



Government of Samoa



KOMISI O LE TOEFUATAIGA O TULAFONO A SAMOA

# Review of the Judgment Summonses Act 1965

*Iloiloga o le Tulafono o le Valaau mo le  
Fa'amalosiā o Fa'ai'uga o Aitalafu 1965*

## Final Report 23/19

September 2019



**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 on the Review of the *Judgment Summonses Act 1965* as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations on the Review of the *Judgment Summonses Act 1965* after stakeholders' consultations and research in accordance with section 4 of the *Law Reform Commission Act 2008*.

A handwritten signature in black ink, appearing to read 'Tuilaepa Sailele Malielegaoi'.

(Hounourable Tuilaepa Lupesoliai Fatialofa 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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A handwritten signature in blue ink, appearing to read 'Lalotoa Mulitalo'.

(Tele'i'ai Dr. Lalotoa Mulitalo)

**EXECUTIVE DIRECTOR**  
**SAMOA LAW REFORM COMMISSION**

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# INTRODUCTION

## (a) The Terms of Reference

On the 20<sup>th</sup> November 2018, the Office of the Attorney General (OAG) referred a reference to the Commission to review the Judgment Summonses Act 1965 (JSA 1965). The Terms of Reference (TOR) require the Commission to do the following.

- a) Review the appropriateness of the current JSA 1965 in particular, the placement in custody of citizens for non-performance of a civil contract.
- b) Consult with stakeholders and the public on the current practice of the JSA 1965.
- c) Research relevant regional and international legislation that provide for alternative methods for debt repayments and consider adopting similar practices, only if applicable to the context of Samoa.
- d) To make recommendations on appropriate legal framework on whether to:
  - i. reform the JSA 1965 (i.e. remove the terms of imprisonment as a punishment for non-payment of debts);
  - ii. introduce new alternative methods of debt repayments under the JSA; or
  - iii. remove government (by the repeal of the JSA 1965) from any role in civil contracts for breach of debts.

## The Need for Change

The call for the reform of the JSA followed an article published in the Samoa Observer in March 2017 regarding a mother and her 2 months old baby who were held in custody at the Tafaigata Prison for the non-payment of a debt to a lender. The presence of an infant in this scenario raised concerns by the public and also the (then) President of the Samoa Law Society who all shared the same view for legislative reform to remove the term of imprisonment as a means of punishment for non-payment of a debt. The JSA was viewed as an archaic law and it must be removed.

There were also concerns from the implementing agencies such as the Ministry of Police (MOP) and the Samoa Prisons and Correctional Services (SPCS) that the enforcement of the JSA 1965, in particular the warrant of committal, has exhausted and continues to exhaust the MOP's and SPCS's limited resources, at the expense of the tax payers.

Although the latter issues relate to the administration and the implementation of the JSA 1965, the focus of this review (as is the Commission's mandate) is on the Act itself. Thus, the aim of this review is to examine the provisions of the JSA 1965 against the Terms of Reference given. This review include the legal, doctrinal social and contextual research and public submissions. The analysis of all these inform any recommendations for legislative changes to reform and update the provisions to ensure they are relevant to today.

The majority of the provisions of the current JSA 1965 have survived for as long as 54 years (since the year of enactment) without substantial amendments. To date, only piecemeal amendments have been made to the JSA. Therefore, this review is necessary and timely given its out-datedness.

## **(b) Preliminary research and consultation**

The Commission carried out preliminary research from November 2018 to March 2019. Preliminary consultations were carried out with the Ministry of Justice and Courts Administration (administrator of the Act) on 2 April 2019. The preliminary research and consultation evolved around the following key questions.

- a. How does the current legal framework (JSA 1965) work and what does it seek to achieve?
- b. How have the courts of Samoa addressed matters brought under the JSA 1965 (case law)?
- c. Are there similar laws in other countries in the region, if yes what do they do? and
- d. What proposed recommendations are there to respond to the TOR?

## **(c) The Discussion Paper**

The findings from the preliminary research and consultations informed a Discussion Paper which was approved by Cabinet on 17 April 2019 for consultations. Following the approval of the Discussion Paper, public notices were circulated on the different media outlets (TV 1, TV 3, 2AP Radio) and Samoa Observer newspaper from 10 May 2019 – 23 June 2019, seeking public submissions. The public submissions were due on 28 June 2019. The Commission prepared for public consultations.

## (d) Public submissions and Consultations

The Commission carried out consultations from May-June 2019 with the following key stakeholders.

<b>Date of consultations</b>	<b>Stakeholders</b>
17 May 2019	Samoa Prisons and Correction Services (SPCS)
17 May 2019	Ministry of Justice Courts and Administration (MJCA)
22 May 2019	Ministry of Police (MOP)
23 May 2019	Office of the Attorney General (OAG)
24 May 2019	Samoa Chamber of Commerce (SCC)
29 May 2019	Central Bank of Samoa (CBS)
7 June 2019	Members of the Judiciary
10 June 2019	Samoa Housing Corporation (SHC)
12 June 2019	Development Bank of Samoa (DBS)
14 June 2019	Samoa National Provident Fund (SNPF)
27 June 2019	Samoa Law Society (SLS)

The Discussion Paper sought public submissions on the following key questions:

- a. The JSA 1965 applies to those who persistently are unwilling to pay their debts (although they are able to pay). Should this law remain for Samoa?
- b. Where the Court commits a debtor to imprisonment for consistent failure to pay, all police officers are required to assist in the execution of the warrant of committal. Should this requirement stay?
- c. The Act provides that no imprisonment under this Act:
  - a) Operates as a satisfaction or cancellation of any debt; or
  - b) Deprives any person of any right to issue execution against the lands, goods or chattels of the judgment debtor. Do you agree? Please explain

The public was also invited to provide any further comments or views on the JSA 1965 review.

## The REACH Programme and Consultations in the Rural Communities

The Commission was fortunate to be part of the Law and Justice Sector’s “Rights, Empowerment and Cohesion Project” (REACH) carried out in March 2019. This allowed the Commission to consult with the wider public in the rural communities.

The objective of the REACH program was to deliver the services of the Law and Justice Sector in Samoa to remote areas of Samoa. Villages covered in Upolu on this pilot project were Uafato, Sapunaoa, Matafa’a, Faleasiu-uta, Leualesi Leauvaa uta. In Savaii, the villages were Tapueleele, Samalaeulu, Paia, Falealupo and Samata-uta. It is important to note that in some of the villages covered in this REACH program (Upolu and Savaii), representatives from neighbouring villages (or villages in close proximity) also attended.

In addition to the REACH sessions with the rural communities (5 in Upolu, 5 in Savaii), 11 consultations were carried out from May-June 2019 with Government stakeholders stated earlier, amounting to 21 consultations carried out by the Commission altogether.

Of these 21 consultations, 17 written submissions were also received from the following:

- 3 from Government;<sup>1</sup>
- 4 from law firms;<sup>2</sup>
- 3 from private business;<sup>3</sup> and
- 7 from the general public.<sup>4</sup>

Needless to say, the consultation stage requires significant funding and resources.

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<sup>1</sup> Office of the Attorney General, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 13 June 2019, Apia; Ministry of Police, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 19 June 2019, Apia; Samoa Bureau of Statistics, Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 19 June 2019, Apia.

<sup>2</sup> Wallwork Lamb Lawyers, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 27 June 2019, Apia; Drake & Co, Barristers, Solicitors & Notaries, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 19 June 2019, Apia; Stowers & Su’a Law Firm, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 19 June 2019, Apia; Summit Lawyers, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 27 June 2019, Apia.

<sup>3</sup> T & N Toleafoa Company Ltd, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 6 June 2019, Apia; TNV’s Finance Ltd, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 13 June 2019, Apia; Dornees Finance, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 28 June 2019, Apia.

<sup>4</sup> Alii ma Faipule Lelepa, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summons Act 1965*, 13 June 2019, Savaii.



## Extent of Consultation Determined by Available Resources

In determining the adequacy of consultations, the Supreme Court of Canada has laid out some of the principles of the duty to consult in law making which include that ‘consultation must be meaningful and reasonable and must involve adequate participation and representatives of the people’.<sup>5</sup> What is ‘adequate consultation’ was held by the Supreme Court of Canada to be ‘where every reasonable effort is made to inform and consult’ on the law reform projects or on new laws impacting on the people.<sup>6</sup> The Commission has pursued this review with the resources and funding available to the Commission, to respond to the TOR provided.

The Commission wishes to sincerely acknowledge the assistance and support of those who have contributed to this Review.

### (e) Further research and review

Following the public consultations, all input was analysed and reviewed against the preliminary research findings and preliminary consultation outcomes. New emerging input raised from public submissions and public consultations not present in the preliminary research and preliminary consultations were analysed in context. All these were done in preparation of the content of the Final Report for this Review, the Review of the Judgment Summonses Act 1965.

### (f) The Final Report - Outline

This Report is divided into the following 7 Parts:

- **Part 1 - The Judgment Summonses Act (JSA) 1965**
- **Part 2 - Case Law**
- **Part 3 - JSA Framework in Other Jurisdictions**
- **Part 4 - Consultation Outcomes**
- **Part 5 - Commission’s Views and Recommendations**
- **Part 6 - Conclusion**
- **Part 7 - List of Recommendations**

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<sup>5</sup> *R v Jack* (1995) 16 BCLR (3d) 201 CA; *R v Noel* (1995) 4 CNLR 78, *R v Nikal* (1996) 1 SCR 1013.

<sup>6</sup> See Mulitalo Lalotoa, ‘The Practice of Legislative Drafting in Samoa, a Plural Society of the South Pacific’, *The Loophole*, Issue No. 3 of 2012, Commonwealth Association of Legislative Counsels, 28-44, at 32.

## ▪ Part 8 - Bibliography

Part 5 of this Report sets out the recommendations of the Commission on this review.

# PART 1: ABOUT THE JUDGMENT SUMMONSES ACT 1965

## (a) The Judgment Summonses Act 1965

The Commission's Discussion Paper approved in April 2017 discussed in detail the current JSA framework which is set out in the Judgment Summonses Act 1965 and the Judgment Summonses Rules 1965.<sup>7</sup>

### (i) Origin

Preliminary research suggests the following.

- The Judgment Summonses Act 1965 was a replicate of the *Imprisonment for Debt Abolition Act 1874* (NZ). New Zealand's *Imprisonment for Debt Limitation Act 1908* is an updated replication of the *Imprisonment for Debt Abolition Act 1874*.
- The *Imprisonment for Debt Limitation Amendment Act 1989 (1989 No 108)* repealed all 15 of the 17 sections of the *Imprisonment for Debt Limitation Act 1908*, except for sections 1 (short title of Act) & 3 (Limitation of imprisonment for non-payment of money).<sup>8</sup>

### (ii) Amendments

The JSA 1965 has only been amended once in 2017, by the *Fees and Charges (Miscellaneous Amendments) Act 2017, No. 13*. This sole amendment was to:

- a. omit the words "fees and" in section 20; and
- b. insert section 21 (Regulation making power).

The effect of the amendment to section 20 is that the Rule making powers under section 20 no longer sets fees under this Act. Rather the JSA will only fix the scales of costs (not the fees) for judgment summons. Section 21 was inserted to allow for regulation making

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<sup>7</sup> Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, Discussion Paper No. 26 (2019).

<sup>8</sup> *Imprisonment for Debt Limitation Act 1908* (NZ). Available at <http://www.legislation.govt.nz/act/public/1908/0080/latest/whole.html>.

powers under this Act. Thus, this is the first comprehensive review to the JSA framework since enactment.

(iii) [The Judgment Summonses Act 1965 in Detail](#)

The Judgment Summonses Act 1965 is divided into 21 sections summarised in the Table below.

<b>The Judgment Summonses Act 1965 - in Detail</b>	
<b>Section of the JSA 1965</b>	<b>Summary of provisions</b>
<b>Section 1</b>	<b>Short title:</b> Judgment Summonses Act 1965
<b>Section 2</b>	<b>Interpretation:</b> defines important terms used throughout the Act
<b>Section 3</b>	<b>In general no imprisonment for non-payment of money:</b> provides for the general rule that no person shall be arrested or imprisoned for making default in payment of a sum of money.
<b>Section 4</b>	<b>Some exceptions to the general rule:</b> provides for the exceptions to the general rule. Some examples of exceptions include 'default in payment of a penalty or sum in the nature of a penalty other than a penalty in respect of any contract' and 'default in payment of any sum recoverable otherwise than under the civil jurisdiction conferred by the Judicature Ordinance 1961'.
<b>Section 5</b>	<b>Discretion in some cases:</b> provides for the discretion of the court to grant or refuse any application made under either of the exceptions in section 4, for a writ of attachment from an arrest.
<b>Section 6</b>	<b>Court may imprison for non-payment of judgment debt:</b> it gives power to the court to imprison any person who makes any default in payments due against him or her pursuant to any judgment order.
<b>Section 7</b>	<b>When application for judgment summons may be made:</b> this provides at what occasion a Judgment Summons may be applied for by the Judgment

	Creditor i.e. when any sum of money due under any judgment or order of any Court remains unsatisfied.
<b>Section 8</b>	<b>Judgment creditor and witnesses may be examined on oath:</b> the judgment creditor, and all other witnesses whom the Court thinks requisite, may be examined on oath, on liability, on the disposal of property, on means of making payment etc.
<b>Section 9</b>	<p><b>When order may be made:</b> this section sets out 4 scenarios in which a Judgment Summons order may be made by the Court. These are where:</p> <ul style="list-style-type: none"> <li>a) the Judgment Debtor (JD) does not appear in Court as required by the Judgment Summons (JS);</li> <li>b) if the JD does make appearance, refuses to be sworn or to disclose anything on his/her liability, disposal of property, means of payment etc.;</li> <li>c) the JD does not respond to his/her liability, disposal of property, means of payment etc. to the satisfaction of the Court;</li> <li>d) the Court is satisfied, by verbal testimony or affidavit or of both; <ul style="list-style-type: none"> <li>i. that the JD contacted liability which was the subject of the judgment order by fraud; or</li> <li>ii. that the JD has made or caused to be made any gift, delivery or transfer of any property with intent to defraud the judgment creditor (JS); or</li> <li>iii. that the JD has had since the judgment or order was obtained, sufficient means and ability (after providing for the reasonable maintenance of himself/herself and his/her family) to pay the sum so recovered against him/her; or</li> <li>iv. that the JD is about to leave Samoa without paying so much of the money as is still unsatisfied, with intent to evade payment.</li> </ul> </li> </ul> <p>The court is then empowered to order that unless the JD pays into the Court either forthwith or by instalments the money so unsatisfied and the costs of any fruitless writs or warrants of execution and of levies thereunder,</p>

	together with the costs of and occasioned by the summons and examination, he or she shall be committed to prison for a period not more than 6 months.
<b>Section 10</b>	<b>No order of committal where judgment debt assigned to debt collector:</b> this provides that no order can be made where a judgment creditor is a person or company whose business is that of collecting or recovering debts unless the Court is satisfied that the debt was incurred to the judgment creditor directly, and was not acquired by assignment from the original creditor.
<b>Section 11</b>	<b>Original direction for payment by instalments:</b> this section provides that the court directs instalment payments and amount as it thinks fit.
<b>Section 12</b>	<b>Later direction for payment by instalments:</b> this provides that the Court may direct any debt due from any person pursuant to a judgment order to be paid in instalments, and may vary or rescind any such direction.
<b>Section 13</b>	<b>Committals to public prisons:</b> A person under this Act may be committed to such public prison within Samoa as the Court thinks fit
<b>Section 14</b>	<b>Bankruptcy of judgment debtor:</b> this section provides that a judgment order shall be made if the JD satisfies that he or she has been adjudicated as bankrupt.
<b>Section 15</b>	<b>Warrant of committal:</b> this provides that the Court shall issue a warrant of committal upon request of the judgment creditor if the payment of debt has not been made as per judgment order
<b>Section 16</b>	<b>Execution of warrant:</b> this provides that all officers of the court, officers in charge of the prisons, and all constables are required to aid and assist in the execution of the warrant
<b>Section 17</b>	<b>Imprisonment not to discharge debt:</b> provides that no term of imprisonment will discharge any debt owed.
<b>Section 18</b>	<b>Discharge from custody:</b> provides for situations where a person can be discharged from custody. For example, upon payment of the money for which the person was imprisoned.

<b>Section 19</b>	<b>Rehearing of summons:</b> provides that the Court can grant a rehearing of summons upon an application by a person against whom a judgment order has been made, at any time before or after the execution of a warrant issued under a judgment order.
<b>Section 20</b>	<b>Rules of Court:</b> provides that the Head of State acting on the advice of the Prime Minister by Order make, alter or revoke such rules.
<b>Section 21</b>	<b>Regulations:</b> this section gives the Head of State, acting on the advice of Cabinet and with the concurrence of the Rules Committee, the power to make regulations to give effect to the provisions or the purpose of the Act.

## (b) The Judgment Summonses Rules 1965 (and Forms)

The Judgment Summonses Rules 1965 (JS Rules 1965), made pursuant to section 20 of the JSA 1965, has 32 rules, 3 Schedules and 17 Forms.<sup>9</sup> The Legislative Assembly's Updated List of Acts and Ordinances and Statutory Regulations as at 31 December 2018 show that there have only been 2 amendments made to the JS Rules- in 1983 and 1988.<sup>10</sup> It is important to read the JS Rules together with the JSA for an understanding of the full operation of the legal framework of the JSA.

For the purposes of this Report, the following Table highlights the relationship between the provisions of the JSA Rules 1965 and the provisions of the JS Act 1965 together with the corresponding applicable Forms.

<b>The Judgment Summonses Rules 1965 and Forms</b>		
<b>JSR Rule #</b>	<b>Form #</b>	<b>JSA section #</b>
<b>Rule 3 (4):</b> Every document filed, issued or served in the course of proceedings under the Act shall be properly intituled showing the Court	Form 1	

<sup>9</sup> Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, Discussion Paper No. 26 (2019) 10; See also *Judgment Summonses Rules 1965*.

<sup>10</sup> Office of the Clerk of the Legislative Assembly, *Tables of Acts and Ordinances & Statutory Regulations as at 31<sup>st</sup> December 2018* (2018) 48.

in which the proceedings are taken, the distinguishing numbers and the names and descriptions of the parties.		
<b>Rule 4:</b> Judgment Summons book.	Form 2	
<b>Rule 5:</b> Application for judgment summons  <b>Rule 7:</b> Application where order for payment by instalments.	Form 3	<b>Section 7:</b> When application for judgment summons may be made.
<b>Rule 6:</b> Where judgment against a firm.	Form 4	
<b>Rule 8:</b> Issue of judgment summons.	Form 5	<b>Section 7:</b> When application for judgment summons may be made.
<b>Rule 15:</b> Order on judgment summons.	Form 6	<b>Section 6:</b> Court may imprison for non-payment of judgment debt.
<b>Rule 17:</b> Refusal of order or order for payment by instalments.	Form 7	<b>Section 11:</b> Original direction for payment by instalments.
<b>Rule 18:</b> Disposal of judgment summons referred to a foreign Court.	Form 8	
<b>Rule 21:</b> Application for rehearing of judgment summons.	Form 9	<b>Section 19:</b> Rehearing summons.
<b>Rule 22:</b> Stay of proceedings on application for rehearing.	Form 10	<b>Section 19:</b> Rehearing summons.
<b>Rule 23:</b> Rehearing	Form 11	<b>Section 19 (4):</b> The court may, at any such rehearing, vary or cancel such judgment order, and cancel any warrant issued thereunder, or

		make such further or other order as it thinks fit.
<b>Rule 24:</b> Warrant of committal	Form 12	<b>Section 15:</b> Warrant of committal
<b>Rule 24:</b> Warrant of committal	Form 13	<b>Section 15:</b> Warrant of committal
<b>Rule 27:</b> Payment after debtor lodged in prison.	Form 14	
<b>Rule 28:</b> Discharge of debtor on request of judgment creditor.	Form 15	
<b>Rule 29:</b> Discharge on bankruptcy	Form 16	<b>Section 14:</b> Bankruptcy of judgment debtor
<b>Rule 29:</b> Discharge on bankruptcy	Form 17	<b>Section 14:</b> Bankruptcy of judgment debtor

### (c) The Judgment Summonses Act 1965 Legal Framework in Brief

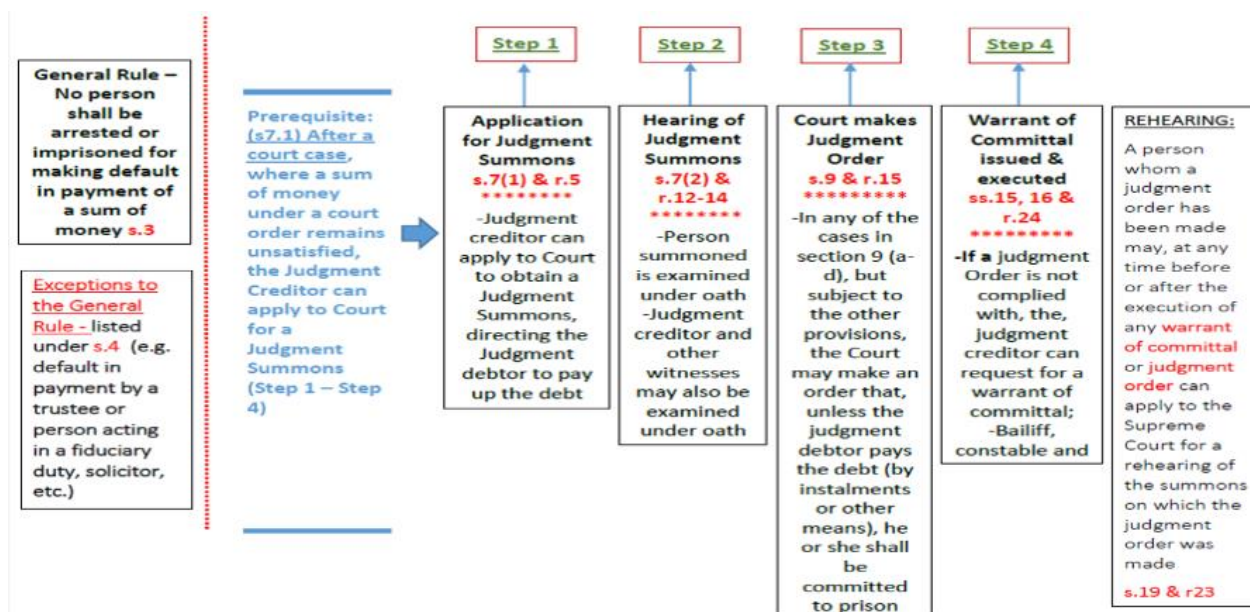
The 2 flow charts below attempt to explain the JSA 1965.<sup>11</sup> **Flow Chart 1** endeavours to set out the legal framework in some detail, and **Flow Chart 2** is a simplified version.

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<sup>11</sup> Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, Discussion Paper No. 26 (2019) 15.



## The JSA 1965 - Flow chart 1



### Analysis

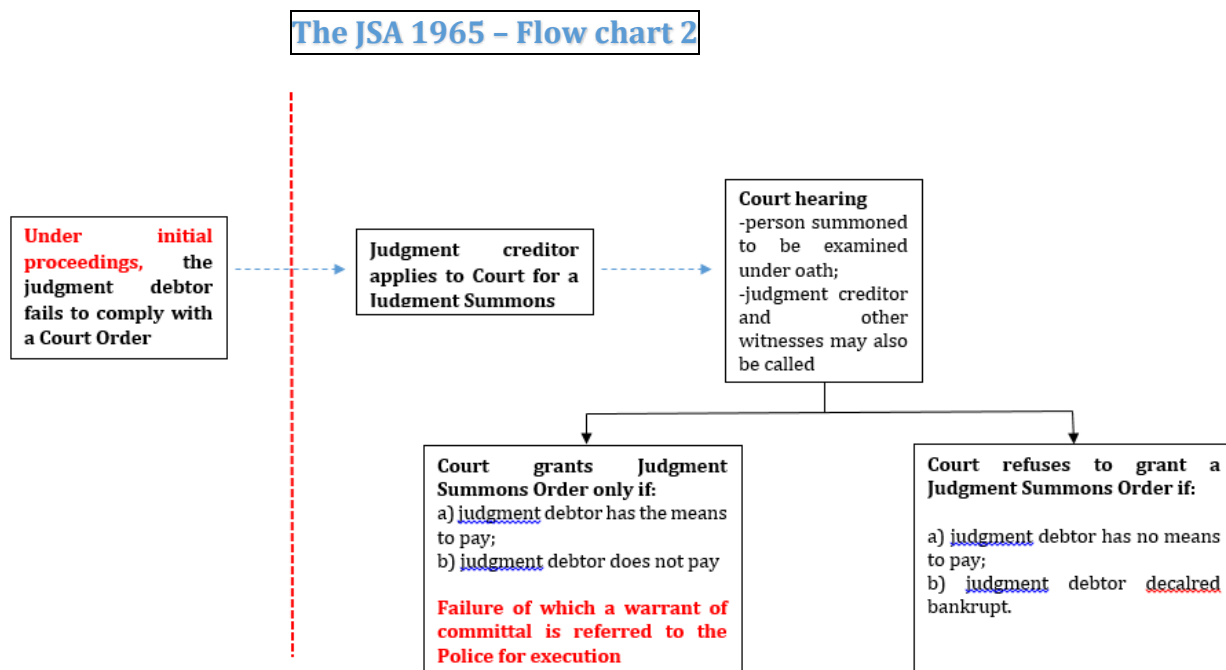
**Step 1** – Where a debt or payment of money is not satisfied following a Court judgment or order, the judgment creditor can apply to the Registrar of the Courts in Samoa to obtain a summons in the prescribed form, directed to the judgment debtor (section 7).

**Step 2** - If the summons is obtained, the judgment debtor is to appear in Court for the hearing of the said summons. This is for the judgment debtor to explain why he or she has not paid the debt. Evidence is presented and the judgment creditor and witnesses may be examined (sections 7 and 8).

**Step 3** - Following the hearing of the summons, the Court may make orders for the payment of unsatisfied money or debt. The Court must take into account the means and the ability of the judgment debtor to support himself or herself and his or her family, before making an Order for debt payment. Thus, an order to pay the debt by way of instalments may be made if appropriate, upon the application and given the circumstances of all parties. The Court may vary or rescind such order for instalments as it deems fit (sections 9 and 11).

**Step 4** - If the Court order made (in Step 3) is not complied with by the judgment debtor, the Registrar upon the request in writing of the judgment creditor, shall issue a warrant

of committal in the prescribed form. The Warrant of Committal is addressed to the Police to execute the warrant. Simplified, it may be set out as follows.



It must be emphasized that at the outset, the provisions of the JSA 1965 is only invoked where a Court Order made by a Court in initial proceedings (on the far left in the diagram above) is not complied with by a Judgment Debtor. For the JSA 1965, as the provisions (sections stand) it can be said that the JSA 1965 opens with a general rule in section 3 - 'no person shall be imprisoned for a non-payment of money'. The exceptions to this general rule only apply when there is default in payment in circumstances stipulated in section 4. For example, where there is a default in payment by a trustee acting in a fiduciary capacity of a sum of money; a default by a solicitor in paying of costs for proven misconduct; and default in the payments of creditors in bankruptcy matters.<sup>12</sup>

In reading together with the scenarios in which a JS Order may be made (s9), 'imprisonment' for non-payment of a debt is a last resort for those problem debtors who avoid and evade the payment of debts owed under a court order (s7).

<sup>12</sup>Judgment Summonses Act 1965 (Samoa) s 4.

#### **(d) Other provisions in the JSA 1965 worthy of note are as follows:**

- When a judgment debtor is committed to prison (Flowchart 1- Step 4), it does not mean that the debt or money owed is discharged or extinguished. Once his or her sentence has been served, the law envisages that he or she must continue to find means to satisfy the debt (section 17).
- A judgment debtor committed to prison can only be discharged upon satisfaction of several requirements. For example, payment of the money in which the person was imprisoned (section 18).
- The judgment debtor, at any time before or after the execution of any warrant issued, can apply for a re-hearing of the summons and the Court, if it thinks fit, may grant a rehearing. This is another avenue for the relevant parties to decide on the options for the repayment of debt before a warrant of committal is issued.
- Court officers, prison officers and all constables are required to aid and assist in the execution of a warrant (section 16).

#### **(e) Relationship between the JSA Framework and the Supreme Court Rules 1980, Magistrate Court Rules 1971**

The Commission's Discussion Paper confirmed that the JSA operates independently of the Court Rules. This is despite some case law showing that the Courts rely interchangeably on some provisions of the JSA and the Court Rules e.g. Rule 140 of the SCR and section 19 of the JSA and Rule 23 of the JS Rules (on rehearing). However, a reading of the JSA on its own shows that the JSA 1965 has its own unique features which seek to enforce a judgment or Order of the Court already made (for payment of a sum of money or debt) through a warrant of committal. There are other alternatives under both the Magistrate and the Supreme Court Rules that are generally available to enforce a court order or judgment for the payment of a sum of money (eg writ of sale, charging order, garnishee proceedings). The JSA 1965 has its own set of procedures and it is one avenue that the judgment creditor is entitled to use, to enforce the payment of a sum of money or a judgment debt, following non-compliance of a decision of the Court by a Judgment Debtor.

## PART 2: CASE LAW IN THE SAMOAN COURTS

To date, 19 cases in Samoa were found to have either discussed or applied the JSA 1965 from the period 1929 to date (September 2019). This number is derived from searching key words such as ‘judgment’, ‘summons or summonses’ or ‘Judgment Summonses Act 1965’. The number of cases found can be said to be inconclusive given that the only accessible online database, Pacific Islands Legal Information Institute (Paclii), may not have all the cases including the unreported case law. Nonetheless, this cannot be the basis to restrict analysis from what is available to the Commission for a review.

The following Table highlights these 19 cases and their summaries:

<b>TABLE OF CASE LAW – JUDGMENTS BY THE COURTS OF SAMOA</b>	
<b>Case law</b>	<b>Summaries</b>
<p><b>1. <i>Meredith v Stewart</i></b> [1929] WSLawRp 3; [1921-1929] WSLR 57 (27 September 1929)</p>	<ul style="list-style-type: none"> <li>- The defendant was charged with contempt of court for failing to comply with a judgment of the (then) High Court</li> <li>- The defendant challenged the validity of the Rule, inter alia, on the ground that failure only to pay a sum of money due under judgment cannot amount to contempt of Court</li> <li>- the Court held that while as a matter of construction there is some doubt as to validity, Rule 83(5) has previously been considered and held by the High Court to be valid.</li> </ul>
<p><b>2. <i>Pacific Commercial Bank Ltd v Uria</i></b> [1990] SamoaLawRp3; [1980-1993] WSLR 331 (2 May 1990)</p>	<ul style="list-style-type: none"> <li>- An application for rehearing of a civil claim</li> <li>- The court ordered that the defendants pay costs of \$300 within 10 days and failure to do so, the defendant will not be allowed to defend the action, and a judgment summons already ordered will be restored.</li> </ul>
<p><b>3. <i>Eteuati v The Pacific Forum Line</i></b> [1998] WSSC 29; CP 153-92 (31 July 1998)</p>	<ul style="list-style-type: none"> <li>- The applicants appealed to set aside the judgment and for the matter to be reheard.</li> <li>- The applicants opposed the 8% interest accrued in the debt owing by them to the plaintiff.</li> </ul>

	<ul style="list-style-type: none"> <li>- Court held that the interest is authorised and provided by law under the Supreme Court (Civil Procedure) Rules 1980. Application to set aside the judgment summons orders denied.</li> </ul>
<p><b>4. <i>Telecom Samoa Cellular Ltd v Sauaga</i> [2003] WSDC 4 (15 April 2003)</b></p>	<ul style="list-style-type: none"> <li>- The judgment debtor filed an application to stay the issuing of a warrant of committal for non-payment of the sum owed and to review the judgment summons order that had been made</li> <li>- The court dismissed the application.</li> </ul>
<p><b>5. <i>Blue Pacific v Banse</i> [2003] WSSC 25 (2 December 2003)</b></p>	<ul style="list-style-type: none"> <li>- Vehicle accident (Car Hire Agreement)</li> <li>- Defendant sought to stay the execution of the warrant of committal and to set aside a judgment entered against her.</li> <li>- A Judgment summons application and a Judgment Summons order was made against the defendant</li> <li>- It was only after the warrant of committal was issued (and the possibility of going to prison) that the defendant decided to go to Court and apply for various orders.</li> </ul>
<p><b>6. <i>Samoa National Provident Fund Board v Lauano</i> [2008] WSSC 70 (28 August 2008)</b></p>	<ul style="list-style-type: none"> <li>- Defendant filed an application to set aside a judgment by default</li> <li>- Defendant raised grounds of defence which the Court considered be of no merit (in applying rules 140 &amp; 141 of the Supreme Court (Civil Procedure) Rules 1980)</li> <li>- Therefore the application was declined.</li> </ul>
<p><b>7. <i>Congregational Christian Church of Samoa v Lamositele</i> [2009] WSSC 108 (28 September 2009)</b></p>	<ul style="list-style-type: none"> <li>- Plaintiff filed a claim against the defendant demanding a refund of costs of order (works delayed)</li> <li>- Judgment summons was served to the defendant and a judgment by default was made</li> <li>- Application by the defendant to set aside judgment by default and to grant a re-hearing, dismissed.</li> </ul>
<p><b>8. <i>Lauano v Samoa National Provident Fund Board</i> [2009] WSCA 3; CA 11 of 2008 (1 May 2009)</b></p>	<ul style="list-style-type: none"> <li>- NPF sought proceedings to claim shortfall/balance of loan owing by the appellant after loan default</li> <li>- Judgment summons application was made to enforce judgment against the appellant (no hearing or order made)</li> </ul>
<p><b>9. <i>Samoa National Provident Fund Board v</i></b></p>	<ul style="list-style-type: none"> <li>- Rent agreement between the Plaintiff and defendant</li> <li>- Defendant fell into arrears in rent and a judgment summons was moved to enforce judgment against the defendant</li> </ul>

<p><b>Ridling</b> [2009] WSSC 91 (21 September 2009)</p>	<ul style="list-style-type: none"> <li>- An application by the defendant to set aside and re-hear was granted, on certain conditions imposed by the Court.</li> </ul>
<p><b>10. Samoa Commercial Bank Ltd v Palm Island Traders</b> [2010] WSSC 56 (11 June 2010)</p>	<ul style="list-style-type: none"> <li>- SCB Bank sought the leave of the Court to recover loan money in default despite an order of bankruptcy by the Respondent</li> <li>- Court held that the law precludes enforcement by means of a judgment summons</li> <li>- Ordered SCB to proceed with recovery action against judgment debtor other than by means of a judgment summons.</li> </ul>
<p><b>11. Tuitama v Westpac Bank Samoa</b> [2010] WSSC 154 (24 September 2010)</p>	<ul style="list-style-type: none"> <li>- Westpac Bank issued proceedings against the applicant in relation to a default loan</li> <li>- Judgment summons was issued to enforce judgment.</li> <li>- Application by the applicant to re-hear the judgment was dismissed</li> <li>- Fresh judgment summons application to be made.</li> </ul>
<p><b>12. Ulugia v Curry</b> [2010] WSSC 59 (30 June 2010)</p>	<ul style="list-style-type: none"> <li>- Vehicle accident and the insurer exercising its power of subrogation</li> <li>- Judgment summon issued by the insurer to recover the amount claimed. Instalment payments made but irregular</li> <li>- Applicant sought to set aside judgment</li> <li>- Application was dismissed by the Court (Court ruled that application had no merit).</li> </ul>
<p><b>13. National Bank of Samoa Ltd v Thompsen</b> [2011] WSSC 21 (18 February 2011)</p>	<ul style="list-style-type: none"> <li>- Repossession of chattel mortgages due to a loan default</li> <li>- Judgment summons was served on the defendants seeking to enforce judgment</li> <li>- Application to set aside judgment and to rehear dismissed.</li> </ul>
<p><b>14. Afoa v Parker</b> [2015] WSSC 163 (9 September 2015)</p>	<ul style="list-style-type: none"> <li>- Plaintiff filed a claim against the defendants for unpaid services rendered</li> <li>- Claim against the second defendant was struck out and application for costs was ordered to be made</li> <li>- Judgment summons application made to recover the unpaid costs.</li> </ul>
<p><b>15. Faumuina v Atoa</b> [2016] WSSC 133 (22 July 2016)</p>	<ul style="list-style-type: none"> <li>- Application to set aside judgment pursuant to rules 140 and 141 of the SC (Civil) Procedure Rules 1980</li> <li>- Damages were awarded against the defendants (Tanugamanono Village Fono)</li> </ul>

	<ul style="list-style-type: none"> <li>- Judgment summons were obtained and heard in Court</li> <li>- The Court made an order for the defendant to make monthly payments</li> <li>- However, the defendant then sought orders to set aside the Court's judgment and to grant a rehearing (140 and 141 of the SC (Civil) Procedure Rules 1980</li> <li>- Application by the defendant to set aside judgment and grant a rehearing was refused.</li> </ul>
<p><b>16. <i>Police v Bourne</i></b> [2016] WSDC 39 (27 September 2016)</p>	<ul style="list-style-type: none"> <li>- Theft (Obtaining by deception)</li> <li>- Defendant has made monthly payments to the victim pursuant to a Court Order on judgment summons.</li> </ul>
<p><b>17. <i>Asian Taste Company Ltd v Ah Sam</i></b> [2017] WSDC 8 (14 June 2017)</p>	<ul style="list-style-type: none"> <li>- Application to set aside judgment (vehicle repairs and refusal to pay by debtor)</li> <li>- The matter was called for first mention before Judge Roma where the judgment debtor did not appear and judgment by default was granted in favour of the Plaintiff</li> <li>- However, Judge Papali'i ruled that it was in the overall justice of the matter that the judgment by default granted by Judge Roma be set aside (judgment debtor met the three limb test in the case of <i>Lauano v Samoa National Provident Fund</i>).</li> </ul>
<p><b>18. <i>Taioalo v Chadwick</i></b> [2017] WSDC 17 (15 August 2017)</p>	<ul style="list-style-type: none"> <li>- Claim in negligence (vehicle accident) for damages</li> <li>- Judgment summons order granted when the judgment debtor failed to appear</li> <li>- Plaintiff's claim successful.</li> </ul>
<p><b>19. <i>CCK Trading Ltd v Salu</i></b> [2018] WSSC 96 (14 September 2018)</p>	<ul style="list-style-type: none"> <li>- Vehicle accident and claim for insurance</li> <li>- Application for hearing pursuant to rule 141 of SC (Civil) Procedure Rules 1980</li> <li>- Judgment summon was issued against the defendant to recover cost of vehicle paid by the insurance company to the Plaintiff</li> <li>- Application for re-hearing dismissed.</li> </ul>

The above cases provide some analysis:<sup>13</sup>

- The effectiveness or the relevance of the procedures under the JSA 1965 has not been questioned in these 19 cases. To date, the JSA is still an active law relied upon by the judgment creditors and the courts of Samoa, as shown by case law.
- A reading of the case law suggests that the Court perhaps have conveniently applied both the JSA 1965 and the Court Rules (Supreme Court Rules and the Magistrate Court Rules) where the circumstances allow, in particular cases.
- The JSA framework can be applied in a number of different proceedings such as vehicle accidents, insurance claims and default in loan repayments, as shown in the cases.
- The JSA has been beneficial particularly to creditors as a fast and effective avenue to enforce a judgment, forcing the judgment debtor to cooperate and comply with a court order.

It is evident from the above case law analysis that the JSA 1965 is still applied and heavily relied upon by judgment creditors, in the pursuance of debts owed.

### **PART 3: JSA FRAMEWORK IN OTHER JURISDICTIONS**

The following Table provides a comparative analysis of laws in other countries and Samoa, namely Fiji, NZ and Australia:

<b>JURISDICTIONAL / COMPARATIVE ANALYSIS</b>	
<b>Fiji</b>	<b>Samoa</b>
<p>The Debtors Act [Cap 32]</p> <ul style="list-style-type: none"> <li>- an Act relating to imprisonment for debt.</li> <li>- Section 3 (Imprisonment for debt restricted) is similar to the general rule and exceptions in the Samoa JSA (sections 3 and 4).</li> </ul>	<ul style="list-style-type: none"> <li>- Although Fiji’s Debtors Act is significantly fewer in provisions than Samoa’s JSA, the key features such as the general rule and exceptions, warrant of</li> </ul>

<sup>13</sup> Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, Discussion Paper No. 26 (2019) 25.



<ul style="list-style-type: none"> <li>- Section 4 (Court may commit to prison defaulting judgment debtor) is similar to section 6 of Samoa's JSA.</li> <li>- Section 5 (Imprisonment not to operate as extinguishment of debt) is similar to section 17 of Samoa's JSA.</li> </ul>	<p>committal for defaulting judgment debtor and imprisonment not to extinguish a debt, are substantially the same.</p>
<p><b>New Zealand</b></p> <p>The Imprisonment for Debt Limitation Act 1908</p> <ul style="list-style-type: none"> <li>- an Act to consolidate certain enactments of the Parliament of New Zealand (NZ) relating to the limitation of imprisonment for debt.</li> <li>- This Act repealed all sections of the old Imprisonment for Debt Limitation Act 1874 of NZ except for section 1 (Short Title) and section 3 (Limitation of imprisonment for non-payment of money).</li> </ul>	<p><b>Samoa</b></p> <ul style="list-style-type: none"> <li>- Section 3 of the NZ Act is similar to sections 3 and 4 of Samoa's JSA. It is important to note that the arrangement in the provisions of Samoa's JSA is substantially similar to the arrangement in the repealed Imprisonment for Debt Limitation Act 1874 of NZ.</li> </ul>
<p><b>South Australia</b></p> <p>The Debtors Act 1936</p> <ul style="list-style-type: none"> <li>- an Act relating to debtors;</li> <li>- Section 3 provides that no person shall be arrested or imprisoned for making default in payment of a sum of money, except in the cases provided in subsection (a) and (b). These provisions are similar to sections 3 and 4 of Samoa's JSA (general rule and exceptions);</li> <li>- The remaining section 4 provides for the penalty for debtor absconding or attempting to abscond.</li> </ul>	<p><b>Samoa</b></p> <ul style="list-style-type: none"> <li>- Section 3 provides that no person shall be arrested or imprisoned for making default in payment of a sum of money, except in the cases provided in subsection (a) and (b). These provisions are similar to sections 3 and 4 of Samoa's JSA (general rule and exceptions);</li> </ul>
<p><b>Tasmania</b></p> <p>The Debtors Act 1870</p> <ul style="list-style-type: none"> <li>- an Act to make better provision for the abolition of imprisonment for debt;</li> </ul>	<p><b>Samoa</b></p> <ul style="list-style-type: none"> <li>▪ Similar to sections 3 and 4 of the Samoa JSA, Tasmania's Debtors Act provides for the general rule</li> </ul>

<ul style="list-style-type: none"> <li>- The Act has 4 Parts, 27 sections and a Schedule;</li> </ul>	<p>that a person shall not be arrested or imprisoned for making default in payment, with exceptions provided in section 3(a) to (g). Other similar provisions found in Samoa's JSA include section 7 (no imprisonment shall satisfy or extinguish a debt) and section 8 (discharge of person upon satisfaction of a debt).</p>
<p><b>Victoria</b></p> <p>Judgment Debt Recovery Act 1984</p> <ul style="list-style-type: none"> <li>▪ an Act to provide for the recovery of judgment debts by instalments and to amend other legislation provided in its long title;</li> <li>▪ contains 6 Parts and 26 sections;</li> <li>▪ The Act places much emphasis on payment by instalment arrangements, between the judgment creditor and the judgment debtor.</li> <li>▪ However, if a judgment debtor who has the means to pay the instalments under an instalment order, <u>persistently and wilfully</u> and without an honest and reasonable excuse, defaults in the payment of the instalments, he or she shall be liable to be imprisoned by order of the Court for not more than 40 days (section 19);</li> <li>▪ Although imprisonment is still available under the Victorian legislation, it only applies when there is a 'persistent wilful default' on the judgment debtor's part.</li> </ul>	<p><b>Samoa</b></p> <ul style="list-style-type: none"> <li>▪ Victoria has taken a different approach, placing much emphasis on instalment payments arrangements between the judgment creditor and the judgment debtor, for the payment of debt. This is slightly the opposite in other legislation where there are no substantive provisions on payment by instalments, and 'imprisonment' appears to be the ultimate goal for non-payment of debt.</li> <li>▪ The exception is where there is a <u>persistent wilful</u> default by the judgment debtor following which he or she will be committed to prison for not more than 40 days.</li> </ul>

The above comparative analysis (on the above 3 jurisdictions) reveal the following commonalities:<sup>14</sup>

- The JSA is not unique to Samoa. The general rule and exceptions (i.e. no person shall be imprisoned for non-payment of debt except in certain circumstances prescribed in the laws discussed) is the same across the jurisdictions discussed.
- If the Court order is not complied with, the judgment debtor can apply to Court for a judgment summons, requiring the judgment debtor to be examined under oath.
- If the Court issues a judgment summonses order, but is still not complied with, the judgment creditor may request for a warrant of committal, to commit the judgment debtor to prison (except in NZ).<sup>5</sup>
- Victoria, the only jurisdiction with a different approach, places much emphasis on instalment payments arrangements between the judgment creditor and the judgment debtor, for the payment of debt. The exception is where there is a persistent wilful default by the judgment debtor following which he or she will be committed to prison for not more than 40 days.

## PART 4: CONSULTATION OUTCOMES

- a) Public notices were circulated on media (TV 1, TV 3, 2AP Radio) and Samoa Observer newspaper from 10 May 2019 – 23 June 2019 seeking public submissions from the stakeholders listed in page 6 above.

The 3 main questions upon which Commission sought submissions and to initiate discussions are as follows.

### **Question 1**

1. The Judgment Summonses Act 1965 applies to those who persistently are unwilling to pay their debts (although they are able to pay). Should this law remain for Samoa?

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<sup>14</sup> Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, Discussion Paper No. 26 (2019) 28.

## Question 2

2. Where the Court commits a debtor to imprisonment for consistent failure to pay, all police officers are required to assist in the execution of the warrant of committal.' Should this requirement stay?

## Question 3

3. The Act provides that no imprisonment under this Act:
  - a) operates as a satisfaction or cancellation of any debt; or
  - b) deprives any person of any right to issue execution against the lands, goods, or chattels of the judgment debtor. Do you agree? Please explain.

## General

The public was also invited to provide any further comments or views on the review.

As stated in the beginning of this Report, the Commission has conducted a total of 21 consultations, 11 with the key stakeholders and the 10 villages covered in the REACH program. There are 17 written submissions received to date:

- 3 from Government;<sup>15</sup>
- 4 from law firms;<sup>16</sup>
- 3 from private business;<sup>17</sup> and
- 7 from the general public.<sup>18</sup>

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<sup>15</sup> Office of the Attorney General, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 13 June 2019, Apia; Ministry of Police, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 19 June 2019, Apia; Samoa Bureau of Statistics, Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 19 June 2019, Apia.

<sup>16</sup> Wallwork Lamb Lawyers, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 27 June 2019, Apia; Drake & Co, Barristers, Solicitors & Notaries, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 19 June 2019, Apia; Stowers & Su'a Law Firm, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 19 June 2019, Apia; Summit Lawyers, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 27 June 2019, Apia.

<sup>17</sup> T & N Toleafoa Company Ltd, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 6 June 2019, Apia; TNV's Finance Ltd, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 13 June 2019, Apia; Dornees Finance, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 28 June 2019, Apia.

<sup>18</sup> Alii ma Faipule Lelepa, Submission to the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*, 13 June 2019, Savaii.

In analysing the submissions, the stakeholders were divided into the following categories together with their submissions to the 3 questions:

- a. Government Ministries**
- b. Financial Institutions**
- c. Members of the Judiciary**
- d. Samoa Law Society**
- e. Public**

### **Method of Analysis**

Due to the varying nature of the submissions received, some key thematic common views will be drawn from the responses to the 3 questions. If a view (and reasoning) expressed by the submitters overwhelmingly agree to a particular view or question, the Commission will note this as the majority view. Opposing or minority views are highlighted. Other matters raised by stakeholders, some of which are outside the scope of the review, were also noted and considered.

### **(a) Government Ministries/Offices**

This comprises of the Government Ministries and Corporations which are key stakeholders in terms of the administration and implementation of the Judgment Summonses Act 1965. This comprised of the Ministry of Justice and Courts Administration (MJCA), the Samoa Police Services or Ministry of Police (MOP), the Office of the Attorney General (OAG), Samoa Prisons and Correction Services (SPCS) and the Central Bank of Samoa (CBS).

### **Question 1**

- The JSA 1965 must be retained mainly as it is the most effective avenue to recover debts.<sup>19</sup>
- The JSA should be updated to consider other alternative methods of debt payment, similar to systems in countries like NZ and Ireland.<sup>20</sup>
- The impact of JSA 1965 on the related international laws Samoa is a party to should be considered. These international laws include the International

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<sup>19</sup> Written submissions received by the Commission from Government Stakeholders, above note 15.

<sup>20</sup> *The Civil Debt (Procedures) Act 2015* (Ireland); *District Court Act 2016* (New Zealand).

Covenant on Civil and Political Rights (ratified by Samoa on 15 February 2008 (ICCPR) and the Conventions on the Rights of the Child (CRC) ratified by Samoa on 11 November 1994.<sup>21</sup>

- The onus of ensuring the capacity to repay should fall on the creditors. These lending institutions must, before an application for a loan/credit is granted have in place stringent measures to check the credit history of borrowers, to ensure that debts can be recovered.<sup>22</sup>

## Question 2

- The JSA should be repealed, as it puts a heavy burden on the enforcers' (e.g. Police) very limited resources, infrastructure e.g. vehicles, and human capacity.
- If the JSA is to be retained, the service of warrants of committal must attract a fee imposed on the creditor, for example, 10% of the actual debt. If this above cannot be met, the warrants of committal should then be serviced by debt collecting private companies.<sup>23</sup>
- Creditors should serve their own warrants as the debts result from contracts between private citizens.
- The Ministry of Police should remain the executor of warrants of committal given that they are authorised under the law and their presence is more 'authoritative'.<sup>24</sup>
- There should be an option of the creditors freely providing transportation to the Police for the execution of their warrants of committal.<sup>25</sup>

## Question 3

- It is likely that creditors will not lend any more money if imprisonment extinguishes the debt.
- The debtors will prefer to serve prison time than paying the debt.<sup>26</sup>

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<sup>21</sup> Office of the Attorney General, above note 15.

<sup>22</sup> Ministry of Police, above note 15.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Consultation with the Samoa Chamber of Commerce (ANZ Bank, BSP, NBS, SCB, Ah Liki Wholesale) (Samoa Chamber of Commerce Conference Room, Sanalele Complex, 24 May 2019).

- The current provisions should be retained but mechanisms should be in place to regulate it. For example, creditors should be more vigilant to check the credit history of any person before lending money.
- Many chances are given to the debtor before imprisonment is imposed.<sup>27</sup>

## OTHER VIEWS

- i. **Safety of prisoners** - There is concern on the safety of those imprisoned for a debt where they are housed with convicted criminals. There is a need to clarify whether the failure to pay a debt constitutes a 'conviction'. For humanitarian reasons, the practice with the SPCS is that where a female prisoner has given birth, she is sent home for 3 months to take care of her new born baby after which she will return back to prison.
- ii. **Safety of Police officers** - MOP strongly emphasised that the safety of Police officers when they execute warrants must be seriously taken into account. The Ministry informs of certain instances where the Police have been threatened by families or are chased out of the debtors' properties.
- iii. **Resources constraints** - SPCS added that there are not enough resources in prison to cater for prisoners of this nature. SPCS suggested to perhaps consider probation terms for the debtors or perhaps a different shelter to house these debtors like in New South Wales Australia. The MOP submitted that executing warrant of committals is costing Police resources when they should be focusing on more serious crimes. They are under-staffed with only 6 Police officers in this Division, and only 4 officers are able to execute warrants on a daily basis. The MOP also submitted that they will only execute warrants signed by a judge. There have been cases where the Police has spent weeks looking for debtors only to find out that an arrangement has been made with the creditor to settle the date, thus wasting precious time. In some cases, the warrant is lost if it is executed in Savaii, and the amount of debt is disputed by the debtor.

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<sup>27</sup> Ibid.

**iv. High Penalty Interest** - The Central Bank of Samoa (CBS) submitted that they had informed MJCA of their concerns regarding the high interest rate imposed by some financial companies. As these companies are not regulated by the CBS, there are amendments in the pipeline for these companies to be properly monitored and regulated.

**v. Other alternative methods other than imprisonment** - Some officers of the Samoa Bureau of Statistics (SBS) submitted to consider other alternatives for the payment of a debt as opposed to imprisonment. For example, labour or community work to satisfy the debt.

## **(b) Financial Institutions**

This comprises of the financial institutions consulted by the Commission which include the Samoa Housing Corporation (SHC), the Development Bank of Samoa (DBS) and the Samoa National Provident Fund (SNPF). Also consulted was the Samoa Chamber of Commerce, where the Commission was informed of a variety of views from the Banking community as financial institutions and some local businesses.<sup>28</sup>

### **Question 1**

- The JSA 1965 should be retained as it is an effective way to recover debts. The removal of the JSA will not sustain businesses and develop families.

### **Question 2**

- It is more fitting that the Police carry out the execution of warrant as they are more authoritative.
- Some financial institutions have tried executing their own warrants of committal, but have found this is too risky on their officers.

### **Question 3**

- A warrant of committal is a form of deterrence and it is very common that the families of a debtor will only move to do something to respond to the call to settle the debt, or settle the debt in full when a debtor is sought to be committed to prison.

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<sup>28</sup> Ibid.



- Perhaps it is timely to place a threshold on the amount of debt that will attract a prison sentence. For example, if the debt is more than \$5,000, then the debtor should be imprisoned. Also, limiting the number of times a person is sent to Prison (3 times). It is also important to consider regulating amounts of money to be forgiven once a jail term has been served (petty amounts). For substantial amounts causing considerable hardship to the lender, imprisonment should still be available under the law.

## **OTHER VIEWS**

- (i) ***Lending/Loan Culture*** - emphasized that Samoa's loan culture needs to be re-visited. From their experience, the Samoa Chamber of Commerce's concern is not so much the 'unwillingness' to pay but that debtors were unable to pay their debts. More emphasis should be placed on the 'prevention side'- having in place measures to check the debtor's credit history and serviceability of debt. Bankruptcy may be another option available to creditors. An interesting suggestion was made to consider working with the community/village governance system as another option. While it is not ideal to commit someone to prison for failure to pay a debt, the matter could possibly be referred to the village council to execute a mutually favourable solution that does not include prison time. No further clarification was given on this view, on how the village council is brought in to the discussions.
- (ii) ***Discount settlements*** - The SHC shared that discount settlement is one option that they have applied, where a lump sum amount is paid by the debtor and the remaining balance is absolved.
- (iii) ***Immigration Clearance*** - The DBS suggested to revive the 'immigration clearance' practice in the past years where those who intend to flee Samoa can be captured. It was a practice that a document is circulated to all financial institutions to check if the person intending to leave Samoa for good is debt free. It was an effective method at the time. There was also a suggestion to lower the threshold of a Departure Prohibition Order (\$7,000) under the

*Immigration Act 2004* so that it can capture absconding debtors with lesser (than \$7,000) debts.<sup>29</sup>

- (iv) **Co-Borrowing** - The DBS also raised an option of 'co-borrowing' whereby an elderly person can bring his or her son or daughter to be a co-borrower to help with the loan repayments.
- (v) **'Minor' Borrowers** - An issue was raised to consider the age of borrowers as the banks may be exposed to lawsuit if the borrower is an infant.
- (vi) **Expeditious execution of warrants of committal** - It was also suggested that MJCA should strengthen its internal policies to ensure that warrant of committals are issued expeditiously as some warrants can take some 12 months to be executed.

## (c) The Judiciary

### Question 1

- The JSA 1965 is a means for the private creditors to use government resources to enforce private agreements (between the lender and the borrower), at the expense of the government and the public. On this basis, it should be repealed.
- There are benefits of the JSA 1965 to the small creditors. The JSA is also helpful to a village person whose car was hit by another person's car. The village person does not have insurance and can use the JSA to claim and enforce a court order (on damages) to his vehicle. To this effect, if the JSA was to be retained it needs to be revised for a more effective application. For example, the Police should not be executing warrant of committals free of charge.

### Question 2

- The Police officers must execute warrant of committals but at some cost. It is risky for a non-Police officer to execute a warrant.

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<sup>29</sup> *Immigration Act 2004 (Public Notice)* commenced 1 December 2005.

### Question 3

- When a person is being imprisoned for a debt, this should satisfy the debt. In their (majority) view, it is inherently unjust and unfair to send someone to prison over and over for the same debt.

## (d) The Samoa Law Society

### Question 1

- The majority view is to retain the JSA 1965 because this is the only avenue that is helpful in recovering debts.<sup>30</sup> Samoa is a country that operates on credit every day with family, village church 'obligations' and it is helpful for the creditor to use the JSA if there is default in the debt repayment especially in the case of unsecured loans.<sup>31</sup> Otherwise, what else is available to the creditors to pursue and reclaim what is owed to them?
- On the other hand, one law firm submitted that the JSA is outdated and should be repealed.<sup>32</sup> Businesses can still function profitably without the 'debtor imprisonment' available under the JSA. If anything, it will force businesses to improve business practices in credit management.<sup>33</sup>
- Suggestions were also made to consider the JSA against Samoa's obligations under the International Covenant on Civil and Political Rights.

### Question 2

- The majority view is to retain Police officers as their mere presence is more effective and do demand authority. Furthermore, the debtors are more compliant if they see Police officers rather than bailiffs or creditors.<sup>34</sup>

### Question 3

- There is argument that 'imprisonment' should not satisfy a debt as it will encourage debtors to not pay debts but serve time in prison.

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<sup>30</sup>Drake & Co Barristers, Solicitors & Notaries, Submission to Law Reform Commission, *Review of the Judgment Summonses Act 1965*, (19 June 2019).

<sup>31</sup> Ibid.

<sup>32</sup> Wallwork Lamb Lawyers, Submission to Law Reform Commission, *Review of the Judgment Summonses Act 1965*, (27 June 2019).

<sup>33</sup> Ibid.

<sup>34</sup> Consultations with Samoa Chamber of Commerce, above note 26.

- The execution of a writ of sale and other alternative methods like charging orders, may be impractical and unrealistic as some debtors have little to no assets, which could be seized under these methods to absolve the relevant debt. Thus, imprisonment (of the threat of) is still more effective means of recovering a debt.
- On the extreme opposite side, some other members submitted that imprisonment is the most ‘inhumane’ aspect of the JSA hence it should suffice to satisfy the debt.

## (e) Public

Public notices were circulated on the local media and the Samoa Observer newspaper from 10 May to 23 June 2019 seeking public submissions on the JSA Review. By the due date on 28 June 2019, 17 written submissions were received from members of the public, including the business community.

### Question 1

- An overwhelming majority submitted to retain the law as it is still useful to date.<sup>35</sup> The Act is quite lenient with its procedures (provides for a long and trying process for the judgment creditor). Also, the Act has been very fair towards the judgment debtors and has also given the judgment creditor some hope.
- The business community was of the view that the law must be retained in order for businesses to enforce repayment of debt.<sup>36</sup> As one lending institution submitted, as a loan business, they have had many dealings filed with the Courts in trying to obtain debts back from clients who have been “unwilling to pay”. They agree with the MJCA in that the process is long and tedious and that ample chances are given to the debtors to come in and make arrangements with them (creditors) so that they don’t have to drag the debtors through the court process. A majority of the debtors are willing to make arrangements with the lenders, however there is also a group of others that turn a blind eye and refuse to discuss their debts for an amiable solution or arrangement. The JSA framework has helped lending institutions to effectively recover the outstanding debts from the disloyal clients. Although imprisonment for non-payment of debt is a last resort, it is an effective

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<sup>35</sup> Ibid.

<sup>36</sup> Submissions received by the Samoa Law Reform Commission, *Review of the Judgment Summonses Act 1965*.

avenue for lending institutions to recover debt owed by disloyal judgment debtors.

## Question 2

- The majority of members of the public submitted to retain police officers to enforce warrants of committal issued under the JSA framework. Their very existence allows for the smooth running of society in Samoa. People will be more compliant if they see a Police officer compared to a non-Police officer.
- A business owner submitted that although they fall under the private sector, they too are tax paying citizens. Therefore they feel that regardless of whether the Warrant comes from a Public or Private Company/Business, everyone is entitled to use the resources offered to the public which includes the assistance of police and court bailiffs.

## Question 3

- The majority of members of the public submitted to retain the current provisions of the JSA. If the judgment debtor is proven through the Court that he/she has no means of paying their debts then they should be declared bankrupt and that should be the end of the matter.
- The business community also submitted to retain the status quo (retain the JSA). It was submitted that in all fairness the lending institutions in particular are in the hope that debtors understand the extent of their actions and that they would choose to do the right thing towards the businesses that have helped them financially.<sup>37</sup>
- Imprisonment should not operate as a satisfaction or cancellation of any debt,<sup>38</sup> on the basis that imprisonment terms for a warrant of committal are not lengthy. For instance, from their experience, for a debt of \$751.60, the judgment debtor is imprisoned for 5 days only.<sup>39</sup>

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<sup>37</sup> Consultations with Samoa Chamber of Commerce, above note 26.

<sup>38</sup> Ibid.

<sup>39</sup> Consultations with the Development Bank of Samoa (DBS Conference Room, 12 June 2019).

## **(f) Sui o Alii ma Faipule Lelepa, Savaii (Village Council of Lelepa, Savaii) – Responses to the JSA Review**

Furthermore, worthy of note in this Report was the written submission from the village council of Lelepa in Savaii, represented and signed by 15 matais. This is the only Village Council in Samoa to have provided submissions to this review collectively. The Commission is extremely grateful to the village council of Lelepa for taking the time to prepare and submit their views. This Village Council responded to the questions as follows:

### **Question 1**

- They support the warrant of committal under the JSA (and the consideration of any other suitable penalties) against those who are dishonest in the payments of money borrowed.

*“Ua matua lagolagoina e lenei nuu se faaiuga faa-falepuipui poo se isi faaiuga talafeagai mo i latou ua le faamaoni e toe totogiina atu tupe a i latou sa latou nonoina”.*

### **Question 2**

- Police officers should carry out execution of warrant of committals against debtors.

*“Ua lagolagoina foi e lenei nuu le faaaogaina o le malosiaga faa leoleo mo se tusi faapoloaiga ina ia noatia ai i le falepuipui e o loo nofo aitalafu”.*

### **Question 3**

- Imprisonment should not absolve a debt and it should not stop the creditor from using other means to recover the debt. For example, properties like land, goods and other suitable means can be taken to absolve the debt.

*“E matua lagolagoina malosi e lenei nuu le faaaauu pea o le totogiina o nei aitalafu, tusa lava pe ua faasalaina le sa nofo i le falepuipui, ma ia faaaogaina mea totino poo se isi lava auala e mafai ai ona faa-fesuiai pei o fanua, oloa ma isi, ina ia laveaina ai le sa aitalafu as sea tagata”.*

## (g) The REACH Programme – Responses to the JSA Review

For the JSA 1965 Review, the Commission was very fortunate to have also received verbal submissions obtained from selected rural and remote villages in Upolu and Savaii during the Law and Justice Sector’s “Rights, Empowerment and Cohesion” **(REACH)** Pilot Program carried out in March 2019. Villages included in this Pilot Program were Uafato, Sapunaoa, Matafa’a, Faleasi’u-uta, Leualesi Leauva’a-uta, Tapu’ele’ele, Samalaeulu, Paia, Falealupo and Samata-uta. This Pilot program is the first of its kind in Samoa with the financial support of UNDP. The objective of the Program was to deliver the relevant Government services to remote areas of Samoa with the aim of achieving the Strategy for the Development of Samoa 2016/17-2019/20 and the Sustainable Development Goals (SDGs) with a focus on Goal 5, which is a commitment to achieve gender equality and empowerment of all women and girl and Goal 16, which is a commitment to promoting just, peaceful and inclusive societies.

**Table of the number of participants at each REACH session in Upolu and Savaii**

REACH PARTICIPANTS						
SAVAII						
VILLAGE	TAPUELEELE	SAMALAEULU	PAIA	FALEALUPO	SAMATA-UTA	TOTAL
NUMBER OF PARTICIPANTS	93	80	70	112	174	529
UPOLU						
VILLAGE	UAFATO	SAPUNAOA	MATAFAA	FALEASIU UTA	LEUALESILEAUVAA	TOTAL
NUMBER OF PARTICIPANTS	107	No number recorded	38	60	No number recorded	205 less 2 sessions

Savaii’s sessions recorded a total of 529 participants while Upolu (in the absence of recorded numbers in Sapunaoa and Leualesi Leauvaa) recorded a total of 205

participants. During these sessions, the Commission used this opportunity to also seek the views of the participants on the JSA review questions:

### **Question 1**

- The majority participants from around Upolu and Savaii were in favour of retaining the JSA 1965.<sup>40</sup>
- People in the village need to borrow money to develop their families (e.g. start a small shop/business). However people must also make sure they pay back the money they borrowed. People who borrow money but do not honour the agreement that they are bound to should be penalised. Therefore the law must be retained to require debtors to pay up or face imprisonment if they are reluctant to do so.

### **Question 2**

- Question 2 was not part of the questions/discussions at the Reach sessions. However, it was the general consensus that the Police is responsible for enforcing the laws of Samoa.

### **Question 3**

- There were mixed views on this question. Some villages submitted that once the debtor serves his/her time in prisons, the debt should be discharged.
- However, some villages submitted otherwise, i.e. imprisonment should never absolve a debt, otherwise people will not be afraid to borrow huge amounts of money and serve a short time in prison.
- For the Savai'i participants, the majority view was that a person who serves an imprisonment term should not be required to pay the amount owed after serving such imprisonment term. It is unfair that a person is punished twice.

## **OTHER VIEWS**

- To regulate high interest rates, assessing eligibility of people who intend to borrow money and assessing the amount of debt owed against the relevant punishment. Other issues noteworthy include:

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<sup>40</sup> Submissions received by the Samoa Law Reform Commission from the REACH Program (Upolu REACH, 4<sup>th</sup> – 8<sup>th</sup> March 2019; Savaii REACH, 11<sup>th</sup> – 15<sup>th</sup> March 2019).



- MJCA to conduct awareness and trainings on a yearly basis with financial institutions on the procedures under the JSA.<sup>41</sup>
- Consider payment of debt in other alternatives in situations where the debtor has no money. For example, by means of goods/ food crops or other traditional means or labour work rather than prison.<sup>42</sup>
- Charging interest on goods bought on credit and the interest can accumulate over a period of time until the debt is paid. <sup>43</sup>

## **(h) STATISTICS - PREVALENCE OF JUDGMENT SUMMONS APPLICATIONS AND WARRANTS OF COMMITTALS UNDER THE JSA 1965**

Some Government Offices were able to submit some statistics upon request by the Commission. They can be used to make some analysis on the prevalence of Judgment Summons proceedings and the public's (creditors) continuous reliance on this Act to pursue payment of debts.

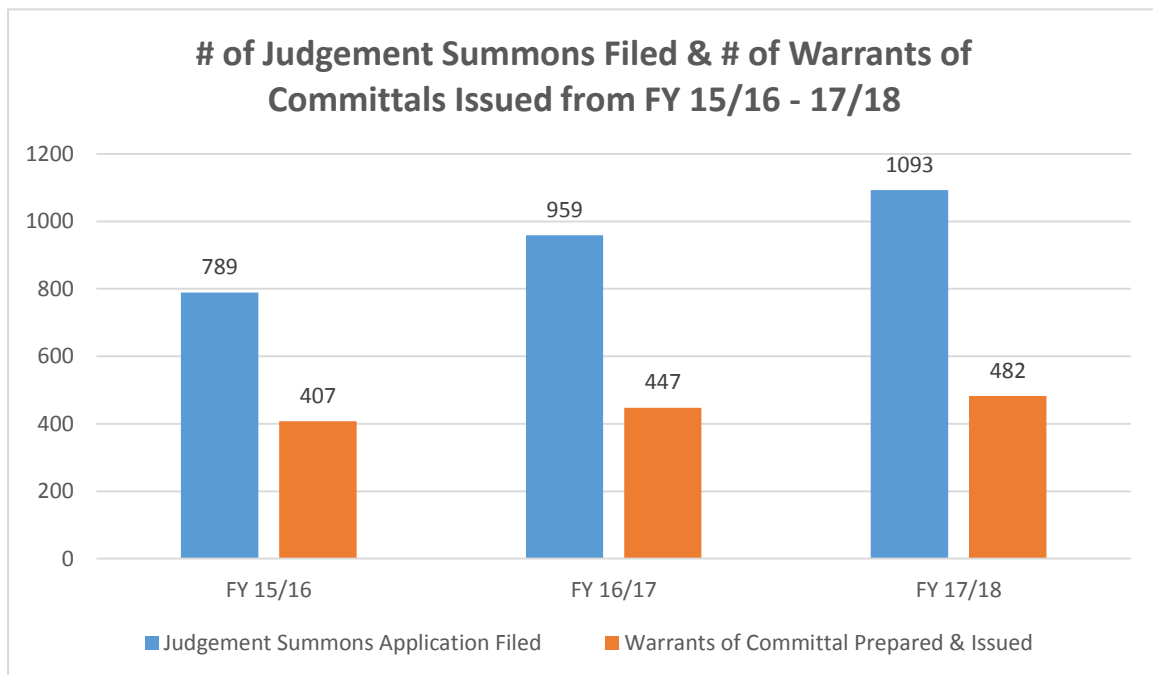
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<sup>41</sup> Consultations with the Ministry of Justice, Courts and Administration (MJCA Conference Room, 17 May 2019).

<sup>42</sup> Consultations with the Samoa Chamber of Commerce, above note 26.

<sup>43</sup> Ibid

**Figure 1: Judgement Summons Applications filed to Court & Warrants of Committals prepared and issued to Ministry of Police for execution**



**Information and Data provided by Ministry of Justice & Courts Administration (MJCA)**

**Figure 1 - Analysis**

1. The Judgment Summonses Act is still used widely in the pursuance of debt payments.
2. About half of the number of the Judgment Summons applications filed end up in consequent Warrants of committals where the debts do not honour or do not turn up (appear in court) to respond to the Judgment Summons.
3. Creditors give up on pursuance of a warrant of committal where it becomes too costly and there is no payment forthcoming.

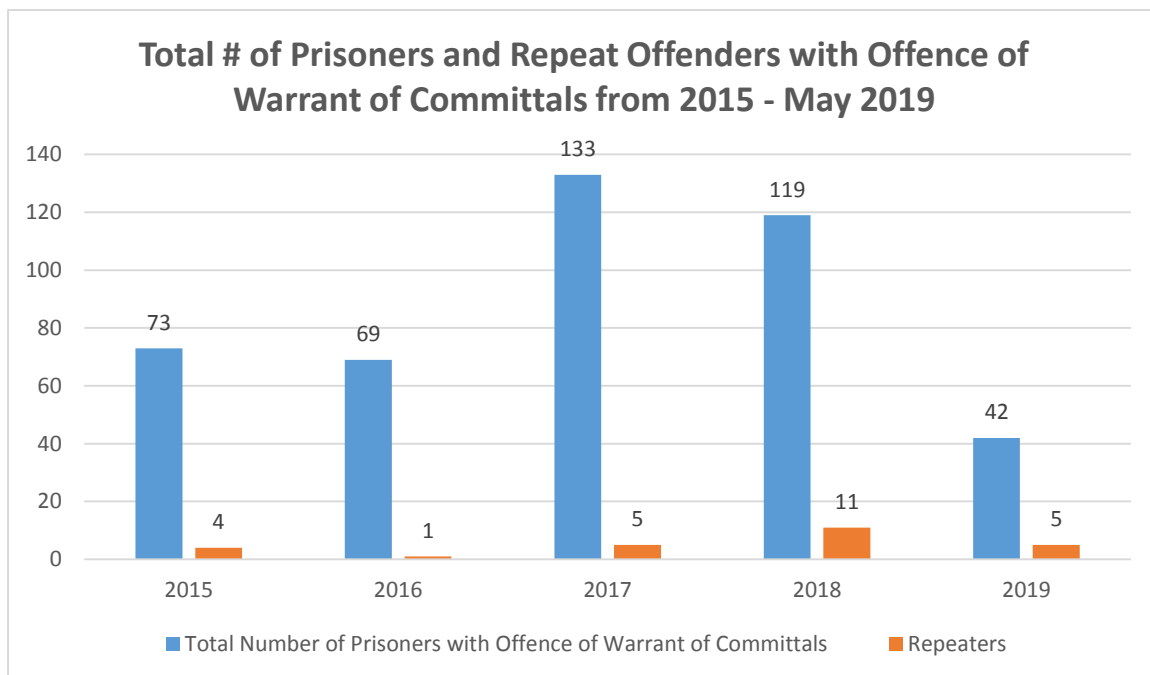
The data received from MJCA shows an increasing number of Judgment summons applications filed with the Ministry from Financial Years 2015 to 2018, for the non-compliance (of debtors) with the Court orders.<sup>44</sup> The warrants of committal prepared and issued for execution by the Police also increased in this period.

<sup>44</sup> Email correspondence from the Ministry of Justice, Courts and Administration, 21 June 2019.

When asked about the significant drop in warrant of committals prepared and issued, from JS applications filed in each FY, MJCA listed some reasons:<sup>45</sup>

- a) It is very costly for the judgment creditor to proceed with the matter further.
- b) The judgment creditor has given up pursuing a debt as the process is very lengthy.
- c) The matter has been settled in full before proceeding to an application for a warrant.
- d) The Judgment debtor cannot be found.
- e) The judgment creditor has given up after the issuance of 3 warrants of committals on the same debt and very little to no payment is forthcoming.

**Figure 2: Prisoners with Offences Issued with Warrants of Committals**  
**Information and Data provided by Samoa Prisons and Corrections Services (SPCS)**

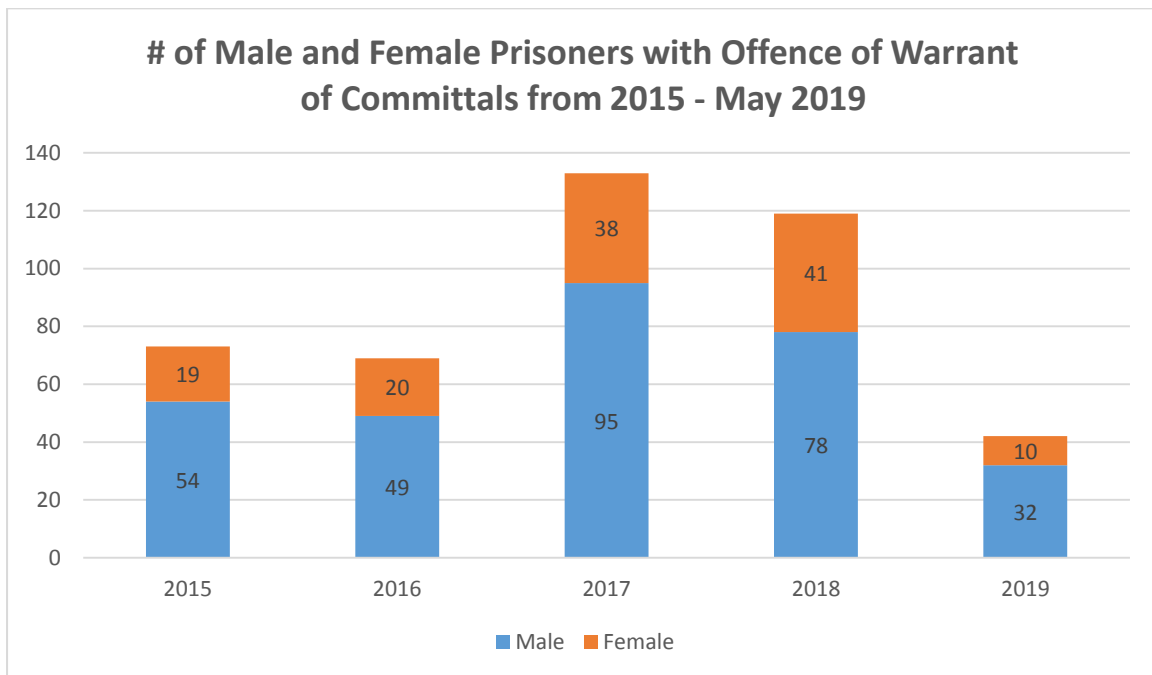


**Figure 2 - Analysis**

1. There was an increase in the number of prisoners brought in to prison under warrant of committals from the years 2015 to 2017 and slightly declined in 2018 and the first half of 2019.
2. Despite the differences of the counts in years, the data shows that to date the JSA is still largely relied upon by creditors in the pursuance of debt payments.

<sup>45</sup> Ibid

**Figure 3: Prisoners with Offence of Warrant of Committals – Male and Female Information and Data provided by Samoa Prisons and Corrections Services (SPCS)**

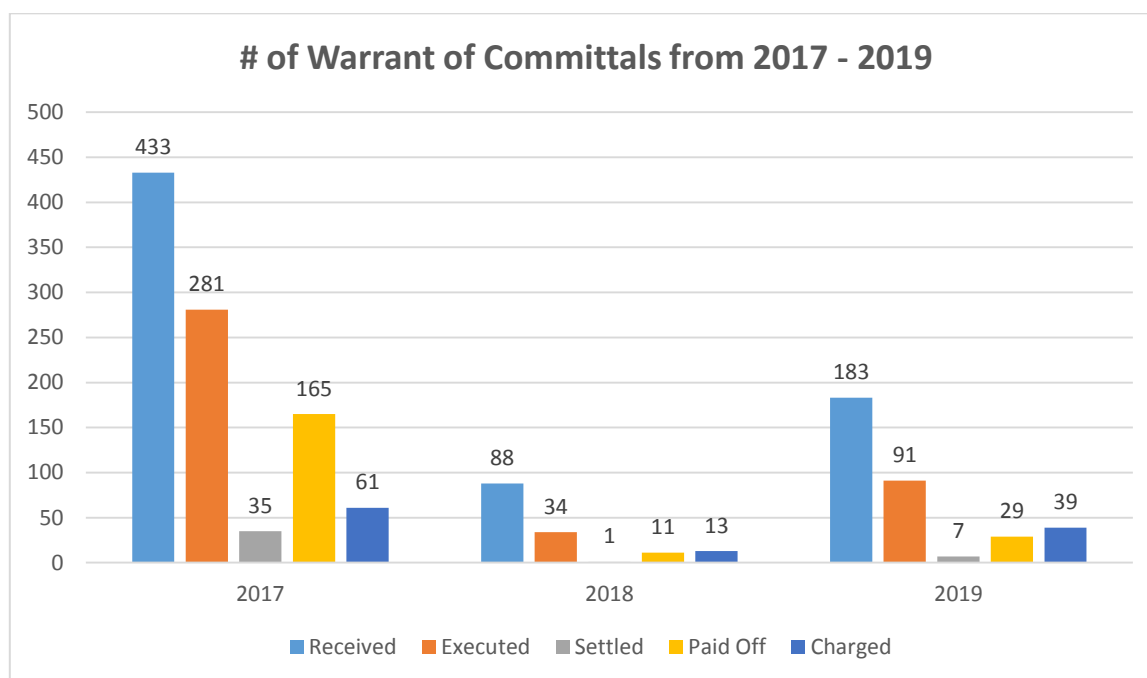


**Figure 3 - Analysis**

1. The constant use of the JSA leads to the Prison authorities seeking facilities appropriate for:
  - a. civil (matters) prisoners only, as opposed to being housed with prisoners with criminal convictions; and
  - b. female debtors and inmates.
2. The number of male debtors imprisoned are higher than the number of female debtors. This may indicate females respond better to Judgment Summons (in that they appear in court to respond), or that more males borrow for themselves or on behalf of their families.

Figure 3 shows that there are more male than female prisoners imprisoned from a warrant of committals. In consultations, SPCS indicated that they do not have sufficient resources and budget to cater for the increasing number of such civil prisoners. SPCS also raised concerns about the safety of those imprisoned under the JSA in instances where civil prisoners are housed together with convicted criminals. One of the main concerns is having appropriate facilities for female debtors imprisoned.

**Figure 4: Warrant of Committals Received, Executed, Settled, Paid Off and Charged Information and Data provided by Ministry of Police (MOP)**



**Figure 4 -Analysis**

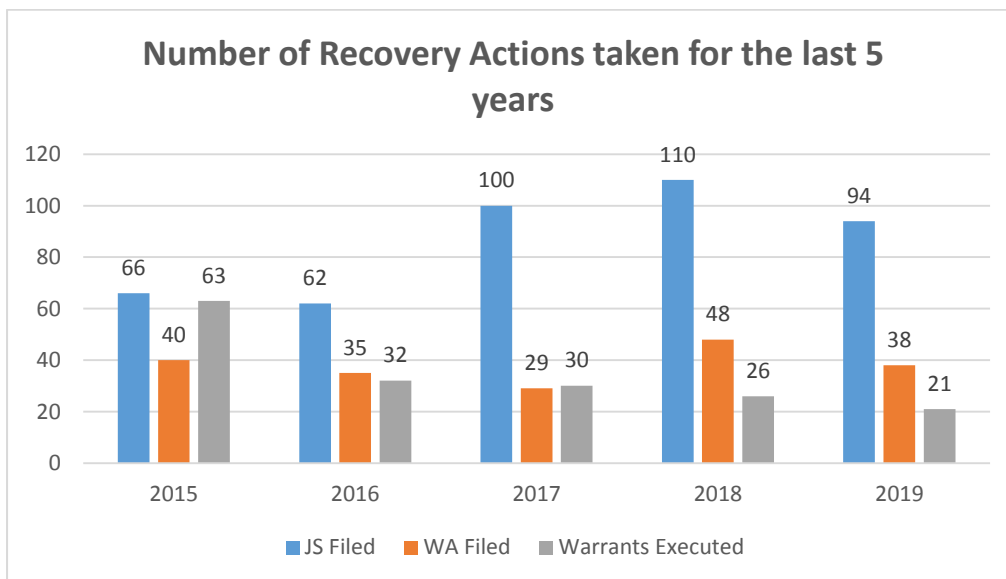
1. The data from MOP shows that in a 3 year span (2017-2019), the year 2017 is reported to have received the highest warrants of committal received (433) from the MJCA for execution by the MOP. From this 433, 35 were settled and a considerable number (165) were paid off.
2. There was a recorded decline in the warrants of committal received from the MJCA in the period 2017-2018 (from 433 to 88). The number then increased in 2019 (183).
3. Notwithstanding the variance in numbers, it is clear from the data from the Ministry of Police that the Judgment Summonses Act is actively used by creditors, and the MOP continue to have a significant workload from this area of their police duties.
4. The data above support the MOP’s submissions that their limited resources are used to potential and more (resources) are required to allow them to meet their statutory duties to the courts and more importantly to the public of Samoa.

**Figure 5: Number of Recovery Actions in the last 5 years, 2019-2015**  
**Information and Data provided by Samoa Housing Corporation**

**Table Form**

Year	Judgment Summons Filed	Warrants Applications Filed	Warrants Executed
2015	66	40	63
2016	62	35	32
2017	100	29	30
2018	110	48	26
2019 (up to June)	94	38	21
	<b>432</b>	<b>190</b>	<b>172</b>

**Graph Form**



**Figure 5 – Analysis**

1. The number of Judgment Summons filed are a matter of fact and keeps the Recovery division of lending facilities and creditors busy, and the JSA is extensively relied upon and used to potential, e.g. by the Samoa Housing Corporation. Judgment summons files in 2015 added up to 66, 62 in 2016, 100 in

2017, 110 in 2018, and 94 and still counting for 2019 with a few more months to go the end of 2019. This shows the JSA is still actively being used to the benefit by the Housing Corporation, as an example of a creditor or lending facility in Samoa.

2. In 2015, there was a higher number of warrants executed (63) than the number filed (40). This may be due to this count (63) including outstanding warrants (for execution) from 2014 and before.
3. In 2016, 2018, 2019, not all warrants of committals filed are executed. This may be due to the unavailability of the MOP to execute the warrants, or some debtors may have made payments.
4. According to the SHC and all lending institutions, when a debtor defaults, they make all efforts to contact the debtor and make arrangements for some payment to be made. Unfortunately, many other debtors try at all costs to avoid making any further payments although they are still operating on profits or have means to pay. This is the unfortunate part. Some of the loans have to be written off, and some warrants of committals are no longer pursued as it was becoming pointless and expensive for the creditors. The lending facilities are constantly prepared to make arrangements beneficial to the debtors, if only to get some of what is owed back.

### **Overall Statistical analysis**

The data received from the stakeholders (MJCA, SPCS, MOP and SHC) reveals that the JSA is an active law which has been utilised to its fullest potential. MJCA's data indicates the high utilisation of the JSA through applications filed by creditors for the debtor's non-compliance with a court order. The data from SHC (as a creditor utilising this law to its full potential) also confirms this in its data with a high number of JS applications filed. As a result of this, MOP received a significant number of warrants to be executed as shown in its data. SPCS has also recorded a high number of prisoners committed under a warrant of committal.

## **OVERALL ANALYSIS OF SUBMISSIONS**

### **Question 1:**

The Judgment Summonses Act 1965 applies to those who persistently are unwilling to pay their debts (although they are able to pay). Should this law remain for Samoa?

There is an overwhelming majority view to retain the JSA 1965. This is for a number of reasons.

1. It is the only effective avenue for creditors or business communities to recover debts.
2. In the absence of the JSA, businesses cannot be sustained and will only discourage businesses from lending money to people thus depriving family development.
3. The current process in the law (JSA) of recovering debts is not onerous. It is flexible i.e allow numerous opportunities to the debtor to settle his or her debt. As indicated in preliminary consultations, imprisonment is the last resort after all other alternatives have been exhausted.
4. Though the JSA operates at the expense of government resources, it does help disadvantaged citizens with limited access to justice as pointed out by the Judiciary.

Statistics obtained to date reveal a rising number of Judgment Summons applications filed over the last few years by grieving creditors. It suggests the usefulness of the JSA as a means to enforce the payment of a debt. The drop in warrant issued and prepared may have resulted from matters being settled with the debtor paying up the money. This shows the positive impact of JSA and its effectiveness in assisting grieving creditors recover their money.

### **Some suggested revisions / checks and balances**

- i. To consider other alternative methods in other countries and the impact of the JSA on international conventions such as the ICCPR and CRC.
- ii. For businesses or creditors to have in place measures to regulate lending so that the borrowers are capable of paying back the money.

### **Question 2**

Where the Court commits a debtor to imprisonment for consistent failure to pay, all police officers are required to assist in the execution of the warrant of committal. Should this requirement stay?



There is overwhelming support to retain the role of Police officers in executing warrant of committals as they are more 'authoritative' and the public will be more compliant in their presence.

### **Some suggested revisions / checks and balances**

- i. Police to continue to execute warrant of committals at a fee .ie 10% of the actual debt imposed on the creditor.
- ii. Creditors to provide transportation to the Police to execute their warrants of committals.

### **Question 3**

The Act provides that no imprisonment under this Act:

- a. operates as a satisfaction or cancellation of any debt; or
- b. deprives any person of any right to issue execution against the lands, goods, or chattels of the judgment debtor. Do you agree? Please explain.

There were split views on the question whether imprisonment should extinguish a debt.

#### *Arguments For:*

- (i) Arguments to retain the status quo argue that imprisonment is a form of deterrence for debtors to pay their debt. It is more likely and has been recent practice that the debtor or his or her families will only settle the debt once a warrant of committal is executed or the debtor is sent to prison.
- (ii) Removing the status quo will only discourage people from paying debts.
- (iii) Imprisonment terms are appropriately short and not too lengthy for cases of such nature.

#### *Argument Against:*

- (i) It is unjust and inhumane to repeatedly imprison a person for not paying the debt.
- (ii) Other forms and means of punishment must be imposed.

## **Some suggested revisions / checks and balances**

- i. Place a threshold on the amount of debt that attracts an imprisonment term i.e petty amounts should not attract an imprisonment term but amounts causing considerable hardship to the lender may.
- ii. Consider other forms of punishment to replace imprisonment to allow for payment in kind rather than monetary and absolve the debt.

## **Other matters noteworthy as raised by the different stakeholders to inform any legislative reforms for this review:**

- **Resource constraints**- some of the stakeholders have expressed the view that the procedures under the JSA 1965 put a strain on Government resources thus the removal of Government from playing any role under the JSA should be considered.
- **Safety of police officers** - There were concerns on the safety of Police officers in the execution of warrants in cases where they are threatened and harassed. The safety of those debtors imprisoned in cases where they are housed together with high level convicts at prison.
- **Strengthen lending rules**- there were strong views to re-visit Samoa's loan culture and focus on the 'prevention side' such as stringent guidelines to be put in place by Financial institutions and businesses to check the credit history of those borrowing money. This is to ensure that these people are able to pay the money back.
- **Other alternatives** - suggestions were made to consider other methods of repayment such as discount settlement, co-borrowing, immigration clearance, labor work or repayment in the form of goods or other traditional means. The matter could possibly be referred to the village council to execute a mutually favourable solution that does not include prison time.
- **Training and awareness** - to conduct regular trainings with businesses and financial institutions on the procedures of JSA to ensure smooth operation of the

law. It was also suggested to improve existing procedures so that warrants of committal are executed expeditiously.

- **High interest rate** - To review and regulate the high interest rates imposed by smaller loan companies which have more or less caused hardship to the debtors.

## **PART 5: COMMISSION'S VIEWS AND RECOMMENDATIONS**

This part provides for the Commission's views and proposed legislative changes to the current JSA 1965, informed by research, statistics and the overall analysis of submissions received to date. In doing so, the 3 questions which sought public submissions will be addressed accordingly, with proposed reforms to the corresponding provisions of the JSA and the relevant laws in Samoa.

At the outset, the recommendations made throughout this Report aim to respond to the TOR provided by OAG in particular the contentious issues raised under the 3 questions. Subsequently, and if necessary, the rest of the (uncontentious) provisions in the JSA will be revised accordingly to update its language and terminology so they are well understood by the users of this law. The outcome of this review is a fully updated revised JSA framework that is relevant to the context of Samoa.

Discussions on an issue and thematic views are presented before recommendations are set out in a Box.

### **A. Should the Judgment Summonses Act 1965 stay?**

The majority view from all the stakeholders is to retain the JSA 1965.

#### **Some Thematic Views Considered**

##### **(a) Alternative methods in Ireland and NZ**

There were suggestions to consider other alternative methods of paying debts as applied in NZ and Ireland. For example, earnings or deductions from social welfare payments to

enforce a debt (Ireland). Samoa has yet to have such systems to be able to apply such alternative methods. In NZ, many people have personal assets upon which other alternative methods (charging orders, garnishee proceedings) can apply. These alternatives are already available under the Court Rules of Samoa (SCR and MCR) but are rarely used. JSA is commonly used to pursue debts as it is more fast and effective.

### **(b) ICCPR and CRC**

There were also concerns raised on the impact of JSA on International Conventions such as ICCPR and CRC. Upon research, the Commission is of the view that the current JSA does not have any impact on these Conventions on the following grounds:

- i. The ICCPR commits its parties to respect the civil and political rights of individuals. Article 11 states that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation i.e in this case a civil debt. This article applies to those who are 'incapable' or 'unable' to pay a debt. As discussed earlier in this Report, the Court cannot make an order in these circumstances. However, an order can only be made against those debtors who persistently and willfully does not pay although they have means to, failing which they can be committed to prison. **It is important to clarify here that 'imprisonment' does not result from the non-payment of a debt, but rather the failure to obey a court order.** States are entitled to have mechanisms for enforcing court orders **in the face of willful and obstinate refusal to obey the same.**
- ii. CRC is an international treaty that protects children under the age of 18 years. This Convention is well adhered to by the relevant stakeholders such as SPCS. As indicated during consultations, they are well aware of the rights of the child especially newborn babies to be with their mothers who are serving prison time. Consultations reveal that a female prisoners who have given birth are allowed to go home for 3 months to look after the baby and return to prison afterwards.

### (c) Lending Requirements

There were strong views from submissions to consider having in place stringent rules to regulate lending to ensure that those intending to borrow are able to repay back the money. The Commission understands that each loan company or business has its own rules to regulate lending requirements. The review of such rules is outside of the scope of the TOR of this review. Perhaps this is a matter for the relevant stakeholders (Banks, Chamber of Commerce) to initiate and address in a separate review.

**Recommendation 1:** The current JSA 1965 framework should be retained given its usefulness and effectiveness in pursuing debts.

**Recommendation 2:** The alternative methods used in Ireland will not be practical for Samoa as Samoa does not have the relevant social welfare systems. There are already alternative methods available under the Magistrate Court Rules 1971 and the Supreme Court Rules 1980 of Samoa similar to NZ. For instance, charging orders, garnishee proceedings.

**Recommendation 3:** The JSA 1965 is in line with the provisions of the ICCPR and CRC.

**Recommendation 4:** The lending rules and requirements of financial institutions and lenders should be reviewed against the current rules and practices. This includes a review of the *Penalty Interest Rate Act 1998*. The administrator of the Penalty Interest Rate Act 1998 must review the appropriateness of this Act to the context of Samoa.

#### B. Should Police Officers continue to execute warrants under this Act?

The majority view as stated earlier is that the Police should continue to execute warrants under the Judgment Summons Act 1965.

## **Some Thematic Views Considered**

### **Recourse constraints**

As indicated earlier, there is overwhelming support from submissions to retain the role of constables in executing the warrants of committal. The Police disagrees on the basis that executing warrant put a strain on their resources and man power. To address these concerns, the Police have suggested that a cost for executing warrants (10% fee of the debt imposed upon the creditor). Otherwise, to remove the imprisonment term from the JSA and subsequently their role under it.

To respond to the suggestion by the Police, the Commission notes that fixing a scale of fees or costs for the purposes of this Act may be made under the Regulation section (section 21) of the JSA. It is to be noted, however that such fees are to be approved pursuant to section 21(2) of the JSA. This is a policy decision to be made by the relevant Ministries (MJCA and MOP). If a cost is to be imposed on services rendered, then it is available to the administering authority (MJCA) to make regulations to this effect.

There were also views that transportation is already provided to Police to aid with the execution of their warrants. In practice, Police provide transportation to private citizens who are unable to provide transport. There is no specific requirement under the law for this. However, it does not restrict Police from carrying out means to effectively execute a court order. If this is to be clarified in the law, then perhaps Practice Directions or guidelines can be made within the relevant section of MOP to guide the execution of warrants. Alternatively, Regulations pursuant to section 79 of the Police Services Act 2009 may be made on matters which include those necessary for rendering the members of the Police Service efficient for the discharge of their duties.

The Commission agrees with the majority that the role of constables should be retained given their key role in effective law enforcement. In practice, Police officers are respected and recognised by the communities as peace keepers and protectors of the community. People will be more compliant to Police in uniforms than private citizens.

**Recommendation 5:** The Police or constables should continue to execute warrants of committal under the JSA.

**Recommendation 6:** The MJCA (administering authority) is empowered under the Act to make regulations (section 20) to provide for a cost for services rendered by MOP in the execution of warrants. It is available to the MOP to instigate this with the MJCA.

**Recommendation 7:** There should be rules and practice directions within MOP to guide their work on the execution of warrants. It may include requirements imposed on financial institutions of a certain (bigger) scale i.e requiring creditors to provide transport. However, for private citizens who are unable to provide transport, the Police should continue to provide transport assistance to them.

### C. Should imprisonment absolve a debt?

As earlier shown, there were split views on this question, some argued for and some argued against this question.

#### **Some Thematic Views Considered**

##### **(a) Imprisonment is for non-compliance with a (Judgment Summons) court order and not about the debt**

It was highlighted at consultations and during research that the imprisonment term (order imposed by the court) does not relate to the debt itself but rather the failure to obey a Judgment Summons court order. Therefore, imprisonment (*for failure to obey a court order e.g. an order to pay \$50 per fortnight commencing on X date*) does not absolve the debt as it has nothing to do with the debt itself, but the failure to obey the court order.

The relevant statistics from MJCA and SHC reveal the wide utilization of the JSA by creditors. In some cases, the warrant of committal (or the threat of it) will only persuade the debtor to make some payment, and make some efforts to address the debt.

## **b) Some background history to imprisonment under the JSA**

The Commission's preliminary research show that provisions such as section 17 of the JSA of Samoa is old law which was applied throughout the 17<sup>th</sup> and 18<sup>th</sup> centuries in other parts of the world. Whilst other countries have abolished such provisions, Samoa, Fiji and some states of Australia (as discussed) still retain it. Section 17 (and other provisions of the JSA) is a transplant from the old repealed NZ statute.

Preliminary research seems to suggest that such a provision (section 17) originates from a time where debtors, who had means to pay, chose to conceal their assets to evade payment of their debts. In doing so, they were willing to serve prison time instead. Thus, to provide in the law that imprisonment will not extinguish a debt in these circumstances specifically targeted these types of debtors. It was argued that these debtors must be held accountable to pay back their debts even after serving prison time. This perception, though valid and justified, is beginning to change today with a plea from some stakeholders to show compassion towards such debtors on humanitarian grounds i.e. debtors should not be punished twice.

## **c) Imprisonment a last final resort**

However, as it stands, imprisonment or the threat of imprisonment only moves some debtors to address their debt commitments. As earlier stated, the Court cannot and will not make an order to pay (*failure to comply which a committal to prison results*), if the debtor has no means to pay. There is abundance of opportunities for the debtor to seek the least payment options to settle the debt, or inform the court that he or she has no means of paying. Imprisonment is therefore not at issue in this matter. This is the spirit in which the Judgment Summons Act exists. There is already a process involved in the JSA which the debtor can use to his/her full advantage. In many occasions, imprisonment results merely because the debtor refuses to appear in court to respond to a summons.

There is ample opportunity for the parties (debtor and creditor) to mutually agree on the best possible alternatives to settle the debt. The process upon which the evidence is brought before the court (sections 7 and 8) should be utilized to potential. Where it is open to the debtor to plead he/she has no means to pay a debt, it is also available to the creditor to provide evidence to the court that the debtor does have means of paying. For the above discussions, section 17 should be retained, and imprisonment (the last measure) should not absolve a debt.



**Recommendation 8:** Section 17 of the JSA should be retained.

## **Other matters raised**

### **(i) Resources and capacity issues**

Some stakeholders have expressed the view that the procedures under the JSA 1965 put a strain on Government resources thus the removal of Government from playing any role under the JSA should be considered. This view was also shared by members of judiciary when they questioned why government resources are used to enforce contracts derived from private contracts.

Also, there were concerns about the safety of Police officers in the execution of warrants in cases where they are threatened and harassed. The safety of those debtors imprisoned in cases where they are housed together with high level convicts in prison.

The Commission is of the view that Government should continue to play an important role under the JSA to assist the people of Samoa starting up private lending services. Samoa currently does not have private companies to carry out debt recovery compared to other developed countries. If resource constraints and lack of capacity are the key hindrance in the performance of duties, then the relevant Ministries must raise these matters within their own management to address. Consequently, management should propose for these matters to be considered in the Ministries' overall budget, with the relevant justifications. These include statistical analysis of the impact of (the implementation) of JSA on their resources. In doing so, Government will be able to invest resources and staff capacity to ensure the JSA is effectively implemented. Technical assistance may also be sought from its international counterparts to assist in this area.

To address safety concerns, Regulations can be made to this effect pursuant to section 79 of the Police Service Act 2009, on matters which include the welfare of members of the service and all matters necessary for rendering the members of the Police Service efficient for the discharge of their duties.

**Recommendation 9:** The available data from the MJCA, SPCS, MOP and SHC show that a high number of Judgment Summons applications are filed with the courts each year, and the warrants of committal being executed following the non-compliance with those judgment summons. This is evidence that the JSA 1965 is to date being used to its potential. Given the statistics, the relevant Government Ministries need to push for more funding and resources to implement the JSA, and the government to consider more assistance is given to these administering Offices.

**Recommendation 10:** To address safety concerns, Regulations can be made pursuant to section 79 of the Police Services Act on matters which include the welfare of members of the service and all matters necessary for rendering the members of the Police Service efficient for the discharge of their duties.

**(ii) Other alternative methods**

Suggestions were made to consider other methods of repayment such as discount settlement, co-borrowing, immigration clearance, labor work or repayment in the form of goods or other traditional means. Also, such matters could possibly be referred to the village council to execute a mutually favourable solution that does not include prison time.

The Commission is of the view that this is already a matter for the Court to decide. The Court is the court of justice and will only make an order upon hearing the evidence of both parties. To clarify this in the law, a proposed provision can be inserted for the Court to take into account in its order other alternative methods of repaying the debt aside from money. A list of alternative methods (non-exhaustive) can be drawn up as a guide to the Court.

**Recommendation 11:** Include in the JSA other material or evidence the court may consider, to make an order on the satisfaction of a debt, outside of money payment.

**(iii) High interest rate**

Some stakeholders in particular members of the public have submitted to review and regulate the high interest rates imposed by smaller loan companies which have more or less caused hardship to the debtors. CBS also expressed concerns that these companies

are not regulated by CBS thus amendments are in the pipeline to the Central Bank of Samoa Act 2015 to address this so that these small companies are monitored and regulated.

Some members of the judiciary have also expressed concerns about this issue and have requested the Commission to carry out review of the Penalty Interest Rate Act 1998 to consider appropriate reforms.

The Commission is of the view that the concerns raised on the high interest rate is outside the scope of this review. However, there is currently work in the pipeline by CBS to review its legislation to address it. Also, the review of the Penalty Interest Act 1998 is timely to consider the issues surrounding the high interest rates imposed by smaller loan companies.

**Recommendation 12:** The Central Bank of Samoa to move forward and complete its review of the penalty interest rates on loans / mortgages, and to whom these rates would apply.

**(iv) Training and awareness**

Some stakeholders submitted to conduct regular trainings with businesses and financial institutions on the procedures of JSA to ensure smooth operation of the law. It was also suggested that the existing procedures for the execution of warrants of committal are to be improved for expeditious execution.

The Commission strongly supports raising the awareness of the JSA with the relevant stakeholders. Consultations and submissions received have revealed some misunderstanding on the intention of the JSA- to imprison a person for failure to pay a debt. However, as discussed, the intention is not to outright imprison anyone as there are numerous opportunities given to the debtor to settle his or her debt, failing which a warrant of committal is issued. It is important to conduct regular public awareness programs and trainings with the relevant stakeholders and the public so that they are able to use the JSA to their advantage.

It is equally crucial that all Government stakeholders and implementers of the JSA, such as Government authorities (MJCA, MOP, SPCS etc) and lending institutions/businesses, and especially the public, understand the full spirit and objectives of the Judgment Summonses Act 1965. This will then allow for the implementation of the Act, in the way and spirit as envisaged by the Act. It was (and still is) never the intention of the JSA to imprison anyone at the outset. No doubt the creditors will need what is owed them, and for some small lending businesses, if only to survive. One is only called into court when one does not honour his/her commitments or an (loan) agreement. For all good intentions, the Judgment Summonses Act will never be discussed at all if everyone honours their commitments in lending and borrowing agreements. If for some unfortunate reason, a debtor cannot honour his/her commitments, in Samoa, a debtor still has the opportunity to appear before the court to inform he/she has no means of making any payment, and the court cannot impose an order upon the debtor that the debtor cannot meet. It is open to the debtor also to declare bankruptcy.

In addition to creditors raising the standards of lending systems (e.g. to assess credit history, confirm the ability to service loans etc.), until some time when Samoa is more modernized and everyone's assets are bountiful, are identifiable, are registered and their details accessible for the court to make an order to allow the use of such to make payments towards a debt, the Judgment Summonses Act 1965 remains useful for Samoa's context to date.

**Recommendation 13:** After Parliament passes the revisions in a Judgment Summonses Amendment Act 2019 to take account of the above recommendations, a full public awareness programme on the objectives of the updated JSA 1965 and its revisions must be undertaken, by the MJCA, MOP with the Office of the Attorney General or by the Commission (SLRC).

## **PART 6: LIST OF RECOMMENDATIONS**

### **Question 1: Should the Judgment Summonses Act 1965 stay?**

**Recommendation 1:** The current JSA 1965 framework should be retained given its usefulness and effectiveness in pursuing debts.

**Recommendation 2:** The alternative methods used in Ireland will not be practical for Samoa as Samoa does not have the relevant social welfare systems. There are already alternative methods available under the Magistrate Court Rules 1971 and the Supreme Court Rules 1980 of Samoa similar to NZ. For instance, charging orders, garnishee proceedings.

**Recommendation 3:** The JSA 1965 is in line with the provisions of the ICCPR and CRC.

**Recommendation 4:** The lending rules and requirements of financial institutions and lenders should be reviewed against the current rules and practices. This includes a review of the *Penalty Interest Rate Act 1998*. The administrator of the Penalty Interest Act 1998 must review the appropriateness of this Act to the context of Samoa.

### **Question 2: Should Police Officers continue to execute warrants under this Act?**

**Recommendation 5:** Police or constables should continue to execute warrants of committal under the JSA.

**Recommendation 6:** The MJCA (administering authority) is empowered under the Act to make regulations (section 20) to provide for a cost for services rendered by MOP in the execution of warrants.

**Recommendation 7:** There should be rules and practice directions within MOP to guide their work on the execution of warrants. It may include requirements imposed on financial institutions of a certain (bigger) scale i.e requiring creditors to provide transport. However, for private citizens who are unable to provide transport, the Police should continue to provide transport assistance to them.

### **Question 3: Should imprisonment absolve a debt?**

**Recommendation 8:** Section 17 of the JSA should be retained.

### **Other matters raised**

**Recommendation 9:** The available data from the MJCA, SPCS, MOP and SHC show that a high number of Judgment Summons applications are filed with the courts each year, and the warrants of committal being executed following the non-compliance with those

judgment summons. This is evidence that the JSA 1965 is to date being used to its potential. Given the statistics, the relevant Government Ministries need to push for more funding and resources to implement the JSA, and the government to consider more assistance is given to these administering Offices.

**Recommendation 10:** To address safety concerns, Regulations can be made pursuant to section 79 of the Police Services Act on matters which include the welfare of members of the service and all matters necessary for rendering the members of the Police Service efficient for the discharge of their duties.

**Recommendation 11:** Revise the wording in the JSA to clarify what other material or evidence the court may consider to make an order on the satisfaction of a debt, outside of money payment.

**Recommendation 12:** The Central Bank of Samoa to move forward and complete its review of the penalty interest rates on loans / mortgages, and to whom these rates would apply.

**Recommendation 13:** After Parliament passes the revisions in a Judgment Summons Amendment Act 2019 to take account of the above recommendations, a full public awareness programme on the objectives of the updated JSA 1965 and its revisions, must be undertaken, by the Office of the Attorney General or by the Commission (SLRC).

## PART 7: Bibliography

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17. *Telecom Samoa Cellular Ltd v Sauaga* [2003] WSDC 4
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1. Fines Act 1996 (New South Wales, Australia)
2. Imprisonment for Debt Limitation Act 1908 (NZ)
3. Judgment Debt Recovery Act 1984 (Victoria, Australia)
4. Judgment Summonses Act 1965
5. Judgment Summonses Rules 1965
6. The Debtors Act [Cap 32] (Fiji)
7. The Debtors Act 1936 (South Australia)
8. The Debtors Act 1870 (Tasmania)

## **Conventions**

1. Convention on the Rights of the Child
2. International Covenant on Civil and Political Rights

## **Written Submissions**

1. Government Stakeholders Submissions
  - Office of the Attorney General
  - Ministry of Police
  - Samoa Bureau of Statistics
2. Private Stakeholders Submissions
  - Wallwork Lamb Lawyers; Drake & Co Barristers, Solicitors & Notaries; Stowers & Su'a Law Firm; Summit Lawyers; T&N Toleafoa; TNV's Finance; Dornees Finance.
3. Public Submissions
  - Ali'i ma Faipule, Lelepa, Savaii; Public submissions from REACH.
4. Email
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