GOVERNMENT OF SAMOA

Samoa
Law Reform Commission
Komisi o le Toefuataiga o Tulafono a Samoa

'CIVIL PROCEDURE RULES'

Supreme Court (Civil Procedure) Rules 1980 and *Magistrates' Court Rules 1971*

Issues Paper Two (IP/13)

November 2014

CALL FOR SUBMISSIONS

Submissions on this Issues Paper close on **17 April 2015.**

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Written submissions should be addressed and send to:
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The Samoa Law Reform Commission was established in 2008 by the Law Reform Commission Act 2008 as an independent body corporate to undertake the review, reform and development of the laws in Samoa. Its purpose is to facilitate law reform in Samoa by providing pragmatic recommendations based on high quality research, analysis and effective consultation.

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CALL FOR SUBMISSIONS

Submissions or comments (formal or informal) on this Issues Paper should be received by the Commission no later than close of business on **17 April 2015.**

Emailed submissions should be sent to:
commission@samoalawreform.gov.ws

Written submissions should be addressed and sent to:
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Executive Director
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Level 1, FMFM II Building
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Oral Submissions should be voiced at our Public Consultations:
Dates, Time and Venues for public consultations will be announced on television, radio stations and newspapers for the public's information.

The Samoa Law Reform Commission seeks your views, comments and feedback on the Review of Civil Procedure Rules: *Supreme Court (Civil Procedure) Rules 1980* and *Magistrates' Court Rules 1971* Issues Paper, in particular the questions set out in the last section of this Issues Paper.

The submitters are advised to focus on any of the questions provided therein. It is definitely not expected that you will answer every question.

A Final Report and Recommednations to Government will be published in 2016.

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1. Introduction

1.1. In November 2008, the Samoa Law Reform Commission (**Commission**) was given a reference by the Cabinet and the Attorney General into the laws regulating the Samoan Court processes. The reference includes the review and reform of the *District Courts Act 1969* (**DCA**), *Judicature Ordinance 1961* (**JO**) the *Supreme Court (Civil Procedure) Rules 1980* (**SCR**) and *Magistrates Court Rules 1971* (**MCR**).

1.2. The final report on the review of the DCA was approved by Cabinet in August 2013, and was tabled in Parliament in August 2014. The final report on the review of the JO was approved by Cabinet in April 2011. It has been translated and is currently being edited in preparation for submission to the Legislative Assembly for tabling in Parliament.

1.3. The civil procedure rules govern practice and procedure in Samoan Courts exercising civil jurisdiction. The Courts of Samoa are structured as a hierarchy, with the Court of Appeal being the highest Court followed by the Supreme Court and then the District Courts. Each of these Courts exercise both civil and criminal jurisdiction. For the purposes of this review, only the civil jurisdiction of the District and Supreme Courts is considered.

1.4 The name of the Magistrates Court was changed to District Court in 1992. However the Rules that apply to the District Court are still known as the *'Magistrates Court Rules 1971'*. In this paper, the main focus is on the content of those rules. However, consideration has also been given to whether the name of these rules should be changed to reflect the name of the Court. For consistency sake, this is raised as a question under the heading General Comment, at the end of this paper.

1.5 Neither, the SCR or MCR have been comprehensively reviewed since their enactment, and the need for review came about as a result of previous consultations as to various Court legislative reviews, which highlighted the need to update provisions to create consistency with similar Court regulatory provisions in overseas jurisdictions, where considered appropriate. The review of the SCR and the MCR has been divided into two parts, given its breadth and complexity. Part 1 of the review (**Issues Paper 1**) was approved by Cabinet in May 2012, followed by consultations. Issues Paper 1 covered the following issues:

- Commencement of proceedings (including Actions and Motions);
- Service;
- Interlocutory Motions;
- Extraordinary remedies;
- Garnishee Proceedings;
- Summary Judgement; and
- Case Management.

1.6 This paper constitutes the second part of the review (**Issues Paper 2**). It is designed to cover the remainder of rules relating to civil procedure identified as being of interest, including the following remaining issues:

- Parties;
- Trial;
- Witnesses and evidence;
- Judgment;
- Pleadings;
- Reinstatements, setting aside and rehearing;
- Interpleader;
- Absconding debtor;
- Early dispute resolution;

- Powers of the Court and Registrar;
- Matters where procedures do not exist;
- Court fees;
- Costs;
- Effect of non compliance with Rules;
- General comment – gender reference.

1.7 Issues Paper 2 will also highlight a number of rules applied in other jurisdictions which are not currently contained in the SCR or MCR but which merit consideration, including provisions relating to subpoena to non parties, expert witnesses, place of trial, summary judgment, offers of compromise, early dispute resolution, overarching obligations of parties and proper basis declarations.

1.8 Issues Paper 1 proposed a larger reform of civil procedure rules for the consideration of stakeholders. This was the possibility of merging the Supreme Court Rules and the Magistrates' Court Rules to create *uniform civil procedure rules* which would apply in both the District and Supreme Courts.

1.9 It is also to be noted that to some extent, the current regulatory and legislative provisions as they relate to witnesses and evidence may have been considered in the proposed *Evidence Bill*. To the extent that any conflicting overlap may arise between existing Rules and proposed provisions in the *Evidence Bill*, such inconsistencies may require further consideration, if that proposed legislation is enacted. At this point, Issues Paper 2 is focused on existing evidence provisions as they appear in the SCR and MCR, such being the terms of the Commission's reference.

1.10 Questions are posed at the end of each issues section to help generate comments from stakeholders. The responses to these questions will form the basis for the Commission's recommendation on how the current SCR and MCR and their associated practice should be reformed in a way that is best suited to the Samoan context.

1.11 In the interests of expediency, references in this paper to comparative legislation and regulations in other jurisdictions have been abbreviated as follows:

New Zealand

- *Judicature Act 1908 (High Court Rules)* (New Zealand), (**HCR (NZ)**);
- *Judicature (High Court Amendment) Rules 2008* (New Zealand), (**HCAR (NZ)**);
- *District Court Act 1947* (New Zealand), ((**DCA (NZ)**);
- *District Courts Rules 2009* (New Zealand), (**DCR (NZ)**);

Australia

- *Federal Court Rules 2011* (Australia), (**FCR (AUS)**);
- *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), (**UCPR (NSW)**);
- *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), (**SCGCPR (VIC)**);
- *Supreme Court Act 1986*, (Victoria, Australia), (**SCA (VIC)**);
- *County Court Civil Procedure Rules 2008* (Victoria, Australia), (**CCCPR (VIC)**);
- *Magistrates' Court General Civil Procedure Rules 2010* (Victoria, Australia), (**MCGCPR (VIC)**);

Vanuatu

- *Civil Procedure Rules* 2002 (Vanuatu), (**CPR (VAN)**).

2. Parties

Definition

2.1 In legal proceedings, a 'party' means a participant in a transaction or in legal action or proceedings[1]. It includes a plaintiff, defendant, or any person against whom a claim for relief is made[2]. Generally, there are two main parties – a 'plaintiff' (who is also sometimes called a 'claimant') is the person who brings a civil action or law suit – and a 'defendant' is the person who is sued in a civil proceeding, and who is defending the claim made by the plaintiff. In some cases, there are additional parties: for example, a plaintiff might make a claim against more than one defendant; or new parties might join an existing proceeding (joinder of parties).[3]

2.2 The meaning of 'party' is not set out in either the SCR or MCR. However, in Samoa, the DCA defines a party in any civil proceedings to include 'every person served with notice of, or attending any proceeding other than as a witness or spectator, whether named as a party to that proceeding or not'[4]. As discussed in para 2.5 below, this raises potential ambiguity about who may be a party under this definition. Unlike the SCR and the MCR, the DCA also provides a definition of 'plaintiff' and 'defendant'.[5]

Comparable Jurisdictions

New Zealand

2.3 By way of comparison, in New Zealand, the definition of a party is provided under the DCA (NZ).[6]

2.4 In New Zealand, the DCR (NZ) provide definitions of 'plaintiff' and 'defendant'[7]. The two terms are similarly defined in both Samoan and New Zealand jurisdictions; however, the two definitions differ on the basis of identifying who precisely is a party to the proceeding. The Samoan definition of defendant is very broad and is extended to include a defendant that becomes a plaintiff by way of counterclaim.

2.5 The Samoan DCA definition encompasses all persons within the Court room during a civil proceeding with the only exception being spectators and witnesses. This poses ambiguity as to other members within the court room, such as counsel, Court personnel and the like.

Australia

2.6 In New South Wales (Australia), the UCPR (NSW) define a 'party to a proceeding' as 'a natural person who may commence and carry on proceedings in any cour*t,* either by a

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[1] Butt, P and Hamer D, 2011,*Lexis Nexis Concise Australian Legal Dictionary, 4th Ed,* Butterworths, Australia

[2] Ibid, p 429

[3] Discussed at para 2.18 (below)

[4] *District Courts Act 1969*, Part I, s2 'Interpretations'

[5] ibid, s2: 'plaintiff includes a person seeking relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of civil proceedings'; 'defendant, in civil proceedings, means any person against whom an action has been commenced or an application for relief has been made and includes every party served with notice of or entitled to attend the proceedings otherwise than as plaintiff'

[6] *District Court Act 1947* (New Zealand), s2 'party means any person who is a plaintiff or defendant in any proceeding; and includes any person added to the proceeding'

[7] *District Court Rules 2009* (New Zealand), r.1.8 defines 'plaintiff' as 'the person by whom or on whose behalf a proceeding is brought' and 'defendant' 'a person served or intended to be served with a proceeding'

solicitor or in person'.[8] This definition of 'party' is broader than the definition provided for under the DCA of Samoa.

2.7 In Victoria (Australia) 'parties' have no specific definition and are known as plaintiff and defendant, or applicant and respondent in limited circumstances, such as applications for discovery to identify a defendant, or discovery from a prospective defendant and for punishment of contempt. In an appeal, parties are referred to as the Appellant Plaintiff/ Appellant Defendant / Appellant Applicant or Respondent Plaintiff / Respondent Defendant and Respondent, dependent on the type of appeal. This provides immediate clarity as to the party bringing the appeal, i.e. whether the appellant is the original plaintiff or defendant.

Question 1: Is it necessary to define the meaning of 'party' in SCR and MCR? If so, should 'party' be defined a*s* in the DCA or in the UCPR (NSW)*?*

Question 2: What issues may arise if 'party' is not defined?

Joinder of Parties

2.8 The legal term 'joinder of parties' means the inclusion of two or more persons as plaintiffs or defendants in legal proceedings if '*separate proceedings were brought by or against any of them, a common question of law or fact would arise; where all rights to relief claimed, whether jointly, severally, or alternatively, arise out of the same transaction or series of transactions*[9]*.* The aim of this process is to minimise the number of separate lawsuits commenced, and also to ensure that everyone interested in a particular matter becomes a party to the proceeding, and a decision of a dispute will not be subject to challenge on the basis that any person materially concerned was not represented.

2.9 The MCR does not provide rules for the joinder of plaintiffs and defendants. These rules state only that a proceeding will not be invalidated if there is a misjoinder[10] of parties. However, the Court may order a party to be struck out if it considers the joinder as embarrassing or inexpedient.[11]

2.10 On the other hand, the SCR contains procedures for joining parties to a proceeding. The joinder(s) must have the right to relief arising out of the same transaction or event, or a series of transactions or events or alternatively, a common question of law or fact arising out of separate actions[12].

Comparable Jurisdictions

New Zealand

2.11 The New Zealand HCR (NZ) provide for persons to be joined as parties if considered that they are necessary for the determination of the claim and that they will be bound by the judgment of the proceeding[13]. The New Zealand rules limit the number of parties to be joined to a proceeding insofar as the Court considers they are necessary to 'justly determine the issues arising' and to 'be bound by any judgment given'.[14] However, as to actual

[8] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia, r.7.1(1)

[9] Butt, P and Hamer D, 2011,*Lexis Nexis Concise Australian Legal Dictionary, 4th Ed,* Butterworths, Australia

[10] 'Misjoinder' means the incorrect inclusion of a party in a proceeding

[11] *Magistrates' Court Rules 1971* (Sāmoa), r.10

[12] *Supreme Court (Civil Procedure) Rules 1980,*(Sāmoa), rr 31, 34

[13] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.4.2

[14] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.4.1

numbers of parties, this does not appear to be specified. For example, reference is made in the rules to a fourth party to proceedings being able to join subsequent parties. [15]

2.12 The HCR (NZ) also provide for orders to be made for new parties to be made a party in the proceedings if in certain circumstances the court considers necessary or desirable,[16] and further, application may be made for those new parties orders to be discharged or varied, thus removing the party. [17]

Australia

2.13 In Victoria (Australia), the CCR (VIC) provide that the Court may order the addition of a party if the Court considers necessary for the effective determination of all questions in the proceeding. Furthermore the Court may also order removal of a party where considered not proper or necessary.[18] There does not appear to be any limitation on the number of parties to be joined, or removed.

2.14 The Victorian CCR (VIC) also provide that two or more parties may seek to be joined as plaintiffs or defendants where separate proceedings were brought by or against each of them where there is a common question of law or fact, or if the claim arises from the same transaction, series of transactions, and the Court may grant leave. An example would be if several persons were injured in a bus accident, and they decided to claim compensation together rather than separately. .[19]

Vanuatu

2.15 In Vanuatu, the CPR (VAN) provide that the Vanuatu Courts may order a person to become a party or be removed as a party to the proceeding if this is necessary for it to decide the case fairly and effectively. Also, these rules enable a person to apply to the Courts to be added or removed as a party to a proceeding. Such an application must be accompanied by an affidavit setting out the reasons why the applicant should become a party or be removed as a party from a proceeding.[20]

2.16 Similar to Vanuatu, the Victorian CCR (VIC) provide discretion to add or remove a party if there is a risk that the party may embarrass or delay the proceedings making it inconvenient for the Court. Also, the Court may add or remove parties at any stage of the trial. Furthermore, a party cannot be added as a plaintiff without the consent of the original plaintiff, and that party must file and serve an affidavit setting out the reasons for applying as a joinder to the proceedings.

2.17 In comparison to New Zealand, Australia and Vanuatu, the rules in Samoa do not appear to include procedures regarding the addition or removal of a party to a proceeding. In particular, there are no provisions concerning the limitation of the number of parties who may be joined, nor procedures to apply to become or be removed as a party to a proceeding.

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[15] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.4.6
[16] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.4.52
[17] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.4.53
[18] *County Court Civil Procedure Rules 2008* (Victoria, Australia) r. 9.06
[19] Ibid, r. 9.02
[20] *Civil Procedure Rules 2002* (Vanuatu), rr 3(1), (2)

Question 3: Should criteria for joinder of parties be included in SCR and MCR?
If yes, should such criteria be similar to that of the HCR (NZ)? (i.e. persons are joined as parties on the basis they are necessary for the determination of the claim and are bound by the judgment of the proceeding.)

If yes, should there be any limitation to the number of parties able to be joined in a single proceeding?

Question 4: Should the SCR and MCR provide a particular process to allow any person to apply to the Courts to be added or removed as a party to a proceeding, for example, by filing and serving affidavit material explaining the basis for the application?

Joinder of claims

2.18 The term 'Joinder of claims' refers to the assertion by one party of several claims against the same opposing party in a single lawsuit. Neither the SCR nor the MCR set out the circumstances where a party can bring several claims against the same opposing party. An alternative in some jurisdictions is for the Court to order claims to be joined (see paras 2.20 and 2.21 below).

Comparable Jurisdictions

New Zealand

2.19 In New Zealand, there is no joinder of claims provision in the DCR (NZ). However the HCR (NZ) provide that claims can be joined, but only in respect of specific areas.[21]

Australia

2.20 In Victoria (Australia), a plaintiff can join multiple claims against a defendant (it does not matter if the claims are made by the plaintiff or made against the defendant in the same or in different capacities)[22].

Vanuatu

2.21 In Vanuatu, the CPR (VAN) set out the procedure for joining or separating claims. The Courts may order (and a party may also seek orders) that[23]:

> *Several claims against one person be included in one proceeding if a common question of law and/or fact is involved in all the claims; the claims arise out of the same transaction or event; or for any other reason the Court considers the claims should be included in the same proceeding.*
>
> *Several claims against one person be treated and heard as separate proceedings if the claims can be dealt with more effectively separately; or if for any other reason the Court considers the claims should be heard as separate proceedings.*

2.22 For example, a plaintiff may bring two claims in contract against a defendant builder in a personal capacity and also as a joint guarantor of his own building company, the other guarantor being his wife. Where the contracts arose out of a similar negotiation, the Court may consider the claims appropriate to be joined against the defendant in both capacities. Where the contracts arose out of the same negotiation, but the Court considers that the

[21] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.5.28: Inclusion of several causes of claim, r5.29: Joint Plaintiffs, r5.30: Joining claims by or against spouses or partners
[22] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r 9.01
[23] *Civil Procedure Rules 2002* (Vanuatu), r.3.3

issues are better dealt with against the defendant as an individual as compared to the defendant as a joint guarantor of a company, the Court may order that the proceedings be brought separately so that the Court may consider the structure of the company and the role of both guarantors distinct from the defendant as an individual contracting party.

Question 5: Should SCR and MCR include procedures for joinder of claims? If yes, should there be any limitation as to the number of claims to be joined?

Third Party Procedure

2.23 The procedure known as 'Third Party' is where a defendant who is sued can raise an issue related to the current proceeding or cause of action by adding another person who has not been sued – hence the term 'third party'. The main purpose of the third party procedure is to enable all the issues concerning a particular matter to be dealt with in the same proceeding, thereby avoiding a multiplicity of proceedings.

2.24 Take for instance a situation where a plaintiff customer buys tinned fish from a retail store for consumption. Later on the customer suffered illness proven to be caused by the tinned fish. The plaintiff sues the shop owner, who in turn seeks contribution or indemnity from the supplier of the contaminated tinned fish. In this example, the supplier is the third party to the proceeding.

2.25 The MCR do not contain any provisions for the inclusion of a third party and/or subsequent parties. The SCR [24] provide that a defendant may claim against a 'third party' where:

- The defendant is entitled to a contribution or indemnity; or
- The defendant is entitled to any relief or remedy relating to the original subject matter of the action; or
- Any question or issue in the action should properly be determined not only as between the plaintiff and the defendant but also as between the plaintiff, the defendant and the third party; or
- Any question or issue relating to or connected with the matter which is substantially the same as some question or issue arising between the plaintiff and the defendant, should be properly determined.

2.26 The third party becomes a party to the action from the time they are served with a third-party notice. The third party has the same rights in respect of his or her defence as if he or she has been sued in the usual way by the defendant[25].

2.27 In comparable jurisdictions, the third party is not a party to the proceeding until a third-party notice is served.

Comparable Jurisdictions

New Zealand

2.28 In New Zealand, a defendant may claim against a third party on the grounds that there is a question or an issue between the defendant and the third party relating to, or connected with, the subject matter of the proceeding that is substantially the same as a question or issue arising between the plaintiff and the defendant. The third party becomes a party to a

[24] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.43(1)
[25] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.43(6)

proceeding with the same rights and obligations in the proceeding as if the defendant had started proceedings against the third party.[26]

Australia

2.29 The Victorian courts adopt a similar process, requiring the defendant to file a third-party notice, but there must be a claim of indemnity, contribution or relief.[27]

Vanuatu

2.30 In Vanuatu, if a defendant claims a contribution, indemnity or other remedy against a third party, the defendant may file and serve a notice on that person stating that the defendant claims the contribution, indemnity or other remedy. The person on whom a third-party notice is served becomes a party to the proceeding from the date of service, with the same rights and obligations in the proceeding as if the defendant had started a proceeding against that person[28]

Case Law

2.31 In BM Pacific Ltd v Mu'a[29]**,** the plaintiff (a New Zealand company) supplied paint and chattels for the sum of $133,597.23 to the defendant company to establish a paint business in Samoa, which was not paid. The defendant sought to join the third party company, who it asserted had retained the chattels and therefore should be liable for payment. It also asserted that the value of these chattels should be deducted from the amount of the plaintiff's claim against the defendant company, and filed a third party notice application. The third party denied liability for contribution. His Honour Sapolu CJ highlighted that a third-party notice in Samoa corresponds with the rules provided under the HCR (NZ). Therefore, the New Zealand case law is relevant to the interpretation and application of the rules in Samoa. The New Zealand Courts require, as a prerequisite to third party proceedings that the defendant establish a right of action against the third party, independent of the plaintiff's rights. Sapolu CJ dismissed the defendant's claim against the third party applying this prerequisite on the basis that the defendant could not establish a right of action against the third party independent of the plaintiff's rights.

Question 6: Should the SCR and MCR provisions relating to third parties require, as a prerequisite to granting a third-party notice, the existence of a right of action of the defendant against the third party (similar to the HCR (NZ))?

Question 7: What appropriate rules should Samoa adopt to reflect current practice, by comparison with New Zealand, Victoria and Vanuatu?

Death of a party

2.32 Neither the SCR nor the MCR contain any provisions dealing with the consequences of the death of a party before the end of a proceeding or at the time a cause of action arises, prior to proceedings being issued. Separate to the Rules however, the *Law Reform Act 1964* of Samoa provides that causes of action either against a party or vested in a party who has since passed away survive the death of that party. [30] In the case of *Samoa Snacks Foods Ltd v*

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[26] *Judicature Act 1908 (High Court Rules)* (New Zealand), rr 4.4. and 4.7
[27] *Magistrates' Court General Civil Procedure Rules 2010* (Victoria, Australia), r.11.01
[28] *Civil Procedure Rules 2002* (Vanuatu), r.3.7
[29] *BM Pacific Ltd v Mu'a* [2002] WSSC 33 (20 September 2002**)**
[30] *Law Reform Act 1964* (Sāmoa), s. 3 (1)

Public Trustee [1992] WSSC 14, the plaintiff issued proceedings against the Public Trustee as the Administrator of the Estate of a deceased person against whom it claimed, a cause of action existed relating to partition of land by the plaintiff against the deceased. In that case, Sapolu CJ referred to the *Law Reform Act,* stating that it was arguable that the 'action is maintainable in law against the deceased's estate provided the cause of action was subsisting against the deceased at the time of his death'.[31]

Comparable Jurisdictions

New Zealand

2.33 Under New Zealand's HCR (NZ), the death of a party before a matter is finalised does not prevent the continuation of a proceeding. When there is a death, but the proceeding is incomplete, the Court must order that a personal representative of that party be made a party to the proceeding or be served with a notice of it. The Court will make orders as it thinks just for the disposal of the proceeding[32].

Australia

2.34 In New South Wales (Australia), the UCPR (NSW) also deal with the death of a party. The case will be dismissed unless a cause of action in the proceedings survives the party's death; and an application for the joinder of a party to replace the deceased party is not made within a specified time.[33] Therefore, where the deceased party is the defendant, it is likely that the case is dismissed because there would not be any person interested in replacing the defendant.

2.35 In Victoria (Australia), if a party dies at the commencement of a trial, the Court can order proceedings be commenced against the estate of the deceased person or their representative (person granted probate or administration). If the trial is commenced against an individual, it will then be deemed to be against their estate. Furthermore, where plaintiff dies, Court shall not make an order to dismiss the matter unless due notice given to the estate or representative of the deceased.

Vanuatu

2.36 In Vanuatu, the CPR (VAN) provide that if a plaintiff dies during a proceeding and the proceeding involves a cause of action that continues after death, then the proceeding may be continued by a plaintiff's personal representative and the Court may give directions to allow the personal representative to continue the proceeding. On the other hand, if at the start of a proceeding a defendant passes away and no personal representative has been appointed, and the cause of action continues after a defendant's death, and the plaintiff is aware that the person is dead, the plaintiff must name the deceased estate and a personal representative is then appointed as defendant.[34]

Question 8: Should both the SCR and MCR provide for the death of a party? If so, should the proceeding be continued by the Court on its own motion, appointing the personal representative of the deceased party?

Question 9: Should provision be made for a specified time for an application to be made for substitution of a personal representative of the deceased, in default of which the proceeding is to be dismissed?

[31] *Samoa Snacks Foods Ltd v Public Trustee* [1992] WSSC 14
[32] *Judicature Act 1908 (High Court Rules)* (New Zealand), rr 4.49(1), 4.50
[33] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r. 6.31
[34] *Civil Procedure Rules 2002* (Vanuatu), rr 3.9 (1), (2)

Representation of parties

2.37 Individuals are normally expected to represent themselves before a Court. Exceptions are made where persons are for some reason unable to undertake proceedings on their own behalf.

2.38 The MCR set out that infants and persons of unsound mind may sue and be sued by a guardian appointed for the purpose of the lawsuit[35].

The SCR provide a single rule regarding the representation by a guardian of infants and persons of unsound mind. Furthermore, they provide for the removal of guardians and the appointment of a new guardian by the Court[36].

2.39 The SCR define a 'mentally defective person' as 'a person who owing to his mental condition requires oversight care or control of himself or his property for his own good or in the public interest'. The terms 'mentally defective person' or those of 'unsound mind' are arcane and pejorative. They have also been (largely) removed from the Samoan statutory lexicon after the 2007 Mental Health Act's adoption of the term 'mental disorder'. This is consistent with comments as to use of the word 'infant' and recent changes suggested in the proposed Samoan Child Care and Protection Bill 2013[37]. By providing a clear definition of the term 'mental disorder' and 'infant', similar to the New Zealand rules, this avoids the necessity for subsequent statutory changes in any subsequent Acts. In New Zealand, the equivalent term used is 'mental disorder' which is defined as:

> *...**mental disorder**, in relation to any person, means an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—*
>
> *(a) poses a serious danger to the health or safety of that person or of others; or*
> *(b) seriously diminishes the capacity of that person to take care of himself or herself;—*
> *and 'mentally disordered', in relation to any such person, has a corresponding meaning.*[38]

2.40 The SCR refer to the *Infants Ordinance 1961* for a definition of 'infant'[39]. The *Infants Ordinance 1961* provides that'infant means a person under the age of 21 years'[40]. This definition of 'infant' is inconsistent with the definition of 'child' as proposed in the *Child Care and Protection Bill 2014.*[41] This Bill suggests addressing this anomaly by requiring that all other laws dealing with children or infants adopt the same definition of 'child' as set out in the Bill. This would mean that other laws would be read as though a child is less than 18 years old.[42] However, it may be more consistent and practical to make the necessary changes in the SCR as part of this review so as to avoid ambiguity, especially as regards separate representation. Similarly, New Zealand's HCR (NZ) set out that a 'minor' [43]and an 'incapacitated person' must be represented by a litigation guardian. However in the case of a

[35] *Magistrates' Court Rules1971,*(Sāmoa), r.14
[36] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), rr 37-41
[37] *Child Care Protection Bill 2013,* s 2, s 5 which removes the term 'infant' and replaces it with the term 'child'.
[38] *Mental Health (Compulsory Assessment and Treatment) Act 1992*(New Zealand), s2
[39] *Supreme Court (Civil Procedure) Rules 1980*(Sāmoa), r.3
[40] *Infants Ordinance 1961* (Sāmoa), s 2
41 *Child Care Protection Bill 2013* s 2: *'child …means every human being below the age of 18 years'*
[42] Ibid, ss 2, 5 (2)
[43]*Judicature Act 1908 (High Court Rules)* (New Zealand), r. 4.29: *"minor means a person who has not attained the age of 18 years"*

minor, he or she may apply to the Court for an authorization to conduct the proceedings themselves, without a litigation guardian. The court may grant such orders if satisfied that:

(a) the minor is capable of making the decisions required or likely to be required in the proceeding; and
(b) no reason exists that would make it in the interests of the minor to be represented by a litigation guardian.[44]

Comparable Jurisdictions

New Zealand

2.41 In New Zealand, a minor is defined as a person who has not attained the age of 18 years; and a person is of full age if he or she has attained the age of 18 years.

2.42 The New Zealand definition of incapacitated person includes 'a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—

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

2.43 In New Zealand, the Court must assess if the minor has the capacity to make necessary decisions in the proceedings and whether it is in his or her best interests to be represented by a guardian[45]. Furthermore, the HCR (NZ) also provide for the appointment of a litigation guardian. A litigation guardian means:

'(i) a person who is authorised by or under an enactment to conduct proceedings in the name of, or on behalf of, an incapacitated person or a minor (but only in a proceeding to which the authority extends); or (ii) a person who is appointed under rule 4.35 to conduct a proceeding; and (b) has the same meaning as the expression 'guardian ad litem.''[46]

2.44 In order for someone to serve as a 'litigation guardian', it is essential that they are formally appointed by a judge. This seems consistent with how this is done in other jurisdictions since the formal appointment would require the guardian to act to further the interests of the 'incapacitated person' or 'infant'.

2.45 It should be highlighted that the Court has a duty to verify if the person to be appointed is able to fairly and competently conduct a proceeding on behalf of the minor or incapacitated person; and does not have interests adverse to those of the minor or incapacitated person.[47]

[44] Ibid r.4.32
[45] *Judicature Act 1908 (High Court Rules)* (New Zealand), rr 4.29-4.32
[46] Ibid, r 4.29(a)
[47] Ibid r.4.35

Australia

2.46 Further, in Victoria, the VSCCPR (VIC) provide that where, after a proceeding is commenced, a party to the proceeding becomes a handicapped person, the Court shall appoint a litigation guardian of that party.[48]

2.47 The New South Wales (NSW) and the SCCPR (VIC) provide that a person under the legal age may not commence or carry on proceedings except by his or her tutor. A person may become the tutor of a person under the legal age without the need for any formal instrument of appointment or any order of a Court if:

- The tutor consents to act as tutor; and
- A certificate signed by the tutor's solicitor in the proceedings certifies that the tutor does not have any interest in the proceedings adverse to the interests of the person under the legal age.[49]

2.48 Furthermore, in Victoria a person can only be appointed a guardian if they are over the age of 18 years. This age is also consistent with other comparable jurisdictions such as New Zealand.

Question 10: Should the expression 'infant' as currently used in the SCR and MCR and in the *Infants Ordinance 1961* be retained or replaced with the expression 'minor' (similar to the New Zealand High Court Rules), or 'child' as proposed in Samoa's *Child Care and Protection Bill 2014?*

Question 11: Should the age for an infant be retained to 21 years as in the *Infants Ordinance* 1961 or changed to 18 years as proposed in the *Child Care Protection Bill 2014* if it gets passed by Parliament?

Question 12: Should there be a provision in both SCR and MCR to allow an infant to represent himself or herself in a proceeding without a litigation guardian, (similar to the HCR (NZ))?

If yes, should there be a provision in both SCR and MCR, similar to the HCR (NZ), to assess:

i. If the infant has the capacity to make the decisions required in the proceedings, and
ii. Whether it is in the infant's best interests to be represented by a guardian.

Question 13: Should both SCR and MCR include uniform requirements as to what is required of a guardian, or tutor, for example:

i. Is he or she able to adequately represent the interests of the infant or incapacitated person?
ii. Does he or she have any interest in the proceedings adverse to the interests of the infant or person of unsound mind (incapacitated person)?

Question 14: Should a person become a guardian without the requirement for any formal appointment or only after being appointed by the Court? Should they be formally appointed by a judge as in other jurisdictions?

Question 15: Should the expression 'person of unsound mind' as used but not defined in the SCR and MCR and 'mentally defective person' as currently defined in the SCR be removed and replaced with the expression 'mental disorder' and 'mental incapacity' consistent with expressions used in the *Mental Health Act 2007* (Samoa)?

Question 16: If adopted for use in Samoa, should definitions of incapacitated person, minor and litigation guardian be defined or specified (similar to the HCR (NZ))?

[48] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r. 15(3)
[49] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), rr 7.13-7.18.

3. Companies and Businesses

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

3.2 Rule 20 of the SCR provides for service on a company or corporation by leaving with a person who appears to be authorised.[50] Rule 21 of the SCR provides that partners of a business within Samoa may sue or be sued in the name of the firm or in the names of the partners in which they were partners when the cause of action arose. Service may be on an individual partner or by leaving at any place of business of the firm. [51]

3.3 There are no specific rules in the MCR relating to companies as distinct from general terms 'plaintiff' and 'defendant'.

3.4 In Samoa, different legislative provisions apply to the representation by a company as compared to a business. This reflects the distinction between a company and a partnership which are not the same. [52]

3.5 The *Companies Act 2001* provides that incorporation has the effect of making the company a 'legal entity in its own right',[53] whereas the *Partnership Act* defines a firm as 'the persons collectively who have entered into partnership with one another'[54] with no further definition as a separate legal entity.

Representation of a company

3.6 The structure of a company is distinct from that of a partnership. The C*ompanies Act 2001* sets out extensive provisions that apply to companies as regards incorporation, ownership, shareholdings, directors responsibilities and the like.[55]

3.7 The specific provisions contained in this Act detail how a company may sue and be sued by a director or shareholder,[56] and how service is to be effected on a company. These provisions in both the Act and SCR appear consistent. [57]

3.8 Whilst the SCR and MCR do not contain the same level of detail concerning corporations as the Act, they do however go further than mere service requirements (see para 3.2 above).

Comparable Jurisdictions

New Zealand

3.9 In New Zealand, specific rules are contained in the HCR (NZ) as to how service is to be effected on a company that is being sued.[58] These Rules mirror service requirements contained in the New Zealand *Companies Act 1993*.

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[50] *Supreme Court (Civil Procedure) Rules* 1980 (Sāmoa), *r.* 20: '*Service on corporation – The summons may be served upon a company or corporation by leaving the same at any place of business of the company or corporation with any person in apparent authority there'.*

[51] *Supreme Court (Civil Procedure) Rules* 1980 (Sāmoa), rr. 21, 48.

[52] *Partnership Act* (Sāmoa), s 4 (2)

[53] *Companies Act* 2001(Sāmoa), s. 8 (2)

[54] *Partnership Act* (Sāmoa), s 2

[55] *Companies Act* 2001 (Sāmoa)

[56] Ibid, ss 92-96,

[57] Ibid, s 345.

[58] *Judicature (High Court Amendment) Rules 2008* r 6.12.

3.10 The New Zealand Rules do not appear to contain any particular provision as to how a company is to sue or be sued, unlike the Samoan Rules in para 2.24 above.

Australia

3.11 In New South Wales, Australia), the UCPR (NSW) provide that a company may commence and carry on proceedings in any Court by a solicitor or by a Director of the company.[59] Service on a corporation is either personally on a principal officer of the corporation, or otherwise according to law, which in turn invokes the extensive provisions of the *Corporations Act 2001*.[60]

3.12 In Victoria, the MCGCPR (VIC) provide that a corporation, whether it is a party to a proceeding or not, must not take any step in a proceeding except through an Australian lawyer. This rule does not extend or apply to a corporation filing a complaint, filing of a notice of defence or a request to issue a warrant to seize property.[61] Service on a corporation is according to the provision of any Act that deals with service of documentation on a corporation, [62] which again invokes the extensive provisions of the corporations legislation regarding service.

Representation of a business

3.13 The *Partnership Act* 1975 sets out the meaning of 'firm' ('persons collectively who have entered into partnership with one another') and 'partnership' ('the relation which subsists between persons carrying on a business in common with a view to profit')[63]. Any company or members of a company are specifically excluded from the definition of a partnership,[64] further distinguishing a company and a partnership as being different from each other.

3.14 There is no provision for a business to sue or be sued as a separate legal entity in the same way as a company. However, the SCR provide for service on firms by delivery of process to partners either in the name of the partners or in the name of the firm. [65] In this way, the partners of the firm may remain obscure.

Comparable Jurisdiction

Australia

3.15 However, in New South Wales, the UCPR (NSW) provide that 'persons are to sue or be sued in their own names and not under any business name'.[66] In fact, New South Wales rules go even further in requiring that business names be removed from proceedings and for any reference to them to be replaced with a person's name.[67] This provision establishes a process designed to identify the actual legal persons behind a business or firm rather than enabling them to remain concealed. This is important as these individuals may be ultimately liable in a personal capacity, as compared to a company that may be liable in its own right, as a separate legal entity.

[59] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r. 7.1
[60] Ibid, r 10.22
[61] *Magistrates' Court General Civil Procedure Rules 2010* (Victoria, Australia), r.1.17
[62] Ibid, r 6.03
[63] *Partnership Act 1975* (Sāmoa), ss 2, 4(1)
[64] Ibid, s 4(2)
[65] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r. 21
[66] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r. 7.19
[67] Ibid, r. 7.22

UCPR (NSW): Rule 7.22 Plaintiff to amend documents in the proceedings to replace business name with defendant's own name

(1) In any proceedings in which a defendant is sued under a business name, the plaintiff must take such steps as are reasonably practicable:

(a) to ascertain the name and residential address of the defendant, and

(b) to amend such documents in the proceedings as will enable the proceedings to be continued against the defendant in his or her own name.

Rule 7.22
(2) In any such proceedings, the plaintiff may not, except by leave of the court, take any step in the proceedings other than:

(a) the steps of filing and serving originating process, and

(b) steps to ascertain the name and residential address of the defendant,
until the documents in the proceedings have been amended as referred to in sub rule (1) (b).

Question 17: Should the SCR include specific procedures for companies registered under the *Companies Act 2001* to become a party to a proceeding?

Question 18: Should the MCR reflect the provisions relating to companies currently existing in the SCR?

Question 19: Should the SCR contain fewer provisions relating to companies, and instead adopt the existing provisions under the *Companies Act 2001*, similar to the UCPR (NSW) and NCGCPR (VIC)?

Question 20: Should the SCR and/or MCR include specific provisions to remove the name of firms or businesses and to replace them with a person's own personal name and address, similar to UCPR (NSW)?

Representative proceedings ('Class Action')

3.16 A 'class action' is a lawsuit in which a group of persons with a common interest join together in a group (the 'class') as plaintiff or defendant. Common class actions involve cases in which a product has injured many consumers, or where a group of people who were victims of a fraud at the hands of a corporation or a disaster has affected a large number of people. A class action is also referred to as 'representative proceeding' because a single person acts as plaintiff or defendant on behalf of the other members of the group.

3.17 Both SCR and MCR[68] set out that where there are numerous persons having the same interest in an action, one or more of them may sue or be sued or may be authorized by the Court to defend the action on behalf of or for the benefit of all persons interested. However, consent is required from any person who is to be a plaintiff in a case ('opt in').[69]

Comparable Jurisdictions

New Zealand

3.18 In New Zealand, one or more persons may sue or be sued on behalf of all persons with the same interest in a proceeding, but it is necessary for the representative person to have

[68] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r. 36 and *Magistrates' Court Rules 1971* (Sāmoa), r.11
[69] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), .r32 and *Magistrates Court Rules 1971* (Sāmoa), r.13

the consent of the other persons who have the same interest ('opt in') or a court order permitting that person to act for the benefit of the others.[70]

Australia

3.19 In Victoria (Australia), one or more persons may commence a proceeding on behalf of a group of seven or more potential members whose claims against the same party give rise to a substantial common question of law or fact. Unlike New Zealand, the Victoria regime is an 'opt out' system: the consent of a person to be a member is not required, but the group members have the right to opt out of the proceeding by notice in writing before the date fixed by the Court. A judgment given in a group proceeding must describe or otherwise identify the group members affected by the ruling.[71]

3.20 An advantage of the 'opt out' system is that it is quicker and easier to commence and run a class action as the representative plaintiffs do not have to secure the consent of all potential members of the group. Conversely a disadvantage of the 'opt out' system is that the potential members of the group are required to take a positive step to exclude themselves in order to avoid being bound by the decision of a group proceeding. If the ruling is unfavorable, they will all be adversely affected.

Question 21: Should both SCR and MCR extend existing procedures in relation to membership in group representative proceedings?

If so, should Samoa identify its representative actions to be an 'opt in' system (requiring explicit consent of every member of a group forming a representative action) or an 'opt out' system (right of every potential member of a group to opt out of the proceeding by a communication in writing to the Court)?

4. Pleadings

4.1 In commencing civil proceedings, pleadings take the form of several documents prepared to set out the elements of each party's case. Each side sets out the elements of its case in documented form in order to make apparent the nature and detail of the dispute.[72] Pleadings encompass the plaintiff's statement of claim, the defendant's defence, the plaintiff's reply to the defendant's defence and if applicable, a counterclaim by the defendant.[73] In the recent case of *Sua v Attorney General*[74]**,** the Courts outlined that 'the purpose of pleadings is to define the issues and give the other party fair notice of the case which he or she has to meet.'

4.2 Both the MCR and the SCR provide specific rules as to the commencement of proceedings by filing a statement of claim. Neither set of rules describe the process subsequent to a statement of claim as outlined above, namely the defendant's defence, the plaintiff's reply or a counterclaim by the defendant.

4.3 In addition, the SCR does not contain any general principles of pleadings.[75] General rules require that all material facts are to be pleaded, but no evidence or the law. These material facts are important as they are connected to the cause of action and are essential to the case

[70] *Judicature Act 1908 (High Court Rules)* (New Zealand), r. 4.24
[71] *Supreme Court Act 1986* (Victoria, Australia), Part 4A 'Group Proceeding' ss 33C, 33E, 33J and 33ZB
[72] Beck, A, 2012, *Principles of Civil Procedure, 2nd Ed.* Brookers Limited, New Zealand
[73] *The CCH Macquarie Concise Dictionary of Modern Law CCH*, 1988, Sydney
[74] *Sua v Attorney General* [2013] WSSC 1
[75] Care, C, J, 2004, *Civil Procedure and Courts in the South Pacific,* Cavendish Publishing Limited, Australia

to be argued and proven at trial. If a material fact is omitted, resulting in a failure to show a cause of action, then the pleading is defective and the Court has discretion to strike it out.[76]

Comparable Jurisdictions

New Zealand

4.4 In New Zealand, distinction is drawn between a statement of claim and a notice of claim. A statement of claim relates only to proceedings in admiralty, defamation or to enforce an arbitral award. A plaintiff starts any other proceeding by notice of claim[77]. The rules set out clear requirements concerning service of response and filing, and in addition, if either party disputes the grounds of the claim or response, there is a further process involving 'information capsules' which set out obligations of both plaintiff and defendant to provide material facts upon which they intend to rely in the claim or defence, [78]together with timeframes. A prescribed form is contained in the Rules, together with reference to simple guidelines for parties to understand their obligations.

4.5 The plaintiff's information capsule is to inform the defendant of the nature of the claim, to disclose relevant and material facts, rebut the defence addressing disputed facts, list witnesses and identify their statements, provide explanation as to why any 'not without prejudice' offers have been rejected. The purpose and effect of this provision is to ensure that legal representatives have not only communicated all offers of settlement to their clients, but also that those representatives have discussed the merits of accepting or rejecting these offers. These rules therefore assist in ensuring that clients are given a full understanding of the case, its likelihood of success and to give meaningful consideration to offers, in such a way that may promote further discussion and/or offers between the parties. This may in turn result in achieving early resolution of matters before they proceed to hearing.

4.6 A further requirement of the plaintiff's information capsule is that the plaintiff must provide copies of all requested documents, at the plaintiff's expense. [79] Placing the burden of copying costs on the party providing the information may result in overall minimisation of costs, because that party must pay for the copies of documents it considers relevant, so will aim theoretically to reduce the volume of material, so as to reduce the cost of copying them.

4.7 Conversely, the Rules are also mirrored in respect of the defendant's information capsule obligations.[80]

4.8 If either party does not provide their information capsule within the prescribed timeframe, in the case of the plaintiff being out of time, the plaintiff's claim comes to an end[81], (although there is provision for the plaintiff to commence proceedings afresh), or if the defendant is out of time, the plaintiff may enter judgment against the defendant[82].

Australia

4.9 The rules in Victoria (Australia) are more comprehensive when dealing with pleadings. The rules are very clear as to the content of pleadings (including material facts but not

[76] Above n4
[77] *New Zealand District Courts Rules 2009* r. 2.10
[78] Ibid r 2.14
[79] Ibid r 2.14.3
[80] Ibid r 2.15
[81] Ibid r 2.14.4
[82] Ibid r 2.15.4

evidence),[83] order of pleadings and their particulars. The rules also acknowledge other areas of pleadings such as time limits for filing, admissions and denials, alternative arguments, as well as pleadings after commencement. These rules are comprehensive and establish clear guidelines for lawyers and their clients. [84]

4.10 In New South Wales (Australia), the UCPR (NSW) focus one particular part on pleadings. The following are some examples:

i) Rule 14.1 provides that Part 14 (Pleadings) applies to proceedings commenced by Statement of Claim.
ii) Rules 14.2 -14.5 provide procedures to be followed when pleading a defence, a reply and further pleadings.
iii) Rule 14.6 states that a pleading is to be divided into paragraphs.
iv) Rule 14.7 provides that a pleading must contain only a summary of the material facts relied upon, and not the evidence by which those facts are to be proved.
v) Rule 14.8 provides that a pleading must be as brief as the nature of the case allows.

Vanuatu

4.11 In Vanuatu, the CPR (VAN) provide guidance as to how a 'statement of the case' is set out in a claim, defence or a reply or counterclaim, as follows:

> (1) Each *statement of the case* must be as brief as the nature of the case permits; and set out all the *relevant facts* on which the party relies, but *not the evidence* to prove them; and identify any statute or *principle of law* on which the party relies, but *not* contain the *legal arguments about it;*
>
> (2) If the *statement of the case* is set out in a claim or a counterclaim, it must also set out the *remedies* or orders sought.[85]

4.12 The CPR (VAN) replace the term "pleading' with the term "statement of the case"; the procedure is relatively useful, clearly setting out what should be included in each party's case. It further sets out what constitutes a statement of a case and the purposes of a Statement of Claim. Similar to Vanuatu, the UCPR (N) contain similar procedures concentrating an entire section on pleadings.

Alteration of Pleadings

4.13 Currently, the SCR provide that a statement of claim may be amended with leave of the Court at any time before or during the trial. No further provision is made for the amendment of a statement of claim or other pleadings.

4.14 Rules exist in comparable jurisdictions to further develop the regulation of amendment to pleadings. The purpose of the additional rules is to provide clarity to the parties regarding amendments of pleadings, and avoids the potential for additional waste of Court resource by way of unnecessary directions or mentions hearings in relation to amendments.

[83] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia) r. 13.02

[84] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia) O.13, rr13.01 – 13.14

[85] *Civil Procedure Rules 2002* (Vanuatu), r.4.2

Comparable Jurisdictions

New Zealand

4.15 In New Zealand, the HCR (NZ) [86]provide for relevant situations where pleadings may be amended and other grounds or causes of actions may also be made with the approval of the Court.

Australia

4.16 In Victoria, the SCGCPR (VIC) allow for a statement of claim to be amended once without the leave of the Court, if the amended document is filed prior to the closing of pleadings. [87]

4.17 Further, the Court requires that each amendment to a pleading shall be made in such a way as to distinguish the amendment from the original pleading and from any previous amendment to the original. The usual practice is that the amendments from the original pleading are marked up in red (underlined for addition, struck through for deletion) so that the Court and the defendant are able to easily identify the amendments which have occurred.

Question 22: Should the SCR be amended to include particular pleading provisions covering the following:

i. Pleadings subsequent to a statement of claim such as defence, reply and counterclaim as practised in Vanuatu, Australia and New Zealand;
ii. Clearer general rules that apply to all pleading documents similar to the Rules in Vanuatu, Australia and New Zealand;
iii. Timeframes for provision of copies of relevant plaintiff and defendant materials together with explanations of why offers have been rejected or how calculated (similar to HCR (NZ) information capsules);
iv. Amending reference to 'statement of claim ' to 'statement of the case';
v. To more comprehensively regulate the amendment of pleadings.

5. Discovery

5.1 In Issues Paper 1, discovery was briefly raised as an issue in relation to time discrepancies in respect of r. 86(3) and Form 17.

5.2 Discovery is raised again in this Issues Paper 2 as it relates to evidence in terms of how discovery is used in the preliminary stages of a trial and as to how the procedure of discovery might be improved.

5.3 The MCR do not contain any rules relating to discovery. The SCR set out the process relating to discovery.[88] In short, the process is that where a defence or counterclaim has been filed in the Court, any party may issue an order for the discovery of documents. The affidavit of documents that have been 'discovered' shall be filed in Court 10 days after the service of the order.

[86]*Judicature Act 1908 (High Court Rules)* (New Zealand), r.7.77

[87] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia) r. 36.04

[88] *Supreme Court (Civil Procedure) Rules 1980,* r.86

5.4 The SCR contain rules as to non compliance by any party, [89] and appropriate discovery orders may be made.[90] If the plaintiff fails to comply, the Court may dismiss the proceedings or order the proceedings stayed until the order is complied with. If the defendant fails to comply, the Court may order that the defendant 'be debarred from defending' the action altogether, or defend the action to a limited extent, as the Court sees fit.

5.5 In *Faasili v Attorney General* [1993] WSSC 32, the plaintiff made an application under this rule, to debar all defendants from defending the proceedings for non-compliance with orders for discovery of documents. The Court granted 10 days to three defendants to comply with the order for discovery, and also awarded the plaintiff $50 against the third defendant for not complying within the required period, and a further $100 against the fourth defendant for non compliance, together with not seeking an extension. The Court issued a warning that further non compliance would result in the defendants being debarred from defending the plaintiff's action against them.

Comparable Jurisdictions

Australia

5.6 In Victoria, the SCCPR (VIC) are more comprehensive, but they also look at discovery at a preliminary stage of proceedings (or prior to the commencement of proceedings). However, a notice for discovery can be served after pleadings are closed[91], with compliance required within 42 days of service of notice, or, if notice is served before pleadings closed, 42 days after closing of pleadings. All discovery is made by affidavit of documents.[92]

5.7 These rules are more comprehensive as they cover issues such as the types of documents that can be discovered, making an order for a particular discovery, inspection of the documents by the Court and where no discovery has taken place, an order for particular discovery can be made.[93]

New Zealand

5.8 In New Zealand, the DCR (NZ) provide for copies of all relevant materials to be provided early in the proceeding.[94]

5.9 The rules in Victoria and the HCR (NZ) go further in allowing for discovery to be ordered prior to the commencement of proceedings. In Victoria, a party can, with the permission of the Court, obtain discovery to:

i) Identify a defendant before the commencement of proceedings. Once a defendant is identified, the Court can then identify and assess a cause of action before proceeding has commenced; and

ii) Seek discovery from a third party which can be ordered before proceedings commence.

5.10 In order to seek discovery from these parties, the party who is seeking the order needs to make an application, and demonstrate reasons for the discovery. The party need to have made reasonable enquiries and have a basis to assert that there may be a document that will assist in the proceedings. Orders for discovery are sought by way of originating motion and affidavit, and if there is no proceeding in existences, by summons and affidavit in support.

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[89] Ibid, r.93

[90] Ibid, rr 91,92

[91] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r. 29.02

[92] Ibid r. 29.04

[93] Ibid (Vic) r. 29.11

[94] Paras 4.4 et seq (above).

5.11 Similarly in the HCR (NZ), the Court can order (8.20) pre-issue discovery where the Court determines that:

i) a person (the intending plaintiff) is or may be entitled to claim in the Court relief against another person (the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to one or more documents or a group of documents; and

ii) There are grounds to believe that the documents may be or may have been in the control of a person (the person) who may or may not be the intended defendant.

5.12 In considering whether pre-issue discovery should be granted, the Court must consider whether the order is necessary, and may order the person to file an affidavit (served on the proposed plaintiff) stating whether the documents are or have been in the person's control, and an explanation regarding who may be in control of the documents.

5.13 If the documents are in the person's control, the Court may order that the documents be made available to the intending plaintiff to review the documents.

5.14 The HCR (NZ) provide an ongoing obligation on the parties to discover documents to their opponent throughout the course of proceedings. In particular, at 8.18 the Rules state that:

i) Each party against whom a discovery order is made has a continuing obligation to make discovery and offer inspection at all stages of the proceeding, even if that party has filed and served an affidavit of documents that complies with this subpart.

ii) A party must discover a document if, in the course of complying with an order for tailored discovery, that party becomes aware of a document that is not required to be discovered under the order, but that—
   - Adversely affects that party's own case; or
   - Adversely affects another party's case; or
   - Supports another party's case.

5.15 In the absence of such a comprehensive set of rules relating to discovery, the result may be that one party who has made discovery in accordance with the rules later becomes aware of further documentation which they choose not to disclose to the other party, until immediately prior to the hearing or at hearing, when this party seeks to rely on the material thus catching the other party by surprise. Where the rules do not impose an ongoing obligation to discover, there is little to no redress to a party failing to disclose later materials. A further consequence may be that a party considers that all information gathering has already taken place, and not seek further discovery of additional materials which may assist their case. Conversely, a party not wishing to continually having to discover as new materials come to hand, may make more strenuous efforts to gather all relevant information at the same time. Another advantage of continuing discovery obligations is that this additional information may serve to promote further meaningful settlement discussions between the parties as the information comes to light, which may result in early dispute resolution prior to hearing. It is likely that this will economise on cost and resource.

Question 23: Should both SCR and MCR allow for pre-issue discovery? If so, what should be the requirements for obtaining an order for pre-issue discovery?

Question 24: Should the SCR and MCR provide for ongoing discovery obligations of both parties, similar to the HCR (NZ)?

Subpoena of and Production by non-parties

5.16 Neither the SCR nor MCR contain specific provisions allowing a party to proceedings to compel a non-party to produce documents or to give evidence in Court. The power to compel production of materials or to give evidence in the rules, as derived from common law is limited to r.92 of the SCR. This appears to relate only to the production of documents by a party to the proceedings.[95]

Comparable Jurisdictions

New Zealand

5.17 The HCR (NZ) contain provisions which allow for parties to obtain documents from a non-party. Rule 8.21 states that:

i) This rule applies if it appears to a Judge that a person who is not a party to a proceeding may be or may have been in the control of 1 or more documents or a group of documents that the person would have had to discover if the person were a party to the proceeding.

ii) The Judge may, on application, order the person—

a) to file an affidavit stating—
  - whether the documents are or have been in the person's control; and
  - if the documents have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and

b) to serve the affidavit on a party or parties specified in the order; and

c) If the documents are in the control of the person, to make those documents available for inspection, in accordance with rule 8.27, to the party or parties specified in the order.[96]

5.18 The HCR (NZ) further provide for production of documents by non parties to a proceeding. [97]

Australia

5.19 The Victorian SCCPR (VIC), [98]and the FCR (AUS)[99] provide an alternative method of obtaining discovery by a 'non-party', (often referred to as 'non-party production'), that is, a party which is not associated with the proceedings. Application can be made to the Court to consider whether an order for non-party production of documents is warranted.

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[95] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.92

[96] *Judicature Act 1908 (High Court Rules)* (New Zealand), r. 8.27

[97] *Judicature Act 1908 (High Court Rules)* (New Zealand), rr 9.52, 9.53

[98] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r. 32.07

[99] *Federal Court Rules 2011* (Australia), r. 20.23

Question 25: Should there be provision in the SCR or MCR for non-parties to be compelled to give evidence or to produce documents as distinct from parties alone?

6. Form of Court Documents

6.1 Different jurisdictions prescribe the content and form of Court documents to a varying degree.

6.2 The SCR contain a number of prescribed forms, and states only that the forms may be altered if the circumstances require, and that documents shall be, unless specially provided, either in the Samoan or English language. The consistency of Court documents in both content and form can assist the Court in dealing with those documents, and in ensuring that the documents are produced to a consistent and high quality. Prescribed forms can also minimise the potential for unnecessarily lengthy and costly documentation.

6.3 The lack of regulation in the SCR can be contrasted with a number of other jurisdictions.

Comparable Jurisdiction

New Zealand

6.4 The High Court of New Zealand Rules takes a prescriptive approach to the form and content of Court documents (See Part 5, subpart 2 of the High Court of New Zealand Rules).

Australia

6.5 The Victorian Supreme Court Rules similarly provide detailed requirements concerning:

- Heading and title of document;
- Form of document, including paper size, typeface, spacing and margins, page numbering;
- The dating and endorsement of the document;
- Prohibition of erasure or disfiguring alteration;
- The expression of numbers, dates and amounts as figures rather than words.[100]

6.6 In addition, the Victorian rules require that a party who prepares a document must supply the other parties with copies of the documents on request.

6.7 The Court has the power to refuse to seal or file a document which does not comply with the rules regarding content and form.

6.8 Lastly, where a Court document contains scandalous, irrelevant or otherwise oppressive matter, the Court may order that the matter be struck out,[101] or that the individual document be taken off the file. The State of Maine Civil Procedure Rules similarly provide an avenue to strike out scandalous or other superfluous material. For example, Rule 12(f) provides*:*

> *motion to strike: Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the Court's own initiative at*

[100] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), Order 27

[101] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r.23.02

any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Question 26: To what extent should both SCR and MCR Rules prescribe the form and content of Court documents?

Question 27: Should the Court have specific power to strike out a matter or remove a document from the Court file where it is found to contain scandalous, irrelevant or otherwise oppressive matter?

Question 28: Should the Court have specific power to strike out any insufficient defence or any redundant, immaterial, impertinent, or scandalous matter from any pleading?

7. Trial

7.1 The SCR and DCA do not define 'trial' or purpose of a trial. The purpose of a trial is to assist the Court to resolve a dispute, having heard the case presented by both sides. Each side will give evidence, generally in oral form by the calling of witnesses.[102]

Comparable Jurisdiction

New Zealand

7.2 In New Zealand, the HCR provide that the objective of the evidence is identified as directing both the court and the parties to pursue the just, speedy, and inexpensive determination of the proceeding, and another objective is described as ' the goal of keeping the cost of the proceeding proportionate to the subject matter of the proceeding'.[103]

7.3 The evidence given by both sides will be tested by cross-examination and where the witnesses do not agree, the Court is required to decide which evidence to accept. Once evidence has been led, the legal representatives of the parties will present arguments and the Court will either reserve its decision to be given at a later date or give judgment immediately.[104]

Hearing Procedures

7.4 In Samoa, procedures regarding the overall management of a trial under the SCR and the MCR are identified as 'hearing procedures'. Other jurisdictions have moved away from categorizing procedures such as non appearance, place and date of hearing to name a few, as particular hearing procedures. Instead, these procedures are often included as part of the trial process as a whole.

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[102] Andrew Beck, *Principles of Civil Procedure* (3rd ed, 2012) p221
[103] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.9.1
[104] Andrew Beck, *Principles of Civil Procedure* (3rd ed, 2012) p221, *Judicature Act 1908 (High Court Rules)* (New Zealand), Part 9

Comparable Jurisdiction

New Zealand

7.5 In New Zealand, the HCR (NZ) provide for the 'allocation of hearing date'[105] and the 'mode of hearing'[106].

Trial Procedures

7.6 No trial procedures are specified in the SCR and the MCR. However under the DCA, a District Court Judge or *Fa'amasino Fesoasoani* is to be the sole judge in all proceedings brought in Court before him or her. He or she is to determine all questions of fact as well as of law.[107] The DCA allows one or more of the *Fa'amasino Fesoasoani* sitting in any proceeding for the sole purpose of giving such advice as may be sought by the District Court Judge on any matter involving Samoan customary law or penalties to be imposed.[108] Under the SCR, all actions or other civil proceedings shall be tried by a judge alone.

Comparable Jurisdiction

New Zealand

7.7 In New Zealand, the HCR (NZ) dedicate Part 10 to provisions relating to the place of trial, adjournments, methods of trial and verdicts. There is also provision for a consolidation process, separate decision of questions, counsel assisting and hearings by video link.

Question 29: Should both SCR and MCR specifically include trial procedures and specify their scope?

Non appearance

7.8 If neither party appears, the Court may strike out the proceedings. In such a case it may be reinstated on application by any party. An example of this is the case of *Fagasaua v Tauati Enterprise Ltd* [1999] WSSC 36) where the plaintiff alleged that he was in a meeting abroad on the day of hearing when he submitted his motion for reinstatement. He also alleged that he was negotiating with counsel for the defendant without knowing that his claim had been struck out. There is no recorded decision of this case as it may have been settled out of Court.

Magistrates Court Rules 1971 (MCR)

7.9 The MCR provide that where neither party appears at a hearing, the proceeding may be struck out[109]. Where the plaintiff is absent or does not appear at a hearing of the action but the defendant is present then if the defendant:

I. admits the claim; the Magistrate or *Fa'amasino Fesoasoani* may give judgment as if the plaintiff had appeared;

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[105] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.7.33 Allocation of hearing date
On or following the filing of an application (other than an application without notice), the Registrar must allocate a hearing date for the application.

[106] Ibid, r.7.34 Mode of hearing (1) An interlocutory application for which a hearing is required must be heard in chambers unless a Judge otherwise directs.
(2) On the Judge's own initiative or on the application of 1 or more of the parties, the Judge may conduct a hearing in chambers by telephone or video link.

[107] *District Court Act 1969* (Sāmoa), s 106

[108] Ibid, s 107

[109] *Magistrates Court Rules 1971* (Sāmoa), r.22

II. does not admit the claim, the proceedings may be struck out and in such a case the Court may order the plaintiff to pay the defendant's costs in such sum as the Court thinks fit.[110]

Plaintiff:

7.10 Where the plaintiff does not appear but has filed an affidavit with the Court, the proceedings will not be struck out but the plaintiff shall be deemed to have appeared at the hearing and tendered the evidence in the affidavit.[111]

Defendant:

7.11 On the other hand, if the defendant fails to appear at the hearing, on proof of service and facts entitling the plaintiff to relief, the Magistrate or *Fa'amasino Fesoasoani* may give judgment for the plaintiff (provided that the claim is for a liquidated demand[112]). The judgment may be given for the plaintiff without requiring him/her to give evidence.[113]

7.12 If the defendant has not admitted the facts before the Court but has addressed the Court in a letter admitting the claim, then the Magistrate *or Fa'amasino Fesoasoani* may treat the letter as consent to judgment and may enter judgment accordingly.[114]

Supreme Court Rules 1980 (SCR)

Plaintiff:

7.13 The SCR provide that where the plaintiff does not appear, the Court may adjourn the trial or strike out the proceedings.[115]

Defendant:

7.14 In contrast, when a defendant fails to appear before the Court, the Court may give judgment by default without a hearing. *In re Chande Lutu Drabele* [2003] WSSC 42 (7 April 2003), the counsel for the defendant failed to make an appearance on the day she was due in Court. She stated in her memorandum that she had an urgent matter to take care of at home because her daughter was ill. Her attempts to inform the Court in time were unsuccessful. In this case, the Court found her explanation to be unsatisfactory as she could have instructed another counsel to appear in Court in her place on the defendant's behalf. The Court considered counsel's actions to demonstrate disrespect for the Court, and her conduct to be unprofessional.[116]The Court ordered the defendant's counsel to pay costs personally.

Comparable Jurisdictions

New Zealand

7.15 In New Zealand, where the plaintiff appears and the defendant does not, the HCR (NZ) provide that the plaintiff must still prove the cause of action insofar as the burden of proof rests with the plaintiff. If the defendant appears but the plaintiff does not, the defendant is entitled to have the matter dismissed, but must prove any counterclaim insofar as the defendant bears the burden of proof. [117]

[110] Ibid r.23(1)
[111] Ibid r.23(2)
[112] Definition: "a term applying to the demand where the amount has already been agreed to." In Black Law Dictionary http://thelawdictionary.org/liquidated-demand/#ixzz2aN1vz4UX
[113] *Magistrates Court Rules 1971* (Sāmoa), r.24(1)
[114] *Magistrates Court Rules 1971* (Sāmoa), r.24(2)
[115] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.117
[116] *In re Chande Lutu Drabele* [2003] WSSC 42 (7 April 2003)
[117] *Judicature Act 1908 (High Court Rules)* (New Zealand), rr 10.8, 10.9

Vanuatu

7.16 In Vanuatu, the CPR (VAN) provide that if the claimant or plaintiff does not attend when the trial starts, the Court may adjourn the proceeding, dismiss the claim or enter judgment for the defendant and in the case of a defendant by way of counterclaim, the Court after hearing evidence may enter judgment against the claimant.[118] The Court may also give directions regarding the future conduct of the proceeding as it sees fit and must consider the question of costs.[119]

7.17 In the case of a defendant failing to attend, the CPR (VAN) provide that the Court may adjourn the proceedings, enter judgment for the claimant, or the Court may permit the claimant to call evidence to establish that he or she is entitled to judgement against the plaintiff.[120]

7.18 In New Zealand, where the plaintiff appears and the defendant does not, the HCR (NZ) provide that the plaintiff must still prove the cause of action insofar as the burden of proof rests with the plaintiff. If the defendant appears but the plaintiff does not, the defendant is entitled to have the matter dismissed, but must prove any counterclaim insofar as the defendant bears the burden of proof. [121]
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Question 30: Should both SCR and MCR be expanded to adopt additional and clearer procedures as adopted by the Vanuatu or New Zealand Rules for non-appearance of defendant or claimant/plaintiff?

Australia

Plaintiff:

7.19 In Australia, the UCPR (NSW) provide that if the plaintiff does not appear at a hearing (but has been provided with due notice of the hearing date), the Court may 'adjourn the hearing to another date and direct that not less than 5 days before that date a notice of the adjournment be served on the plaintiff advising that the proceedings may be dismissed if there is no attendance by or on behalf of the plaintiff at the adjourned hearing.'[122] In addition, if the plaintiff fails to appear after having been notified, the Court may then dismiss the proceeding.[123]

Defendant:

7.20 Courts in New South Wales require a defendant to file a notice of appearance prior to the Court hearing date.[124] A defendant who intends to take no active part in the proceedings may include in the defendant's Notice of Appearance a statement to the effect that the defendant consents to the making of all orders sought and to the entry of judgment in respect of all claims made to which may be added the words 'save as to costs'. The defendant who files a notice of appearance containing such a statement may not file a defence or affidavit or take any other step in the proceedings.[125]

Question 31: Should both SCR and MCR adopt procedures for plaintiff's non-appearance, similar to the UCPR (NSW)?

[118] *Civil Procedure Rules 2002* (Vanuatu), r12.9(2)
[119] Ibid, r12.9(3)
[120] Ibid, r12.9(1)
[121] *Judicature Act 1908 (High Court Rules)* (New Zealand), rr 10.8, 10.9
[122] *Uniform Civil Procedure Rules 2005* (NSW, Australia), r.13.6(1)
[123] Ibid, r.13.6(2)
[124] Ibid, r.6.9
[125] Ibid, r.6.11

Question 32: Should a notice of appearance by the defendant prior to the Court hearing date be incorporated in the SCR and MCR, similar to the UCPR (NSW)?

Place of trial

7.21 Neither the SCR nor the MCR address where a civil proceeding is to take place. In New Zealand on the other hand, Courts are able to order that a proceeding be tried at a place other than the courthouse where proceedings were initially commenced provided that both parties consent to the change of venue or that the venue proposed is where the proceeding can be heard more conveniently or more fairly.[126]

Comparable Jurisdiction

New Zealand

7.22 In New Zealand, the place of trial is normally the office of the Court in which the statement of defence is filed, that is, in the absence of an order by the Court, the place where the plaintiff commenced proceedings.[127] The parties may consent to a different venue and apply to the Court for an order accordingly, or the Court may decide that a different venue would enable the matter to be more conveniently or fairly heard and make an order to that effect.[128]

7.23 In Samoa, the matter of *Police v Leafa Vitale and Toi Aukuso Cain*[129] was heard in a different venue because the old Court house at Apia did not have the capacity to hold parties to the proceedings, highlighting a need for the Court to be able to determine or change the venue of a trial in the interests of necessity and public security.[130]

Question 33: Should both SCR and MCR include a provision that allows the Court to determine/change the location of a trial provided that:
i. both parties to the proceeding have consented; and/or
ii. it would be more convenient or fairer to hear the proceeding at a different location?

8. Witnesses and Evidence

8.1 It is to be noted that the *Evidence Bill* has recently been developed by the Office of the Attorney and may include reference to some of the issues set out below. To the extent that the following issues are contained in the SCR and MCR, they have been discussed below. To the extent that there may be overlapping provisions proposed in that Bill, some further analysis of that will be required, however, if any such proposed legislation is enacted, that Act is likely to take priority over the SCR and the MCR.

Comparable Jurisdiction

New Zealand

8.2 In New Zealand, the HCR (NZ) provide that the rules are subject to the *Evidence Act 2006.*[131]

[126] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.10.1
[127] Andrew Beck, *Principles of Civil Procedure* (3rd ed, 2012), p221
[128] Ibid
[129] *Police v Leafa Vitale and Toi Aukuso Cain*, an unreported decision of the Supreme Court of Samoa dated 6, 7, 10 and 11 April 2000
[130] Ibid
[131] *Judicature Act 1908 (High Court Rules)* (New Zealand) r 1.4

Summoning and Calling a Witness

8.3 Part VII of the SCR sets out procedures relating to witnesses and evidence. Specifically, Rule 52(1) of the SCR states that a Judge, Registrar or Deputy Registrar may in any proceeding before the Court, issue a Summons to any person requiring them to appear before the Court at the time and place mentioned in the Summons to give evidence in that proceeding or to produce any document to the Court. Rule 53 provides that any Witness Summons may be served either by an Officer of the Court or by the party in respect of whose case the witness is summoned.

8.4 The Court may also order, as it thinks fit, any or all witnesses, other than the witness under examination, to remain outside of the courtroom until required to give evidence, and any witness who does not comply with such an order is guilty of contempt.[132]

Failure to Appear

8.5 A witness who fails to appear before the Court without sufficient cause, refuses to be sworn, refuses to give evidence or fails to follow further Court directions to appear at a later time is liable to a fine not exceeding one hundred tala.[133]

Witnesses and evidence

8.6 There is no provision in the SCR or MCR for witnesses to make an affirmation to give evidence rather than swearing. However there is provision for affirmations under Samoa's *Oath, Affirmations and Declarations Act 1963*. Other jurisdictions also provide for alternatives to swearing.

Reimbursement of Witnesses

8.7 Witnesses in a civil proceeding in the Supreme Court are entitled to payment as reimbursement for their time and travel as determined by the Court, rather than as set out in the rules. For instance, in *In re Chande Lutu Drabele*, [134]counsel for the defendant was ordered to pay the plaintiff's cost for airfare and transportation for witnesses estimated by the Court in the amount of $748.06. There is no specific scale or a way for such a payment to be calculated or capped (for example distinguishing between lay and expert witnesses) in the SC Rules.

Manner in which Witness Testimony is given

8.8 Witnesses can also be examined out of Court if it is necessary for the efficient and effective administration of justice. The Court may order depositions to be filed and may allow parties to adopt the deposition as evidence.[135] A deposition means the out-of-Court testimony of a witness that is reduced to writing for later use in Court or for discovery purposes.

Expert witnesses

8.9 Neither the SCR nor the MCR make special provision for expert witnesses, whether called to provide expert evidence on behalf of either party, or where appointed by the Court.[136]

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[132] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r. 60

[133] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r54, also see *In re Chande Lutu Drabele* [2003] WSSC 42 (7 April 2003

[134] Op cit

[135] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r.56

[136] This is raised as a question at the end of this issue segment

Comparable Jurisdiction

New Zealand

8.10 In New Zealand, the NCR (NZ) provide that the Court may appoint an expert witness in a proceeding or interlocutory hearing and each party may call 1 expert witness (or more by leave of the Court) to provide a different expert opinion to the Court appointed expert.[137]

Rule 9.42

(1)If a court expert is appointed in a proceeding or an interlocutory application, a party may call 1 expert witness, or with leave, more than 1, to give evidence on the question reported on by the court expert, if the party gives notice of the intention to do so a reasonable time before the trial.

(2)The court must not grant leave under subclause (1) unless the circumstances are exceptional.

Affidavits

8.11 An affidavit is a sworn statement used to justify a claim or application in Court.[138] The person swearing the affidavit or deponent is in effect a witness and the facts contained in the affidavit will constitute the evidence on the basis of which the Court will come to a decision.[139]

8.12 There are no procedural rules in the MCR governing the swearing of affidavits.

8.13 In the SCR affidavits may be sworn before:

I. A Solicitor of the Supreme Court; or
II. A Registrar or Deputy Registrar of the Supreme or Magistrate Court; or
III. A Postmaster; or
IV. A collector of customs; or
V. A Medical Officer; or
VI. Any other person authorized from time to time by the Head of State.

Question 34: Should a 'postmaster', a 'collector of customs, or a 'medical officer' retain the authority to swear affidavits?

8.14 No provisions exist as to whether details of date, name and location should be stamped upon the signing of affidavits. In practice, date, stamp, name and location are usually printed on paper ready to be completed with the relevant information and for the deponent's signature.

Question 35: Should there be a provision requiring the date, name and location upon swearing and signing of affidavits?

8.15 Where a party wishes to rely on affidavit evidence of a witness attesting to particular facts, and no order in the proceedings has been made, that party may include that affidavit as evidence in the proceedings if, in no less than 5 days before the hearing, it gives notice accompanied by a copy of the affidavit, to the party against whom it is to be used. The other party may object to the admission of the affidavit no later than 2 days before the hearing. If

[137] *Judicature Act 1908 (High Court Rules)* (New Zealand) r. 9.42
[138] Andrew Beck, *Principles of Civil Procedure* (3rd ed, 2012) p115
[139] Ibid

2 days prior the hearing no such notice is given, then they shall be taken to have consented to the admission of the affidavit as evidence in the proceedings unless the Judge orders otherwise.[140]

The manner of giving evidence

8.16 There are no procedural rules in the MCR which outline a preference for the manner in which evidence is given and taken. The SCR only provide a rule as to how evidence is to be taken. This rule simply states that evidence is to be either oral or by affidavit (only by leave of the Court).[141] In order to increase efficiency and to avoid surprise, consideration may be given to whether evidence could be given orally or by affidavit, or in some other way, for example, some types of discovery evidence only available to be given by affidavit, in the interests of expediency. Caution needs to be exercised as to whether such evidence may be tested, especially during the running of a trial. (see paras 7.1-7.23 above)

8.17 Any party to a proceeding may by way of notice, call on one or more of the opposing parties to admit specific facts identified in the notice. If the party served with the notice does not admit the listed facts by way of a written admission within 3 days of receiving the notice, he/she will be liable for any costs incurred in proving such facts, irrespective of the outcome of the proceedings, unless the Court orders otherwise.[142] However, 3 days is not likely to be sufficient time for the party to examine the notice, liaise with the opposing party and obtain legal advice, as the case may be.

8.18 In any proceeding, a party may give notice that he or she admits in part or in whole the facts as stated by the opposing party. No costs relating to the proof of any matters admitted will be incurred after receipt of the admission. Such an admission may be contained in a Statement of Defence, [143]and is useful for reducing potential liability to legal costs.

8.19 Where a party intends to adduce a document in evidence they may do so, not less than 5 days before the hearing, by giving the opposing party a notice requiring them to inspect the document and admit part or all of the facts contained therein.[144] It is not certain whether a copy of the document must be served. Normally, it is the Court that determines admissibility. Once admitted, the parties argue the facts contained in the document so as to prove their case.

Comparable Jurisdictions

New Zealand

8.20 The New Zealand HCR (NZ) provide for evidence as to disputed facts to be given orally in open Court unless the Court orders otherwise.[145] Evidence may be given by affidavit for an interlocutory application. If the parties agree, they may file an agreed statement of facts as evidence from which the Court may draw inferences. The Court may still direct oral evidence to be given. [146]

8.21 Timing applied to evidence given by affidavit is calculated by reference to the date when the parties have agreed to evidence by affidavit, rather than by reference to the hearing

[140] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.58
[141] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.61
[142] Ibid r.63
[143] Ibid r.62
[144] Ibid r.64
[145] *Judicature Act 1908 (High Court Rules 2008)* (New Zealand), r. 9.51
[146] Ibid r. 9.57

date. The plaintiff's affidavits are to be filed and served within 10 days of the prescribed date and the defendant's affidavits are to be filed and served within 10 days after that date.

Australia

8.22 The UCPR (NSW) provide comprehensive and detailed rules relating to the giving of evidence, expert witness, affidavits, subpoenas and notices to produce.

8.23 Part 24 of the NSW UCPR applies to proceedings in the Supreme and the District Courts and allows the Courts to make orders to examine a witness outside NSW or outside Australia.[147]

8.24 The default rule in NSW is that witnesses must give oral evidence unless the Court orders evidence to be given by affidavit or by witness statement. The only evidence that must be given by affidavit relates to interest on a debt or liquidated claim or value of goods under judgment.[148]

8.25 It should be noted that a party may require another party who proposes to use an affidavit in Court to be in attendance at Court for cross examination as to the contents of their affidavit. [149]

8.26 Plans, photographs, audio-visual recordings and models can be used if 7 days prior to the hearing, the opposing party has had the opportunity to inspect the material. Also, an 'audio visual recording' includes a sound recording or a record of moving image (or both) whether stored on film, audio or video tape, digitally, electronically or by any other means.[150]

8.27 Expert evidence may be adduced if directions are sought prior to the calling of the expert witness. Expert evidence in chief is to be given by way of written expert report (although the Court has discretion to order that expert evidence is given orally if the Court sees fit). Parties must serve any such report on all other parties to the proceeding 28 days prior to the hearing.[151]

8.28 If there are several experts on a particular matter, the Court may direct them to attend a conference and prepare a joint report that details the matters agreed upon and those not agreed upon. This has the effect of minimising costs.

8.29 Expert witnesses, have the right to apply to the Court and seek further directions in relation to the matter. Generally, the discussions and content of the conference is not revealed at the hearing of the case[152]. Moreover, the Court can order that the affected parties engage a single expert jointly, instead of two or more experts giving evidence on the same issue.

8.30 Both parties have the right to cross-examine the single expert.[153] The Court has discretion to appoint an expert and make any directions to the expert that it sees fit.[154]

[147] *Uniform Civil Procedure* Rules (New South Wales, Australia), rr 24.3 – r.24.4
[148] Ibid r.30.1
[149] Ibid r.31.37 – 35.2
[150] Ibid r.31.10(4)
[151] Ibid r.31.28
[152] Ibid r.31.24
[153] Ibid rr31.37 – 31.45
[154] *Uniform Civil Procedure Rules* (New South Wales, Australia), r.31.46

8.31 Subpoenas are also used in Court proceedings to order a person) to come to Court and give evidence or produce a document that is relevant in the proceedings. Failure to comply is contempt of Court and may lead to arrest.[155]

8.32 In Victoria, the SCGCPR (VIC) provide that all evidence is to be given orally, unless in an interlocutory application or originating motion, in which case evidence is to be 'on the papers', or by affidavit.[156] The Court retains power to order evidence to be given either by affidavit or orally, together with powers of examination. There are rules relating to the giving of expert evidence on behalf of either the plaintiff or defendant, particularly as regards providing the expert with a set of rules (code of conduct) that govern independence, fields of expertise, basis of opinion and any reservations held by the expert.[157] The report given by the expert should be provided to the Court and the opposing side at least 30 days prior to the fixed date for trial.

8.33 The report must contain certain information including details of the expert requiring:

i) An acknowledgement that the expert has read the code of conduct and agrees to be bound by it;
ii) The qualifications of the expert;
iii) Facts, matters and assumptions on which the report is based (which may be by letter of instructions annexed to the report);
iv) The opinion of the expert.

8.34 It is not possible to adduce additional expert evidence in the Examination in Chief. However, it is possible to do so in cross examination. The Court may order the expert or experts (if more than one) to confer and provide a joint report specifying matters which are agreed upon, matters that are not agreed upon and reasons for the variation of opinion. Finally, expert evidence once submitted, can be relied on by either party as their own evidence.

8.35 Subpoena may be served by the opposing party on witnesses to give evidence to the Court. . These compel either attendance at Court by a witness to testify, or production of documents in Court, for example medical records.[158] In this case, only one subpoena per person is allowed and is to be served more than 5 days before the date on which compliance is required. The subpoena is used mainly to alert a witness to appear or produce evidence at the time specified by the subpoena. The last day to serve a subpoena is five days before the date on which compliance is required. Such evidence is still subject to challenge under cross examination.

Question 36: Should the default position be to take evidence by way of affidavit or a sworn statement? Alternatively, should this change relate only to evidence in an interlocutory application?

Question 37: Should parties be able to agree to evidence by affidavit, within a set timeframe, with the Court retaining discretion to require oral evidence?

Question 38: Should provision be made for expert witnesses to be called either by the Court and/or by parties similar to rules in New Zealand, Vanuatu and Australia?

[155] Ibid rr31.37 – 33.2 and r.33.12
[156] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r. 40.02
[157] Ibid r. 44.03
[158] Ibid r. 42A

Question 39: Should provision be made for joint experts to be appointed by the Court?

Vanuatu

8.36 In Vanuatu, a witness must attend the trial and he or she may be examined on his or her evidence by all other parties to the proceeding.[159] If a witness is not available at the time of the trial the Court may hear the witness's evidence prior to the trial date.[160]

8.37 Evidence in the Vanuatu Magistrates Court is to be given orally unless otherwise ordered by the Magistrate. On the other hand, evidence in the Supreme Court is to be given by way of a sworn statement, which may have the effect of avoiding delays in proceedings. This may also be more practical for the Supreme Court to examine. In Courts, the Magistrate or Judge may order evidence by way of sworn statement or orally, depending on the facts of the particular case.[161]

8.38 The Vanuatu CPR also contain rules that govern the content of sworn statements including exhibits. A statement must refer to facts that are relevant to proving or rebutting the other party's claim and must not contain or refer to material that is inadmissible.[162]

8.39 Unlike the Samoan SCR, which require that affidavits be served on all parties 5 days prior to the hearing, the Vanuatu rules require a sworn statement to be served at least 21 days prior to the hearing; or if the statement relates to an application, then 3 days before the hearing date of the application.[163] More importantly, no leave of the Court is required to adduce the statement as evidence. Once filed and served it automatically becomes evidence unless the Court finds it inadmissible.[164]

8.40 Parties may choose to cross-examine witnesses on their statements so long as they give 14 days notice of their intention to do so.[165] Failure to give timely notice will not automatically disentitle the party from their right to cross-examine; the Court has discretion to allow cross-examination in accordance with the principles of fairness, justice and case management.[166]

8.41 If a party intends to call an expert witness to give evidence they must notify all other parties to the proceeding and provide them with a copy of the expert's report 21 days prior to the hearing. The Court retains discretion to call experts to give evidence as it sees fit.[167]

8.42 The Court has power to summon a person to come to Court to give evidence or produce documents. Failure to do so without a lawful excuse is contempt of Court.[168]

8.43 There are also provisions detailing how evidence in Vanuatu is to be taken when required for use outside Vanuatu, and vice versa.

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[159] *Civil Procedure Rules 2002* (Vanuatu), r.12.6
[160] Ibid r.12.5
[161] Case law suggests that both magistrates and judges will examine whether the motive or credibility of the person giving evidence is in question, in order to determine the mode of adducing of the evidence – either oral or in writing (*Re Smith & Fawcett [*1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545)
[162] *Civil Procedure Rules 2002* (Vanuatu), rr11.4 – r.11.5
[163] Ibid r.11.6
[164] Ibid r.11.7
[165] Ibid r.11.7(1)-(4)
[166] Ibid r.11.7(1)-(4)
[167] Ibid r.11.12-r.11.15
[168] Ibid r.11.15-r.11.19

Question 40: Should both SCR and MCR allow for sworn statements that are filed and served on the opposing side without leave of the Court to automatically become evidence, unless the Court finds them inadmissible?

Question 41: Should the SCR and MCR provide for evidence to be given by way of affirmation as an alternative to swearing, consistent with the *Oath, Affirmations and Declarations Act 1963* Samoa)?

Question 42: What timeframe for service of evidence should be adopted in the SCR and MCR?

9. Reference for inquiry and report

9.1 A reference is where the Court refers an issue or question in dispute in a proceeding to a Registrar or to anyone that the Court refers to as a referee[169], either by request by parties or on the judge's own motion. These referees may be certain people with skills or knowledge to determine the questions which the judge does not consider can be conveniently dealt with by the Court. The judge gives directions to the referee for the conduct of the inquiry; the referee is bound to abide by the rules and files a report in the Court.

9.2 Whilst not appearing to be frequently appointed, an example of determination of issues by a referee occurred in the New South Wales case of *Marshall v Fleming.*[170] In that case, the plaintiff challenged the amount of legal costs charged by her lawyers representing her in negligence proceedings in New York, America. The lawyers sought the appointment of New York referees under UCPR (NSW) r. 20.14.[171] The judge ordered the appointment of the referee to inquire and report on questions of foreign law on the basis that the referee 'would provide a certain, and presumably final, answer about the content and application of the law of that State'.

9.3 Part XI of the SCR of Samoa sets out procedures governing references that may be made by the judges for inquiries and reports, including the subject matter of the reference and how the reference should be conducted.

9.4 Reference in any proceeding may involve further examination of documents or any scientific and local investigation, a disputed question arising wholly or partly from matters of account or any question arising in any proceeding and any other proceeding that the parties consent to.

9.5 The Registrar and a referee shall have the powers of a Judge with respect to discovery and producing documents.

9.6 The rules provide for how the report should be made. For example, it is to be in writing and is to be filed in Court and open for inspection by the parties.[172]

[169] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), rr111, 113
[170] [2013] NSWSC 566
[171] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r 20.14: (1)At any stage of the proceedings, the court may make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings
[172] *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r.114

9.7 Part XI of the SCR of Samoa does not however provide guidance as to who may become referees.

Comparable Jurisdictions

New Zealand

9.8 In New Zealand, Judges have power to make directions as to the running of a case, by way of interlocutory order, either on the judge's own motion or on the application of either party[173]. On the hearing of such an application, a commercial list judge may give any directions as the judge thinks just for the speedy and inexpensive determination of the real questions to the proceeding including the determination of any question of fact by a referee[174]. An Associate Judge may act as a referee in respect of any proceeding or any question in a proceeding[175]. There is no other reference to who may be appointed a referee.

Australia

9.9 In New South Wales provides the Court with wider powers as to when a reference can be made, in what types of proceeding and issues to be addressed by the reference, as follows:

> '(1) At any stage of the proceedings, the Court may make orders for reference to a referee appointed by the Court for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings.'

9.10 Vanuatu clearly provides the following:

> 12.7 (2) If a proceeding raises questions of a complex technical nature, the Court may by order appoint a person qualified and experienced in that field as a referee to hear and determine those questions."

9.11 The Rules in New South Wales and Vanuatu clearly set out the references the judges may order, such as any proceeding that may have a question of a complex technical nature in which the Court or a judge cannot answer alone. In addition, the Rules in Vanuatu appoint a person that is qualified and experienced in that particular expertise to inquire and report on those issues. It may be useful in Samoa's case to widen the scope of the power given to the Court and to provide some guidance as to the type of referee to be appointed.

9.12 Victoria, Australia the term used in the rules is 'special referee'. These rules do not have a specific provision which sets out who can be a referee. However, the wording is very broad that it can be construed to mean that anybody who is qualified or has sufficient expert experience in the area may be a referee.

9.13 Much like the previous jurisdictions mentioned the Courts in Victoria have the power appoint the referee and give instructions on the question they are required to answer. Furthermore, Victoria's Civil Procedure Act provides that the Courts may direct the referee to use other dispute resolution methods such as mediation, judicial resolution conference, settlement conference or a special referee conciliation conference or arbitration.

Question 43: Should the SCR be amended to widen the scope of the judges' powers to appoint a referee for an inquiry and report: i. at any stage of the proceedings similar to UCPR (NSW); and

[173] *Judicature Act 1908 (High Court Rules 2008)* (New Zealand), rr 7.43, 7.43A
[174] Ibid r.29.12(2)(n)
[175] Ibid r.26M

ii. appointing any qualified and experienced person to inquire and report to the Court on a question of complex and technical nature, similar to the CPR (VAN)?

iii. as practised in Vanuatu.

10. Reinstatement, Setting Aside and Rehearing

10.1 Part XIII of the SCR of Samoa sets out rules governing proceedings such as reinstatement, setting aside and rehearing.

10.2 Rule 139 of the SCR sets out a procedure to restore a proceeding to its original state prior to being dismissed by the Court. Emphasis is particularly made on reinstating proceedings struck out as a result of the plaintiff's non appearance.[176] To reinstate a proceeding, this rule provides that an application be made by way of an ex parte[177] motion and a notice to be served on the defendant 7 days prior to the hearing. Additionally, the Court may make any order for costs of reinstatement as it sees fit.

10.3 This provision also provides for an applicant to have a proceeding reinstated. It does not provide criteria to be considered by the Court for determination of a reinstatement.

10.4 The MCR do not contain an equivalent provision for reinstatement of proceedings after dismissal.

10.5 It is not readily apparent the extent to which reinstatements are sought in Samoa, nor the constraints on Courts and resource issues associated with such applications.

Comparable Jurisdiction

New Zealand

10.6 In New Zealand, the HCR (NZ) provide that if an order determining an application was made in the absence of the party and if an application was struck out for non appearance, a reinstatement may be made on the judge's own initiative or by the application of the party,[178] if the judge thinks it just to do so. [179]

10.7 Whereas it would appear that in Samoa, dismissed proceedings may be reinstated by ex parte applications, New Zealand rules provide for reinstatement:

i) By a Judge's own initiative; or
ii) By application by the party (not only ex parte).

Question 44: Where there has been a 'reinstatement of a proceeding struck out as a result of a non appearance', should the SCR be amended to provide more detail and clarify the grounds to be satisfied for reinstatement, including on the Judge's own initiative, as in New Zealand?

Question 45: Should the procedure for reinstatement currently contained in the SCR also be included in the MCR?

[176] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r. 139
[177] An ex parte motion is a motion made on application of one party in the absence of another party
[178] *Judicature Act 1908 (High Court Rules)* (New Zealand), r. 7.40 (4)
[179] Ibid, r 7.40 (2)

Setting Aside Judgment or Order in the Absence of the Defendant

10.8 The SCR provides that an application may be made to set aside a judgment, order and any execution in the absence of the defendant.[180] The MCR do not set out procedures for the setting aside of a judgment or an order made by the District Court. This may be to focus challenges to decisions in that Court to appeals rather than setting aside applications.

10.9 The SCR provide that an application to set aside may be made on the day the judgment was given or on notice 7 days before the new hearing.[181] Other than these procedures, there is no provision as to grounds of the application to set aside.

Comparable Jurisdictions

New Zealand

10.10 In New Zealand, where judgment has been made in circumstances where a party:

i) does not appear at the hearing of an application for summary judgment on liability, or
ii) has no defence; or
iii) when there is no cause of action that will succeed;

such judgment may be set aside or varied by the Court on any terms it thinks just, if it appears that there may have been a miscarriage of justice. [182]

Australia

In the New South Wales Court of Appeal case of *Northey v Bega Valley Shire Council*[183] the Court was of the view that mere absence of a party is insufficient by itself to justify setting aside an order. There must be some added factor that makes it unjust for the order to stand.

10.11 In Samoa, an application can be made to set aside a judgment made in the absence of the defendant.

10.12 The HCR (NZ) provide that a Court Order may be set aside if the Court considers the setting aside to be just, or if it appears that there may have been a miscarriage of justice.[184] In *Northey v Bega Valley Shire Council* (above), the NSW Courts mirrored the New Zealand approach, reasoning that mere absence is insufficient to justify the setting aside of an order.

Question 46: Should the SCR relating to the setting aside of a judgement or order made by the Court in the absence of the defendant be amended to provide more detail and clarity around whether mere absence of a party is sufficient for an order to be set aside following the New South Wales provision; or

Question 47: Should the Court take into consideration whether just terms to set aside have been established in order to establish that setting aside is in the interests of justice following the New Zealand rule? (For example, should the applicant have to justify their absence through no fault of their own before a judgment or order is set aside?)

Question 48: Should procedures for the setting aside of a judgment or an order made by the Court be included in the MCR?

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[180] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r. 140
[181] Ibid.
[182] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.12.14
[183] *Northey v Bega Valley Shire Council* [2012] NSWCA 28
[184] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.12.14

Rehearing

10.13 A Rehearing is where a matter in which a decision has already been made is heard again. Rehearing as understood from its definition means reopening the decision to review the proceeding, and if successful, removing the final order, which allows the matter to proceed to a hearing at a later stage. The SCR state that the Court shall in every proceeding have the power to order a rehearing where it considers reasonable, during which time stay proceedings[185] may be allowed, providing the opportunity to examine the application[186].

10.14 The rehearing must be sought no later than 14 days after judgment is given, unless the Court is satisfied that the application could not reasonably have been made any sooner. A notice stating the grounds for applying for a rehearing and an accompanying affidavit must be served on the opposing party no less than 3 days from the date fixed for hearing. The Registrar must retain any monies in Court until the application is heard. Also, the mere filing of an application does not equate to a stay of proceedings unless the Court has heard the application and has ordered a stay. If an order for a rehearing is made the order must be served on the opposing party and the rehearing may take place before the judge before whom the proceedings were originally heard or by any other judge. At the rehearing the Court may affirm, reserve or vary its original judgment. [187]

10.15 The MCR and SCR make no mention of any determination by the Courts whether these rehearing matters will be heard in full or limited to some of the issues in the proceeding. It is essential to set out this process at the beginning of the rehearing, so that the proceeding is restricted on the subject matter so as to conserve Court resource.

10.16 A rehearing application should generally be filed in any case which involves an issue worthy of review. For instance, an application for a rehearing may be useful where there has been a fundamental error of law and there is reason to believe that the Court will correct the mistake, if an error can be demonstrated in a rehearing application.

Comparable Jurisdictions

New Zealand

10.17 In New Zealand, the HCR (NZ) appear to provide that applications for rehearing are made by way of appeal.[188] The Court may, on application, order a stay of proceedings pending determination of an appeal.[189] This also extends to reviews of decisions made by an Associate Judge.

10.18 In New Zealand, the DCR (NZ) provide that a party may apply for a review of a decision.[190] However, this does not apply to a review of a decision to allocate a short trial where an application for summary judgment has been dismissed.[191]

10.19 In New South Wales, the UCPR (NSW)[192] provide that, on the date fixed for the rehearing proceedings to be listed before the Court, or any date to which the proceedings are

[185] To stay a proceeding is to suspend an action either permanently or temporarily discontinuing an action. Proceedings are sometimes stayed until some order of the Court shall have been complied with.
[186] *Supreme Court Rules* (Sāmoa), r.141
[187] Ibid, r. 141
[188] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.20.18
[189] Ibid, r. 20.10 (2)
[190] *District Court Rules* (New Zealand), r. 2.46
[191] Ibid, r.2.43. (7)(a)
[192] *Uniform Civil Procedure Rules* 2005 (NSW), r. 20.12

adjourned, the Court must make a determination as to whether the proceedings are to be a full rehearing or a limited rehearing.[193]

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10.20 In New Zealand, the Rules appear to provide a different approach to rehearing. It appears that any appeal made is by way of rehearing.[194] It is unclear whether these provisions extend to a review of a decision by an Associate Judge in the DCR (NZ).

Australia

10.21 In New South Wales, the Court may determine whether a rehearing is heard in full or is limited. For Samoa, it may be appropriate to define the extent of the rehearing rather than maintaining a broad scope for all matters. Consideration could be given to enabling the Court to determine at the outset before a rehearing the scope of the rehearing, and whether it is considered suitable to rehear in full or whether it should be limited to specific matters.

Question 49: Should the SCR and MCR on rehearing be amended so as to provide for the Court to determine at the outset of the rehearing:

i. whether the matter is appropriate for rehearing; and
ii. whether any rehearing should be for the entire matter or should it be limited to specific issues?

11. Proceedings Before Judgment Can Be Entered In Default and/or Ordinary Actions

11.1 In any civil proceeding there are several procedures that a party must undertake before a hearing can begin. The Court proceedings that this part considers encompass default actions that include, but are not limited to the following:

- Confession, defence and counterclaim including set off and setting down;
- Matters that resolve with judgment and matters that resolve without judgment; and
- Discontinuance.

11.2 Once a civil proceeding has commenced in either the Supreme Court or District Court, either party to the civil proceeding may engage in any of the following procedures to facilitate a speedy judgment.

Defence, Counterclaim and Setting Down

Defence

11.3 In pleadings, 'defence' is the formal contesting of the plaintiff's statement of claim.[195] A defence to a statement of claim is the formal written response of a defendant or respondent under Court rules setting out legal or factual reasons why the plaintiff should not establish or recover that which is sought in the statement of claim. The defence must be pleaded directly in response to the statement of claim.

A defence may either admit or deny the plaintiff's allegations and may also plead any additional facts in support of any affirmative case, in response to the plaintiff's claim.

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[193] Ibid,r. 20.12
[194] *Judicature Act 1908, (High Court Rules)* (New Zealand), r. 20.18
[195] CCH Macquarie, *Concise Dictionary of Modern Law* (Australia, 1988), p38

Setting Down

11.4 Setting down', on the other hand, is after a defendant files and serves on the plaintiff a statement of defence or a counterclaim, or where the Court or Registrar shall adjourn the proceedings sine die[196] until either of the parties files in the Court a request to set the proceedings down for hearing.[197]

Current Rules

Magistrates Court Rules 1971 (MCR)

11.5 Part 3 of the MCR sets out provisions relating to confessions, defence and counterclaim. A defendant in a default action who admits his liability for the whole or part of a claim; or disputes his liability for the whole or part of the claim or desires to set up a counterclaim, may within 7 days after the service of the summons on him (inclusive of the day of service), file in the Court a confession and/or a counterclaim.[198]

11.6 In relation to setting down, the MCR set out the procedure for a Registrar to set down an action for hearing. This is done by way of the defendant filing a counterclaim in the Court office. On the other hand, the plaintiff may also request that the action be set down for hearing. The Registrar shall then fix a day for the hearing of the action and shall give no less than seven days notice in writing to the parties and the action shall therefore proceed as an ordinary action[199].

Supreme Court (Civil Procedure) Rules 1980 (SCR)

11.7 Similar to the MCR, the SCR provide procedures relating to confession, defence or counterclaim. The defendant has 10 days in which to file a confession, notice of intention to defend, or a counterclaim statement as the case may be.[200]

11.8 The SCR contain procedures relating to setting down (see para 11.4 above) and set off which will be discussed in greater detail below in para 11.22. Before judgment is entered, the defendant is to file and serve on the plaintiff a statement of defence or a counterclaim. The Court or Registrar shall then adjourn the proceedings sine die until the parties file in the Court a request to set the proceedings down for hearing. The Registrar shall then fix a day for hearing of the action and give both parties no less than 14 days notice. [201]

11.9 The SCR go further to outline how a party may apply to have the matter set down, obtaining the signature of the opposing party by the party seeking to have the matter set down. If the opposing party fails to return the request form duly signed within 14 days of receipt, then the party initiating the request may apply independently to have the matter set down.[202]

[196] CCH Macquarie, *Concise Dictionary of Modern Law* – when a civil proceeding is adjourned without a day being assigned for further hearing.
[197] *Supreme Court (Civil) Procedure Rules 1980* (Sāmoa), r100
[198] Magistrate Court Rules(Sāmoa), r.15
[199] Ibid, r 18 (2)
[200] *Supreme Court (Civil Procedure) Rules* (Sāmoa), r.96. Further discussion as to confessions follows at para 17.23 under 'General Provisions'
[201] *Supreme Court Civil Procedure) Rules 1980* (Sāmoa), r.100 (1)
[202] *Supreme Court (Civil Procedures) Rules 1980* (Sāmoa), r.100 (2)

Comparable Jurisdictions

New Zealand

11.10 The HCR (NZ) provide that admission may be made on the cause of action, there may also be an admission of defence.[203]

11.11 Under the heading 'General procedure for civil claims where no other procedure is provided',[204] the DCR (NZ) set out that a defendant who wishes to respond to a notice of claim must complete and serve a response on the plaintiff within 30 working days after the date on which the plaintiff's notice of claim is served on the defendant. Further discussion as to procedures where no other rules exist is contained at para 17.23 below.

11.12 The DCR (NZ) also set out the content of the defendant's response, as follows:

- Admit the claim and immediately pay or comply with the requested relief or remedy; or
- Admit the claim but offer an alternative remedy to that requested in the notice of claim; or
- Deny the claim; or
- Partially admit and partially deny the claim.[205]
- The response must also indicate whether the defendant intends to make a counterclaim against the plaintiff and if so, a copy of the counterclaim is to be filed and attached to the defendant's response when the response is served.[206]Where the defendant denies or partially denies a claim, he or she must also:
- State the defendant's version of the facts;
- State any facts that the defendant intends to rely upon at the trial that are not stated in the notice of claim;
- Contain a signed statement verifying the truth of those facts; and
- State an address for service.[207]

Vanuatu

11.13 The CPR provide that if a defendant intends to contest a claim then he or she must file and serve a defence on the claimant within 14 days of service of the claim.[208]The rule goes further into sets out how a defence is to be structured, for instance:

i) The defence must contain a statement of the case.[209]

ii) The defendant must not deny the claimant's claim generally, but must deal with each fact in the claim;[210]

iii) If the defendant does not agree with a fact that a plaintiff has stated in the claim, the defendant must file and serve a defence that:

- Denies the fact; and
- States what the defendant alleges happened.[211]

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[203] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.15.6

[204] Ibid, r.2.12.1

[205] *District Court Rules 2009* (New Zealand), r.2.13.1

[206] Ibid, r.2.13.2

[207] Ibid, r.2.13.3

[208] *Civil Procedure Rules 2002* (Vanuatu), r.4.5(1)

[209] Ibid, r.4.5(2)

[210] Ibid, r.4.5(3)

[211] Ibid, r.4.5(4)

11.14 If the defendant does not deny a particular fact, the defendant is taken to have agreed with it.[212]

11.15 If the defendant does not know a particular fact and cannot reasonably find out about it, the defendant must say so in the defence.[213]

Comparison of jurisdictions

11.16 It should be noted that civil procedures in other jurisdictions have moved away from specifying individual rules governing confession, defence and/or counterclaim. Vanuatu refers to such rules generally as 'statement of the case', which includes rules that govern a confession and/or defence. The DCR (NZ) refer to the rule as general procedure for civil claims where no other procedure is provided, which includes all rules as to confession and/or defence. The New Zealand Supreme Court Rules provide under the main heading, 'Commencement of proceedings and filing of documents' a subpart which focuses on the requirements for a statement of defence and filing.

11.17 In Samoa, some consideration may be given to the usefulness of having a general heading whereby the requirement of each pleading (including defence, counterclaim) is detailed in the requirements, with filing and service similar to New Zealand and Vanuatu, rather than just one provision.

11.18 Both the MCR and SCR contain similar provisions regarding a confession, defence or setting down. However, both rules differ as to timeframes for filing and serving of applications after a notice of claim is received from the plaintiff. The MCR specify 7 days inclusive of the day of service of the summons, and the SCR stipulate 10 days.

11.19 Vanuatu provides 14 days in which to file and serve a defence and/or counterclaim. New Zealand provides 30 working days in which to file and serve a defence, confession and/or counterclaim. There are no provisions in the MCR and SCR of Samoa relating to the form which a confession, defence and/or counterclaim should take.

Question 50: Should the SCR and MCR amend the timeframe for filing and serving a confession/defence and/or to the following timeframes:

i. 14 working days (as practised in Vanuatu); or
ii. 30 working days (as practised in New Zealand).

Question 51: Should the SCR and MCR of Samoa include specific provisions relating to the form and content of a confession, or defence?

Counterclaim and Set Off

11.20 A counterclaim is a substantive claim made by the defendant against the plaintiff capable of grounding an independent action, but dealt with for the sake of convenience in the proceedings initiated by the plaintiff.[214]

11.21 A set off is a procedure that allows one party to apply debt owed to him or her by another party, to discharge all or part of a debt that he or she owes to the other party. [215]

[212] Ibid, r.4.5(5)
[213] Ibid, r.4.5(6)
[214] CCH Macquarie, *Concise Dictionary of Modern Law* (Australia, 1988), p31

11.22 A set off may be applicable in a counterclaim. In other words, where a defendant has an ancillary cause of action against the plaintiff, he or she may be able to claim that the plaintiff is indebted to the defendant and that any amount owing to the plaintiff has to be reduced accordingly. If both claims by the plaintiff and defendant are due and payable at the commencement of an action, and the two claims cannot be decided separately as to the payment of the debt, this will give rise to the defence of 'set off'.[216] This is illustrated in the case of *Grant v NZMC Ltd* [217] where the judgment indicated that the defence of set off means that the parties must be mutually indebted to each other in the same capacity.

11.23 The MCR set out that a defendant can file a counterclaim within seven days of receipt of a summons.[218] No form of counterclaim is provided nor guidance as to whether the filing of a counterclaim requires a statement of defence to be attached to it. Similarly there are no rules as to the form and a content of a set off as part of a defence.

11.24 The SCR provide that a defendant who wishes to make a counterclaim may within 10 days after service of the summons file in Court a statement of counterclaim.[219] This rule is subject to the *Government Proceedings Act 1974.*[220] The SCR provide that:

11.25 Rule 96: Subject to the provisions of section 11(2) of the Government Proceedings Act 1974, a defendant in an action who admits his liability for the whole or party of the claim, or who disputes his liability for the whole or part of the claim or who desires to set up a counterclaim, may, within 10 days after the service of the summons on him, inclusive of the day of service, file in the Court office a confession in form 18 or 19 or a statement of defence, or a statement of counterclaim, as the case may be.

11.26 A plaintiff or other person made defendant under a counterclaim may pay money into Court as if he or she were the defendant to an action.[221] Rule 96 of the SCR shall then apply with the necessary modifications.

11.27 The SCR provide that any defendant may by way of defence set off any claim or demand that they may have against the plaintiff and in the same capacity as the plaintiff has sued that defendant.[222]

11.28 There are no provisions in the SCR as to the required form and process of a statement of counterclaim and set off.

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[215] Atkinson, J and Olischlager, S, *An Introduction to Civil Procedure Act 2005: Uniform Civil Procedure Rules 2005,* August 2005, New South Wales http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/vwFiles/Info%20paper_with%20Index_august.doc/$file/Info%20paper_with%20Index_august.doc (Accessed 29/07/2013)

[216] Andrew Beck, *Principles of Civil Procedure* (3rd Ed, 2012) p139

[217] [1989] 1 NZLR 8 (CA)

[218] *Magistrate Court Rules 1971* (Sāmoa), , r.15

[219] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.96

[220] *Government Proceedings Act* 1974, (Sāmoa) , s 11- states that any civil proceeding instituted against the Government is to be addressed for service and served to the Attorney General. Any statement of defence or notice of intention to defend such writ or summons must be filed not less than 28 days from service of statement of claim

[221] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.107

[222] *Supreme Court (Civil Procedure) Rules 1980*(Sāmoa), r.108

Comparable Jurisdictions

New Zealand

11.29 The DCR (NZ) require that a defendant files a notice of counterclaim within 30 working days after the date on which the plaintiff's notice of claim is served on the defendant.[223] In matters of a set off, both the HCR (NZ) and DCR (NZ) restrict the right of a defendant to set off if the proceeding is against and/or filed by the Crown for the recovery of taxes, duties or penalties.[224]

Australia

11.30 The rules in Victoria state that a counterclaim may be pleaded with a defence by the defendant in the same document. A defendant may bring a counterclaim against another person and the defendant and seek to join them to the proceedings if they have not been joined already, if there is a common question of law or fact, a relief in claims arises through a series of transaction(s) or the Court grants leave.[225]

11.31 Furthermore, the Court has the discretion to refuse a counterclaim if it causes a delay, embarrasses the trial of the plaintiff, prejudices a party or cannot conveniently be tried with the claim. The Court can order a separate trial, or it can exclude a counterclaim, or strike out any counterclaim made without prejudice.

Vanuatu

11.32 The CPR (VAN) require the defendant to include details of counterclaim in the defence rather than filing it as a separate proceeding. It must be filed and served within 14 days. A counterclaim must contain a statement of the case and that part of the defence that deals with the counterclaim must:

i) Be shown clearly as the counterclaim; and
ii) Set out details of the counterclaim as if it were the claim.[226]

11.33 These rules in Vanuatu, provide for a situation where a defendant being sued by a plaintiff wishes to make a counterclaim against the plaintiff and another person, asserting that they are both liable under counterclaim, provided that the relief sought by the defendant is related to the original subject matter of the proceeding.

11.34 The defendant must then serve the defence, counterclaim and the claim on the other party and within 14 days on the claimant. The other person becomes a party to the proceeding upon being served with the defence and the counterclaim.[227]

11.35 In Samoa's DCR, a counterclaim is to be filed and served within 7 days inclusive of the day when the summons was served. There is no defence of set off in the MCR. The SCR allow 10 days for filing and service of a counterclaim. In matters where the Attorney General is the plaintiff, the SCR also provide no less than 28 days for the defendant to file and serve a counterclaim, defence or notice of intention to defend.

[223] *District Court Rules 2009* (New Zealand), r.2.27.1
[224] *High Court Rules 1908* (New Zealand), r.5.61 (1)
[225] *Supreme Court (General Civil Procedure) Rules* (Victoria, Australia) 2005, r.9
[226] *Civil Procedure Rules 2002* (Vanuatu), r.4.8
[227] *Civil Procedure Rules 2002* (Vanuatu), rr 4.9 (2), 4.9(3)

Question 52: Should the SCR and MCR adopt an extended timeframe to file and serve a counterclaim, as follows:

i. 30 working days (as practised in NZ); or
ii. 14 working days (as practised in Vanuatu).

Question 53: Should there be a defence of set off or should it be removed from the SCR?

Question 54: Should set off be restricted to private civil proceedings as practised in NZ?

Question 55: Should the defence of set off be available in the District Court?

Question 56: Should the SCR and MCR allow for a third party counterclaim as practised in Vanuatu?

12. Matters that Resolve with Judgment

Judgment on confession (Samoa)

12.1 In the MCR, the effect of a defendant confessing to the whole claim and not serving a counterclaim before a judgment is entered (be it an ordinary or a default action) may result in a Magistrate, *Fa'amasino Fesoasoani* or Registrar, at the written request of the plaintiff, entering judgment on confession accordingly.[228] This also applies in the Supreme Court.[229]

12.2 Where a defendant who confesses to part of a claim makes a payment into Court and does not intend to defend or serve a counterclaim, the plaintiff can consider the following options:

- Have judgment entered for the full amount or part of the claim;[230] or
- Accept the amount paid into Court to satisfy the claim;[231] or
- Have the case set down for hearing.[232]

Comparable Jurisdiction

New Zealand

12.3 In New Zealand, the HCR provide that if a party admits facts (in the party's pleadings or otherwise), any other party to the proceeding may apply to the Court for any judgment or order that the party may be entitled to, upon those admissions, without waiting for the determination of any other question between the parties, and the Court may make any judgment or order as it considers just.[233]

12.4 Samoa and New Zealand differ on the rules in relation who can apply for a judgment on confession. Whereas Samoa provides that the plaintiff may enter judgment on confession, New Zealand allows for any other party to the proceeding to make application.

Question 57: Is it relevant in Samoa for any other party (and not only the plaintiff, for example a third party) to the proceeding to apply for judgment on confession?

[228] *Magistrates Court Rules 1971* (Sāmoa), r.17.
[229] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.98
[230] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.99 (1); *Magistrates Court Rules 1971* (Sāmoa), r.18
[231] Ibid, r.99 (1) (b); r.18
[232] Ibid, r.99 (1) (c); r.18 (1) (c)
[233] *Judicature Act 1908 (High Court Rules)* (New Zealand), r. 15.15

Default judgment in the Supreme Court and District Court (Samoa)

12.5 The SCR provide for judgment in the absence of a defence. A plaintiff may apply for judgment to be entered if the defendant does not file a counterclaim, defence or confession or submit payment into Court within 10 days of service of summons.[234]

12.6 This is also the case where in any action, the relief claimed is the payment of monies and the defendant has not filed and served a statement of defence. The defendant may pay into the Court the whole amount of the claim and costs stated on the summons. The Court may then award costs to the plaintiff.[235]

12.7 Similar provisions are contained in the MCR where for judgment in default of defence, counterclaim, confession or payment into court, may be entered by a Magistrate or Fa'amasino Fesoasoani or the Registrar at the request of the plaintiff.[236]

Comparable Jurisdictions

New Zealand

12.8 In New Zealand, the DCR (NZ) provide that a plaintiff may apply immediately for judgment by default if the response by the defendant is not served within the time allowed. A defendant making a counterclaim may apply for judgment by default if the plaintiff does not serve a response within the time allowed.[237]

12.9 In Samoa, the SCR appear to mirror the above New Zealand rule.[238]

Australia

12.10 The rules in Victoria (Australia) state that the Court has discretion to set aside or vary any judgment entered.[239]

Summary Judgment

12.11 A summary judgment is a discretionary verdict made in favour of the plaintiff where there is evidence of the facts upon which the claim is based and the defendant appears to have no real defence to the plaintiff's claim.

Comparable Jurisdictions

New Zealand

12.12 For example in New Zealand, the HCR (NZ) provide that the Court may enter judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.[240]

Australia

12.13 In Victoria, the SCGCPR (VIC) provide for a summary judgment application by the plaintiff. This rule provides that the plaintiff may at any time apply to the Court for

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[234] *Supreme Court (Civil Procedures) Rules 1980* (Sāmoa), r.97
[235] *Supreme Court (Civil Procedures) Rules 1980* (Sāmoa), r.101
[236] Default judgment in the District Court was discussed in *Civil Procedure Rules: Supreme Court (Civil Procedure) Rules 1980 and Magistrates' Court Rules 1971 – Issues Paper One (IP/10)*
[237] District Court Rules (New Zealand) r.2.39.1
[238] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.97
[239] *Supreme Court (General Civil Procedure) Rules 2005*, (Victoria, Australia), rr. 21.07, 22.15
[240] *Judicature Act 1908 (High Court Rules)* (New Zealand), r.12.2

judgment against the defendant on the basis that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim or no defence except as to the amount of the claim.[241]

12.14 In Samoa, the SCR contain no specific provision similar to that of the summary judgment rules in New Zealand and Victoria. This is a useful procedural device that the Samoan courts may consider including in the rules as it provides a speedy method of resolving civil disputes where one of the parties is not likely to succeed. It is a rule that can minimise frivolous defences which are unlikely to succeed.

12.15 The Commission in 2012 produced its Issues Paper One in relation to the Civil Procedure Rules (Issues Paper One IP/10) where the process of summary judgment was discussed. In this case, a plaintiff may use the procedure of summary judgment to file an application for judgment against the defendant on the basis that the defendant has revealed no defence to a claim or no cause of action.[242]The review of the *District Courts Act 1969* has also recommended that the District Court be a court of summary jurisdiction so that procedures for summary judgment may be available to the public. The Commission is therefore focussing consideration on whether matters as set out in Part IX of the SCR may be dealt with more appropriately and expediently through summary judgment.

Question 58: Would it be appropriate for a similar rule to be adopted by the Courts in Samoa?

Question 59: Should all matters discussed above be amended to proceed by way of summary judgment irrespective of the type of relief sought i.e. monetary or land/chattels?

13. Matters that Resolve without Judgment in the Supreme Court

13.1 Matters may resolve without the need for judgment. For instance, if a defendant has paid monies into Court, this may be accepted by the plaintiff without judgment being entered. Part IX of Samoa's SCR provides different payment into the Court mechanisms to satisfy different actions or claims:

i) Delivery of land or chattels and compensation for the detention or damage thereof;[243]
ii) Payment into Court with or without denial of liability;[244]
iii) Acceptance of monies paid into Court.[245]

[241] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r. 22.02
[242] Sāmoa Law Reform Commission, *Civil Procedure Rules: Supreme Court (Civil Procedure) Rules 1980 and Magistrates' Court Rules 1971 – Issues Paper One (IP/10)*, Report 10 (2012)
[243] *Supreme Court (Civil Procedures) Rules 1980* (Sāmoa), r.102
[244] *Supreme Court (Civil Procedures) Rules 1980* (Sāmoa), r.103
[245] *Supreme Court (Civil Procedures) Rules 1980* (Sāmoa), r.104 provides that where the defendant pays an amount less than the claim in satisfaction of the plaintiff's claim, the plaintiff may file and serve on the defendant a notice of acceptance within 3 days of the offer being made. Upon receipt of the notice of acceptance by the Registrar, the action shall be stayed

Comparable Jurisdiction

New Zealand

13.2 New Zealand does not appear to have specific Court rules relating to the three different methods of payment into Court to satisfy actions or claim, however the Court considers such generic methods of resolution prior to judgment. For example, settlement negotiation without prejudice basis resulting in settlement, payment into Court and offers of compromise as discussed in paragraph 13.3 below. These processes result in resolution prior to hearing and associated Orders.

Offer of Compromise and Calderbank Letters

13.3 In broad terms, these are two significant devices to promote early dispute resolution, by invoking a cost consequence against a party who unreasonably fails to accept an offer of settlement. [246] If the offer is unreasonably rejected, the Court rules may result in costs being awarded against that party from the date the offer was made, if the judgment is for a sum less than the offer. It therefore provides relief to the party who has incurred costs unnecessarily because of the other party's failure to accept the offer.[247] This provision promotes proper consideration of settlement at the time it is made and may result in fewer matters reaching trial.

13.4 An offer of compromise is a formal offer which, if a matter proceeds to judgment and the amount awarded is less than the offer (even by a small amount), the party who made the offer may seek a costs order against the party who rejected it. It is a procedural device that applies a simple mandatory formula compelling the party who fails to accept the offer of compromise to pay the other party's costs. This is achieved by court rules, for example, as in Order 26 of the SCGCPR (VIC).[248]

13.5 The purpose of an offer of compromise is to encourage the parties to realistically assess the strengths and weaknesses of the matter before it reaches the hearing, with additional costs risks and benefits in the event that an offer is rejected and the judgment is for less than the offer.

13.6 An alternative offer of settlement, known as a 'Calderbank offer'[249] leaves the question of costs to the discretion of the Court[250] in instances where an offer is unreasonably rejected. This form of offer is not usually contained in the Court rules, but has evolved according to common law principles, as an alternative to the formal offer. This is to enable and encourage negotiation and resolution offers of a realistic kind. The Court may use its discretion to analyse whether the offer in fact represented some form of compromise by the paying party and whether the rejection by the offeree was unreasonable.[251] This may involve some analysis by the Court of the reasonableness of the offer, even if it is greater than the amount finally awarded by the Court, rather than applying the mechanical formula of the offer of compromise contained in the rules, as discussed in the preceding paragraph.

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[246] Judicial Commission of New South Wales, 2013, *Civil Trial Bench Book-Calderbank and Offers of Compromise,* New South Wales, http://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html (Accessed 26th August, 2014)
[247] Ibid
[248] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r. 26.08
[249] *Calderbank v Calderbank* [1975] 3 All ER 333
[250] Judicial Commission of New South Wales, 2013, *Civil Trial Bench Book-Calderbank and Offers of Compromise,* New South Wales, http://www.judcom.nsw.gov.au/publications/benchbks/civil/calderbank_letters.html (Accessed 26th August, 2014)
[251] Ibid

Current Rules (Samoa)

13.7 There are currently no rules in the SCR or MCR regarding formal offers of settlement. Some consideration may be given to other jurisdictions' provisions and approaches to promoting resolution by the making and acceptance of offers.

Comparable Jurisdictions

New Zealand

13.8 The DCR provide for written without prejudice offers, except as to costs.[252] A party to a proceeding may at any time make to any other party to the proceeding a written offer that—(a) is expressly stated to be without prejudice except as to costs; and (b) relates to an issue in the proceeding. The fact that the offer has been made must not be communicated to the Court until the question of costs is to be decided.

Australia, Solomon Islands and United Kingdom

13.9 Most Australian states, including Queensland[253], Western Australia[254], Tasmania[255] New South Wales[256] and Victoria[257] contain provisions for formal offers between the parties. The ACT formalises the Common Law rules relating to Calderbank offers only as they relate to disputes as to costs.[258]

13.10 The procedures in Australian states and territories otherwise largely follow a similar pattern. For example, the procedure under the Victorian Supreme Court Rules is as follows[259]:

- At any time before the Court makes its determination a party may serve the other party with an offer of compromise, in writing, being an amount for which they would be prepared to settle the litigation;

- The offer is made "without prejudice, save as to costs" and is not filed or otherwise brought to the attention of the Court;[260]

- The offer must be open for at least 14 days (unless there is a mistake in making the offer), however the offer lapses when a Court makes its determination;

- Within 3 days of receiving the offer, the party must acknowledge receipt of the offer;

- In the event that the opponent accepts the offer, the matter is resolved and the defendant will pay the other party's costs to the date of the offer;

- If the party rejects the offer, and the Court's determination is the same as the offer, or is less favourable for the rejecting party, the offer may be produced to

[252] *District Court Rules 2009* (New Zealand), r 4.10
[253] *Uniform Civil Procedure Rules 1999* (Queensland, Australia) ,Part 5
[254] *Rules of the Supreme Court, 1971* (Western Australia), Order 24A
[255] *Supreme Court Rules 2000* (Tasmania, Australia), Part 9
[256] *Uniform Civil Procedure Rules, 2005* (New South Wales),Division 4
[257] *Supreme Court (General Civil Procedure) Rules*(Victoria, Australia) 2005, r.26
[258] *Court Procedure Rules*, 2006 (Australian Capital Territory) - REG 1814
[259] *Supreme Court (General Civil Procedure) Rules* (Victoria, Australia), r.26
[260] *Uniform Civil Procedure Rules 1999* (Queensland, Australia) r.357

the Court, and the Court is then able to award costs to the successful party on an indemnity basis[261] from the date that the offer was made;

- Strict rules operate to ensure that an offer of compromise is not filed or otherwise brought to the attention of the Court until the matter has been determined by the Court, in order to avoid any perception of bias.

13.11 Comparing the New Zealand and the Australian rules, both jurisdictions recognise *Calderbank* offers as a way for the Court to exercise its discretion to make costs orders where real efforts to compromise a matter by one party are rejected unreasonably by the other. However, in Australia, the rules around offers of compromise also provide for the more formulaic application of automatic costs consequences where a formal offer of compromise is rejected and the judgment amount is less favourable, or equal to the offer, regardless of the difference. In this way, even if the rejection could be considered reasonable, a costs consequence will follow. [262] The Australian rule may result in fewer matters proceeding to trial.

13.12 In the Victorian Court of Appeal case of *Hazledene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*, [263]there is an informative discussion about the difference between these two offer mechanisms and the considerations to be applied by the Court in determining whether, in the *Calderbank* context, an offer represented a real compromise, and the rejection of it was unreasonable. In that case, an offer 3 weeks prior to hearing to settle a worker's injury claim for a sum that was ultimately more favourable to the worker than the Court finally awarded was considered by the Court to have been a real compromise of the employer's prospects of success, and that its rejection by the worker was unreasonable. The worker was ordered to pay the employer's costs on the most punitive basis of indemnity costs.

13.13 The United Kingdom Civil Procedure Rules set out a procedure for the making of offers of compromise, which are more commonly called "Part 36 offers".[264]

13.14 There may be some cases in which an offer of compromise is unable to reflect or resolve the issues in dispute: for instance, where a non monetary order is being sought. The Victorian Rules and those in other Australian States are silent as to the types of cases in which this procedure can be used. However there is a presumption that an offer of compromise will not be effective where the claim is not for the recovery of debt or damages, or where a monetary amount was not in issue in the proceedings. In these cases, where the offer is rejected, indemnity costs do not follow as of course unless the Court is convinced that offer made was a genuine compromise on behalf of the offeror and was unreasonably rejected by the offeree.

13.15 In other jurisdictions, formal offers of compromise may only be made with respect to claims of a certain type. For example, the Court Rules of the Solomon Islands codifies the common law principles of a Calderbank offer only in relation to collisions between ships.[265]

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[261] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r.63.30.1
Indemnity costs are the most generous form of costs being incurred by the successful party, unless the party liable to pay them can establish that they were unreasonably incurred. These are to be compared to 'standard costs' which are a party's costs 'reasonably incurred and of a reasonably amount', ibid r 63.30
[262] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r.26.08
[263] *Hazledene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* 2005 VSCA 298
[264] *UK Civil Procedure Rules*, *1998*
[265] *Solomon Islands Courts (Civil Procedure) Rules 2007*, r.15.4.16*,*

13.16 This procedure is not currently available in Samoa; therefore both the MCR and SCR are silent on such an alternative. The advantage of having this alternative option would be to provide parties with an incentive to settle out of Court. Furthermore, parties will seriously consider what realistic options they may have and the potential consequences of their continuation of a claim to judgment on their part.

13.17 Further analysis may be appropriate as to the mechanisms and incentives behind any contemplated resolution initiatives either in this or subsequent reviews. This should include consideration of any costs consequences of such mechanisms, such as offers of compromise. However, consideration should also be given to the likely impact that any increased focus on costs may have on the way litigation is handled in future, especially when compared to the ways in which costs orders may currently be made in litigation.

Question 60: Offer of Compromise – would this alternative procedure be useful in Samoa, and if so, in what situations?

Question 61: *Calderbank Offers* – would the Court consider exercising its discretion to make costs orders against a party unreasonably rejecting an offer, where the party making the offer can demonstrates that they have made a real compromise?

Question 62: Would either or both of these costs measures be considered appropriate in the Samoan context?

14. Discontinuance

14.1 Both the MCR[266] and SCR[267] provide for discontinuance. The plaintiff may, at any time before trial discontinue the action, either wholly or as to any cause of action by filing a memorandum of discontinuance that discontinues an action, provides for a copy of that memorandum to be served on the defendant. This empowers the Court to award costs to the defendant.

The effect of discontinuance on subsequent proceedings

14.2 The MCR and the SCR provide that discontinuance of an action will not constitute a defence to any subsequent proceedings provided the costs of the previous action awarded have been paid.[268] However, there is no provision preventing the plaintiff from recommencing the same proceeding. There are no rules relating to costs incurred by the defendant that may prevent a plaintiff from recommencing the proceedings.

Comparable Jurisdiction

New Zealand

14.3 The DCR (NZ) allow a plaintiff to discontinue proceedings similar to the SCR of Samoa. However, the DCR contain comprehensive provisions relating to costs as a result of the discontinuance. In addition, the Court has power to set aside the discontinuance in certain circumstances. The plaintiff must seek leave to discontinue if the defendant has given an undertaking to the Court. If a part payment has been made then the consent of the

[266] *Magistrate Court Rules* (Sāmoa), r. 20
[267] *Supreme Court (Civil Procedure Rules 1980* (Sāmoa), , r. 109
[268] *Magistrates Court Rules 1971*, (Sāmoa), r.21, *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.110

defendant is required for the discontinuance. There are also various consent requirements for proceedings involving multiple plaintiffs and/or defendants.[269]

14.4 Both the HCR and DCR provide that a plaintiff who discontinues a proceeding (*proceeding A*) against a defendant may not commence another proceeding (*proceeding B*) against the defendant if proceeding B arises out of facts that are the same or substantially the same as those relating to proceeding A, unless the plaintiff has paid any costs ordered to be paid to the defendant under rule 15.23 relating to proceeding A.[270]

14.5 As identified in the current Samoan rules, there are two provisions in the SCR for discontinuance of an action either wholly, or as to any part of a cause of action. In addition, discontinuance should not be used as a defence to bar subsequent proceedings. The HCR (NZ) that deal with discontinuance contain comprehensive provisions concerning the right to discontinue proceedings, the effect of discontinuance, the Court's power to set aside a discontinuance and dealing with costs.

14.6 Consideration may be given to whether the rules in Samoa should be expanded in relation to discontinuance.

Question 63: Should the SCR and MCR adopt similar provisions relating to discontinuance as the HCR (NZ)?

15. Interpleader

Definition

15.1 An Interpleader is a procedure by which a person, faced with competing claims in respect of personal property (which the person does not claim as their own), can protect themselves from the uncertainty and expense of separate legal proceedings with each claimant by applying to the Court to compel the claimants to settle their entitlements to the disputed property as between themselves.[271]

15.2 Disputed property means any debt or other personal property in respect of which a stakeholder is being sued, or expects to be sued, by two or more persons in proceedings before a Court.

Interpleader procedure in Samoa

15.3 In Samoa, the DCA, the MCR and SCR all deal with interpleader. However, the procedure itself and its purpose are not clearly defined in any of the above Rules or Acts. Reading the Rules or Acts alone may not assist a lawyer to understand the use of such a procedure.

15.4 The DCA defines an Interpleader as follows: 'Where a person is under a liability for any debt or other cause of action, money, or chattels for or in respect of which he is or expects to be sued by 2 or more persons making adverse claims thereto, he may, if the subject-matter does not exceed in value the sum of $1,000 apply for relief by way of interpleader'.[272] The District Court Amendment in 1992-1993, No 11[273] was changed by omitting the term '$1,000', and substituting the term '$10,000'. The District Court has

[269] *District Court Rules 2009* (New Zealand), r.12.20 – r. 12.21
[270] *District Court Rules 2009* (New Zealand), r.12.20 *and Judicature (High Court Rules) Amendment Act 2008* r.15.24
[271] *Ritchie's* at [r 43.1] ff and see *Australian Customer Target Information Co Pty Ltd v Cabool Holdings Pty Ltd* [2003] NSWSC 753 at [9]–[10].
[272] *District Courts Act 1969* (Sāmoa), s. 54
[273] *District Court Amendment Act 1992-93, No 11*, (Sāmoa), s12

power to award equitable remedies.[274] There are no specific rules for interpleader proceedings in the District Courts. Therefore, a third party holding property claimed by others could seek interpleader relief in a District Court, provided the property falls within the Court's jurisdiction.

15.5 Part XV of the SCR deals with interpleader.[275] The procedure for obtaining relief by interpleader in the Supreme Court is quite complex. The basis for an application for relief by interpleader is that a person is 'under a liability for any debt or other cause of action, money, or chattels for or in respect of which he is or expects to be sued by two or more persons making adverse claims thereto[276].

15.6 A person's application for interpleader relief must be supported by an affidavit which states that the applicant fulfils the following criteria:

i) has no ownership claim to the personal property;
ii) has been or expects to be sued;
iii) is not colluding with any claimant; and
iv) is willing to bring the property into Court or otherwise dispose of it as the Court directs.[277] The mere grounds that the claimants' rights to the property do not derive from a common source do not of themselves disentitle an applicant to relief.

15.7 If an interpleader applicant is the defendant in an action, the Registrar issues a summons to the property claimants, then the Registrar notifies the plaintiff party and the action is adjourned until the conclusion of the interpleader proceeding. If the applicant is not involved in an action, the Registrar enters the proceeding in the plaint-book and issues summons to the property claimants.[278]

15.8 An interpleader summons must be served not less than 10 days before the hearing of the matter and may be served on anyone at the Judge's direction.[279]

15.9 The Judge may direct the applicant to bring the property into Court or otherwise dispose of it as the Judge sees fit.

15.10 A claimant must file, within 10 days of receiving the summons, either a notice that states he or she makes no claim to the property or particulars concerning the grounds of his or her property claim. The Judge may decide to hear the matter even if the claimant does not file particulars.[280]

15.11 The First Schedule to the MCR specifies only the Court fee payable to the Registrar for an interpleader summons. Other than this, the MCR do not contain procedures for interpleader proceedings.

[274] *District Courts Act 196* (Sāmoa), s. 28
[275] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) rr. 158 - 168
[276] Ibid r. 158
[277] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r. 159
[278] Ibid r. 161
[279] Ibid r. 162
[280] Ibid r. 164

Comparable Jurisdictions

New Zealand, Vanuatu and New South Wales

15.12 Similar to Samoa, the basic procedure for obtaining interpleader relief is similar to the procedure in the superior courts of New Zealand, Vanuatu and New South Wales.[281] Also, interpleader relief is available to persons who hold property that may, or may not be the subject of an existing civil action.[282]

15.13 To support an application for interpleader relief in these three jurisdictions, an applicant must;

a. State that he or she does not claim to own the property;
b. Identify those who do claim ownership;
c. Affirm that he or she is not colluding with any claimant;
d. State that he is willing to dispose of the property in any manner the Court decides; and
e. Ask the Court to determine who has rights to the property. The same applies in Samoa.[283]

15.14 Furthermore, Samoa's requirements for an interpleader proceeding initiated by Court officers or in enforcement matters are noted separately in the rules, as is also the case in New Zealand and New South Wales.[284] Although the grounds and basic procedure for obtaining interpleader relief in Samoa and the other jurisdictions are essentially identical, the applicable rules are different in terms of the level of detail and writing style. For example, New Zealand and New South Wales include definitions for key terms used in the interpleader rules, whereas Samoa and Vanuatu do not.[285]

15.15 Also, all three foreign jurisdictions provide more specific guidance as to how an interpleader proceeding is initiated within an existing civil dispute.[286]

15.16 As a final example of detail and style differences, Vanuatu has only one interpleader rule which is written in relatively plain language.[287]

Question 64: Are Samoa's procedures for obtaining relief by interpleader a) during the trial of a civil action; b) after judgment; and c) otherwise, accurately and clearly described in the SCR? If not, how should the rules is modified?

Question 65: Should procedures for interpleader relief similar to those in the SCR be included in the MCR?

[281] *District Court Rules 2009* (New Zealand) r. 3.36 *Civil Procedure Rules 2002* (Vanuatu), r 16.1; *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), Part 43
[282] *High Court Rules 2008* (New Zealand), r. 4.58(1); *Civil Procedure Rules 2002* (Vanuatu), r. 16.23(1); *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r. 43.2 (1)(2)
[283] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r. 159; *High Court Rules 2008* (New Zealand), r. 4.60; *Civil Procedure Rules 2002* (Vanuatu), r 16.23(2); *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r. 43.2(3)
[284] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) rr 166-168; *High Court Rules 2008* (New Zealand), r. 4.58(2)(3); *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), rr 43.3-43.6; *District Court Rules 2009* (New Zealand) r5 15.93-15.105
[285] *District Court Rules 2009* (New Zealand), r. 3.36.1; *High Court Rules 2008* (New Zealand), r. 4.57; *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r.43.1
[286] *High Court Rules 2008* (New Zealand), r. 4.59; *Civil Procedure Rules 2002* (Vanuatu), r. 16.23(4); *Uniform Civil Procedure Rules 2005* (New South Wales, Australia), r. 43.2(2)
[287] *Civil Procedure Rules 2002* (Vanuatu),r. 16.23

16. Absconding Debtors

Provisions in the MCR and SCR of Samoa

16.1 An 'Absconding Debtor' is a person who owes money to another person and who runs away from his creditors or goes into hiding so he or she cannot be found.[288]

16.2 Both the SCR and the MCR provide procedures for the arrest of debtors prior to final judgment if the plaintiff can prove to the satisfaction of the Court that the cause of action is good, meaning that there is a probability that the defendant will leave Samoa and if the defendant were to leave, the plaintiff would be materially prejudiced in pursuing their action. If the defendant fails to give security to the satisfaction of the Court that he or she will not leave Samoa then the defendant may be imprisoned for a period not exceeding three months. Security for the purposes of this provision is in monetary form, either in the form of a payment, or bond, with one or two securities in the like amount.[289] Unlike the SCR, the MCR further provides that any such application should be supported by affidavit.

16.3 An exception exists in the SCR, where if the action is for a penalty and the plaintiff is the government, there is no requirement to prove that the absence of the defendant would 'materially prejudice'" the case for the government. In addition, the defendant must provide security in the full amount of the penalty. Failure to provide such security will lead to imprisonment.[290]

Comparable Jurisdictions

New Zealand

16.4 The HCR (NZ) provide for the arrest of an absconding the debtor. There it states that:

i) The plaintiff may make an application without notice for an order to arrest and imprison a defendant under *section 55* of the Act.

ii) The defendant may at any time before or after arrest apply to the Court to rescind or vary the order or to be discharged from custody, or for other relief.

iii) The Court may make any order that is just on an application under sub clause (2).[291]

Australia

16.5 In Western Australia, the *Restraint of Debtors Act* makes provision for and in respect of the protection of creditors in certain circumstances[292]. The Australian High Court Rules contain a provision that empower the Court to arrest defendants who might leave the jurisdiction, but only in proceedings where the defendant is charged with contempt of Court.[293]

16.6 Based on the rules identified for absconding debtors, Samoa sets out a formula or criteria[294] to arrest an absconding debtor. Western Australia mirrors the criteria that Samoa provides, but does not provide for the application to be ex parte or set out a power for the defendant to rescind or vary the order. It does however set out a minimum amount for the debt.

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[288] Black's Law Dictionary-2nd Edition http://thelawdictionary.org

[289] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) rr. 184- 186 and *Magistrates Court Rules 1971,* (Sāmoa), r.26 (1).

[290] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r. 186

[291] *Judicature Act 1908 (No 89) High Court Rules (*New Zealand) rr.55 (2) and (3)

[292] *Restraint of Debtors Act*, Western Australia 1984

[293] *High Court Rules 2004* (Australia) r. 11.02.3

[294] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa). r. 184

16.7 The HCR (NZ) provide for the arrest of absconding debtors, however this appears to be very broad. Application can be made ex parte but there do not appear to be established criteria for the arrest of debtors. A defendant on the other hand has the right to rescind or vary the order or to be discharged from custody if the Court considers just.[295]

Discussion

16.8 Article 11 of the *International Covenant on Civil and Political Rights* states, 'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. [296]Samoa acceded to this International Covenant on 15 February 2008. It is important to consider whether these existing provisions in Samoa are consistent with international human rights and whether Samoa should repeal these provisions.

16.9 The SCR provision on absconding debtor provides for the Court to order the arrest and imprisonment of a defendant debtor where there is probable cause that the defendant debtor will flee the country and prejudice the plaintiff. As compared to this, Article 11 of the ICCPR Convention expresses that no one is to be imprisoned merely because of their inability to fulfil a contractual obligation. These two provisions relating to imprisonment of a debtor may appear to be inconsistent, dependent (among other possible factors) on whether a debtor is considered to be under a contractual obligation.

16.10 However it may also be relevant that the imprisonment provision in the Supreme Court Rules provides that the order for the arrest and imprisonment of the debtor takes place *where there is probable cause that the debtor will escape the country and prejudice the plaintiff*. Thus, it may not be of such significance that the debtor owes a debt, but that the debtor is about to leave the country when the defendant/debtor has to pay the debt.

16.11 Furthermore, there are other scenarios that should be considered. For example, where a judgment debtor has been ordered by the Court to pay a sum of money to the judgment creditor. In this instance, the practical implications should be considered, given that a judgment debt may not be deemed a contractual obligation but one that requires a debtor to pay money according to a Court order.

Question 66: Should there be a provision in the SCR to provide for a right of the defendant to rescind, vary or discharge the order for the arrest of an absconding debtor?

Question 67: Is the existing absconding debtor provision consistent with Article 11 of the International Covenant on Civil and Political Rights?

17. General Provisions

Measures for the early resolution of disputes

17.1 In a number of jurisdictions, Court Rules set out the overriding objectives of the Court in civil proceedings, particularly as they relate to the timely resolution of claims. This may also include provisions as to pre hearing interventions known as 'alternative dispute resolution' or 'appropriate dispute resolution (discussed at 17.16 below).

[295] *Judicature Act 1908 (High Court Rules)* (New Zealand), r. 17.88

[296] *International Covenant on Civil and Political Rights* adopted and opened for signature ratification and accession by General Assembly, Resolution r.2200A (xxi) of 16 December 1966. Entry into force 23 March 1976

17.2 The extent to which parties are obliged to assist the Court in fulfilling those objectives varies among jurisdictions.

17.3 The Law Reform Commission's Issues Paper 1 discussed the overriding objectives of Courts in various jurisdictions.

17.4 In the following section, the issue of the overriding objectives will be discussed by reference to the obligations of the parties to maintain those objectives, and whether the standard of civil practice in Samoa might be improved by strengthening those obligations.

Current Law (Samoa)

17.5 Currently, the SCR contain a short statement as to how the rules are to be construed so as to secure the just, speedy and inexpensive determination of any proceeding.[297] It is to be noted that the term 'inexpensive' is inaccurate as the term may infer that proceedings will not be expensive, whereas the intention is perhaps better described as 'cost effective'. Rather than identifying whether or not proceedings are expensive, the focus may be better directed on the efficient running of the matter.

17.6 The SCR and MCR otherwise contain no overriding objectives or purpose, and impose no codified obligations upon the parties to assist with their obligations to the Court.

Comparable Jurisdictions

New Zealand

17.7 In New Zealand, the HCR (NZ) provide the Court with discretion to order parties to participate in mediation negotiations by way of conference or, if the parties agree, to other alternative dispute resolution mechanisms, which must remain confidential until such time as a resolution is reached.[298] This provision is consistent with the objective of the Rules, which are to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.[299]

Australia

17.8 In New South Wales, Australia, the *Legal Profession Act* reiterates the parties' obligations to the Court by way of a declaration. Practitioners for all parties are required to provide a declaration to the Court affirming their belief that a claim or defence has reasonable prospects of success.[300]

17.9 The purpose of such a requirement is to ensure that parties declare their belief in the claim (or their defence against a claim) at the outset, and the Court is given specific powers to deal with practitioners who bring or defend a claim which is without merit.

17.10 Further, this requirement aims to reduce the number of strike out applications, and to ensure that parties do not initiate or defend actions which may result in a waste of valuable Court time and resource.

[297] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r. 4
[298] *Judicature (High Court Amendment) Rules 2008* r 7.79
[299] Ibid, r. 1.2
[300] *Legal Profession Act* 2004 (New South Wales) s 347

17.11 In Victoria, Courts have even greater powers to ensure that the conduct of the parties in claiming and defending civil actions is kept to a high standard. [301]

17.12 In that state, all practitioners and their clients are required to file a declaration acknowledging their 'overarching obligations' to the Court. This document must be filed prior to or concurrently with the first substantial documents filed by the party in the claim.

17.13 The short, pro forma declaration includes a statement:
- that the claim is meritorious and has a proper basis;
- that attempts have been made to resolve the issues in dispute before proceedings were issued;
- that the claim or defence had reasonable prospects of success;
- acknowledging the obligation regarding paramount duty to the Court to act honestly;
- promising to only take steps to resolve or determine the dispute;
- promising to cooperate in the conduct of civil proceedings;
- promising not to mislead or deceive;
- promising to use reasonable endeavours to resolve the dispute;
- promising to narrow the issues in dispute;
- promising to minimise delay; and
- promising to disclose the existence of relevant documents of which they are aware.[302]

17.14 The Court is able to impose sanctions on either/both the practitioner and/or represented party in the event that they fail to act in accordance with these obligations.

17.15 Both parties are able to apply to the Court in the event that the other was in breach of its obligations. Further, either party can apply to the Court for summary judgement in the event that the claim had no real prospects of success.

Appropriate Dispute Resolution

17.16 It is also important to consider the introduction of special rules regarding 'alternative dispute resolution' to allow for parties to engage in alternative resolution mechanisms such as mediation, case conferences or conciliation before pleadings are filed or referred to by the Courts. This would be useful for Family Court matters and in the Youth Court.

17.17 The MCR and SCR provide no specific provision for the Court to refer parties to a dispute to attend alternative dispute resolution. However the *Alternative Dispute Resolution Act 2007*[303] provides that the Court may refer parties to a dispute to attend mediation prior to or during the hearing of any civil matter in dispute.

Comparable Jurisdiction

Australia

17.18 In Victoria, there are specific provisions that empower the Court to order such early dispute resolution procedures, called 'appropriate dispute resolution'[304] that may have the effect of achieving a resolution prior to hearing.

17.19 It is important to consider not only the mechanisms for promoting early and cost effective resolution of disputes, but also the enforcement of them, in order to ensure, as

[301] *Civil Procedure Act 2010* (Victoria, Australia)
[302] *Civil Procedure Act* 2010 (Victoria, Australia), ss 17-26
[303] *Alternative Dispute Resolution Act* 2007, s 7
[304] *Civil Procedure Act 2010* (Victoria, Australia), ss 3, 66

much as is possible, meaningful participation of parties and their legal representatives in appropriate or alternative dispute resolution.

Question 68: What are the potential barriers to parties being required to provide a declaration to the Court regarding the proper basis of their claim, their prospects of success of a claim or defence?

Question 69: Should the parties and their solicitors be required to acknowledge a set of overarching obligations regarding their conduct in the litigation?

Question 70: Should the Court be granted more specific powers to ensure that parties and their solicitors abide by their duties to the Court and their opponent? Would this ensure the conduct of parties in claiming and defending civil actions is kept to a high standard?

Question 71: Should there be specific provisions in the SCR and MCR for the Court to order parties to engage in meaningful appropriate dispute resolution?

Question 72: If yes, what enforcement powers may the court have and be likely to adopt, to ensure its effect?

Powers of the Court and the Registrar

17.20 Registrars, their powers and functions have been dealt with in the District Court Act Final Report prepared by the Samoa Law Reform Commission. [305]

17.21 The MCR deal with the powers of the Court and the Registrar. A power or discretion at the hearing of proceedings can only be exercised by the Magistrate or the *Fa'amasino Fesoasoani*. However, a Registrar may exercise powers and discretion at any other stage of the proceedings (other than at the hearing). The Registrar does not have power to commit a person to prison or to enforce any other order by committal. Any order that is made by the Magistrate or the *Fa'amasino Fesoasoani* can be signed by the Registrar in his or her own name and capacity, carrying the Court seal. [306]

17.22 Any Supreme Court Judge has power to exercise the jurisdiction of the Court at any time or place. The Registrar has power to adjourn proceedings if there is no Judge present. If the Registrar does not adjourn the proceedings then they are deemed to be adjourned to the same place on the next succeeding day at the same hour stated in the summons or notice.[307]

Question 73: Should Registrars have the same functions in both the Magistrate Court and the Supreme Court?

Matters where procedures do not exist

17.23 The MCR state that if a case arises for which there is no procedure provided in the *Magistrates Court Act 1969* or the *Samoa Act 1921* (NZ)[308] then the Court is to dispose of the case 'as nearly as may be practicable'. The SCR state that if any such proceedings arise then

[305] Refer to Recommendation 17 of the *District Courts Act* 1969 Final Report, Samoa Law Reform Commission. Recommendation 17: The District Courts Act should set out the current and existing powers, duties and responsibilities of District Courts Judges, Fa" amasino Fesoasoani and Registrars.
[306] *Magistrates' Court Rules 197* ,(Sāmoa), *,* rr 27,28
[307] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r. 204
[308] The *Samoa Act 1921* (NZ) contains provisions relating to the legal capacity and status of married women and no distress for rent.

the Court is to 'dispose of the case in such a manner as the Court deems best calculated to promote the ends of justice'.[309]

Question 74: Should the MCR include provisions to enable judges to follow any procedure they consider fair and just in cases where no other procedures are provided?

Confession

17.24 A 'confession' in a civil proceeding is a *formal admission* or *a pleading* in defence admitting the allegations made by the other party.[310] A confession also has its origins in criminal proceedings as a full acknowledgement of guilt of criminal offence by one person to another, usually in the context of investigation of the offence by police or some other investigation agency.[311] These two distinctions raise concerns as to whether the term 'confession' in the Samoa Supreme Court Rules should be maintained or rather referred to as an 'admission' in the civil procedure context.

Question 75: Should the term 'confession' in the civil context be changed to 'admission' to differentiate from the criminal context?

Court fees

17.25 There is a schedule of fees attached in the MCR (First Schedule) and the *Supreme Court (Fees and Costs) Rules 1971* (First Schedule) relating to Court fees payable to the Court for administrative functions, such as filing writs, affidavits and the like.[312] It is understood that the latest increase in Court fees took effect from August 2014.

Comparable Jurisdiction

Australia

17.26 Similarly in NSW and in the Federal Court of Australia, filing fees are tapered to reflect the cost of the Court's time, and the resources of the parties. As a result, the filing fees payable by corporations are greater than those payable by individuals. In NSW, Court fees are almost double if the filing-party is a corporation (not an individual)[313].

17.27 Further, the costs associated with filing an appeal from a decision are far greater than the fees associated with filing the proceedings at first instance.

Question 76: Should the Court fees be further increased since August 2014?
If not, when should the next review of Court fees take place?

Question 77: Should there be a higher fee for commencing proceedings if the plaintiff is a corporation (not an individual)? If so, why?

Question 78: Should there be higher fees associated with filing an appeal? If so, why?

Costs

17.28 Legal costs are those costs payable by a party to their legal practitioner for performing legal services on the client's behalf. In the event of a success, a party may be indemnified

[309] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa) r.206
[310] CCH Macquarie, *Concise Dictionary of Modern Law* (Australia, 1988) p27
[311] Butt, P and Hamer D, 2011,*Lexis Nexis Concise Australian Legal Dictionary, 4th Ed,* Butterworths, Australia
[312] *Magistrates' Court Rules1971* (Sāmoa), r. 30, *Supreme Court (Fees and Costs) Rules 1971* (First Schedule)
[313] http://www.localcourt.lawlink.nsw.gov.au/localcourts/fees.html last visited on 7 May 2013 at 1.23pm

for a proportion of those costs by the unsuccessful party if ordered to pay costs. The unsuccessful party may expect to have to pay at least a proportion of the reasonable legal costs to the opposing party. These are known as 'party and party' costs, or in some jurisdictions a broader description of 'standard costs' has more recently been adopted.[314] Further detailed analysis of these distinctions is recommended before any particular costs standard is adopted in Samoa.

17.29 Costs in the Magistrates Court are regulated in accordance with the Second Schedule to the MCR. The Court maintains discretion to award a greater or smaller sum than that set out in the schedule, if it sees fit.[315] There are no provisions indicating what principles or guidelines the Court must consider when exercising such discretion.

17.30 It is to be noted, that legal costs set out in the MCR Second Schedule have never revised or amended.

Comparable Jurisdiction

Australia

17.31 In Victoria, there are extensive legislative provisions and rules governing legal costs, all designed to promote proportionality of legal costs when compared to the amounts in dispute, and to place obligations on practitioners to advise clients of their potential liability to pay. [316] In addition, the guiding principles are designed to ensure that a party cannot profit out of a successful costs order against an unsuccessful litigant. Of further concern is the potential for legal practitioners to extend litigation unnecessarily so as to maximise costs by doing so.

Question 79: Should the schedule in the MCR be revised and updated?

Question 80: Should there be provisions in the MCR and SCR relating to what principles and guidelines the Court must apply when awarding costs?

The effect of non-compliance with the Rules

17.32 The SCR provide that if the parties fail to comply with any of these rules, this will not automatically render the proceedings void, either in whole or in part, and the Court has discretion to deal with the irregularity as the Court sees fit, depending on the circumstances and facts of each case.[317] No similar rule is set out in the MCR.

Question 81: Should the MCR contain a similar rule to that of SCR 202 stating that the Court has the discretion to deal with any non-compliance with the rules as it sees fit and that proceedings will not automatically be rendered void?

[314] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia), r. 63.30
[315] *Magistrates Court Rules* 1971 (Samoa), r 3.
[316] *Supreme Court (General Civil Procedure) Rules 2005* (Victoria, Australia) Order 63, *Civil Procedure Act 2010* (Victoria), s 65B, *Legal Profession Act 2004* (Victoria, Australia), Div 3
[317] *Supreme Court (Civil Procedure) Rules 1980* (Sāmoa), r.202

18. General comments

Gender neutral language

18.1 Parties and judges in the Supreme Court and Magistrates Court Rules are generally gender specific.

Comparable Jurisdictions

New Zealand and Australia

18.2 Both New Zealand and Australian rules generally avoid reference to a particular gender, referring instead to neutral terms such as 'the judge', 'the party', 'the plaintiff' or 'the defendant'.

Name of Magistrates Court Rules

18.3 As raised in para 1.4 above, the 'Magistrate' Court has been changed to the 'District' Court in 1992, However the MCR have not been changed to reflect the name of the Court.

Question 82: Should the name of the MCR be changed to *District Court Rules 1971* or *District Court Rules 1992* to accord with the change of name of the Magistrates Court in 1992?

LIST OF QUESTIONS

Question 1: Is it necessary to define the meaning of 'party' in SCR and MCR? If so, should 'party' be defined a*s* in the DCA or in the UCPR (NSW)*?*

Question 2: What issues may arise if 'party' is not defined?

Question 3: Should criteria for joinder of parties be included in SCR and MCR?

If yes, should such criteria be similar to that of the HCR (NZ)? (i.e. persons are joined as parties on the basis they are necessary for the determination of the claim and are bound by the judgment of the proceeding.)

If yes, should there be any limitation to the number of parties able to be joined in a single proceeding?

Question 4: Should the SCR and MCR provide a particular process to allow any person to apply to the Courts to be added or removed as a party to a proceeding, for example, by filing and serving affidavit material explaining the basis for the application?

Question 5: Should SCR and MCR include procedures for joinder of claims? If yes, should there be any limitation as to the number of claims to be joined?

Question 6: Should the SCR and MCR provisions relating to third parties require, as a prerequisite to granting a third-party notice, the existence of a right of action of the defendant against the third party (similar to the HCR (NZ))?

Question 7: What appropriate rules should Samoa adopt to reflect current practice, by comparison with New Zealand, Victoria and Vanuatu?

Question 8: Should both the SCR and MCR provide for the death of a party? If so, should the proceeding be continued by the Court on its own motion, appointing the personal representative of the deceased party?

Question 9: Should provision be made for a specified time for an application to be made for substitution of a personal representative of the deceased, in default of which the proceeding is to be dismissed?

Question 10: Should the expression 'infant' as currently used in the SCR and MCR and in the *Infants Ordinance 1961* be retained or replaced with the expression 'minor' (similar to the New Zealand High Court Rules), or 'child' as proposed in Samoa's *Child Care and Protection Bill 2014?*

Question 11: Should the age for an infant be retained to 21 years as in the *Infants Ordinance* 1961 or changed to 18 years as proposed in the *Child Care Protection Bill 2014* if it gets passed by Parliament?

Question 12: Should there be a provision in both SCR and MCR to allow an infant to represent himself or herself in a proceeding without a litigation guardian, (similar to the HCR (NZ))?

If yes, should there be a provision in both SCR and MCR, similar to the HCR (NZ), to assess:

i. If the infant has the capacity to make the decisions required in the proceedings, and
ii. Whether it is in the infant's best interests to be represented by a guardian.

Question 13: Should both SCR and MCR include uniform requirements as to what is required of a guardian, or tutor, for example:

i. Is he or she able to adequately represent the interests of the infant or incapacitated person?
ii. Does he or she have any interest in the proceedings adverse to the interests of the infant or person of unsound mind (incapacitated person)?

Question 14: Should a person become a guardian without the requirement for any formal appointment or only after being appointed by the Court? Should they be formally appointed by a judge as in other jurisdictions?

Question 15: Should the expression 'person of unsound mind' as used but not defined in the SCR and MCR and 'mentally defective person' as currently defined in the SCR be removed and replaced with the expression 'mental disorder' and 'mental incapacity' consistent with expressions used in the *Mental Health Act 2007* (Samoa)?

Question 16: If adopted for use in Samoa, should definitions of incapacitated person, minor and litigation guardian be defined or specified (similar to the HCR (NZ))?

Question 17: Should the SCR include specific procedures for companies registered under the *Companies Act 2001* to become a party to a proceeding?

Question 18: Should the MCR reflect the provisions relating to companies currently existing in the SCR?

Question 19: Should the SCR contain fewer provisions relating to companies, and instead adopt the existing provisions under the *Companies Act 2001*, similar to the UCPR (NSW) and NCGCPR (VIC)?

Question 20: Should the SCR and/or MCR include specific provisions to remove the name of firms or businesses and to replace them with a person's own personal name and address, similar to UCPR (NSW)?

Question 21: Should both SCR and MCR extend existing procedures in relation to membership in group representative proceedings?

If so, should Samoa identify its representative actions to be an 'opt in' system (requiring explicit consent of every member of a group forming a representative action) or an 'opt out' system (right of every potential member of a group to opt out of the proceeding by a communication in writing to the Court)?

Question 22: Should the SCR be amended to include particular pleading provisions covering the following:

i. Pleadings subsequent to a statement of claim such as defence, reply and counterclaim as practised in Vanuatu, Australia and New Zealand;
ii. Clearer general rules that apply to all pleading documents similar to the Rules in Vanuatu, Australia and New Zealand;
iii. Timeframes for provision of copies of relevant plaintiff and defendant materials together with explanations of why offers have been rejected or how calculated (similar to HCR (NZ) information capsules);
iv. Amending reference to 'statement of claim ' to 'statement of the case';
v. To more comprehensively regulate the amendment of pleadings.

Question 23: Should both SCR and MCR allow for pre-issue discovery? If so, what should be the requirements for obtaining an order for pre-issue discovery?

Question 24: Should the SCR and MCR provide for ongoing discovery obligations of both parties, similar to the HCR (NZ)?

Question 25: Should there be provision in the SCR or MCR for non-parties to be compelled to give evidence or to produce documents as distinct from parties alone?

Question 26: To what extent should both SCR and MCR Rules prescribe the form and content of Court documents?

Question 27: Should the Court have specific power to strike out a matter or remove a document from the Court file where it is found to contain scandalous, irrelevant or otherwise oppressive matter?

Question 28: Should the Court have specific power to strike out any insufficient defence or any redundant, immaterial, impertinent, or scandalous matter from any pleading?

Question 29: Should both SCR and MCR specifically include trial procedures and specify their scope?

Question 30: Should both SCR and MCR be expanded to adopt additional and clearer procedures as adopted by the Vanuatu or New Zealand Rules for non-appearance of defendant or claimant/plaintiff?

Question 31: Should both SCR and MCR adopt procedures for plaintiff's non-appearance, similar to the UCPR (NSW)?

Question 32: Should a notice of appearance by the defendant prior to the Court hearing date be incorporated in the SCR and MCR, similar to the UCPR (NSW)?

Question 33: Should both SCR and MCR include a provision that allows the Court to determine/change the location of a trial provided that:

i. both parties to the proceeding have consented; and/or
ii. it would be more convenient or fairer to hear the proceeding at a different location?

Question 34: Should a 'postmaster', a 'collector of customs, or a 'medical officer' retain the authority to swear affidavits?

Question 35: Should there be a provision requiring the date, name and location upon swearing and signing of affidavits?

Question 36: Should the default position be to take evidence by way of affidavit or a sworn statement? Alternatively, should this change relate only to evidence in an interlocutory application?

Question 37: Should parties be able to agree to evidence by affidavit, within a set timeframe, with the Court retaining discretion to require oral evidence?

Question 38: Should provision be made for expert witnesses to be called either by the Court and/or by parties similar to rules in New Zealand, Vanuatu and Australia?

Question 39: Should provision be made for joint experts to be appointed by the Court?

Question 40: Should both SCR and MCR allow for sworn statements that are filed and served on the opposing side without leave of the Court to automatically become evidence, unless the Court finds them inadmissible?

Question 41: Should the SCR and MCR provide for evidence to be given by way of affirmation as an alternative to swearing, consistent with the *Oath, Affirmations and Declarations Act 1963* Samoa)?

Question 42: What timeframe for service of evidence should be adopted in the SCR and MCR?

Question 43: Should the SCR be amended to widen the scope of the judges' powers to appoint a referee for an inquiry and report:

i. at any stage of the proceedings similar to UCPR (NSW); and
ii. appointing any qualified and experienced person to inquire and report to the Court on a question of complex and technical nature, similar to the CPR (VAN)?
iii. as practised in Vanuatu.

Question 44: Where there has been a 'reinstatement of a proceeding struck out as a result of a non appearance', should the SCR be amended to provide more detail and clarify the grounds to be satisfied for reinstatement, including on the Judge's own initiative, as in New Zealand?

Question 45: Should the procedure for reinstatement currently contained in the SCR also be included in the MCR?

Question 46: Should the SCR relating to the setting aside of a judgement or order made by the Court in the absence of the defendant be amended to provide more detail and clarity around whether mere absence of a party is sufficient for an order to be set aside following the New South Wales provision; or

Question 47: Should the Court take into consideration whether just terms to set aside have been established in order to establish that setting aside is in the interests of justice following the New Zealand rule? (For example, should the applicant have to justify their absence through no fault of their own before a judgment or order is set aside?)

Question 48: Should procedures for the setting aside of a judgment or an order made by the Court be included in the MCR?

Question 49: Should the SCR and MCR on rehearing be amended so as to provide for the Court to determine at the outset of the rehearing:

i. whether the matter is appropriate for rehearing; and
ii. whether any rehearing should be for the entire matter or should it be limited to specific issues?

Question 50: Should the SCR and MCR amend the timeframe for filing and serving a confession/defence and/or to the following timeframes:

i. 14 working days (as practised in Vanuatu); or
ii. 30 working days (as practised in New Zealand).

Question 51: Should the SCR and MCR of Samoa include specific provisions relating to the form and content of a confession, or defence?

Question 52: Should the SCR and MCR adopt an extended timeframe to file and serve a counterclaim, as follows:

i. 30 working days (as practised in NZ); or
ii. 14 working days (as practised in Vanuatu).

Question 53: Should there be a defence of set off or should it be removed from the SCR?

Question 54: Should set off be restricted to private civil proceedings as practised in NZ?

Question 55: Should the defence of set off be available in the District Court?

Question 56: Should the SCR and MCR allow for a third party counterclaim as practised in Vanuatu?

Question 57: Is it relevant in Samoa for any other party (and not only the plaintiff, for example a third party) to the proceeding to apply for judgment on confession?

Question 58: Would it be appropriate for a similar rule to be adopted by the Courts in Samoa?

Question 59: Should all matters discussed above be amended to proceed by way of summary judgment irrespective of the type of relief sought i.e. monetary or land/chattels?

Question 60: Offer of Compromise – would this alternative procedure be useful in Samoa, and if so, in what situations?

Question 61: *Calderbank Offers* – would the Court consider exercising its discretion to make costs orders against a party unreasonably rejecting an offer, where the party making the offer can demonstrates that they have made a real compromise?

Question 62: Would either or both of these costs measures be considered appropriate in the Samoan context?

Question 63: Should the SCR and MCR adopt similar provisions relating to discontinuance as the HCR (NZ)?

Question 64: Are Samoa's procedures for obtaining relief by interpleader a) during the trial of a civil action; b) after judgment; and c) otherwise, accurately and clearly described in the SCR? If not, how should the rules is modified?

Question 65: Should procedures for interpleader relief similar to those in the SCR be included in the MCR?

Question 66: Should there be a provision in the SCR to provide for a right of the defendant to rescind, vary or discharge the order for the arrest of an absconding debtor?

Question 67: Is the existing absconding debtor provision consistent with Article 11 of the International Covenant on Civil and Political Rights?

Question 68: What are the potential barriers to parties being required to provide a declaration to the Court regarding the proper basis of their claim, their prospects of success of a claim or defence?

Question 69: Should the parties and their solicitors be required to acknowledge a set of overarching obligations regarding their conduct in the litigation?

Question 70: Should the Court be granted more specific powers to ensure that parties and their solicitors abide by their duties to the Court and their opponent? Would this ensure the conduct of parties in claiming and defending civil actions is kept to a high standard?

Question 71: Should there be specific provisions in the SCR and MCR for the Court to order parties to engage in meaningful appropriate dispute resolution?

Question 72: If yes, what enforcement powers may the court have and be likely to adopt, to ensure its effect?

Question 73: Should Registrars have the same functions in both the Magistrate Court and the Supreme Court?

Question 74: Should the MCR include provisions to enable judges to follow any procedure they consider fair and just in cases where no other procedures are provided?

Question 75: Should the term 'confession' in the civil context be changed to 'admission' to differentiate from the criminal context?

Question 76: Should the Court fees be further increased since August 2014?
If not, when should the next review of Court fees take place?

Question 77: Should there be a higher fee for commencing proceedings if the plaintiff is a corporation (not an individual)? If so, why?

Question 78: Should there be higher fees associated with filing an appeal? If so, why?

Question 79: Should the schedule in the MCR be revised and updated?

Question 80: Should there be provisions in the MCR and SCR relating to what principles and guidelines the Court must apply when awarding costs?

Question 81: Should the MCR contain a similar rule to that of SCR 202 stating that the Court has the discretion to deal with any non-compliance with the rules as it sees fit and that proceedings will not automatically be rendered void?

Question 82: Should the name of the MCR be changed to *District Court Rules 1971* or *District Court Rules 1992* to accord with the change of name of the Magistrates Court in 1992?