER TONGAN SUBJECTS WHO HAVE ACQUIRED FOREIGN CITIZENSHIP SHOULD RETAIN THEIR RIGHTS AND ENTITLEMENT TO LAND IN TONGA

This topic was a major discussion issue in the Commission's meetings in overseas countries including America, New Zealand and Australia as it attracted the interest of Tongans living overseas. The majority of Tongans living overseas oppose any move to take away their rights to land in Tonga on the basis that they have acquired foreign citizenship or their extended stay overseas for numerous years.

The public provided the following proposals regarding this topic:

15.1 Land rights of Tongan subjects who have acquired foreign citizenship should not be forfeited

Some people are of the view that although a Tongan becomes the citizen of another country he/she still has a right to have land in Tonga based on the following reasons:

- a) Although Tongans who live overseas have lived in those countries for many years they still have a special place in their heart for Tonga and they value their family land. A Tongan may acquire foreign citizenship and be issued a foreign passport, but they will still be a Tongan in blood, heart, mind and lifestyle. Tongans acquire foreign citizenship for one reason only and that is to alleviate their lives of poverty. In addition, their acquiring foreign citizenship can benefit their relatives in Tonga as they can also qualify for citizenship allowing them to migrate overseas in search of a better life. No one acquires foreign citizenship in order to get rid of one's "Tonganess".
- b) Tongans living overseas contribute to the economic development of the country through remittances which assist the country's general income. They still contribute from overseas to their families, Churches and the country as a whole so they should retain their right to land in Tonga. Remittances from Tongans overseas over a period of one year are more than any other means of financial aid including foreign aid. Remittances from Tongans living overseas are a sure and certain source of revenue for Tonga.
- c) A Tongan living overseas has every intention to build a house in Tonga so that he/she may return to it when they retire. Apart from direct remittances to their families in Tonga, this provides yet source revenue for Tonga when Tongans return to Tonga with their retirement funds to contribute to the economic development of Tonga. It is only a few Tongans who live overseas and completely ignore their land in Tonga.

This proposal also confirms that there's still a need for Tongan children born overseas to retain their hereditary rights to land. They are the future of our country and although they grow up overseas they are proud to be Tongans and they want to retain their heritage.

15.2 Land rights of Tongan subjects who have acquired foreign citizenship should be forfeited

It is proposed that land should be taken away from Tongans who have acquired foreign citizenship. This proposal was first made in one of the Commission's meetings in Tongatapu and it was also brought up by Tongans living overseas in the Commission's meetings overseas. The following reasons were provided as basis for the proposal:

- a) It is selfish to allow Tongans who have acquired Tongan citizenship to retain their

land. When they acquire foreign citizenship they are entitled to benefits and opportunities in those countries and yet they still hold on to land in Tonga.

- b) There are many families in Tonga who are still without land because the population is growing and there is not enough land available for distribution to everyone. Tonga's Constitution was enacted in 1875 in a time when Tonga had a smaller population. In the last census the population of Tonga has reached 100,000. It is time to review the provisions of the Constitution and the Land Act and make the necessary amendments to enable better land distribution to the people.

During discussions of this Topic, a lot of people wanted to know and understand the Nationality Act and particularly the Nationality (Amendment) Act 2007 which commenced in August 2007 as is outlined in Topic 16.

TOPIC 16: TO CLARIFY WHETHER A TONGAN SUBJECT WHO ACQUIRED FOREIGN CITIZENSHIP BEFORE DUAL CITIZENSHIP WAS ALLOWED IN 2007 LOST THEIR RIGHTS TO LAND IN TONGA

The Nationality (Amendment) Act 2007 allowed dual citizenship. The same Act repealed the provision which provided that a Tongan subject who acquires foreign citizenship will lose his Tongan nationality. The repeal of this provision meant that any Tongan who acquired foreign citizenship after the Act was passed will not lose their Tongan nationality whilst they will also acquire foreign citizenship. The same Act also provides an opportunity to those who acquired foreign citizenship before 2007 (and in turn lost their Tongan nationality) to apply for re-admission to Tongan nationality.

This Act is directly related to land because of the limitation of some land rights to Tongan subjects only. It was evident from the meetings that people wanted information on Tongans who acquired foreign citizenship before the 2007 Act which allowed dual citizenship.

The following were matters that people brought up for discussion with the Commission which showed some gaps in the Land Act that should be considered:

16.1 Did they (or should they have lost) lose their land?

This question was asked many times in the Commission's meetings and particularly in the meetings overseas as people who acquired foreign citizenship before 2007 wanted to know whether their rights to land were lost because of their acquiring foreign citizenship. No one told the Commission that they had actually lost their land because of a change in their citizenship, but a lot of people think that this is the case because only Tongan subjects are entitled to registered land in Tonga. Some people pointed out that there is no section in the Land Act or the Constitution that expressly state that land (which had been registered) will

be lost due to landholder subsequently acquiring foreign citizenship. If the rights of these people were meant to be taken away upon their acquiring a foreign citizenship then that should have been clearly stated in the law.

16.2 If their lost their right, does the land devolve to the heir and through the line of succession?

This question was asked in the meetings as people were interested to know what is to become of the land if such was to be forfeited. The law of succession to land does specify what will become of land so forfeited. There were other relevant matters that people were concerned with such as:

- a) Would the sons and heirs of the landholder succeed to the land or will the land devolve to the landholder's younger brothers.
- b) Should the heir lodge an heir's claim within a year from the date the landholder acquires foreign citizenship (and thereby loses his Tongan nationality)? If so, the heir will face difficulties (if it is the younger brother who is the rightful heir) in knowing when exactly his older brother acquired foreign citizenship so that he may make a claim, particularly where the landholder (older brother) lived overseas and his younger brother lived in Tonga.

16.3 Can land which has been lost be returned to the original holder?

People asked the Commission in some of its meetings whether land of those who had acquired foreign citizenship before 2007 can be returned to them or reinstated. A lot of people were concerned with this because the 2007 Act provided readmission procedures for those who had acquired foreign citizenship before then so that they can apply to be readmitted to Tongan nationality. Because no one had told the Commission that they had actually lost their land after they acquired foreign citizenship it is believed that the majority of Tongans who have acquired foreign citizenship still have their land despite having changed nationality for many years. The people's aspiration is that those who lost Tongan nationality should retain their land if they have since been re-admitted to Tongan nationality and the land had not been forfeited. But the Land Act and the Constitution does not have specific provisions for these issues so it should be considered.

The proposal to legalize and allow the use of family trusts over family land in Tonga was repeated made due to the dissatisfaction with the current provisions of succession to land. Some people believe that it is not right that one person controls the family land. Not only does the heir acquire all the family land, but his younger brothers claim that the heir can be very selfish when he distributes the family land as he only allocates land for himself and his children then to other from outside the family so that he can make a financial gain.

The proposals for change to the laws that relates to succession to land as is provided in Topic 3 is due to dissatisfaction with the power and rights that is given to one person namely the heir to the family land. Furthermore, a lot of people wish for more people within the family to qualify to succeed as heirs including adopted children and illegitimate children and more rights to be afforded to a female heir. The heirs of today do not have the same love that heirs in the past used to have which led them to distribute the family land within the family circle.

TOPIC 17: ENACT LEGISLATION TO LEGALISE FORMATION OF A FAMILY TRUSTS TO GOVERN FAMILY LAND

Those who had put this proposal to the Commission believed that it will provide a new procedure for control of the family land that would be more peaceful. They believe that the benefit of a family trust is that it will allow the voice of each member of the family to be heard, which will allow for consultation between members so that subsequent distribution or use of the family land would have taken their views into account. A law practitioner who supported the concept of family trusts was of the opinion that family trusts would reduce the occurrence of family feuds and court action amongst family members that result from the heir's selfish acts.

The basic principle underlying a family trust rests on the landholder and the heir consenting to give up their rights to the registered land so that the family land may be handed over to the trust where they will discuss what is to become of the land, which may include the following things:

- a) If the land is to be given to one member of the family - who will it be?
- b) If the land will be divided – who will get a share and how will land be divided?
- c) If the land will be developed and not divided nor given to just one family member – what work do they want the land to be used for; what are their various roles in such work; how will they divide any profit or interest earned from the work on the land.
- d) Would the trustee agree to a sublease or mortgage of the land?

There were no further clarifications from people on any other details they wished to be included in the family trust. Some people believed that this was a matter for the Commission to consider if they will accept the proposal as a recommendation. The following proposals were made in their support for this Topic:

17.1 To give families the option to create a family trust and do away with succession

It is proposed that the landholder and the heir should be allowed to surrender (if they so wish) their rights to the family land so that the land may be freed to be controlled by a family trust. Some people propose that a family trust should be allowed only where there is no heir.

A family trust will work well for some families such as families who are loving, respectful

and work together and they may choose to establish a family trust. For those families where the landholder and the heir to let a trustee take over the family land, the line of succession to land will continue to apply. This provides an opportunity for families to choose what suits them best given their circumstances. For a family with daughters only and no sons, the family trust can be used to control and dictate what is to become of the land. There are also families who would like to see the youngest son or the less fortunate of all the children receive the family land. There are also families who do not own a lot of land (in comparison to other families) which can be divided and distributed to each member of the family - such a family will have to make reasonable decisions regarding its small plot of land. A foreigner told the Commission in the meeting in Canberra, Australia that a family trust is a good option so that land will not be divided into smaller portions and distributed to the family members. The larger the piece of land the more chances there are to develop it for financial gain for the trust such as the practice in Australia with families who own large pieces of land which they use for farming and other purposes. The President of the Tonga Chamber of Commerce & Industries agreed because the larger the plot of land the greater its market value and financial benefits that could be earned from the land.

A married couple can allocate access to the land in accordance with the needs of each family member and this can be done in a manner that they know would guarantee that peace prevails amongst their children and the rest of the family.

17.2 Each member of the family should have a voice in the family trust

One of the proposals regarding a trust was those who will be members of the trust who will have the power to make decisions regarding the family land. Some people believe that the father, mother and their children should be members. Some people believe that it should also include the sisters and brothers of the father (landholder) particularly where the landholder does not have any children.

Another proposal suggests that the heir should be the chair of the trust and the 'ulumotu'a and fahu should also be members.

17.3 The trust should clearly specify how the family is to be administered under the trust

People wanted to ensure that the members of the family should be made aware of the terms which will be used to control the trust. The matters referred to in paragraphs 17.1 and 17.2 should be expressly stated in the trust and comply with any new law regarding trusts.

17.4 An independent body should assist families who wish to establish a trust

Because the concept of family trusts is new to Tonga, families who wish to establish a trust should be given assistance. The idea is to have a body or branch of Government to provide this service which should include legal advice. This function can be performed by the same body that is proposed in Topic 7 and 9.

Despite the proposals received on this Topic, there are people who believe that the current

law of succession to land is more secure and it is not yet time to introduce these concepts to Tonga. Family trusts may be widely used in foreign countries, but foreigners have a different mindset from a Tongan. Some people believe that parents can abuse it to award a favorite sibling and ignore the heir and the rest of the siblings. Many people believe that our line of succession to land which was borne from the heavens if Godly and it should not be changed. No one should question the right of an heir and stability will be assured by retaining the status quo.

This topic was commonly discussed in the Commission's meetings that were held in Tonga and particularly in towns with coastal areas and beaches and people who own allotments that are located close to these beaches. This topic was also topical with the people of the Ha'apai group of islands as it was related to land erosion resulting from sea level rising and how it can affect the size of a registered allotment.

TOPIC 18: TO REVIEW THE PROCEDURE FOR GRANTING LEASES ON THE FORESHORES

There is concern regarding the procedure for allocation of Crown land on the foreshores. Allocation is done via leases and people want the following matters reviewed in light of these allocations:

18.1 The Minister should consult with other stakeholders before granting a lease on the foreshore

People in villages that have beaches are concerned with the Minister of Lands' practice of leasing out the Crown's land on these beaches – which is the land within 50 feet from the high water mark. It is proposed that the Minister of Lands' power to leases out Crown land on the foreshores should be restricted by subjecting him to consultation with the Estate Holder of the town where the beach is located. This will ensure that in considering such a lease, the Minister of Lands will take into account the following:

- a) There are people in the village who live close to the foreshores and they face problems when land (belonging to Government) on the foreshore is leased out to others as that lessee will live closer to the beach. The people in the village who had lived close to the beach having lived close to the foreshore for many years and they have looked after the beach area so they should be given the first opportunity to the Government's lands on foreshores. It is frustrating for those who have lived in these coastal areas for many years that new people are given rights to the foreshore so that they can carry out businesses in these areas while they just stand by and watch.
- b) There are people in the villages where beaches are located who are still without land and they should be given the first opportunity to any land that becomes

- available such as foreshores instead of giving it to people from other villages.
- c) There is uncertainty regarding these people residing on the foreshores as it is Crown land. Residents of villages have responsibilities to the estate holder, but people residing on the foreshores do not contribute to village functions. It may have been more convenient to let villagers who are committed to village activities live on those foreshores.
 - d) The people of the villages are proud of their beaches and certain beaches and ponds which plays an important in folklore. Foreshores should therefore be given to the Estate Holder and town committees of the village to maintain these areas and the traditions of the village, which will also assure that every Tongan subject is free to go to these beaches.
 - e) The people of each town earn a livelihood through fishing from their beaches, which will be affected when the foreshore is leased out. The people of Ma'ufanga were concerned with the construction of wharfs and ports on their coasts and the leasing of land in Fanga'uta to a foreign company for development. The rights of people of the towns and the country as a whole to earn a livelihood from the sea so compensation to the surrounding towns should be considered due to lost opportunity to fish from the sea and degradation of sea organisms due to development works. Furthermore, the people of Haveluloto had concerns over Fanga'uta. They hope that Government would not continue to lease out Fanga'uta which really should be given to the people of Haveluloto to maintain as they have always considered it part of Havelu.

18.2 To clarify the provisions of Fishery laws and land laws relating to the foreshores

The public and particularly the people of the Ha'apai group of islands seek clarification of Fisheries laws. There are coastal community regulations which impinge one's right to rest on a beach in these designated areas before they will continue fishing on other islands. This sometimes result in fights and those from other islands who come to rest on the beach in an island before they will continue fishing the following day are usually chased away by residents of the island. It is not only the beaches which are restricted from use by others, but it also restricts fishing in these special management areas. These restrictions should be reviewed as it hinders one's freedom to use the beaches and fish from the sea.

18.3 Foreshores should not be leased

It is proposed that the only way to guarantee that people's rights to use the beaches and fish freely from the sea is to prohibit the lease of foreshores.

Another proposal suggests that if foreshores are leased out then the rent should be shared by the Government, Noble Estate Holder of the estate where the coast is located and holders of allotments located next to the foreshores.

TOPIC 19: THE PROBLEM OF LAND EROSION SHOULD BE GIVEN SPECIAL AND URGENT ATTENTION

The people of the Ha'apai group of islands had great concern regarding this topic due to land being increasingly eroded by sea. Although this appears to be a major problem in Ha'apai, this topic was also brought up by the people from the Western villages in Tongatapu as this same problem is happening in some of the villages in the west.

This problem was brought up for discussion in the Commission's meeting in Pangai, Ha'apai. We were told that part of some allotments in Lifuka has been eroded by the sea. This problem spreads to land surrounding calm waters (tu'aliku) where the sea also erodes nearby cemeteries. When the Commission travelled by boat to 'Uiha and Ha'ano the problem of land erosion was evident on these islands.

It is proposed that the Government pay urgent attention to this matter and the Ministry of Lands should survey affected areas to identify land that has been "stolen" due to sea level rising. Some people claim that erosion of land from the foreshores takes away part of the foreshores that belonged to Government (within the 50 feet from the high water mark) and continues to nearby land which has been registered to individual landholders. Such landholders are concerned that part of their land may be taken away to make up for the land that has been lost by Government from erosion.

By resolution of the Legislative Assembly of Tonga dated 28 September 2010, the Land (Amendment) Bill 2010 was referred to the Land Commission for review. The amendments proposed in the Bill were introduced and put to the public in the Commission's public meetings towards the end of 2010 and in all the meetings in 2011. People had some concerns regarding the Bill which is shown in Topic 20 below.

TOPIC 20: THE CURRENT LAND PRACTICES SHOULD NOT BE AMENDED AS PROPOSED AND THE CHANGES PROPOSED SHOULD BE CONSIDERED VERY CAREFULLY

Many people believed that the Bill was a move by the Estate Holders to protect their powers and status in light of the new incoming Government. It is as if the Nobles are afraid that their powers over land will be affected by the change in Government.

In the Commission's meeting with the People's Representatives to the Legislative Assembly, the People's representatives questioned what good can be achieved in terms of land practices due to changes proposed in the Bill. The People's representatives were concerned that the amendments proposed will provide more opportunities for corruption by some Estate Holders. One of the People's representatives who were in the Legislative Assembly at the time

this Bill was tabled in the House in 2010 that the People's representatives on the day did not support this Bill. And in the meeting, the People's representatives informed the Commission that they do not support this Bill.

In the Commission's meeting with Church Leaders, concern was raised regarding this Bill and the amendments proposed to land practices. The amendments proposed in the Bill were not supported because of consequences that may result such as Churches competing as to who will give the most money and gifts to Nobles so as to win the favour of a Noble.

The public put forward various thoughts regarding the amendments proposed in the Bill, which included the following:

20.1 Cabinet to retain its current powers over land matters

The public believe that Cabinet should retain its current powers under the Land Act. The Cabinet acts as a check on land matters and certain matters should continue to be finalized from Cabinet such as surrenders and leases. The current practice is orderly whereas if Nobles are given more powers as proposed there will be more communication breakdowns because Nobles do not have a set office or working hours whereby people can contact them with their land needs.

Despite this, there was a written submission that suggests the removal of all estates from Government and distributing them amongst the Noble Estate Holders so that there are no more Government Estates. Nobles would then be responsible for consideration and approval of all land matters of his estate including application for grant of an allotment, lease application, renewal of leases, setting rent on lease and cancellation of leases.

20.2 The legal age of 16 years for males (to qualify for an allotment) should not be changed

Although some people understood the reason behind the proposal to increase the legal age under the Land Act to 21 years, many people still preferred 16 years. Some people stated that they live and long for the time when their son would reach the age of 16 years so that land may be registered in his name and they prefer to leave the age at 16 years. Some law practitioners also supported retaining 16 years because that law is presently working well. It helps a woman who wishes to register land under her son's name in case something may happen to that woman before title on the land can be registered under her son.

A written submission proposed that 18 years be the new legal age to qualify for an allotment.

Another written submission supported increasing the legal age from 16 years because at that age one's sons and daughters are still at school. It was proposed that it be left to the Commission (proposed to be established under paragraph 30.8.b) to determine what would be the reasonable age.

20.3 The widow's right to lease an allotment over which she has an interest

There was support for the proposal to allow a widow to lease out land over which she has a widow's right provided that the heir also consents. This would benefit the widow and provide her with a source of income.

A law practitioner thought that the widow should be allowed to lease the land regardless of the heir's consent.

Another proposal suggests a time limit on leases that the widow can make such as a limit of 20 years. The heir's consent should still be obtained before the lease can go ahead.

There were other proposals from the public during the public meetings which were not of the subject matters provided in the 19 Topics above. These miscellaneous proposals are provided in Topics 21 to 30 below and some aspects of these proposals are relevant to those provided in Topics 1 to 20.

TOPIC 21: TO CONSIDER NEW AND IMPROVED WAYS OF LAND DISTRIBUTION

A major problem that people are facing today is that there are still a lot of people who do not own any land and this was constantly brought up for discussion in the Commission's meetings. Despite this it is true that whilst the population is growing the land will not multiply. Therefore, people hope to see new methods or ways of land distribution so that more people receive an allotment. The Commission was told by villagers in one of its meetings in Western Tongatapu that they believe that only 30 percent of the people in their town have land and the remaining 70 percent (including women) do not have any land. It is important to have a piece of land in this country so that one may then call himself or herself a Tongan. People of this country would be happy to receive a piece of land.

The following were proposed by the people to assist in considering this Topic:

21.1 To reduce the legal size for town and tax allotments

It is proposed that the legal size for an allotment which can be registered should be reduced so that more people are granted registered allotments. If the minimum size for a town allotment can be reduced from 30 perches to say 25, 20 or 15 perches and tax allotments are granted in acre plots. Not only would more people have registered allotments, this will also allow registration of allotments which are already occupied but remain unregistered because its size is less than the minimum size prescribed by law. There is also land left over from subdivisions which is less than 30 perches, but is sufficient in size for residential