



TĀOGA NIUE ACT 2012

No. 320

CONTENTS

- 1 Title
- 2 Commencement

Part 1 Preliminary Matters

- 3 Interpretation
- 4 Purposes of Act
- 5 Act binds the Government

Part 2 Establishment of the Department of Tāoga Niue

- 6 Establishment of the Department of Tāoga Niue
- 7 Functions of Department
- 8 Department must follow Government policy and Cabinet directives
- 9 Staff
- 10 Annual report

Part 3 Establishment of Tāoga Niue Council

- 11 Establishment of Tāoga Niue Council
- 12 Council's status and powers
- 13 Council's functions
- 14 Membership of Council
- 15 Qualifications of Cabinet appointees
- 16 Further provisions relating to Council and its members

Part 4 Export controls on antiquities and protected objects

- 17 Register of protected objects
- 18 Council's role in relation to antiquities and objects
- 19 Export permit required to export antiquities and protected objects
- 20 Grant of export permit
- 21 Unlawfully exported antiquities and protected objects may be seized
- 22 Director may recover unlawfully exported antiquities and protected objects
- 23 Offences and forfeiture of antiquities and protected objects

Part 5
Protection of traditional knowledge and expressions of culture

Subpart 1 – Preliminary matters

- 24 Application
- 25 Customary use

Subpart 2 – Traditional cultural rights

- 26 Holders of traditional cultural rights
- 27 Meaning of traditional cultural rights
- 28 Material form not required
- 29 Duration
- 30 Traditional cultural rights inalienable
- 31 Additional rights
- 32 Derivative works

Subpart 3 – Moral rights

- 33 Meaning of moral rights

Subpart 4 – Obtaining prior and informed consent from traditional owners

- 34 Overview
- 35 Application to Director for use of traditional knowledge or expression of culture
- 36 Public notification
- 37 Identification of traditional owners
- 38 Uncertainty or dispute about ownership
- 39 No traditional owners or no agreement about ownership
- 40 Application to be rejected or accepted
- 41 Proposed agreement to be referred to Director
- 42 Terms and conditions
- 43 Authorised user agreement and prior and informed consent
- 44 No authorised user agreement reached
- 45 Procedure for applications made directly to traditional owners

Subpart 5 – Enforcement

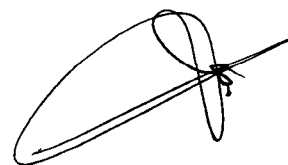
- 46 Offence in relation to traditional cultural rights
- 47 Offence in relation to moral rights
- 48 Offence in relation to sacred-secret material
- 49 Offences in relation to importation and exportation
- 50 Civil claims
- 51 Remedies
- 52 Defences
- 53 Other rights of action and remedies

Subpart 6 – Role of Director

- 54 Directors role in relation to traditional knowledge and expressions of culture

Part 6
Miscellaneous matters

- 55 Regulations



56	Consequential amendments
57	Repeals
58	Transitional provision for Part 2
59	Transitional provisions for Part 5

Schedule 1
Sectors in which Department is to advance purposes of this Act
Schedule 2
Further provisions applying to Council
Schedule 3
Consequential amendments

An Act to enhance and protect tāoga Niue.

- 1 Title**
This is the Tāoga Niue Act 2012.
- 2 Commencement**
This Act comes into force on the day after the date on which it becomes law in accordance with Article 34 of the Constitution.

Part 1
Preliminary Matters

- 3 Interpretation**
- (1) In this Act, unless the context otherwise requires,—
- “antiquity” includes a Niue relic, any article manufactured with ancient Niue tools and according to Niue methods, and any other article or thing of historical or scientific value or interest relating to Niue, but does not include any botanical or mineral collections or specimens;
 - “authorised user agreement” means a written agreement entered into under Part 5;
 - “Convention 1972” means the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972;
 - “Council” means the Tāoga Niue Council established by section 11;
 - “customary use” means the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners;
 - “Department” means the Department of Tāoga Niue established by section 6;
 - “derivative work” means any intellectual creation or innovation based upon or derived from traditional knowledge or expressions of culture;
 - “derogatory treatment”, in relation to traditional knowledge or expressions of culture, includes any act or omission that results in a material distortion, mutilation or alteration of the traditional knowledge or expressions of culture that is prejudicial to the honour or reputation of the traditional owners, or the integrity of the traditional knowledge or expressions of culture;
 - “Director” means the Director of the Department;

“expression of culture” means any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and includes—

- (a) names, stories, chants, riddles, histories, and songs in oral narratives; and
- (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terracotta mosaic, woodwork, metal ware, painting, jewellery, weaving, needlework, shell work, rugs, costumes, and textiles; and
- (c) music, dances, theatre, literature, ceremonies, ritual performances, and cultural practices; and
- (d) the delineated forms, parts, and details of designs and visual compositions; and
- (e) architectural forms;

“intangible cultural heritage” has the same meaning as in article 2 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 17 October 2003;

“member” means a member of the Council;

“Minister” means the Minister who is responsible for the Department;

“moral rights” are the rights set out in section 33;

“prior and informed consent” means consent that is deemed to be given when traditional owners enter into an authorised user agreement, as set out in section 43(1) and 45(3);

“protected object” means an antiquity or object that is recorded on the register of protected objects in accordance with section 17(3);

“tāoga Niue” means—

- (a) antiquities; and
- (b) objects of national cultural significance to Niue; and
- (c) objects of national historical significance to Niue; and
- (d) traditional knowledge; and
- (e) expressions of culture; and
- (f) customs, traditions, and history of Niue; and
- (g) Vagahau Niue;
- (h) traditional food;

“traditional cultural rights” are the rights set out in section 27(2) and (3);

“traditional knowledge” includes any knowledge that generally—

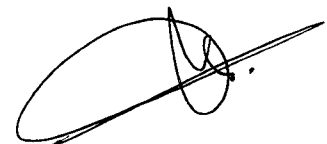
- (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative, or recreational purposes; and
- (b) is or has been transmitted from generation to generation; and
- (c) is regarded as pertaining to a particular traditional group in Niue; and
- (d) is collectively originated and held;

“traditional owners”, in relation to traditional knowledge or expressions of culture, means—

- (a) the group, clan, or community of people; or
- (b) the individual who is recognised by a group, clan, or community of people as the individual,—

in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan, or community.

- (2) If there is any conflict between the Vagahau Niue version and the English version of this Act, the Vagahau Niue version prevails.



4 Purposes of Act

The purposes of this Act are to—

- (a) establish the Department as a department of Government to act as the central coordinator of all matters relating to tāoga Niue; and
- (b) establish a Tāoga Niue Council to act as an expert advisory council to the Department in relation to tāoga Niue; and
- (c) place controls on the export of—
 - (i) antiquities; and
 - (ii) objects of national cultural significance; and
 - (iii) objects of national historical significance; and
- (d) protect traditional knowledge and expressions of culture; and
- (e) consequentially amend a number of other enactments so that they reflect the purposes set out in paragraphs (a) to (d); and
- (f) promote the cultural standards proclaimed in the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007; and
- (g) support the implementation of the Convention 1972.

5 Act binds the Government

This Act binds the Government.

Part 2

Establishment of the Department of Tāoga Niue

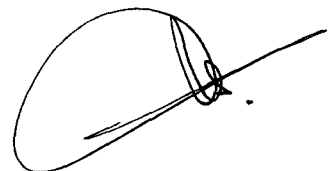
6 Establishment of the Department of Tāoga Niue

The Department of Tāoga Niue is established as a department of Government.

7 Functions of Department

The functions of the Department are to—

- (a) administer this Act; and
- (b) advance the purposes of this Act in each of the sectors, and for the purposes, set out in Schedule 1; and
- (c) advise the Government of Niue on all matters relating to tāoga Niue; and
- (d) formulate objectives relating to the protection and public awareness of tāoga Niue; and
- (e) promote all aspects of work associated with tāoga Niue; and
- (f) facilitate the formulation of policies and law relating to tāoga Niue; and
- (g) review laws relating to tāoga Niue and where necessary propose reform; and
- (h) develop a cultural bridge between Niue and Niueans abroad; and
- (i) develop an integrated strategy for continuing education in relation to tāoga Niue; and
- (j) develop and strengthen training to meet the needs of the Department; and
- (k) establish and maintain a register of protected objects; and
- (l) control the export of antiquities and protected objects in accordance with Part 4; and
- (m) introduce incentives for the people of Niue and Niueans to produce creative works; and
- (n) work with communities, groups, and relevant organisations to identify and define the various elements of the intangible cultural heritage of Niue; and



- (o) cooperate at the bilateral, sub-regional, regional, and international levels with appropriate institutions for the safeguarding of intangible cultural heritage; and
- (p) be the competent body for the purposes of safeguarding the intangible cultural heritage of Niue; and
- (q) keep the public informed of any dangers threatening the intangible cultural heritage of Niue and the activities carried out for the purposes of safeguarding that heritage; and
- (r) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage of Niue; and
- (s) promote the cultural standards proclaimed in the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007; and
- (t) support the implementation of the Convention 1972.

8 Department must follow Government policy and Cabinet directives

In the exercise of its functions and powers under this Act, the Department must—

- (a) have regard to the Tohi Fakatokatoka Gahua (Strategic Action Plan) 2005-2008 or any document that replaces it; and
- (b) have regard to the general policy of the Government in relation to the protection and preservation of tāoga Niue; and
- (c) comply with any policy directive given to it by Cabinet.

9 Staff

The Niue Public Service Commission must appoint a Director and such other officers of the Department as are necessary to fulfil the functions of the Department.

10 Annual report

- (1) The Director must, before 31 March in each year, give a written report to the Minister on the operations of the Department in the preceding year.
- (2) The Minister must table a copy of the report before the Assembly at the first available meeting.

Part 3

Establishment of Tāoga Niue Council

11 Establishment of Tāoga Niue Council

The Tāoga Niue Council is established.

12 Council's status and powers

- (1) The Council has—
 - (a) the statutory powers conferred by this Act and any other Act; and
 - (b) the powers necessary to enable it to perform its functions.
- (2) The Council may exercise its powers only for the purpose of performing its functions.

13 Council's functions

The Council's functions are—

- (a) to act as an expert advisory council to the Department in relation to tāoga Niue; and
- (b) to advise the Director on whether an object is—



- (i) an antiquity; or
- (ii) of national cultural significance; or
- (iii) of national historical significance; and
- (c) to advise the Director on the removal of protected objects from the register; and
- (d) to determine the ownership of antiquities and protected objects if it is unclear or if there is a dispute; and
- (e) all incidental and related matters.

14 Membership of Council

The Council consists of—

- (a) a representative of the Niue Language Commission; and
- (b) a representative of the Environment Department; and
- (c) a representative of the Education Department; and
- (d) one senior employee of the National Archives of Niue, the National Museum and Cultural Centre, the National Library, or the Justice, Lands and Survey Department that is selected jointly by those organisations to represent those organisations; and
- (e) the chairperson of the Niue Council of Women; and
- (f) the chairperson of the Niue Youth Council; and
- (g) three members selected and appointed by Cabinet; and
- (h) the Director (as a non-voting member).

15 Qualifications of Cabinet appointees

To be qualified to be selected and appointed by Cabinet in accordance with section 14(g), a person must—

- (a) have his or her primary residence in Niue; and
- (b) be widely regarded as being well-versed in either—
 - (i) Niue culture and heritage; or
 - (ii) matters of the Department.

16 Further provisions relating to Council and its members

Schedule 2 applies to the Council and its members.

Part 4

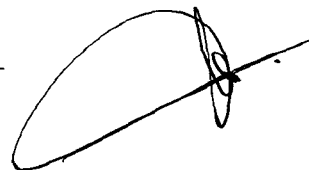
Export controls on antiquities and protected objects

17 Register of protected objects

- (1) The Director must establish and maintain a register of protected objects.
- (2) The register is to be in such form and contain such information as the Director determines.
- (3) The Director may, with the approval of the Council, record on the register—
 - (a) antiquities; and
 - (b) any object that is of national cultural significance; and
 - (c) any object that is of national historical significance.
- (4) A protected object may be removed from the register only if the Council decides that the export of the object would not substantially diminish the cultural heritage of Niue.

18 Council's role in relation to antiquities and objects

- (1) The Council is the final authority on whether an object is—



- (a) an antiquity; or
 - (b) of national cultural significance; or
 - (c) of national historical significance.
- (2) The Director must refer any dispute about the ownership of an antiquity or an object of national cultural or historical significance to the Council for determination in accordance with customary law and practice.
- (3) The decision of the Council on an ownership dispute is final.

19 Export permit required to export antiquities and protected objects

- (1) Any person who wishes to export an antiquity or protected object must make a written application for an export permit to the Director.
- (2) The application must provide the following information—
- (a) an accurate description of the antiquity or protected object; and
 - (b) the name of the owner of the antiquity or protected object; and
 - (c) the purpose of the export; and
 - (d) the period the antiquity or protected object will be absent from Niue; and
 - (e) the proposed security and insurance measures to be taken (if any) by the applicant for the antiquity or protected object while it is absent from Niue; and
 - (f) any other information prescribed by regulations made under this Act.

20 Grant of export permit

- (1) An export permit may be granted for an antiquity or protected object—
- (a) only if—
 - (i) its absence from Niue is temporary; and
 - (ii) its owner allows it to be photographed, cast, or otherwise copied as the Director requires; and
 - (b) on such other conditions as the Director thinks fit, which may include a requirement that the exporter—
 - (i) provide a bond to the Government of Niue of an amount set by the Director against the return of the antiquity or protected object in good condition; and
 - (ii) comply with packaging and handling requirements specified by the Director; and
 - (c) only with the approval of the Minister.
- (2) A copy made of an antiquity or protected object is the property of the Government of Niue.

21 Unlawfully exported antiquities and protected objects may be seized

A constable or customs officer may seize and detain any antiquity or protected object that a person attempts to remove from Niue in breach of this Act.

22 Director may recover unlawfully exported antiquities and protected objects

If an antiquity or protected object is exported from Niue in breach of this Act, the Director may take all appropriate action to have the antiquity or protected object returned to Niue.

23 Offences and forfeiture of antiquities and protected objects

- (1) A person commits an offence if that person—
- (a) removes an antiquity or protected object from Niue without an export permit issued under section 20; or

- (b) attempts to remove an antiquity or protected object from Niue without an export permit issued under section 20; or
 - (c) breaches a condition of an export permit issued under section 20.
- (2) A person who commits an offence against subsection (1) is liable on conviction to a fine not exceeding 100 penalty units.
- (3) If the owner of an antiquity or protected object is convicted of an offence against subsection (1), the antiquity or protected object is automatically forfeited to the Government of Niue for the benefit of the people of Niue.

Part 5

Protection of traditional knowledge and expressions of culture

Subpart 1 – Preliminary matters

24 Application

- (1) This Part applies to traditional knowledge and expressions of culture that—
- (a) were in existence before the commencement of this Act; or
 - (b) are created on or after the commencement of this Act.
- (2) This Part does not affect or apply to rights that exist immediately before the commencement of this Act, including intellectual property rights.
- (3) This Part does not affect or apply to contracts, licences, or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of traditional knowledge or expressions of culture.

25 Customary use

The customary use of traditional knowledge or expressions of culture does not give rise to any criminal or civil liability under this Part.

Subpart 2 – Traditional cultural rights

26 Holders of traditional cultural rights

The traditional owners of traditional knowledge or expressions of culture are the holders of the traditional cultural rights in the traditional knowledge or expressions of culture.

27 Meaning of traditional cultural rights

- (1) Traditional cultural rights are the rights set out in subsections (2) and (3).
- (2) The following uses of traditional knowledge or expressions of culture require the prior and informed consent of the traditional owners in accordance with section 43(1) or 45(3) if the use is a non-customary use (whether or not of a commercial nature)—
- (a) to reproduce traditional knowledge or expressions of culture; or
 - (b) to publish traditional knowledge or expressions of culture; or
 - (c) to perform or display traditional knowledge or expressions of culture in public; or
 - (d) to broadcast traditional knowledge or expressions of culture to the public by radio, television, satellite, cable, or any other means of communication; or
 - (e) to translate, adapt, arrange, transform, or modify traditional knowledge or expressions of culture; or
 - (f) to fixate traditional knowledge or expressions of culture through any process such as making a photograph, film, or sound recording; or

- (g) to make traditional knowledge or expressions of culture available online or to electronically transmit traditional knowledge or expressions of culture to the public (whether over a path, a combination of paths, or both); or
 - (h) to create derivative works; or
 - (i) to make, use, offer for sale, sell, import, or export traditional knowledge or expressions of culture or products derived from traditional knowledge or expressions of culture; or
 - (j) to use traditional knowledge or expressions of culture in any other material form.
- (3) To avoid doubt, the traditional owners are entitled to use traditional knowledge or expressions of culture in the ways specified in subsection (2) in the exercise of their traditional cultural rights.
- (4) Subsection (2) does not apply to the use of traditional knowledge or expressions of culture for any of the following—
- (a) face to face teaching; or
 - (b) criticism or review; or
 - (c) reporting news or current events; or
 - (d) judicial proceedings; or
 - (e) incidental use.
- (5) A user of traditional knowledge or expressions of culture specified in subsections (4)(a) to (d) must make sufficient acknowledgement of the traditional owners by mentioning them, or the geographical place from which the traditional knowledge or expressions of culture originated, or both.

28 Material form not required

Traditional cultural rights exist in traditional knowledge and expressions of culture whether or not that traditional knowledge or those expressions of culture are in material form.

29 Duration

Traditional cultural rights continue in force in perpetuity.

30 Traditional cultural rights inalienable

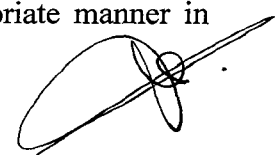
Traditional cultural rights are inalienable.

31 Additional rights

The traditional cultural rights in traditional knowledge or expressions of culture are in addition to, and do not affect, any rights that may subsist under any law relating to copyright, trademarks, patents, designs, or other intellectual property.

32 Derivative works

- (1) Any copyright, trademark, patent, design, or other intellectual property right that exists in relation to a derivative work vests in the creator of the work or as otherwise provided by the relevant intellectual property law.
- (2) If a derivative work, traditional knowledge, or expressions of culture are to be used for a commercial purpose, the authorised user agreement must—
 - (a) contain a benefit sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners; and
 - (b) provide for identification of the traditional knowledge or expressions of culture on which the derivative work is based in an appropriate manner in



connection with the exploitation of the derivative work by mentioning the traditional owners, or the geographical place from which it originated, or both; and

- (c) provide that the traditional knowledge or expressions of culture in the derived work will not be subject to derogatory treatment.

Subpart 3 – Moral rights

33 Meaning of moral rights

- (1) The traditional owners of traditional knowledge or expressions of culture are the holders of the moral rights in the traditional knowledge or expressions of culture.
- (2) The moral rights of the traditional owners of traditional knowledge and expressions of culture are—
 - (a) the right of attribution of ownership in relation to their traditional knowledge and expressions of culture; and
 - (b) the right not to have ownership of traditional knowledge or expressions of culture falsely attributed to them; and
 - (c) the right not to have their traditional knowledge and expressions of culture subject to derogatory treatment.
- (3) The moral rights of traditional owners in their traditional knowledge and expressions of culture exist independently of their traditional cultural rights.
- (4) Moral rights continue in force in perpetuity, are inalienable, and cannot be waived or transferred.

Subpart 4 – Obtaining prior and informed consent from traditional owners

34 Overview

This subpart sets out the procedure for obtaining the prior and informed consent of the traditional owners to use their traditional knowledge or expressions of culture for a non-customary use (whether or not of a commercial nature).

35 Application to Director for use of traditional knowledge or expression of culture

- (1) A prospective user of traditional knowledge or expression of culture for a non-customary use (whether or not of a commercial nature) must apply to the Director to obtain the prior and informed consent of the traditional owners to use the traditional knowledge or expressions of culture.
- (2) The application must—
 - (a) be in the prescribed form; and
 - (b) specify the way in which the applicant proposes to use the traditional knowledge or expressions of culture; and
 - (c) state clearly the purpose for which that use is intended; and
 - (d) be accompanied by the prescribed fee.
- (3) If the Director does not finalise the application within 90 days, the traditional owners are deemed not to have consented to the proposed use.

36 Public notification

- (1) The Director must—
 - (a) give a copy of the application to any persons who the Director is satisfied are the traditional owners of the traditional knowledge or expressions of culture to which the application relates; and

- (b) give public notice of the application by—
 - (i) publishing a copy of the application on the Department's website or the Government's website stating how interested persons may obtain a copy of the application; and
 - (ii) broadcasting details of the application on radio or television stating how interested persons may obtain a copy of the application; and
 - (iii) making it generally known by any other means that the Director considers appropriate in the circumstances.
- (2) Any person who claims to be a traditional owner of the traditional knowledge or expressions of culture to which the application relates must advise the Director (either orally or in writing) within 28 days after the application is published or broadcast (whichever is the later).
- (3) The Director must record in writing the details of any advice given under subsection (2).

37 Identification of traditional owners

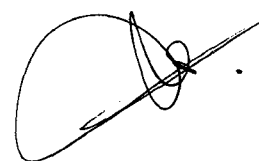
- (1) If the Director is satisfied that all of the traditional owners have been identified, the Director must issue a written determination identifying the traditional owners.
- (2) The Director must give public notice of the determination by—
 - (a) publishing a copy of the determination on the Department's website or the Government's website; and
 - (b) broadcasting details of the determination on radio or television; and
 - (c) making it generally known by any other means that the Director considers appropriate in the circumstances.

38 Uncertainty or dispute about ownership

- (1) If the Director is not satisfied that all of the traditional owners have been identified, or if there is a dispute about ownership, the Director must refer the matter to the Council to be resolved according to customary law and practice.
- (2) When all of the traditional owners have been identified,—
 - (a) the traditional owners must advise the Director; and
 - (b) the Director must issue a written determination identifying the traditional owners.
- (3) The Director must give public notice of the determination by—
 - (a) publishing a copy of the determination on the Department's website or the Government's website; and
 - (b) broadcasting details of the determination on radio or television; and
 - (c) making it generally known by any other means that the Director considers appropriate in the circumstances.

39 No traditional owners or no agreement about ownership

- (1) The Director may, after consultation with Cabinet, issue a determination that the Government of Niue is the traditional owner of traditional knowledge or expressions of culture for the purposes of this Act if the Director is satisfied that—
 - (a) no traditional owners can be identified; or
 - (b) no agreement has been reached on ownership within 90 days after the matter was referred to the Council in accordance with section 38(1).
- (2) If the Director, as a representative of the Government, enters into an authorised user agreement, any monetary or non-monetary benefits arising under the agreement must be used for traditional cultural development purposes.



40 Application to be rejected or accepted

- (1) The traditional owners to whom an application relates must decide whether—
 - (a) to reject the application; or
 - (b) to accept the application and to enter into negotiations for a written authorised user agreement in relation to the application.
- (2) The traditional owners must advise the Director (either orally or in writing) of their decision.
- (3) The Director must advise the applicant in writing of the traditional owners' decision.

41 Proposed agreement to be referred to Director

- (1) Before entering into an authorised user agreement, the traditional owners must refer the proposed agreement to the Director for comment on the proposed terms and conditions of the agreement.
- (2) The Director may request the applicant and the traditional owners to meet with the Director to discuss the proposed agreement if the Director is, after reviewing the proposed agreement, satisfied that—
 - (a) the traditional owners do not have sufficient information to make a full and informed decision about the proposed terms and conditions of the agreement; or
 - (b) the proposed terms and conditions of the agreement do not adequately protect the traditional knowledge or expressions of culture of the traditional owners.
- (3) The traditional owners may accept, reject, or modify any comments made by the Director in relation to the proposed agreement.

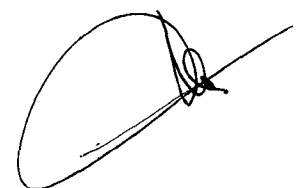
42 Terms and conditions

An authorised user agreement should include terms and conditions about—

- (a) the extent of the permitted use of the of the traditional knowledge or expressions of culture (the “use”); and
- (b) sharing of financial and other benefits arising from the use; and
- (c) compensation, fees, royalties, or other payments for the use; and
- (d) whether the use will be exclusive or non-exclusive; and
- (e) the duration of the use to be allowed and rights of renewal; and
- (f) disclosure requirements in relation to the use; and
- (g) the possible sharing by the traditional owners of any intellectual property rights arising from the use of the traditional knowledge or expressions of culture; and
- (h) access arrangements for the traditional owners; and
- (i) education and training requirements for the applicant; and
- (j) controls on publication; and
- (k) whether the rights arising under the agreement can be assigned; and
- (l) choice of law in relation to disputes under the agreement; and
- (m) respect for the moral rights of the traditional owners.

43 Authorised user agreement and prior and informed consent

- (1) If an applicant and the traditional owners enter into an authorised user agreement, the traditional owners are deemed to have given their prior and informed consent to the use of the traditional knowledge or expressions of culture permitted by the agreement.
- (2) The traditional owners must advise the Director and forward a copy of the final agreement to the Director.
- (3) The Director must keep a register of authorised user agreements.



- (4) The register is to be in such form and contain such information as the Director determines.

44 No authorised user agreement reached

- (1) The traditional owners must advise the Director (either orally or in writing) if the traditional owners and an applicant cannot agree on the terms and conditions of an agreement in relation to an application.
- (2) The Director must advise the applicant in writing that the traditional owners have rejected the proposed authorised user agreement.
- (3) The Director must record in writing the details of any oral or written advice given under subsection (1).

45 Procedure for applications made directly to traditional owners

- (1) A prospective user of traditional knowledge or expressions of culture may obtain the prior and informed consent of the traditional owners without applying to the Director under section 35.
- (2) The prospective user must—
- (a) advise the Director that the prospective user has sought the prior and informed consent of the traditional owners; and
 - (b) provide the Director with a copy of the proposed authorised user agreement between the prospective user and the traditional owners for comment and for advice about other prospective traditional owners; and
 - (c) provide a copy of the signed authorised user agreement to the Director to be entered in the register kept by the Director in accordance with section 43(3) and (4) within 28 days after the agreement comes into force.
- (3) If a prospective user and the traditional owners enter into an authorised user agreement, the traditional owners are deemed to have given their prior and informed consent to the use of the traditional knowledge or expressions of culture permitted by the agreement.
- (4) The prospective user cannot contract out of the obligations under subsection (2)(b) and (c).
- (5) If a copy is not provided in accordance with subsection (2)(b), the authorised user agreement is null and void.
- (6) To the extent that it is inconsistent, this section overrides the rest of this subpart.

Subpart 5 – Enforcement

46 Offence in relation to traditional cultural rights

A person commits an offence and is liable on conviction to a fine not exceeding 100 penalty units, or a term of imprisonment not exceeding 12 months, or both, if—

- (a) that person makes a non-customary use of traditional knowledge or an expression of culture (whether or not such use is of a commercial nature); and
- (b) the traditional owners have not given their prior and informed consent to that use.

47 Offence in relation to moral rights

A person commits an offence and is liable on conviction to a fine not exceeding 100 penalty units, or a term of imprisonment not exceeding 12 months, or both if—

- (a) that person does an act or makes an omission in relation to traditional knowledge or an expression of culture that is inconsistent with the moral rights

- of the traditional owners of that traditional knowledge or expression of culture; and
- (b) the traditional owners have not given their prior and informed consent to the act or omission.

48 Offence in relation to sacred-secret material

- (1) A person who uses sacred-secret traditional knowledge or an expression of culture other than in accordance with a customary use commits an offence and is liable on conviction to a fine not exceeding 100 penalty units, or a term of imprisonment not exceeding 12 months, or both.
- (2) In this section, “sacred-secret” means any traditional knowledge or expression of culture that has a sacred or secret significance according to the customary law and practices of the traditional owners concerned.

49 Offences in relation to importation and exportation

- (1) A person commits an offence and is liable on conviction to a fine not exceeding 100 penalty units, or a term of imprisonment not exceeding 12 months, or both if that person—
- (a) imports an article or other thing into Niue that relates to traditional knowledge or expressions of culture of Niue; and
- (b) knows, or ought reasonably to know, that the article or thing would contravene the traditional cultural rights or the moral rights of the traditional owners had it been created in Niue.
- (2) A person commits an offence and is liable on conviction to a fine not exceeding 100 penalty units, or a term of imprisonment not exceeding 12 months, or both if—
- (a) that person exports traditional knowledge or an expression of culture; and
- (b) the export is a non-customary use (whether or not such use is of a commercial nature); and
- (c) the traditional owners have not given their prior and informed consent to the export of the traditional knowledge or expressions of culture.

50 Civil claims

- (1) The traditional owners may institute proceedings in the Niue High Court seeking all or any of the relief set out in section 51 against a person if—
- (a) that person makes a non-customary use of traditional knowledge or an expression of culture (whether or not such use is of a commercial nature); and
- (b) the traditional owners have not given their prior and informed consent to that use.
- (2) The traditional owners may institute proceedings in the Niue High Court seeking all or any of the relief set out in section 51 against a person if—
- (a) that person does an act or makes an omission in relation to traditional knowledge or an expression of culture that is inconsistent with the moral rights of the traditional owners of that traditional knowledge or expression of culture; and
- (b) the traditional owners have not given their prior and informed consent to the act or omission.

51 Remedies

- (1) The Niue High Court may grant all or any of the following in relation to proceedings instituted under section 50—

- (a) an injunction:
 - (b) damages for loss resulting from the unauthorised use:
 - (c) a declaration that the traditional cultural rights of the traditional owners have been contravened:
 - (d) an order that the defendant make a public apology for the contravention:
 - (e) an order that any false attribution of ownership, or derogatory treatment, of the traditional knowledge or expression of culture cease or be reversed:
 - (f) an order for an account for profits:
 - (g) an order for the seizure of any object made, imported, or exported contrary to this Act:
 - (h) such other orders as the Court considers appropriate in the circumstances.
- (2) The Court in deciding what relief is to be granted may take into account all or any of the following—
- (a) whether the defendant was aware or ought reasonably to have been aware of the traditional cultural rights and moral rights of the traditional owners:
 - (b) the effect on the honour or reputation of the traditional owners resulting from the unauthorised use:
 - (c) anything done by the defendant to mitigate the effects of the unauthorised use:
 - (d) any cost or difficulty that may have been associated with identifying the traditional owners:
 - (e) any cost or difficulty in ceasing or reversing any false attribution of ownership, or derogatory treatment, of the traditional knowledge or expression of culture:
 - (f) whether the parties have undertaken any other action to resolve the dispute.

52 Defences

It is a defence to an offence against section 47 or 47, or an action under section 50(1) or (2), if a determination has been published under section 37 and the traditional owners specified in that determination have given their prior and informed consent to the use in question.

53 Other rights of action and remedies

This Part does not affect any rights of action or other remedies, whether civil or criminal, provided for under any other law.

Subpart 6 – Role of Director

54 Directors role in relation to traditional knowledge and expressions of culture

The Director may—

- (a) monitor compliance with authorised user agreements and advise traditional owners of any breaches of such agreements; and
- (b) develop standard terms and conditions for authorised user agreements; and
- (c) provide training and education programmes for traditional owners and users of traditional knowledge or expressions of culture; and
- (d) develop a Code of Ethics in relation to the use of traditional knowledge and expressions of culture; and
- (e) issue advisory guidelines for the purposes of this Part; and
- (f) liaise with regional bodies in relation to matters in this Part; and
- (g) maintain a record of traditional owners and of traditional knowledge and expressions of culture; and

- (h) if requested, provide guidance on the meaning of customary use in specific cases.

Part 6

Miscellaneous matters

55 Regulations

- (1) Cabinet may make regulations for the purposes of this Act.
- (2) Regulations made under this Act may set fees.
- (3) Cabinet may by regulation amend Schedule 1.
- (4) In accordance with reciprocal arrangements, Cabinet may make regulations extending the application of this Act to traditional knowledge and expressions of culture originating in other countries or territories in order to provide the same protection for that traditional knowledge or expressions of culture as is provided to traditional knowledge and expressions of culture originating in Niue.

56 Consequential amendments

The enactments specified in Schedule 3 are amended in the manner set out in that Schedule.

57 Repeals

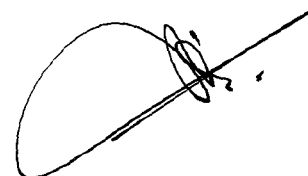
- (1) The Niue Cultural Council Act 1986 is repealed and the Niue Cultural Council is disestablished.
- (2) All enactments made under the Niue Cultural Council Act 1986 are repealed.
- (3) Part 29 of the Niue Act 1966 is repealed.

58 Transitional provision for Part 2

All members of staff of the Department who were appointed before the commencement of this Act are deemed to have been appointed under section 9 and, subject to this Act, continue in office on the terms and conditions of their original appointment.

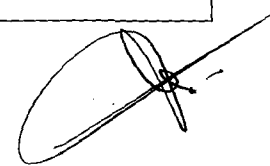
59 Transitional provisions for Part 5

- (1) If, immediately before the commencement of this Act, a person was making a non-customary use of traditional knowledge or an expression of culture, Part 5 does not apply to the person during the period of 60 days ("the application period") starting on the commencement of this Act.
- (2) During the application period, the person must apply to the Director to obtain prior and informed consent in accordance with section 35 from the traditional owners to continue to use the traditional knowledge or expression of culture.
- (3) If the person does not apply to the Director in accordance with this section, Part 5 applies to the person on and after the end of the application period.
- (4) If a person has applied to the Director in accordance with this section, Part 5 continues not to apply to the person until the traditional owners reject the application or enter into an authorised user agreement with the person, whichever first occurs.



Schedule 1
Sectors in which Department is to advance purposes of this Act

Sector	Purpose of Sector
Arts and Crafts	To promote development of traditional art and crafts and encourage participation of people of Niue in the creation and sharing of artistic and craft work.
Cultural bridge	To promote continuing and sustainable affiliations between people of Niue in Niue and abroad.
Customs and traditions	To preserve customs and traditions in order to secure the identity and sovereignty of the people of Niue.
Environment	To collaborate with the Department for the Environment in order to preserve the natural environment, biological diversity, and historic areas for the benefit of future generations.
Heritage Assets	<p>To collaborate with the National Archives of Niue to maintain, collect, conserve, and preserve archival records as assets for the use of future generations.</p> <p>To collaborate with the National Archives of Niue and the National Library to act as custodians of Niue's intellectual heritage and to provide organisations access to that heritage.</p> <p>To collaborate with the National Archives of Niue and the National Library to preserve the national imprint in all media.</p> <p>To collaborate with the National Museum and Cultural Centre to maintain, promote, exhibit, and use traditional ways to preserve Niue's cultural history.</p> <p>To collaborate with the Justice, Lands and Survey Department to support the recording, maintenance, and preservation of Niue genealogies.</p>
History	To raise the status of the study of the history of Niue through the production of books for students, scholars, researchers, and the general public.
Vagahau Niue	To collaborate with the Education Department and the Niue Language Commission to promote Vagahau Niue in accordance with the Vagahau Niue Act 2012.



Schedule 2
Further provisions applying to Council

1 Procedure for appointing members

- (1) Each of the members must be appointed by Cabinet.
- (2) The procedure for Cabinet selecting and appointing persons in accordance with section 14(g) is as follows—
 - (a) the Director must recommend suitably qualified members of the public to Cabinet, setting out the relevant qualifications and expertise of each candidate; and
 - (b) Cabinet must appoint the candidate or (depending upon the number of vacancies) candidates that it considers is most qualified to be a member of the Council.
- (3) The procedure in subclause (2) applies each time there is a vacancy in the membership of a person referred to in section 14(g).

2 Effect of vacancies and validity of members' acts

- (1) A vacancy in the membership of the Council does not affect—
 - (a) the validity of any Council decision; or
 - (b) the powers and functions of the Council.
- (2) The acts of a person as a member are valid even if—
 - (a) the person's appointment was defective; or
 - (b) the person is not qualified to be a member.

3 Term of appointment

- (1) A member selected and appointed by Cabinet in accordance with section 14(g) may be appointed for 3 years or any shorter period of time specified by Cabinet.
- (2) A member may be reappointed.

4 Duties of members

- (1) A member of the Council must act—
 - (a) in good faith; and
 - (b) with reasonable care, diligence, and skill; and
 - (c) with honesty and integrity; and
 - (d) in accordance with the Niue Public Service Code of Conduct.
- (2) The duties of members are owed to Cabinet and do not provide any ground of action for any other person.

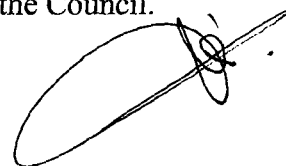
5 Collective duties of Council

The Council must—

- (a) not contravene this Act; and
- (b) act in a manner consistent with the objectives and functions of the Council; and
- (c) perform its functions efficiently and effectively and in a manner consistent with the spirit of service to the public.

6 Liability of members

No member is liable for any act or omission done, in good faith, in the performance or intended performance and exercise of the functions and powers of the Council.



7 Removal from office

- (1) Cabinet may remove a member from the Council by written notice to the member for any of the following reasons proved to the satisfaction of the Cabinet—
 - (a) breach of the member's duties or the Council's collective duties under this Act; or
 - (b) failure or inability to perform, or inadequate performance of, the member's duties and responsibilities as a member; or
 - (c) misconduct by the member; or
 - (d) any other just cause.
- (2) Cabinet must give the member a reasonable opportunity to be heard on the proposal to remove the member.
- (3) The notice of removal must state the reason for the removal.

8 Member ceasing to hold office

A member ceases to hold office if he or she—

- (a) is removed from office in accordance with clause 7; or
- (b) dies; or
- (c) resigns by giving written, signed notice to Cabinet; or
- (d) fails to attend 3 consecutive meetings of the Council without the prior permission of the chairperson; or
- (e) ceases to have his or her primary residence in Niue.

9 No compensation for ceasing to hold office

A member is not entitled to any compensation or other payment or benefit relating to his or her ceasing for any reason to hold office as a member of the Council.

10 Chairperson and deputy chairperson

- (1) Cabinet may appoint one of the members as the chairperson, and another member as the deputy chairperson, of the Council by written notice to the Council.
- (2) However, the Director must not be appointed as chairperson or deputy chairperson.
- (3) In the case of the absence or incapacity of the chairperson, the functions of the chairperson must be performed by the deputy chairperson.

11 Meetings of Council

- (1) The Council must meet—
 - (a) to the extent required in order for it to fulfill its functions, but no less than 4 times in each 12 month period; and
 - (b) when directed by the Director.
- (2) The Council must meet at the time and place determined by the chairperson.
- (3) The quorum for a meeting of the Council is 5 voting members.
- (4) Subject to this Act and any regulations made under this Act, the Council may regulate its proceedings as it thinks fit.

12 Decisions of Council

- (1) All decisions made by the Council must be made by consensus if this can be obtained.
- (2) If there is no consensus, the decision must be made by vote.
- (3) The Director does not have a vote.
- (4) At any meeting, the person presiding has a deliberative vote and, in the case of an equality of votes, a casting vote.

13 Remuneration of members

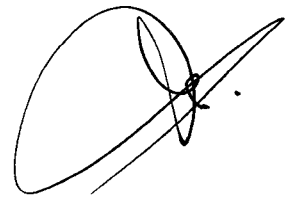
- (1) A member is entitled to receive remuneration for services as a member at a rate and of a kind set by regulations made by Cabinet.
- (2) However, the following office holders are not entitled to any remuneration for services as a member of the Council in addition to the member's remuneration in respect of that office—
 - (a) a Judge:
 - (b) a member of the Assembly:
 - (c) an employee (including a director) within any part of the Niue Public Service who is acting as a member of the Council as a representative of all or any part of the Niue Public Service.

14 Annual report

- (1) The Council must, before 31 March in each year, give a written report to the Minister on the operations of the Council in the preceding year.
- (2) The Minister must table a copy of the report before the Assembly at the first available meeting.

15 Resources and facilities

The Department must provide the resources and facilities that are necessary for the Council to fulfill its functions.



Schedule 3
Consequential amendments

Archives Act 1992

The Archives Act 1992 is amended by inserting the following section after section 16—

“16A Deposit of Niue documents concerning tāoga Niue

- “(1) A person who makes a document publicly available must provide 2 copies of the document to the Archivist for deposit in the Archives Office—
- (a) within 4 weeks after making the document publicly available; and
 - (b) free of charge.
- “(2) A person who fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding 10 penalty units.
- “(3) This section applies despite anything in the Copyright Act 1962 or in any other intellectual property right or law.
- “(4) In this section,—
- “document”—
- (a) means a document that—
 - (i) is printed in Niue, or whose author or publisher is resident in Niue; and
 - (ii) concerns or refers to tāoga Niue; and
 - (b) includes—
 - (i) books; and
 - (ii) serials; and
 - (iii) pamphlets; and
 - (iv) sheets of letter press or music; and
 - (v) plans, maps, charts, or tables; and
 - (vi) audio visual materials; and
 - (vii) documents that are in microform or digital form; and
 - (viii) any part of a document; and
 - (ix) each edition of a document:
- “publicly available” includes issuing a document—
- (a) in hard copy format; or
 - (b) in electronic format, whether online or offline
- “tāoga Niue” has the same meaning as in section 3(1) of the Tāoga Niue Act 2012.”

Customs Act 1966

The Customs Act 1966 is amended by inserting the following section after section 64—

“64A Export of antiquities and protected objects to comply with Tāoga Niue Act 2012

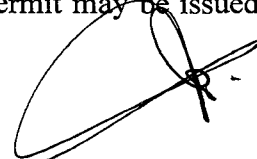
- (1) The export of a good that is an antiquity or a protected object (as each of those terms is defined in the Tāoga Niue Act 2012) must comply with the requirements of the Tāoga Niue Act 2012.
- (2) The requirements specified in subsection (1) are in addition to the requirements of this Act.”

Immigration Act 2011

The Immigration Act 2011 is amended by inserting the following section after section 16A—

“16B Further permit requirements for persons researching tāoga Niue

- “(1) If a person wishes to remain in Niue for the purpose of research concerning tāoga Niue (as defined in the Tāoga Niue Act 2012), a temporary permit may be issued to that person—



- (a) only with the prior written approval of the Director of the Department of Tāoga Niue; and
 - (b) subject to such conditions as to research procedures, guarantees, and publication of results as the Director may impose.
- (2) The requirements of subsection (1) are in addition to the requirements under sections 14 to 16A.”

Niue Act 1966

Section 737 of the Niue Act 1966 is amended by numbering the existing provision “(1)” and by adding the following subsections—

- “(2) However, the courts of Niue must not protect a copyright, design, patent, or trademark if it would be offensive to Niue culture to do so.
- “(3) The courts of Niue must not protect a copyright, design, patent, or trademark which affects traditional knowledge or expression of culture unless the requirements in relation to prior and informed consent under the Tāoga Niue Act 2012 are satisfied in relation to that traditional knowledge or expressions of culture.
- “(4) In this section, “expression of culture”, “prior and informed consent”, and “traditional knowledge” have the same meaning as in section 3(1) of the Tāoga Niue Act 2012.”

Niue Flag Act 1975

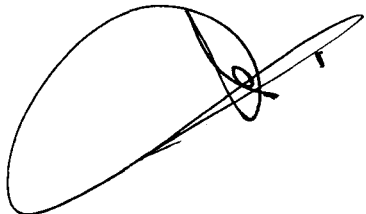
The Niue Flag Act 1975 is amended by repealing section 4 and replacing it with the following sections—

“4 Offences involving Niue Flag

- (1) Every person commits an offence and is liable on conviction to a fine not exceeding 5 penalty units or to imprisonment for a term not exceeding 6 months who,—
 - (a) without lawful authority, alters the Niue Flag by placing any sign, letter, emblem, or representation on it; or
 - (b) in or within view of any public place, uses, displays, destroys, or damages the Niue Flag in any manner with the intention of dishonouring it.
- (2) In any prosecution for an offence against this section, the onus of proving that any alteration of the Niue Flag was lawfully authorised is on the defendant.

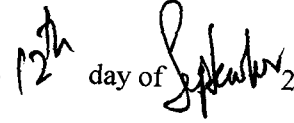
“4A Consent of Cabinet required for prosecution under section 4

No prosecution for an offence against section 4 may be commenced without the consent of Cabinet.”

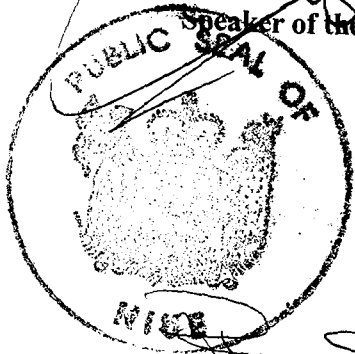
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I, AHOHIVA LEVI, Speaker of the Niue Assembly, certify that the requirements of Article 34 of the Niue Constitution have been complied with.

SIGNED AND SEALED at the Assembly Chambers this 12th day of September 2012.



Speaker of the Niue Assembly



Clerk of the Niue Assembly

COUNTERSIGNED in the presence of the Speaker

This Act was passed by the Niue Assembly on the 16th day of July 2012.
This Act is administered by the Department of Tāoga Niue.