Government of Samoa

KOMISI O LE TOEFUATAIGA O TULAFONO A SAMOA

SAMOA LAW REFORM COMMISSION

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'CIVIL PROCEDURE RULES' Supreme Court (Civil Procedure) Rules 1980 and Magistrates' Court Rules 1971

Final Report 19/17

February 2017

GOVERNMENT OF SAMOA

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

The Honourable Speaker

THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with section 9 (2) of the *Law Reform Commission Act 2008*, I have the honour to submit to you copies of the Report of the Civil Procedure Rules Supreme Court (Civil Procedure) Rules 1980 and Magistrates' Court Rules 1971 as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations on Report of the Civil Procedure Rules Supreme Court (Civil Procedure) Rules 1980 and Magistrates' Court Rules 1971 after public consultations and research in accordance with section 4 of the *Law Reform Commission Act 2008*.

(Hounourable Tuilaepa Dr. Sailele Malielegaoi)

PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM COMMISSION

GOVERNMENT OF SAMOA

Honourable Tuilaepa Lupesoliai Fatialofa Dr. Sailele Malielegaoi

PRIME MINISTER AND MINISTER FOR THE

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(Ulupale Fuimaono)

ACTING EXECUTIVE DIRECTOR

SAMOA LAW REFORM COMMISSION

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PREFACE

In November 2008, Cabinet and the Attorney General provided the Samoa Law Reform Commission (***Commission***) with a reference to review and reform the laws regulating Samoan Court processes. The reference included the review and reform of the *District Courts Act 1969* (**DCA**), *Judicature Ordinance 1961* (***JO***), the *Supreme Court (Civil Procedure) Rules 1980* (**SCR**) and *Magistrates' Court Rules 1971* (**MCR**). Given the size of this project, the Commission broke up the report into parts.

The final report on the DCA was approved by Cabinet in August 2013 and passed by Parliament in November 2014. This lead to the enactment of the District Courts Act 2016 in February 2016, which repealed the former DCA and reformed the law relating to the constitution, powers and procedures of the District Courts of Samoa and the Divisions of the Court. The final Report on the review of the JO was approved by Cabinet in March 2011 and passed by Parliament in January 2016.

This is the Final Report on the review of the SCR and MCR, which sets out the Commission's recommendations and options for reform. Following receipt of the reference, the Commission divided the review of the SCR and MCR into two parts because of its breadth and complexity.

Part 1 of the review (Issues Paper1) was published in March 2012 and approved by Cabinet in May 2012. Part 2 of the review (Issues Paper 2) was published in November 2014 and approved in December 2014. Consultation for Issues Paper 1 and Issues Paper 2 was held with the Judiciary, members of the Samoa Law Society and the Ministry of Justice Courts and Administration. The consultations invited views and comments from these three main stakeholders who are the main users of the SCR and MCR. The Commission also acknowledges the helpful written submissions from the legal sector and government ministries in Samoa, as well as overseas submissions from members of the legal sector and civil procedure experts.

This report is a culmination of research carried out by the Commission, supplemented by submissions received, and makes numerous recommendations to make the civil procedure process more efficient, cost effective and clearer for users of the civil court system.

INTRODUCTION

A. The Role of Civil Procedure Rules

1. Civil procedure rules govern practice and procedure in Samoan Courts exercising civil jurisdiction. The Courts of Samoa are structured as a hierarchy, with the Court of Appeal being the highest Court, followed by the Supreme Court and then the District Courts. Each of these Courts exercise both civil and criminal jurisdiction. For the purposes of this review, only the civil jurisdiction of the District and Supreme Courts is considered. Rules governing the practice and procedures of the Supreme Court and District Courts in exercising their civil jurisdiction are set out in the SCR[1] and the MCR[2] respectively. In Samoa, the pathway to resolving civil disputes is through the District Court for matters that do not exceed $20,000 and the Supreme Court for matters that are above that amount.[3]

2. Civil procedure rules play a vital role in settling disputes. This is achieved through provisions directing alternative dispute resolution like mediation, or judicial case management for example.

B. A Need for Change

3. The SCR and MCR have not been comprehensively reviewed since their enactment in 1980 and 1971, respectively. It is therefore necessary to review both rules to ensure they reflect current practice, and to consider and incorporate regulatory provisions from similar overseas jurisdictions where appropriate.

4. As part of this review process, gendered language should be replaced with more inclusive gender neutral terms where applicable.

5. This Report considers specific issues relating to the SCR and the MCR that were raised in Issues Papers 1 and 2 and explores options for their reform.[4] These include specific areas of concern raised by members of the judiciary and the legal profession in consultations.

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[1] *The Supreme Court (Civil Procedure) Rules* 1980 are made under s 40 of the *Judicature Ordinance 1961.*

[2] The name of the Magistrates Court was changed to District Court in 1992 however the rules that apply are still known as the *Magistrates Court Rules 1971*. The *Magistrates Court Rules 1971* are still in force under s 89(3) of the District Courts Act 2016.

[3] *District Court Act 2016*, Part III. Prior to the enactment of the new *District Court Act 2016*, the District Court could only deal with matters that amount to $10,000.

[4] A total of 121 questions are raised in Issues Papers 1 and 2. Most have been specifically addressed in this report, however some questions have been excluded as they are not contentious, and will be indirectly addressed by other reforms recommended in the report. Some questions have been slightly amended for clarity.

6. While this paper comprehensively considers most provisions of the civil procedure rules, it does not consider them all. The Commission considers that the provisions not included are not contentious at this time. The Commission therefore recommends that any provisions not included here should be retained, but redrafted in plain language. This will make the rules clearer and consistent with other reforms made as a result of the Report.

7. Recommendations have been made throughout the Report to adjust certain timelines under the rules, for example, for filing documents or listing court dates. The Commission has developed these timelines having considered limited submissions received, the existing rules and the practice in comparable jurisdictions and its appropriateness in the Samoan context. The Commission will nevertheless be guided by the judiciary and submitters like the Office of the Attorney General and the Samoan Law Society about the efficacy of the proposed timeframes.

8. The Commission also notes that the Report makes reference to the MCR as this name has remained unchanged despite the Magistrates Court being changed to the District Court in 1992. However, all references to the Magistrates Court in the MCR have been replaced with the District Court. The Commission recommends that the new rules reflect this change and be amended accordingly to District Courts Rules in line with the current name of the court.

9. For the most part, the Commission has also recommended that the rules in the SCR are replicated in the MCR. This is to achieve uniformity across the civil court jurisdictions in Samoa. It is hoped that a more uniform civil procedure will make civil proceedings more efficient as courts and legal practitioners are better informed of procedural requirements, which are standardised, easier to understand and aim to increase efficiency and reduce costs in the civil process. Again, the Commission will be guided by the judiciary about the efficacy of doing so in some of the procedures. The Commission notes that where the recommendations refer to 'the rules' generally, this is to encapsulate both the SCR and MCR.

10. Finally, the Commission has also identified a need for ongoing legal education for legal practitioners, to ensure that legal practitioners are up to date with the latest changes in legislation and also familiar with rules governing their practice. The Samoa Law Society current has the power to require lawyers to undertake this type of training under the *Lawyers and Legal Practice Act 2014* (Samoa).[5] The need for this training was illustrated in submissions received from both the judiciary and the private legal sector indicating a lack of understanding of many parts of the civil procedure rules by some members of the legal fraternity. As such, some practitioners do not effectively and efficiently utilise or

[5] *Lawyers and Legal Practice Act 2014* (Samoa) s 6(2)(g).

comply with the rules governing procedure, resulting in unnecessary delays, increased costs and wasting the valuable time of the Courts, counsel and clients.

Recommendations:

1. Any provisions not specifically referred to in this report are considered uncontentious at this time. It is recommended that they be retained but redrafted in plain language to make the rules clearer and consistent with other reforms made as a result of this Report.

2. Prescribed forms should be updated and redrafted in plain language. Consider whether additional forms should be prescribed to reflect any amendments or additions made to the rules from recommendations.

3. The Commission has included numerous references to specific timelines, for example in relation to filing documents and listing court dates. The timelines are provided in square brackets and are given on a provisional basis only, reflecting practice in neighbouring jurisdictions and in Samoan courts. It is intended that the proposed timelines will be settled by the judiciary and relevant stakeholders like the Office of the Attorney-General and the Samoan Law Society at the appropriate time.

4. For the purposes of this Report, references to 'days' means calendar days. Consideration should be given to whether days should mean calendar days or working days. Once decided, this should be defined and adjusted where appropriate in the rules.

5. The Magistrates' Court Rules should be referred to as the District Court Rules.

6. Unless otherwise stated, the Commission recommends that the rules in the SCR are replicated in the MCR, to achieve uniformity across civil court jurisdictions in Samoa.

7. Gender neutral language should be used throughout the revised SCR and MCR.

8. Require lawyers to undertake ongoing legal education, particularly related to changes in legislation and their area of practice, as provided under the *Lawyers and Legal Practice Act 2014* (Samoa).

C. Comparable Jurisdictions

11. In New Zealand, the court hierarchy is headed by the Supreme Court, followed by the Court of Appeal, the High Court and the District Courts. The High Court and the District Court are courts of general jurisdiction, and are governed by the High Court Rules 2016

(**“NZ HCR”**) and the *District Court Rules 2014* (**“NZ DCR”**). The High Court Rules were formerly in Schedule 2 of the *Judicature Act 1908* until October 2016 when there was a move to publish them separately to improve accessibility for court users.[6] Despite being a standalone document, the HCR form a part of the *Senior Courts Act 2016*.[7] The New Zealand civil procedure rules have been comprehensively compared with Samoa’s civil procedure rules and are frequently reflected in recommendations. New Zealand’s civil procedures provide helpful guidance in developing new rules governing civil procedure in Samoa, particularly as New Zealand case law is commonly applied in Samoa.

12. In Australia, the state jurisdictions are headed by the Supreme Court. The State of Victoria has the most recently reformed civil procedure rules in Australia, the *Supreme Court (General Civil Procedure) Rules 2015 (Victoria)* (**“CPR (Vic)”**) and the Commission therefore chose Victoria as a key state for comparison. To discern any similarities or differences between jurisdictions in Australia, the Commission at times also compared Samoa and Victoria’s civil procedure rules with the New South Wales *Uniform Civil Procedure Rules 2005* (**“UCPR”**).

13. In Vanuatu, a uniform set of civil procedure rules to govern proceedings in the Supreme and Magistrates’ Court were introduced on 31 January 2003. The *Civil Procedure Rules 2002* (Vanuatu) (**“CPR (Vanuatu)”**) simplify civil procedures and provide a good example of how civil procedure rules can be drafted in clear, plain language. They also provide useful insight into how civil procedure rules operate in another Pacific jurisdiction, particularly one in which many Samoan lawyers study and develop their legal practice.

COMMENCEMENT OF PROCEEDINGS

A. PARTIES

Definition of ‘party’

14. In civil disputes, the parties who commence proceedings are generally called plaintiffs and the parties against whom the proceedings are brought are called defendants. A party must be able to sue or be sued to participate in a civil dispute as a plaintiff or defendant.[8] The general rule is that only legal persons of full capacity can appear in court.[9]

Samoa

[6] Parliamentary Counsel Office, ‘New Zealand Legislation News’, <http://www.legislation.govt.nz/news.aspx#hcr>, accssed 12 Decmber 2016.
[7] *Senior Courts Act 2016* (New Zealand) s 147.
[8] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 44.
[9] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 53.

15. The SCR and MCR do not define 'party'. However the *District Courts Act 2016* (**DCA**) defines 'party' in any civil proceeding as including every person served with a notice of, or attending, any proceeding other than as a witness or spectator, whether named as a 'party' to that proceeding or not.[10]

16. The DCA also defines plaintiff and defendant. A plaintiff 'includes every person seeking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of civil proceedings'.[11] A defendant, in civil proceedings, means 'any person against whom proceedings have been commenced or an application for relief has been made, and includes any party served with notice of or entitled to attend the proceedings otherwise than as plaintiff'.[12]

Comparable Jurisdictions

New Zealand

17. 'Party' is defined in *District Court Act 1947 (NZ)* and the *High Court Rules 2016* (NZ) as any person who is a plaintiff or defendant or a person added to the proceeding.[13] A plaintiff is defined as the person by whom or on whose behalf a proceeding is brought and a defendant as the person served or intended to be served with a proceeding.[14]

Australia(NSW/ Victoria)

18. In New South Wales, a 'party to a proceeding' is defined as a natural person who may commence and carry on proceedings in any court, either by a solicitor or in person.[15]

19. In Victoria, the rules provide that a plaintiff is a person who commences proceedings and a defendant is a person against whom a proceeding is commenced.[16]

Vanuatu

20. In Vanuatu, a person is 'party to proceedings' if he or she is the claimant, the defendant, or a person who becomes a party and a person the court orders to take part in the proceedings.[17] The term 'claimant' is used in Vanuatu to refer to the person filing the

[10] *District Court Act 2016* (Samoa) s 2, which is exactly the same as the definition under the *District Court Act 1969* (Samoa) which was in place when Issues Paper 2 was developed.
[11] *District Court Act 2016* (Samoa) s 2.
[12] *District Court Act 2016* (Samoa) s 2.
[13] *High Court Rules 2016* (New Zealand) r 1.3 (1); *District Court Act 1947* (New Zealand) s 2.
[14] *High Court Rules 2016* (New Zealand) r 1.3 (1); *District Court Rules 2014* (New Zealand) r 1.8.
[15] *Uniform Civil Procedure Rules 2005* (NSW) r 7.1(1).
[16] *Supreme Court (General Civil Procedure) Rules 2015* (Victoria) r 4.03(1).
[17] *Civil Procedure Rules 2002* (Vanuatu) r 3.1(1).

claim while defendant is defined as the person against whom the claim is filed.[18] One proceeding may have more than one claimant or defendant.[19]

Submissions

21. In Issues Paper 2, the Commission took the preliminary view that the definition of 'party' for Samoa poses ambiguity as to whether other members in the court room such as counsel, Court personnel and the like are 'parties'. The Commission accordingly sought submissions on:

   - *Should 'party' be defined in the SCR and MCR? If so, should it follow the definition in the DCA or in the UCPR (NSW)?*

22. The Office of the Attorney General (**OAG**) indicated in its submission that it may be useful to provide a more comprehensive definition of 'party' in the SCR and MCR. However, OAG also noted that there are numerous other terms such as Plaintiff and Defendant, Applicant and Respondent, the status of an amicus curiae and people or entities who may be affected by proceedings but not specifically named in them, who may also fall within the definition of 'party'.[20]

Commission's View

23. The current definition of 'party' in the DCA Samoa is quite broad as it states that a 'party' includes "every person attending any proceeding", which encompasses all persons within Court room during a civil proceeding.

24. The Commission has considered the definitions from comparative jurisdictions and has opted to modify the definition in the DCA Samoa, to mean any person who is a plaintiff or a defendant or a person added to a proceeding. The Commission recommends that this definition replace the broad and ambiguous reference to *any person attending the proceedings* currently in the DCA Samoa.

25. The Commission also considers that the rules should be clear that only parties[21] that have the legal capacity to sue or be sued, can participate in a civil dispute as a plaintiff or a defendant.

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[18] *Civil Procedure Rules 2002* (Vanuatu) r 3.1(1).
[19] *Civil Procedure Rules 2002* (Vanuatu) r 3.1(2).
[20] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 1.
[21] The Commission notes that the Acts Interpretation Act 2015 section 3 defines 'party' as having the same meaning as 'person', which includes a corporation sole or a body of persons whether corporate or unincorporated.

Recommendations:

9. Both rules should clarify that a party means any person who is a plaintiff or a defendant or a person added to a proceeding. Plaintiff and defendant should accordingly be defined.

10. Both rules should clarify that a party who commences and brings proceedings should refer to legal persons or legal entity of full capacity.

Joinder of Parties and Claims

26. Joinder of parties is the legal term given to the inclusion of two or more persons as plaintiffs or defendants in legal proceedings. It also refers to the ability by one party to join several causes of action against another party in a single lawsuit.[22] The aim of this process is to minimise the number of separate lawsuits lodged by combining causes of action where the relief sought arises out of the same transaction or a common question of law or fact arises. This process also ensures that all persons interested in a particular matter become party to a proceeding.

27. While there is a need to ensure that everyone interested in a particular matter is a party to a proceeding, there is also concern that having too many parties may be cumbersome and costly and it is undesirable to involve an unwilling party who may be only marginally involved.[23]

Samoa

28. The current rule in Samoa on joinder of parties is provided in the SCR. A person may be joined as plaintiff or defendant if the relief claimed arises out of the same transaction or event, whether jointly, or if there are separate actions, where there is a common question of law or fact.[24] There is no similar provision in the MCR, which states only that a proceeding will not be invalidated if there is a misjoinder.[25]

29. The practice and procedure currently being used by the court to permit applicants to be joined as a party is not clearly set out in Rules. The procedure relating to joinder is that the Court may at any stage with or without the application of either party order the name of any person (whether plaintiff or defendant) whose presence is necessary to adjudicate and settle the questions involved in the action to be added as a party

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[22] Butt, P and Hamer D, *Lexis Nexis Concise Australian Legal Dictionary* (Butterworths, 4th ed,2011).

[23]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rded, 2012) 62-6.

[24]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 31 and 34.

[25]A misjoinder is when parties are improperly joined to a proceeding as co-plaintiffs or co-defendants.

(provided a plaintiff can only be added with his or her consent) or substitute the plaintiff, or strike off any party improperly joined. [26]

30. Unlike joinder of parties, neither the MCR nor SCR provide rules pertaining to joinder of claims.

Comparable Jurisdictions

New Zealand

31. The HCR (NZ) Rules provide that a person may be added as either a plaintiff or defendant where the claim for relief arises out of the same transaction, matter, event, instrument, document, or enactment and that a common question of law or fact would arise if separate proceedings were brought.[27] This is similar to Samoa. Where the application concerns joining a plaintiff, the defendant may apply for the Court to order separate trials if a joinder may prejudice or delay the trial.[28] Although the Court's approach to the joinder of plaintiffs is liberal, the rule does not permit joinder of a person who only has a commercial rather than legal interest in the outcome.[29]

32. The number of persons that may be joined as parties to a proceeding are limited to those whose presence the Court considers necessary for the just determination of the issues and those who ought to be bound by any judgment.[30] The court may at any stage strike out a party improperly or mistakenly joined or add a party who is necessary to adjudicate all questions involved in the proceeding.[31]

33. It is important to ensure all necessary defendants are before the Court, although there is not quite the same requirement as there is in joinder of plaintiffs. Defendants may be joined if there is alleged to be a right of relief against them arising out of essentially the same matter.[32] Where a matter is arguable, joinder may be made subject to conditions so as to preserve the defendant rights.[33]

34. There is no set procedure for joining parties. Plaintiffs entitled to join (under HCR 4.4) can cite themselves at plaintiffs and similarly defendants entitled (under HCR 4.3) may be cited and served without formality when proceedings are instituted.[34] Where they fall

[26]*Supreme Court (Civil Procedure) Rules* 1980 (Samoa) rr 32-35.
[27]*High Court Rules 2016* (New Zealand) r 4.2.
[28] *High Court Rules 2016* (New Zealand) r 4.2.
[29]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 82 referring to *Re Farbenindustries* [1944] Ch 41 (CA).
[30]*High Court Rules 2016* (New Zealand) rr 4.1 and 4.2; *District Court Rules 2014* (New Zealand) r 4.56.
[31]*High Court Rules 2016* (New Zealand) r 4.56.
[32] *High Court Rules 2016* (New Zealand) r 4.3.
[33] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 60 referring to *Thompson v Good Shepherd Covenant Trust* (2000) 14 PRNZ 684 (HC).
[34] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 61.

outside these rules, they must then make an interlocutory application to Court.[35] Where there is doubt as to joinder, the Court may be approached for directions.[36]

35. The HCR provide that several causes of action may be brought together in the same claim.[37] The DCR does not include any provisions concerning joinder of claims.

Australia (Victoria)

36. Similar to New Zealand, parties can be joined as either plaintiffs or defendants in Victoria, if there is a common question of law or fact that would arise if separate proceedings were brought and if all rights to relief claimed arise out of the same transaction or series of transactions. The Court may also grant leave to join plaintiffs or defendants to a proceeding.[38]

37. The Court nevertheless retains discretion to order that a party not be joined to a proceeding, if it delays the proceeding, causes prejudice to any party or is otherwise inconvenient.[39] Again, this is similar to New Zealand.

38. If a plaintiff claims relief that another person is jointly entitled to, then those entitled persons must be added to proceedings. A person who does not consent to be joined as a plaintiff in these circumstances shall be made a defendant.[40]

39. The procedure for adding a party to a proceeding includes:[41]
    - Obtaining written consent from the plaintiff to be joined as a plaintiff;
    - Applying to the Court with an affidavit showing the person's interest in the questions in the proceeding.

40. A proceeding will not be defeated if there is a misjoinder or a non-joinder of a particular person. [42]

41. In Victoria, both the SCR and MCR provide that a plaintiff may join multiple claims against a defendant (it does not matter if the claims are made by the plaintiff or made against the defendant in the same or in different capacities).[43]

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[35] *High Court Rules 2016* (New Zealand) r 4.56.
[36] *High Court Rules 2016* (New Zealand) r 7.9 which is an overarching rule empowering the Court to make directions for the conduct of proceedings from beginning to conclusion.
[37] *High Court Rules 2016* (New Zealand) r 5.28. The rules prevent persons in certain capacities suing or being sued in any other capacity.
[38] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.02.
[39] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.04.
[40] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.03.
[41] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.07.
[42] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.05.
[43] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.01; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 9.01.

Vanuatu

42. The CPR (Vanuatu) provides that the Court may order a person to become a party to a proceeding if that person's presence is necessary to enable the court to make a decision fairly and effectively.[44] This enables all parties to the dispute to appear before the court at the same time to reduce delay, and to prevent injustice to a person whose rights or liabilities may be affected by the court's judgement if they are not given an opportunity to be heard.[45] The court may also order the removal of a party if satisfied that it can make a fair and effective decision without that party or if the court considers any other reason which would warrant the removal of a party.[46]

43. Vanuatu also provides rules for joining several claims in one proceeding in the following situations:

    - if a common question of law and/or fact is involved in all the claims;
    - the claims arise out of the same transaction or event; or
    - for any other reason the court considers the claims should be included in the same proceeding.[47]

Submissions

44. In Issues Paper 2, the Commission sought submissions on the following:

    - *Should criteria for joinder of parties be included in SCR and MCR? If yes, should such criteria be similar to that of the HCR (NZ)?*

    - *Should there be any limitation to the number of parties able to be joined in a single proceeding?*

    - *Should SCR and MCR provide a particular process to allow any person to apply to the Courts to be added or removed as a party to a proceeding, for example by filing and serving affidavit material explaining the basis for the application?*

    - *Should SCR and MCR include procedures for joinder of claims? If yes, should there be any limitation as to the number of claims to be joined?*

45. The OAG submitted that criteria for joinder of parties would be useful, and expanding the current definition in the SCR to reflect NZ's approach was suggested as logical and sound. The OAG did not agree to limit the number of people to be joined to a proceeding. They also submitted that the following matters need to be clarified and formalised in the Rules:

[44] *Civil Procedure Rules 2002* (Vanuatu) r 3.2(1).
[45] *Civil Procedure Rules 2002* (Vanuatu) commentary on rr 3.2.1 and 3.2.2.
[46] *Civil Procedure Rules 2002* (Vanuatu) r 3.2(2).
[47] *Civil Procedure Rules 2002* (Vanuatu) r 3.3.

- Who can apply to join someone as a party to proceedings?; and
- Practice and procedure currently being used by the court to permit applicants to be joined as a party.

46. With regards to joinder of claims, the OAG raised that a procedure set out in the rules may be beneficial. However, it was submitted that criteria for the joinder of claims should be left to the discretion of the court rather than limited by the rules. It was expressed that limiting the number of claims that may be joined may not be logical and should be left open.[48]

47. No further submissions were received on these issues.

Commission's View

48. The rules in the SCR (Samoa) and HCR (NZ) largely reflect similar aims, albeit with the NZ rules providing more modern language, detail and a greater emphasis on efficiency. The Commission considers that Samoa's rules should be changed in line with the NZ Rules to reflect these three qualities.

49. Criteria for joinder of parties should be included in the MCR and SCR. While the courts should still have a broad discretion regarding joinder of parties, more detailed criteria for joinder are nevertheless desirable. In line with the HCR (NZ) courts should limit the parties to a claim as far as practicable to those necessary for the determination of the claim and those who ought to be bound by the judgment.[49] While consent should still be required to join a party as a plaintiff, the Rules should note, as is the case in comparable jurisdictions that parties who do not consent to be plaintiffs should nevertheless be joined as defendants in order to be bound by the judgment.[50]

50. It is submitted that the Court should have the discretion with or without the application of any parties to order that a party not be joined to a proceeding, a separate trial ordered, or any other order made that the court thinks fit if it delays the proceeding, causes prejudice or embarrassment or is otherwise inconvenient.[51] This builds on the current rule 31 of the Samoan SCR but allowing the court to exercise its case management role, again, in line with the overriding purpose of the Rules.

51. The existing criteria regarding the right to relief arising from the same transaction or event is consistent with comparable jurisdictions and should be retained.

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[48] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 1.
[49] *High Court Rules 2016* (New Zealand) r 4.1.
[50] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.03(1)(b).
[51] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.04.

52. There should be no limit as to the number of parties able to join a proceeding. The court should however, as noted above, limit joinder to those parties necessary for the determination of the claim and those who ought to be bound by the judgment, in line with the overriding purpose of the Rules.

53. Both the MCR and SCR should more clearly set out the process applicable for any person to apply to the Court to be added to (or removed from) a proceeding. It is submitted that unless the Court otherwise orders an application by a person for an order adding (or removing) the person as a party shall be supported by an affidavit showing the person's interest (or lack thereof) in the proceeding and this affidavit served on all parties to the proceeding.

54. The CPR in comparative jurisdictions contain rules relating to joinder of claims, with the exception of the NZ DCR. The Commission considers that rules relating to joinder of claims should be provided for in the rules in Samoa. Such a provision would allow for the court to include several related claims into one proceeding, rather than requiring distinct determination for each claim individually. It would not only be highly inconvenient for the court but would also expend limited court resources and time unnecessarily. The Commission notes the lack of criteria for a joinder of claim application in both the Victoria and New Zealand rules. Vanuatu has provided some guidance around this area. After considering a submission from the OAG, which is in line with the current rules in Victoria and New Zealand, the Commission will leave this issue to be appropriately determined by the Judiciary.

Recommendations:

11. Both rules should clearly limit the persons that can be joined to a proceeding to those whose presence the Court considers necessary for the just determination of the issues 'and those whom ought to be bound by any judgment. This should be set out in both the SCR and MCR.
12. Subject to the court's discretion, there should be no limit on the number of parties who can be joined to a single proceeding.
13. Any person should be entitled to join a proceeding on application supported by affidavit.
14. Any party can be removed from a proceeding on application supported by affidavit.
15. Both rules should also provide that the plaintiff in a proceeding may join several claims or causes of action into one proceeding.

Third Parties

55. The third party procedure is a proceeding in which the defendant who has been sued may join a person who has not been sued (i.e. a third party) on certain grounds by issuing a third party notice.[52] The third party procedure is a useful means of resolving in one proceeding, two or more identical or closely related claims; enabling the court to settle all issues in dispute and avoiding a multiplicity of proceedings.[53]

Samoa

56. In Samoa, the SCR sets out four grounds in which a third party may be joined or in which a defendant may claim against a third party:[54]
    i. The defendant is entitled to a contribution or indemnity; or
    ii. The defendant is entitled to any relief or remedy relating to the original subject matter of the action; or
    iii. Any question or issue in the action should properly be determined not only as between the plaintiff and the defendant but also as between the plaintiff, the defendant and the third party; or
    iv. Any question or issue relating to or connected with the matter which is substantially the same as some question or issue arising between the plaintiff and the defendant, should be properly determined.

[52] *High Court Rules 2016* (New Zealand) r 4.4; *District Court Rules 2014* (New Zealand) r 4.4.
[53] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 62.
[54] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 43(1)(a)–(d).

57. In consideration of the above four grounds, the Commission in Issues Paper 2 cited the case of *BM Pacific Ltd v Mua*,[55] to raise the question of whether there should be a prerequisite to third party proceedings. In this case, the plaintiff (a New Zealand company) supplied paint and chattels for the sum of $133,597.23 to the defendant company to establish a paint business in Samoa, which was not paid. The defendant sought to join the third party company, who it asserted had retained the chattels and therefore should be liable for payment. It also asserted that the value of these chattels should be deducted from the amount of the plaintiff's claim against the defendant company, and filed a third party notice application. The third party denied liability for contribution.

58. His Honour Sapolu CJ highlighted that a third-party notice in Samoa corresponds with the rules provided under the HCR (NZ), and therefore, New Zealand case law is relevant to the interpretation and application of the rules in Samoa. The New Zealand Courts require, as a prerequisite to third party proceedings that the defendant establish a right of action against the third party, independent of the plaintiff's rights. Sapolu CJ dismissed the defendant's claim against the third party applying this prerequisite on the basis that the defendant could not establish a right of action against the third party independent of the plaintiff's rights.

59. Therefore a cause of action must be shown by the defendant against the third party in an application for a third party procedure. This prerequisite is therefore a proposed extension of the rule on third party notice for Samoa, as there is no similar rule in the SCR.

60. The SCR provide procedural steps involved in issuing a third party notice. These include that the defendant seeking leave of the Court to issue and serve a third party notice within 10 days after the service of the summons.[56] Such notice should state the nature and grounds of the claim or issue to be determined, and the relief claimed.[57]

Comparable Jurisdiction

New Zealand

61. The four grounds for a defendant to claim against a third party in New Zealand are similar to those of Samoa. These include if the defendant claims any of the following:[58]
    i. The defendant is entitled to a contribution or indemnity from a person who is not a party to the proceeding; or

[55] *BM Pacific Ltd v Mu'a* [2002] WSSC 33. This case also cited the New Zealand case of *Karori Properties* [1969] NZLR 698.
[56] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r43.
[57] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r43.
[58] *High Court Rules 2016* (New Zealand) rr 4.4 and 4.7; *District Court Rules 2014* (New Zealand) rr 4.4 and 4.7.

ii. The defendant is entitled to relief or remedy relating to the subject matter of the proceeding from a third party and the relief or remedy is substantially the same as that claimed in the proceeding against the defendant; or
iii. A question or issue in the proceeding ought to be determined not only between the plaintiff and defendant but also between the plaintiff, defendant and third party; or defendant and third party; the plaintiff and the third party.
iv. There is a question or an issue between the defendant and the third party relating to the proceeding that is substantially the same as a question or issue arising between the plaintiff and the defendant.

62. The requirement for a cause of action or a claim by the defendant against a third party is clearly set out for New Zealand as noted in the *BM Pacific Ltd v Mua* case.[59]

63. The HCR provide procedural steps involved in issuing a third party notice. These include that a defendant may join a third party on any of these grounds by issuing a third party notice within the 10 working day requirement following the expiration of the time for filing a statement of defence (the Court's leave is otherwise required if the limit is expired).[60] The third party notice must inform the third party of the claims by the plaintiff against the defendant, and the defendant against the third party, the steps to be taken by the third party and the consequences of default.[61] It must also be accompanied by a statement of claim by the defendant against the third party, and specify the question or issue to be tried and the remedy sought from that party.[62]

Australia (Victoria)

64. In Victoria, there are three circumstances when a defendant can claim against a third party. These largely replicate the New Zealand provisions and include circumstances where a defendant claims:[63]

- Any contribution or indemnity;
- Any relief relating to the original subject matter of the proceeding or relief that is substantially the same as that claimed by the plaintiff; or
- That a question relating to the original subject matter of the proceeding should also be determined between the plaintiff, defendant and a third party.

65. There are numerous procedural steps set out in the Victorian Rules to join a third party to proceedings. These include:

- Defendant to serve a third party notice and statement of claim on third party;[64]

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[59] *BM Pacific Ltd v Mu'a* [2002] WSSC 33.
[60] *High Court Rules 2016* (New Zealand) r 4.4.
[61] *High Court Rules 2016* (New Zealand) r 4.10; *District Court Rules 2014* (New Zealand) r 4.10.
[62] *High Court Rules 2016* (New Zealand) r 4.11.
[63] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o11.01.

- Defendant to serve third party notice after serving defence;[65]
- Third party notice to be served within 60 days after being filed;[66] and
- Defendant to seek leave to file third party notice.[67]

Vanuatu

66. The Vanuatu rules provide that a defendant may make an application to join a non-party to a proceeding (by filing and serving a third party notice on that person) if he or she wishes to claim a contribution, an indemnity or other remedy from that non-party.[68]The third party notice is to state what the defendant claims (i.e. contribution, indemnity or any other remedy) and also state that the non-party will become party to the proceeding upon his or her receipt of the notice.[69]

67. If the defendant wishes to file a third party notice but has already filed a defence, he or she must secure leave of the court to be able to do this.[70]

Submissions

68. In Issues Paper 2, the Commission sought submissions on the following:

- *Should the SCR and MCR provisions relating to third parties require, as a prerequisite to granting a third-party notice, the existence of a right of action of the Defendant against the third party?*

- *What appropriate rules should Samoa adopt to reflect current practice, by comparison with New Zealand, Victoria and Vanuatu?*

69. Submissions received indicated that a defendant must have a valid cause of action against a third party before a third party notice is granted by a Court.[71] No submissions were received in relation to which rules Samoa should adopt to reflect current practice.

Commission's View

70. The Commission considers that the rule on third party procedure should be expanded to clearly require a defendant to provide or show a cause of action or claim against the third party independent of the plaintiff's rights. This is consistent with New Zealand case

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[64]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 11.04.
[65]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 11.05. There are additional time requirements articulated in this rule about when a third party notice can be served.
[66]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 11.07.
[67]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 11.06.
[68]*Civil Procedure Rules 2002* (Vanuatu) r 3.7(1).
[69]*Civil Procedure Rules 2002* (Vanuatu) r 3.7(1).
[70]*Civil Procedure Rules 2002* (Vanuatu) r 3.7(3).
[71] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2,* 17 June 2015, 1.

law that was applied in the Supreme Court of Samoa. This would minimise unnecessary applications to join third parties who have no involvement whatsoever in proceedings.

71. The procedural steps involved in issuing a third party notice in Samoa's SCR include the defendant seeking leave of the Court to issue and serve a third party notice on any of the grounds within the rules within 10 days after service of the summons. In New Zealand the procedural steps require parties to issue a third party notice within the 10 working day requirement following the expiration of the time for filing a statement of defence, with leave from the Court only required if that limit has expired. The Commission considers that Samoa should adopt this aspect of the New Zealand procedure. This procedure would require less judicial intervention, encourage and reward prompt action and ultimately reduce court costs, all in line with the overriding objectives of the Rules.

72. The Commission has included 14 days in its recommendation to reflect the use of calendar days over working days which was the preference indicated by Judiciary.

73. Although Samoa's SCR set out the requirements for third party notice under Rule 43, the Commission considers that the rules should provide more guidance regarding the content of the notice and the procedure to be followed. The Commission thus suggests that similarly to New Zealand, the third party notice must:

    - Use prescribed form;
    - Be accompanied by a statement of claim by the defendant against the third party;
    - State the claims by the plaintiff against the defendant, and the defendant against the third party;
    - State the question or issue to be tried and the remedy sought from that third party;
    - State the time within which the third party may file an appearance in the proceeding; and
    - Outline the consequences of default by that third party

74. The Commission considers that such rules around third party would also be equally applicable for inclusion into the new MCR and should be replicated as far as necessary in the new MCR.

Recommendations:

16. The existing rule on third party procedure should be extended to require defendants to show a claim against the third party independent of the plaintiff's rights.
17. The third party notice procedure should only require leave of the court to issue notice, if the specified time frame (14 days) has expired.
18. The procedure for third party notice should outline that defendants must:
    - Use prescribed form
    - Be accompanied by a statement of claim by the defendant against the third party
    - State the claims by the plaintiff against the defendant, and the defendant against the third party
    - State the question or issue to be tried and the remedy sought from that third party
    - State the time within which the third party may file an appearance in the proceeding
    - Outline the consequences of default by that third party
19. Rules on third party notice should be clearly set out in both the SCR and MCR.

Death of a Party

Samoa

75. There is no provision on the death of a party for Samoa in the MCR and SCR. However under the *Law Reform Act 1964*, it provides that causes of action against a party who has died survives the death of that party.[72] Proceedings that do not continue include causes of action for defamation or seduction or for inducing a spouse to leave under the *Divorce and Matrimonial Causes Ordinance 1961* for damages on the ground of adultery, and claims for exemplary damages.[73]

Comparable Jurisdictions

New Zealand

[72] *Law Reform Act 1964* (Samoa) s 3.
[73] *Law Reform Act 1964* (Samoa) s 3.

76. In New Zealand, if one of the parties to a proceeding dies, the proceeding will not come to an end, unless the cause of action itself is brought to an end.[74] If it is necessary in order to settle any question involved in the proceeding, the court is required to order that the personal representative, trustee or other successor of the deceased become a party so that all questions may be completely settled for the just disposal of proceedings.[75]

77. In most cases where a substitution of parties is necessary or desirable to settle any question involved in the proceeding, the Court may (if necessary) order that a party be added or that an existing party continue in a different capacity.[76] An application may be made ex parte to the court for a change of party in the event of death or bankruptcy, some other event causing a change or transmission of interest or liability, or a person interested coming into existence (e.g. through birth or incorporation).[77]

78. The *Law Reform Act 1936 (NZ)* deals with survival of causes of action in tort.[78] Basically, all causes of action survive a person's death, however proceedings for defamation and claims for exemplary damages do not continue after the death of a plaintiff.[79]

Australia (Victoria)

79. The rules on death of a party in Victoria are similar to those in New Zealand. A cause of action survives the death of a party.[80] The rules provide for the appointment of representatives of a deceased person's estate, adding appointed representatives to proceedings and details for service.[81] The rules also provide for dismissal of the proceedings if a party dies and a representative is not appointed, as well as how costs are awarded in that situation.[82]

Vanuatu

80. The Vanuatu rules are substantially the same as New Zealand.[83] If the claimant dies during a proceeding, the proceeding may be continued by the personal representative of

[74]*High Court Rules 2016* (New Zealand) r 4.49; *District Court Rules 2014* (New Zealand) r 4.49.
[75]*High Court Rules 2016* (New Zealand) r 4.50; *District Court Rules 2014* (New Zealand) r 4.50.
[76] Mathew Casey, Christopher Corry, John Faire, Sally Fitzgerald, Phillip McCabe, Graham Taylor and Peter Twist, *New Zealand Procedure Manual: High Court* (LexisNexis NZ Limited, 2nd ed, 2013) 4.52.3.
[77] Mathew Casey et al., *New Zealand Procedure Manual: High Court* (LexisNexis NZ Limited, 2nd ed, 2013) 4.52.3.
[78]*Law Reform Act 1936* (New Zealand) s 3.
[79] Mathew Casey et al., *New Zealand Procedure Manual: High Court* (LexisNexis NZ Limited, 2nd ed, 2013) 4.49.4; Andrew Beck, *Principles of Civil Procedure* (Thomson Reuters, 3rd ed, 2012) 65.
[80]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 9.09.
[81]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 9.08-9.09.
[82]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 9.10 and 16.03.
[83]*Civil Procedure Rules 2002* (Vanuatu) r 3.9.

the claimant provided that the proceeding involves a cause of action that continues after death.[84]

81. The rules also provide that if the defendant dies at the start of the proceeding and the cause of action continues after his or her death, the claimant may name the defendant's estate in the claim if no representative of the defendant has been appointed yet. Otherwise, if a representative of the defendant is appointed, then all documents in the proceedings must name the representative of the defendant.[85]

Submissions

82. In Issues Paper 2, the Commission sought submissions on the following:

  - *Should both the SCR and MCR provide for the death of a party? If so, should the proceeding be continued by the Court on its own motion, appointing the personal representative of the deceased party?*

83. Submissions received indicated that the Court already has a practiced procedure in relation to death of a party, involving letters of probate being granted by the Court and a representative being appointed for the deceased. It was submitted that this process should be reflected in the Rules.[86]

  - *Should provision be made for a specified time for an application to be made for substitution of a personal representative of the deceased, in default of which the proceeding is to be dismissed?*

84. Fixing a time limit for appointing a representative was considered useful by OAG to prevent proceedings from becoming protracted. Furthermore, if more time is required due to unforeseen circumstances then the Court may exercise its discretion to grant more time.[87]

Commission's View

85. Although the *Law Reform Act 1964 (Samoa)* provides that causes of action survive a person's death, with the exception for example of proceedings for defamation and claims for exemplary damages – the Commission considers that rules on the death of a party should be expressly included in the MCR and SCR for ease of reference and clarity.

[84] *Civil Procedure Rules 2002* (Vanuatu) r 3.9(1).
[85] *Civil Procedure Rules 2002* (Vanuatu) r 3.9(2).
[86] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015 and 27 January 2017.
[87] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 2.

86. The Commission considers that where a party dies, the proceeding should not come to an end if a cause of action survives or continues, unless the cause of action itself is brought to an end. Consultations with the Judiciary indicated that the current practice is that the court will not continue to hear a matter until the name of the plaintiff or defendant is amended and replaced with the name of the administrator or executor of the estate. The Commission considers that this practice should be reflected in the rules.

87. It was raised in submissions that fixing a time limit for appointing a representative in substitute of the deceased would be considered useful and should be included in the rules. It was suggested that this would prevent proceedings from being dragged on and ensure that parties will be expeditious in ensuring that proceedings continue.[88]

88. The Court should also be given discretion to deal with the matter as it deems just, including timeframes for providing names of administrator or executor of the estate, or how the matter should proceed if there are no letters of administration or probate orders made (including appointing a public trustee).

89. Furthermore, an ex parte application to the court should be able to be made for a change of party in the event of death, where a substitution of parties is necessary or desirable to settle any question involved in the proceeding. Where necessary or desirable the Court should be able to order that a party be added or that an existing party continue in a different capacity.

[88] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 20 January 2017.

Recommendations:

20. The provisions of the NZ Rules on the death of a party provide helpful guidance and are appropriate to Samoa. Rules on death of a party should be clearly set out in the MCR and SCR.

21. Both rules should provide that where a party to a proceeding dies before a matter has been finalized, the proceeding should not come to an end if a cause of action survives or continues, unless the cause of action itself is brought to an end. The current practice that the court will not continue to hear a matter until the name of the plaintiff or defendant is amended and replaced with the name of the administrator or executor of the estate, should be included in the rules.

22. The Court should also be given discretion to deal with the matter as it deems just, including timeframes for providing names of administrator or executor of the estate, or how the matter should proceed if there are no letters of administration or probate orders made (including appointing a public trustee).

23. Where a substitution of parties is necessary or desirable to settle any question involved in the proceeding, an ex parte application to the court should be able to be made for a change of party in the event of death.

B. REPRESENTATION OF PARTIES

90. The concept of representation under this part is based on the understanding that there are persons who are legally unable to represent themselves and would require an appropriate representative to undertake proceedings on their behalf. The sorts of persons envisaged are minors and incapacitated persons. The general rule is that only legal persons of full capacity can appear in court.[89]

91. This part will consider minors and incapacitated persons, as well as representation of companies and businesses who are not considered 'natural legal persons' and actions containing multiple plaintiffs or "class actions".

Minors

Samoa

[89] Andrew Beck, *Principles of Civil Procedure* (Brooker Limited, 3rd ed, 2012) 53, referring to *Halsbury's Laws of England* (4th ed, 1982) vol 37 at 216; *District Court Act 2016* (Samoa) s 36.

92. A 'minor' under the *Infants Ordinance1961* (Samoa) is a person under the age of 21 years.[90] A 'child' however is defined under that Ordinance as an infant under the age of 16 years.[91] A minor is defined under the Family Court Rules 2014 as a child or young person. It further provides that a child means a person under 18 (consistent with the *Family Safety Act 2013*) and a young person means a person between 16 and 18 years.[92]

93. The SCR and MCR do not define 'minor', but state that in a proceeding where an infant is involved, representation by a guardian *ad litem* is necessary unless the Court orders otherwise.[93] There is no provision allowing a minor to apply to conduct proceedings without a guardian. Whilst there is provision for removing a guardian by the Court upon sufficient cause being shown, which subsequently must be replaced by another guardian,[94] there is no express requirement that an appointed guardian must act in the best interests of the minor.[95]

94. In relation to costs, the Family Court Rules 2014 provides that a representative of a minor (which includes a guardian *ad litem)* is responsible for costs awarded against a party they represent, and costs paid or incurred while acting as a representative. There are provisions enabling a representative to recover these costs, however.[96]

Comparable Jurisdiction

New Zealand

95. In New Zealand, a minor is a person who has not reached the age of 18 years.[97] According to the High Court Rules, a minor must have a litigation guardian as his or her representative in any proceeding unless the Court otherwise orders.[98]

96. However, a minor may apply to the Court for an authorisation to conduct the proceedings themselves without a litigation guardian.[99] In such cases, the Court may grant such orders if satisfied that the minor has the capacity to make decisions required or likely to be required in the proceedings and there is no reason that would make it in their interests to be represented by a guardian.[100]

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[90] *Infants Ordinance 1961* (Samoa) s 2(b). Note however that the *Child Care and Protection Bill 2013* (Samoa) being developed proposes that the age of a child be below 18 years.
[91] *Infants Ordinance 1961* (Samoa) s 2(b).
[92] *Family Court Rules 2014* (Samoa) s 2; *Family Safety Act 2013* (Samoa) s 6.
[93] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 37; *Magistrates' Court Rules 1971* (Samoa) r 14.
[94] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 40.
[95] See *Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 37-40; *Magistrates' Court Rules 1971* (Samoa) r 14.
[96] *Family Court Rules 2014* (Samoa) r 30. See discussion on "Incapacitated persons".
[97] *High Court Rules 2016* (New Zealand r 4.29; *District Court Rules 2014* (New Zealand) r 4.29.
[98] *High Court Rules 2016* (New Zealand) r 4.31; *District Court Rules 2014* (New Zealand) r 4.31.
[99] *High Court Rules 2016* (New Zealand) r 4.32; *District Court Rules 2014* (New Zealand) r 4.32.
[100] *High Court Rules 2016* (New Zealand) r 4.32(3).

97. If appointing a litigation guardian, the Court should be satisfied that the person appointed is able to fairly and competently conduct a proceeding on behalf of the minor (or incapacitated person) and does not have interests adverse to those of the minor (or incapacitated person).[101]

Australia (NSW, Victoria)

98. The NSW UCPR and the Victoria SCCPR provide that there be a tutor to commence and carry out a proceeding on behalf of a person who is under the legal age, being 18 years.[102]

99. In Victoria, the litigation guardian must be represented by a solicitor.[103] Victoria includes a provision requiring that the litigation guardian not have interests adverse to the minor.[104] The Court is empowered to appoint, remove or substitute the litigation guardian.[105] The rules contain protections if a defendant who is a minor does not file an appearance within the required timeframes. In that situation, the plaintiff cannot continue the case unless a litigation guardian is appointed.[106]

Vanuatu

100. In Vanuatu, the term "child" is used instead of the term "minor" to refer to person(s) under 18 years old.[107] The CPR (Vanuatu) maintains that a child may only start or defend legal proceedings through a court appointed litigation guardian.[108]

Submissions

101. In Issues Paper 2, the Commission sought submissions which included:

- *Should the expression 'infant' as currently used in the SCR and MCR and in the Infants Ordinance 1961 be retained or replaced with the expression 'minor' (similar to the New Zealand High Court Rules), or 'child' as proposed in Samoa's Child Care and Protection Bill 2014?*

- *Should there be a provision in both SCR and MCR to allow an infant to represent himself or herself in a proceeding without a litigation guardian, (similar to the HCR (NZ))? If yes, should there be a provision in both SCR and MCR, similar to the HCR*

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[101] *High Court Rules 2016* (New Zealand) r 4.35; *District Court Rules 2014* (New Zealand) r 4.35.
[102] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15(3); *Uniform Civil Procedure Rules 2005* (NSW) rr 7.13-7.18; *Civil Procedure Act 2005* (NSW) s 3; *Age of Majority Act 1977* (Vic) s 3.
[103] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.02(3).
[104] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.03(1)(b).
[105] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.03(4).
[106] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.04.
[107] *Civil Procedure Rules 2002* (Vanuatu) r 20.1
[108] *Civil Procedure Rules 2002* (Vanuatu) r 3.8.

(NZ), to assess if the infant has the capacity to make the decisions required in the proceedings, and whether it is in the infant's best interests to be represented by a guardian.

- *Should both SCR and MCR include uniform requirements as to what is required of a guardian, or tutor, for example whether he or she able to adequately represent the interests of the infant or incapacitated person, or whether he or she has any interest in the proceedings adverse to the interests of the infant or person of unsound mind (incapacitated person)?*

- *Should a person become a guardian without the requirement for any formal appointment or only after being appointed by the Court? Should they be formally appointed by a judge as in other jurisdictions?*

- *If adopted for use in Samoa, should definitions of incapacitated person, minor and litigation guardian be defined or specified (similar to the HCR (NZ))?*

102. The OAG submitted that it may be useful to have a provision allowing a minor to represent themselves in civil proceedings, however, with proper parameters in place. For example, restricting this to minors between the ages of 18-21 and that this may only be granted if the Court is satisfied that the minor is capable of representing themselves.[109]

103. A further submitter suggested that the current practice in appointing a guardian *ad litem* to represent the minor should be retained, due to a minor's unfamiliarity and apprehensiveness of the court process where the minor may be unable to properly represent themselves.[110]

104. No further submissions were received.

Commission's View

105. The Commission acknowledges that there are different ages and terms used to define a minor, infant, young person or child across different legislation in Samoa and in comparable jurisdictions. For the purpose of this part the Commission considers that it should apply to a child which means a person under 18 years. This is consistent with the definition of child under the *Family Court Rules 2014* and the UN Convention on the Rights of the Child.[111] It also reflects the age used in all other comparable jurisdictions.

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[109] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015 and 30 January 2017.

[110] Ruby Drake, Submission No 1 to the Samoa Law Reform Commission*, Civil Procedure Rules Issues Paper 2*, 25 November 2015.

[111] See *Family Court Rules 2014* (Samoa) r 2(1) and *Convention on the Rights of a Child 1989* (UN) art. 1.

106. The Commission considers that rules in both Courts should continue to require that a child must have a guardian *ad litem* as his or her representative in any proceeding unless the court otherwise orders. In addition, the rules should require that the Court must be satisfied that the guardian *ad litem* will act in the best interests of the child and is able to fairly and competently conduct a proceeding on his or her behalf.

107. The Commission also considers that rules should provide some flexibility so that a child between the ages of 16 and 18 could be allowed to conduct proceedings without a guardian *ad litem*, where the Court is satisfied that the child has the capacity to make decisions required or likely to be required in the proceedings and there is no good reason that would make it in their interests to be represented by a guardian. The provisions of the NZ Rules provide helpful guidance.

108. Rules in both Courts should also empower the Court to remove or substitute the guardian *ad litem*. This enables the Court to replace a guardian *ad litem* if they are not acting in the best interests of the child.

Recommendations:

24. Rules in this part should apply to a child which should be defined in the rules as meaning a person under 18 years (consistent with the definition of child under the Family Court Rules and the UN Convention on the Rights of the Child).

25. Rules in both Courts should require that a child must have a guardian *ad litem* as his or her representative in any proceeding unless the court otherwise orders. The Court must also be satisfied that the guardian *ad litem* will act in the best interests of the child and is able to fairly and competently conduct a proceeding on behalf of the child.

26. A costs provision should be included in both rules so that a litigation guardian can recover their costs (which include costs paid or incurred by them or any costs award made against the child). Guidance can be sought from the Family Court Rules 2014.

27. Rules in both Courts should also empower the Court to remove or substitute the guardian *ad litem*.

28. The rules should provide that a child between 16 and 18 years can represent themselves provided the Court is satisfied that they have capacity to make decisions and there is no reason that would make it in their interests to be represented by a guardian.

29. The term guardian *ad litem* should be replaced with litigation guardian in the rules.

Incapacitated Person

Samoa

109. The incapacity of a person, whether physical, mental or legal, is relevant to representation in legal proceedings. The SCR provides that a person of 'unsound mind' may sue and be sued through a guardian *ad litem* appointed by the Court to represent them.[112] The same applies in the MCR.[113]

110. Under the Family Court Rules 2014 (which reflects the NZ HCR and DCR), an incapacitated person means a person who by reason of physical, intellectual, or mental impairment whether temporary or permanent is:

- not capable of understanding the issue on which his or her decision would be required as a litigant conducting proceedings; or
- unable to give sufficient instructions to issue, defend or compromise proceedings.

111. In Issues Paper 2, the definition of a person with an unsound mind or a 'mentally defective person' in the SCR was raised as being pejorative or insulting. This term has been replaced by 'mental disorder' in the *Mental Health Act 2007* but the same change has not been made in the SCR.[114]

112. The same rules that apply to minors also apply to incapacitated persons. Whilst there is provision for removing a guardian by the Court upon sufficient cause being shown, which subsequently must be replaced by another guardian,[115] there is no requirement that an appointed guardian must act in the best interests of the incapacitated person.[116]

113. In relation to costs, the *Family Court Rules 2014* provide helpful guidance in their equivalent part that deals with minors and incapacitated persons. Under those rules, a representative (which includes a guardian *ad litem)* is responsible for costs awarded against a party they represent, and costs (including solicitor and client costs) paid or incurred while acting as a representative. The representative can however, by interlocutory application, apply to the Court for an order that they not be responsible for any costs awarded against the party they represent, or for an order to recover costs paid or incurred. If seeking to recover costs paid or incurred, costs are recovered from the party's property (if the party is an incapacitated person) or estate (if the party is a minor).[117]

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[112] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 37-41.
[113] *Magistrates' Court Rules 1971* (Samoa) r 14.
[114] *Mental Health Act 2007* (Samoa) s 2.
[115] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 40.
[116] See relevantly, *Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 37-40; *Magistrates' Court Rules 1971* (Samoa) r 14.
[117] *Family Court Rules* (Samoa) r 30.

Comparable Jurisdictions

New Zealand

114. In New Zealand, 'incapacitated person' means a person who by reason of physical, intellectual, or mental impairment whether temporary or permanent, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or is otherwise unable to give sufficient instructions to issue, defend or compromise proceedings.[118]

115. An incapacitated person must have a litigation guardian as his or her representative in any proceeding unless the court otherwise orders.[119] A litigation guardian has the same meaning as 'guardian *ad litem*'[120] and is formally appointed by a judge who ensures the guardian is able to fairly and competently conduct a proceeding and does not have interests adverse to those of the incapacitated person.[121] If a person becomes incapacitated during a proceeding, permission from the court should be sought before any other step is taken so that a litigation guardian may be appointed to represent that person.[122]

116. In relation to costs, the NZ HCR provide that a litigation guardian is entitled to be reimbursed out of the property of the incapacitated person for any costs (including solicitor and client costs) paid or incurred, or that are to be paid or incurred, by the litigation guardian on behalf of the incapacitated person.[123]

Australia (Victoria)

117. In the CPR (Vic), a person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to proceedings is called a handicapped person.[124] The rules relating to minors also apply to handicapped persons in Victoria.[125] Therefore, unless otherwise provided for under other legislation, a litigation guardian shall commence or defend legal proceedings on behalf of a handicapped person.[126] As stated above in relation to minors, the litigation guardian must not have any interest in the proceeding adverse to the handicapped person.[127] The Court remains empowered to appoint, remove or substitute a litigation

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[118] *High Court Rules 2016* (New Zealand) r 4.29; *District Court Rules 2014* (New Zealand) r 4.29.
[119] *High Court Rules 2016* (New Zealand) r 4.30; *District Court Rules 2014* (New Zealand) r 4.30.
[120] *High Court Rules 2016* (New Zealand) r 4.29.
[121] *High Court Rules 2016* (New Zealand) r 4.35; *District Court Rules 2014* (New Zealand) r 4.35.
[122] *High Court Rules 2016* (New Zealand) r 4.30(2); *District Court Rules 2014* (New Zealand) r 4.30(2).
[123] *High Court Rules 2016* (New Zealand) r 4.45.
[124] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.01.
[125] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.01.
[126] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.02(1).
[127] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.03(1)(b).

guardian.[128] If a handicapped person is a defendant and has not filed an appearance, the plaintiff is also barred from continuing the proceeding until a litigation guardian is appointed.[129]

Vanuatu

118. Under the CPR (Vanuatu), "a person with an impaired capacity" is used to refer to a person who is incapable of making the decisions required to conduct proceedings.[130] Similar to a child, a person with an impaired capacity in Vanuatu can only start and defend legal proceedings through a litigation guardian that the court appoints.[131]

119. Besides starting and defending legal proceedings on behalf of a legally incapacitated person, the litigation guardian may be required to do all that is required to be done by persons under legal incapacity in all civil proceedings.[132]

Submissions

120. In Issues Paper 2, the Commission sought submissions on the following:

- *Should the expression 'person of unsound mind' as used but not defined in the SCR and MCR and 'mentally defective person' as currently defined in the SCR be removed and replaced with the expression 'mental disorder' and 'mental incapacity' consistent with expressions used in the Mental Health Act 2007 (Samoa)?*

121. The OAG submitted that the language used in the SCR is outdated and recommended that it should be updated to correspond with the *Mental Health Act 2007*. It was submitted that the terms adopted from comparative jurisdictions should be properly defined and consider existing legislation that use the same terms.[133]

Commission's View

122. The current rules in Samoa refer to a 'person of unsound mind'. The Commission considers that this appears limited to intellectual, or mental impairment or disorder. It also considers that the NZ and Australian rules and the Family Court Rules 2014 have a broader ambit than the current rules relating to a person with unsound mind, and provide helpful guidance and an updated definition that would be appropriate to civil procedure rules in Samoa.

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[128] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.03(4).
[129] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 15.04.
[130] *Civil Procedure Rules 2002* (Vanuatu) r 20.1.
[131] *Civil Procedure Rules 2002* (Vanuatu) r 3.8.
[132] *Civil Procedure Rules 2002* (Vanuatu) r 3.8(4).
[133] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015.

123. The Commission considers that 'person with unsound mind' should be replaced with, 'incapacitated person' which should mean a person who by reason of physical, intellectual, or mental impairment whether temporary or permanent, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or is otherwise unable to give sufficient instructions to issue, defend or compromise proceedings. To guide the Court in its assessment of whether a person is incapacitated or not, expert evidence can be produced, for example by a medical professional.

124. The Commission considers that an incapacitated person must have a litigation guardian as his or her representative in any proceeding unless the court otherwise orders. A litigation guardian should be appointed by a judge who ensures the guardian is able to fairly and competently conduct a proceeding and does not have interests adverse to those of the incapacitated person. The litigation guardian should also be able to be removed by the Court in the interests of the incapacitated person but should not be able to retire without the leave of the court. Furthermore, if a person becomes incapacitated during a proceeding, permission from the court should be sought before any other step is taken so that a litigation guardian may be appointed to represent that person.

125. The current rules in Samoa refer to 'guardian *ad litem'.* The Commission considers that the Latin terms should be replaced with the English term 'litigation guardian' which is easier to understand, or alternatively the rules should clarify that bot terms have the same meaning.

Recommendations:

30. The rules should no longer be limited to 'a person with unsound mind' and should be broader. The rules should instead govern 'incapacitated persons' which should mean:

    - 'a person who by reason of physical, intellectual, or mental impairment whether temporary or permanent, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or is otherwise unable to give sufficient instructions to issue, defend or compromise proceedings'.

31. To guide the Court in its assessment of whether a person is incapacitated or not, expert evidence can be produced, for example by a medical professional, to meet the definition of 'incapacitated person'.

32. The rules should require an incapacitated person to have a litigation guardian as his or her representative in any proceeding, which should be able to be removed by the Court in the interests of the incapacitated person but should not be able to retire without the leave of the Court. A litigation guardian should be appointed by a judge who ensures the guardian is able to fairly and competently conduct a proceeding and does not have interests adverse to those of the incapacitated person.

33. A costs provision should be included in both rules so that a litigation guardian can recover their costs (which include costs paid or incurred by them or any costs award made against the incapacitated person). Guidance can be sought from Samoa's Family Court Rules 2014.

34. If a person becomes incapacitated during a proceeding, the rules should require that permission from the court be sought before any other step is taken so that a litigation guardian may be appointed.

35. The term 'guardian *ad litem*' should be replaced by 'litigation guardian'.

36. Consideration should be given to allocating resources to legal aid or the community legal sector to represent incapacitated persons. This is not for inclusion in the rules.

Companies

Samoa

126. Procedural rules contained in the SCR concerning the representation of businesses and companies include provisions about who may sue or be sued, service requirements, interlocutory measures and relief provisions.

127. A company is a legal entity in its own right.[134] Under the *Companies Act 2001* the Court may grant leave to a director or shareholder of a company to bring proceedings on behalf of the company.[135] The Act also provides specific matters that the Court must consider in determining whether to grant leave, for example the likelihood of the proceedings succeeding, the costs of proceedings in relation to the relief likely to be obtained, and the interests of the company in the proceedings.[136]

128. The *Companies Act 2001* also provides how service is to be effected on a company.[137] The SCR do not replicate this but instead cover service on a company or corporation (by leaving the document with a person who appears to be authorised) which is consistent with the *Companies Act 2001* (Samoa).[138] Service of a company is discussed in more detail under "Service".[139]

129. In the District Court, a party to any civil proceedings may appear and act personally or be represented by a legal representative.[140] In addition, a party may be permitted to appear by an agent authorised in writing by the party, or by a person holding a power of attorney authorising, on special circumstances in the District Court.[141] These provisions also extend to companies.[142]

Comparable Jurisdiction

New Zealand

130. In New Zealand, a company generally has to be represented in the High Court by a lawyer, and cannot be represented by a director or member appearing personally.[143]However the court retains its inherent jurisdiction to permit someone other than a lawyer to represent the company.[144]

131. By contrast the *District Courts Act 1947 (NZ)* provides that in the District Court, a corporation is not required to use a lawyer, and may appear by any officer, attorney or agent of the corporation.[145] Furthermore, other parties may be permitted in special

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[134] *Companies Act 2001* (Samoa) s 8(2).
[135] *Companies Act 2001* (Samoa) ss 92-93.
[136] *Companies Act 2001* (Samoa) s 94.
[137] *Companies Act 2001* (Samoa) ss 92-96.
[138]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 20.
[139] See Court Documents: Part B, p 72.
[140] *District Court Act 2016* (Samoa) s 39.
[141] *District Court Act 2016* (Samoa) s 39.
[142] *Companies Act 2001* (Samoa) ss 92 and 93.
[143] Andrew Beck, *Principle of Civil Procedure (*Brookers Limtied, 3rd ed, 2013) 68, referring to *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA).
[144] Andrew Beck, *Principle of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 68, referring to *Harrison v Guardian Assurance Co Ltd* [1989] 1 NZLR 59 (HC).
[145] *District Court Act 1947* (New Zealand) s 57(2).

circumstances to appear by an agent authorized in writing by the party concerned provided no fee is charged by the agent.[146]

132. Specific rules are contained in the HCR (NZ) as to how service is to be effected on a company that is being sued.[147] These Rules mirror service requirements contained in the New Zealand *Companies Act 1993*. Service of a company is discussed in more detail under "Service".[148]

Australia (NSW, Victoria)

133. In New South Wales, the UCPR (NSW) provides that a company may commence and carry on proceedings in any Court by a director of the company or by a solicitor.[149] There are additional rules that govern the process if a director or officer does represent the company. This includes filing an affidavit acknowledging that they may be individually liable to pay some or all of the costs of the proceedings.[150] This acknowledgment and cost liability often leads to directors not representing the company.[151]

134. In Victoria, the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) are slightly different. Under Rule 1.17, a corporation may only be involved in proceedings if represented by a solicitor. The Rules also state that any court orders that require a corporation to act can be done by an appropriate officer.[152]

Vanuatu

135. The Vanuatu Rules do not expressly specify a particular person who may commence or defend proceedings on behalf of a company.

Submissions

136. In Issues Paper 2, the Commission sought submissions on the following questions:

- *Should the SCR include specific procedures for companies registered under the Companies Act 2001 to become a party to a proceeding?*

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[146] *District Court Act 1947* (New Zealand) s 567(1).
[147] *High Court Rules 2016* (New Zealand) r 6.12.
[148] See Court Documents: Part B, p. 72.
[149] *Uniform Civil Procedure Rules 2005* (NSW) r 7.1.
[150] *Uniform Civil Procedure Rules 2005* (NSW) r 7.2; New South Wales Young Lawyers Civil Litigation Committee, *The Practitioner's Guide to Civil Litigation* (2010) The New South Wales Law Society <https://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/026375.pdf>.
[151] New South Wales Young Lawyers Civil Litigation Committee, *The Practitioner's Guide to Civil Litigation* (2010) The New South Wales Law Society <https://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/026375.pdf>.
[152] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 1.16-1.17.

- *Should the MCR reflect the provisions relating to companies currently existing in the SCR?*
- *Should the SCR adopt the existing provisions under the Companies Act 2001, similar to the UCPR (NSW) and Supreme Court (General Civil Procedure) Rules (Vic)?*

137. The OAG was uncertain as to what purpose inclusion of specific procedures for companies under the *Companies Act 2001* to become a party to a proceeding would serve.[153]

138. A member of the judiciary also indicated that although a company may be represented by either a lawyer or director of the company, the company will often get legal representation in a complicated case.[154]

139. No further submissions were received.

Commission's View

140. The Commission suggests that the SCR should clarify how a company may commence and carry on proceedings in Court, which replicates the provisions in the *Companies Act 2001 (Samoa)* to the fullest extent possible. This includes rules relating to representation, service and what the court must consider in whether to grant leave to appear on behalf of a company.[155]

141. The Commission considers that the provisions in the *District Court Act 2016* permitting a party to appear in the District Court by an agent authorised in writing by the party, or by a person holding a power in special circumstances,[156] are appropriate and should be replicated in the MCR for ease of reference.

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[153] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015.
[154] Judge Leilani Tuala-Warren, Submission to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2,* 21 September 2016.
[155] See *Companies Act 2001*, Part 6.
[156] *District Court Act 2016* (Samoa) Part 5 and s 39(2).

Recommendations:

37. The SCR should clarify how a company may commence and carry on proceedings in any Court, which should replicate the requirements in the *Companies Act 2001 (Samoa)* to the fullest extent possible. This includes rules relating to representation, service and what the court must consider in whether to grant leave to appear on behalf of a company.

38. The provisions in the *District Court Act 2016* permitting a party to appear by an agent authorised in writing by the party, or by a person holding a power in special circumstances, are appropriate and should be replicated in the MCR.

Businesses

Samoa

142. There is no provision for a business to sue or be sued as a separate legal entity in the same way as a company. However, the SCR provides that a person carrying on business in a name other than his own may be sued in that name as if it were the name of a firm, and, so far as the nature of the case may be permitted, the rules relating to actions against firms shall apply.[157]

143. A 'firm' is not defined under the rules, however it is defined under the *Partnership Act 1975* as persons who have collectively entered into partnership with one another'.[158]'Partnership' is also defined under that Act as the relationship which subsists between persons carrying on a business in common with a view to profit,[159] whilst 'business' is defined as including a trade, occupation or profession.[160]

144. The SCR provides that partners of a business within Samoa may sue or be sued in the name of the firm or in the names of the partners existing when the cause of action arose.[161] The personal names of the partners involved are also able to be requested by the opposing party.[162]

Comparable Jurisdictions

New Zealand

[157] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 51.
[158] *Partnership Act 1975* (Samoa) s 2.
[159] *Partnership Act 1975* (Samoa) s 2.
[160] *Partnership Act 1975* (Samoa) s 2.
[161] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 21 and 48.
[162] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 48(3) and (4).

145. Typically, unincorporated bodies do not have a separate legal personality and cannot sue and be sued.[163] However, the rules do provide some guidance in the case of partnerships and firms.

146. The HCR allow persons claiming or alleged to be liable as partners to sue or be sued in the name of the firm. The personal names of the partners involved are also able to be requested by the opposing party, as it can be important for discovery and execution.[164] The HCR also permit a person carrying on business in the name of a firm to sue and be sued in the name of the firm, and may be required to file an affidavit to fully identify himself or herself.[165] This rule applies to a sole trader situation, whereas the former rule (rule 4.25) applies when a firm comprises more than one person. Furthermore there is no provision for the plaintiff to sue in his or her trading name.

Australia (NSW, Victoria)

147. In New South Wales, the UCPR provides that 'persons are to sue or be sued in their own names and not under any business name', [166] and that any reference to the business names be replaced with a person's name.[167] This provision establishes a process designed to identify the actual legal persons behind a business or firm rather than enabling them to remain concealed. This is important as these individuals may be ultimately liable in a personal capacity, as compared to a company that may be liable in its own right, as a separate legal entity.

148. In relation to partners, in Victoria a proceeding can be commenced by or against partners in the name of the firm.[168] Parties can serve notice requiring disclosure of the names and addresses of partners constituting the firm at the time the cause of action occurred.[169]Partners sued shall appear individually in their own names but the proceeding continues in the name of the firm.[170] Judgments can be enforced against any property of the partnership and specific partners.[171]

Vanuatu

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[163] Andrew Beck, *Principle of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 3.5.4.
[164] Andrew Beck, Princip*le of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 3.5.4; *High Court Rules 2016* (New Zealand) r 4.25.
[165] Andrew Beck, *Principle of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 3.5.4; *High Court Rules 2016* (New Zealand) r 4.26.
[166]*Uniform Civil Procedure Rules 2005* (NSW) r 7.19.
[167]*Uniform Civil Procedure Rules 2005* (NSW) r 7.22.
[168] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 17.01.
[169]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 17.02.
[170]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 17.04.
[171]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 17.07.

149. Under the CPR (Vanuatu), proceedings may be commenced in the name of a partnership where one of the partners brings a claim.[172] A proceeding against a partner may also be brought in the partnership's name.[173]

150. A party to a partnership proceeding is enabled under the CPR (Vanuatu) to send a written notice requiring the names of all the partners in the partnership.[174]

Submissions

151. In Issues Paper2, the Commission sought submissions on the following:

- *Should the SCR and/or MCR include specific provisions to remove the name of firms or businesses and to replace them with a person's own personal name and address, similar to UCPR (NSW)?*

152. The submission from the OAG indicated that names of businesses and firms need to be viewed in a jurisdictional context. For example, if our laws recognise trading names, then trading names may be used but for partnerships in Samoa, the partners may be sued together and severally.[175]

153. No other submissions were received on this issue.

Commission's View

154. Although typically a business does not have a separate legal personality and cannot sue and be sued, the SCR enables a person carrying on business in a name other than his own to be sued in that name as if it were the name of a firm. Furthermore, the SCR provides that the rules relating to actions against firms should be applied insofar as the nature of the case may permit.

155. To facilitate this process of getting to the individuals behind a firm name, the Commission suggests that the following requirements under the UCPR (NSW) be considered for the new SCR and MCR. Namely, where a Defendant is sued under a business or firm name, the Defendant must enter an appearance under their own name and must supply names and addresses of all people carrying on business under the firm name at the commencement of the proceedings.

156. The Commission considers that the current rules in New Zealand most closely reflect the practice in Samoa at present namely that parties can be sue or be sued in their

[172]*Civil Procedure Rules 2002* (Vanuatu) r 3.11 (1).
[173]*Civil Procedure Rules 2002* (Vanuatu) r 3.11 (2).
[174]*Civil Procedure Rules 2002* (Vanuatu) r 3.11(3).
[175] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015.

trading names. The Commission therefore considers that the following rules should be adopted in Samoa:

i) For firms comprising of more than one person, persons claiming or alleged to be liable as partners can sue or be sued in the name of the firm. The personal names of the partners involved are also able to be requested by the opposing party.

ii) For sole traders, a person carrying on business in the name of a firm can sue and be sued in the name of the firm and may be required to file an affidavit to fully identify himself or herself.

Recommendations:

39. The rules should be clarified so that:

i) For firms comprising of more than one person, persons claiming or alleged to be liable as partners can sue or be sued in the name of the firm. The personal names of the partners involved may be requested by the opposing party.

ii) For sole traders, a person carrying on business in the name of a firm can sue and be sued in the name of the firm and may be required to file an affidavit to fully identify himself or herself.

Class Action

157. Both the SCR and MCR state that where there are numerous persons having the same interest in an action, one or more of them may sue or be sued or may be authorised by the Court to defend the action on behalf of or for the benefit of all persons interested.[176]

Comparable Jurisdictions

New Zealand

158. In New Zealand, a party can sue or be sued in a representative capacity if those represented have the same interest in a proceeding and either their consent is obtained ('opt in system') or a court's direction is given.[177] The words 'same interest' have been taken to mean a significant common interest in the resolution of a question of law or

[176] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 36; *Magistrates' Court Rules 1971* (Samoa) r 11.
[177] *High Court Rules 2016* (New Zealand) r 4.24; *District Court Rules 2014* (New Zealand) r 4.24.

fact arising in the proceeding.[178] Where a member of the class does not wish to be associated with the proceeding or does not wish to be represented by the named party, he or she can apply to be excluded from representation (in the case of plaintiff) or to be joined as a separate party.[179]

159. The purpose of the rule appears to be to facilitate 'judicial economy, eliminate duplication, share costs and promote access to justice'.[180] Notwithstanding this, representative proceedings have not been used widely in New Zealand.[181]

Australia (Victoria)

160. In Victoria, the provisions governing group proceedings are primarily found in the *Supreme Court Act 1986* (Vic). Under the Act, one or more persons may commence a proceeding on behalf of a group of seven or more potential members whose claims against the same party give rise to a substantial common question of law or fact.[182] Here, the consent of a person to be a member is not required, but the group members have the right to exclude themselves by opting out of the proceeding to avoid being bound by the decision. This is done by notice in writing before the date fixed by the Court ('opt out system').[183]A judgment given in a group proceeding must describe or otherwise identify the group members affected by the ruling.[184]

161. The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) stipulate that proceedings can be commenced by or against one or more persons having the same interest in a matter.[185] The Rules also set out the forms required to consent to being a group member or opt out of a proceeding, as referred to in the *Supreme Court Act 1986* (Vic).[186]

Vanuatu

162. In Vanuatu, the rules state that a proceeding may be started by one or more person who have the same interest in a matter, and can also be continued by or against one or more persons representing all of the persons with the same interest and could have

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[178] Andrew Beck, *Principle of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 69 referring to *Houghton v Saunders* (2008) 19 PRNZ 173.
[179] Andrew Beck, *Principle of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 69.
[180]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rded, 2012) 102 referring to *Houghton v Saunders* (2008) 19 PRNZ 173; [2009] NZCCLR 13.
[181] Andrew Beck, *Principle of Civil Procedure* (Brookers Limited, 3rd ed, 2013) 70.
[182]*Supreme Court Act 1986* (Vic) s 33C.
[183]*Supreme Court Act 1986* (Vic) Part 4A 'Group Proceeding' ss 33C, 33E, 33J and 33ZB.
[184]*Supreme Court Act 1986* (Vic) Part 4A 'Group Proceeding' ss 33C, 33E, 33J and 33ZB.
[185]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 18.02.
[186]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 18A.

been parties in the proceeding.[187] The court may appoint at any stage of the proceeding any person or parties named in the proceeding to represent those who have the same interest in the proceeding.[188] Furthermore, the rules provide that an order made against the representative party at the end of the proceedings may be enforced on all persons named as parties to the proceedings but it can only be enforced on a non-party with the court's leave.[189]

Submissions

163. In Issues Paper 2, the Commission sought submissions on the following:

- *Should both SCR and MCR extend existing procedures in relation to membership in group representative proceedings? If so, should Samoa create an 'opt in' system (requiring explicit consent of every member of a group) or an 'opt out' system (right of every potential member of a group to opt out of the proceeding by a communication in writing to the court)?*

164. Submissions received indicated that Samoa's current law is the same as New Zealand and that it should remain so.[190]

Commission's View

165. Regarding class actions or representative proceedings, the SCR appears to be substantially the same as that of NZ whereby those represented must have the same interest in an action. However the Commission considers that other provisions of the NZ Rules provide helpful guidance and would be appropriate to Samoa, in particular the requirement that the consent of those represented must first be obtained (opt in), unless the court directs otherwise.

166. Currently the SCR provides that the Court may authorise one or more of persons having the same interest in an action, to sue or be sued, or to defend the action on behalf of or for the benefit of all persons interested. The Commission considers that Samoa's SCR should also enable the Court to provide directions on this issue on application made by a party or intending party to the proceeding.

167. The Commission considers that class action rules are equally applicable for inclusion into the new MCR and should be replicated as far as necessary in the new MCR.

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[187] *Civil Procedure Rules 2002* (Vanuatu) r 3.12.
[188] *Civil Procedure Rules 2002* (Vanuatu) r 3.12(2).
[189] *Civil Procedure Rules 2002* (Vanuatu) rr 3.12(3) and (4).
[190] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015.

Recommendations:

40. In addition to requiring all persons represented to have the same interest in the subject matter of the proceeding in class actions or representative proceedings, the rules should also require the consent of those represented to first be obtained ("opt in" system), unless otherwise directed by the court. The SCR currently provides for authorisation by the Court, which should be an alternative on an application made by a party or intending party to the proceeding.

41. Class action rules are also applicable to the MCR and should therefore be replicated as far as necessary in the new MCR.

C. ACTIONS AND MOTIONS

Samoa

168. Standard proceedings in the Supreme Court are commenced by action or motion.[191] Proceedings are commenced by action for recovery of debt or damages, recovery of land or chattels, or for an order for specific performance.[192] All other civil proceedings are commenced by motion.[193] The commencement of an action is by filing a statement of claim, [194] but if filing a motion, it must be accompanied by an affidavit.[195]

169. The SCR provide that non-compliance with the rules does not render the proceeding void, but the proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and on such terms as the Court deems just.[196] The rules relating to amending pleadings are discussed further under 'Part D – Pleadings'[197].

Comparable Jurisdictions

New Zealand

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[191]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 11 and 12.
[192]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 11.
[193]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 12.
[194]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 13 (see Part IV, V, VI). Statement of Claim are discussed in more detail under 'Pleadings' in Part D.
[195]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) Part VIII.
[196]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 202.
[197] Refer to page 51.

170. When the High Court Rules were introduced in 1985, all matters (other than uncontested probate applications) were commenced by statement of claim.[198] One of the main reforms the HCR sought to achieve was uniformity in the way proceedings started. It was soon discovered that this was unsuitable in many instances however, [199] because pre-existing rules that required certain types of proceedings to be commenced in a particular way, were inconsistent with the new HCR.[200] The rules were therefore amended to allow originating applications supported by affidavit as an alternative means of commencing proceedings in specified cases.[201]

171. The current rules expressly provide that non-compliance is treated as an irregularity and does not necessarily nullify the proceeding, document, judgment or order.[202] Furthermore, the Court can exercise its discretion where the irregularity can be cured although it may not set aside if there has been a waiver or delay by the opposite party.[203] The court has wide powers to amend any procedural pleading so that the real dispute is determined, with or without application and as it thinks fit.[204] Therefore it would be unusual for the court to refuse to rectify a mistake made by the plaintiff in the commencement of proceedings.[205]

Australia (Victoria)

172. In the Supreme and County Courts of Victoria, a proceeding is commenced by writ or originating motion.[206] The Rules specify when an originating motion can be used to commence proceedings. This includes if there is no defendant in the proceeding, if it is specified otherwise in another Act or the Rules themselves, or there is unlikely to be any substantial dispute of fact and accordingly no pleadings or discovery.[207] In all other circumstances, proceedings are commenced by writ.[208]

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[198]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 74; Andrew Beck, Submission to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 April 2015, 1.
[199]Andrew Beck, *Principles of Civil Procedure* (Brookes Limited, 3rd ed, 2012) 75, referring to the example of drafting proceedings for admission as barristers and solicitors.
[200]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 84, referring to the *Insolvency Rules 1970*, the Companies (Winding up) Rules 1956 and the *Admiralty Rules 1975* as examples.
[201] *High Court Rules 2016* (New Zealand) rr 19.2-19.6; *District Court Rules 2014* (New Zealand) r 20.13.
[202] *High Court Rules 2016* (New Zealand) r 1.5; *District Court Rules 2014* (New Zealand) r 1.8.
[203] *High Court Rules 2016* (New Zealand) r 1.5(3)-(4).
[204] *High Court Rules 2016* (New Zealand) r 1.9; *District Court Rules 2014* (New Zealand) r 1.12.
[205] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 101.
[206]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 4.01; *County Court Civil Procedure Rules 2008* (Vic) r 4.01.
[207]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 4.05-4.06; *County Court Civil Procedure Rules 2008* (Vic) rr 4.05-4.06.
[208]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 4.04; *County Court Civil Procedure Rules 2008* (Vic) r 4.04.

173. In the Magistrates' Court, a proceeding commences by filing a complaint.[209]

174. Interlocutory applications in the Supreme and County Courts of Victoria are made by summons.[210]

175. Generally speaking, a failure to comply with the civil procedure rules in Victoria is considered an irregularity and does not automatically make the proceedings, any steps taken or any documents, judgment or order a nullity.[211] Where there has been a failure the courts can set aside the proceedings (in whole or part), set aside particular documents, judgments or orders, allow amendments or make other orders relating to the proceeding generally.[212] There is an exception however, which applies if a party starts a proceeding using the wrong process. If this occurs, then the Court cannot set aside the proceeding in full.[213]This applies in all Victorian Courts.

Vanuatu

176. The CPR (Vanuatu) provides that a proceeding in Vanuatu is started by filing a claim.[214]

Submissions

177. In Issues Paper 1, the Commission sought submissions on the following:

- *Should the SCR be amended to require all proceedings to be commenced by statement of claim?*

- *Alternatively, should rules 11 and 12 of the SCR state in clearer terms the circumstances where actions and motions are used, reflecting the public/private actions divide?*[215]

178. In preliminary consultations, the distinction between actions and motions was described by reference to the type of remedy available. That is, public remedies are

[209]*Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 4.04.
[210]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 4.02; *County Court Civil Procedure Rules 2008 (Vic) r 4.02*. The County Court Rules go further to say that summons is required for interlocutory applications made with notice, but applications made without notice can be made orally.
[211]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 2.01.
[212]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 2.01(2).
[213]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 2.02; *County Court Civil Procedure Rules 2008* (Vic) r2.02; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 2.02.
[214]*Civil Procedure Rules 2002* (Vanuatu) r 2.2.
[215]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 11 and 12 provide that all proceedings for the recovery of debts or damages, lands or chattels and for an order for specific performance must be instituted by way of action, and any other civil proceedings not provided otherwise by any Act, rule or an order of the Court must be commenced by way of motion, respectively.

available in proceedings commenced by motions and private law remedies are available in those commenced by action.[216]

179. Members of the judiciary submitted that the current rule should remain as is to differentiate between claims of private and public law.[217] Similarly, the judiciary submitted that rules 11 and 12 of the SCR do not need amendment because setting out terms to reflect the public and private divide is considered too substantive to be contained in the Rules.[218]

180. Submissions from members of the legal private sector were mixed, with some submitting that all proceedings should be commenced by statement of claim regardless of the remedy being sought. Reasons for this included that:

- There is no obvious reason for the distinction between actions and motions;[219]
- It is hard to locate files or a case because it has been commenced by motion. However if all proceedings are commenced by statement of claim then a civil proceeding number can be assigned to it and locating such a file would not be so hard;[220] and
- A public law remedy should not prevent you from starting a proceeding by a statement of claim.[221]

181. Others however, indicated that the action and motion distinction works well in the Supreme Court.[222] One submission reflected on New Zealand's history, which initially provided for only one method of commencement, which turned out not to work in practice as not all proceedings are adversarial in nature. Therefore, the provision for a second method of commencement, being an application supported by an affidavit, became very useful.[223]

182. It was also indicated in consultations on Issues Paper 1 that at an application to strike out proceedings is usually made when proceedings are commenced the wrong way, illustrating the system may be time-consuming and costly.

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[216]Office of the Attorney General, Submission No 1 to the Samoa Law Reform Commission, *Civil Procedure Rules Briefing Notes for Preliminary Consultations*, January 2012.
[217] Consultation with Judiciary (Chief Justice Chambers, Ministry of Justice and Courts Administration) 13 July 2012; See also Civ*il Procedure Rules Issues Paper 1*, March 2012.
[218] Consultation with Judiciary (Chief Justice Chambers, Ministry of Justice and Courts Administration) 13 July 2012.
[219] Preliminary Consultation with George Latu (Apia, Samoa) 25 January 2010.
[220] Preliminary Consultation with Ainuu (Ainuu Law Firm, Malifa) 18 July 2012.
[221] Preliminary Consultation with Ainuu (Ainuu Law Firm, Malifa) 18 July 2012.
[222] Preliminary Consultation with Ruby Drake (Apia, Samoa) 25 January 2010.
[223] Andrew Beck, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2,* 17 April 2015, 1.

183. The Commission received no other submissions in relation to the issues raised above.

Commission's View

184. The Commission considers that the commencement of proceedings should continue by action (through a statement of claim) or by motion (accompanied by an affidavit). As discovered in NZ history, the adversarial nature of a statement of claim followed by a statement of defence was unsuitable in many instances and the rules needed to be amended to provide an alternative means of commencing proceedings in specified cases, by originating application.[224]

185. It is evident in submissions and consultations with practitioners that many practitioners are not aware of the need for distinction between action and motion and have indicated all matters should be commenced by statement of claim. The Commission considers that the rules should state in clearer terms the circumstances where actions and motions are used. For example, a statement of claim should generally be used when seeking any private law remedy and a motion should generally be used when seeking a public law remedy.

186. The SCR is similar to New Zealand's HCR. The SCR provide that non-compliance with the rules does not render the proceeding void, but that proceedings may be set aside in the event of non-compliance with the rules. Therefore, although the ability to set aside the proceedings in such circumstances is available, the Court has wide powers to rectify mistakes made by the plaintiff in the commencement of proceedings and can deal with non-compliance in a manner as it thinks just. The position in Victoria differs in that the Court cannot set aside a proceeding in full if a party starts it using the wrong process.

187. The Commission considers that the position in Victoria is not appropriate for Samoa. As it currently stands, there is misunderstanding by many legal practitioners of the distinctions between actions and motions, which can lead to numerous proceedings being commenced using the wrong process. This wastes the Court's time and costs other parties time and money. Parties should be encouraged to properly prepare proceedings and carefully consider the correct process to do so, particularly if the distinction between actions and motions is clarified. If the Court did not retain a discretion to strike out proceedings if improperly commenced, then the Commission is concerned that legal practitioners could commence proceedings without sufficient preparation on the basis that they can later rectify mistakes, thereby perpetuating the problem of exhausting Court and party resources.

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[224] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 74; Andrew Beck, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 April 2015, 1.

Recommendations:

42. The rules should continue to provide for commencement of proceedings by filing a statement of claim or a motion supported by affidavit, however it should state in clearer terms the circumstances where actions and motions are used. For example, a statement of claim should generally be used when seeking any private law remedy and a motion should generally be used when seeking a public law remedy.

43. The rules should continue to provide the court wide powers to amend any procedural pleading as it thinks fit including rectifying a mistake made by the plaintiff in the commencement of proceedings so that the real dispute is determined, or to set aside proceedings in such circumstances.

D. PLEADINGS

188. In civil proceedings, the documents that set out the elements of each party's case are called pleadings. Pleadings include the plaintiff's statement of claim, the defendant's statement of defence, the plaintiff's reply to the statement of defence and any counterclaim.[225]

189. All material facts must be stated in the pleadings to ensure that causes of action or defences are set out. Generally, evidence and argument should not be pleaded. In *Sua v Attorney General* the Court stated that the purpose of pleadings is 'to define the issues and give the other party fair notice of the case which he or she has to meet.'[226] In short, the pleadings set out what is being claimed and what is being defended by the parties, so that there are no surprises at trial.

190. The SCR in Samoa does not contain a specific part addressing pleadings, particularly related to their form and content. However, there are some provisions that deal with statements of claim and timelines for filing other pleadings.[227]

191. The MCR provides for pleadings generally as follows:
    - A statement of claim is the only form of pleadings required in actions for amounts less than $100;[228]

[225] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 76.
[226] *Sua v Attorney General* [2013] WSSC 1, [78].
[227] Jennifer Corrin-Care, *Civil Procedure and Courts in the South Pacific* (Cavendish Publishing Pty Ltd, 2004) 342.
[228] *Magistrates' Courts Rules 1971* (Samoa) r 7(1).

- If the relief sought exceeds $100, then a plaintiff can apply ex parte to the court for an order that the defendant file a statement of defence, after receiving the statement of claim;[229] or
- The Court may of its own motion require a defendant to file a statement of defence.[230]

Statement of Claim

Samoa

192. Proceedings are commenced by filing a statement of claim. The SCR set out particulars that should be specified in the statement of claim including time, place, persons, dates of instruments and any other information required to fully and fairly inform the other party about the cause of action.[231]

193. The SCR also allows the plaintiff to amend a statement of claim with the Court's leave at any time before or during the trial.[232]

194. The MCR only specify that the statement of claim must include the names and descriptions of plaintiff and defendant, the cause of action and relief claimed.[233]

Comparable Jurisdictions

New Zealand

195. In New Zealand, pleadings in civil proceedings are dealt with under Part 5 of the High Court Rules[234] and District Court Rules.[235] The High Court Rules provide that "distinct causes of action and distinct grounds of defence, founded on separate and distinct facts, must if possible be stated separately and clearly".[236]

196. The rules are prescriptive in nature and dictate the required form and content of pleadings. If the pleadings are defective, a party is able to request further particulars under the HCR.[237]

197. In the High Court, standard proceedings are commenced by filing a notice of proceeding and statement of claim.[238] The notice of proceeding advises the other parties

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[229] *Magistrates' Courts Rules 1971* (Samoa) r 7(2).
[230] *Magistrates' Courts Rules 1971* (Samoa) r 7(3).
[231] *Supreme Court (General Civil Procedure) Rules 1980* (Samoa) r 15.
[232] *Supreme Court (General Civil Procedure) Rules 1980* (Samoa) r 17.
[233] *Magistrates' Courts Rules 1971* (Samoa) r 3.
[234] *High Court Rules 2016* (New Zealand) Part 5.
[235] *District Court Rules 2014* (New Zealand) Part 5.
[236] *High Court Rules 2016* (New Zealand) r 5.17(1); *District Court Rules 2014* (New Zealand) r 5.20.
[237] *High Court Rules 2016* (New Zealand) r 5.21; *District Court Rules 2014* (New Zealand) r 5.24.

that a claim will be made against them.[239]The statement of claim must show the general nature of the claim and give sufficient particulars of time, places, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and other parties of the plaintiff's cause of action (similar to the SCR (Samoa)).[240]

198. Under the current District Court Rules, proceedings are required to be commenced by statements of claim, with the exception for appeals and proceedings commenced by originating application.[241] When a statement of claim or defence is served, the serving party must provide a list of documents relied on to the other parties and provide copies of those documents within five working days of any request.[242] Essentially this means that parties must show their case at the earliest possible stage with the aim of assisting the court and encouraging speedy resolution to proceedings.

Australia (Victoria)

199. In Victoria, every pleading shall contain a summary of facts, legislative provisions relied on and the relief or remedy claimed.[243] The Rules are also quite detailed as to the particulars of pleadings that are necessary to allow the opposite party to plead, to define questions and avoid surprise at trial.[244] The particulars required vary depending on the type of claim brought or damages sought.[245] There are also rules that govern timelines when no further pleadings can be filed, that empower the Court to make orders in relation to serving or dispensing with pleadings, and that require parties to file a copy of the pleadings immediately after service.[246]

200. A proceeding is commenced by writ or originating motion in the Supreme and County Courts of Victoria.[247] Precedent forms setting out the structure and requisite content are also specified in the Rules. Under a proceeding commenced by writ, the plaintiff may, with leave of the Court, amend the statement of claim to add or substitute a new cause of action.[248]

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[238]*High Court Rules 2016* (New Zealand) rr 5.25 and 5.22; *District Court Rules 2014* (New Zealand) rr 5.28 and 5.25.

[239]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rded, 2012) 75.

[240]*High Court Rules 2016* (New Zealand) r 5.29; *District Court Rules 2014* (New Zealand) r 5.26.

[241]*District Court Rules 2014* (New Zealand) r 5.28.

[242] New Zealand Law Society, *District Court Rules 2014* in force (18 July 2014) New Zealand Law Society <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-846/district-court-rules-2014-in-force>.

[243]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o13.02(1).

[244]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o13.10(2).

[245] See for example, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 13.10(3)-(6).

[246] See for example, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 14.08-14.10.

[247]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 4.01; *County Court Civil Procedure Rules 2008* (Vic) r 4.01.

[248]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 14.01.

Australia (NSW)

201. In New South Wales, the UCPR specify how proceedings are commenced and differentiate when a proceeding is commenced by statement of claim or summons.[249] The UCPR set out the requisite contents of a statement of claim, which include the relief claimed, timeline for filing the defence and a notice to the defendant that failure to file a defence may result in a judgment or order against them. The UCPR also has a Part dedicated to amendments, which gives the plaintiff 28 days after first filing to amend a statement of claim without leave of the Court, unless the Court otherwise orders or it has been fixed for trial.[250] If a plaintiff amends a statement of claim after the defendant has filed their defence, then the defendant may also amend their defence within 14 days of being served with the amended statement of claim.[251] The UCPR stipulates the form in which amendments must be made.[252] The Court nevertheless retains discretion to disallow the amendment or to issue orders about the mode of amendment (including service or timelines for filing and service).[253]

Vanuatu

202. The CPR (Vanuatu) expressly provides that proceedings are initiated through filing a claim.[254]

203. A claim in Vanuatu must contain the following:[255]

i. a statement of the case;
ii. the plaintiff's address for the service of documents; and
iii. a response form.

204. The bulk of a claim under Vanuatu rules is contained in the "statement of the case", which is the term used in place of "pleadings".[256] A statement of the case in Vanuatu must contain the relevant facts and any law that the party seeks to rely on.[257] The pleadings must not include evidence or legal argument. The orders or remedy sought must however be clearly stated.[258]

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[249] *Uniform Civil Procedure Rules 2005* (NSW) r 6.3-6.4.
[250] *Uniform Civil Procedure Rules 2005* (NSW) r 19.1(1).
[251] *Uniform Civil Procedure Rules 2005* (NSW) r 19.1(2).
[252] *Uniform Civil Procedure Rules 2005* (NSW) r 19.6.
[253] *Uniform Civil Procedure Rules 2005* (NSW) rr 19.4 and 19.6.
[254] *Civil Procedure Rules 2002* (Vanuatu) r 2.2.
[255] *Civil Procedure Rules 2002* (Vanuatu) rr 4.3 (1)(a), 4.3 (1)(b) and r 4.3 (1)(e).
[256] Jennifer Corrin-Care, *Civil Procedure and Courts in the South Pacific* (Cavendish Publishing Pty Ltd, 2004) 133.
[257] *Civil Procedure Rules 2002* (Vanuatu) r 4.2(1).
[258] *Civil Procedure Rules 2002* (Vanuatu) r 4.2(2).

205. Parties can amend the statement of the case to better identify issues between them, correct a mistake or defect or provide better facts.[259] The amendments may be made with leave of the court and at any stage of proceedings.[260]

Submissions

206. In Issues Paper 2, the Commission sought submissions on whether the SCR should be amended to include particular pleading provisions including:

- *Pleadings subsequent to a statement of claim such as defence, reply and counterclaim as practised in Vanuatu, Australia and New Zealand;*[261]

- *Clearer general rules that apply to all pleading documents similar to the Rules in Vanuatu, Australia and New Zealand;*

- *Timeframes for provision of copies of relevant plaintiff and defendant materials together with explanations of why offers have been rejected or how calculated (similar to HCR (NZ) information capsules);*[262]

- *Amending reference to 'statement of claim' to 'statement of the case'; and*

- *To more comprehensively regulate the amendment of pleadings.*

207. Submissions addressing some of these questions are outlined below by specific reference to statements of defence, reply and counterclaim.

208. The Commission also consulted with court registrars about making the procedures for pleadings clearer. It was suggested there that given Samoa's current Rules reflected earlier rules in New Zealand which have since been revised, it is appropriate for Samoa to do so as well.[263]

Commission's View

209. The Commission considers that the rules should be more prescriptive in nature and set out the required form and content for a statement of claim and all pleadings subsequent to a statement of claim such as defence, reply and counterclaim as practised in Vanuatu, Australia and New Zealand. As such, the provisions of the NZ, Australia and Vanuatu rules provide helpful guidance. This will provide clarity for litigants and enable greater efficiency in the court process.

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[259] *Civil Procedure Rules 2002* (Vanuatu) r 4.11(1).

[260] *Civil Procedure Rules 2002* (Vanuatu) r 4.11(2).

[261] This will be looked at further below.

[262] Since Issues Paper 2 was published, the New Zealand District Court Rules were reviewed and amended removing the concept of an 'information capsule'.

[263] Consultation with Registrars (Masinalupe Tusipa Masinalupe) (Ministry of Justice and Courts Administration) 30 October 2015.

210. Samoa’s SCR currently state that the statement of claim should include particulars of time, place names of persons, dates of instruments and ‘other circumstances’. To assist the Court and parties in determining the cause of action, the Commission considers that the rules should provide that a statement of claim must show the general nature of the claim. It should also include sufficient particulars of the following, which should be stated in the rules:

- Any relief, remedy or orders sought;
- Any legislative provisions relied upon; and
- All material facts but no evidence or argument.

211. The Commission considers that the current practice allowing parties to amend a statement of claim at any time with leave of the Court is functioning well and should be reflected in both rules, for consistency and clarity.

212. The Court should retain discretion to disallow the amendment or to issue orders about the mode of amendment (including service or timelines for filing and service) and this should be clarified in the rules.

213. ‘Statement of claim’ is the term currently used in Samoa and well known across neighbouring jurisdictions. The Commission sees no benefit in changing this term. Accordingly no recommendation is made to change the term ‘statement of claim’ to ‘statement of the case’.

Recommendations

44. In addition to the current requirements under the SCR for a statement of claim to include particulars of time, place, names of persons, dates of instruments and 'other circumstances' – the rules should also expressly provide that a statement of claim must show the general nature of the claim and should also include sufficient particulars of the following:

    - Any relief, remedy or orders sought;
    - Any legislative provisions relied upon; and
    - All material facts but no evidence or argument.

45. Both rules should include that a party can amend a statement of claim at any time with leave of the Court.

46. The rules should clarify that the Court retains discretion to disallow the amendment or to issue orders about the mode of amendment (including service or timelines for filing and service).

47. Samoa retain reference to 'statement of claim' in the SCR and MCR.

48. Amend the MCR in line with the amendments made to the SCR.

Statement of Defence

214. Once the statement of claim is filed, the defendant will file and serve on other parties its statement of defence (if any), that must respond to the statement of claim.

215. A statement of defence must admit, deny or 'not admit' the allegations of fact in the statement of claim and may raise additional facts as an affirmative defence. An affirmative defence is when the defendant wants to raise facts that are not in the statement of claim.[264]

216. Neither the MCR nor SCR specify any requirements for the form or content of the statement of defence, aside from the timeframe for filing.

217. The SCR states that a defendant may file a statement of defence within 10 days after service of the statement of claim.[265] However, the MCR requires filing of the statement of defence within 7 days of service of the statement of claim.[266]

[264] Matthew Casey et al. *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd., 2nd ed, 2013).
[265] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r96.

Comparable Jurisdictions

New Zealand

218. Filing and serving the statement of defence is set out in Part 5, Division 10 of the High Court Rules.[267]Generally, a defendant who intends to defend the proceeding must file a statement of defence within 25 working days after being served with the statement of claim and notice of proceeding.[268]

219. Allegations in the statement of claim must be answered in substance and any allegation not denied is treated as being admitted.[269] In other words, it is not sufficient for the defendant to provide only a bare denial to the allegations, and a statement of defence which consists of blanket denials with no substance can be struck out.

220. A defendant served outside of New Zealand must file a statement of defence within 30 working days from the date of service.[270]

Australia (Victoria)

221. In Victoria, the statement of defence must be served within 30 days of filing an appearance, within 30 days after service of the statement of claim or as the Court directs.[271]

222. Similar to New Zealand, in the Victorian *Supreme Court (General Civil Procedure) Rules 2015*, allegations of fact in a statement of claim will be treated as being admitted unless specifically denied.[272] If the defendant wants to plead different facts to those in the statement of claim, then they must plead those facts. The defendant cannot just deny or not admit the facts pleaded by the plaintiff.[273] The Victorian provisions also include that any allegation that a party has suffered damage or the amount of damages is taken to be denied unless it is specifically admitted by the defendant.[274]

Vanuatu

223. Vanuatu's rules are slightly different in that they allow a defendant to file a 'response' and a 'defence'. A defendant's response sets out the defendant's address for

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[266]*Magistrates Courts Rules 1971* (Samoa) r 15.
[267]*High Court Rules 2016* (New Zealand) rr 5.47-5.52; *District Court Rules 2014* (New Zealand) rr 5.49-5.54.
[268] *High Court Rules 2016* (New Zealand) r 5.47(2)(b); *District Court Rules 2014* (New Zealand) r 5.49(2)(b).
[269] *High Court Rules 2016* (New Zealand) r 5.48(5); *District Court Rules 2014* (New Zealand) r 5.50(4)-(5).
[270]*High Court Rules 2016* (New Zealand) r 6.35; *District Court Rules 2014* (New Zealand) r 6.31.
[271] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 14.04. This is dependent on the way in which the proceeding is commenced.
[272]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o13.12(1).
[273]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o13.12(2).
[274]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 13.12(3).

service and must be filed within 14 days of service of the claim.[275] If a defendant intends to defend the claim, then they must file their defence (setting out a statement of their case and responding to each fact in the claim) within 28 days after service of the claim.[276] However, there is also provision for the defendant to file only a defence, without filing a response, but in those circumstances the defence must be filed earlier, namely within 14 days of service of the claim.[277]

224. If the defendant disagrees with the facts contained in the claim, the defendant must deny that fact in the defence and state instead what he or she alleges happened.[278] The rules also require the defendant to outright deny a particular fact in the statement of claim because otherwise, the court will assume that the defendant agrees with that fact.[279]

Submissions

225. In Issues Paper 2, the Commission sought submissions on the following:

- *Whether the SCR and MCR should be amended to include a timeframe for filing and serving a defence within 14 working days (as practised in Vanuatu); or 25-30 working days (as practised in Victoria and New Zealand).*

- *Specific provisions relating to the form and content of a confession, or defence.*

226. Submissions were also sought on more general issues such as whether clearer rules are required for all pleading documents and whether the rules should be amended to more comprehensively regulate the amendment of pleadings as in comparative jurisdictions.

Timeframes

227. In a submission from the private sector, it was indicated that a 14 day time limit for filing a statement of defence in the SCR is manageable. However, there can be instances due to workload or delay by a client in providing the requisite information, where a lawyer may need to seek an extension of time for filing a statement of defence. It was submitted that in these circumstances, Judges should be flexible and grant additional time if requested.[280]

228. In consultation with the court registrars, it was submitted that lawyers regularly seek adjournments and request extensions for up to 14 days to file statements of defence,

[275] *Civil Procedure Rules 2002* (Vanuatu) rr 4.4 and 4.13 (1)(a).
[276] *Civil Procedure Rules 2002* (Vanuatu) rr 4.5(2) and 4.13 (1)(b).
[277] *Civil Procedure Rules 2002* (Vanuatu) r 4.13(2).
[278] *Civil Procedure Rules 2002* (Vanuatu) r 4.5(4).
[279] *Civil Procedure Rules 2002* (Vanuatu) r 4.5(5).
[280] Preliminary Consultation with Ruby Drake (Apia, Samoa, 25 January 2010).

reply and counterclaim.[281]The reason indicated was that court mentions were normally every 2 weeks and a 10 'working day' limit appeared more suitable than a 10 calendar day limit, which was not sufficient time.[282]

229. As to whether the timeframes outlined in the MCR should be the same as in the SCR, it was raised in consultation with the court registrars that in New Zealand, the DCR typically follow the HCR except where the procedure of the District Court specifically requires a separate rule. There was some concern raised by court registrars that if the rules of both courts were replicated that it could increase the volume of documents received by registrars.[283] However, the Commission does not foresee any significant risk of this occurring, by replicating extended timeframes for filing pleadings.

Form and content of defence

230. The Office of the Attorney General submitted that it could be useful to include provisions in the Rules detailing the procedures for filing and amending a defence. They reflected that these are all part of pleadings but there are currently only provisions governing statements of claim.[284]

231. Members of the private sector submitted that the Rules should state that bare denials are not acceptable in a statement of defence.[285]

232. No further submissions were received pertaining to these issues.

Commission's View

233. The Commission considers that rules should clarify the purpose, form and content of the statement of defence. This will provide clarity for litigants and certainty for the court and enable greater efficiency in the court process.

234. For example the defendant should address every allegation of fact in the statement of claim which must be answered in substance, and that a statement of defence which consists of blanket denials with no substance should be able to be struck out.

235. In practice, once a defendant is served with a statement of claim, they may need to secure funding to obtain legal advice, meet with lawyers and allow time to prepare the

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[281] Consultation with Registrars (Lio Heinrich W. Siemsen), (Ministry of Justice and Courts Administration Complex, 30 October 2015).
[282] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[283] Consultation with Registrars (Masinalupe Tusipa Masinalupe), (Ministry of Justice and Courts Administration Complex) 30 October 2015.
[284] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 1.
[285] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1*, 25 November 2015, 2.

defence. The Commission considers that the timeline for filing a statement of defence should be extended so as to reduce exhausting the Court's time to seek extensions, as the common view indicated in consultations and submissions is that the current time frame is inadequate. The Court Registrar in consultations advised that adjournments and extensions for up to 14 calendar days to file statements of defence, reply and counterclaim were regularly sought by lawyers. Currently the rules provide 10 days for filing a statement of defence after service of the statement of claim. Consultations with the Judiciary however indicated that the current practice is that a statement of defence is filed 14 days after the first mention or as otherwise directed by the Court. The Commission considers this be reflected in the rules. The Commission considers that the same timeframe should be provided to defendants when responding to an amended statement of claim.

236. As is the case when amending a statement of claim, a party should be permitted to amend a statement of defence at any time with leave of the Court. This should be reflected in the rules along with giving the Court a discretion to disallow an amendment or make orders about the mode of amendment (including service or timelines for filing and service).

237. The Commission also considers that the same time limits should be applied in the SCR and MCR for consistency and clarity, except where the procedure of the District Court specifically requires a separate rule.

Recommendations:

49. The SCR and MCR should include specific requirements as to the form and content of the statement of defence, and should include that:

    - The defendant must address every allegation of fact in the statement of claim which must be answered in substance by either admitting, denying or not admitting allegations in the statement of claim.
    - A statement of defence which consists of blanket denials with no substance can be struck out.
    - Any allegations not denied are deemed to be admitted;
    - A denial of an allegation should not be evasive and should be a fair and substantial answer.
    - Sufficient particulars must be given (e.g. names, times, places, amounts) to inform the court and parties of the defence.

50. The SCR should provide that the defendant may file a statement of defence within [14] days after the first mention or as directed by the Court. The same timeframe should be provided to defendants when responding to an amended statement of claim.
51. A party can amend a statement of defence at any time with leave of the Court. Both rules should clarify that the Court retains discretion to disallow the amendment or to issue orders about the mode of amendment (including service or timelines for filing and service).
52. The same time limits should be in the MCR, except where the procedure of the District Court specifically requires a separate rule.

Reply

238. If a plaintiff has been served with a notice of defence, then in some jurisdictions they can file a 'reply', which responds to any new allegations or to a counterclaim made by the defendant.[286]

239. In Samoa, neither the MCR nor SCR contain any provisions relating to a reply.

[286] See *Uniform Civil Procedure Rules 2005* (NSW) rr 14.2 -14.5.

Comparable Jurisdictions

New Zealand

240. In New Zealand, the DCR and the HCR provide for replies. Namely, if a statement of defence asserts an affirmative defence or contains any positive allegation, the plaintiff must file and serve a reply on the defendant[287] within 10 working days after being served.[288]

241. The rules require that the reply must be limited only to answering the affirmative defence or positive allegations in the statement of defence and not to raise any new causes of action.[289] An affirmative defence or positive allegation that is not denied is treated as being admitted.[290] The reply must also comply with the rules governing statements of defence.[291]

Australia (NSW, Victoria)

242. In New South Wales, the UCPR specifically deal with 'reply' in rule 14.4. A plaintiff may file a reply to a defence in the Supreme or District Courts.[292] In the Local Court, a reply can only be filed with leave of the Court.[293] The reply must be filed within 14 days after service of the defence.[294] An allegation of fact made in any pleading is taken to be admitted unless denied or stated to be 'not admitted'.[295]

243. In Victoria, the matters that must be pleaded *and* their form and content are the same for all pleadings.[296] Similarly, every allegation of fact in any pleading is taken to be admitted unless specifically denied or stated as 'not admitted'.[297] If the plaintiff is

[287]An affirmative defence is one that raises material that hasn't been raised by the plaintiff in their statement of claim, for example contributory negligence, or a claim that a proceeding is statute-barred. See Andrew Beck, *Principles of Civil Procedure* (2nd ed, 2001) 154 [7.3.3]; *High Court Rules 2016* (New Zealand) r 5.62; *District Court Rules 2014* (New Zealand) r 5.64.
[288]*High Court Rules 2016* (New Zealand) r 5.62; *District Court Rules 2014* (New Zealand) r 5.64.
[289]*High Court Rules 2016* (New Zealand) r 5.63(1); *District Court Rules 2014* (New Zealand) r 5.65(1).
[290]*High Court Rules 2016* (New Zealand) r 5.63(2); *District Court Rules 2014* (New Zealand) r 5.65(2).
[291]*High Court Rules 2016* (New Zealand) r 5.63(1); *District Court Rules 2014* (New Zealand) r 5.65(1).
[292]*Uniform Civil Procedure Rules 2005* (NSW) r 14.4(1).
[293]*Uniform Civil Procedure Rules 2005* (NSW) r 14.4(2).
[294]*Uniform Civil Procedure Rules 2005* (NSW) r 14.4(3); Note: the 14 days does not include the day of service (r 1.11(3)). If the registry is closed on a the day on which the event must occur, it is permitted to be done on the next working day (r 1.11(4)).
[295]*Uniform Civil Procedure Rules 2005* (NSW) r 14.26.
[296] See *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 13.01-13.12.
[297]*Supreme Court (General Civil Procedure) Rules* 2015 (Vic) o 13.12.

required to serve a reply, it must be served within 30 days of service of the defence, unless the Court orders otherwise.[298]

Vanuatu

244. In Vanuatu, if the plaintiff does not file or serve a reply, the rules allow the court to presume the plaintiff denies all facts alleged in the defence.[299]This is slightly different to the approach taken in Victoria, New South Wales and New Zealand. Nevertheless, if the plaintiff wishes to allege further facts after being served with a defence, the plaintiff must file and serve a reply to include these further facts.[300] Additionally, if a plaintiff does not deal with a particular fact in his or her reply, the court will infer that the plaintiff denies this fact.[301]

Submissions

245. In Issues Paper 2, the Commission sought submissions on the following issues:

- *Whether the SCR and MCR should include rules relating specifically to reply;*
- *Whether clearer rules are required for all pleading documents; and whether the rules should be amended to more comprehensively regulate the amendment of pleadings as in comparative jurisdictions.*

246. The Commission did not receive any submissions specifically relating to replies in pleadings.

Commission's View

247. Neither the MCR nor the SCR provide for the form or content of a reply.

248. The Commission had considered including the rules related to reply similar to the New Zealand approach. This would have included rules clarifying the content and filing of a reply where a statement of defence asserts an affirmative defence or contains any positive allegations. It also contemplated including a rule stating that the reply should not raise any new cause of action.

249. However, the Judiciary in consultation expressed a strong preference that rules relating to reply are not necessary for Samoa at this time.

[298] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 14.05; Note the 30 days does not include the day of service (r 301.(2)) and where an act must be done on a day on which the Registrar is closed, it may be done on the next business day.(r 3.01(5)).
[299]*Civil Procedure Rules 2002* (Vanuatu) r 4.6(1).
[300]*Civil Procedure Rules 2002* (Vanuatu) r 4.6(2).
[301]*Civil Procedure Rules 2002* (Vanuatu) r 4.6(4).

Recommendations
53. There is no need to include rules relating to reply in either jurisdiction at this time.

Counterclaim

250. A situation may arise where the plaintiff is not the only one with a claim in an action. A defendant may be able to file their own counterclaim against the plaintiff or another person who becomes a party to the proceeding, as a counterclaim defendant. The counterclaim is usually tried at the same time as the plaintiff's claim or immediately after it.[302]

251. The practice in Samoa is normally that if a counterclaim is made, then it goes in the same document as the defence.

252. The SCR permits a defendant to file a statement of counterclaim within 10 days after service of the statement of claim or summons.[303] However, there is no rule expressly stating the time within which a defence to a counterclaim must be filed. The MCR also allows a defendant to file a statement of counterclaim, but it must be filed within 7 days of service of the statement of claim or summons.[304]

253. Neither the MCR nor the SCR provide for the form or content of a counterclaim.

Comparable Jurisdictions

New Zealand

254. The rule in New Zealand requires that the counterclaim procedure is separate from that of a statement of defence and must have its own pleading, although previously it was added to the statement of defence.[305] The rationale is that combining both into one document may be confusing, especially if an amendment is filed later.[306]

255. Counterclaims are dealt with under Part 5, Division 11 of the High Court Rules.[307] The rules state that the counterclaim must be headed 'Counterclaim' but in every other regard must follow the rules and format applying to statement of claims.[308] Therefore, although headed 'counterclaim' the parties are referred to as they are in the original

[302] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 96.
[303] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 96.
[304] *Magistrates' Courts Rules 1971* (Samoa) r 15.
[305] See Andrew Beck, *Principles of Civil Procedure* (2nd ed, 2001).
[306] Matthew Casey et al. *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd., 2nd ed, 2013) 186; *High Court Rules 2016* (New Zealand) r 5.53.4.
[307] *High Court Rules 2016* (New Zealand) rr 5.53-5.61; *District Court Rules 2014* (New Zealand) rr 5.55-5.63.
[308] *High Court Rules 2016* (New Zealand) r 5.54; *District Court Rules 2014* (New Zealand) r 5.56.

proceeding.[309]The statement of counterclaim must be filed within the time stated in the notice of proceeding for filing a statement of defence, which is 25 days, or as fixed by the court.[310]

256. A defendant can plead any claim or right for which an action can be maintained in the counterclaim and it is not necessary that it is analogous to the plaintiff's claim.[311]

257. A plaintiff or another person who intends on defending a counterclaim must, within 25 working days after the day on which the counterclaim is served, file and serve a statement of defence to the counterclaim.[312] If the plaintiff or counterclaim defendant fails to file a defence, the defendant is able to move the court for judgment on the counterclaim. If the original proceedings are stayed, discontinued or dismissed, the counterclaim remains live and may proceed independently.[313]

Australia (NSW, Victoria)

258. In NSW, a counterclaim is referred to as a cross-claim. Cross-claims are dealt with in a separate part of the UCPR to pleadings. Nevertheless, the time for filing a cross-claim is the same as that for filing a defence, namely 28 days (or if the action is commenced by summons then as specified in the summons).[314] A court can at any time direct that the cross-claim or part of it be separately tried, but unless that happens the cross-claim is heard with the original proceeding.[315]

259. In Victoria, counterclaims are also dealt with separate to pleadings under Order 10. A defendant who has a claim against the plaintiff may file a counterclaim in the proceeding.[316] If a counterclaim is made, then it goes in the same document as the defence and is called a 'defence and counterclaim'.[317] A counterclaim can be filed against the defendant and/or another person.[318] A counterclaim must be filed on the plaintiff in accordance with the 30 day timeline for serving a defence.[319] If the counterclaim is filed against a person not yet party to the proceedings then it must be served within 30 days after the expiration of the time required for serving the

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[309]Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 156..
[310]*High Court Rules 2016* (New Zealand) r 5.55.
[311]Matthew Casey et al. *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd., 2nd ed, 2013).
[312]*High Court Rules 2016* (New Zealand) r 5.56; *District Court Rules 2014* (New Zealand) r 5.58.
[313]*High Court Rules 2016* (New Zealand) r 5.59; *District Court Rules 2014* (New Zealand) r 5.61.
[314]*Uniform Civil Procedure Rules 2005* (NSW) r 9.1 <http://www.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/s14.3.html>.
[315]*Uniform Civil Procedure Rules 2005* (NSW) r 9.8 and 9.9.
[316]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o10.02(1).
[317]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 10.02(3).
[318]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 10.03.
[319]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 10.04(2)(a), 14.04.

defence.[320] A counterclaim is tried at the same time as the original proceeding unless the Court orders otherwise.[321]

260. The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) also states that the rules relating to pleadings apply to counterclaims as if it were a statement of claim, and to defences to counterclaims as though it were a defence. The time limit, again, is 30 days.[322]

Vanuatu

261. Under the CPR (Vanuatu), a defendant wishing to counterclaim must attach the details in his or her defence.[323] The rules provides that the part of the defence containing the counterclaim must clearly show that it is "the counterclaim" and must set out the details of the counterclaim as if it were a claim.[324] In Vanuatu, since the defence is required to be filed and served within 28 days after the date of service of the claim, it is implied that the counterclaim must also be filed and served within this time.[325]

262. The Vanuatu CPR also allows the defendant to bring a counterclaim against an additional party to the proceeding.[326] A defendant may only make this counterclaim if they allege that the additional party is liable with the plaintiff or if the relief claimed is related to the current proceedings.[327]

263. A plaintiff wishing to defend a counterclaim may include the defence to the counterclaim in his or her reply.[328]

Submissions

264. The Commission sought submissions in Issues Paper 2 on whether the SCR and MCR should include rules relating specifically to counterclaim. Submissions were also sought on more general issues such as whether clearer rules are required for all pleading documents and whether the rules should be amended to more comprehensively regulate the amendment of pleadings as in comparative jurisdictions.

265. Additionally, the Commission sought the following questions in Issue Paper 2:

[320] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 10.04(2)(b).
[321] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 10.05.
[322] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 10.04(4), 13.15
[323] *Civil Procedure Rules 2002* (Vanuatu) r 5.8(1).
[324] *Civil Procedure Rules 2002* (Vanuatu) r 4.8(3).
[325] *Civil Procedure Rules 2002* (Vanuatu) r 4.13(1)(b).
[326] *Civil Procedure Rules 2002* (Vanuatu) r 4.9(1).
[327] *Civil Procedure Rules 2002* (Vanuatu) r 4.9(1).
[328] *Civil Procedure Rules 2002* (Vanuatu) r 4.8(4)

- *Should the SCR and MCR adopt an extended timeframe to file and serve a counterclaim, as follows: 30 working days (as practised in NZ); or 14 working days (as practised in Vanuatu).*
- *Should the SCR and MCR allow for a third party counterclaim as practised in Vanuatu?*

266. The Commission did not receive any submissions specifically relating to counterclaims in pleadings.

Commission's View

267. Neither the MCR nor the SCR make provision for the form or content of a counterclaim against the plaintiff. The Commission considers that the rules should set out the required form and content for a counterclaim as practised in comparable jurisdictions below, which will provide clarity for litigants and greater efficiency in the court process. This includes clarifying the time within which to file a counterclaim and to reply by.

268. The Commission suggests that the form and content of a counterclaim should follow the form and content requirement for a statement of claim (similarly to New Zealand and Victoria).

269. The normal practice in Samoa is that if a counterclaim is made, it goes in the same document as the defence. There were no submissions or any concerns raised about the current practice relating to counterclaims and no suggestion that there is confusion between the defence and the counterclaim, or confusion arising when an amendment to a counterclaim is filed later, which is why New Zealand changed its rules separating the counterclaim procedure to have its own pleading, from that of a statement of defence.

270. In line with the current practice the Commission considers that a defendant who has a counterclaim against the plaintiff or another person should still be able file that counterclaim in the same document as the defence, and be clearly labelled as 'defence and counterclaim'.

271. The timeframe for filing a counterclaim will be the same as the timeframe for filing a statement of defence. This is consistent across most comparative jurisdictions and with the current rules. In Samoa, this should be 14 days in line with the recommendations relating to timeframe for filing a statement of defence.

272. A court should at any time be able to direct that the counterclaim or part of it be separately tried, but unless that happens the counterclaim should be heard with the original proceeding (similar to Victoria).

273. The Commission also suggest that the rules should apply to defences to counterclaims as though it were a defence. The timeframe for filing a defence to a counterclaim should also be the same as the timeframe for defending a statement of claim, which in the case of proposed reforms would be 14 days of service of the counterclaim. Currently no time frame is provided in either of the rules.

274. The Commission also suggests that if the plaintiff (or counterclaim defendant) fails to file a defence to the counterclaim, the defendant should be able to seek judgment on the counterclaim. If the original proceedings are stayed, discontinued or dismissed, the counterclaim should remain live and may proceed independently.

Recommendations

54. Both rules should set out the required content and filing of a counterclaim.

55. A counterclaim may continue to be filed in the same document as the statement of defence. The document should be clearly labelled a 'defence and counterclaim'.

56. A court should at any time be able to direct that the counterclaim or part of it be separately tried, but unless that happens the counterclaim should be heard with the original proceeding. If however the original proceeding (i.e. plaintiffs claim) is stayed, discontinued or dismissed, the counterclaim should remain live and may proceed independently.

57. The form and content of a counterclaim should follow the form and content required for a statement of claim.

58. The timeframe for filing a counterclaim will be the same as the timeline for filing a statement of defence i.e. 14 days, where they are filed in the same document.

59. The rules on the form or content relating to pleadings should apply to defences to counterclaims as though it were a defence. The timeline for filing a defence to a counterclaim should be the same as the timeline for defending a statement of claim. If the plaintiff (or counterclaim defendant) fails to file a defence to the counterclaim, the defendant, should be able to seek judgment on the counterclaim.

Set Off

275. A set off is a procedure that allows one party to apply debt owed to him or her by another party, to discharge all or part of a debt that he or she owes to the other party

and is a defence in whole or in part to a claim. [329] The rationale for set off is to avoid multiplicity of proceedings where there are liquidated debts on either side which can be easily ascertained.[330]

General application

276. The SCR provides set off as a defence where every defendant may set off any claim or demand whatsoever, that he or she may have in the capacity in which he or she is sued, against the plaintiff in the capacity in which he or she sues.[331]

277. Furthermore, a set off must be specially pleaded with sufficient particulars to inform not only the other party as to the nature or basis of the set off but also the Court.[332]

278. There is no defence of a set off in the MCR.

Comparable jurisdictions

New Zealand

279. Both the HCR and DCR cover set off as a defence. A plaintiff who wishes to allow a set-off or to give up a portion of their claim must show the amount allowed or given up in their statement of claim.[333] Furthermore, if costs are allowed to both parties, their respective costs must be set off and the lesser sum must be deducted from the greater, unless the court otherwise directs.[334]

280. Further, both rules restrict the right of a defendant to set off if the proceeding is against and or filed by the Crown for the recovery of taxes, duties or penalties.[335]

Australia (NSW/ Victoria)

281. In NSW, defendants who have claims against a plaintiff for money may, by way set off, seek to balance out mutual debts.[336] It does not matter whether the mutual debts are of a different nature.[337]

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[329] Atkinson, J and Olischlager, S, *An Introduction to Civil Procedure Act 2005: Uniform Civil Procedure Rules 2005* (2005) New South Wales <http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/vwFiles/Info%20paper_with%20Index_august.doc/$file/Info%20paper_with%20Index_august.doc>.

[330] *Barescape Pty Ltd v Bacchus Holdings Pty Ltd* (No 10) [2012] NSWSC 1275 [15] (Black J); See also *Ansett Transport Industries (Operations) Proprietary Ltd v Polynesian Airlines* (Holdings) Ltd [1994] WSSC 11.

[331] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 108.

[332] *Ansett Transport Industries (Operations) Proprietary Ltd v Polynesian Airlines (Holdings) Ltd* [1994] WSSC 11.

[333] *High Court Rules 2016* (New Zealand) r 5.34; *District Court Rules 2014* (New Zealand) r 5.37.

[334] *High Court Rules 2016* (New Zealand) r 14.17; *District Court Rules 2014* (New Zealand) 14.16.

[335] *High Court Rules 2016* (New Zealand) r 5.61 (1).

[336] *Civil Procedure Act 2005* (NSW) s 21(1). See also Halsbury's Law of Australia [325-3535].

[337] *Civil Procedure Act 2005* (NSW) s 21(1).

282. In Victoria, where a defendant has a claim against a plaintiff for the recovery of a debt or damages, the claim may be relied on as a defence to the whole or part of a claim made by the plaintiff for the recovery of a debt or damages and may be included in the defence and set off against the plaintiff's claim, whether or not the defendant also counterclaims for that debt or damages.[338]

Vanuatu

283. Although there is no specific rule on set off, it is still mentioned in the commentary for costs of counterclaim in the Vanuatu Rules.[339] Case law suggests that when a defendant succeeds in a set off equal to the claimant's claim, the costs of the proceedings ought to go to the defendant.[340] Furthermore, the other debtor may raise a set-off which might have been raised against a claim by the enforcement debtor.[341]

Submissions

284. The Commission sought submissions in Issues Paper 1 on the following:

- Should there be a defence of set off or should it be removed from the SCR?

-Should set off be restricted to private civil proceedings as practised in NZ?

-Should the defence of set off be available in the District Court?

285. The Commission did not receive any submissions on these issues.

Commissions Views

286. The Commission considers that the defence of set off should remain and continue to be available in the SCR. This is to allow a party (i.e. debtor) to reduce or extinguish its liability against another party (i.e. creditor). The defence will also avoid a range of proceedings where there are liquidated debts on either side which can be easily ascertained. The Commissions suggests that the MCR also cover set off as a defence, with helpful guidance from the New Zealand rules.

287. Furthermore, as practised in NZ, set off should be restricted to private civil proceedings and should not be available for cases filed by the Government for the recovery of taxes and penalties.

[338] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 13.14.
[339] *Civil Procedure Rules 2002* (Vanuatu) r 15.15.
[340] *Civil Procedure Rules 2002* (Vanuatu) r 15.15; *Stooke v Taylor* (1880) 5 QBD 569 at 582-3.
[341] *Tapp v Jones* (1875) LR 10 QB 591 at 593.

Recommendations

60. Both rules to provide for set off as a defence, which should be restricted to private civil proceedings and not available for cases filed by the Government for the recovery of taxes and penalties similar to NZ.

COURT DOCUMENTS

A. FORMAT AND FILING

Documents

288. The SCR contain a number of prescribed forms setting out the content and format in which the documents filed in the Supreme Court must follow.[342] The SCR provides that the forms may only be altered if the circumstances require.[343]

289. In regards to filing, the MCR do not set out any procedures for filing court documents. The SCR do contain rules around filing although to a very limited extent. The SCR provides that when a statement of claim is filed, the Registrar must enter the action in the Actions book, fix a hearing date and issue a summons.[344] No guidelines are provided regarding how documents are to be filed.

290. As a matter of court practice, documents filed in the District and Supreme Courts of Samoa must be printed on bond paper, although this is not in the civil procedure rules. A document not printed on bond paper will not be accepted by registry for filing, even if it otherwise complies with the rules.

Comparable Jurisdictions

New Zealand

291. Documents filed in court must comply with requirements set out in the rules.[345] Leave is required to file a document that does not comply with the rules, for example, if a document is not printed on paper that is international size A4 and good quality[346]or if the contents of the document do not comply (for example margins, signatures, cover sheets, numbering, fastening of document, description of document, heading and

[342]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) sch 1.
[343]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 200.
[344]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 14..
[345] *High Court Rules 2016* (New Zealand) Part 5 div 2; *District Court Rules 2014* (New Zealand) Part 5 div 2.
[346] *High Court Rules 2016* (New Zealand) r 5.3; *District Court Rules 2014* (New Zealand) r 5.6.

format which are all provide for in the rules)[347].[348] Where leave is sought in these circumstances, the solicitor is liable for costs of obtaining it.[349]

292. In cases of non-compliance with rules as to the form, the Registrar will usually accept the document, so that it is left to the court to address the irregularities. Under the relevant rules, non-compliance is regarded as an irregularity and not a nullity, and left to the court's discretion.[350] The court, however, must not set aside any proceedings if there has been a waiver or delay by the other party.[351]

Australia (Victoria)

293. In Victoria, the rules across the Supreme, County and Magistrates' court jurisdictions all contain prescribed forms, which set out the format and desired content. They also specify the types of headings, paper size, margins, spacing, numbering and so forth that must be used.[352] The Registrar is empowered under these rules to refuse to accept a document for filing if it does not comply with these rules.[353]

Vanuatu

294. The rules in Vanuatu prescribe how all documents filed in a proceeding must be formatted. This includes that the documents:

i. Are typewritten or in neat legible handwriting;

ii. contain the number of the proceedings, if any;

iii. must consecutively number the pages of the documents;

iv. be divided into consecutively numbered paragraphs, with each paragraph dealing with a separate matter;

v. show the address of the party's lawyer or, if the party is not represented by a lawyer, the party's address; and

vi. If the Rules require the document to be in a form in Schedule 3, be in that form.[354]

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[347] *High Court Rules 2016* (New Zealand) rr 5.4-5.10; *District Court Rules 2014* (New Zealand) rr 5.7-5.13.

[348] *High Court Rules 2016* (New Zealand) r 5.2(1); *District Court Rules 2014* (New Zealand) r 5.5(1).

[349] *High Court Rules 2016* (New Zealand) r 5.2(2); *District Court Rules 2014* (New Zealand) r 5.5(2).

[350] *High Court Rules 2016* (New Zealand) r 1.5; *District Court Rules 2014* (New Zealand) r 1.8.

[351] *High Court Rules 2016* (New Zealand) r 1.5(4); *District Court Rules 2014* (New Zealand) r 1.8(4).

[352] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 27; *County Court Civil Procedure Rules 2008* (Vic), o 27.03; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) o 27.

[353] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 27.06; *County Court Civil Procedure Rules 2008* (Vic), o 27.06; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) o 27.06.

[354] *Civil Procedure Rules 2002* (Vanuatu) r 2.6(3).

295. The Vanuatu Rules maintain that although strict compliance with the forms set out in the Rules is not required, documents are still required to substantially comply with the prescribed forms.[355] Similar to New Zealand, the Vanuatu rules prescribe that a document that does not comply will not be nullified but will only be made irregular and dealt with at the court's discretion.[356] Failure to comply with the rules will enable the court to declare the document either ineffectual or effectual or otherwise make another order available under the rules.[357]

Submissions

296. In Issues Paper 1, the Commission sought submissions for the following question:

- *Should the requirement to use bond paper for filing documents be inserted into the SCR and the MRC; or alternatively be abolished?*

297. In Issues Paper 2:

- *To what extent should both SCR and MCR Rules prescribe the form and content of Court documents?*

298. The Commission was advised of a person from New Zealand seeking admission at the Supreme Court of Samoa who was posted Legal Size Bond Paper to use for her application for admission, as it was not commonly sold at retail stores. This caused unnecessary delay and costs in filing the documents, which could have easily been alleviated if the registry accepted documents on good quality A4 paper, which is easily obtained and significantly cheaper.

299. In consultations with Registrars however, the Commission was informed that bond paper was preferred for its durability, as it was assumed that regular paper can be easily damaged. The Registrars indicated however that this requirement could easily change on the condition that good quality paper is used.[358]

Commission's View

300. In order to ensure consistency and a high standard in documents filed, there should be general rules on the form of all court documents. Non-compliance should be regarded as an irregularity so that where the Registrar accepts a document that is not in compliance with rules as to the form, such irregularities may be left to the court to address using its discretion.

[355] *Civil Procedure Rules 2002* (Vanuatu) r 18.9.
[356] *Civil Procedure Rules 2002* (Vanuatu) r 18.10 (1).
[357] *Civil Procedure Rules 2002* (Vanuatu) r 18.10 (2).
[358] Consultation with Registrars (Masinalupe Tusipa Masinalupe) (Ministry of Justice and Courts Administration Complex) 30 October 2015.

301. The Commission suggests that rules for filing documents should require that all documents be on good quality A4 paper, instead of bond paper. The cost of bond paper and high quality of paper available these days are some of the reasons for this change – furthermore, e-filing may be more common in future.

Recommendations

61. The rules for filing documents should require that all documents be on good quality A4 paper, instead of bond paper.

62. General rules on the form of all court documents should continue to be included in the rules. Rules should also clarify that non-compliance should be regarded as an irregularity that may be addressed by the Court and not a nullity.

Filing

302. The MCR do not set out any procedures for filing. The SCR stipulate that when a statement of claim is filed, the Registrar must enter the action in the Actions Book, fix a day for hearing, issue a summons (per Form 1) and annex the statement of claim to the summons and every copy is served.[359] No guidelines are provided to parties about how documents are filed, but preliminary consultations revealed that parties generally attend the court registry and submit the document for filing.

Comparable Jurisdictions

New Zealand

303. In New Zealand, the courts have become more considerate of user needs and often provide flexibility. Postal filing and filing electronically (e-filing) are both used extensively, and viewed as allowing for much better access to justice, especially in situations of urgency.[360]

304. A document may be e-filed in the High Court if it complies with the rules.[361] Requirements for e-filing are that it must be authenticated by an electronic identity assigned by the Registrar;[362] that it must comply with requirements in a practice direction issued by the Chief Judge or judge of a particular court with the approval of

[359]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 14(1).
[360] *High Court Rules 2016* (New Zealand) r 5.78.
[361]*Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(1).
[362]*Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(2).

the Chief Judge;[363] and that the practice direction may impose requirements by limiting the number of documents to be filed on a single occasion or in a period to ensure electronic filing is convenient to registered users and efficient and reliable and causes no injustice to other parties.[364] The e-filed document must also be labelled so that it is clear what the document is, for example, "Interlocutory application without notice for interim injunction".[365]

305. Acceptance of a document by the Registrar or Deputy Registrar must be recorded verifying the date, time and endorsement of filing.[366] If an e-filed document is not accepted by the Registrar, he or she must notify the registered user immediately.[367]

306. Affidavits or formal undertakings must be passed to the court in imaged form when they are being e-filed. These documents must be authenticated by an electronic identity;[368] comply with requirements set out in a practice direction issued by the Chief Judge or a list Judge with the approval of the Chief Judge[369]; and adequately labelled.[370]

307. The original hard copy of the affidavit or formal undertaking form must be retained by the registered user for the period of time provided under the rules,[371] and may be ordered by the Judge to be produced on application or on the Judge's own initiative if there is any uncertainty as to the content of an affidavit or formal undertaking.[372]

Australia (NSW, Victoria)

308. In New South Wales, documents may be filed in person or by sending the documents by post to the registry.[373] In the Federal Court of Australia, documents may also be faxed to the registry or filed electronically.[374]

309. In Victoria, certain lists and jurisdictions now accept filing of documents in person or electronically.[375] In some circumstances, electronic filing is now the only method of

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[363] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(3). In New Zealand there is a general move to include provisions in the rules wherever possible and practice notes tend to be confined to experimental matters: Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 6.
[364] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(4).
[365] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78 (7).
[366] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.80(1)
[367] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.80(2).
[368] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(2).
[369] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(3).
[370] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.78(7).
[371] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.81(4). i. e for 12 months from the date of efiling in a proceeding that does not go to trial, or until no appeal or further appeal from a judgment given in that proceeding is possible in a proceeding that goes to trial.
[372] *Judicature (High Court) Rules Amendment Act 2008* (NZ) r 5.81(5).
[373] *Uniform Civil Procedure Rules 2005* (NSW) r 4.10(1).
[374] *Federal Court Rules 1977* (Aus) r 2.21.
[375] Supreme Court (General Civil Procedure) Rules 2015 (Vic) o 28.01; *County Court Civil Procedure Rules 2008* (Vic) r 28.

filing documents.[376] There are still certain documents which may not be filed electronically however. These include appeal books, court books, documents produced in response to a subpoena and affidavit exhibits.[377] Whilst the courts now accept electronic filing, the Courts may still request that parties produce the original document.[378]

Vanuatu

310. In Vanuatu, the rules only provide that filing is required to be done in the office of the court in which the proceedings will be heard in.[379] There is no provision in Vanuatu that deals specifically with the methods of filing documents. Nevertheless, it appears to imply a preference for filing a claim in person.[380]

Submissions

311. In Issues Paper 1, the Commission sought submissions on the following question:

- *Whether the SCR should be amended to provide that filing can only carried out by attending the registry in person, or whether it should be expanded to include methods of filing such as by post or electronically?*
- *Should the rules for filing documents in the Supreme Court (Civil Procedure) Rules 1980 be replicated in the Magistrates' Court Rules 1971?*

312. In consultation with Court registrars, they advised that e-filing was currently practiced in Samoa but to a limited extent and only in Court of Appeal matters and in conjunction with physical filing. The practice is where an appeal is physically filed; an e-copy is provided to the Registrar.[381] It was expressed that the difficulty in the current e-filing system is the payment which requires an electronic bank account for the payment to go into. Nonetheless, e-filing was submitted to be advantageous and a practice that should be considered to feature in the new rules.[382]

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[376] For example, in certain lists of the Victorian Supreme Court like the Commercial List, Corporations List and Intellectual Property List. See *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 28A.01 and 28A.03.
[377] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 28.13; *County Court Civil Procedure Rules 2008* (Vic) r 28.13.
[378] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 28.15.
[379] *Civil Procedure Rules 2002* (Vanuatu) rr 2.3, 2.4.
[380] *Civil Procedure Rules 2002* (Vanuatu) rr 2.3, 2.4. Rule 2.3 states that a claim can be filed in any office of the Supreme Court while rule 2.4 provides that a claim must be filed in the office of the Magistrates Court in any district where either party lives, where the incident leading to the proceeding happened or where the property the subject of the claim is located.
[381] Consultation with Registrars (Lio Heinrich W. Siemsen), (Ministry of Justice and Courts Administration Complex) 30 October 2015.
[382] Consultation with Registrars (Lio Heinrich W. Siemsen), (Ministry of Justice and Courts Administration Complex) 30 October 2015.

Commission's View

313. The Commission considers that in addition to filing in person as is the current practice, documents should also be able to be faxed to the registry.

314. Electronic filing is already being carried out in matters before the Court of Appeal due to the Appeal Court judges originating from New Zealand. Although currently electronic filing is relatively limited to these particular matters in the Court of Appeal. The Commission foresees that an e-filing system is likely to be developed in Samoa in future. This would allow for much better access to justice particularly in situations of urgency. It would expedite proceedings for lawyers and courts, require less human resources to process in person, be a more environmentally conscious approach, and may also improve document retention.

315. The Commission suggests that rules should require e-filing to comply with requirements in a practice direction issued by the Chief Justice. This would ensure it is convenient to users, efficient, reliable and causes no injustice to other parties. Practice directions could include specifications on how documents are signed and sealed, how they are stored, any restrictions on copying the documents, what evidence is provided confirming filing, requirements for acceptance of an e-filed document so that the date, time and endorsement of filing is verified, and so forth. The rules from other jurisdictions experienced with e-filing systems can be used as a guide and can be adapted to fit with Samoa's technological infrastructure.

316. There should also be requirements for the Registrar to notify the user immediately if an e-filed document is not accepted by the Registrar. The rules should also specify what documents may not be filed electronically (such as court books and affidavit exhibits), and what e-filed documents must be passed to the court in imaged form (such as affidavits) and what requirements these documents must also comply with.

317. The rules should provide that the original hard copy of the affidavit or formal undertaking form must be retained by the user for a period of time provided under the rules, and may be ordered by the Judge to be produced on application or on the Judge's own initiative if there is any uncertainty as to the content of an affidavit or formal undertaking.

Recommendations:

63. In addition to filing in person, documents should also be able to be faxed to the registry.

64. The following recommendations are made in anticipation of an e-filing system being developed in Samoa in future on a date to be nominated by the Chief Justice.

    i. Documents should be able to be filed electronically. Systems for e-filing will need to be in place and available for electronic filing. Both rules should be expanded to permit e-filing subject to compliance with requirements in rules or in practice directions issued by the Chief Justice (as is done in similar jurisdictions). Practice directions could include specifications on how documents are signed and sealed, how they are stored, any restrictions on copying the documents, evidence is provided confirming filing, requirements for acceptance of an e-filed document so that the date, time and endorsement of filing is verified, and so forth. The rules from other jurisdictions experienced with e-filing systems can be used as a guide and can be adapted to fit with Samoa's technological infrastructure.

    ii. The Registrar should notify the user immediately if an e-filed document is not accepted by the Registrar. The rules should also specify what documents may not be filed electronically (such as court books and affidavit exhibits), and what e-filed documents must be passed to the court in imaged form (such as affidavits) and what requirements these documents must also comply with.

    iii. The rules should provide the period of time the original hard copy of the affidavit or formal undertaking form must be retained. It should also provide that the Judge may order it to be produced on application or on the Judge's own initiative if there is any uncertainty as to the content of an affidavit or formal undertaking.

B. SERVICE

Documents Requiring Service

318. The SCR and MCR specify throughout the rules the documents that require service.[383]

Comparable Jurisdictions

New Zealand

319. Both the HCR and DCR stipulate what documents are required to be served, generally under the particular rule pertaining to that document.

Australia (NSW)

320. In New South Wales, the UCPR eliminates any confusion about which documents should be served by stipulating that any document filed in court must be served upon all other active parties.[384]In addition, affidavits which have not been filed, but which a party intends to rely on in court, must be served on all interested parties.[385]

321. There are different timeframes for service set out in the rules. These timeframes vary depending on the type of document being served. They include specific timeframes for example, a notice of appeal must be served within 7 days after leave to appeal is given.[386] The Court also has an ability to fix the time within which something must be done if no time is specified in the rules.[387]

Vanuatu

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[383] Documents requiring service in the Supreme Court (Civil Procedure Rules 1980 (Samoa): Summons and statement of claim (implicit in r 14 and Part V); Motion for third party notice (on plaintiff), third party notice (on third party/co-defendant), and statement of defence (on plaintiff and defendant (rr 43–44, 47); Witness summons (r 53); Notice to admit specific facts (implicit in r 63(2)); Interlocutory motions on notice (r 65); Orders required to be filed under Part VIII (r 76);) Order for discovery (r 86); Notice to produce documents for inspection (r 87); Notice that money is paid into court (r 103) and notice of acceptance (r 104); Memorandum of discontinuance (r 109); Notice of reinstatement (r 139); Notice of new hearing (r 140); Application for rehearing and affidavit, and Order for rehearing (r 141); Summons for garnishee proceedings (r 144), Notice by creditor accepting amount paid (r 146), Notice by debtor disputing amount (r 149); Interpleader summons (r 161) and claimant disclaimer or particulars (r 164); Order to change parties (r 170); and Writ of sale (r 175). Documents requiring service in the MCR: Summons and statement of claim (implicit, eg r 4); Order directing the defendant to file a defence, together with summons and statement of claim, (r 7(2)); Notice of intention to defend, or counterclaim (r 16); and Memorandum of discontinuance (r 20).

[384]*Uniform Civil Procedure Rules 2005* (NSW) r 10.1(1).

[385]*Uniform Civil Procedure Rules 2005* (NSW) r 10.2.

[386] *Uniform Civil Procedure Rules 2005* (NSW) r 51.16(1)(a).

[387] *Uniform Civil Procedure Rules 2005* (NSW) r 1.13.

322. Similar to New Zealand, the CPR (Vanuatu) also stipulate what documents must be served and the timelines for service. The rules provide that if it has required a document to be served then the responsible party is whoever filed the document.[388] In commentary to the Act, it is clear that this obligation applies even if it is court practice to serve documents on parties. The obligation also extends to informing parties of hearing dates.[389]

Submissions

323. In Issues Paper 1, the Commission sought submissions on the following:

- *Should service for any documents be required explicitly by the SCR or the Magistrates' Court Rules 1971? (For example, affidavits, and injunctions.) If so, which documents? Alternatively, should the SCR and the Magistrates' Court Rules 1971 stipulate that any document filed in court must be served on all active parties?*

- *Should Part V of the Supreme Court (Civil Procedure) Rules 1980, which sets out only the method for service of a summons, be extended to include procedures for service for all documents required by the rules to be served?*

- *Should rules for service be added to the Magistrates' Court Rules 1971?*

- *Should an outer time limit be given for the service of documents in the SCR or the Magistrates' Court Rules 1971, noting that more urgent applications may need to be served earlier? If so, what would be an appropriate timeframe? Alternatively, should timing be stipulated in each rule in the SCR or the Magistrates' Court Rules 1971 that requires service of a particular document? Instead of an outer time, should the rules require that service be effected 'as soon as practicable' after filing?*

324. It was raised in submissions that there is a lack of detail in the rules regarding service of court documents. It was raised that the current practice in lieu of rules is that the Court orders the service of documents and stipulates the timeframes in which service is to be effected.[390] Consequently, in practice the service process is able to operate without specific rules. It was further raised that any recommendations to rules of service should be subject to the discretion of the Court to extend or limit the time of service as it deems necessary.[391]

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[388] *Civil Procedure Rules 2002* (Vanuatu) r 5.1(1).
[389] *Civil Procedure Rules 2002* (Vanuatu) r 5.1.1.
[390] Office of the Attorney General, Submission No 1 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1*, 4.
[391] Office of the Attorney General, Submission No 1 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1*, 4.

325. Some submissions stated that court documents to companies locally and abroad is covered to some extent in the *Companies Act 2001*, although the methods of service are not addressed.[392]

326. It was highlighted that there is no domestic legislation to cover procedures for serving court documents on private individuals or where the Government is a party to a proceeding.[393]

327. Submissions indicated that in practice, parties tend to delay serving documents, however, it was viewed that adding an "as soon as practicable" requirement would not necessarily help.[394] Furthermore, consultation with the judges raised that adding this requirement would be the subject of unnecessary arguments in court to extend the time of filing.

Commission's View

328. A practical measure to eliminate any confusion about which documents should be served, is for both rules to stipulate documents that require service. The rules should also state that any document filed in court must be served upon all other active parties. Furthermore, affidavits which a party intends to rely on in court but which have not been filed, must be served on all interested parties.

329. Despite the common practice for parties to delay serving documents as raised in consultations, there was little support to include an "as soon as practicable" requirement to encourage parties to serve their documents promptly. Furthermore, doing so may result in unnecessary arguments in court to extend the time of filing, which was a concern raised by a member of the Judiciary. The Commission therefore suggests that rules should specifically include procedures (including time frames) and methods for service.

330. The Commission considers that the approach in NSW is a sensible one as it sets out specific timeframes where appropriate, and gives the Court discretion to set the timeframes for serving documents.

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[392] Office of the Attorney General, Submission No 1 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1*, 4.
[393] Office of the Attorney General, Submission No 1 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1*, 4.
[394] Preliminary Consultation with Ruby Drake (Apia, Samoa, 25 January 2010).

Recommendations:

65. Both rules should require that any document filed in court must be served on other parties. Affidavits which a party intends to rely on in court but which have not been filed, must be served on all interested parties.

66. Rules should include procedures for methods of service.

67. Rules should also include specific time frames where appropriate and give the Court discretion to set timeframes for service if not otherwise specified.

Mode of Service

331. SCR provides for service of actions (i.e. service of summons) under Part V, as well as other specific court documents. Personal service of summons has always been the practice in Samoa and is provided under the SCR, [395]although the Court may dispense with personal service in certain circumstances.[396]The MCR do not state when, if at all, personal service is required. According to practitioners interviewed in preliminary consultations however, personal service is always used in Samoa. What constitutes personal service is not defined in the rules.

332. In cases where personal service cannot be effected, the SCR stipulate that in such situations the Court may order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as the Court thinks fit to impose.[397]There are no specific rules in relation to substituted service

333. Service on a company or corporation is carried out by leaving the documents at any place of business of the company or corporation with any person of apparent authority there.[398]Service on partners or members of a firm may be carried out by leaving the documents at any place of business of the firm.[399]No rules are provided in the MCR relating to mode of service.[400] Unlike NZ, the SCR and MCR have no rules in relation to service on an unincorporated society.

Comparable Jurisdictions

New Zealand

[395] *Supreme Court (Civil Procedure Rules) 1980* (Samoa) rr 19, 43, 139 and 145.
[396] *Supreme Court (Civil Procedure Rules) 1980* (Samoa) r 23.
[397] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 23(1).
[398] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 20.
[399]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 21
[400] With the exception of proof of service of documents provided under the *District Courts Act 1969* (Samoa) s 131.

334. Specific documents require a specific mode of service. For example, statements of claim and notices of proceeding must be served personally unless the court decides otherwise.[401] Originating applications also need to be served personally unless another Act provides some exclusive mode of service.[402]

335. Personal service is provided under the rules by leaving the document with the person to be served, or if that person does not accept it, by putting it down and bringing it to the notice of the person.[403]

336. A party may also agree in writing to service by some other method.[404]

337. The rules also provide for substituted service where despite reasonable efforts, personal service cannot be effected. In such situations a court may direct how a document should be served or brought to the notice of the other party; direct that steps have already been taken sufficient to constitute service; or dispense with service.[405]

338. Service on companies in New Zealand and overseas companies with a place of business in New Zealand are effected under the *Companies Act 1993.* The Act provides similar requirement for service on New Zealand companies and on overseas companies with a place of business in New Zealand. It requires: [406]

- Delivery to a director (or person named on the overseas register as a director or as authorised to accept service);
- Delivery to an employee and the head office or principal place of business in New Zealand;
- Leaving it at the company's registered office or address for service as required under the Act (in the case of a company in New Zealand);
- In accordance with directions by the court;
- In accordance with any agreement with the company.

339. Service on New Zealand corporations must be by personal service to a director or employee at the head office or principal place of business (or as the court may direct), or at the registered office.[407]However service on foreign corporations with a place of

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[401]*High Court Rules 2016* (New Zealand) r 5.71(1); *District Court Rules 2014* (New Zealand) r 5.67(1).
[402]*High Court Rules 2016* (New Zealand) r 6.1; *District Court Rules 2014* (New Zealand) r 6.1.
[403]*High Court Rules 2016* (New Zealand) r 6.11; *District Court Rules 2014* (New Zealand) r 6.11.
[404]*High Court Rules 2016* (New Zealand) r 6.7; *District Court Rules 2014* (New Zealand) r 6.7.
[405]*High Court Rules 2016* (New Zealand) r 6.8; *District Court Rules 2014* (New Zealand) r 6.8.
[406]*Companies Act 1993* (New Zealand) ss 387 and 389.
[407]*High Court Rules 2016* (New Zealand) r 6.12; *District Court Rules 2014* (New Zealand) r 6.12.

business in New Zealand must be by personal service on the person in charge at the place of business of the corporation.[408]

340. In relation to service on an unincorporated society, personal service on the president, chairman, secretary or similar officer constitutes good service.[409] Personal service on a partnership carrying on business in the name of a firm can be effected on a partner or person apparently in control of the business at the principal place of business.[410] There is no requirement that service be effected on each member of the organisation.

341. For service of a document in a proceeding to persons under legal incapacity such as minors and people with disability, both the HCR and DCR stipulates that such documents be served on their litigation guardian.[411]

342. The rules also provide for service to be effected by post, fax or email and sets out when a document is deemed to be served by these means.[412] The time when the documents are deemed to have been served vary by mode. For documents served by post they are treated as served on the earliest of the third working day after it was posted; or the day it was received.[413] Electronically served documents i.e. by email, are treated as dispatched at the time the electronic communication first enters an information system outside the control of its originator; and treated as received, at the time the electronic communication enters that information system; or in any other case, when it comes to the attention of the party or person being served.[414] Where a document is transmitted electronically on a day that is not a working day, or after 5 pm on a working day, it must be treated as served on the first subsequent working day.[415] If effected this way, receipt of service must be acknowledged in writing (including by email), noting also the date and time of receipt.[416] Unlike Australia there is no provision with regard to documents served by fax.

Australia (NSW, Victoria)

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[408]*High Court Rules 2016* (New Zealand) r 6.13; *District Court Rules 2014* (New Zealand) r 6.13.
[409] *High Court Rules 2016* (New Zealand) r 6.14; *District Court Rules 2014* (New Zealand) r 6.16.
[410]*High Court Rules 2016* (New Zealand) r 6.15; *District Court Rules 2014* (New Zealand) r 6.17.
[411] *High Court Rules 2016* (New Zealand) r 4.10; *District Court Rules 2014* (New Zealand) r 4.40.
[412]*High Court Rules 2016* (New Zealand) r 6.6; See also District Court Rules 2014 (New Zealand) r 6.6.
[413] *High Court Rules 2016* (New Zealand) r 6.6(1)(a); *District Court Rules 2014* (New Zealand) r 6.6(1)(a).
[414] *High Court Rules 2016* (New Zealand) r 6.6(2); *District Court Rules 2014* (New Zealand) r 6.6(2).
[415] *High Court Rules 2016* (New Zealand) r 6.6(3); *District Court Rules 2014* (New Zealand) r 6.6(3).
[416]*High Court Rules 2016* (New Zealand) r 6.6(4); *District Court Rules 2014* (New Zealand) r 6.6(4)(a)-(b).

343. The Victorian Supreme Court Rules state that any document served in a proceeding may be served personally, but it does not have to be served personally unless required by the Rules or by court order.[417] The UCPR (NSW) has a similar provision to Victoria.[418]

344. Both the Victorian and NSW rules also comprehensively set out the various manners of service, which can differ depending on who is serving the documents, who is being served or what type of document is being served.[419] These include by post, fax, document exchange, through a solicitor or by substituted service, for example. A faxed document is considered served at the end of the first day after the day it was faxed.[420] Electronically served documents (like emails) are served on the same day it is sent to the person being served. However, if served after 5.00pm, the document is considered served on the next day, and if sent on a Saturday, Sunday or public holiday, it's considered served on the next working day.[421] Unlike NZ, there is no provision as to the time for documents served via post.

345. Service on a corporation is either personally on a principal officer of the corporation, or otherwise according to law, which in turn invokes the extensive provisions of the *Corporations Act 2001*.[422] Service on a corporation is effected by serving the document on a specified list of office holders within that corporation.[423]

Vanuatu

346. All court documents other than a statement of claim may be served either personally or through means of service contained under Vanuatu's CPR rules[424]. Personal service of a document is effected on an individual when a copy of that document is given directly to that individual.[425] However, it is still considered personal service when the individual refuses the document, and it is placed in that person's presence and the person is told what the document is.[426]

347. Other modes of service in Vanuatu include by post or by fax.[427] Service carried out by fax requires the serving party to, among other things, establish that the other party

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[417]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 6.01.
[418] *Uniform Civil Procedure Rules 2005* (NSW) r 10.20.
[419] *Uniform Civil Procedure Rules 2005* (NSW) Part 10 div 2 and *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 6.
[420] *Uniform Civil Procedure Rules 2005* (NSW) Part 10 div 2 r 10.5(3)(b).
[421] *Electronics Transactions Act 2000* (NSW) cl 13 sch 1.
[422]*Uniform Civil Procedure Rules 2005* (NSW) r 10.22
[423]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 604.
[424] *Civil Procedure Rules 2002* (Vanuatu) r.5.5.
[425]*Civil Procedure Rules 2002* (Vanuatu) r 5.8(1) (a).
[426]*Civil Procedure Rules 2002* (Vanuatu) r 5.8(1)(b).
[427] *Civil Procedure Rules 2002* (Vanuatu) r 5.5

received a legible copy of the document.[428] There is no provision stating when a post or fax is considered served. However, for all other documents, they must be served within the times provided in the rules.[429]

348. There is no provision stating when a post or fax is considered served. However, the rules do prescribe for all other documents to be served within the times specified under the rules.[430]

349. The service of a claim in Vanuatu is dealt with separately from the service of "other documents".[431] A claim and response are required to be served personally on the defendant unless the court allows substituted service or orders otherwise. [432]

350. Vanuatu also provides for substituted service. If a party is unable to serve a document personally, then that party may apply to the court for an order that the document be served in another way.[433] In an application to the court, the applicant party will need to show what steps have been taken to try to effect personal service.[434] The Court can then order that the document instead be served on a chief or church minister, in a newspaper notice, local radio broadcast or in another way.[435]

351. Service on corporations in Vanuatu is to be served personally to an officer of the corporation or by leaving a copy of the document at the registered officer or corporation or at the principal place of business or office of the corporation in Vanuatu if the corporation does not have a registered office in Vanuatu.[436]

352. Claims against partnerships must be served on a partner or at place of business of the partnership and if this served to one of the partners, it is taken that each partner who was a partner when the claim was issued have been served.[437]

Submissions

353. In Issue Paper 1, the Commission sought submissions on the following:

- *In either the MCR or the SCR, is there a need to clarify which documents must be served personally, or to set out that all documents must be served personally?*

[428] See commentary for *Civil Procedure Rules 2002* (Vanuatu) r 5.5.2; and *Rules of the Supreme Court 1971* (Western Australia) o 69 (3).
[429] *Civil Procedure Rules 2002* (Vanuatu) r 5.6(2).
[430] *Civil Procedure Rules 2002* (Vanuatu) r 5.6(2).
[431] *Civil Procedure Rules 2002* (Vanuatu) r 5.2; *Civil Procedure Rules 2002* (Vanuatu) r 5.5.
[432] *Civil Procedure Rules 2002* (Vanuatu) r 5.6.
[433] *Civil Procedure Rules 2002* (Vanuatu) r 5.9(1).
[434] *Civil Procedure Rules 2002* (Vanuatu) r 5.9(1) at [5.9.2].
[435] *Civil Procedure Rules 2002* (Vanuatu) r 5.9(2).
[436] *Civil Procedure Rules 2002* (Vanuatu) r 5.8 (2).
[437] *Civil Procedure Rules 2002* (Vanuatu) r 5.12.

- *Should either or both of the SCR and/or the MCR include a general definition for personal service?*

- *If a general definition for personal service is included in either the SCR or the MCR, should specific definitions also be used to apply to certain categories of persons? If so, to which categories?*

- *Should the SCR and the MCR be amended to include rules for service by post to a party, and by fax and/or email to a party's solicitor of documents other than summons and other documents expressly requiring personal service under the rules?*

- *Should the MCR and Part V of the SCR be amended to provide for service to persons under legal incapacity (i.e., children and persons with disability)?*

354. Submissions were only received in relation to some of the questions asked. Some views expressed by members of the Judiciary were that personal service should remain the primary method of service. However, if a party states specifically that a different mode of service is preferable via email, post or fax then using an alternative mode of service should be allowed.[438] It was also raised that as there is no current definition of personal service in the rules, that this should be clearly defined especially differentiating what constitutes personal from substituted service.

355. It was submitted by one law firm that where service is to an established residence, it should be sufficient that it is received by an adult rather than personal service to the party involved.[439]Another law firm suggested that other modes of service such as post, fax or email should be acceptable however, it was conceded that given the close proximity in which practitioners work in Samoa this was probably not necessary.[440]

Commission's View

356. Although the SCR contains some provisions relating to modes of service, the Commission considers that there is a need to comprehensively set out the various modes of service for serving documents. These modes can differ depending on who is serving the documents, who is being served (and whether they are legally represented) or what type of document is being served. For example the SCR only provides for the *service of a summons* to a defendant in person, company or corporation, firm and agent. Service of people with legal incapacity (i.e. minors and persons with disabilities)

[438] Consultation with Judiciary (Chief Justice Chambers, Ministry of Justice and Courts Administration) 13 July 2012.

[439]Preliminary Consultation with Ainuu (Ainuu Law Firm) 18 July 2012.

[440] Preliminary Consultation with Ruby Drake (Apia, Samoa) 25 January 2010.

must be carried out through their representatives.[441] These rules should also be stated in the MCR.

Personal and alternate modes of service

357. The provisions of the NZ, Australia and Vanuatu rules provide helpful guidance in relation to modes of service for greater efficiency. In particular, Vanuatu provides a clear option which recognises that all documents can be served personally, but also allows documents other than originating motions to be served by other means including by post and fax. While personal service is more easily achievable in Samoa due to its size than other jurisdictions, as reflected in the submissions, the Commission considers that for documents other than originating motions, the ability to serve documents by post, fax or email, particularly between law firms, is more efficient and cost effective.[442]

358. The Commission therefore considers that, for represented parties, the SCR and MCR should permit documents other than a summons to be served using other modes (not just personal service) including by sending it to the party's address for service by courier post, fax, or email, provided it meets the requirements contained in rules or practice directions (to be formulated) about what constitutes proof of service and when documents are considered served.

359. The Commission considers that, for unrepresented parties, all documents must be served personally or by way of substituted service as directed by the Court. This recognizes that not all persons will have access to other modes of service.

360. In NZ, documents effected by email in particular, are considered served when the email leaves the originator and it enters the information system of the person being served. Upon receipt, service must be acknowledged in writing or by email noting receipt and the date and time of receipt. Therefore, the Commission considers that this be included in the rules as it will become more common practice soon.

361. In providing additional modes of service other than personal service, the Commission is conscious that commentary may also need to be included in the Rules to clarify what constitutes proof of service and when documents are considered to be served in these circumstances. For example, documents served by prepaid post (particularly given it is still very unreliable) should still be acceptable, provided practice directions are formulated to set out what constitutes proof of service. The timelines offered up by the other jurisdictions provide a helpful starting point to develop this commentary so that courts and parties cannot dispute whether documents have been served and when civil procedure timelines start running.

[441] Representation of minors and incapacitated persons is discussed in Part B.
[442] It reduces travel costs and staff time away from the office.

Define personal service

362. A general definition of personal service must also be set out clearly in both the MCR and SCR. The New Zealand HCR provides a helpful definition as follows, which would be appropriate in Samoa:

- 'A document may be personally served by leaving the document with the person to be served, or if that person does not accept it, by putting it down and bringing it to the notice of that person.'[443]

Substituted Service

363. The Commission considers that substituted service should also be defined to assist in cases where despite reasonable efforts, personal service cannot be effected. In such situations a court can direct that the document be served in another way, direct that steps have already been taken sufficient to constitute service, or dispense with service. This would cover situations where, for example, a person has gone into hiding, is evading service or there are difficulties in locating parties.[444]

364. As to alternative methods of substituted service, Vanuatu includes options like serving it on a chief who lives in the same area, putting a notice in the newspaper or arranging for a broadcast on the local radio. While these examples could also be appropriate to Samoa's village structure, the Commission has some reservations about including them in the rules due to privacy concerns for individuals and because it unnecessarily imposes a responsibility on third parties, i.e. a chief, which may not always be capable of compliance. The Commission therefore considers that the court should retain discretion to direct how a party can alternatively be served, having regard to the specific circumstances of the case. The Court can nevertheless have regard to the examples from Vanuatu for guidance if it sees fit.

Service on companies (including overseas companies with a place of business in Samoa)

365. The Commission considers that service on corporations should be by personal service to a director or employee at the principal place of business, or as the court may direct, or at the registered office.

366. However in the case of foreign corporations with a place of business in Samoa, by personal service on the person in charge at the place of business.

[443] *High Court Rules 2016* (New Zealand) r 6.11; *District Court Rules 2014* (New Zealand) r 6.11.

[444] Office of the Attoirney General, Submission to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 30 Jan 2017.

367. The Commission considers that both rules should set out requirements for service on companies and overseas companies with a place of business in Samoa, for example by:[445]

- Delivery to a director (or person named on the overseas register as a director or authorised to accept service);
- Delivery to an employee and the head office or principal place of business in Samoa;
- Leaving it at the company's registered office or address for service as required under the Act;
- In accordance with directions by the court;
- In accordance with any agreement with the company.

368. If effected this way, receipt of service must be immediately acknowledged. This may be by email or other written correspondence acknowledging date and time of receipt.

[445] *Companies Act 1993* (New Zealand) ss 387 and 389.

Recommendations

68. Retain in the SCR the provision requiring personal service of a summons.

69. Insert into the MCR a provision requiring personal service of a summons.

70. Insert a definition of 'personal service' into the SCR and MCR so that it captures the following – where a document is personally served by leaving the document with the person to be served, or if that person does not accept it, by putting it down and bringing it to the notice of that person.

71. For represented parties, rules should permit documents other than a summons to be served using other modes (not just personal service) including by sending it to the party's address for service by courier post, fax, or email, provided it meets the requirements contained in rules or practice directions (to be formulated) about what constitutes proof of service and when documents are considered served.

72. For unrepresented parties, all documents must be served personally or by way of substituted service as directed by the Court.

73. Both rules should also provide for substituted service where despite reasonable efforts, personal service cannot be effected. In such situations a court may direct how a document should be served or brought to the notice of the other party; direct that steps have already been taken sufficient to constitute service; or dispense with service. Service on corporations should be by personal service to a director or employee at the principal place of business, or as the court may direct, or at the registered office. However in the case of foreign corporations with a place of business in Samoa, by personal service on the person in charge at the place of business. Both rules should set out requirements for service on companies and overseas companies with a place of business in Samoa, for example by: [446]

    - Delivery to a director (or person named on the overseas register as a director or authorised to accept service);

    - Delivery to an employee at the head office or principal place of business in Samoa;

    - Leaving it at the company's registered office or address for service as required under the Act;

    - In accordance with directions by the court;

[446] *Companies Act 1993* (New Zealand) ss 387 and 389.

- In accordance with any agreement with the company.

74. If effected this way, receipt of service must be immediately acknowledged. This may be by email or other written correspondence acknowledging date and time of receipt.

75. Both rules should provide that the Court can cure any technical irregularity in service, extension of time, or substituted service – where a document has come to the required persons notice and no irreparable prejudice has been suffered.

Overseas Service

369. The SCR provides for service of a summons outside Samoa by leave of the Court.[447] For example, a defendant outside Samoa that has an attorney or agent authorised to act on his or her behalf may be served via that attorney or agent with the leave of the Court.[448]

370. The SCR provides the circumstances in which leave of the Court may be sought for service of a summons outside Samoa. This is by ex parte motion supported by an affidavit showing what place or country the defendant may be found.[449]

The MCR does not include any provisions relating to overseas service.

Comparable Jurisdictions

New Zealand

371. The High Court Rules list circumstances when an originating document may be served outside New Zealand without leave. Generally, this may occur where the cause of action arose or damage was sustained in New Zealand or where New Zealand courts have particular jurisdiction.[450] Where a party served abroad protests the court's jurisdiction, the party serving must establish that the service abroad was proper and the court should assume jurisdiction.[451] Service of an originating document overseas must be in accordance with the requirements of the country in which service is effected, otherwise it can be through the usual methods (i.e. personal service, at an address for service including post office box, fax, and email address where given, or as the court directs).[452] There is no specific provision for overseas companies that do not have a

[447]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 28.
[448] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 22.
[449] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 28.
[450]*High Court Rules 2016* (New Zealand) r 6.27; *District Court Rules 2014* (New Zealand) r 6.23.
[451]*High Court Rules 2016* (New Zealand) r 6.29; *District Court Rules 2014* (New Zealand) r 6.25.
[452]*High Court Rules 2016* (New Zealand) r 6.32; *District Court Rules 2014* (New Zealand) r 6.28.

place of business in New Zealand, which are governed by the rules for service overseas.[453]

372. Documents other than an originating document may be served abroad with leave of the court.[454]

Australia

373. In Victoria, originating documents may be served out of Australia without leave of the Court in certain circumstances including where Victorian land is affected, where relief is sought against someone who lives in Victoria, where a contract was made within Victoria and so forth.[455] In these circumstances, documents do not need to be served personally. Rather, they need to be served in accordance with the laws where the document is being served.[456] Originating documents for other proceedings and any summons, order or notice can also be served outside Australia with the Court's leave.[457]

Vanuatu

374. The CPR (Vanuatu) allows for overseas service of a claim when the serving party applies to the Supreme Court for an order.[458] Nevertheless, the Supreme Court of Vanuatu may only order a claim to be served overseas if the claim concerns the circumstances prescribed in the rules.[459] These include circumstances relating to land, contractual claims or claims for damages done in Vanuatu, claims against Vanuatu residents, injunction orders to not do anything in Vanuatu, or in proceedings where another party is outside Vanuatu.[460]

Submissions

375. In Issue Paper 1, the Commission sought submissions on the following:

- *Should the requirement in s 28 of the SCR to seek leave of the Court to serve a summons outside of Samoa be removed, and more guidelines be provided on the situations in which a summons (or any other document) may be served overseas?*

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[453] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 125.
[454] *High Court Rules 2016* (New Zealand) r 6.30; *District Court Rules 2014* (New Zealand) r 6.26.
[455] For a full list of circumstances when originating documents can be served out of Australia see *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 7.01.
[456] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 7.03.
[457] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 7.06.
[458] *Civil Procedure Rules 2002* (Vanuatu) r 5.14(1).
[459] *Civil Procedure Rules 2002* (Vanuatu) r 5.14 (2).
[460] *Civil Procedure Rules 2002* (Vanuatu) r 5.14 (2).

- *Should the SCR be amended to include a provision stating that a document to be served outside Samoa need not be served personally provided it is served according to the laws of the overseas jurisdiction?*

- *Should Samoa become party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and provide for service under that Convention in the SCR?*

- *Should rules for service outside of Samoa be inserted into the MCR?*

376. It was noted by the OAG that there is a lack of detail surrounding overseas service in the rules.[461] It was raised that the international service process works well,[462] however it was suggested that the need to seek consent for international service is a hindrance and should be omitted.[463]

377. No submissions were received about whether Samoa should become party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Commission's View

378. The Commission considers that there needs to be more prescribed rules relating to overseas service.

379. Currently, a summons can be served overseas but only with leave from the Court. This means that the court's time is occupied any time a person brings an action against someone residing in another jurisdiction. In Samoa, this could be a common occurrence having regard to the number of Samoans who live abroad in New Zealand and Australia but who remain involved in contracts, business and land agreements in Samoa. It also costs the plaintiff money as they may need to obtain legal representation to appear at an ex parte hearing seeking the court's leave to serve the summons. It also has the potential to delay proceedings depending on the court's availability to hear the application.

380. Based on these reasons and the submissions of the OAG, the Commission considers that an alternate approach, like that used in Victoria and New Zealand, may better meet the overarching purpose of civil procedure. In those jurisdictions, a summons can be served overseas without leave from the Court, saving the court's time, reducing litigation costs for plaintiffs and reducing the delay in proceedings. Furthermore in those jurisdictions documents other than originating processes may be served with the

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[461] Office of the Attorney General, Submission No 1 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1*, January 2012.
[462] Preliminary Consultation with Ruby Drake (Apia, Samoa) 25 January 2010.
[463] Preliminary Consultation with George Latu (Apia, Samoa) 25 January 2010.

court's leave. This ensures that at an early stage in the proceeding, the court has some oversight over the progress of the case, can ensure it has been properly brought and can oversee the appropriate mode of serving the documents in overseas jurisdictions.[464] The Commission considers that this requirement to require parties to seek leave from the court before serving other documents overseas should also be adopted by Samoa.

381. The current Samoan rules are silent on how documents other than summons should be served overseas. The Commission considered that rules for overseas service should be based on the rules applying in the jurisdiction where the document is being served. However, the judiciary indicated in consultations their preference that overseas service be effected in accordance with Samoa's rules of service.[465] The Commissions considers that if this approach is taken, then a discretion should be given to the Court to make alternate service orders.

382. Overseas service provisions are currently contained only in the SCR but the Commission considers it appropriate that the provisions are also included in the MCR.

383. As to whether Samoa should become party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Commission notes that signing up to international conventions are decisions made by the Executive and are outside the ambit of this current review.[466] However should Samoa ratify this Convention in future, obligations under the Convention will need to be reflected in its civil procedure rules.

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[464] See <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm12> and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [10].

[465] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).

[466] The Commission notes that Australia is currently party to the Convention and the Convention is reflected in their respective civil procedure rules. At this stage neither New Zealand nor Vanuatu are parties to the Convention.

Recommendations

76. Extend existing rule so that parties can serve all documents outside of Samoa with leave of the Court.

77. Specify that overseas service is effected in accordance with the rules of service in the jurisdiction where the documents originate, unless otherwise directed by the Court.

78. Include the same overseas provisions in the MCR as in the SCR.

INTERLOCUTORY APPLICATIONS/ MOTIONS

384. Interlocutory procedures occur between pleadings and the final hearing. They are considered incidental to the main proceeding and are dealt with separately. Interlocutory applications can be made to protect the position of a party, adduce evidence, expedite proceedings or provide incentives to settle the dispute before trial.[467]

A. SUMMARY JUDGMENT

385. The summary judgment procedure is a 'fast-track' procedure that enables a plaintiff to issue proceedings and obtain judgment considerably faster and for significantly less expense than if ordinary proceedings were issued.[468] It allows a matter to proceed from pleadings directly to hearing, and allows a plaintiff to obtain judgment from the court without going through a full trial.[469] Summary judgment is therefore beneficial for all parties and the Court and achieves the overriding purpose of civil procedure to expedite proceedings and reduce costs.[470] Where the issue raised is a clear-cut question of law which does not require further investigation of the facts, the court should normally decide the issue on an application for summary judgment.[471] When going through this procedure, the onus is on the plaintiff to establish that the defendant has no defence or, that there is no real issue to be tried.[472]

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[467] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 162.
[468] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 163 at [9.2.1.].
[469] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 163 at [9.2.1.].
[470] The High Court of Australia in *Aon Risk Services Limited v Australian National University* [2009] HCA 27 (5 August 2009) stated that 'the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost effective resolution of a dispute has an effect upon the court and upon other litigants.'
[471] Matthew Casey et al. *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd., 2nd ed, 2013).
[472] *High Court Rules 2016* (New Zealand) r 12.2; *District Court Rules 2014* (New Zealand) r 12.2.

386. A simple example of a proceeding suitable for this procedure is summary judgment proceedings commenced for a dishonoured cheque. In that situation, it is likely on the face of it that there can be no arguable defence.

Samoa

387. The new *District Courts Act 2016* (Samoa) provides for summary judgment. The DCA allows summary judgment in favour of a plaintiff if the defendant either does not file a defence, or there is no defence disclosed by the defendant and the court is satisfied that the amount is due to the plaintiff from the defendant.[473] The DCA states that the procedure for making an application is in accordance with the Rules of Court.[474] However, neither the MCR nor SCR contain any rules relating to summary judgment.

388. While there is provision for a plaintiff to apply for summary judgment under the DCA, there is no provision allowing a defendant to make the same application. It seems that a defendant would need to rely on the 'strike out' provisions in the SCR if they wanted proceedings struck out on the basis that the plaintiff's claim disclosed no cause of action. However, current precedent indicates that this power is sparingly exercised to strike out entire proceedings.[475] 'Strike out' is discussed further at Trial: Part C below.

Comparable Jurisdictions

New Zealand

389. In New Zealand, summary judgment was originally restricted to certain types of claims. Now however, the only situations in which summary judgment is not available are applications for administration in common form, appeals, originating applications and applications for writs of habeas corpus,[476] otherwise any plaintiff may apply for summary judgment.

390. The summary judgment procedure however is not suitable if there are disputed issues of fact or there is an arguable defence to the claim.

391. Summary judgment proceedings are commenced by an interlocutory application and include affidavit evidence. A plaintiff seeking summary judgment must file and serve a:[477]

- Statement of claim;

[473] *District Court Act 2016* (Samoa) s 29.
[474] *District Court Act 2016* (Samoa) s 29(1).
[475] *Enosa v Samoa Observer* [2005] WSSC 54.
[476] *High Court Rules 2016* (New Zealand) r 12.1. Summary judgment under the *District Court Rules 2014* (New Zealand) r 12.1 applies to all proceedings except proceedings under Part 17 and 18 (appeals).
[477] *High Court Rules 2016* (New Zealand) r 12.4; *District Court Rules 2014* (New Zealand) r 12.4.

- Notice of proceeding specific to summary judgment:
- Notice of interlocutory application for summary judgment specifying the terms of judgment sought; and
- Affidavit(s).

392. The affidavit forms the crux of the summary judgment procedure and therefore the plaintiff (or witness) must verify the allegations in the statement of claim and state on oath that the defendant has no defence, as well as the grounds for that belief.[478] A defendant who wishes to oppose the application must file and serve a notice of opposition and an affidavit setting out the basis of opposition.[479]

393. The matter will receive a hearing date and will often be disposed of at that first hearing based on the affidavit evidence.

394. If the plaintiff satisfies the court that there is no defence, the court may grant a final judgment against the defendant.[480] If there are major disputes in fact, the matter will not be suitable for summary judgment and will be set down for hearing.

395. A defendant can also apply for summary judgment against a plaintiff on grounds that no real claim has been made out. In reality this is much less common; however, it does act as a 'check' against frivolous applications.

Australia (Victoria)

396. As with New Zealand, in Victoria, both the plaintiff and the defendant have the opportunity to apply to the Court for summary judgment on the basis that the defendant has no defence or, alternatively, the plaintiff's claim is unsustainable.[481]

397. An application for summary judgment by a plaintiff is made by filing a summons and affidavit in support.[482] The affidavit must verify the facts on which the claim is made and state the deponent's belief that the defence (or part of it) has no real prospect of success.[483] An application brought by a defendant for summary judgment is also by summons, but the defendant can choose whether to file an affidavit in support.[484] The

[478] *High Court Rules 2016* (New Zealand) r 12.4(5); *District Court Rules 20*14 (New Zealand) r 12.4.
[479] *High Court Rules 2016* (New Zealand) r 12.9; *District Court Rules 2014* (New Zealand) r 12.9.
[480] *High Court Rules 2016* (New Zealand) r 12.12; *District Court Rules 2014* (New Zealand) r 12.12.
[481] *Civil Procedure Act 2010* (Vic) ss 61, 62; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 22.
[482] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 22.04.
[483] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 22.04.
[484] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 22.17-22.18.

plaintiff and defendant must serve the summons and any affidavits in respect of their applications no less than 14 days before the hearing date.[485]

398. On hearing an application for summary judgment, the Court can dismiss the application, give summary judgment or dispose of the proceeding finally in a summary manner, with consent of all parties.[486]

399. The rules relating to summary judgment applications also apply to third parties joined to proceedings. This means they can apply for summary judgment on the basis the claim against them has no prospect of success or applications can be brought against them on the basis their defence has no real prospect of success.[487]

Vanuatu

400. A claimant may apply for summary judgement if he or she believes that the defendant does not have any real defence against the claim.[488] The CPR (Vanuatu) requires an application for this judgment to be accompanied by a sworn statement which reaffirms that the facts in the claim are true and that the claimant believes, and has grounds to believe, that the defendant does not have a real defence.[489] If the defendant wishes to challenge the claim, they must file a sworn statement containing the reasons why he has an arguable defence and serve the statement to the claimant seven days before the hearing date.[490] The court will give judgment in favour of the claimant if it is satisfied that the defendant hasn't any real prospect of defending the claim and that there is no need for a trial.[491]

Submissions

401. In Issue Paper 1, the Commission sought submissions on the following:

- *Should the procedures for any or all interlocutory motions be provided for in the MCR?*
- *Should a summary judgment procedure be added to the SCR and or the MCR for use by a plaintiff where the defendant has revealed no defence?*
- *Should the strike-out procedure in r 70 of the SCR be added to the MCR for use by a defendant where the plaintiff has raised no cause of action?*

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[485] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 22.04(4) and 22.18(4).
[486] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 22.08 and 22.22.
[487] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 22.24.
[488] *Civil Procedure Rules 2002* (Vanuatu) r 9.6(1).
[489] *Civil Procedure Rules 2002* (Vanuatu) r 9.6(3).
[490] *Civil Procedure Rules 2002* (Vanuatu) r 9.6 (5).
[491] *Civil Procedure Rules 2002* (Vanuatu) r 9.6(7).

402. Additionally, in Issue Paper 2, the Commission sought submissions for the following issues raised:

- *Would it be appropriate for rules on summary judgment to be adopted by the Courts in Samoa (similar to comparable jurisdictions) ?*

- *Should all matters discussed above be amended to proceed by way of summary judgment irrespective of the type of relief sought i.e. monetary or land/chattels?*

403. Preliminary discussions with the Chief Justice at the time of consulting on Issues Paper One were favourable regarding the incorporation of a summary judgment procedure into the MCR and SCR.

404. Consultations have been completed with the Registrars, who agreed that summary judgment is an appropriate procedure to be incorporated in the civil procedure rules.

405. It was submitted that the summary judgment procedure used in New Zealand has been significantly successful. The current procedure has been expressed to have saved many hours of court and parties' time and has been highly recommended for Samoa to consider.[492] It was further expressed that making summary judgment available in Samoa's rules will be likely to assist with the swift disposal of unmeritorious claims while still preserving the judge's discretion to proceed with a formal hearing where summary judgment is deemed inappropriate.[493]

406. In relation to the strike out procedure available to defendants under rule 70, the Chief Justice in July 2012 expressed the view that strike out proceedings are sufficient in saving the Court time from unmeritorious claims.

407. No further submissions were received on the remaining issues raised above.

Commission's View

408. The *District Court Act 2016 (Samoa)* now permits plaintiffs to apply for summary judgment. It also provides that the procedure should be in accordance with the Rules of Court but no rules are contained in the SCR or MCR to date.

409. The Commission therefore considers that procedures for summary judgment should be included in the SCR and MCR, as foreshadowed in the DCA.

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[492] Andrew Beck, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 April 2015, 2.
[493] McCaw Lewis Lawyers, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, August 2015 , 2.

410. The Commission considers it appropriate to set out how a plaintiff applies for summary judgment, for example what documents must be filed and served and what those documents must set out. The rules should also set out what decisions are available to the Court when hearing an application, for example dismiss the application, give summary judgment or dispose of the proceeding finally and summarily with consent of the parties. Given the success of the New Zealand procedure on summary judgment, the Commission considers that the New Zealand provisions would be appropriate and beneficial for Samoa.

411. At present, the summary judgment procedure in Samoa is only available to plaintiffs. All other jurisdictions discussed extend the availability of summary judgment to a defendant on the basis that the plaintiff's claim is unsustainable. Summary judgment provisions are meant to enhance efficiency and reduce costs in litigation, thereby achieving the overriding purpose of civil procedure. Additionally, each party is subject to the burdens of additional costs and delay that are caused by unmeritorious claims continuing. There is little basis therefore, for distinguishing between plaintiffs and defendants in terms of accessing summary judgment. Additionally, it is in the interests of access to justice for all parties, and the courts as a publicly funded resource, that claims with little prospect of success do not continue.

412. The Commission therefore considers that the rules should be amended to allow defendants access to summary judgment. This amendment can easily be inserted into the SCR. To make the same amendment in the MCR however, the DCA will first need to be amended to allow defendant's to apply for summary judgment as the DCA currently only allows a plaintiff to apply for summary judgment. Once the DCA has been amended, the MCR can be amended accordingly.

413. Until the rules are amended, a defendant can only rely on the strike out provisions in the SCR. This has saved parties and the court from unmeritorious claims in the past and can suffice as an interim measure. Notwithstanding this, the Commission considers it important in achieving the overall purpose of civil procedure that the rules give defendants access to summary judgment.

414. The Commission also suggests that consideration be given to list in the rules situations in which summary judgment is not available (for example in New Zealand summary judgment is not available in applications for appeals, originating applications and applications for writs of habeas corpus), or alternatively that summary judgment be restricted to certain types of claims.

Recommendations

79. That the MCR and SCR contain provisions setting out the procedure for applying for summary judgment. The rules should address the following:

    i. Application for summary judgment is made by summons and an affidavit in support.

    ii. The affidavit in support must set out the grounds on which the claim is made, and state the plaintiff's belief (and grounds for that belief) that the defence has no real prospect of success.

    iii. Timelines for filing these documents should be specified

    iv. The orders available to the Court when hearing an application for summary judgment, specifically:

        a. To dismiss the application

        b. To order summary judgment

        c. To dispose of the proceeding finally in a summary manner with consent of all parties.

80. A rule should be inserted into the SCR allowing plaintiffs and defendants to apply for summary judgment on the basis that the defendant has no defence/no real prospect of success or, alternatively, the plaintiff's claim is unsustainable.

81. Section 29 of the *Districts Court Act 2016* (Samoa) should be amended to permit defendants to apply for summary judgment at the District Court level. The MCR should then be updated accordingly to allow defendants access to summary judgment.

82. List in the rules situations in which summary judgment is not available, or alternatively list certain types of claims summary judgment should be restricted to.

B. INTERPLEADER

415. If a person with no interest in the subject-matter is faced with competing claims (2 or more) to the same property or debt, interpleader proceedings enable a person to apply to the court for relief in these circumstances.[494] Those claiming interest in the property can then present their claims and have them determined against each

[494] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 99 at [4.12.1].

other.[495] This procedure has been used in situations where there was doubt about whether an amount had to be paid to a head contractor or subcontractor, or where prize money was claimed by both an individual and team members.[496]

Samoa

416. Interpleader was previously provided for under the *District Court Act 1969* (Samoa) (now repealed). That provision is not expressly contained in the new DCA, which instead provides that regulations or rules relating to interpleader proceedings can be made.[497]

417. The SCR currently contains numerous rules on interpleader, but the MCR does not. The SCR states that the basis for an application for relief by interpleader is that a person is 'under liability for any debt or other cause of action, money, or chattels for or in respect of which he is or expects to be sued by two or more persons making adverse claims thereto'.[498]

418. The rules specify that the application is made by motion to the Court and an affidavit. The rules set out what must be contained in the affidavit, for example, that the applicant does not collude with any claimants and the applicant claims no interest in the subject matter in dispute, other than charges or costs.[499] The application procedure is the same whether the applicant is already being sued or not.[500]

419. The SCR set out various timelines for filing summons and affidavits when applying for interpleader. An interpleader summons must be served no less than 10 days before the hearing of the interpleader.[501] If the applicant for an interpleader is a defendant, then the affidavit must be filed within five days of being served with the summons.[502]

420. The rules also set out the orders available to the Court depending on which parties appear at the hearing.[503]

421. While the current provisions are comprehensive, they are somewhat confusing and could be made clearer. Furthermore, the process could be better defined so that practitioners may understand and use it to its full effect.

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[495] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 99 at [4.12.1].
[496] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 113.
[497] *District Court Act 2016* (Samoa) r 44.
[498] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 158.
[499] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 159.
[500] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 159(1).
[501] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 162.
[502] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 159(3).
[503] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 165.

Comparable Jurisdictions

New Zealand

422. The basic grounds for obtaining relief by interpleader in the New Zealand High Court is largely similar to Samoa, however the applicable procedure is different in terms of the level of detail, structure and writing style. For example, in New Zealand, the rules include definitions of key terms used in interpleader proceedings and the provisions are also set out logically and by headings, namely:[504]

- Interpretation;
- Right to interplead;
- Form of application;
- Affidavit in support;
- Time for applying;
- Claimants to file affidavits;
- Powers of court; and
- Costs of applicant.

423. The Rules in New Zealand also differ if there is already a proceeding on foot. In that situation, an interpleader proceeding can be brought as an interlocutory application. If there is no action on foot, i.e. the applicant has not yet been sued, then the interpleader proceedings are commenced as a separate action by filing a statement of claim.[505] In either case, an affidavit stating the facts relied upon should be filed.

424. The Court has wide powers when deciding an interpleader. For example, the Court may decide between competing claims or require one claimant to proceed and prevent another claimant from proceeding.[506]

425. An applicant is also entitled to costs unless the court orders otherwise. The costs can be split between claimants or charged on the property in dispute. Any costs orders should not be made until the interpleader is determined.[507]

Australia (Victoria)

426. In Victoria, the *Supreme Court (General Civil Procedure) Rules* 2015 have a part allocated to interpleader. Under these rules, there are two types of interpleader being a stakeholder's interpleader (which is similar to that used in Samoa and New Zealand)

[504] *High Court Rules 2016* (New Zealand) rr 4.57–4.64; *District Court Rules 2014* (New Zealand) r 4.57.
[505] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 114.
[506] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 115.
[507] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 115.

and a sheriff's interpleader.[508] The Stakeholder's interpleader arises in similar circumstances, namely where a person is under a liability in respect of a debt or other personal property and where that person is sued or expects to be sued for that debt or property by two or more people with adverse claims to it.[509]

427. Similar to New Zealand, if a stakeholder is already being sued in a proceeding then an application for interpleader should be by summons, served on each claimant. If a proceeding is not on foot, then the interpleader application should be as an originating motion with all claimants joined as defendants.[510]

428. The Court has broad powers when hearing an interpleader application, which include making such orders or judgments as it thinks fit.[511]

Vanuatu

429. The CPR (Vanuatu) contains claims for interpleader. A person who files a claim for interpleader may do so if the person owes a debt or has possession of goods or money on behalf of another. Furthermore, the person who files a claim for interpleader must expect to be sued for the debt or the goods that he or she has.[512]

430. The rules outline that the claim for an interpleader must:

- Name the defendants; or
- Describe the goods and specify why the claimant owes or possesses the goods; and
- State that the claimant has no vested interest in the goods except for charges and costs incurred; and
- State where, how and the charges for keeping the goods; and
- State that the parties are not involved in any collusion; and
- Support the claim with an sworn statement; and
- Ask the court to decide who should receive the debt or goods given.[513]

431. Both the claim and sworn statement must be served on all the defendants personally unless the court allows otherwise.[514]

Submissions

432. In Issue Paper 2, the Commission sought submissions on the following:

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[508] If a sheriff takes or intends to take personal property under a warrant, then a person can make a claim in respect of the property or its proceeds or value by giving notice in writing of that claim to the sheriff.

[509] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 12.02.

[510] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 12.02(2)-(3).

[511] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 12.08.

[512] *Civil Procedure Rules 2002* (Vanuatu) r 16.23(1).

[513] *Civil Procedure Rules 2002* (Vanuatu) r 16.23 (2).

[514] *Civil Procedure Rules 2002* (Vanuatu) r 5.2.

- *Are Samoa's procedures for obtaining relief by interpleader a) during the trial of a civil action; b) after judgment; and c) otherwise, accurately and clearly described in the SCR? If not, how should the rules be modified?*

- *Should procedures for interpleader relief similar to those in the SCR be included in the MCR?*

433. It was submitted by a senior practitioner in Samoa that in her many years of practice this procedure has not been utilised.[515] It was also submitted that more understanding as to this procedure needs to be provided.[516] These submissions highlight that the interpleader procedure is not commonly understood by the legal profession in Samoa.

Commission's View

434. The Commission considers that the rules relating to interpleader should be updated to provide greater clarity and increase usability, where appropriate New Zealand's provisions are set out logically, reflecting the order of proceedings and include key information for the court and its users about when and how an interpleader application can be made, as well as what the court can order on such an application. The Commission therefore considers that amending Samoa's interpleader provisions in a similar form to New Zealand's would benefit the interpleader procedure in Samoa.

435. The Commission considers that for consistency across jurisdictions, the interpleader provisions should also be included in the MCR. The Commission notes that this is permitted under section 44(c) of the DCA.

[515] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 4.

[516] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 6.

Recommendations:

83. Interpleader provisions in the SCR should be clearer and modified. The Commission considers that the New Zealand interpleader provisions provide a useful starting point to amend the interpleader provisions in the SCR.

84. Interpleader provisions should be included in the MCR in the same terms as the SCR. The rules can be made pursuant to section 44(c) of the DCA.

PREPARATION FOR TRIAL

A. Discovery

General Application

436. Discovery is designed to allow a party to see what documents the other party has in relation to the proceeding.[517] The main purpose of discovery is to avoid any surprises at trial and encourage parties to settle if they realise that the other side has overwhelming evidence against them.[518] Discovery can be time consuming and costly, so rules relating to discovery are important to mitigate these issues.

437. At present, the MCR do not contain any rules on discovery. On the other hand the SCR provides for discovery without an application to the Court in any action where a statement of defence or counterclaim has been filed.[519] On receipt of a request for discovery, the receiving party must prepare an affidavit setting out the documents in their possession, [520] which must be filed in Court with a copy served on the party issuing the order within 10 days after the service of the order, or such further time as the Court may order upon application.[521] Where the Government is a third party, a discovery order against the Government can only be issued with leave by the Court.[522]

438. There are additional rules that relate to inspecting those documents, and which enable a party to request a copy of any document listed in the affidavit.[523]

[517] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 191 [10.4].
[518] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 191 at [10.4.1].
[519] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 86(1). Under r 86(2), t here is a prescribed form in the rules to request discovery.
[520] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 86(3).
[521] *Supreme Court (Civil Procedure)Rules 1980* (Samoa) r 86(3).
[522] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 94.
[523] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 87.

439. The SCR also contain rules on non-compliance with discovery. If a plaintiff fails to comply, the Court may dismiss the proceedings or order the proceedings stayed until the order is complied with. If a defendant fails to comply, the Court may order that the defendant 'be debarred from defending' the action altogether, or defend the action to a limited extent.[524]

Comparable Jurisdictions

New Zealand

440. The rules governing discovery in New Zealand were significantly changed in 2011. The new rules are designed to reduce disproportionate costs and delays caused by discovery and reduce the tactical use of disclosure.[525] The new rules provide for 'standard discovery' and 'tailored discovery'.[526]

441. Standard discovery requires disclosure only of documents on which a party relies and documents that support or are adverse to any parties' case.[527] Tailored discovery involves the parties prescribing their own categories of discoverable documents to meet the needs of the particular case.[528] Tailored discovery can be wider or narrower than standard discovery, and reflects the intention to create rules with more flexibility that are better able to respond proportionately to the requirements of any given case. The rules set out the types of cases where it is presumed that tailored discovery be used, including matters where costs of standard discovery would be disproportionately high, those on the commercial list and those involving one or more allegations of fraud or dishonesty.[529]

442. Parties must discuss and try to agree on the appropriate discovery order and how inspection will occur, no less than 10 days before the first case management conference.[530] In doing so, the parties must go through a prescribed discovery checklist, which requires them to consider issues like proportionality, extent of search, tailored discovery, exchange of documents and how they will be presented at trial.[531] At the case management conference the Judge can make orders dispensing with discovery or order standard or tailored discovery.[532]

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[524] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 93.
[525] *High Court Amendment Rules* (No 2) 2011(New Zealand). Discovery can be used tactically to stall proceedings or increase costs significantly for the other party by providing excessive lists of documents or by continually providing further documents for discovery.
[526] *High Court Rules 2016* (New Zealand) r 8.6; *District Court Rules 2014* (New Zealand) r 8.6.
[527] *High Court Rules 2016* (New Zealand) r 8.7; *District Court Rules 2014* (New Zealand) r 8.7.
[528] *High Court Rules 2016* (New Zealand) r 8.8; *District Court Rules 2014* (New Zealand) r 8.8.
[529] See *High Court Rules 2016* (New Zealand), r 8.9 for a full list of proceedings.
[530] *High Court Rules 2016* (New Zealand) r 8.11.
[531] *Judicature Act 1908* (New Zealand) sch 9 (High Court Rules) Part 1.
[532] *High Court Rules 2016* (New Zealand) r 8.12.

443. To comply with discovery, each party must file and serve an affidavit of documents. The matters that must be included in the affidavit are also prescribed in the rules, as is the requisite form.[533] This includes stating any documents possessed by the party over which privilege is claimed.[534]

444. The rules expressly provide that parties have a continuing obligation to give discovery and offer inspection at all stages of a proceeding.[535] For example, in the course of complying with an order for tailored discovery a party who becomes aware of a document that is not required to be discovered under the order, but that adversely affects that party's own case or supports another party's case can discover such document.[536]

445. Furthermore, the party giving discovery is required to file and serve an amended list where an error is subsequently found in the list of documents, or the list becomes inaccurate from a change in circumstances.[537] If a party fails to include a document in the affidavit of documents, then they may only use the document in evidence with the consent of all parties or leave of the court.[538]

446. As soon as the affidavit of documents is filed and served, that party must make the documents available for inspection.[539] Unless the court otherwise orders, inspection is through electronic exchange of the documents.[540]

447. A party is not required to make privileged documents available for inspection.[541] If a document contains both privileged and non-privileged information, a party may redact the privileged information by rendering the privileged information in the document unreadable.[542]

448. For documents containing confidential information[543], a party may limit inspection to the persons specified in the affidavit of documents, subject to restrictions proposed in the affidavit.[544]

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[533] *High Court Rules 2016* (New Zealand) r 8.15.
[534] *High Court Rules 2016* (New Zealand) r 8.16.
[535] *High Court Rules 2016* (New Zealand) r 8.18; *District Court Rules 2014* (New Zealand) r 8.18.
[536] *High Court Rules 2016* (New Zealand) r 8.18(2).
[537] *High Court Rules 2016* (New Zealand) r 8.23.
[538] *High Court Rules 2016* (New Zealand) r 8.31.
[539] *High Court Rules 2016* (New Zealand) r 8.27.
[540] *Judicature Act 1908* (New Zealand) sch 9 (High Court Rules) Part 2.
[541] *High Court Rules 2016* (New Zealand) r 8.28(1).
[542] *High Court Rules 2016* (New Zealand) r 8.28(2).
[543] Information that is considered to be private or classified and that is not available to the public. For example, payroll time sheets or financial data on public sponsored projects among others. Elizabeth A Martin, *Oxford Dictionary of L*aw (Oxford University Press, 7th ed, 2009).
[544] *High Court Rules 2016* (New Zealand) r 8.28(3).

449. With regards to use of documents containing privileged or confidential information, the Judge's order may be made on any terms the Judge thinks just, including that the applicant pay the reasonable expenses of the other party[545] A party who obtains a document by way of inspection or who makes a copy of a document under this rule may use that document or copy only for the purposes of the proceeding[546]; and must not make it available to any other person (unless it has been read out in open court).[547]

Australia (Victoria)

450. The rules on discovery in Victoria are similarly comprehensive. Order 29 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) state that the discovery rules apply to all proceedings commenced by writ.[548] As is the case in New Zealand, discovery extends to documents that support or are adverse to either party's case.[549] When making discovery, parties are also required to consider the nature and complexity of the proceeding, the number of documents involved, the ease and cost of retrieving documents, the significance of any document to be found and any other relevant matter.[550]

451. In Victoria, the discovery process occurs after pleadings have closed. Parties may serve a notice of discovery on another party (seeking discovery of documents) before or after pleadings close, but a party does not need to make discovery until the pleadings have closed.[551] If served with a notice of discovery, then a party must respond by filing and serving an affidavit of documents either 42 days after service of the notice or, if the notice was served before pleadings closed, then 42 days from the day after pleadings closed.[552]

452. The rules also set out what a party must include in their affidavit of documents and there is a prescribed form that must be complied with.[553] After being served with a notice for discovery, a party then has 7 days to allow the other party to inspect and copy the documents.[554]

453. The Court is also given broad powers to order discovery before pleadings are closed, or in proceedings that are not commenced by writ.[555] Additionally, if a party fails to

[545] *High Court Rules 2016* (New Zealand) r 8.30(3)(a).
[546] *High Court Rules 2016* (New Zealand) r 8.30(4)(a).
[547] *High Court Rules 2016* (New Zealand) r 8.30(4)(b).
[548] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.01.
[549] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.01.1(3).
[550] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.01.1(5).
[551] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.02.
[552] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.03.
[553] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.04.
[554] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.09.
[555] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.07.

comply with discovery then the Court may order the party to do any act as the case requires.[556]

454. As is the case in New Zealand, parties in Victoria are under a continuing obligation to make discovery throughout proceedings, even after the affidavit of discovery has been served with respect to documents of which the party obtains possession.[557]

Vanuatu

455. In Vanuatu, the discovery process is called 'Disclosure of Documents'. The rules that apply to Supreme Court proceedings are quite comprehensive. A party must disclose a document if they are relying on the document, including if it adversely affects or supports another party's case.[558] A party discloses documents by filing and serving a sworn statement in a prescribed form, listing the documents.[559] A party claiming privilege or public interest immunity over certain documents can stipulate this in the statement.

456. The Vanuatu rules also contain a provision in case of mistaken disclosure of privileged documents. If that occurs, a party must not use it if a lawyer would realise that the document is privileged and was disclosed by mistake.[560]

457. Parties can inspect and ask for copies of documents. They can do so by giving the other party 'reasonable notice', so no specific timelines are specified, and they bear the costs of copying the document.[561]

458. Vanuatu also imposes a continuing obligation on parties to disclose documents.[562]Such obligation requires a party to give disclosure of documents that may have come into the party's control after disclosure had originally been provided and also of documents that were already in the party's control but were not disclosed through inadvertence or otherwise. These documents must be disclosed within 7 days of the disclosing party becoming aware of such documents, and in any case before the trial starts; or if the trial has started, as soon as practicable after becoming aware of the documents.[563]

459. Failure to disclose documents means that a party cannot rely on that document unless the court allows it. If a party fails to disclose a document, another party can also

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[556]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.11.
[557]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 29.15.
[558] *Civil Procedure Rules 2002* (Vanuatu) r 8.2.
[559] *Civil Procedure Rules 2002* (Vanuatu) r 8.5.
[560] *Civil Procedure Rules 2002* (Vanuatu) r 8.6.
[561] *Civil Procedure Rules 2002* (Vanuatu) r 8.7.
[562] *Civil Procedure Rules 2002* (Vanuatu) r 8.8.
[563] *Civil Procedure Rules 2002* (Vanuatu) r 8.8(3).

apply to the court for an order that the person disclose it, and if the party still fails to disclose the document within 7 days then the court can strike out their claim or defence.[564]

460. There are additional rules governing how discovered documents may be used.[565] Like NZ, a document disclosed to a party may only be used for the purposes of the proceedings unless it has been read to or by the court[566] or referred to in open court.[567] Despite this, a party who has control of a document may apply to restrict and prohibit use of the document by the other party.[568] The court may restrict and prohibit the use of the document if satisfied that the benefits of doing so outweigh the benefits of allowing the document to be used.[569]

461. Disclosure of documents is also applicable in the Magistrates' Court but the rules are much simpler. There, parties must disclose documents they intend to rely on at trial. A party makes the disclosure by giving a copy of the document to the other party at least 14 days before trial. A party can apply for an order that another party disclose particular documents and the magistrate may order disclosure of the documents if relevant to the issues, necessary to decide the matter fairly or for any other reason.[570]

Submissions

462. In Issue Paper 1, the Commission sought submissions on the following:

- *Should Form 17 (Order for Discovery of Documents) in the SCR be amended to allow a party ordered to make discovery 10 days, rather than 7 days, to file and serve an affidavit of documents?*

463. Discovery was also raised in Issue Paper 2 where the Commission sought submissions on the following:

- *Should the SCR and MCR provide for ongoing discovery obligations of both parties, similar to the HCR (NZ)?*

464. It was submitted by members of the judiciary that this should be amended to extend days for discovery to 10 days.[571]

[564] *Civil Procedure Rules 2002* (Vanuatu) r 8.15.
[565] *Civil Procedure Rules 2002* (Vanuatu) r 8.16.
[566] *Civil Procedure Rules 2002* (Vanuatu) r 8.16(1)(a).
[567] *Civil Procedure Rules 2002* (Vanuatu) r 8.16(1)(b).
[568] *Civil Procedure Rules 2002* (Vanuatu) r 8.16(2)(a)(b).
[569] *Civil Procedure Rules 2002* (Vanuatu) r 8.16(3).
[570] *Civil Procedure Rules 2002* (Vanuatu) rr 8.26-8.28.
[571] Conference with Judges on Civil Procedure Rules (Chief Justice Chambers, Ministry of Justice and Courts Administration, 13 July 2012).

465. However, one law firm recommended that this should be further extended to 15 days. The reason for this is to allow sufficient time for the parties to locate the documents.[572]

466. It was also raised that procedures for ongoing discovery may be useful for ensuring proceedings are conducted properly.[573] It was raised that rules relating to ongoing discovery should be formulated to advise practitioners of their obligations.[574]

Commission's View

467. Although the SCR contains provisions relating to discovery, the Commission considers that more specific and comprehensive rules governing the process of discovery should be included. This will help reduce the costs and delays caused by discovery and minimise the tactical use of discovery by lawyers. The provisions of the NZ HCR, NSW UCPR and Vanuatu CPR provide useful guidance.

468. The Commission considers that the discovery rules should also be provided in the MCR in some form. For example, detailed discovery rules from the SCR could be replicated in the MCR, as is done in New Zealand. Alternatively, a simplified set of rules could be included in the MCR, as is done in Victoria and Vanuatu, which at least covers the following matters:

- definition of discovery;
- notice of discovery;
- discovery requiring the Court's leave;
- time for notice;
- affidavit of documents;
- time for making discovery;
- continuing obligation to make discovery; and
- failure to make discovery.

Tailored and standard discovery

469. With respect to discovery orders made in a case management conference, the NZ approach allows a Judge to make either an order dispensing with discovery, an order for standard discovery, or an order for tailored discovery. The Commission is of the view that these different types of discovery orders should also be covered in both the SCR and MCR. This will assist with greater efficiency of Samoa's rules. '

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[572] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2,* 25 November 2015, 3.
[573] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 3.
[574] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015,3.

470. The Commission further considers that tailored discovery (which allows parties to set out categories by which documents are to be identified) is appropriate for Samoa in instances when the costs of standard discovery would be disproportionately high in comparison with the matters at issue in the proceeding, or if the parties agree to use it. Its inclusion in both the SCR and MCR, will allow for greater flexibility and better respond proportionately to the requirements of any given case. It will give parties the opportunity to prescribe their own categories of discoverable documents to better meet the needs of their particular case.

Continuing obligations for discovery and inspection

471. Like in NZ, Australia and Vanuatu, the Commission considers that an ongoing and continuing obligation to discover and inspect documents at all stages of proceedings expressly should be provided for in the SCR and the MCR. This ensures that all relevant material being relied on by the parties is provided to the court and each party ahead of trial. Accordingly, a party who becomes aware of a document not contained in the order but adversely affects that party's own case or supports another party's case, or was already in the party's control but was not disclosed through inadvertence, must disclose that document. With regards to timeframes for disclosing documents, Vanuatu provides some helpful guidance here.

472. In relation to inspection of documents, the Commission considers it appropriate to allow for inspection via electronic exchange of documents unless the Court orders otherwise. This responds to growing use of email communication and reduces costs of litigation by reducing printing costs of potentially voluminous and unnecessary material.

473. Furthermore, in situations where there is an error or the list of documents becomes inaccurate, the Commissions suggests that the SCR and MCR include a provision that requires a party giving discovery to file an amended list. Also, if a party fails to provide a document, that party should only use such document in evidence with the consent of the other party or leave of the Court.

474. The Commission also suggests that with regard to applications for discovery, parties must consider certain matters to ensure just, speedy, and inexpensive determination of any proceeding. The rules in Victoria list important matters of consideration that could be used as guidance. These include the nature and complexity of the proceedings, the number of documents involved, the cost of retrieving documents, the significance of the document and any other relevant matter. A requirement to consider these matters can be inserted into the SCR and MCR.

Privileged and confidential documents

475. Although the SCR contains provisions with regard to privilege, the Commissions suggests that more comprehensive rules as to privileged and confidential documents be set out in the SCR and MCR. Similar to NZ, privileged documents should remain unavailable for inspection. However, for documents containing partly privileged information, parties should redact the privileged part of the document before production. If a party is claiming privilege, then the Commission considers that a provision like that used in Vanuatu, which requires parties to state this in their affidavit, should be included. This ensures that the parties and court are aware of all material that is in the possession of each party. Moreover, a party who receives privileged documents that are mistakenly disclosed must not use these documents if a lawyer would realise that the document is privileged and was disclosed by mistake.

476. For confidential documents, for example information held by a lawyer about a former client or health records of a prisoner while in custody, rules should be included to allow parties to propose in their affidavit restrictions as to who can inspect the documents and how they are used.

Use of documents

477. The SCR allows for parties receiving documents to make copies after permission is granted by the other party. The NZ HCR stipulates that the copies must only be used for the purposes of the proceedings and must not be made available to any other person. The Commission considers that this should also be the case for Samoa in order to achieve fairness and avoid unnecessary use and disclosure. Similarly to Vanuatu, the Commission suggests that the cost burden to print or produce copies of document should be on the person seeking the documents, which will reduce the tactical use of disclosure.

Timeframes

478. Issues Paper 1 raised the question about whether timelines for filing and serving an affidavit of documents in discovery should be extended. This is due to discrepancies in the timelines across the different jurisdictions. For example, Samoa allows 7 days, New Zealand 20 days and Victoria, Australia allows 42 days to file and serve an affidavit of documents.

479. It is also important to note that the same discrepancy applies to the inspection of documents (which takes places after service of the affidavit of documents). For instance, Samoa allows for inspection between 2 days, and New Zealand allows 10 days, while Victoria Australia and Vanuatu both allow for 7 days. However, in Vanuatu's Magistrate Court, the other party is allowed at least 14 days for inspection.

480. The submissions received by the Commission however, related to timelines for inspection of documents rather than for filing and serving an affidavit of documents. Regardless, the Commission is of the view that the timelines for filling and serving the affidavit of documents, as well as inspection should be extended. This is to give adequate time for parties to prepare and put together documents to be produced for inspection and also to recognise that parties could benefit from more time to prepare for discovery, without extending so much that it causes significant delay to proceedings.

Recommendations:

85. More specific and comprehensive rules governing the process of discovery should be included in the SCR. These should include the following:

    i. Provide for two types of discovery, namely standard and where appropriate tailored discovery. Definitions of both should be included. The New Zealand HCR can be used as a guide. This includes, prescribed forms, discovery checklist, matters for parties to consider when preparing for discovery, how documents will be exchanged, how they will be presented at trial and how to claim privilege.

    ii. A continuing obligation on parties to discover and inspect documents at all stages of a proceeding (for example, where a party becomes aware of a document not contained in the order but adversely affects that party's own case or supports another party's case, or was already in the party's control but was not disclosed through inadvertence).

    iii. Requirement that the party giving discovery must amend the list of documents if it becomes inaccurate from a change of circumstances.

    iv. Judge may make an order at the case management conference dispensing discovery, or order standard discovery or order tailored discovery.

    v. A party who fails to include a document in the affidavit of documents may only use the document in evidence with the consent of all parties or leave of the court.

    vi. The inspection of documents should also include inspection through electronic exchange of documents, unless the court orders otherwise.

    vii. A party asking for discovery must consider certain factors before making an application. These include the nature and complexity of the proceeding, number of documents involved, ease and cost of retrieving documents, significance of any document to be found and any other relevant matter.

    viii. Parties need not produce privileged documents but must state in their affidavit of documents if they are claiming privilege. For documents that are privileged in part, parties can redact the privileged information before producing the document. A party must not use privileged documents that are mistakenly disclosed if a lawyer would realise that the document is privileged and was disclosed by mistake.

    ix. For confidential documents, parties can propose in their affidavit restrictions as

to who can inspect the documents and how they are used.

x. Copies of documents produced under discovery must only be used for the purposes of the proceedings and must not be made available to any other person.

xi. The cost of printing or producing the documents should generally be borne by the party seeking the documents, as a default position.

xii. Sufficient time should be given for discovery of documents:

a) filing and serving the affidavit of documents. The current timeframe of 7 days should be revisited and extended as appropriate (for example 20 days as is the position in New Zealand)..

b) inspecting documents to allow parties to locate the documents to be produced. The current timeframe of 2 days should be revisited and extended as appropriate (for example 7 days as is the position in Vanuatu and Victoria).

86. Insert discovery rules into the MCR. Consideration can be given to including detailed discovery rules that replicate the SCR, or including a simplified version which at least covers:

i. Definition of discovery;

ii. Notice of discovery;

iii. discovery requiring the Court's leave;

iv. time for notice;

v. affidavit of documents;

vi. time for making discovery;

vii. continuing obligation to make discovery; and

viii. failure to make discovery.

Pre-Commencement Discovery

481. There is no pre-commencement discovery procedure for Samoa.

Comparable Jurisdictions

New Zealand

482. The New Zealand rules provide for an order for particular discovery *before* a proceeding is commenced.[575] The rule applies if it appears to a judge that the intending plaintiff is or may be entitled to relief against another person but it is impossible or impracticable for them to formulate the claim without reference to certain documents. [576]The claimant must have grounds to believe that the documents may be or may have been in the control of the intended defendant.[577] In order for an intending plaintiff to rely on this rule, there must be a real probability of the existence of a claim against someone.[578] The rule is not to be used for 'fishing expeditions'.

483. A liberal and practical approach is to be taken by the court to ensure that justice is afforded to all parties. Pleadings must be properly drawn and as accurate and complete as possible in the first instance. The application is an interlocutory one.[579]

Australia (Victoria)

484. In Victoria, preliminary discovery is used to identify a potential defendant before commencing a proceeding.[580] A court may make an order that requires a person or corporation to attend before court or discover documents that help to identify a defendant.[581] A court may make this order if the applicant has made reasonable inquiries but is unable to identify a defendant and if it appears that a person could produce documents to help in identifying a defendant.[582]

485. Applications for preliminary discovery to identify a defendant are made by originating motion with an affidavit in support. The affidavit must set out the facts of the application and specify the documents sought.[583]

Vanuatu

486. Parties can apply for disclosure of documents before proceedings have started.[584] This is designed to enable a party to ascertain whether he has a case against another. This application must be accompanied by a sworn statement setting out the reasons

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[575]*High Court Rules 2016* (New Zealand) r 8.20; *District Court Rules 2014* (New Zealand) r 8.20.
[576] *High Court Rules 2016* (New Zealand) r 8.20(1)(a).
[577] *High Court Rules 2016* (New Zealand) r 8.20(1)(b).
[578] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 195 at [10.5.2].
[579]*High Court Rules 2016* (New Zealand) r 8.20(3); *District Court Rules 2014* (New Zealand) r 8.20(3).
[580] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 32.03.
[581] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 32.03(2).
[582]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 32.03.
[583]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 32.08.
[584] *Civil Procedure Rules 2002* (Vanuatu) r 8.13(1).

why documents should be disclosed.[585] The application should make it clear that a decision to commence proceedings depends on the documents being disclosed.[586] In deciding this application, the Court must consider the likely benefits and disadvantages of disclosure and whether the party required to disclose documents could financially do so.[587]

Submissions

487. In Issue Paper 2, the Commission sought submissions on the following:

- *Should both SCR and MCR allow for pre-issue discovery? If so, what should be the requirements for obtaining an order for pre-issue discovery?*

488. It was raised that there are both positive and negative aspects to pre-discovery. On the positive end, it may allow for a more efficient process as it provides the plaintiff clarity on the cause of action or whether one exists at all.[588]

489. Conversely, it was also suggested that pre-discovery gives rise to 'fishing expeditions' to gain access to certain documents.[589] This view was reiterated with a submission that pre-discovery rules should be appropriately formulated to safeguard against abuse.[590]

Commission's View

490. The Commission considers that discovery *before* a proceeding is commenced should be included in the rules similarly to other jurisdictions discussed. This could improve efficiency by clarifying with the applicant whether a cause of action exists at all.

491. To require the disclosure of documents by an intended defendant, the intended plaintiff must first apply for a court order.[591]An application for pre-commencement discovery should be made with an affidavit in support setting out the facts of the application and specifying the documents sought. The application should make it clear that a decision to commence proceedings depends on the documents being disclosed – such that claimant is or may be entitled to relief against another person but it is impossible or impracticable for them to formulate the claim without reference to certain documents. In order for a an intending plaintiff to rely on this rule, there must

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[585] *Civil Procedure Rules 2002* (Vanuatu) r 8.13(2).
[586] *Civil Procedure Rules 2002* (Vanuatu) r 8.13(2).
[587] *Civil Procedure Rules 2002* (Vanuatu) r 8.13(3).
[588] Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015,3.
[589]Office of the Attorney General, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 3.
[590] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 3.
[591]*Civil Procedure Rules 2002* (Vanuatu) r 8.14(1).

be a real probability of the existence of a claim against the intended defendant, and the intending plaintiff must have grounds to believe that the documents may be or may have been in the control of the intended defendant.

492. In deciding such an application, the Court must consider the likely benefits and disadvantages of disclosure and that the application should not be used for 'fishing expeditions'. Rules should be formulated to safeguard against such abuse, for example, providing that the search must be reasonable, depending on the circumstances.[592] Factors to be considered include the nature and complexity of the proceeding, the number of documents involved, the ease and cost of retrieving a document, the significance of any document likely to be found, and the need for discovery to be proportionate to the subject matter of the proceeding.[593] Provision could also be included to permit the Court to make costs orders to discourage parties from abusing the pre-commencement discovery process.

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[592] *High Court Rules 2016* (New Zealand) r 8.14(1).
[593] *High Court Rules 2016* (New Zealand) r 8.14.

Recommendations:

87. The rules should allow for discovery *before* a proceeding is commenced. An application for pre-commencement discovery can be made with an affidavit in support setting out the facts of the application and specifying the documents sought and making it clear that a decision to commence proceedings depends on the documents being disclosed.

88. In order for an intending plaintiff to rely on this rule, there must be a real probability of the existence of a claim against the intended defendant, and the intending plaintiff must have grounds to believe that the documents may be or may have been in the control of the intended defendant.

89. In deciding such an application, the Court must consider the likely benefits and disadvantages of disclosure and that it should not be used for 'fishing expeditions'. Rules should be formulated to safeguard against such abuse, for example, providing that the search must be reasonable, depending on the circumstances. Factors to be considered include the nature and complexity of the proceeding, the number of documents involved, the ease and cost of retrieving a document, the significance of any document likely to be found, and the need for discovery to be proportionate to the subject matter of the proceeding. Provision could also be included to permit the Court to make costs orders to discourage parties from abusing the pre-commencement discovery process.

Non-Party Discovery

493. The production of documents by non-parties is not provided in the SCR and MCR Samoa.

Comparable Jurisdictions

New Zealand

494. The High Court Rules provide that a non-party to a proceeding who may have been in the control of documents may be ordered by a judge to produce documents. Discoverable documents are those that the person would have had to disclose if the person were a party to the proceeding.[594]The judge may order the applicant seeking discovery to pay for all or part of the non party's expenses if it thinks just in retrieving documents. This includes solicitor and client costs. [595]

Australia

[594]*High Court Rules 2016* (New Zealand) r 8.21; District Court Rules 2014 (New Zealand) r 8.21.
[595]*High Court Rules 2016* (New Zealand) r 8.22 (3);District Court Rules 2014 (New Zealand) r 8.22 (3).

495. In Victoria, any party involved in a proceeding can apply to the court for discovery from a person who is not a party to the proceedings. A court can make a discovery order if it appears that the person has, is likely to have or has had in their possession a document relating to a question in the proceeding.[596] An application for discovery in these circumstances is made by summons with a supporting affidavit.[597]

Vanuatu

496. To require the disclosure of documents by a person who is not a party to the proceedings in Vanuatu, the party seeking disclosure must apply for a court order.[598] A sworn statement including the reasons why the documents should be disclosed must be attached to the application.[599] The CPR (Vanuatu) also provides for certain factors that the court must consider before making an order, which include the likely advantages and disadvantages of disclosure and whether or not the party disclosing the documents has sufficient financial resources to do so.[600]

497. Furthermore, the court must not order non-party disclosure unless satisfied that the person in possession and control of the documents has an opportunity to be heard, the documents are relevant to the proceedings and disclosure is necessary for reasons of both fairness and costs.[601]

Submissions

498. In Issue Paper 2, the Commission sought submissions on the following:

- *Should there be provision in the SCR or MCR for non-parties to be compelled to give evidence or to produce documents as distinct from parties alone?*

499. It was suggested by one of the private law firms that rules regarding non-party discovery should be expressly included in the rules to assist the court in having before it all the relevant evidence and material to inform its decision.[602]

Commission's View

500. The rules in Samoa do not allow for disclosure of documents by a person who is not a party to the proceedings. The Commission considers that allowing any party involved in a proceeding to apply to the court for discovery from a non-party to the proceedings

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[596] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 32.07.
[597] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 32.08.
[598] *Civil Procedure Rules 2002* (Vanuatu) r 8.14(1).
[599] *Civil Procedure Rules 2002* (Vanuatu) r 8.14(2).
[600] *Civil Procedure Rules 2002* (Vanuatu) r 8.14(3).
[601] *Civil Procedure Rules 2002* (Vanuatu) r 8.14(4).
[602] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 3.

will assist in enabling all relevant evidence and material to be before the court to inform its decisions. This is consistent with the practice in other jurisdictions discussed, which provide helpful guidance and would be appropriate for Samoa.

501. The Commission considers that the rules should enable the court to order a non-party to a proceeding who may have been in the control of documents to produce documents. This should apply to discoverable documents that the person would have had to disclose if the person were a party to the proceeding. The Commission suggests an application for discovery in these circumstances should be accompanied by a supporting affidavit. Similarly to Vanuatu the rules should also provide what the court must be satisfied of before such order can be made, which should include that the person in possession and control of the documents has an opportunity to be heard, the documents are relevant to the proceedings and that disclosure is necessary for reasons of both fairness and costs.

502. One of the concerns however, are the costs that may be involved for a non party in retrieving and providing documents, particularly as they would not have a vested interest in the proceeding and incurring discovery costs could be overly burdensome in those circumstances. However, the Commission considers that an appropriate way to address this would be to include a cost provision in the rules (similar to New Zealand) so that the court could order the party seeking discovery to pay for costs incurred by the non-party to produce and retrieve documents.

Recommendations:

90. Both rules should provide for non-party discovery. It should also include what the court must be satisfied of before such order can be made to a non-party, which should include the name of the non-party, that the person in possession and control of the documents is given an opportunity to be heard, the documents that are relevant to the proceedings and that disclosure is necessary for fairness and costs. The rules should allow this only for discoverable documents that the person would have had to disclose if the person were a party to a proceeding.

91. Both rules should include a cost provision so that the court could order the party seeking discovery to pay for costs incurred by the non-party to produce and retrieve documents

B. Setting Down

503. Under the SCR, when a statement of claim is filed, the Registrar must fix a day for 'hearing' and must list the 'place and time of trial' in the summons.[603] It is the Commission's understanding however, that notwithstanding the terminology, this rule relates to the first listing of a case, for example a first mention.[604]

504. This is to be contrasted with 'setting down', which occurs later in proceedings after pleadings have been filed. If a defendant files a statement of defence or counterclaim in a proceeding, then the court or registrar must adjourn proceedings until a party requests to set the hearing down. At that point the setting down provisions of the SCR activate and the court or registrar must re-list the case for hearing and give at least 14 days' notice to the parties.[605] The hearing allocated at this point relates to the full hearing of the matter.

505. The SCR outlines how a party may apply to have the matter set down. There is a form prescribed in the rules, which requires the signature of both parties agreeing that all pleadings and interlocutory matters are resolved and that the case is ready for hearing. The applicant party prepares the form and sends it to the opposing party for signature. If the opposing party fails to return the signed form within 14 days of receipt, then the party seeking the hearing date may apply independently to have the matter set down.[606]

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[603] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 14.
[604]Consultation with Registrars (Masinalupe Tusipa Masinalupe) (Ministry of Justice and Courts Administration) 30 October 2015.
[605] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 100(1).
[606] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 100(2).

506. The MCR also sets out a procedure enabling a Registrar to set down an action for hearing. This can be done if a defendant files a counterclaim or if the plaintiff requests that the action is set down for hearing. The Registrar will then fix a day for hearing, giving parties at least seven days written notice.[607]

Comparable Jurisdictions

New Zealand

507. In New Zealand, cases can proceed on two different tracks – a swift track and a standard track.[608] For proceedings on the swift track, a hearing date will be allocated at the case management conference, or a direction will be given requiring the registrar to allocate a date.[609]

508. In proceedings on the standard track, a hearing date will be allocated at the second case management conference unless the court orders otherwise.[610]

Australia

509. In Victoria,[611] the Court can set a date for trial once a notice of trial has been filed and served.[612] It is the plaintiff's responsibility to file a notice of trial and this should be done within a reasonable time after the proceedings start.[613]If the plaintiff fails to file a notice of trial, then a defendant may file their own notice of trial, or they may apply to the Court to dismiss the proceedings.[614]

Vanuatu

510. In Vanuatu, a Judge can set a matter down for trial at the first conference.[615] It is common practice however, for the Judge to set dates for Trial Preparation Conference(s), where the parties can discuss estimated number of witnesses, length of trial, expert evidence to be relied upon and so forth.[616] This is done so that the Judge

[607] *Magistrates' Court Rules 1971* (Samoa) r 18(2).
[608] See *Judicature (High Court Rules) Amednment Act 2008* (New Zealand) r 7.1.
[609] *High Court Rules 2016* (New Zealand) r 7.1; Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 154.
[610] *High Court Rules 2016* (New Zealand) r 7.13; Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 154.
[611] Note, the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 48.01 makes it clear this does not apply to all cases before the Court.
[612] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 48.02.
[613] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 48.04.
[614] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 48.04.
[615] *Civil Procedure Rules 2002* (Vanuatu) r 6.5(1).
[616] Civi*l Procedure Rules 2002* (Vanuatu) r 6.6(3).

can then manage the future direction of the trial.[617] In this situation, the trial date can therefore also be set at the Trial Preparation Conference.[618]

Submissions

511. In Issues Paper 1, the Commission sought views for the following question:

- *Should r 14 of the SCR be amended to include a timeframe for when a date for hearing must be fixed (being the day after filing at the latest)?*

512. The Commission received two submissions from the private sector that briefly addressed the court listing provisions. In relation to the initial hearing date allocated upon first filing a statement of claim, a practitioner from the private sector indicated that the time taken to receive a first hearing date can be slow, sometimes taking weeks, when it could be allocated at the time of filing or soon thereafter. As to the setting down provisions, one submission suggested that once a case is ready to be allocated a final hearing date, it should be allocated to a particular Judge to case manage, instead of being allocated to a Judge only a few weeks before the hearing date. This should ensure that the Judge is familiar with the issues when the case reaches trial. Additionally, it should avoid the situation where a Judge recuses himself from hearing a case on the morning of a trial. [619]

Commission's View

513. Although recognised in practice, it is not expressly clear from the SCR that rule 14 relates to a Registrar listing a case for its first court date, for example a first mention, as distinct from the final hearing or trial. To avoid any ambiguity, the Commission considers that rule 14 should be clarified to stipulate that the Registrar's responsibility is to list it for first appearance/ first mention.

514. The Commission acknowledges the concern from some members of the private sector, that when filing a statement of claim, they are not given a court date for first mention for quite some time. This unnecessarily extends legal proceedings. The Commission has not received any information to explain why Registrars may need a lengthy period of time before they can allocate a date for first mention.

515. To respond to submissions from the private sector, and ensure court proceedings continue to run efficiently, the Commission considers it appropriate to amend rule 14(a) of the SCR. That rule specifies that a Registrar must allocate a hearing when a statement

[617] *Civil Procedure Rules 2002* (Vanuatu) r 6.6(4).
[618] *Civil Procedure Rules 2002* (Vanuatu) r 6.6(4)(d).
[619] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 2.

of claim is filed, but does not say how long the Registrar has to provide that court date. The Commission had considered inserting a timeframe (for example, 24 hours) within which the Registrar must give parties a court date, to alleviate reported delays between filing the statement of claim and receiving the first mention date. However, consultations with Judiciary indicated that this would not be necessary as the current rules stating that a first mention should be allocated when the statement of claim is filed was sufficient.

Recommendations:

92. Amend rule 14(a) and 14(2) of the SCR to more clearly state that the Registrar must fix a date for first mention when a statement of claim is filed in court.

MEASURES FOR EARLY RESOLUTION OF DISPUTES

A. Alternative Dispute Resolution

516. Alternative Dispute Resolution ("**ADR**") is a collective term for a range of processes resolving disputes outside of litigation.[620] ADR generally aims to assist parties in reaching agreement and encompasses various forms including but not limited to mediation, negotiation and arbitration.[621]

517. ADR serves an increasingly important role because it offers ways to divert unnecessary litigation away from the courts. If used appropriately, it can reduce the time and cost spent by parties on litigation. It can also increase the efficiency and effectiveness of the courts as it saves court resources being exhausted on matters that can be settled outside of the court room.[622]

Samoa

518. The MCR and SCR do not expressly include provisions empowering the court to refer parties to a dispute to attend ADR. However, in Samoa there is a legislative framework that provides some regulation in the absence of the rules. The *Alternative Dispute Resolution Act 2007* (Samoa) ("**ADR Act**") provides that the court may make referrals for

[620] New Zealand Dispute Resolution Centre, *An Introduction to Dispute Resolution* (2010) <http://www.nzdrc.co.nz/DISPUTE+RESOLUTION.html>.
[621] New Zealand Dispute Resolution Centre, *An Introduction to Dispute Resolution* (2010) <http://www.nzdrc.co.nz/DISPUTE+RESOLUTION.html>.
[622] New Zealand Dispute Resolution Centre, *An Introduction to Dispute Resolution* (2010) <http://www.nzdrc.co.nz/DISPUTE+RESOLUTION.html>.

parties to a dispute to attend ADR prior to or during the hearing of any civil or criminal matter.

519. The ADR Act defines ADR as "any process used to resolve disputes between parties in civil and criminal proceedings which is outside the usual Court-based litigation model."[623] It empowers the Court to refer a matter to ADR, namely arbitration, judicial settlement, reconciliation and with a specific emphasis on mediation.[624]

520. The ADR Act provides that the Court may refer parties to mediation prior to or during the hearing of any civil matter in dispute. When referring a matter to mediation, the Court may take into account any matter prescribed by the rules. The Court may refer a matter to mediation if:[625]

- There is considered a possibility of settlement;
- The parties or a party may not be able to meet the costs of a proceeding if the matter were to proceed;
- Both parties voluntarily agree to mediate.

521. The introduction of the *Mediation Rules 2013* (Samoa) ("**Mediation Rules**") reflects this focus on mediation and the court's endorsement of mediation as a form of dispute resolution in Samoa. The Mediation Rules provide that after the filing of the defence, the court may direct the proceedings to be referred to mediation or another form of ADR. Of particular note, the Mediation Rules also stipulate that the court cannot grant leave for a matter to proceed unless it is satisfied that the parties have made "real and good faith effort to resolve the dispute through mediation."[626] An application for the matter to proceed requires a certificate from the mediator to the effect that an agreement could not be reached in mediation.[627]

Comparable Jurisdictions

New Zealand

522. The HCR empowers the court to make an order at any point in the proceeding directing the parties to attempt to settle their dispute by mediation or other ADR specified in the order. The rules require that the parties consent to participating in ADR as well as the form of ADR to be undertaken.[628]

[623] *Alternative Disputes Resolution Act 2007* (Samoa) s 2.
[624] *Alternative Disputes Resolution Act 2007* (Samoa) ss 2,14, 15.
[625] *Alternative Disputes Resolution Act 2007* (Samoa) s 7.
[626] *Mediation Rules 2013* (Samoa) r 4(3)(b).
[627] *Mediation Rules 2013* (Samoa) r 4(3)(b) and sch 3 Form 1.
[628] *High Court Rules 2016* (New Zealand) r 7.79(5).

523. Outside of this rule, ADR is also explicitly provided as a matter to be discussed and considered by the parties during the case management conference.[629]

524. In contrast, the DCR does not directly provide for ADR. Under the DCR, the case management agenda states that if a short trial is not allocated the matter should be directed to a judicial settlement conference unless the judge directs otherwise or the parties agree to participate in ADR.[630] The DCR therefore does not appear to empower the court to make orders referring a matter to ADR. It appears that a proceeding will only be referred to ADR if the parties agree to it.

Federal Court of Australia

525. In Australia, the Federal Court of Australia has made ADR a mandatory consideration for parties early as is reasonably practicable in the proceeding.[631] A party may apply for an order to refer the proceeding or part of it to an arbitrator, mediator or other person for resolution by ADR,[632] or the Court may order this of its own motion.[633] The rules also allow parties to arrange ADR of their own volition, provided that within 14 days of doing so, the applicant applies to the Court for directions as to the future management and conduct of the proceeding.[634]

526. The rules also specify procedural requirements for the ADR process which include:
- appointment of arbitrators, mediators and other persons to conduct an ADR process;
- ways to register with the Court agreements arising out of ADR;
- termination of an ADR process;
- rules for internal arbitration; and
- procedures for referring matters to a referee for inquiry and report.[635]

Australia (Victoria)

527. In Victoria, ADR is provided as a statutory requirement for civil proceedings. The term used in the *Civil Procedure Act 2010* (Victoria), is ‘appropriate dispute resolution’ and is defined as a process in which parties attend for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute.[636] Under the *Civil Procedure Act the* court may refer a civil proceeding or part of a civil

[629]*Judicature Act 1908* (New Zealand) sch 5 (High Court Rules).
[630] *District Court Rules 2014* (New Zealand) r 7.2(3)(d)(ii).
[631]*Federal Court Rules 2011* (Aus) r 28.01.
[632]*Federal Court Rules 2011* (Aus) r 28.02.
[633]*Federal Court Rules 2011* (Aus) r 28.05.
[634]*Federal Court Rules 2011* (Aus) r 28.05.
[635]*Federal Court Rules 2011* (Aus) Part 28.
[636]*Civil Procedure Act 2010* (Vic) s 3.The definition of ADR provided in the legislation includes but it not limited to mediation, early neutral evaluation, judicial resolution conference, settlement conference, reference to special referee, expert determination, conciliation and arbitration.

proceeding to ADR.[637] If the type of ADR results in a non-binding outcome the court may order the ADR without the parties consent. However, where the form of ADR results in a binding outcome, such as arbitration, the consent of parties would be required in these cases.[638]

528. The *Civil Procedure Act 2010*, also states that the court may actively encourage parties to use forms of ADR as part of their case management powers.[639] Notably, Victoria has also enshrined the further enhancement of appropriate dispute resolution processes in the purpose statement of the Act.[640]

529. The *Supreme Court (General Civil Procedure) Rules 2015 (Victoria)* include a separate provision for the referral of matters to mediation. This can be at any stage of the proceeding and it may be with or without the consent of any party.[641]

530. The Magistrates Court also takes the approach in the *Civil Procedure Act 2010* by expressly stipulating that the court should encourage parties to use ADR if it is considered appropriate as part their case management powers.[642]

531. Aside from that, the Magistrates Court also places a specific focus on the use of mediation. The court is empowered to refer the whole or any part of a civil proceeding to mediation with or without the consent of the parties.[643] The matters discussed at the mediation can only be admitted as evidence during the hearing with the consent of all the parties who attended mediation.[644]

532. Neither the SCR nor the MCR prescribe in any detail the process around ADR. There is also limited guidance around mediation in the SCR. The *Magistrates Court General Civil Procedure Rules 2010* (Vic) provides a bit more detail setting out the procedures for court ordered mediation, which include referrals of proceedings to mediation, the compulsory nature of attendance, consequences of failing to attend and the filing of a mediation report.[645]

Australia (New South Wales)

533. Both the *Civil Procedure Act 2005* and Part 20 of the *Uniform Civil Procedure Rules 2005* empower Judges to refer matters for different forms of ADR.

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[637]*Civil Procedure Act 2010* (Vic) s 66(1).
[638]*Civil Procedure Act 2010* (Vic) s 66(2). Such forms of ADR include arbitration, reference to special referee or expert determination.
[639]*Civil Procedure Act 2010* (Vic) s 47(3)(d)(iii).
[640]*Civil Procedure Act 2010* (Vic) s 1(2)(d).
[641] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 50.07.
[642] *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 1.24.
[643] *Magistrates' Court Act 1989* (Vic) s 108(1).
[644] *Magistrates' Court Act 1989* (Vic) s 108(2).
[645] *Magistrates Court (General Civil Procedure) Rules 2010* (Vic) r 50.10.

534. The *Civil Procedure Act* allows the court to order a referral to mediation if it considers the circumstances appropriate and may do so with or without the consent of the parties.[646] The rules provide that the court may give directions regulating the practice and procedure to be followed in mediation.[647] There is a positive duty imposed on each party to participate in good faith to the mediation.[648] The *Civil Procedure Act* also empowers a court to refer a proceeding to arbitration in specific situations.[649]

535. Part 20 of the UCPR provide the rules around ADR. The rules provide additional guidance on the procedures around mediation and arbitration provided in the *Civil Procedure Act*.

536. Notably, the rules also include other forms of ADR not provided in the *Civil Procedure Act* including references to referees and compromise. The rules provide that at any stage of the proceeding, the court may make orders for reference to a referee appointed by the court for inquiry and report on the whole proceeding or on a specific question arising in the proceeding.[650] The rules on compromise allow any party to make a written offer to compromise any claim in the proceedings, either in whole or in part, on specified terms.[651] If an offer is accepted, any party may apply for judgment to be entered accordingly.[652]

537. The CPA and the UCPR also regulate civil proceedings in lower courts.[653] Therefore, the ADR provisions above would also apply to proceedings in these courts.

Vanuatu

538. In Vanuatu, as part of the case management process the court has a duty to encourage parties to participate in ADR where appropriate.[654]

539. In particular, the courts may order referrals to mediation on the grounds that mediation may resolve some or all of the issues in dispute or that there is no substantial objection by the parties to the issues raised in the dispute.[655] This order does not prevent parties from agreeing to mediation without the court's order.[656]

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[646] *Civil Procedure Act 2005* (NSW) s 26(1).
[647] *Uniform Civil Procedure Rules 2005* (NSW) r 20.2.
[648] *Civil Procedure Act 2005* (NSW) s 27.
[649] *Civil Procedure Act 2005* (NSW) s 38. Arbitration is limited to proceedings concerning the recovery of damages or other money or any other relief ancillary to a claim for the recovery of damages or other money.
[650] *Uniform Civil Procedure Rules 2005* (NSW) r 20.14.
[651] *Uniform Civil Procedure Rules 2005* (NSW) r 20.26.
[652] *Uniform Civil Procedure Rules 2005* (NSW) r 20.27.
[653] *Civil Procedure Act 2005* (NSW) s 4 sch 1; *Uniform Civil Procedure Rules 2005* (NSW) r 1.5 sch 1.
[654] *Civil Procedure Rules 2002* (Vanuatu) r 1.4 (2)(e).
[655] *Civil Procedure Rules 2002* (Vanuatu) r 10.3 (1).
[656] *Civil Procedure Rules 2002* (Vanuatu) r 10.1 (2).

540. The *Civil Procedure Rules 2002* also apply to civil proceedings in the lower courts; therefore the same provisions discussed above apply equally in the Magistrates Court.[657]

Submissions

541. In Issues Paper 1, the Commission sought submissions on the following question:

- *What provisions in relation to alternative dispute resolution should be included in the civil procedure rules?*

542. Additionally in Issue Paper 2, Commission sought submissions on the following question:

- *What are the potential barriers to parties being required to provide a declaration to the Court regarding the proper basis of their claim, their prospects of success of a claim or defence?*
- *Should the parties and their solicitors be required to acknowledge a set of overarching obligations regarding their conduct in the litigation?*
- *Should the Court be granted more specific powers to ensure that parties and their solicitors abide by their duties to the Court and their opponent? Would this ensure the conduct of parties in claiming and defending civil actions is kept to a high standard?*

543. The Commission did not receive any submissions relating to this part.

Commission's View

544. ADR has become an increasingly important mechanism for the courts to use to settle parties disputes without resorting to trial. If appropriate disputes are referred to ADR, this can reduce significant expense to the parties going through litigation, time, as well as limited court resources.

545. The Commission has reviewed the provisions in comparative jurisdictions and notes the extensive provisions already contained in the ADR Act and Mediation Rules. The Commission recommends including the following key provisions into the rules, which it considers suitable for Samoa:
    - parties may apply to the Court for ADR at any point in the proceeding;
    - parties may undertake ADR outside of court processes provided written notice is submitted to the Court within a specified time;

[657] *Civil Procedure Rules 2002* (Vanuatu) r 1.6.

- the Court may issue directions as to ADR procedures not provided for under the rules;
- parties should participate in the ADR process, in good faith and with a genuine effort to reach resolution;
- when the Court refers a matter to mediation, there should be a requirement for the exhaustion of the mediation process before allowing the case to proceed to trial.

546. The Commission considers that incorporating these key provisions into the rules will reiterate the importance and availability of ADR in the civil procedure process. This will provide court users with a comprehensive guide about the ADR procedure, which complements the ADR Act and Mediation Rules. The Commission recognizes that some of the key provisions suggested may not be provided for in the ADR Act and Mediation Rules and may require amendment for consistency.

547. The ADR Act defines ADR as including mediation, arbitration, judicial settlement, reconciliation and conciliation. The Commission considers that a definition of ADR should also be included in the rules for clarity. Comparative jurisdictions have included other forms of ADR such as negotiation and reference to special referee. The Commission recommends exploring the inclusion of other forms of ADR in future.

548. In the comparative jurisdictions, the court may order referral to ADR with or without the consent of the parties. In Victoria, the court is not required to obtain the parties consent where the results of the ADR are non-binding. However, where the outcome of the ADR binds the parties to what is agreed upon, such as arbitration, the consent of the parties is required. The Commission considers that this approach should be adopted by Samoa. Despite the benefits of ADR, parties are likely to approach this process with some hesitance. If the court is able to require the parties to undertake ADR this would provide an opportunity for the parties to confront some of the issues raised in the proceedings. This may or may not result in agreement; however, any result would not be binding on the parties. This would hopefully encourage the parties to fully engage in the process with the assurance that the results are non-binding. The Commission is mindful that ADR is not a panacea to resolving disputes and there are cases where ADR would not be deemed appropriate. Therefore, the Commission considers that the rules should only provide for the court to make ADR orders where it considers the circumstances warrant such an order.

549. The Commission considers that a costs provision could be included as a consequence where parties do not participate in ADR in good faith.

550. In Samoa, there is currently a legislative framework on ADR. The new rules should complement the ADR legislation and expand on the procedures within that framework.

Recommendations:

93. The rules should provide for inclusion of ADR in the civil procedure process consistent with the *Alternative Dispute Resolution Act 2007* and Mediation Rules 2013.

94. The rules should provide a definition of ADR and the forms of ADR available in civil proceedings including:

    - Mediation
    - Arbitration
    - Judicial Settlement (currently not defined in the ADR Act)
    - Reconciliation (currently not defined in the ADR Act)
    - Conciliation

95. To underline its importance, the enhancement of the use of ADR processes at the earliest possible opportunity in proceedings should be reflected in the purpose statement of the rules.

96. The rules should enable the Court to make an order for ADR, pursuant to the *Alternative Dispute Resolution Act 2007,* where it deems the circumstances appropriate at any point of the proceeding. The rules should also specify that any party to a proceeding may apply to the court for an order for ADR at any point of the proceeding.

97. Both rules should also enable the Court to issue directions as to ADR procedures not provided for under the rules.

98. The rules should also grant parties the right to undertake ADR outside of the court process, provided that written notice is submitted to the court within a specified time.

99. As is currently reflected in the Mediation Rules 2013, the rules should also provide that where appropriate, the court must require the exhaustion of the ADR processes before allowing the case to proceed to trial.

100. The rules should impose a duty on each party to participate in the ADR process in good faith and with a genuine effort to reach a resolution. A costs provision could also be included as a consequence for breaching this duty by failing to participate in ADR in good faith.

101. The rules should also provide a comprehensive procedural guide for the ADR process to assist the court and parties in civil procedure proceedings including procedures for referral to alternative dispute resolution, who may be appointed to conduct the ADR, how the process is managed and resolved, how outcomes are recorded and preserving

confidentiality in the ADR process.

102. Consider including in the ADR process (whether as an amendment to the *Alternative Dispute Resolution Act 2007* or in the rules) provision that where the outcome of the ADR is non-binding, the Court order may be without the consent of the parties. However, where the ADR process results in a binding outcome, the consent of the parties is required.

103. The *Alternative Dispute Resolution Act 2007* and Mediation Rules 2013 should be reviewed to check whether any amendments are required as a result of these recommendations to ensure consistency across all legislation.

B. Judicial Settlement Conference Resolution

551. A Judicial Settlement Conference (**JSC**) is appropriate in cases that are unlikely to settle without judicial guidance (for example, if mediation has already been tried and found unsuccessful) because the parties cannot afford private mediation,[658] or the parties do not meet the requirements to participate in mediation under the ADR Act.[659] The purpose of JSC is for the judge to assist the parties to settle the proceeding or any issues in the proceeding and alleviate the need to go to trial. The judges' role assists, rather than controls, the parties to evaluate the merits of the dispute to come to a possible resolution.[660]

552. One of the benefits of JSC is that it can provide additional opportunities for parties to achieve a fair outcome at a more affordable cost, which is proportionate to the process compared to regular litigation.[661] JSC may assist judges in dealing with these more complex disputes and enable issues to be narrowed and defined and even possibly resolved.

553. Another crucial benefit of JSC which differentiates it from other forms of ADR is that a successful outcome of the conference can be readily expressed in a consent order or court judgment.[662] In contrast, a referral to a mediator, for example, may result in an

[658]Courts of New Zealand, *Judicial Settlement Conferences High Court Guidelines*, April 2012 [4]-[5]. See: <https://www.courtsofnz.govt.nz/business/guidelines/judicial-settlement-conference>.
[659] *Alternative Disputes Resolution Act 2007* (Samoa) s 7.
[660] Courts of New Zealand, *Judicial Settlement Conferences High Court Guidelines*, April 2012. See: <https://www.courtsofnz.govt.nz/going-to-court/practice-directions/practice-guidelines/high-court/judicial-settlement-conferences>.
[661] Tania Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 31(1) Monash University Law Review 149 <http://www.austlii.edu.au/au/journals/MonashULawRw/2011/9.pdf>.
[662] Courts of New Zealand, *Judicial Settlement Conferences High Court Guidelines*, April 2012. See: <https://www.courtsofnz.govt.nz/going-to-court/practice-directions/practice-guidelines/high-court/judicial-settlement-conferences>.

outcome that cannot be enforced without a lawsuit for the other party to uphold his or her part of the agreement.[663]

Samoa

554. Samoa's Civil Procedure Rules do not expressly provide for JSC, however it is currently used in Samoa to resolve proceedings prior to trial.

555. In Samoa, the usual process is that if mediation is unsuccessful or not engaged in, the matter returns to Court for a mention. If considered appropriate the judge can refer the matter for JSC. If the JSC is successful, the agreement is formalised by the Court. If JSC is unsuccessful, the matter returns to Court for mention to set a hearing date and is allocated to a judge.[664]

556. The Court notifies the parties of the date and time for the JSC.[665] The parties are also provided a copy of the 'Standard Settlement Conference Directions' (**Directions**) to assist with their preparations for the JSC.[666] These Directions provide that as a pre-condition to the JSC proceedings, the parties must file and serve a memorandum by a certain date addressing a number of issues.[667] These issues are broad and are specifically tailored to assist the parties in reaching settlement including providing details on issues affecting the ability to settle, whether alternative settlement negotiations have been undertaken, the details of previous settlement offers and any other matter the parties wish for the judge to know.[668] The Directions also expressly provide that the JSC and any documents filed in connection with it is to be treated as without prejudice and as privileged information. The Directions are also made on the understanding that parties who attend will have full and unlimited authority to settle the case in the event an agreement is reached.[669]

557. JSC is also provided for in the *Alternative Disputes Resolution Act 2007.* The definition of ADR in this legislation includes JSC. Under the legislation either party may apply to the court for ADR, which includes JSC.[670]

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[663] Anthony Willy and Peter Whiteside, *New Zealand Procedure Manual: District Court* (2nd edition) 488 at DCR 2.47.03 Explanation.
[664] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[665] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[666] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[667] Judicial Settlement Conference Directions require certain matters to be addressed in a memorandum to be filed by court concerning the following questions: What are the issues in this litigation; which of these issues most significantly affects your ability to settle and why; have you engaged in settlement negotiations and the nature of these negotiations; what offers of settlement have been exchanged and what criteria is the settlement offer based; other matters that would enable the settlement conference Judge to work more productively with all parties in the conference.
[668] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[669] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[670] *Alternative Disputes Resolution Act 2007* (Samoa) s 7.

Comparable Jurisdictions

New Zealand

558. Both the HCR and DCR contain rules pertaining to JSC. In the DCR, the JSC is designed to fit into the case management process.[671] The first case management conference will determine whether the matter goes to a short trial or a JSC. Matters that are not allocated for a short trial proceed to a JSC.[672]

559. The rules state that the purpose of a JSC is to give the parties an opportunity to negotiate a settlement of the whole claim or any particular issue(s).[673] The parties are required to file and serve a memorandum identifying the issues and any settlement negotiations at least 10 working days before the date set for the conference.[674]

560. If the JSC does not result in a settlement, the rules stipulate that a second case management conference is to be convened.[675]

561. The JSC is to be convened by a judge and held in chambers.[676] The rules also state that any statements and documents produced at a JSC are not to be admissible during trial.[677]

562. The DCR states that a judge who convenes a JSC and assist in negotiations must not preside at the trial unless the parties consent and only if the matter to be resolved is a question of law.[678]

563. The HCR does not provide for JSC in the same manner.[679] The HCR provides a separate rule for JSC which empowers the judge to convene a JSC prior to the hearing to negotiate a settlement of the whole proceeding or any issue and may assist in those negotiations.[680] In contrast to the DCR, the HCR also provides that a judge may convene a JSC at any time during the hearing as well.[681] The consent of the parties is required in this instance and the judge may not assist in the negotiations but should appoint another judge to do so.[682] However, if the parties consent and if the judge is satisfied

[671] *District Court Rules 2014* (New Zealand) r 7.3.
[672] *District Court Rules 2014* (New Zealand) r 7.2(3)(d).
[673] *District Court Rules 2014* (New Zealand) r 7.3(2).
[674] *District Court Rules 2014* (New Zealand) r 7.3(3).
[675] *District Court Rules 2014* (New Zealand) r 7.3(8)(b).
[676] *District Court Rules 2014* (New Zealand) r 7.3(5).
[677] *District Court Rules 2014* (New Zealand) r 7.3(4).
[678] *District Court Rules 2014* (New Zealand) r 7.3(6).
[679] *High Court Rules 2016* (New Zealand) r 7.79.
[680] *High Court Rules 2016* (New Zealand) r 7.79(1).
[681] *High Court Rules 2016* (New Zealand) r 7.79(3).
[682] *High Court Rules 2016* (New Zealand) r 7.79(4).

that there are no circumstances that would make it inappropriate, then the judge may assist in the negotiations as well as continue to preside over the trial.[683]

564. The rules also prohibit the disclosure of any statements made during a JSC by the parties or presiding judge.[684]

Australia (Victoria)

565. The CPR in Victoria make provisions for JSC although it is not strongly emphasised as is the case in New Zealand. The CPR includes in its definition of ADR the process of judicial resolution conference. This is defined as a resolution process presided over by a Judge of the Court, an Associate Judge or a judicial registrar for the purposes of negotiating a settlement of a dispute.[685]

566. Under the rules a court may make an order referring a proceeding to ADR at any point of the proceeding.[686] This can implicitly include a judicial resolution conference according to the definition of ADR in Victoria's CPR.[687]

567. There is no further provision relating to the process of the judicial resolution conference except for a general prohibition on the admissibility in evidence at the hearing of any statements made or actions done during the judicial resolution conference.[688]

Australia (NSW)

568. In contrast, NSW does not specifically provide for JSC in its civil procedure legislation or rules. In NSW, there is no overarching definition for ADR which could encapsulate other forms of ADR including JSC such as the case in Victoria. Instead the legislation and rules specifically regulate the forms of ADR available in civil proceedings which are limited to mediation, arbitration, references to referees and compromise.[689]

Submissions

569. In Issues Paper 2, the Commission sought submissions on the following:

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[683] *High Court Rules 2016* (New Zealand) r 7.79(4).
[684] *High Court Rules 2016* (New Zealand) r 7.79(6).
[685] *County Court Civil Procedure Rules 2008* (Vic) r 48.12.
[686] *County Court Civil Procedure Rules 2008* (Vic) r 48.12.
[687] *Civil Procedure Act 2010* (Vic) s 66. See also definiteion of 'appropriate dispute resolution' at *Civil Procedure Act 2010* (Vic) s 3.
[688] *Civil Procedure Act 2010* (Vic) s 67 – the Court may however order evidence from the judicial resolution conference to be admitted at the hearing after having regard to the interests of justice and fairness.
[689] *Civil Procedure Act 2005* (NSW) Part 4 and 5; *Uniform Civil Procedure Rules 2005* (NSW) Part 20.

- *Should there be specific provisions in the SCR and MCR for the Court to order parties to engage in meaningful appropriate dispute resolution?*

- *If yes, what enforcement powers may the court have and be likely to adopt, to ensure its effect?*

570. It was submitted that under the current rules when a case is ready for a hearing, it is automatically referred to mediation, but if the parties want a JSC then an application to the Court is required.[690] The JSC has been remarked as being more successful than mediation to settle disputes. Therefore, given its success, it was suggested that JSC should be a means of ADR prescribed in the rules rather than requiring an application to the court. It was submitted that parties should then be given the choice of mediation or JSC before a hearing.[691]

Commission's View

571. JSC is a form of ADR that has been utilized to varying extents in comparative jurisdictions.

572. In New Zealand, JSC has been incorporated into both the HCR and DCR. In the DCR it is a part of case management process in an effort to settle cases as soon as practicable. In the HCR there is a broader scope for judges, under an independent provision, to order JSC which can be done at any point before and during the hearing. Both rules also provide that the judge presiding over the hearing must not also engage in the JSC negotiations except in certain situations. In the HCR, it is where the parties consent and where the judge is satisfied that in the circumstances it is not inappropriate to do so. In the DCR, it is where the parties consent and the only matter to be resolved at the hearing is a question of law.

573. In Australia, JSC is not given the same level of prominence in civil proceedings. In NSW, it is not provided for entirely, and in Victoria, it is only available indirectly where a court may make an order for ADR which includes JSC.

574. The Commission considers that as JSC is already being used as a form of case resolution in Samoa, the rules should include this form of ADR to reflect the current practice. The rules should also incorporate the current process around the use of JSC such as the Directions issued by the court and any further procedural matters.

575. The Commission considers that the court should be given broad scope to convene a JSC at any time before the hearing, as well as during the hearing with consent of the

[690]Ruby Drake, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015.
[691]Ruby Drake, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015.

parties. Similar to New Zealand, the rules should also include provisions so that where JSC is ordered during a trial, the presiding judge should not also be part of the JSC unless all the parties consent and the judge is satisfied that it is appropriate.

576. In order to assist with the JSC process, the parties should also be required to file and serve a memorandum identifying the issues and any settlement negotiations before the conference. This is currently the process in the DCR in New Zealand and under the current process used in Samoa. The Commission considers that a memorandum would provide both parties a clear picture of the issues that are being advanced by either side and would provide assistance during the conference. This should be reflected in the new rules.

577. Both rules in New Zealand preserve the privilege and confidentiality of statements made during the JSC. The Commission considers that this also should be replicated in Samoa's rules.

Recommendations

104. Both rules should include rules on JSC in civil proceedings which should be convened by a judge and held in chambers.

105. The rules should empower the Court to convene a JSC of the whole proceeding or any issue:

- at any point before the hearing; or
- during the hearing with the consent of all parties.

106. Both rules should provide that for JSC conducted during a hearing, the presiding judge may not assist in negotiations but should appoint another judge to run the JSC, unless:

- the parties consent to the presiding judge running the JSC; and
- the presiding judge is satisfied that there are no circumstances that would make it inappropriate to do so.

107. The rules should require parties to file and serve a memorandum identifying the issues and any settlement negotiations by a certain timeframe before the date set for the conference. [New Zealand uses a timeframe of 10 working days in the DCR].

108. In order to preserve the privilege and confidentiality of statements made during JSC, there should be a general prohibition on the admissibility of these statements as evidence during the hearing.

109. The rules should also provide that the JSC and papers filed in connection with them are to be treated as without prejudice.

110. Both rules should provide that the Judge may issue directions to determine procedure when it is not provided for under the rules.

C. Case Management

578. Samoa's approach to case management is primarily borne out of court practice and is not stipulated in either the SCR or MCR. From consultations with the Judiciary, the Commission understands that following pleadings, civil proceedings generally follow the process summarised below:[692]

- Pleadings are filed;
- Interlocutories, if any, are completed;
- If requirements under the ADR Act to participate in mediation are not met, a hearing date is set and the matter is allocated to a judge;
- If the requirements under the ADR Act are met the matter is referred to mediation;
- After mediation the matter returns to Court for a mention;
- If the mediation is successful then the agreement is formalised by the Court;
- If the mediation is unsuccessful or not engaged in,[693] the matter can be referred to JSC;
- After JSC the matter returns to Court for a mention;
- If the JSC is successful, the agreement is formalised by the Court;
- If JSC is unsuccessful, a hearing date is set and the matter is allocated to a judge.

579. Currently, there are no rules permitting case management conferences. From our consultations with the Judiciary it is envisaged that a case management conference could take place after a matter is allocated to a judge but before the hearing date. Based on the current practice, this may occur after mediation and/or JSC.[694]

580. Notwithstanding this the Commission notes that the ADR Act contemplates case management in the courts by using ADR at an appropriate stage *before* mediation.[695] This suggests that case management can occur at an earlier stage and for a longer period (i.e. from first mention up until the hearing date).

[692] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[693] Where requirements of the *Alternative Disputes Resolution Act 2007* are not met.
[694] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).
[695] *Alternative Disputes Resolution Act 2007* (Samoa) s 3.

Comparable Jurisdictions

New Zealand

581. In New Zealand, the courts have moved to a system where judges play a bigger role in the ongoing management of a case, rather than leaving it to the parties. This is primarily in response to concerns about costs and delays in litigation and the idea that cases should not idly remain in the system but instead proceed actively towards resolution.[696]

582. New Zealand has a comprehensive case management system which is now codified in the District Court Rules and High Court Rules.[697]

583. In the High Court, the case management provisions apply to the following:[698]

- ‘ordinary defended proceedings’;
- ‘complex defended proceedings’;
- appeals;
- applications for leave to appeal; and
- judicial review cases.

584. Proceedings commenced by originating application and proceedings on the commercial list are also subject to limited case management through the parties’ ability to seek directions.[699] Case management does not apply to undefended proceedings, insolvency proceedings or liquidation proceedings.[700]

585. The program is referred to as a ‘triage system’, recognising that judicial resources are limited and not one size fits all.[701] Once a defence is filed, every civil proceeding filed in the High Court is referred to one of three triage Judges, who reviews the proceedings and determines which of the above categories the claim fits into.[702] ‘Complex defended proceedings’ refer to those that, in a Judge’s opinion, require more than one case management conference before trial, whereas ‘ordinary defended proceedings’ would

[696] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 177.
[697] *High Court Rules 2016* (New Zealand) Part 7; *District Court Rules 2014* (New Zealand) Part 7. Previously, the case management process operated by practice notes.
[698] *High Court Rules 2016* (New Zealand) r 7.1(1).
[699] *High Court Rules 2016* (New Zealand) r 7.1AA(3)-(5).
[700] *High Court Rules 2016* (New Zealand) r 7.1AA(6).
[701] Geoff Venning, “Innovation in Case Management’ (Paper presented at the AIJA Conference, 7-9 March 2013) <http://www.aija.org.au/Asia%20Pacific%202013/Presentations/Venning.pdf > [27].
[702] Geoff Venning, “Innovation in Case Management’ (Paper presented at the AIJA Conference, 7-9 March 2013) <http://www.aija.org.au/Asia%20Pacific%202013/Presentations/Venning.pdf > [27].

only need one.[703] Once a classification has been made, the case can proceed to a case management conference at the initiative of the Judge or on application of a party,[704] generally within 25 working days after the defence is filed.[705]

586. Case management conferences provide the Judge with an opportunity to give directions to “secure the just, speedy, and inexpensive determination of the proceedings, including the fixing of timetables and directing how the hearing or trial is to be conducted.”[706] Agendas for the conferences are based upon the rules.[707] Before the commencement of a case management conference, the parties are to submit a joint memorandum to the court that outlines the issues, the status of discovery and other interlocutory applications, whether the proceeding is ready for trial, etc.[708] This joint memorandum is to assist with the case management conference and is required to be filed no later than 10 working days before the conference.

587. The process ensures that the majority of cases are provided only one conference, whereby issues are defined, witnesses identified and hearing time confirmed by counsel.[709] Small cases are allocated early hearing dates, whereas hearing dates for complex cases are not allocated until they are ready for trial (to avoid unnecessary adjournments of long trial fixtures).[710]

588. In the District Court, the case management system applies to all cases except undefended proceedings.[711] Initial case management conferences are held not less than 25 days after filing the statement of defence and the agenda of the conference is set out in the rules.[712] Generally, cases where short trials are deemed appropriate are timetabled and set down for hearing immediately, whilst other modes of trial are referred to a judicial settlement conference.[713]

[703]*High Court Rules 2016* (New Zealand) r 7.1(4).
[704]*High Court Rules 2016* (New Zealand) r 7.2(1)-(2). For appeal conferences, see r 7.14. For judicial review conferences, see r 7.17.
[705]*High Court Rules 2016* (New Zealand) r 7.3(2).
[706]*High Court Rules 2016* (New Zealand) r 7.2(3).
[707]*High Court Rules 2016* (New Zealand) r 7.2(3).
[708]*High Court Rules 2016* (New Zealand) r 7.3. This joint memorandum is required to be filed no later than 10 working days before the conference.
[709]Geoff Venning, “Innovation in Case Management’ (Paper presented at the AIJA Conference, 7-9 March 2013) <http://www.aija.org.au/Asia%20Pacific%202013/Presentations/Venning.pdf > [27].
[710] Geoff Venning, “Innovation in Case Management’ (Paper presented at the AIJA Conference, 7-9 March 2013) <http://www.aija.org.au/Asia%20Pacific%202013/Presentations/Venning.pdf > [27].
[711]*District Court Rules 2014* (New Zealand) rr 7.1, 7.2(1).
[712]*District Court Rules 2014* (New Zealand) rr 7.2(2)and7.2(3).
[713] Note, this is now a presumption rather than mandatory under the rules: New Zealand Law Society, “District Court Rules 2014 in force” (New Zealand Law Society, 18 July 2014) <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-846/district-court-rules-2014-in-force>. For judicial settlement conferences, see District Court Rules 2014 (New Zealand) r 7.3.

589. Where judicial settlement conferences do not result in a settlement, the rules make provision for a second case management conference to be held within 10 working days.[714] The matter is then properly timetabled prior to trial.

Australia (NSW, Victoria)

590. In New South Wales, the UCPR sets out rules related to case management in Part 2. At the outset a broad discretion is given to judges to 'give such directions and make such orders for the conduct of any proceedings as appear convenient... for the just, quick and cheap disposal of the proceedings'.[715] Judges therefore have a responsibility, through their own active case management, to assist in ensuring matters proceed efficiently and expeditiously.[716]

591. The UCPR (NSW) set out a comprehensive list of examples of when the court can issue directions and orders, which include filing of pleadings, providing particulars, making admissions, expert reports and filing of affidavits.[717]

592. In the Victorian jurisdictions, the basic principles of case management are framed as the 'overriding objective' or 'overarching purpose' of civil procedure.[718] The 'overriding objective' is to 'enable the Court to deal with a case justly'. Dealing with a case justly is also defined and includes 'effectively, completely, promptly and economically determining issues', 'avoiding unnecessary expense', dealing with a case proportionate to the money and complexity involved and allocating the case an appropriate share of the Court's resources.[719]

593. The parties have a duty to help the Court to further this overriding objective,[720] and the Court itself must further the overriding objective by giving any direction or imposing any condition it thinks fit according to the powers provided in the rules,[721] and by actively managing cases.[722] These rules therefore provide broad scope for judicial case management. In the County Court of Victoria, Judges are given control over every proceeding in a specific Division or List that they are assigned to.[723] The Rules also set

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[714]*District Court Rules 2014* (New Zealand) r 7.4.

[715] *Uniform Civil Procedure Rules 2005* (NSW) r 2.1.

[716]HonSpigelman CJ, "Case Management in New South Wales", Address to the Annual Judges Conference, Malaysia (2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman220806> at 20 February 2012. Source taken from Samoa Law Reform Commission, *Civil Procudre Rules Issues Paper 1*, 32.

[717] For the full list of matters see *Uniform Civil Procedure Rules 2005* (NSW) r 2.3.

[718]*Civil Procedure Act 2010* (Vic) s 1; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) Part 5.

[719]*Magistrates' Court General Civil Procedure Rules 2010* (Vic) o1.2.

[720]*Magistrates' Court General Civil Procedure Rules 2010* (Vic) o 1.22; *Civil Procedure Act 2010* (Vic) ss 16-26.

[721]*Magistrates' Court General Civil Procedure Rules 2010* (Vic) o 1.23; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 1.14.

[722]*Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 1.24.

[723]*County Court Civil Procedure Rules 2008* (Vic) r 34A.14.

out broad powers available to the Court at first mentions, for example recording any admissions, ordering production of expert reports or guiding the future conduct of the case.[724]

Vanuatu

594. The courts in Vanuatu have a duty to actively manage cases as required under the CPR (Vanuatu)[725]. Part 6 of the CPR is dedicated completely to conferences which enable the judge to actively manage the proceeding.[726] The rules require the same judge to preside in all the conferences pertaining to a particular proceeding even though parties are not required to attend without an order from the judge. The judge is empowered to arrange the first conference between the parties if the defendant has filed a defence to the claim. The purpose of the first conference is to allow the court to actively manage proceedings by covering the matters like identifying issues at earlier stage, encouraging parties to engage in alternative dispute resolution first,[727] and, as such, the judge may deal with or make orders set out in the rules.[728] The judge may also set the date for a trial preparation conference or other conferences at this first conference unless the judge considers that proceedings can be set down without further conferences.[729] There may also be a conference held by telephone if it is necessary to include the judge and all other parties.[730]

595. All conferences nevertheless are not to be conducted in open court unless in the public's interest or there are other reasons which require the conference to be held in an open court.[731]

Submissions

596. In Issues Paper 1, the Commission sought submissions on the following:

- *Should a provision about the overriding objectives of civil procedure rules, and the roles of litigants and judges in this, be inserted into the Supreme Court (Civil Procedure) Rules 1980 and the Magistrates' Court Rules 1971?*

- *If you answered yes to the preceding question, what formulation should such provision/s take and what sorts of case management powers should be given to judges?*

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[724]*County Court Civil Procedure Rules 2008* (Vic) o 34A, Part 6.
[725]*Civil Procedure Rules 2002* (Vanuatu) r 14(1).
[726]*Civil Procedure Rules 2002* (Vanuatu) r 6.2(1).
[727]*Civil Procedure Rules 2002* (Vanuatu) r 1.4 (2).
[728]*Civil Procedure Rules 2002* (Vanuatu) r 6.4(2).
[729]*Civil Procedure Rules 2002* (Vanuatu) r 6.5(1).
[730]*Civil Procedure Rules 2002* (Vanuatu) r 6.10.
[731]*Civil Procedure Rules 2002* (Vanuatu) r 6.11.

597. It was raised by one of the private law firms that under the current practice the court is too heavily involved in case management. It was raised that for efficiency, all the pre-trial paperwork should be sorted by the lawyers and/or parties before the mentions stage. Pre-trial conferences was suggested to be included in the rules and used more often. It was also raised that efficiency will be improved if mentions and call-overs were minimized.[732] They further suggested that law clerks would assist the judges with research and ease the immense workload and possibly quicken the resolution of cases.[733]

598. It was suggested by another legal practitioner that mentions which are heard by the Chief Justice could be tasks allocated to registrars. It was raised that often the mentions are merely procedural in nature such as setting a date for hearing and could be properly dealt with by a registrar.[734]

599. It was further submitted that there are significant delays in the courts particularly regarding the process for receiving a return date on filing of summons which takes days or sometimes weeks. It was suggested that receiving a return date should be immediate.[735]

600. One of the submitters suggested that an individual docket system should be established in the rules where one judge is allocated a case at the early stages and manages it from there.

601. The use of case management conferences was emphasized as being essential to a case, as it is at this stage that arguments are filtered and the real issues are identified. It was suggested that it should be a requirement for case management conferences to be held within a set timeframe (this submitter suggested 21 days) after the case has been allocated to a judge.[736]

602. The submission from the AGO stated that the current case management system is working effectively in light of the capacity and resources available to the court. The possibility of an electronic management system was also suggested as a potential pathway for the future.

Commission's View

603. The Commission considers that case management conferences should be included in the rules. Guidance has been sought from New Zealand which has a very prescriptive

[732] Preliminary Consultation with Ainuu (Ainuu Law Firm, Malifa) 18 July 2012.
[733] Preliminary Consultation with Ainuu (Ainuu Law Firm, Malifa) 18 July 2012.
[734] Preliminary Consultation with George Latu (Apia, Samoa) 25 January 2010.
[735] Preliminary Consultation with George Latu (Apia, Samoa) 25 January 2010.
[736] Preliminary Consultation with Ruby Drake (Apia, Samoa) 25 January 2010.

approach and NSW and Victoria which provide the Court broad scope in case management. The Commission has also been heavily guided by judicial input.[737]

604. The overarching theme of the court controlled case management system in comparative jurisdictions is to promote the just, expedient and inexpensive resolution of proceedings. The Commission considers that the rules should provide for case management to achieve this purpose.

605. The Commission considers that once a matter has been allocated to a judge and a hearing date is set, there should be at least one case management conference held between the parties and a judge prior to hearing. The case management conference should be held in chambers and is intended to:

- identify, define and refine issues involved in the civil proceeding;
- determine the steps to be taken to prepare the proceeding for trial;
- encourage the parties to cooperate with each other, to settle whole or part of the proceeding or to use appropriate dispute resolution; and
- control the progress of the civil proceeding.

606. This will allow the Court to ensure that the matter is ready to proceed on the allocated hearing date and that there are no further delays that would waste the court's time or cause additional costs to parties.

607. The rules in comparative jurisdictions require that once a matter is given to a designated judge, the same judge will preside over the proceedings until the resolution of the case. This was a point raised in a submission from a local practitioner and the Commission agrees that this is essential to the effectiveness of the case management system and should be followed in Samoa where possible.

608. The Commission considers that the rules should empower a judge to allocate or cancel a case management conference at any time or on the application of one or more of the parties similar to New Zealand.

609. In Vanuatu the conferences are not to be carried out in open court unless it is in the public interest to do so. The Commission agrees with this approach noting that the case management conferences will involve discussions on private and at times confidential matters. Therefore, the judge should only allow for the conferences to be held in public court if it is in the public interest to do so.

610. Currently, there are no rules permitting case management conferences. From our consultations with the Judiciary it is envisaged that a case management conference

[737] Consultation with the Judiciary, (Ministry of Justice and Courts Administration Complex, January 2017).

could take place after a matter is allocated to a judge but before the hearing date. Based on the current practice, this may occur after mediation and/or JSC.

611. Notwithstanding this the Commission notes that the ADR Act contemplates case management in the courts by using ADR at an appropriate stage *before* mediation.[738] This suggests that case management can occur at an earlier stage and for a longer period (i.e. from first mention up until the hearing date).

[738] *Alternative Disputes Resolution Act 2007* (Samoa) s 3.

Recommendations:

111. Both rules should provide for case management conferences to promote the just, speedy and inexpensive determination of proceedings.

112. The purpose for a case management conference should be provided in the rules to include the following:

- To identify, define and refine issues involved in the civil proceeding;
- To determine the steps to be taken to prepare the proceeding for trial;
- To encourage the parties to cooperate with each other, to settle whole or part of the proceeding or to use appropriate dispute resolution; and
- To control the progress of the civil proceeding.

113. The rules should clarify that once a matter has been allocated to a judge and a hearing date is set, there should be at least one case management conference held between the parties and a judge prior to hearing.

114. Both rules should set out that once a matter is allocated to a judge, the same judge is to assume control over the course of the proceeding, where possible, until it is resolved.

115. Both rules should empower a judge to allocate or cancel a case management conference at any time or on the application of one or more of the parties.

116. A judge may, at any case management conference, give directions to secure the just, speedy and inexpensive determination of the proceedings.

117. Both rules should also include that case management conferences are held privately. However, the judge may only order conference to be held in open court if it is in the public's interest.

TRIAL

612. The purpose for trial is to enable the court to resolve the dispute, having heard the case presented by both sides.[739] Each side will bring evidence to prove the facts of their case. In every court hearing or trial, the rules of evidence facilitate the fact finding task of the court to ensure fair and equal treatment.[740] Factors noted below are some of the areas to be taken into account for the effective flow of trial procedures.

A. TRIAL PROCEDURE

General Application

613. There is no specific part allocated to Trials in the SCR. However the rules contain provisions in other Parts, similar to those found in other jurisdictions and which set out the trial process. These include time and place of trial and failure to appear. The MCR also has some similar provisions under Part V Hearing of Action or Matter, which mainly address non-appearance.

Comparable Jurisdictions

New Zealand

614. The High Court Rules dedicate Part 10 to trial procedures that the Court may be guided by, such as the place of trial, adjournments, methods of trial and verdicts.[741] There are also provisions for a consolidation process, separate decision of questions, counsel assisting and hearings by video link.[742] It appears that the prescription of these trial procedures not only clarifies guiding principles on trial but also reaffirms the judges overriding discretion when it comes to trial proceedings.

615. The District Court Rules largely mirror Part 10 of the High Court Rules providing for place of trial, adjournments, methods of trial as well as a consolidation process, separate decision of questions and provisions providing for counsel assisting.[743]

Australia (Victoria)

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[739] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 211 at [11.8.1].

[740] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 211.

[741] High *Court Rules 2016* (New Zealand) Part 10; *District Court Rules 2014* (New Zealand) Part 10.

[742] High *Court Rules 2016* (New Zealand) Part 10, subpart 6.

[743] Unlike the *High Court Rules 2016* (New Zealand) however, the *District Court Rules 2014* (New Zealand) (rr 10.01-10.07) provide for three modes of trial, a short trial, a simplified trial or a full trial. In allocating the appropriate mode of trial the court looks to the number of parties, the complexity of issues, the requests of parties and a variety of other factors. The Rules then outline the respective procedures governing short and simplified trials. Full trials, follow High Court procedure.

616. In Victoria, there are similar rules that guide the trial. As in New Zealand, the rules cover place and mode of trial, fixing and adjourning trial dates and separate trial of questions. The Victorian rules also include provisions for pre-trial conferences, the order of evidence and payment of jury fees, for example.[744]

Vanuatu

617. The Vanuatu rules also have a part dedicated to trial.[745] These include the conduct of the trial, adjournments, hearing, giving evidence, failure to attend, and judgment.

Submission

618. In Issue Paper 2, the Commission sought submissions on the following:

- *Should both SCR and MCR specifically include trial procedures and specify their scope?*

619. A common concern was raised in submissions regarding the prescription of trial procedures in the rules. It was raised that prescribing these procedures in the rules will lessen the discretion of the court to deal with matters before it. It was suggested however that prescribing basic procedures may be useful provided the rules do not lessen the discretion of the Court and should be in light of the resources available to the Court and the legal profession in Samoa.[746]

620. It was also submitted that rule 206 of the SCR should be retained.[747]

Commission's Views

621. The Commission considers that it would be beneficial for Samoa's trial procedures to be updated to provide greater clarity and set out similarly to New Zealand. The Commission considers that all trial procedures should be included under a single Part for ease of reference, as is the case under New Zealand's Part 10. For example, place of trial, adjournments, methods of trial, verdicts, consolidation, separate decisions of questions, counsel assisting and hearings by video link. Moreover for consistency this Part should be included in both the SCR and the MCR.

622. The Commission considers that care should be taken not to be too prescriptive so as to significantly reduce flexibility of the judges in the exercise of their discretion. The

[744] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 47-49.
[745] *Civil Procedure Rules 2002* (Vanuatu) Part 12.
[746] Office of Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (17 June 2015) , 3; Ruby Drake, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper* 2, 3.
[747] Ruby Drake, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 3.

Commission therefore suggests that the Rules reaffirm judges' discretion when it comes to trial proceedings.

Recommendations:

118. Trial procedures in the rules should be updated to provide greater clarity, set out similarly to New Zealand's HCR. For example, place of trial, adjournments, methods of trial, verdicts, consolidation, separate decisions of questions, counsel assisting and hearings by video link. The rules should also reaffirm the judges' discretion when it comes to trial proceedings.

119. Trial procedures should be included in the MCR in the same terms as the SCR as appropriate.

Place of Trial

623. The SCR provides that 'the time and place of trial shall be such as the Registrar thinks fit having regard to the residence of the parties to the action; the place where the cause of action has arisen, and any other relevant circumstances'.[748] As noted in Issues Paper 2, the Supreme Court has on certain occasions changed the trial venue.[749]

624. The time and place are stated in the summons accordingly.

625. The MCR does not provide for the time and place of the trial.

Comparable Jurisdictions

New Zealand

626. The trial is to be held where the pleadings are filed, but can be in another place if the parties consent or it is more convenient or fairer.[750]

Australia (Victoria)

627. In Victoria, the place and mode of trial is as indorsed on the writ. If the writ is not indorsed with a place and mode of trial, then the trial is assumed to occur in Melbourne, without a jury.[751]

Vanuatu

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[748] *Supreme Court (Civil Procedure Rules) 1980* (Samoa) r 14(2).
[749] See *Police v Leafa Vitale and Toi Aukuso Cain* (an unreported decision of the Supreme Court of Samoa dated 6,7,10 and 11 April 2000); Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, p 34.
[750] *High Court Rules 2016* (New Zealand) r 10.1; Mathew Casey et al, *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd, 2nd ed, 2013) 427.
[751] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 5.08 and 47.01.

628. In Vanuatu, the provisions relating to time and place of trial are not located under Part 12. Instead, the rules relating to commencing a proceeding seem to impliedly dictate the location of a trial. There are different locations specified for filing a claim in the Supreme and District Courts. A Magistrate can change the district where a proceeding is dealt with however, if satisfied that it would be more convenient or fairer to deal with it in another district. If a defendant objects to the place, this must be stated in the response or defence.[752]

Submissions

629. In Issues Paper 2, the Commission sought submissions pertaining to the following issues:

- *Should both SCR and MCR include a provision that allows the Court to determine/change the location of a trial provided that both parties to the proceeding have consented; and or it would be more convenient or fairer to hear the proceeding at a different location?*

630. It was submitted by the OAG that it has been established by precedent that the Courts are able to change the venue of a trial, and suggested that this should be included in the rules. Furthermore, that some criteria should be included in the rules for the Courts to consider before exercising its discretion to change the venue.[753] Examples that were provided include, that the Court room is too small, for the safety of parties involved and as the Court deems best calculated to promote the ends of justice.[754]

Commission's View

631. As noted above in the Commission's Recommendations on Setting Down, the provisions relating to the powers of a registrar regarding the time and place of a trial as they currently stand create ambiguity for those not well versed in current practices of Samoan courts. For this reason, it is submitted that the Rules should specify that the Court is empowered to change the venue and time of the trial.

632. The power to do so should be included in both the SCR and MCR including criteria for the Courts to consider before exercising its discretion to change the venue. For example, the Court should be able to change the location of a trial provided that both

[752] *Civil Procedure Rules 2002* (Vanuatu) r 2.5.
[753] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (17 June 2015) 4.
[754] Office of the Attorney General, Written Submission to Samoa Law Reform Commission, *Civil Procedure Rules Issues Papers 1 and 2* (30 Januray 2017).

parties to the proceeding have consented; or it would be fairer, safer or more convenient to hear the proceeding at a different location.

Recommendations:

120. Both the SCR and MCR should specify that a Court may determine or change the location of a trial. In making such a determination a Court should have regard to whether both parties to the proceeding have consented, and whether it would be fairer, safer or more convenient to hear the proceeding at a different location considering the overriding purpose of the Rules.

Failure to Appear

633. In the SCR*,* if a plaintiff does not appear at a trial, the Court may adjourn or strike out proceedings.[755] If the defendant does not appear and the claim is for a liquidated claim, the Court may give judgment by default without a hearing.[756]

634. In the MCR, if neither party appears at the hearing, the proceedings may be struck out.[757] If the plaintiff does not appear then:

- If the defendant admits the claim, the Magistrate or Fa'amasino Fesoasoani can give judgment as if the plaintiff did appear; or
- If the defendant does not admit the claim, the proceedings may be struck out and costs orders made against the plaintiff as the court sees fit.[758]

635. If the defendant does not appear then the Magistrate or Fa'amasino Fesoasoani may give judgment as just, after seeing proof of service and facts entitling the plaintiff to relief. If a claim is for a liquidated amount then the court may give judgment without requiring the plaintiff to give evidence.[759]

Comparable Jurisdictions

New Zealand

636. The High Court Rules state that if the plaintiff appears and the defendant does not, the plaintiff must prove the cause of action insofar as the burden of proof rests with the plaintiff.[760] However if the defendant appears and the plaintiff does not, the defendant

[755] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 117.
[756] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 118.
[757] *Magistrates' Courts Rules 1971* (Samoa) r 22.
[758] *Magistrates' Courts Rules 1971* (Samoa) r 23.
[759] *Magistrates' Courts Rules 1971* (Samoa) r 24.
[760] *High Court Rules 2016* (New Zealand) r 10.7; *District Court Rules 2014* (New Zealand) r 10.14.

is entitled to have the matter dismissed and must prove any counterclaim insofar as the defendant bears the burden of proof.[761] The effect of such judgment is as if the proceeding had been dismissed on the merits.

637. The rules also provide that if neither party appears when the proceeding is called, the Court may order it to be struck out.[762] The Court may later order for it to be reinstated on good cause shown by either party and on any terms it thinks fit.[763]

638. The rules go on to state that any verdict or judgment obtained when one party does not appear at the trial may be set aside or varied by the Court on any terms that are just if there has, or may have been, a miscarriage of justice.[764]

Australia (NSW, Victoria)

639. The UCPR provides that if a plaintiff fails to appear but has been provided with notice of the hearing date, the Court may:

- adjourn the hearing and direct that a notice of adjournment be served on the plaintiff within 5 days, advising the plaintiff that the proceedings may be dismissed if they or someone on their behalf do not appear at the adjourned hearing;[765] or
- dismiss proceedings.[766]

640. A defendant who intends to take no active part in the proceedings may include in their Notice of Appearance, a *statement* to the effect that they consent to all orders being made and the entry of judgment in respect of all claims. The defendant may not file a defence or affidavit or take any other steps in the proceedings if this statement is included, except with leave of the Court.[767]

641. In Victoria, if either party is absent at the trial, the Court may adjourn the trial, order that it not occur unless it is again set down for trial or other steps occur, or it can proceed with the trial. An application can be made however, for the Court to set aside or vary a judgment, order or verdict if obtained when a party was absent. This application must be made within 14 days after the trial.[768]

Vanuatu

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[761] *High Court Rules 2016* (New Zealand) r 10.8; *District Court Rules 2014* (New Zealand) r 10.15.
[762] *High Court Rules* (New Zealand) r 10.6(1).
[763] *High Court Rules* (New Zealand) r 10.6(2).
[764] *High Court Rules* (New Zealand) r 10.9.
[765] *Uniform Civil Procedure Rules 2005* (NSW) r 13.6(1).
[766] *Uniform Civil Procedure Rules 2005* (NSW) r 13.6(2).
[767] *Uniform Civil Procedure Rules 2005* (NSW) r 6.11
[768] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 49.02.

642. If the defendant fails to attend the trial, the court may adjourn the proceedings, give judgment for the claimant or allow the claimant to call evidence to establish their entitlement to judgment.[769]If the claimant fails to attend trial, the court may adjourn proceedings, dismiss the claim, give judgment to the defendant or allow the defendant to call evidence to show entitlement to judgment under a counterclaim.[770]

Submissions

643. In Issues Paper 2, the Commission sought submissions on the following:

- *Should both SCR and MCR be expanded to adopt additional and clearer procedures as adopted by the Vanuatu or New Zealand Rules for non-appearance of defendant or claimant/plaintiff?*
- *Should both SCR and MCR adopt procedures for plaintiff's non-appearance, similar to the UCPR (NSW)?*
- *Should a notice of appearance by the defendant prior to the Court hearing date be incorporated in the SCR and MCR, similar to the UCPR (NSW)?*

644. It was raised that the current rules regarding non-appearance in Samoa are sufficient and in line with comparative jurisdictions.[771]

Commission's View

645. The Commission considers that both rules should be expanded to adopt additional and clearer procedures for non-appearance of a defendant or claimant/plaintiff and to achieve consistency across both jurisdictions.

646. The provisions in both New Zealand and Vanuatu are clear and comprehensive and provide useful guidance for Samoa. The rules allow parties to produce evidence to show their entitlement to judgment. The Commission considers that these rules are appropriate and enable the court to properly determine how to deal with a case if a party or both parties fail to appear. It also ensures that the court can be satisfied on the basis of evidence that it is appropriate to dismiss the case, or otherwise adjourn it depending on the facts of the case.

647. The Commission considers that the rules in New Zealand providing that the Court may set aside or vary a verdict or judgement obtained when one party does not appear

[769]*Civil Procedure Rules 2002* (Vanuatu) r 12.9(1).
[770]*Civil Procedure Rules 2002* (Vanuatu) r 12.9(2).
[771]Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (17 June 2015) 4.

at the trial if there has or may have been a miscarriage of justice should be reflected in the rules for Samoa.

648. The Commission notes that Victoria also enables parties who failed to appear and had their claims dismissed, to apply to the court within 14 days of the trial, to have the order set aside or varied. The Commission does not consider it necessary to include this provision at this time. Submissions indicated that the current system is sufficient and therefore impliedly working well. By including the additional decision-making powers and enabling parties to call evidence to support their application for judgment, this ensures that the court has relevant information before it when making its decision to dismiss proceedings. Additionally, parties can also rely on the reinstatement provisions in the rules to reinstate proceedings to their original state before they were struck out.[772]

649. The Commission considers that including a provision similar to NSW relating to non-appearance by plaintiffs, namely that the case can be adjourned with a notice served on the plaintiff or otherwise dismissed, is not necessary. This is because the existing provision in the SCR already empowers a court to adjourn or strike out proceedings. If a case is adjourned then the plaintiff would invariably be informed about the adjourned court date. For the sake of consistency however, the Commission notes that the ability to adjourn proceedings if a plaintiff fails to appear is currently absent from the MCR but should be included.

650. The Commission also does not consider it necessary to include a provision similar to NSW, that a defendant include in their Notice of Appearance a statement indicating their intention not to appear at hearing. Although the Commission is aware that one possible reason for this is so that the Court is informed in advance of a defendant's intention not to appear, and to ensure there are no delays in proceedings through further adjournments, it considers that the orders presently available to the court in the SCR and MCR to adjourn or dismiss proceedings, are adequate and sufficient to respond to non-appearance depending on the facts of the case.

[772] See Reinstatement at 'Trial: Part C'.

Recommendations:

121. Both rules should be expanded to adopt additional and clearer procedures for non-appearance of defendant or claimant/plaintiff using the provisions in New Zealand and Vanuatu as a guide. More specifically, if the plaintiff appears and the defendant does not, the plaintiff must prove the cause of action insofar as the burden of proof rests with the plaintiff. However if the defendant appears and the plaintiff does not, the defendant should be entitled to have the matter dismissed and must prove any counterclaim insofar as the defendant bears the burden of proof.

122. Both rules should also provide that if neither party appears when the proceeding is called, the Court may order for the proceeding to be struck out.

123. Both rules should also empower the Court to reinstate the proceeding upon good cause being shown by either party and on any terms it thinks fit.

124. Both rules should also include that any verdict or judgment obtained when one party does not appear at the trial may be set aside or varied by the Court on any terms that are just if there has, or may have been, a miscarriage of justice.

125. For consistency and clarity, the rules should be the same in both the SCR and MCR.

B. EVIDENCE AND WITNESSES

651. In Issues Paper 2, the Commission highlighted that the Evidence Bill was going to be enacted. The Act has now been passed and came into force in 2015. The Commission notes that some of the questions identified in the Issues Paper may have been answered in the newly enacted *Evidence Act 2015* and will be emphasised in this Report.

652. The *Evidence Act 2015* provides uniformity for evidence that can or cannot be led in Court. The long title of the Evidence Act states that it is to help secure the just determination of proceeding by providing facts to be established by applying logical rules, promoting fairness to parties and witnesses, protecting rights of confidentiality and other important public interests, avoiding unjustifiable expense and delay and also to enhance access to and understanding of the law of evidence.[773] In this part, references to this Act will be made to accentuate the new statutory rules of evidence for civil proceedings in Samoa. This Act is to be taken into account in developing rules for the District and Supreme Court.

[773] *Evidence Act 2015* (Samoa) long title.

Oral Evidence, Affidavits and Written Statements

653. In the adversarial system, the judge relies on at least two parties presenting opposing submissions and where appropriate, evidence. When two parties do not agree on the facts relating to a proceeding, evidence is presented orally in court by a witness, by affidavit or a witness' written statement.

654. In short, an affidavit is a written sworn statement[774] while a witness statement is a written unsworn statement; oral evidence on the other hand is evidence given orally in Court by a witness.

Samoa

655. The current procedural requirements of oral and affidavit evidence in SCR provide that evidence may be taken orally or by affidavit in any civil proceeding. [775] In the *Evidence Act 2015*, the same rules are reiterated except for the reading of a written statement in the courtroom, which can be adduced if the rules allow it or if the parties consent.[776]

Comparable Jurisdictions

New Zealand

656. In New Zealand, the HCR (NZ) provides that the rules are subject to the *Evidence Act 2006 (New Zealand).* It also provides that any disputed questions of fact must be determined on evidence given orally in Court unless ordered otherwise.[777] This applies to evidence of disputed facts at trial. For interlocutory applications, evidence is given by affidavit, though the Court can accept oral evidence in certain circumstances.[778] In proceedings before a single Judge, if the parties agree, they may file an agreed statement of facts as evidence in affidavit form. The Court may still direct that oral evidence be given however, if it relates to disputed facts.[779]

657. In NZ there are provisions that govern video link in relation to proceedings generally and more specifically trans-Tasman proceedings.[780] These two parts provide helpful guidance of how the court can receive evidence in submission by video link or

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[774]It is generally sworn either on the bible or other religious text or by giving a non-religious affirmation.

[775] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 61.

[776] *Evidence Act 2015* (Samoa) s 71: the ordinary way of giving evidence in civil proceeding is:
orally or in an affidavit filed in Court or by reading a written statement in courtroom, if the rules permit the giving of evidence in this form or both parties consent to the giving of evidence in this form.

[777]*Judicature Ordinance 1908* (High Court Rules, New Zealand) r 9.10.

[778]*Judicature Ordinance 1908* (New Zealand) sch 2 (High Court Rules) r 7.27; Mathew Casey et al, *NZ Procedure Manual: High Court* (LexisNexis NZ Ltd, 2nd Edition, 2013)

[779]*Judicature Ordinance 1908* (New Zealand) sch 2 (High Court Rules) r 9.55.

[780] *High Court Rules 2016* (New Zealand) Part 10, subpart 6 and Part 28.

telephone conference. For example, an application to give evidence or provide submission should include,[781]

- The reasons for the proposed cause of action,
- The Nature of the evidence,
- The witnesses to be examined in a case where a evidence is proposed to be given,
- An estimate of the time an examination of witness will take,
- Whether issues of character or credibility are likely to be raised,
- In case for submission proposed to be made, and
- An estimate of time that will be required to make the submissions.

658. The Court may give directions in relation to procedure as he or she thinks fit.[782] The Court can also direct that the cost incurred in giving the evidence or making submissions by video link or telephone conference must be paid by the applicant.[783]

Australia (NSW/ Victoria)

659. The UCPR (NSW) provides comprehensive and detailed rules relating to evidence at trial.[784] Generally, evidence at trial must be given by witnesses orally before the Court.[785]The Court may order however, that the witnesses' evidence must be given by affidavit.[786] The Court can also order that evidence and submissions may be received by telephone, video link or any other form of communication.[787]Witnesses required to give evidence must be given at least 21 days' notice of the hearing date.[788]

660. In Victoria, there are comprehensive rules relating to evidence generally, evidence before trial and further provisions relating to subpoenas and order of evidence at trial. For example the SCR Victoria state that subject to agreement by the parties, evidence shall be given as follows:

- On an interlocutory application, by affidavit;
- At a trial commenced by writ, orally; or
- At a trial commenced by originating motion, by affidavit.[789]

661. The Court nevertheless retains discretion to order oral evidence on an interlocutory application or to permit affidavit evidence at a trial commenced by writ.[790]

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[781] *High Court Rules 2016* (New Zealand) r 28.12(2)
[782] *High Court Rules 2016* (New Zealand) rr 10.24 and 10.26.
[783] *High Court Rules 2016* (New Zealand) r 28.12(5)
[784]*Uniform Civil Procedure Rules 2005* (NSW) Part 31.
[785]*Uniform Civil Procedure Rules 2005* (NSW) r 31.1.
[786]*Uniform Civil Procedure Rules 2005* (NSW) r 31.1.
[787]*Uniform Civil Procedure Rules 2005* (NSW) r 31.3.
[788]*Uniform Civil Procedure Rules 2005* (NSW) r 31.5 which makes the *Uniform Civil Procedure Rules 2005* compliant with s 67 or s 99 of the *Evidence Act 1995* (Australia).
[789]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 40.02.

662. Appearance by video or audio link is also permitted under the Victorian rules. Parties must file 14 days' notice before the witness is required to give evidence. Parties can address the Court about making, varying or revoking an order permitting video or audio link. The Court can vary or revoke a direction permitting this form of evidence at any time and of its own volition, as well as on application by another party.[791]

Vanuatu

663. Similar to Australia, the CPR (Vanuatu) provides thorough and detailed rules in relation to the giving of evidence. Evidence is given by witnesses orally in the Magistrate court, unless the Magistrate orders otherwise.[792] Evidence in chief in the Supreme Court is given by sworn statement, unless Judge orders for a particular case or evidence to be given orally.[793]

664. Evidence by link (any form of communication like telephone, etc.) may be allowed by court when satisfied that it is impossible for the witness to attend court to give evidence.[794]An application for evidence to be given in link is to be in the form stipulated in the rules[795].

665. Furthermore, the court is to take into account the circumstances listed in the rules to allow evidence to be provided by link[796].

Submissions

666. In Issue Paper 2, the Commission sought submissions on the following:

- *Should the default position be to take evidence by way of affidavit or a sworn statement? Alternatively, should this change relate only to evidence in an interlocutory application?*
- *Should parties be able to agree to evidence by affidavit, with the Court retaining discretion to require oral evidence?*
- *Should both SCR and MCR allow for sworn statements that are filed and served on the opposing side without leave of the Court to automatically become evidence, unless the Court finds them inadmissible?*

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[790]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 40.03.
[791] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 41A and *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 42E(1).
[792]*Civil Procedure Rules 2002* (Vanuatu) r 11.2.
[793]*Civil Procedure Rules 2002* (Vanuatu) r 11.3.
[794]*Civil Procedure Rules 2002* (Vanuatu) 11.8 (1).
[795] *Civil Procedure Rules 2002* (Vanuatu) r. 11.8 (3).
[796] *Civil Procedure Rule 2002* (Vanuatu) r.11.8 (4).

- *Should the SCR and MCR provide for evidence to be given by way of affirmation as an alternative to swearing, consistent with the Oath, Affirmations and Declarations Act 1963 Samoa)?*

- *What timeframe for service of evidence should be adopted in the SCR and MCR?*

667. It was submitted that proceedings may be more efficiently dealt with if the default position was for evidence to be taken by way of affidavits. However, the Court would retain discretion to hear evidence orally rather than by affidavits.[797]

668. No further submissions were received by the Commission on other issues raised above.

Commissions View

669. While submissions indicated a preference for all evidence to be given by affidavit, the Commission considers that the default position should largely mirror the New Zealand and Victorian jurisdictions. That is, that oral evidence be given in all cases except for interlocutory applications (where affidavit can instead be the default position) and unless otherwise ordered by the Court. This preserves the rights of parties to test the evidence whilst still providing the Court with discretion to permit alternative forms of evidence and deal with proceedings more efficiently where appropriate.

670. In regards to sworn statements and providing evidence by way of affirmation, the Commission is of the view that the Rules should be consistent with section 71 of the *Evidence Act 2015 (Samoa)* and section 4 of the *Oath, Affirmations and Declarations Act 1963 (Samoa).*

671. The Commission also considers it appropriate to include a rule permitting parties to agree to alternative modes of evidence being given, which will also help to keep proceedings running efficiently (such as telephone or video link, provided it is available), if the Court is satisfied that it is impossible for the witness to attend Court to give evidence. This provision would not impact on the Court's discretion to order parties to give evidence in a particular way. The Commission considers that the Court can direct that costs incurred in giving evidence by telephone or video link must be paid by the applicant.

Recommendations:

126. Amend rule 61 of the SCR so that, subject to any agreement by the parties or court orders otherwise, evidence shall be given as follows:

[797] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (17 June 2015), 4.

- At trial, orally, unless ordered otherwise by the Court.
- On an interlocutory application, by affidavit.
- Any other alternative forms of communication (including telephone or video link provided its available) if the Court is satisfied that it is impossible for the witness to attend Court to give evidence.

127. The Court can direct that costs incurred in giving evidence by telephone or video link must be paid by the applicant.

128. The Rules should also replicate the provisions pertaining to Affirmation in *the Oath, Affirmations and Declarations Act 1963 (Samoa).*

Persons Authorised to take Affidavits

672. A document is not an affidavit until an oath is sworn or affirmed to verify its content, in front of a person lawfully authorised to take oaths and affirmation.[798]

673. There are no procedural rules in the MCR governing the taking of affidavits. In the *Oaths, Affidavits and Declarations Act 1963* and in the SCR, affidavits may be sworn before a:[799]

i. Solicitor of the Supreme Court;
ii. Registrar or Deputy Registrar of the Supreme or Magistrate Court;
iii. Postmaster;
iv. Collector of customs;
v. Medical Officer; or
vi. Any other person authorised from time to time by the Head of State.

674. The *Oaths, Affidavits and Declarations Act 1963* provides that the place and date of swearing an affidavit must be stated in the jurat. The jurat must be signed by the person witnessing the affidavit. These provisions are not replicated in the SCR.[800]

Comparable Jurisdiction

New Zealand

675. The HCR indicate that an affidavit must be sworn or affirmed in accordance with the *Oaths and Declarations Act 1957* (NZ) and before a person authorised under that Act to

[798] If a person does not wish to make an oath on a Bible or other religious text, they may make an affirmation. An affirmation can be used for all purposes where an oath is required by law. It has the same effect and force as an oath. See *Oaths, Affidavits and Affirmation Act 1963* (Samoa).
[799] *Oaths, Affidavits and Affirmation Act 1963* (Samoa) s 14(1).
[800] *Oaths, Affidavits and Affirmation Act 1963* (Samoa) s 13(8).

witness affidavits.[801] There are 12 categories of persons authorised to witness an affidavit under that Act.[802] These include a barrister and solicitor of the High Court, justice of the peace, a Parliament member and Registrar or Deputy Registrar of the Supreme Court and the Court of Appeal.[803]The Rules also stipulate however, the form and content of affidavits in detail. This includes that the authorised witness must sign after the person making the affidavit has signed it, and the witness must state the date, place and their qualification.[804]

Australia (Victoria)

676. In Victoria, the *Evidence (Miscellaneous Provisions) Act 1958* set out 17 categories of persons who are authorised to witness affidavits.[805] These include a legal practitioner, justice of the peace, police officer and a judge. The *Supreme Court (General Civil Procedure) Rules* 2015 also set out the form of affidavit, including requirements that the jurat and each page of the affidavit be signed by the authorised witness. The authorised witness is also required to include their name, address and qualification to witness affidavits.[806]

Vanuatu

677. In Vanuatu, the *Oaths Act 1964* provides that oaths, affidavits, affirmation or declaration are administered by any judicial officer. These include any judge, magistrate and justice of an island court.[807] They may also be administered by any registrar of the Supreme Court, clerk of the magistrate court or any clerk of the island court as instructed by a judicial officer in such court.[808]

Submissions

678. In Issues Paper 2, the Commission sought submissions on the following:

- *Whether a 'postmaster', a 'collector of customs, or a 'medical officer' should retain the authority to swear affidavits?*
- *Should there be a provision requiring the date, name and location upon swearing and signing of affidavits?*

[801] *High Court Rules 2016* (New Zealand) 9.73.
[802]*Oaths and Declarations Act 1957* (New Zealand) s 9.
[803]*Oaths and Declarations Act 1957* (New Zealand) s 9.
[804] *High Court Rules 2016* (New Zealand) r 9.76.
[805]*Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 123C.
[806]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 43.01.
[807]*Oaths Act 1964* (Vanuatu) s 1.
[808]*Oaths Act 1964* (Vanuatu) s 10(2).

679. It was raised in submissions that the practice nowadays is that only solicitors and registrars may witness affidavits.[809] However, it was raised that before any changes are made to exclude certain authorised persons in the *Oaths, Affidavits and Declarations Act*, some research is required to ascertain the rationale to include them in the list of authorised persons. The reasons for retaining the authorised persons list may no longer be relevant in Samoa's current circumstances and the list of authorised persons may then be limited to solicitors and registrars.[810]

Commissions View

680. The Commission found limited information on the rationale for including certain persons on the list of authorised witnesses. On one view, having a comprehensive list enables parties to more easily swear affidavits and may therefore avoid delays in legal proceedings. However, it is important to recognise and preserve the evidentiary value of an affidavit, and the formality associated with swearing an affidavit before an officer of the Court. This view would favour a limited list of authorised witnesses. Additionally, the *Oaths, Affidavits and Declarations Act1963* is quite dated, as are the current rules, and the Commission sees a need to update the list of witnesses in line with current practices. The Commission therefore considers that a postmaster, collector of customs and medical officer should be removed from the list of persons authorised to witness affidavits.

681. The Commission is also of the view that the rules in the *Oaths, Affidavits and Declarations Act 1963* regarding the place and date of wearing an affidavit should be replicated in the SCR ensure that affidavits are properly sworn and their evidentiary value is preserved. To this end, the Commission also considers it beneficial to include in this rule, that the authorised witness' qualifications are also included. This is a feature of the Victorian rules. This reduces the likelihood of fraud in terms of affidavits being sworn in front of unauthorised persons and again, preserves the evidentiary value of affidavits. For the sake of consistency and to eliminate any confusion between requirements, the Commission considers it appropriate that this amendment also be made to the *Oaths, Affidavits and Declarations Act1963*.

682. The Commission considers that the rules relating to affidavits should be inserted into the MCR as well as the SCR, as evidence may be led by affidavit in the District Court and it ensures consistency across jurisdictions.

Recommendations:

[809] Office of the Attorney General, Submission No 2 to Samoa Law Reform*, Civil Procedure Rules Issues Paper 2* (17 June 2015) 4.
[810]Office of the Attorney General, Submission No 2 to Samoa Law Reform, *Civil Procedure Rules Issues Paper 2* (17 June 2015) 4.

129. Modernise and update the rules by omitting the following persons currently authorised to witness affidavits: Postmaster; Collector of customs; Medical Officer. Persons authorised to witness affidavits should include: Solicitor of the Supreme Court; Registrar or Deputy Registrar of the Supreme Court or Magistrate Court; or any other person authorised by the Head of State on the recommendation of the Chief Justice.

130. Insert provision into the SCR and MCR that the place and date of swearing an affidavit, and the qualifications of the authorised witness, must be included in the jurat and that the jurat must be signed by the authorised witness.

131. In order to ensure consistency between the *Oaths, Affidavits and Declarations Act 1963* and the new civil procedure rules, the Commission also recommends that the requirement to include the qualifications of the authorised witness is also added to the *Oaths, Affidavits and Declarations Act 1963.*

132. Insert rules relating to affidavits into the MCR.

Expert Evidence

683. In many trials, an expert is called as a witness to give an opinion about a fact in issue. An expert is a person who has experience or expertise in a subject calling for special skill or knowledge. There must be a field of specialised knowledge identified and it should be relevant to the issues arising in the pleadings. Such a witness can give opinions within their area of expertise, and is not limited to giving evidence of facts as are other witnesses. Examples include medical opinions as to whether the Plaintiff worker is suffering from a claimed injury or evidence as to whether an engineering structure was designed or constructed satisfactorily.

Samoa

684. An "expert" means a person who has specialised knowledge or skill based on training, study, or experience.[811] Expert evidence has been defined as the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion.[812] The opinion of an expert witness is admissible if it helps to understand other evidence in the proceeding or to ascertain any fact that is of consequence to the determination of the proceeding.[813] The *Evidence Act 2015* is silent on the issue of whether an expert witness should be called to provide expert opinion on behalf of a party or appointed by the Court.

[811] *Evidence Act 2015* (Samoa) s 2.
[812] *Evidence Act 2015* (Samoa) s 2.
[813] Statements of opinion are otherwise inadmissible in court proceedings by virtue of the 'opinion rule' found in section 14 of the *Evidence Act 2015* (Samoa).

685. In preparing and giving expert evidence, the *Evidence Act 2015* requires that an expert conduct themselves in accordance with the rules.[814] However, the SCR and MCR currently do not contain any rules for expert conduct.

Comparable Jurisdiction

New Zealand

686. The New Zealand rules provide that the Court may appoint an expert witness in a proceeding or interlocutory hearing and each party may call one expert witness (or more by leave of the Court) to give evidence on a question put to the Court appointed expert. [815] Parties must give notice of intention to call an expert witness within a reasonable time before the trial.[816] At trial, the Court may direct when the expert gives their oral evidence. [817]

687. Regarding cost, the court has discretion to order one or more of the parties to provide remuneration for the expert in proportions that it decides.[818] Where the Court appoints an expert of its own initiative, the Ministry of Justice pays the expert. [819] However, the Court retains the discretion to include the expert's remunerations as part of the cost of the proceeding. [820]

688. An expert witness must comply with the code of conduct when preparing any written statement or giving oral evidence in a proceeding.[821]

Australia (NSW)

689. In NSW, the UCPR states that if a party intends to call an expert witness during the hearing, it must first seek directions from the Court.[822] If directions are not sought, expert evidence is not allowed at the trial. The Court will give directions specifying things such as the time of service of expert's report, the issues which cannot be mentioned and if a court appointed expert should be engaged.[823]

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[814]*Evidence Act 2015* (Samoa) s 17.
[815]*Judicature Act 1908 (High Court Rules)* (New Zealand) r 9.42; *District Court Rules 2014* (New Zealand) r 9.3.
[816]*Judicature Act 1908 (High Court Rules)* (New Zealand) r 9.42; *District Court Rules 2014* (New Zealand) r 9.33.
[817]*Judicature Act 1908 (High Court Rules)* (New Zealand) r 9.46; *District Court Rules 2014* (New Zealand) r 9.37.
[818]*Judicature Act 1908 (High Court Rules)* (New Zealand) r 9.41(2); *District Court Rules 2014* (New Zealand) r 9.32 (2).
[819]*Judicature Act 1908 (High Court Rules)* (New Zealand) r 9.41(3); *District Court Rules 2014* (New Zealand) r 9.32 (3).
[820]*Judicature Act 1908 (High Court Rules)* (New Zealand) r 9.41(4); *District Court Rules 2014* (New Zealand) r 9. 32 (4).
[821]Judicature Act *1908 (High Court Rules)* (New Zealand) r 9.43 (See Schedule 4 HCR for Code of Conduct); District Court Rules 2014 (New Zealand) r 9.34.
[822]*Uniform Civil Procedure Rules 2005* (NSW) r 31.19.
[823]*Uniform Civil Procedure Rules 2005* (NSW) r 31.20.

690. An expert, whether it be a party's expert or a court appointed expert may be cross examined by the other party,[824] and if cross examination is requested by a party, the expert must attend the Court for the examination.

Australia (Victoria)

691. The procedure is slightly different in Victoria. In Victoria, a party who seeks to adduce expert evidence need not seek directions from the court. Nevertheless they must provide the expert with a copy of the Code of Conduct and comply with the provisions regarding the content, scope and service of the expert report as well as any other orders made by the Court relating to the expert report.[825]

Vanuatu

692. In Vanuatu, when a party wants to call an expert witness, that party must notify all other parties and give them a copy of the witness' report.[826] This must be done within 21 days before the trial date for matters in the Supreme Court and within 14 days if it is a response to an already existing report or a date set by the court.[827] In the Supreme Court, the expert witness' report must be done at the first conference.[828] Only one expert witness may be called unless the court orders otherwise.[829]

Submissions

693. In Issues Paper 2, the Commission sought submissions on the following:

- *Should provision be made for expert witnesses to be called either by the Court and/or by parties similar to rules in New Zealand, Vanuatu and Australia?*

- *Should provision be made for joint experts to be appointed by the Court?*

694. It was submitted that rules pertaining to expert witnesses should be prescribed and modelled on comparative jurisdictions. It was noted with concern that these rules should be formulated in light of the resource constraints in Samoa.[830]

Commissions View

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[824]*Uniform Civil Procedure Rules 2005* (NSW) rr 31.43 and 31.51.
[825]*Uniform Civil Procedure Rules 2005* (NSW) r 44.03.
[826]*Civil Procedure Rules 2002* (Vanuatu) r 11.12 (1).
[827]*Civil Procedure Rules 2002* (Vanuatu) r 11.12 (2).
[828]*Civil Procedure Rules 2002* (Vanuatu) r 11.12 (3).
[829]*Civil Procedure Rules 2002* (Vanuatu) r 11.12 (4).
[830]Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (17 June 2015)4.

695. The Commission considers that the role of expert witnesses needs to be regulated. This can be done through amendments to the rules and/or by implementing a Code of Conduct for experts. Either way, the following matters need to be covered.

696. The Commission is of the view that the SCR and MCR should include rules relating to expert witnesses, specifically their conduct emphasing their duties to the Court in preparing written statements and reports and giving oral evidence. In particular the rules should set out timelines for filing expert reports and filing notices of intention to cross-examine experts. The rules should also clarify whether an expert can be called by both parties as well as appointed by the Court. It is the Commission's view that any party to a proceeding should be entitled to call an expert. However, if a party intends to rely on an expert witness during the hearing, it must first seek directions from the Court.

697. The rules should emphasise that where practicable, the parties (or if the court so orders) should by agreement jointly engage a single expert.[831] Where this would not be just or practicable, the Expert Code of Conduct should establish a duty for experts to work cooperatively with other expert witnesses.[832]

698. The Commission notes that in other jurisdictions parties tend to bear responsibility for the remuneration of their own experts, subject to judicial discretion regarding costs orders. This should be reflected in Samoa. Where the Court appoints an expert of its own initiative, the Ministry of Justice should pay the expert. The Commission suggests however, that the Court should retain the discretion to include the expert's remuneration as part of the cost of the proceeding.

699. The Commission suggests that these changes are necessary to ensure the efficient and fair use of expert evidence. There must be clear rules ensuring that experts' qualifications and experience and exact field of expertise is set out. Moreover, experts must be clear that their duties are ultimately to the court and not to any particular party. With this in mind it is suggested that where witnesses are employed by government bodies, steps should be taken to ensure that opposing parties are not disadvantaged by having to pay for their experts where the government body does not.[833]

Recommendations:

133. The rules should include provisions relating to matters such as preparing written

[831] *Uniform Civil Procedure Rules 2005* (NSW) r 31.37
[832] *Uniform Civil Procedure Rules 2005* (NSW) sch 7(4).
[833] See for example, *District Court Benchbook* 2009 (Samoa) [2.15].

statements, reports and giving oral evidence for expert witnesses.

134. The rules should also provide clearly the responsibility of respective parties and the court in the remuneration of experts. The Court should have discretion to order one or more of the parties to provide remuneration for the expert in proportions that it decides. Where the Court appoints an expert of its own initiative, the Ministry of Justice pays the expert. However, the Court retains the discretion to include the expert's remunerations as part of the cost of the proceeding.

135. If not set out in the rules, then a Code of Conduct for expert witnesses should be developed to regulate the conduct of expert witnesses, particularly when preparing written statements or giving oral evidence in proceedings. This code of conduct should provide that the expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise. This code of conduct should also set out other necessary matters such as the requirement for an expert witness to provide qualifications, the procedure for providing expert evidence, a duty on the expert to comply with directions from the court etc.

C. JUDGMENT

Strike Out

Overview

700. A strike out is a legal motion made by one party in a trial requesting that the presiding judge order the removal of all or part of the opposing party's pleading to the court. Common grounds for a strike out motion include instances whereby a claim is considered 'vexatious' or 'unfounded'.[834] It is one way of dealing with incorrect pleadings, but it has a wider application relating to interlocutory applications and abuse of procedure. The strike out procedure is used to tidy up documents and limit issues for the Court's consideration. Generally, applications are made to strike out only part of a document or claim. Striking out a whole proceeding or cause of action is more drastic and is only granted where a lesser remedy would be insufficient. [835]

General Application

701. Under the SCR, a defendant may apply to have proceedings struck out by a Judge where no cause of action is disclosed.[836] The principles governing a strike out motion have been discussed in many cases including *Enosa v Samoa Observer* where the Court

[834] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rded, 2012).
[835] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rded, 2012).
[836] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 70.

stated that the jurisdiction to strike out a statement of claim for disclosing no reasonable cause of action must be sparingly exercised.[837] The jurisdiction will only be exercised where it is clear that the plaintiff's claim is so clearly untenable that it cannot possibly succeed.[838] The rationale is that a litigant should not be easily deprived of their right to have their case tried in court unless it is apparent that the case cannot succeed if it goes to trial.[839]

702. The MCR do not contain the same strike out provisions, except for situations where neither party appears at hearing.[840] Preliminary consultations conducted in 2012 noted that strike outs are routinely used by some defence lawyers in the Supreme Court as a 'first defence' to any proceedings filed. The Commission raised concerns in Issues Paper 1 about the waste of cost and resources that may be caused by this type of proceeding. Moreover, a member of the judiciary shared the same concern with the Commission and noted the need to consider the practice in the Federal Court of Australia (discussed below) where it has introduced novel ways of dealing with frivolous or vexatious proceedings.

Comparable Jurisdictions

New Zealand

703. In New Zealand, the HCR and DCR provide that the court may strike out part or all of a pleading.[841] The rule can be used where all or part of a pleading discloses no reasonable cause of action or defence, is likely to cause delay or prejudice, is frivolous or vexatious or an abuse of court process.[842]A strike out application is made by interlocutory application, however the High Court may dismiss a proceeding without an application being made.[843] The approach to summarily striking out proceedings in New Zealand is similar to Samoa, in that the case must be 'so certainly or clearly bad' that it should not continue.[844]

704. The NZ rules also contain provisions separate to the strike out provisions that deal with vexatious litigants in various parts of the rules. For example, the court may,

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[837]*Enosa v Samoa Observer* [2005] WSSC 54.
[838]*Enosa v Samoa Observer* [2005] WSSC 54.
[839]*Peter Meredith Companyv Drake Solicitors Nominee Company Ltd* [2001] WSSC 32 .
[840] This is discussed in Failure to Appear at 'Trial: Part A.'
[841] *Judicature Act 1908* (New Zealand) sch 2(High Court Rules) r 15.1; *District Court Rules 2014* (New Zealand) r 15.1.
[842] *High Court Rules 2016* (New Zealand) r 15.1(1).
[843] Mathew Casey et al, *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd, 2nd ed, 2013) 548 [15.1.2B].
[844] Mathew Casey et al, *New Zealand Procedure Manual: High Court* (LexisNexis NZ Ltd, 2nd ed, 2013) 550 [15.1.7], citing *Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725 (Elias CJ and Anderson J at [32]-[33]).

- Order a party to pay indemnity costs if the party has acted vexatiously[845]
- Dismiss or stay all or part of the proceeding if it is vexatious[846]
- Refuse the application for a charging order where the amount involved is so small that the issue of a charging order is vexatious or worthless, or if the charging order has been issued (whether as of right or on application), revoke the charging order.[847]

Australia

705. In the Federal Court of Australia, a Registrar has power to accept or refuse a document for filing if they consider it an abuse of process, frivolous or vexatious.[848] If a Federal Court Registrar accepts an originating process for filing, a defendant can still apply to have the matter struck out, the document removed from the court, or for summary judgment. The strike out proceedings in this circumstance are similar to those in Samoa.[849]

706. There are additional provisions under the Australian Federal Court Rules for vexatious litigants. If a person starts a vexatious proceeding then the respondent, Attorney-General, Registrar or an interested person can apply to the Court for an order that the person must not continue or start the existing or another proceeding without leave of the Court.[850] This is an effective way of dealing with people who continually file vexatious proceedings, as leave of the Court is required before further proceedings may be commenced or continued.

Australia (New South Wales)

707. In NSW, the Court at any stage can make an order that the whole or part of a pleading be struck out if it discloses no reasonable cause of action or defence, has a tendency to cause prejudice, embarrassment or delay or if the pleading is an abuse of court process.[851]

708. If the evidence establishes that the plaintiff has no arguable cause of action and cannot possibly succeed, this is considered a frivolous and vexatious proceeding and the Court will dismiss the proceeding.[852]

Vanuatu

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[845] *High Court Rules 2016* (New Zealand)r 14.6.
[846] *High Court Rules 2016* (New Zealand) r 15.1.
[847] *High Court Rules 2016* (New Zealand) r 17.43.
[848] *Federal Court Rules 2011* (Australia) r 2.26.
[849] *Federal Court Rules 2011* (Australia) rr 6.01 and 26.01.
[850] *Federal Court Rules 2011* (Australia) rr 6.02-6.03.
[851]*Uniform Civil Procedure 2005* (NSW) r 14.28.
[852]*Uniform Civil Procedure 2005* (NSW) r 13.4.

709. There is no specific provision in the Vanuatu Civil Procedure Rules to strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process. Instead, the court can only strike out a proceeding if the claimant does not take the steps required to ensure the proceeding continues, or if the claimant does not comply with court orders during the proceeding.[853]

Submissions

710. In Issues Paper 1, the Commission sought views on the following questions:

- *Should the CPR introduce either or both of the following procedures to deal with vexatious documents and vexatious litigants? (a) the Registrar may refuse to accept a document for filing if satisfied that it is an abuse of the process of the Court or is frivolous or vexatious; (b) If a person starts a vexatious proceeding, the defendant or the AG, Registrar or other interested person may apply to the Court for an order that a person may not continue, start or continue any other proceeding without leave.*

711. The Honourable Chief Justice in July 2012 was hesitant to consider the issues raised in the above questions indicating that the terms 'abuse', 'frivolous' and 'vexatious' have acquired a more legal and technical definition. However, he expressed the view that strike out proceedings are sufficient in saving the Court time from unmeritorious claims.

712. It was submitted that Registrars should not be given additional powers to deal with strike out proceedings because they are not qualified. An example was provided where one of the District Court Judges had struck out a proceeding only for it to be put back on the schedule by a Registrar.[854]

713. It was also submitted that conferring powers on the Registrar is likely to be contentious because the Registrar is not generally equipped to make judicial decisions, and that a vexatious litigant procedure, like that used in New Zealand or the Federal Court of Australia, may be the better option.[855]

Commissions View

714. The Commission notes that there is a lack of information on how regularly proceedings are struck out for being vexatious. Nevertheless, it is of the view that the existing strike out provisions in the SCR and MCR are sufficient and do not require any

[853] *Civil Procedure Rules 2002* (Vanuatu) r 9.10(1)-(3). If three months pass with no steps taken, the court can give notice and if claimant does not appear and show cause – strike out the proceedings; the court can also strike out proceedings without notice if no step has been taken in the proceedings 6 months.
[854] Preliminary Consultation with Ainuu (Ainuu Law Firm, Malifa) 18 July 2012.
[855] Andrew Beck, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 April 2015, 2.

change until more information is available. This is because the current provisions save the Court time from unfounded and unmeritorious claims.

715. While the Commission is aware that the Federal Court of Australia enables Registrars to accept or refuse a document for filing if they consider it an abuse of process, frivolous or vexatious, it does not consider it appropriate to include this provision in Samoa. Submissions indicated that this would be contentious given that Registrars' are not qualified and not generally equipped to make judicial decisions.

716. The Commission nevertheless considers that including provisions to deal specifically with vexatious litigants should be inserted. These could include vexatious litigants paying for indemnity costs, the court dismissing or staying all or part of proceedings if vexatious, or refusing the application for a charging order if the amount is so small that the issue of a charging order is vexatious, for example. The NZ provisions provide some guidance here.

Recommendations

136. Include provisions in both rules to deal specifically with vexatious litigants such as,

- provisions allowing the court to order a vexatious litigant to pay costs;
- provisions to dismiss or stay proceedings if it is vexatious;
- provisions to refuse an application for a charging order if the amount involved is considered so small as to be vexatious (or if a charging order has been issued, to revoke it).

Setting Aside a Judgment

Overview

717. Usually a judgment binds parties, subject to any right of appeal. In very limited circumstances though, it is possible to have a judgment set aside.[856] These rules apply only to summary judgments and default judgments.[857] In each case, the court would normally be reluctant to act unless a miscarriage of justice can be shown.[858]

General Application

[856] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 245-246.
[857] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 245-246.
[858] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 245-246.

718. The SCR provides that an application may be made to set aside a judgment, order and any execution in the absence of the defendant.[859] The application may be made on the day the judgment was given or on notice at least 7 days before the new hearing.[860]There is no similar procedure in the MCR for setting aside judgment.

719. The SCR itself is silent as to the grounds that must be satisfied to set aside the judgment. This was, however clarified in *Lauano v Samoa National Provident Fund* which appeared to follow the grounds for setting aside on a similar previous version of the New Zealand *High Court Rules*.[861] While the discretion is ultimately unfettered to have a judgment set aside and a new hearing ordered, [862] an applicant must establish a substantial ground of defence, a reasonable justification or explanation for the delay, and that the plaintiff will not suffer irreparable harm if the judgment is set aside.[863]

Comparable Jurisdictions

New Zealand

720.In New Zealand, judgments can be set aside or varied in certain circumstances if it appears that there may have been a miscarriage of justice.[864] These include where there is no defence or cause of action that can succeed for summary judgment on liability,[865] and judgment following non-appearance.[866] Some of the factors that a court will take into account when deciding whether to set aside a judgment have come out of case law and include whether the defendant had a substantial ground of defence and whether there was an explanation for failing to appear on the original application.[867]

721.Rules regarding setting aside are present in the HCR (NZ) Rules as well as in the District Court Rules.[868]

Australia (NSW, Victoria)

722.A general power is given to the court in NSW to set aside a judgment or order if it was given, entered or made irregularly, illegally or against good faith.[869]A judgment or order

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[859]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 140.
[860] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 140.
[861] *Lauano v Samoa National Provident Fund* [2009] WSCA 3 at [3]; See *Russell v Cox* [1983] NZLR 654.
[862] *Lauano v Samoa National Provident Fund* [2009] WSCA 3 at [3].
[863]See *Faumuina v Atoa* [2016] WSSC 133.
[864]*High Court Rules 2016* (New Zealand) r 12.14.
[865] This is where a court can give judgment if the applicant party satisfies the court that the only issue in dispute is the amount being claimed.
[866] *High Court Rules 2016* (New Zealand) rr 10.9, 12.2, 12.3.
[867] See further in Mathew Casey et al, *New Zealand Procedure Manual: High Court* (LexisNexis NZ, 2nded, 2013) 498 [12.14.4].
[868] See for example, *District Court Rules 2014* (New Zealand) rr 10.16, 12.14 and 15.11.
[869]*Uniform Civil Procedure 2005* (New South Wales, Australia) r 36.15

of the court in any proceeding can also be set aside if the parties consent.[870] To set aside the judgment an order must be made and there must be sufficient cause. Often it is only default judgments and consent orders which are set aside. The Court is normally reluctant to set aside judgments after a hearing where the merits were discussed and all parties were present.

723.In *Northey v Bega Valley Shire Council,*[871] the Court held that mere absence of a party is insufficient by itself to justify setting aside an order. There must be some added factor that makes it unjust for the order to stand.

724.In Victoria, the SCR helpfully insert the court's power to set aside a judgment, underneath each type of judgment that it relates to. For example, under 'Judgment in default of appearance or pleading' in Order 21 of the SCR, the power to set aside or vary this type of judgment is included at rule 21.07. Similarly, under Order 22 relating to 'Summary judgment', the power to set aside or vary judgment is included at rule 22. 15. This is a clear way of setting out which judgments a court can set aside or vary.

Vanuatu

725.In Vanuatu, the court can set aside a default judgment. The defendant can apply at any time to have a default judgment set aside, and must provide the reasons why he or she did not defend the claim, details of his or her defence and a sworn statement in support of the application.[872] The court can then make the order to set aside the default judgement if satisfied the defendant has shown reasonable cause for not defending the claim and has an arguable defence, either about his or her liability for the claim, or the amount of the claim.[873] It is worth nothing that although the court must be satisfied of at least the above matters to set aside a default judgement, it can take other matters into account in exercising its discretion.[874]

Submissions

726. In Issues Paper 2, the Commission sought views on the following questions:

- *Should the SCR relating to the setting aside of a judgment or order made by the Court in the absence of the defendant be amended to provide more detail and clarity around whether mere absence of a party is sufficient for an order to be set aside following the New South Wales provision; or*

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[870]*Uniform Civil Procedure 2005* (New South Wales, Australia) r 36.15.

[871] *Northey v Bega Valley Shire Council* [2012] NSWCA 28.

[872]*Civil Procedure Rules 2002* (Vanuatu) r 9.5(2).

[873]*Civil Procedure Rules 2002* (Vanuatu) r 9.5(3).

[874]*Brenner v Johnson* [1985] VUSC 8; 1 Van LR 180; *Nelson v A-G* [1995] VUCA 1; CAC 7 of 1995; *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004; *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004.

- *Should the Court take into consideration whether just terms to set aside have been established in order to establish that setting aside is in the interests of justice following the New Zealand Rule? (For example, should the applicant have to justify their absence through no fault of their own before a judgment or order is set aside?)*
- *Should procedures for the setting aside of a judgment or an order made by the Court be included in the MCR?*

727. The Attorney General's Office when consulted in June 2015 was of the view that the current practice for setting aside judgment in Samoa is consistent with practices in Australia and New Zealand. It noted that if procedures for setting aside are prescribed (as raised in above questions), then there needs to be further research into the grounds for setting aside as adopted by our courts and at common law. Moreover, if procedures for setting aside are to be included in the SCR then it should also be included in the MCR.

728. In response to question 1 above, Ruby Drake in November 2015 expressed the view that rule 140 in the SCR is adequate and case law has already established the grounds upon which the Court may exercise its discretion. Furthermore, she disagrees with question 2 and submitted that lawyers should honour their professional obligations and attend Court to fulfil their obligations to their clients.

Commission's View

729. As noted above, there is existing case law in this area which has clarified the current state of the law.[875] Moreover submissions suggest that the practice in this area is broadly in line with comparable jurisdictions. Given that the court's power to set aside judgments or orders is ultimately unfettered,[876] a change in line with NSW law where mere absence of a party is sufficient grounds for setting aside would go against the spirit of an unfettered power and thus should not be adopted. It is submitted that any codification of the common law grounds should retain the court's unfettered discretion, perhaps by listing the three grounds from *Lauano* for the court to consider along with a fourth ground allowing the court to set aside a judgment or order if it thinks fit or if the interests of justice so require. The Commission considers that under the existing common law the interests of justice are already part of the test for setting aside, present within the court's unfettered discretion and within the second ground in *Lauano* requiring a reasonable justification or explanation for the delay. Nevertheless this should be set out as a fourth ground in line with the New Zealand Rules.

730. These changes would be in line with existing case law, New Zealand jurisprudence in this area and codify the common law to make it more easily accessible and clear.

[875] See for example, *Lauano v Samoa National Provident Fund* [2009] WSCA 3.
[876] *Lauano v Samoa National Provident Fund* [2009] WSCA 3 at [3].

731. The Commission suggests that the position of setting aside judgments and orders in the SCR should be replicated in the MCR.

Recommendations:

137. Codify the existing common law established in *Lauano v Samoa National Provident Fund* [2009] WSCA 3, adding an additional interests of justice ground.

138. Maintain and codify the court's unfettered discretion.

139. Include setting aside provisions in the MCR that mirror those in the SCR as appropriate.

Reinstatement

732. If a proceeding has been struck out due to a plaintiff not appearing at trial, then the plaintiff can apply to have the proceeding reinstated to the original state before it was struck out. [877] To reinstate a proceeding, a plaintiff applies to the court by ex-parte motion and notice is served on the defendant at least 7 days before the hearing. Additionally, the court may make an order for costs of reinstatement as it sees fit.[878]

733. The SCR does not provide criteria to be considered by the Court when determining a reinstatement motion. The MCR do not contain an equivalent provision for reinstatement of proceedings after dismissal. It is not readily apparent the extent to which reinstatements are sought in Samoa, nor the constraints on Courts and resource issues associated with such applications.

Comparable Jurisdictions

New Zealand

734. In New Zealand, the rules provide for reinstatement by a judge's own initiative and by application of a party.[879] The rules of reinstatements also apply to proceedings struck out due to non-appearance by either party, not just a failure to appear by the plaintiff (as is the case in Samoa).

735. Reinstatement provisions are contained in both the High Court and District Court Rules.[880]

Australia (NSW)

[877] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 43.
[878] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 139.
[879] *High Court Rules 2016* (New Zealand) r 7.40(4); See also *District Court Rules 2014* (New Zealand) r 7.33(4).
[880] *High Court Rules 2016* (New Zealand) r 7.40(4); See also *District Court Rules 2014* (New Zealand) r 7.33(4).

736. In New South Wales, the Court has a general power under the UCPR to reinstate proceedings if any step has been taken to enforce a judgment or order that the court has varied or set aside.[881] There are also specific provisions that deal with reinstatement in appeal and cross-appeal proceedings.[882]

Vanuatu

737. The Vanuatu rules provides for a process referred to as 'reopening a proceeding'. Here, an order by the court may allow a party to re-open a proceeding if it is necessary that substantial justice needs to be done. This application must be done after trial but before judgment.[883]

Submissions

738. In issues Paper 2, the Commission sought views on the following questions:

- *Where there has been a 'reinstatement of a proceeding struck out as a result of a non-appearance, should the SCR be amended to provide more detail and clarify the grounds to be satisfied for reinstatement, including on the Judge's own initiative, as in New Zealand?*
- *Should the procedure for reinstatement currently contained in the SCR also be included in the MCR?*

739. The Attorney General's Office in June 2015 submitted that clear grounds and reasons must be provided in order to reinstate a matter that has been struck out as a result of non appearance. It also agreed that the SCR and MCR should have the same procedure in relation to reinstatement.

740. One submitter agreed with question 1 above but further added that to safeguard the appearance of impartiality; the existing Rule should be left as it is. The claim is that of the plaintiff and that is the party who should initiate the application of reinstatement. She did not agree that procedure for reinstatement in the SCR should be included in the MCR, but did not provided reasons.[884]

Commission's View

741. Where a proceeding has been struck out due to non-appearance of a plaintiff, that plaintiff should be able to apply to the court for the proceeding to be reinstated. Similar to New Zealand, both the SCR and MCR should contain identical criteria to this effect

[881] *Uniform Civil Procedure Rules 2005* (NSW) r 51.54.
[882] *Uniform Civil Procedure Rules 2005* (NSW) r 51.19.
[883] *Civil Procedure Rules 2002* (Vanuatu) r 12.10
[884] Ruby Drake, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Review*, 25 November 2015, 4.

outlining the factors for a court to consider in determining reinstatement motions. These factors should include good cause for the non-appearance and the interests of justice. These criteria, while broad, will assist in courts in clearly formulating their reasons for permitting or denying reinstatement motions.

742. The Commission considers that the rules should be replicated in the MCR given failure to appear provisions are also contained in the MCR. This is also consistent with New Zealand, which has reinstatement available at the High Court and District Court levels.

743. The Commission also considers that reinstatement provisions should be available to plaintiffs as defendants, particularly given the failure to appear provisions apply to plaintiffs and defendants. It would be unfair to give the benefit of reinstatement to the plaintiff without also giving it to the defendant.

Recommendations:

140. Introduce criteria that clarify the grounds for reinstatement (these could include good cause for the non-appearance and the interests of justice).

141. Include this criteria in identical terms in both the SCR and MCR.

142. Amend the existing provision so that it applies to plaintiffs and defendants.

Rehearing

744. A rehearing is where a matter in which a decision has already been made is heard again. [885] The SCR states that the Court shall, in every proceeding, have the power to order a rehearing where it considers reasonable.[886]The MCR does not provide a rule on rehearing.

745. The rehearing must be sought within 14 days after judgment is given, unless the Court is satisfied that the application could not reasonably have been made any sooner. [887] A notice and an accompanying affidavit must be served on the opposing party within 3 days from the date fixed for hearing. An order for a rehearing must be served on the opposing party and the rehearing may take place before the judge whom the proceedings were originally heard or by any other judge. [888] The court can affirm, reverse or vary the original judgment at the rehearing.

[885] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 45.
[886]*Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 141.
[887] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 45.
[888] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 45.

746. A rehearing should generally be filed in any case which involves an issue worthy of review. For example, an application for a rehearing may be useful where there has been a fundamental error of law and there is reason to believe that the Court will correct the mistake, if an error can be demonstrated in a rehearing application. [889]

747. The SCR does not specify whether the rehearing will be of the whole matter or limited to certain issues in the proceeding.

Comparable Jurisdictions

New Zealand

748. In New Zealand, a different approach appears to be applied for rehearing as the rules state that in most cases applications for rehearing are made by appeal.[890]

Australia (Victoria)

749. Similar to New Zealand, in most cases applications for rehearing in Victoria are made by appeal. Rehearing is included in the definition of an appeal in the SCR. In relation to appeals from lower jurisdictions, the SCR stipulate that if leave to appeal is granted then the appeal can be heard immediately or as the Judge directs. It also states that the appeal is by rehearing de novo.[891]

Vanuatu

750. The Vanuatu rules are similar to New Zealand whereby most applications for rehearing are by appeal. This is done by an order from the court for part or all of the proceeding to be referred back to the Magistrates Court for rehearing.[892]

Submissions

751. In issues Paper 2, the Commission sought submissions on the following question:

- *Should the SCR and MCR on rehearing be amended so as to provide for the Court to determine at the outset of the hearing whether the matter is appropriate for rehearing; and whether it should be for the entire matter or limited to specific issues?*

752. The Attorney General in June 2015 submitted that procedures and criteria for a rehearing should be sufficiently clarified and prescribed to prevent it being abused as a backdoor way for litigants to re-litigate matters than cannot be appealed or judicially reviewed.

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[889] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 45.
[890] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012) 236.
[891] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 58.04.
[892] *Civil Procedure Rules 2002* (Vanuatu) r 16.32 (b).

753. On the other hand, a submitter from the private sector did not agree with amending rules on rehearing. She expressed the view that a rehearing must necessarily follow the procedure of an appeal, that is, no evidence but on legal submissions only. She further expressed that a rehearing means an actual re-trial.[893]

Commission's View

754. The Commission notes that although there are provisions in the SCR which enable rehearing of matters, they are silent as to whether it enables rehearing of the whole matter or on certain issues. The Commission is therefore proposing to enable a rehearing of matters either in full or limited to specific issues. The Commission considers this appropriate as the rules allow courts to make decisions on discrete parts of proceedings, in addition to deciding the case in full. Given the current rehearing provisions apply 'in every proceeding', it necessarily follows that a rehearing could be conducted on certain issues or in full.

755. The Commission considers that the procedures and criteria for rehearing should be clarified and prescribed in the SCR to prevent a floodgate of court cases being re-litigated especially those that cannot be appealed or judicially reviewed. Criteria should include whether the court will accept new evidence or whether the rehearing will be based on legal submissions alone, and whether the applicant needs to establish an error of law, for example.

756. As to whether rehearing should be included in the MCR, the Commission notes that in other comparable jurisdictions, most applications for rehearing are made by appeal and do not offer much guidance here. Additionally, the Commission did not receive any submissions on this point to inform any recommendations. The Commission therefore suggests that further consideration may need to be given to whether Samoa moves towards appeal provisions rather than rehearing provisions in future.

[893] Ruby Drake, Submission No 2 to Samoa Law Reform, *Civil Procedure Rules Review*, 25 November 2015, 4.

Recommendations:

143. Amend the SCR (rule 141) to enable rehearing on a whole matter or specific issues.

144. Amend the SCR (rule 141) to include specific procedures and criteria for a rehearing for example, whether the court will accept new evidence or receive legal submissions alone, and whether there is an onus on the applicant to establish an error of law.

Judgment on Confession

757. The rationale behind this provision is that if a party is prepared to admit the claim or defence, then the case can be disposed of at an early stage.[894] It is possible for a party to admit to the whole or part of a claim, and receive judgment on either the whole or part of the case accordingly. [895]

758. The MCR provides that if a defendant confesses to the whole claim and does not serve a counterclaim before a judgment is entered (in an ordinary or a default action), it may result in a Magistrate, *Fa'amasino Fesoasoani* or Registrar, at the written request of the plaintiff, entering judgment on confession accordingly.[896] This also applies in the Supreme Court.[897]

759. If, before judgment is entered, a defendant confesses to part of a claim or makes a payment into Court and does not intend to defend or serve a counterclaim, the plaintiff can consider the following:

- Have judgment entered for the full amount or part of the claim;
- Accept the amount paid into Court to satisfy the claim; or
- Have the case set down for hearing.[898]

760. In Samoa, it is only the plaintiff who can apply for judgment on the confession of a defendant.[899]

Comparable Jurisdictions

New Zealand

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[894] Andrew Beck, *Principles of Civil Procedure* (Brookers Ltd, 3rd edition, 2012) 216 [11.4.1].
[895] Andrew Beck, *Principles of Civil Procedure* (Brookers Ltd, 3rd edition, 2012) 216 [11.4.1].
[896] *Magistrates' Court Rules 1971* (Samoa) r 17.
[897] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 98-99.
[898] *Magistrates' Court Rules 1971* (Samoa) r 18(1)(c); *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 99(1)(c).
[899] See *Supreme Court (Civil Procedure) Rules 1980* (Samoa) Part IX. The provisions relating to judgment on confession specify that it is only the plaintiff who can apply for judgment.

761. In New Zealand, the HCR provide that if a party admits facts, any other party to the proceeding may apply to the Court for any judgment or order that the party may be entitled to, upon those admissions, without waiting for the determination of any other question between the parties, and the Court may make any judgment or order as it considers just.[900]

762. Samoa and New Zealand differ on this provision as New Zealand allows any party to apply for judgment, whereas Samoa only allows the plaintiff to apply.

Australia (NSW and Victoria)

763. The rules in Victoria and New South Wales are similar to those in New Zealand. If any party makes admissions of fact in a proceeding, then the other party can apply to the Court to give judgment on that particular matter. The Court can exercise this power without deciding on the other issues in the proceeding.[901]

Vanuatu

764. There does not appear to be any specific provisions in the Vanuatu Civil Procedure Rules for judgment on confession during a proceeding.

Submissions

765. In Issues paper 2, the Commission sought views on the following:

- *Is it relevant in Samoa for any other party (and not only the plaintiff, for example a third party) to the proceeding to apply for judgment on confession?*

766. Only one submission was received for judgment on confession. The Attorney General's Office queried how the above question to include a third party (aside from the plaintiff), would be of any benefit to this third party. It further suggested that this question needs to be addressed before any changes are made to the relevant Rules.[902]

Commission's View

767. Given the rules permit filing counterclaims and joining third parties to proceedings, the Commission considers it appropriate that all parties be entitled to admit to certain facts and accordingly apply for judgment if an opposing party admits to certain facts in a proceeding. This amendment is in the spirit of the overarching objective of the civil procedure rules, being to secure the just, speedy and inexpensive determination of any

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[900] *High Court Rules 2016* (New Zealand) r 15.15.
[901] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 35.04; *Uniform Civil Procedure Rules 2005* (NSW) r17.7.
[902] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 5.

proceedings, as it ensures that only those matters in dispute are dealt with by the Court and no unnecessary time or expense is used litigating uncontested matters. It also ensures fairness between the parties so that the plaintiff is not the only party that benefits from judgments on confession.

768. The Commission's research on this matter, particularly in the Australian context, suggests that a party other than the plaintiff may benefit greatly in terms of savings in time and cost. An example of another party benefitting from facts admitted is where the defendant admits the existence of a contract and their liability under it. Those parties to the proceeding relying on the validity of the contract can then proceed to ask the court to give judgment for monies owed under the contract or make any order to which they are entitled on the admissions.[903]

Recommendations:

145. Amend the MCR and SCR so that in addition to plaintiff, any other party to the proceeding can apply for judgment on confession or order that the party may be entitled to, without waiting for the determination of any other question between the parties.

146. The rules should clarify that the Court exercise this power without deciding on the other issues in the proceeding and should be able to make any judgment or order it considers just.

COSTS AND COURT FEES

A. COSTS REGIME

769. Legal costs are those costs payable by a party to their legal practitioner for performing legal services on the client's behalf.[904] In the event of a success, a party may be indemnified for a proportion of those costs by the unsuccessful party if ordered to pay costs. The unsuccessful party can expect to pay at least a proportion of the reasonable legal costs to the opposing party. These are known as 'party and party' costs or in some jurisdictions a broader description of 'standard costs' has more recently been adopted.[905]

General Application

[903] See for example, *Moon v Mun* [2013] NSWCA 217. The discretion is exercised cautiously where 'the correct outcome is so unambiguously obvious that there is simply no need for any issue to go to trial' *Moon v Mun* [2013] NSWCA 217 at [43].
[904] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 67.
[905] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia) r. 63.30.

770. Schedule 2 of the MCR regulates costs in the District Court; however the Schedules in the MCR have not been revised or amended since it came into force. The District Court maintains a discretion to award a greater or smaller sum than that set out in the schedule if it sees fit; but there are no provisions indicating what principles or guidelines the Court must consider when exercising such discretion. [906] There is no similar schedule in the Supreme Court Rules, however the Supreme Court determines costs on the basis of reasonableness and what it considers fit. Accordingly, three main considerations in determining costs include whether costs of proceedings are reasonable, reasonable contributions made by the losing party to those costs, and proportionality (i.e. an assessment by the Court of proportionality between value of the award and the costs awarded). [907]

Comparable Jurisdictions

New Zealand

771. In New Zealand, the rules provide that the following general principles apply to the determination of costs:

- the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;
- an award of costs should reflect the complexity and significance of the proceeding;
- costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step required in relation to the proceeding or interlocutory application;
- an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application;
    - what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs;
- an award of costs should not exceed the costs incurred by the party claiming costs; and

[906] *Magistrates Court Rules* 1971 (Samoa) r 3.
[907] *Pelenato Fonoti v Ben Chan Sau* [2015] DC (27 May 2015). See also *Tagi Sautia v Fuelafo Titi and Tito Fuelafo* [2015] DC (15 May 2015). See also *In re Chande Lutu Drabel* [2003] WSSC 42 where a defence counsel who failed to make an appearance was ordered to pay costs personally. Her attempts to inform the Court of her absence were unsuccessful and the Court found her explanation unsatisfactory.

– so far as possible the determination of costs should be predictable and expeditious.[908]

Australia (NSW, Victoria)

772. In Victoria, there are comprehensive rules governing costs. In relation to the costs of a party in a proceeding, the court can order that costs are payable on a standard basis, indemnity basis or as the court directs.[909] Costs awarded on an indemnity basis include all costs except in so far as they are of an unreasonable amount or have been unreasonably incurred. If there is any in the Costs Court about whether unreasonable costs were incurred or were unreasonable in amount, it shall be resolved in favour of the party to whom the costs are payable.[910] A scale of costs is also provided under the SCR.[911]

773. In New South Wales, the rules appear simpler than in Victoria. There are general rules providing that costs follow the event and that costs are assessed on an 'ordinary basis' unless otherwise ordered. The Court can still however, order that costs are payable on an indemnity basis.[912] There are also specific rules relating to how costs are payable when disputes of fact or authenticity of documents are subsequently proved or admitted.[913]

Vanuatu

774. In Vanuatu, the court has discretion in determining whether and how to award costs.[914] Generally costs are payable by the party who is not successful in the proceeding, but parties can agree to pay their own costs, or the court may order that parties pay their own costs.[915] The court can make a costs order at any time during proceedings, or after proceedings finish.[916] Costs are usually awarded on a standard basis unless the court orders that they be awarded on an indemnity basis.[917]

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[908]*High Court Rules 2016 (*New Zealand) r 14.2; *District Court Rules 2014* (New Zealand) r 14.2.
[909]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 63.28.
[910] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) o 63.30.1(2).
[911] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) app A.
[912]*Uniform Civil Procedure Rules 2005* (NSW) r 42.5.
[913]*Uniform Civil Procedure Rules 2005* (NSW) rr 42.8-9.
[914] *Civil Procedure Rules 2002* (Vanuatu) rr 15.1(1) and (2). When the Court decides the costs, the quantum can only be fixed broadly having regard to the information before the court: However, if the judge cannot do this, the judge must ask the successful party to prepare a statement of costs using records kept as proof, and fix a time by which this is to be done.
[915] *Civil Procedure Rules 2002* (Vanuatu) rr 15.1(2), (3) and (4).
[916] *Civil Procedure Rules 2002* (Vanuatu) r 15.2(1).
[917] *Civil Procedure Rules 2002* (Vanuatu) rr 15.5(1) and (2).

775. Costs awarded on a standard basis include all costs necessary for the proper conduct of the proceeding, while costs awarded on an indemnity basis include all costs reasonably incurred and proportionate to the matters involved in the proceeding.[918]

776. Costs on an indemnity basis must take into consideration the charges ordinarily payable by a client to a lawyer.[919] Indemnity costs are generally more generous and might be ordered if the other party deliberately prolonged a proceeding, brought a proceeding in circumstances that amount to a misuse of the litigation process, deliberately engaged in conduct that resulted in increased costs, rejected an offer of settlement, or in any other circumstances the court thinks fit.[920]

777. In determining a fair and reasonable amount of costs, the judge in the Supreme Court can consider the skill and labour of the party's lawyer, the complexity of the case, the amount of money involved, the quality of work done, the circumstances in which the legal services were provided, the time within which work was done and the outcome of the proceeding.[921]

778. In addition to the general principles stated above, the Vanuatu Rules also provide detailed principles on costs in Magistrate Court.[922] These include the amount recovered or claimed; the complexity of the case; the length of the proceeding; and any other relevant matter.[923]

Submissions

779. In Issues Paper 2, the Commission sought views on the following questions:

- *Should the Schedule in the MCR be revised and updated?*
- *Should there be provisions in the MCR and SCR relating to what principles and guidelines the Court must apply when awarding costs?*

780. The Attorney General's Office submitted in June 2015 that the schedule of costs in the MCR should be revised and updated but did not suggest a way to do this. It also agreed that there should be guidelines and principles in the MCR and SCR but the Court should be allowed to keep its discretion.

781. One submitter form the private sector expressed the view that costs in both the District Court and Supreme Court should be considered for review although to a large extent there is a settled practice in the Supreme Court where the judge usually grants

[918] *Civil Procedure Rules 2002* (Vanuatu) rr 15.5(1) and (2).
[919] *Civil Procedure Rules 2002* (Vanuatu) r 15.5(2)(a).
[920] *Civil Procedure Rules 2002* (Vanuatu) r 15.5(5).
[921] *Civil Procedure Rules 2002* (Vanuatu) r 15.8(1) and (2).
[922] *Civil Procedure Rules 2002* (Vanuatu) r 15.10.
[923] *Civil Procedure Rules 2002* (Vanuatu) r 15.10(4).

two thirds of the total amount in the Memorandum of Costs. She further commented that factors to be considered would be the skill and experience of the lawyer involved and the complexity and importance of the matter, attendances at Court and preparation. Whilst costs may be in the Court's discretion, costs should follow the event. Costs should reflect the reality of running a law practice to take into account the high cost of electricity, rent and resources (paper, ink, equipment and staff). [924]

Commission's View

782. The Commission acknowledges that although the current practice involves the Court in granting two thirds of the total amount in the Memorandum of Costs, it considers that comprehensive rules around costs are needed. These rules should be covered and contained in the schedules of both rules for consistency. For example, new provisions should cover different bases (i.e. standard or indemnity) that costs are awarded. The rules should also clarify under what costs are included. Having different bases differentiates between costs necessary for the proper conduct of the proceeding and costs reasonably incurred and proportionate to the matters involved in the proceeding. The provisions in NSW provides some guidance here.

783. Moreover, the Commission is aware that the Schedule of Costs in the MCR is outdated and has not been revised since it first came into effect. Therefore, it considers that this be revised accordingly and periodically.

784. The Commission considers it appropriate to include guiding principles about when and how costs should be awarded, similar to New Zealand, which reflects the current practice employed by Samoan Courts (where case law is used). This will assist parties in knowing upfront the potential cost implications involved in litigation, and may enhance alternative dispute resolution or settlement processes, and assist Courts when making cost orders. Submissions received raise similar considerations as those contained in the NZ rules such as the complexity and significance of the proceeding and misconduct of a party in proceedings among others.

[924] Ruby Drake, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Review*, 25 November 2015, 4.

Recommendations:

147. Principles applying to the determination of costs should be inserted into the SCR and MCR. These principles should cover those already applied by the Courts using case law as well as those used in New Zealand. These include, but are not limited to:

- the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;
- an award of costs should reflect the complexity and significance of the proceeding;
- an award of costs should not exceed the costs incurred by the party claiming costs; and
- so far as possible the determination of costs should be predictable and expeditious.

148. Specify in both rules bases as to which costs are awarded (i.e. standard and indemnity) to differentiate between costs necessary for the proper conduct of the proceeding and costs reasonably incurred and proportionate to the matters involved in the proceeding.

149. A Schedule of Costs should be included in the SCR reflecting similar principles of determining costs like that in the MCR.

150. The Schedule of Costs in the MCR should be revised.

B. COURT FEES

785. Court fees relate to fees that are payable to the Court for administrative functions, such as filing writs, affidavits and the like. [925] Both the SCR and MCR contain schedules for fees. Since the Issues Paper was published, the Ministry of Justice and Courts Administration has implemented new approved fees. These were implemented on 12 September 2016. There is also a *Fees and Charges (Miscellaneous Amendments) Bill 2016* in Parliament, soon to undergo third reading, which empowers the Head of State on the advice of Cabinet to prescribe fees in future.[926]

Comparable jurisdictions

[925] *Magistrates' Court Rules 1971* (Samoa) r. 30; *Supreme Court (Fees and Costs) Rules 1971* sch 1.
[926] Ministry of Justice and Courts Administration submission to Samoa Law Reform Commission dated 20 January 2017.

New Zealand

786. Fees payable in respect of proceedings in court such as for filing an application, setting down a hearing date and for the hearing itself, are contained in Schedule 1 of the *High Court Fees Regulations 2009*. Similar to Australia, companies and corporations pay more fees compared to individuals.[927] Furthermore, District Court fees are significantly less compared to High Court fees for administrative matters and appeals.[928]

Australia

787. In NSW as well as in the Federal Court of Australia, filing fees are tapered to reflect the cost of the Court's time, and resources of the parties. Accordingly, the filing fees payable by corporations are greater than those payable by individuals.[929] In NSW, court fees paid by corporations are almost double compared to an individual party.[930]

788. Furthermore, court fees in relation to filing an appeal is greater than fees paid when filing proceedings at first instance.

Vanuatu

789. Court fees in Vanuatu are set out in Schedule 1 of its Rules.[931] The validity of any particular fee lies in the reasonableness of its relationship with the cost of administration or provision of the services to which the fee relates.[932] Given the extensive jurisdiction of the Supreme Court, fees for filing court documents, trials and appeals are greater than fees paid in the Vanuatu Magistrate Court.[933]

Submissions

790. The Commission also sought submissions on the following issues on Court fees as raised in its Issues Paper 2:

- *Should the Court fees be further increased since August 2014? If not, when should the next review of Court fees take place?*

- *Should there be a higher fee for commencing proceedings if the plaintiff is a corporation (not an individual)? If so, why?*

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[927] *High Court Fees Regulations 2013* (New Zealand) sch 1.
[928] *District Court Fees Regulations 2009* (New Zealand) sch 1.
[929] *Federal Court and Federal Circuit Court Regulation 2012* (Australia) sch 1 Part 1.
[930] *Civil Procedure Regulation 2012* (NSW) sch 1. The Individual fee rate will apply to: liquidators commencing action on behalf of company in liquidation, Office of the Protective Commissioner of New South Wales, New South Wales Trustree & Guardian.
[931] *Civil Procedure Rules 2002* (Vanuatu) r 4.12(1).
[932] *Civil Procedure Rules 2002* (Vanuatu) r 4.12(1). See also *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 580-1; 40 ALJR 317 at 319-20; *Elder's Trustee v Registrar of Probates for SA* (1917) 23 CLR 169 at 174
[933] Civil *Procedure Rules 2002* (Vanuatu) sch 1 Part 1 and 2.

- *Should there be higher fees associated with filing an appeal? If so, why?*

791. The Commission received helpful submissions from the Ministry of Justice and Courts Administration noting the recent reviews of court fees and the updated status of the Fees and Charges (Miscellaneous Amendments) Bill 2016. Given the court fees were implemented as recently as 12 September 2016, there is no need for further review at the present time. Additionally, if the Bill is passed, the Ministry will have the opportunity to review the fees again in future.[934]

792. In relation to whether there should be a higher fee for commencing proceedings if the plaintiff is a corporation, rather than an individual, the Ministry indicated that this issue will be explored further. The Ministry is mindful of preserving access to justice and avoiding circumstances where parties are inhibited from bringing actions, whether they are corporations or individuals, because they cannot pay court fees. The Ministry envisages that if any decisions are made in future to alter the court fees, then there would also be the ability under the law to waive, refund or postpone the fees.[935]

Commissions Views

793. The Commission considers that the Schedule has recently been updated and does not require further amendment at this time. However the Commission does consider that ongoing review of court fees (at least every 3 years) is appropriate to ensure that the demands of modern practice and economics are considered.

794. Court fees should be different for each Court and must be formulated to reflect the cost of the Court's time, and resources of the parties. For example, like in NZ and Australia, corporations pay a higher fee for commencing proceedings compared to an individual party.

Recommendations

151. Schedules listing court fees of both rules should be reviewed periodically (at least every 3 years) to ensure the demands of modern practice, court's times and resources of the parties are taken into account.

[934] Ministry of Justice and Courts Administration submission to Samoa Law Reform Commission dated 20 January 2017.

[935] Ministry of Justice and Courts Administration submission to Samoa Law Reform Commission dated 20 January 2017.

SETTLEMENT OFFERS

795. Settlement offers are designed to promote early dispute resolution, by invoking a cost consequence against a party who unreasonably fails to accept an offer of settlement.[936] If the offer is unreasonably rejected, the Court rules may result in costs being awarded against that party from the date the offer was made, if the judgment is for a sum less than the offer. It therefore provides relief to the party who has incurred costs unnecessarily because of the other party's failure to accept the offer.[937] Offers of Compromise and Calderbank Letters promote proper consideration of settlement at the time it is made and may result in fewer matters reaching trial.

A. OFFERS OF COMPROMISE[938]

796. An offer of compromise is a formal offer, which, if a matter proceeds to judgment and the amount awarded is less than the offer (even by a small amount), the party who made the offer may seek a costs order against the party who rejected it. It is a procedural device that applies a simple mandatory formula compelling the party who fails to accept the offer of compromise to pay the other party's costs. The purpose of an 'offer of compromise' is to encourage the parties to realistically assess the strengths and weaknesses of the matter before it reaches the hearing, with additional costs risks if an offer is rejected and the judgment is for less than the offer.

797. While the offer of compromise is a useful tool, there are instances where it may not be appropriate. If a non-monetary order is being sought, the offer of compromise procedure is not suitable for resolving the issues in dispute. [939]

B. CALDERBANK LETTERS

798. An alternative offer of settlement, the 'Calderbank offer', leaves the question of costs to the discretion of the Court in instances where an offer is unreasonably rejected. This form of offer is not usually contained in the Court Rules, but has evolved according to common law principles, as an alternative to the formal offer. A Calderbank offer is normally a letter outlining an offer of settlement, which is marked 'without prejudice save as to costs'. By being 'without prejudice', the party making the offer reserves the

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[936] Judicial Commission of New South Wales, *Civil Trial Bench Book-Calderbank and Offers of Compromise* (2013) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html>.
[937] Judicial Commission of New South Wales, *Civil Trial Bench Book-Calderbank and Offers of Compromise* (2013) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html>.
[938] Judicial Commission of New South Wales, *Civil Trial Bench Book-Calderbank and Offers of Compromise* (2013) Judicial Commission of New South Wales <http://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html>.
[939] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 55.

right to notify the court of the offer if and when a question on costs arises. The purpose of the Calderbank offer is that if the party who made the offer later loses the case, but the ultimate award of damages to the winning party is less than what was offered, then the losing party can produce the letter in Court on an application for costs. In that situation, the Court may order that the losing party pay less costs or that the winning party even pay the costs of the losing party.

General Application

799. There are currently no rules in the SCR or MCR regarding formal offers of settlement. Some consideration may be given to other jurisdictions' provisions and approaches to promoting resolution by the making and acceptance of offers.

Comparable Jurisdictions

New Zealand

800. In New Zealand, Calderbank offers are used as a way for the court to exercise its discretion to make costs orders where real efforts to compromise a matter by one party are rejected unreasonably by the other.[940]

801. Written offers made without prejudice except as to costs are provided for in both the HCR and DCR in New Zealand.[941]A party may at any time make a written offer that is expressly stated to be without prejudice except as to costs; and relates to an issue in the proceeding. The fact that the offer has been made must not be communicated to the Court until the question of costs is decided.[942]The terms of the offer should be explicit about what it covers, for example whether it relates to the whole or a part of the proceeding.[943]

802. The Court retains discretion to determine what effect an offer has on the question of costs. The SCR do state however, that a party is entitled to costs taken in the proceeding if:

- If offers a sum of money to the other party which exceeds the amount of settlement money that party obtains as a result of the judgment; or
- The party makes an offer that was more beneficial than the judgment obtained by the winning party.

[940] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2* (2014) 55.
[941] *High Court Rules 2016* (New Zealand) rr 14.10-14.11; *District Court Rules 2014* (New Zealand) rr 4.10-4.11.
[942] *High Court Rules 2016* (New Zealand) r 14.10.
[943] Mathew Casey, *New Zealand Procedure Manual: High Court* (LexisNexis NZ, 2nd ed, 2013) 534 [14.10.3].

803. There is also helpful commentary available, which indicates what elements a Calderbank offer must contain to be effective. These include:

- The offer must be fair, clear and transparent;
- Sufficient time must be allowed for consideration of the offer;
- The offer should contain a contribution towards pre-offer costs (but not in an “all inclusive” way); and
- The party needs to be put on notice that if the offer of settlement is not accepted, then it may be submitted to the Authority or Court in relation to the question of costs.[944]

804. This effectively enshrines the Calderbank principles in the HCR.[945]

Australia

805. Most Australian states, including Queensland,[946] Western Australia,[947] Tasmania,[948] New South Wales,[949] and Victoria,[950] contain provisions for formal offers between the parties.

806. Offers of compromise, including Calderbank offers, are clearly set out in the Victorian *Supreme Court (General Civil Procedure) Rules*.[951]The rules clearly set out how an offer must be made (in writing, with a statement that it is made under the specific rule and whether the offer is inclusive of costs).[952] They also set out the times for making and accepting an offer, time for payment and a general presumption that the offer is made without prejudice unless otherwise specified.[953] As in New Zealand, the offer is not to be disclosed to the court until the question of costs arises.[954]

807. If an offer of compromise has not been accepted at the time of verdict or judgment, then there are various rules which set out the cost consequences depending on the circumstances of the case.[955] For example, if a plaintiff unreasonably refuses a defendant’s offer but receives a judgment that is less than the offer, then the plaintiff is

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[944]PD Associates, *What is a Calderbank* (25 May 2012) <http://www.pdassociates.co.nz/blog/1136/2016/>.
[945] Mathew Casey, *New Zealand Procedure Manual: High Court* (LexisNexis NZ, 2nd ed, 2013) 534 [14.11.2].
[946]*Uniform Civil Procedure Rules 1999* (Queensland, Australia) ch 9 Part 5.
[947]*Rules of the Supreme Court 1971* (Western Australia) o 24A.
[948]*Supreme Court Rules 2000* (Tasmania, Australia) Part 9.
[949]*Uniform Civil Procedure Rules 2005* (New South Wales) Part 20 div 4.
[950]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 26.
[951]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 26.
[952]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 26.02.
[953]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) oo 26.03-26.04.
[954]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 26.05.
[955]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 26.08.

only entitled to costs up until the offer was effectively made and after that time the defendant can claim costs.[956]

Vanuatu

808. When determining costs in Vanuatu, the Court takes into account any offer to settle that was rejected.[957] This is to encourage parties to seriously consider offers of settlement.[958] Rejection of a settlement offer is one of the specific factors that the Court can consider in deciding to order costs on the more generous indemnity basis rather than just on a standard basis.[959] In relation to the Supreme Court, there are specific provisions surrounding offers of settlement. During proceedings in the Supreme Court, a party can make an offer to settle in the prescribed form. If this offer is refused and the other party is successful, but for less than the amount that was offered, then the court can award costs against that successful other party that refused the offer to settle.[960]

Submissions

809. In Issues paper 2, the Commission sought views on the following questions:

- *Offer of compromise- would this alternative procedure be useful in Samoa, and if so, in what situations?*
- *Calderbank offers- would the Court consider exercising its discretion to make costs orders against a party unreasonably rejecting an offer, where the party making the offer can demonstrate that they have made a real compromise?*
- *Would either or both of these costs measures be considered appropriate in the Samoan context?*

810. The Attorney General's Office submitted that offers of compromise would be useful in Samoa but did not elaborate further. It also agreed that Calderbank Offers are also useful but noted that Samoa has informal settlement procedures used today. Overall, it expressed the view that both 'offer of compromise' and 'Calderbank offers' would benefit Samoa as it is more or less practiced informally between the parties.[961]

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[956] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 26.08(3).
[957] *Civil Procedure Rules 2002* (Vanuatu) r 15.11.
[958] See for example, *Health Waikato v Elmsly* [2004] NZCA 35.
[959] *Civil Procedure Rules 2002* (Vanuatu) r 15.5(5)(d).
[960] *Civil Procedure Rules 2002* (Vanuatu) r 9.7.
[961] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 5.

811. One submitter from the private sector indicated that a Calderbank letter may be of better utility, but did not elaborate further on this.[962]

Commission's View

812. Given the judiciary's move towards early dispute resolution, the Commission is of the view that settlement offers such as 'offers of compromise' and 'Calderbank letter' should be incorporated into the Samoan rules. This is consistent with the views expressed by the Attorney General's Office in their submission. These two types of settlements offers would further facilitate and promote early dispute resolution before a matter reaches trial. It will also complement the JSC already in existence in Samoa aimed at early dispute resolution. Both settlements offers would also save the Court's time and resources. Additionally, an 'offer of compromise' encourages the parties to realistically assess the strengths and weaknesses of the matter before it reaches the hearing, with additional costs risks if an offer is rejected and the judgment if for less than the offer. A 'Calderbank Letter' on the hand leaves the question of costs to the discretion of the Court in instances where an offer is unreasonably rejected.

813. Settlement offers such as the Calderbank offer are commonly found in the rules of New Zealand and the Victorian Supreme Court Rules, Australia. As discussed above, principles guiding Calderbank offers are contained in the New Zealand Rules, such as the requirement that such an offer must be fair, clear and transparent and sufficient time must be allowed for the consideration of the offer. There are also rules around cost consequences, as in Victoria, if an offer has not been accepted at the time of verdict or judgment, depending on the circumstances of the case. Vanuatu also has rules around settlement offers which are similar to the New Zealand Rules.

814. Thus, the Commission is of the view that settlement offers such as 'offers of compromise' and 'Calderbank letters' should be incorporated into the Samoan rules (where practical to suit the Samoan context) given its significance for early dispute resolution and to be in line with practices in close neighbouring countries like New Zealand, Australia (Victoria) and Vanuatu. This view is also consistent with submissions from the Attorney General's Office.

[962] Office of the Attorney General, Submission No 2 to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 June 2015, 5.

Recommendations:

152. Both settlement offers such as 'offer of compromise' and 'Calderbank letter' should be incorporated into the Samoan Rules (where practical to suit the Samoan context) to encourage and promote early dispute resolutions before a matter reaches a trial.

153. There should be guiding principles for Calderbank offers similar to those in the New Zealand Rules. For example, the offer must be fair, clear and transparent, sufficient time must be allowed for consideration of the offer, the party needs to be put on notice that if the offer of settlement is not accepted, then it may be submitted to the Court to determine costs.

EXTRAORDINARY REMEDIES

A. OVERVIEW

815. Extraordinary remedies are reliefs sought in special proceedings, particularly in the context of judicial reviews of administrative decisions, in relation to actions done or not done by government officials. [963] They are exceptional remedies in the sense that they are distinct from ordinary remedies by actions, however they are granted only where absolutely necessary to protect the legal rights of a party in a particular case. [964] Some examples of extraordinary remedies include mandamus, certiorari, injunction and habeas corpus.

General Application

816. There are four extraordinary remedies available in Samoa. They are mandamus, injunction, prohibition and certiorari.[965] Mandamus is a judicial command compelling the respondent, usually a public official, to perform a duty incumbent upon him or her.[966] Injunction is an order restraining the respondent, usually a public official, from breaching a duty.[967] Prohibition is an order prohibiting an inferior Court, tribunal, Magistrate or *Fa'amasino Fesoasoani* from exercising any jurisdiction which they are not

[963] Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 1* (2012) 21.
[964] Andrew Beck, Principles of Civil Procedure (Brookers Limited, 3rd ed, 2012) 93.
[965] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) Part XIX.
[966] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 192.
[967] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 193.

by law empowered to exercise.[968] Certiorari is a direction that an action be removed from an inferior court or from any statutory tribunal into the Supreme Court.[969]

817. A request for extraordinary remedy is made by motion on notice, accompanied by a statement of claim and a supporting affidavit.[970] A defendant must file a defence, which may be accompanied by an affidavit in reply.[971] There are no timelines stipulated in the SCR for the filing of these documents.

818. These extraordinary remedies are currently only available in the Supreme Court Rules. The Magistrates' Court Rules do not provide for extraordinary remedies.

819. Whilst the Commission understands extraordinary remedies are commonly sought in judicial review proceedings, there is no part specifically dealing with judicial review in the SCR and judicial review is not mentioned specifically under Part XIX dealing with extraordinary remedies. This is in contrast to other jurisdictions, which each allocate a specific part dealing with judicial review in their rules, including matters like time for commencing proceedings, serving a claim, procedure and so forth.[972]

Comparable Jurisdictions

New Zealand

820. It is the inherent jurisdiction of the High Court of NZ to ensure inferior courts, tribunals and administrative authorities have acted in accordance with the rules of natural justice.[973] This is achieved through judicial review and common law remedies including prerogative writs of mandamus, prohibition, certiorari as well as declarations and injunctions. These remedies continue to exist and are available in Part 30 of the HCR.

821. All proceedings are commenced in the same way, by statement of claim and notice of proceeding.[974] A statement of claim may seek more than one extraordinary remedy in the one claim.[975]

Australia (Victoria)

[968] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 194.
[969] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 195.
[970] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 196.
[971] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 197.
[972] *High Court Rules 2016* (New Zealand) Part 30; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 56; *Civil Procedure Rules 2002* (Vanuatu) Part 17.
[973] Andrew Beck, *Principle of Civil procedures* (Brookers Limited, 3rd ed, 2012) 93 [4.7.5].
[974] *High Court Rules 2016* (New Zealand) r 30.3.
[975] *High Court Rules 2016* (New Zealand) r 30.3(3).

822. In Victoria, the Court's power to grant certiorari, mandamus, prohibition or quo warrant (i.e. extraordinary remedies) is found in Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015*, relating to judicial review. Judicial review proceedings are commenced by originating motion using a prescribed form.[976] The originating motion must state the grounds on which the relief is sought and identify any mistake or omission identified as a ground for relief.[977] The originating motion must also be accompanied by an affidavit in support.[978]

823. There are specific timelines for commencing judicial review proceedings, which are within 60 days of the decision being reviewed.[979]

824. The *Supreme Court (General Civil Procedure) Rules 2015* also contain a separate order dealing with habeas corpus.[980] That order sets out the circumstances when a writ can be issued and how an application is made.

Vanuatu

825. In Vanuatu, judicial review is only available in the Supreme Court.[981] A person seeking judicial review in the Supreme Court can make a claim for a mandatory order, a prohibiting order or a quashing order about a decision.[982] A mandatory order is an order that a person do something, while a prohibiting order is an order that a person not do something.[983] A quashing order is an order that the decision of a decision-maker be quashed.[984] A claim for any of these above orders must set out the grounds for making the claim, be accompanied by a sworn statement in support of the claim and be in the specified form.[985]The claim must be made within 6 months of the enactment and decision. However, it can be extended by the court if it sees that substantial justice requires it.[986] The Vanuatu rules also contain express timelines for filing and serving the claim and the defendant's response.[987]

826. The judge must also call a conference as soon as practicable after the defence is filed.[988]There are certain matters that the judge must consider at this conference. These include hearing the claim only if satisfied that the claimant has an arguable case, the

[976]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 56.01(2).
[977]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 56.01(4).
[978]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 56.01(5).
[979]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 56.02.
[980]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 57.
[981]*Civil Procedure Rules 2002* (Vanuatu) r 17.1; See generally, *Enock v David* [2003] VUCA 19; CAC 25 of 2003.
[982]*Civil Procedure Rules 2002* (Vanuatu) r 17.4(1).
[983]*Civil Procedure Rules 2002* (Vanuatu) r 17.2.
[984]*Civil Procedure Rules 2002* (Vanuatu) r 17.2.
[985]*Civil Procedure Rules 2002* (Vanuatu) r 17.4(3).
[986]*Civil Procedure Rules 2002* (Vanuatu) r 17.5.
[987]*Civil Procedure Rules 2002* (Vanuatu) r 17.7.
[988]*Civil Procedure Rules 2002* (Vanuatu) r 17.8.

enactment or decision directly affects the claimant and there is no delay in making the claim. A court order is made after hearing a claim and these orders range from a mandatory order, a prohibiting or a quashing order.[989]

Submissions

827. In Issues Paper 1, the Commission sought views on the following questions:

- *Whether the procedure for extraordinary remedies under the SC Rules be done away with entirely, with orders of mandamus, injunction, prohibition and certiorari being available through the use of statement of claim?*
- *If the jurisdiction of the District Court is increased, should any of the extraordinary remedies set out in the SC Rules be replicated in the rules of that Court? If so, which remedies?*

Extraordinary remedies in the District Court

828. During preliminary consultations for Issues Paper 1, one submitter from the private sector explained that 'interim injunctions' were the most commonly used extraordinary remedy. She submitted that extraordinary remedies were not needed in the District Court but agreed with the Commission's view in Issues paper 1 that if the jurisdiction of the District Court is increased, extraordinary remedies would then be useful.[990]

829. Another submitter from the private sector indicated that injunctions were the most commonly used extraordinary remedy but did not see the need for such remedies in the District Court even if its jurisdiction is increased, noting that most of the work in the District Court seemed related to debt recovery.[991]

830. Members of the judiciary consulted responded to the above questions in Issues Paper 1 and expressed the view that the Supreme Court should remain the only court dealing with extraordinary remedies, whether or not the jurisdiction of the District Court is increased. An issue raised by members of the judiciary was that an increase in District Court jurisdiction would mean that the District Court will encounter extraordinary remedy applications potentially resulting in people applying to two separate courts.[992]

831. A member of the judiciary expressed the view that mandamus and certiorari were used reasonably often particularly with respect to Lands and Titles Court Rulings. He confirmed that extraordinary remedies are not used in the District Court.[993] One

[989]*Civil Procedure Rules 2002* (Vanautu) r 17. 9.
[990] Prelimiary Consultation with Ruby Drake (Apia, Samoa) 25 January 2010.
[991] Preliminary Consultation with George Latu (Apia, Samoa) 25 January 2010.
[992]Consulation with Judiciary (Chief Justice Chambers, Ministry of Justice and Courts Administration Complex, 13 July 2012).
[993]Preliminary Consultation with Vui Clarence Nelson (Apia, Samoa, 10 February 2010).

submitter from New Zealand in his submission expressed the view that extraordinary remedies are normally considered the province of the superior courts arising out of its inherent jurisdiction.[994]

832. Ultimately, the submitters indicated that extraordinary remedies should not be made available in the District Court. Some submitters were more receptive to the District Court hearing extraordinary remedy applications if the Court's jurisdiction is extended but others were wary that there would be confusion about which Court to bring an application in.

Statement of claim procedure and extraordinary remedies

833. A submitter from New Zealand clarified that the statement of claim procedure is used in New Zealand but that proceedings are managed in a different way under the case management system. No further explanation was provided to clarify how the proceedings are managed.

834. The Attorney General's office considered that a statement of claim under rule 196, which relates to motions for extraordinary remedies, is reserved for private law remedies as opposed to public law remedies.[995]

Evidence and listing of extraordinary remedy applications

835. Justice Vui acknowledged that affidavits and affidavits in reply are used to support extraordinary remedy applications but noted that there are no procedures for testing contradicting affidavits. He also submitted that applications for extraordinary remedies are usually resolved by judges by way of a hearing which causes further delays of up to 3-6 months. Furthermore, as a temporary remedy before the hearing, the judge could issue an interim injunction. Justice Vui suggested to consider if amendments to the rules would address delays, and to consider the practice in other jurisdictions.

Judicial review procedure

836. The Commission received an isolated submission from the private sector indicating that judicial review is common in Samoa and that consideration be given to setting out the procedure for judicial review.[996]

Commission's View

Extraordinary remedies in the District Court

[994] Andrew Beck, Submission to Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 17 April 2015, 2.
[995] Preliminary Consultation with Office of the Attorney General (Apia, Samoa, January 2012).
[996] Tasi Malifa, Oral submission to the Samoa Law Reform Commission, *Civil Procedure Rules Review*, January 2017.

837. The submissions are overwhelmingly in favour of extraordinary remedies remaining in the Supreme Court jurisdiction. This is also consistent with other jurisdictions including New Zealand and Vanuatu who only make extraordinary remedies available in the higher courts. The Commission therefore considers that it is not appropriate to include extraordinary remedies in the MCR at this time. The Commission suggests that this should be reviewed again in the near future following ample time to consider implications of the increased jurisdiction of the District Court, as some remedies may be considered appropriate for the District Court.

Statement of claim procedure and extraordinary remedies

838. The current procedure of filing a statement of claim or originating motion to commence an application for extraordinary remedies is consistent with New Zealand, Victoria and Vanuatu. The Commission accordingly sees no need to change the existing procedure for commencing this type of application in the Supreme Court namely by motion on notice, statement of claim and supporting affidavit, unless it would be unnecessary (for example, when seeking an interim injunction).[997]

Evidence and listing of extraordinary remedy applications

839. The Commission acknowledges the concern raised by Justice Vui about contradicting affidavits. However the Commission maintains its view that a court hearing is the appropriate way to test the truth of supporting affidavits and affidavits in reply. The Commission acknowledges that this approach could be problematic where an urgent injunction is sought but a hearing cannot be listed for a long period. Thus the Commission recommends including in the SCR timelines for filing the requisite documents by both parties (similar to Vanuatu), as well as a rule requiring the Judge to list the matter for hearing as soon as practicable. Alternatively, urgent injunctions could also be sought through interlocutory motion or parties could apply for a *Mareva* order (discussed below).

Judicial review procedure

840. The Commission notes that there is existing case law in Samoa, which sets out the procedure for judicial review proceedings. The Commission considers that further consideration should be given to whether a separate section should be included in the SCR to set out the procedure for judicial review proceedings, or whether the case law is

[997] In consultation with the Judiciary, the Chief Justice indicated that in certain situations, for example when seeking an interim injunction, filing a statement of claim was not appropriate because the relief sought is intended to prevent loss or damage.

sufficient to guide the courts and parties in conducting judicial review proceedings. Guidance can be sought from other jurisdictions and the relevant case law.[998]

Recommendations:

154. The extraordinary remedy provisions remain in the SCR only at this time.

155. The existing procedure for commencing an application for extraordinary remedy remain as is, namely by motion on notice, statement of claim and supporting affidavit, unless it would be unnecessary (for example, when seeking an interim injunction).

156. Timelines in relation to the following matters should be included in the SCR:

- filing and serving the motion on notice, accompanied by a statement of claim and affidavit;
- filing and serving the defendant's reply; and
- listing the hearing as soon as practicable.

Vanuatu offers helpful timelines for filing documents and can be used as a guide.

157. Consider whether to include in the SCR a procedure in judicial review proceedings. Guidance can be sought from other jurisdictions and relevant case law including *Amoa v Land and Titles Court* [2011] WSSC 77 (31 January 2011), which helpfully describe the way judicial review proceedings are conducted.

B. Garnishee Proceedings

841. Garnishee proceedings is a legal procedure where a judgment creditor can recover debt owed by a judgment debtor from a third party who in turn owes money to the judgment debtor.[999] To clarify, a garnishee proceeding is when X (judgment creditor) seeks a court order to recover money from Z (third party) who owes money to, or holds money for, Y (judgment debtor). This may be in cases where the judgment debtor is not in a position to pay the debt owed to the creditor.

General Application

842. Part XIV of the SC provide for garnishee proceedings. They are instituted by affidavit and the Registrar issues a summons to the third party and a notice to the judgment debtor.[1000] The summons and notice must be served personally at least 10 days before

[998] *Amoa v Land and Titles Court* [2011] WSSC 77 (31 January 2011) [21].
[999] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 3rd ed, 2012).
[1000] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 144.

hearing.[1001] If the third party does not pay the amount into court before the hearing and does not appear at the hearing, the judge may make an enforceable order for the payment of money to the judgment creditor.[1002] If the amount owing or paid is disputed by either the judgment creditor or the third party, the judge may determine the question of liability, order a trial of the question or order that the creditor may sue the sub-debtor.[1003]

843. The *District Court Act 2016* also deals with garnishee proceedings as a means of enforcing judgments for the payment of money owed to the judgment debtor.[1004]

844. Despite empowering the Samoan District Courts to hear garnishee proceedings, the DCA does not specify how garnishee proceedings are initiated or carried out in the District Court. Garnishee proceedings are contemplated as an enforcement option by the MCR, as supporting affidavits for garnishee proceedings have costs allocated to them in Schedule 1 of the MCR. The MCR do not however, provide any further rules for garnishee proceedings.

845. It is likely that a garnishee proceeding would be dealt with under rule 29 of the MCR, being a procedure in a matter not provided for under the rules. This rule gives the Samoan District Court wide discretion to run a proceeding through reference to the rules that govern that procedure in other jurisdictions (specifically New Zealand and Australia) and in the manner that the court believes is best calculated to promote the ends of justice. It is difficult to gauge how widely rule 29 is intended to apply and therefore how many procedures are able to be run by the Samoan courts by reference to foreign jurisdictions.

Comparable Jurisdictions

846. The New Zealand rules are extensive by comparison. The District Court Rules states that garnishee proceedings may be initiated even if the amount of the debt exceeds the District Court's $200,000 jurisdictional limit.[1005] There is no similar extension to the Samoan District Court's jurisdiction.

847. The New Zealand rules also impose a timeframe of at least 15 working days before the day of the hearing for the summons and notice to be served to the judgment debtor personally. It specifies that the summons is binding on the sub-debtor to pay debts as stated in the summons.[1006] The rules provide information on particular fact scenarios

[1001] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 145.
[1002] *Supreme Court (Civil Procedure) Rules* 1980 (Samoa) r 148.
[1003] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 149.
[1004] *District Court Act 2016* (Samoa) s 46 (1)(b).
[1005] *District Court Rules 2014* (New Zealand) r 19.72.
[1006] *District Court Rules 2014* (New Zealand) r 19.74.

where the debt in question belongs to a third party, when the courts will be obligated to refuse an order, and when the courts will be obligated to award costs.[1007]

848. The rationale for garnishee proceedings under the New Zealand rules is to allow a charge to attach to certain kinds of debt for which an attachment order or charging order would be unsuitable, for instance rent due from a tenant, money due in respect of shares held in a company, or money held in a trust account for a special purpose which can no longer be achieved.

Australia

849. Garnishee proceedings are comprehensively covered in the Victorian *Supreme Court (General Civil Procedure) Rules (2015)*. The relevant Order sets out helpful definitions of a garnishee, judgement creditor and judgment debtor.[1008] The Order also sets out what debts can attach to a garnishee order, the content and process for filing and serving a garnishee summons, what evidence can be relied upon in a supporting affidavit, the orders available to the Court when hearing a garnishee summons, how a garnishee's liability is discharged and costs.[1009]

Vanuatu

850. The Vanuatu rules uses "the Warrant for the redirection of debts and earnings" to refer to proceedings whereby a court issues an enforcement warrant to a third person to pay a certain and payable debt.[1010]

851. The CPR (Vanuatu) provides that in deciding whether to issue the warrant, the court must consider whether the enforcement debtor has sufficient means to pay his own necessary living expenses as well as those of his family. The court must also consider whether unreasonable hardship will be caused on the enforcement debtor upon the issue of the warrant and whether it is at all appropriate to issue the warrant given the nature and the amount of the debt.[1011]

852. A judgment creditor under the Vanuatu rules is entitled to enforce a money order while a judgment debtor is the person who is required to pay money under a money order.[1012]

[1007] See generally *District Court Rules 2014* (New Zealand) rr 19.70-19.88.
[1008] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 71.01(1).
[1009] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 71.
[1010] *Civil Procedure Rules 2002* (Vanuatu) r 14.22 (1).
[1011] *Civil Procedure Rules 2002* (Vanuatu) r 14.22 (2).
[1012] *Civil Procedure Rules 2002* (Vanuatu) r 14.1 (1).

853. A warrant for the redirection of debts and earnings can only be enforced if it is served on the third person and upon service of the warrant, the third party will be obliged to pay the debt to the judgment creditor.[1013]

Submissions

854. In Issues Paper 1, stakeholders consulted were of the view that garnishee proceedings were rarely used in the Supreme Court given that the process is complex.

855. In the District Court, stakeholders in Issues Paper 1 noted that garnishee proceedings would not be practical given the sums of money in question are small. If the jurisdiction were increased in the District Court, some stakeholders took the view that garnishee proceedings would be useful then given the number of debt recovery cases that go to that court.

856. The Commission accordingly sought views on the following questions:

- *Should the procedure for garnishee proceedings be simplified? If so, in what way?*
- *Should garnishee proceedings be added to the rules of the District Court if the jurisdiction of that Court is increased?*

857. In response to the above questions, the Commission collected submissions from various stakeholders, as follows:

858. One submitter from the private sector stated that garnishee proceedings were too cumbersome and were rarely used. She suggested that the procedure set out in the rules needs to be simplified. However if the jurisdiction of the District Court is increased, she expressed the view that garnishee proceedings will be useful because cases of debt recovery (e.g. small loans) were very common.[1014] She provided submissions restating the same view but further clarifying that garnishee proceedings in the District Court should assist in enforcing maintenance orders.[1015]

859. Another submitter shared the same view stating that the rules were cumbersome. He had thought about it on a few occasions but had never used them. He also agreed that garnishee proceedings will be useful in the District Court if the jurisdiction is increased.[1016]

860. A member of the judiciary also agreed that garnishee proceedings seem to be a complex procedure but did not provide an opinion on how to address such a complexity.

[1013] *Civil Procedure Rules 2002* (Vanuatu) r 14.23.
[1014] Preliminary Consultation with Ruby Drake (Apia, Samoa, 25 January 2010).
[1015] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 2.
[1016] Preliminary Consultation with George Latu (Apia, Samoa, 25 January 2010).

He also expressed the view that garnishee proceedings should be in the Magistrates' Court Rules.[1017]

861. The Commission met with members of the judiciary and they agreed that garnishee proceedings should be simplified but did not provide further information. Also, they agreed with views expressed by other submitters that garnishee proceedings was something that the District Court could utilize.[1018]

862. On the other hand, one submitter expressed the view that garnishee proceedings are not practical and that most practitioners in Samoa would probably prefer using judgment summons. He added that the process for garnishee proceedings was not quick but agreed to maintain these proceedings in the Rules but to simplify the process involved.[1019]

Commission's View

863. The Commission is of the view that Part XIV regarding garnishee proceedings is too cumbersome and this complexity may in part be due to the fact that such proceedings, by their nature, can occur in various circumstances as provided in the SC Rules as follows:

i. Where the sub-debtor or third party pays money into court before the garnishee proceeding (rules 146,147);
ii. Where the sub-debtor or third party fails to pay the money or appear in court (rule 148]
iii. Where the sub-debtor disputes liability (rule 149);
iv. Where a third person has a claim to the money claimed by the judgment creditor from the sub-debtor or third party (rule 150);
v. Where the sub-debtor or third party owes money to the debtor under a court order or judgment (rule 153); or
vi. Where money has been paid into court and held for the debtor (rule 154).

864. Moreover, the Commission took the view that garnishee proceedings in Samoa are no different from those in New Zealand. In fact, Part XIV of the SC Rules of Samoa replicates similar rules in New Zealand. This complexity merits consideration for review to simplify the procedures for garnishee proceedings to ensure that they are user-friendly for lawyers in Samoa. Although submitters rose that this procedure be simplified, they did not provide any insights on how this could be done.

[1017] Consultation with Justice Vui Clarence Nelson (Ministry of Justice and Courts Administration Complex) 10 February 2010.
[1018] Consultation with Judiciary (Chief Justice Chambers, Ministry of Justice and Courts Administration) 13 July 2012.
[1019]Preliminary Consultation with Ainuu (Ainuu Law Firm, Malifa) 18 July 2012.

865. The Commission therefore recommends that in order to simplify the procedures for garnishee proceedings, the SCR should be amended allow garnishee proceedings to be attached to certain kinds of debt. This is similar to the NZ rules whereby garnishee proceedings are attached to certain debts by which an attachment order or a charging order is unsuitable such as money owed regarding shares held in a company, rent due from a tenant, or money in a trust account held for special purposes which can no longer be achieved. This would enable judgment creditors to enforce payments from judgment debtors especially in situations where a charging order is deemed unsuitable.

866. The Commission also notes that Vanuatu provides useful guidance in taking into account certain aspect before issuing a warrant to the enforcement debtor. Such aspects include considering whether the enforcement debtor has the means to pay for the debt and whether this payment would bring unreasonable hardship on the enforcement debtor. The Commission considers that including a provision similar to Vanuatu in the SCR is necessary to ensure that the judgment debtor is not financially deprived when granting the garnishee order.

867. The submitters indicated that garnishee proceedings would be of great use to the District Court if the jurisdiction was increased. The Commission notes that the jurisdiction in the District Court has increased; and therefore considers that the incorporation of garnishee proceedings in the MCR would be useful especially in debt recovery cases.

868. The Commission notes that in addition to garnishee proceedings there are numerous other creditor's remedies under the SCR and other legislation, and in comparative jurisdictions. Some examples include liens, preservation orders, writs of sale/sale orders, right to restrain, charging orders, possession orders and judgment summons. Consultations with the judiciary indicated that judgment summons, currently governed by the *Judgement Summonses Act 1965*, is sometimes relied upon however garnishee proceedings and other remedies rarely come before the court. The Commission therefore considers that this could be improved by clarifying the procedures and circumstances in which these remedies can best be used.

868. The Commission also strongly recommends that continuing legal education be provided to lawyers on creditor's remedies so that the procedures and circumstances in which these remedies can best be used are clarified and more user friendly.

Recommendations:

158. Clarify existing procedure on Garnishee Proceedings and other creditor's remedies under the current rules and other legislation, and consider including the following additional creditor's remedies from comparable jurisdictions in the rules:

- Liens;
- Preservation orders;
- Writs of sale/sale orders;
- Right to restrain;
- Charging orders;
- Possession orders; and
- Judgment summons (currently governed by the *Judgement Summonses Act 1965*)

159. Continuing legal education should be provided to lawyers on creditor's remedies so that the procedures and circumstances when they can be used are clarified and more user friendly.

160. Simplify Part XIV of the SCR by allowing garnishee proceedings to attach to certain kinds of debt. Such debts include those by which a charging order is unsuitable. For instance: rent due from tenant, money owed relating to shares in a company, money in a trust account held for special purposes which can no longer be achieved.

161. Vanuatu offers useful guidelines in addressing whether the judgment debtor would encounter any unreasonable hardship when paying the debt, or whether or not the judgment debtor has the financial means to pay for the debt. These provide useful guidance in simplifying the SC rules.

162. The procedures for Garnishee proceedings should be incorporated into the MCR.

C. Absconding Debtor

870. An absconding debtor is a person who owes money to another person and who runs away from his creditors or goes into hiding so he or she cannot be found.[1020]

General Application

871. The SCR and MCR provide procedures for the arrest of debtors prior to final judgment if the plaintiff can prove to the satisfaction of the Court that the cause of action is good, meaning that there is a probability that the defendant will leave Samoa and if the defendant were to leave, the plaintiff would be materially prejudiced in pursuing their action. If the defendant fails to give security to the satisfaction of the Court that he or she will not leave Samoa then the defendant may be imprisoned for a period not exceeding three months. Security for the purposes of this provision is in monetary form, either in the form of a payment, or bond, with one or two securities in the like amount.[1021] Unlike the SCR, the MCR further provides that any such application should be supported by affidavit.

872. An exception exists in the SCR, where if the action is for a penalty and the plaintiff is the government, there is no requirement to prove that the absence of the defendant would 'materially prejudice' the case for the government. In addition, the defendant must provide security in the full amount of the penalty. Failure to provide such security will lead to imprisonment.[1022]

873. Another tool used in addressing debtors who might seek to frustrate the court's jurisdiction is through the use of Mareva (also called freezing) orders.[1023] A *Mareva* order is a court order freezing a debtor's assets to prevent them being disposed of or dissipated and thereby frustrating a judgment made by a court against them.[1024] The jurisdiction of the Samoan Supreme Court to grant such an order stems from its inherent jurisdiction as well under the *Judicature Ordinance 1961*.[1025]

[1020] Black's Law Dictionary Free Online Legal Dictionary 2nd ed, *Absconding debtor* <http://thelawdictionary.org/absconding-debtor/>.

[1021] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) rr 184-186; *Magistrates' Court Rules 1971* (Samoa) r 26(1).

[1022] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 186.

[1023] New Zealand, Victoria and Vanuatu each have specific provisions dealing with mareva orders in their respective rules. See *High Court Rules 2016* (New Zealand) Part 32.1; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 37A; *Civil Procedure Rules 2002* (Vanuatu) r 7.8 - 7.9.

[1024] See for example, *Commercial Bank Platina v Mytischinki Commercial Bank* [1997] WSSC 10 (19 March 1997).

[1025] *Commercial Bank Platina v Mytischinki Commercial Bank* [1997] WSSC 10 (19 March 1997); *Judicature Ordinance 1961* (Samoa) s 31.

Comparable Jurisdictions

New Zealand

874. New Zealand still retains the power to arrest absconding debtors, but this power is exercised with great caution recognising that it constitutes a considerable infringement on personal freedoms.[1026] Arrests of this type are only available in the High Court and the power to arrest comes from section 55 of the *Judicature Act 1908 (NZ)* and Part 17, Subpart 8 of the HCR.[1027]

875. Applications can be made without notice to the defendant.[1028] The defendant can at any time apply to have the order discharged or varied and they can also produce security which entitles them to be discharged from custody.[1029]

Australia (NSW, Victoria)

876. In Victoria, 'freezing orders' are used to deal with absconding debtors. A freezing order can restrain a party from removing, disposing of, dealing with or diminishing the value of its assets.[1030]The purpose of making a freezing order is to prevent the court process from being frustrated or inhibited where there is a danger that a judgment will be wholly or partly unsatisfied.[1031]A court can make a freezing order if this danger arises because the judgment debtor absconds or their assets are removed from Australia, disposed of, dealt with or diminished in value.[1032]

877. The Rules prescribe what form is used to apply for a freezing order, what should be included in an affidavit in support and how a freezing order should be served.[1033] The court has power to make costs orders in relation to freezing order applications.[1034] The applications proceed by hearing before a Judge.[1035]

878. The provisions relating to freezing orders are clearly drafted and provide an alternative way of dealing with absconding debtors, which does not interfere with the rights and freedoms protected in the International Covenant on Civil and Political Rights (ICCPR).

[1026] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 195 [9.7.1].
[1027] Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed, 2001) 195 [9.7.1].
[1028]*High Court Rules 2016* (New Zealand) r 17.88(1).
[1029]*High Court Rules 2016* (New Zealand) rr 17.88(2) and 17.90; Andrew Beck, *Principles of Civil Procedure* (Brookers Limited, 2nd ed) 195 [9.7.2].
[1030]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 37A.02(2).
[1031]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o37A.02(1).
[1032]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 37A.
[1033]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 37A.02(3) and (5) and r37A.07.
[1034]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 37A.08.
[1035]*Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 37A.09..

879. New South Wales also uses 'freezing orders' in its *Uniform Civil Procedure Rules 2005* (NSW) to deal with absconding debtors, in largely similar terms to Victoria.[1036]

Vanuatu

880. Similar to Australia, Vanuatu uses "freezing orders" to deal with absconding debtors. The Vanuatu rules provide that a freezing order may be ordered by the Supreme Court to restrain a person from removing assets from Vanuatu or dealing with assets in or outside Vanuatu whether or not the owner of the assets is a party to an existing proceeding.[1037]

881. The rules state that an order is made only if the freezing order is ancillary to the judgment made by court in favour of the applicant or if the court is satisfied that there is a good and arguable case from the applicant's side, and assets are likely to be involved in a judgment in the matter and that the assets are likely to be removed from Vanuatu.[1038]

882. The Vanuatu Civil Procedure Rules provide how and what should be included in an application to freezing orders.[1039] The application must also have with it a sworn statement to support the application and a draft freezing order.

883. This sworn statement must contain why the applicant believes the assets may be removed from Vanuatu or assets that should be restrained. It must also contain why the applicant believes a freezing order should be made to satisfy the judgment that has already been made by court, or if a proceeding has not been started and the name and address of owners of assets are unknown, the applicant should state what has been done to find out names and addresses of owners of assets. The applicant must state how the assets to be subject to an order will form part of the judgment and how to preserve the assets.[1040]

884. The rules provide what the court should do when making the freezing order,[1041] which may also be varied or set aside by the court.[1042]

Submissions

885. Samoa is a signatory to the ICCPR. In Issues Paper 2, the Commission discussed the importance of considering article 11 of the Covenant and its relationship with

[1036] *Uniform Civil Procedure Rules 2005* (NSW) Part 25 div 2.
[1037] *Civil Procedure Rules 2002* (Vanuatu) r 7.8.
[1038] *Civil Procedure Rules 2002* (Vanuatu) r 7.8 (4).
[1039] *Civil Procedure Rules 2002* (Vanuatu) r 7.8 (5).
[1040] *Civil Procedure Rules 2002* (Vanuatu) r 7.8 (6).
[1041] *Civil Procedure Rules 2002* (Vanuatu) r 7.8 (8).
[1042] *Civil Procedure Rules 2002* (Vanuatu) r 7.8 (9).

absconding debtor provisions in the SCR and MCR.[1043]In particular, whether the relevant provisions in both Rules are consistent with international human rights and whether Samoa should repeal these provisions. Whilst both Rules provide for the arrest and imprisonment of a defendant debtor where there is probable cause that the defendant will flee the country, article 11 of ICCPR expresses that no one is to be imprisoned merely because of their inability to fulfil a contractual obligation.

886. In Issue Paper 2, the Commission accordingly sought submissions on the following questions:

- *Should there be a provision in the SCR to provide for a right of the defendant to rescind, vary or discharge the order for the arrest of an absconding debtor?*
- *Is the existing absconding debtor provision consistent with article 11 of the ICCPR?*

887. There was only one written submission on the issue of absconding debtor. The Attorney General Office expressed the view that given the impact of this rule on Samoa's commitment under the ICCPR, more research is needed to be conducted here to find ways to address the contradiction. In addition, they submitted that the issue of whether the effect of an absconding debtor is related to a contempt of court as opposed to a breach of contract should be considered. They added that contempt of court has criminal ramifications.

888. The Commission additionally received comments in some submissions about the possibility of including Mareva orders in the rules of the District Court. One submitter provided that in their experience applications for Mareva orders had generally been confined to commercial disputes that invariably involved a substantial quantities of money and complex legal issues.[1044]

889. Members of the judiciary further noted that should the jurisdiction of the District Court be increased (to include access to e.g. extraordinary remedies), then they would recommend considering the inclusion of Mareva orders within the DC jurisdiction. It should be noted that they do not support this increase in jurisdiction.[1045]This sentiment was echoed in another submission.[1046]

[1043] *International Covenant on Civil and Political Rights 1966* (UN) art 11 states that 'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'.

[1044] Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 1.

[1045] Consultations with Judiciary (Chief Justice Chambers, Ministry of Justice and Courts Administration) 13 July 2012.

[1046]Ruby Drake, Submission No 2 to the Samoa Law Reform Commission, *Civil Procedure Rules Issues Paper 2*, 25 November 2015, 1.

Commission's View

890. The Commission considered the submission from the Attorney General's Office expressing concern that there might be a contradiction with the ICCPR and has conducted additional research to address this concern. The absconding debtor provision in the MCR is for circumstances where there is an action to recover debt, damages or other sum of money and there is a probable cause for believing the defendant is about to leave the country to escape payment. The danger the provision is designed to prevent is the frustration of the Court's judgment. As such, arrest and imprisonment under the provision is not the result of any inability to fulfil contractual obligations, but is instead related to the likelihood that the defendant will try and flee the country and escape the judgment of the court.

891. New Zealand ratified the ICCPR in 1978, yet retains the power to arrest absconding debtors under the *Judicature Act 1908 (NZ).*[1047] The Commission has found no suggestion in its research of any contradiction between New Zealand's provisions about absconding debtors and its commitment under the ICCPR. Similarly the Commission is unable to identify contradiction between Samoa's absconding debtor provisions and its commitment under the ICCPR. In New Zealand the plaintiff make an application without notice for an order to arrest a defendant. The defendant may at any time before or after arrest apply to the court to rescind or vary the order or produce security which entitles them to be discharged from custody.

892. The Attorney General's Office also stated in its submission that the relationship between the effect of an absconding debtor and contempt of court proceedings needs to be considered.

893. Currently, contempt of court is used in Samoa in relation to enforcing judgments for the payment of money under the Supreme Court's civil jurisdiction, but not in relation to absconding debtors. Under the SCR, a charging order can be made where an equitable charge is placed over certain property of the person by whom money is payable.[1048] The Court can then appoint a receiver to take the rents or profits from the charged property, or sell the property so as to ensure the judgement is enforced.[1049] Contempt of court can be made out where there is disobedience in relation to the charging order.[1050]

894. In New Zealand civil contempt of court is utilised in relation to anyone who does not comply with a judgement or order of the court. However, it does not apply to enforce monetary awards or in relation to the non-payment of money in breach of a judgment,

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[1047] *High Court Rules 2016* (New Zealand) r 55.
[1048] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 177 and 179.
[1049] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 180.
[1050] *Supreme Court (Civil Procedure) Rules 1980* (Samoa) r 181.

and it is therefore not relevant to absconding debtor provisions. Overall, the Commission's research suggests contempt of court is not relevant in dealing with absconding debtors.

Recommendations

163. Samoan rules should allow the defendant to apply to discharge or vary an order and to provide security to be discharged from custody, at any time.

LIST OF RECOMMENDATIONS

GENERAL

1. Any provisions not specifically referred to in this report are considered uncontentious at this time. It is recommended that they be retained but redrafted in plain language to make the rules clearer and consistent with other reforms made as a result of this Report.

2. Prescribed forms should be updated and redrafted in plain language. Consider whether additional forms should be prescribed to reflect any amendments or additions made to the rules from recommendations.

3. The Commission has included numerous references to specific timelines, for example in relation to filing documents and listing court dates. The timelines are provided in square brackets and are given on a provisional basis only, reflecting practice in neighbouring jurisdictions and in Samoan courts. It is intended that the proposed timelines will be settled by the judiciary and relevant stakeholders like the Office of the Attorney-General and the Samoan Law Society at the appropriate time.

4. For the purposes of this Report, references to 'days' means calendar days. Consideration should be given to whether days should mean calendar days or working days. Once decided, this should be defined and adjusted where appropriate in the rules.

5. The Magistrates' Court Rules should be referred to as the District Court Rules.

6. Unless otherwise stated, the Commission recommends that the rules in the SCR are replicated in the MCR, to achieve uniformity across civil court jurisdictions in Samoa.

7. Gender neutral language should be used throughout the revised SCR and MCR.

8. Require lawyers to undertake ongoing legal education, particularly related to changes in legislation and their area of practice, as provided under the *Lawyers and Legal Practice Act 2014* (Samoa).

COMMENCEMENT OF PROCEEDINGS

Parties

9. Both rules should clarify that a party means any person who is a plaintiff or a defendant or a person added to a proceeding. Plaintiff and defendant should accordingly be defined.

10. Both rules should clarify that a party who commences and brings proceedings should refer to legal persons or legal entity of full capacity.

Joinder of Parties and Claims

11. Both rules should clearly limit the persons that can be joined to a proceeding to those whose presence the Court considers necessary for the just determination of the issues 'and those whom ought to be bound by any judgment. This should be set out in both the SCR and MCR.

12. Subject to the court's discretion, there should be no limit on the number of parties who can be joined to a single proceeding.

13. Any person should be entitled to join a proceeding on application supported by affidavit.

14. Any party can be removed from a proceeding on application supported by affidavit.

15. Both rules should also provide that the plaintiff in a proceeding may join several claims or causes of action into one proceeding.

Third Parties

16. The existing rule on third party procedure should be extended to require defendants to show a claim against the third party independent of the plaintiff's rights.

17. The third party notice procedure should only require leave of the court to issue notice, if the specified time frame (14 days) has expired.

18. The procedure for third party notice should outline that defendants must:
    - Use prescribed form
    - Be accompanied by a statement of claim by the defendant against the third party
    - State the claims by the plaintiff against the defendant, and the defendant against the third party
    - State the question or issue to be tried and the remedy sought from that third party
    - State the time within which the third party may file an appearance in the proceeding

- Outline the consequences of default by that third party.

19. Rules on third party notice should be clearly set out in both the SCR and MCR.

Death of a Party

20. The provisions of the NZ Rules on the death of a party provide helpful guidance and are appropriate to Samoa. Rules on death of a party should be clearly set out in the MCR and SCR.

21. Both rules should provide that where a party to a proceeding dies before a matter has been finalized, the proceeding should not come to an end if a cause of action survives or continues, unless the cause of action itself is brought to an end. The current practice that the court will not continue to hear a matter until the name of the plaintiff or defendant is amended and replaced with the name of the administrator or executor of the estate, should be included in the rules.

22. The Court should also be given discretion to deal with the matter as it deems just, including timeframes for providing names of administrator or executor of the estate, or how the matter should proceed if there are no letters of administration or probate orders made (including appointing a public trustee).

23. Where a substitution of parties is necessary or desirable to settle any question involved in the proceeding, an ex parte application to the court should be able to be made for a change of party in the event of death.

REPRESENTATION OF PARTIES

Minors

24. Rules in this part should apply to a child which should be defined in the rules as meaning a person under 18 years (consistent with the definition of child under the Family Court Rules and the UN Convention on the Rights of the Child).

25. Rules in both Courts should require that a child must have a guardian *ad litem* as his or her representative in any proceeding unless the court otherwise orders. The Court must also be satisfied that the guardian *ad litem* will act in the best interests of the child and is able to fairly and competently conduct a proceeding on behalf of the child.

26. A costs provision should be included in both rules so that a litigation guardian can recover their costs (which include costs paid or incurred by them or any costs award made against the child). Guidance can be sought from the Family Court Rules 2014.

27. Rules in both Courts should also empower the Court to remove or substitute the guardian *ad litem*.

28. The rules should provide that a child between 16 and 18 years can represent themselves provided the Court is satisfied that they have capacity to make decisions and there is no reason that would make it in their interests to be represented by a guardian.

29. The term guardian *ad litem* should be replaced with litigation guardian in the rules.

Incapacitated Persons

30. The rules should no longer be limited to 'a person with unsound mind' and should be broader. The rules should instead govern 'incapacitated persons' which should mean:

    - 'a person who by reason of physical, intellectual, or mental impairment whether temporary or permanent, is not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or is otherwise unable to give sufficient instructions to issue, defend or compromise proceedings'.

31. To guide the Court in its assessment of whether a person is incapacitated or not, expert evidence can be produced, for example by a medical professional, to meet the definition of 'incapacitated person'.

32. The rules should require an incapacitated person to have a litigation guardian as his or her representative in any proceeding, which should be able to be removed by the Court in the interests of the incapacitated person but should not be able to retire without the leave of the Court. A litigation guardian should be appointed by a judge who ensures the guardian is able to fairly and competently conduct a proceeding and does not have interests adverse to those of the incapacitated person.

33. A costs provision should be included in both rules so that a litigation guardian can recover their costs (which include costs paid or incurred by them or any costs award made against the incapacitated person). Guidance can be sought from Samoa's Family Court Rules 2014.

34. If a person becomes incapacitated during a proceeding, the rules should require that permission from the court be sought before any other step is taken so that a litigation guardian may be appointed.

35. The term 'guardian *ad litem*' should be replaced by 'litigation guardian'.

36. Consideration should be given to allocating resources to legal aid or the community legal sector to represent incapacitated persons. This is not for inclusion in the rules.

Companies

37. The SCR should clarify how a company may commence and carry on proceedings in any Court, which should replicate the requirements in the *Companies Act 2001 (Samoa)* to the fullest extent possible. This includes rules relating to representation, service and what the court must consider in whether to grant leave to appear on behalf of a company.

38. The provisions in the *District Court Act 2016* permitting a party to appear by an agent authorised in writing by the party, or by a person holding a power in special circumstances, are appropriate and should be replicated in the MCR.

Businesses

39. The rules should be clarified so that:

    i. For firms comprising of more than one person, persons claiming or alleged to be liable as partners can sue or be sued in the name of the firm. The personal names of the partners involved may be requested by the opposing party.

    ii. For sole traders, a person carrying on business in the name of a firm can sue and be sued in the name of the firm and may be required to file an affidavit to fully identify himself or herself.

Class Action

40. In addition to requiring all persons represented to have the same interest in the subject matter of the proceeding in class actions or representative proceedings, the rules should also require the consent of those represented to first be obtained ("opt in" system), unless otherwise directed by the court. The SCR currently provides for authorisation by the Court, which should be an alternative on an application made by a party or intending party to the proceeding.

41. Class action rules are also applicable to the MCR and should therefore be replicated as far as necessary in the new MCR.

ACTIONS AND MOTIONS

42. The rules should continue to provide for commencement of proceedings by filing a statement of claim or a motion supported by affidavit, however it should state in clearer terms the circumstances where actions and motions are used. For example, a statement of claim should generally be used when seeking any private law remedy and a motion should generally be used when seeking a public law remedy.

43. The rules should continue to provide the court wide powers to amend any procedural pleading as it thinks fit including rectifying a mistake made by the plaintiff in the commencement of proceedings so that the real dispute is determined, or to set aside proceedings in such circumstances.

PLEADINGS

Statement of Claim

44. In addition to the current requirements under the SCR for a statement of claim to include particulars of time, place, names of persons, dates of instruments and 'other circumstances' – the rules should also expressly provide that a statement of claim must show the general nature of the claim and should also include sufficient particulars of the following:
    - Any relief, remedy or orders sought;
    - Any legislative provisions relied upon; and
    - All material facts but no evidence or argument.

45. Both rules should include that a party can amend a statement of claim at any time with leave of the Court.

46. The rules should clarify that the Court retains discretion to disallow the amendment or to issue orders about the mode of amendment (including service or timelines for filing and service).

47. Samoa retain reference to 'statement of claim' in the SCR and MCR.

48. Amend the MCR in line with the amendments made to the SCR.

Statement of Defence

49. The SCR and MCR should include specific requirements as to the form and content of the statement of defence, and should include that:
    - The defendant must address every allegation of fact in the statement of claim which must be answered in substance by either admitting, denying or not admitting allegations in the statement of claim.
    - A statement of defence which consists of blanket denials with no substance can be struck out.
    - Any allegations not denied are deemed to be admitted;
    - A denial of an allegation should not be evasive and should be a fair and substantial answer.
    - Sufficient particulars must be given (e.g. names, times, places, amounts) to inform the court and parties of the defence.

50. The SCR should provide that the defendant may file a statement of defence within [14] days after the first mention or as directed by the Court. The same timeframe should be provided to defendants when responding to an amended statement of claim.

51. A party can amend a statement of defence at any time with leave of the Court. Both rules should clarify that the Court retains discretion to disallow the amendment or to issue orders about the mode of amendment (including service or timelines for filing and service).

52. The same time limits should be in the MCR, except where the procedure of the District Court specifically requires a separate rule.

Reply

53. There is no need to include rules relating to reply in either jurisdiction at this time.

Counterclaim

54. Both rules should set out the required content and filing of a counterclaim.

55. A counterclaim may continue to be filed in the same document as the statement of defence. The document should be clearly labelled a 'defence and counterclaim'.

56. A court should at any time be able to direct that the counterclaim or part of it be separately tried, but unless that happens the counterclaim should be heard with the original proceeding. If however the original proceeding (i.e. plaintiffs claim) is stayed, discontinued or dismissed, the counterclaim should remain live and may proceed independently.

57. The form and content of a counterclaim should follow the form and content required for a statement of claim.

58. The timeframe for filing a counterclaim will be the same as the timeline for filing a statement of defence i.e. 14 days, where they are filed in the same document.

59. The rules on the form or content relating to pleadings should apply to defences to counterclaims as though it were a defence. The timeline for filing a defence to a counterclaim should be the same as the timeline for defending a statement of claim. If the plaintiff (or counterclaim defendant) fails to file a defence to the counterclaim, the defendant, should be able to seek judgment on the counterclaim.

Set Off

60. Both rules to provide for set off as a defence, which should be restricted to private civil proceedings and not available for cases filed by the Government for the recovery of taxes and penalties similar to NZ.

COURT DOCUMENTS

Format and Filing

61. The rules for filing documents should require that all documents be on good quality A4 paper, instead of bond paper.

62. General rules on the form of all court documents should continue to be included in the rules. Rules should also clarify that non-compliance should be regarded as an irregularity that may be addressed by the Court and not a nullity.

63. In addition to filing in person, documents should also be able to be faxed to the registry.

Electronic Filing:

64. The following recommendations are made in anticipation of an e-filing system being developed in Samoa in future on a date to be nominated by the Chief Justice.

    - Documents should be able to be filed electronically. Systems for e-filing will need to be in place and available for electronic filing. Both rules should be expanded to permit e-filing subject to compliance with requirements in rules or in practice directions issued by the Chief Justice (as is done in similar jurisdictions). Practice directions could include specifications on how documents are signed and sealed, how they are stored, any restrictions on copying the documents, evidence is provided confirming filing, requirements for acceptance of an e-filed document so that the date, time and endorsement of filing is verified, and so forth. The rules from other jurisdictions experienced with e-filing systems can be used as a guide and can be adapted to fit with Samoa's technological infrastructure.

    - The Registrar should notify the user immediately if an e-filed document is not accepted by the Registrar. The rules should also specify what documents may not be filed electronically (such as court books and affidavit exhibits), and what e-filed documents must be passed to the court in imaged form (such as affidavits) and what requirements these documents must also comply with.

    - The rules should provide the period of time the original hard copy of the affidavit or formal undertaking form must be retained. It should also provide that the Judge

may order it to be produced on application or on the Judge's own initiative if there is any uncertainty as to the content of an affidavit or formal undertaking.

Service

65. Both rules should require that any document filed in court must be served on other parties. Affidavits which a party intends to rely on in court but which have not been filed, must be served on all interested parties.

66. Rules should include procedures for methods of service.

67. Rules should also include specific time frames where appropriate and give the Court discretion to set timeframes for service if not otherwise specified.

68. Retain in the SCR the provision requiring personal service of a summons.

69. Insert into the MCR a provision requiring personal service of a summons.

70. Insert a definition of 'personal service' into the SCR and MCR so that it captures the following – where a document is personally served by leaving the document with the person to be served, or if that person does not accept it, by putting it down and bringing it to the notice of that person.

71. For represented parties, rules should permit documents other than a summons to be served using other modes (not just personal service) including by sending it to the party's address for service by courier post, fax, or email, provided it meets the requirements contained in rules or practice directions (to be formulated) about what constitutes proof of service and when documents are considered served.

72. For unrepresented parties, all documents must be served personally or by way of substituted service as directed by the Court.

73. Both rules should also provide for substituted service where despite reasonable efforts, personal service cannot be effected. In such situations a court may direct how a document should be served or brought to the notice of the other party; direct that steps have already been taken sufficient to constitute service; or dispense with service. Service on corporations should be by personal service to a director or employee at the principal place of business, or as the court may direct, or at the registered office. However in the case of foreign corporations with a place of business in Samoa, by personal service on the person in charge at the place of business. Both rules should set out requirements for service on companies and overseas companies with a place of business in Samoa, for example by:

    - Delivery to a director (or person named on the overseas register as a director or authorised to accept service);

- Delivery to an employee at the head office or principal place of business in Samoa;
- Leaving it at the company's registered office or address for service as required under the Act;
- In accordance with directions by the court;
- In accordance with any agreement with the company.[1051]

74. If effected this way, receipt of service must be immediately acknowledged. This may be by email or other written correspondence acknowledging date and time of receipt.

75. Both rules should provide that the Court can cure any technical irregularity in service, extension of time, or substituted service – where a document has come to the required persons notice and no irreparable prejudice has been suffered.

76. Extend existing rule so that parties can serve all documents outside of Samoa with leave of the Court.

77. Specify that overseas service is effected in accordance with the rules of service in the jurisdiction where the documents originate, unless otherwise directed by the Court.

78. Include the same overseas provisions in the MCR as in the SCR.

INTERLOCUTORY APPLICATIONS

Summary Judgment

79. That the MCR and SCR contain provisions setting out the procedure for applying for summary judgment. The rules should address the following:

    i. Application for summary judgment is made by summons and an affidavit in support.

    ii. The affidavit in support must set out the grounds on which the claim is made, and state the plaintiff's belief (and grounds for that belief) that the defence has no real prospect of success.

    iii. Timelines for filing these documents should be specified

    iv. The orders available to the Court when hearing an application for summary judgment, specifically:

        a. To dismiss the application

[1051]Companies Act 1993 (New Zealand) ss 387 and 389.

b. To order summary judgment

c. To dispose of the proceeding finally in a summary manner with consent of all parties.

80. A rule should be inserted into the SCR allowing plaintiffs and defendants to apply for summary judgment on the basis that the defendant has no defence/no real prospect of success or, alternatively, the plaintiff's claim is unsustainable.

81. Section 29 of the *Districts Court Act 2016* (Samoa) should be amended to permit defendants to apply for summary judgment at the District Court level. The MCR should then be updated accordingly to allow defendants access to summary judgment.

82. List in the rules situations in which summary judgment is not available, or alternatively list certain types of claims summary judgment should be restricted to.

Interpleader

83. Interpleader provisions in the SCR should be clearer and modified. The Commission considers that the New Zealand interpleader provisions provide a useful starting point to amend the interpleader provisions in the SCR.

84. Interpleader provisions should be included in the MCR in the same terms as the SCR. The rules can be made pursuant to section 44(c) of the DCA.

PREPARATION FOR TRIAL

Discovery

85. More specific and comprehensive rules governing the process of discovery should be included in the SCR. These should include the following:

i. Provide for two types of discovery, namely standard and where appropriate tailored discovery. Definitions of both should be included. The New Zealand HCR can be used as a guide. This includes, prescribed forms, discovery checklist, matters for parties to consider when preparing for discovery, how documents will be exchanged, how they will be presented at trial and how to claim privilege.

ii. A continuing obligation on parties to discover and inspect documents at all stages of a proceeding (for example, where a party becomes aware of a document not contained in the order but adversely affects that party's own case or supports another party's case, or was already in the party's control but was not disclosed through inadvertence).

iii. Requirement that the party giving discovery must amend the list of documents if it becomes inaccurate from a change of circumstances.

iv. Judge may make an order at the case management conference dispensing discovery, or order standard discovery or order tailored discovery.
v. A party who fails to include a document in the affidavit of documents may only use the document in evidence with the consent of all parties or leave of the court.
vi. The inspection of documents should also include inspection through electronic exchange of documents, unless the court orders otherwise.
vii. A party asking for discovery must consider certain factors before making an application. These include the nature and complexity of the proceeding, number of documents involved, ease and cost of retrieving documents, significance of any document to be found and any other relevant matter.
viii. Parties need not produce privileged documents but must state in their affidavit of documents if they are claiming privilege. For documents that are privileged in part, parties can redact the privileged information before producing the document. A party must not use privileged documents that are mistakenly disclosed if a lawyer would realise that the document is privileged and was disclosed by mistake.
ix. For confidential documents, parties can propose in their affidavit restrictions as to who can inspect the documents and how they are used.
x. Copies of documents produced under discovery must only be used for the purposes of the proceedings and must not be made available to any other person.
xi. The cost of printing or producing the documents should generally be borne by the party seeking the documents, as a default position.
xii. Sufficient time should be given for discovery of documents:
    a) filing and serving the affidavit of documents. The current timeframe of 7 days should be revisited and extended as appropriate (for example 20 days as is the position in New Zealand).
    b) inspecting documents to allow parties to locate the documents to be produced. The current timeframe of 2 days should be revisited and extended as appropriate (for example 7 days as is the position in Vanuatu and Victoria).

86. Insert discovery rules into the MCR. Consideration can be given to including detailed discovery rules that replicate the SCR, or including a simplified version which at least covers:

i. Definition of discovery;
ii. Notice of discovery;
iii. discovery requiring the Court’s leave;
iv. time for notice;

v. affidavit of documents;
vi. time for making discovery;
vii. continuing obligation to make discovery; and
viii. failure to make discovery.

87. The rules should allow for discovery *before* a proceeding is commenced. An application for pre-commencement discovery can be made with an affidavit in support setting out the facts of the application and specifying the documents sought and making it clear that a decision to commence proceedings depends on the documents being disclosed.

88. In order for an intending plaintiff to rely on this rule, there must be a real probability of the existence of a claim against the intended defendant, and the intending plaintiff must have grounds to believe that the documents may be or may have been in the control of the intended defendant.

89. In deciding such an application, the Court must consider the likely benefits and disadvantages of disclosure and that it should not be used for 'fishing expeditions'. Rules should be formulated to safeguard against such abuse, for example, providing that the search must be reasonable, depending on the circumstances. Factors to be considered include the nature and complexity of the proceeding, the number of documents involved, the ease and cost of retrieving a document, the significance of any document likely to be found, and the need for discovery to be proportionate to the subject matter of the proceeding. Provision could also be included to permit the Court to make costs orders to discourage parties from abusing the pre-commencement discovery process.

90. Both rules should provide for non-party discovery. It should also include what the court must be satisfied of before such order can be made to a non-party, which should include the name of the non-party, that the person in possession and control of the documents is given an opportunity to be heard, the documents that are relevant to the proceedings and that disclosure is necessary for fairness and costs. The rules should allow this only for discoverable documents that the person would have had to disclose if the person were a party to a proceeding.

91. Both rules should include a cost provision so that the court could order the party seeking discovery to pay for costs incurred by the non-party to produce and retrieve documents

Setting Down

92. Amend rule 14(a) and 14(2) of the SCR to more clearly state that the Registrar must fix a date for first mention when a statement of claim is filed in court.

MEASURES FOR EARLY RESOLUTION OF DISPUTES

Alternative Dispute Resolution

93. The rules should provide for inclusion of ADR in the civil procedure process consistent with the *Alternative Dispute Resolution Act 2007* and Mediation Rules 2013.

94. The rules should provide a definition of ADR and the forms of ADR available in civil proceedings including:
    - Mediation
    - Arbitration
    - Judicial Settlement (currently not defined in the ADR Act)
    - Reconciliation (currently not defined in the ADR Act)
    - Conciliation

95. To underline its importance, the enhancement of the use of ADR processes at the earliest possible opportunity in proceedings should be reflected in the purpose statement of the rules.

96. The rules should enable the Court to make an order for ADR, pursuant to the *Alternative Dispute Resolution Act 2007,* where it deems the circumstances appropriate at any point of the proceeding. The rules should also specify that any party to a proceeding may apply to the court for an order for ADR at any point of the proceeding.

97. Both rules should also enable the Court to issue directions as to ADR procedures not provided for under the rules.

98. The rules should also grant parties the right to undertake ADR outside of the court process, provided that written notice is submitted to the court within a specified time.

99. As is currently reflected in the Mediation Rules 2013, the rules should also provide that where appropriate, the court must require the exhaustion of the ADR processes before allowing the case to proceed to trial.

100. The rules should impose a duty on each party to participate in the ADR process in good faith and with a genuine effort to reach a resolution. A costs provision could also be included as a consequence for breaching this duty by failing to participate in ADR in good faith.

101. The rules should also provide a comprehensive procedural guide for the ADR process to assist the court and parties in civil procedure proceedings including procedures for referral to alternative dispute resolution, who may be appointed to conduct the ADR, how the process is managed and resolved, how outcomes are recorded and preserving confidentiality in the ADR process.

102. Consider including in the ADR process (whether as an amendment to the *Alternative Dispute Resolution Act 2007* or in the rules) provision that where the outcome of the ADR is non-binding, the Court order may be without the consent of the parties. However, where the ADR process results in a binding outcome, the consent of the parties is required.

103. The *Alternative Dispute Resolution Act 2007* and Mediation Rules 2013 should be reviewed to check whether any amendments are required as a result of these recommendations to ensure consistency across all legislation.

Judicial Settlement Conference Resolution

104. Both rules should include rules on JSC in civil proceedings which should be convened by a judge and held in chambers.

105. The rules should empower the Court to convene a JSC of the whole proceeding or any issue:

- at any point before the hearing; or
- during the hearing with the consent of all parties.

106. Both rules should provide that for JSC conducted during a hearing, the presiding judge may not assist in negotiations but should appoint another judge to run the JSC, unless:

- the parties consent to the presiding judge running the JSC; and
- the presiding judge is satisfied that there are no circumstances that would make it inappropriate to do so.

107. The rules should require parties to file and serve a memorandum identifying the issues and any settlement negotiations by a certain timeframe before the date set for the conference. [New Zealand uses a timeframe of 10 working days in the DCR].

108. In order to preserve the privilege and confidentiality of statements made during JSC, there should be a general prohibition on the admissibility of these statements as evidence during the hearing.

109. The rules should also provide that the JSC and papers filed in connection with them are to be treated as without prejudice.

110. Both rules should provide that the Judge may issue directions to determine procedure when it is not provided for under the rules.

Case Management

111.Both rules should provide for case management conferences to promote the just, speedy and inexpensive determination of proceedings.

112. The purpose for a case management conference should be provided in the rules to include the following:

- To identify, define and refine issues involved in the civil proceeding;
- To determine the steps to be taken to prepare the proceeding for trial;
- To encourage the parties to cooperate with each other, to settle whole or part of the proceeding or to use appropriate dispute resolution; and
- To control the progress of the civil proceeding.

113. The rules should clarify that once a matter has been allocated to a judge and a hearing date is set, there should be at least one case management conference held between the parties and a judge prior to hearing.

114. Both rules should set out that once a matter is allocated to a judge, the same judge is to assume control over the course of the proceeding, where possible, until it is resolved.

115. Both rules should empower a judge to allocate or cancel a case management conference at any time or on the application of one or more of the parties.

116. A judge may, at any case management conference, give directions to secure the just, speedy and inexpensive determination of the proceedings.

117. Both rules should also include that case management conferences are held privately. However, the judge may only order conference to be held in open court if it is in the public's interest.

TRIAL

Trial Procedure

118. Trial procedures in the rules should be updated to provide greater clarity, set out similarly to New Zealand's HCR. For example, place of trial, adjournments, methods of trial, verdicts, consolidation, separate decisions of questions, counsel assisting and hearings by video link. The rules should also reaffirm the judges' discretion when it comes to trial proceedings.

119. Trial procedures should be included in the MCR in the same terms as the SCR as appropriate.

Place of Trial

120. Both the SCR and MCR should specify that a Court may determine or change the location of a trial. In making such a determination a Court should have regard to whether both parties to the proceeding have consented, and whether it would be fairer,

safer or more convenient to hear the proceeding at a different location considering the overriding purpose of the Rules.

Failure to Appear

121. Both rules should be expanded to adopt additional and clearer procedures for non-appearance of defendant or claimant/plaintiff using the provisions in New Zealand and Vanuatu as a guide. More specifically, if the plaintiff appears and the defendant does not, the plaintiff must prove the cause of action insofar as the burden of proof rests with the plaintiff. However if the defendant appears and the plaintiff does not, the defendant should be entitled to have the matter dismissed and must prove any counterclaim insofar as the defendant bears the burden of proof.

122. Both rules should also provide that if neither party appears when the proceeding is called, the Court may order for the proceeding to be struck out.

123. Both rules should also empower the Court to reinstate the proceeding upon good cause being shown by either party and on any terms it thinks fit.

124. Both rules should also include that any verdict or judgment obtained when one party does not appear at the trial may be set aside or varied by the Court on any terms that are just if there has, or may have been, a miscarriage of justice.

125. For consistency and clarity, the rules should be the same in both the SCR and MCR.

Evidence and Witnesses

126. Amend rule 61 of the SCR so that, subject to any agreement by the parties or court orders otherwise, evidence shall be given as follows:

- At trial, orally, unless ordered otherwise by the Court.
- On an interlocutory application, by affidavit.
- Any other alternative forms of communication (including telephone or video link provided its available) if the Court is satisfied that it is impossible for the witness to attend Court to give evidence.

127. The Court can direct that costs incurred in giving evidence by telephone or video link must be paid by the applicant.

128. The Rules should also replicate the provisions pertaining to Affirmation in *the Oath, Affirmations and Declarations Act 1963 (Samoa).*

129. Modernise and update the rules by omitting the following persons currently authorised to witness affidavits: Postmaster; Collector of customs; Medical Officer. Persons authorised to witness affidavits should include: Solicitor of the Supreme Court;

Registrar or Deputy Registrar of the Supreme Court or Magistrate Court; or any other person authorised by the Head of State on the recommendation of the Chief Justice.

130. Insert provision into the SCR and MCR that the place and date of swearing an affidavit, and the qualifications of the authorised witness, must be included in the jurat and that the jurat must be signed by the authorised witness.

131. In order to ensure consistency between the *Oaths, Affidavits and Declarations Act 1963* and the new civil procedure rules, the Commission also recommends that the requirement to include the qualifications of the authorised witness is also added to the *Oaths, Affidavits and Declarations Act 1963.*

132. Insert rules relating to affidavits into the MCR.

133. The rules should include provisions relating to matters such as preparing written statements, reports and giving oral evidence for expert witnesses.

134. The rules should also provide clearly the responsibility of respective parties and the court in the remuneration of experts. The Court should have discretion to order one or more of the parties to provide remuneration for the expert in proportions that it decides. Where the Court appoints an expert of its own initiative, the Ministry of Justice pays the expert. However, the Court retains the discretion to include the expert's remunerations as part of the cost of the proceeding.

135. If not set out in the rules, then a Code of Conduct for expert witnesses should be developed to regulate the conduct of expert witnesses, particularly when preparing written statements or giving oral evidence in proceedings. This code of conduct should provide that the expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise. This code of conduct should also set out other necessary matters such as the requirement for an expert witness to provide qualifications, the procedure for providing expert evidence, a duty on the expert to comply with directions from the court etc.

JUDGMENT

Strike Out

136. Include provisions in both rules to deal specifically with vexatious litigants such as,

- provisions allowing the court to order a vexatious litigant to pay costs;
- provisions to dismiss or stay proceedings if it is vexatious;

- provisions to refuse an application for a charging order if the amount involved is considered so small as to be vexatious (or if a charging order has been issued, to revoke it).

Setting Aside a Judgment

137. Codify the existing common law established in *Lauano v Samoa National Provident Fund* [2009] WSCA 3, adding an additional interests of justice ground.

138. Maintain and codify the court's unfettered discretion.

139. Include setting aside provisions in the MCR that mirror those in the SCR as appropriate.

Reinstatement

140. Introduce criteria that clarify the grounds for reinstatement (these could include good cause for the non-appearance and the interests of justice).

141. Include this criteria in identical terms in both the SCR and MCR.

142. Amend the existing provision so that it applies to plaintiffs and defendants.

Rehearing

143. Amend the SCR (rule 141) to enable rehearing on a whole matter or specific issues.

144. Amend the SCR (rule 141) to include specific procedures and criteria for a rehearing for example, whether the court will accept new evidence or receive legal submissions alone, and whether there is an onus on the applicant to establish an error of law.

Judgment on Confession

145. Amend the MCR and SCR so that in addition to plaintiff, any other party to the proceeding can apply for judgment on confession or order that the party may be entitled to, without waiting for the determination of any other question between the parties.

146. The rules should clarify that the Court exercise this power without deciding on the other issues in the proceeding and should be able to make any judgment or order it considers just.

COSTS AND COURT FEES

Costs Regime

147. Principles applying to the determination of costs should be inserted into the SCR and MCR. These principles should cover those already applied by the Courts using case law as well as those used in New Zealand. These include, but are not limited to:

- the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;
- an award of costs should reflect the complexity and significance of the proceeding;
- an award of costs should not exceed the costs incurred by the party claiming costs; and
- so far as possible the determination of costs should be predictable and expeditious.

148. Specify in both rules bases as to which costs are awarded (i.e. standard and indemnity) to differentiate between costs necessary for the proper conduct of the proceeding and costs reasonably incurred and proportionate to the matters involved in the proceeding.

149. A Schedule of Costs should be included in the SCR reflecting similar principles of determining costs like that in the MCR.

150. The Schedule of Costs in the MCR should be revised.

Court Fees

151. Schedules listing court fees of both rules should be reviewed periodically (at least every 3 years) to ensure the demands of modern practice, court's times and resources of the parties are taken into account.

SETTLEMENT OFFERS

152. Both settlement offers such as 'offer of compromise' and 'Calderbank letter' should be incorporated into the Samoan Rules (where practical to suit the Samoan context) to encourage and promote early dispute resolutions before a matter reaches a trial.

153. There should be guiding principles for Calderbank offers similar to those in the New Zealand Rules. For example, the offer must be fair, clear and transparent, sufficient time must be allowed for consideration of the offer, the party needs to be put on notice that if the offer of settlement is not accepted, then it may be submitted to the Court to determine costs.

EXTRAORDINARY REMEDIES

Overview

154. The extraordinary remedy provisions remain in the SCR only at this time.

155. The existing procedure for commencing an application for extraordinary remedy remain as is, namely by motion on notice, statement of claim and supporting affidavit, unless it would be unnecessary (for example, when seeking an interim injunction).

156. Timelines in relation to the following matters should be included in the SCR:

- filing and serving the motion on notice, accompanied by a statement of claim and affidavit;
- filing and serving the defendant's reply; and
- listing the hearing as soon as practicable.

Vanuatu offers helpful timelines for filing documents and can be used as a guide.

157. Consider whether to include in the SCR a procedure in judicial review proceedings. Guidance can be sought from other jurisdictions and relevant case law including *Amoa v Land and Titles Court* [2011] WSSC 77 (31 January 2011), which helpfully describe the way judicial review proceedings are conducted.

Garnishee Proceedings

158. Clarify existing procedure on Garnishee Proceedings and other creditor's remedies under the current rules and other legislation, and consider including the following additional creditor's remedies from comparable jurisdictions in the rules:

- Liens;
- Preservation orders;
- Writs of sale/sale orders;
- Right to restrain;
- Charging orders;
- Possession orders; and
- Judgment summons (currently governed by the *Judgement Summonses Act 1965*)

159. Continuing legal education should be provided to lawyers on creditor's remedies so that the procedures and circumstances when they can be used are clarified and more user friendly.

160. Simplify Part XIV of the SCR by allowing garnishee proceedings to attach to certain kinds of debt. Such debts include those by which a charging order is unsuitable. For instance: rent due from tenant, money owed relating to shares in a company, money in a trust account held for special purposes which can no longer be achieved.

161. Vanuatu offers useful guidelines in addressing whether the judgment debtor would encounter any unreasonable hardship when paying the debt, or whether or not the judgment debtor has the financial means to pay for the debt. These provide useful guidance in simplifying the SC rules.

162. The procedures for Garnishee proceedings should be incorporated into the MCR.

Absconding Debtor

163. Samoan rules should allow the defendant to apply to discharge or vary an order and to provide security to be discharged from custody, at any time.