

SECTION G.

1.1.1 THE LAND COMMISSION 1917

1.1.2 The last Land Commission was constituted in 1917 (which in this report shall be referred to as the 1917 Commission). Unlike the present Commission it was not a review Commission but a Commission to hear land disputes. It was empowered to take over all cases of dispute over land which had been brought before the Supreme Court (not the Land Court because there was none then).

1.1.3 The 1917 Commission and its mode of appointment and function became the focus of an interesting legal issue in the late sixties. The validity of its constitution, function and decisions were questioned. The argument surrounding this issue may be stated as follows: Section 92 (now Section 90) of the Constitution provided as follows:

"The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and the laws of the Kingdom (excepting cases of felony which can be tried only by jury (and excepting cases concerning titles to land which shall be determined by a Land Court subject to an appeal to the Privy Council) ...")

1.1.4 The underlined provision was inserted by an Amendment to the Constitution by Law No. 25 of 1916. It was argued that the Land Commission was a land court within the meaning of this provision. Two of its members, H.C. Stronge and A.B. Wallace were distinguished persons in law and its rules of procedure were similar to those of a court. But the Act went on to say in Section 13, Land Commission Act that the decision of the Commission shall be binding and final upon all parties to the inquiry and upon the Government of Tonga ... and there shall be no appeal therefrom. Why this provision was included is perhaps understandable but it conflicted with and at variance with Section 85 (now 82) of the Constitution. As a result it was claimed to be void and no effect.

Section G

1.1.5 In 1917 the Constitution had provided for a Land Court (but Land Court had not been constituted) subject to an appeal to the Privy Council. The Legislative Assembly, by enacting the Land Commissions Act sought to establish a "Land Court which was subject to an appeal to the Privy Council". An essential feature of the Land Court envisaged by the Constitution was that its decisions should be subject to scrutiny in cases of dissatisfaction by the Privy Council. What the Land Commissions Act of 1917 did was to establish a Land Court with no appeal therefrom contrary to the Constitutional right of appeal. It was a Court unto itself with no means by which their decisions could be verified like a normal court. In that respect it was not a court and was certainly not the Land Court which the Constitutional amendment of 1916 had contemplated.

1.1.6 The judgment of Scott J. in Minister of Lands v Siieli Pangia (No. 9/1932) and Minister of Lands v Tunqi (No. 10/1932) ruled that all decisions made by the Land Commission were null and void. Ragnar Hyne C.J. agreed with this view. In delivering judgment in Kalaniualu v Minister of Lands (1937) Tonga Law Reports, Vol. II p.40 at 43 he said:

"In 1932 however, the validity of the Land Commissions Act 1917 was challenged and the Land Court, in an action brought by the Minister of Lands against Siieli Pangia for the recovery of the villages given him by the Lands Commission, held that the findings of the Commission were of no effect, the Commission being contrary to the Constitution, as amended by Law No. 25 of 1916".

1.1.7 Notwithstanding the controversy that surrounded the 1917 Commission it can claim credit for the eventual establishment of a separate Land Court for the Kingdom. The work and function of the 1917 Commission demonstrated the need that conceived its establishment. Refer to paragraph hereof on the Land Court.

Section G

- 1.1.8 We wish to make it clear that in referring to the 1917 Commission in this report it is not our desire nor intention to express any legal opinion on its Constitutional validity or otherwise. It was appointed under Cabinet decision No. 1287 on 26 October 1916 to make recommendations to Honourable Privy Council and so long as it acted within the ambit of that stated term of reference it would have avoided criticism.
- 1.1.9 The present Commission as can be seen from Section A1.1.1 of this report had its origin from Cabinet decision No. LSR1/1 dated 18 January 1983. Members of the Commission being conscious of the controversy and criticism surrounding the 1917 Commission properly and understandably sought proper appointment with proper terms of reference under the Royal Commissions Act. Its work and enquiry shall pursuant to Section 4(1) of the aforesaid Royal Commissions Act, be set out in a report and rendered to the King in Council on or before the date specified in its Terms of Reference namely the 31st day of January 1985.
- 1.1.10 Not unlike the previous Commission it has not escaped during its term of office criticism being levelled against it relating to its function and purpose. It is accepted that there will always be criticism and misapprehension and as long as there are people whether with or without vested interests. However there should be no misapprehension concerning its objectives, function, powers and work. It is hoped that this report will provide information which may or may not form the basis of future decisions by the appropriate people in authority. The Commission does not nor claims to have the right to make the final decisions. That prerogative is vested in the King, Privy Councillors, Cabinet and the Legislative Assembly.

Section G

1.1.11 Between the 1917 Land Commission and the present Commission there have been several ad hoc Land Committees appointed by Cabinet or His Majesty's Privy Council. In addition, there was a Parliamentary Land Committee set up in the 1930's to consider land questions. All these committees were required to investigate and report on single or special issues. Little information is available on the work carried out and it would appear that nothing of note had emerged therefrom for adoption.

SECTION H

1.1.1 THE LAND COURT

1.1.2 The Land Court is established under the Act to hear and determine all disputes, claims and questions of title affecting any land or interest in land in the Kingdom. Its jurisdiction is properly defined and there is a right of appeal from its decision to His Majesty's Privy Council which acts as the final appeal authority.

1.1.3 In its sittings the Judge of the Supreme Court presides as a Land Court Judge with an assessor selected by the Judge from the panel of assessors. The orders and judgments of the Court are formulated and pronounced by the Judge alone without the assessor having a voice or part therein. The Privy Council appeal hearings are presided over by His Majesty and Privy Councillors assisted by a senior and experienced overseas Judge.

1.1.4 Under the Constitution the Chief Justice was a member of the Privy Council but in 1942 the Constitution was amended and the Chief Justice was omitted therefrom. On the omission of the Chief Justice from the Privy Council it was enacted that when the Privy Council is sitting as a Court of Appeal, the Chief Justice shall be present to advise on points of law though he has no voice in the decision. The decisions of Privy Council is final.

1.1.5 The historical background leading to the establishment of the Land Court is interesting. Disputes relating to land has gone through 3 different phases of processing and methods of resolutions as follows:

(i) For the period 1875 to 1903 there was no legal procedures for resolution of disputes arising between parties. If any disputes arose it resolved by family or tribal arrangements.

(ii) For the period 1903 to 1917 land disputes were handled by the Minister of Lands, that power being vested in

Section II

the Minister under and by virtue by the 1903 Statutes. There was a right of appeal to the Privy Council against the Minister's decision.

(iii) For the period 1917 to 1921 land disputes were handled by the 1917 Land Commission under Section 13 of the Land Commissions Act 1917. There was no right of appeal to Privy Council - refer 1917 Land Commission Section

(iv) For the period 1921 to the date thereof all disputes, claims and questions of title affecting any land or interest in land vested in the Land Court. A proper Court was constituted with a right of appeal pursuant to Section 92 (now 90) of the Constitution.

1.1.6 By Act No. 3 of 1921, the 1917 Commission was demised and the Land Court was formally constituted with proper jurisdiction defined. The amendment to the Constitution by Law No. 15 of 1915 (of Section 92 (now 90) of the Constitution) applied as to appeals to Privy Council - refer Section G1.1.3 and G1.1.4 of this report.

1.1.7 The Commission considered the position of the Land Court, its role, workload, effects of its decisions and final appeals therefrom with a view to making such recommendations as may be appropriate. The following questions were raised for consideration viz:

- (a) With the Commission's wide terms of reviewing the law can the jurisdiction of the Court be restricted to questions of law only?
- (b) Is it a desirable and feasible alternative to establish a Land Board with one of its function is to receive disputes, investigate and determine the facts thereof and thereby reduce the Court's workload?

Section H

- (c) What are the other fields of activity of the Land Board and the cost factor in terms of manpower and finance?
- (d) What is the workload of the Land Court and is it functioning effectively with such a workload?
- (e) What is the state of case law and its effect on the Act?

1.1.8 It will be seen from paragraph B1.1.6 hereof that the first person summoned by the Commission to attend one of its meetings was the Registrar of the Supreme Court. He is also clerk of the Land Court. Please refer to sections 125, 140 and 141 of the Act Section J of this report where recommendations are made to alter the designation of clerk to "Registrar". The majority view of the Commission did not favour any restrictions being made to the jurisdiction of the Court. This view consequently eliminated any detailed considerations of questions (b) and (c).

1.1.9 Although the Commission made a conclusion on questions (a), (b) and (c) some of the rationale behind them are worthy of mention in this report. It was submitted that a large percentage of cases before the Court turned on factual issues only. Further there were also a certain number of cases which have been motivated by the wrong reasons, ill conceived and without legal or factual issues for determination. With regards to the first category of cases the workings of a Land Board properly constituted could be valuable to the Court systems and to the public generally.

1.1.10 A Land Board would have greater flexibility and informality. It would have the parties before it, hear their sides, and investigated the facts with the assistance of both parties as well as independently. The resources of the Ministry of Lands would be at its disposal to provide the Land Board

Section H

with factual records in its independent investigation. The factual determination would be easily and quickly resolved. The service could be less expensive to the public because although a reasonable filing fee would be payable for cases before the Land Board a lot of legal fees could be avoided. An important factor in favour of the Land Board was the possible elimination of delays in obtaining a decision.

1.1.11 The cost of operating such a Land Board was not determined as it was unnecessary with the view which the Commission had reached with question (a) above. Even with filing fees payable in respect of cases before the Land Board these would not have any significant bearing on the operational costs.

1.1.12 The Commission looked at the case load of the Court during the last 10 years namely from 1974 to 1983. (Refer to Department of Justice Annual Reports).

(1) Number of cases heard and decided by the Court:

1974 - 31 cases	1979 - 11 cases
1975 - 5 cases	1980 - 12 cases
1976 - 8 cases	1981 - 11 cases
1977 - 24 cases	1982 - 12 cases
1978 - 8 cases	1983 - 7 cases

(2) Appeals heard and decided by His Majesty's Privy Council for the same years.

1974 - 4 appeals	1979 - 2 appeals
1975 - 5 appeals	1980 - 3 appeals
1976 - 2 appeals	1981 - 2 appeals
1977 - 3 appeals	1982 - 5 appeals
1978 - 9 appeals	1983 - 4 appeals

1.1.13 After checking the number of cases heard by the Court in the ten year period referred to above it is noted that there are 135 cases before it awaiting resolution. These



Section H

cases are referred to as back log cases dating back to the year 1978. Justice is not dispensed if there are long delays without hearings or determination. The Commission noted with interest that in the second and third weeks of January 1985 the Court appointed fixture dates for a large number of these cases with approximately 6 cases being dismissed for want of prosecution.

- 1.1.14 A quick calculation of the number of cases filed from 1978 to 1984 and the number of cases determined by the Court give an approximate average of 32 cases per annum. The figure is not high for a Court of law to cope with but the consideration does not end there as the same Judge is also responsible for the entire case load of the Supreme Court in its civil and criminal jurisdiction. When the total case load of the Supreme Court and Land Court are taken together it is an impossible situation for one man to dispense justice for the whole of Tonga. It could be suggested that there is a denial of justice given the present situation referred to above.
- 1.1.15 The examination of decided and reported cases do not reveal any need for the Act to be restated to accord with those decisions. We considered the implications of the case of LISIATE PAHULU v MOSESE KAUFUSI (land case No. 2 of 1967) relating to tossing of the dice to decide the competing and equal rights of both claimants and saw no need for statutory enactment relative thereto.
- 1.1.16 Amongst a number of other cases we refer to the decision of the Privy Council on Mele M. Fifita v Minister of Lands and another. Appeal No. 9 of 1972: Vol. 3 T.L. (1962-1973) page 45 as to the Minister's powers under Section 49 of the Act to cancel registration of allotments with area in excess of the statutory areas defined under Section 7. The position outlined in the judgment was clear to avoid doubts notwithstanding the subsequent decision of the Privy Council with

◦ Section H

a contrary result. The result was different but the legal principles were decided within the exceptions laid down in Fifita v Minister of Lands (Supra).

- 1.1.17 In the main cases have turned on factual issues and on the proper application and interpretation of the law. These decisions do not affect the provisions of the Act as there was no room in the facts of decided cases for the application of the principles of equity. Further the law of equity has little or no application to our Act notwithstanding the provisions of Section 4 Civil Law (Cap. 14).

Recommendation

1. That designation of clerk of the Land Court be altered to Registrar of the Land Court: Refer to the Act for this recommendation.
2. That position relating to judiciary and any suggestions of denial of justice through delays be considered.
3. That present Court structure, jurisdiction and appeal procedure remain unchanged.

SECTION

I. 1.1.1 REPORTS

1.1.2 Attached and set out in full as attachments A and B are reports: (1) On the Samoan land system and (11) Ministry of Lands, its Staff structure and Office procedures.

Both these reports are self explanatory and need no further commentary under this section.

SECTION J

1.1.1 LAND ACT 1927

1.1.2 The concepts and fundamental principles underlying the Act are unique and not easily discernible for comparative purposes in any of the land systems of our neighbouring Pacific Island nations. It intrigued and lead the Commission to believe that it was based or taken from the land system of a country similar to Tonga. However the development of our land system and its basic concepts as referred to in this report is partially based on a draft constitution for Hawaii in the 1850's and principally on King George Tupou I's perceptions and visions of his people.

1.1.3 An American by the name Giles San Julian forwarded a copy of the Draft Constitution of Hawaii to the King of Tonga and which copy was translated by the Missionaries. A significant and pervading influence on land legislation was the King's lasting impression of poverty and landless people gained from personal observation at Sydney, Australia on his visit to that country. After observing people begging in the streets in Sydney and being advised that they were without home or land the King was alarmed that this could happen in a country with vast land areas. He vowed that his subjects shall not be without land. His speeches to the Legislative Assembly in 1875 and the years thereafter record His Royal and benevolent ambitions for His people. In this respect refer to the Tongan Government Gazettes, The Constitution and the Act.

1.1.4 Prior to the year 1927 there was no separate Land Act as such. The provisions relating to Land were contained in the Constitution and the general provision of the Law of Tonga. The Law of Tonga were sectionalised in consecutive order and subdivided under different headings e.g. Land or Police etc. The Land Act of 1927 restated and enlarged on the existing provisions of the law in an improved form without departure or detraction from the original concepts

Section 5

as enacted in 1875. Since 1927 there has been a continual process of minor patchwork amendments to keep up with changing conditions. In paragraph A1.1.10 hereof we referred to 1975 Amendments empowering the mortgaging of land to secure loans from the Banks as the most significant change to the land system since its inception.

1.1.5 The present review is a major in-depth examination and analysis of the principles of the Act, its applicability to today's conditions and changes for the future, practices outside it and whether they should be codified. The first step has been taken to have a thorough look at ourselves and our land system after a century with the same laws and relate it to the progress of time, life styles and values. If little or no change emerge from this review it should not be construed as a failure on the part of the Commission but should be regarded as a compliment to the foresight and vision of a great benefactor and Sovereign of this Kingdom.

1.1.6 The Act is interesting when read in conjunction with King George Tupou I's speeches because Part I and other sections of the Act have restated into law parts of His Majesty's speeches. Part I is appropriately entitled Declaratory. It contains references under Section 7 to the entitlement of every male Tongan aged 16 years to land. He is thereby guaranteed a home and tax allotment for subsistence farming so that he may be free from want and deprivation. A noble thought and a noble deed to render the Tongan a free person. Over the years Tongans have been a proud race but with our population growth and changes taking place in our society we see people today begging for money at the market place and outside the premises of the general stores. Events which King George Tupou I had strived to prevent its occurrence in Tonga.

Section J

- 1.1.7. The prohibition on disposition or agreements for benefit or profit were intended to protect and safeguard against a Tongan ever losing his home. Greed had no place under the Tongan land system and land is treated with some reverence. One cannot avoid the clear impression that the Act was formed and designed to accord with the King's desire and vision for his people. Given the principle that every male Tongan 16 years of age shall have free land, the law then is made so that he cannot dispose it. It can only pass on to the eldest male heir. The interests in the land is limited to the holder's lifetime. He cannot enter into any commercial transaction involving his land in case such transactions or arrangements may result in the loss of his land.
- 1.1.8. Once the basic concept underlying the Act, namely the right to be granted a tax allotment and that grant or ownership cannot be alienated was established all the other provisions were made to support and protect it. The prohibitions on certain dealings and penalties are the support and protection arrangement. The next major aspect of the Act is concerned with the succession to this right and the procedures for the granting and obtaining of it. The life interest estate of every Tongan holder under the Act was used to emphasise the inalienability of the land. A device which in more recent years has raised problems and will continue to do so in the future. It was partly for this reason and partly on the belief that once land is granted to a Tongan he becomes the owner of it, that the concept of freeholding was conceived. Ownership had to be more definitive and meaningful. It could be made freehold with the inalienability of land still retained in the Act subject to exemptions within the family circle including more recognition of daughters or women's rights. The remainder of the Act are concerned with powers, procedures and its management, operation and enforcement.

Section J

1.1.9 The work and proposals contained in this report do not depart from the principal concept of the Act. The right of every male Tongan 16 years of age is not changed or compromised. We have made statements to the effect that this heritage is no longer capable of complete fulfilment.

1.1.10 Subject to the guidelines and statement of objectives referred to in paragraph B1.1.3 hereof the review of the Act were directed at 3 main areas as follows:

- (i) Life interest of holders. It is proposed to amend this to a limited freehold interest with the inalienability of land still retained in the Act subject to dispositions within the family circle.
- (ii) Abolition of certain sections which are obsolete or redundant.
- (iii) Amendments to the Act for purposes of updating to accord with current practices, clarification and improvements.

1.1.11 The statistical effect of the review to the Act may be summarised as follows:

- (a) The number of sections which had new sections added thereto totalled 17.
- (b) The total number of sections which were reworded, amended or improved came to 55.
- (c) The number of sections to be repealed totalled 30.
- (d) The number of sections not altered in any way totalled 71.

Section J

- (iii) Amendments to the Act for purposes of updating to accord with current practices, clarification and improvements.

1.1.12 The detailed review of the Act with explanatory notes and recommendations on every section is set out hereunder:

Long Title to the Act: An Act Relating in Land.

Explanatory Notes: The wording of the long title above appears grammatically incorrect. Previous recitals contained in the various editions of the Laws of Tonga were examined. Rewording of the long title is recommended.

Recommendation: An Act to Revise and Consolidate the Law Relating to Land.

1.1.13 Section 1: This Act may be cited as The Land Act.

Explanatory Notes: No change is needed.

Recommendation: No change.

1.1.14 Section 2: In this Act unless the context otherwise requires -

"Court" means the Land Court;  
"Minister" means the Minister of Lands, the Governors of Vava'u and Ha'apai when acting as Deputy Minister, and any other person duly appointed to act for the Minister;

"foreshore" means the land adjacent to the sea alternately covered and left dry by the ordinary flow and ebb of the tides and all land adjoining thereunto lying with 15.24 metres of the high water mark of the ordinary tides;

"prescribed" means prescribed by this Act or regulations made hereunder;

"registered" in reference to any document means registered under this Act or regulations made hereunder;

"landholder" or "holder" means -

- (a) as regards Crown Land the Minister of Lands;



Section J

- (b) any Tongan subject holding an hereditary estate (tofi'a), a tax allotment ('api kolo));
- (c) any Tongan subject claiming to be interested in land which he is legally capable to hold;
- (d) any trustee duly appointed by the King, the Minister, or the Court on behalf of any person entitled to succeed to any land on reaching the lawful age of succession in respect of such land;
- (e) any person appointed as or acting as trustee or representative for any person beneficially entitled to any land or interest in land;
- (f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise.

Explanatory Notes:

- (i) The present definitions are adequate. The use of the word "Crown" in the Act without definition has raised and caused some confusion because of the use of word "King" in the Constitution.
- (ii) The word "King" is defined in the Interpretation Act whereas "Crown" is not. To eliminate any doubts a new definition is recommended.
- (iii) The word "Minister" has been redefined. Refer Section 21 of the Act which refer to powers delegated by the Minister. The present definition is too wide.

Section J

Recommendation:

Add a new definition -

- "Crown" - means the King in Council, or  
- means the King as the symbol  
of the people of Tonga as a  
whole, or  
- means the Government of Tonga.  
"Minister" - means the Minister of Lands.

PART I - GENERAL

DIVISION I

DECLARATORY

1.1.15 Section 3:

All the land of the Kingdom is the property of the Crown.

Explanatory Notes:

- (i) The wording of this section is shorter than Section 104 of the Constitution. There is no need for any change but the question raised is whether it should follow the wording of the Constitution.
- (ii) The recommendation below is that it should follow that format and two options are offered.

Recommendation:

All the land of the Kingdom is the property of the King and he may grant to the nobles and matapules one or more estates to become their hereditary estates and the remainder of the land not so granted shall become and form Crown lands, or

All the land of the Kingdom is the property of the Crown from which the King may grant to the nobles and matapules one or more estates to become their hereditary estates.

Section J

1.1.5

Section 4:

The interest of a holder in any hereditary estate, tax allotment or town allotment is a life interest subject to the prescribed conditions.

Explanatory Notes:

- (i) Should the tentative freehold proposal be adopted it will be necessary to add a proviso to cover its implementation here and other sections following. If the proposal is not adopted then no further addition or alteration is required.

Recommendation:

Add - Provided that the holder of a tax or town allotment may during his lifetime grant the whole or part of his allotment of such size as allowed by law to any of his children, grandchildren or brothers.

1.1.17

Section 5:

Every estate (tofi'a) and allotment ('api) is hereditary according to the prescribed rules of succession.

Explanatory Notes:

- (i) Refer to notes under Section 4 above. Addition is necessary for the same reasons.

Recommendation:

Add at the beginning - Subject to the rights of an allotment holder in Section 4 to make a grant of his allotment.

Section J

1.1.18 Section 6:

Every verbal or documentary disposition by a holder of any estate (tofi'a) or allotment ('api) which purports to effect a voluntary conveyance, an out-and-out sale, or a devise by will of such estate or allotment is null and void.

Explanatory Notes:

- (1) An addition is necessary for the same reasons appearing under notes to Section 4 relating to Tentative Freehold proposal.

Recommendation:

Add at beginning - Subject to the rights of an allotment holder in Section 4 to make a grant of his allotment.

1.1.19 Section 7:

Every male Tongan subject by birth upon making application on the prescribed form to the Minister of Lands shall be entitled to receive subject to the provisions of this Act a grant of land not exceeding  $3\frac{1}{2}$  hectares as a tax allotment and where any such grants is less than  $3\frac{1}{2}$  hectares the Minister may from time to time as land becomes available and as he deems expedient make further grants to such holder until the area granted to him as a tax allotment has a total area of  $3\frac{1}{2}$  hectares. He shall also be entitled to receive on making application as aforesaid and subject to the provisions of this Act a grant of an area not exceeding 1600 sq. metres in a town as a town allotment.

Explanatory Notes:

- (1) This is the section dealing with the entitlement of every male Tongan subject by birth to a tax allotment.

Section J

(ii) Refer to comments in paragraph hereof as to His Majesty's King George Tupou I desire that His people shall not be landless.

(iii) No change is to be made to the intent and purpose of the section. However circumstances have changed and a number of Tongans who are holders of tax allotments have renounced their Tongan Nationality and adopted foreign nationalities. If careful note is made of the wording of the section above it can be observed that it refers to Tongan subject by birth. The Commission is of the view that one's entitlement to land in Tonga is based on Tongan citizenship and through the duration of that citizenship. Once it ceases or is expressly renounced as in the case of naturalisation and adoption of a foreign citizenship the right to land does not exist. He is not a Tongan anymore. The recommendation below updates the law to current practices.

Recommendation:

Add new subsection (2) as follows:  
7(2) Every Tongan subject who changes his nationality to that of another country shall not be entitled to a grant of land under this section and any allotment held by such a person shall be de-registered and treated in like manner as if the holder had died and the heir who is a Tongan subject shall be entitled to inherit the allotment in accordance with the provisions of this Act.

Section J

1.1.20 Section 8:

Subject to the provisions of this Act relating to surrender the grant, if the applicant be lawfully residing on an hereditary estate, shall be made from the lands in such hereditary estate; and if the applicant is lawfully residing upon Crown Land shall be made from Crown Land:

Provided always that land comprised in an hereditary estate shall not be granted as a tax or town allotment without prior consultation with the holder of the hereditary estate.

Explanatory Notes:

(i) This is a mandatory provision as to granting of allotments from hereditary estates and Crown Land. It elaborates and extends Section 7.

(ii) It was decided that the word shall be replaced by the word may but on reflection once altered will weaken the meaning of this section. It will enable an estate holder to refuse distribution of land on the grounds that it is not mandatory for a grant or grants to be made.

(iii) The proviso should be reworded to improve it. There is no change to its general purpose.

Recommendation:

Proviso to read -

"No land comprised in an hereditary estate shall be granted as a tax or town allotment without prior consultation with the holder of the hereditary estate."

1.1.21 Section 9:

The lands specifically described in column one of the Schedule I are the hereditary estates held by the nobles and matapules whose names are set out in column two of the said Schedule.

Section J

Explanatory Notes: (i) No change proposed. The Commission has been guided by provisions in the Constitution i.e. Section 20 prohibiting retrospective laws.

Recommendation: No change.

1.1.22 Section 10: All lands other than those described in Schedule I are Crown lands and there shall be set aside therefrom the lands specifically described in Schedule II as the Royal Estates for the use of the Sovereign for the time being and there shall also be set aside therefrom the lands described in Schedule III as the Royal Family Estate. A life interest in any of the lands described in Schedule III or any portion thereof may be granted to such persons as the Sovereign for the time being may appoint.

Explanatory Notes: (i) Refer notes under Section 9 above.

Recommendation: No change.

1.1.23 Section 11: The King with the consent of the Privy Council and subject to the provisions of this Act, may grant from the Crown Lands hereditary estates to Tongan subjects who are holders of hereditary estates or who may at any time be granted by royal letters patent a title of honour.

Explanatory Notes: (i) Refer wording of Section 104 of the Constitution which is at variance with this section. Require amendment as set out in recommendation.

Recommendation: The King subject to the provisions of the Act may grant from Crown Lands hereditary estates to Tongan subjects who are holders of hereditary estates or who may at any time be granted by royal letters patent a title of honour.

Section J

DIVISION II

PENALTIES FOR UNLAWFULLY DEALING WITH LAND

1.1.24 Section 12:

Any landholder who sells or attempts to sell any land out-and-out to any other person shall be liable on conviction therefore to a term of imprisonment not exceeding ten years.

Explanatory Notes:

- (i) After considering the totality of the written and oral submissions it is clear that there is overwhelming support not to interfere with or alter this section.

Recommendation: No change.

1.1.25 Section 13:

Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or a part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for any period not exceeding twelve months or both.

Explanatory Notes:

- (i) With development and growth of trade and commerce it is considered that this section is too restrictive. Flexibility is necessary with our changing society and this can be achieved without any loss. If this section is repealed the concept of eligibility to land and its inalienability will remain intact.
- (ii) Also refer to Section 55A the purpose of which conflicts with this section.

Recommendation:

That Section 13 be repealed.



Section J

1.1.26 Section 14: It is unlawful for any alien to hold or to reside upon or to occupy any land without having first obtained from the Minister of Lands a permit so to do issued by him in exercise of the powers conferred under sub-section four of Section nineteen of this Act. Any alien who contravenes the provisions of this section shall on conviction be liable to a fine not exceeding ten pounds or in default of payment to imprisonment for any period not exceeding three months.

Explanatory Notes: (i) In the context of today's conditions, contact with the outside world and continual flow of tourist and its promotion have rendered this type of provision inoperative out-moded and discriminative.

Recommendation: That Section 14 be repealed.

1.1.27 Section 15: Any landholder who allows an alien to reside upon or occupy any part of his holding shall, unless such alien has been granted a lease or permit in accordance with this Act, be guilty of an offence and on conviction therefore shall be liable to a fine not exceeding ten pounds or in default of payment to imprisonment for any period not exceeding three months.

Explanatory Notes: (i) Comments under Section 14 are applicable to this section.

Recommendation: That Section 15 be repealed.

1.1.28 Section 16: It shall be unlawful for any Tongan subject to make any mortgage agreement or other document pledging or charging or selling his growing crops of coconuts, yams or other produce or any part thereof. Any person acting in contravention of this section shall on conviction be liable to a fine not exceeding fifty pounds or to imprisonment for an period not exceeding six months.

Section J

Explanatory Notes: (1) This provision is in conflict with the general intent and purpose of the 1976 Amendments. Also refer to paragraph hereof.

Recommendation: That Section 16 be repealed.

DIVISION III

LAND HELD BY CHARITABLE BODIES

1.1.29 Section 17: Religious bodies, charitable and social organisations, may subject to the provisions of this Act hold land upon lease: Provided that no land shall be granted upon lease in any town to any religious body unless there are at least thirty adherents of that body resident in such town and that each adherent has attained the age of sixteen years.

Explanatory Notes: (1) This provision is necessary to empower the organisations referred to therein to hold land on lease. No change required.

Recommendation: No change.

1.1.30 Section 18: (1) Religious bodies and charitable and social organisations holding land on lease shall not have the right to use such land for any other than the original purposes of the body or organisation declared at the time of the making of the lease, or to transfer or sub-let such land, without the prior consent of Cabinet.

(2) If any such body or organisation contravenes the provisions of this section the Minister may with the consent of the Cabinet institute proceedings in the Land Court against such body or organisation claiming therein the cancellation of its lease and on proof of the contravention of this section by such

Section J

body or organisation the Court shall order such lease to be delivered up to be cancelled and upon cancellation of the lease the lands therein specified if situate in an hereditary estate (tofi'a) or town allotment ('api kolo) shall revert to the holder and if situate elsewhere shall revert to the Crown.

(3) It shall be unlawful for any person holding a town allotment or any land upon lease other than a charitable lease to erect thereon a place of worship and any holder of a town allotment or lessee acting in violation of this section shall be liable to forfeiture of his town allotment or to the cancellation of his lease or sub-lease (as the case may be) upon the institution in either case by the Minister with the consent of the Cabinet of such legal proceedings as are specified in the immediately preceding subsection, and shall also be liable upon conviction to a fine not exceeding ten pounds.

Explanatory Notes:

(i) The present provisions require elaboration and enlargement. Churches have charitable objects and in the main serve the public interest notwithstanding some contrary views.

Its existence is continuous from generations to generations and people who lease their land to Churches usually do so on the understanding that it is more or less on a permanent basis. If that is not the situation they can contractually provide that there will be no right of renewal.

(ii) Churches need special consideration because of the special role they perform in our society, that and for other reasons additional provisions are recommended below.

Recommendation:

- (1) (a) Religious bodies and charitable and social organisations holding land on lease shall not use such land for any other than the purposes stated in its original application unless prior approval for such use has been given by Cabinet.
- (b) Unless otherwise agreed by the parties, a lease to a religious body, charitable and social organisation shall have a right of renewal upon notice given by the lessee to the lessor at least 6 months prior to the expiration of the lease but such a lease shall not be transferred or sub-letted without the prior consent of Cabinet.
- (2) No change.
- (3) No change.

PART II - ADMINISTRATION

DIVISION I

POWER OF MINISTER OF LANDS

1.1.31

Section 19:

- (1) The Minister of Lands is the representative of the Crown in all matters concerning the land of the Kingdom.
- (2) He shall grant allotments to Tongan subjects duly entitled thereto by law.
- (3) He shall grant leases and permits with the consent of Cabinet: Provided that the consent of His Majesty in Council is required where the period of lease exceeds ninety-nine years or where the period of renewal of any lease added to any previous renewals and to the original period of the lease exceeds ninety-nine years.

Section J

- (4) He shall issue permits for foreigners to reside upon the premises of a Tongan subject.
- (5) He shall act as Registrar-General of all land titles.
- (6) He shall authorise all surveys and order the opening of all new roads, but shall not close any road except with the consent of the Cabinet.
- (7) He shall collect the rents for all allotments on Crown Land, and all leases and permits; and where the land leased is part of any hereditary estate or an allotment shall pay the lease rent into the Treasury and shall issue a voucher in favour of the holder of the estate or allotment for that amount of rent less ten per centum thereof.
- (8) He shall in every case where no application is made to the Court for the appointment of a Trustee or Trustees appoint one or more fit and proper persons to act with or without remuneration as trustee or trustees for any Tongan other than a noble or matapule who being entitled to land is under the age appointed by law for succeeding thereto.
- (9) He shall require any trustee or trustees appointed in accordance with the preceding subsection to submit accounts of his or their trust estates and he may dismiss any trustee guilty of mismanagement, breach of trust or fraud in connection with the trust estate and he may appoint another trustee in his stead.
- (10) He shall approve mortgages and assignments thereof.

Explanatory Notes:

- (i) Requires updating and recommendation below are self explanatory and cover situation.
- (ii) For repeal of subsection 4 refer to notes under Section 14 above.

Section J

- (iii) In respect of subsection 7 refer to notes under Section 31 hereafter.
- (iv) A new provision is added in subsection 9 for appointment and removal of trustees on grounds set out thereunder.

Recommendation:

No change except the following:

- 19(4) Repeal.
- 19(7) Change ten per centum to five per centum.
- 19(9) He shall require any trustee or trustees appointed in accordance with the preceding subsection to submit accounts of his or their trust estates and he may dismiss any trustee guilty of mismanagement, breach of trust, fraud in connection with the trust estate or who in his opinion is not a fit and proper person and he may appoint another trustee in his stead.

1.1.32 Section 20:

There shall be provided from the Public Funds of the Kingdom -

- (a) a suitable office in Nuku'alofa for the use of the Minister and for the safe keeping of all documents and registers relating to titles;
- (b) suitable fire proof storage in the offices of the Governors or other persons duly appointed to act for the Minister in places other than Nuku'alofa, Neiafu (Vava'u) and Lifuka (Ha'apai).

Explanatory Notes:

- (i) This provision is self explanatory and needs no further attention.

Section J

Recommendation: No change.

Section 21:

Where in this Act any authority is given to or any duty is imposed upon the Minister the authority may be exercised and, subject to any express exemption hereinafter provided, the duty shall be performed by the Governors of Ha'apai and Vava'u in their respective districts or, in any other districts, by any person appointed by the Cabinet to act for the Minister.

Explanatory Notes:

- (i) Powers of delegation is necessary.  
No amendments needed.

Recommendation:

No change.

1.1.33

Section 22:

- (1) The King with the consent of the Privy Council may, from time to time, make regulations providing for all purposes whether general or to meet particular cases that may be convenient for the administration of this Act or that may be necessary or expedient to carry out the objects and purposes of this Act and where there may be in this Act no provision or no sufficient provision in respect of any matter or thing necessary or expedient to give effect to this Act, providing for or supplying such omission or insufficiency and without prejudice to the foregoing powers, providing for all or any of the matters following, that is to say -

- (a) prescribing and defining the manner of doing or performing any act or thing under or for the purposes of this Act, and the time when or within which it shall be done or performed;
- (b) prescribing forms of registers, books, documents, instruments and writings, and the conditions, stipulations, reservations and exceptions that shall be inserted or that shall be implied in grants, leases, permits, and other instruments;

Section J

- (c) defining the duties of officers;
- (d) regulating the procedure in applications to the Minister of Lands;
- (e) regulating the cutting, getting, and removal of timber, sand, stone, metals, and material on and from Crown Land or any holding;
- (f) regulating common and public reserves in cases not otherwise provided by law.

(2) The regulations may impose fees in respect of any inspection, survey, lease, licence, registration, certificate, permit or other matter granted or made by any officer or other person under this Act; and in respect of any application made to any officer or other person under this Act:

Provided that the fees set out in Schedule IV shall be the fees imposed until the same have been varied or revoked in pursuance of the authority given by this section.

(3) The regulations may impose royalties to be paid to the Crown in respect of timber, stone, sand, and metals or other material cut, got and removed pursuant to any permits issued under this Act.

(4) Any person who offends against any regulation shall be liable to a penalty not exceeding \$1.00.

Explanatory Notes:

(1) No reorganisation or structuring necessary and matter requiring change is penalty only.

Recommendation:

No change except sub-section (4) which would read:

(4) Any person who offends against any regulation shall be liable to a penalty not exceeding five hundred pa'anga.



Section J

DIVISION II

DEFINITION OF AREAS AND BOUNDARIES

1.1.34 Section 23:

(1)

The Minister shall endeavour to define the holdings and boundaries of every landholder and for such purpose he is empowered to serve any landholder with a notice in writing requiring such landholder to attend at the office of the Minister for the district in which such landholder's land is situated and to define the area and boundaries of his land.

(2)

Where any landholder having been served with such notice as is mentioned in subsection one of this section neglects or refuses to attend at the office of the Minister it shall be lawful for the Minister after the expiration of thirty days from the service of such notice to institute proceedings against such landholder in the Court for the purpose of determining the area and boundaries of such landholder's land and all disputes in connection therewith.

(3)

Where a landholder having been served with the notice mentioned in subsection one of this section attends in obedience thereto at the office of the Minister and it becomes apparent to the Minister that there is a dispute concerning the area or boundary of such landholder's land the Minister may order such landholder to take proceedings in the Court for the determination of any such dispute.

(4)

A notice under this section may be served upon the landholder or his representative in the district in which the land in respect of which the notice is given is situated.

1.1.35 Section 24:

If there is any dispute in regard to the area or boundaries of his holding as defined by any landholder or in regard to any other matter concerning his land the Minister may direct that a survey be made of the area or boundaries of such land.

Section J

1.1.36 Section 25:

Should there be no dispute in reference to any area or boundary the Minister shall have a survey made of the land and file a copy of such survey in the office of the Minister at Nuku'alofa.

1.1.37 Section 26:

After any decision of the Court or (where such decision has been appealed from) after the decision of the Appeal Court the Minister shall cause a survey to be made of the boundaries of the holding as finally determined by such decision and shall cause a copy of such survey to be filed in the office of the Minister of Nuku'alofa.

1.1.38 Section 27:

Should any landholder after being ordered to do so by the Minister neglect or fail to bring an action in the Court within fourteen days of being so ordered and the Minister takes action in accordance with subsection two of section twenty-three the Court may order the landholder to pay all costs of the action.

1.1.39 Section 28:

In the case of any dispute as to the area or boundaries of a holding the decision of the Court or if there is an appeal the decision of the Appeal Court shall be final and in any case where there is no dispute the determination by the Minister and the landholder of the area and boundaries shall be conclusive and no further action claim or demand in regard thereto shall be maintainable.

1.1.40 Section 29:

(1) Upon the boundaries of any allotment having been determined in the manner prescribed by this Part of this Act the Minister for the district in which such allotment is situated and the Minister shall grant such holder a deed of grant in the form in Schedule V.

(2) Upon the boundaries of any hereditary estate having been determined in the manner prescribed by this Part of this Act the Minister shall deliver to the holder a tofi'a certificate in the form set out in Schedule VI.

Explanatory Notes:

(1) These are empowering and procedural provisions - they are adequate for the purposes which they were intended to serve. No amendments or additions necessary.

Section J

Recommendation: No change.

PART III - HEREDITARY ESTATES

DIVISION I

RIGHTS OF HOLDERS

1.1.41 Section 30:

Any land granted as an hereditary estate shall descend to the lawful heirs of the body of the grantee in accordance with section one hundred and eleven of the Constitution:

Provided that no person shall be granted or be permitted to succeed to a noble's or matapule's hereditary estate who has been convicted of felony and has not been pardoned, or who is insane or imbecile.

Explanatory Notes:

- (i) This provision is important and necessary. It deals with devolution of hereditary estates and the exclusion of certain categories of persons on public interest grounds.
- (ii) We see no reason to alter its general purpose except to redefine persons convicted of a felony to read persons convicted of an offence punishable by imprisonment for more than 2 years.
- (iii) It would have twofold effects. First it widens the type of offence and secondly it limits it to more serious offences with imprisonment of more than 2 years.
- (iv) Also this proposed amendment ties up with the Constitutional disability of a noble who has committed an offence punishable by imprisonment for more than 2 years to be elected to the Legislative Assembly: Refer Sections 23 and 63 of the Constitution.

Section J

Recommendation:

No change except the proviso which would read: Provided that no person shall be granted or be permitted to succeed to a noble's or matapule's hereditary estate who has been convicted of an offence punishable by imprisonment for more than two years and has not been pardoned, or who is insane or imbecile.

1.1.42 Section 31:

The holder of an hereditary estate shall receive from every tax allotment holder on that estate the rent prescribed by this Act without deduction. He shall also receive ninety per centum of the rent reserved in any lease demising a part of the estate for a term of years.

Explanatory Notes:

- (i) This section deals with the right of an estate holder to receive the rent of 80 seniti for tax allotments on his estate without deduction.
- (ii) He is also entitled to receive the rental in respect of land leased from his estate less a Commission of 10% payable as administration charge or service charge to Government.
- (iii) At the 1984 parliamentary session there was a motion from one of the estate holders to repeal or abolish the 10% administration charge on the grounds that it was not justifiable. It was also suggested that it was a form of special taxation on estate holders.
- (iv) These arguments are not valid. Every Government applies in a limited way the user pay principle to support the services it provides.

Section J

The judiciary charge filing fees, these fees were increased at the beginning of 1985. The Police charge for drivers licenses and many other types of licenses. The Post Office and Telegraph also charge for their service. One can recite a host of public services provided which members of the public must pay. In the case of the 10% administration charge for leases processed by the Ministry is required to administer these leases, serve notices on lessees, demand payments involving Government postage, receive payments transfer same to Treasury and disburse the rents to estate holders and keep proper records to protect the interests of the estate holder and lessee. It is a necessary and desirable function which in some cases avoid trouble between the parties. An important consideration to bear in mind is that in many or all cases of leasing it is a commercial transaction for estate holders. Why shouldn't they pay for the service?

- (v) There is also a clear distinction between service charges and taxation - the two are separate.
- (vi) The Commission has assessed the value of the service provided and believe that a figure of 5% would be reasonable in the circumstances.

Section J

(vii) Also note the recommendation to Section 19(7) above similarly reducing the charge to 5%.

Recommendation:

The holder of an hereditary estate shall receive from every allotment holder on that estate the rent prescribed by this Act without deduction. He shall also receive ninety-five per centum of the rent reserved in any lease demising part of the estate for a term of years.

1.1.43 Section 32:

The holder of an hereditary estate shall not dispossess in any manner other than the manner provided by the Act any holder of a tax or town allotment of his allotment. Any holder of an hereditary estate acting in contravention of this section shall be liable upon conviction to a fine not exceeding ten pounds or to imprisonment for a period not exceeding three months and shall also be liable in damages at the suit of the dispossessed holder, and the Court shall order the allotment to be returned to the dispossessed holder.

Explanatory Notes:

- (i) The general purpose of this section requires no change.
- (ii) To give greater protection to a holder of a tax or town allotment it is appropriate to increase the fine to \$100 from \$20.
- (iii) By increasing the fine it might act as a deterrent for estate holders not to break the law.

Recommendation:

No change except the limit of the fine should go up to \$100.

Section J

1.1.44 Section 33:

(1) The holder of an hereditary estate may subject to the provisions of this Act lease such portions of the estate as have not been granted as allotments or will not, in the opinion of the Cabinet, be required for allotments within the term of the lease.

The opinion of the Cabinet in such matter shall be conclusive and final.

(2) The total amount of land leased on an hereditary estate under the foregoing subsection (other than land leased to religious bodies, charitable institutions, boards established under the Agricultural Organisation Act or the Electric Power Boards Act and Producers Cooperative Societies established under the Agricultural Organisation Act) shall in no case exceed five per cent of the total area of that hereditary estate:

Provided that nothing in this section shall affect in any way whatsoever any lease granted prior to the tenth day of September nineteen hundred and forty-five.

Explanatory Notes:

(i) The restriction on leasing of hereditary estates to 5% thereof is being tightened. Refer to paragraph IV S31 hereof for further comments on this.

(ii) The exemptions of religious bodies, charitable institutions, Government and Boards are removed.

(iii) The purpose of this exercise is aimed at making more land available for allotments.

(iv) His Majesty's Privy Council is being given an unfettered discretion to waive the restriction but the Commission hope that it may only do so in cases involving the public interest.

Section J

Recommendation:

- (1) No change.
- (2) The total amount of land leased under the foregoing sub-section other than land leased for a public purpose shall in no case exceed five percent of the total area of that hereditary estate. A decision by Privy Council as to whether a lease is for a public purpose shall be conclusive and final:

Provided that nothing in this section shall effect in any way any lease granted prior to the day of 19 .

1.1.45 Section 34:

- (1) The holder of an hereditary estate shall admit into possession any person who has been granted an allotment upon his estate by the Minister:

Provided that a holder shall be permitted to reserve a portion of the hereditary estate, being of such area as may be determined by regulation, for the sole use of himself and his successors in title.

- (2) Before making a grant of a tax allotment out of an hereditary estate the Minister shall consult the holder thereof and hear any objections he may make to the grant being made and where the Minister and the holder of the hereditary estate fail to agree, the Minister shall nevertheless grant the land as a tax allotment but such grant shall within three months of the making thereof be liable to review by the Court, the decision of which on the matter shall be final.

Explanatory Notes:

- (i) No change except proviso which should be clarified by the insertion after the word Regulation the following made by the King in Privy Council.



Section J

- (ii) As it stands now in the proviso it means regulation made under the Act which would be the responsibility of the Minister of Lands to determine.
- (iii) The view is taken that Hereditary estates were granted by the King under Section 104 of the Constitution and any determination of land reserved for the use of the estate holder should similarly be made by the King in Council.
- (iv) Such a determination affects the rights of the estate holders and is different from other matters under the Act which is administered by the Minister of Lands.

Recommendation:

The proviso to now read:

Provided that a holder shall be permitted to reserve a portion of the hereditary estate, being of such area as may be determined by regulation made by the King in Privy Council, for the sole use of himself and his successors in title.

1.1.46 Section 35:

- (1) Nothing contained in section thirty-four hereof shall be deemed or construed as prohibiting any holder of an hereditary estate from refusing permission to take up residence on his hereditary estate to any person who belongs to another locality or holds a tax allotment elsewhere even though the wife of such person belongs to a village upon such holder's estate.

Section J

- (2) Any such person coming to reside on an estate may be ordered in writing by the holder to leave, and if that person refuses or fails to obey such order within seven days he shall be liable on conviction therefore to a fine not exceeding two pounds and in default of payment to imprisonment for any period not exceeding one month.

Explanatory Notes:

- (i) This provision is out of date with current practice general movement of people.
- (ii) With the shortage of land and growth of our population it is unrealistic to have this type of restriction which is not enforced at present.

Recommendation:

Repealed.

1.1.47 Section 36:

- (1) Where on the expiration of any lease of land forming part of any hereditary estate or of an allotment the holder of such hereditary estate or allotment fails to agree to the grant of a new lease for a period equal to that of the expiring lease at a rent not greater than that reserved in such expiring lease within three months after a request in writing so to do by the holder of such expiring lease it shall be lawful for the Minister at the direction of Cabinet to grant to such holder of such expiring lease a further lease for a period not exceeding that granted in the expiring lease and such further lease shall be as effective for all purposes as though granted by the holder of the hereditary estate or allotment of which it forms part:

Provided always that no lease shall be granted under this section whereby the total period of the original lease and any leases granted under this section shall exceed ninety-nine years unless the prior consent of His Majesty in Council has been obtained.

Section J

Provided further that no lease shall be granted under this section unless a request in writing for a new lease shall have been served on the holder of the hereditary estate or allotment of which the land leased forms part not less than six months before the termination of the expiring lease.

- (2) On the expiration of any lease of land forming part of Government land it shall be lawful for the Minister at the direction of Cabinet after a request in writing so to do by the holder of the expiring lease to grant to such holder of such expiring lease a further lease for a period not exceeding that granted in the expiring lease:

Provided that no lease shall be granted under this section whereby the total period of the original lease and any leases granted under this section shall exceed ninety-nine years, unless the prior consent of His Majesty in Council has been obtained.

- (3) No lease shall be granted under this section unless all rent due shall have been paid and all other terms and conditions of the expiring lease shall have been observed and performed.

Explanatory Notes:

- (i) The right of renewal and procedure prescribed under this section are cumbersome and difficult to interpret.
- (ii) The view is taken that these provisions be updated and simplified.
- (iii) Refer to Section 18(1)(b) and the recommendation thereunder. The forms for charitable leases e.g. Church have a right of renewal exercisable by the lessee up to the date of expiration.

Section J

- (iv) The proposals under Section 18 and 36 is to bring the question into line and clarify it. At this juncture please refer to the Constitution - Section 106 and Explanatory Notes.
- (v) All leases prior to 1976 have options for renewal.
- (vi) Under the proposed rewording of Section 36 a more uniform situation will be achieved in that the form of lease will clearly state that a renewal right is not granted or that this section applies.

Recommendation:

Repeal subsections 1 and 2 and replace it with:

- (1) Unless otherwise agreed upon by the parties every lease under this Act shall have a right of renewal upon written notice given by lessee to the lessor at least three months prior to the expiration of the lease. The renewed lease shall be

Section J

on the same terms, conditions and covenants as the expiring lease except the rental payments thereunder which shall be agreed upon by the parties and failing agreement the rental payment shall be determined by Minister of Lands whose decision shall be final.

(2) No change.

(3) The parties to a lease may by agreement exclude the application of this section to their lease.

DIVISION II

DEVOLUTION OF HEREDITARY ESTATES ON DEATH; TRUSTEESHIP

1.1.48

Section 37:

Any holder of any hereditary estate convicted of felony or certified by a medical officer to be insane or imbecile shall as from the date of such conviction or certificate cease to hold such title and the estate.

Explanatory Notes:

(1) The proposed amendment to this section is similar to that under the proviso to Section 30. Please refer to the notes thereunder.

Recommendation:

Any holder of any hereditary estate convicted of an offence punishable by imprisonment for more than two years and has not been pardoned, or certified by a medical doctor ...

Section J

1.1.49 Section 38:

- (1) Upon the death of a holder of any hereditary estate or upon a conviction of felony or upon his being certified as insane or imbecile by a medical officer His Majesty shall cause the name of the lawful successor to the title of such holder to be published in the Gazette together with the date of his succession thereto which shall be the day following that on which the death of the holder took place or on which the holder was convicted of felony or was certified by a medical officer as insane or imbecile.
- (2) On a convenient day not more than six months after the date of such publication, or, where the lawful successor is on such date a minor, six months after the day he attains the age of twenty-one years, His Majesty shall summon the person so named to appear before him in the Privy Council and there to take oath of allegiance set out in Schedule VII.
- (3) The clerk of the Privy Council shall keep a roll of all persons holding hereditary estates.

Explanatory Notes:

- (i) The general purpose of this section is not being altered.
- (ii) The conviction of felony is replaced by an offence punishable by imprisonment for more than two years. Refer to notes under Section 30.
- (iii) The redrafting of the section is an improvement.

Recommendation:

- (1) Upon the death of a holder of an hereditary estate or upon a conviction of an offence punishable by imprisonment for more than two years and has not been pardoned, or upon his being certified as insane or imbecile by the Director of Health and one other qualified

Section J

medical officer His Majesty shall cause the name of the lawful successor to the title of such holder to be published in the Gazette together with the date of his succession thereto which shall be the day following that on which the death of the holder took place or on which the holder was convicted or certified insane or imbecile as aforementioned.

(2) No change.

(3) No change.

1.1.50 Section 39:

The successor to the title if he has attained the age of twenty-one years shall as from the date of succession published in the Gazette possess and enjoy the hereditary estate appurtenant to the title to which he has succeeded together with the rents and profits thereof and all other rights and privileges attached to the title.

Explanatory Notes:

(i) The general purpose of this section does not require any change.

Recommendation:

No change.

1.1.51 Section 40:

(1) Whenever upon the death of a holder of an hereditary estate or upon his being convicted of felony or being duly certified as insane or imbecile his lawful successor has not attained the age of twenty-one years His Majesty shall appoint one or more fit and proper persons to act as trustees for such successor during his minority for the purpose of protecting, preserving and managing the hereditary estate appurtenant to the title to which he has succeeded and of

Section J

applying for his maintenance and benefit all moneys or profits arising from such estate including the salary attached to the title and all moneys arising from the sale or hire of live stock or from the sale of copra or other produce until such time as the successor attains the age of twenty-one years.

- (2) Every trustee shall at the end of each period of six months present to His Majesty a statement of account concerning the estate of which he is trustee. Such statement shall be verified on oath and shall show clearly each item of receipt and outgoing in connection with the estate.
- (3) Every trustee shall be paid such remuneration out of the estate of which he is trustee as may be determined by His Majesty.
- (4) His Majesty may dismiss any trustee who is guilty of mismanagement, breach of trust, or fraud in connection with his trusteeship and appoint another trustee in his stead.

Explanatory Notes:

- (i) The general purpose of this section does not require change excepted the part referring to "convicted of a felony". This is to be substituted by the words "convicted of an offence punishable by imprisonment for more than 2 years".
- (ii) This is in line with the requirement of standardising the terminology of the Act and for the same reasons appearing under Sections 30, 37 and 38.

Recommendation:

- (1) Convicted of an offence as aforesaid.
- (2)(3)(4) No change.



Section J

1.1.52 Section 41:

Upon the death of a holder of an hereditary estate the succession to the estate shall be as follows -

- (a) only persons born in wedlock may inherit;

Explanation:

Provided marriage precedes the birth of a child such child is legitimate and capable of succeeding no matter how short the interval between the parents' marriage and its birth.

- (b) no person shall be entitled to succeed who is insane, or has since the granting of the Constitution been convicted of felony;
- (c) the inheritance shall descend in the first place to the issue of the deceased holder in infinitum;
- (d) the male issue shall be preferred to female issue of the same degree;

Examples:

On the death of a holder leaving a son and a daughter, the son is entitled to succeed.

On the death of a holder leaving a grand-daughter and a grand-son, children of the same parents, the grand-son will succeed.

- (e) as between issue of the same degree of relationship to the deceased holder the eldest shall inherit.

Examples:

On the death of a holder leaving three sons the eldest will succeed. Similarly in the case of a holder dying and leaving only daughters the eldest would succeed. Again if a holder's only son predeceases him leaving three sons the eldest of such sons would succeed on the death of the holder.

- (f) all the lineal descendants of any deceased person who if he had been alive would have been entitled to succeed shall represent their ancestor that is, they shall have the same right to succeed as such person would have had if still living:

Provided always that no female and no male descendant claiming through a female shall be entitled to succeed by right of representation.

Section J

so long as any heir male of the body of the deceased holder survives;

Examples:

A - the holder dies leaving a son B, a daughter C and a grand-son E (child of A's eldest son D deceased). Under rules (d) and (e) D, if alive, would have succeeded in preference to C or B and as under this rule E stands in the same place as his father D if still living would have done, E will succeed in preference to C or B.

W a holder dies leaving a daughter X and a grand-daughter Z (child of W's deceased son Y). Under rule (d) Y, if alive, would have succeeded in preference to his sister X and as there are no heirs male of the deceased holder surviving Z will under this rule be entitled to stand in the same place as her father Y would have done and will therefore succeed.

A a holder dies leaving a daughter B and two grand-children viz C the daughter of A's eldest son if alive would have succeeded before B or D C the daughter of the eldest son will not so succeed as representing her father because she is a female descendant of the deceased holder and there is a male heir of the body of the holder still living namely D, D would therefore succeed. In the case last mentioned had C predeceased A leaving a son surviving her D would still succeed in preference to such son, for D is an heir male of the body of the deceased holder while C's son although also a descendant of the deceased holder, claims through a female, viz. his mother C.

- (g) on failure of lineal descendants of the deceased holder, the inheritance shall descend to his brothers and sisters and their issue subject to rule (d) and (e) and all lineal descendants of any deceased brother or sister who, if he or she had been living would have been entitled to succeed, shall have the same right

Section J

to succeed as their ancestor would have had if still living:

Provided always that no female descendant of a brother, and no male descendant of a brother claiming through a female shall be entitled to succeed by representation so long as any heir male of the body of any deceased brother survives;

- (h) if upon the death, insanity or conviction for felony of any holder there is no heir to succeed to the title and estates, the estates shall revert to the crown and shall be dealt with as Crown Lands until such time as the King grants the title of honour when such estates shall be granted to the holder of the title.

Explanatory Notes:

There are three proposals for amendments:

- (i) Subsection (a) is to be enlarged to include legitimated children. In some cases a son or daughter are born before marriage of parents and under Section 4(c) of the Legitimacy Act (Cap. 62) a legitimated person can succeed to the title and estate. However the wording under Section 41 (a) and reference to "wedlock" create an apparent variation or conflict.
- (ii) The doubt or conflict is to be resolved by the recommendation below.
- (iii) Subsection 41(b) should be deleted.
- (iv) Subsection 41(h) needs to be reworded - refer notes to Section 30, 37 and 38.

Section J

Recommendation:

- (a) Only persons born in wedlock or legitimated may inherit.
- (b) Repeal.
- (c) No change.
- (d) No change.
- (e) No change.
- (f) No change.
- (g) No change.
- (h) If upon the death, insanity or conviction for an offence punishable by imprisonment for more than two years of any holder there is no heir to succeed to the title and estates, shall revert to the King (Crown) and shall be dealt with as Crown land until such time as the King grants the title of honour when such estates shall be granted to the holder of the title.

1.1.53

Section 42:

Nothing in this part of this Act shall apply to any person who is not of Tongan nationality.

Explanatory Notes:

- (1) The general purpose of this section needs no change or further explanation.

Recommendation:

No change.

PART IV - TAX AND TOWN ALLOTMENTS

DIVISION I

GRANTS OF ALLOTMENTS

1.1.54

Section 43:

- (1) Every male Tongan subject by birth of sixteen years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.

Section J

(2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules:-

- (a) the applicant shall make an application on the prescribed form to the Minister;
- (b) the applicant shall produce for the inspection of the Minister his birth certificate or some other proof of the date of his birth;
- (c) the applicant shall pay the prescribed fees.

Explanatory Notes:

- (i) Subsection (b) should be amended to fall in line with current practice.
- (ii) Also refer to notes under Section 7 and proposed amendments thereto.

Recommendation:

Age to be increased to 21 years.  
No change except 2(b) which should read:

- (b) the applicant shall produce for the inspection of the Minister his birth certificate or some other proof of the date of his birth and proof of his nationality to the satisfaction of the Minister.

1.1.55 Section 44:

- (1) Any person who has applied for and has been granted by the Minister an allotment and without reasonable cause refuses to accept the land granted to him shall not be entitled to make a further application and the Minister shall keep a record of all cases where an applicant has so refused and shall not entertain any second application if made.
- (2) Any person who has been granted an allotment and abandons the same for a period of more than two years shall forfeit such allotment to the holder of the hereditary estate or to the Crown as the case may be: in any such case the holder of the hereditary estate or the Minister where the

Section J

allotment is situate on Crown Land shall take proceedings in the Land Court for the recovery of such allotment and on the abandonment being proved to the satisfaction of the Court, the Court shall declare such allotment to have been forfeited and shall order the register of allotments to be rectified accordingly and such allotment may be regranted by the Minister.

Explanatory Notes:

- (i) The general purpose of this section needs no change or further explanation.

Recommendation:

No change.

1.1.56

Section 45:

A male Tongan subject by birth who when this Act comes into force is a registered holder of a tax allotment and who does not hold a town allotment shall be entitled to the grant of a town allotment.

Explanatory Notes:

- (i) This section is unnecessary and inoperative.

Recommendation:

Repeal.

1.1.57

Section 46:

An applicant duly entitled in accordance with section forty-three may apply for and may be granted a parcel of agricultural (bush) land of five hectares in one lot as a tax allotment. Upon acceptance of such land as a tax allotment his right to a town allotment shall be deemed to extinguish:

Provided that where a person has been granted an allotment of three and one-third hectares as a tax allotment and provided that at the time of the grant to him of such allotment any land adjoining his allotment was not subdivided into tax allotments it shall be lawful for him at any time before such land is subdivided into tax allotments as aforesaid to apply for and he may be granted an allotment of land containing five hectares inclusive of the three and one third hectares he already holds. On the grant to him of such an allotment his town allotment shall revert to the Crown or Tofi'a holder as the case may be.

Section J

Explanatory Notes: (i) The general purpose of this section needs no change or further explanation.

Recommendation: No change.

1.1.58 Section 47: (1) Notwithstanding the provisions of this Act it shall be lawful for any noble provided in the opinion of Cabinet having regard to the amount of land available for tax allotments there is sufficient land for the purpose to grant to every Tongan subject making application for a tax allotment on such noble's hereditary estate an area of land containing four hectares to be held as follows -

(a) as a tax allotment an area of three and one-third hectares;

(b) as a town allotment an area of 7,000 square metres.

(2) It shall be lawful for a noble with the consent of Cabinet to grant on application being made such an allotment of four hectares to be held as aforesaid to any other Tongan subject who already holds a tax allotment on such noble's hereditary estate and on the grant of such allotment of four hectares the grantee shall relinquish the tax allotment he already holds.

Explanatory Notes: (i) The general purpose of this section needs no change or further explanation.

Recommendation: No change.

1.1.59 Section 48: No person who already holds a tax allotment or town allotment shall be granted a second allotment of the same kind as he already holds and any such grant shall be null and void.

Explanatory Notes: (i) The general purpose of this section needs no change or further explanation.

Section J

1.1.60 Section 49:

Subject to the provision of sections 46 and 47 hereof it shall be unlawful to grant an allotment in excess of the areas specified in Section 7 and any such grant made after the coming into force of this Act shall be null and void;

Provided that to facilitate survey of the prescribed areas a tax allotment and a town allotment may be exceeded by areas of not more than 500 square metres and 12 square metres respectively.

Explanatory Notes:

- (i) The proposed amendment is a protective measure on behalf of the holder to save possible loss of his allotment.
- (ii) Further there are two conflicting Court decisions on the interpretation of this section.
- (iii) The proposed amendment will resolve the conflict.

Recommendation:

Add after the end of the first paragraph after the word "void" -  
in respect only of the area in excess.

1.1.61 Section 50:

Land for allotments may be taken from the hereditary estates in accordance with the following rules -

- (a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotments in that estate;
- (b) where there is no land available in the estate in which the applicant is resident, then the allotment shall be taken out of some other estate held by the noble or matapule in one of whose estates the applicant is resident;