

SAMOA
LAW REFORM COMMISSION

CRIMINAL PROCEDURE ACT 1972
Issues Paper IP 06/10

March 2010

Preface

The review of Criminal law includes the review and reform of the Crimes Ordinance 1961, the Criminal Procedure Act 1972, the Evidence Ordinance 1961 and the creation of a Sentencing Bill. This major law reform reference was given to the Law Reform Commission by Cabinet and the Attorney General in November 2008.

This is the second in a series of papers on aspects of the Criminal law. This first issues paper dealt with the Crimes Ordinance 1961(*released December 2009*). This Issues Paper deals with the Criminal Procedure Act 1972.

The Commission has employed for this Issues Paper, the form of questions and a closing date for responses (31 March 2011). This paper therefore discusses the issues and poses questions for consideration. The intention is to enable detailed and practical consideration of the issues.

We emphasize that we are not committed to the views indicated and any provisional conclusions should not be taken as precluding further consideration of the issues.

The case for change cannot simply be based on the premise that other jurisdictions have moved on in their criminal legislation. In any determination for reform, it must always be kept in mind that Samoan custom and traditions must be factored in. At the same time, this must be balanced against the enhancement of the social, cultural, economic and commercial enhancement of Samoa as well as the laws of Samoa meeting the needs of the community.

Given that many questions have been posed, the Commission will make its recommendations for reform once it has received all submissions from stakeholders. The recommendations of the Commission will form the basis of its final report to Cabinet. The recommendations of the Commission will be independent of all stakeholders.

Not all of the Commissions recommendations will be contained in this issues paper. Those recommendations which the Commission believes do not substantively change a section are not included in this issues paper but will be included in its final report.

We emphasize however that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us

Submissions or comments on this paper should be sent by the 31st March 2011 to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to lawreform@ag.gov.ws.

We are grateful for the assistance of the following people who provided comments on earlier drafts of this paper: the assistance of the working group made up of the Criminal Prosecution team of the AGO, and representatives from Ministry of Police and Prisons Services, and the Ministry of Justice and Courts Administration.

Introduction

This issues paper considers the current law and practice relating to the operation of the Criminal Procedure Act 1972 (“CPA”), and explores options for reform. This paper will be divided in the following way:

The content of the issues paper will be as follows;

| | |
|---|----|
| 1) THE CASE FOR CHANGE | 5 |
| 2) CURRENT LAW AND PRACTICE | 6 |
| 3) THE CRIMINAL PROCEDURE 1972: THE ISSUES | 7 |
| 3.1 Police Powers to Stop Vehicles | 7 |
| 3.2 Evidence of Witness Overseas | 8 |
| 3.3 Pre-Trial Issues | 8 |
| 3.4 Powers of Court where informant does not appear | 9 |
| 3.5 Prosecution Disclosure | 9 |
| 3.6 Scope of Defence Disclosure | 10 |
| 3.7 Victims in the Prosecution System | 11 |
| 3.8 Bailable as of right | 11 |
| 3.9 Discretion of the Court | 12 |
| 3.10 Arrest | 12 |
| 3.11 Young Offenders | 12 |
| 3.12 Procedures in Criminal Trials with assessors | 13 |
| 3.13 Concurrence of presiding judge | 13 |
| 3.14 Retrials by Supreme Court | 13 |
| 3.15 Costs in Criminal Cases | 14 |
| 3.16 Power of Registrars of the Court | 14 |
| 4) OPTIONS AND RECOMMENDATIONS FOR REFORM | 15 |
| 5) SUMMARY OF QUESTIONS | 15 |
| 6) CALL FOR RESPONSES | 16 |

On 20 June 1972, the Honourable Amoa T[^], Minister for [^], moved a motion for the introduction and first reading of the Criminal Procedure Bill into Parliament. He explained that it was “An Act to make provision for the procedure to be followed in criminal prosecutions”. On 1 December 1972, the Chairman of the Bills Committee, the Honourable Ulugia S[^] gave a report on the Bill. There were no major amendments recommended and it was noted that the Bill was drafted in order to suit the conditions here in Western Samoa, and at the same time the Bill was quite in line with legislation of a similar nature of overseas countries.

The date of assent and commencement was 8 December 1972. Thus the Act has governed the procedure of criminal prosecutions for thirty seven years.

The Commission has approached this particular reference of reviewing the Criminal Procedure Act 1972(CPA) with the following purposes in mind;

- 7) Ensure the fair trial of accused persons;
- 8) Protect the rights and freedoms of all persons suspected or accused of offences; and
- 9) Provide efficient and effective procedures for the prosecution of offences and the hearing of criminal cases.¹

1) THE CASE FOR CHANGE

Procedural law, at a minimum must set out the series of steps or actions to be followed in order validly to administer justice within the state. General rules are often inadequate for this purpose. Failure to provide important detail reduces the ability of the law to guide action. Such a failure creates a legal void which must then be filled either by the common law or local practice. This in turn may cause inconsistency and uncertainty.²

The flaws of the current system of criminal procedure have been noted as;

¹ NZLC Report 66 Criminal Prosecutions October 2000.

² Law Reform Commission of Canada, Report 33, Recodifying Criminal Procedure, Vol. 1, Title 1.

- Uncertainty of provisions have meant that procedures have become the subject of litigation and have unnecessarily lengthened trials, increasing the cost to both the Prosecution and the Defendant;
- Not keeping up with technological change;
- The relative indifference of the system towards victims (during and after trials) heightens perceptions of unfairness; and
- The lack of sufficient guidelines for bail and sentencing.³

Criminal Procedure embraces the rules which are intended to promote the just application of the substantive criminal law in actual cases. In its simplest form the purpose is to ensure that the rights of individuals are protected and kept in fair balance with the interests of society as a whole.⁴

This review is intended to make recommendations which will attempt to ensure that individual rights are protected through the just application of rules, while not losing sight of the interest of society as a whole.

2) CURRENT LAW AND PRACTICE

The CPA 1972 has eight parts and 177 sections. The Parts are as follows;

Part I-Preliminary (which deals with interpretation and application)

Part II-Procedure for Prosecution of Offences(deals with arrest, commencement of information, summons and service of documents, taking of evidence, trial provisions, pleading, conduct of trial, witnesses, adjournments and bail and search)

Part III-Assessors in Supreme Court Trials (trials with and without assessors, depositions, challenges to assessors, concurrence of presiding judge and remuneration)

³ CLR Report from Working Group.

⁴ NZLC Report 14 Criminal Procedure Part One Disclosure and Committal.

Part IV-Miscellaneous Provisions as to Trials (deals with discharge without conviction, record of proceedings, adjournments, retrials, reservations on questions of law)

Part V-Sentence and Enforcement of Penalties (deals with discretion of court, cumulative sentences, warrant of committal and execution, and enforcement of penalties and court orders)

Part VI- Preservation of the Peace (deals with application, making and default of order for bond to keep the peace)

Part VII-Appeals from District Courts to Supreme Courts

Part VIII-Criminal Appeals from Supreme Court

3) THE CRIMINAL PROCEDURE 1972: THE ISSUES

The following issues have arisen as a result of preliminary consultations within the working group spearheaded by the AGO. These issues will be presented to the general public for their thoughts and comments.

3.1) Police Powers to Stop Vehicles

Existing powers of the police to stop vehicles are contained in;

Section 36 of the Police Powers Act 2007 which gives Police the power to stop, search and detain people if they suspect on reasonable grounds that the person is carrying a thing relevant to a serious offence and it is necessary to exercise the power without the authority of a search warrant; and

Section 14A of the Narcotics Act 1967 which gives Police the power to enter and search any building, aircraft, ship, carriage, vehicle, premises or place if any Constable has reasonable grounds to believe that an offence against this Act has been committed.

The CPA provides a power to enter premises without warrant to arrest offender or prevent offence (s5) and to arrest defendant with warrant (s7). There is no specific provision contained in the CPA that deals with the power to stop vehicles.

This power to stop and search vehicles should always be carefully controlled so as to not impinge on the dignity of the individual. For the benefit of the public as well as persons exercising search or seizure powers, provisions designed to promote the reasonable execution of the powers should be included. Rules should be clearly set out on such matters as: the general authority conferred under statute; the persons authorized to act under the authority; the time when and manner in which, a search may be made; the notification to be given to persons affected; and the general procedure to be followed.

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| Questions: | <ol style="list-style-type: none"> 1. <i>Should a general power to stop vehicles and carry out road blocks be inserted into the CPA?</i> 2. <i>If so, should there be guidelines in the CPA to clarify the proper procedures for the Police to follow when exercising the power to stop vehicles?</i> |
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3.2) Evidence of Witness Overseas

Section 28 deals with the evidence of a witness/s out of court. This section allows an order for the taking of evidence of the defendant or a witness, at any place either within or outside of Samoa. To keep in line with technological developments, a recommendation has been put forward to allow evidence via videoconference during a trial to allow evidence of witnesses overseas to be given.

Legislating for the use of technology in trials should at all times be kept realistic and the cost implications of such should also be factored in to avoid legislation which is not practical and workable.

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| Question: | 3. <i>Should the use of videoconferencing be provided for under the CPA?</i> |
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3.3) Pre-trial Issues

The role of pre-trial issue identification in identifying issues in dispute and evidence that can be admitted by consent is now formally recognized in some overseas jurisdictions. For example, section 257 of the Criminal Procedure (Scotland) Act 1955 places a duty

upon both the prosecution and defence to identify evidence that they believe is unlikely to be disputed by the other party and to take all reasonable steps to secure the agreement of the other party to that evidence.⁵ It has been argued that refining the issues for trial prior to the trial ensures that the trial is not protracted and witnesses are not unnecessarily attending court.

The underlying concern about any process that encourages the advance identification of issues in dispute and of evidence that should be admitted by consent is that there may be undue pressure on defendants to make admissions that will be contrary to their interests. It is also seen as the imposition of further obligations of disclosure on the defence.⁶

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| Question: | <i>4. Should the legislation allow the option of a hearing to determine pre trial issues, such as the admissibility of evidence?</i> |
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3.4) Powers of Court where Informant does not Appear

Under section 43(b) CPA, the Court may dismiss the information for want of prosecution or adjourn the trial where the informant does not appear and the defendant appears. Section 44 states that the same can be done if neither the informant nor the defendant appears. Costs may also be awarded to the defendant.

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| Question: | <i>5. Should it be open for the informant to apply to the Court to have an information reinstated if it has been dismissed for want of prosecution under these sections?</i> |
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3.5) Prosecution Disclosure

The central principle in our system of criminal justice depends upon promoting a fair balance between the general public interest and important personal rights of individual citizens.⁷

⁵ NZLC Preliminary Paper 55 Reforming Criminal Pre-Trial Processes.

⁶ NZLC Preliminary Paper 55 Reforming Criminal Pre-Trial Processes.

⁷ NZLC Report 14 Criminal Procedures: Part One Disclosure and Committal.

This means that all relevant information that the prosecution has, should be made available to the defence subject only to exceptions needed to avoid prejudice to the wider public interest. Such information should be readily available as of right, by means which will enable opportune decisions to be made by defendants and by a comprehensive process which will be applied consistently. It should promote efficiency in the flow of work through the courts and increased confidence in the verdicts they produce.⁸

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| Question: | <i>6. Should there be a statutory scheme of prosecution disclosure to defendants?</i> |
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3.6) Scope of Defence Disclosure

The issue of defence disclosure rests on somewhat different criteria from that of disclosure by the prosecution. Some of the reasons are central to the whole system of criminal justice. An accused person is presumed innocent until proved guilty. There is the privilege against self-incrimination. The burden of proof is on the prosecution.⁹

If knowledge of a defendant's intentions could save unnecessary attention by the prosecution to aspects of a case that were not to be contested, or avoid the surprise of an unexpected defence as reason for adjournment of the trial, there would obviously be consequential benefits in terms of convenience and expense for all concerned. That is the proper basis for deciding whether disclosure obligations should be put upon defendants.

Two areas of defence disclosure requiring attention relate to alibi defences and the use of expert opinion. If not disclosed in advance, these can lead to delays during the trial. By its very nature, these are the subject of considered assessment. The disclosure of an alibi defence is required under common law.

⁸ NZLC Report 14 Criminal Procedure: Part One Disclosure and Committal.

⁹ NZLC Report 14 Criminal Procedure: Part One Disclosure and Committal.

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| Questions: | <p>7. <i>Should the disclosure of an alibi defence be provided for in the Act?</i></p> <p>8. <i>Should discovery of expert opinion obtained by the defence and intended to be used at evidence at the trial be made available prior to the trial?</i></p> |
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3.7) *Victims in the Prosecution System*

The role of victims in any prosecution system and Samoa is no exception, has historically been limited to that of a witness and the victims are to a large extent marginalized by the process.

In the same manner, section 61 provides that the Court may prohibit publication of the name of the defendant or of any other person connected with the trial. It does not provide specifically for the protection of a victim's identity from publication. This is particularly important in matters of a sexual nature.

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| Question: | 9. <i>Should the legislation provide specific protection for the victims of sexual offences through non-publication of their names?</i> |
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3.8) *Bailable as of Right*

Sections 71-82 deal with bail. Those who are bailable as of right are those that are charged with any offence that is not punished by death or imprisonment, those charged with offences for which the maximum punishment is less than 2 years imprisonment, and those charged with any offence against section 76(duty to provide necessaries of life), section 77(duty of parent or guardian to provide necessaries) and section 100 (false statement by public officer) of the Crimes Ordinance 1961.

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| Question: | 10. <i>Should the category of those bailable as of right be extended or limited?</i> |
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3.9) Discretion of the Court

Section 71(5) provides for the discretion of the Court where a person is charged with an offence and is not bailable as of right. As a practice, the courts take into account several factors *inter alia* flight risk and the risk of interfering with witnesses.

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| Questions: | <p>11. Should the factors to be taken into account in the exercise of the discretion of the Court be codified in this Act?</p> <p>12. Should the Act specify situations when the Court ought to consider custody over bail, such as violent offending and offending of a sexual nature?</p> <p>13. Should there be guidelines in the Act for:</p> <ul style="list-style-type: none">i) Bail pending sentence; andii) Bail pending appeal. <p>14. Should bail conditions be codified to reflect current practice, e.g reporting conditions and surrender of travel documents to name a few.</p> |
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3.10) Arrest

Section 78 deals with arrest of absconding defendant and section 79 deals with arrest of defendant failing to report to Police as required. Both sections require a warrant from the court for arrest to be effected.

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| Question: | <p>15. Should arrest without warrant of a defendant on bail be allowed?</p> <p>16. If so, in what circumstances?</p> <p>17. Should the failure to abide by bail conditions be made an offence?</p> |
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3.11) Young Offenders

Section 72 deals with bail for Young defendants. Section 22 of the Young Offenders Act 2007 also deals with bail and custody of young offenders. The CPA deals with offenders

under 21 years, and those under 18 years, while the Young Offenders Act deals with offenders under 17 years.

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| Question: | <i>18. Should there be one bail provision under the CPA for all matters pertaining to bail regardless of whether the offender is a young offender(under 17 years) or an adult offender? Or should the bail provisions for young offenders be separate and be contained under the Young Offenders Act 2007?</i> |
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3.12) Procedures in Criminal Trials with Assessors

Section 89(2) requires the translation of all statements into English and the certification of them as correct by a commissioned officer of the Police.

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| Question: | <i>19. Should all statements from the Prosecution be translated into English or should translations only be required when the Judge is non-Samoan?</i> |
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3.13) Concurrence of Presiding Judge

Sections 100 and 101 allow for the presiding judge to overturn a guilty verdict which has been returned by assessors.

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| Question: | <i>20. Should these sections be removed to take away this power from the presiding Judge?</i> |
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3.14) Retrials by Supreme Court only

Sections 108 and 109 relates to mistrials. A defendant who has been convicted may apply in writing to the Judge who presided at the trial for a retrial.

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| Question: | <i>21. Should the process of retrials be removed completely as there is the availability of the appeal process?</i> |
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3.15) Costs in Criminal Cases

When considering costs in criminal cases, competing interests must be balanced. The competing public interests are illustrated by the following quotations;

A plaintiff brings an action for his own ends and to benefit himself; it is therefore just that if he loses he should pay the costs. A prosecutor brings proceedings in the public interest, and so should be treated more tenderly. (*Berry v British Transport Commission*[1962] 1 QB 306, 327)

Persons accused of criminal offences can be put to a great deal of expenses in defending themselves. Unlike civil litigation, they cannot simply compromise the matter. Their liberty, reputation and pocket are, or may be, at risk. (*Acuthan v Coates*(1989) 6 NSWLR 472, 480)

Section 167 deals with costs in the case of conviction and in the case of dismissal. Under section 167(2) costs can be awarded against the Prosecution where an information is dismissed.

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| Question: | 22. <i>Should this section be repealed to the effect that where the Court dismisses an information, no costs shall be awarded against the Prosecution?</i> |
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3.16) Power of Registrars of the Court

There is the possibility that Registrars can be transferred judicial administrative tasks so as to free up Judges to adjudicate. The following administrative sections may possibly be exercised by Registrars or Deputy Registrars;

- Section 36 Amendment of Information;
- Section 42 Powers of Court where defendant does not appear;
- Section 43 Powers of Court when informant does not appear;
- Section 44 Powers of Court when neither party appears;
- Section 48 Plea on defendant being charged;

- Section 49 Plea on behalf of corporation;
- Section 68 Power to adjourn hearing; and
- Section 70 When defendant may be remanded in custody.

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| Question: | <i>23. Should the Registrars/Deputy Registrars perform these judicial administrative tasks?</i> |
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4) OPTIONS AND RECOMMENDATIONS FOR REFORM

It has been said that any reform must promote adequate minimum standards of common decency and fair play; and maintain principles of democracy, freedom and equality.¹⁰

It is important to re-emphasise that the case for change cannot simply be based on the premise that times have changed. A law which meets the needs of the community and government is paramount.

5) SUMMARY OF QUESTIONS

- 1. Should a general power to stop vehicles and carry out road blocks be inserted into the CPA?*
- 2. If so, should there be guidelines in the CPA to clarify the proper procedures for the Police to follow when exercising the power to stop vehicles?*
- 3. Should the use of videoconferencing be provided for under the CPA?*
- 4. Should the legislation allow the option of a hearing to determine pre trial issues, such as the admissibility of evidence?*
- 5. Should it be open for the informant to apply to the Court to have an information reinstated if it has been dismissed for want of prosecution under these sections?*
- 6. Should there be a statutory scheme of prosecution disclosure to defendants?*
- 7. Should the disclosure of an alibi defence be provided for in the Act?*
- 8. Should discovery of expert opinion obtained by the defence and intended to be used at evidence at the trial be made available prior to the trial?*

¹⁰ NZLC Report 66 Criminal Prosecutions October 2000.

9. *Should the legislation provide specific protection for the victims of sexual offences through non-publication of their names?*
10. *Should the category of those bailable as of right be extended or limited?*
11. *Should the factors to be taken into account in the exercise of the discretion of the Court be codified in this Act?*
12. *Should the Act specify situations when the Court ought to consider custody over bail, such as violent offending and offending of a sexual nature?*
13. *Should there be guidelines in the Act for:*
 - i) *Bail pending sentence; and*
 - ii) *Bail pending appeal.*
14. *Should bail conditions be codified to reflect current practice, e.g reporting conditions and surrender of travel documents to name a few?*
15. *Should arrest without warrant of a defendant on bail be allowed?*
16. *If so, in what circumstances?*
17. *Should the failure to abide by bail conditions be made an offence?*
18. *Should there be one bail provision under the CPA for all matters pertaining to bail regardless of whether the offender is a young offender (under 17 years) or an adult offender? Or should the bail provisions for young offenders be separate and be contained under the Young Offenders Act 2007?*
19. *Should all statements from the Prosecution be translated into English or should translations only be required when the Judge is non-Samoan?*

6) CALL FOR RESPONSES

It is not necessary to respond to all questions. It is preferred that responses be in writing. Responses on this paper should be sent by[^] to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to lawreform@ag.gov.ws