

# SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS PERIODIC REVIEW: **SAMOA**

This Submission has been contributed to and prepared by:

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And

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## The Organisations:

**The Tupu'aga Institute (Samoa)** is a Charitable Trust (Non-Government Organisation) for the purposes of the protection of 'Faasinomaga and Tupu'aga' (*Identity and genealogies connecting Samoans to families, villages and their customary lands*). The Tupu'aga Institute develops Indigenous approaches that strengthen and protect the cultural, economic, environmental, social, and intergenerational wellbeing of all Samoans and includes the objective to monitor the social impacts of laws, governance, and policies in Samoa. This Institute has operated for over five years and was legally registered in Samoa in April 2020.

**The Indigenous Solutions Group (Aotearoa New Zealand)** is a partner to the Tupu'aga Institute in current community development and social policy research projects. The Indigenous Solutions Group purposes include carrying out community development and community education programmes within Pacific and Samoan communities in Aotearoa New Zealand, and to carry out social, economic, and cultural research to inform cultural approaches to Pacific Peoples health and wellbeing development, cultural, social, psychosocial, public policy and legal projects. The Indigenous Solutions Group (Aotearoa New Zealand) was established in 2017.

## Introduction.

This submission is prepared for the Universal Periodic Review (PR) of Samoa to be held Tuesday 2<sup>nd</sup> November 2021.

In this submission we examined the recommendations from the Report of the Working Group on the Universal Periodic Review: Samoa of 27 June 2016.

We note Conclusions and Recommendations from the report and this submission addresses issues following up on three of the areas:

**95.24: Continue supporting the work of the National Human Rights Institution in line with the Paris Principles and in collaboration with civil society and other relevant stakeholders, to raise awareness on human rights and conduct more human rights activities in Samoa (Indonesia)**

**95.33 Continue to consolidate its human rights policies, particularly in the sphere of economic, social, and cultural rights, in order to continue enhancing the quality of life of its people, especially the most vulnerable sectors of the population (Bolivarian Republic of Venezuela)**

**95.37 Submit its overdue reports to the Human Rights Committee and the Committee on Enforced Disappearances (Sierra Leone) (Ukraine)**

In relation to Samoa this submission addresses the following Human rights areas for ongoing review:

1. Strengthening and Restoring the people's rights to a fair trial, and protection of freedom of expression within Samoa,
2. That the Universal Periodic Review Committee notes that there are erosions being caused to the Human rights of BOTH the resident Samoan population and the international Samoan diaspora. Samoans globally have contributory relationships to their Samoan families, villages, and institutions because of their genealogical and heritage based indigenous culture. The 'life blood' of the Samoan indigenous culture includes our intergenerational relationships being enacted through carrying out our collective responsibility for the guardianship of customary lands -which is carried out regardless of whether we reside fully in Samoa or elsewhere.
3. Strengthening and instituting international monitoring of the electoral process and the impacts of legislative changes on Samoan Indigenous people's rights, as well as the rights of the Indigenous diaspora of Samoans whose fundamental and indigenous cultural rights are negatively impacted by the recent law changes enacted by the Samoan government in the year of a pandemic. (The Constitutional Amendment Act 2020, The Lands and Titles Act 2020, and the Judicature Act 2020)
4. The combined impacts of the three Acts erode legal, judicial, genealogical, and indigenous guardianship protections over Samoan customary lands and chiefly titles and do not comply with Samoa's international human right obligations.
5. While there is positive achievement in the establishment of the National Human Rights Institution and the Office of the Ombudsman, and he has performed a very

important role since its institution, the Ombudsman has now been replaced by Government.

6. Increased independent monitoring of the protections of Fundamental Human Rights within Samoa continues to be critically important.

#### Local Samoa Context:

- On March 17, 2020 three legislative Bills were presented to the Samoan Parliament for their first reading. These Bills were the Constitutional Amendment Bill 2020, the Lands and Titles Bill 2020, and the Judicature Bill 2020.
- By 18<sup>th</sup> March, these three draft pieces of legislation had passed their second reading and was referred to the Special Parliamentary Committee (SPC) that same day. The members on the SPC were all current governing party members and one independent member, that has since become sympathetic to the ruling party.
- The resident Samoan population was not prepared for, nor had any knowledge that these Bills were to be presented to Parliament in March 2020. The Samoa Law Society, the Samoan Judiciary and other stakeholders had not been properly consulted, as is customary when law reform is proposed.
- These Bills have been enacted (15 Dec 2020) and assented to by the Head of State (5 Jan 2021)

### Changes to the Lands and Titles Court laws take away the Samoan people's access to Fundamental Human Rights and a fair trial.

1. The passage of these Bills, both prior to their introduction into Parliament and subsequently to their assent, have not followed the accepted and customary path. The legislation has been enacted without the proper law reform process being followed. As independent Non-government organisations we agree with the Samoa Law Society in their public statements and in their submission to the SPC that these Bills:

*“...will replace the entire Court and justice system in Samoa with a ‘twin tower’ structure, whose foundations replace the Rule of Law (as provided in the Constitution of Samoa)...” (SLS, page 3)<sup>1</sup>*

2. The three Acts are now known as the Constitution Amendment Act 2020, the Lands and Titles Act, 2020 and the Judicature Act remove the Constitutional right of all persons to seek remedies for the protection of their Fundamental Rights and freedoms from the Supreme Court under Part 2 of the Constitution of Samoa.

### Independence of the Judiciary undermined.

3. These three Acts remove the judicial authority of the Supreme Court as the superior Court in the land responsible to protect the Constitution of Samoa and to act as the

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<sup>1</sup> Samoa Law Society Submission made in respect of the three Bills tabled before Parliament on 17 March 2020: The Constitution Amendment Bill 2020, the Land and Titles Bill 202, and the Judicature Bill 2020 and referred to the Special Parliamentary Committee on 18 March 2020.

guardian of the people's fundamental rights and freedoms.

4. The three Acts purposefully undermine Judicial Independence by: reducing the requirements that allow for the removal of Judges, and removing protections for their tenure, salaries and conditions and their independence. The changes made now increase the ability of governments to influence or interfere with their ability to act with 'impartiality' or 'fear or favour'.
5. The Constitution Amendment Act 2020 created a new Lands and Titles Court of Appeal and Review, which is empowered to Judicially review and decide in Constitutional matters that have been heard *within* the Lands and Titles lower courts. Decisions will now be open to political influence and independence of Lands and Titles Court is not assured.
6. The passing of these Acts has ignored the submissions of the Public Consultations (2016) on proposed changes to the Lands and Titles Court. In 2016 the people's submissions recommended that:

*"Recommendation 16: Judicial Review*

*That the ability to refer matters to the Supreme Court for Judicial review is confirmed and should continue in order to protect the fundamental rights of the Citizens of Samoa."*

7. Any changes to the Constitution of Samoa and its protection of Fundamental Human Rights and the judicial system requires comprehensive and transparent public consultations. The Government of Samoa moved directly to 'staging' public consultations and ignored the need to follow the correct and accepted law reform process.
8. The Samoa Law Society has in The Lawyers and Legal Practice Act (2014) to:
  - a. *"Promote and encourage the maintenance of the Rule of Law and the development of laws of Samoa.*
  - b. *Promote respect for Samoan customs and traditions to its members.*
  - c. *To consider and suggest amendments to the law..."*

They were not given the opportunity to carry out their role. The Judiciary of Samoa were also ignored in the law reform process either. <sup>2</sup>

9. The Samoan Judiciary wrote to the Chief Executive Officer of the Law Reform Commission (attached) dated 4 April 2020 and signed by the majority of Samoa's judiciary:

*" Upon receipt of the draft Bills under cover of your letter of 14 February 2020, some six days before submission to Cabinet, the Acting Chief Justice wrote and requested more time for consideration of these developments. **This request was declined.** Considering what is at stake, the Judges are a loss to understand the "rush". If this process takes years, then so it should for these changes are not minor and are to the Constitution, the Supreme Law of*

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<sup>2</sup> Samoa Law Society, Submission made in respect of the three Bills tabled before Parliament on 17 March 2020: The Constitutional Amendment Bill 2020; the Lands a Titles Bill 2020; and the Judicature Bill 2020 and referred to the Special Parliamentary Committee 18 March 2020. (May 2020) Samoa Law Society.

*Samoa adopted by the founding fathers of this Nation upon Independence.”*

10. Consultations with those who will be impacted by the intended law reforms to the Lands and Titles Court have historically included Samoans resident in other locations such as New Zealand for example but that there has been a deliberate exclusion in this instance and the protections have not been adhered to by the Samoan government.
11. The Samoa Law Society and the Judiciary of Samoa as two agents of protection and guardianship of Samoan peoples fundamental and human rights were effectively excluded from the law reform process.
12. When the Samoan peoples, and the ‘guardians’ of fundamental and human rights have been deliberately excluded from the law reform process by government, then it is critical for an independent review of the process of law making in Samoa by the United Nations.

### The loss of Rights to a Fair Trial and Access to Justice in Samoa.

13. No proper reasons have been given to the Samoan resident population of Samoa nor the Samoan diaspora populations in New Zealand, Australia and the United States to explain exactly WHY their rights of Appeal to the Supreme Court as Lands and Titles Court litigants have been removed by these new Acts.
14. It is the Samoan diaspora that provide the financial means to file applications and defend challenges in the Lands and Titles Court.
  - It is us who travel to Samoa to lead Lands and Titles Cases to protect lands or customary Matai and Sa’o Matai (principal Matai) titles.
  - These are the responsibilities we have as Samoans who are descendants of our aiga or families (*suli*), Samoans who give service to their aiga or families and as Samoan matai whose primary responsibilities include the protection of aiga/family and lands belonging to their aiga.
  - It is the diaspora who will pay the SAT\$500 filing fees for a case to be brought to the Lands and Titles Courts. This means that Lands and Titles access is only for those who have the wealth to afford access. This becomes open to exploitation and political pressures.
  - The indigenous lands and chiefly matai titles are more vulnerable into the future.
15. All the legislative changes intentionally impose a westernized Supreme Court system upon and within an Inquisitorial system based on different values and practices. Neither system was designed to work in this combined.
  - Samoan peoples will have the burden of two separate systems of Justice with their own separate Appeal Courts.
  - There is no Apex court so it is unclear which Court should prevail.
  - The erosion of Samoan indigenous people’s rights impact on the ability of all Samoans, no matter where they are located, to defend and protect their customarily held lands.
16. Article 43 of the Constitution of Samoa provides for the making of laws “... for the whole or any part of Samoa and laws having effect outside as well as within Samoa.”

Parliament’s law-making powers must be consistent with the provisions of the Constitution.

These Acts are inconsistent with rights under the Constitution and therefore should be seen and understood as an unlawful breach of our Human and Fundamental rights.

17. The fundamental human rights of 182,721 Samoans<sup>3</sup> in New Zealand including Samoan citizens have been eroded by the Samoan government's legislation including:
- Dual New Zealand and Samoan citizens.
  - Samoan residents in New Zealand who are eligible for Samoan citizenship.
  - Younger New Zealand born Samoans and children growing up in New Zealand.

These same issues arise for Samoan citizens resident in Australia and the USA for example.

USA Census Bureau notes 204,640 Samoan residents (including Hawaii but excluding American Samoa) in 2018. (Table 193)

American Samoa Census notes their population as 55, 312 (2019).<sup>4</sup>

18. New Zealand residents wrote and sent submissions to the Special Parliamentary Committee (SPC) in Samoa. We ourselves wrote to invite the SPC to visit New Zealand. They responded in two ways – a) by telling us we had to appear in Samoa before the committee, or b) made no response at all until we asked them to acknowledge receipt of our submissions. No attempt was made to understand impacts for the New Zealand resident Samoans and the intergenerational impacts.

## Article 14 International Covenant for Civil and Political Rights.

19. This article of the ICCPR sets out standards for fair trials internationally. The standards are like the Samoan Constitution requiring fair treatment, and by a competent and impartial court established by law. The Samoan Constitution Article 9 shares the same language and intent, so the ICCPR is “a powerful interpretive aid”<sup>5</sup>. As Samoa is part of the international community and has ratified the ICCPR in 2008, it is in Samoa's best interests to ensure consistency with international human rights law, otherwise the ratification by Samoa is clearly of little value to the international community and should not be trusted.

## The Samoan Government laws attack Indigenous populations long-term wellbeing in physical, mental, and spiritual terms.

20. When indigenous peoples are deliberately severed from their genealogical and cultural connections and relationships with their families and lands the long-term impacts are manifested in intergenerational physical and mental health indicators.

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<sup>3</sup> New Zealand Census 2018 accessed 9 Feb 2021

<sup>4</sup> Source:

[https://www.google.com/search?q=samoa+population+in+United+States+&rlz=1C1GCEB\\_enNZ911NZ911&sxsrf=ALeKk](https://www.google.com/search?q=samoa+population+in+United+States+&rlz=1C1GCEB_enNZ911NZ911&sxsrf=ALeKk)

<sup>5</sup> Sylvester, J. Ou, A, Grant, M, Avia, J, Milbank, S, Nickel, P, Peden, A, Gucake, W. (2020) *Briefing 2020* (In progress)

21. The 'He Purongo Mate Pukupuku o Aotearoa 2020 – State of Cancer in New Zealand 2020' report provides evidence for the health consequences for Indigenous peoples of Aotearoa (Maori peoples) when they have been severed from their customary lands and cultures through the alienation of their familial and tribal lands. Maori have experienced the devastation of alienation from their indigenous customary lands where only 5% remains in their tribal control. The impacts are reflected in their health status.

*“Cancer mortality rates are significantly higher for Maori for all the most common cancers...The highest cancer mortality disparities between Maori and non-Maori are seen in breast, liver, lung, pancreatic and stomach cancers (Gurney et al.2020), with lung cancer continuing to be by far the most significant cancer for Maori ...mortality.”(page 26)<sup>6</sup>*

22. Pacific peoples, with Samoans being the dominant group that are based in Aotearoa, already experience higher rates of several cancers (Teng et al, 2016) and *“also carry a disproportionate burden of cancers...”* (page 27)
23. Samoan customary lands are being made vulnerable to the same kind of alienation through the changes being made to the Constitution of Samoa as well as to the Lands and Titles Act, 2020.
24. Samoa's current Constitution provides protections against the alienation of customary lands. But the three Acts, in combination, threaten to significantly erode these protections and make it much simpler, *easier and lawful* to arbitrarily take land.
25. These Acts contradict the current Constitution and remove the customary lands from the court hierarchy and put these lands matters directly into the jurisdiction of the Lands and Titles Court which we have pointed out is not bound to uphold either the fundamental human rights or existing historical constitutional rules designed to protect against the taking of indigenous customary lands.

## The need to retain customary lands in the face of Climate Change and Natural Disasters in Samoa.

26. In September 2009, the eastern coast of Upolu Island was devastated by a tsunami following an earthquake. While many people were killed because of the tsunami the survivors were able to go inland and to higher lands in order to get to safety.
27. They were only able to do this because they have access to their ancestral customary lands which they are guardians to. Without this access to the customary lands, the level of recovery in physical, economic, and psychosocial recovery for the populations would have been severely limited and taken much longer. The connections between access to customary lands and improved psychosocial and economic livelihoods recovery and outcomes are clearly outlined in *“Trauma, livelihoods and resilience in post-tsunami Samoa: A review for the New Zealand Aid Programme”* (2014)<sup>7</sup>

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<sup>6</sup> Te Aho o Te Kahu.2021.*He Purongo Mate Pukupuku o Aotearoa 2020, The State of Cancer in New Zealand 2020*. Wellington :Te Aho o Te Kahu, Cancer Control Agency. Available on: <https://teaho.govt.nz/reports/cancer-state>

<sup>7</sup> Tamasese, T.K., Parsons, T.L., Waldegrave, C., & Thompson, A. (2014). *Trauma, livelihoods and resilience in post-tsunami Samoa: A review for the New Zealand Aid Programme*. Lower Hutt: Family Centre Social Policy Research Unit.

28. By comparison, the Christchurch (New Zealand) earthquake a year later led to high levels of fatalities and injuries. This natural disaster took place in a first world economy-but the recovery has been much slower as insurance companies and the government still negotiate their responsibilities a decade later. Many of the affected people are still recovering economically and are without access to alternative secure lands where they can rebuild their lives and new housing.
29. When land ownership is under a Torrens system of freehold title populations are left vulnerable for much longer and are left further vulnerable if natural disasters and climate changes continue. Insurance companies distance themselves when disasters strike. Affected families and communities are left facing the context of a pandemic with heightened vulnerabilities in physical, mental, cultural, spiritual, and economic terms and recovery remains in the distant future for many.
30. The maintenance and protections of indigenous customary lands, and therefore the indigenous systems of protections are paramount for ALL Samoans, both resident in Samoa and externally. These two populations are interdependent of each other.